UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., Executor of the Estate of CHERYL B. CANFIELD, Plaintiff, vs. STATOIL USA ONSHORE PROPERTIES INC., STATOIL NATURAL GAS LLC and STATOIL ASA, Defendants.	Case No. 3:16-cv-00085-MEM LEAD PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND SERVICE AWARD TO PLAINTIFF AND CLASS REPRESENTATIVES

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I. INTRODUCTION

Class Counsel have succeeded in obtaining an all cash Settlement of $7 million for the benefit of the Class.[1] This favorable outcome was achieved despite significant risks of non-recovery and only after vigorous and extensive litigation that has lasted over four years. Class Counsel now respectfully move for an award of attorneys' fees in the amount of 25% of the Settlement Amount, as well as an award of expenses reasonably incurred by Class Counsel in the prosecution of the Action. The percentage requested represents a fair and reasonable amount and falls at the low end of the range considered by the Third Circuit to be "standard" for class action settlements. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 303 (3d Cir. 2005) (recognizing that fee awards in class actions in the range of 25%-30% were "fairly standard"). The 25% requested fee is also fair and reasonable under the lodestar cross-check as the resulting multiplier of 0.6 is a ***negative*** multiplier and far lower than those approved in similar cases. *See, e.g., In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (approving a multiplier of 6.96).

The Settlement was not reached at an early stage of the Action, but only after significant investigation and litigation and only after contentious, arm's-length

[1] Unless otherwise stated, capitalized terms used herein have the same meaning as provided in the Stipulation and Agreement of Settlement. ECF No. 137. All citations and internal quotation marks are omitted and emphasis is added, unless otherwise indicated.

negotiations between highly experienced and capable counsel. In light of Class Counsel's well-known reputation to try cases, if required, and their effective advocacy in this particular case, Defendants agreed to settle prior to exhausting all of their legal challenges through trial and appeal. The Settlement saves judicial resources and achieves the Class Members' goal of recovering money sooner, rather than later. Specifically, Class Counsel obtained this result through its skill, experience, and effective advocacy in the face of numerous obstacles, including affirmative defenses asserted by Statoil and efforts by the plaintiffs in a dismissed arbitration proceeding (the "Arbitration Plaintiffs") to intervene and otherwise delay Settlement proceedings.

Moreover, Class Counsel prosecuted this Action on a wholly contingent basis, with no payment for the last four years, even though the case was risky and difficult from the outset. Defendants asserted every conceivable argument available to defeat Plaintiff's claims. Despite Defendants' efforts and the real risks of continued litigation and non-recovery, Class Counsel advanced costs, devoted numerous lawyers and staff to this case for over four years without pay and achieved an exceptional recovery for the Class.

As compensation for these efforts, Class Counsel request that the Court award a percentage fee of 25% of the Settlement Amount, as well as an award of expenses reasonably incurred by Class Counsel in the prosecution of the Action. The

requested fee is at the low end of the 25%-30% range commonly awarded in class actions. *See Wallace v. Powell*, No. 3:09-cv-286, 2015 WL 9268445, at *18 (M.D. Pa. Dec. 21, 2015) (finding that Class Counsel's requested fees of 30% of the common benefit fund was "within the range of reasonable fees, on a percentage basis, in the Third Circuit"). And, as discussed below, it is also in line with fees generally awarded in class action settlements.

Moreover, former Plaintiff Canfield negotiated the fee at the outset of the litigation, before the outcome was known and while the risks and uncertainty were substantial. *See* Declaration of Douglas A. Clark in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation ("Clark Decl."), ¶¶9-10. Accordingly, the fee is entitled to a presumption of reasonableness. As the Third Circuit held in *In re Cendant Corp. Litigation*, 264 F.3d 201, 220 (3d Cir. 2001): "[C]ourts should afford a presumption of reasonableness to fee requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel."

II. ATTORNEYS' FEES SHOULD BE AWARDED BASED ON A PERCENTAGE OF THE SETTLEMENT AMOUNT

A. Class Counsel Are Entitled to a Fee from the Common Fund

It is well-settled that an attorney who maintains a suit that results in the creation of a fund or benefit in which others have a common interest may obtain fees

from that common fund. *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"). "'[T]he percentage-of-recovery method is preferred in common fund cases, as courts have determined 'that Class Members would be unjustly enriched if they did not adequately compensate counsel responsible for generating the fund.'" *Tavares v. S-L Distrib. Co.*, No. 1:13-cv-1313, 2016 WL 1743268, at *10 (M.D. Pa. May 2, 2016) (quoting *Hegab v. Family Dollar Stores, Inc.*, No. CIV.A. 11-1206 CCC, 2015 WL 1021130, at *11 (D.N.J. Mar. 9, 2015)). The ultimate determination of the proper amount of attorneys' fees rests within the sound discretion of the district court based on the specifics of the case. *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 280 (3d Cir. 2009).

B. The Court Should Award Attorneys' Fees Using the Percentage Approach

The Supreme Court has consistently held that where a common fund has been created for the benefit of a class as a result of counsel's efforts, the award of counsel's fees should be determined as a percentage of the fund. *See, e.g.*, *Boeing*, 444 U.S. at 478-79. By 1984, this point was so well established that the Supreme Court needed no more than a footnote to address it in *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* Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 242 (Oct. 8, 1985) (fee awards in common fund cases have historically been computed based upon a percentage of the fund); 1 Alba Conte, *Attorney Fee Awards* §2.02, at 31-32 (2d ed. 1993) (same).

The Third Circuit and district courts within it have repeatedly approved the percentage-of-recovery method of awarding fees in common fund class actions. *See, e.g.*, *Cendant*, 264 F.3d at 220 ("For the past decade, counsel fees in securities litigation have generally been fixed on a percentage basis rather than by the so-called lodestar method."); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998) ("The percentage-of-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.'") (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995)); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 128 (D.N.J. 2002) ("the percentage-of-recovery method is used in common fund cases on the theory that class members would be unjustly enriched if they did not adequately compensate counsel responsible for generating the fund").

III. THE REQUESTED FEE IS FAIR AND REASONABLE UNDER THE *GUNTER* FACTORS

The Third Circuit gives a "great deal of deference to a district court's decision to set fees." *See, e.g.*, *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 (3d Cir. 2000). As guidance, there are several factors courts may consider in exercising that broad discretion, including: (a) the size of the fund created and the number of persons benefited; (b) the presence or absence of substantial objections by members of the class to the settlement terms and/or the fees requested by counsel; (c) the skill and efficiency of the attorneys involved; (d) the complexity and duration of the litigation; (e) the risk of non-payment; (f) the amount of time devoted to the case by plaintiffs' counsel; and (g) awards in similar cases. *Id.* at 195 n.1; *Acevedo v. Brightview Landscapes, LLC*, No. 3:13-2529, 2017 WL 4354809, at *16 (M.D. Pa. Oct. 2, 2017) (Mannion, J.). These factors "need not be applied in a formulaic way . . . and in certain cases, one factor may outweigh the rest." *Gunter*, 223 F.3d at 195 n.1; *see also Acevedo*, 2017 WL 4354809, at *16. Here, each factor supports the 25% fee award.

A. The Size and Nature of the Common Fund Created and the Number of Persons Benefited by the Settlement

In awarding fees, courts acknowledge that the "most critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *In re Viropharma Inc. Sec. Litig.*, No. 12-2714, 2016 WL 312108, at *16 (E.D. Pa.

Jan. 25, 2016) (same); *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("The most significant factor in this case 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.'"). In assessing this factor, courts "'consider the fee request in comparison to the size of the fund created and the number of class members to be benefitted.'" *Dartell v. Tibet Pharms., Inc.*, No. 14-3620, 2017 WL 2815073, at *9 (D.N.J. June 29, 2017).

Here, the $7 million recovery is an exceptional result that provides an immediate cash recovery to Class Members with over 13,400 leases, without Class Members having to submit a claim or take any other action. *See* Declaration of Ross D. Murray Regarding Notice Dissemination and Requests for Exclusion Received to Date ("Murray Decl."), ¶¶4-6. Moreover, the Settlement provides relief for Class Members who could otherwise only obtain relief through uneconomical individual arbitrations. For example, there was an individual arbitration brought by a different set of plaintiffs who were signatories to a so-called L-29 Lease (the "*Kuffa* Arbitration"). The *Kuffa* plaintiffs appear to have spent $17,625.00 on arbitrators' fees alone to recover a judgment of only $3,611.74, plus interest. *See* ECF No. 138-2, Exhibit 1 to the Motion to Intervene (the "Proposed Complaint"); ECF No. 138-

7, Exhibit E to the Proposed Complaint. The Settlement allows Class Members to recover a fair amount without expending unnecessary and prohibitive expenses on individual arbitrations.

B. Reaction of Class Members to the Fee Request

Notice of the Settlement and Class Counsel's fee request was provided to 13,445 potential Class Members. *See* Murray Decl. ¶6. To date, only 35 persons opted out of the Class, and there have been no objections from any potential Class Member. Thus, the reaction of the Class weighs strongly in favor of approval of the fee. *See, e.g.*, *Cendant*, 264 F.3d at 235 (stating that "[t]he vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement"); *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. 08-379 (DMC) (JAD), 2013 WL 5505744, at *40 (D.N.J. Oct. 1, 2013) ("*Schering-Plough II*") (overruling objection to 28% fee on $215 million settlement and noting lack of significant number of objections); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 338 (E.D. Pa. 2007) (holding that "the total absence of objections to the requested fees weighs in favor of finding that the percentage of the settlement fund requested is appropriate").

C. The Skill and Efficiency of Class Counsel

The third *Gunter* factor – 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 the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *Martin v. Foster Wheeler Energy Corp.*, No. 3:06-cv-0878, 2008 WL 906472, at *4 (M.D. Pa. Mar. 31, 2008).

The fact that Class Counsel was able to achieve a recovery for the Class after the Court granted Statoil's motion to dismiss with respect to Plaintiff's first, second, third, fifth, and sixth claims for relief, leaving only one claim, is proof of Class Counsel's tenacity and skill. Moreover, the fact that Class Counsel consistently protected the Settlement from repeated attempts by certain Arbitration Plaintiffs to delay the proceedings in this Action is likewise proof of Class Counsel's effective advocacy and efficiency.

Class Counsel have track records in successfully prosecuting class actions. *See In re AT&T Corp. Sec. Litig.*, No. 00-5364 (GEB), 2005 WL 6716404, at *9 (D.N.J. Apr. 25, 2005) (stating that Robbins Geller is comprised of "highly skilled attorneys with great experience in prosecuting complex securities action[s], and their professionalism and diligence displayed during [this] litigation substantiates this characterization"), *aff'd*, 455 F.3d 160 (3d Cir. 2006); *see also* Declaration of

Francis P. Karam Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("RGRD Decl."), Ex. E (Firm Resume). Similarly, Co-Class Counsel John Harnes also has substantial experience in successfully litigating complex cases, and Douglas Clark of the Clark Law Firm is a prominent oil and gas attorney in Northeastern Pennsylvania, having represented hundreds of landowners and negotiated hundreds of oil and gas leases. *See* Declaration of Douglas A. Clark Filed on Behalf of The Clark Law Firm, PC in Support of Application for Award of Attorneys' Fees and Expenses ("Clark Firm Decl."), Ex. D (Firm Resume); Declaration of John F. Harnes in Support of Application for Award of Attorneys' Fees and Expenses ("Harnes Decl."), Ex. C (Firm Resume).

Simply put, no Defendant would agree to pay $7 million after successfully moving to dismiss most of Plaintiff's claims unless the course of litigation and settlement negotiations demonstrated Class Counsel's effort to master the legal and factual arguments in the case and their ability to field a team of lawyers that posed a substantial and credible trial risk. In short, the result is the best indicator of the experience and ability of the attorneys involved and this factor also supports the fee requested. *See In re Lucent Techs., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 437 (D.N.J. 2004) (approving fee request where "the result itself evidences counsel's skill and efficiency") (citing *AremisSoft Corp.*, 210 F.R.D. at 132 (stating that "'the single

clearest factor reflecting the quality of class counsels' services to the class are the results obtained'")).

D. The Complexity and Duration of the Litigation

The litigation has been complex and has lasted over four years. To secure the recovery, Class Counsel had to retain experts and review thousands of pages of documents over the course of several months, including complex data setting forth the actual revenues received by Statoil, the costs that the Company incurred, the terms of the various leases to which Class Members were parties, and the potential damages incurred by each individual Class Member. Specifically, Class Counsel and their experts reviewed monthly index pricing data and back-up; monthly resale pricing calculations, worksheets, and supporting data; sales invoices and statements; lease records; pipeline invoices and statements; royalty payment records; and index price methodology supporting documentation. This data demonstrated in detail the difference between the index price utilized by Statoil, the price it actually received from the resale of gas, and the costs associated therewith. Declaration of Francis P. Karam in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation ("Karam Decl."), ¶32. By reviewing these records and data, Class Counsel developed a firm and detailed understanding of the case before reaching an agreement in principle with Statoil to settle the Action.

With regard to the quantity of work, the Settlement was achieved only after Class Counsel had, *inter alia*: investigated the claims before filing a complaint; responded to Statoil's motion to dismiss after starting the Action; reviewed thousands of pages of documents provided by Defendants in discovery; and retained qualified experts to assist and to verify the data provided by the Defendants. *See generally* Karam Decl.

Moreover, Class Counsel have successfully defeated multiple motions brought by Arbitration Plaintiffs, including a motion to consolidate, an opposition to preliminary approval of the Settlement, a motion to intervene, and a motion to stay the Settlement proceedings. These motions raised a number of threshold legal issues requiring significant research and analysis, as reflected by the extensive briefing on each motion. The complexity of these issues amply supports the requested fee award, particularly in light of the skillful and efficient manner in which Class Counsel handled these issues and now submit the case to the Court for final approval of the recovery on behalf of the Class. Thus, the complexity and duration of litigation also supports the requested fee.

E. The Risk of Non-Payment

The fifth *Gunter* factor – the risk of nonpayment – also supports the requested fee award. The recovery did not come easily and it was uncertain both because of the difficulty of prevailing on Plaintiff's claims, particularly Plaintiff's remaining

claim following the Court's order on Statoil's motion to dismiss, and due to the efforts of Arbitration Plaintiffs to delay and hinder the proceedings. Moreover, Defendant almost certainly would have opposed certification of a class for litigation purposes.

Absent this Settlement, the parties would have continued to litigate through class certification, summary judgment, trial, and appeals, which would have taken several more years at considerable expense, creating the very real risk that Class Counsel and the Class could ultimately receive a smaller recovery, or even no recovery at all, as Defendant has consistently denied liability and pressed an offset and counterclaim which, if successful, could negate most of Plaintiff's damages. Class Counsel have devoted numerous lawyers and staff to the case, and advanced costs, without pay all the while having to pay salaries, leases, and all other expenses of running two small firms and a large law firm with approximately 210 lawyers and approximately 200 additional employees and staff. *See* RGRD Decl., ¶2; *Ikon*, 194 F.R.D. at 193 (stating fees need to compensate counsel for "the risk of undertaking complex or novel cases on a contingency basis"). In contrast, Defendant hired one of the largest and most prestigious defense firms in the nation, and one of the foremost oil and gas firms serving clients along the Gulf Coast, who have undoubtedly been paid by the hour and in regular installments.

These factors, and the risks Plaintiff faced in pursuing this Action, are highly relevant to the requested fee award because Class Counsel handled the case on a contingent fee basis, without any guarantee that they would be compensated for their extensive investment in time or paid for their litigation expenses. It is only because Class Counsel agreed to accept these risks that they were able to represent Plaintiff and achieve a favorable Settlement. Accordingly, this factor also weighs in favor of the requested fee award.

F. The Significant Time Devoted to This Case by Class Counsel

To date, Class Counsel have been litigating this case for over four years and their attorneys and paraprofessionals have expended over 3,423 hours and incurred more than $2,962,895 in lodestar and litigation expenses prosecuting this Action for the benefit of the Class. *See* RGRD Decl. ¶4; Clark Firm Decl. ¶4; Harnes Decl. ¶4. The work Class Counsel performed in order to achieve this result is discussed above. *See supra* Section III.D. This factor also supports the fee award. *See Lucent*, 327 F. Supp. 2d at 435 (finding fee supported where lead counsel devoted more than 61,000 hours to the case, including time spent on, among other things, investigations, motion practice, and service of forty-two subpoenas).

G. The Range of Fees Typically Awarded

There is no precise rule as to what percentage of the common fund should be awarded as attorneys' fees, but "[c]ourts have generally awarded fees in the range

of nineteen to forty-five percent." *In re Schering-Plough Corp. Enhance ERISA Litig.*, No. 08-1432 (DMC) (JAD), 2012 WL 1964451, at *7 (D.N.J. May 31, 2012) ("*Schering-Plough I*") (citing cases); *see also Viropharma*, 2016 WL 312108, at *17 (noting that "[i]n this Circuit, 'awards of thirty percent are not uncommon in securities class actions'") (citing cases). Numerous courts within and outside the Third Circuit have awarded fee percentages higher than the Class Counsel's requested fee of 25%.[2] *See King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-01797-MSG, 2015 WL 12843830, at *5 (E.D. Pa. Oct. 15, 2015) (awarding a 27.5% attorneys' fee); *Schering-Plough II*, 2013 WL 5505744, at *57 (awarding a 28% attorneys' fee); *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1099 (D. Kan. 2018) (approving a 33% percentage-of-recovery attorneys' fee). As the foregoing demonstrates, Class Counsel's fee request of 25% falls at the low end of the 25%-30% range considered by the Third Circuit to be "fairly standard" for class action settlements. *Rite Aid*, 396 F.3d at 303.

Accordingly, the application of all the *Gunter* factors makes clear that Plaintiff's requested fee of 25% is fair and reasonable.

[2] Class Counsel's 25% fee request was negotiated with former plaintiff Canfield and has been approved by Lead Plaintiff Rescigno. Clark Decl., ¶10.

IV. THE REQUESTED FEE IS REASONABLE UNDER A LODESTAR CROSS-CHECK

Courts in the Third Circuit may also use a "lodestar cross check" to confirm the reasonableness of a percentage fee. *See Schering-Plough I*, 2012 WL 1964451, at *8 (using lodestar cross-check). *But see Moore v. GMAC Mortg.*, No. 07-4296, 2014 WL 12538188, at *2 (E.D. Pa. Sept. 19, 2014) (stating the "lodestar cross-check is 'suggested,' but not mandatory"). If used, the lodestar cross-check "should not displace a district court's primary reliance on the percentage-of-recovery method." *In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006). Courts have cautioned that focusing on lodestar runs the risk of "penalizing class counsel for achieving a settlement" earlier in litigation which would "work against the interests of the class and undercut the judicial policy favoring early settlement." *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-md-2800-TWT, 2020 WL 256132, at *35 (N.D. Ga. Mar. 17, 2020); *see also Ikon*, 194 F.R.D. at 193 (noting that focusing on lodestar "may encourage attorneys to delay settlement or other resolution to maximize legal fees" and "may also compensate attorneys insufficiently for the risk of undertaking complex or novel cases on a contingency basis").

When used, the Third Circuit has recognized that the lodestar crosscheck "need entail neither mathematical precision nor bean-counting" and "district courts

may rely on summaries submitted by the attorneys and need not review actual billing records." *Rite Aid*, 396 F. 3d at 306-07. The lodestar crosscheck is done by simply comparing counsel's "lodestar" to the fee resulting from the requested percentage award and assessing the reasonableness of the resulting multiplier. The appropriate multiplier on counsel's lodestar varies based on the specifics of each case and it "'need not fall within any pre-defined range, provided that the [d]istrict [c]ourt's analysis justifies the award.'" *Schuler v. Meds. Co.*, No. 14-1149 (CCC), 2016 WL 3457218, at *10 (D.N.J. June 24, 2016) (quoting *Rite Aid*, 396 F.3d at 307). However, the Third Circuit has recognized that percentage awards that result in multipliers "'ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'" *See In re Veritas Software Corp. Sec. Litig.*, 396 F. App'x 815, 819 (3d Cir. 2010).

In the present case, Class Counsel's current lodestar is $2,837,895.00, which is based on 3,423 attorney and professional staff hours. RGRD Decl., ¶4; Clark Firm Decl., ¶4; Harnes Decl., ¶4. Thus, the lodestar multiplier in this case is 0.6. This is a ***negative*** multiplier which is significantly lower than those awarded by other courts in similar cases, largely due to the time Class Counsel dedicated to defending Class Members' relief under the Settlement against the efforts of the Arbitration Plaintiffs to consolidate, intervene, and otherwise delay the proceedings in this Action.

Plaintiff's Counsel will inevitably incur additional time and expenses litigating this matter, as well as administering the Settlement, and should be compensated for such reasonably incurred additional time and expenses. For instance, the Arbitration Plaintiffs appealed this Court's order denying their motion to intervene, dated July 8, 2020. The Third Circuit assigned the Arbitration Plaintiffs' appeal for mediation, calling for position papers to be submitted on October 14, 2020, and a telephonic mediation to occur on November 4, 2020. Courts have noted that it is appropriate to consider future time in calculating the lodestar, including time that will be needed in administering the settlement. *See Equifax*, 2020 WL 256132, at *39 (approving 20% fee on $380.5 million minimum settlement fund and noting that "[i]n addition to time spent through final approval, class counsel estimate they will spend" significantly more time "to implement and administer the settlement" and calculating lodestar using past and future estimated time); *Stevens v. SEI Invs. Co.*, No. 18-4205, 2020 WL 996418, at *13 (E.D. Pa. Feb. 28, 2020) (approving fee with 6.16 multiplier where "Class Counsel is expected to perform additional work in connection with this case" and "the multiplier will likely be lower by the time the matter is closed and Class Counsel's work is complete").

Thus, the lodestar cross-check confirms the reasonableness of the fee award.

V. CLASS COUNSEL'S REASONABLY INCURRED LITIGATION EXPENSES SHOULD BE APPROVED

Class Counsel also requests an award of expenses incurred in connection with the prosecution of the Action in the aggregate amount of $125,000. Counsel in class actions "are entitled to reimbursement of expenses that were 'adequately documented and reasonable and appropriately incurred in the prosecution of the class action.'" *Viropharma*, 2016 WL 312108, at *18 (quoting *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995)); *Schering-Plough I*, 2012 WL 1964451, at *8 (approving litigation expenses and noting that "[t]his type of reimbursement has been expressly approved by the Third Circuit"). Class Counsel's and additional counsel's expenses and charges actually exceed the amount requested ($125,000 compared to $125,466.05 incurred or expected to be incurred) and are adequately documented in the accompanying firm declarations. *See* RGRD Decl., ¶¶5-7; Clark Firm Decl., ¶¶5-7; Harnes Decl., ¶¶5-7.

The charges and expenses consist of the typical categories: experts and consultants, travel, document hosting and production, legal and financial computerized research costs, mediation fees, filing fees, postage, copying, and delivery. *See id*. These expenses and charges were reasonable and necessary to the prosecution of the claims and achieving the Settlement, and are of the same type of expenses routinely approved in class actions. *See also Viropharma*, 2016 WL

312108, at *18 (approving costs and expenses for, among other things, experts, travel, copying, postage, telephone, filing fees, and online and financial research); *Yedlowski v. Roka Bioscience, Inc.*, No. 14-cv-8020-FLW-TJB, 2016 WL 6661336, at *23 (D.N.J. Nov. 10, 2016) (approving costs and expenses for experts, investigation, mediation, publishing notice, and online legal research, and noting that "[c]ourts have held that all of these items are properly charged to the Class").

Moreover, there has been no objection to date to Class Counsel's fee request.

VI. PLAINTIFF AND CLASS REPRESENTATIVES ARE ENTITLED TO REASONABLE SERVICE AWARDS

"A service award compensates class representatives for services provided and risks incurred during the course of litigation and settlement proceedings and rewards their public service in contributing to enforcement of the laws." *Dickerson v. York Int'l Corp.*, No. 1:15-cv-1105, 2017 WL 3601948, at *12 (M.D. Pa. Aug. 22, 2017) (holding as reasonable service awards in the amount of $2,500 each for five named plaintiffs); *see also Acevedo*, 2017 WL 4354809, at *15 (approving a service award of $5,000 for one named plaintiff and $1,000 each for the remaining five plaintiffs who were added to the complaint).

The Class Representatives agreed to serve as named plaintiffs and actively participated in the prosecution of the case by, among other things, providing Class Counsel with the information that was necessary to file this lawsuit, participating in

settlement negotiations, staying in touch with Class Counsel to monitor the progress of the case, and otherwise admirably performing their duties as class representatives during the pendency of the case. *See, e.g.*, Clark Firm Decl., ¶¶5-9. For these reasons, Class Counsel respectfully request that an incentive award of $5,000 be awarded to the Lead Plaintiff and $2,500 jointly to the Class Representatives. Class Counsel note that this amount is on the low end of the amount that is typically awarded to class representatives for their service.

VII. CONCLUSION

For all the reasons stated herein, and in the accompanying declarations and Memorandum of Law in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation, Class Counsel respectfully request that the Court: (i) award Class Counsel attorneys' fees of 25% of the Settlement Amount and payment of litigation expenses of $125,000.00, plus interest on both amounts at the same rate as earned by the Settlement Fund; and (ii) award Lead Plaintiff Angelo Rescigno, Executor of the Estate of Cheryl B. Canfield $5,000 and $2,500 to Mary E. and Donald K. Stine.

DATED: September 25, 2020

Respectfully submitted,

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CERTIFICATION

The undersigned counsel certifies that pursuant to L.R. 7.8, they have used a proportionally spaced Times New Roman typeface, 14 point, and certifies that the total number of words in the brief, inclusive of point headings and footnotes, and exclusive of the caption, table of contents, table of authorities, signature block, is 4,872 words, according to the word count provided by Microsoft Word 2016 word processing software.

DATED: September 25, 2020

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on September 25, 2020, I authorized a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such public filing to all counsel registered to receive such notice.

/s/ Francis P. Karam

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANGELO R. RESCIGNO, SR., Executor of the Estate of CHERYL B. CANFIELD, Plaintiff, vs. STATOIL USA ONSHORE PROPERTIES INC., STATOIL NATURAL GAS LLC and STATOIL ASA, Defendants.	Case No. 3:16-cv-00085-MEM

COMPENDIUM OF UNREPORTED DECISIONS CITED IN MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND SERVICE AWARD TO PLAINTIFF AND CLASS REPRESENTATIVES

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2017 WL 4354809
Only the Westlaw citation is currently available.
United States District Court, M.D. Pennsylvania.

Jonathan Amador ACEVEDO, Mitchell Bratton, Jeremy Busse, Stephen Pullum, Eric Migdol, and Jose Gonzalez, individually and on behalf of all others similarly situated, Plaintiffs,

v.

BRIGHTVIEW LANDSCAPES, LLC, (f/k/a The Brickman Group Ltd. LLC), Defendant.

CIVIL ACTION NO. 3:13-2529

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Signed 10/02/2017

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MEMORANDUM

MALACHY E. MANNION, United States District Judge

***1** Currently before the court are the named plaintiffs' unopposed motion for final approval of the parties amended settlement agreement, (Doc. 122), and the named plaintiffs' unopposed motion for attorneys' fees, (Doc. 121). Having reviewed and considered the named plaintiffs' motions, both memorandums in support of the motions, and having held a final fairness hearing, the named plaintiffs' motions will be granted and the parties amended settlement agreement, (Doc. 118-3), will be finally approved.

I. BACKGROUND

This action is a putative class action against the defendant, BrightView Landscapes, LLC ("Brightview"), formerly known as The Brickman LTD. LLC., under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA") and state wage and hour laws across twenty-seven states, specifically, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, and Wisconsin. (Doc. 103 at 1–2). The defendant is a national landscaping and snow removal company. The named plaintiffs were non-exempt, salaried landscape/crew/irrigation supervisors working for the defendant in various locations across the country who, on behalf of themselves and all others similarly situated, alleged that, between October 8, 2010 and June 8, 2014, the defendant had a policy and practice of failing to pay its employees who were paid on a half-time, fluctuating workweek ("FWW") basis all overtime compensation owed in accordance with the FLSA and state wage and hour laws. (Doc. 103).

In particular, the named plaintiffs alleged in their amended complaint that the defendant could not use the FWW method to compute overtime for hours worked over 40 hours in a workweek under 29 C.F.R. § 778.114 because the class members' salaries were not fixed, a requirement for using that method. The plaintiffs alleged this was the case based on the defendant's payment of nondiscretionary holiday and annual bonuses and different rates of pay for any snow-related activities a class member might have performed ("snow pay"). The plaintiffs alleged these forms of compensation were not added to the overtime calculation and should have and that these additions made the defendants usage of the FWW method improper.

On October 8, 2013, the initial named plaintiff, Jonathan Amador Acevedo ("Amador"), filed the original class action complaint in this court alleging violations of the FLSA and Pennsylvania wage and hour laws alone. (Doc. 1). On February 14, 2014, the court granted the parties' joint request to stay discovery, (Doc. 35), allowing the parties to participate in three full-day sessions of mediation in Philadelphia, Atlanta, and Los Angeles between July 2014 and February 2015 with the Honorable Joel B. Rosen (Ret.), retired Magistrate Judge for the United States District Court of the District of New Jersey, and Hunter Hughes, Esq., where the parties ultimately reached a settlement. In order to reach an agreement, the parties engaged in extensive

informal discovery and the defendant voluntarily produced employee pay data. The exchange of this information led to the discovery of additional named plaintiffs and alleged violations in other states where the defendant employed supervisors.

***2** On May 29, 2015, the named plaintiffs filed an unopposed motion to preliminarily approve their initial settlement agreement along with an amended complaint which added the additional state law claims and the five additional plaintiffs now named in this action. (Doc. 103; Doc. 104). After several telephone conferences with the court to discuss the court's concerns with the initial settlement agreement, the plaintiffs filed a motion for preliminary approval of an amended settlement agreement, the agreement now subject to approval. (Doc. 118). On March 21, 2017, the court preliminarily approved the parties' amended agreement and class counsel and the court scheduled a final approval hearing for July 21, 2017. (Doc. 119; Doc. 120). The court also preliminarily approved the parties' proposed settlement administrator, Dahl Administration, LLC ("Dahl"), to set in motion the process of sending notice, claim forms, objections, opt-in and opt-out forms, etc. for class members. Prior to the final hearing, on May 8, 2017, the named plaintiffs filed their current unopposed motion for attorneys' fees. (Doc. 121). Also prior to the final hearing, on July 11, 2017, the named plaintiffs formally motioned for final approval of the amended settlement agreement, submitting their briefing for the court's review. (Doc. 122).

At the final approval hearing, class counsel reiterated in detail the arguments set forth in the named plaintiffs' briefing. The defendant's counsel supported these arguments in open court without objections. The court lauded the parties for their extensive work in reaching a settlement the court deemed fair and reasonable. No objectors were present at the final hearing. Class counsel did inform the court that several class members had filed late claims that the defendant had agreed to include in the final settlement. Accordingly, on July 28, 2017, the named plaintiffs filed a declaration from Dahl detailing the final amount of class members, the final amount to be included in the settlement, the final sum for distribution, a list of calculated settlements to be distributed to the class members following final approval, and a settlement fund summary. (Doc. 125).

II. THE AMENDED SETTLEMENT AGREEMENT

A. Classes Included in the Amended Settlement Agreement

The parties' amended settlement agreement contains two distinct settlement classes, a class dedicated to the FLSA claims, the FLSA Collective Group, and a class dedicated to the state law claims, the State Settlement Class. On February 14, 2014, the court conditionally certified the FLSA Collective Group under Section 16(b) of the FLSA, 29 U.S.C. § 216(b). (Doc. 35). The Collective Group was defined as follows:

> All current and former employees in the United States who have worked for The Brickman Group and who, at any time between October 8, 2010 and the present, were paid a salary, but only received "fluctuating workweek"-type half-time overtime pay for hours worked over 40 hours in a workweek (meaning at a rate that decreased with each overtime hour worked, rather than at time-and-a-half their hourly rate), including but not limited to salaried landscape/crew/irrigation Supervisors and those in similarly titled positions.

After preliminary approval of the class, notice with an opt-in consent form was then sent to 1,360 Collective Group members. Ultimately, 417 Collective Group members filed opt-in consent forms to the FLSA action at the start of the litigation. Now, an additional 345 members have opted in by submitting claim forms.

On March 21, 2017, the court preliminarily certified the State Settlement Class defined as follows:

> all individuals who were paid by The Brickman Group for work performed in Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, or Wisconsin and who, at any time between October 8, 2010 and June 8, 2014, were paid a salary, but worked under a pay plan in which they were eligible to receive "fluctuating workweek"-type half-time overtime pay for hours worked over 40 in a workweek (meaning at a rate that decreased with each overtime hour worked, rather than at time-and-a-half their hourly rate), including but not limited to salaried landscape/crew/irrigation Supervisors and those in similarly titled positions.

***3** (Doc. 120). The State Settlement Class incorporated the additional state law claims in the amended complaint.

B. Terms of the Amended Settlement Agreement

The amended settlement divided all of the class members and named plaintiffs from the above two classes into two groups, Group 1 and Group 2. Group 1 included all FLSA Collective Group members who originally filed an opt-in form at the start of this litigation, including all the named plaintiffs, and all Collective Group members who worked in Pennsylvania, regardless of their original opt-in status. The parties estimated that there were approximately 476 Group 1 members. Group 2 included all remaining Collective Group members who did not file an opt-in form and who did not work in Pennsylvania. Group 2 was designed as a catch-all for all of those putative plaintiffs in the Collective Group who did not file an opt-in form at the start of the case, other than those who worked in Pennsylvania. The parties initially estimated that there were approximately 839 individuals in Group 2.

Dahl agreed to administer the entire settlement for these two groups for fees not to exceed $17,470.00. The parties also agreed that the named plaintiff in the original complaint, Amador, would receive a service award in the amount of $5,000.00. The remaining named plaintiffs would each receive a $1,000.00 service award. These amounts would be taken pro rata from the Group 1 and Group 2 qualified fund.[1]

[1] The gross fund was labeled a qualified fund after the defendant handed over the agreed upon sums to Dahl. Upon receipt of the funds, Dahl was required to satisfy all Internal Revenue Service ("IRS") regulations needed to convert the funds into a "Qualified Settlement Fund" as defined by IRS regulations.
(Doc. 118-3, ¶ 28).

Settlement treatment depended on inclusion within a certain group. Group 1 members were guaranteed a minimum payment without further action and would be excluded only if they expressly opted out of the settlement. The defendant agreed to pay a gross maximum of $3.25 million for Group 1 claims. After deducting class counsel attorneys' fees and costs, administrator fees and costs, and service awards, each Group 1 member was initially entitled to $150.00 as an award. After this initial set-aside award, the parties agreed that Dahl would determine how to distribute the remaining funds to Group 1 members by using a formulation that created a per dollar share, taking into account the members' actual overtime pay during weeks the member was eligible to receive FWW pay for hours worked over forty in a workweek. This calculation would be based on the defendant's payroll and timekeeping data. The remaining funds would then be divided pro rata among Group 1 members based on their per dollar share figure.

The defendant agreed to pay a gross maximum of $3.7 million for Group 2 claims, but the parties negotiated a built in limitation to this gross amount. The defendant's actual gross payment for Group 2 claims would be based on the percentage of Group 2 members who submitted a timely claim form —*i.e.*, if thirty percent of individuals in Group 2 opted in, then only thirty percent of the Group 2 maximum fund, or $1.11 million, would be the gross fund from which a portion would be going to Group 2 members. The net fund would be determined after deducting attorneys' fees and costs, administrator fees and costs, and service awards.

***4** Unlike Group 1 members, only Group 2 members who submitted a timely claim form would be eligible to participate in settlement. Like Group 1 members, however, eligible Group 2 members would receive a minimum $150.00 set aside from the Group 2 net fund. Dahl would then determine a per dollar share figure for eligible Group 2 members based on the defendant's previously produced payroll and timekeeping data. Dahl would then distribute the remaining funds pro rata based on the net amount in the Group 2 fund and each Group 2 member's per dollar share figure.

Also unlike the Group 1 settlement, the Group 2 settlement was subject to the defendant's unilateral option to void the agreement if more than thirty-one percent of Group 2 members became eligible to receive a payment, *i.e.,* if more than thirty-one percent of Group 2 members opted in. The void provision did not effect the settlement of Group 1 members. The defendant's decision to void the agreement was optional, not mandatory. Thus, although $3.7 million was agreed to as the maximum gross amount for Group 2 claims, this amount was limited by the amount of Group 2 members who actually opted in and, further, by the defendant's option to void the agreement with respect to Group 2 if more than thirty-one percent of Group 2 members did opt in.

Group 1 and Group 2 members had thirty days from the initial mailing of settlement notices and claim forms to object to the settlement by providing a written statement to Dahl. The forms would be in both English and Spanish as many of the defendant's employees were Spanish-speaking. A website would also be established where members could submit a claim form via electronic signature. Those in the State Settlement Class who wished to exclude themselves

from the claims based on state law were allowed to do so by providing a written statement to Dahl on or before the thirty-day deadline. Group 2 members were given sixty days to submit an executed claim form needed to receive a settlement award, thereby opting into settlement.

The parties agreed that Group 1 and Group 2 members would have their settlement award treated the same for tax purposes. Half of the award would be treated as wages, with Dahl responsible for withholding federal and state income and employment taxes. The remaining half would be treated as non-wage liquidated damages reported on an IRS Form 1099. Release language for the FLSA claims and the state law claims would be included on all settlement checks. Mailed checks would remain valid and negotiable for 180 days after issuance and would be automatically cancelled if not cashed within that time. If administratively feasible, the parties agreed that funds from uncashed checks would be redistributed to eligible Group 1 and Group 2 members. If that was not administratively feasible, uncashed check funds would revert to a qualified settlement fund to be held by class counsel in a trust account for the applicable state statutory period for contract claims. No amount from the uncashed checks would revert to the defendant and class counsel would update the court within a year regarding the status of any unclaimed funds.

C. Current Administration of the Amended Settlement Agreement

After the court preliminarily approved the parties amended settlement agreement, Dahl immediately began the settlement process. Based on the defendant's records, Dahl identified 1332 unique records that identified a particular class member's name, last known address, social security number, and payroll information. (Doc. 135 ¶ 4). Of this list, 494 members were classified as being in Group 1 and 838 members were classified as being in Group 2. (*Id.* ¶ 5). On April 10, 2017, Dahl mailed notice packets in English and Spanish to all 1332 class members. (*Id.* ¶ 7). Dahl also established a settlement website. (*Id.* ¶ 8). Of the 1332 notices mailed, only 54 were returned as undeliverable. (*Id.* ¶ 9). Dahl found updated addresses for eleven of these individuals and remailed packets to those updated addresses, with none returned as undeliverable. (*Id.* ¶¶ 9–10). The remaining 43 packets could not be redelivered, resulting in a non-deliverable rate of only 3.2%. (*See id.*).

***5** Dahl did not receive any objections to the settlement and, as the court noted at the hearing, no objectors attended the final hearing. (*Id.* ¶ 12). Dahl did not receive any requests for exclusion from any group members. (*Id.* ¶ 11). Out of the 838 Group 2 members, 345 of these members submitted opt-in forms, though eight of these forms were untimely. (*Id.* ¶ 13). The defendant agreed to accept these untimely claim forms as part of the settlement, bringing the final opt-in rate for Group 2 members to 41.16%. (*Id.*). Based on the information gathered during administration, the average estimated, net settlement award will be $4,153.72 for Group 1 members and $2,769.61 for eligible Group 2 members who opted-in. (*Id.* ¶ 24). This average, of course, does not take into account the great variation amongst the members based on their individualized per dollar share figure. (*See id.* at Exs. B–C (listing the estimated individual settlement award calculations for all members)). The maximum estimated award for Group 1 members is $25,062.86 and $19,388.46 for Group 2 members. (*Id.* ¶ 24).

Although the percentage of opt-in forms from Group 2 members triggered the defendant's unilateral option to void the settlement with respect to Group 2, on June 22, 2017, the defendant advised Dahl that it would not elect to exercise that provision. (*Id.* ¶ 21). Even after being advised of several more late filings at the final hearing, the defendant's counsel advised the court that the defendant would continue with the settlement and would not exercise the void provision. Thus, many of the court's reservations with respect to the void provision, reservations that the court expressed to the parties on multiple occasions, did not come to fruition. Dahl's administrative fees and costs for its work to date totals $15,882.00, less than the $17,470.00 maximum the parties agreed to.

III. FINAL CERTIFICATION OF THE SETTLEMENT CLASSES

This action is a hybrid FLSA and state law action. Due to the hybrid nature of the action, the court must grant final certification of the opt-in FLSA Collective Group under Section 16(b) of the FLSA, 29 U.S.C. § 216(b) for settlement purposes. The court must also grant final certification to the State Settlement Class under Federal Rule of Civil Procedure 23. The analytical inquiries for these two types of class actions are distinct with some overlap. The court finds that final certification is warranted with respect to both the FLSA Collective Group and the State Settlement Class.

A. The State Settlement Class

Rule 23(a) requires that four threshold requirements be met in order for a Rule 23 class to be certified: numerosity, commonality, typicality, and adequate representation. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 613 (1997); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 527 (3d Cir. 2004). In addition, the class must satisfy one of the requirements of Rule 23(b). Here, the plaintiffs seek final certification under Rule 23(b)(3) which permits a court to certify a class in cases where "questions of law or fact common to class members predominate over any questions affecting individual members" and the "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These two requirements are commonly referred to as predominance and superiority. *See, e.g., In re Constar Int'l, Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009). A party that seeks to certify a settlement class must satisfy the same requirements necessary to maintain a litigation class. *In re Gen. Motors*, 55 F.3d at 778. However, the fact that the parties have reached an agreement and the terms of that agreement may factor into the certification analysis. *See Amchem Prods.*, 521 U.S. at 619.

The court finds that each of the above requirements are met in this case. Specifically, Rule 23(a)(1) requires that a class be so numerous that joinder of all members is impracticable. Classes exceeding forty or more class members are generally held to meet the numerosity requirement. *See Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001). In addition, the court may consider the geographic dispersion of the members. *Bredbenner v. Liberty Travel, Inc.*, Nos. 09-905 (MF), 09-1248 (MF), 09-4587 (MF), 2011 WL 1344745, at *5 (D.N.J. April 8, 2011).

***6** The instant settlement class consists of 1332 persons, 494 are automatically included in settlement by virtue of their inclusion in Group 1 and another 345 members from the Group 2 pool are included as these members have submitted valid claim forms. These class m embers are found across the country. The large amount of class members and the geographic dispersion of the members would make joinder impracticable. Accordingly, the plaintiffs satisfy the numerosity requirement.

Rule 23(a)(2) requires that there are questions of law or fact common to the class. If class members share at least one question of law or fact in common, factual differences among the claims of the class members do not defeat certification. *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 310 (3d Cir. 1998). Here, the class members share a common claim of alleged violations of state law based on the defendant's usage of the half-time FWW method for overtime compensation that did not include (and despite) payment of holiday bonuses, annual bonuses, and snow pay. *Cf. Rivet v. Office Depot*, 207 F. Supp. 3d 417, 429 (D.N.J. 2016) (finding commonality was satisfied in a hybrid FLSA/state settlement class under Rule 23 where state claims under four state regimes were based on the defendant's usage of the FWW method). The class claims will involve common factual issues regarding: (1) entitlement to additional overtime compensation; and (2) whether the defendant's pay practices violated state wage and hour laws. "Courts regularly find commonality in similar wage and hour suits in which class certification is sought." *Bredbenner*, 2011 WL 1344745, at *6 (collecting cases). Thus, the second prerequisite is met in this case.

Rule 23(a)(3) and Rule 23(a)(4) require that the claims or defenses of the representative be typical of the claims or defenses of the class and that the representative will fairly and adequately protect the interests of the class. These two inquiries tend to merge because both evaluate the relation of the claims and the potential conflicts between the class representative and the class in general. *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006). Typicality focuses on whether the interests of the class representative aligns with the interests of the absent class members such that the representative is working towards the benefit of the class as a whole. *In re Prudential*, 148 F.3d at 311. Three considerations are relevant to this inquiry: (1) whether the claims of the class representative are generally the same as the class in terms of the legal theory advanced and the facts; (2) whether the class representative is entitled to a defense not applicable to the class and is likely to be a focus of litigation; and (3) whether the interests and incentives of the class representative align with the rest of the class. *In re Schering Plough Corp., ERISA Litig.*, 589 F.3d 585, 599 (3d Cir. 2009). The claims and facts do not need to be identical, but there must be strong similarity. *Bredbenner*, 2011 WL 1344745, at *7. Adequacy is comprised of two inquiries. *Id.* (citing *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975)). The first inquiry looks to whether any significant antagonistic interests or conflicts exist between the class representative and absent members. *Id.* The second inquiry looks to the experience and expertise of class counsel in representing the class. *Id.*

In this case, the named plaintiffs' claims are typical of those held by the class members as they are based on the same facts and the same legal theories. All named plaintiffs were

supervisory employees who worked for the defendant in various locations across the country and received annual bonuses, holiday bonuses, and/or snow pay but were paid using a half-time FWW method of overtime compensation. There is no defense unique to the named plaintiffs and their interests directly align with the members of the State Settlement Class. The named plaintiffs also satisfy the adequacy requirement. The named plaintiffs hold no interests that are antagonistic of the class members' interests, thus making them adequate class representatives. Moreover, the class is represented by counsel who have experience and success with collective and hybrid FLSA/Rule 23 class action litigation, an inquiry that the court detailed in its preliminary approval of the amended agreement.

***7** The court also finds that the action meets the predominance and superiority requirements of Rule 23(b)(3). Rule 23(b)(3) allows certification of a class if the questions of law or fact common to class members predominate over any questions affecting only individual members and if a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Predominance merges with the concept of commonality, but has a more exacting standard. *Bredbenner*, 2011 WL 1344745, at *8. The court may consider four non-exhaustive factors listed in Rule 23(b)(3) to determine whether superiority is met. Fed. R. Civ. P. 23(b)(3)(A)–(D). These include the following:

(1) The class members' interest in individually controlling the prosecution or defense of separate actions;

(2) The extent and nature of any litigation concerning the controversy already begun by or against class members;

(3) The desirability or undesirability of concentrating the litigation of the claims in the a particular forum; and

(4) The likely difficulties in managing a class action.

Id. Management problems, however, are not applicable when certifying a settlement class. *In re Warfarin*, 391 F.3d at 529. Ultimately, the court should attempt to "balance, in terms of fairness and efficiency, the merits of the class action against those of alternative available methods of adjudication." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996) (internal quotation marks and citation omitted).

Here, the common factual and legal questions applicable to the class members predominate over any individual claims. The class claims are based upon a common course of alleged conduct, particularly, the defendant's pay policies and its usage of the FWW method for overtime compensation. Similarly, class adjudication is the superior method of adjudication. Given the lack of objections or exclusions, there appears to be no class member with a controlling interest in the litigation. There are no other actions overlapping with the current one. Given the defendant's locations across the country with employees across various states, a singular action would enhance recovery. Moreover, the claims are fully matured as the defendant changed its method of overtime compensation in June of 2014 as a result of this action. *Cf. Bredbenner*, 2011 WL 1344745, at *9 (finding that the full maturation of the claims weighed in favor of finding superiority).

Further, when certifying a settlement class, variations in state law do not present an insurmountable obstacle to final certification because the court is not concerned with the manageability of claims from a litigation perspective. *In re Warfarin*, 391 F.3d at 529; *see also Bredbenner*, 2011 WL 1344745, at *9 (same). These issues are irrelevant when certifying a settlement only class. *Id.*; *id.* Thus, the court finds that the predominance and superiority requirements of Rule 23(b)(3) are met for the State Settlement Class. Accordingly, the court will grant final certification to this class for settlement purposes.

B. The FLSA Collective Group

The court will also grant final certification to the FLSA Collective Group for settlement purposes. This class will include all Group 1 members[2] and all Group 2 members who submitted claim forms for settlement purposes. Courts employ a two-step process for approving FLSA classes, an initial "conditional" certification and a later "reconsideration" phase. *Bredbenner,* 2011 WL 1344745, at *16 n. 4. The court has already granted conditional certification of the Collective Group, (Doc. 35), and need only reconsider that decision in finally certifying the class for settlement purposes.

2 Group 1 members who did not opt-in originally but are included in Group 1 based on their Pennsylvania claims will, in essence, opt in by cashing their settlement award.

***8** To certify a FLSA collective action the court must find that the employees in the class are "similarly situated" within the meaning of the FLSA. *Bredbenner*, 2011 WL 1344745, at *17 (citing *Sperling v. Hoffman-La Roche, Inc.*, 862 F.2d 439, 444 (3d Cir. 1888), *aff'd*, 439 U.S. 165 (1989)). The Third Circuit Court of Appeals has endorsed the balancing

of various factors set forth in *Plummer v. General Electric Co.*, 93 F.R.D. 311 (E.D. Pa. 1981) and *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987) to make this finding. *Id.* (citing *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989) and *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 388 n. 17 (3d Cir. 2007)). The *Lusardi* factors are typically used in granting final FLSA certification and they include: "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to [defendants] which appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations." *Id.* (quoting *Lusardi*, 118 F.R.D. at 359) (alterations in original). These factors are "neither exhaustive nor mandatory." *Id.* Moreover, where the FLSA class is joined with a Rule 23 class, the FLSA class inquiry largely overlaps with the Rule 23 analysis. *Id.* In these instances, the court agrees that it "need only address the *Lusardi* factors in passing." *Id.* In addition, the concern with individualized inquiries speaks directly to case management issues which is not at issue when certifying a class for settlement purposes only. *Id.* (citing *Amchem*, 521 U.S. at 620).

The court has already found that the employees should be certified for Rule 23 settlement purposes and the court now finds that the FLSA Collective Group members continue to be similarly situated, warranting final certification of the FLSA Collective Group. They are all non-exempt supervisory employees who were paid under the FLSA's half-time FWW method of overtime compensation between October 8, 2010 and June 8, 2014. The named plaintiffs are representative of employees in this category. The alleged harm is based on payments of holiday bonuses, annual bonuses, and snow pay not included in the FWW method. Thus, the court finds that the employees in the Collective Group and their claims are factually similar and not disparate.

With respect to individualized defenses, the named plaintiffs did advise the court in their motion for attorneys' fees that the defendant's planned to seek decertification based on individualized defenses. (Doc. 121-1 at 19–20). In particular, the defendant's planned to assert an exemption defense for those supervisory employees who drove trucks with trailers that exceeded a combined 10,000 pounds in weight. Class counsel was then prepared to argue a "mixed-fleet" exception to this exemption based on Third Circuit precedent and federal statutory law. (*Id.* at 20 (citing *McMaster v. Eastern Armored Servs.*, 780 F.3d 167 (3d Cir. 2015)). This would present a defense that might be individualized. Either a particular plaintiff did or didn't drive trucks with trailers over 10,000 pounds and, if a particular plaintiff did drive trucks with trailers over 10,000 pounds, the court would need to determine if any percentage of time was spent driving trucks with trailers under 10,000 pounds. This inquiry, however, would speak directly to case management problems, problems that have little weight in the settlement context. Moreover, it is not obvious that this defense would predominate and present an insurmountable obstacle to certification. Accordingly, the court will finally certify the FLSA Collective Group for settlement purposes.

IV. FINAL APPROVAL OF THE AMENDED SETTLEMENT AGREEMENT

A. Rule 23 Final Settlement Approval

In order to approve a Rule 23 class settlement, the court must find that the settlement is fair, reasonable, and adequate and in the best interests of the class under Rule 23(e). *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 258 (3d Cir. 2009); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995). In considering a Rule 23 class action settlement, the court "plays the important role of protector of the [absent class members'] interests, in a sort of fiduciary capacity." *In re Gen. Motors*, 55 F.3d at 786. "Before sending notice of the settlement to the class, the court will usually approve the settlement preliminarily. This preliminary determination establishes an initial presumption of fairness when the court finds that: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *Id.* at 785-86 (citations omitted). "This presumption may attach even where, as here, settlement negotiations precede class certification." *Bredbenner*, 2011 WL 1344745, at *10.

***9** Here, the court has already preliminarily approved the parties amended settlement agreement and found that the first three factors weighed in favor of that preliminary approval. (Doc. 119; Doc. 120). Now that notices have been sent to class members in Group 1 and Group 2, the court can address the fourth factor, the amount of objectors. Here, there have been no objections, further emphasizing the presumptive fairness of the parties amended settlement agreement.

In *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), the Third Circuit set forth specific factors that the court should consider in determining whether a settlement is fair, reasonable, and adequate. These factors include the following:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) stage of the proceedings and the amount of discovery completed; (4) risks of establishing liability; (5) risks of establishing damages; (6) risk of maintaining the class action through the trial; (7) 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.

Girsh, 521 F.2d at 157. "The proponents of the settlement bear the burden of proving that these factors weigh in favor of approval." *In re Gen. Motors*, 55 F.3d at 785-86 (citations omitted). "The findings required by the *Girsh* test are factual, which will be upheld unless they are clearly erroneous." *Id.*

The first *Girsh* factor, the complexity, expense and likely duration of the litigation, favors final approval in this case. While the court cannot state that a hybrid FLSA claim is somehow unique, the existence of state law claims under twenty-seven state regimes joined with the FLSA action does make this case relatively complex. Some of these states (including, Florida, Georgia, South Caroline, Texas, and Virginia) do not have statutory wage and hour laws and the state law claims in those instances would be based on a common law theory of unjust enrichment alone. Each state regime has a distinct statute of limitations period, which at this late stage has likely run because the defendant changed its practice of using a FWW method of computing overtime in June of 2014.

In addition, the parties decided to distinguish the Pennsylvania state law claims from the claims under the remaining twenty-six states and the court required the parties to justify this distinction. Adding to the complexity, the plaintiffs explained the strong viability of the Pennsylvania claims under the Pennsylvania Minimum Wage Act ("PMWA"), 43 Pa. Stat. § 333.101, *et seq.* These claims, in addition to unjust enrichment claims under Pennsylvania law, were included in the original class action complaint and are, therefore, tolled even if settlement is denied. It is also clearer under the PMWA that the defendant's previous method of computing overtime was improper in all circumstances. *See, e.g., Verderame v. RadioShack Corp.*, 31 F. Supp. 3d 702, 709 (E.D. Pa. 2014) (holding that the FWW method of computing overtime is impermissible under the plain language of 34 Pa. Admin. Code § 231.43(d)(3), an implementing regulation of the PMWA).

In comparison, many of the state statutory regimes likely follow the FLSA standards for overtime pay. The appropriateness of the defendant's actions under the FLSA is less clear. The U.S. Department of Labor ("DOL") has interpreted the FLSA to allow a FWW method of calculating overtime pay at a half-time rate where there is "fixed amount" per week and a "clear mutual understanding that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period." 29 C.F.R. § 778.114.[3] The current action is based on the theory that the defendant could not use the half-time, FWW method because the class members' salaries were not fixed. The plaintiffs believed this to be the case based on the defendant's payment of nondiscretionary holiday and annual bonuses and snow pay. The plaintiffs alleged these added payment were not added to the overtime calculation and should have and that these additions made the defendants usage of the FWW method improper.

3 *See Mozingo v. Oil States Energy Servs.*, LLC, No. 16-529, 2017 WL 3219345, at *2 (W.D. Pa. July 28, 2017) (explaining that respect under *Skidmore v. Swift*, 323 U.S. 134 (1944) is due to an agency's informal interpretations of an act only to the extent that interpretation has the power to persuade).

***10** The ability of the plaintiffs to recover under the FLSA using the above theory presents an issue that has not been directly addressed by the Supreme Court or the Third Circuit. The trend appears to be that courts distinguish between performance-based and time-based bonuses with only time-based bonuses violating the "fixed salary" requirement needed to use the FWW method. *See, e.g., Mozingo*, 2017 WL 3219345, at *3 (concluding that only time-based compensation would violate the fixed salary requirement); *Lalli v. Gen. Nutrition Ctrs., Inc.*, 814 F.3d 1, 4–6 (1st Cir. 2016) (same); *Wills v. RadioShack Corp.*, 981 F. Supp. 2d 245, 256–58 (S.D.N.Y. 2013) (same) (collecting cases) (finding that this interpretation was consistent with the Supreme Court's interpretation of the FLSA in *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942), partially superceded by statute as stated in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 n. 22 (1985)).

Here, the alleged violations are based on holiday bonuses, annual bonuses, and snow pay. Had the court been required to weigh in on this issue and followed the apparent trend, it is possible that not all of the violations would have been deemed

a violation of the FWW method, though this case law is still developing. The distinctions between the types of additional compensation and the fact that the court would need to weigh in on an unsettled issues would naturally make litigation more complex. These considerations would also likely lead to higher expenses if the plaintiffs were required to litigate their claims to trial and a lengthier litigation timeline overall. Thus, the first *Girsh* factor weighs in favor of approval of the parties' amended settlement agreement.

The second *Girsh* factor, the reaction of the class to settlement, undoubtably favors settlement. There were no objections to the class and no requests for exclusion from the State Settlement Class. (Doc. 125 ¶¶ 11–12). No objectors attended the final hearing on July 21, 2017, as the court noted on the record. Out of the 1332 class members, 494 Group 1 members will be participating in the settlement, the full amount of Group 1 members, and 345 Group 2 members will be participating. The reaction of Group 2 members went beyond even the parties' expectations. Approximately 41.16% of Group 2 members will be participating in settlement, above the anticipated thirty-one percent the parties negotiated as part of the void provision. Ultimately, 839 class members, out of a total of 1332 class members, have affirmatively participated in the parties' settlement, approximately sixty-three percent of the class members. The court views this as an excellent result.

The third *Girsh* factor also favors final approval, the stage of the proceedings and the amount of discovery completed. The court stayed discovery in the action early on to allow the parties to engage in mediation. (Doc. 35). At that point the defendant had already answered the original complaint in this action. (Doc. 21). The parties did not engage in any formal motions practice and the defendant has not answered the amended complaint, which was filed on a stipulated basis contingent on the success of settlement.

***11** Although the parties did not engage in formal discovery, during the mediation process there was sufficient exchange of information and class counsel uncovered violations in other states across the country. In particular, the parties exchanged the following:

(1) [A]n electronic spreadsheet setting forth the dates of employment in which putative class members worked in the position at issue;

(2) Employee Earnings Detail history Reports and weekly pay data for each calendar year in which an employee worked in the position at issue during the applicable time period;

(3) [A]ll documents summarizing or describing the policies and procedures for compensating putative class members in the form of wages, bonuses, overtime compensation, and all other forms of compensation during the applicable period;

(4) [P]olicies or practices applicable to putative class members with respect to time-keeping and compensation;

(5) [J]ob descriptions for the putative class members;

(6) Department of Labor audit, evaluations, and reports; and

(7) [A] sample of personnel files.

This documentation was required in order to arrive at damages calculations, calculations that the parties disputed during mediation. Thus, the court finds that the second *Girsh* factor favors settlement given the sufficiency of informal discovery and the amount of time spent by the parties attempting to reach a settlement.

The fourth, fifth, and sixth *Girsh* factors also strongly favor final approval of the parties' amended settlement agreement. These factors speak to the risks the class would face with respect to establishing liability, establishing damages, and maintaining the class action if litigation were to continue. Here, these risks are high. The court has discussed in detail the risks of establishing liability in its analysis of the first *Girsh* factor. Some potential liability issues would include: (1) varying statutes of limitations; (2) finding liability in states without statutory protection where a class member's sole claim would be for unjust enrichment; and (3) finding liability for all the defendant's practices with respect to holiday pay, annual pay, and snow pay in states with statutes that closely track the FLSA FWW method.

In addition, given their disagreement with respect to liability, the parties naturally disagreed over proper damage calculations. The parties disagreed over the appropriate amount of damages for settlement purposes even after exchanging employee records, including time-keeping records. As detailed in a letter brief to the court, (Doc. 113), the parties used both a conservative damage model favorable to the defendant and a damage model favorable to the plaintiffs to arrive at the gross sum for Group 1 and Group

2. (*Id.* at 2–3). These models attempted to take into account the attendant risks of establishing liability.

The two damages estimates for Group 1 members were $1,030,842.00 and $4,377,660.00. (*Id.* at 2) The resulting $3,250,00.00 set aside for Group 1 is, on its face, a compromise between these damages estimations. Group 2 members, those with only state law claims at that point in time because they had not opted into the FLSA class, faced higher risks.[4] (*Id.* at 3 n. 2). The two damages estimates for Group 2 members were $224,540.00 and $7,287,983.00. (*Id.* at 3). The parties' divergent views on the ability to establish liability for Group 2 members is clearly seen in the difference between those two numbers. Like the final Group 1 amount, the $3,700,000.00 gross amount set aside for these claims is a clear compromise over these divergent views. The void provision and the defendant's ability to walk away from the Group 2 settlement if more than thirty-one percent of Group 2 members opted in was an added layer of protection for the defendant from these weaker claims. If the plaintiffs were required to continue litigating this case, and particularly the Group 2 claims, the risks of establishing damages would be inextricably tied to the risks of establishing liability.

4 Group 2 did not include Pennsylvania law claims but these claims faced little to no risk because these claims had no statute of limitations issues. These claims were tolled by the original complaint filing. Further, the defendant's actions were clearly improper under Pennsylvania law.

***12** In addition, the plaintiffs face serious risks of trying to maintain the Rule 23 State Settlement Class. Here, the State Settlement Class consists of claims under twenty-seven state law regimes, some of which do not have statutory wage and hour protection. While the heart of this action is the FLSA action, if faced with managing litigation the court would be wary of certifying such a sprawling class. In the briefing to the court for the motion for attorneys' fees, the named plaintiffs explained that the defendants planned to oppose certification of the Rule 23 class and planned to motion to decertify the FLSA class based on individuals defenses to the class claims. (Doc. 121-1 at 14–15). Accordingly, the court finds that the class claims bore substantial liability, damages, and class certification risks. These risks were assessed and weighed in the damages calculations and the resulting settlement as seen by the gross amounts set aside for Group 1 and Group 2 and the void provision. As such, the *Girsh* risk factors weigh in favor of final approval.

The eight *Girsh* factor also weighs in favor of final approval, the ability of the defendants to withstand a greater judgment. Here, the parties negotiated a gross settlement amount of $6,950,000.00—$3,250,000.00 for Group 1 and $3,700,000.00 for Group 2. The actual gross amount, now that Group 2 members have had an opportunity to opt-in will be $4,773,269.69—$3,250,000.00 for Group 1 and $1,523,269.69 for Group 2—less than the agreed upon gross amount. (Doc. 125, Ex. A). Thus, in theory the defendant could withstand a greater judgment. However, although the gross amount set aside was $6,950,000.00, the gross amount set aside before the defendant's unilateral option to void the Group 2 settlement could be exercised was $4,397,000.00.[5] The fact that the defendant chose not to exercise that option when the opt-in rate for Group 2 reached 41.16% means that the defendant will be withstanding a greater financial burden than it originally anticipated. The court cannot state with any certainty that the defendant could somehow withstand more, even if financially able, given the risks of litigation, the resulting compromise, and the defendant's later decision to compromise even after more Group 2 members opted in than were originally anticipated. Accordingly, this factor weighs in favor of approval.

5 The parties' void provision anticipated a thirty-one percent opt-in rate for Group 2 members lowering the anticipated Group 2 gross total to $1,147,000.00. When added to the $3,250,000.00 set aside for Group 1 the final estimated gross amount was $4,397,000.00.

The eight and ninth *Girsh* factors, the ranges of reasonableness of the settlement fund in light of the best possible recovery (with and without consideration of attendant risks), clearly favor final approval. The court has explained the damages models used by the parties to reach a final sum, with one model more favorable to the plaintiffs and the other more favorable to the defendant. For Group 1 members these calculations amounted to $1,030,842.00 and $4,377,660.00. For Group 2 members these calculations amounted to $224,540.00 and $7,287,983.00. Thus, the range was between $1,255,382.00 and $11,665,643.00. The gross amount of $6,950,000.00 set aside for Group 1 and Group 2 is a near exact compromise over the parties' damages calculations. While the actual gross amount will be lower, $4,773,269.69 to be exact, the court finds this amount to be reasonable. It amounts to approximately 40% of the damages model most favorable to the plaintiff and approximately 380% of the damages model most favorable to the defendant, almost four times more than those calculations. Moreover, the final amount is a near perfect compromise over the claims when

viewed in light of the many risks of establishing liability and maintaining class claims at this stage of the litigation. It is more than what the defendant anticipated paying while still below the most favorable damages calculation for the class. Because of this the court finds that the final two *Girsh* factors clearly favor approving the settlement in this case. Thus, all of the *Girsh* factors favor approval. Accordingly, the Rule 23 settlement will be finally approved.

B. FLSA Final Settlement Approval

***13** The standard for final approval under the FLSA is distinct but intertwined with the court's *Girsh* analysis above. Under the FLSA, "[o]nce employees present a proposed settlement agreement to the district court pursuant to Section 216(b), the [c]ourt may enter a stipulated judgment if it determines that the compromise 'is a fair and reasonable resolution of a bona fide dispute over FLSA provisions.' " *Brown v. TrueBlue, Inc.*, No. 1:10-cv-00514, 2013 WL 5408575, *1 (M.D. Pa. Sept. 25, 2013) (citing *Cuttic v. Crozer–Chester Med. Ctr.*, 868 F. Supp. 2d 464, 466 (E.D. Pa. 2012); *see also Adams v. Bayview Asset Mgmt., LLC,* 11 F. Supp.3 d 474, 476 (E.D. Pa. 2014) (DOL supervision or court approval are the "only two ways that FLSA claims can be settled or compromised by employees," "[b]ecause of the public interest in FLSA rights"). The role of the court in FLSA class actions is distinct because, unlike its role in Rule 23 actions to serve as caretaker and protect absent class members, the court in FLSA class actions serves as gatekeeper to "ensure[ ] that the parties are not 'negotiating around the clear FLSA requirements' via settlement." *Bredbenner*, 2011 WL 1344745, at *18 (quoting *Collins v. Sanderson Farms, Inc.*, 568 F. Supp. 2d 714, 720 (E.D. La. 2008)). There are no absent class members in an FLSA opt-in class.

The Third Circuit has not specifically addressed the factors that the district court should consider when approving FLSA settlements. However, district courts within this circuit have followed the Eleventh Circuit's decision in *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1354 (11th Cir. 1982). *See, e.g., Kraus v. PA Fit II*, 155 F. Supp. 3d 516, 521 (E.D. Pa. 2016) (court applied the *Lynn's Food* standard); *Brown*, 2013 WL 5408575, *1 (same). Under this standard, "[w]hen parties present to the district court a proposed settlement, the district court may enter a stipulated judgment if it determines that the compromise reached 'is a fair and reasonable resolution of a bona fide dispute over FLSA provisions.' " *Cuttic*, 868 F. Supp. 2d at 466 (quoting *Lynn's Food*, 679 F.2d at 1354). Thus, application of the *Lynn's Food* standard for approval is a two part inquiry: (1) is the settlement fair and reasonable and (2) does it resolve a bona fide dispute. Lastly, the court should "proceed to determine whether [the settlement] furthers or frustrates the implementation of the FLSA." *Brown*, 2013 WL 5408575, *1

To determine whether an FLSA settlement agreement is fair and reasonable, "district courts have relied on the factors set out by the Third Circuit for approving class action settlements pursuant to Federal Rule of Civil Procedure 23." *Id.* at *2. Thus, the *Girsh* factors set forth by the Third Circuit apply. The court has already concluded that all of the *Girsh* factors favor settlement in this case.

The court also finds that the parties amended settlement agreement resolves a bona fide dispute. A dispute is bona fide if it involves "factual issues rather than legal issues such as the statute's coverage and applicability and when its settlement reflects a reasonable compromise of disputed issues rather than a mere waiver of statutory rights brought about by an employer's overreaching." *Creed v. Benco Dental Supply Co.*, No. 3:12-CV-01571, 2013 WL 5276109, at *1 (M.D. Pa. Sept. 17, 2013) (internal citations and quotation marks omitted). A bona fide dispute under the FLSA includes computation of backwages and compensation due. *Bredbenner*, 2011 WL 1344745, at *18. Similarly, issues over the proper calculation of overtime under the FWW method present a bona fide dispute. *Id.* Here, the parties' dispute revolves around the proper computation of overtime pay and whether or not the FWW method was available to the defendant. *Cf. id.* (concluding that whether or not an employer's FWW formula was proper under the FLSA presented a bona fide dispute).

The issues presented in this case present a bona fide dispute over the back wages and overtime compensation. The defendant's actions in reaching settlement cannot be described as overreaching but an utmost compromise. In reaching settlement the defendant's have allowed FLSA class members to join the FLSA Collective Group well after the original time for opting in, giving these class members (Group 2) another opportunity to be compensated for wrongs that may or may not be compensable given the developing state of FLSA law on the issue of FWW overtime pay.

***14** Finally, the court finds that the parties' amended settlement agreement furthers the FLSA. "In 1938, Congress enacted the FLSA to protect covered workers from substandard wages and oppressive working hours." *Friedrich v. U.S. Computer Servs.*, 974 F.2d 409, 412 (3d Cir. 1992)

(citing *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). The FLSA provides that:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). Thus, employers covered by the FLSA must pay overtime compensation to employees who work for more than forty hours a week "unless one or another of certain exemptions applies." *Packard v. Pittsburgh Transp. Co.*, 418 F.3d 246, 250 (3d Cir. 2005). In this case, the defendant used the half-time FWW method instead of the one and one-half time method, which is an FLSA compliant method of overtime compensation under 29 C.F.R. § 778.114 in certain circumstances. If this method was not appropriate, however, the one and one-half method was required.

The resulting settlement compensates the FLSA Collective Group for the defendant's potential wrongdoing while taking into account the attendant risks of further litigation. The amount received by class members will reflect a pro rata share of the sum of money set aside for claims. This share figure is based on actual time-keeping records of hours worked on an individualized basis. Moreover, the defendant changed its method of computing overtime compensation in June of 2014. Thus, not only will those in the FLSA class be fairly compensated for any potential wrongdoing, employees hired after the defendant's change in pay practices will likely benefit from this action. Thus, the benefits reach beyond the settlement itself. This result clearly furthers the purpose of the FLSA to protect workers and ensure they are paid appropriately. Accordingly, the parties amended settlement agreement will be finally approved with respect to the Collective Group's FLSA claims.

C. Final Approval of Dahl and the Service Awards

The court will also finally approve Dahl as settlement administrator. The court is aware of no issues with the handling of the settlement. The 3.2% non-deliverable rate for the mailing of notices is noteworthy. The documents submitted by Dahl are clear and concise and allow the court to fully evaluate the settlement distribution. The parties agreed to administration costs not to exceed $17,470.00. Dahl's costs total $15,882.00, less than the amount agreed to. (Doc. 122-3 at 7). Accordingly, Dahl will be finally approved as settlement administrator.

The named plaintiffs also seek final approval of their service awards. "[C]ourts routinely approve incentive awards to compensate named plaintiffs for services they provided and the risks they incurred during the course of the class action litigation." *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000) (quoting *In re S. Ohio Corr. Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997)). They also reward the named plaintiff for the "public service that they performed by contributing to the enforcement of mandatory laws." *Keller v. TD Bank, N.A.*, No. 12-5054, 2014 WL 5591033, at *16 (E.D. Pa. Nov. 4, 2014).

***15** Here, the named plaintiffs seek $5,000.00 for Amador and $1,000.00 for the remaining five plaintiffs who were added to the amended complaint. These awards will total $10,000.00 and will be taken from the common fund. The $10,000.00 amount is less than one percent of the total claimed settlement fund. The court finds that the amount request is justified and in line with awards in this circuit. This is well within the range of acceptable amounts for service awards. *See, e.g., Sakalas v. Wilkes Barre Hosp. Co.*, No. 3:11-cv-0546, 2014 WL 1871919, at *5 (M.D. Pa. May 8, 2014) (awarding service award that amounted to 1.57% of the settlement fund and describing this amount as within the "mainstream for class action service awards in the Third Circuit").

Further, class counsel attested to the fact that the named plaintiffs provided background and employment information for the class claims and provided information about the defendant's pay policies and practices. (Doc. 118-4 ¶ 14). They also risked their reputation in coming forward to participate in the classes. (*Id.*). They performed a public service in bringing the defendant's pay practices to light. The defendant changed its practices in June of 2014, leading to benefits for even those employees who are not included as class members. Though Amador will be receiving a higher amount, this higher is justified given his length of time as a named plaintiff in this action and the strength of his Pennsylvania state law claim. Accordingly, the court will finally approve the $10,000.00 amount in service awards to reward the named plaintiffs for their contribution to this action.

V. ATTORNEYS' FEES AND COSTS

The court will also approve the requested attorneys' fees and costs for class counsel. Originally, the parties agreed that class counsel would receive attorneys' fees in an amount not to exceed one-third (33.33%) of the Group 1 gross settlement amount from the Group 1 qualified fund, with a maximum amount of $1,083,333.33. Class counsel would also receive no more than one-third of the Group 2 calculated gross settlement fund from the Group 2 qualified fund, which was to be determined based on the amount of Group 2 members who opted in and became eligible to participate in settlement. Lastly, the parties agreed that class counsel would receive reimbursement of their out-of-pocket costs approved by the court in an amount not to exceed $65,000.00, which would be paid pro rata from the Group 1 and Group 2 qualified funds.

After discussions with the court regarding the percentage amount set aside for attorneys' fees, class counsel agreed to lower that amount. Currently, the named plaintiffs' request attorneys' fees in the amount of 31.6667% of the Group 1 fund and the claimed amounts from the Group 2 fund, which will result in reallocation and correspondingly higher payments to the settlement participants. This percentage amount is used in the settlement fund summary provided by Dahl. (Doc. 125 Ex. A). The final amount requested in fees, based on sums in Dahl's Settlement Fund Summary, is $1,511,536.99.[6] The named plaintiffs have also requested $48,950.62 to reimburse class counsel's out-of-pocket costs, less than the $65,000.00 maximum agreed to by the parties. The court will approve the parties agreed upon percentage-of-recovery fee amount for class counsel and allow for full reimbursement of costs.

6 The Settlement Fund Summary estimates that the final sum for Group 2 claims totals $1,523,269.69 leaving the amount of attorneys' fees taken from the Group 2 settlement at $482,369.24 ($1,523,269.69 x .316667). The amount of attorneys' fees taken from Group 1 is $1,029,167.75 ($3,250,000.00 x .316667). The final sum for attorneys' fees will therefore be $1,511,536.99 ($482,369.24 + $1,029,167.75).

A. Legal Standard

***16** The FLSA provides that the court "shall, in addition to any judgment awarded to the plaintiff ... allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b). Under Third Circuit law, a court may evaluate the award of attorneys' fees through two established methods: (1) the lodestar approach; and (2) the percentage of recovery approach. *In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524, 540 (3d Cir. 2009). "Under the lodestar approach, a court determines the reasonable number of hours expended on the litigation multiplied by a reasonable hourly rate." *Hahnemann Univ. Hosp. v. All Shore, Inc.*, 514 F.3d 300, 310 (3d Cir. 2008). Under the percentage of recovery method, the court awards counsel a percentage of the total class recovery and uses a seven-factor test set forth in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n. 1 (3d Cir. 2000) to approve that percentage. *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 (3d Cir. 2005) ("*Cendant II*").

The percentage of recovery method is generally preferred under the common fund doctrine. *Keller*, 2014 WL 5591033, at *14 (citing *In re Prudential*, 148 F.3d at 333). Under the common fund doctrine, "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." *Cendant II*, 404 F.3d at 187 (quoting *In re Gen. Motors*, 55 F.3d at 820 n. 20). "Further, the percentage of recovery method is the prevailing methodology used by courts in the Third Circuit for wage and hour cases." *Keller*, 2014 WL 5591033, at *14; *see also DiClemente v. Adams Outdoor Adver., Inc.*, No. 3:15-0596, 2016 WL 3654462, *4 (M.D. Pa. July 8, 2016) (same). "[C]ourts have approved attorneys' fees in FLSA [collective and class action] settlement agreements 'from roughly 20-45%' of the settlement fund." *Kraus*, 155 F. Supp. 3d at 534 (quoting *Mabry v. Hildebrant*, No. 14-5525, 2015 WL 5025810, at *4 (E.D. Pa. Aug. 24, 2014) (collecting cases)).

The *Gunter* factors the court considers under the percentage-of-recovery method to evaluate an award of attorneys' fees in common fund cases are:

> (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.

Gunter, 223 F.3d at 195 n. 1 (citations omitted). These factors do not have to be "applied in a formulaic way" and, "[e]ach case is different, and in certain cases, one factor may outweigh the rest." *Id.* In addition, the court should consider three additional factors: (1) the value of benefits attributable to the efforts of class counsel relative 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 arrangement at the time counsel was retained, and (3) any innovative terms of settlement. *In re Diet Drugs*, 582 F.3d at 541 (citing *In re Prudential*, 148 F.3d at 338–40).

Lastly, Third Circuit "jurisprudence also urges a 'lodestar cross-check' to ensure that the percentage approach does not lead to a fee that represents an extraordinary lodestar multiple." *Cendant II*, 404 F.3d at 188; *see also Keller,* 2014 WL 5591033, at *14 (same). The Third Circuit has noted that a factor ranging between 1 and 4 is generally common. *In re Prudential*, 148 F.3d at 341. Here, nearly all of the *Gunter* and *Prudential* factors and the lodestar cross-check support the plaintiffs' attorneys' fees request of 31.6667% of the gross, claimed settlement fund.

B. The *Gunter* and *Prudential* Factors

***17** The first *Gunter* factor, the size of the fund created and the number of persons benefitted, supports the attorneys' fees request. Generally, the appropriate percentage awarded to class counsel decreases as the size of the fund increases. *Keller*, 2014 WL 5591033, at *14. This idea is premised on the belief that increases in recovery are usually the result of the size of the class and not a result of the efforts of counsel. *In re Prudential*, 148 F.3d at 339. Thus, this first factor leads to less fees in "mega-fund" cases. *In re Cendant Corp. Litig.*, 264 F.3d 201, 287 (3d Cir. 2001) ("*Cendant I*"). The named plaintiffs posit and the court agrees that the basis for this mega-fund rule has less application in FLSA opt-in actions. Unlike Rule 23 opt-out classes, counsel for FLSA must spend time and effort locating and notifying possible plaintiffs, who must then opt into the action to proceed. They are not absent class members and counsel may be required to directly communicate, interview, and work with these various opt-in plaintiffs.

Here, the action is a hybrid FLSA class action. Ultimately, the settlement will result in benefits to 839 class members, including the named plaintiffs, or about 63% of all possible plaintiffs (1,332 total). Of that percentage, almost half are plaintiffs who opted into the FLSA action at the start of the case. The total gross fund allocated to all class members amounts to $4,773,269.69, a sizeable but not extraordinary amount given the maximum gross fund agreed to by the parties. Thus, the court finds no indication that the parties' amended settlement agreement and the results of administrative have triggered a mega-fund warranting a reduction. As such, the court views the 31.6667% allocated to attorneys' fees as more than appropriate give the size of the fund, the moderate number of participating members, and the two types of class members included in the settlement.

The second *Gunter* factor, the presence or absence of substantial objections, also supports the request for attorneys' fees. As the court has indicated in several instances, there have been no objections to the settlement and no late objectors were present at the final hearing. This is yet another indication that the resulting settlement is fair and an indication of the work expended by counsel in reaching a fair settlement.

The third *Gunter* factor, the skill and efficiency of the attorneys, also supports the request. As the court explained in its preliminary approval of the settlement agreement, class counsel Shanon J. Carson with the law firm Berger & Montague, P.C. previously provided a declaration to the court with the firm's resume attached as an exhibit. (Doc. 118-4). Attorney Carson currently serves as lead or co-counsel in employment and collective actions in federal courts around the country. (*Id.* ¶ 3). Berger & Montague, P.C. has represented clients in major class action cases for over 40 years. (*Id.* ¶ 3). The firm's resume supported this finding. (*Id.* Ex. A). In addition, attached to the motion for attorneys' fees and costs was a declaration from co-lead counsel, C. Andrew Head with the Head Law Firm, LLC. (Doc. 121-2). In it, Attorney Head explains that he is the founding partner of the law firm, which has a nationwide employment law practice. (*Id.* ¶ 3). Attorney Head provides a long list of FLSA and state wage and hour lawsuits he has participated in throughout the country. (*Id.*).

The court is confident that these attorneys are highly skilled in FLSA collective and hybrid actions as seen by their dealings with the court and the results achieved in both negotiating and handling the settlement to date. The court has held several conferences with class counsel and has, in some instances, requested briefing and explanation of various settlement terms. In all instances, counsel has promptly provided the court with requested documentation and justifications for the settlement and has shown the ability to compromise, thereby reaching a settlement that is fair to all parties.

***18** The fourth *Gunter* factor, the complexity and duration of the litigation, also favors the attorneys' fees request. This action was initiated in this court on October 8, 2013. (Doc. 1). It is nearly four years later. This action began as a collective FLSA action joined with claims under Pennsylvania law alone. As a result of information gathered during the mediation process, the case expanded to include claims

under twenty-six other state wage and hour law regimes. The plaintiffs admit that some of these regimes would pose substantial difficulties if litigated to a trial. In addition, the defendant would have, if no agreement was reach, sought decertification of the FLSA action and would have opposed a Rule 23 certification motion. The defendant and the plaintiffs also disagreed over liability issues, particularly, whether or not the FWW overtime calculation used by the defendant was valid even if did not strictly comply with 29 C.F.R. § 778.114. These issues not only made the case complex, they led to a great differences is original damages calculations. (*Id.* at 1–2). Working through these issues required three full-day mediation sessions. Thus, while the facts of this case have been relatively straightforward, the issues presented were complex and class counsel efficiently navigated these issues with the defendant to, ultimately, reach a fair compromise.

The court also finds that the fifth *Gunter* factor, the risk of nonpayment, also favors the requested award. There is no indication that the defendant is insolvent or close to insolvency and therefore would be unable to satisfy a judgment. *See In re Janney Montgomery Scott LLC Fin. Consultant Litig.*, No. 06-3202, 2009 WL 2137224, at *15 (E.D. Pa. July 16, 2009) (explaining that this factor favors a fee application when the defendant cannot satisfy the judgment). Class counsel does, however, have a 40% contingency agreement in place with the original named plaintiff, Amador. *See Keller*, 2014 WL 5591033, at *15 (explaining the risk of nonpayment where a contingency agreement is in place). Thus, the risk of nonpayment is partly determined based on the risk of losing the case. Here, there were such risks, as fully explained above. Had the plaintiffs litigated this case and lost, class counsel would have been left with no reimbursement.

The sixth *Gunter* factor, the amount of time devoted to the case by class counsel, also favors the requested award. Attached to their motion for attorneys' fees, the named plaintiffs provided the court with declarations from Attorney Head and Attorney Carson, both serving as lead class counsel. (Doc. 121-2; Doc. 121-3). Collectively, these declarations indicate that class counsel, along with their associates and support staff, engaged in a total of 2434.1 hours of work in this case. There is nothing to indicate that this amount of work was somehow excessive. Although the parties did not engage in formal discovery, they did participate in extensive informal discovery and spent an ample amount of time engaging in mediation, three full-day sessions to be exact. Class counsel held several discussions with the court after an initial settlement agreement was reached and this initial settlement was revised and amended based on those discussions. Additional briefing was also provided to the court when requested. The result of all that work is clearly seen in the parties final amended settlement agreement.

The court also finds that the seventh *Gunter* factor, the awards in similar cases, favors the requested award. "[C]ourts have approved attorneys' fees in FLSA [collective and class action] settlement agreements 'from roughly 20-45%' of the settlement fund." *Kraus*, 155 F. Supp. 3d at 534 (quoting *Mabry*, 2015 WL 5025810, at *4 (collecting cases)). "[A]n award of one-third of the settlement is consistent with similar settlements throughout the Third Circuit." *Creed*, 2013 WL 5276109, at *6 (citing *Martin v. Foster Wheeler Energy Corp.*, No. 3:06-CV-0878, 2008 WL 906472, at *5 (M.D. Pa. Mar. 31, 2008) (collecting cases)) (approving a one-third attorneys' fee arrangement in an FLSA overtime action); *see also In re Janney*, 2009 WL 2137224, at *16 (approving a 30% attorneys' fee recovery rate in a hybrid FLSA action). Accordingly, the court finds attorneys' fees of 31.6667% of the claimed settlement fund to be well within the range of acceptable fees in this action.

***19** With respect to the additional *Prudential* factors, the court finds that the first added factor is neutral as it bears little weight in this action. The first factor, the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups such as government agencies conducting investigations, *In re Diet Drugs*, 582 F.3d at 541, has no application. There is no indication that the DOL was investigating the defendant's overtime compensation practices and, thus, there is nothing to compare. The court does note, however, that the efforts of class counsel are clearly seen in the final settlement as well as the added benefit from the defendant's change to its overtime compensation practices. Thus, as a result of the settlement process not only are those included in the settlement benefitted but current and future employees of the defendant will also receive benefits based on this litigation.

The second added factor, 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, does weigh in favor of the requested award. Generally, a request of "one-third of the settlement fund comports with privately negotiated contingent fees negotiated on the open market." *Brumlet v. Camin Cargo Control, Inc.*, Nos. 08-1798 (JLL), 10-2461 (JLL), 09-6128 (JLL), 2012 WL 1019337, at

*12 (D.N.J. Mar. 26, 2012). Class counsel does have a 40% contingency agreement in place with Amador. *Cf. Lovett v. Connect America.com*, No. 14-2596, 2015 WL 5334261, at *5 (E.D. Pa. Sept. 14, 2015) (noting a 40% contingent fee agreement in an FLSA hybrid action). Accordingly, the court finds that the request for 31.6667% of the claimed settlement fund for attorneys' fees falls within the acceptable range of privately negotiated contingency fees.

Lastly, the court finds that the final added *Prudential* factor, innovative terms of settlement, favors settlement. Here, the parties negotiated a void provision, or reverse "blow-out" provision, that uniquely accounted for the hybrid nature of the class claims and, more specifically, the relative weakness of Group 2 claims. While the provision was not exercised and favored the defendant alone, usage of this provision gave a layer of protection that made it possible for the defendant to move forward with settlement despite the many risks of litigation and the strength of its position. Class counsel's ability to navigate this unique provision while preserving settlement for as many as possible weighs in favor of the request for attorneys' fees.

C. The Lodestar Cross-Check

The court also finds that a lodestar cross-check comparing the percentage-of-recovery rate with the attorneys' hourly billing also supports the request for attorneys' fees. "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." *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 306–07 (3d Cir. 2005) (footnoted omitted) (citing *In re Prudential*, 148 F.3d at 342). The court should, however, take into account the hourly rates of the various attorneys working on the case and not a blended rate that might artificially reduce the multiplier. *Id.* at 306. "Furthermore, the resulting multiplier need not fall within any pre-defined range, provided that the [d]istrict [c]ourt's analysis justifies the award." *Id.* at 307 (footnote omitted). While the court should not solely rely on a pre-defined range, the Third Circuit has noted that a factor ranging between 1 and 4 is generally common. *In re Prudential*, 148 F.3d at 341.

Attached to the request for attorneys' fees is a declaration from Attorney Head and Attorney Carson setting forth a summary of the hours and billing rates for all of the attorneys, senior to associate, and support staff that worked on this case. (Doc. 121-2; Doc. 121-3). Attorney Head provides that the lodestar for Head Law Firm, LLC totals $386,085.00 as of the May 8, 2017. (Doc. 121-2 at 6). Attorney Carson provides that Berger & Montague, P.C.'s lodestar totals $767,712.50 as of May 5, 2017. (Doc. 121-3 at 4). Thus, the total lodestar is $1,155,797.50. These numbers are based on an hourly rate of $550.00 for Attorney Head as lead counsel and $795.00 for Attorney Carson as co-lead counsel. When compared to the requested fee of $1,511,536.99, the cross-check results in a 1.3 multiplier. These numbers, including the multiplier, do not take into account any of the work that has occurred since the filing of the motion for attorneys' fees, including the final fairness hearing.

***20** The court takes no position on whether or not Attorney Carson's and Attorney Head's hourly rates are reasonable and finds instead that the multiplier is low enough to take into account a range of hourly rates below those billed that would still warrant the court's approval even if this reduction would result in a higher multiplier. As the court has repeated in several instances, the court views this to be an excellent settlement and would not hesitate to approve a multiplier above 1.3. The fact that the multiplier is so near the requested fees speaks directly to the skill and efficiency of the attorneys involved in this case, on both sides. Accordingly, the court will approve the requested 31.6667% percentage-of-recovery rate for attorneys' fees.

D. Costs

The named plaintiffs have also requested a total of $48,950.62 to reimburse class counsel's out-of-pocket costs. This is less than the $65,000.00 maximum agreed to by the parties in their amended settlement agreement. The court will approve these costs in full.

The FLSA explicitly allows for the reimbursement of any costs expended litigating the case. 29 U.S.C. § 216(b). "Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001). Fees for travel, legal research, telephone and fax charges, photocopying, mail and postage, and fees for filing have all been held to acceptable and reasonably incurred during litigation. *Id.* at 108; *see also Keller,* 2014 WL 5591033, at *16 (approving filing fees and mediation fees as reimbursable expenses).

Here, the named plaintiffs request reimbursement for class counsel for a variety of expenses such as travel, photocopying, filing fees, research, postage, and mediation

fees. (Doc. 121-2 at 9–19; Doc. 121-3 at 11). The named plaintiffs provided documentation of these fees in the form of declarations from Attorney Head and Attorney Carson. (*Id.*; *id.*). Attorney Head and Attorney Carson list the category and amount of the expenses. (*Id.*; *id.*). There is nothing on the lists provided that the court views as unreasonable or excessive given the length and complexity of this case. Accordingly, the court will approve the request for $48,950.62 to reimburse class counsel's out-of-pocket costs.[7]

7 In a footnote with their brief in support, the named plaintiffs advised the court that class counsel anticipated additional expenses would be incurred during the administration of the settlement and in preparation for the final fairness hearing. (Doc. 121-1 at 28 n. 11). They requested an opportunity to request additional reimbursement at the time of final distribution. (*Id.*). The court has not received any additional documentation with respect to reimbursable costs to date, but the named plaintiffs may request additional reimbursement for class counsel at the close of settlement.

VI. CONCLUSION

***21** In accordance with the above, the court will grant the named plaintiffs' motion for final approval of the parties amended settlement agreement, (Doc. 122), and grant the named plaintiffs' motion for attorneys' fees and costs, (Doc. 121). The court will finally certify the FLSA Collective Group for settlement and finally certify the Rule 23 State Settlement Class. The parties amended settlement agreement, (Doc. 118-3), will be finally approved. The court's approval will also include final approval of the named plaintiffs as representatives, $10,000.00 in service awards to the named plaintiffs, Dahl as settlement administrator, Dahl's costs totaling $15,882.00, and Berger & Montague, P.C. and Head Law Firm, LLC as class counsel. Attorneys' fees in the amount of 31.6667% of the gross claimed fund will be approved for a total of $1,511,536.99 in attorneys' fees. The court will also award reimbursement for out-of-pocket costs expended by class counsel in the amount of $48,950.62. An appropriate order shall follow.

All Citations

Not Reported in Fed. Supp., 2017 WL 4354809

End of Document

2017 WL 2815073
Not for Publication
United States District Court, D. New Jersey.

Robin Joachim DARTELL, et al., individually and on behalf all others similarly situated, Plaintiffs,

v.

TIBET PHARMACEUTICALS, INC., et al., Defendants.

Civil Action No. 14–3620
|
Signed 06/29/2017

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OPINION

John Michael Vazquez, U.S.D.J.

***1** This matter comes before the Court by way of the motions for final approval of the proposed settlement and for attorney fees filed by Lead Plaintiffs Obasi Investment Limited, Jude Shao, Robin Dartell, Lixin Wu, Jason Helton, and Sean Carithers. D.E. 263, 265. The motions are unopposed, however, two potential class members submitted letters regarding the proposed settlement and award of attorneys' fees. D.E. 258, 259, 270. The Court reviewed the submissions in support of the motions and held a settlement hearing on June 6, 2017. For the reasons stated below, both motions are **GRANTED**.

I. FACTUAL BACKGROUND

This class action involves alleged misrepresentations in Defendant Tibet Pharmaceuticals, Inc.'s ("Tibet") Initial Public Offering ("IPO") registration documents. Specifically, Lead Plaintiffs allege that Tibet's IPO registration statement and prospectus "misrepresented Tibet as a financially sound and profitable company." *See generally* First Amended Complaint ("FAC"), D.E. 50. Plaintiffs brought suit under the Securities Act of 1933 against a number of individuals and entities who were involved in the IPO, including Tibet;[1] the Tibet Directors who signed the IPO registration statement;[2] the underwriter, Anderson & Strudwick ("A&S");[3] and the auditor for the IPO, Acquavella, Chiarelli, Shuster, Berkower & Co., LLP ("ACSB"). *See generally* FAC ¶¶ 23–40. This proposed settlement only involves ACSB.[4]

1 On July 28, 2016, the Clerk of the Court entered default against Tibet for failure to plead or otherwise defend pursuant to Federal Rule of Civil Procedure 55(a).

2 The Registration Statement was signed by Defendants Hong Yu, Taylor Z. Guo, Sabrina Ren, Wenbo Chen, Youhang Peng, and Solomon Chen. On March 31, 2017, the Court granted Peng's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(5) because Lead Plaintiffs did not serve Peng until March 22, 2016, almost three years after filing the FAC. D.E. 260, 261. The Court is not aware of any information indicating that Lead Plaintiffs ever served the other Director Defendants.

3 Defendant Sterne Agee Group, Inc. ("Sterne Agee") acquired A&S and assumed all of its assets and liabilities in December 2011. FAC ¶ 33–34. Sterne Agee was dismissed as a Defendant through a court-approved settlement on July 13, 2016 (D.E. 217).

4 Lead Plaintiffs continue to litigate their claims against L. McCarthy Downs and Hayden Zou who, among other things, were named as "Board Observers" in the prospectus. The Court denied motions for summary judgment as to the Section 11 claims asserted against Downs and Zou and a motion for reconsideration is pending. D.E. 269, 271.

Lead Plaintiffs allege that Tibet's prospectus stated that Tibet was financially sound when in reality the registration documents overstated Tibet's assets and misrepresented the Company's indebtedness. FAC ¶¶ 48–51. Specifically, Lead Plaintiffs allege that the registration statement failed to mention that on September 10, 2010, the People's

Intermediate Court in China's Yunnan Province entered default against Yunnan Shangri–La Tibetan Pharmaceutical Group ("YSTP"), an entity that Tibet effectively controlled. YTSP failed to appear and did not contest a suit filed by the Agricultural Bank of China alleging that YSTP defaulted on three loans totaling $4.54 million. The judgment ordered YSTP to repay its debt to the Bank within sixty days. *Id.* ¶ 55. On January 10, 2011, about two weeks before the IPO became effective, the Chinese court froze all of YSTP's assets after it failed to make the ordered payments. *Id.* ¶ 56.

***2** In the registration statement, ACSB certified that it performed an audit and found that the financial statements in the registration statement accurately represented Tibet's financial position. *Id.* ¶ 94. Lead Plaintiffs allege that had ACSB conducted its audit in conformance with audit standards, it would have discovered the defaulted loans and Chinese lawsuit. *Id.* ¶¶ 100–03. Lead Plaintiffs further allege that a proper audit would have prevented the losses suffered by class members. *Id.* ¶ 108.

II. PROCEDURAL HISTORY

Plaintiffs initially filed suit on August 31, 2012, in the United States District Court for the District of the Virgin Islands, and on May 1, 2013, filed the Amended Complaint (the "FAC"). D.E. 1, 50. After considering multiple motions to dismiss for improper venue, the case was transferred to the District of New Jersey on May 1, 2014. D.E. 72. Zou, ACSB, Sterne Agee, and Downs then filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). D.E. 96, 101, 102, 104. Judge Hochberg denied the four motions on February 20, 2015. D.E. 132.

The parties then began discovery. As to discovery for ACSB, Lead Plaintiffs engaged two accounting experts, reviewed documents produced by ACSB, and attempted to depose David Svoboda, a partner at ACSB. Svoboda did not show up for the deposition. Declaration of Laurence M. Rosen in Support of Plaintiffs' Motion for Final Approval of the Class Action Settlement and Motion for Attorneys' Fees ("Rosen Decl.") ¶ 40. In addition, Plaintiffs filed a motion for class certification, which was opposed by ACSB, Downs, and Zou. On February 22, 2016, Judge Arleo granted Lead Plaintiffs' motion, certifying a class of persons who purchased Tibet stock pursuant and/or traceable to Tibet's registration statement and prospectus. D.E. 183, 184. Judge Arleo also appointed the Rosen Firm as Lead Counsel and Lead Plaintiffs to serve as representatives of the class. D.E. 184.

ACSB and Lead Plaintiffs engaged in arms' length settlement negotiations, which resulted in an agreement in principal to settle the claims against ACSB. Rosen Decl. ¶ 47. Lead Plaintiffs filed their motion for preliminary approval of the settlement agreement on May 31, 2016. D.E. 206. The settlement states that in exchange for ACSB's payment of $2.075 million, Lead Plaintiffs and the settlement class will release their claims against ACSB. *See* Settlement Stipulation, D.E. 205. ACSB's settlement payment utilizes almost half the funds remaining in its insurance policy.[5] *See* Rosen Decl. ¶¶ 6, 80.

5 The other half of ACSB's policy is being used for settlement in *P. Van Hove BVBA, et al v. Universal Travel Group, Inc., et al*, Civ. No. 11–2164. The Court held a settlement hearing in *Universal Travel Group* immediately before the hearing in this case. The Court required Lead Counsel to adequately explain the reasons by which the parties determined the apportionment of ACSB's total amount between the two matters.

After it preliminarily approved the settlement and class notice in December 2016, the Court scheduled a settlement hearing for June 6, 2017. D.E. 253. Lead Plaintiffs filed the pending motions in advance of the hearing. In their motion for final approval of the class action settlement, Lead Plaintiffs ask the Court to find that notice was provided in accordance with the Court's preliminary approval Order, and approve the settlement and plan of allocation. *See generally* Settlement Approval Br., D.E. 264. Concerning the motion for attorneys' fees, Lead Counsel seeks an award of attorneys' fees of one-third of the settlement fund, or $691,667; reimbursement of $62,140.25 in out-of-pocket expenses; and a $5,000 award for each Lead Plaintiff; all of which would be paid from the settlement fund. *See generally* Attorneys' Fees Br., D.E. 266.

***3** The Court and Lead Counsel received letters from two individuals regarding the proposed settlement and award of attorneys' fees. The Court does not construe either as an objection to the settlement or a request to be excluded as a class member.

III. ADEQUACY OF NOTICE

Through the Order preliminarily approving the settlement, the Court ruled that the class notice materials and the proposed method of dissemination satisfied Due Process requirements, Rule 23, and the PSLRA. D.E. 252. The Court reaffirms its early conclusions concerning the adequacy of notice.

Rule 23(e) provides that when a class action is settled, "[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). "The Rule 23(e) notice is designed to summarize the litigation and the settlement and 'to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation.' " *In re Prudential Ins. Co. Am. Sales Practices Litig. Agent Actions*, 148 F.3d 283, 327 (3d Cir. 1998) (quoting 2 *Newberg on Class Actions* § 8.32 at 8–109). In addition, the PSLRA imposes notice requirements upon the settlement of a securities class action. *See* 15 U.S.C. § 77z–l. The PSLRA requires that class members receive notice regarding a settlement that includes the following:

> 1) a statement of recovery in the aggregate and on an average per share basis;
>
> 2) a statement of the potential outcome of the case, which includes an explanation on the average amount of damages per share;
>
> 3) a statement of attorneys' fees or costs sought;
>
> 4) the name and contact information for at least one representative of class counsel who can be available for questions; and
>
> 5) the reasons for settlement.

15 U.S.C. § 77z–1(a)(7). The Court-approved class notice here informed class members of (a) the nature, history and progress of the litigation; (b) the rights of class members, including how to lodge objections and opt out of the class; (c) the proposed settlement; (d) how to file a proof of claim; (e) the fees and expenses sought by Lead Counsel; and (f) where to find and review relevant court documents for this matter. *See* Declaration of Josephine Bravata ("Bravata Decl.") Ex. A. As a result, the class notice here satisfies the requirements of Rule 23(e) and the PSLRA. Moreover, the notice plan was implemented as set forth in the Preliminary Approval Order. *See* Bravata Decl. ¶¶ 4–7. Accordingly, the notice plan was sufficient and the Court approves the plan of allocation as set forth in the class notice.

IV. FINAL SETTLEMENT APPROVAL

A class action cannot be settled under Rule 23(e) without a determination that the proposed settlement is "fair, reasonable and adequate." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534 (3d Cir. 2004). In determining the reasonableness, fairness, and adequacy of a proposed settlement for the purposes of Rule 23(e), courts consider the following factors, known as the *Girsch* 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;
>
> ***4** 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; and
>
> 9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation.

In re Nat'l Football League Players Concussion Injury Litig., 821 F.3d 410, 437 (3d Cir. 2016) (citing *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)). The settling parties bear the burden of establishing that the *Girsh* factors weigh in favor of approval. But the ultimate decision of whether to approve a proposed settlement "is left to the sound discretion of the district court." *Girsh*, 521 F.2d at 157.

The Third Circuit also requires courts to consider whether the settlement satisfies several additional factors, as set forth in *In re Prudential Insurance Company America Sales Practice Litigation Agent Actions*. *See, e.g.*, *Yedlowski v. Roka Bioscience, Inc.*, No. 14–8020, 2016 WL 6661336, at *12 (D.N.J. Nov. 10, 2016) (quoting *In re Pet Food Prods. Liab. Litig*, 629 F.3d 333, 350 (3d Cir. 2010)). The *Prudential* factors include:

> [1] [T]he maturity of the underlying substantive issues ....; [2] the existence and probable outcome of claims by other classes and subclasses; [3] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved – or likely to be achieved –for other claimants; [4] whether class or subclass members are accorded the right to opt out of the settlement; [5] whether any provisions for attorneys' fees are reasonable; and [6] whether the procedure for

processing individual claims under the settlement is fair and reasonable.

Id. In this instance, the proposed settlement satisfies the *Girsh* factors, as well as the relevant *Prudential* factors.

1. Complexity, Expense, and Likely Duration of Litigation

The first factor considers "the probable costs, in both time and money, of continued litigation." *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) (quoting *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 801 (3d Cir. 1974)). "Settlement is favored under this factor if litigation is expected to be complex, expensive and time consuming." *Yedlowski*, 2016 WL 6661336, at *12 (quoting *In re Royal Dutch/Shell Transp. Sec. Litig.*, No. 04–374, 2008 WL 9447623, at *17 (D.N.J. Dec. 9, 2008)).

"Federal securities class actions by definition involve complicated issues of fact and law." *In re Royal Dutch*, 2008 WL 9447623, at *17. This observation applies here. Lead Plaintiffs face significant burdens to survive motions for summary judgment, and ultimately, to succeed at trial. To succeed, Lead Plaintiffs would need to retain experts to testify as to multiple issues including auditing standards, class action damages, and loss causation. Settlement Approval Br. at 11. Such experts are expensive and could quickly drive up the cost of continued litigation. Therefore, this factor favors settlement.

2. Reaction to Settlement

***5** The second *Girsh* factor "gauge[s] whether members of the class support the settlement." *In re Prudential*, 148 F.3d at 318. As such, courts look at the "number and vociferousness of the objectors .... [and] generally assume[ ] that silence constitutes tacit consent to the agreement." *In re Gen. Motors*, 55 F.3d at 812 (quoting *Bell Alt. Corp.*, 2 F.3d at 1313 n.15).

Here, Strategic Claims Services ("SCS"), the claims administrator, sent notice and claim forms to 4,941 potential class members or their nominees. Bravata Decl. ¶ 6. To date, not a single class member objected to any portion of the settlement or opted out of the settlement. Two potential class members did submit letters.

First, Mr. Louis Yelich sent one letter addressed to the Court and another letter addressed to Lead Counsel, Lawrence Rosen of the Rosen Law Firm. D.E. 259, 270. In his letter to Mr. Rosen, Mr. Yelich largely sought clarification regarding the number of outstanding shares of Tibet stock and the inability of the Defendants to participate in the settlement. D.E. 259. The Rosen Law Firm responded to Mr. Yelich's questions. Rosen Decl., Ex. 3. In his letter to the Court, Mr. Yelich asked several questions, including why he was not a Lead Plaintiff in this matter. D.E. 270. Based on the information provided by Mr. Yelich, it appears that he purchased his shares (or at least a large portion of his shares) outside of the class period. D.E. 270. Consequently, Mr. Yelich does not appear to be a member of the class.

Second, Mr. Fred W. Riesen's letter questions why Lead Counsel accepted such a small settlement. Mr. Riesen, however, specifically states that he is not objecting to the settlement. D.E. 258.

Accordingly, the lack of objectors weighs in favor of approving the settlement.[6]

6 The Court notes that some courts have suggested that the lack of objectors essentially *requires* a finding that the settlement is fair and reasonable. *See, e.g., In re Linerboard Antitrust Litig*, 296 F. Supp. 2d 568, 578 (E.D. Pa. 2003) (" '[T]his unanimous approval of the proposed settlement[ ] by the class members is entitled to nearly dispositive weight in this court's evaluation of the proposed settlement.' " (quoting *Fisher Bros v. Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 451 (E.D. Pa. 1985))). The Court does not agree with this conclusion but recognizes that the lack of objectors provides a strong indication that the settlement is fair and reasonable.

3. Stage of Proceedings

The purpose of this factor is to determine "the degree of case development that class counsel have accomplished prior to settlement." *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001). "[C]ourts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Id.* (citing *In re Gen. Motors*, 55 F.3d at 813).

In this instance, ACSB and Lead Plaintiffs have litigated this case for nearly five years. The parties have fully briefed motions to dismiss, a motion for class certification, and have engaged in discovery. Moreover, Lead Plaintiffs engaged two experts regarding accounting and auditing practices in China and regarding GAAP. Rosen Decl. ¶ 40. Accordingly, Lead Plaintiffs are well aware of the relative strengths and weaknesses of their case as to ACSB. *See, e.g., In re Genta*

Sec. Litig., No. 04–2123, 2008 WL 2229843, at *6 (D.N.J. May 28, 2008).

***6** Importantly, the settlement proceeds here come from a wasting insurance policy. *See* Settlement Br. at 19. This means that the policy limit was reduced by payment of defense costs while the matter was being litigated. As litigation continues, less money is available to the class. If the parties did not settle and instead continued with discovery and motions for summary judgment, the insurance funds available for any potential settlement would be quickly diminished and perhaps exhausted. Accordingly, this factor weighs in favor of the fairness of the settlement.

4. The Risks of Establishing Liability and Damages

The purpose of these factors is to "balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement." *In re Prudential*, 148 F.3d at 319. "By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *In re Gen. Motors*, 55 F.3d at 814. Where there is a prospect of long, contentious, and uncertain litigation along with a lack of evidence required to support claims in such protracted litigation, these factors weigh in favor of approval. *See In re Cendant Corp. Litig.*, 264 F.3d at 238.

a. Liability

Lead Plaintiffs face multiple obstacles in moving this case forward if it does not settle. Further discovery will be difficult and time consuming because evidence is located in China. Settlement Approval Br. at 16. Gathering evidence in China for litigation that is occurring in the United States is a difficult and expensive process. *See, e.g.*, Elizabeth Fahey & Zhirong Tao, The Pretrial Discovery Process in Civil Cases: A Comparison of Evidence Discovery Between China & the United States, 37 B.C. Int'l & Comp. L. Rev. 281, 283–86 (2014). And as discussed, this case involves difficult and complicated issue of law and fact that may not be successful in a motion for summary judgment or at trial. Settlement Br. at 15–16. The Court notes, however, that Lead Plaintiffs asserted claims against ACSB under Section 11 of the Securities Act. Thus, Lead Plaintiffs only need to establish that the registration statement contained material misstatements or omissions, and that ACSB is within the class of individuals and entities that can be liable under Section 11. *In re Cendant Corp. Litig.*, 60 F. Supp. 2d 354, 364 (D.N.J. 1999). These requirements are less onerous to prove than scienter-based securities claims, such as a 10b–5[7] claim, where a plaintiff must prove "knowledge by the defendant, an intent to defraud, misrepresentation or failure to disclose, materiality of the information and, injurious reliance by the plaintiff." *Id.* at 368.

7 The SEC's Rule 10b–5 is found at 17 C.F.R. § 240.10b–5, and was promulgated pursuant to Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*

b. Damages

Assuming that Lead Plaintiffs could prove liability, proving damages is also difficult. Yet, unlike 10b–5 claims, plaintiffs asserting a Section 11 claim do not have the burden to prove causation. Defendants, however, may assert an affirmative defense "that a lower share value did not result from any nondisclosure or false statement." *In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 277 (3d Cir. 2004). As it did in its motion to dismiss, ACSB would likely assert this affirmative defense. ACSB would likely argue that the class members' losses are not attributable to the alleged misrepresentations in Tibet's registration statement and prospectus. This issue typically requires expert testimony. "Thus in the end, loss causation would be reduced to a 'battle of experts.' The reaction of a jury to such competing expert testimony is impossible to predict." Settlement Approval Br. at 17. Moreover, this expert testimony would likely be expensive and, therefore, deplete the money available from the insurance policies for defense experts. As a result, this factor also weighs in favor of concluding that the settlement is fair and reasonable.

5. Risk of Retaining Class Certification throughout Trial

***7** The risk of obtaining and maintaining class certification through trial also supports approval of the settlement. "There will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." *In re Prudential*, 148 F.3d at 321. Here, in their motions for summary judgment Downs and Zou sought to revisit the class certification decision, arguing that certain Lead Plaintiffs lacked standing to maintain their claims. The Court granted their motions in part. Summary Judgment Opinion at 12. Although this does not impact the settlement here, it illustrates the fact that there is a risk of

retaining class certification. Consequently, this factor also weighs in favor of approving the settlement.

6. Defendant's Ability to Withstand Greater Judgment

This factor "is concerned with whether defendants could withstand a judgment for an amount *significantly* greater than the [s]ettlement." *In re Cendant Corp. Litig.*, 264 F.3d at 240 (emphasis added). ACSB was dissolved during the pendency of this litigation and its sole remaining asset is the insurance policy. Almost half of the remaining $4.4 million in the policy will be contributed to the common fund here.[8] Settlement Approval Br. at 19. Thus, this factor weighs in favor of approving the settlement.

8 As discussed in note 5, *supra*, the other half ACSB's policy is being used to settle another class action, *P. Van Hove BVBA, et al v. Universal Travel Group, Inc., et al*, Civ. No. 11–2164.

7. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and the Attendant Risk of Litigation

These factors aim to "evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case." *In re Warfarin*, 391 F.3d at 538. "In conducting this evaluation, it is recognized that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and [courts should] guard against demanding to[o] large a settlement based on the court's view of the merits of the litigation." *See In re Johnson & Johnson Derivative Litig.*, 900 F. Supp. 2d 467, 484–85 (D.N.J. 2012) (internal quotations omitted). These factors consider "whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial." *Pro v. Hertz Equip. Rental Corp.*, No. 06–3830, 2013 WL 3167736, at *5 (D.N.J. June 20, 2013) (quoting *In re Prudential*, 148 F.3d at 322). As discussed, this settlement provides a good recovery to the class in light of the risks of litigation. Moreover, because the settlement fund consists of money from a wasting insurance policy, any further litigation will decrease the amount of money available to the class. Consequently, these factors also weigh in favor of settlement.

8. The Relevant Prudential Factors

In this instance, the relevant *Prudential* factors are whether class members may opt out of the settlement and whether the procedure for processing individual claims is fair and reasonable.[9] *In re Prudential*, 148 F.3d at 323–24.

9 The reasonableness of plaintiffs' request for attorneys' fees is another *Prudential* factor. Because Lead Plaintiffs here filed a motion for attorneys' fees along with their motion for final settlement approval this factor will be addressed at length below. As will be discussed, the Court finds that the requested fees and costs are reasonable. Thus this factor weighs in favor of settlement.

Class members may opt out of the class here and the claims procedure is fair and reasonable. As was made clear in the class notice, class members may elect to opt out of the class and were informed of the procedures to do so. *See* Bravata Decl. Ex. A, at 8. Potential class members are required to submit claims to SCS, who assesses whether the potential member is a valid member of the class. The claims process is standardized and Lead Counsel represented at the Settlement Hearing that SCS provides claimants with the ability to resolve problems with their claims if SCS determines that the initial submission is lacking. In addition, SCS will continue to accept late claims if practicable, up until the time that the settlement funds are actually distributed. Thus, the claims procedure appears to be fair and reasonable.

***8** Having considered each of the *Girsch* and *Prudential* factors, the Court approves the settlement as fair and reasonable.

V. MOTION FOR ATTORNEYS' FEES AND EXPENSES

Lead Plaintiffs also make a claim for attorneys' fees of one-third of the settlement amount, or $691,667; reimbursement of litigation expenses; and a nominal award for the six Lead Plaintiffs. The fees and expenses would be paid from the settlement fund. *See generally* Attorneys' Fees Br. In common fund cases such as this one, attorneys' fees are typically awarded through the percentage-of-recovery method. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005). The percentage-of-recovery method provides for attorneys' fees by awarding a reasonable percentage of the common fund. *Id.* The percentage-of-recovery method is preferred in common fund cases because it "rewards counsel for success and penalizes it for failure." *Id.* (quoting *In re Prudential*, 148 F.3d at 333).

The Third Circuit suggests that when district courts use the percentage-of-recovery method, they also employ the lodestar method to cross-check the fee and ensure that it is reasonable. *Id.* at 305. "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." *Id.* The cross-check occurs by dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier. If "the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award." *Id.* at 306.

A. The Percentage-of–Recovery Method

As discussed, Lead Counsel seeks a fee award of one-third of the settlement fund. When analyzing a fee award under the percentage-of-recovery method, courts consider several 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.

Id. at 301 (citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000)). The list is not exhaustive. *Yedlowski*, 2016 WL 6661336, at *19. As such, in *In re Prudential*, the Third Circuit enumerated three additional factors that may be relevant. *Id.* The additional factors are:

> 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.

Id. (quoting *In re Prudential*, 148 F.3d at 338–40). A court, however, need not apply these factors "in a formulaic way because each case is different." *Id.* (quoting *In re Rite Aid*, 396 F.3d at 301).

***9** Here, because the *Gunter* factors substantially overlap with the *Girsch* factors, the Court will refer to its earlier findings when reviewing the fee application. An analysis of these factors supports the requested one-third fee award.

1. The Size of the Fund and the Benefit to Class Members

For this factor, courts "consider the fee request in comparison to the size of the fund created and the number of class members to be benefitted." *Id.* at *20 (quoting *Rowe v. E.I. DuPont de Nemours & Co.*, Nos. 06–1810, 06–3080, 2011 WL 3837106, at *18 (D.N.J. Aug. 26, 2011)). A smaller fund does not necessarily equate to a smaller percentage award. In fact, "because of fixed costs and economies of scale, attorneys' fees and costs do not increase dollar-for-dollar with the size of the case. Thus, it takes a greater percentage of the settlement to support litigation in a smaller case." *Id.*

This is a relatively small securities class action. In addition, the average percentage of estimated damages that were recovered through securities class action settlements in 2016 was nine percent. *See* Securities Class Action Settlements 2016 Review & Analysis, at 1, http://securities.stanford.edu/research-reports/1996–2016/Settlements–Through–12–2016–Review.pdf (last visited June 26, 2017); *see also In re Par Pharm. Sec. Litig.*, No. 06–3226, 2013 WL 3930091, at *2 (D.N.J. July 29, 2013) (approving settlement with total sum of $8.1 million, which amounted to approximately 7% of class-wide damages). Here, total maximum damages are optimistically valued at approximately $16.5 million. The settlement fund is $2.075 million. Attorneys' Fees Br. at 7. In addition, at the Settlement Hearing, Lead Counsel represented that SCS has only received 847 valid claims. Consequently, the relatively low amount of actual claims ensures that each class member will receive a proportionally larger payment.[10] Thus, this factor supports the fee request.

10 Lead Plaintiffs also recovered $1.45 million through the A&S settlement, which will also be distributed to class

members. Thus, class members may recover up to 37% of their recognized losses. Attorneys' Fees Br. at 7.

2. Objections to the Fee Request

In this instance, class notice informed potential class members that Lead Counsel was seeking an award of up to one-third of the settlement fund. The notice also advised class members that they could object to the settlement and explained the procedure to do so. Bravata Decl., Ex. A. To date, no class member has objected to the requested fees. *Id.* ¶12. Accordingly, the reaction from the class supports the fee request.

3. The skill and efficiency of the attorneys involved

"Lead Counsel's skill and efficiency 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 the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.' " *Yedlowski*, 2016 WL 6661336, at *20 (quoting *Hall v. AT&T Mobility LLC*, No. 07–5325, 2010 WL 4053547, at *19 (D.N.J. Oct. 13, 2010)). In addition, "[t]he quality and vigor of opposing counsel" is relevant when evaluating the quality of services rendered by Lead Counsel. *Id.* at *21.

***10** Here, the Rosen Firm is experienced in the complex field of securities fraud class action litigation. *See* Rosen Fee Decl. Ex. 2–A. Courts have recognized that the Rosen Firm "has extensive experience navigating the particular complexities of litigation with Chinese companies." *Khunt v. Alibaba Grp. Holding Ltd.*, 102 F. Supp. 3d 523, 540 (S.D.N.Y. 2015). The performance and quality of defense counsel is also high. Thus, the competence of opposing counsel favors a finding that Lead Counsel prosecuted this case with skill and efficiency. Therefore, this factor supports the fee request.

4. The complexity and duration of the litigation

The fourth factor captures "the probable costs, in both time and money of continued litigation." *In re Gen. Motors*, 55 F.3d at 812 (quoting *Bryan*, 494 F.2d at 801). As discussed, the settlement fund is financed through a wasting insurance policy. Any continued litigation would decrease the amount of money available for settlement and attorneys' fees. Moreover, due to the complexity and nature of securities litigation, any further litigation would likely be time consuming as well as expensive due to the need for experts. In light of the potential length of continued litigation, the likely additional costs of this securities class action, and the fact that ACSB has a wasting insurance policies, a one-third fee is reasonable.

5. The risk of nonpayment

"Courts across the country have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees." *Yedlowski*, 2016 WL 6661336, at *21. This risk of no recovery "is especially high in securities class actions, as they are 'notably difficult and notoriously uncertain.' " *Id.* (quoting *Trief v. Dun & Bradstreet Corp.*, 840 F. Supp. 277, 281 (S.D.N.Y. 1993)). In this instance, Lead Counsel undertook this action on a contingency basis with no guarantee that it would be compensated for its time or expenses. Attorneys' Fee Br. at 11. In light of the difficulty of its undertaking, Lead Counsel should be reimbursed for its time and expenses.

6. The amount of time devoted to the case by plaintiffs' counsel

The sixth factor considers the time that counsel devoted to this litigation. *Gunter*, 223 F.3d at 199. While this factor will be addressed in the Court's discussion of the lodestar cross-check, the hours that Lead Counsel devoted to this case appear reasonable.

7. The awards in similar cases

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. *See In re Gen. Motors*, 55 F.3d at 822. "For smaller securities fraud class actions, 'courts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses.' " *Yedlowski*, 2016 WL 6661336, at *22 (quoting *In re Ravisent Techs., Inc. Sec. Litig.*, No. 00–1014, 2005 WL 906361, at *11 (E.D. Pa. Apr. 18, 2005)). Thus, the requested fee in this matter is within the normal range.

8. The Recovery is Solely Attributable to the Efforts of Class Counsel

When Lead Counsel initiated this action no government action against ACSB was announced. Although, a Public Company Accounting Oversight Board ("PCAOB") action against ACSB and Svoboda was announced in November 2013, it failed to make any reference to Tibet.[11] Therefore, the

PCAOB action cannot be attributed to Lead Counsel's success here. "The fact that Lead Counsel received no help from any government investigation is a 'significant factor' supporting the fee award." *Yedlowski*, 2016 WL 6661336, at *22.

11 While ACSB and Svoboda did not admit liability, the PCAOB imposed a $10,000 civil penalty on ACSB and barred Svoboda from associating with a registered firm for at least three years. *See* PCOAB Press Release, https://pcaobus.org/News/Releases/Pages/11212013_Enforcement.aspx (Nov. 22, 2013).

9. The Percentage Fee is Consistent with Contingent Fee Arrangements in Privately Negotiated Non–Class Litigation

***11** A one-third fee is consistent with fee awards in non-class cases. *See id.* at *23. In individual cases, "the customary contingent fee would likely range between 30 and 40 percent of the recovery." *Id.* Consequently, this factor also supports Lead Counsel's fee request.

B. LODESTAR CROSS–CHECK

The lodestar cross-check "ensures that the proposed fee award does not result in counsel being paid a rate vastly in excess of what any lawyer could reasonably charge per hour, thus avoiding a 'windfall' to lead counsel." *In re Cendant Corp. Litig.*, 264 F.3d at 285. Again, to perform the cross-check, a court divides the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier. *In re AT&T*, 455 F.3d at 164.

Excluding the work it performed exclusively for the A&S bankruptcy proceeding, had the Rosen Firm been paid an hourly rate, it would hypothetically receive $ 1,313,540 for 2,028.7 hours, with a blended hourly rate of $670.[12] *See* Rosen Fee Decl. ¶ 6. While the blended hourly rate here is on the higher end of the spectrum, the Court recognizes that it is based upon a reasonable hourly rate for such services given the geographical area, the nature of the services provided, and the experience of each attorney. Among other things, the Rosen Firm researched and investigated the facts and claims in this case, prepared the Complaint and the FAC, drafted opposition briefs for multiple motions, reviewed documents produced during discovery, and took and defended multiple depositions. *Id.* ¶ 5. In this instance, the lodestar cross-check results in a multiplier of .53. Attorneys' Fees Br. at 20. "[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *Yedlowski*, 2016 WL 6661336, at *19. A negative multiplier, as is the case here, means that Lead Counsel will only be compensated for approximately 50% of its work. However, the multiplier does not appear to be quite as low as indicated because Lead Counsel included hours it spent on matters that do not pertain to ACSB, such as opposing Peng's motion to dismiss for lack of service, and Downs and Zou's motions for summary judgment. However, even excluding these hours, the cross-check still results in a low multiplier. As a result, the Court finds that the lodestar cross-check demonstrates that the requested fee award here is reasonable.

12 Lead Counsel anticipates receiving an award of attorneys' fees for the A&S bankruptcy proceeding so the Court will not include these hours in its lodestar cross-check. Attorneys' Fees Br. at 19.

C. LEAD COUNSEL'S REQUEST FOR REIMBURSEMENT OF FEES

"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." *In re Cendant Corp.*, 232 F. Supp. 2d 327, 343 (D.N.J. 2002). Class notice here stated that Lead Counsel may seek reimbursement for expenses not to exceed $150,000. Bravata Decl. Ex. A at 2. Nobody opposed the proposed request for expenses. *Id.* ¶ 12.

Through their motion, Lead Counsel now seeks to be reimbursed for $62,140.25 of litigation expenses that it incurred. Lead Counsel's request is supported with adequate documentation; approximately $52,000 of the expenses are associated with expert fees; $3,373 is associated with service of process fees, much of which is in connection to Lead Plaintiffs' letters rogatory to determine the whereabouts of the IPO proceeds, and the remaining expenses were incurred for online legal research and other miscellaneous fees. Rosen Fee Decl. ¶ 13. These fees are all properly charged to the class. *Yedlowski*, 2016 WL 6661336, at *23. The Court finds that these expenses are reasonable and will award the requested amount of $62,140.25 to Lead Counsel.

D. LEAD PLAINTIFF AWARD

***12** Finally, Lead Counsel requests an award of $5,000 for each Lead Plaintiff, or a total of $30,000, to compensate them for the time devoted to this case over the last six years. Attorneys' Fees Br. at 19. The PSLRA does not

specifically provide for incentive awards to lead plaintiffs but does acknowledge that "[n]othing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." 15 U.S.C. § 78u–4(a)(4). In addition, "the Third Circuit favors encouraging class representatives, by appropriate means, to create common funds and to enforce laws—even approving 'incentive awards' to class representatives." *In re Schering–Plough Corp.*, 2013 WL 5505744, at *56.

Lead Counsel argues that the Lead Plaintiffs should each receive a $5,000 award because collectively, they spent more than 6,000 hours reviewing pleadings, discussing the case with Lead Counsel, independently following developments regarding Tibet, and preparing for and traveling to their depositions. Rosen Decl. Exs. 4–9. In addition, Class Notice informed potential class members that Lead Plaintiffs were seeking this award and, to date, no objections have been received. Bravata Decl. ¶ 12, Ex. A. Lead Counsel contends that this request is reasonable and that others courts have approved similar awards for Lead Plaintiffs' efforts. *See, e.g., Yedlowski*, 2016 WL 6661336, at *24.

Although Lead Plaintiffs engaged in the type of activities that warrant reimbursement, the Court is concerned by the disparity between the hours spent on this case amongst the individual Lead Plaintiffs. Specifically, Lead Plaintiffs' efforts range from approximately 27 to 3000 hours. Rosen Decl. Ex. 4–9. The Court takes this disparity into account in calculating the awards. As a result, Edmund Obasi is awarded $6,500, Jude Shao is awarded $4,500, Robin Dartell is awarded $4,500, Lixin Wu is awarded $3,000, Jason Helton is awarded $3,000, and Sean Carithers is awarded $1,500.

VI. CONCLUSION

In sum, Lead Plaintiffs' motion for final approval of the settlement [D.E. 263] is **GRANTED**. Subject to modifications to the Lead Plaintiffs' award, the motion for attorneys' fees [D.E. 265] is also **GRANTED**. An appropriate form of Order accompanies this Opinion.

All Citations

Not Reported in Fed. Supp., 2017 WL 2815073, Fed. Sec. L. Rep. P 99,807

End of Document

2017 WL 3601948
Only the Westlaw citation is currently available.
United States District Court, M.D. Pennsylvania.

Steven DICKERSON, et al., Plaintiffs

v.

YORK INTERNATIONAL CORPORATION, et al., Defendants

CIVIL ACTION NO. 1:15-CV-1105

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Signed 08/22/2017

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MEMORANDUM

Christopher C. Conner, Chief Judge

***1** The above-captioned action involves claims arising from the alleged failure of copper evaporator and condenser coils used by defendants York International Corporation and Johnson Controls, Inc., in residential and light-commercial air-conditioning and heat pump systems. Before the court are a motion (Doc. 94) for final approval of class action settlement and motion (Doc. 92) for attorneys' fees and expenses. For the reasons articulated on the record during a fairness hearing convened on August 16, 2017 and reaffirmed in further detail herein, the court will grant both motions.

I. Factual Background and Procedural History

Plaintiffs commenced this litigation by filing a class action complaint (Doc. 1) on June 5, 2015 against York International Corporation and Johnson Controls, Inc. (collectively "JCI"). The matter is currently proceeding on plaintiffs' first amended complaint (Doc. 31) filed September 21, 2015. Therein, plaintiffs assert claims for declaratory relief, injunctive relief, and unjust enrichment, in addition to claims for breach of express and written warranties under federal and state laws. (Id. ¶¶ 121-278). Plaintiffs' claims concern alleged defects in copper evaporator and condenser coils manufactured and sold by JCI and installed in plaintiffs' air-conditioning and heat pump systems. (See id.) Plaintiffs allege that the uncoated copper coils used by JCI are known to be vulnerable to formicary corrosion, pitting corrosion, and other defects which result in costly refrigerant leaks under normal usage. (See id.) According to plaintiffs, JCI's coils are substandard compared to similar products, *viz.*, tin-coated copper or aluminum coils. (See id. ¶ 6). Plaintiffs further contend that, although JCI's limited manufacturer's warranty covers a replacement coil itself, the warranty does not cover labor or refrigerant costs, causing homeowners to incur substantial out-of-pocket expenses. (See id. ¶¶ 106, 108, 112).

JCI denies these allegations. (See Doc. 95 at 2, 5). JCI maintains that only 1.5 percent of all coils manufactured from 2010 to present have failed for any reason, and that less than 10 percent of that number are believed to have failed due to corrosion. (Id. at 5). JCI also contends that environmental factors rather than manufacturing defects are likely responsible for the limited occasions of corrosion-induced damage. (Id.) JCI moved to dismiss the amended complaint on October 5, 2015. (Doc. 36). The motion is fully briefed and raises timeliness, justiciability, and merits challenges to the various counts of plaintiffs' amended complaint. (See Docs. 39, 48, 51).

The parties moved to stay these proceedings pending mediation on December 22, 2015. (Doc. 52). The court granted the motion, and the parties participated in several mediation sessions with retired federal magistrate judge Diane M. Welsh. Those sessions were successful and ultimately produced the settlement agreement currently before the court for approval. (Doc. 95 at 6-7).

***2** On November 14, 2016, the parties filed a motion (Doc. 78) for preliminary approval of class settlement agreement. The court granted preliminary approval and provisionally certified a settlement class under Federal Rule of Civil Procedure 23 on November 22, 2016. (Doc. 80). The settlement documents compartmentalized the relief to be offered into four distinct categories based on the nature of the harm to class members, as follows:

- Class members who experienced one copper coil failure between January 1, 2008 and the preliminary approval

date would receive a $75 service rebate certificate for service performed by an authorized JCI dealer;

- Class members who experienced two or more copper coil failures between January 1, 2008 and the preliminary approval date would receive a check as reimbursement of their out-of-pocket expenses up to $550.00 for each replacement (but no more than $1,100 for all replacements);

- Class members who experience a first copper coil failure after the preliminary approval date would receive an aluminum replacement coil plus a $75 service rebate certificate for service performed by an authorized JCI dealer; and

- Class members who experience two or more copper coil failures, with at least one occurring after the preliminary approval date, would receive an aluminum replacement coil plus a check as reimbursement of their out-of-pocket expenses up to $550.00 for each replacement (but no more than $1,100 for all replacements).

(Doc. 79-1 ¶¶ 15-18).

Counsel contacted the court on December 28, 2016 to request a telephonic status conference concerning the preliminarily-approved settlement. The parties reported recently learning that certain air-conditioning and heat pump systems could not accept replacement aluminum condenser coils. (See Doc. 83 ¶ 2). The parties initially believed the issue impacted only condenser coil class members, but eventually learned that a limited number of systems could not accept aluminum evaporator coils either. (See id. ¶ 4). We tasked the parties to develop appropriate alternative remedies and to file a renewed motion for preliminary approval. With the mediator's assistance, the parties negotiated an amended settlement.

The parties filed a motion (Doc. 89) for preliminary approval of the amended settlement agreement on March 8, 2017. The categories of relief are unchanged for class members who experience copper coil failures prior to preliminary approval. (Doc. 90-1 ¶¶ 15-16). For copper coil failures post-dating the preliminary approval date, the parties propose the following relief:

- Class members who experience a first copper coil failure after the preliminary approval date will receive:

  - If the failed coil is an evaporator coil, either an aluminum replacement coil or a tin-coated copper coil (if aluminum is not feasible) in addition to a $75 service rebate certificate for service performed by an authorized JCI dealer; or

  - If the failed coil is a condenser coil, a new copper replacement coil with an extended copper coil warranty and a $75 service rebate certificate for service performed by an authorized JCI dealer.

- Class members who experience two or more copper coil failures after the preliminary approval date will receive:

  - If the failed coil is an evaporator coil, either an aluminum replacement coil or a tin-coated copper coil (if aluminum is not feasible) in addition to a check as reimbursement for out-of-pocket expenses up to $550 for each replacement (but no more than $1,100 for all replacements); or

***3** - If the failed coil is a condenser coil, a new copper replacement coil with an extended copper coil warranty in addition to a check as reimbursement for out-of-pocket expenses up to $550 for each replacement (but no more than $1,100 for all replacements).

(Id. ¶¶ 17-18). The settlement allows reimbursement and replacement regardless of the cause of the failure. (See Doc. 95 at 8). The terms of the settlement apply only to copper coil failures that occur while the coil in question is covered by the original manufacturer's warranty. (See Doc. 90-1 ¶¶ 15-18). For those class members whose systems cannot accept a replacement aluminum or tin-coated copper coil, JCI will provide a replacement uncoated copper coil with an extended eight-year parts and labor warranty, in addition to the rebate or reimbursement described above. (See id. ¶¶ 14(O), 17-18). The deadline for filing claims is 120 days after the date of final approval or 120 days after the class member experiences a coil failure, whichever is later. (See id. ¶ 14(F)).

By order dated March 15, 2017, we provisionally certified the settlement class, preliminarily approved the amended settlement agreement, and scheduled a final approval hearing for August 16, 2017. (Doc. 91). The settlement administrator thereafter provided notice to class members in accordance with the court-approved notice plan. (See Doc. 97 ¶¶ 7-12). In addition to internet banner ads, publication notice, and press releases, the settlement administrator disseminated direct notice to 893,620 settlement class members. (See id.) Of those class members, 11,403 returned claim forms.[1] Only twelve objections were received. (See id. ¶ 20).

[1] This updated figure was provided to the court by class counsel during the final approval hearing.

The court convened a final approval hearing on August 16, 2017. (Doc. 91). None of the twelve objectors appeared personally or through counsel. During the hearing, the court pressed all counsel about particular aspects of the settlement and fully explored the parties' proposed resolution. We noted on the record that the settlement appears to be fair, reasonable, and adequate. This memorandum supplements and memorializes the court's findings.

II. Discussion

A. Rule 23 Class Certification

Class certification under Rule 23 requires a two-step process. First, a putative class must meet each of four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy. See *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 309 n.6 (3d Cir. 2008). These determinations require a court to conduct a "rigorous analysis" of the relevant evidence to determine whether the elements of Rule 23 have been met. Id. at 310. In considering the evidence, courts should address all relevant legal and factual issues and make preliminary inquiries into the merits of the case. See id. at 317. The party seeking class certification bears the burden to prove, by a preponderance of the evidence, each requirement of Rule 23(a). *In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 426 (3d Cir. 2016) (quoting *In re* Cmty. Bank of N. Va. Mortg. Lending Practices Litig., 795 F.3d 380, 391 (3d Cir. 2015)).

***4** Once the elements of Rule 23(a) are satisfied, the suit must fit within one of three categories described in subsection (b). Rule 23(b)(3) certification is proper if a court finds "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The dual requirements of Rule 23(b)(3) are referred to as predominance and superiority. *In re* Hydrogen Peroxide, 552 F.3d at 310.

The parties posit that the elements of Rule 23(a) and 23(b)(3) are easily satisfied. We will address each of the prerequisites *seriatim.* Ultimately, the court agrees that certification of this settlement class is appropriate under Federal Rule of Civil Procedure 23.

1. *Numerosity*

No minimum threshold of plaintiffs is required to obtain class certification. See Stewart v. Abraham, 275 F.3d 220, 226 (3d Cir. 2001) (citing 5 James Wm. Moore et al., Moore's Federal Practice § 23.22[3][a] (3d ed. 1999)). However, the Third Circuit Court of Appeals has noted that the numerosity requirement is "generally" satisfied if the potential class exceeds 40 members. Id. at 226-27. The settlement administrator herein reports that more than 10,000 class members have submitted claims to date. (See Doc. 97 ¶ 18). Given the nature of the settlement, claims will continue to be filed for the foreseeable future. The numerosity factor resolves in favor of certification.

2. *Commonality*

The commonality requirement is satisfied when the named plaintiffs share "at least one" question of law or fact with the prospective class. See Stewart, 275 F.3d at 227 (quoting Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)). Thus, the requirement "is easily met." Baby Neal, 43 F.3d at 56. The parties here identify several common issues of law and fact, including: whether uncoated copper coils are susceptible to premature failure; whether that failure is due to formicary and pitting corrosion; whether the alleged corrosion amounts to a "defect"; whether JCI knew its products were "defective"; whether JCI disclosed the alleged defect in its products; and whether JCI took measures to mitigate the harm once known. (See Doc. 95 at 16-17). These manifold common issues support certification.

3. *Typicality*

The typicality inquiry examines whether the named plaintiffs' interests align with the interests of absent class members. See Stewart, 275 F.3d at 227 (quoting Moore, *supra*, at § 23.24[1]). Typicality is generally satisfied when each plaintiff would need to prove the existence of the same adverse behavior by the defendant. Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183-85 (3d Cir. 2001) (citations omitted). The named plaintiffs' claims and the prospective class members' claims *sub judice* all arise from allegations that JCI's uncoated copper coils are defective. (See Doc. 31 ¶¶ 122-278). And all claims are grounded in

the same or similar legal theories—principally, breach of implied and express warranties. (See id.) This factor favors certification.

4. ***Adequacy***

Under Rule 23(a)(4), class representatives must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Third Circuit has explained that the "linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class." Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170, 183-84 (3d Cir. 2012). The adequacy inquiry comprises two prongs: whether class counsel is competent and qualified to conduct a class action, and whether the class representatives have any interests adverse to or conflicting with the prospective class. See id. at 182-83 (citing *In re* Cmty. Bank, 418 F.3d at 303); *In re* Chocolate Confectionary Antitrust Litig., 289 F.R.D. 200, 218 (M.D. Pa. 2012) (Conner, J.) (citing New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 313 (3d Cir. 2007)).

***5** As for the first inquiry, plaintiffs maintain that class counsel invested time and resources in preliminary discovery and substantial research, as well as intense and protracted settlement negotiations, and that class counsel have considerable experience in litigating similar class actions. (See Doc. 95 at 19). The court has no reason to doubt this assertion, which is evidenced by counsel's exemplary, zealous, and thorough representation at all stages of the settlement process. As for the second inquiry, all class members, including the named plaintiffs, receive equal treatment and benefits under the settlement. (See Doc. 90-1 ¶¶ 15-18). These considerations weigh in favor of certification.

5. ***Predominance***

The predominance inquiry is "far more demanding" than the commonality requirement. *In re* Hydrogen Peroxide, 552 F.3d at 310-11 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997)). To satisfy this element, common issues must constitute a "significant part" of the individual cases. See *In re* Chiang, 385 F.3d 256, 273 (3d Cir. 2004) (citations omitted), abrogated on other grounds by *In re* Hydrogen Peroxide, 552 F.3d at 318-19 & n.18. Nonetheless, the presence of some individualized issues and inquiries will not defeat a predominance finding. See id. Plaintiffs contend that a trio of common issues—whether the coils are defective, whether JCI knew they were defective, and whether JCI failed to disclose the defect—is the fulcrum of each class member's claim. (See Doc. 95 at 21). We agree and conclude that this case readily surmounts the predominance hurdle.

6. ***Superiority***

Rule 23(b)(3) outlines several factors pertinent to the superiority inquiry, to wit: (a) the class members' interest in individually controlling the action; (b) the nature and extent of litigation already commenced by or against individual class members; (c) the desirability *vel non* of concentrating the litigation in the chosen forum; and (d) whether the case, if tried, will present intractable case management problems. Fed. R. Civ. P. 23(b)(3). The factors balance, "in terms of fairness and efficiency, the merits of the class action against those alternative available methods of adjudication." *In re* Chocolate, 289 F.R.D. at 225 (quoting *In re* Warfarin Sodium Antitrust Litig., 391 F.3d 516, 534 (3d Cir. 2004)).

As a threshold matter, plaintiffs assert (correctly) that considerations regarding the difficulties of managing a class action through trial do not arise for settlement-only classes because, if a settlement is approved, there will be no trial. Amchem Prods., 521 U.S. at 620. The remaining factors support certification. The individual class members would have little interest in pursuing individual actions when the cost of litigating would quickly outpace the value of their claim. And concentrated class settlement procedures avoid a potentially significant strain on judicial resources. As this court has previously observed, certification is the superior method of adjudication in terms of both economic and judicial efficiency when a case involves thousands of class members disbursed throughout the United States who otherwise likely could not afford to pursue claims individually. See *In re* Chocolate, 289 F.R.D. at 225-26. We have little difficulty concluding that class certification is the fairest and most efficient means of adjudicating this case.

Plaintiffs have established that the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—are readily satisfied in this case. See Fed. R. Civ. P. 23(a). The court further finds that a settlement class may be maintained under Rule 23(b)(3) because plaintiffs have established both predominance and superiority. See Fed. R. Civ. P. 23(b)(3). Accordingly, we will grant plaintiffs' request for certification of a settlement class.

B. Approval of Class Settlement

***6** A class action cannot be settled absent court approval upon a finding that the settlement is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2). Within the Third Circuit, it is well-established that the "law favors settlement," especially in class actions, when considerable resources might be saved by early and amicable resolution of a case. *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig. ("*In re* GMC Trucks"), 55 F.3d 768, 784 (3d Cir. 1995) (citations omitted).

We consider nine factors (the "Girsh factors") in measuring the fairness of a proposed settlement, to wit:

> (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; [and] (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 alterations and citations omitted). After Girsh, the circuit suggested that, in appropriate circumstances, courts may also wish to consider additional factors (the "Prudential factors"):

> (1) 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 factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; (2) the existence and probable outcome of claims by other classes and subclasses; (3) the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; (4) whether class or subclass members are accorded the right to opt out of the settlement; (5) whether any provisions for attorneys' fees are reasonable; and (6) whether the procedure for processing individual claims under the settlement is fair and reasonable.

In re NFL Players Concussion Litig., 821 F.3d at 436 (citing *In re* Prudential Ins. Co. America Sales Practice Litig. Agent Actions, 148 F.3d 283, 323 (3d Cir. 1998)).

1. *Presumption of Fairness*

Plaintiffs maintain, as a threshold issue, that a presumption of fairness applies to their proposed settlement. (Doc. 95 at 24-25); see also *In re* NFL Players Concussion Litig., 821 F.3d at 436 (quoting *In re* Cendant Corp. Litig., 264 F.3d 201, 232 n.18 (3d Cir. 2001)). The presumption applies when (1) negotiations occurred at arm's length; (2) the parties exchanged sufficient discovery; (3) class counsel are experienced in similar litigation; and (4) any objectors represent "a small fraction" of the class. *In re* NFL Players Concussion Litig., 821 F.3d at 436 (quoting *In re* Cendant, 264 F.3d at 232 n.18).

***7** The presumption of fairness applies here. The parties exchanged thousands of pages of documents and reached their settlement under the auspices of a retired federal magistrate judge during multiple mediation sessions. (See Doc. 95 at 24-25). It is beyond peradventure that counsel are well-qualified in class action litigation and have vigorously pursued the interests of the plaintiff class. The objectors —12 total—represent a miniscule fraction of the class, which currently comprises more than 10,000 members. This settlement warrants the presumption of fairness.

The fairness presumption is rebuttable, however, and the court must fastidiously examine a settlement's terms and ensure that class counsel has advocated for and protected the interests of all class members. See First State Orthopaedics v. Concentra, Inc., 534 F. Supp. 2d 500, 516 (E.D. Pa. 2007) (quoting *In re* Warfarin, 391 F.3d at 534-35). Hence, courts must still explore the Girsh and Prudential factors even after finding that the presumption applies. See, e.g., *In re* NFL Players Concussion Litig., 821 F.3d at 436-37 (finding presumption applies but nonetheless proceeding to extensive analysis of the Girsh and Prudential factors).

2. *Complexity, Expense, and Likely Duration of Litigation*

The first Girsh factor considers "probable costs, in both time and money, of continued litigation." Id. at 437-38 (quoting *In re* Warfarin, 391 F.3d at 535-36). We agree with counsel that, had this case proceeded to trial, extensive and expensive

litigation would have ensued. Defendants' pending motion to dismiss fully tests the timeliness, justiciability, and merits of plaintiffs' claims. Had any aspect of that motion failed, the parties would have proceeded to full merits and class discovery, dispositive motion practice, and eventually trial. The parties also highlight the possibility of a Rule 23(f) interlocutory appeal if the court did certify a litigation class. (See Doc. 95 at 26-27). The expense and likely duration of this litigation favors settlement.

3. ***Reaction of the Class to the Settlement***

The second Girsh factor gauges whether class members generally support the settlement. *In re* NFL Players Concussion Litig., 821 F.3d at 438 (quoting *In re* Warfarin, 391 F.3d at 536). Notice in this matter was disseminated to more than 893,000 class members. (Doc. 97 ¶ 7). Of more than 10,000 responses, only 12 class members objected to the settlement. (Id. ¶ 20). There can be little doubt that the settlement has been well-received.

4. ***The Stage of the Proceedings and the Amount of Discovery Completed***

The third factor examines the degree to which the case developed before counsel elected to settle—that is we ask whether counsel had a true appreciation of the merits before negotiating. *In re* NFL Players Concussion Litig., 821 F.3d at 438-39 (quoting *In re* Warfarin, 391 F.3d at 537). Here, the parties assert that counsel conducted extensive review of the facts underlying the class claims and considered the ramifications of settlement. (See Doc. 95 at 29). Class counsel have participated in three other cases concerning formicary corrosion of copper coils and began this litigation with a firm understanding of the legal and factual foundation, including all attendant risks. (See id.) Defendants' motion to dismiss, which the parties fully briefed, allowed each side to consider the strengths and weaknesses of their respective claims and defenses. This factor too favors settlement.

5. ***Risks of Establishing Liability and Damages***

The fourth and fifth factors examine the dual risks of litigation—establishing liability and damages—and balances the likelihood of success on both components with the benefits of the negotiated settlement. *In re* NFL Players Concussion Litig., 821 F.3d at 439 (quoting Prudential, 148 F.3d at 319). In other words, we measure the potential but uncertain value of litigating with the immediate and determinable value of settlement. See id.; see also *In re* GMC Trucks, 55 F.3d at 814.

***8** If JCI were to prevail on any aspect of its motion to dismiss, plaintiffs' claims would be substantially weakened —if not entirely defeated right out of the gate. JCI has identified several decisions dismissing virtually identical claims on grounds similar to those raised in JCI's Rule 12 motion. (Doc. 39 at 1 n.2 (collecting cases)). Plaintiffs face a not-insignificant hurdle in establishing at trial not only that JCI's product was defective, but also that JCI knew and failed to disclose that its product was defective. And plaintiffs would additionally need to establish causation—that defective coils, rather than environmental factors, caused the corrosion. These uncertainties militate in favor of settlement.

6. ***Risks of Maintaining the Class Through Trial***

The Third Circuit recently held that the sixth Girsh factor receives only "minimal consideration" in the settlement class context. *In re* NFL Players Concussion Litig., 821 F.3d at 440 (citation omitted). Plaintiffs correctly aver that this factor still requires some consideration because the strength of the class bears directly on the range of recovery components of the Girsh analysis. (See Doc. 95 at 33-35 (citing *In re* GMC Trucks, 55 F.3d at 817)). The risk that the class may be decertified by the district court at any time were this matter to proceed to trial weighs in favor of settlement. See *In re* Warfarin, 391 F.3d at 537.

7. ***Ability of Defendants to Withstand Greater Judgment***

The seventh factor is "most relevant" when the settlement is justified, at least in part, by a defendant's professed inability to pay. *In re* NFL Players Concussion Litig., 821 F.3d at 440. The mere fact that a defendant *could* withstand a greater judgment, however, does not mean that the settlement is unreasonable. See, e.g., id. (quoting Sullivan, 667 F.3d at 323); *In re* Warfarin, 391 F.3d at 538; see also *In re* GMC Trucks, 55 F.3d at 818. This factor is a wash.

8. ***Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and All Attendant Risks of Litigation***

The final two factors together form a capstone which tests the settlement's overall reasonableness: they task the court to determine whether a settlement represents "a good value for a weak case or a poor value for a strong case." *In re* NFL Players Concussion Litig., 821 F.3d at 440 (quoting *In re* Warfarin, 391 F.3d at 538). There is no mathematical formula for measuring reasonableness. The Third Circuit describes the test as follows: "[T]he present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." Prudential, 148 F.3d at 322 (quoting *In re* GMC Trucks, 55 F.3d at 806).

Even if plaintiffs were ultimately successful in their claims at trial, there is no guarantee that any plaintiff would recover substantial damages. Plaintiffs request punitive damages in their amended complaint, but the standard for recovery of punitive damages is a stringent one. Moreover, the parties have identified several legal and factual hurdles that stand between plaintiffs and proven liability. The proposed settlement is reasonable in view of the risk-reduced value of plaintiffs' claims.[2]

2 The parties do not address the Prudential factors in their motion. The court finds that only two are relevant *sub judice*. The procedure for processing individual claims is the subject of an objection and is addressed in the next section. The provision for and reasonableness of attorneys' fees is also discussed *infra* in Section C examining class counsel's motion for attorneys' fees and expenses.

9. ***Objections***

Only 12 class members object to the settlement. (See Docs. 95-1 to -12). The objections can be catalogued into five groups: those requesting reimbursement of 100 percent of out-of-pocket costs; those requesting reimbursement for incidental damages; those seeking to expand the dealers with whom rebates can be redeemed beyond JCI authorized dealers; those who believe the claims process requires too much documentation; and those who contend that the warranty period should be extended for uncoated copper coils which have not yet experienced a failure. (See id.) Plaintiffs respond to each of these objections at length in their memorandum supporting final approval. (Doc. 95 at 38-51). We address the objections in turn.

***9** All 12 objectors first take issue with the amount of reimbursement provided by the settlement. They contend that the settlement is unreasonable for failure to reimburse homeowners 100 percent of their out-of-pocket costs. This argument fundamentally misapprehends the bargained-for nature of the benefit provided: a settlement necessarily requires all parties to make calculated concessions. Here, JCI compromises by waiving the protective shield of its parts-only warranty; the class compromises by accepting a guaranteed but risk-reduced benefit previously unavailable to them. The $75 rebate certificate for one-time failures reflects the reality that a single failure is not necessarily indicative of a defective product; the $550 cash reimbursement for two or more failures, capped at $1,100 for all failures, reflects that a second failure within the warranty period is suggestive (but not *ipso facto* proof) of a defect. (See Doc. 95 at 40-44). These amounts were the result of intense and informed negotiations with the assistance of the mediator. In view of the risks of proving liability and causation, these awards are quite reasonable.[3]

3 This same rationale answers the objection which asks why all failures are not reimbursed equally. (See Doc. 95-1 at 3). Specifically, the objector queries: "Shouldn't each failure of the Copper Coil be treated equally and the compensation for each failure be equitable, regardless of the date when and/or number of failures that occurred?" (Id.) As detailed above, the parties deliberately chose to treat single failure claims differently than multiple failure claims given the liability inferences to be drawn from a second failure during the warranty period.

The objections seeking incidental damages are related to the above request for full reimbursement of service costs. These objectors request reimbursement for all conceivable costs associated with an alleged defect, ranging from damage caused to air duct systems, lost wages for taking time off work for service visits, and the potential health and safety effects caused by leaking refrigerant or a temporary lack of proper air conditioning. Plaintiffs observe that each of these enumerated items presents manifold and individualized issues of causation and valuation that cannot be addressed in a class settlement context. (Doc. 95 at 46). Plaintiffs also note that this litigation never sought to recover costs for damaged air ducts, and there is no allegation in the pleadings that such

damage results from defective coils. (See id.) Settlements necessarily require "yielding of the highest hopes in exchange for certainty and resolution." *In re* GMC Trucks, 55 F.3d at 806. If any class member felt they had a stronger damages claim than the rest of the class, they were free to opt out of the settlement class. The court will overrule the objections to the rebate and reimbursement remedies provided by the settlement agreement.

One objector is dissatisfied that the $75 service rebate is redeemable only with authorized JCI dealers. The objector suggests that this arrangement is self-dealing which "increases costs" for the class. (Doc. 95-7 at 1). Plaintiffs respond with ample and adequate justification for limiting redemption to JCI dealers: the limitation increases the likelihood that service will be performed correctly and will allow accurate monitoring of the rebate system. (See Doc. 95 at 46-47). Because JCI authorized dealers are independent, JCI receives no revenue from redemption of the rebates. (Id.) This objection is without merit.

The same objector contends that the documentation required to submit a claim is "too extensive" given that the claim period dates to 2008. (Doc. 95-7 at 1). This objection is belied by the claim form itself, which permits claimants to prove purchase by "[a]ny competent evidence," including but not limited to "an invoice, receipt, photograph, owners' manual, or registration card." (Doc. 90-1 at 62). To receive a $75 rebate certificate, claimants must submit "evidence of the copper coil failure," including "invoice(s), receipt(s), photograph(s), correspondence to or from JCI or an HVAC dealer or contractor, warranty claim(s), or *any other competent evidence* of the failure." (Id. (emphasis added)). Similarly, to submit a claim for a reimbursement check, a class member need only provide proof that the coil was in fact replaced and evidence of the amounts paid, in the form of, *inter alia*, invoices, receipts, checks, credit card statements, or "*any other competent evidence.*" (Id. (emphasis added)). The documentation requirement reflects the bare minimum proof necessary to protect the settlement from abuse. The court overrules this objection.

***10** Finally, one objector contends that the settlement should extend the warranty on all copper coils which have not yet failed for either the lifetime of the product or fifteen years, the average lifetime of a unit. (Doc. 95-1 at 4). Plaintiffs' response is twofold: first, by virtue of the settlement, JCI has already extended its limited manufacturer's warranty to cover labor and refrigerant costs not previously available to homeowners; and second, extending the warranty to cover the lifetime of the product would "illogically extend[ ] the benefit conferred ... to the point that the systems would be expected to need replacement" due to normal wear-and-tear. (Doc. 95 at 49-50). The parties further allege that formicary corrosion typically presents within 5 to 10 years of installation; thus, the current warranty period offers an appropriate limitation for capturing claims likely related to a defective coil. (Id.) We agree that to extend the manufacturer's warranty as requested would result in a windfall to class members whose systems fail for reasons other than alleged defects.

10. *Conclusion*

The court has rigorously reviewed the amended settlement agreement for fairness, adequacy, and reasonableness. We have carefully considered each of the twelve objections and have weighed the points raised therein against the terms of the settlement. The court concludes that none of the objections upset the presumption of fairness or the weighted balance of the Girsh factors. The settlement provides immediate and certain relief to class members who, given the likely value of the average claim, otherwise would lack the means or motivation to pursue appropriate relief. The court concludes that the proposed settlement is fair, adequate, and reasonable under Federal Rule of Civil Procedure 23. We will grant plaintiffs' motion for final approval of the amended settlement agreement.

C. Class Notice

Rule 23(e) mandates that all members of a class be notified of the terms of any proposed settlement. Fed. R. Civ. P. 23(e)(1). Such notice is "designed to summarize the litigation and the settlement and to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation." Prudential, 148 F.3d at 327 (internal quotation marks omitted). District courts must closely monitor notice provided at all phases of a class action "to safeguard class members from unauthorized and misleading communications from the parties or their counsel." *In re* Cmty. Bank, 418 F.3d at 310 (internal quotation marks omitted).

We approved the parties' notice plan in the course of provisionally certifying the class and preliminarily approving the settlement agreement. (See Doc. 91). The settlement administrator submitted a declaration detailing its compliance

with and implementation of the court-approved notice plan. (See Doc. 97). The rate at which claims have been received confirms that notice has been effective. The court finds that the notice provision of Rule 23(e) is satisfied.

D. Attorneys' Fees and Expenses

An award of attorneys' fees is within the sound discretion of this court. Fed. R. Civ. P. 23(h). Courts generally apply one of two methods to calculate attorneys' fees: the percentage of recovery method, or the lodestar method. Prudential, 148 F.3d at 333. The lodestar method is traditionally applied in matters (like this one) in which "the nature of the recovery" precludes estimation of the settlement's total value. Id. (citing *In re* GMC Trucks, 55 F.3d at 820). The lodestar method employs a simple formula: multiply the number of hours reasonably attributable to the case by a reasonable hourly billing rate. Id. Courts determine a reasonable hourly rate in view of geographical area, the nature of the services provided, and the attorneys' experience and qualifications. See *In re* Rite Aid Corp. Sec. Litig., 396 F.3d 294, 305 (3d Cir. 2005). The court has discretion to adjust the lodestar after it is calculated based on the results obtained, the litigation's complexity and scope, the quality of counsel's representation, and any public policy considerations. See Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990).

***11** We then measure the requested fee against the lodestar to determine the lodestar multiplier. Multipliers between one and four are routinely approved in the Third Circuit. See *In re* Cendant, 243 F.3d at 742 (citing Prudential, 148 F.3d at 341). A negative multiplier reflects that counsel is requesting only a fraction of the billed fee; negative multipliers thus "favor[ ] approval." Altnor v. Preferred Freezer Servs., 197 F. Supp. 3d 746, 767 (E.D. Pa. 2016) (citation omitted). Although the percentage-of-recovery approach is inapplicable here given that the settlement value *in toto* is incalculable, the Gunter/Prudential factors that typically govern percentage-of-recovery analyses are nonetheless informative in measuring the reasonableness of the lodestar award. Those factors 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.

In re Diet Drugs, 582 F.3d 524, 541 (3d Cir. 2009) (citing Gunter v. Ridgewood Energy Corp., 223 F.3d 190 (3d Cir. 2000); Prudential, 148 F.3d 283).

Class counsel seeks attorneys' fees in the amount of $1,000,000 and reimbursement of out-of-pocket expenses in the amount of $22,176.81. (See Docs. 92-93, 99). They calculate a current lodestar fee of $1,156,601.75 (exclusive of costs associated with the final approval motion and hearing), resulting in a multiplier of 0.865. Counsel suggests that the negative multiplier, combined with an examination of the Gunter/Prudential factors, favors approving the requested fee.

The court agrees. The settlement benefits a class of substantial size; the attorneys are well-qualified; the case involved substantial time and resources and could be fairly characterized as complex; and class counsel proceeded despite the risk that JCI could prevail (and in fact had prevailed in other, similar cases). In an analogous case involving Lennox, the court approved a fee award at a lodestar multiplier of .88. See Thomas v. Lennox Indus. Inc., No. 1:13-CV-7747 (N.D. Ill.). Moreover, despite the additional efforts by class counsel necessary to resolve coil incompatibility issues after the first settlement agreement had been preliminarily approved, class counsel did not increase its initial fee request. Only one objection speaks to attorneys' fees; that objection is without merit—it does not genuinely dispute counsel's calculation or performance, but instead suggests that the fee award should be distributed amongst the class.

Class counsel also request reimbursement in the amount of $22,176.81 for out-of-pocket expenses such as copying fees, expert fees, computerized research, travel, and costs of mediation. (Doc. 99). The settlement agreement contemplates reimbursement for costs and expenses up to a maximum of $25,000. (See Doc. 90-1 ¶ 59). Given the relative complexity of this matter, the court concludes that reimbursement of costs and expenses of $22,176.81 is reasonable.

E. Service Awards

***12** Plaintiffs lastly ask the court to approve service awards in the amount of $2,500 each for named plaintiffs Steven

Dickerson, Robert Hester, Nancy Roberts, Katie Evans Moss, and Richard Sanchez. (See Doc. 96; see also Doc. 90-1 ¶ 64). A service award compensates class representatives for services provided and risks incurred during the course of litigation and settlement proceedings and rewards their public service in contributing to enforcement of the laws. See Sullivan, 667 F.3d at 333 n.65. The court finds that the named plaintiffs' assistance to this case was valuable and substantial. The service awards of $2,500 to each named plaintiff are entirely reasonable.

III. Conclusion

For all of the reasons stated herein, the court will grant in full the pending motion (Doc. 94) for final approval of class action settlement and motion (Doc. 92) for approval of attorneys' fees and expenses. An appropriate order shall issue.

All Citations

Not Reported in Fed. Supp., 2017 WL 3601948

End of Document

2015 WL 1021130
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

Ambro HEGAB, individually and on behalf of other persons similarly situated, Plaintiff,
v.
FAMILY DOLLAR STORES, INC., Defendant.

Civil Action No. 11–1206(CCC).
|
Signed March 9, 2015.

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OPINION

CECCHI, District Judge.

***1** This matter comes before the Court upon Plaintiff Ambro Hegab ("Plaintiff") and Defendant Family Dollar Stores, Inc.'s ("Defendant") Joint Motion for Final Approval of a Class Action Settlement Agreement [ECF No. 53] and Plaintiffs Unopposed Motion for Attorneys' Fees, Costs, and Class Representative Enhancement [ECF No. 52]. The Court conducted a fairness hearing on February 5, 2015. Having considered the arguments by all the parties to this matter, the Court sets forth its findings below.[1]

1 The Court considers any arguments not presented by the parties to be waived. *See Brenner v. Local 514 United Bhd. of Carpenters & Joiners,* 927 F.2d 1283, 1298 (3d Cir.1991) ("It is well established that failure to raise an issue in the district court constitutes a waiver of the argument.").

I. *BACKGROUND*

A. Litigation History

In March 2011, Plaintiff filed a class action complaint that follows on the heels of two similar cases filed in other district courts. *See Youngblood, et al. v. Family Dollar Stores, Inc., et al.,* No. 09–cv–3176 and *Rancharan v. Family Dollar Stores, Inc., et al.,* No. 10–cv–7580. The complaint alleged that Defendant violated the New Jersey Wage and Hour Law by misclassifying its store managers in New Jersey as exempt from state overtime requirements. Plaintiff sought overtime pay for all hours worked in excess of 40 per week.

On October 3, 2014, the Court issued an order conditionally certifying a settlement class of current and former store managers in New Jersey, approving the form and manner of notice proposed by the parties, appointing settlement class counsel, appointing Plaintiff Hegab as settlement class representative, and appointing Rust Consulting, Inc. ("Rust") as settlement administrator. On January 29, 2014, the parties submitted a joint motion for final approval of a settlement agreement and Plaintiff filed an unopposed motion for attorneys' fees.

B. Settlement Agreement

1. Terms

The Settlement Class consists of 557 potential class members that worked as store managers in New Jersey Family Dollar stores between March 3, 2009 and October 3, 2014, Defendant agrees to pay $1.15 million to resolve the instant action.[2] In exchange for payment of this sum, Defendant will receive a waiver and release of all claims that were or could have been asserted based on the alleged facts in the complaint.

2 All payments under the settlement would be made from this gross amount, including: distributions to individuals who filed proper claims, attorneys' fees and litigation costs, an enhancement for Plaintiff Hegab, the cost of administering the settlement, and all payroll and withholding taxes (if approved by the Court). (Joint Mot. at 5.)

2. Notice Plan

Rust was responsible for administering the court-approved notice plan. Rust established a PO Box to receive

communications regarding the settlement (Lefebvre Dec. at ¶ 10) as well as a toll-free phone number for class members to call with questions regarding the settlement and a website with relevant settlement information. (*Id.* at ¶¶ 5–6.)

On November 7, 2014, Rust mailed the Notice of Proposed Settlement and Right to Opt-out along with a Claim Form (together, "Class Notice") to all 557 class members via First Class mail.[3] (*Id.* at ¶ 10.) The Class Notice advised class members that they could request exclusion from the class or object to the settlement on or before December 22, 2014, or submit a claim form on or before January 6, 2015. (*Id.*) In total, 265 settlement class members filed Claim Forms,[4] resulting in a participation rate of 46.68%. [ECF No. 55.] There were no objections to the settlement and no requests for exclusion. (Lefebvre Dec. at ¶¶ 15–16.)

3 After diligent efforts by Rust—including address traces—32 Class Notices remained undeliverable. (*Id.* at ¶ 11.)

4 Although the Joint Motion notes a participation percentage of 45.96% because nine class members that filed untimely Claim Forms were initially excluded, Defendant has agreed not to challenge these late claimants, thus increasing the participation percentage to 46.68%. [ECF No. 55.]

3. Attorney Fees, Expenses, and Incentive Awards

***2** Plaintiff requests: (1) attorneys' fees totaling $345,000, (2) reimbursement of litigation costs and expenses in the amount of $4,462.80, and (3) an "enhancement service award" to Plaintiff Hegab of $7,500. (Pl.'s Mot. at 1.) The $345,000 in attorneys' fees is 30% of the $1.15 million settlement amount. Defendant does not oppose this motion.

II. *CLASS CERTIFICATION*

Rule 23 of the Federal Rules of Civil Procedure requires the Court to engage in a two-step analysis to determine whether to certify a class action for settlement purposes. First, the Court must determine if Plaintiffs have satisfied the prerequisites for maintaining a class action as set forth in Rule 23(a). If Plaintiffs can satisfy these prerequisites, the Court must then determine whether the requirements of Rule 23(b) are met. *See* Fed.R.Civ.P. 23(a) advisory committee's note. "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. R. Civ. Proc. 23(b)(3) (D), for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Rule 23(a) provides that Class Members may maintain a class action as representatives of a class if they show that (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or 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 (d) the representative parties will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a).

A. Rule 23(a) Factors

1. Numerosity

Courts will ordinarily discharge the prerequisite of numerosity if "the class is so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1); *see also Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir.1998). Plaintiffs "need not precisely enumerate the potential size of the proposed class, nor [are] plaintiff's] required to demonstrate that joinder would be impossible." *Cannon v. Cherry Hill Toyota, Inc.,* 184 F.R.D. 540, 543 (D.N.J.1999) (citation omitted). "[G]enerally if the named plaintiff demonstrates the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham,* 275 F.3d 220, 226–27 (3d Cir.2001) (citation omitted).

Numerosity is easily satisfied here because there were 557 potential class members and Rust mailed Claim Forms to all of them. (Lefebvre Dec. at ¶ 10.)

B. Commonality

Plaintiffs must demonstrate that there are questions of fact or law common to the class to satisfy the commonality requirement. Fed.R.Civ.P. 23(a)(2). The Supreme Court recently clarified the standard, emphasizing that a plaintiff must show that Class Members "have suffered the same injury," not merely a violation of the same law: *Wal–Mart Stores, Inc. v. Dukes,* ––U.S. ––––, ––––, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon,* 457 U.S. 147, 157, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). Furthermore, the Court noted that commonality is satisfied where common questions "generate common *answers* apt to drive the resolution of the litigation." *Id.* at 2551 (citation omitted) (emphasis in original); *see also Sullivan v. DB Invs., Inc.,* 667 F.3d 273, 299 (3d Cir.2011). The claims of Class Members "must depend upon a common contention[,] .... [which] must be of such a nature

that it is capable of classwide resolution-which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal–Mart,* 131 S.Ct. at 2551. Still, "commonality does not require an identity of claims or facts among Class Members[;]" rather, "[t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Newton v. Merrill Lynch. Pierce, Fenner & Smith, Inc.,* 259 F.3d 154, 183 (3d Cir.2001) (citation omitted).

***3** The key issue in this case is whether Defendant misclassified its store managers under New Jersey law. This question is common to all class members. Indeed, the only variation among class members is the *amount* of overtime pay to which each class member is entitled—a problem that was remedied through the Claims Notice process. (*See* Lefebvre Dec. at ¶ 14.) Thus, commonality is satisfied.

C. Typicality

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical of the claims ... of the class. The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *Barnes v. Am. Tobacco Co.,* 161 F.3d 127, 141 (3d Cir.1998) (citation omitted). As with numerosity, the Third Circuit has "set a low threshold for satisfying" typicality, stating that "[i]f the claims of the named plaintiffs and putative Class Members involve the same conduct by the defendant, typicality is established ...." *Newton,* 259 F.3d at 183–84; *see also Baby Neal v. Casey,* 43 F.3d 48, 58 (3d Cir.1994). The typicality requirement "does not mandate that all putative Class Members share identical claims." 259 F.3d at 184 (citation omitted); *see also Hassine v. Jeffes,* 846 F.2d 169, 176–77 (3d Cir.1988).

Here, the claims made by named Plaintiff Hegab and those made on behalf of the other class members arise out of the same alleged conduct by Defendant—namely, the misclassification of store managers under New Jersey law. Consequently, the named Plaintiff's claims are typical of those brought by the class members at large. *See, e.g., In re Pet Food Prods. Liab. Litig.,* 629 F.3d 333, 342 (3d Cir.2010) (affirming the District Court's certification of the settlement class where "the claims of the class representatives [were] aligned with those of the Class Members since the claims of the representatives ar[o]se out of the same conduct and core facts"); *Grasty v. Amalgamated Clothing & Textile Workers Union,* 828 F.2d 123, 130 (3d Cir.1987) (holding that the District Court did not abuse its discretion in finding the typicality requirement met because the claims brought by the named plaintiffs and those brought on behalf of the class "stem from a single course of conduct"). Thus, typicality is also satisfied.

D. Adequacy of Representation

Finally, the Court must consider adequacy of representation both as to the named Plaintiff and the Class Counsel under Rules 23(a) and (g). The class representatives should "fairly and adequately protect the interests of the class." *Georgine v. Amchem Prods., Inc.,* 83 F.3d 610, 630 (3d Cir.1996). Such class representatives must not have interests antagonistic to those of the class. *Id.* In order to find an "antagonism between [the named] plaintiff[s'] objectives and the objectives of the [class]," there would need to be a "legally cognizable conflict of interest" between the two groups. *Jordan v. Commonwealth Fin. Sys., Inc.,* 237 F.R.D. 132, 139 (E.D.Pa.2006). In fact, courts have found that a conflict will not be sufficient to defeat a class action "unless the conflict is apparent, imminent, and on an issue at the very heart of the suit." *In re Flat Glass Antitrust Litig.,* 191 F.R.D. 472, 482 (W.D.Pa.1999) (quoting *In re NASDAQ Market–Makers Antitrust Litig.,* 169 F.R.D. 493, 514 (S.D.N.Y.1996)).

***4** Here, there is no indication that Plaintiff Hegab's interests are antagonistic to those of the class. Plaintiff Hegab has also actively participated in the case, most notably by being deposed. (Lesser Dec. at ¶ 7.) Consequently, the adequacy requirement has been met.

Class Counsel and their respective law firms have extensive experience litigating complex class actions and obtaining class action settlements. (Lesser Dec. at ¶¶ 23–25.) Thus, the Court finds that Class Counsel has the qualifications, experience, and ability to conduct the litigation.

With this last requirement satisfied, it is clear that the Settlement Class in this case has demonstrated compliance with the elements of Rules 23(a) and (g).

E. Rule 23(b)(3) Factors

The Court must next address the question of whether the class comports with the requirements of Rule 23(b). Under 23(b)(3), the Court must find both that "the questions of law or fact common to Class Members predominate over any questions affecting only individual members, and that a class

action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). As explained below, the class action in this case readily meets these requirements of predominance and superiority.

1. Questions of Law and Fact Common to the Class Predominate

To satisfy the predominance requirement, parties must do more than merely demonstrate a "common interest in a fair compromise;" instead, they must provide evidence that the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *see also Sullivan v. DB Invs., Inc.,* 667 F.3d 273, 297 (3d Cir.2011) (noting that the predominance requirement is "more stringent" than the Rule 23(a) commonality requirement). The Third Circuit has repeatedly held that predominance exists where proof of liability depends on the conduct of the defendant. *See Sullivan,* 667 F.3d at 298–301 (reaffirming the Third Circuit precedent supporting this holding). "[V]ariations in state law do not necessarily defeat predominance[ ] and ... concerns regarding variations in state law largely dissipate when a court is considering the certification of a settlement class." *Id.* at 297.

Here, the class consists of individuals who served as Family Dollar store managers. As such, the class members share common questions of law and fact—*i.e.,* whether Defendant misclassified store managers under New Jersey law. Evidence in the record supports the conclusion that common questions predominate over individual questions particular to any putative class member. Consequently, the predominance requirement is satisfied.

2. A Class Action is Superior to Other Available Methods

To demonstrate that a class action is "superior to other available methods" for bringing suit in a given case, the Court must "balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods 'of adjudication." *Georgine v. Amchem Prods., Inc.,* 83 F.3d 610, 632 (3d Cir.1996) (citing *Katz v. Carte Blanche Corp.,* 496 F.2d 747, 757 (3d Cir.1974) (en banc)). One consideration is the economic burden Class Members would bear in bringing suits on a case-by-case basis. Class actions have been held to be especially appropriate where "it would be economically infeasible for [individual Class Members] to proceed individually." *Stephenson v. Bell Atl. Corp.,* 177 F.R.D. 279, 289 (D.N.J.1997). Another consideration is judicial economy. In a situation where individual cases would each "require[ ] weeks or months" to litigate, would result in "needless duplication of effort" by all parties and the Court, and would raise the very real "possibility of conflicting outcomes," the balance may weigh "heavily in favor of the class action." *In re Corrugated Container Antitrust Litig.,* 80 F.R.D. 244, 252–53 (S.D.Tex.1978); *see also Klay v. Humana, Inc.,* 382 F.3d 1241, 1270 (11th Cir.2004) (finding a class action to be the superior method because it would be costly and inefficient to "forc[e] individual plaintiffs to repeatedly prove the same facts and make the same legal arguments before different courts"), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.,* 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008); *Sollenbarger v. Mountain States Tel. & Tel. Co.,* 121 F.R.D. 417, 436 (D.N.M.1988) (finding that, in contrast to the multiple lawsuits that members of a class would have to file individually, "[t]he efficacy of resolving all plaintiffs' claims in a single proceeding is beyond discussion").

***5** To litigate the individual claims of even a fraction of the potential class members would place a heavy burden on the judicial system and require unnecessary duplication of effort by all parties. It would not be economically feasible for the class members to seek individual redress. The litigation of all claims in one action is far more desirable than numerous, separate actions and therefore the superiority requirement is met.

III. *FAIRNESS OF THE CLASS ACTION SETTLEMENT*

Under Federal Rule of Civil Procedure 23(e), approval of a class settlement is warranted only if the settlement is "fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(2). Acting as a fiduciary responsible for protecting the rights of absent class members, the Court is required to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." *In re Cendant Corp. Litig.,* 264 F.3d 201, 231 (3d Cir.2001) (quoting *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 785 (3d Cir.1995)). This determination rests within the sound discretion of the Court. *Girsh v. Jepson,* 521 F.2d 153, 156 (3d Cir.1975). In *Girsh,* the Third Circuit identified nine factors to be utilized in the approval determination. *Id.* at 157. These factors 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 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) and the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. (internal quotation marks, alterations, and citation omitted).

Additionally, a presumption of fairness exists where a settlement has been negotiated at arm's length, discovery is sufficient, the settlement proponents are experienced in similar matters, and there are few objectors. *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 535 (3d Cir.2004). Finally, settlement of litigation is especially favored by courts in the class action setting. "The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re Gen. Motors,* 55 F.3d at 784; *see also in re Warfarin Sodium Antitrust Litig.,* 391 F.3d at 535 (explaining that "there is an overriding public interest in settling class action litigation, and it should therefore be encouraged").

Turning to each of the *Girsh* factors, the Court finds as follows:

A. Complexity, Expense, and Likely Duration of the Litigation

***6** The first factor, the complexity, expense, and likely duration of the litigation, is considered to evaluate "the probable costs, in both time and money, of continued litigation." *In re Cendant Corp.,* 264 F.3d at 233 (quoting *In re Gen. Motors,* 55 F.3d at 812).

The instant litigation was commenced in 2011 and the duration of this action would only be further delayed absent approval of the settlement. Indeed, significant time, effort, and expense would be incurred to resolve discovery disputes, brief dispositive motions and a motion to certify the class, prepare for and complete trial, submit post-trial submissions, and pursue likely appeals. By reaching a settlement, the parties have avoided the significant expenses connected with these steps. Lastly, the settlement provides immediate and substantial benefits for the settlement class.

As a result, this factor weighs in favor of approval of the Settlement. *See In re Warfarim Sodium Antitrust Litig.,* 391 F.3d at 535–36 (finding that the first *Girsh* factor weighed in favor of settlement because "continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial").

B. Reaction of the Class to the Settlement

This second factor "attempts to gauge whether members of the class support the settlement." *In re Lucent Techs., Inc., Sec. Litig.,* 307 F.Supp.2d 633, 643 (D.N.J.2004) (internal quotation marks and citation omitted). The Third Circuit has found that "[t]he vast disparity between the number of potential Class Members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement." *In re Cendant Corp.,* 264 F.3d at 235.

On November 7, 2014, notice was sent directly to the 557 potential class members. As of the date of the Fairness Hearing, there were no objections to the settlement and no requests for exclusion. (Lefebvre Dec. at ¶¶ 15–16.); *see In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 305 (3d Cir.2005) ("such a low level of objection is a 'rare phenomenon' ") (citation omitted). The paucity of negative feedback in the face of an extensive notice plan leads the Court to conclude that the settlement class generally and overwhelmingly approves of the settlement. *See Varacallo v. Mass. Mutual Life Ins. Co.,* 226 F.R.D. 207, 237–38 (D.N.J.2005) (finding exclusion and objection requests of .06% and .003%, respectively, "extremely low" and indicative of class approval of the settlement). Therefore, this factor weighs in favor of approval of the Settlement.

C. The Stage of the Proceedings and the Amount of Discovery Completed

The Court should consider the stage of the proceedings and the amount of discovery completed in order to evaluate the degree of case development that Class Counsel have accomplished prior to settlement. "Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Cendant Corp.,* 264 F,3d at 235 (quoting *In re Gen. Motors,* 55 F.3d at 813), "Generally, post-discovery settlements are viewed as more likely to reflect the true value of a claim as discovery allows both sides to gain an appreciation of the potential liability and the likelihood of success," *In re Auto. Refinishing*

Paint Antitrust Litig., 617 F.Supp.2d 336, 342 (E.D.Pa.2007) (citing *Bell Atl. Corp. v. Bolger,* 2 F.3d 1304, 1314 (3d Cir.1993)).

***7** The Court notes that this case has been litigated for years. Certainly, a fair amount of discovery has occurred here; Defendant took the deposition of Plaintiff, both parties served and responded to written discovery requests, and thousands of pages of materials were exchanged. (Lesser Dec. at ¶ 7.) The parties also had access to the substantial discovery produced in nearly identical cases—*Youngblood* and *Rancharan*—regarding the same dispute at issue in this case (albeit, under different state laws). (*See* Lesser Dec. at ¶ 6.) In addition, the Settlement was reached after extensive arm's length negotiations and mediation sessions. "Where this negotiation process follows meaningful discovery, the maturity and correctness of the settlement become all the more apparent." *In re Elec. Carbon Prods. Antitrust Litig.,* 447 F.Supp.2d 389, 400 (D.N.J.2006) (citation omitted). Based on the extensive discovery and negotiations, the Court concludes that class counsel had a thorough appreciation of the merits of the case prior to settlement. Accordingly, this factor weighs in favor of approval.

D. Risks of Establishing Liability

The risks of establishing liability should be considered to "examine what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them." *In re Cendant Corp.,* 264 F.3d at 237 (quoting *In re Gen. Motors,* 55 F.3d at 814). "The inquiry requires a balancing of the likelihood of success if 'the case were taken to trial against the benefits of immediate settlement.' " *In re Safety Components Int'l, Inc. Sec. Litig.,* 166 F.Supp.2d 72, 89 (D.N.J.2001) (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions.* 148 F.3d 283, 319 (3d Cir.1998)).

Class Counsel have outlined several risks to establishing liability, as exemplified by the fact that Defendant has prevailed on summary judgment against Plaintiff Hegab in a potential class action in Pennsylvania alleging store manager misclassification, *see Itterly v. Family Dollar Stores, I nc.,* No. 5:08–cv–01266–LS, Order (E.D.Pa. Jan. 30, 2014) (ECF No. 40), and obtained more than 60 similar summary judgments in a MDL proceeding in North Carolina, *see In re Family Dollar FLSA Litig.,* 637 F.3d 508 (4th Cir.2011). On the Defendant's side, Family Dollar acknowledges that its defense also carries inherent risks.

In contrast, the settlement provides immediate and certain recovery for the class members. All class members who filed a claim form by the deadline (and even those who filed after the deadline) will receive a benefit in the form of payment for overtime hours worked. In light of the uncertainty of success for both sides in this litigation and the certain, immediate benefit provided by the settlement, the Court concludes that this factor weighs in favor of approval.

E. Risks of Establishing Damages

This factor, like the factor before it, "attempts to measure the expected value of litigating the action rather than settling it at the current time." *In re Cendant Corp.,* 264 F.3d at 238 (quoting *In re Gen. Motors,* 55 F.3d at 816). Here, even if Plaintiff could establish liability, the proper measure of damages is unclear. Defendant would argue that the half time overtime method is proper for misclassification claims. *See Desmond v. PNGI Charles Town Gaming, L.L.C.,* 630 F.3d 351 (4th Cir.2011); *Urnikis–Negro v. Am. Family Prosperity Servs.,* 616 F,3d 665 (7th Cir.2010); *Clements v. Serco, Inc.,* 530 F.3d 1224 (10th Cir.2008); *Valerio v. Putnam Assocs., Inc.,* 173 F.3d 35 (1st Cir.1999). Some district courts, however, have questioned the applicability of the half-time method to damage calculations. *See Seymour v. PPG Indus., Inc.,* 891 F.Supp.2d 721, 737 (W.D.Pa.2012). Accordingly, the Court agrees that significant risks exist in establishing both liability and damages and concludes that this factor weighs strongly in favor of approval.

F. Risks of Maintaining Class Action Status Through Trial

***8** The Court also finds that the sixth factor, the risk of maintaining class action status through trial, weighs in favor of approval of the Settlement. "Because the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial." *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d at 537 (internal quotation marks and citation omitted). If the litigation proceeded, Defendant would have argued that certification was inappropriate. As shown by other state law Family Dollar store manager misclassification actions, class certification is far from certain. *Compare Cook v. Family Dollar Stores of Conn., Inc.,* 2013 WL 1406821 (Conn.Super.Ct. Mar.18, 2013) (denying class certification) with *Youngblood v. Family Dollar Stores, Inc.,* 2011 WL 4597555 (S.D.N.Y. Oct.4, 2011) (granting class certification), and *Farley v. Family*

Dollar Stores, Inc., No. 12–cv–00325, Order (D.Colo. Mar. 21, 2013) (ECF No. 48) (granting class action certification). Thus, because there are significant risks in obtaining and maintaining class certification, this factor weighs in favor of approval.

G. The Settling Defendant's Ability to Withstand a Greater Judgment

In *Cendant,* the Third Circuit interpreted the seventh factor as concerning "whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." 264 F.3d at 240. The parties correctly argue that "even if defendant could afford a greater amount, this provides no basis for rejecting an otherwise reasonable settlement." (Joint Mot. at 22.) Thus, the Court is satisfied that the settlement is fair, reasonable, and adequate, despite the possibility that Defendant could pay a greater sum. *See, e.g., In re Auto. Refinishing Paint Antitrust Litig.,* 617 F.Supp.2d at 344 (finding the settlement figure fair, reasonable, and adequate despite defendants' ability to withstand greater judgment in light of the substantial benefits provided to Class Members); *In re Cendant Corp. Sec. Litig.,* 109 F.Supp.2d 235, 262–63 (D.N.J.2000), *aff'd In re Cendant Corp.,* 264 F.3d 201 (approving settlement despite lack of evidence of defendant's ability to withstand greater judgment); *Weiss v. Mercedes–Benz of N. Am., Inc.,* 899 F.Supp. 1297, 1302–03 (D.N.J.1995) (concluding the settlement was fair, adequate, and reasonable despite finding defendant could withstand greater judgment).

Class members will receive substantial benefits from the settlement, and any ability of Defendant to withstand a greater judgment is outweighed by the risk that Plaintiff would not be able to achieve a greater recovery at trial. In addition, as discussed above, there are significant risks to establishing liability and damages. *See Yong Soon Oh v. AT & T Corp.,* 225 F.R.D. 142, 150–51 (D.N.J.2004) (finding that the difficulties plaintiffs would have in certifying the class and proving damages at trial "diminish[es] the importance of this factor").

***9** In light of these considerations, the Court concludes that this factor weighs in favor of approval.

H. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The eighth and ninth factors, concerning the range of reasonableness of the settlement fund in light of the best possible recovery and the attendant risks of litigation, weigh in favor of settlement.

> The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself mean that the proposed settlement is grossly inadequate and should be disapproved. The percentage recovery, rather must represent a material percentage recovery to plaintiff in light of all the risks considered under Girsh.

In re Cendant Corp. Sec. Litig., 109 F.Supp.2d 235, 263 (D.N.J.2000) (internal quotation marks and citation omitted).

The parties argue that, given the size of the settlement class, the potential benefits available to class members, and the risks in proving liability and damages and in obtaining class certification, the settlement is, fair, adequate and reasonable. (Joint Mot. at 1–2.) The Court agrees with the parties and finds that these factors weigh in favor of approval.

I. Summary of *Girsh* Factors

In conclusion, the Court holds that the nine *Girsh* factors overwhelmingly weigh in favor of approval. The settlement agreement was reached after arm's-length negotiations between experienced counsel and after completion of, and access to, a significant amount of discovery. Therefore, the Court concludes that the settlement represents a fair, reasonable, and adequate result for the settlement class considering the substantial risks Plaintiff faces and the immediate benefits provided by the settlement. *See Reibstein v. Rite Aid Corp.,* 761 F.Supp.2d 241, 255–56 (E.D.Pa.2011).

IV. *NOTICE*

"In the class action context, the district court obtains personal jurisdiction over the absentee Class Members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class." *In re Prudential* 143 F.3d at 306 (citation omitted). Under Federal Rule of Civil Procedure 23(c), notice must be disseminated by "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); *See also Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 175–76, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (finding that Rule 23(c) includes an "unambiguous requirement" that "individual notice must be provided to those Class Members who are identifiable through reasonable effort").

Additionally, in this case, where a settlement class has been provisionally certified under Rule 23(b)(3) and a proposed settlement preliminarily approved, proper notice must meet the requirements of Federal Rules of Civil Procedure 23(c)(2)(B) and 23(e). *Larson v. Sprint Nextel Corp.,* No. 07–5325(JLL), 2009 WL 1228443, at *2 (D.N.J. Apr.30, 2009). 23(c)(2)(B) compliant notice must inform Class Members of: (1) the nature of the action; (2) the definition of the class certified; (3) the class claims, issues, or defenses; (4) the Class Members' right to retain an attorney; (5) the Class Members' right to exclusion; (6) the time and manner for requesting exclusion; and (7) the binding effect of a class judgment on Class Members under Rule 23(c)(3). Fed.R.Civ.P. 23(c)(2)(B)(i)-(vii). Rule 23(e) notice must contain a summary of the litigation sufficient "to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions,* 177 F.R.D. 216, 231 (D.N.J.1997) (citation omitted).

***10** As explained above, Rust—the settlement administrator—mailed the Court-approved Class Notice to all 557 class members via First Class mail. (Lefebvre Dec. at ¶ 10.) Notifications that were returned as undeliverable were re-sent if another address could be traced. (*Id.* at ¶ 11.) In total, 265 settlement class members filed Claim Forms, resulting in a participation rate of 46.68%.[5] [ECF No. 55.] There were no objections to the settlement and no requests for exclusion. (Lefebvre Dec. at ¶¶ 15–16.)

5 As noted, *supra,* nine class members filed untimely Claim Forms and were therefore excluded from the participation percentage stated in the Joint Motion (45.96%). However, Defendant has agreed not to challenge these late claimants, thus increasing the participation percentage to 46.68%. [ECF No. 55.]

The Court finds that the parties complied with the requirements set forth by Rules 23(c)(2)(B) and 23(e). The notice plan was thorough and included all of the essential elements necessary to properly apprise absent settlement class members of their rights. The written notice included: (1) an explanation of the nature of the pending litigation, (2) information regarding the pending settlement, how their payments were calculated, and the material settlement terms (including relevant deadlines and what they give up by participating in the settlement), (3) notification to class members of the number of qualifying workweeks he or she worked during the relevant period (thus allowing class members to calculate the approximate amount they will receive under the settlement), (4) procedures regarding how class members can obtain a copy of the complete settlement agreement, and (5) an explanation of class members' rights to file objections and appear at the final fairness hearing. Rust also established a PO Box to receive communications regarding the settlement (Lefebvre Dec. at ¶ 10) as well as a toll-free phone number for class members to call with questions regarding the settlement and a website with relevant settlement information. (*Id.* at ¶¶ 5–6.)

In conclusion, the Court finds that the notice fully complied with the requirements of Rules 23(c)(2)(B) and 23(e).

V. *ATTORNEY FEES, EXPENSES, AND INCENTIVE AWARDS*

Class counsel filed an unopposed motion for an award of attorney fees and expenses in the amount of $345,000.00 and for an enhancement award of $7,500.00 to Plaintiff Hegab. The Court has considered the parties' written submissions and the oral arguments made during the fairness hearing. For the reasons that follow, the Court will grant the requested attorney fees, reimbursement of expenses, and enhancement award payment.

A. Standard for Judicial Approval of Fees

Fed.R.Civ.P. 23(h) provides that "[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." The awarding of fees is within the discretion of the Court, so long as the Court employs the proper legal standards, follows the proper procedures, and makes findings of fact that are not clearly erroneous. *In re Cendant Corp. PRIDES Litig.,* 243 F.3d 722, 727 (3d Cir.2001).

Notwithstanding this deferential standard, a district court is required to clearly articulate the reasons that support its fee determination. *Reibstein v. Rite Aid Corp.,* 761 F.Supp.2d 241, 359 (E.D.Pa.2011); *In re Rite Aid,* 396 F.3d at 301. "In a class action settlement, the court must thoroughly analyze an application for attorneys' fees, even where the parties have consented to the fee award." *Varacallo v. Mass. Mutual Life Ins. Co.,* 226 F.R.D. 207, 248 (D.N.J.2005).

***11** "Relevant law evidences two basic methods for evaluating the reasonableness of a particular attorneys' fee request—the lodestar approach and the pereentage-of-recovery approach." *Id.* (internal quotation marks and citation omitted). The lodestar method is generally 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." *In re Cendant Corp.,* 243 F.3d at 732 (internal quotation marks and citation omitted). The lodestar is also preferable where "the nature of the settlement evades the precise evaluation needed for the percentage of recovery method." *In re Gen. Motors,* 55 F.3d at 821; *see also In re Rite Aid,* 396 F.3d at 300. The percentage-of-recovery method is preferred in common fund cases, as courts have determined "that Class Members would be unjustly enriched if they did not adequately compensate counsel responsible for generating the fund." *Varacallo,* 226 F.R.D. at 249 (internal quotation marks and citation omitted). The Court has discretion to decide which method to employ. *Charles v. Goodyear Tire & Rubber Co.,* 976 F.Supp. 321, 324 (D.N.J.1997). "While either the lodestar or percentage-of-recovery method should ordinarily serve as the primary basis for determining the fee, the Third Circuit has instructed that it is sensible to use the alternative method to double check the reasonableness of the fee." *Varacallo,* 226 F.R.D. at 249 (internal quotation marks and citation omitted).

Plaintiff argues, and the Court agrees, that the percentage-of-recovery method is appropriate in this case due to the creation of a common fund.

B. Percentage–of–Recovery Method

The Third Circuit has identified a non-exhaustive list of factors that a district court should consider in its percentage of recovery analysis:

> (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.

In re Rite Aid, 396 F.3d at 301 (quoting *Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190, 195 n. 1 (3d Cir.2000)). The district court need not apply these *Gunter* fee award factors in a formulaic way. Certain factors may be afforded more weight than others. *Id.* at 301. The district court should engage in a robust assessment of these factors. *Id.* at 302; *see also Gunter,* 223 F.3d at 196 (vacating district court's ruling because the fee-award issue was resolved in a "cursory and conclusory" fashion).

***12** The Court finds that the totality of the *Gunter* factors weighs strongly in favor of approval of the fee award. Given the similarity and overlap of the *Gunter* and *Girsh* factors, the Court incorporates by reference the reasons given for approval of the settlement agreement. The Court will now discuss additional reasons that support approval of attorney fees in this matter.

1. The Size of the Fund Created and the Number of Persons Benefitted

With regard to the size and nature of the Settlement Fund and the number of persons benefitted by the Settlement Agreement, Class Counsel obtained a settlement that creates a common fund of $1.15 million. Of the 557 class members, 265 filed Claims Forms, resulting in a participation rate of almost 47%. Accordingly, the gross amount per person (over $2000) parallels other employee misclassification cases. *See Alli v. Boston Market Corp.,* No. 10–cv–0004 (D.Conn.) (final approval of S3 million settlement for 1,921 class members-$1,561 per person); *Jenkins v. Sports Authority,* No. 09–cv–224 (E.D.N.Y.) (final approval of $990,000 settlement for class of 559 co-managers-$1,771 per person); and *Caissie v. BJ's Wholesale Club,* No. 08–cv–30220 (D. Mass. June 24, 2010) (final approval of $9.15 million settlement for class of 2,803 "mid-managers"-$3,264 per person). Given the total settlement value, as well as the number of class members entitled to benefits and the gross amount per person, this factor weighs in favor of approval.

***2.* Presence or Absence of Substantial Objections by Members of the Class to Settlement Terms and/or Fees Requested by Counsel**

The absence of objections by settlement class members to the fees requested by class counsel strongly supports approval. As noted above, notice was sent directly to the 557 potential class members and there were no objections to the settlement and no requests for exclusion (Lefebvre Dec. at ¶¶ 15–16.); *see In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 305 (3d Cir.2005) ("such a low level of objection is a 'rare phenomenon' ") (citation omitted). The lack of *any* negative feedback in the face of an extensive notice plan leads the Court to conclude that the settlement class generally and overwhelmingly approves of the settlement. *See Varacallo v. Mass. Mutual Life Ins. Co.,* 226 F.R.D. 207, 237–38 (D.N.J.2005) (finding exclusion and objection

requests of .06% and .003%, respectively, "extremely low" and indicative of class approval of the settlement). As such, this factor weighs in favor of approval. *See In re Lucent Techs., Inc., Sec. Litig.,* 327 F.Supp.2d 426, 435 (D.N.J.2004) (finding that this factor weighed in favor of approval where only nine of nearly three million potential Class Members objected to the fee application).

3. Skill and Efficiency of Attorneys

As discussed in the section on class certification, class counsel are experienced in litigating and settling consumer class actions. Class counsel obtained substantial benefits for the class members—despite vigorous defense by Defendant's counsel—a consideration that further evidences class counsels' competence. Thus, this factor also weighs in favor of approval of the fee award.

4. The Complexity and Duration of the Litigation

***13** As explained in the discussion of the *Girsh* factors, this case has been litigated for over three years and involves uncertain legal issues. The parties reached the settlement after access to extensive discovery and arm's length settlement negotiations. Thus, this factor weighs in favor of approval.

5. The Risk of Non–Payment

Class counsel undertook this action on a contingent fee basis, assuming a substantial risk that they might not be compensated for their efforts. (Pl.'s Mot. at 7.) Courts recognize the risk of non-payment as a major factor in considering an award of attorney fees. *See In re Prudential–Bache Energy Income P'ships Sec. Litig .,* 1994 U.S. Dist. LEXIS 6621, at *16, 1994 WL 202394 (E.D.La. May 18, 1994) ("Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable."). Class counsel invested substantial effort and resources to obtain this favorable settlement. Accordingly, this factor weighs in favor of approval.

6. The Amount of Time Devoted to the Litigation

Class counsel reports over 1,000 hours of contingent work on this case for the past three years. (PL's Mot. at 7.) Based on the amount of time expended on this matter, this factor weighs in favor of approval.

7. Awards in Similar Cases

The Court must also take into consideration amounts awarded in similar actions when approving attorney fees. Specifically, the Court must: (1) compare the actual award requested to other awards in comparable settlements; and (2) ensure that the award is consistent with what an attorney would have received if the fee were negotiated on the open market. *See, e.g., In re Remeron Direct Purchaser Antitrust Litig.,* 2005 U.S. Dist LEXIS 27013, *42–46, 2005 WL 3008808 (D.N.J. Nov. 9, 2005). While there is no specific benchmark for fee awards in the Third Circuit, there has been a "range of 19 percent to 45 percent of the settlement fund approved in other litigations." *In re Schering–Plough Corp. Sec. Litig.,* 2009 U.S. Dist. LEXIS 121173 at *14, 2009 WL 5218066 (approving 23% fee in $165 million securities settlement); *see also In re GMC Pick–Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir.1995)*, at 822 (noting a range of nineteen to forty-five percent); *see also In re Ikon Office Solutions v. Stuart,* 194 F.R.D. 166, 194 (E.D.Pa.2000) ("Percentages awarded have varied considerably, but most fees appear to fall in the range of nineteen to forty-five percent").

With respect to awards in comparable settlements, a 30% fee is in line with other wage and hour settlements—including misclassification cases—within the Third Circuit. *See, e.g., In re Janney Montgomery Scott LLC Financial Consultant Litigation,* 2009 U.S. Dist. LEXIS 60790, 2009 WL 2137224 (E.D.Pa. July 16, 2009) (30% fee approved in $2,880,000 wage and hour case); *Lenahan v. Sears,* 2006 U.S. Dist. LEXIS 60307 (D.N.J. July 10, 2006) (30% fee approved in $15,000,000 wage and hour case); *Herring v. Hewitt.* No. 3:06–cv–00267–GB (D.N.J.2009) (30% fee approved in $4,900,000 misclassification case); *In re Staples Inc. Wage & Hour Employment Practices Litig.,* No. 08–5746 (MDL–2025) (D.N.J.2011) (28.5% fee approved in $42,000,000 retail misclassification case); *Craig v. Rite Aid Corp.,* 2013 U.S. Dist. LEXIS 2658, 2013 WL 2145810 (M.D.Pa.2013) (32% fee approved in $20,900,000 retail misclassification settlement). Given these cases, class counsel's request of $345,000 is reasonable and commensurate with awards in comparable eases.

***14** The second part of this analysis addresses whether the requested fee is consistent with a privately negotiated contingent fee in the marketplace. "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," *In re Remeron Direct Purchaser Antitrust Litig.,* 2005 U.S. Dist. LEXIS 27013, * 44–45, 2005 WL

1362974. "The object ... is to give the lawyer what he would have gotten in the way of a fee in an arms' length negotiation, had one been feasible." *In re Cont'l Ill. Sec. Litig.,* 962 F.2d 566, 572 (7th Cir.1992); *see also In re Synthroid Mktg. Litig.,* 264 F.3d 712, 718 (7th Cir.2001) ("[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."). To determine the market price for an attorney's services, the Court should look to evidence of negotiated fee arrangements in comparable litigation. *In re Cont'l Ill. Sec. Litig.,* 962 F.2d at 573 (stating that the judge must try to simulate the market "by obtaining evidence about the terms of retention in similar suits, suits that only differ because, since they are not class actions, the market fixes the terms"). As explained more fully below, class counsel used standard hourly rates to calculate the lodestar amount. (*See* Lesser Decl., Ex. E–F.) These hourly billable rates are consistent with hourly rates routinely approved by this Court in complex class action litigation. *See In re Merck & Co.,* 2010 U.S. Dist. LEXIS 12344 at *45; *McGee,* 2009 U.S. Dist. LEXIS 17199 at *50.

In sum, for all the reasons stated above, the Court concludes that the requested fee by class counsel is fair and reasonable under the percentage-of-recovery method. The Court will approve class counsel's application for attorney fees in the amount of $345,000.

C. Lodestar Cross–Check

Although the Court has determined that class counsel's requested fees are reasonable under the percentage-of-recovery method, the Court will employ the lodestar method as an appropriate cross-check. *Varacallo,* 226 F.R.D. at 249 ("While either the lodestar or percentage-of-recovery method should ordinarily serve as the primary basis for determining the fee, the Third Circuit has instructed that it is sensible to use the alternative method to double check the reasonableness of the fee." (internal quotation marks and citation omitted)).

The lodestar analysis is performed 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: *see also In re Diet Drugs Prod. Liab. Litig.,* 582 F.3d 524, 540 (3d Cir.2009). When performing this analysis, the Court "should apply blended billing rates that approximate the fee structure of all the attorneys who worked on the matter." *In re Rite Aid.* 396 F.3d at 306. The lodestar figure is presumptively reasonable when it is calculated using a reasonable hourly rate and a reasonable number of hours. *Planned Parenthood of Cent. N.J. v. Att'y Gen. of N.J.,* 297 F.3d 253, 265 n. 5 (3d Cir.2002) (citations omitted).

***15** After calculating the lodestar amount, the Court may increase or decrease the amount using the lodestar multiplier. The multiplier is calculated by dividing the requested fee by the lodestar figure. "The multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *In re Rite Aid.* 396 F.3d at 305–06 (footnote omitted). The multiplier "need not fall within any pre-defined range, provided that the District Court's analysis justifies the award." *Id.* at 307 (footnote omitted). Further, the Court is not required to engage in this analysis with mathematical precision or "bean-counting." *Id.* at 306. Instead, the Court may rely on summaries submitted by the attorneys; the Court is not required to scrutinize every billing record. *Id.* at 306–07.

Based upon their hourly rates, class counsel calculated a combined lodestar figure of $608,392.67. (Pl. Mot. at 16.) In support of their fee application, class counsel provided detailed exhibits explaining the billing rates for each attorney that worked on the case. (*See* Lesser Decl., Ex. E–F.) Class counsel calculated the lodestar figure taking all of these billing rates into account. An examination of the hours expended by class counsel reveals that appropriate work was performed by class counsel in light of the size and complexity of this case. Accordingly, the Court finds the billing rates to be appropriate and the billable time to have been reasonably expended. (*See* Lesser Decl., Ex. E–F.) The lodestar is thus presumptively reasonable. Therefore, the Court sees no reason to find the lodestar figure of $345,000 unreasonable.

Here, the lodestar multiplier is approximately 0.57. (Pl. Mot. at 16.) Indeed, because the lodestar is $608,392.67 and the requested fees are $345,000, the result is a *negative* lodestar multiplier. (*Id.*) This multiplier is *below* the range found to be acceptable by the Third Circuit and this Court. *See In re Cendant Corp. PRIDES Litig.,* 243 F.3d at 734, 742 (approving a suggested multiplier of three and stating that multipliers "ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied"); *In re Schering–Plough Corp.,* 2012 U.S. Dist. LEXIS 75213, at *22 (noting that a 1.6 multiple "is an amount commonly approved by courts of this Circuit," and approving it as

reasonable); *McCoy v. Health Net. Inc.,* 569 F.Supp.2d 448, 479 (D.N.J.2008) (finding a multiplier of almost 2.3 to be reasonable). Thus, this Court considers the lodestar multiplier to be reasonable.

D. Expenses

Class Counsel also seek reimbursement of $4,462.80 in litigation expenses to be paid from the $ 1.15 million award. (Pl.'s Mot. at 2 .) "Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *In re Safety Components Int'l, Inc.,* 166 F.Supp.2d at 108 (citing *Abrams v. Lightolier Inc.,* 50 F.3d 1204, 1225 (3d Cir.1995)). Class counsel contends that these expenses reflect costs expended for the purposes of litigating this action, including costs associated with court fees, travel expenses, photocopying, mailing, telephone usage, and PACER/Lexis costs. (*See* Lesser Decl. ¶ 28.) The Court finds that the expenses were adequately documented and reasonably and appropriately incurred in the litigation of the case. *See In re Datatec Sys. Sec. Litig.,* 2007 U.S. Dist. LEXIS 87428, at *27, 2007 WL 4225828 (D.NJ. Nov. 28, 2007).

E. Enhancement Award

***16** Finally, class counsel also request that the Court approve the payment of a $7,500 enhancement award to Plaintiff Hegab. (Pl.'s Mot. at 11.) "[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 ." *Dewey v. Volkswagen of Am.,* 728 F.Supp.2d 546, 577 (D.N.J.2010) (internal quotation marks and citation omitted). Class counsel explains that Plaintiff Hegab provided valuable information about his experiences working for Family Dollar, made himself available as needed, answered discovery, was deposed and stayed in touch with class counsel throughout the litigation. (Pl.'s Mot. at 11.) Modest enhancement/incentive awards are routinely approved. *See, e.g., In re Insurance Brokerage Antitrust Litig.,* 2007 WL 2916472 at *8 (D.N.J. Oct 5, 2007) ($10,000 incentive award to each plaintiff, resulting in total payment of $250,000); *Lazy Oil Corp. v. Watco Corp.,* 95 F.Supp.2d 290, 324–25, 345 (incentive awards of $5,000 to $20,000 awarded); *Godshall v. Franklin Mint Co.,* 2004 WL 2745890 at *4 (E.D.Pa. Dec.1, 2004) ($20,000 to each named plaintiff). Given the duration of the litigation and the extent of personal involvement, the Court finds that Plaintiff Hegab is entitled to the requested

F. Summary of Attorney Fees, Expenses, and Enhancement Award Analysis

For the foregoing reasons, the Court grants the application of class counsel for an award of attorney fees, reimbursement of expenses, and an enhancement award payment.

VI. *CONCLUSION*

Because the named Plaintiff has satisfied all of the requirements of Fed.R.Civ.P. 23, this Court certifies the class for purposes of this Settlement and approves the Settlement Agreement. The Court also grants the application of Class Counsel for attorney fees, reimbursement of expenses, and class representative enhancement. An appropriate Order accompanies this Opinion

All Citations

Not Reported in F.Supp.3d, 2015 WL 1021130

End of Document

2005 WL 6716404
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

In re AT & T CORPORATION SECURITIES LITIGATION.
This Document Relates To: All Actions.

MDL Docket No. 1399.
|
Civ. No. 00–5364 (GEB).
|
April 25, 2005.

MEMORANDUM OPINION

BROWN, District Judge.

***1** This matter comes before the Court upon Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds, and the Application of Plaintiffs' Counsel for an Award of Attorneys' Fees and Reimbursement of Expenses. A fairness hearing was held on February 28, 2005. The Court, having reviewed the parties' written submissions and oral argument, and for the reasons discussed herein, grants both the Motion and Application.

I. BACKGROUND

This action involves a securities class action lawsuit that was vigorously litigated for more that four years. The Court is now called to consider the fairness of the proposed cash settlement in the amount of $100,000,000 that was reached two weeks after trial began in October 2004. The settlement was reached with the considerable assistance of Magistrate Judge John J. Hughes, whose major contribution to the management of this complex litigation from its inception was of great benefit.

Having discussed at length the factual and procedural history of this action in the Memorandum Opinion that was issued by this Court on June 4, 2004, the Court does not need to repeat such details here. At summary judgment, Plaintiffs' claims under §§ 10(b) and 20(a) of the Securities and Exchange Act of 1934 ("1934 Act") survived because this Court found that a triable issue of fact existed. The issue concerned a single statement made by Defendants at an analyst conference on December 6, 1999, regarding a 9–11% projected revenue growth for the Business Service Unit or AT & T ("the December 6 Statement"). Whether Defendants made this statement with "actual knowledge" of its falsity was an issue of fact that could only be resolved at trial.

Following the Court's ruling on the summary judgment motion, the parties proceeded with trial preparation, which included the filing of numerous motions *in limine*. Oral argument on these motions was heard on September 23, 2004. The Court ruled from the bench on a number of these motions, and reserved on others. The trial began before this Court on October 5, 2004. On the first day of trial, the jury was selected and impaneled. During the next seven days of trial, after opening statements, Plaintiffs called eleven witnesses to the stand and submitted numerous documents into evidence.

After completing eight days of trial, this Court referred the parties to Judge Hughes for a settlement conference on October 18 and 20, 2004. The negotiations proved to be successful, and the parties entered into a tentative settlement agreement. Under the agreement, AT & T would pay $100,000,000 to the Class, which consisted of purchasers of AT & T common stock between December 6, 1999 through May 1, 2000. (Decl. of Arthur C. Leahy ("Leahy Decl.") at ¶ 154). On October 26, 2004, this Court granted preliminary approval of the settlement, approved the form and manner of Notice of Settlement of Class Action ("Notice"), and scheduled a fairness hearing for February 28, 2005.

***2** Pursuant to this Court's Order of October 26, 2004, notice was mailed to over one million potential Class Members by the Court-appointed Settlement Administrator, Gilardi & Co. LLC ("Gilardi"). (Pls.' Settlement and Plan Approval Mem, at 11). Gilardi also published a notice of the settlement hearing in *Investor's Business Daily* and posted pertinent documents on its website.

The Notice described the Plan of Allocation which dictateshow the NetSettlement fund will be allocated. Generally, the Plan of Allocation provides that proceeds from the Fund will be distributed to Class Members who suffered a "net loss on all transactions in AT & T common stock during the Class Period" and who timely submit valid Proofs of Claim and Release forms. (Decl. of Carole K. Sylvester ("Sylvester Decl."), Ex. A at 4). The Notice also informed Class Members of their right to be heard at the fairness

hearing. The deadline for filing objections was January 31, 2005.

II. DISCUSSION

A. Fairness of Class Action Settlement and Plan of Allocation

1. Standard for Judicial Approval of Settlement in Class Action

Under Federal Rule of Civil Procedure 23(e), the district court must approve any settlement in a class action, and direct reasonable notice to all class members who may be bound by such settlement. Fed. R. Civ. P. 23(e). Approval is warranted only if the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(C). Acting as a fiduciary responsible for protecting the rights of absent class members, the court is required to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." *In re Cendent Corp. Litig.,* 264 F.3d 201, 231 (quoting *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768 (3d Cir.1995)). This determination rests within the sound discretion of the court. *Girsh v. Jepson,* 521 F.2d 153, 156 (3d Cir.1975).

In *Girsh v. Jepson,* the Third Circuit identified nine factors that a district court should consider when determining whether a proposed class action settlement warrants approval. 521 F.2d at 157. These factors 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 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." *Id.* at 157. The burden of proving that these factors weigh in favor of approval rests on the proponents of a settlement.

2. A pplication of Girsh Factors

***3** Based on the tacts and circumstances of this case, the Court concludes that factors one through five overwhelmingly weigh in favor of approval of settlement, and factors six through nine weigh slightly or moderately in favor of approval. Significantly, the Court finds that none of the *Girsch* factors suggest that the proposed settlement should not be approved. The Court will now discuss its reasons for arriving at this conclusion.

a. Complexity, Expense and Likely Duration of the Litigation

The first factor concerning the complexity, expense and duration of litigation, is considered to evaluate "the probable costs, in both time and money, of continued litigation." *Cendant,* 264 F.3d at 233 (quoting *GM Trucks,* 55 F.3d at 812). As ths Court noted in earlier proceedings, securities class actions are by their nature convoluted and complex. (Tr. of Fairness Hearing, Feb. 28, 2005). This action was no exception. The lawsuit involved alleged violations of §§ 10(b) and 20(a) of the Securities and Exchange Act of 1934 ("1934 Act") and Rule 10b–5, and was subject to the provisions of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). Thus, from its inception, the case involved complex legal and factual issues. With the resolution of summary judgment, however, the relevant issues of this case were narrowed substantially. The crux of the Plaintiffs' case rested on one specific statement made by Defendants. Though the initial complexity of this action had been significantly refined, the remaining factual issue left to be resolved was not straightforward or simple. Plaintiffs were left withe formidable task of proving that the December 6 Statement was made with "actual knowledge" that it was false or misleading.

Further, in addition to establishing liability at trial, Plaintiffs were required to establish loss causation and damages. Indeed, the issue of damages in a § 10(b) action adds to the complexity factor. As this Court previously ruled, the Plaintiffs would need to prove that the share price decreased because of the alleged misrepresentation. This task would likely involve conceptually difficult economic theories and complex calculations. Reliance on damage experts in proving their theories was expected, and as this case indicated, the parties' damage experts had diametrically opposed opinions. Furthermore, Defendants filed a motion *in limine* to exclude the report and testimony of Plaintiffs' damage expert. Dr. Nye. During oral argument, this Court expressed doubt as to the admissibility of Dr. Nye's opinion, and re served ruling on this issue until the damages phase of the trial. Thus, it is evident that the issue of damages would have been litigated

vigorously by both parties—but was nonetheless obviated by the settlement agreement.

Without question, significant expense in both time and money would have continued to incur had the litigation gone Forward —particularly in light of the remainder of trial, and any potential filings of post-trial motions or appeal. Accordingly, the Court finds that the first *Girsch* factor weighs strongly in favor of approval.

b. Reaction of the Class to the Settlement

***4** This factor weighs heavily in favor of approval. Notices of the settlement were mailed to over one million potential class members on November 9, 2004. (Sylvester Decl. ¶ 3). Notice was also published in *Investor's Business Daily,* and relevant documents were posted on Gilardi's website. However, only eight class members filed objections.[1] Notably, none of these objections opposed the settlement amount, and only four objections concerned the attorneys fees which will be discussed in Part B of this Opinion.[2] As the Third Circuit articulated in *Rite Aid,* "such a low level of objection is a 'rare phenomenon.' " *Rite Aid,* 396 F.3d at 305, Furthermore, no objections were filed by any institutional investors who had great financial incentive to object. (Lead Counsel's Resp. at 1). Consequently, the Court concludes that the absence of a single objection by a Class Member to the settlement award strongly weighs in favor of approval.

1 Two objections were filed by Richard R. Furstenau and State Street Bank and Trust Company, on behalf of the AT & T Savings Plan Master Trust concerning ERISA claims. The parties resolved the dispute prior to the fairness hearing, and these objections were withdrawn. (Tr. of Fairness Hearing, Feb. 28, 2005).

2 An objection, dated November 19, 2004, was filed by John N. Pavlis ("Pavlis"), Custodian for Anastasia F. Pavlis and Nicholas J. Pavlis. Pavlis objected to the form and format of the Notice of Settlement, and stated that it was "improper, vague and unduly cumbersome and constitutes a violation of the United States Constitution as it applies to the undersigned through the Fourteenth Amendment." (John N. Pavlis Objection at 1). This constituted the entirety of his objection. Pavlis fails to provide the Court with any evidence, argument or reasons supporting his assertion. Thus, the Court concludes that his contention lacks merit and is therefore rejected.
Objector William A. Hoffman III ("Hoffman") also objected to the Notice by stating that it did not disclose the amount of damages demanded, (Hoffman Objection, ¶ 5). However, such a statement is not required under the PLSRA when the parties disagree on the amount of damages that would have been recoverable, which is clearly the case here. *See* 15 U.S.C. § 78u–4(a)(7)(B)(ii). Therefore, the Court likewise rejects this objection and finds the Notice of Settlement to be adequate.

c. The Stage of the Proceedings and the Amount of Discovery Completed

The Court should consider this factor to evaluate "the degree of case development that class counsel have accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Cendant,* 264 F.3d at 235 (quoting *GM Trucks,* 55 F.3d at 813). The Court notes at the outset that this action has been vigorously litigated for over four years. During this time, a considerable amount of time, money and effort was expended by all parties in litigating the action.

The numerous events that transpired during the course of litigation until the reaching of settlement are a testament to the hard work, dedication, and diligent efforts invested by Lead Counsel on behalf of the Class. These events include: 1) litigating motions to dismiss, motion for leave to amend the Complaint, complex discovery motions, motion for class certification, and motion for summary judgment; 2) engaging in extensive motion practice with regard to the protective order; and 3) trial preparation and trying the case for two weeks. (Lead Counsel's Resp, at 2). Additionally, the parties engaged in extensive discovery. Plaintiffs reviewed and analyzed over 4.5 million pages from Defendants' document production, and over 380,000 additional pages from forty-eight non-party witnesses. Plaintiffs conducted numerous informal interviews, deposed more than eighty fact witnesses, and produced over 3,000 pages of documents in response to Defendants' requests.

Based on the labor-intensive nature of the proceedings that had taken place, and the fact that the case actually went to trial, the Court finds that Counsel had a thorough and exhaustive appreciation for the merits of the case prior to settlement. Accordingly, the Court concludes that this factor cuts strongly in favor of settlement.

d. Risks of Establishing Liability

This factor should be considered to "examine what potential rewards (or downside) of litigation might have been had

class counsel decided to litigate the claims rather than settle them." *Cendant,* 264 F.3d at 237 (quoting *GM Trucks,* 55 F.3d at 814), As aforementioned, in resolving the summary judgment motion, this Court identified the key factual issue upon which Plaintiffs' case rested. Specifically, to succeed at trial, Plaintiffs would have to prove that Defendants made the December 6 Statement with actual knowledge that it was false or misleading. Throughout the litigation, Defendants vehemently denied any wrongdoing. Defendants asserted that a reasonable basis existed for making the statement. At trial, Defendants intended to call key witnesses, namely AT & T Executives, who would support this assertion.

***5** Given this backdrop, the Court finds that liability would have not been easily established if the trial continued rather than settled. It involved difficult factual issues which would have translated into protracted litigation and accumulating expenses, in both time and money. Thus, whether the jury would have returned a favorable verdict for the Class remains uncertain. What is certain, however, is that Plaintiffs faced formidable obstacles in establishing liability. Accordingly, the Court finds that this *Girsch* factor weighs strongly in favor of approval.

e. Risk of Establishing Damages

This factor also "attempts to measure the expected value of litigating the action rather than settling it at the current time." *Cendant,* 264 F.3d at 238 (quoting *GM Trucks,* 55 F.3d at 816). Plaintiffs submit that they faced significant risks in establishing damages in this case. Plaintiffs contend that establishing damages at trial would have lead to a battle of the experts. The experts on both sides had completely contradictory opinions as to damages. Plaintiffs would have been required to discredit Defendants' damage expert opinion that the decease in value of shares was caused by factors unrelated to the December 6 Statement. This would have been difficult because of the other obstacle Plaintiffs faced—the possibility of not having their damage expert, Dr. Nye, testify at trial. Thus, the Court agrees that there was a significant risk in establishing damages, and concludes this factor also weighs in favor of approval.

f. Additional Girsch Factors

The sixth factor concerning the risks of maintaining the class action through the trial slightly weighs in favor of approval. Plaintiffs argue that pursuant to Federal Rule of Civil Procedure 23(c)(1)(C), which allows the Court to alter or amend class certification before final judgment, there was a risk that the Class would be altered to exclude purchasers of stock on or alter December 21, 1999. Plaintiffs assert that this would depend on the Court's ruling on the admissibility of Dr. Nye, which the Court chose to reserve until the damages phase of trial. Because such a possibility existed, the Court finds Plaintiffs' argument somewhat persuasive and concludes that this factor slightly tips the balance in favor of approval.

The seventh factor concerning the ability of Defendants to withstand a greater judgment also slightly favors approval. In *Cendant Corp. Litig.,* 264 F.3d 201 (3d Cir.2001), the Third. Circuit interpreted this factor as concerning "whether the defendants could withstand a judgment for an amount sufficiently greater than the Settlement." *Id.* at 240. Plaintiffs submit that there is no guarantee that AT & T would be able to withstand a multi-million or billion dollar judgment, as evidenced by the downfall of major corporations such as Enron, Tyco and WorldCom. As the Third Circuit noted in *Cendant,* "the possibility of bankruptcy is quite real when the settlement or judgment numbers sufficiently increase." *Id.* at 241. In light of these considerations, the Court finds that this factor weighs in favor, albeit only slightly, of approval.

***6** Lastly, the eighth and ninth factors concerning the range of reasonableness of the settlement fund in light of the best possible recovery and the attendant risks of litigation weigh in favor of settlement, "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved. The percentage recovery, rather must represent a material percentage recovery to plaintiff in light of all the risks considered under *Girsh." In re Cendant Corp. Sec. Litig.,* 109 F.Supp.2d 235, 263 (D.N.J.2000) (citation and quotations omitted). In the present case, although the best possible recovery had yet to be determined, a recovery of $ 100,000,000 represents a material percentage considering the significant risks Plaintiffs faced in establishing liability. Plaintiffs note that AT & T Executives Nicholas Cyprus and Richard Roscitt testified at trial they completely believed the December 6 Statement regarding 9–11% projected growth was attainable. Thus, if the trial continued, it was wholly possible that the jury would have found these witnesses, in addition to the other AT & T executives, completely credible —and render a verdict in favor of Defendants. As with the other factors, the Court finds that this favors settlement.

3. Summary of Girsch Factors

In conclusion, the Court, finds that factors one through five all weigh heavily in favor of approval of the settlement. Factors six through nine weigh slightly or moderately in favor of approval. Significantly, the Court finds that none of the *Girsch* factors weigh against settlement. As the above analysis demonstrates, the Court concludes that the settlement of $100,000,000 represents an excellent result for the Class considering the substantial risks Plaintiffs faced, and the absence of any guarantee of a favorable verdict. Accordingly, the Court grants Lead Plaintiffs' motion for final approval of the class action settlement.

4. Plan of Allocation

In approving the Plan of Allocation of the Settlement ("Plan"), the Court must likewise determine whether the Plan is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). The Court notes that no Class Members have objected to the Plan of Allocation.[3] This, along with the reasons stated above that support approval of the settlement, lead this Court to conclude that the Plan satisfies the standard set forth in Federal Rule 23(e). Accordingly, the Court grants Lead Plaintiffs' motion for final approval of the Plan of Allocation,

[3] By letter dated December 19, 2004, Class Member Charles Wm. Dobra ("Dobra") expressed concern regarding the necessary documentation for submitting a Proof of Claim (but did not object to the settlement award or attorneys' fees themselves). Dobra suggests that Class Members may have difficulty accessing the proper documentation relating to their ownership of stock. The Court finds it reasonable, however, to require Class Members to substantiate their claims through documentation. Though it may difficult for some Members to access the proper documentation, failure to meet the evidentiary requirement does not automatically lead to a rejection of a claim as Dobra suggests. Instead, the processing of Class Member's claim may be delayed, or lead to a possible rejection. Class Members may seek assistance from the Settlement Administrator or Plaintiffs' Counsel by calling the toll-free number provided in the Notice of Settlement.
The Court requested Counsel to respond to Dobra's concerns. Counsel timely complied with the request and the responses were forwarded to Dobra. The Court notes that Dobra did not file any additional objections after Counsels' responses were forwarded to him.

B. Attorneys' Fees and Reimbursement of Expenses

1. Standard for Judicial Approval of Fees

Lead Counsel seek approval of its application for attorneys' fees in the amount of 21.25% of the settlement, and reimbursement of expenses in the amount of $5,465,996.79. The awarding of fees is within the discretion of the court, so long as the court employs the proper legal standards, follows the proper procedures, and makes findings of facts that are not clearly erroneous. *In re Cendant Corp. PRIDES Litig.,* 243 F.3d 722, 727 (3d Cir.2001). In *Rite Aid Corp. Securities Litigation,* the Third Circuit recently discussed the proper legal standard that a district court must employ when determining whether to approve a request for attorneys' fees particularly, in a common fund case where the attorneys' fees and the clients' award are drawn from the same source. 396 F.3d 294 (3d Cir.2005). When a district court calculates the attorneys' fees based on a percentage-of-recovery method, which is the case here, the court should also use the lodestar method as a cross-check on the reasonableness of the award. *Id.* at 300.

***7** District courts are given great deference in determining whether a request for attorneys' fees should be granted. Notwithstanding this deferential standard, a district court is required to clearly articulate the reasons which support its conclusion. *Rite Aid,* 396 F.3d at 301. The Third Circuit identified several factors that a district court should consider. These factors include:

> (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 plaintiff's counsel; and (7) the awards in similar cases.

Rite Aid, 396 F.3d at 301 (citing *Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190, 195 n. 1 (3d Cir.2000)). The district court need not apply these fee award factors in a formulaic way. Certain factors may be afforded more weight than others. *Rite Aid,* 396 F.3d at 301. The Third Circuit emphasized in *Rite Aid,* however, that the district court must engage in a robust assessment of these factors. *Rite Aid,* 396 F.3d at 302; *see also Gunter,* 223 F.3d at 196 (vacating district court's ruling because the fee-award issue was resolved in a "cursory and conclusory" fashion).

In *Cendant Corp. Litig.,* 264 F.3d 201 (3d Cir.2001), the Third Circuit discussed the proper standard that should be applied in class action lawsuits that are brought under the PSLRA.

> Although in general the court should use the same seven-factor test that our cases have developed for reviewing fee requests in other class action contexts, review in PSLRA cases must be modified to take into account the changes wrought by the Reform Act. The biggest change, we believe, is that courts should afford a presumption of reasonableness to fee requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel. This is not to say, however, that this presumption cannot be overcome. There is an arguable tension between the general schema of the PSLRA on the one hand and its overarching provision that requires the court to insure that counsel fees not exceed a reasonable amount, on the other. We hold that the presumption will be rebutted when a district court finds the fee to be (prima facie) clearly excessive.

Cendant, 264 F.3d at 220 (citation omitted). Thus, the relevant inquiry for the district court is whether this presumption has been rebutted. At the outset, the Court notes that the percentage fee of 21.25% was negotiated by Lead Counsel and Lead Plaintiff New Hampshire Retirement System ("NHRS") at the beginning of the case. (Pls.' Attorneys' Fees Mem. at 12). Additionally, each Court–Appointed Lead Plaintiff subsequently approved the fee. (*Id.*). Thus, the requested fee of 21.25% is presumptively reasonable.

2. Relevant Factors

***8** The Court finds that the totality of these factors weighs strongly in favor of approval of the fee award for the same reasons provided in this Court's analysis of the *Girsch* factors. Given the similarity and overlap of the *Girsch* factors with the factors the Court must consider here, the Court incorporates by reference the reasons given for approval of the settlement. The Court will now discuss additional reasons that support approval of attorneys' fees in this matter.

First, the absence of substantial objections by class members to the fees requested by counsel strongly supports approval. Only four objections by Class Members concerned attorneys' fees. These objections fall into two main categories: 1) that the fee award is excessive and 2) that a staggered fee system should be implemented.[4] With respect to the first issue, Objectors Hoffman, Carlon M. Colker, Marian Washburn, and Jacquelynn D. Frame and Doland J. Frame ("the Frames") challenge the amount of attorneys' fees and expenses. The Objectors generally suggest that the fees are excessive, and that documentation should be provided to substantiate the award. For example, Hoffman cites a study where it was determined that 15.1% is the average percentage for fee awards in class action lawsuits resulting in settlements over $100 million. Notably, however, none of the Objectors cite controlling authority that would require this Court to make a downward adjustment.

4 The Frames also suggest that a *"De Minimus* Settlement Administrator" be appointed who will be responsible for the administration of claims totaling less than $5000. The Frames argue that this is necessary because many Class Members with small claims will likely not expend the effort to fill out their Proof of Claims. The Court rejects this proposal. In addition to the absence of binding precedent that would require this Court to adopt such a proposal, the Court finds no reason why the settlement, which was the product of considerable effort on the part of all Counsel, needs to be modified in order to accommodate those Class Members who cannot expend (what may be *de minimis*) effort to file a Proof of Claim.

As aforementioned, the requested fee of 21.25% of the settlement was negotiated by Lead Plaintiff NHRS and Lead Counsel at the start of trial, and was subsequently approved by all Lead Plaintiffs. (Pls.' Attorneys' Fees Mem. at 12), Therefore, this fee arrangement is entitled to a presumption of reasonableness. The Objectors fail to present evidence to rebut this presumption.[5] As the Court expressed at the fairness hearing, this lawsuit may be characterized as anything but average. Lead Counsel invested the time (over 48,000 hours) and advanced its own money (over $5,000,000), to develop this case from the ground up, try the case for two weeks, and achieve an excellent result for the Class. The Court witnessed first hand the dedication and tenacity with which this case was prosecuted, and. concludes that a fee award of $21,250,000 is well-deserved. Consequently, the Court rejects Objectors' request for a reduction in the fee award.

5 The Frames note that according to the fee agreement, Lead Counsel was entitled to 15% for any recovery up to $25,000,000, 20% for any recovery between $25,000,000 and $50,000,000, and 25% for any recovery over $50,000,000. (Frames Reply Mem, to Objection to Proposed Settlement at 2). Citing *Tn re Rite Aid Corp. Securities Litigation,* 396 F.3d 294 (3d Cir.2005), the Frames contend that Lead Counsel should be held to the 15% recovery only since "it is no easier to try a case for $10 million than one for $100,000,000." *Id.* The Court finds this argument insufficient to rebut the presumption of reasonableness, and is therefore rejected.

Secondly, Objector Washburn proposes a staggered fee award.[6] Specifically, Washburn asserts that the Court should withhold a percentage of the attorneys' fees until the Class Members are paid. Additionally, Washburn argues that Lead Counsel should file reports periodically so that the settlement administration could be monitored closely. Washburn's proposal appears to focus on the possibility of Lead Counsel abandoning Class Members once their fees are paid. In response, Lead Counsel argues that their record of vigorous advocacy, their extensive experience in the securities class action settlements, and the involvement of Gilardi, an experienced independent Settlement Administrator, render this proposal unnecessary. (Lead Counsel's Resp. at 10).

6 Objector Hoffman joined in this objection on February 24, 2005.

***9** This Court agrees with Lead Counsel. By her objection, Washburn implicitly suggests that Lead Counsel cannot be trusted with properly effectuating the terms of the settlement. The Court finds no basis, however, to suddenly distrust Lead Counsel after having witnessed them vigorously prosecute this action for four years without any guarantee of success. Throughout the entire litigation, Plaintiffs' Counsel represented the Class with zealous advocacy and utmost diligence. They have given no indication to this Court that they will suddenly abandon Class Members during the administration of the settlement. Class Members will have at their disposal the Settlement Administrator to assist them in processing their claims. Further, this Court retains jurisdiction over this matter and will be available to Class Members for final resolution of any dispute that may arise. For these reasons, in addition to the absence of any controlling authority that would require this Court to enforce Washburn's proposal, the Court declines to implement a staggered fee award.

With regard to the size and nature of the common fund and the number of persons benefitted by the settlement, as discussed previously, Lead Counsel were able to obtain an excellent, sizeable result on behalf of the Class despite the substantial risks they faced in establishing liability. Further, the number of persons benefitting from this award is expected to be large considering the Notices of Settlement that were sent to over a million potential Class Members. Many thousands of Class Members will likely participate in the settlement. This factors weighs in favor of approval.

The factor concerning the skill and efficiency of the attorneys prosecuting the action also favors approval of the fee award. Lead Counsel are highly skilled attorneys with great experience in prosecuting complex securities action, and their professionalism and diligence displayed during 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.

The remaining factors likewise weigh in favor of settlement for the same reasons discussed in the first part of this Opinion. This class action began over fours years ago as a complex security class action. Over the course of litigation, with extensive discovery and motion practice, the Court was ultimately able to narrow the issues to very specific factual issues that had to be resolved at trial. Indeed, Lead Counsel invested a substantial amount of time and effort to reach this point and obtain the favorable settlement that it did. Having accepted the responsibility of prosecuting this class action on a contingent fee basis and without any guarantee of success or award, Lead Counsel nonetheless maintained vigor and dedication throughout. In sum, for all the reasons stated above, the Court concludes that the requested fee by Lead Counsel is fair and reasonable. Consequently, the Court grants approval of the requested attorneys' fees on this basis.

3. Lodestar Cross-check

***10** The Third Circuit has articulated that when an award is based on percentage of recovery, it is sensible to confirm the reasonableness of the award using the lodestar method. *Rite Aid,* 396 F.3d at 305–06. The lodestar analysis is performed 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." *Id.* at 305. When performing this analysis, the court "should apply blended billing rates that approximate the fee structure of all the attorneys who worked on the matter." *Id.* at 306. Thus, the lodestar multiplier is equal to the proposed fee award divided by the product of the total hours and the blended billing rate. If the lodestar multiplier is large, the award calculated under the percentage-of-recovery method may be deemed unreasonable, and a trial judge may consider a reducing the award appropriately. *Id.* at 306.

The multiplier, however, "need not fall within any pre-defined range, provided that the [d]istrict [c]ourt's analysis justifies

the award." *Id.* at 307. Further, the court is not required to engage in this analysis with mathematical precision or "bean-counting." *Id.* at 306. Instead, the court may rely on summaries submitted by the attorneys, and is not required to scrutinize every billing record. *Id.* at 306–07.

In the present case, the proposed fee award presented by Lead Counsel is 21.25% of the proposed, settlement, or $21,250,000. Counsel have submitted declarations indicating that the total number of hours expended by the attorneys and paraprofessionals in this case is 48,727.70 hours. (*See* Decl. of Keith F. Park Filed on Behalf of Lerach Coughlin Stoia Geller Rudman & Robbins LLP In Support of Application for Award of Attorneys' Fees and Reimbursement of Expenses ("Park Decl.") at 1–3; Decl. of Peter S. Pearlman Filed on Behalf of Cohn Litland Pearlman Herrmann & Knopf LLP In Support of Application for Award of Attorneys' Fees and Reimbursement of Expenses ("Pearlman Decl.") at 2–3; Decl. of Alan P. Cleveland Filed on Behalf of Sheehan Phinney Bass Green, P.A. In Support of Application for Award of Attorneys' Fees and Reimbursement of Expenses ("Cleveland Decl.") at 2; Decl. of Wendy W. Huang, Esq. Filed on Behalf of Secured Holdings, Inc. In Support o ("Application for Award of Attorneys" Fees and Reimbursement of Expenses at 1). Lead Counsel submit that the cumulative lodestar equals $16,626,896.49. (Pls.' Attorneys' Fees Mem. at 38). This amount is adequately supported by the detailed declarations submitted by the parties. The Court further notes that this lodestar value is based on the blended billing rates of all attorneys and paraprofessionals who were involved with this case. Accordingly, the Court accepts these calculations as the basis for performing the lodestar cross-check.

***11** These values render a lodestar multiplier of 1.28. The Court finds this result to be indicative of a truly reasonable fee award, particularly in light of the massive time and effort expended by Lead Counsel in litigating this action. The Court again notes that the attorneys in this matter, on both sides, exhibited a high level of proficiency and professionalism during the course of this litigation and finds the fee award to be well-deserved. In sum, for the reasons stated above, the Court grants approval of Lead Counsel's request for attorneys' fees.

4. Reimbursement of Expenditures

Lead Counsel also request reimbursement for expenses incurred during this litigation in the amount of $5,465,996.79. (Pls.' Attorneys' Fees Mem. at 1). "Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *In re Safety Components, Inc. Sec. Litig.,* 166 F, Supp.2d 72, 108 (D.N.J.2001) (citing *Ahrams v. Lightolier, Inc.,* 50 F.3d 1204, 1225 (3d Cir.1995)). The declarations submitted to the Court by Lead Counsel describe typical litigation expenditures including, *inter alia,* photocopies, postage, telephone, online legal research, court reporters, meals, hotel and transportation. The Court finds that these expenses were reasonably and appropriately incurred during the prosecution of this case, and sufficiently documented in the declarations. (*See* Park Decl. at 3–29; Pearlman Decl. at 3–5; Cleveland Decl. at 3–4). Consequently, the Court approves Lead Counsel's request for reimbursement.

Additionally, Lead Plaintiffs Mohammed Karkanawi, Mauline Coon, Secured Holdings, Inc., Robert Baker and and International Brotherhood of Electrical Workers Local 98 ("IBEW") request reimbursement for expenses incurred during the litigation, including lost wages, as Lead Plaintiffs in this action.[7] Under the PSLRA, lead plaintiffs are entitled to recover reasonable expenses incurred during litigation, including lost wages, that directly relate to their representation. *See* 15 U.S.C. § 78u–4(a)(4). The Court finds Lead Plaintiffs' request for reimbursement reasonable, and likewise properly substantiated in the declarations submitted to the Court. (*See* Decl. of Mohammed Karkanawi at 2; Decl. of Mauline Coon at 2; Decl. of Andrei Olenicoff at 3; Decl. of Robert Baker at 2; Decl. of Harry Foy at 4). Accordingly, the Court grants Lead Plaintiffs' request for reimbursement of expenses.

7 The following amounts are requested by Lead Plaintiffs: 1) $2,320 by Mohammed Karkanawi; 2) $113.40 by Mauline Coon; 3) $9,420 by Secured Holdings, Inc.; 4) $16,045 by Robert Baker; and 5) $2,550 by IBEW. (Pls.' Attorneys' Fees Mem. at 1).

III. CONCLUSION

For the foregoing reasons, the Court grants Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds, grants the Application of Plaintiffs' Counsel for an Award of Attorneys' Fees and Reimbursement of Expenses, and dismisses this action in its entirety with prejudice. The appropriate forms of Order accompany this Memorandum Opinion.

All Citations

Not Reported in F.Supp.2d, 2005 WL 6716404

End of Document

2020 WL 256132
Only the Westlaw citation is currently available.
United States District Court,
N.D. Georgia, Atlanta Division.

IN RE: EQUIFAX INC. CUSTOMER DATA SECURITY BREACH LITIGATION

MDL Docket No. 2800
|
No. 1:17-md-2800-TWT
|
Signed 03/17/2020

AMENDED ORDER GRANTING FINAL APPROVAL OF SETTLEMENT, CERTIFYING SETTLEMENT CLASS, AND AWARDING ATTORNEY'S FEES, EXPENSES AND SERVICE AWARDS

THOMAS W. THRASH, JR., United States District Judge

***1** Consumer Plaintiffs and Defendants Equifax Inc., Equifax Information Services, LLC, and Equifax Consumer Services LLC (collectively, "Equifax"), reached a proposed class action settlement resolving claims arising from the data breach Equifax Inc. announced on September 7, 2017. On July 22, 2019, this Court directed that notice issue to the settlement class. [Doc. 742]. This matter is now before the Court on the Consumer Plaintiffs' Motion for Final Approval of Proposed Settlement [Doc. 903] and Motion for Attorneys' Fees, Expenses, and Service Awards to the Class Representatives. [Doc. 858]. For the reasons set forth below and on the record of the hearing of December 19, 2019, the Court grants both motions, issues its ruling on the pending objections and motions from various objectors that have been filed, and will separately enter a Consent Order relating to the business practice changes to which Equifax has agreed and a Final Order and Judgment.

I. INTRODUCTION.

A. Factual Background and Procedural History.

On September 7, 2017, Equifax Inc. announced a data breach that it determined had impacted the personal information of about 147 million Americans. More than 300 class actions filed against Equifax were consolidated and transferred to this Court, which established separate tracks for the consumer and financial institution claims and appointed separate legal teams to lead each track.

In the consumer track, on May 14, 2018, plaintiffs filed a 559-page consolidated complaint, which named 96 class representatives and asserted common law and statutory claims under both state and federal law. [Doc. 374]. The complaint alleged claims including negligence, negligence per se, unjust enrichment, declaratory judgment, breach of contract (for those individuals who had provided personal information to Equifax subject to its privacy policy), and violation of the Fair Credit Reporting Act ("FCRA"), the Georgia Fair Business Practices Act ("GFBPA"), and various state consumer laws and state data breach statutes.

Equifax moved to dismiss the complaint in its entirety, arguing *inter alia* that Georgia law does not impose a legal duty to safeguard personal information, plaintiffs' alleged injuries were not legally cognizable, and no one could plausibly prove that their injuries were caused by this data breach as opposed to another breach. The parties exhaustively briefed the motion during the summer and early fall of 2018.

After the benefit of oral argument on December 14, 2018, the Court issued an order on January 28, 2019, granting in part and denying in part the motion to dismiss. [Doc. 540]. The Court allowed the negligence and negligence per se claims to proceed under Georgia law, finding among other things that the plaintiffs alleged actual injuries sufficient to support a claim for relief (*id.* at 15-21). The Court dismissed the FCRA claim, the GFBPA claim, the contract claims, and the unjust enrichment claims of those plaintiffs who had no contract with Equifax. The Court dismissed some state statutory claims, but allowed many others to proceed. Following the Court's order on dismissal, Equifax answered on February 25, 2019 [Doc. 571]. Before and after Equifax filed its answer, the parties engaged in significant discovery efforts and raised numerous discovery-related disputes with the Court in late 2018.

***2** On April 2, 2019, after more than 18 months of negotiations, the parties informed the Court they had reached a binding settlement that was reflected in a term sheet dated March 30, 2019, and that had been approved the following day by Equifax's board of directors. After consulting and

negotiating with federal and state regulators regarding revisions to the term sheet, the parties entered into the final settlement agreement on July 19, 2019, and presented the final settlement agreement to the Court on July 22, 2019. (App. 1, ¶¶ 17-24).[1] After a hearing on July 22, 2019, the Court entered an order directing notice of the proposed settlement ("Order Directing Notice") [Doc. 742]. In the Order Directing Notice, the Court found that it would likely approve the settlement as fair, reasonable, and adequate, and certify the settlement class.

[1] References in this Order to "App." refer to the declarations comprising the Appendix [Doc. 900] accompanying the pending motions.

B. Terms of the Settlement.

The following are the material terms of the settlement:

1. The Settlement Class.

The settlement class is defined as follows:

> The approximately 147 million U.S. consumers identified by Equifax whose personal information was compromised as a result of the cyberattack and data breach announced by Equifax Inc. on September 7, 2017.

Excluded are (i) Equifax, any entity in which Equifax has a controlling interest, and Equifax's officers, directors, legal representatives, successors, subsidiaries, and assigns; (ii) any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff; and (iii) any individual who timely and validly opts out of the settlement class. [Settlement Agreement, Doc. 739-2, ¶ 2.43].

2. The Settlement Fund.

Equifax will pay $380,500,000 into a fund for class benefits, attorneys' fees, expenses, service awards, and notice and administration costs; up to an additional $125,000,000 if needed to satisfy claims for certain out-of-pocket losses; and potentially $2 billion more if all 147 million class members sign up for credit monitoring. [Doc. 739-2, ¶ 7.8; Doc. 739-4, ¶ 37]. No settlement funds will revert to Equifax. [Doc. 739-2, ¶ 5.5]. The specific benefits available to class members include:

- Reimbursement of up to $20,000 for documented, out-of-pocket losses fairly traceable to the breach, such as the cost of freezing or unfreezing a credit file; buying credit monitoring services; out-of-pocket losses from identity theft or fraud, including professional fees and other remedial expenses; and 25 percent of any money paid to Equifax for credit monitoring or identity theft protection subscription products in the year before the breach. If the $380.5 million fund proves to be insufficient, Equifax will add another $125 million to pay claims for out-of-pocket losses.

- Compensation of up to 20 hours at $25 per hour (subject to a $38 million cap) for time spent taking preventative measures or dealing with identity theft. Ten hours can be self-certified, requiring no documentation.

- Four years of specially negotiated, three-bureau credit monitoring and identity protection services through Experian and an additional six years of one-bureau credit monitoring and identity protection services through Equifax. The Experian monitoring has a comparable retail value of $24.99 per month and has a number of features that are typically not available in "free" credit monitoring services offered to the public. (App. 6, ¶¶ 33-43). The one-bureau credit monitoring shall be provided separately by Equifax and not paid for from the settlement fund.

- Alternative cash compensation (subject to a $31 million cap) for class members who already have credit monitoring or protection services in place and who choose not to enroll in the enhanced credit monitoring and identity protection services offered in the settlement.

***3** - Identity restoration services through Experian to help class members who believe they may have been victims of identity theft for seven years, including access to a U.S. based call center, assignment of a certified identity theft restoration specialist, and step by step assistance in dealing with credit bureaus, companies and government agencies.

Class members have six months to claim benefits (through January 22, 2020), but need not file a claim to access identity restoration services. (*Id.*, ¶¶ 7.2 and 8.1.1). If money remains in the fund after the initial claims period, there will be a four-year extended claims period during which class members may recover for certain out-of-pocket losses and time spent rectifying identity theft that occurs after the end of the initial claims period. (*Id.*, ¶ 8.1.2). If money remains in the fund after the extended claims period, it will be used as follows: (a) the caps for time and alternative compensation will be

lifted and payments will be increased *pro rata* up to the full amount of the approved claims; (b) up to three years of additional identity restoration services will be purchased; and (c) the Experian credit monitoring services claimed by class members will be extended. (*Id.*, ¶ 5.4). Equifax will not receive any monetary or other financial consideration for any of the benefits provided by the settlement. (*Id.*, ¶ 7.3).

3. Injunctive Relief.

Equifax has agreed to entry of a consent order requiring the company to spend a minimum of $1 billion for data security and related technology over five years and to comply with comprehensive data security requirements. Equifax's compliance will be audited by an experienced, independent assessor and subject to this Court's enforcement powers. [*See generally* Doc. 739-2, pp. 76-84; Doc. 739-4, ¶ 44]. According to cybersecurity expert Mary Frantz:

> [I]mplementation of the proposed business practice changes should substantially reduce the likelihood that Equifax will suffer another data breach in the future. These changes address serious deficiencies in Equifax's information security environment. Had they been in place on or before 2017 per industry standards, it is unlikely the Equifax data breach would ever have been successful. These measures provide a substantial benefit to the Class Members that far exceeds what has been achieved in any similar settlements.

[739-7, ¶ 66]. Equifax's binding financial commitment to spend $1 billion on data security and related technology substantially benefits the class because it ensures adequate funding for securing plaintiffs' information long after the case is resolved. (*See id.*, ¶ 56).

4. Notice And Claims Program.

The notice plan [*see* Doc. 739-2, p. 125], was developed by class counsel and the Court-appointed notice provider (Signal Interactive Media), with input from the claims administrator (JND Legal Administration) and the regulators. (App. 1, ¶ 25). The notice plan is not designed merely to satisfy minimal constitutional requirements, but an innovative and comprehensive program that takes advantage of contemporary commercial and political advertising techniques—such as focus groups, a public opinion survey, and micro-targeting—to inform, reach, and engage the class and motivate class members to file claims. According to the plaintiffs and Signal, the notice program is a first-of-its kind effort and is unprecedented in scope and impact. The Court finds that the notice program is a significant benefit to the class.

***4** The notice program consists of: (1) multiple emails sent to those whose email addresses can be found with reasonable effort; (2) a digital and social media campaign using messaging continually tested and targeted for effectiveness; (3) a full-page ad in *USA Today* using plain text designed with input from experts on consumer communications at the Federal Trade Commission as well as a national radio advertising campaign to reach those who have limited online presence; (4) a settlement website on which the long-form notice and other important documents, including various pleadings and other filings from the litigation, are posted; and (5) the ability for class members to ask questions about the settlement via email and a toll-free number staffed with live operators. (App. 4, ¶¶ 43-57, 85-90; App. 5, ¶¶ 22-30). Signal will continue digital advertising during the extended claims period and until identity restoration services are no longer available, a period that will last for seven years. [Doc. 739-2, pp. 127, 138].

JND transmitted the initial email notice to 104,815,404 million class members beginning on August 7, 2019. (App. 4, ¶¶ 53-54). JND later sent a supplemental email notice to the 91,167,239 class members who had not yet opted out, filed a claim, or unsubscribed from the initial email notice. (*Id.*, ¶¶ 55-56). The notice plan also provides for JND to perform two additional supplemental email notice campaigns. (*Id.*, ¶ 57).

The digital component of the notice plan, according to Signal, reached 90 percent of the class an average of eight times before the notice date of September 20, 2019, approximately 60 days before the deadline for objecting and opting out. Signal's digital campaign achieved 1.12 billion impressions on social media, paid search, and advertising before the notice date, far surpassing the original target of 892 million impressions. (App. 5, ¶ 24). Signal is expected to deliver an additional 332 million impressions during the remainder of the initial claims period (*id.*, ¶ 25), many more digital impressions than initially anticipated. Signal also placed a full-page notice that appeared in the September 6, 2019 issue of *USA Today*. (*Id.*, ¶ 26). The radio campaign, which ran from August 19 through September 8, 2019 in 210 markets across the country, resulted in 194,797,100 impressions overall and

63,636,800 impressions for the target age group least likely to be reached online. (*Id.*, ¶¶ 27-28).

Finally, the settlement received a great deal of media coverage in virtually every U.S. market, increasing exposure and reach to class members. The settlement was featured prominently by CNN, in the *New York Times*, and on the Today Show, among other national media outlets. (*Id.*). From July 22, 2019 through December 1, 2019, there were approximately 30,000 mentions related to the data breach or the settlement in the media. (*Id.*, ¶ 90).

As a result of the notice program and extensive media coverage, the response from the class has been unprecedented. The settlement website received 46 million visits during the first 48 hours following preliminary approval and, as of December 1, 2019, the total number of visits to the website exceeded 130 million, with nearly 40 million discrete visitors. Most significantly, with several weeks left in the initial claims period, the claims administrator has received in excess of 15 million claims from verified class members, including over 3.3 million claims for credit monitoring. (*Id.*, ¶¶ 5, 64-69). The claims rate, to date, thus exceeds 10% of the class.

These claims and others that continue to be filed are governed by a detailed claims administration protocol, which employs a variety of techniques to facilitate access, participation, and claims adjudication and resolution. (App. 4, ¶¶ 4, 71). JND has also developed specialized tools to assist in processing claims, calculating payments, and assisting class members in curing any deficient claims. (*Id.*, ¶¶ 4, 21). As a result, class members have the opportunity to file a claim easily and have that claim adjudicated fairly and efficiently.

5. Attorneys' Fees And Expenses And Service Awards.

***5** Class counsel have applied for a percentage-based fee of $77.5 million, reimbursement of $1,404,855.35 in litigation expenses, and service awards of $2,500 for each settlement class representative totaling no more than $250,000 in the aggregate. [Doc. 858]. These amounts are in accordance with the terms of the settlement agreement and were not negotiated by the parties until after the negotiations regarding the relief to be afforded to the class had concluded. Under prevailing precedent and the circumstances of this case, these requests are reasonable, and for the reasons set forth in more detail below, the requests will be approved.

6. Releases.

In pertinent part, the class will release Equifax from claims that were or could have been asserted in this case. The releases are set forth in more detail in the settlement agreement. [Doc. 739-2, ¶¶ 2.38, 2.50, 16].

II. FINAL APPROVAL OF PROPOSED SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS.

The Court, having considered the Settlement Agreement and Release including all of its exhibits [Doc. 739-2]; all objections and comments received regarding the settlement; all motions and other court filings by objectors and *amici curiae*; the arguments and authorities presented by the parties and their counsel in their briefing; the arguments at the final approval hearing on December 19, 2019; and the record in this action, and good cause appearing, hereby reaffirms its findings in the Order Directing Notice, finds the settlement is fair reasonable and adequate, and certifies the settlement class.

A. The Proposed Settlement Is Fair, Reasonable, And Adequate.

Before the Court may finally approve a proposed settlement, it must consider the factors listed in Rule 23(e)(2) including 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). As explained below, consideration of each of these factors supports a finding that the settlement is fair, reasonable, and adequate and should be approved.

1. The Class Was Adequately Represented.

The first prong of Rule 23(e)(2) directs the Court to consider whether the class representatives and class counsel have

adequately represented the class. Fed. R. Civ. P. 23(e)(2)(A). Traditionally, adequacy of representation has been considered in connection with class certification. For this analysis, courts consider: "(1) whether [the class representatives] have interests antagonistic to the interests of other class members; and (2) whether the proposed class' counsel has the necessary qualifications and experience to lead the litigation." *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 555 (N.D. Ga. 2007).

The Court finds that the class representatives are adequate. They share the same interests as absent class members, assert claims stemming from the same event that are the same or substantially similar to the rest of the class, and share the same types of alleged injuries as the rest of the class. Like the rest of the class, the class representatives' personal information at issue was stolen and they all allege the same risk—that their information may be misused by criminals in the future. And, no class member has benefitted from the breach. For all these reasons, the Court finds that the interests of class members are not antagonistic and there is no intra-class conflict here.

***6** Further, the Court finds that class counsel have adequately represented the class. The Court appointed class counsel after a comprehensive and competitive appointment process. Their experience in complex litigation generally and data breach litigation specifically has been brought to bear here, as they effectively worked to bring this case to a successful resolution. The Court has observed class counsel's diligence, ability, and experience in pleadings and motion practice; in regularly-conducted status conferences; in their presentation of the settlement to this Court; and in their attention to matters of notice and administration after the announcement of the settlement. The excellent job class counsel have done for the class is also demonstrated in the benefits afforded by the settlement.

2. The Proposed Settlement Was Negotiated At Arm's Length.

With respect to the second factor under Rule 23(e)(2), the Court readily concludes that this settlement was negotiated at arm's length, and that there was no fraud or collusion in reaching the settlement. Fed. R. Civ. P. 23(e)(2)(B). This Court has observed the zeal with which counsel for the parties have advanced their clients' interests in this case, their written work, and their oral advocacy at status conferences and the numerous other hearings that have been conducted. Further, Layn Phillips, a retired federal judge with a wealth of experience in major complex litigation and large-scale data breach cases who served as the settlement mediator, has attested to the history of the contentious negotiations, the process of reaching agreement on a binding term sheet, the level of advocacy on both sides of the case, and his opinion that the settlement represents a reasonable and fair outcome. [Doc. 739-9]. *See generally Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001) (presence of "highly experienced mediator" pointed to "absence of collusion"). Moreover, any possibility of collusion—already remote—is undercut by the fact that the settlement enjoys the support of the Federal Trade Commission, the Consumer Financial Protection Bureau, and Attorneys General of 48 states, Puerto Rico, and the District of Columbia. These regulators entered into their own separate settlements with Equifax after the parties entered into the term sheet in this case and agreed that the settlement fund in this case can serve as the vehicle for consumer redress related to the breach.

3. The Relief Provided To The Class Is Adequate.

The third factor the Court considers under Rule 23(e)(2) is the relief provided for the class 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)." Fed. R. Civ. P. 23(e)(2)(C).

In examining the adequacy of the relief provided to the class, the Court starts with the observation that this settlement is the largest and most comprehensive recovery in a data breach case in U.S. history by several orders of magnitude. [Doc. 739-4, pp. 40-45]. Not only does the size of the settlement fund exceed all previous data breach settlements, but the specific benefits provided to class members (both monetary and nonmonetary) that were enumerated above meet or substantially exceed those that have been obtained in other data breach cases. (*Id.*; *see also* Doc. 739-7, ¶ 66). It is also particularly significant that all valid claims for out-of-pocket losses likely will be paid in full; that 3.3 million class members have already submitted claims for credit monitoring with a collective retail value of roughly $6 billion; that all class members, whether or not they file a claim, will have access to identity restoration services to help deal with the aftermath of any identity theft for seven years; that the notice

program will continue for the full seven years to remind class members of the existence of those extended services; that Equifax must spend at least $1 billion on data security and related technology; and that Equifax's compliance with comprehensive data security measures will be subject to independent verification and judicial enforcement.

***7** The minimum cost to Equifax of the settlement is $1.38 billion and could be more, depending on the cost of complying with the injunctive relief, the number and amount of valid claims filed for out-of-pocket losses, and the number of class members who sign up for credit monitoring (as Equifax, not the settlement fund, will bear the cost if more than seven million class members sign up for three-bureau credit monitoring and Equifax, not the settlement fund, will bear the cost of providing the extended one-bureau credit monitoring under the settlement). The benefit to the class—even when only considering the value of the $380.5 million minimum settlement fund, the minimum $1 billion Equifax is required to spend on data security and related technology, and the retail value of the credit monitoring already claimed by class members—exceeds $7 billion.

These benefits have added value by being available now, rather than after years of continued litigation, because class members can immediately take advantage of settlement benefits designed to mitigate and prevent future harm, including credit monitoring and injunctive relief. *See Anthem*, 327 F.R.D. at 318 (discussing the importance of timely providing credit monitoring to the class and implementing security enhancements in wake of a data breach). Additionally, the Court finds that much of the relief afforded by the settlement likely exceeds what could be achieved at trial (*see* Doc. 903 at 13-16), and, taken as a whole the settlement represents a result that is at the high end of the range of what could be achieved through continued litigation.

The adequacy of the relief is likewise supported by consideration of the four subparts enumerated in Rule 23(e)(2)(C)(i-iv), all of which support a finding that the relief provided by the settlement is fair, reasonable, and adequate.

a) The Risks, Costs, and Delay of Continued Litigation.

In considering the adequacy of the settlement in light of the risks of continued litigation under Rule 23(e)(2)(C)(i), the Court finds the cost and delay of continued litigation would have been substantial. But for the settlement, the parties would likely incur tens of millions of dollars in legal fees and expenses in discovery and motion practice. Trial likely would not occur earlier than 2021 and appeals would almost certainly delay a final resolution for a year or more after that. Moreover, had the case not settled, the plaintiffs would have faced a high level of risk. *See Anthem*, 327 F.R.D. at 322 (finding that the "significant risks" and the "delay in any potential recovery from proceeding with litigation," weighed in favor of approval). Equifax would likely renew its arguments under Georgia law that it has no legal duty to safeguard personal information, arguments that were strengthened following the Supreme Court of Georgia's decisions in *Georgia Dep't of Labor v. McConnell*, 305 Ga. 812, 828 S.E.2d 352 (Ga. 2019). Class certification outside of the settlement context also poses a significant challenge. *See, e.g., Adkins v. Facebook, Inc.*, 2019 WL 7212315, at *9 (N.D. Cal. Nov. 26, 2019) (denying motion to certify data breach damages class under Rule 23(b)(3)); *Anthem*, 327 F.R.D. at 318 ("While there is no obvious reason to treat certification in a data-breach case differently than certification in other types of cases, the dearth of precedent makes continued litigation more risky."). And, even if plaintiffs prevail on all those legal issues, they face the risk that causation cannot be proved, discovery will not support their claims, a jury might find for Equifax, and an appellate court might reverse a plaintiffs' judgment.

Class counsel, appointed to act in the best interests of the class, cannot afford to ignore or downplay these significant risks in deciding whether to settle or continue litigating plaintiffs' claims. Similarly, the Court must take those risks into account in determining whether the proposed settlement is fair, reasonable, and adequate. In considering these risks, the Court finds that the guaranteed and immediate recovery for the class made available by this settlement far outweighs the mere possibility of future relief after lengthy and expensive litigation. The reality is that, if the Court does not approve the settlement in this case, there is a serious risk that many if not all class members will receive nothing. That the plaintiffs achieved all the relief in the settlement in the face of the risk they face strongly weighs in favor of approving the settlement as fair, reasonable, and adequate.

b) The Method of Distributing Relief is Effective.

***8** Rule 23(e)(2)(C)(ii) requires the Court to next consider the effectiveness of the proposed method to distribute relief to the class, including the method for processing claims.

Upon review of the declarations submitted in support of the motion to direct notice and for final approval [*see generally* Docs. 739-6 and 900-4], the Court finds that the method of distributing relief is effective. Class members can file claims through a straightforward claims process, and claims are not required for identity restoration services or to benefit from the injunctive relief agreed to by Equifax. Those claiming out-of-pocket losses must supply documentation of their losses, but such requirements are routine and likely less stringent than a plaintiff would have to present during discovery or trial. Some documentation requirements are necessary to ensure that the settlement fund is used to pay legitimate claims. Similarly, the requirement that losses be "fairly traceable" to the breach is not onerous (and is arguably a less stringent standard than would apply at trial), and its enforcement is subject to a claims administration protocol developed with input from state and federal regulators. [Doc. 739-2, pp. 286-87, ¶ III].

The Court concludes that the requirements to make claims for other relief are also reasonable. For example, any class member is eligible to enroll in credit monitoring services without any documentation. Class members seeking alternative compensation in lieu of credit monitoring do not need to provide any documentation, but only identify and attest to their existing credit monitoring service. This is not an onerous requirement, and even those who already submitted claims and failed to provide the name of their credit monitoring service will be given another chance to do so through the deficient claims process set forth in the claims administration protocol. And, those seeking reimbursement for time spent dealing with the breach can claim up to 10 hours without any documentation.

The claims administrator, JND, is highly experienced in administering large class action settlements and judgments, and it has detailed the efforts it has made in administering the settlement, facilitating claims, and ensuring those claims are properly and efficiently handled. (App. 4, ¶¶ 4, 21; *see also* Doc. 739-6, ¶¶ 2-10). Among other things, JND has developed protocols and a database to assist in processing claims, calculating payments, and assisting class members in curing any deficient claims. (*Id.*, ¶¶ 4, 21). Additionally, JND has the capacity to handle class member inquiries and claims of this magnitude. (App. 4, ¶¶ 5, 42). This factor, therefore, supports approving the relief provided by this settlement.

c) The Terms Relating To Attorneys' Fees Are Reasonable.

The third consideration of evaluating relief under Rule 23(e)(2)(C) is whether the attorneys' fees requested under the settlement are reasonable. Fed. R. Civ. P. 23(e)(2)(C)(iii). Here, class counsel are requesting a fee based on a percentage of the benefits available to the class. As addressed in detail below, the Court finds that the request is reasonable under prevailing precedent and the facts of this case. Further, the timing of the payment of fees does not impact the adequacy of the relief, as no fee will be paid until after Equifax fully funds the settlement fund and under no circumstance will any of the settlement funds revert to Equifax. *See* Fed. R. Civ. P. 23(e)(2)(B)(iii). As such, this factor weighs in favor of approving the settlement.

d) Agreements Required To Be Identified By Fed. R. Civ. P. 23(e)(3).

Finally, Rule 23(e)(2)(C)(iv) directs the Court to consider the relief afforded to the class in light of any agreements required to be identified by Rule 23(e)(3). The parties previously submitted to the Court, *in camera*, the specific terms of the provision allowing Equifax to terminate the settlement if more than a certain number of class members opted out and the cap on notice spending that would create a mutual termination right. These provisions have not been triggered, and thus do not affect the adequacy of the relief obtained here. The parties have not identified, and the Court is unaware of, any other agreements required to be identified by the Rule. Therefore, this element of Rule 23(e)(2)(C) also weighs in favor of approval.

4. Class Members Are Treated Equitably Relative To Each Other.

***9** The fourth and final factor under Rule 23(e)(2), directs the Court to consider whether class members are treated equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(D). According to the advisory committee notes, this factor is closely related to the adequacy requirement of Rule 23(a). The Court expressly considers whether the settlement provides equitable "treatment of some class members vis-à-vis others," and an issue that has been raised by some objectors is whether the settlement apportions "relief among class members [that] takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways." Adv. Comm. Notes 23(e)(2) (2018).

As an initial matter, the class members all have similar claims arising from the same event: the Equifax data breach. And as all class members are eligible to claim the various benefits provided by the settlement if they meet the requirements, they all are treated equitably under the settlement.

While class members who have incurred out-of-pocket losses will be able to recover more relative to class members who have not, this allocation is fair and equitable because these class members would have had the ability to seek greater damages at trial. Additionally, the settlement provides for an extended claims period of four years after the initial claims period, through January 2024. This provides the opportunity for all class members to make claims for future out-of-pocket losses resulting from the breach.

All class members, regardless of whether they incurred out-of-pocket losses, are eligible to claim credit monitoring. This also treats class members fairly. "The emphasis on this form of relief is logical because it is directly responsive to the ongoing injury resulting from the breach." *Anthem*, 327 F.R.D. at 332; *see also* App. 6, ¶ 41 (stating that "[t]he features included in the Experian services are particularly helpful for consumers concerned about identity theft, because they are designed to quickly help identify fraudulent misuse of a consumer's personal information").

Moreover, all class members—even those who do not submit claims—benefit from the various non-monetary aspects of the settlement, including access to identity restoration services and the business practice changes that Equifax will implement at a cost of at least $1 billion. (*See* App. 2, ¶ 21). By addressing the alleged injuries class members suffered and by helping to mitigate future harm—through the extended claims period, availability of credit monitoring and identity restoration services, and mandated business practice changes—the settlement is equitable to all class members.

Finally, class members have been treated equitably despite the fact that they reside in different states and may have been able to assert different statutory claims depending on the state in which they reside. All class members share at least one common claim for negligence under Georgia law, and as to the statutory remedies that survived the motion to dismiss, the Court does not find that those remedies are materially different such that they render the plan of apportionment inequitable. Although some statutory claims may permit a plaintiff to seek statutory damages, Georgia law permits all class members to seek nominal damages and there are additional risks associated with those statutory claims that persuade the Court they are not materially more beneficial so as to render the settlement unfair.

This final factor of Rule 23(e)(2) thus supports this Court's finding that the settlement is fair, reasonable, and adequate and should be approved.

5. The *Bennett* Factors Support Approving The Settlement As Fair, Reasonable, And Adequate.

***10** In addition to the rule-based factors set forth in Rule 23, in considering whether to approve the settlement the Court is further guided by the factors set forth in *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). These factors include: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) the opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved. *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1240 (11th Cir. 2011). Many of these considerations overlap those found in Rule 23(e)(2); all of them support final approval.

As explained above with respect to consideration of Rule 23(e)(2), the first and fourth *Bennett* factors strongly support approving the settlement. The likelihood of success at trial is uncertain at best. Equifax would have no doubt renewed its defenses at the summary judgment stage and the settlement provides relief that may not have been available had the case been tried. The case would have been extraordinarily expensive to litigate going forward and would have certainly taken years to conclude. Likewise, consideration of the second and third *Bennett* factors support the settlement as fair, reasonable, and adequate because the settlement reflects relief the Court finds is in the high range of what could have been obtained had the parties continued to litigate.

The fifth *Bennett* factor, which examines opposition to the settlement, likewise supports approval. In the Court's view, the class has reacted positively to the settlement. In contrast to the 15 million claims, including over 3.3 million claims for credit monitoring that already have been filed by verified class members, only 2,770 settlement class members asked to be excluded from the settlement and only 388 class members directly objected to the settlement—many in the wake of incomplete or misleading media coverage, or at the behest

of serial class action objectors, and often demonstrating a flawed understanding of the settlement terms. This miniscule number of objectors in comparison to the class size is entitled to significant weight in the final approval analysis. *See, e.g., Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005) ("[A] low percentage of objections points to the reasonableness of a proposed settlement and supports its approval"); *In re Home Depot, Inc. Customer Data Sec. Breach Litig.*, 2016 WL 6902351, at *4 (N.D. Ga. Aug. 23, 2016) (same).

With respect to the sixth *Bennett* factor, the Court finds that the case settled at a stage of the proceedings where class counsel had sufficient knowledge of the law and facts to fairly weigh the benefits of the settlement against the potential risk of continued litigation. (*See, e.g.*, App. 1, ¶¶ 4-15; Doc. 739-4, ¶ 36). In particular, class counsel conducted a thorough factual and legal investigation in order to prepare their comprehensive consolidated amended complaint; exhaustively researched and analyzed the applicable law; reviewed more than 500,000 pages of documents and voluminous electronic spreadsheets from Equifax [*see generally*, Doc. 900-1, ¶¶ 6-14; Doc. 739-4, ¶ 17]; consulted with various experts; had the benefit of substantial informal discovery, including meetings with Equifax and its senior employees responsible for data security [Doc. 900-1, ¶ 14; Doc. 739-4, ¶ 23]; and engaged in confirmatory discovery after the term sheet was finalized. [Doc. 739-4, ¶ 36]. Thus, the *Bennett* factors, like the Rule 23 factors, strongly support approval of the settlement.

***11** Finally, in evaluating whether the settlement is fair, reasonable, and adequate, the Court also gives due weight to the judgment of class counsel. *See, e.g., Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 434 (11th Cir. 2012) ("Absent fraud, collusion, or the like, the district court should be hesitant to substitute its own judgment for that of counsel."); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). Class counsel are highly experienced in significant complex litigation including large and complex data breach class actions [Doc. 187, pp. 6-7], and they strongly believe that both the economic and injunctive relief secured for the class here is extraordinary. [Doc. 739-4, ¶ 60; *see also* App. 1, ¶ 16]. Also significant is Judge Phillips's endorsement of the settlement, particularly given his experience in mediating large-scale data breach cases. [Doc. 739-9, ¶ 13]. Finally, the fact that nearly all of the applicable state and federal regulators agreed to the provision of consumer redress through the settlement fund in this action strongly demonstrates the fairness of the settlement.

In conclusion, the settlement reflects an outstanding result for the class in a case with a high level of risk. The relief provided by this settlement—both monetary and non-monetary—exceeds the relief provided in other data breach settlements and the Court finds is in the high range of possible recoveries if the case had successfully been prosecuted through trial. Moreover, the settlement resulted from hard fought, arm's-length negotiations, not collusion. The settlement is therefore fair, reasonable, and adequate under Rule 23 and Eleventh Circuit precedent.

B. The Court Certifies The Settlement Class.

The Court must examine whether this proposed settlement class may be certified under Rule 23(a)'s prerequisites and under Rule 23(b)(3). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613-14, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). The Court previously concluded it was likely to certify the following settlement class:

> The approximately 147 million U.S. consumers identified by Equifax whose personal information was compromised as a result of the cyberattack and data breach announced by Equifax Inc. on September 7, 2017.

Excluded are (i) Equifax, any entity in which Equifax has a controlling interest, and Equifax's officers, directors, legal representatives, successors, subsidiaries, and assigns; (ii) any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff; and (iii) any individual who timely and validly opts out of the settlement class. As the Court ruled on Equifax's motion to dismiss, all of these class members state claims for negligence and negligence per se under Georgia law. [Doc. 540, at 9, 29-43]. For the reasons set forth below, the Court hereby finally certifies, for settlement purposes only, the settlement class pursuant to Fed. R. Civ. P. 23.

1. Fed. R. Civ. P. 23(a) Requirements Are Satisfied.

a) Numerosity:

Rule 23(a)(1) requires that a proposed settlement class be so numerous that joinder of all class members is impracticable. Fed. R. Civ. P. 23(a)(1). The settlement class consists of more

than 147 million U.S. consumers, indisputably rendering individual joinder impracticable.

b) Commonality:

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury," such that "all their claims can productively be litigated at once.' " *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011); *see also Sellers v. Rushmore Loan Mgmt. Servs., LLC*, 941 F.3d 1031, 1039 (11th Cir. 2019) (noting inquiry is far less demanding than Rule 23(b)(3)'s predominance requirement). All members of the class suffered the same alleged injury, exposure of their data in the Equifax data breach, stemming from the same conduct and the same event. The class members are asserting the same or substantially similar legal claims. And "[t]he extensiveness and adequacy of [defendants'] security measures lie at the heart of every claim." *Anthem*, 327 F.R.D. at 308. As the central question in all class members' claims is whether Equifax breached its duty of care through its conduct with regard to their personal information, common questions are apt to drive the resolution of the legal issues in the case. *Id.*

***12** Courts, including this one, have previously addressed this requirement in the context of data breach class actions and found it readily satisfied. *See, e.g., Home Depot*, 2016 WL 6902351, at *2 (finding that multiple common issues "all center on [the defendant's] conduct, satisfying the commonality requirement."); *Anthem*, 327 F.R.D. at 308 (noting that "the complaint contains a common contention capable of class-wide resolution—'one type of injury allegedly inflicted by one actor in violation of one legal norm.' "). The same sorts of common issues are present here, including whether Equifax had a legal duty to adequately protect class members' personal information; whether Equifax breached that legal duty; and whether Equifax knew or should have known that class members' personal information was vulnerable to attack. *See Home Depot*, 2016 WL 6902351, at *2. Commonality is satisfied.

c) Typicality:

Rule 23(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). This prong too is readily met in settlements of nationwide data breach class actions. *See Anthem*, 327 F.R.D. at 309 ("[I]t is sufficient for typicality if the plaintiff endured a course of conduct directed against the class."). Plaintiffs' claims here arise from the same data breach and Equifax's conduct in connection with the data breach. The claims are also based on the same overarching legal theory that Equifax failed in its common-law duty to protect their personal information. The typicality requirement has been met.

d) Adequacy of Representation:

As noted above, the adequacy requirement is satisfied here, as the class representatives do not have any interests antagonistic to other class members, and the class has been well represented by the appointed class counsel. The Court finds that the class representatives have fulfilled their responsibilities on behalf of the class. There is at least one class representative from each state, and therefore the potential interests of class members with various state law claims have been represented. The Court further finds no material differences that would render these class representatives inadequate. Likewise, the Court further finds that class counsel have prosecuted the case vigorously and in the best interests of the class, and they adequately represented each class member.

Again, the Court notes that this prong too has been readily met in nationwide data breach class action settlements. *See Home Depot*, 2016 WL 6902351, at *2. And multiple courts have found the adequacy requirement satisfied in nationwide data breach class action settlements in the face of objections to the contrary. *See Anthem*, 327 F.R.D. at 310 ("To the extent that there are slight distinctions between Settlement Class Members, the named Plaintiffs are a representative cross-section of the entire Class."); *see generally In re Target Corp. Customer Data Sec. Breach Litig.*, 892 F.3d 968, 974 (8th Cir. 2018) (rejecting challenge to adequacy due to lack of "future-damages subclass"). The Court has identified no conflicts among class members here. And significantly, even the existence of minor conflicts does not defeat certification: "the conflict must be a fundamental one going to the specific issues in controversy." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003) (internal quotations and citations omitted). If any conflict exists among class members or groups of class members, that conflict certainly is not fundamental. The Court has no doubt that the class representatives and class counsel have performed their duties in the best interests of the class.

2. The Settlement Class Meets the Requirements of Fed. R. Civ. P. 23(b)(3).

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members," and that class treatment is "superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* The matters pertinent to these findings include:

***13** • the class members' interests in individually controlling the prosecution or defense of separate actions;

• the extent and nature of any litigation concerning the controversy already begun by or against class members;

• the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

• the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b); *see also Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1278 (11th Cir. 2009) ("In determining superiority, courts must consider the four factors of Rule 23(b)(3)."). One part of the superiority analysis—manageability—is irrelevant for purposes of certifying a settlement class. *Amchem*, 521 U.S. at 620, 117 S.Ct. 2231.

a) Predominance:

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623, 117 S.Ct. 2231. "Common issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to ... relief." *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 985 (11th Cir. 2016).

Here, as set forth above, there are numerous common questions. These common questions predominate because all claims arise out of a common course of conduct by Equifax. The focus on a defendant's security measures in a data breach class action "is the precise type of predominant question that makes class-wide adjudication worthwhile." *Anthem*, 327 F.R.D. at 312.

Even though this is a nationwide class action, variations in state law will not predominate over the common questions. The Court previously found that Georgia law applies to the negligence claims of the entire class. [Doc. 540 at 8-9].[2] Further, in the context of this litigation, the Court is persuaded that the presence of multiple state consumer protection laws does not defeat predominance, because "the idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims" for purposes of Rule 23(b)(3). *Anthem*, 327 F.R.D. at 315. In *Anthem*, the court found it noteworthy that "Plaintiffs' theories across these consumer-protection statutes are essentially the same" thereby avoiding any pitfalls of state law variation. *Id.* (quoting *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001)). Here too, the core allegations are that Equifax failed to implement and maintain reasonable security and privacy measures and failed to identify foreseeable security and privacy risks.

2 Even if Georgia law did not apply to the negligence claims of the entire class, "Plaintiffs' negligence claims would not get bogged down in the individualized causation issues that sometimes plague products-defect cases.... [because] the same actions by a single actor wrought the same injury on all Settlement Class Members together." *Anthem*, 327 F.R.D. at 314.

Perhaps the only significant individual issues here involve damages, but these issues do not predominate over the common issues in this case. *See, e.g., Home Depot*, 2016 WL 6902351, at *2; *Anthem*, 327 F.R.D. at 311-16; *see also Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1239 (11th Cir. 2016) (individualized damages generally do not defeat predominance). Further minimizing any risk of individual damages predominating over common issues, the consolidated amended complaint seeks nominal damages on behalf of all class members, which may be available under Georgia law even where no evidence is given of any particular amount of loss. *See, e.g., Georgia Power Co. v. Womble*, 150 Ga. App. 28, 32, 256 S.E.2d 640 (1979); *Land v. Boone*, 265 Ga. App. 551, 554, 594 S.E.2d 741 (2004).

b) Superiority:

***14** "The inquiry into whether the class action is the superior method for a particular case focuses on increased efficiency." *Agan v. Katzman & Korr, P.A.*, 222 F.R.D. 692, 700 (S.D. Fla. 2004) (internal quotation omitted). "The focus of this analysis is on the relative advantages of a class action suit

over whatever other forms of litigation might be realistically available to the plaintiffs." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1183-84 (11th Cir. 2010) (internal quotation omitted). That a class member may not receive a large award in a settlement does not scuttle superiority; the opposite tends to be true. *See Dickens v. GC Servs. Ltd. P'ship*, 706 F. App'x 529, 538 (11th Cir. 2017) (describing "the ways in which the high likelihood of a low per-class-member recovery militates in favor of class adjudication").

Here, it is inconceivable that the vast majority of class members would be interested in controlling the prosecution of their own actions. The cost of doing so, especially for class members who do not claim out-of-pocket losses, would dwarf even a full recovery at trial. A major thrust of Equifax's motion to dismiss was that the plaintiffs did not suffer any damages, let alone the "relatively paltry potential recoveries" that class actions serve to vindicate. *See Sacred Heart*, 601 F.3d at 1184. Given the technical nature of the facts, the volume of data and documents at issue, and the unsettled area of the law, it would not take long for an individual plaintiff's case to be hopelessly submerged financially. On the other hand, the presence of such pertinent predominant questions makes certification here appropriate. *Compare Anthem*, 327 F.R.D. at 312 (data breach dealt with "the precise type of predominant question that makes class-wide adjudication worthwhile") with *Sacred Heart*, 601 F.3d at 1184 ("T]he predominance analysis has a tremendous impact on the superiority analysis[.]") (internal quotation marks omitted).

As to the extent and nature of litigation already commenced, the settlement agreement identifies 390 consumer cases related to this multidistrict litigation, and there are more than 147 million class members. As the Judicial Panel on Multidistrict Litigation stated, "[c]entralization will eliminate duplicative discovery, prevent inconsistent pretrial rulings on class certification and other issues, and conserve the resources of the parties, their counsel, and the judiciary." *In re: Equifax, Inc., Customer Data Sec. Breach Litig.*, 289 F. Supp. 3d 1322, 1325 (JPML 2017). The settlement furthers those goals. Similarly, it is desirable to concentrate the litigation of the claims here, which was selected as the transferee district because, among other reasons, Equifax is headquartered in this district, the vast majority of the plaintiffs supported this district, and "far more actions [were] pending in this district than in any other court in the nation." *Id.* at 1326.

Because the requirements of Rule 23(a) and (b)(3) have been satisfied, the Court certifies the settlement class.

III. THE COURT OVERRULES ALL OBJECTIONS TO THE SETTLEMENT.

The Court now addresses objections to the settlement. The objections fail to establish the settlement is anything other than fair, reasonable, and adequate.

Out of the approximately 147 million class members, only 388 directly objected—or just 0.0002 percent of the class—despite organized efforts to solicit objections using inflammatory language and based on false and misleading statements about the settlement, such as that only $31 million is available to pay claims and that if all 147 million class members filed claims everyone would get 21 cents.[3] Many objections repeat these false and misleading assertions as fact and challenge the settlement on that basis. Further, on the eve of the objection deadline, an additional 718 form "objections," which allegedly had been filled out online by class members, were submitted *en masse* by Class Action Inc., a class action claims aggregator that created a website (www.NoThanksEquifax.com) with a "chat-bot" that encouraged individuals to object based on that same erroneous information.[4] (App. 1, ¶¶ 49-59). These form "objections" are procedurally invalid for the reasons set forth later in this Order.

3 Charlie Warzel, *Equifax Doesn't Want You to Get Your $125. Here's What You Can Do*, The New York Times (Sept. 16, 2019), https://www.nytimes.com/2019/09/16/opinion/equifax-settlement.html.

4 Reuben Metcalfe, *You have the right to object to the Equifax settlement. Here's how.*, Medium (Nov. 8, 2019), https://medium.com/@reubenmetcalfe/you-have-the-right-to-object-to-the-equifax-settlement-heres-how-4dfdb6cca663. As demonstrated in the record, Mr. Metcalfe represented to class counsel that he had not even read the settlement agreement or notice materials. [Doc. 939-1, ¶ 36].

***15** The Court has considered and hereby rejects all of the objections on their merits, whether or not the objections are procedurally valid or whatever may have motivated their filing. All of the objections are in the record, having been filed publicly on the Court's docket with the declaration of the claims administrator. [Doc. 899]. By way of example only, this Order references some of the objectors by name. The Court groups the objections as follows: (1) objections to the

value of the settlement and benefits conferred on the class; (2) objections relating to the alternative compensation benefit; (3) objections relating to class certification; (4) objections relating to the process for objecting; (5) objections relating to the process for opting-out; (6) objections to the notice plan; and (7) objections to the claims process.[5]

5 For the sake of organization, objections to attorneys' fees, expenses, and service awards are addressed separately below. The Court's consideration of attorneys' fees, and relating objections, are an integral part of the determination to finally approve the settlement under the criteria of Rule 23.

In addition to the briefing from class counsel and Equifax's counsel, and the Court's own independent review and analysis, the Court reviewed and found helpful to this process the supplemental declaration of Professor Robert Klonoff (App. 2). Professor Klonoff's declaration was particularly helpful to the Court in the organization and consideration of the objections, but the Court's decisions regarding the objections are not dependent upon his declaration or the declarations plaintiffs submitted from two other lawyers, Professor Geoffrey Miller and Harold Daniel. To the contrary, the Court has exercised its own independent judgment in deciding to reject all of the objections that have been filed.

A. Objections To The Value Of The Settlement And Benefits Conferred On The Class.

A majority of the objectors express frustration with Equifax's business practices and want Equifax and its senior management to be punished. The Court is well aware of the intense public anger about the breach, which, in the Court's view, reflects the sentiment that consumers generally do not voluntarily give their personal information directly to Equifax, yet Equifax collects and profits from this information and allegedly failed to take reasonable measures to protect it.

While understandable, the public anger does not alter the Court's role, which is not to change Equifax's business model or administer punishment. Under the law, the Court is only charged with the task of determining whether the proposed settlement is fair, reasonable, and adequate.[6] And, with regard to that task, no one can credibly deny that this is a historically significant data breach settlement that provides substantial relief to class members now and for years into the future. Or, that if the Court does not approve the settlement, the plaintiffs' claims may ultimately be unsuccessful and class members may be left with nothing at all.

6 *See Ressler v. Jacobson*, 822 F. Supp. 1551, 1552-53 (M.D. Fla. 1992) (judicial evaluation of a proposed settlement "involves a limited inquiry into whether the possible rewards of continued litigation with its risks and costs are outweighed by the benefits of the settlement"); *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1326 (S.D. Fla. 2007) (a court's role is not to "engage in a claim-by-claim, dollar-by-dollar evaluation, but rather, to evaluate the proposed settlement in its totality."); *Carter v. Forjas Taurus, S.A.*, 701 F. App'x 759, 766 (11th Cir. 2017) ("settlements are compromises, providing the class members with benefits but not full compensation.").

Objections that the settlement fund is too small for the class size, or that Equifax should be required to pay more, do not take into account the risks and realities of litigation, and are not a basis for rejecting the settlement. "Data-breach litigation is in its infancy with threshold issues still playing out in the courts." *Anthem*, 327 F.R.D. at 317. In light of the material risks involved and the possibility that any of several adverse legal rulings would have left the class with nothing, class counsel would have been justified in settling for much less. *See Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1998), *aff'd*, 899 F.2d 21 (11th Cir. 1990); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("[T]he very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes.") (internal quotation omitted). As it stands, in many respects the settlement provides relief beyond what the class members could have obtained at trial.

***16** Many objectors also ask the Court to rewrite the settlement, but that is beyond the Court's power.[7] For example, objectors demand that the settlement should include: a long-term fund for "significant inflation-adjusted cash compensation from Equifax should they leak my data again any time within the next 20 years"[8]; "lifetime" credit and identity protection[9]; a minimum cash payment for every class member (proposed amounts include $10,000, $5,000, or $1,200)[10]; and a separate cash option for class members who freeze their credit.[11] In most cases, these objectors do not contend that the monetary relief is inadequate to compensate class members for any harm caused by Equifax's alleged wrongs, making it hard to see how they are aggrieved. *See Brown v. Hain Celestial Grp., Inc.*, 2016 WL 631880, at

*10 (N.D. Cal. Feb. 17, 2016) (citing *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 33 F.3d 29 (9th Cir. 1994)).[12] Regardless, the Court readily concludes that the settlement provides fair and adequate relief under all of the circumstances.

7 *Cotton*, 559 F.2d at 1331; *Howard v. McLucas*, 597 F. Supp. 1504, 1506 (M.D. Ga. 1984) ("[T]he court's responsibility to approve or disapprove does *not* give this court the power to force the parties to agree to terms they oppose." (emphasis in original)), *rev'd in part on other grounds*, 782 F.2d 956 (11th Cir. 1986).

8 Objection of Tristan Wagner.

9 *E.g.*, Objections of Francis J. Dixon III and Linda J. Moore.

10 *E.g.*, Objections of Emma Britton, Norma Kline, and Vijay Srikrishna Bhat.

11 *E.g.*, Objections of Gary Brainin and Sybille Hamilton. These objections ignore, however, that class members could request out-of-pocket losses if they paid to freeze their credit.

12 Those class members who were unsatisfied with the relief made available had the opportunity to opt out, weighing in favor of finding the settlement fair, reasonable, and adequate. *See, e.g., In re Oil Spill By Oil Rig Deepwater Horizon on April 20, 2010*, 295 F.R.D. 112, 156 (E.D. La. 2013) ("Those objectors who are unhappy with their anticipated settlement compensation could have opted out and pursued additional remedies through individual litigation.").

Other settlement terms proposed by objectors are of a regulatory or legislative nature, well beyond the power of the civil justice system. For example, according to some objectors, "[a]ny settlement is inadequate if it allows Equifax to continue using my personal data without my express written consent"[13]; the board and officers should disgorge their salaries and serve prison time[14]; or Equifax should be forced out of business.[15] These "suggestions constitute little more than a 'wish list' which would be impossible to grant and [are] hardly in the best interests of the class." *In re Domestic Air Trans. Antitrust Litig.*, 148 F.R.D. 297, 305 (N.D. Ga. 1993). No objector explains how this type of relief could be achieved at trial.

13 Objection of Susan S. Hanis.

14 *E.g.*, Objections of Christie Biehl, Jeffrey Biehl, George Bruno, and Patrick Frank.

15 *E.g.*, Objections of David Goering, Christie Biehl, and Jeffrey Biehl.

A number of objectors take issue with the credit monitoring services made available under the settlement. Some object that credit monitoring is very valuable, and thus the settlement should pay for more monitoring extended beyond ten years. Others object that credit monitoring is not valuable at all, that free credit monitoring and credit freezes are already available to everyone, that the value of the offered monitoring is inflated to justify an inadequate settlement, and that the actual cost to provide credit monitoring services is *de minimis*.

This Court, like others before it, finds that credit monitoring is a valuable settlement benefit, particularly so the credit monitoring offered to class members in this case for such a lengthy period of time.[16] The credit monitoring provider has explained how the product offered in the settlement is better than the "free" monitoring products typically available to the public, and how the services seek to both prevent and address identity theft concerns. *See* App. 6, ¶¶ 33-43 (summarizing the advantages of the Experian credit monitoring and identity protection service negotiated as part of this settlement over other services available). Its comparable retail value is $24.99 per month. *Id.* It provides for $1 million in identity theft insurance and identity restoration services—features designed to address identity theft. And as reported by the claims administrator, millions of class members have chosen to make a claim for the services, further demonstrating their value.

16 *See Target* and *Anthem, supra*; *see also Home Depot*, 2016 WL 6902351, at *4 (overruling objections and finding that 18 months of credit monitoring and injunctive components of settlement are valuable class benefits); *Hillis v. Equifax Consumer Servs. Inc.*, 2007 WL 1953464, at *5 (N.D. Ga. June 12, 2007) (credit monitoring as part of settlement has substantial value).

***17** This Court has repeatedly lauded high-quality credit monitoring services as providing valuable class-member relief that would likely not otherwise be recoverable at trial, as have other courts in connection with other data breach settlements.[17] Finally, if class members do not wish to claim the credit monitoring option, they can elect alternative cash compensation—which is a form of relief that would not even be recoverable at trial—or opt out of the settlement.[18] After

careful consideration of the objections, the size and scope of relief secured by this settlement remains unprecedented and strongly supports final approval.

17 At the fairness hearing, class counsel summarized the benefits available in the credit monitoring and identity protection plan that was specifically negotiated as part of the settlement. The Court has had the opportunity to review the benefits provided, as well as the estimation of the value of those benefits, and this information has informed the Court of its decision to approve the settlement.

18 *See, e.g., Greco v. Ginn Dev. Co., LLC*, 635 F. App'x 628, 635-36 (11th Cir. 2015) ("If [objector] was displeased with the consideration provided to him under the settlement ... he was free ... to opt out of the settlement."); *Faught*, 668 F.3d at 1242 (to the same effect); *Lee v. Ocwen Loan Servicing, LLC*, No. 14-cv-60649, 2015 WL 5449813, at *13 (S.D. Fla. Sept. 14, 2015) (to the same effect).

B. Objections Relating To The Alternative Compensation Benefit.

Many objectors challenge the adequacy of the alternative compensation benefit, complaining that they will not receive a $125 payment that they believe they were promised. Objectors also suggest that the parties and, implicitly by approving the notice plan, the Court, misled the public by stating that all class members were entitled to $125 simply by filing a claim or that the parties engaged in some sort of "bait and switch" to keep class members from getting $125. While the Court appreciates the vehemence with which some of these objections are expressed, the reality is that the objections are misguided, ignore the limits of litigation, and are based upon a misunderstanding of the settlement.

Class counsel have explained that among their primary goals in the settlement negotiations were to ensure that consumers with out-of-pocket losses from dealing with identity theft that had already occurred or by taking precautionary measures would be reimbursed, that all 147 million class members would have the opportunity to get high quality credit monitoring to detect and defend against future identity theft, and that all class members would have access to identity restoration services if they learn they have been victimized by identity theft. The structure of the settlement reflects those goals, which the Court finds were appropriate and reasonable. Contrary to the impression held by many objectors who are critical of the settlement, the purpose of the alternative compensation remedy was not to provide every class member with the opportunity to claim $125 simply because their data was impacted by the breach (and those who object provide no statutory support that they would be entitled to such an automatic payment at trial). Rather, its purpose was to provide a modest cash payment as an "alternative" benefit for those who, for whatever reason, have existing credit monitoring services and do not wish to make a claim for the credit monitoring offered under the settlement. Thus, under the settlement, alternative compensation is expressly limited to those who already have credit monitoring services, do not want the credit monitoring services available under the settlement, attest they will maintain their own service for at least six months, and provide the name of their current credit monitoring service. Moreover, those individuals who paid for their own credit monitoring service after the breach are able to file a claim to recoup what they paid for those credit monitoring services as out-of-pocket losses in addition to making a claim for the alternative reimbursement compensation available under the settlement.

***18** The Court finds that the parties' decision to settle on terms that did not provide a cash payment to every class member was reasonable; indeed, settlement likely would not have been possible otherwise. The Court is skeptical that, even if it had the financial ability to do so, Equifax would ever willingly pay (or even expose itself to the risk of paying) the billions of dollars that providing a substantial cash payment to all class members would cost. The Court also finds that limiting the availability of the alternative compensation benefit in the way that is done under the settlement was reasonable, and the settlement would have easily been approved had there been no alternative compensation benefit at all.

The alternative compensation remedy was capped at $31 million as a result of arm's length negotiations. As compared to the settlement fund amounts earmarked for out-of-pocket losses, the Court finds this apportionment to be entirely equitable. Class members who incurred out-of-pocket losses —*including* paying for credit monitoring or credit freezes after announcement of the breach—have stronger claims for damages, and those who do not are also entitled to claim credit monitoring and identity restoration services going forward, which provides protection and assistance to class members who are subject to identity theft during the term of the settlement. It appears that the distribution plan will

successfully achieve its goals. According to the settlement administrator, even after paying the costs of credit monitoring and identity restoration services, the settlement fund (as supplemented with an additional $125 million if needed) likely will have sufficient money to pay class members with demonstrable out-of-pocket losses the entire amount of their approved claims. And, any money remaining in the fund after the extended claims period will be used to lift the cap on alternative compensation, allowing alternative compensation claimants to receive an additional, pro rata payment—which many objectors ignore.[19]

19 Objections have also been made to the $38 million cap on claims for time. For the same reasons, the Court rejects these objections.

The notice plan the Court approved in its Order Directing Notice explained that the amount available to pay alternative compensation claims was capped and that individual class members might receive less than $125. The long form notice (which was posted on the settlement website as of July 24, 2019—the same date that class members could start making claims), for example, told class members that they could get "up to" $125 in alternative compensation and further stated: "If there are more than $31 million in claims for Alternative Reimbursement Compensation, all payments for Alternative Reimbursement Compensation will be lowered and distributed on a proportional basis." [Doc. 739-2 at 266].

On the same day that the proposed settlement was first presented to this Court and well before the Court-approved email notices were sent to class members, regulators announced their own settlements with Equifax that incorporated the proposed settlement's consumer restitution terms in this case, including the alternative compensation benefit. In covering the regulators' announcements, media outlets began reporting that consumers could get $125 under the settlement without describing the limited purpose of and the eligibility requirements for the alternative compensation benefit. The ability to receive $125 under the settlement was also touted on social media, adding to the public misperception. (App. 1, ¶¶ 30-37).

The settlement website began accepting claims on July 24, 2019, shortly after the settlement was preliminarily approved. In the ensuing days, millions of claims for alternative compensation were filed. Because of the claims volume and the $31 million cap, it quickly became apparent to class counsel that alternative compensation claimants likely would receive a small fraction of what they may have expected based upon media reports, although the specific amount they would receive was unknown. (The specific amount alternative compensation claimants will be paid is unknowable until after the total number of valid alternative compensation claims is determined following the end of the initial claims period and, even then, their payments may be supplemented following the extended claims period if additional money remains after claims for out-of-pocket losses have been satisfied.) (App. 1, ¶¶ 43-44).

***19** Class counsel acted immediately to ensure that class members were not disadvantaged by the misleading media reports and the widespread public misperception about the alternative compensation benefit. They proposed a plan to Equifax and, after receiving input from regulators, presented the plan to the Court at a hearing held on July 30, 2019. The essence of the plan entailed notifying class members that, because of the claims volume, alternative compensation claimants likely would receive much less than $125 so that, going forward, class members would have that information in making a choice between credit monitoring and alternative compensation. The plan also afforded those who had already filed a claim a renewed opportunity to choose credit monitoring rather than alternative compensation. The Court approved the plan at the hearing and directed the parties to implement its terms. They did so. (App. 1, ¶¶ 43-44).

On August 1, 2019, class counsel distributed a statement to the media explaining the limitations of the alternative compensation benefit and urging class members to rely only on the official court notice, not what they heard or read in the media. On August 2, 2019, a statement was placed in a prominent position on the home page of the settlement website that read:

> If you request or have requested a cash benefit, the amount you receive may be significantly reduced depending on how many valid claims are ultimately submitted by other class members. Based on the number of potentially valid claims that have been submitted to date, payments for time spent and alternative compensation of up to $125 likely will be substantially lowered and will be distributed on a proportional basis if the settlement becomes final. Depending on the number of additional valid claims filed, the amount you receive may be a small percentage of your initial claim.

On August 7, 2019, the direct email notice campaign that the Court approved in its July 22, 2019 Order Directing Notice commenced. The first email notice, which was sent to more than 100 million class members, prominently featured

the same statement that had been added to the settlement website.[20] The same statement also was featured in a follow up email to the class. Moreover, a separate email was sent to all class members who had filed a claim for alternative compensation before August 2, 2019, repeating the same message and giving them the opportunity to choose credit monitoring if they wanted to switch their claim from alternative reimbursement. Also around this time, the FTC publicly announced that the alternative compensation claim would be less than $125, recommended that class members select credit monitoring, and included the statement that any class member who already made a claim for alternative compensation could switch to claim credit monitoring.[21]

20 This statement was also included in the publication notice, which appeared as a full-page advertisement in *USA Today* on September 6, 2019.

21 FTC Encourages Consumers to Opt for Free Credit Monitoring, as part of Equifax Settlement, FTC (July 31, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/07/ftc-encourages-consumers-opt-free-credit-monitoring-part-equifax.

So, beginning August 2, 2019, all class members who went to the website to file a claim were put on notice that alternative compensation claimants in all likelihood would only receive a small percentage of $125.[22] Beginning August 7, 2019, class members were given the same information as part of the Court-approved direct email notice program. And, all class members who filed an alternative compensation claim before August 2, 2019, were separately told of the situation and given an opportunity to amend their claim to choose credit monitoring instead of the cash payment if they wanted to do so. The Court thus finds that the notice plan approved by the Court on July 22, 2019, coupled with the supplemental plan approved at the July 30, 2019 hearing, provided reasonable and adequate notice to the class about the limits of the alternative compensation benefit and that class members had sufficient information and opportunity to make an informed choice between that benefit and credit monitoring.

22 The online claim form was also amended as of August 2, 2019 to advise that payments for the alternative compensation benefit may be less than $125 depending on the number and amount of claims filed.

***20** The likelihood that alternative compensation claimants will receive substantially less than $125 does not mean that the relief afforded by the settlement is inadequate. To the contrary, as described above, the relief offered by the settlement is unprecedented in scope. The Court must evaluate the adequacy of the settlement in terms of the entirety of the relief afforded to the class. The other substantial benefits—including payment of out-of-pocket losses, credit monitoring, identity restoration services, and the reduction in the risk of another breach—would justify approval of the settlement as fair, reasonable, and adequate even if the settlement did not provide an alternative compensation benefit at all. Indeed, this Court has previously approved settlements that provided no alternative compensation benefit in the *Home Depot* and *Arby's* data breach cases.

Moreover, the likelihood that alternative compensation claimants will receive substantially less than $125 is not unfair, and does not render the alternative compensation benefit itself inadequate. All of the alternative compensation claimants are eligible for the same relief made available to other class members, they received the same Court-approved communications as other class members disclosing that payments for alternative compensation claims would be a small percentage of $125, and those who filed their claims before the above enhancements to the settlement website were implemented were given the opportunity to change their minds. That class members, armed with this information, chose alternative compensation rather than the more valuable credit monitoring services offered by the settlement reflects their own personal decision, not a failing of the settlement or inadequate representation by class counsel. Moreover, the alternative compensation claimants retain the right to take advantage of all the other settlement benefits except credit monitoring.

It is unfortunate that inaccurate media reports and social media posts created a widespread belief that all class members, simply by filing a claim, would receive $125. But the parties are not responsible for those reports and class counsel acted appropriately, diligently, and in the best interests of the class by taking corrective action when they learned of the erroneous reporting. Moreover, any class member who chose alternative compensation rather than credit monitoring has had ample opportunity to make a new choice. Accordingly, objections to the adequacy of the settlement based on the fact that alternative compensation claimants will not receive $125; the manner in which class members were informed about the alternative compensation benefit; or the notion that class members were misled into choosing alternative compensation are overruled.

C. Objections Relating To Class Certification.

Objectors to class certification assert that the class representatives and counsel are not "adequate" for purposes of Rule 23(a)(4) because: (1) the interests of class members who have already incurred out-of-pocket losses conflict with those who have incurred only a risk of future losses,[23] or (2) some state consumer protection laws implicate statutory penalties while others do not.[24] Thus, according to the objections, "fundamental" intra-class conflicts between subgroups exist, requiring numerous subclasses with separate counsel for each. *See, e.g., Amchem*, 521 U.S. at 591, 117 S.Ct. 2231; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). These objections are wholly without merit as there simply are no fatal intra-class conflicts, fundamental or otherwise.

23 Objection of Shiyang Huang [Doc. 813 at 5-7].

24 Objection of Frank and Watkins [Doc. 876 at 1].

For the reasons set forth below, subclasses were not required here and, much more likely, would have been detrimental to the interests of the entire class. The practical effect of creating numerous subclasses represented by competing teams of lawyers would have decreased the overall leverage of the class in settlement discussions and rendered productive negotiations difficult if not impossible.[25] Further, if the case had not settled, the additional subclasses and lawyers likely would have made the litigation process, particularly discovery and trial, much harder to manage and caused needless duplication of effort, inefficiency, and jury confusion.[26]

25 *See In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on April 20, 2010*, 910 F. Supp. 2d 891, 919 (E.D. La. 2012), *aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (district court wary of "[s]uch rigid formalism" of requiring subclasses, "which would produce enormous obstacles to negotiating a class settlement with no apparent benefit[.]").

26 Frank and Watkins contend that residents of each jurisdiction with statutory claims that survived the motion to dismiss should be served by separate counsel. (*See* Final Approval Hearing Tr., at 78-79). They also acknowledge that claims under consumer protection statutes from 33 jurisdictions survived. [Doc. 876, at 6]. The objectors' approach thus would require at least 34 separate teams of lawyers (appointed class counsel plus lawyers for each jurisdiction), which would needlessly cause the scope of these proceedings to explode. The selection and appointment process alone would be incredibly time consuming and the duplication of effort involved in ensuring each legal team was adequately versed in the law and facts to assess the relative worth of their clients' claims would be staggering. Ironically, the same objectors criticize the requested attorneys' fees in this case on the basis that class counsel's hours are inflated because too many lawyers worked on it. [Doc. 876, at 24].

***21** The Eleventh Circuit has provided the contours necessary for an objector to establish a fundamental conflict that may necessitate subclasses: "A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d at 1189. "[T]he existence of minor conflicts alone will not defeat a party's claim to class certification: the conflict must be a 'fundamental' one going to the specific issues in controversy." *Id.* There is simply is no evidence of a fundamental intra-class conflict in this case. No class members were made better off by the data breach such that their interests in the outcome of the litigation are adverse to other class members. Similarly, all class members benefit from the proposed settlement, while none are harmed by it. In arguing otherwise, the objectors focus on minor differences within the class that are immaterial in the context of this case and, in any event, do not defeat class certification.

Shiyang Huang's objection—that this fact pattern is akin to *Amchem* and *Ortiz* because some class members have presently incurred out-of-pocket costs while others have not—was thoroughly analyzed and rejected in *Target*:

> The *Amchem* and *Ortiz* global classes failed the adequacy test because the settlements in those cases disadvantaged one group of plaintiffs to the benefit of another. There is no evidence that the settlement here is similarly weighted in favor of one group to the detriment of another. Rather, the settlement accounts for all injuries suffered. Plaintiffs who can demonstrate damages, whether through unreimbursed charges on their payment cards, time spent resolving issues with their payment cards, or the purchase of credit-monitoring or identity-theft protection, are reimbursed for their actual losses, up to $10,000. Plaintiffs who have no demonstrable injury receive the benefit of Target's institutional reforms that will better protect consumers' information in the future, and will also receive a pro-rata share of any remaining settlement fund. It is a red herring to insist, as [Objector] does, that the no-injury Plaintiffs' interests are contrary to those of the demonstrable-injury

> Plaintiffs. All Plaintiffs are fully compensated for their injuries.

Target, 2017 WL 2178306, at *5, *aff'd*, 892 F.3d at 973-76; *see generally id.* at *2-9. Further, "the 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." *Id.* at *6 (quoting *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999)). As in *Target*, the class representatives are adequate here because they seek essentially the same things as all class members: compensation for whatever monetary damages they suffered and reassurance that their information will be safer in Equifax's hands in the future. *Id.*[27]

27 *See also Anthem*, 327 F.R.D. at 309-11 (analyzing and overruling same objection). This Court rejected a similar objection in the *Home Depot* consumer track. *See* 2016 WL 6902351 (rejecting all objections asserted by Sam Miorelli, including an objection that separate counsel was necessary to represent allegedly conflicting subclasses (No. 14-md-2583-TWT, Doc. 237 at 39-40) (objection); Doc. 245 at 21-23 (reply in support of final approval)).

Unlike here, *Amchem* and *Ortiz* were massive personal injury "class action[s] prompted by the elephantine mass of asbestos cases" that "defie[d] customary judicial administration." *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 646 (8th Cir. 2012). In those cases adequacy was not sufficiently protected within a single class because claimants who suffered diverse medical conditions as a result of asbestos exposure wanted to maximize the immediate payout, whereas healthy claimants had a strong countervailing interest in preserving funds in case they became ill in the future. These vast differences between groups of claimants in *Amchem* required "caution [because] individual stakes are high and disparities among class members great." *Amchem*, 521 U.S. at 625, 117 S.Ct. 2231. Those concerns are simply not present in this consumer case where all class members allege the same injury from the compromise of their personal information. *See Anthem*, 327 F.R.D. at 314 (dispelling analogies to *Amchem* in the data beach context because "the same actions by a single actor wrought the same injury on all Settlement Class Members together").

***22** Further, Mr. Huang's argument is particularly weak given the structure of the settlement in this case and the nature of the alleged harm to the class. While those who have already incurred out-of-pocket losses are being reimbursed now, those who incur out-of-pocket losses in the future are not left without a monetary remedy. Class members will have an opportunity to be reimbursed for out-of-pocket losses relating to future identity theft during the extended claims period. Moreover, there is no conflict because of the nature of the harm caused by the breach. Those who have already suffered losses stand just as likely to suffer future losses as those who have not suffered any losses to date and thus all class members have an incentive to protect against future harm. *See Target*, 892 F.3d at 976 (future injury "is just as likely to happen to a member of the subclass with documented losses").

Accordingly, the interests of the proposed subclasses here "are more congruent than disparate, and there is no fundamental conflict requiring separate representation." *Target*, 892 F.3d at 976; *see also Anthem*, 327 F.R.D. at 309-10. The settlement benefits all class members equally by compensating both current and future losses as well as protecting against and providing assistance in dealing with any future losses or misuse of their information. The Court therefore rejects Shiyang Huang's objection to class certification.

Objectors Frank and Watkins insist that the adequacy of representation requirement can only be satisfied with subclasses, with separate counsel, to account for differences in the damages potentially available under different state consumer statutes. The Court is not persuaded, as this case seems well-suited to resolution via a nationwide class settlement. Frank and Watkins have not demonstrated how separate representation for state-specific subclasses would benefit anyone, let alone the class as a whole, or that the state statutes as a practical matter provide any class members with a substantial remedy under the facts presented. To the contrary, the Court finds that it is unlikely that any individual class members would have benefitted in any material way from state statutory remedies under the circumstances of this case or from separate representation for the purpose of advocating the alleged value of those remedies.

To begin with, the court in *Target* rejected this specific objection explaining:[28]

> The availability of potential statutory damages for members of the class from California, Rhode Island, and the District of Columbia does not, by itself, mean that the interests of these class members are antagonistic to the interests of class members from other jurisdictions. Class actions nearly always involve class members with non-identical damages....

> [Objector's] argument in this regard ignores the substantial barriers to any individual class member actually recovering statutory damages. Class members from these three jurisdictions willingly gave up their uncertain potential recovery of statutory damages for the certain and complete recovery, whether monetary or equitable, the class settlement offered. Contrary to [Objector's] belief, this demonstrates the cohesiveness of the class and the excellent result named Plaintiffs and class counsel negotiated, not any intraclass conflict.

2017 WL 2178306, at *6. Similarly, the trial court in *Anthem* found that, as in this case, "there is no structural conflict of interest based on variations in state law, for the named representatives include individuals from each state, and the differences in state remedies are not sufficiently substantial so as to warrant the creation of subclasses." *Anthem*, 327 F.R.D. at 310 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998)); *cf. Columbus Drywall*, 258 F.R.D. at 555 ("The fact that the named plaintiffs may have suffered greater damages does not indicate that named plaintiffs possess interests antagonistic to other plaintiffs.").[29]

28 Frank, the objector here, is a lawyer who represented the unsuccessful objector in *Target*. His co-counsel in *Target*, Melissa Holyoak, represents Frank and Watkins (her brother) in this case. While their roles may be different, Frank and Holyoak are making the same argument that failed in *Target*.

29 *See also Hanlon*, 150 F.3d at 1022 ("although some class members may possess slightly differing remedies based on state statute or common law, the actions asserted by the class representatives are not sufficiently anomalous to deny class certification. On the contrary, to the extent distinct remedies exist, they are local variants of a generally homogenous collection of causes which include products liability, breaches of express and implied warranties, and 'lemon laws.' "); *Dickens v. GC Servs. Ltd. P'ship*, 706 F. App'x 529, 536 (11th Cir. 2017) (class representative may be adequate even where seeking only statutory damages when other class members also suffered actual damages; at most this is a "minor conflict" under *Valley Drug*); *Navelski v. Int'l Paper Co.*, 244 F. Supp. 3d 1275, 1307 (N.D. Fla.), *reconsideration denied*, 261 F. Supp. 3d 1212 (N.D. Fla. 2017) ("The class members' damages will differ in degree, perhaps, but not in nature.").

***23** Those cases are more analogous here than the authority objectors cite. In *W. Morgan-E. Lawrence Water & Sewer Auth. v. 3M Co.*, 737 F. App'x 457 (11th Cir. 2018), consumers of allegedly contaminated water *and* the water authority that supplied the water were lumped into the same settlement class in an action against the alleged polluters, even though many class members had actually filed injury claims *against* the water authority. *Id.* at 464. Because the water authority had an interest in maximizing the injunctive relief obtained from the alleged polluters while *minimizing* the value of (if not undermining entirely) consumers' claims for compensatory damages, a fundamental intra-class conflict plainly existed, precluding dual representation of consumers and the water authority. *Id.* No such fundamental conflict exists here.

Frank and Watkins also rely on the Second Circuit's opinion in *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242 (2d Cir. 2011). They claim the case is "directly on point," but it is not. [Doc. 876 at 7]. *Literary Works* was a copyright case in which the proposed settlement divided the class into three claimant groups, called Categories A, B, and C. Unlike here, no single transaction or claim united the Category A, B, and C plaintiffs. The settlement capped the defendants' total liability and provided that, if the claims exceeded that cap, the Category C claims would be reduced *pro rata*. *Id.* at 246. In other words, the settlement protected the Category A and B claims at the sole expense of the Category C claims and could have resulted in Category C claimants receiving nothing. So, unlike here, the *Literary Works* settlement "sold out" one category of claims. *See id.* at 252.

The three claims categories in *Literary Works* were different in kind given the statutory scheme under which they arose. Category A claimants (whose claims were uniquely valuable under federal copyright law because they were registered in time to be eligible for statutory penalties) had stronger claims than Category C claimants (who had never registered their copyrights and thus were not eligible to claim even actual damages). But, according to the court, that did not mean Category A claimants could take all the settlement's benefits, at least not without independent representation for the Category C claimants. In contrast, the proposed settlement in this case provides all class members with benefits and, unlike in the proposed settlement in *Literary Works*, is "carefully calibrated" to do so. *Anthem*, 327 F.R.D. at 310-11.[30]

30 For the same reason, the Court overrules the Frank and Watkins objection that the settlement treats class members inequitably. The Court finds that due to the calibration of benefits, the settlement satisfies Rule 23(e)

(2)(D). Further, the Court does not agree that Frank and Watkins's approach would lead to a more equitable result and finds instead that it could disadvantage the entire class. Due to the large number of class members, at best, the approach might allow residents of a handful of states to receive potentially larger (but still quite small) statutory damages. But predicting such a result is mere speculation, particularly because the two objectors have not demonstrated that the statutory claims to which they point are even viable. More likely, their approach would lead to no settlement (and possibly no recovery at all).

Further, unlike in *Literary Works*, the entire class in this case brings the same common law claim for negligence stemming from the same event and arising under one state's law. This shared claim—involving the uniform applicability of Georgia law to a single set of facts—binds the interests of all class members, no matter where they reside, and overcomes any theoretical differences that arise from potential state statutory remedies. That is particularly true in this case because there is substantial doubt as to whether the plaintiffs can satisfy conditions the state statutes require to prove liability on an individual or class wide basis, (Utah's statute for example, requires each plaintiff to establish a "loss" and may not even be available in a class action),[31] and the complaint seeks nominal damages under Georgia law on behalf of all class members, which could yield more than the statutory damages for which Frank and Watkins argue. *See, e.g., Wright v. Wilcox*, 262 Ga. App. 659, 662, 586 S.E.2d 364 (2003) (noting that damages are not "restricted to a very small amount"). Thus, Frank and Watkins's claim that no one "press[ed] their most compelling case" is without merit. [Doc. 876, at 11].

31 *See* U.C.A. § 13-11-19 ("A consumer who suffers loss as a result of a violation of this chapter may recover, *but not in a class action*, actual damages or $2,000, whichever is greater, plus court costs.") (emphasis added).

***24** So too is the objectors' implication that their recovery is inadequate in relation to a possible award at trial. The Court has already noted that the settlement is at the high end of the range of likely recoveries and that many of the specific benefits of the settlement likely would not be attainable at trial, such as the fact that all class members are eligible for credit monitoring. Over a four-year period, the retail value of the credit monitoring approximates or exceeds the purported value of Frank and Watkins's statutory damages claims. Accordingly, Frank and Watkins likely are economically better off under the settlement than they would be even in the unlikely event that their state statutory claims were successfully litigated through trial. In short, the reality is that any conflicts between class members based upon their states of residence are doubtful and speculative, and even if any such conflicts exist, they are minimal.

Finally, Frank and Watkins do not identify any authority holding that a class settlement cannot release individual claims arising from the same transaction or occurrence that are not held by all class members. That happens all the time, in all manner of class judgments, and the Court has considered and found equitable under Rule 23(e) the scope of the release here. Under Frank and Watkins's theory, every multi-state class action settlement involving state law claims would risk invalidity without subclasses (with separate representatives and counsel) for each state. Many class settlements that have been approved and upheld on appeal would be invalid as a matter of law under such a rule, including *NFL Concussion*,[32] *Chrysler-Dodge-Jeep Ecodiesel*,[33] and *Volkswagen* "*Clean Diesel*."[34]

32 *In re Nat'l Football League Players Concussion Injury Litig.*, 307 F.R.D. 351 (E.D. Pa. 2015), *aff'd*, 821 F.3d 410 (3d Cir. 2016).

33 *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, & Prods. Liab. Litig.*, 2019 WL 2554232 (N.D. Cal. May 3, 2019).

34 *In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. MDL 2672 CRB, 2016 WL 6248426 N.D. Cal. Oct. 25, 2016, *aff'd*, 895 F.3d 597 (9th Cir. 2018), *and aff'd*, 741 F. App'x 367 (9th Cir. 2018) (2.0-liter settlement); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. MDL 2672 CRB, 2017 WL 2212783 N.D. Cal. May 17, 2017 (3.0-liter settlement).

The facts asserted by the objectors thus do not establish a conflict. And even if the objectors had identified a non-speculative conflict, which they have not, the conflict is minor and does not go to the heart of the claims asserted in the litigation. Moreover, the involvement of a cross-section of class representatives across all states, use of a respected and experienced mediator, and extensive input from state and federal regulators all safeguarded the process leading to the settlement. Indeed, the Attorneys General of both jurisdictions in which Frank and Watkins reside—Utah and the District of Columbia—incorporated this settlement as the mechanism for providing relief to their citizens in their own settlements with Equifax.

For all these reasons, the objections related to other consumer protection statutes do not present a problem with adequacy. In that regard, the Court also finds it relevant that Rule 23(e) was recently amended to require consideration of how settlement benefits are apportioned among class members as part of the fairness, reasonableness, and adequacy requirement. That, in and of itself, suggests that the adequacy requirement does not require that every class member share identical and overlapping claims. The Court has found here that the benefits are being equitably apportioned, and that the class is adequately represented without fundamental conflicts. There is therefore no basis to deny class certification under Rule 23(a)(4).

Another objector claims that class members who have an existing credit monitoring service are treated inequitably. [Doc. 880 at 11]. But claimants who purchased credit monitoring on or after September 7, 2017, in response to the breach may make a claim for full reimbursement of the costs, up through the date they submit a claim. [Doc. 739-2, ¶¶ 2.37, 6.2.4, 8.3.2]. These class members also have the opportunity to cancel their existing credit monitoring service and sign up for the (likely superior) comprehensive credit monitoring offered under the settlement, obtaining the same benefits available to every other class member. Or, they are eligible for alternative cash compensation, albeit smaller than the maximum $125, and remain eligible for all of the other settlement benefits. Accordingly, the Court finds that those class members with existing credit monitoring are treated equitably under the settlement.

D. Objections Relating To The Process For Objecting.

***25** The Court finds that the process for objecting is reasonable. Some objectors argue that the procedure for objecting is overly burdensome, asserting that objectors should not be required to show they are members of the settlement class, or provide their personal contact information, signature, or dates for a potential deposition. This argument is at odds with the number of objections received, and few objectors had difficulty meeting these criteria. Nevertheless, the requirements imposed on objectors are consistent with Rule 23, are common features of class action settlements,[35] and were informed by the Court's previous experience dealing with objectors in connection with the *Home Depot* data breach settlement.

35 *See Champs Sports Bar & Grill Co. v. Mercury Payment Sys., LLC*, 275 F. Supp. 3d 1350, 1353 (N.D. Ga. 2017) (striking objection for failing to comply with similar criteria); *Home Depot*, Doc. 185 at ¶ 12 (N.D. Ga. March 8, 2016) (requiring objectors to provide personal contact information and signature); *Jones v. United Healthcare Servs., Inc.*, 2016 WL 8738256, at *4 (S.D. Fla. Sept. 22, 2016); *Chimeno-Buzzi v. Hollister Co.*, 2015 WL 9269266, at *5 (S.D. Fla. Dec. 18, 2015) (same); *see also In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 2019 WL 3410382, at *27 (D. Or. July 29, 2019) (requiring objectors to provide personal contact information and provide signed statement that he or she is member of settlement class); *In re Anthem, Inc. Data Breach Litig.*, 2017 WL 3730912, at *3 (N.D. Cal. Aug. 25, 2017) (requiring written objection to contain personal contact information and signature).

Some objectors protest the possibility of being subjected to a deposition, but objectors who voluntarily appear in an action place their standing and basis for objecting at issue for discovery. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, 281 F.R.D. 531, 533 (N.D. Cal. 2012) (holding that when an objector voluntarily appears in litigation by objecting to a class settlement, he or she is properly subject to discovery). Courts in this Circuit have found it advisable to discover the objector's knowledge of the settlement terms, to ferret out frivolous objections, and to expose objections that are lawyer-driven and filed with ulterior motives.[36] Moreover, Rule 23 has recently been amended to address these sorts of concerns. *See generally* Fed. R. Civ. P. 23(e)(5).[37] The objection requirements serve to further appropriate lines of inquiry, and are not meant to discourage objections. "Such depositions not only serve to inform the Court as to the true grounds and motivation for the objection, but they also help develop a full record should the objector file an appeal." *Montoya*, 2016 WL 1529902, at *19.

36 *See Montoya v. PNC Bank, N.A.*, 2016 WL 1529902, at *19 (S.D. Fla. April 13, 2016); *see also Champs Sports*, 275 F. Supp. 3d at 1359 (overruling the objection in a case where the objector was deposed, admitted he had no evidence or knowledge supporting objection, and could not explain how the settlement was inadequate); *Morgan v. Pub. Storage*, 301 F. Supp. 3d 1237, 1259 (S.D. Fla. 2016) ("An objector's knowledge of the objection matters in crediting (or not) the objection and determining the objector's motives."); *cf. Greco v. Ginn Dev. Co.*, 635 F. App'x 628, 633 (11th Cir. 2015) (district court may properly consider whether those voicing opposition to settlement have ulterior motives).

37 The accompanying 2018 Advisory Committee Notes explain that the Rule has been amended because "some

> objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements."

***26** Finally, the personal signature requirement is not burdensome, and is of particular importance in this case, to ensure that the objection is made in the objector's personal capacity, and not at the behest of others. And, the personal signature requirement decreases the likelihood that services encouraging mass objections or opt-outs file unauthorized or fictitious objections. These objections are overruled.

E. Objections Relating To How To Opt Out.

The Court overrules all objections related to the procedures for how to opt out. The exclusion procedure is simple, affords class members a reasonable time in which to exercise their option, and is conventional.[38] The individual signature requirement on opt-out requests is not burdensome at all. Moreover, it ensures that each individual has carefully considered his options and understands that he is giving up his right to relief under the settlement. While technology provides an avenue for filing claim forms more easily, it also makes it easier for third parties and their counsel to file unauthorized "mass opt-outs," which are sometimes "highly indicative of a conclusion that such counsel did not spend much time evaluating the merits of whether or not to opt-out in light of the individual circumstances of each of their clients and in consultation with them."[39] The Court's Order Directing Notice clearly did not present insurmountable hurdles to opting out of the settlement class.

38 *See, e.g., Harrison v. Consol. Gov't. of Columbus, Georgia*, 2017 WL 6210318, at *2 (M.D. Ga. April 26, 2017) (requiring exclusion form to be mailed via regular mail); *Flaum v. Doctor's Assoc., Inc.*, 2017 WL 3635118, at *3 (S.D. Fla. March 23, 2017) (same); *Home Depot*, Doc. 185 at ¶ 11 (N.D. Ga. March 8, 2016) (same); *Jones*, 2016 WL 8738256, at *3 (same); Manual for Complex Litigation (Fourth) § 21.321 (2004) (hereinafter, "*Manual*") ("Typically, opt-out forms are filed with the clerk, although in large class actions the court can arrange for a special mailing address and designate an administrator retained by counsel and accountable to the court to assume responsibility for receiving, time-stamping, tabulating, and entering into a database the information from responses.").

39 *In re Oil Spill by Oil Rig Deepwater Horizon*, 910 F. Supp. 2d at 939. Here, where the technology allowing class members to object or opt out is coupled with misinformation about what the settlement actually provides, the dangers of accepting mass, unsigned objections or opt-out requests are even more acute.

Several class members object that there should be a renewed opportunity to opt out of the settlement after the final approval hearing. But class members already had at least 60 days from the notice date [Doc. 742 at 15] and 120 days after the order directing notice to evaluate the settlement and request exclusion. The length of the opt-out period provided class members a reasonable opportunity to exclude themselves.[40] And, because the Court is approving the settlement without any changes, the final approval hearing did not create any new grounds for a class member to opt out.

40 "Courts have consistently held that 30 to 60 days between the mailing (or other dissemination) of class notice and the last date to object or opt out, coupled with a few more weeks between the close of objections and the settlement hearing, affords class members an adequate opportunity to evaluate and, if desired, take action concerning a proposed settlement." *Greco*, 635 F. App'x at 634.

F. Objections To The Notice Plan.

***27** Objections to the notice plan include that: (1) the content of the notice is inadequate; (2) the supplemental e-mail notice to early claimants was inadequate or improper; (3) the notice plan is too reliant on email and social media; (4) the notice plan is inadequate for those without computers or access to news; and (5) the notice plan is unclear as to the amount of fees requested. The Court rejects and overrules each of these objections. The parties implemented the Court-approved notice plan that was developed in conjunction with federal and state regulators, which constitutes the best notice practicable under the circumstances, and provides class members with information reasonably necessary to evaluate their options. *See* Fed. R. Civ. P. 23(e)(1)(B); *see also Greco*, 635 F. App'x at 633.

The notice plan here clearly and concisely explains the nature of the action and the rights of class members, thereby satisfying the requirements of Rule 23 and due process. The short form notice, developed with both federal and state regulators, and approved by this Court, sets forth a clear and concise summary of the case and the proposed settlement and, in large, bold typeface, directs class members to visit the settlement website[41] or call the toll-free phone number

for more information. *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1342-44 (S.D. Fla. 2011) (approving notice where information was referenced in short form notice and more information was readily available in full on settlement website). And the long form notice on the settlement website contains a comprehensive explanation of the settlement and related matters. While the long form notice does not contain every fact or piece of information a class member might find to be material, that is legally unnecessary, potentially confusing, and off-putting to class members.[42]

41 The long-form notice and the "Frequently Asked Questions" ("FAQ") page of the settlement website contain a section entitled "Legal Rights Resolved Through The Settlement" and provide an answer to the question: "What am I giving up to stay in the settlement class?" The answer clearly provides that, by staying in the settlement class, class members are releasing their "legal claims relating to the Data Breach against Equifax when the settlement becomes final." *See* Doc. 739-2 at 269 & Settlement Website FAQ 20. Additionally, these notice materials contain a section titled "The Lawyers Representing You" and provide an answer to the question: "How will these lawyers be paid?" The answer clearly states that class counsel are seeking attorneys' fees of up to $77,500,000 and reimbursement for costs and expenses up to $3,000,000 to be paid from the Consumer Restitution Fund. *See* Doc. 739-2 at 270-71 & Settlement Website FAQ 22.

42 *See Faught*, 668 F.3d at 1239 (an overly-detailed notice has the potential to confuse class members and impermissibly encumber their right to benefit from the action).

Some objectors complain the notice plan failed to adequately explain that the alternative compensation benefit could be reduced depending on how many valid claims were submitted. But, as discussed above, the misconception that each class member would automatically receive alternative reimbursement compensation of $125 arose not from the notice plan (nor could it, since direct email notice to the class had not yet been sent when the misconception arose), but from misleading media coverage that began even before the proposed settlement was presented to the Court. *See* App. 1, ¶¶ 27-37. Further, as discussed above, the notice plan, particularly when coupled with the additional steps the Court approved on July 30, 2019, ensured that class members had adequate information about the alternative compensation benefit—including information that alternative compensation claimants likely would receive a "small percentage" of $125—before making a choice between that benefit and credit monitoring.[43] And, for those who made the choice before the enhancements to the settlement website were implemented, they were sent an email giving them an opportunity to change their minds and amend their claim.[44]

43 Some objectors also erroneously assert that the Court approved a change to the claims form (requiring alternative claimants to provide the name of their existing credit monitoring service) to deter class members from claiming $125. This requirement was a component of the settlement from the outset. Changing the form helped ensure that only those eligible for alternative compensation would file a claim and saved the claims administrator from the necessity of having to go back to claimants and ask for that information in the claims vetting process from the millions of people who were filing claims.

44 Other objectors argue that all early claimants should have been notified by notarized letter, rather than email. But each claimant provided his email address as part of the claims filing process, and was informed that subsequent correspondence would be received via email. *See* App. 4, ¶¶ 60-62. Moreover, the objectors present no evidence that a substantial number of class members did not receive the supplemental email notice. *See Nelson*, 484 F. App'x at 434-35 (affirming district court's decision overruling conclusory objections).

***28** Some objectors argue that the notice plan was too reliant upon newer technologies to deliver notice of the settlement to the class. But courts have increasingly approved utilizing email to notify class members of proposed class settlements, and such notice was appropriate in this case. *See, e.g., Home Depot*, 2016 WL 6902351, at *5 (holding notice reaching 75 percent of class through email and internet advertising satisfied Rule 23 and due process); *Morgan*, 301 F. Supp. 3d at 1262 ("Courts consistently approve notice programs where notice is provided primarily through email because email is an inexpensive and appropriate means of delivering notice to class members."). The ultimate focus is on whether the notice methods reach a high percentage of the class. *See* Federal Judicial Center, "*Judge's Class Action Notice and Claims Process Checklist and Plain Language Guide*" (2010) (available at www.fjc.gov); R. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 Emory L.J. 1569, 1650 & n. 479 (2016) ("Courts have increasingly utilized social media ... to notify class members of certification, settlement, or other developments.").

The Court-approved notice plan, which as noted above was designed by experienced counsel for the parties, JND (an expert in providing class action notice), Signal (an expert in mass media and data analytics), and experts on consumer communications at the Federal Trade Commission and the Consumer Financial Protection Bureau, effectively reached and engaged the class. *See Carter v. Forjas Taurus S.A.*, 2016 WL 3982489, at *5 (S.D. Fla. Jul. 22, 2016) (notice plan that "used peer-accepted national research methods to identify the optimal traditional, online, mobile and social media platforms to reach the Settlement Class Members" was sufficient). Direct email notice was sent to the more than 104 million class members whose email addresses could be found with reasonable effort. The digital aspects of the notice plan, alone, reached 90 percent or more of the class an average of eight times. App. 5, ¶¶ 22-24. *See* Federal Judicial Center, "Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide" (2010)[45] (recognizing the effectiveness of notice that reaches between 70 and 95 percent of the class). And, the unprecedented claims rate in a case of this magnitude not only further demonstrates that the notice plan's use of email and social media satisfied minimum standards, but also has been more effective than other notice methods.

45 *Available at* https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf.

The Court also overrules objections that the notice program is inadequate for those without ready access to computers or the internet. The Constitution does not require that each individual member receive actual notice of a proposed settlement. *See Juris v. Inamed Corp.*, 685 F.3d 1294, 1318 (11th Cir. 2012). Publication and media notice are appropriate where direct notice is not reasonable or practicable, such as when a class consists of millions of residents from different states. *See Edwards v. Nat'l Milk Producers Fed'n*, 2017 WL 3623734, at * 4 (N.D. Cal. June 26, 2017) ("In view of the millions of members of the class, notice to class members by individual postal mail, email or radio or television advertisements, is neither necessary nor appropriate.") (quoting *In re MetLife Demutualization Litig.*, 262 F.R.D. 205, 208 (E.D.N.Y. 2009)). It was particularly appropriate here, where so much effort was spent in quantitative and qualitative research (including the use of focus groups and a public opinion survey) to specifically identify and target those who lack ready access to the internet and to design a national radio advertising campaign to reach them.[46]

46 *See, e.g., Kumar v. Salov N. Am. Corp.*, 2017 WL 2902898, at *3 (N.D. Cal. July 7, 2017) (approving of notice campaign consisting of media notice, publication notice, and advertisements on various websites); *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig.*, 314 F.R.D. 580, 602-03 (N.D. Ill. 2016) (approving indirect notice for class members who could not be given direct notice including print publication, settlement class website, press release, and social media); *In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 WL 7364803, at *3 (N.D. Cal. Dec. 19, 2016) (approving notice consisting of email, settlement website, toll-free number, publication notice, press release, text link advertising, banner advertising, and advertising on Facebook and Twitter); *Manual* § 21.312 ("Posting notices and other information, on the Internet, publishing short, attention-getting notices in newspapers and magazines, and issuing public service announcements may be viable substitutes for ... individual notice if that is not reasonably practicable.").

***29** In the Court's estimation, it would have been extremely wasteful to spend a significant portion of the settlement fund sending direct mail notice to 147 million class members across the United States and its territories or even to a substantial subset of the class. That would have needlessly reduced the money available to pay for the benefits to the class. The plan developed by the parties, notice experts, and federal and state regulators, and approved by the Court, was sufficient, particularly in light of the pervasive media coverage and the efforts of state and federal regulators to inform consumers about the potential relief available to the class under the settlement. Indeed, few, if any, other class actions of which the Court is aware have received the widespread public attention that the settlement in this case has received or, as noted above, triggered such a substantial number of claims.

Some objectors argue that the notice plan does not identify the exact amount of fees sought by class counsel and thus precisely how much money will be left in the settlement fund after the fees have been paid. But because this Court has broad discretion over the amount of fees to be awarded, *see Piambino v. Bailey*, 757 F.2d 1112, 1139-42 (11th Cir. 1985); *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1329 (S.D. Fla. 2001), the class notice could not with certainty disclose the amount of fees that would ultimately be awarded or the amount that would remain in the fund after those fees are paid. Identifying a maximum amount of fees to be requested is sufficient, and that is what happened here. *See* Doc. 739-2 at 270 & Settlement Website FAQ 22; *see also Carter*, 2016

WL 3982489, at *7 (approving notice where it informed class members that class counsel would be seeking "up to $9 million in fees"). Moreover, class counsel's motion for fees was posted on the settlement website when it was filed on October 29, 2019, giving class members the ability to learn exactly what class counsel requested well before the deadline to opt out or object.

G. Objections To The Claims Procedures.

The Court overrules the objections regarding claims procedures, specifically those objections stating that: (1) the procedure for claiming the alternative reimbursement compensation is confusing and unfair; (2) the requirement that time spent and actual out-of-pocket losses be "fairly traceable" to the data breach will disallow valid claims; (3) the call center was unhelpful and inadequately staffed early in the claims period; and (4) the claims procedure presents "too many hoops to jump through" to submit a claim.

Some objectors argue that the claims process improperly "channels" class members toward electing credit monitoring as the only form of relief because too many class members have elected alternative compensation. Perhaps because of the inaccurate public reporting suggesting that only $31 million is available to pay claims, these objectors misunderstand the settlement. Credit monitoring or alternative reimbursement compensation is not the only available relief. Further, class members are not told the form of relief that they must choose, but are given adequate and appropriate information so they can make up their own minds. That class members were told alternative compensation claimants likely would receive a small percentage of $125 is accurate. To keep that information from class members would not have been appropriate.

Some objectors argue that they did not receive the supplemental email providing enhanced information about the alternative compensation benefit, but that is no reason to upend the settlement—especially where those class members will have an opportunity to address any claims deficiencies as part of the agreed-upon claims review process.[47] *See, e.g., Home Depot*, 2016 WL 6902351, at *5 (rejecting objections from class members who claimed they did not receive subsequent email notice). Further, this information was on the settlement website, which was available to all class members.

47 According to class counsel and the claims administrator, any claimants who did not respond to the supplemental email notice or otherwise take action will be routed through the regular deficiency process for claims validation, which provides them an opportunity to address any deficiencies with their claims. *See* Settlement Agreement § 8.5.

***30** Other objectors argue that requiring class members to provide the name of their current credit monitoring provider to claim alternative compensation is unfair. But the settlement agreement clearly and unambiguously requires class members claiming that benefit to "identify the monitoring service" that they have in place to ensure they are eligible for that benefit. *See* Settlement Agreement § 7.5. And, there is nothing unfair about requiring a claimant to meet the eligibility requirements for a particular benefit. *See Manual* § 21.66 ("Class members must usually file claims forms providing details about their claims and other information needed to administer the settlement.").

Other objectors argue that the settlement's "fairly traceable" requirement for reimbursement of out-of-pocket losses and time spent on the data breach will work to disallow valid claims. But to pursue a claim in court, a plaintiff must demonstrate that his or her injuries are "fairly traceable" to the challenged conduct of the defendant. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Settlement is no different; thus courts in other data breach cases have upheld similar requirements. *See, e.g., Premera*, 2019 WL 3410382, at *22 (providing reimbursement for "proven out-of-pocket damages that can plausibly be traced to the Data Breach"); *Home Depot*, 2016 WL 6902351, at *4 (requiring "Documented Claims" to claim monetary relief).

Some objectors argue that the call center was unhelpful early in the claims period. But the settlement provides reasonable procedures and allocates sufficient funds to ensure that the call center was adequately staffed (indeed, more than one hundred operators were on call at times early in the claims period) and the staff is trained to help class members with questions relating to the proposed settlement. *See* App. 4, ¶¶ 37-41. Beyond that, class counsel were available to respond to class member inquiries and routinely responded to class member emails and phone calls. *See* App. 1, ¶ 69. While frustration with a call center is familiar to most people who exist in the modern world, the Court sees no indication of a pervasive problem here that in any way affects the fairness of the settlement or the claims procedure. That so few class members made this objection despite the massive number of calls that the call center has handled is further testament that any problems were not material.

Several objectors also claim that there are "too many hoops to jump through" in order to submit a claim. But completion and documentation of the claim form are no more burdensome than necessary and similar claims procedures are routinely required in other settlements. *See, e.g., Jackson's Rocky Ridge Pharmacy, Inc. v. Argus Health Sys., Inc.*, 2007 WL 9711416, at *2 (N.D. Ala. June 14, 2007) ("[E]ach class member who seeks damages from the settlement fund must file and substantiate its claim. This requirement is no more onerous than that to which each of the class members would have been subjected had they filed a separate lawsuit against the defendant and prevailed on the substantive claim."); *Manual* § 21.66 ("Class members must usually file claims forms providing details about their claims and other information needed to administer the settlement.... Verification of claims forms by oath or affirmation ... may be required, and it may be appropriate to require substantiation of the claims...."). The robust number of claims is further evidence that the process was not unduly burdensome.

Some objectors are dissatisfied with the claims period and argue that it is too short to provide relief for potential future harms. The Court concludes that the length of the claims period is reasonable and comparable to, if not longer than, claims periods in other data breach cases. *See, e.g., Home Depot*, 2016 WL 6902351 (approving settlement with initial claims period of 150 days); *Premera*, 2019 WL 3410382, at *26 (ordering initial claims period of 150 days); *Anthem*, 327 F.R.D. at 325 (overruling objections that a one-year claims period was too short because there is a risk of proving harm that has not yet occurred at trial and because settlement provided protections against future identity fraud). The proposed settlement provides class members with six months to claim benefits for losses already sustained and does not require claims to be filed to access identity restoration services. If money remains in the fund after the initial claims period, class members can file claims in the extended claims period, which provides an additional four years to recover for losses that have not yet occurred. Beyond that, credit monitoring and identity restoration services will allow class members to monitor and help safeguard their information for several more years. The Court views these periods as entirely fair and reasonable and calculated to equitably deliver relief to members of the settlement class.

IV. PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS TO THE CLASS REPRESENTATIVES.

***31** Plaintiffs request that the Court award a $77.5 million fee as provided in the settlement agreement. The Court finds that the requested fee is reasonable under the percentage approach, which is the exclusive method in this Circuit for calculating fees in a common fund case such as this one. A lodestar crosscheck, though not required, also supports the requested fee.

A. The Requested Fee Is Reasonable Under The Percentage Method.

The controlling authority in the Eleventh Circuit is *Camden I Condominium Association, Inc. v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991), which holds that fees in common fund cases must be calculated using the percentage approach. *Camden I* does not require any particular percentage. *See id.* ("There is no hard and fast rule ... because the amount of any fee must be determined upon the facts of each case."); *see also, e.g., Waters v. Int'l. Precious Metals Corp.*, 190 F.3d 1291, 1294 (1999). Typically, awards range from 20% to 30%, and 25% is considered the "benchmark" percentage. *Camden I*, 946 F.2d at 775. The Eleventh Circuit has instructed that, to determine the appropriate percentage to apply in a particular case, a district court should analyze the *Johnson* factors derived from *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), as well any other pertinent considerations. *Camden I*, 946 F.2d at 775.

The $77.5 million requested fee is 20.36% of the $380.5 million *minimum* settlement fund. Under the controlling authority cited above, the requested fee is reasonable as a percentage of the non-reversionary fund alone. However, the minimum amount of the settlement fund is not the true measure of all the benefits, monetary and non-monetary, available to the class under the settlement. The class benefit also includes: (1) an additional $125 million that Equifax will pay if needed to satisfy claims for out-of-pocket losses; (2) the consent order requiring Equifax to pay at least $1 billion for cybersecurity and related technology and comply with comprehensive standards to mitigate the risk of another data breach involving class members' personal data; (3) the value of the opportunity to receive ten years of free credit monitoring for all class members (which would cost each class member $1,920 to buy at its retail price); (4) the value of seven years of identity restoration services available to all class members; and (5) the value of a ban on the use by Equifax of arbitration clauses in some circumstances.[48] In assessing a fee request, the Court may also consider all of these benefits. *See, e.g., Camden*, 946 F.2d at 775; *Poertner*

v. Gillette Co., 618 F. App'x 624, 629 (11th Cir. 2015), *cert. denied sub nom. Frank v. Poertner*, —— U.S. ——, 136 S. Ct. 1453, 194 L.Ed.2d 575 (2016) (district court did not abuse its discretion by "including the value of the nonmonetary relief ... as part of the settlement pie").

48 In addition to these benefits provided under the settlement, certain settlement class members also benefited from an additional year of credit monitoring services, known as IDnotify, provided to class members who previously enrolled in the TrustedID Premier services offered by Equifax following the data breach. *See* Settlement Agreement § 4.3.

When these other benefits are considered, the percentage of the class benefit the requested fee represents is much less than 20.36%.[49] For example, the requested fee is 15.3% of the $380.5 million fund plus the additional $125 million available to pay out-of-pocket claims. The requested fee is only 5% of those amounts plus the $1 billion that Equifax is required to spend for cybersecurity and related technology and it is less than 1% when the retail value of the credit monitoring services already claimed by class members is included. These figures demonstrate that using 20.36% in the calculation of a percentage-based fee is conservative as it does not account for all of the settlement's benefits, but that percentage nonetheless will be the focus of the Court's analysis because if a 20.36% award is reasonable, as it is, then there can be no question that a smaller percentage is also reasonable.

49 For the same reasons, even if the Court calculated the percentage of the fund based upon the size of the fund specified in the term sheet rather than the ultimate settlement (25% of $310 million), that percentage would be reasonable, and the presence of all the other ingredients in the "settlement pie" drive the requested fee well below the benchmark.

***32** The percentage of the class benefit represented by the requested fee is supported by the factors that the Eleventh Circuit has directed be used in assessing the reasonableness of a fee request, including the *Johnson* factors. There are twelve *Johnson* factors:

> (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.

George v. Academy Mortgage Corp. (UT), 369 F. Supp. 3d 1356, 1376 (N.D. Ga. 2019). Other relevant factors include the number of objections from class members, the risks undertaken by class counsel, and the economics of handling class actions. *Champs Sports*, 275 F. Supp. 3d at 1356; *Camden I*, 946 F.2d at 775. The Court does not analyze two of the *Johnson* factors, the undesirability of the case and the nature of the attorney-client relationship, due to their limited applicability here. The Court addresses the other factors below.

(1) *The Time and Labor Involved*

The Court has observed the intensive amount of time and labor required to prosecute the claims in this case. Class counsel and those under their direction have spent over 33,000 hours prosecuting this action. The vast majority of the work was done by class counsel and other firms the Court appointed to the plaintiffs' steering committee. The work was allocated to those able to do the work most efficiently. Class counsel also estimate they will spend at least another 10,000 hours over the next seven years in connection with final approval, managing the claims process, and administering the settlement. The Court finds that the work that class counsel have done and estimate they will do is reasonable and justified in view of the issues, the complexity and importance of the case, the manner in which the case was defended, the quality and sophistication of Equifax's counsel, the result, the magnitude of the settlement and the number of claims. Moreover, the amount of work devoted to this case by class counsel likely was a principal reason that they were able to obtain such a favorable settlement at a relatively early stage. This factor weighs in favor of approval of the requested fee.

(2) *The Novelty and Difficulty of the Questions*

Although many of the plaintiffs' claims were able to survive a motion to dismiss, their path forward remained difficult. The law in data breach litigation remains uncertain and the applicable legal principles have continued to evolve, particularly in the State of Georgia, where protracted appellate litigation in two other data breach cases while this case has been pending demonstrate the unsettled state of the law. *See McConnell*, 828 S.E.2d at 352; *Collins v. Athens Orthopedic Clinic*, 347 Ga.App. 13, 815 S.E.2d 639 (Ga. Ct.

App. 2018), *rev'd* —— Ga. ——, —— S.E.2d ——, 2019 WL 7046786 (Dec. 23, 2019). As a result, this case involved many novel and difficult legal questions, such as the threshold issue of whether Equifax had a duty to protect plaintiffs' personal data, whether plaintiffs' alleged injuries are legally cognizable and were proximately caused by the Equifax breach, the applicability of the FCRA to a data breach at a major credit reporting agency, the meaning of various state consumer protection statutes, and other issues briefed by the parties in connection with Equifax's motion to dismiss. These would be recurring issues throughout the litigation if the settlement is not approved.

***33** Other novel and difficult questions in this case resulted from the sheer size of the litigation, the number of Americans impacted by the breach, and the highly technical nature of the facts. Determining and proving the cause of the breach and developing cybersecurity measures to prevent a recurrence were particularly challenging. The plaintiffs' lawyers also confronted unusual circumstances and a dearth of legal guidance or governing precedent when they engaged in extensive negotiations with federal and state regulators after reaching a binding term sheet with Equifax. This factor strongly weighs in favor of the requested fee request.

(3) *The Skill Requisite to Perform the Legal Services Properly and the Experience, Reputation, and Ability of the Lawyers*

This case required the highest level of experience and skill. Plaintiffs' legal team includes lawyers from some of the most experienced and skilled class action law firms in the country who have collectively handled more than 50 data breach cases, including all of the most significant ones. Their experience and skill was needed given the scope of the case and the quality of the opposition. The lawyers who represented Equifax are highly skilled and come from several of the nation's largest corporate defense firms. Moreover, Judge Phillips has noted that "the settlement is the direct result of all counsel's experience, reputation, and ability in complex class actions including the evolving field of privacy and data breach class actions." [Doc. 739-9, ¶ 15]. The Court can also attest to the high level of zealous, diligent advocacy demonstrated throughout this case. These factors weigh in favor of the requested fee.

(4) *The Preclusion of Other Employment*

Given the demand for their services attributable to their high level of skill and expertise, but for the time and effort they spent on this case the plaintiffs' lawyers would have spent significant time on other matters. Further, by necessity given its nature, the bulk of the work was done by a relatively small number of senior lawyers, and demanded their full attention. As described above, their focus on this case likely served as the principal reason that the case was able to settle favorably, further weighing in support of the requested fee.

(5) *The Customary Fee*

The percentage used to calculate the requested fee is substantially below the percentages that are typically charged by lawyers who handle complex civil litigation on a contingent fee basis, which customarily range from 33.3% to 40% of the recovery.

(6) *Whether the Fee is Fixed or Contingent*

"A contingency fee arrangement often justifies an increase in the award of attorneys' fees." *Behrens*, 118 F.R.D. at 548. A larger award is justified because if the case is lost a lawyer realizes no return for investing time and money in the case. *See In re Friedman's, Inc. Sec. Litig.*, 2009 WL 1456698, at *3 (N.D. Ga. May 22, 2009). As discussed above, the novel and difficult questions present in this case heightened this concern here. This action was prosecuted on a contingent basis and thus a larger fee is justified.

(7) *Time Limitations Imposed by the Client or the Circumstances*

Priority work done under significant time pressure is entitled to additional compensation and justifies a larger percentage of the recovery. *See, e.g., Johnson*, 488 F.2d at 718; *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1215 (S.D. Fla. 2006). At various times during this litigation, class counsel were forced to work under significant time pressure, such as when they had to vet thousands of potential class representatives in a short period to meet the Court's deadline for filing a consolidated amended complaint and during the several months they spent negotiating with Equifax and federal and state regulators leading up to finalizing the settlement. During critical periods, class counsel spent as much as 2,000 hours a month or more. This factor thus supports an increased award.

(8) *The Amount Involved and the Results Obtained*

***34** This is the largest data breach settlement in history. The $380.5 million fund alone is more than the total

recovered in all consumer data breach settlements in the last ten years.[50] Further, class members are eligible for an unprecedented package of benefits, including but not limited to cash compensation for out-of-pocket losses fairly traceable to the breach of up to $20,000 per class member, reimbursement for time spent as a result of the breach, and 25% of the amount paid to Equifax by class members for identity protection services in the year prior to the breach; ten years of high quality credit monitoring services having a retail value of $1,920 per class member; and seven years of identity restoration services without the need to file a claim.

50 Contrary to the arguments of some objectors, the size of the settlement fund is not just a matter of scale. For instance, the settlement is larger on a per capita basis than the *Anthem* settlement, which resulted in a $115 million fund for a class of 80 million individuals.

In addition, Equifax has agreed to a consent order requiring it to comply with comprehensive cybersecurity standards, spend at least $1 billion on data security and related technology, and have its compliance audited by independent experts. Violations of the consent order are subject to this Court's enforcement power. This injunctive relief provides a substantial benefit to all class members, and exceeds what has been achieved in other data breach settlements.

Finally, as noted, class counsel negotiated an innovative notice program to effectively inform and engage class members, and a robust claims process to facilitate and increase class member participation. The notice program and claims process are both a direct benefit to the class.

In short, the results obtained—which are in the high range of potential recoveries and in some instances may exceed what could be achieved at trial—weigh strongly in favor of the requested fee.

(9) *Awards in Similar Cases*

The requested fee is in line with—if not substantially lower than—awards in other class actions that have resulted in similarly impressive settlements. Even if the fee is based only on the cash fund, ignoring all other monetary and non-monetary benefits, the 20.36% that the requested fee represents is below the 25% benchmark recognized in *Camden I* and substantially less than has been awarded in similar cases, including specifically other data breach cases. *See, e.g., In re Arby's Rest. Grp., Inc. Data Sec. Litig.*, 2019 WL 2720818, at *4 (N.D. Ga. June 6, 2019) (awarding a fee of approximately 30% and noting that "[a]wards of up to 33% of the common fund are not uncommon in the Eleventh Circuit, and especially in cases where Class Counsel assumed substantial risk by taking complex cases on a contingency basis."); *Home Depot*, 2016 WL 11299474, at *2 (awarding a fee in the consumer track of "about 28% of the monetary benefit conferred on the Class."); *Home Depot*, No. 1:14-MD-02583-TWT (Doc. 345 at 4) (using one-third of the benefit in percentage-based calculation in the financial institution track); *Target*, 2015 WL 7253765, at *3, *rev'd and remanded on other grounds*, 847 F.3d 608 (awarding 29% of the monetary payout).

Empirical studies also show that fees in other class action settlements are substantially higher than the requested fee. *See, e.g.*, Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. Rev. 937, 947, 951 (2017) (finding that in the Eleventh Circuit the average fee was 30% and median fee was 33% from 2009 through 2013); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 836 (2010) (finding, in the Eleventh Circuit for 2006–2007 period of the study, the average fee was 28.1% and the median fee was 30%).

(10) *The Number of Objections*

***35** Only 38 of the 147 million class members objected to the requested fee. This number represents 0.000026 percent of the class or just 1 of every 3.9 million class members. The extremely small number of objectors is further evidence of the reasonableness of the requested fee. *See, e.g., Home Depot*, 2016 WL 6902351, at *4 (objections from an "infinitesimal percentage" of the class "indicates strong support" for the settlement).

(11) *The Risk Undertaken by Class Counsel*

The plaintiffs' lawyers undertook extraordinary litigation risk in pursuing this case and investing as much time and effort as they did. The Court is familiar with data breach litigation and appreciates that this was undeniably a risky case when it was filed. It is even riskier today, as demonstrated by recent authority. *See, e.g., McConnell*, 828 S.E.2d at 352 (Ga. 2019); *Adkins v. Facebook*, 2019 WL 7212315, at *9 (N.D. Cal. Nov. 26, 2019) (granting motion to certify injunctive-only class but denying motion to certify damages class and issues class in data breach case).

Based on these factors, the Court finds the award of attorneys' fees in the amount of $77.5 million is appropriate under the percentage of the fund approach. The Court has considered and hereby overrules all of the objections to the requested fees as described below.

First, most of the objections to the motion for fees are conclusory, do not provide any legal support for why a lower fee should be awarded, or are based on a misunderstanding about the terms of the settlement. These objections can be summarily rejected. *See, e.g., In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 264 n.3 (S.D.N.Y. 2012).

Second, one objector, John Davis, argues that the fee must be calculated using the lodestar method because he disagrees with *Camden I* and claims that the case is no longer good law in light of *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010). (Doc. 879-1 at 8-10). This argument is frivolous. *Camden I* is binding precedent. And, *Perdue*, which construes a fee-shifting statute, does not apply in a common fund case such as this one. *See In re Home Depot, Inc. Customer Data Sec. Breach Litig.*, 931 F.3d 1065, 1084-85 (11th Cir. 2019).

Third, several class members do not object to the fee amount, but to its payment from the settlement fund. According to these objectors, the Court should punish Equifax by ordering the company to pay the fees separately. But this Court cannot order Equifax to pay more. *See, e.g., Howard v. McLucas*, 597 F. Supp. 1504, 1506 (M.D. Ga. 1984) ("[T]he court's responsibility to approve or disapprove does *not* give this court the power to force the parties to agree to terms they oppose") (emphasis in original). And, having created a common fund, class counsel are entitled to be paid from the fund.

Fourth, two other objections—one by Mikell West and the other by Frank and Watkins—contend that the fee should be no more than 10% of the class benefit because class counsel allegedly faced little risk, the case settled within two years, and awards in cases involving "megafund" settlements do not justify a higher percentage. As stated above, the Court disagrees with the assertion that plaintiffs had little risk. To the contrary, class counsel faced extraordinary risk, which the objectors unreasonably and erroneously discount. Further, penalizing class counsel for achieving a settlement within two years would work against the interests of the class and undercut the judicial policy favoring early settlement. *See, e.g., Markos v. Wells Fargo Bank, N.A.*, 2017 WL 416425, at *4 (N.D. Ga. Jan. 30, 2017); *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d at 1362.

***36** Their argument that the requested fee is too large because this case involves a megafund settlement—often defined as a settlement in excess of $100 million—also is unpersuasive. When all of the settlement benefits are properly included the value of the settlement is in the several billions of dollars, meaning the requested fee *is* less than the 10% that the two objectors contend is appropriate. In arguing otherwise, the objectors improperly discount all of the settlement benefits except the $380.5 million fund, including specifically all of the settlement's non-monetary benefits.[51] *See Poertner*, 618 F. App'x at 630 (rejecting an objection by Frank that the requested fee was too large because he improperly limited the monetary value of the settlement and disregarded the settlement's substantial non-monetary benefits, which he wrongly claimed were illusory).

51 Under the percentage approach, "courts compensate class counsel for their work in extracting non-cash relief from the defendant in a variety of ways." *In re Checking*, 2013 WL 11319244, at *12. If the non-monetary relief can be reliably valued, courts can include such relief in the fund and award counsel a percentage of the total. *Id.*; *George*, 369 F. Supp. 3d at 1379-80; *see also Poertner*, 618 F. App'x at 628-29. If it cannot be reliably valued, such relief is a factor in selecting the right percentage. *See, e.g., Camden I*, 946 F.2d at 774-775. Accordingly, in this case, even if the non-monetary benefits to the class could not be valued with precision, those benefits —which are undeniably substantial—would certainly justify awarding class counsel 20.36% of the cash fund.

Even if calculated only as a percentage of the $380.5 million fund, the requested fee of 20.36% is justified notwithstanding the size of the settlement. Likewise, even if the Court considered only the $310 million fund created under the parties' term sheet, a 25% fee would be justified. The Court is unaware of any *per se* rule that a reduced percentage must be used in a "megafund" case and declines to create one now. Additionally, other courts have criticized the use of a reduced percentage in such a case because, among other things, the practice undercuts a major purpose of the percentage approach in aligning the interests of the class and its lawyers in maximizing the recovery. Such a rule might also discourage early settlements, and it fails to appreciate the immense risk presented by large, complex cases. *See, e.g., In re Cendant Corp. Litig.*, 264 F.3d 201, 284 n.55 (3d Cir.

2001); *Allapattah*, 454 F. Supp. 2d at 1213; *In re Checking*, 830 F. Supp. 2d at 1367; *Syngenta*, 357 F. Supp. 3d at 1114.

Regardless, the objectors overemphasize the importance of the settlement's size. Under *Camden I*, this Court must base its award on an evaluation of all of the *Johnson* factors, not just the factor involving awards in other cases. The Court's evaluation of those factors in light of the particular facts and circumstances of this case, as discussed above, would support using a percentage higher than the 25% benchmark and certainly higher than the 20.36% requested here. Indeed, the lowest fee awarded in the other data breach cases cited above was 27%. That class counsel are not requesting a much higher fee here akin to that awarded in other cases suggests that they have already accounted for the settlement's size by agreeing to accept a reduced percentage.

The objectors, furthermore, are simply wrong in asserting that no more than 10% is typically awarded in megafund cases.[52] In *Anthem*, which involved a $115 million settlement fund, the court surveyed awards in other large settlements and concluded: "a percentage of 27% appears to be in line with the vast majority of megafund settlements." *Anthem*, 2018 WL 3960068, at *15. Further, none of the three authorities relied upon by the objectors justify the conclusion that no more than a 10% fee is appropriate here. The empirical study the objectors cite does not support that conclusion, according to Professor Geoffrey Miller, one of its co-authors.[53] To the contrary, the study's data set shows that, in cases with settlements between $325 million and $425 million (the range in which the cash portion of this case falls), the mean percentage was 19.7%—remarkably close to the percentage requested here. (Doc. 900-3, ¶¶ 16-17). In *Carpenters Health & Welfare Fund v. The Coca-Cola Co.*, 587 F. Supp. 2d. 1266 (N.D. Ga. 2008), the court awarded a 21% fee. And, in *In re Domestic Air*, 148 F.R.D. at 350-51, the court relied upon pre-1991 research, which conflicts with the findings of more recent studies.

52 Class counsel have cited at least 40 cases involving settlements in excess of $100 million in which a fee of more than 25% has been awarded, including several such cases in this Circuit. *See, e.g., Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006) (31.33% of a $1.06 billion fund); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330 (S.D. Fla. 2011) (30% of a $410 million fund); *In re Sunbeam*, 176 F. Supp. 2d 1323 (25% of a $110 million fund).

53 Theodore Eisenberg and Geoffrey Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 Journal of Empirical Legal Studies 248 (2010).

***37** *Fifth*, objectors West, Frank and Watkins argue that the $70.5 million added to the settlement fund at the request of federal and state regulators did not result from class counsel's efforts and thus class counsel are not entitled to receive a percentage of the additional amount. This argument fails as a factual matter because it assigns no credit to class counsel's efforts and their agreement to integrate the additional money into the settlement they negotiated. While regulators may have been the initial catalyst for the extra funds, the money would not have been added to the settlement fund but for class counsel's efforts. Class counsel spent months negotiating with Equifax on the proposed changes so that the additional funds could be incorporated without having any potential adverse impact to the class.

Thus, without minimizing the role played by the regulators, class counsel were ultimately responsible for integrating the increased funds into the settlement they negotiated and are entitled to compensation for their efforts. The Court also notes that class counsel have not sought any increased fees relative to what they agreed to request in the term sheet, so they are not attempting to use the extra money as a basis for an additional fee request. Basing the percentage off the $380.5 million rather than $310 million simply recognizes the reality of the size of the non-reversionary fund to which the parties ultimately agreed. Treating the calculation differently would penalize class counsel after they spent thousands of hours in the negotiations with Equifax and regulators to integrate the $70.5 million into the settlement without adverse consequences for the class.

Sixth, objectors Frank and Watkins argue that the notice and administration costs to be paid out of the settlement fund should be excluded from the class benefit for fee purposes. The Court disagrees. It has long been the practice in this Court to use the gross amount of a common fund in calculating a percentage-based fee award without deducting the costs of notice or administration. *See, e.g., George*, 369 F. Supp. 3d at 1375; *Champs Sports*, 275 F. Supp. 3d at 1356; *In re Domestic Air*, 148 F.R.D. at 354; *see also Arby's*, 2019 WL 2720818, at *2 (including notice and administration claims in the class benefit even though paid separately by the defendant). That is because notice and administration costs inure to the benefit of the class. *Id.* Similar arguments have been rejected before. *See, e.g., In re Domestic Air*, 148 F.R.D. at 354; *In re Online*

DVD-Rental Antitrust Litig., 779 F.3d 934, 953 (9th Cir. 2015); *Caliguiri v. Symantec Corp.*, 855 F.3d 860, 865 (8th Cir. 2017); *Anthem*, 2018 WL 3960068, at *8-9.[54] And, there is a particularly good reason for rejecting the argument here. Because an additional $125 million is available to pay out-of-pocket claims, notice and administration costs will not diminish the fund except in the unlikely event that both the fund and the extra $125 million are exhausted.

54 The main case on which Frank and Watkins rely, *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014), is readily distinguishable. *Redman* involved a coupon settlement, the proposed fee could be justified only by including notice and administration in the class benefit, and the court was concerned that class counsel thus would have a "perverse" incentive to increase those costs to justify a larger fee. This settlement does not include coupons, costs will be paid from a non-reversionary fund, there is an additional $125 million to pay out-of-pocket claims if the fund is exhausted, and class counsel selected the providers after a competitive bidding process. Moreover, adopting the *Redman* approach on these facts would incentivize counsel to cut corners on notice and administration, hurting the class by lowering its awareness and participation and hindering the claims process. Unsurprisingly, other courts have declined to follow *Redman*. *See, e.g., Keil v. Lopez*, 862 F.3d 685, 704 (8th Cir. 2017); *McDonough v. ToysRUs, Inc.*, 80 F. Supp. 3d 626, 654 n.27 (E. D Pa. 2015).

***38** *Seventh*, objectors West, Frank and Watkins improperly discount the value of the credit monitoring offered under the settlement for purposes of calculating a fee. West does not recognize it has any value beyond the cost to be paid from the fund for the first seven million claims. Frank and Watkins argue it is not even worth that, asserting its true value is only $15 million ($5 per class member multiplied by the roughly three million claims they assert have been made to date) because free credit monitoring is widely available and class members allegedly prefer alternative compensation. The objectors also discount the value of the injunctive relief class counsel obtained. The Court disagrees.

As discussed earlier, the record shows that the high-quality credit monitoring offered here is more valuable than the free or low-cost services typically available. Moreover, courts have often recognized the benefit of credit monitoring, use its retail cost as evidence of value, and consider that value in awarding fees. *See, e.g., Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 218 (E.D. Pa. 2011) (overruling an objection that the settlement offered "worthless credit monitoring services that no one wants" and valuing the services at their retail price in awarding a fee); *In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 409 (D. Mass. 2008) (the class-wide, $177 million retail value of the credit monitoring was "a benchmark against which to measure the award of attorneys' fees"); *Home Depot*, 2016 WL 6902351, at *4; *Hutton v. Nat'l. Bd. of Exam'rs in Optometry, Inc.*, 2019 WL 3183651, at *7 (D. Md. Jul. 15, 2019); *Hillis v. Equifax Consumer Servs., Inc.*, 2007 WL 1953464, at *4 (N.D. Ga. June 12, 2007); *Anthem*, 2018 WL 3960068, at *11.[55]

55 Even assuming that the credit monitoring offered is worth less to class members than its retail price, the credit monitoring is certainly worth more than its discounted, wholesale cost to Equifax. *See Anthem*, 2018 WL 3960068, at *7. And even valued at that cost, the credit monitoring available to the entire class under the settlement would far exceed what the objectors claim it is worth. Indeed, that cost alone (several billion dollars at a minimum) would more than justify the requested fee. *See generally Waters*, 190 F.3d at 1297 (class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed); *see also Poertner*, 618 F. App'x at 629-30, n.2.

The Court also disagrees with the objectors' contention that there is no value for fee purposes in the comprehensive injunctive relief provided under the settlement, including the requirement that Equifax spend a minimum of $1 billion on data security and related technology. Courts routinely consider the presence of similar business practice changes to be a factor in the fee analysis. *See, e.g., Anthem*, 2018 WL 3960068, at *28 (mandatory minimum expenditure for cybersecurity was "properly considered in determining an appropriate attorneys' fees award"); *Ingram*, 200 F.R.D. at 689-90 (programmatic changes to reduce racial discrimination supported an upward adjustment from the benchmark); *see generally Home Depot*, 2016 WL 6902351, at *4 (two years of enhanced cybersecurity measures was a valuable class benefit).

The Court specifically finds that the injunctive relief class counsel obtained here is a valuable benefit to the class because it reduces the risk that their personal data will be compromised in a future breach. That Equifax may also benefit makes no difference. Similarly, that Equifax agreed to the injunctive relief to avoid litigation risk does not mean class counsel have no entitlement to a fee; rather, Equifax's motivation is what triggers class counsel's entitlement. *See*

Poertner, 618 F. App'x at 629 (rejecting a similar objection by Frank and holding that the defendant's business practice changes were a settlement benefit because the changes were "motivated by the present litigation").

***39** In short, the requested fee is well-justified under the percentage method, and the objections to the fee are overruled.

B. A Lodestar Cross-Check, If Done, Supports The Requested Fee.

The Eleventh Circuit has authorized courts to use the lodestar method as a cross-check on the reasonableness of a percentage-based fee, but such a cross-check is not required. *See, e.g.*, *Waters*, 190 F. 3d at 1298. In fact, a cross-check can re-introduce the same undesirable incentives the percentage method is meant to avoid and for that reason courts regularly award fees without discussing lodestar at all. *In re Checking*, 830 F. Supp. 2d at 1362; *Champs Sports*, 275 F. Supp. 3d at 1350.

In this case, the Court does not believe that a lodestar cross-check is necessary or even beneficial. Nonetheless, the requested fee easily passes muster if a cross-check is done.

As of December 17, 2019, plaintiffs' counsel spent 33,590.7 hours on this litigation. Class counsel documented the time expended in detailed records filed *in camera* with the Court, and they personally reviewed more than 21,000 time entries and excluded 3,272.9 hours as duplicative, unauthorized, of insufficient benefit, or inconsistent with the billing protocol that they established at the outset of the litigation. Plaintiffs' counsel's lodestar up to the final approval hearing, including the reviewed time, amounts to $22,816,935. In addition to time spent through final approval, class counsel estimate they will spend 10,000 hours over the next seven years to implement and administer the settlement. This time has an expected value of $6,767,200. The Court finds that this estimate is reasonable. Class counsel's current and future lodestar thus totals $29,584,135.

When the lodestar approach is used in common fund cases, courts typically apply a multiplier to reward counsel for their risk, the contingent nature of the fee, and the result obtained. Here, the requested fee represents class counsel's lodestar (including future time) plus a multiplier of roughly 2.62, which is consistent with multipliers approved in other cases. *See, e.g.*, *Columbus Drywall*, 2012 WL 12540344, at *5 & n.4 (noting a multiplier of 4 times the lodestar is "well within" the accepted range and citing examples); *Ingram*, 200 F.R.D. at 696 (noting courts apply multipliers ranging from less than two to more than five); *Pinto v. Princess Cruise Lines Ltd.*, 513 F. Supp. 2d 1334, 1344 (S.D. Fla. 2007) (multipliers " 'in large and complicated class actions' range from 2.26 to 4.5, while three appears to be the average") (internal quotations omitted).

No objector argues that a lodestar cross-check is mandated, or even explains why this case warrants a cross-check given the reasonableness of the percentage fee being sought. Several objectors, however, dispute various aspects of the cross-check analysis. None of these objections have any merit.

One objector contends hourly rates should be capped at $500 because most ordinary people earn minimum wage or less than $20 an hour. The proper comparison, though, is to the prevailing rates in the legal community. By that standard, class counsel's rates are reasonable. Class counsel supplied substantial evidence that the prevailing rates for complex litigation in Atlanta and around the country are commensurate with or even in excess of the rates applied here and none of the objectors have presented any evidence to the contrary. The Court therefore finds class counsel's rates are reasonable and well supported, including specifically the hourly rates charged by Mr. Barnes ($1050); Mr. Canfield ($1000); Ms. Keller ($750), and Mr. Siegel ($935).

***40** Several objectors challenge class counsel's time, claiming it is inflated and duplicative, and demand that the Court closely examine the time records and order them to be produced for review by the class. A lodestar cross-check, however, does not require that time records be scrutinized or even reviewed. *See, e.g.*, *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) ("[U]sed as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court. Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case.") (internal citations omitted); *In re Checking*, 2013 WL 11319244, at *14 (declining to review billing records). Nevertheless, based on its *in camera* review of a sampling of class counsel's records, its familiarity with the litigation, class counsel's declarations regarding their line-by-line review of all entries to remove duplicative and unnecessary time, and other factors, the Court finds that class counsel's time was reasonable and appropriately spent. The Court also finds that ordering the records be made public would needlessly require the voluminous records to be reviewed and redacted for privileged and confidential

material and serve no useful purpose, particularly given the fact that a lodestar cross-check is not required and litigation over specific time entries would be a waste of resources for both the Court and the parties.

One objector claims that estimated future time cannot be considered. Yet, other courts have included future time in lodestar calculations, including this Court in the financial institutions track of the *Home Depot* data breach case. *See Home Depot*, 2017 WL 9605207, *1 (N.D. Ga. Oct. 11, 2017), *aff'd in part and rev'd in part on other grounds*, 931 F.3d 1065, 1082 (11th Cir. 2019). Using a reasonable estimate also is appropriate. A cross-check is not intended to involve "mathematical precision." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005). And, if the fee was lodestar-based, class counsel would be entitled to file supplemental applications for future time. *See Cassese v. Washington Mut., Inc.*, 27 F. Supp. 3d 335, 339 (E.D.N.Y. 2014). Excluding such time thus would misapply the lodestar methodology and needlessly penalize class counsel.

Finally, several objectors argue the proposed multiplier is too high and one claims *Perdue* bars the use of any multiplier. But class counsel have demonstrated that the multiplier is reasonable and within the typical range, and *Perdue* is irrelevant in a common fund fee analysis. *See Home Depot*, 931 F.3d at 1084-85.

In sum, a lodestar analysis is not required, but a consideration of the lodestar here only confirms that the requested fee is reasonable.

C. Reimbursement Of Class Counsel's Expenses.

The settlement agreement authorizes reimbursement of up to $3 million in expenses that class counsel reasonably incurred on behalf of the class. Class counsel have incurred $1,404,855.35 in expenses through December 17, 2019, for such items as court reporter fees; document and database reproduction and analysis; e-discovery costs; expert witness fees; travel for meetings and hearings; paying the mediator; and other customary expenditures. The Court finds that these expenses are reasonable and were necessarily incurred on behalf of the class. Class counsel are thus entitled to be reimbursed for these expenses. *See, e.g., Columbus Drywall*, 2012 WL 12540344, at *7-8.

Two objectors challenge class counsel's expenses. One says the total is simply "too much." The other speculates that some computerized research charges might be overbilled and complains that the "miscellaneous" expense category is not further itemized. Such vague assertions and speculation do not overcome the substantial evidence in the record that all of the expenses were reasonable. Moreover, the expenses are detailed in class counsel's *in camera* submissions to the Court.

D. The Service Awards Are Appropriate.

Courts routinely approve service awards to compensate class representatives for the services they provide and the risks they incur on behalf of the class. *See, e.g., Ingram*, 200 F.R.D. at 695-96; *Allapattah Servs.*, 454 F. Supp. 2d at 1218; *In re Checking*, 2014 WL 11370115, at *12-13. The settlement agreement provides for a modest service award of $2,500 to each class representative, who devoted substantial time and effort to this litigation working with their lawyers to prosecute the claims, assembling the evidence supporting their claims, and responding to discovery requests. Simply put, the class representatives were instrumental in achieving a settlement benefitting the entire class. But for their efforts, other class members would be receiving nothing. The Court therefore finds that the service awards are deserved and approves them for payment.

***41** Objector Davis contends the longstanding practice of compensating class representatives for their service is prohibited by two Supreme Court cases from the 1800s. The argument previously has been rejected out of hand because the cases were decided before Rule 23 and involve different facts and circumstances. *See, e.g., Merlito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019). Davis also suggests that each class member be required to document the specific amount of time spent on the litigation, but he provides no basis to believe the class representatives did not perform the services described and the amount of time needed for such tasks is necessarily substantial. Further evidence of the class representatives' service thus is unnecessary, particularly given the modest sums involved. *See, e.g., Home Depot*, 2016 WL 11299474, at *1 (N.D. Ga. Aug. 23, 2016) (awarding modest service awards to 88 class representatives based on a similar description of their service by their counsel).

V. FINDINGS REGARDING SERIAL OBJECTORS.

"Objectors can play a useful role in the court's evaluation of the proposed settlement terms. They might, however, have interests and motivations vastly different from other attorneys and parties." *Manual* § 21.643. The *Manual* goes on to explain:

> Some objections, however, are made for improper purposes, and benefit only the objectors and their attorneys (*e.g.*, by seeking additional compensation to withdraw even ill-founded objections). An objection, even of little merit, can be costly and significantly delay implementation of a class settlement. Even a weak objection may have more influence than its merits justify in light of the inherent difficulties that surround review and approval of a class settlement. Objections may be motivated by self-interest rather than a desire to win significant improvements in the class settlement. A challenge for the judge is to distinguish between meritorious objections and those advanced for improper purposes.

Manual § 21.643.

The *Manual*'s guidance has been instructive in evaluating the objections received in this case. To be clear, the Court has considered in full the merits of all objections, regardless of whether the objector is a repeat player, and found them to be without merit. "The fact that the objections are asserted by a serial or 'professional' objector, however, may be relevant in determining the weight to accord the objection, as an objection carries more credibility if asserted to benefit the class and not merely to enrich the objector or her attorney." *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1104 (D. Kan. 2018) (referring, in part, to objectors and objectors' counsel here George Cochran and Christopher Bandas). There is sufficient evidence to conclude that certain objectors here are of the "serial" variety.

This Court therefore finds, based on information in the record and otherwise publicly available, that the individuals identified below are serial objectors, that they have unsuccessfully asserted many of the same or similar objections in other class action settlements, that their objections are not in the best interests of the class, that there is no substantial likelihood their objections will be successful on appeal, and that the class would be best served by final resolution of their objections as soon as practicable so that class members can begin to benefit from the settlement:

- Objector George Cochran, an attorney who objects on his own behalf, "is a serial objector to class action settlements, with a history of attempting to extract payment for the withdrawal of objections." *Syngenta*, 357 F. Supp. 3d at 1104.

- Christopher Bandas, an attorney who represents objector Mikell West, is recognized by federal courts across the country as a "serial objector" who "routinely represents objectors purporting to challenge class action settlements, and does not do so to effectuate changes to settlements, but does so for his own personal financial gain; he has been excoriated by Courts for this conduct." *CRT*, 281 F.R.D. at 533; *see also, e.g.*, *Clark v. Gannett Co.*, 428 Ill.Dec. 367, 122 N.E. 3d 376, 380 (Ill. Ct. App. 2018) (Bandas has "earn[ed] condemnation for [his] antics from courts around the country. Yet, [his] obstructionism continues."). Moreover, Bandas and his law firm are subject to a permanent injunction issued by a federal judge governing their ability to object in class actions. *Edelson P.C. v. The Bandas Law Firm*, 2019 WL 272812 (N.D. Ill. Jan. 17, 2019).

***42** • Objector Christopher Andrews, although not an attorney, by his own admission at the final approval hearing has filed objections in about ten class actions. In *Shane v. Blue Cross*, No. 10-cv-14360 (E.D. Mich.), the court found that "many of [Mr. Andrews'] submissions are not warranted by the law and facts of the case, were not filed in good faith and were filed to harass Class Counsel." App. 1, ¶ 65 & Ex. 7. That court also noted that Mr. Andrews "is known to be a 'professional objector who has extorted additional fees from counsel in other cases[.]' " *Id.* Additionally, class counsel have submitted an email from Mr. Andrews that calls into question his motivation for objecting in this case. [Doc. 900-1, Ex. 8].

- Objector Troy Scheffler has previously objected to a number of class actions and at least one court has previously found that similar objections to the ones he makes here "have no factual or legal merit." *Carter*, 2016 WL 3982489, at *13. He also has been paid to withdraw an objection in a similar case. *In re Experian Data Breach Litig.*, No. 15-cv-01592, Doc. 335 (C.D. Cal. July 3, 2019) (approving payment of $10,000 to Mr. Scheffler and his counsel to drop objection).

- John Davis has a history of objecting in class actions and his involvement as an objector and class representative has been criticized by other courts. In *Muransky v. Godiva Chocalatier*, 2016 WL 11601079, at *3 (S.D. Fla. Sept. 16, 2016), a federal magistrate judge denied an objection similar to the one filed here by Mr. Davis and, in so doing, labeled Davis and others as "professional objectors who threaten to delay resolution of class action cases unless they receive extra compensation." *See also Davis v. Apple Computer, Inc.*, 2005 WL 1926621, at *2 (Cal. Ct. App. Aug. 12, 2005) (noting that Davis and

Steven Helfand, another serial objector who objected here, previously had "confidentially settled or attempted to confidentially settle putative class actions in return for payment of fees and other consideration directly to them" in apparent violation of court rules.)

- Steven Helfand has a history of improper conduct in class action litigation. *Id.* In 2018, he was accused by the State Bar of California of, among other things, filing an objection in the name of a class member without being authorized by the class member to do so, misleading a court and opposing counsel, settling an objection on appeal without the client's authorization, misappropriating the settlement proceeds, and other acts of moral turpitude. Notice of Disciplinary Charges, *In the Matter of Steven Franklyn Helfand*, Case No. 17-O-00411 and 17-O-00412 (State Bar Court of California; filed Sept. 24, 2018). Helfand did not contest the charges and a default was entered against him. *Id.*, Order Entering Default (Jan. 15, 2019).

- Theodore Frank, a lawyer and director of the Hamilton Lincoln Law Institute, is in the business of objecting to class action settlements and has previously and unsuccessfully made some of the same or similar objections that he has made here. *See Target*, 2017 WL 2178306, at *6 (rejecting objection that an allegedly fundamental intra-class conflict existed in a data breach case because class members could assert claims under various state statutes); *Poertner*, 618 F. Appx at 628-29 (rejecting objection that the proposed fee was unfair, finding Frank had improperly limited the monetary benefits to the class and excluded the substantial non-monetary benefits of the settlement). The Court also finds that Frank disseminated false and misleading information about this settlement in an effort to encourage others to object in this case and directed class members to object using the "chat-bot" created by Class Action Inc., notwithstanding that it contained false and misleading information about the settlement. These actions are improper and further support a finding that Frank's objection is not motivated to serve the interests of the class. *See Manual* § 21.33 ("Objectors to a class settlement or their attorneys may not communicate misleading or inaccurate statements to class members about the terms of a settlement to induce them to file objections or to opt out.").

***43** Finally, the Court addresses the 718 "chat-bot" generated forms submitted by Class Action Inc. on which class members simply checked one or more of several boxes indicating that the settlement was "unfair," "inadequate," "unreasonable," or "unduly burdensome" and had the opportunity to add a "personal note" to the Court. The Court has considered the substance of these objections (which are repeats of objections addressed above) and rejects them in their entirety. Separately, the Court rejects these objections as procedurally defective. The objections were not submitted through the process ordered by the Court and do not comply with the requirement under Rule 23 that an objection "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." *See* Fed. R. Civ. P. 23(e)(5)(A).

Moreover, class counsel submitted information that Class Action Inc. failed to accurately describe the settlement both on its website and in promotions of the chat-bot elsewhere, which may have prompted users of the site to object based on inaccurate and incomplete information about the benefits available under the settlement. The Court notes that class counsel subpoenaed Reuben Metcalfe, the CEO of Class Action Inc., for a deposition, but Mr. Metcalfe failed to appear. The Court also notes that Mr. Metcalfe represented to class counsel that he had not even read the settlement agreement or notice materials before falsely telling class members that the settlement provided only $31 million to pay claims. [Doc. 939-1, ¶ 36]. Therefore, based on the uncontested record, the Court accepts the facts as presented by class counsel on this point, and finds that Class Action Inc. and Mr. Metcalfe promoted false and misleading information regarding the terms of the settlement in an effort to deceptively generate objections to the settlement.

VI. THE COURT'S TREATMENT OF OTHER PENDING MATTERS.

A. Motions To Strike Declarations Of Robert Klonoff, Geoffrey Miller And Harold Daniel.

Several objectors moved to "strike" [Docs. 872, 890, 909, 918] the Declarations of Robert Klonoff [Docs. 858-2, 900-2], Geoffrey Miller [Doc. 900-3], and Harold Daniel [858-3] submitted by class counsel. Plaintiffs oppose these motions [Docs. 887, 932, 946]. While the Court has found the declarations helpful, as noted above, the Court has exercised its own independent judgment in resolving the matters addressed in the declarations, rendering the challenges to the declarations moot. Regardless, the motions lack merit. All three of the proposed experts are well-qualified, *Daubert* does

not govern at the final approval stage, and, even if it did, each of the declarations passes muster under *Daubert.*[56]

56 Similar motions to strike at the final approval stage filed by Frank's organization have also been rejected in other pending class actions. *See Briseño v. Conagra Foods, Inc.*, No. 11-cv-05379-CJC-AGR, Doc. 695 (C.D. Cal. Oct. 8, 2019); *In re Samsung Top-Load Washing Machine Marketing, Sales Practices and Prods. Liab. Litig.*, No. 17-ml-2792-D, Doc. 208 (W.D. Okla. Nov. 18, 2019). *See also Target*, 2015 WL 7253765, at *4 ("even if the affidavit contained impermissible legal conclusions, the Court is capable of separating those conclusions from Magistrate Judge Boylan's helpful and insightful factual descriptions of the settlement process in this case.").

Professor Klonoff is a prominent law professor and teacher of civil procedure; former Assistant to the U.S. Solicitor General; the author of relevant academic publications and the leading casebooks on class actions and multi-district litigation; was the Associate Reporter for the American Law Institute's class action project; and was appointed by Chief Justice Roberts for two three-year terms as the sole academic member to the Advisory Committee on the Rules of Civil Procedure, a position in which he took the lead on the proposed amendments to Rule 23 that became effective on December 1, 2018. [Doc. 858-2, ¶¶ 4-12]. Because of his expertise, other courts have specifically accepted and relied extensively upon Professor Klonoff's opinions regarding proposed attorneys' fee awards and other class action issues. *See, e.g., Syngenta*, 357 F. Supp. 3d at 1115; *In re AT&T Mobility Wireless Data Services Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1032 n.3, 1034-35, 1037-38, 1040, 1042 (N.D. Ill. 2011); the *National Football League Players Concussion Injury* MDL; the *Chinese-Manufactured Drywall* MDL; and the *Deepwater Horizon* MDL. (*See* Doc. 858-2, ¶ 10) (listing cases).

***44** Professor Miller is the co-author of several leading empirical studies of attorneys' fees in class action litigation and a frequent expert witness on issues relating to class actions and attorneys' fees. [Doc. 900-3, ¶ 1]. One objector cites to a study that he authored. [Doc. 880 at 12-15, Doc. 876 at 18-19]. Professor Miller is the Stuyvesant Comfort Professor of Law at NYU Law School, and a member of the advisory committee for the American Law Institute's Principles of the Law project on Aggregate Litigation, which, among other topics, addressed questions of attorneys' fees in class actions and related types of cases. [Doc. 900-3 ¶¶ 2-3]. His research articles on class action cases, especially in the area of attorneys' fees, have been cited as authority by many state and federal courts. [Doc. 900-3 ¶¶ 4-6].

Harold Daniel served as the President of the State Bar of Georgia and the Lawyers Club of Atlanta. [Doc. 858-3, ¶ 2]. He was a member Standing Committee of the Federal Judiciary of the American Bar Association. [*Id.*]. He also has been qualified and has served as an expert witness on the issue of attorneys' fees in numerous courts, including this Court. [*Id.*, ¶ 10].

At the final approval stage, the weight of authority from the circuits makes clear that district courts have discretion to use "whatever is necessary ... in reaching an informed, just and reasoned decision." *Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989). Final approval is not a trial on the merits, and the Court need not be a gatekeeper of evidence for itself. Further, the issues on which the experts opine are both relevant and inherently factual in nature, not disputed legal principles, and the declarations are helpful as to these matters. Moreover, the methodology the experts used—applying their expertise gained through years of experience to questions of fairness and reasonableness—is more than sufficient to satisfy Rule 702 and *Daubert. See, e.g., Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (recognizing that a district court has "broad latitude" to allow an expert whose testimony is based on "professional studies or personal experience"); *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 561-63 (5th Cir. 2004) (affirming admission of testimony from a fee expert, stating the "fair and reasonable compensation for the professional services of a lawyer can certainly be ascertained by the opinion of members of the bar who have become familiar through experience and practice with the character of such services"); *Freed by Freed v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2005 WL 8156040, at *2-3 (S.D. Fla. Aug. 2, 2005) (rejecting *Daubert* challenge to an expert who testified as to the reasonableness of an attorneys' fee based on his experience as a litigator, finding the methodology was reliable); *Yowell v. Seneca Specialty Ins. Co.*, 117 F. Supp. 3d 904, 910-11 (E.D. Tex. 2015) (declining to strike affidavit from fee expert because it satisfied *Daubert* requirements).

Finally, the Court again emphasizes that, with regard to all of the matters addressed in this Order it has performed its own independent legal research and analysis and made up its own mind. The pending motions to strike [Docs. 890, 909, 918]

are therefore denied. The Court previously denied [Doc. 951] objector Shiyang Huang's motion to strike [Doc. 872].

B. Oppositions To The Scope Of The Release By Proposed Amicus Curiae The State Of Indiana And The Commonwealth Of Massachusetts.

The State of Indiana, through the Indiana Attorney General, submitted a self-styled *amicus curiae* brief, requesting that the Court modify the release in the settlement in several respects, purportedly to "safeguard its sovereign and exclusive authorities to enforce Indiana law." [Doc. 898]. The Commonwealth of Massachusetts makes a similar request. [Doc. 923]. The gist of these requests is that the two states believe the release cannot be used as a bar to claims they are pursuing in separate enforcement actions against Equifax in Indiana and Massachusetts state courts. Indiana cites several cases in apparent support for its position that a class action "cannot impede a separate action by government actors acting in an enforcement capacity." [Doc. 898, at 5]. Massachusetts says its claims were not and could not have been asserted by any class plaintiffs in this case. The states' requests are denied for the following reasons.

***45** First, the Court concludes that Indiana and Massachusetts lack standing to object to the settlement because they are not members of the settlement class. Second, nothing in the settlement prevents Indiana or Massachusetts from pursuing enforcement actions in state court, which they both already are doing. Third, the Court does not have the power to grant the primary relief the states seek, which is a modification of the settlement, *see Cotton*, 559 F.2d at 1331, and any suggestion by Indiana or Massachusetts that the Court reject the settlement altogether is not in the best interests of the 147 million class members. It would make no sense for this Court to reject this historic settlement—one that provides substantial relief to a nationwide class and is supported by the Federal Trade Commission, Consumer Financial Protection Bureau, and 50 other Attorneys General—and subject all class members to the risks of further litigation simply because two states seek the opportunity to obtain additional relief for their own residents.

To the extent they move for specific relief from this Court, request that the Court issue an advisory opinion, or request that the Court refuse to approve the settlement, the requests by Indiana [Doc. 898] and Massachusetts [Doc. 923] are hereby denied.

C. Miscellaneous Pending Motions.

The Court has carefully considered all timely filed objections. As a housekeeping matter, and for clarity of the record, the Court addresses several motions filed by objectors. The Court previously denied [Doc. 851] the Motion to Reject Settlement by Susan Judkins [Doc. 824], and the Motion to Reject Settlement by John Judkins [Doc. 825]. The Court also denied [Doc. 853] the Motion to Enforce Settlement by Lawrence Jacobson [Doc. 837], and Motion to Deny the Settlement by Beth Moscato [Doc. 841]. And the Court denied [Doc. 873] the Motion to Telephonically Appear at Fairness Hearing by Shiyang Huang [Doc. 852]. These motions were primarily further objections to the settlement couched as "motions" and, again, the Court has considered all timely filed objections. For similar reasons, the Court hereby denies the Motion for Court Order Setting Deadline to Pay Settlement Fee to Petitioning Parties by Peter J. LaBreck, Elizabeth M. Simons, Gregory A. Simons, Joshua D. Simons [Doc. 789]; the Motion to Remove Class Counsel, the Steering Committee, and Legal Administration, the Named Plaintiffs and Defense Counsel by Christopher Andrews [Doc. 916]; the Motion to Remove Class Counsel, the Steering Committee, and Legal Administration, the Named Plaintiffs and Defense Counsel for Misconduct by Christopher Andrews [Doc. 917]; the Motion to Strike Response to Doc. 903 [Doc. 935]; the Motion to Strike Equifax's Response to Doc. 903 [Doc. 936]; and the Motion to Strike Plaintiffs' Untimely Filings [Doc. 949]. Any other motions and requests for specific relief asserted by objectors are also denied.

For the reasons set forth herein, the Court hereby (1) **GRANTS** final approval of the settlement; (2) **CERTIFIES** the settlement class pursuant to Federal Rules of Civil Procedure 23(a), (b)(3) and (e); (3) **GRANTS** in full Plaintiffs' request for attorneys' fees of $77.5 million, reimbursement of expenses of $1,404,855.35, and service awards of $2,500 each to the class representatives; and (4) otherwise rules as specified herein.

SO ORDERED, this 13 day of January, 2020.

All Citations

Slip Copy, 2020 WL 256132

End of Document

2012 WL 1964451
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

In re SCHERING–PLOUGH CORP. ENHANCE ERISA LITIG.

Civil Action No. 08–1432 (DMC)(JAD).
|
May 31, 2012.

OPINION

DENNIS M. CAVANAUGH, District Judge.

***1** This matter comes before the Court on Plaintiff's Motion for Final Approval of Class Certification, Final Approval of Class Action Settlement, Final Approval of the Proposed Plan of Allocation, and for an Award of Attorneys' Fees. ECF No. 136. After considering the submissions of the parties, and based upon the fairness hearing conducted before this Court on May 30, 2012, it is the decision of this Court for the reasons herein expressed, that Plaintiff's Motion is **granted.**

I. BACKGROUND

This matter began on March 19, 2008, when Plaintiff Michael Gradone, individually and on behalf of the Schering–Plough Employees' Savings Plan and the Schering–Plough Puerto Rico Employees' Retirement Savings Plan (the "Plans"), filed a Complaint alleging that Defendants breached their financial duties to certain Plan Participants under the Employee Retirement Income Security Act ("ERISA"), particularly with regard to the Plans' holdings of Schering–Plough stock. On February 10, 2012, Plaintiffs filed a Settlement Agreement with this Court, wherein Defendants will provide $12.25 million (the "Settlement Amount"), which will be distributed to a Settlement Class consisting of participants in the Plans from April 19, 2007 through April 2, 2008 (the "Settlement Class Period"), in accordance with the proposed Plan of Allocation. ECF No. 134. This Court preliminarily approved the Settlement Agreement on February 17, 2012. ECF No. 135. The Court's February 17, 2012 Order also approved the form and dissemination of class notice, and scheduled a Fairness Hearing for May 30, 2012.

Pursuant to this Court's Order, notice of the Settlement and Plan of Allocation has been provided to over 13,000 Settlement Class members. The deadline for filing of objections to the Settlement Agreement was May 8, 2012, and as of this date, no such objections have been filed on the record. Plaintiffs filed their motion papers on May 1, 2012. The matter is now before this Court.

II. *LEGAL STANDARDS*

A. Class Certification

Class certification under Rule 23 has two primary requirements. First, pursuant to Fed.R.Civ.P. 23(a), the party seeking class certification must demonstrate the existence of numerosity of the class, commonality of the questions of law or fact, typicality of the named parties' claims or defenses, and adequacy of representation. Second, the party must demonstrate that the class fits within one of the three categories of class actions set forth in Fed.R.Civ.P. 23(b). Rule 23(b)(1) allows certification of a class if prosecuting separate actions would result in prejudice either to Plaintiff or Defendants. *In re Ikon Office Solutions, Inc. Sec. Litig.,* 191 F.R.D. 457, 466 (E.D.Pa.200). Rule 23(b) (2) allows certification of a class where the party opposing the class has acted or refused to act in a manner generally applicable to the class, so that final injunctive or declaratory relief would be appropriate with respect to the class as a whole.

B. Settlement Approval

***2** Federal Rule of Civil Procedure 23(e), provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs." Fed. R. Civ. P. 23(e). In determining whether to approve a class action settlement pursuant to Rule 23(e), "the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members." *In re GMC Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 785 (3d Cir.1995) (quoting *Grunin v. Int'l House of Pancakes,* 513 F.2d 114, 123 (8th Cir.1975). *cert. denied,* 423 U.S. 864 (1975) (citation omitted)).

Before giving final approval to a proposed class action settlement, the Court must determine that the settlement is "fair, adequate, and reasonable." *Lazy Oil Co. v. Witco Corp.,* 166 F.3d 581, 588 (3d Cir.1999); *Walsh v. Great Atl. & Pac. Tea Co.,* 726 F.2d 956, 965 (3d Cir.1983). In *Girsh v. Jepson,* the Third Circuit identified nine factors, so-

called "*Girsh* factors," that a district court should consider when making this determination: (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. 521 F.2d 153, 157 (3d Cir.1975). "These factors are a guide and the absence of one or more does not automatically render the settlement unfair." *In re American Family Enterprises,* 256 B.R. 377, 418 (D.N.J.2000). Rather, the court must look at all the circumstances of the case and determine whether the settlement is within the range of reasonableness under *Girsh*. *See In re Orthopedic Bone Screw Prods. Liab. Litig.,* 176 F.R.D. 158, 184 (E.D.Pa.1997); *see also In re AT & T Corp. Secs. Litig.,* 455 F.3d 160 (3d Cir.2006).

C. Plan of Allocation Approval

The "[a]pproval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *Karcich v. Stuart (In re Ikon Office Solutions, Inc., Sec. Litig.),* 194 F.R.D. 166, 184 (E.D.Pa.2000) (citations and internal quotations omitted); *see also Walsh v. Great Atlantic & Pacific Tea Co.,* 726 F.2d 956, 964 (3d Cir.1983) ("The Court's principal obligation is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund.").

D. Attorneys' Fees

***3** The Third Circuit Court of Appeals identified several factors—the *Gunter* factors—that a district court should consider when evaluating a motion for an award of attorneys' fees. These factors include: (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 plaintiff's counsel; and (7) the awards in similar cases. *In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 301 (3d Cir.2005) (citing *Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190, 195 n. 1 (3d Cir.2000)).

III. *DISCUSSION*

A. Class Certification

1. Numerosity, Commonality, Typicality, and Adequacy

The numerosity element is met where the class is so numerous that joinder of all class members is impracticable. The Third Circuit has advised that the numerosity requirement is satisfied where the proposed class consists of "more than 90 geographically dispersed plaintiffs." *Eisenberg v. Gagnon,* 766 F.2d 770, 785–86, *cert. denied,* 424 U.S. 946 (1985). In this instance, there are over 13,000 members of the Settlement Class. Accordingly, the numerosity requirement is met.

The commonality requirement is satisfied if named plaintiffs share at least one question of fact or law with the prospective class. In this instance, the Complaint alleges breach of fiduciary duties owed under ERISA, the determination of which involves issues of law and fact that are identical for all Settlement Class members. The commonality requirement is thus satisfied.

The typicality requirement is satisfied where the class representatives and absent class members point to the same broad course of alleged conduct. The presence of some factual differences will not preclude a finding of typicality. In this instance, the typicality requirement is satisfied because the claims of both named Plaintiffs and the absent class members are wholly based on the violation of duties owed under ERISA in the same course of conduct.

Finally, the adequacy requirement is met where the class representatives' interests are not adverse to those of other members of the class, and the class representative is represented by attorneys who are qualified, experienced, and generally able to conduct the litigation. Here, there is no doubt that lead plaintiffs have acted, and continue to act, in the best interest of the settlement class. Further, counsel's firm resumes and experience clearly indicate their adequacy.

2. Rule 23(b)(1)

Plaintiffs seek certification under Rule 23(b)(1)(A) or, alternatively, under Rule 23(b)(1)(B). In either instance, the class may be certified. The class satisfies Rule 23(b)(1)(B) because absent certification as a class action, both parties

face the possibility of inconsistent judgments, such as the possibility that in one case Defendants may be held liable as fiduciaries, and in another they may not. The class may also be certified under Rule 23(b)(1)(B), because adjudication with respect to individual member of the Settlement Class would be dispositive of the interests of the other members of the Class, as the recovery would go directly to the Plan and not the participants. Accordingly, the matter may be properly certified as a class action.

B. Approval of Settlement

1. Complexity, Expense and Likely Duration of Litigation

***4** This factor is concerned with assessing the "probable costs, in both time and money, of continued litigation." *In re Cendant Corp. Litig.,* 264 F.3d 201, 234 (3d Cir.2001). Significant delay in recovery if this case proceeds to trial favors settlement approval. *See, e.g., In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 536 (3d Cir.2004); *Weiss v. Mercedes–Benz of N. Am., Inc.,* 899 F.Supp. 1297, 1301 (D.N.J.1995). This lawsuit has been ongoing since March 19, 2008. Without settlement, the parties would need to engage in extensive additional discovery, as well as the exchange of pre-trial, and potentially, trial and post-trial motions. If the case does indeed go to trial, there will necessarily be significant additional delay. Therefore, this factor favors settlement approval.

2. Reaction of the Class to Settlement

This factor requires the Court to evaluate whether the number of objectors, in proportion to the total class, indicates that the reaction of the class to the settlement is favorable. The Court also notes that the second *Girsh* factor is especially critical to its fairness analysis, as the reaction of the class "is perhaps the most significant factor to be weighed in considering [the settlement's] adequacy." *Sala v. National R.R. Passenger Corp.,* 721 F.Supp. 80, 83 (E.D.Pa.1989); *Fanning v. AcroMed Corp.* (*In re Orthopedic Bone Screw Prods. Liab. Litig.*), 176 F .R.D. 158, 185 (E.D.Pa.1997) (stating that a "relatively low objection rate militates strongly in favor of approval of the settlement") (internal citations omitted). Further, silence constitutes tacit consent to the agreement. No objections have been filed in this matter. This militates strongly in favor of a finding that the Settlement is fair and reasonable, and is entitled to nearly dispositive weight. *New England Carpenters Health Benefits Fund v. First DataBank, Inc.,* 602 F.Supp.2d 277, 282, 285 (D.Mass.2009); *In re Linerboard Antitrust Litig.,* 321 F.Supp.2d 619 (E.D.Pa.2004). The second *Girsh* factor, therefore, weighs strongly in favor of approving the Settlement.

3. Stage of the Proceedings and Amount of Discovery Completed

Pursuant to the third *Girsh* factor, the Court must consider the "degree of case development that Class Counsel have accomplished prior to Settlement," including the type and amount of discovery already undertaken. *GMC,* 55 F.3d at 813. In short, under this factor the Court considers whether the amount of discovery completed in the case has permitted "counsel [to have] an adequate appreciation of the merits of the case before negotiating." *In re Schering–Plough/Merck Merger Litig.,* No. 09–1099, 2010 U.S. Dist. LEXIS 29121 at *30 (Mar. 26, 2010). The discovery analyzed encompasses both formal and "informal" discovery, including discovery from parallel proceedings, companion cases and even third parties, such as experts or witnesses. *Id.* Here, as Plaintiff notes, the Settlement was reached after over four years of litigation and the review of Plan documents and tens and thousands of internal documents. Further, Plaintiff's Counsel deposed several witnesses, responded to dispositive motions, and engaged in and reviewed expert analysis of several key issues in this litigation. It is thus clear that Plaintiff's counsel have an adequate appreciation of the facts in this matter, and this factor weighs in favor of approval.

4.–5. Risks of Establishing Liability and Damages

***5** A trial on the merits always entails considerable risk. *Weiss,* 899 F.Supp. at 1301. "By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them ." *GMC,* 55 F.3d at 814. "The inquiry requires a balancing of the likelihood of success if 'the case were taken to trial against the benefits of immediate settlement.' " *In re Safety Components Int'l,* 166 F.Supp.2d 72, 89 (D.N.J.2001). ERISA class actions based on the same theories as the present matter involve a complex and rapidly evolving area of law. This uncertainty, combined with the risks associated with a potential trial and the need to overcome likely summary judgment motions, indicates that Plaintiff faced significant risks in establishing liability and damages if the matter proceeded to trial. This factor therefore weighs in favor of approval.

6. Ability of Plaintiffs to Maintain Class Certification

Plaintiff's brief does not address this issue. However, the absence of one *Girsch* factor does not render a settlement unfair. *In re American Family Enterprises,* 256 B.R. 377, 418 (D.N.J.2000). Accordingly, this factor weighs neither against nor in favor of settlement.

7. Ability of Defendants to Withstand a Greater Judgment

To evaluate whether the Settlement Agreement is fair to Plaintiff, the Court must evaluate whether Defendants could withstand a judgment much greater than the amount of the settlement. *In re Schering–Plough/Merck Merger Litig.,* 2010 U.S. Dist. LEXIS 29121 at *37. Plaintiff indicates that Defendant would surely be able to withstand a judgment in an amount greater than $12.25 million. This does not, however, standing alone, render the settlement unreasonable. *See In re Painewebber Ltd. P'ships Litig .,* 171 F.R.D. 104, 129 (S.D.N.Y.1997). Accordingly, this factor does not weigh against a finding of reasonableness.

8.–9. Reasonableness of the Settlement Fund in Light of the Best Possible Recovery, and in Light of the Attendant Risks of Litigation

"According to *Girsh,* courts approving settlements should determine a range of reasonable settlements in light of the best possible recovery (the eighth *Girsh* factor) and a range in light of all the attendant risks of litigation (the ninth factor)." *GMC,* 55 F.3d at 806. "The last two *Girsh* factors evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case." *In re Schering–Plough/Merck Merger Litig.,* 2010 U.S. Dist. LEXIS 29121 at *38–39. In this matter, as noted above, Plaintiff faces many uncertainties regarding the proof of damages. For instance, if only Company Stock added to the Plans was considered in the damages analysis, and not full liquidation of all Company Stock in the Plans, the damages amount would likely be under the amount currently sought. Accordingly, this factor weighs in favor of settlement.

10. Summary of Factors

***6** In sum, upon balancing the *Girsch* factors, the Settlement appears fair, adequate, reasonable and proper, and in the best interests of the class and the shareholders.

C. The Plan of Allocation

In determining whether a Plan of Allocation is fair, reasonable, and adequate, courts give great weight to the opinion of qualified counsel. *White v. NFL,* 822 F.Supp. 1389, 1420 (D.Minn.1993). Under the present Plan of Allocation, each Participant receives a share of the Net Proceeds based approximately on the decline in the value of Schering–Plough Stock Fund shares he or she held in a Plan account over the Class Period in comparison with the decline in value of the Schering–Plough Stock Fund units held by other Participants in their Plan accounts. The distribution takes place through the Plans so as to realize the tax advantage of investment in the Plans. This is a simple, neutral, and commonly used structure that has been approved in a number of stock fund ERISA cases. *See, e.g., In re AOL Time Warner ERISA Litig.,* No. 02–8853, 2006 WL 2789862, at * 10 (S.D.N.Y. Sept. 27, 2006). The Plan of Allocation is therefore approved as fair, adequate, and reasonable.

D. Attorneys' Fees

Class Counsel seeks an award of 33.3% of the Settlement Fund, representing a multiplier of Class Counsel's lodestar of 1.6. Class Counsel also seeks reimbursement of their out of pocket expenses in the amount of $112,207.20. Finally, Class Counsel requests case contribution awards in the amount of $10,000 to Michael Gradone and $5,000 for T.C. Davis. The Class Notice provided the Settlement Class members with advance notice that Class Counsel would seek these awards. No objections have been filed by Class Members or by Defendants.

1. The Size of the Fund Created and the Number of Persons Benefitted

Approximately 13,000 individuals will benefit from this litigation. Plaintiff's Counsel's efforts have resulted in a substantial cash recovery for those individuals, especially when considered in light of the above discussed risks faced in this litigation. Given the size of the fund created and the number of individuals benefitted, this factor weighs in favor of approval. *See, e.g., Hall,* 2010 WL 4053547, at *16.

2. The Presence or Absence of Objections

As discussed above, no objections have been filed in this matter. "The lack of objections to the requested attorneys' fees supports the request, especially because the settlement class includes large, sophisticated institutional investors." *Smith v. Dominion Bridge Corp.,* No. 96–7580, 2007 WL 1101272 (E.D. Pa. April 11 2007) (citing *Stoetzner v. U.S. Steel Corp.,*

897 F.2d 115, 118–19 (3d Cir.1990)). This factor therefore favors the award of Plaintiff's Counsel's requested fee.

3. The Skill and Efficiency of the Attorneys Involved

The skill and efficiency of Class Counsel is high, as demonstrated by the supporting documents submitted by Class Counsel, as well as the Court's own experience with Class Counsel. Class Counsel are highly skilled attorneys with substantial experience in class action litigation. Therefore, this factor favors an award of attorneys' fees.

4. The Complexity and the Duration of the Litigation

***7** As discussed above, this is a significantly complex litigation that has been ongoing for four years. This factor weighs in favor of an award of attorneys' fees.

5. The Risk of Nonpayment

Plaintiff's Counsel undertook this action on a contingency fee basis, have carried the risk of non-payment throughout the four years of ongoing litigation, and have devoted 4,640 hours to this litigation. Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of approval. *See, e.g., McGee v. Continental Tire North America, Inc.,* No. 06–6234, 2009 WL 539893, at *15 (D.N.J. Mar. 4, 2009) ("Class Counsel accepted the responsibility of prosecuting this class action on a contingent fee basis and without any guarantee of success or award. Accordingly, this factor weighs in favor of approval."); *In re Prudential–Bache Energy Income P'ships Sec. Litig.,* No. 888, 1994 U.S. Dist. LEXIS 6621, at *16 (E.D.La. May 18, 1994) (stating that "[c]ounsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable."). Accordingly, this factor weighs in favor of approval of the award of attorneys' fees.

6. The Reasonableness of the Fee When Compared with Similar Cases

As discussed above, Plaintiff's Counsel have reviewed tens of thousands of pages of documents, conducted numerous depositions, and have spent over 4,000 hours in the pursuit of this litigation. In this matter, Plaintiff requests a fee of 33.3%. Courts have generally awarded fees in the range of nineteen to forty-five percent. *Hall,* 2010 WL 4053547, at *21; *see, e.g., In re Remeron Direct Purchaser Antitrust Litig.,* No. 03–0085, 2005 WL 30080, at *12–18 (D.N.J. Nov. 9, 2005) (Hotchberg, J.) (confirming 33.3% fee). Further, if this were not a class-action litigation, a contingent fee in such a complex case would likely range between 30 and 40 percent of the recovery. *See, e.g., Hall,* 2010 WL 4053547, at *21 (requested fee is "consistent with a privately negotiated contingent fee in the marketplace"). Plaintiff's requested fee is therefore reasonable.

Courts in this Circuit confirm the reasonableness of a fee by using the lodestar calculation method when a fee award is based on percentage of recovery. *In re Merck & Co., Inc. Vytorin Erisa Litigation,* No. 8–285, 2010 WL 547613 at *12 (D.N.J. Feb. 09, 2010). The lodestar analysis is performed 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. *Id.* (citations omitted). "The reasonableness of the requested fee can be assessed by calculating the lodestar multiplier, which is equal to the proposed fee award divided by the lodestar. But the lodestar multiplier need not fall within any predefined range, provided that the District Court's analysis justifies the award." *Id.* (citations omitted). "After a court determines the lodestar amount, it may increase or decrease that amount by applying a lodestar multiplier." *Id.* (citations omitted).

***8** Plaintiff's Counsel's lodestar for this action, based on the 4,640 hours devoted to this litigation and on the usual billing rates of its attorneys and professionals, is $2,539,991.50. Joint Decl. ¶ 36, ECF No. 136–4. Plaintiff's requested fee constitutes a multiplier of 1.6 times the lodestar, which is an amount commonly approved by courts of this Circuit. Accordingly, the lodestar cross check confirms that the requested fee is reasonable.

7. Summary of Factors

In sum, the balance of factors weigh in favor of an award of attorneys' fees.

C. Reimbursement of Expenses

Class Counsel additionally asks the Court for reimbursement of $112,207.20 in litigation expenses incurred in connection with this litigation. This type of reimbursement has been expressly approved by the Third Circuit. *Abrams v. Lightolier, Inc.,* 50 F.3d 1204, 1225 (3d Cir.1995). The test for this inquiry is whether the particular costs are the type routinely billed by attorneys to paying clients in similar cases. Class

Counsel's declarations indicate that their separate expenses are in the amount sought. The Notice provided to the Settlement Class indicated that Class Counsel would seek an award up to $200,000,000.00. No class member has objected. Accordingly, reimbursement in the amount sought is warranted.

D. Incentive Fees

Finally, Class Counsel seeks permission to pay incentive fees to the representative Plaintiffs, in the amount of $10,000 to Michael Gradone and $5,000 to T.C. Davis. It is not uncommon to award such fees. *See, e.g., Cullen v. Whitman Med. Corp.,* 197 F.R.D. 136, 145 (E.D.Pa.2000) (quoting *In re S. Ohio Corr. Facility,* 175 F .R.D. 270, 272 (S.D.Ohio 1997)) ("[C]ourts routinely approve incentive awards to compensate named plaintiffs for services they provided and the risks they incurred during the course of the class action litigation."). Class Counsel notes that each Plaintiff has contributed to this litigation and benefitted the Class by reviewing the pleadings, staying informed with the litigation, providing Class Counsel with information and materials, providing information and documents responsive to Defendants' discovery requests, preparing to sit for depositions, and reviewing the Settlement Agreement. The Court is convinced that the award sought is appropriate, and accordingly, Plaintiff's request for an award of incentive fees is granted.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion is **granted.** An appropriate Order accompanies this Opinion.

All Citations

Not Reported in F.Supp.2d, 2012 WL 1964451

End of Document

2013 WL 5505744
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

In re SCHERING–PLOUGH CORP. ENHANCE SECURITIES LITIGATION. In re Merck & Co., Vytorin/ Zetia Securities Litigation.

Civil Action Nos. 08–397 (DMC) (JAD), 08–2177(DMC)(JAD).
|
Oct. 1, 2013.

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OPINION

DENNIS M. CAVANAUGH, District Judge.

***1** This matter comes before the Court upon the following: 1) Motion for Final Approval of Class Action Settlement and Plan of Allocation by Lead Plaintiffs appointed in the action *In Re Merck & Co., Vytorin/Zeita Secutiries Litigation* (the "Merck Action"); 2) Motion for Final Approval of Class Action Settlement and Plan of Allocation by Lead Plaintiffs appointed in the action *In Re Schering–Plough Corp. Enhance Securities Litigation* (the "Schering Action"); and 3) Report and Recommendation of the Special Masters Relating to the Award of Attorneys' Fees and Expenses (the "Report"). Pursuant to Fed. R. Civ. P 78, no oral argument was heard. Based on the following and for the reasons expressed herein, this Court **grants** both Motions for Final Approval of Class Action Settlement and Plan of Allocation and **adopts** The Report in its entirety.

I. BACKGROUND

The facts of this case are well known. The Settlement for the Schering Action provides for the payment of $473,000,000 in cash. The Settlement for the Merck Action provides for the payment of $215,000,000 in cash. Lead Plaintiffs for the Schering Action filed a Motion for Final Approval of Class Action Settlement and Plan of Allocation on July 2, 2013 (ECF No. 423). Lead Plaintiffs for the Merck Action also filed a Motion for Final Approval of Class Action Settlement and Plan of Allocation on July 2, 2013 (ECF No. 333).

The Report addresses two separate motions for an award of attorneys' fees and expenses arising out of the two settlements. Stephen M. Greenberg and Jonathan J. Lerner ("Special Masters") filed the Report on August 28, 2013 (ECF Nos. 435, 342). Subsequently, a Supplemental Report was filed.

II. MOTIONS FOR SETTLEMENT APPROVAL

A. LEGAL STANDARD

In determining whether to approve a class action settlement pursuant to Rule 23(e), "the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members." *In re GMC Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 785 (3d Cir.1995) (quoting *Grunin v. Int'l House of Pancakes,* 513 F.2d 114, 123 (8th Cir.1975), *cert. denied,* 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975) (citation omitted)).

Before giving final approval to a proposed class action settlement, the Court must determine that the settlement is "fair, adequate, and reasonable." *Lazy Oil Co. v. Witco Corp.,* 166 F.3d 581, 588 (3d Cir.1999); *Walsh v. Great Atl. & Pac. Tea Co.,* 726 F.2d 956, 965 (3d Cir.1983). In *Girsh v. Jepson* 521 F.2d 153, 157 (3d Cir.1975), the Third Circuit identified nine so-called *"Girsh* factors," that a district court should consider when making this determination: (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. "These factors are a guide and the absence of one or more does not automatically render the settlement unfair." *In re American Family Enterprises,* 256 B.R. 377, 418 (D.N.J.2000). Rather, the court must look at all the circumstances of the case and determine whether the settlement is within the range of reasonableness under *Girsh. See In re Orthopedic Bone Screw Prods. Liab. Litig.,* 176 F.R.D. 158, 184 (E.D.Pa.1997); *see also In re AT & T Corp.,* 455 F.3d 160 (3d Cir.2006). In sum, the Court's assessment of whether the settlement is fair, adequate and reasonable is guided by the *Girsh* factors, but the Court is in no way limited to considering only those enumerated factors and is free to consider other relevant circumstances and facts involved in this settlement.

B. DISCUSSION

***2** This Court is convinced that the settlement is fair, adequate, and reasonable in light of the *Girsh* factors and will address several of the factors below.

The second *Girsch* factor is the reaction of the class to the settlement. This factor requires the Court to evaluate whether the number of objectors, in proportion to the total class, indicates that the reaction of the class to the settlement is favorable. The Court also notes that the second *Girsh* factor is especially critical to its fairness analysis, as the reaction of the class "is perhaps the most significant factor to be weighed in considering [the settlement's] adequacy." *Sala v. National R.R. Passenger Corp.,* 721 F.Supp. 80, 83 (E.D.Pa.1989); *In re Orthopedic Bone Screw Prods. Liab. Litig.,* 176 F.R.D. 158, 185 (E.D.Pa.1997) (stating that a "relatively low objection rate militates strongly in favor of approval of the settlement" (internal citations omitted)). In the instant case, with respect to the Schering Action, over 346,000 Settlement Notice Packets were mailed to potential Class Members. To date, there has only been one Opposition on behalf of two class members filed (Aug 5, 2012, ECF No. 431). With respect to the Merck action, over 725,000 settlement notice packets were mailed to potential Class Members. To date, there has only been one Opposition on behalf of two class members filed (Aug 5, 2012, ECF No. 338). Accordingly, this factor weighs heavily in favor of granting the Motions.

The third *Girsch* factor is the stage of the proceedings and the amount of discovery completed. Under this factor, the Court must consider the "degree of case development that Class Counsel have accomplished prior to Settlement," including the type and amount of discovery already undertaken. *GMC,* 55 F.3d at 813. Here, the litigation is at a very advanced stage, as the Settlements were reached only a few weeks before trial was to begin. Discovery has been going on for years and has consisted of a vast number of depositions, the review of millions of documents, mocks trials, and extensive pre-trial-preparation. The parties have clearly had the opportunity to gain a detailed understanding of the case during this time. *See Henderson v. Volvo Cars of N. Am., LLC,* No. 09–4146 CCC, 2013 WL 1192479, at *9 (D.N.J. Mar.22, 2013) ("Generally, post-discovery settlements are viewed as more likely to reflect the true value of a claim as discovery allows both sides to gain an appreciation of the potential liability and the likelihood of success." (citation omitted)). Thus, this factor weighs heavily in favor of granting the Motions.

The sixth *Girsch* factor is the risks of maintaining the class action through the trial. Here, there is nothing to suggest that the class will not maintain its certification if litigation continues. Thus, the Court does not place significant weight on this factor.

The eight *Girsch* factor is the range of reasonableness of the settlement fund in light of the best possible recovery. The ninth factor is the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. Together, these two factors "evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case." *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 538 (3d Cir.2004). These 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." *Id.* Here, factors eight and nine weigh in favor of granting the Motions. Plaintiffs for both the Merck Action and the Schering Action have set forth the numerous risks they would ultimately face at trial in detail in their Motions. Further, they are certain that even if they prevailed at trial, Defendants would appeal. Thus, it is reasonable for Plaintiffs to accept the large amounts offered in the Settlement. Although there is always a chance for greater recovery at trial, the benefits of accepting the immediate Settlement Funds outweigh the

potential detriments that Plaintiffs face if a jury becomes involved.

***3** In sum, this Court is satisfied that the settlements are fair, adequate, and reasonable in light of the *Girsch* factors. Accordingly, the Court **grants** both Motions for Final Approval of Class Action Settlement and Plan.

II. THE REPORT

In The Report. The Special Masters recommend the Court to take the following actions with respect to the Schering Action: 1) grant Co–Lead Counsels' motion for an award of attorneys' fees in the amount of 16.92% of the Settlement Fund (including interest earned on the fund amount); 2) grant the motion of Co–Lead Counsel to be reimbursed for expenses in the amount of $3,620,049.63; and 3) grant the motion of Lead Plaintiffs to be reimbursed for costs and expenses in the total amount of $102,447.26. Additionally, the Report recommends the Court to take the following actions with respect to the Merck Action: 1) grant Merck Co–Lead Counsels' motion for an award of attorneys' fees in the amount of 28% of the Settlement Fund (plus interest); 2) grant Co–Lead Counsel's Motion for Reimbursement of Litigation Expenses, as modified, in the amount of $4,079,435.55; and 3) grant the motion of Lead Plaintiffs to be reimbursed for costs and expenses in the total amount of $109,865.31.

In reviewing an attorneys' fees award in a class action settlement, the Third Circuit looks at a number of factors known as the *"Gunter* factors" and the *"Prudential* factors." *In re AT & T Corp.,* 455 F.3d 160, 166 (3d Cir.2006). The *Gunter* factors include:

> (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 165. The *Prudential* factors include:

> (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

Id. (internal citations omitted). This Court is convinced that the Special Masters have done a thorough and accurate job in assessing the Motions for Attorneys' Fees by conducting a detailed analysis of the *Gunter* and *Prudential* factors in The Report. Accordingly, this Court adopts the Report in its entirety and approves of the recommendations set forth therein.

IV. CONCLUSION

For the foregoing reasons, this Court **grants** both Motions for Final Approval of Class Action Settlement and Plan of Allocation and **adopts** The Report in its entirety.

ORDER

***4** This matter comes before the Court upon the following: 1) Motion for Final Approval of Class Action Settlement and Plan of Allocation by Lead Plaintiffs appointed in the action *In Re Merck & Co., Vytorin/Zeita Secutiries Litigation* (the "Merck Action"); 2) Motion for Final Approval of Class Action Settlement and Plan of Allocation by Lead Plaintiffs appointed in the action *In Re Schering–Plough Corp. Enhance Securities Litigation* (the "Schering Action"); and 3) Report and Recommendation of the Special Masters Relating to the Award of Attorneys' Fees and Expenses (the "Report") (ECF Nos. 435; 342). Pursuant to Fed. R. Civ. P 78, no oral argument was heard.

Upon careful consideration of the submissions of the parties, and based upon the Court's Opinion filed this day;

IT IS on this *1* day of October, 2013

ORDERED that the both Motions for Final Approval of Class Action Settlement and Plan of Allocation are **granted,** and The Report is **adopted** in its entirety.

REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTERS RELATING TO THE AWARD OF ATTORNEYS' FEES AND EXPENSES

STEPHEN M. GREENBERG and JONATHAN J. LERNER, Special Masters.

Table of Contents

I. INTRODUCTION

***5** In this Report and Recommendation, we address two separate motions for an award of attorneys' fees and expenses arising out of the settlement of two different but parallel securities class actions brought on behalf of shareholders of Schering–Plough Corporation (the "Schering Action") and Merck & Co., Inc. (the "Merck Action"), respectively.[1]

[1] The Motion by Schering Co–Lead Counsel for Attorneys' Fees and Reimbursement of Litigation Expenses (the "Schering Application") is supported by the Joint Declaration of Salvatore J. Graziano, Esq., a member of Co–Lead Counsel Bernstein Litowitz Berger & Grossmann LLP ("BLB & G") and Christopher J. McDonald, Esq., a member of Co–Lead Counsel Labaton Sucharow, LLP ("Labaton") (the "Schering Declaration"). The Motion by Merck Co–Lead Counsel for Attorneys' Fees and Reimbursement of Litigation Expenses (THE "Merck Application") is supported by the Joint Declaration of Daniel L. Berger, Esq., a Director of Co–Lead Counsel Grant & Eisenhofer PA ("G & E") and Salvatore J. Graziano, Esq., a member of Co–Lead Counsel BLB & G (the "Merck Declaration").

Although the claims differ in certain respects, both the Schering Action and the Merck Action contain securities claims under the Securities Exchange Act of 1934 (the "1934 Act") based on allegedly false and misleading statements made in connection with the commercial prospects of Vytorin, a drug being developed and marketed by a Joint Venture formed by Merck and Schering.[2] The allegations in both cases focused on the claimed failure to disclose material information and allegedly false statements pertaining to the results of a clinical trial known as ENHANCE that tested whether Vytorin, a cholesterol lowering drug consisting of a combination of a Merck drug (Zocor) and a Schering drug (Zetia), was more effective than Zocor alone in reducing the intima-media thickness of the carotid arteries ("cIMT").

[2] Unlike the Schering Action, allegations in the Merck Action does not contain any claims under the Securities Act of 1933. (Merck Decl. at ¶ 15.)

In both the Schering Action and the Merck Action, the core allegations are that more than a year before the ENHANCE results were made public, the corporate and individual defendants conducted improper statistical analyses of ENHANCE trial results and thereby determined that there was no statistically significant difference in cIMT change between subjects receiving Zocor alone and subjects receiving Vytorin. Lead Plaintiffs in the Schering and Merck Actions allege that the defendants failed to disclose their knowledge of these negative trial results while making materially false and misleading positive statements concerning the ENHANCE trial and the commercial prospects of Vytorin and Zetia which allegedly inflated the prices of both Schering and Merck shares. (Merck Decl. ¶ 17; Schering Decl. ¶ 17)

Following the statutory procedure dictated by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the Court appointed a Lead Plaintiff in the Schering and Merck

Actions. In each case, the Court appointed a "group" Lead Plaintiff consisting of four large institutions to supervise the prosecution of the cases and in each action approved the Co–Lead Counsel selected by Lead Plaintiff.[3] As is customary in class actions, the Co–Lead Counsel in the Schering and Merck Actions undertook the prosecution of each of these cases purely on a contingency basis. (Schering Decl. ¶ 160–162; Merck Decl. ¶ 144, 145.)

3 *In re Cendant Securities Litigation, 264 F.3d 201, 223 n. 3 (3d Cir.2001)*, then Chief Judge Becker observed that where, as here, the Lead Plaintiff appointed under the PSLRA consists of a "group", the members of the group still constitute a *single* plaintiff: "Only one 'entity' is entitled to speak for the class: *the Lead Plaintiff.* In cases where a group serves as Lead Plaintiff, it is for the group's members to decide how the group will make decisions, but it is the group—not its constituent members—that speaks for the class. *A fortiori,* we use the term 'Lead Plaintiff throughout this opinion." In this Report and Recommendation we follow the Court's instruction referring to the Schering and Merck Lead Plaintiff Groups, and to their constituents as "members" of these groups.

Unlike many large securities class actions, where restated financial statements already have been issued by solvent corporations,[4] or indictments of senior corporate officers already have been announced or are likely to be forthcoming,[5] and critical elements of liability may be viewed from the inception of the case as a foregone conclusion, none of those aids were present here. (Schering Decl. ¶ 155; Merck Decl. ¶ 139.)

4 *See, e.g., In re Cendant, supra; In re Worldcom, Inc. Sec. Litig., 388 F.Supp.2d 319, 329 (S.D.N.Y.2005); Aronson v. McKesson, HBOC, Inc., 2005 WL 93433 (N.D. CA 2005)*.

5 *Id.*

***6** In both these cases, Co–Lead Counsel, whose compensation was entirely contingent on achieving success, were on their own.[6] Their success, if any, depended solely on their own discovery efforts to prove liability, their investment of time and expenses would be substantial and the potential that the Class—and Co–Lead Counsel—would not prevail and could come away empty-handed was significant.

6 Apart from the absence of any restatement or potential indictment, no companion SEC proceeding was commenced and no deep-pocket shareholder had initiated separate litigation on which the class action could "piggy back." *See In re DaimlerChrysler AG Securities Litigation, Civ. Action No. 00–993/00–984/0J–004 (JJF), Report of Special Master Seitz, January 28, 2004 at 5–6* ("The revelations in the Financial Times caused Tracinda Corporation to file a fraud and securities action in this case.... The filing of Tracinda's complaint triggered an avalanche of class action complaints filed in this district.") *Tracinda v. DaimlerChrysler AG, 502 F.3d 212 (3d Cir.2007)*. At most, a group of state attorney generals investigated allegations that Schering and Merck delayed releasing the results of the ENHANCE trial which settled on July 15, 2009—almost four years before the settlements in this case—without any admission of misconduct or liability by Schering or Merck and involved a payment of only $5.4 million to cover the cost of the investigation. (*See* Schering Decl. ¶ 120; Merck Decl. ¶ 109.)

In both the Schering and Merck Actions, the Co–Lead Counsel, who are among the most sophisticated and qualified law firms in the securities class action Bar, were well aware that these were challenging cases and by no means "lay-ups". (Schering Decl. ¶ 162; Merck Decl. ¶ 146.) At the time the Co–Lead Counsel undertook the significant responsibility to zealously prosecute the Schering and Merck Actions, respectively, they knew they were committing substantial resources to cases that promised to be difficult, complex, lengthy, and in all likelihood, extremely expensive with uncertain outcomes. (*Id.*) After all, the main corporate defendants, Schering and Merck, were large pharmaceutical companies who adamantly denied the allegations. They were no strangers to litigation and had more than ample resources to vigorously defend their innocence. Not surprisingly, Schering and Merck retained eminent and experienced defense counsel and for five years fought both cases tooth and nail. (Schering Decl. ¶ 142; Merck Decl. ¶ 158.)

Reflecting the profoundly divergent views of the merits of the two cases held by both sides, initial efforts to resolve each of the cases through mediation failed dismally. (Schering Decl. ¶ 122; Merck Decl. ¶ 111.) Only after defendants were unsuccessful in obtaining interlocutory review by the Court of Appeals of this Court's orders granting class certification, and after extensive contentious negotiations presided over by the Special Masters (who had served as Mediators pursuant to an Order dated April 9, 2012), were the parties to the Schering and Merck Actions finally able to reach agreements to settle each case—efforts that did not bear fruit in either case until the eve of trial.[7] (Schering Decl. ¶ 125; Merck Decl. ¶ 114.)

7 The settlements finally came only after the Mediators made *final* proposals and imposed a deadline to accept or reject them. (Schering Decl. ¶ 125; Merck Decl. ¶ 114.)

The Schering settlement provides for a cash Settlement Fund of $473 million. (Schering Decl. ¶ 6.) It would be among the twenty-five largest securities class action settlements since passage of the PSLRA. Even more significantly, it would rank among the ten largest post-PSLRA securities class action settlements not involving a financial restatement. (Schering Decl. ¶ 8.)

On July 2, 2013, the Schering Co–Lead Counsel moved for approval of the settlement and for an award of attorneys' fees amounting to 16.92% of the Settlement Fund (including interest thereon), for reimbursement of litigation expenses in the amount of $3,620,049.63, and for reimbursement of expenses incurred by members of the Lead Plaintiff Group. (Schering Decl. ¶ 6.)

The Merck settlement provides for a cash Settlement Fund of $215 million. (Merck Decl. ¶ 8.) It would be among the fifty largest securities class action settlements ever obtained, would rank among the thirty largest securities class action settlements not involving a financial restatement, and is the third largest settlement ever obtained from a pharmaceutical company. (Merck Decl. ¶ 8; *see* Ex. A.) The amount of the Merck Settlement Fund, although not as large as the Schering Settlement Fund, is extremely impressive given the particular challenges presented by the Merck Action in proving causation, materiality, *scienter* and damages emanating from, among other difficulties, the failure of Merck shares to decline in the wake of the initial public disclosure that Vytorin had failed the ENHANCE trial. Unlike Schering's stock, which plummeted approximately 8% losing approximately $3.5 billion in value, Merck's stock price did not decline by any significant amount. (Merck Decl. ¶ 104.)

***7** On July 2, 2013, the Merck Co–Lead Counsel moved for approval of the settlement and for an award of attorneys' fees, for reimbursement of expenses amounting to $4,367,376.95 and for reimbursement of expenses incurred by the members of the Lead Plaintiff Group. (Merck Decl. ¶ 6.) In the Merck Declaration, Co–Lead Counsel abjure applying for a specific amount of attorneys' fees: "[I]in light of the fact that the amount of attorneys' fees to be awarded will be initially recommended to the Court by the Court-appointed Special Masters, Co–Lead Counsel has not applied for a specific fee amount." (Merck Decl. ¶ 130.) Nevertheless, throughout the Merck Declaration and accompanying Memorandum of Law, the Merck Co–Lead Counsel argue that an award of 28% of the settlement would be "reasonable", and they offer support from three members of the Lead Plaintiff Group, "who support an award of fees amounting to 28% of the settlement fund." (*Id.; see also* Merck Lead Plaintiffs' Memorandum of Law in Support at 2: "it is abundantly clear an award of 28% is reasonable".)

By Order dated April 19, 2013, the Court appointed the Special Masters.[8] (S.ECF 418; M.ECF 327.)[9] Among other tasks, the Order directed the Special Masters "to prepare and file with the Court a Report and Recommendation determining any and all issues relating to the amount of attorneys' fees and expenses that should be awarded to the various law firms representing the Class Plaintiffs."[10] (*Id. at 2–3.*) In discharging this responsibility, we are cognizant that the Third Circuit has admonished district courts "to engage in robust assessments of the fee award reasonableness factors when evaluating a fee request." *In Re Rite Aid Corporation Securities Litigation, 396 F.3d 294, 301 (3d Cir.2005) (Scirica, C.J.); see In Re Prudential Ins. Co., 148 F.3d 283, 340 (3d Cir.1998)* (remanding for clarification of basis for fee award.) As the Third Circuit subsequently stated in an *en banc* decision in *Sullivan v. D.B. Investments, Inc.*: "[O]ur case law makes clear that a robust and 'thorough judicial review of fee applications is required in all class action settlements." *667 F.3d 273, 329 (3d Cir.2011) (citation and quotation omitted).*

8 References to docket entries in the Schering Action are designated "S.ECF" followed by the entry number and references to docket entries in the Merck Action are designated as M.ECF followed by entry number.

9 On March 18, 2013, the Court filed a Notice of Intent to Appoint Special Masters pursuant to Federal Rules of Civil Procedure 23(h)(4) and 54(d)(2)(D) and sought consent, objections or any other views no later than March 23, 2013. (S.ECF 394; M.ECF 314.) On March 22, 2013, counsel for the Defendants advised the Court that the Defendants had no objection to the appointment of the Special Masters (S.ECF 395; M.ECF 315) and by letter dated March 25, 2013, Lead Counsel consented to the appointment. (S.ECF 396; M.ECF 316.)

10 On August 21, 2013, the Court issued an Amended Order directing that we also address the request in the Schering and Merck Applications for reimbursement of expenses

by members of the Lead Plaintiff Groups. (*See S.ECF 434; M.ECF 341.*)

While we address in detail below the legal standards applicable to assessing legal fee applications, we apply these standards mindful that the overarching objective of our review is to "evaluate what class counsel actually did and how it benefitted the class." *In re AT & T Corp., 455 F.3d 160, 165–66 (3d Cir.2006)*. Accordingly, in this Report and Recommendation, we describe (i) the background of the Schering and Merck Actions; (ii) the prosecution of the Actions by Co–Lead Counsel from the inception of the actions through the settlement agreements; (iii) the applicable legal standards to be applied; and then (iv) we evaluate separately the Fee Applications submitted in the Schering and Merck Actions under the criteria mandated by Third Circuit law and provide our recommendations.

II. BACKGROUND

A. *Vytorin and the ENHANCE Trial*

***8** In 2000, Merck and Schering formed a Joint Venture to develop and market a cholesterol-lowering drug called Vytorin. (S.ECF 52 ¶ 24; M.ECF 208 ¶ 31.) Vytorin combines two cholesterol-lowering drugs: (i) Zocor (a brand name for simvastatin, the popular generic statin drug) and (ii) Zetia (the brand name for ezetimibe). (S.ECF 52 ¶¶ 44, 80 ¶ ; M.ECF 208 ¶¶ 47, 52.) Cholesterol has long been linked to plaque buildup that narrows the arteries, known as "atherosclerosis." (S.ECF 52 ¶¶ 4, 80; M.ECF 208 ¶ 45.) In 2004, the U.S. Food and Drug Administration approved the use of Vytorin based on clinical evidence that Vytorin is highly effective in reducing low-density lipoprotein ("LDL" or "bad") cholesterol. (S.ECF 52 ¶ 80; M.ECF 208 ¶ 52.)

The ENHANCE trial was designed to test whether Vytorin was more effective than statins alone in reducing plaque buildup, as measured by the intima-media thickness ("IMT") of the carotid arteries. S.ECF 52 ¶ 90; M.ECF 208 ¶¶ 64, 68.) Half of the study participants were treated with Vytorin, and the other half were treated with Zocor. (S.ECF 52 ¶ 91; M.ECF 208 ¶ 71.) The "primary endpoint," or main research question being analyzed, was the amount of change in patients' carotid IMT after two years of treatment. (S.ECF 52 ¶ 7, 90–92; M.ECF 208 ¶ 69.) The Defendants expected the ENHANCE trial to demonstrate that Vytorin's combination of Zetia and Zocor would stop or reduce the growth of fatty arterial plaque more than Zocor alone. (Schering Class Action Decision at 2–3, S.ECF 314.)

B. *The January 14, 2008 Disclosure of the ENHANCE Results*

On January 14, 2008, at 8:05 a.m., defendants issued a news release entitled "Merck/Schering Plough Pharmaceuticals Provides Results of the ENHANCE Trial," which announced that there was no statistically significant difference between the carotid IMT of the Vytorin and Zocor patients. (S.ECF 52 ¶ 172; M.ECF 208 ¶¶ 218–220; News Release dated Jan. 14, 2008.) The news release unequivocally stated that the ENHANCE trial had found "no statistically significant difference between treatment groups on the primary endpoint." (S.ECF No. 52 ¶ 172; M.ECF No. 208 ¶ 220.) In fact, it disclosed that there was also no statistically significant difference between treatment groups for each of the components of the primary endpoint, or any of the key secondary imaging endpoints.

The January 14, 2008 news release produced substantial media coverage. The major wire service ran stories that same day, with headlines such as: "Merck, Schering's Vytorin No Better Than Generic" (*Bloomberg News*); "Merck, Schering: Enhance Study Misses Significance" (*Reuters News*); "Merck, Schering–Plough's Cholesterol Drug Combination Fails to Benefit Patients in Study" (*Associated Press Newswires*); and "Study Shows Zetia Increases Level of Plaque in Blood" (NBC Nightly News). (*See, e.g.,* Expert Report of Gregg A. Jarrell (M.ECF 180 ¶ 84.)

C. *The Impact of the January 14 Disclosure*

***9** The following day, national television networks and major newspapers throughout the country ran stories with headlines such as: "Cholesterol Drug Shocker Tests Show No Benefit from Zetia & Vytorin" (ABC News) (Good Morning America); "Cholesterol–Lowering Drug Vytorin Comes Up Short vs. Statin in Study" (USA Today); "Generic Found as Good as Vytorin" (Los Angeles Times); "Study Deals Setback to Vytorin Cholesterol Drug" (Wall Street Journal); and "Study Reveals Doubt on Drug for Cholesterol" (New York Times). (M.ECF 180 ¶ 86.) In one of the articles that day concerning the news release, Dr. Steven Nissen, chief of cardiology at the Cleveland Clinic, stated: "This drug doesn't work. Period. It just doesn't work." (M.ECF 208 1227; S.ECF 52 ¶ 176.)

The Lead Plaintiffs themselves allege that the January 14, 2008 release "shocked the market" because it "showed that Vytorin failed to reduce the buildup of arterial plaque any

more than less expensive generic simvastatin alone." (S.ECF ¶ 172; M.ECF ¶ 218.) Only four days after the news release, on January 18, 2008, Schering shareholders filed a securities class action complaint alleging that the disclosure of the ENHANCE results had been delayed and that the purported "fraud" was disclosed on January 14, 2008. Specifically, the complaint alleged:

> On January 14, 2008, investors were shocked and alarmed after it was revealed, for the first time ... that defendants had purposefully delayed the publication of a study that they possessed throughout the Class Period that demonstrated that VYTORIN was neither safe nor effective.

(S.ECF 1 ¶ 60.)

After the news was announced, Schering's stock price fell approximately 8%, resulting in a loss of approximately $3.5 billion of its market capitalization. (Schering Class Action Decision S.ECF 314.) In contrast, the shares of Merck's stock did not decline by any statistically significant amount on January 14, 2008. (Merck Decl. ¶ 104.) Given the importance of proving loss causation emanating from the Third Circuit's decision in *Semerenko v. Cendant Corp., 223 F.3d 165 (3d Cir.2000)*,[11] and the United States Supreme Court's subsequent decision in *Dura Pharmaceuticals, Inc. v. Michael Broudo, et al., 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005)*, the vastly different stock market reaction of Merck's shares remained an overarching and potentially fatal problem for the Merck Lead Plaintiffs—placing the potential success of the Merck Action on a far more risky footing than the Schering Action.

11 In Semerenko, the Third Circuit stated "where the value of the security does not actually decline as a result of our alleged misrepresentation, it cannot be said that there is in fact an economic loss attributable to that misrepresentation. In the absence of a correction in the market price, the cost of the alleged misrepresentation is still incorporated into the value of the security and may be recovered at any time simply by reselling the security at the inflated price." *Id.,* 233 F.3d at 185. *See, Alaska Elec. Pension Fund v. Pharmacia Corp., 554 F.3d 342 (3d Cir.2009)*.

D. ***The Impact of Subsequent Disclosures***

In the wake of the January 14 disclosures, the Merck Defendants publicly appealed to investors, analysts and the medical community to await release of the full ENHANCE results and this may have tempered the stock market reaction to the January 14 news. (Schering Class Action Decision at 3; S.ECF 314.)

The release of full information about the ENHANCE trial occurred on Sunday, March 30, 2008 when the results were vetted at a meeting of the American College of Cardiology and discussed in an online article in the *New England Journal of Medicine.* (S.ECF 52 ¶¶ 194, 198; M.ECF 208 ¶¶ 249–255.) In keeping with the previous January 14 release, the full ENHANCE results showed that Vytorin provided no benefit over general simvastatin alone in reducing plaque buildup in the arteries. (Schering Class Action Decision at 3; S.ECF 314.) It also showed that the Vytorin portion of the study actually experienced an increase in arterial plaque. Thereupon, a panel of experts released a statement calling for cardiologists to limit the use of Zetia and Vytorin. (*Id.*)

***10** Following the release of this news, on Monday, March 31, 2008, Schering's shares again plummeted, losing approximately $8.2 billion of its market capitalization. (*Id. at 3.*) This time, Merck's shares also declined by more than $14 billion in value. (M.ECF 208 ¶ 261.) Lead Plaintiffs in the Schering and Merck Actions vehemently contended these sharp declines demonstrated that the statements by Merck officials following the January 14 revelation of top line results urging investors to withhold judgment until disclosure of the full results of the ENHANCE trial were both misleading and highly effective. (Schering Class Action Dec. at 3; S.ECF ¶ 314.) Prevailing on this claim was by no means an easy task. After all, given the basic disclosures that already had made on January 14, 2008, revealing Vytorin had failed the ENHANCE trial and the widespread publicity it had received, "it is hard to see what benefits accrue from a short respite from an inevitable day of reckoning. There is no claim here the false statements were made in an effort to sell off shares by management, or to delay a criminal prosecution." *Shields v. Cititrust Bankcorp, 25 F.3d 1124, 1130 (2d Cir.1994)*.

For the Schering Class, success on this difficult claim could have extended the class period beyond January 14, 2008 and significantly increased the amount of recoverable damages beyond the already large damage claims based on the $3.5 billion investor losses from the original January 14, 2008 disclosures. But, for the Merck Class (and Co–Lead Counsel) winning this argument was imperative. Failure to prevail and extend the case beyond January 14, 2008 would be fatal to the entire Merck Action.

III. THE PROSECUTION OF THE SCHERING AND MERCK ACTIONS The Securities Litigation is Commenced The Schering Action

The ink was barely dry on the January 14 news release when the first Schering Action was filed. On January 18, 2008, the first of several securities class action complaints was filed by Schering shareholders alleging that disclosure of the ENHANCE results had been purposely delayed by Schering. (S.ECF No. 1).

2. Lead Plaintiff and Co–Lead Counsel Are Appointed in the Schering Action

On April 18, 2008, the Court entered an Order appointing the Lead Plaintiff in the Schering Action pursuant to the PSLRA. The Court appointed as Lead Plaintiff a "group" consisting of the following four institutions: Arkansas Teacher Retirement System ("ATRS"), the Mississippi Public Employees' Retirement System ("MPERS"), Louisiana Municipal Police Employees' Retirement System ("LMPERS"), and Massachusetts Pension Reserves Investment Management Board ("Mass PRIMB") (collectively "Schering Lead Plaintiff Group"). (S.ECF 30) (Schering Decl. ¶ 24)

The Court also approved the Group's selection of BLB & G and Labaton as Co–Lead Counsel for the Class and approved the law firm of Carella, Byrne, Cecchi, Olstein Brody and Agnello ("CBCOBA") as Liaison Counsel for the Class. (Schering Decl. ¶ 139, n. 11.)

3. The Merck Action

***11** On May 5, 2008, a securities class action complaint was filed in the United States District Court for the District of New Jersey on behalf of Merck shareholders against Merck and its then Chief Executive Officer Richard T. Clark ("Clark"). (Merck Decl. ¶ 23 .)

4. The Merck Lead Plaintiffs and Co–Lead Counsel Are Appointed

By Order dated July 2, 2008, the Court appointed as Lead Plaintiff in the Merck Action a group consisting of the following four institutions: Stichting Pensioenfonds ADP ("ADP"), International Fund Management, S.A. (Luxemburg) ("IFM"), the Jacksonville Police and Fire Retirement System ("Jacksonville"), and the General Retirement System of the City of Detroit ("Detroit") (collectively, the "Merck Lead Plaintiff Group"). (Merck Decl. ¶ 24.)

The Court also approved retention by Lead Plaintiff of the law firms of G & E and BLB & G as Co–Lead Counsel (Merck Decl. ¶ 3) and the law firms of CBCOBA and Seeger Weiss, LLP ("Seeger") as Liaison Counsel to the Class (Merck Decl. ¶ 135, n. 7).

5. Consolidated Amended Complaints Are Filed in Both Actions

Once the PSLRA appointment process was completed, Co–Lead Counsel in both the Schering and Merck Actions began preparing detailed and comprehensive Amended and Consolidated Complaints.

On September 15, 2008, the Schering Lead Plaintiffs filed a 230–page Consolidated Amended Complaint against 37 defendants, including, Schering–Plough Corporation ("Schering"), Merck/Schering–Plough Pharmaceuticals ("M/S–P"), Fred Hassan ("Hassan"), Carrie S. Cox ("Cox"), Robert J. Bertolini ("Bertolini"), Steven H. Koehler ("Koehler"), Susan Ellen Wolf ("Wolf"), certain members of the Schering Board of Directors (the "Director Defendants") (collectively, the "Schering–Related Defendants"), and the underwriters of two offerings of Schering common and preferred stock (the "Underwriter Defendants") (referred to collectively along with the Schering–Related Defendants as the "Schering Defendants"). (*See* Schering Decl. ¶ 26.)

In the Amended Complaint, members of the Schering Lead Plaintiff Group alleged claims under section 10(b), 20(a) and 20 A of the 1934 Act and Sections 11, 15 and 12(a)(2) of the 1933 Act. In essence, they alleged that Schering knew or recklessly disregarded, but did not disclose, the results of the ENHANCE study, which showed that Vytorin was in fact no more effective at reducing cIMT than simvastatin alone. Lead Plaintiff alleged that Schering knew the results of the ENHANCE test well before the results were "un-blinded," but withheld that information in order to forestall any negative impact the results would have on sales of Vytorin and Schering's common stock price. According to Lead Plaintiff, Schering used the pretext of data issues to delay the release of the results, and simultaneously made public statements actually touting the ENHANCE study and the purportedly greater medical benefits of Vytorin over simvastatin alone. (Schering Class Action Decision at 2–3; S.ECF 314.)

***12** On October 6, 2008, the Merck Lead Plaintiff Group filed a 216–page Consolidated and Amended Complaint against Merck, Clark and other officers. (Merck Decl. ¶ 25; M.ECF 24.)

On February 9, 2012, members of the Merck Lead Plaintiff Group filed a Second Amended Consolidated Complaint for violations of the Federal Securities Laws (the "Complaint") which again asserted claims under Sections 10(b) and 20(a) of the 1934 Act and Rule 10b–5. (Merck Decl. ¶ 33.) The Complaint added additional allegations concerning the alleged false statements and dropped all claims against two of Merck's officers who had been named as defendants in the Consolidated Complaint. Defendants denied all violations of the securities laws and asserted affirmative defenses to Lead Plaintiffs' allegations. (Merck Decl. Ex. A to Ex. F at p. 4.)

6. Defendants' Motion to Dismiss the Consolidated Class Action Complaint

By December 12, 2008, the Defendants in both cases had moved to dismiss the Schering and Merck Consolidated Class Action Complaints on a variety of legal grounds. In Orders dated September 2, 2009, the Court denied all dismissal motions. (S.ECF No. 123; M.ECF 64 and 65.)

7. Defendants Fight Class Certification

On February 7, 2011, members of the Lead Plaintiff Group in both the Schering and Merck Actions filed motions for class certification and, on September 16 and September 22, 2011, respectively, filed amended motions for class certification. (Schering Decl. ¶¶ 46, 47; Merck Decl. ¶¶ 46, 47.)

Securities class actions like the Schering and Merck Actions, routinely are certified as class actions, especially since the advent of the PSLRA in which the Court has been actively involved in the selection of lead plaintiffs and approval of lead counsel. Even though several significant institutions were selected as the Lead Plaintiffs in the Schering and Merck Actions, defendants, leaving no stone unturned, conducted extensive discovery into the propriety of certification and actively contested virtually every possible aspect of class certification. (*See* Schering Decl. ¶ 35; Merck Decl. ¶ 35.) Defendants not only resisted certification, but also utilized the certification process as a vehicle to attempt to sharply limit the Schering class period to end on January 14, 2008—and to try to eliminate the Merck class entirely. (Merck Decl. ¶ 48.) The pitched battle waged over certification was ferocious.

Indeed, on April 12, 2010, even before Lead Plaintiff Group's motions for class certification were filed, the Schering and Merck Defendants commenced extensive discovery by serving members of the Lead Plaintiff Groups with document requests that were extremely broad, including forty-eight (48) separate requests for documents and nine interrogatories. In response to Defendants' discovery requests, Lead plaintiffs produced more than 15,000 pages of documents, including account statements, investment guidelines and investment manager reports. Defendants then deposed five Rule 30(b)(6) representatives of the various members of the Schering Lead Plaintiff Group and six Rule 30(b)(6) representatives of the various members of the Merck Lead Plaintiff Group. (Schering Decl. ¶¶ 35, 36; Merck Decl. ¶¶ 35–37.)

***13** Defendants also sought discovery from the external investment advisers that purchased Schering and Merck securities on behalf of members of the Lead Plaintiff Groups during the class period. It is common for public pension funds to diversify their investment strategy by apportioning capital among a number of investment managers, who usually specialize in different asset classes—*e.g.,* equity, fixed income, emerging markets, etc. (Schering Decl. ¶ 42; Merck Decl. ¶ 42.)

Between December 2010 and March 2011, Defendants served subpoenas *duces tecum* on fifteen external advisors to the members of the Schering Lead Plaintiff Group and twenty-one external advisors to the members of the Merck Lead Plaintiff Group. (Schering Decl. ¶ 43; Merck Decl. ¶ 43.) These subpoenas required review by Co–Lead Counsel of approximately 100,000 pages of documents. (*Id.*) At depositions held throughout the country, Defendants deposed five representatives of the advisors to the members Schering Lead Plaintiff Group and fourteen advisors to the members of the Merck Lead Plaintiff Group. The unusually intense battle over certification even involved submissions of expert reports and expert depositions by all parties. (Schering Decl. ¶ 44; Merck Decl. ¶ 44.)

Following class certification discovery, and after receiving voluminous briefing, on September 25, 2012, the Court issued Opinions and entered Orders granting Lead Plaintiffs' motions in both the Schering and Merck Actions certifying Classes (*See* S.ECF 314; M.ECF 250.)

8. Both Actions Involved Massive Fact Discovery

After the motions to dismiss were denied, formal fact discovery began in both the Schering and Merck Actions.[12] (Schering Decl. ¶ 58; Merck Decl. ¶ 55.)

12 Even before the automatic PSLRA stay expired upon the denial of the dismissal motions and resort to formal discovery became available, Co–Lead Plaintiffs had conducted an extensive factual investigation. (*See* Schering Decl. ¶¶ 21–33; Merck Decl. ¶¶ 20–22.) The members of the Schering Lead Plaintiff Group also unsuccessfully sought to partially vacate the automatic stay granted by the PSLRA to obtain documents produced in related investigations. (Schering Decl. ¶ 57.)

At bottom, both the Schering and Merck Actions required proof of what Defendants knew about the ENHANCE trial —and when they knew it. Of course, this evidence was almost entirely in the exclusive possession of Defendants. Accordingly, a massive discovery effort was required and the highly complex scientific and statistical nature of the evidence added to the difficulty. Throughout the course of both actions, Co–Lead Counsel embarked on an extensive and hotly-contested discovery effort to attempt to develop evidentiary support for the claims asserted in the Complaints. These efforts were critical to the result achieved for the Classes in both the Schering and Merck Actions.

Lead Plaintiffs in both cases served lengthy document requests, as well as interrogatories, on the various Defendants. Further, Lead Plaintiffs in the two cases gathered additional evidence through subpoenas *duces tecum* served on numerous non-parties, including clinical imaging firms, informatics and technology firms, industry intelligence firms and crisis management firms engaged by Defendants in connection with the ENHANCE trial or the marketing of Vytorin. (Schering Decl. ¶ 59; Merck Decl. ¶ 56.)

***14** In response to these discovery efforts by Co–Lead Counsel, Defendants and nonparties produced more than 12 million pages of documents. (Schering Decl. ¶ 51; Merck Decl. ¶ 58.) In order to efficiently review and analyze this massive response, Co–Lead Counsel dedicated extensive resources and utilized advanced technology to organize, review and analyze the vast amount of information produced by Parties and non-parties. Given the significant efficiencies both in terms of time and money that could be achieved by joining their efforts in the two parallel actions, Co–Lead Counsel in the Schering and Merck Actions coordinated their discovery efforts. (Schering Decl. ¶ 62; Merck Decl. ¶ 59.)

Co–Lead Counsel in the two actions developed a joint discovery program for the review of documents and the taking of depositions, and areas of responsibility both as to document review and depositions were allocated among attorneys in both actions. This approach, among other things, allowed for a larger overall team of attorneys to review the documents and for the teams to effectively share information with each other and with more senior lawyers in each case. This increased the efficiency of the document review in both cases by reducing redundancy and duplicated efforts and facilitated the review of documents and the efficient preparation for depositions. (Schering Decl. ¶ 53; Merck Decl. ¶ 60.)

Additionally, the Co–Lead Counsel in the respective actions also sought to realize significant cost savings by placing all the documents in a shared electronic document depository hosted by a leading litigation technology support company that was hired jointly by Co–Lead Counsel in the Schering and Merck Actions. This avoided significant copying costs necessary to create numerous hard copy sets of the 12 million pages produced at a cost of more than $1 million (at $0.10/page) per set, an order of magnitude more than the $325,602.86 cost Co–Lead Counsel incurred in connection with the document depository. (Schering Decl. ¶ 64; *see* Merck Decl. ¶ 63.)

The electronic document depository also enabled all Lead Plaintiffs' Counsel working on both cases to search the documents through "Boolean" type word searches (*i.e.,* the type of searches used in the Westlaw and Lexis–Nexis databases), as well as by multiple categories, such as by author and/or recipients, type of document (*e.g.,* emails, memoranda, SEC filings), date, bates number, etc. The electronic database was accessible through the Internet, allowing attorneys in both the Schering and Merck Actions, under the direction and supervision of their respective co-lead counsel, to review documents and coordinate discovery remotely. For example, when attorneys in one location identified "hot" documents, that designation was saved so attorneys in other locations would be aware of which documents carried that designation and could immediately review them. Co–Lead Counsel achieved substantial savings by working primarily electronically (saving significant copying costs), and by sharing the costs of electronic data storage. (Schering Decl. ¶ 65; Merck Decl. ¶ 62.)

***15** To review the enormous document production, teams of attorneys from Plaintiffs' Counsel in both the Schering and Merck Actions were assembled and thorough document

review guidelines and protocols were prepared to aid them. With guidance from more senior attorneys, they worked full-time on this project to complete the document review and analysis as quickly and efficiently as possible. The review was structured to limit overall cost, with the bulk of the initial review being conducted by more junior attorneys. (Schering Decl. ¶ 67; Merck Decl. ¶ 69.)

All aspects of the review by attorneys were supervised by Co–Lead Counsel to attempt to eliminate inefficiencies and to try to insure a high-quality work-product. This supervision included multiple in-person training sessions, the drafting of a detailed "document review manual," presentations regarding the key legal and factual issues in the case and in-person instruction from senior attorneys and experts. The training sessions were supplemented by weekly conferences with senior attorneys at each Co–Lead Counsel firm as well as conferences with Co–Lead Counsel in the companion case to discuss important documents and case strategy. (Schering Decl. ¶ 68; Merck Decl. ¶ 65.)

So-called "hot" documents that were identified were all subject to further analysis and assessment by senior attorneys (with the assistance of Lead Plaintiffs' experts) on an on-going basis. In addition, samplings of documents coded as "relevant" and "non-relevant" were reviewed by those same senior attorneys to provide quality control, i.e., to make certain that the more junior attorneys' assessments were accurate. (Schering Decl. ¶ 69; Merck Decl. ¶ 66.)

9. Depositions

In addition to reviewing more than 12 million pages of documents and taking and defending depositions related to class discovery as described above, Lead Plaintiffs in the Schering and Merck Actions conducted more than 45 depositions of fact witnesses and 30(b)(6) witnesses, some of which were two-day depositions. (Schering Decl. ¶ 71; Merck Decl. ¶ 67.)

In preparing for these depositions (and for possible trial), Co–Lead Counsel in both cases needed to analyze complex medical, scientific and statistical issues that were integral to the claims, including to prove loss causation and damages. As a result, Co–Lead Counsel and their experts needed to devote considerable time and effort to learning and analyzing: (i) the principles of conducting clinical trials and the protocol for the ENHANCE study; (ii) the interim and final clinical trial results of the ENHANCE study; (iii) information relating to collection, transmittal, storage and analysis of data gathered during the course of the ENHANCE study, including the use of the "SAS" platform in connection with statistical analyses; (iv) internal Schering and Merck documents and scientific literature concerning the various elements of Vytorin, Zetia, Zocor, other cholesterol drugs in the "statin" class and other cholesterol-lowering medications; (v) internal Schering and Merck documents and scientific literature relating to complex statistical concepts and methods; and (vi) information relating to the marketing practices of Schering, Merck and M/S–P relating to their cholesterol franchise.[13] (Schering Decl. ¶ 73; Merck Decl. ¶ 69.)

13 Co-lead Counsel in the Schering Action also needed to analyze internal correspondence and memoranda produced by the Underwriter Defendants to determine whether adequate due diligence was conducted in advance of the Offerings. (Schering Decl. ¶ 73.)

10. Extensive Reliance on Experts

***16** Given the complex scientific nature of the Schering and Merck Actions, it is hardly surprising that both sides needed to make extensive use of expert testimony. This required the preparation of lengthy expert reports, expert depositions and, of course, *in limine* motions. (Schering Decl. ¶¶ 75–83; Merck Decl. ¶¶ 71–78.) In the Schering Action, the parties exchanged a total of 22 opening and rebuttal reports from 11 experts. (Schering Decl. ¶ 75 .) In the Merck Action, the parties exchanged a total of 18 opening and rebuttal expert reports from a total of 9 experts. (Merck Decl. ¶ 71.)

On September 15, 2011, the Schering and Merck Lead Plaintiff Groups served expert reports on Defendants from the following 5 experts:

Expert	Subject Area
Chad Coffman, CPA (Schering expert only)	Damages, Market Efficiency, Causation, Valuation Analyses
Gregg A. Jarrell, Ph.D. (Merck expert only)	Damages, Market Efficiency, Loss Causation, Valuation Analyses

Curt D. Furberg, M.D., Ph.D. (both actions)	Clinical Trial Standards, Clinical Trial Design, Clinical Trial Data Analyses, Publication of Clinical Trial Results
David B. Madigan, Ph.D. (both actions)	Biostatistics, Clinical Trial Standards Relating to Blinded Data, Clinical Trial Data Quality and Reliability
Allan J. Taylor, M.D., F.A.C.C., FA.H.A. (both actions)	Cardiology, Clinical Trial Standards, Imaging Trials, cIMT Methodology, Surrogate Clinical Markers

(Schering Decl. ¶ 76; Merck Decl. ¶ 72.) Also, on September 15, 2011, Defendants served expert reports on Lead Plaintiffs in both the Schering and Merck Actions from the following individuals:

Expert	Subject Area
Arnold Barnett, Ph.D.	Statistics, Clinical Trial Data Quality and Reliability
Marc Cohen, M.D., F.A.C.C.	Cardiology, Surrogate Clinical Markers, Publication of Clinical Trial Results
Eva Lonn M.D., M.Sc, F.R.C.P.C., F.A.C.C.	Cardiology, Surrogate Clinical Markers, Imaging Trials, cIMT Methodology, Publication of Clinical Trial Results
Denise Neumann Martin, Ph.D.	Damages, Market Efficiency, Loss Causation, Valuation, Analyses
Robert Starbuck, Ph.D.	Biostatistics, Clinical Trial Data Quality and Reliability, Clinical Trial Data Cleaning

(Schering Decl. ¶ 78; Merck Decl. ¶ 73.) An additional expert report from Gary Lawrence, Esq. was served by Defendants in the Schering Action on the subjects of investment banking, public equity offerings and underwriter due diligence. (Schering Decl. ¶ 78.) Each of these experts was deposed. (Schering Decl. ¶¶ 81–82; Merck Decl. ¶¶ 76–77.)

11. Summary Judgment Motions

On March 1, 2012, the Defendants moved for partial summary judgment and summary judgment in the Schering and Merck Actions, respectively. (Schering Decl. ¶ 84; Merck Decl. ¶ 79.) They contended that Lead Plaintiffs could not prove loss causation as to any corrective disclosure after January 14, 2008. (Schering Decl. ¶ 85; Merck Decl. ¶ 80.) After extensive briefing, on September 25, 2012, the Court denied the motions. (Schering Decl. ¶ 89; Merck Decl. ¶ 84.) In most cases, this would have cleared away the last major obstacle to trial.

***17** Undaunted, on October 9, 2012, Defendants filed separate petitions in both the Schering and Merck Actions pursuant to Rule 23(f) in the Court of Appeals seeking interlocutory review of the Court's orders granting certification in both the Schering and Merck Actions.

(Schering Decl. ¶ 53; Merck Decl. ¶ 51.) In these petitions, Defendants specifically challenged the district court's determination that it would be premature to determine to end the class period on January 14, 2013. (Schering Decl. ¶ 53; Merck Decl. ¶ 51.) If Defendants had succeeded, this would have significantly reduced the potential damages in the Schering Action (Schering Decl. ¶ 114) and would have entirely eliminated the Merck Action (Merck Decl. ¶ 104). As Co–Lead Counsel in the Merck Action note, if the class period were ended on January 14, 2008, it would "result[ ] in no recoverable damages for the Class." (Merck Decl. ¶ 104.) On January 7, 2013, the Third Circuit denied the Defendants Rule 23(f) the petitions. (Schering Decl. ¶ 54; Merck Decl. ¶ 52.)

12. Settlement Negotiations

By any definition, the settlement negotiations in both the Schering and Merck Actions were protracted and extremely contentious. Before the Court appointed Pilgrim Mediation Group LLC ("Pilgrim") to attempt to mediate a resolution, efforts led by party-appointed mediator Layne Phillips, Esq. had been unsuccessful and an enormous gulf existed between the parties in both cases. (Schering Decl. ¶ 121–22 ("those efforts still left the Parties with unbridgeable differences."). At the inception of Pilgrim's involvement, the discussions with counsel for all parties were dominated by recriminations over who was responsible for the previous miscommunications and lack of progress. As a result, it was difficult to make significant headway as Lead Plaintiffs continued to make stratospheric demands while Defendants refused to move beyond bargain basement proposals. While a modicum of progress did ensue, our efforts to translate it into a resolution fared no better than previous attempts. An "all-hands" mediation session, convened at the courthouse on September 7, 2012, failed to achieve a resolution and quickly demonstrated neither the time nor the dynamics were yet ripe for a settlement. In response, we determined to suspend our efforts and await further litigation developments to see whether they might create a more receptive environment. (*See generally,* Schering Decl. ¶¶ 120–124; Merck Decl. ¶¶ 110–113.)

13. Preparation for Trial

Once it became evident that neither action could be resolved in the short term, the Parties turned their full attention to final preparations for what promised to be a lengthy, complex jury trial scheduled to commence on March 4, 2013. Among other tasks, Co-lead Counsel in both the Schering and Merck Actions:

- In January, 2013, as part of the pretrial order process, submitted lengthy statements of stipulated facts, exhibit lists, deposition designations, *voir dire* questions, jury instructions and verdict forms.

***18** • In January and February 2013, filed motions to bifurcate and were served with Defendants' competing motions to bifurcate different aspects of the case.

- On January 14, 2013, filed a Dauber motion in the Schering Action challenging the testimony of an expert defense witness.

- On February 1, 2013 filed 23 *in limine* motions accompanied by an omnibus 96–page brief and were served with seven *in limine* motions by the corporate defendants, and 2 additional *in limine* motions by the Underwriter Defendants in the Schering Action.

- On February 1, 2013 filed responses to Defendants' Dauber motions challenging the opinions and qualifications of their expert witnesses.

- In February 2013, filed a trial brief outlining their case in brief and the important legal and factual issues to be discussed.

(Schering Decl. ¶¶ 91, 98–100; Merck Decl. ¶¶ 86, 87, 89, 91–96.)

14. Settlement Agreements Are Reached on the Eve of Trial

In January 2013, once the summary judgment motions had been denied, class action status had been granted, the Third Circuit had rejected any interlocutory review and trial appeared to be both certain and imminent in both the Schering and Merck Actions, we restarted settlement discussions.

Given the radically divergent positions espoused by all of the Parties on the merits and damages and their correspondingly antagonistic settlement postures, either or both of the cases could well have gone to trial. Indeed, both sides appeared ready, willing and able to go that route, especially as the push toward final trial preparation gained momentum. Initially, Lead Plaintiffs and Co–Lead Counsel in both the Schering and Merck Actions continued demanding enormous amounts to settle a difficult circumstantial case they insisted had merit, while defendants and their counsel maintained the

cases lacked merit and implacably resisted paying significant amounts until the very end.

Though negotiations still remained complex and difficult, on February 11, 2013, agreements in principle in both cases were reached only after final "take it or leave it" Mediators' proposals containing the financial terms of the settlements ultimately embodied in both the Schering and Merck settlements were accepted. On February 27, 2013, the Court was notified by Counsel for the Defendants that the parties had entered into an agreement in principle to settle the Schering and the Merck Actions. (*See generally,* Schering Decl. ¶¶ 125–126; Merck Decl. ¶¶ 114–115.)

We think the sophistication and quality of counsel for both sides who persuaded their clients that there was considerable risk that the jury, Judge or the Third Circuit might not share their bullish views about the cases were instrumental in producing the Settlement Fund. Given our own perspective, having participated in the intense negotiations, we think the settlements were true compromises by both sides—and the prudence of the Lead Plaintiffs and Co–Lead Counsel in both the Schering and Merck Actions recognizing the considerable risk faced at all levels was significant and constructive. To paraphrase lyrics from a Kenny Rodgers country music song, Co–Lead Counsel in both the Schering and Merck Actions "knew when to hold'em, when to fold'em [and] knew when to walk away" ("The Gambler", lyrics by Don Schlitz.) We believe Co–Lead Counsel in both the Schering and Merck Actions played their cards deftly and their efforts to persuade Lead Plaintiffs to resolve the case at an optimal time for the Class warrants mention, if not some added support for their fee applications.

15. The Preliminary Approval Orders

***19** On June 7, 2013, the Court entered Orders preliminarily approving both the proposed Schering and Merck settlements and providing for notice (the "Preliminary Approval Orders"). (Schering Decl. ¶ 133; Merck Decl. ¶ 122.) In the Preliminary Approval Orders, the Court specifically approved the form and content of the notice of the proposed settlements provided to members of the Class (the "Settlement Notice").

The Schering Settlement Notice specifically provided notice that:

> Plaintiffs' Counsel, which collectively is Co–Lead Counsel, Liaison Counsel, and all other counsel who, at the direction and under the control of Co–Lead Counsel, performed services on behalf of or for the benefit of the Class, have prosecuted this Action on a wholly contingent basis since its inception in 2008. Co–Lead Counsel (defined below), on behalf of Plaintiffs' Counsel, will apply to the Court for a collective award of attorneys' fees to Plaintiffs' Counsel in an amount not to exceed 17% of the settlement fund (which includes accrued interest). In addition, Co–Lead Counsel will apply for reimbursement of Litigation Expenses paid or incurred in connection with the prosecution and resolution of the Action in an amount not to exceed $5,250,000, plus accrued interest (which will include an application for reimbursement of the reasonable costs and expenses incurred by Lead Plaintiffs directly related to their representation of the Class in an amount not to exceed $150,000). Any fees and expenses awarded by the Court will be paid from the settlement fund.

(Schering Decl., Ex. A to Ex. 6 at 2.)

The Merck Settlement Notice provided notice that:

> Plaintiffs' Counsel, which collectively is Co–Lead Counsel, Liaison Counsel, and all other legal counsel who, at the direction and under the supervision of Co–Lead Counsel, performed services on behalf of or for the benefit of the Class, have prosecuted this Action on a wholly contingent basis since its inception in 2008. Co–Lead Counsel (defined below), on behalf of Plaintiffs' Counsel, will apply to the Court for a collective award of attorneys' fees to Plaintiffs' Counsel in an amount not to exceed 28% of the settlement fund (which includes accrued interest). In addition, Co–Lead Counsel will apply for reimbursement of Litigation Expenses paid or incurred in connection with the prosecution and resolution of the Action in an amount not to exceed $5,000,000, plus accrued interest, and will also apply for reimbursement of the reasonable costs and expenses incurred by Lead Plaintiffs directly related to their representation of the Class in an amount not to exceed $175,000. Any fees and expenses awarded by the Court will be paid from the Settlement Fund.

(Merck Decl. Ex. A to Ex. F at 2.)

Pursuant to the Preliminary Approval Orders in both Actions, hearings have been scheduled for October 1, 2013 to determine, *inter alia,* whether the Proposed Settlements and the motions by Co–Lead Counsel for an award of attorneys' fees and reimbursement of litigation expenses should be approved by the Court. (S.ECF 421, Order at 4; M.ECF 330, Order at 4.) The Preliminary Approval Orders provide that

written objections to the Proposed Settlements must be made in writing no later than August 5, 2013.[14]

14 The Preliminary Approval Orders provide that any objections must be filed no later than forty-five (45) calendar days after the "Notice Date" (S.ECF 421; Order at 11) which is defined to be ten (10) *business* days after entry of the Preliminary Approval Order (*id.* at 4–5) which occurred on June 7, 2013. Accordingly, the Notice Date is June 21, 2013 and 45 days thereafter would fall on Sunday, August 4, 2013, allowing any objections to be filed on or before August 5, 2013, the following business day. (See Schering Decl. ¶ 134; Merck Decl. ¶ 123.)

16. The Fee Applications

***20** On July 2, 2013, Co–Lead Counsel in both the Schering[15] and Merck Actions filed their separate applications for attorneys' fees and expenses. Co–Lead Counsel in the Schering Action seek 16.92% of the Settlement Fund which would constitute a total amount of $80,031,600, plus interest; reimbursement for total litigation expenses incurred in prosecuting the action in the amount of $3,620,049.63; and reimbursement for expenses incurred by members of the Schering Lead Plaintiff Group totaling $109,865.31. (Schering Decl. ¶ 6.)

15 To be precise, the fee application is by Schering's Co–Lead Counsel on behalf of all the law firms involved on the plaintiffs' side of the Schering Action: "Co–Lead Counsel is making a collective application on behalf of Plaintiffs' Counsel for a fee award of 16.92% of the settlement fund (which includes accrued interest)." (Schering Decl. ¶ 139.) Plaintiffs' Counsel include Co–Lead Counsel and the law firm of CBCOB & A, Court-appointed liaison counsel to the Class; the law firm of Cohen, Milstein, Sellers & Toll, PLLC, and the law firm of Corlew Munford & Smith, PLLC, which served as additional counsel for Lead Plaintiff the Public Employees' Retirement System of Mississippi." (Schering Decl. ¶ 139.)

In the Merck Fee Application, Co–Lead Counsel have taken a slightly different approach.[16] As they state, "in light of the fact that the amount of attorneys' fees to be awarded will be initially recommended to the Court by the Court-appointed, independent Special Masters, Co-lead Counsel has not applied for a specific fee amount." (Merck Decl. ¶ 130.) Having demurred from explicitly requesting a specific amount, Co–Lead Counsel hasten to note, "three of the four Lead Plaintiffs expressly support an award of fees amounting to 28% of the Settlement Fund, and the fourth Lead Plaintiff takes no position on the amount of the fee, *and instead defers to the discretion of the Special Masters and the Court.*"[17] (*Id., emphasis supplied.*) In this same vein, the balance of the Merck Declaration states "an award of fees up to 28% would be fair and reasonable" (Merck Decl., subheading A ¶ 132) and that "under the lodestar approach, a fee award of 28% of the settlement fund yields a multiplier of 1.34 on the lodestar ... which is within the range of multipliers awarded in actions where similar settlements have been achieved." (Merck Decl. ¶ 136.) (*See also* ¶ 150: "[F]or the reasons set forth therein [referring to the Co–Lead Counsel's Memorandum of Law], a fee award of 28% is well within the range of fee awards that have been approved in other similarly sized litigation" (emphasis supplied).) Suffice it to say, we interpret the Merck fee application as strongly suggesting, if not requesting, an award of 28%. Merck Co–Lead Counsel also have applied for reimbursement of expenses amounting to $4,367,376.50 and for reimbursement of expenses of the four members of the Merck Lead Plaintiff Group in the aggregate amount of $109,865.31.

16 Although not as explicit as the Schering Fee Application, we interpret the Merck Fee Application by Co–Lead Counsel also to be made collectively on behalf of all Plaintiffs' Counsel who are referred to and included in the lodestar calculation, and who have submitted declarations in support of Merck Co–Lead Counsel's Fee Application. (*See* Exhibit A to Exhibit F of Merck Decl.; Notice of Proposed Settlement at 2 ("Co–Lead Counsel on behalf of Plaintiffs' Counsel, will apply to the court for a collective award of attorneys' fees....").) Throughout the Lead Plaintiffs' Memorandum of Law, they use Co–Lead Counsel and Plaintiffs' Counsel interchangeably. (*See, e.g.,* "[T]he Court should grant Plaintiffs' Counsel a fee equal to a percentage of the $215 million settlement" (Mem. Of Law at p. 19.)) As stated in paragraph 135 of the Merck Declaration, Plaintiffs' Counsel in the lodestar calculation "include Co–Lead Counsel, the law firms of CBCOB & A and Seeger, Court-appointed liaison counsel to the class; Labaton and Klausner Kaufman PA, additional counsel to Jacksonville". (Merck Decl. ¶ 135.)

17 This characterization is a more definitive reading of the Declaration of ABP, the abstaining a member of the Merck Lead Plaintiff Group, than we give it. The Declaration actually states "ABP will not now take a position on the specific amount of attorneys' fees that should be awarded; rather ABP will await the report and recommendation of the Special Masters and *evaluate that*

recommendation when it is made, but expects it will defer to the Special Masters." (Exhibit B to Merck Declaration at ¶ 13, emphasis supplied.)

IV. DISCUSSION OF APPLICABLE LEGAL STANDARDS

A. The Legal Standard Applicable to Common Fund Cases.

In the Third Circuit, the percentage-of-recovery method ("POR") should be applied in common fund cases like the Schering and Merck Actions. *Sullivan v. DB Investments, Inc., 667 F.3d 273, 330 (3d Cir.2011) (En Banc) ("Sullivan").* As the Court of Appeals has held: "[T]he POR 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." (*Id. at 3; citations and quotations omitted.) In re AT & T Corp., 455 F.3d 160, 164 (3d Cir.2006 ("AT & T"); In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir.2005) ("Rite Aid") quoting In re Prudential Ins. Co., 148 F.3d 283, 333 (3d Cir.1998)*.

***21** Indeed, Court of Appeals has "several times reaffirmed that the application of a percentage-of-recovery method is appropriate in common-fund cases." *In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 734 (3d Cir.2001) ("Cendant PRIDES") (citing Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n. 1 (3d Cir.2000) ("Gunter")).* To be sure, while the Third Circuit has repeatedly "recommended" that POR award be "cross-checked" against the lodestar method to ensure its reasonableness,[18] *In re Cendant Corp. Litigation, 264 F.3d 201, 286 (3d Cir.2001) ("Cendant I"),* "[t]he lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method." *AT & T at 164.*

18 Although consistently phrased as a "recommended" or "suggested" cross-check, the Third Circuit in *Rite Aid* agreed with the objector that in "cross-checking" the lodestar, "the district court improperly applied the billing rates of only the most senior partners of plaintiffs' co-lead counsel, resulting in an artificially low multiplier.... The district court should apply blended billing rates that approximate the fee structure of all attorneys who worked on the matter. That did not occur here.... Failure to apply a blended rate, we believe is inconsistent with the exercise of sound discretion *and requires vacatur and remanding* for further consideration." *396 F.3d at 306 (emphasis supplied).* If an incorrect calculation of the lodestar by the court while cross-checking is an abuse of discretion, *a fortiori,* failure to perform a lodestar cross-check at all must be reversible error. In reality, the lodestar cross-check, therefore, must be considered to be a requirement. As then Chief Judge Becker previously had observed in *Cendant I,* "Arguably Cendant PRIDES, which, as noted above ... was not decided as a Reform Act case, may have, by implication, elevated the lodestar cross-check from being a 'recommendation' to a requirement." *264 F.3d at 285, n. 57.* In light of *Rite–Aid's* subsequent remand, there can no longer be any real doubt that the lodestar "cross-check" is more than a recommendation—it is mandated.

In keeping with prior case law, the PSLRA, which governs the Schering and Merck Actions, incorporated the POR method by providing that "[t]otal attorneys' fees and expenses awarded by the court to counsel for plaintiffs shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." PSLRA, 15 U.S.C. § 78u–4(a)(6). The Third Circuit has interpreted this language to reflect the intention of Congress to adopt the percentage-of-recovery method, rather than the lodestar method, in determining attorneys' fees in securities class actions. *See In re Cendant Corp. Sec. Litig., 404 F.3d 173, 188 n. 7 (3d Cir.2005) ("Cendant II"); Rite Aid, 396 F.3d at 300.*

B. A Robust Assessment of the Fee Requests is Mandated

As the Court of Appeals has made abundantly clear: "[A] 'robust and thorough judicial review of fee applications is required in all class action settlements.' " *Sullivan,* 667 F.3d at 329 *quoting In re DietDrugs,* 582 F.3d 524, 537–38 (3d Cir.2009). *Accord, Rite Aid, 396 F.3d at 302* ("[W]e remind the trial courts to engage in robust assessments of the fee award reasonableness factors when evaluating a fee request").

C. The Applicable Reasonableness Factors

In applying the POR method to a requested fee award, among the factors the district court should consider are the seven factors derived from *Gunter:*

(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.

223 F.3d at 195, n. 1; accord, AT & T, 445 F.3d at 165; Rite Aid, 396 F.3d at 301.

These factors were, however, not "intended to be exhaustive". *AT & T, 455 F.3d at 165*. As Chief Judge Scirica observed:

> In *Prudential,* we noted three other factors that may be relevant and important to consider: (i) 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 (ii) the percentage fee that would have been negotiated had the case been subject to a private contingency fee agreement at the time counsel was retained; and (iii) any "innovative" terms of settlement.

***22** *AT & T, 455 F.3d 165 (citations omitted).* Thus, there are at least ten factors that must be evaluated in assessing the reasonableness of an award of legal fees. *Sullivan, 366 F.3d at 330* (referring to "each of the ten factors that we identified in *Gunter v. Ridgewood Energy* and *Prudential"*).

In applying these factors in *AT & T,* the Third Circuit has emphasized the touchstone of the reasonableness analysis:

> [W]henever a district court awards attorneys' fees in class action cases, "[w]hat is important is that the district court evaluate what class counsel actually did and how it benefitted the class."

In re AT & T, 455 F.3d at 166, quoting Prudential, 148 F.3d at 342 .

D. The Weight, if Any, to be Accorded Views Expressed by the Lead Plaintiffs

Each member of the Schering Lead Plaintiff Group and three out of four members of the Merck Lead Plaintiff Group have expressed views on the fee applications. We must, therefore, determine what, if any, weight should be accorded to these views.

As established in *Cendant I,* "[u]nder the PSLRA, courts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly selected lead counsel." *264 F.3d at 282*. As the Court explained, "[t]his presumption will ensure that the lead plaintiff, not the court, functions as the class's primary agent vis-a-vis its lawyers," and also would help align the interests of the class and its lawyers: "Further, by rendering *ex parte* fee agreements more reliable, it will assist those agreements in aligning the interests of the class and its lawyers during the pendency of the litigation." (*Id.*)

Even when an *ex ante* fee agreement is entered into by a lead plaintiff and lead counsel, subsequent Third Circuit jurisprudence appears to have diluted the weight to be accorded the *Cendant* presumption. As the Court of Appeals emphasize in *AT & T:*

> We now emphasize that the presumption of reasonableness set forth in *Cendant* does not diminish a court's responsibility to closely scrutinize all fee arrangements to ensure fees do not exceed a reasonable amount. *We caution against affording the presumption too much weight at the expense of the court's duty to act as a fiduciary guarding the rights of absent class members.*

455 F.3d at 168 (emphasis supplied).

Where, as here, the fee application is not predicated on an *ex ante* fee agreement, the Court of Appeals has held, "We would then review the fee request using the traditional standards." *AT & T, 455 F.3d at 172* (holding "traditional standards" apply if *Cendant* presumption were abrogated.) The question remains, however, what, if any, weight should be accorded the *ex post* views provided by members of the Schering Lead Plaintiff Group and the majority of the members of the Merck Lead Plaintiff Group.[19]

19 Although APB has reserved its position on the amount of legal fees that should be awarded in the Merck Action, it provides some affirmative support for the fee application. At the very least, APB appears to have authorized the fee application to be submitted (*see* Merck Lead Plaintiff Mem. Of Law at p. 18 ("Co–Lead Plaintiffs requested Plaintiffs' Counsel not to seek a fee greater than 28% of the Settlement Fund, and Lead Counsel agreed")), attests to the reasonableness of the *Lodestar* of *G & E,* acknowledges the fee agreement with G & E was executed before "joining with co-lead plaintiffs and co-lead counsel," and indicates it "expects" to defer to the Special Masters' Recommendation. (*See* Merck Decl. Ex. B ¶ 13.) We interpret this as more than a mere "failure to object". (*Compare Cendant,* 264 F.3d at 281 ("acquiescence" (which is the most a failure to object shows) is not the same thing as "prior approval" .)

***23** Unlike *ex ante* fee agreements which help "align[ ] the interests of the class and its lawyers during the pendency of the litigation," the *ex post* views provided here by Lead Plaintiffs do not assist this alignment. *A fortiori,* the *ex post* views expressed by Lead Plaintiffs do not rise to the

level of an *ex ante* agreement and are not sufficient to trigger even the mild *Cendant* presumption. *Compare, Lucent Technologies, Inc. Securities Litigation, 327 F.Supp.2d 426, 434 (D.N.J.2004) (Pisano, J.)* (applying *Cendant* reasonableness presumption where Lead Plaintiffs negotiated a revised fee agreement with common shareholders' lead counsel when the case concluded to reflect the evolution of the case and to harmonize the terms of the two original retainer agreements.) We are reinforced in our conclusion by both the Schering and Merck Fee Applications which do not suggest any presumption of reasonableness applies.

On the other hand, the Lead Plaintiff and Co–Lead Counsel in both the Schering and Merck Actions were properly selected pursuant to the PSLRA and "there is good reason to think under the PSLRA that a lead plaintiff that has been properly selected" would possess "the incentive and ability to monitor lead counsel's performance". *Cendant,* 264 F.3d at 282. Each member of the Lead Plaintiff Groups (except for ABP in the Merck Action which has deferred) has submitted an affidavit attesting to their involvement in this case and their active roles in monitoring Lead Counsel. Our own previous observation of the active roles played by Lead Plaintiffs during the Mediation confirm that they actively participated in supervising Lead Counsel.

As the Third Circuit has stated, "[i]n 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 to the particular facts of the case." AT & T,* 455 F.3d at 166 (emphasis supplied). Given their active roles, we believe the views of the members of the Lead Plaintiffs Groups in both the Schering and Merck Actions are "useful and relevant," that according weight to them is consistent with their role under the PSLRA as "the class' primary agent[s] *vis-a-vis* its lawyers" (*Cendant I, 264 F.3d at 282*) and their views should be considered as an additional factor bearing on the reasonableness of the amount of the award. *(See Lucent Technologies, 377 F Supp.2d at 440.)*

V. ANALYSIS OF THE SCHERING AND MERCK APPLICATIONS

A. The Schering Fee Application

We now apply the reasonableness factors to the Schering Fee Applications.

1. The First Factor: The Size of the Fund Created and the Number of Persons

The first *Gunter* factor requires assessment of the size of the fund created and the number of persons benefitted. The size of the common fund is a primary benchmark of the success obtained and is, therefore, one of the critical factors in evaluating an attorneys' fee award. *Hensley v. Eckerhart,* 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) ("the most critical factor is the degree of success obtained").

***24** Under any criteria, the size of the fund created by the Schering settlement is an outstanding result. The Schering settlement created a $473 million Settlement Fund which would be among the twenty-five largest securities class action settlements since passage of the PSLRA. Even more significantly, it would rank among the ten largest post-PSLRA securities class action settlements ever achieved without the assistance of a financial restatement. In absolute dollars alone, the size of the Schering Settlement Fund is extremely impressive. A comparison of the Settlement Fund created here to the results in other cases involving comparably sized investor losses, confirms the great success achieved by Schering's Co–Lead Counsel. Although the Schering Fee Application did not provide an expert report or offer comparative analyses to other settlements—perhaps content to let the absolute amount speak for itself—the NERA Consulting Group's respected "Recent Trends in Securities Class Action Litigation: 2012 Full Year Review," which contains an analysis of the median securities class action settlement value as a percentage of investor losses from January 1996 through December 2012, confirms that the size of the Settlement Fund is a significant achievement for the Class.

According to NERA's analysis, the median settlement value as a percentage of investor losses in cases where investor losses were between $1 billion and $4,999 billion was only 1.1%. Where investor losses were between $5 billion and $9,999 billion, the median settlement was only 1.0%, and where investor losses exceeded $10 billion, the median settlement was a mere .7%. *(NERA, Recent Trends in Securities Class Action Litigation: 2012 Full Year Review at p. 32.)*

Measured against January 14, 2008 investor losses of $3.5 billion, the $473 million Settlement Fund constitutes more than 13% of the investor losses. The achievement is all the more impressive given the absence of any critical admissions from criminal pleas or financial restatements or assistance by

companion SEC or DOJ proceedings, or even a motivated deep-pocket individual shareholder leading the charge.[20]

20 Indeed, the only other outside effort appears to have come from a group of state attorneys general who resolved their investigations years before the settlement of the Schering Action for $5.4 million to cover their costs. (*See* Schering Mem. Of Law at p. 27; Schering Decl. ¶ 120.)

Even if we were to include in the equation the far more speculative additional Schering investor losses on March 31, 2008, after the full results of the ENHANCE trial were disclosed—recovery of which are much more problematic given the January 14 disclosures—which could add another $8.2 billion of investor losses, the Settlement Fund still would constitutes a full 4% of the $11.7 billion of investor losses compared to the median settlement for losses of that size of only .7%—a very small fraction of the Schering settlement here.

As of August 12, 2013, a total of 406,733 Settlement Notice Packets had been mailed to potential class members and nominees. (Suppl. Decl. of Stephanie A. Thurin ¶¶ 4, 5.) Accordingly, there can be little doubt that a great number of Schering investors will benefit from the settlement.

***25** In the final analysis, we think the $473 million Settlement Fund is an outstanding accomplishment that strongly supports the requested 16.92% attorneys' fees requested.

2. The Second Factor: The Presence or Absence of Substantial Objections by Members of the Class

As of July 1, 2013, more than 346,000 Settlement Notice Packets had been mailed to potential Class Members pursuant to the Court's Preliminary Approval Order advising them that Co–Lead Counsel would seek an award of attorneys' fees not to exceed 17% of the Settlement Fund. Despite the large number of Class Members, only a single objection to the fee application had been received by the August 5, 2013 deadline.

Under these circumstances, there can be no doubt that this overwhelmingly positive reaction to the Schering Fee Application strongly supports approval of the requested fee. In *Rite Aid,* the Court of Appeals for the Third Circuit held in language equally applicable here: "The class' reaction to the fee request supports approval of the requested fees. Notice of the fee request and the terms of the settlement were mailed to 300,000 class members, *and only two objected. We agree with the district court such a low level of objection is a 'rare phenomenon.' " Rite Aid, 396 F.3d at 30 (emphasis supplied). See AT & T, 455 F.3d at 166, 170* (where "more than one million class members were notified of the proposed settlement ... and only four opposed the attorneys' fee award. No objections were filed by institutional investors with the greatest financial stake in the settlement. The district court characterized this low level of objection as rare....") Plainly, the single objection here, which we conclude below lacks merit, is an equally "rare phenomenon" and strongly supports the Schering fee application.

3. The Third Factor: The Skill and Efficiency of the Attorneys Involved

In this case, we have no doubt that the outstanding result achieved for the class is the direct product of outstanding skill and perseverance by Co–Lead Counsel. The skill and efficiency of counsel 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 the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *Hall v. AT & T Mobility LLC,* No. *07–5325 (JLL), 2010 WL 4053547, at *19 (D.N.J. Oct. 13, 2010) (citation omitted).* Indeed, courts in this district have found that "the single clearest factor reflecting the quality of class counsels' services to the class are the results obtained." *In re Aremisoft Corp. Sec. Litig., 210 F.R.D. 109, 132 (D.N.J.2002)*. Here, the $473 million Settlement Fund was obtained through Co–Lead Counsel's hard work, persistence and skill, overcoming numerous difficult and novel legal and factual challenges, which were litigated to the hilt by highly-experience and first-rate defense counsel to the eve of trial.

***26** Indeed, the case was fraught with unusual class certification issues and the absence of high-level direct admissions requiring Co–Lead Counsel to grapple with complex issues of circumstantial proof, loss causation and damages, many of which lacked clear precedent. In particular, they faced substantial difficulties in establishing falsity and *scienter,* given Defendants' claimed data quality reasons for delaying the ENHANCE results and loss causation and damages under Section 10(b), given that the top-line results of the ENHANCE study were publicly disclosed two months before the end of the Class Period. *Scienter* would have been especially hard to prove in a highly complex, scientifically based case where Co–Lead Counsel were forced to rely only on circumstantial evidence presented through adverse

witnesses and highly technical expert testimony. (Schering Decl. ¶¶ 106–14, 159–60.)

Although cases of this magnitude, especially founded on complex scientific circumstantial evidence, by nature do not lend themselves to efficiency, no doubt mindful that a recovery was by no means certain and that a very real risk existed that the enormous amount of time and expenses Co–Lead Counsel committed to the Schering Action might never be recoverable, Lead Counsel had every incentive to be as efficient as possible. From their pre-filing investigation, through fact and expert discovery, and into final pretrial preparations, Co–Lead Counsel developed and followed a plan to coordinate the marshaling of evidence and prosecution of the Action. (Schering Decl. ¶ 21.) To achieve synergies, among other things, Co–Lead Counsel conducted the review of Defendants' twelve million page document production in close coordination with Co–Lead Counsel in the parallel Merck Action. The cooperative effort among Plaintiffs' Counsel in the two cases allowed for a larger overall team of attorneys to review the documents and for the teams to more effectively share information with each other and with more senior lawyers in each case, allowing for a more efficient document review, reducing redundancy and duplicated efforts. (Schering Decl. ¶¶ 62–69.)

With respect to "the experience and expertise" of counsel, Plaintiffs' Counsel are the cream of the crop of the securities class action Bar. Co–Lead Counsel are among the most experienced and skilled firms in the securities class action litigation field, and each firm has a long and successful track record in securities cases throughout the country. (Schering Decl. ¶ 157.) *In re Schering–Plough Corp. Enhance ERISA Litig., No. 08–1432, 2012 WL 1964451, at *6 (D.N.J. May 31, 2012) (Cavanaugh, J.)* (noting that the skill and efficiency of attorneys with substantial experience in class action litigation, as demonstrated by their supporting documents, favored an award of attorneys' fees); *In re Genta Sec. Litig., No. 04–2123, 2008 WL 2229843, at *10 (D.N.J. May 28, 2008)* ("the attorneys' expertise in securities litigation favors approving the requested award for attorneys' fees").

***27** In a securities class action of this potential magnitude, and given the caliber of the opposition, a top-tier team like this was needed. " 'The quality of opposing counsel is also important in evaluating the quality of counsel's work.' " *Hall,* 2010 WL 4053547, at *19 (citation omitted); *In re Datatec Sys., Inc. Sec. Litig.,* No. 04–CV–525 (GEB), 2007 WL 4225828, at *7 (D.N.J. Nov.28, 2007). *See, e.g., In re WorldCom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 358 (S.D.N.Y.2005) (stating defense counsel, including Paul, Weiss, the lead defense firm here, were "formidable opposing counsel" and among "some of the best defense firms in the country").

Defense counsel zealously represented the interests of their respective clients and were fully prepared to try and appeal this case to the very end. Faced with this experienced, formidable, and well-financed opposition who aggressively litigated the Schering Action, Co–Lead Counsel stood toe-to-toe and achieved an outstanding result for the Class. The fact that Co–Lead Counsel achieved this Settlement for the Class "in the face of formidable legal opposition further evidences the quality of their work." *In re Corel Corp. Inc. Sec. Litig.,* 293 F.Supp.2d 484, 496 (E.D.Pa.2003).

The quality of the representation provided by Co–Lead Counsel and the team they assembled, which we believe is directly responsible for the outstanding result that was achieved, strongly supports the reasonableness of the fee request.

4. The Fourth Factor: The Complexity and Duration of the Litigation

As the Third Circuit has observed, a case is complex when it involves "complex, and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case by class counsel." (*PRIDES, 243 F.3d at 722*.) Under this definition, or any other test, the Schering Action epitomizes the kind of complex case embodying all the factors described by the Third Circuit. It was vigorously litigated to the hilt for five years and required extensive discovery into extremely difficult circumstantial evidence involving complex scientific and statistical data.

The Schering Action included claims under both the 1934 Act and the Securities Act against more than two dozen defendants. (Schering Decl. ¶¶ 15–19.) At every turn, the case presented difficult and challenging legal and factual issues that required creativity and sophisticated analysis. It was hotly contested at every stage—from motions to dismiss and class certification through the partial summary judgment motion—and included exhaustive discovery and trial preparation. Even the settlement negotiations, which initially succeeded only inflaming both sides, spanned two years and were incredibly contentious and complicated. (*Id. at ¶¶ 11, 121–25.*)

The basic theory of the case—that Schering cheated on the ENHANCE trial by secretly "unblinding" it—presented extremely difficult challenges given the highly technical nature of the alleged fraud. Given the absence of admissions of liability or a "smoking gun" to prove their case, Lead Plaintiff needed to show that Schering biostatisticians conducted improper statistical analyses on unblinded data from the ENHANCE study, and from their knowledge of statistical methods, were able to deduce that Vytorin had failed the ENHANCE study. These complicated claims of cheating in the conduct of clinical trials were especially difficult to present to a jury and were vigorously disputed by Defendants, who offered a plausible alternative explanation, supported by experts and numerous exhibits, that Defendants were attempting to improve data quality and not improperly learning the ENHANCE results. In this context, a very real risk existed that a jury would conclude Defendants did not "cheat" at all by prematurely unblinding the ENHANCE test or that they did not act with the requisite *scienter* required by the 1934 Act claims. Indeed, it bears emphasis that the statistical analyses at the heart of the Schering Action were conducted by employees of Schering who were several steps down the corporate ladder from the senior officers of the Company requiring Co–Lead Counsel to rely entirely on circumstantial evidence to attempt to show that the senior officers were aware that the ENHANCE study had failed. (Schering Decl. ¶¶ 109–11); *AT & T, 455 F.3d at 170* ("the difficulty of proving actual knowledge under § 10(b) of the Securities Exchange Act ... weighed in favor of approval of the fee request.").

***28** The Securities Act claims were also challenging. Sections 11 and 12 require a plaintiff to "come forward with facts to suggest that reasonable jurors might be able to find that the information allegedly omitted or misrepresented *was known* ... prior to the time the prospectus was prepared and disseminated....: *Krim v. Banktexas Group, Inc. 989 F.2d 1435, 1446 (5th Cir.1993)*. *Compare, Castlerock Management, Ltd. v. Ultralife Batteries, Inc., 114 F.Supp.2d 316, 323 (D.N.J.2000) (Hochberg, J.)* ("Section 11 or Section 12 require 'that allegedly omitted facts both existed *and were known or knowable at the time* of the offering' ") *with Truk Int'l Fund LP v. Wehlmann, 737 F.Supp.2d 611, 621 affd 389 Fed. Appx. 354 (5th Cir.2010)*. Accordingly, the Schering Lead Plaintiffs to prevail on the Securities Act claims still needed to prove the underlying misconduct with the ENHANCE trial was known by senior officers of Schering at the time of the Offering Materials.

Lead Counsel also needed to rely heavily on expert witnesses for critical scientific expert testimony. Defendants sought to block the experts by the filing of Daubert motions challenging all five of Lead Plaintiff's designated testifying experts. Had Defendants prevailed in excluding any of this testimony, the presentation of many aspects of the case would have been more difficult and the exclusion of all this testimony could have crippled the case. (See Schering Decl. ¶¶ 116–17.)

We conclude the Schering Action was extremely complex and lengthy and that this factor strongly supports the requested attorneys' fees.

5. The Fifth Factor: The Risk of Non–Payment

Some cases addressing the risk of non-payment have focused on the credit risk presented to defendants when trying to "collect" a judgment once it is obtained. (*See, e.g., In re Lucent Technology, 327 F.Supp. At 439; see also, In re AT & T Corp., 455 F.3d at 171* ("chances of AT & T going bankrupt are quite small....") In *Rite–Aid,* the Third Circuit made clear the risk of non-payment also includes the "risk of establishing liability". *396 F.3d at 304* (holding "the District Court made several significant findings in assessing the 'risks of establishing liability' under the *Girsh* analysis that affect the risk of non-recovery" and "there were significant risks of non-payment or non-recovery, which weighs in favor of approving the fee request.") *See Rowe v. DuPont DeNemours & Co., 631 F.3d 900, 2011 WL 383710 (D.N.J.2011)*.

Here, 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. *See, e.g., Schering–Plough ENHANCE ERISA Litig., 2012 WL 1964451, at *6 (Cavanaugh, J.)* ("Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of approval").

***29** From the outset of this Action, Co–Lead Counsel understood that they were embarking on a complex, expensive, and lengthy litigation with no guarantee of ever being compensated for the substantial investment of time and money the case would require. In undertaking that responsibility, Co–Lead Counsel obligated themselves to ensure adequate resources were dedicated to the prosecution of the Schering Action, and that millions of dollars in funding

were available to compensate staff and to cover the expenses a case like the Schering Action required. Even if the case were to be successful—which, as we have explained, was by no means a foregone conclusion—an expected lag time of several years exists for cases of this type to conclude. Accordingly, both the risk and financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis. As it turned out, Plaintiffs' Counsel still have not yet received any compensation whatsoever during the nearly five years the Schering Action has been pending for the massive commitment of attorney time devoted to the case 126, 177.49 hours (*see* Schering Decl. ¶ 152) or reimbursement for the $3,620,049 .63 incurred in external expenses in prosecuting this Action for the benefit of the Class. (Schering Decl. ¶ 162.)

The significant risk of no financial recovery in a complex case like this one is heightened when plaintiffs' counsel aggressively press to maximize the result for the Class, as Co–Lead Counsel did here, rather than "satisficing"—accepting a more modest recovery that may pass muster and may be less risky to counsel and far easier to achieve. By pushing the case to the brink of trial and convincing Defendants that Co–Lead Counsel were ready, willing and able to try the case (and thereby threatening to "go all in") raising the stakes for Defendants by exposing them to a potentially ruinous jury verdict", Plaintiffs' Counsel were able to achieve a better result for the Class. By doing so, however, Plaintiffs' Counsel raised the stakes for themselves as well—by increasing the potential that Defendants would accept the challenge and win the case, leaving Plaintiffs' Counsel to walk away empty-handed. Even if Lead Plaintiffs had prevailed at trial on both liability and damages, which was by no means assured, the judgment would not have been secure until after the rulings on the inevitable post-judgment motions and appeals became final—a process that could have taken years. Co–Lead Counsel were acutely aware that their success in a contingent litigation, like the Schering Action, is never assured, and there are many examples of class actions in which plaintiffs' counsel expended tens of thousands of hours and received nothing for their efforts.[21] (Schering Decl. ¶¶ 161–163.)

21 Indeed, even judgments that are bonded and initially affirmed on appeal by an appellate panel are not an absolute assurance of an ultimate recovery. *See, e.g., Backman v. Polaroid Corp.,* 910 F.2d 10 (1st Cir.1990) (after 11 years of litigation, and following a jury verdict for plaintiffs and an affirmance by a First Circuit panel, plaintiffs' claims were dismissed by an en banc decision and plaintiffs recovered nothing). Similarly, even the most promising cases can be eviscerated by a sudden change in the law after years of litigation. *See, e.g., In re Alstom S.A. Sec. Litig., 741 F.Supp.2d. 469 (S.D.N.Y.2010)* (after completion of extensive foreign discovery, 95% of plaintiffs' damages were eliminated by the Supreme Court's reversal of 40 years of unbroken circuit court precedents in *Morrison v. Nat'l Bank of Austl., —— U.S. ——, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010)*).

We conclude that a significant risk of non-payment existed in the Schering Action from the beginning of the case and until the Settlement. (*See* Schering Decl. ¶¶ 108–119, 161, 163.) Given the very substantial investment of time and expenditure of money by Plaintiffs' Counsel that was required by their fiduciary duty to effectively prosecute the Schering Action on behalf of the Class, the risk was very significant in this case. (Schering Decl. ¶ 162.) We conclude the risk of non-payment in this case weighs strongly in favor of the requested attorneys' fees.

6. The Sixth Factor: The Amount of Time Devoted to the Case

***30** It follows from our prior discussion of other factors, especially *Gunter* Factor 4 (complexity and duration) and *Gunter* Factor 5 (risk of non-payment) that an enormous amount of time was devoted to this case. Plaintiffs' Counsel devoted more than 126,00 total hours to the Schering Action which had a value of almost $60 million—with no guaranty whatsoever it would be recovered. In keeping with their fiduciary duties, Plaintiffs' Counsel had to devote this enormous amount of time to this case because the large amount at stake, the hotly-contested nature of the case, the complexity and the five-year duration mandated it. This was the antithesis of cases like *Cendant PRIDES,* where liability under Section 11 of the 1933 Act was "virtually certain" due to a financial restatement that was issued almost immediately after the securities offering was marketed to investors by a corporation that could withstand an enormous judgment, and a large settlement—which was inevitable—was quickly procured in a Securities Act case without any significant motion practice or discovery. This factor too weighs heavily in favor of the requested fee award.

7. The Seventh Factor: The Requested Attorneys' Fees are Reasonable In Comparison to Awards in Similar Cases

The seventh Gunter factor is the size of awards in similar cases. In this case, the requested fee is 16.92% of the Settlement Fund which consists of $473 million.

In *Rite–Aid,* the Third Circuit considered an award of 25% of the $126.6 million settlement noting the district court's analysis of this factor with apparent approval:

> In comparing this fee request to awards in similar cases, the District Court found persuasive three studies referenced by Professor Coffee: one study of securities class action settlements over $10 million that found an average percentage fee recovery of 31%; a second study by the Federal Judicial Center of all class actions resolved or settled over a four-year period that found a median percentage recovery range of 27–30%; and a third study of class action settlements between $100 million and $200 million that found recoveries in the 25–30% range were "fairly standard." *Id* . at 610. We see no abuse of discretion in the District Court's reliance on these studies.

Rite Aid., 396 F.3d at, 303.

District courts within the Third Circuit regularly have approved fee awards larger than the POR sought in the Schering Fee Application in other securities class actions and other complex common fund cases involving settlements of similar size to the Schering Settlement Fund. *See, e.g., Lucent Technologies, 327 F.Supp.2d at 442–43* (awarding 17% of $517 million settlement and stating that the fee was "considerably less than the percentages awarded in nearly every comparable case"); *In re Rite Aid Corp. Sec. Litig., 362 F.Supp.2d 587 (E.D.Pa.2005) and 146 F.Supp.2d 706, 736 (E.D.Pa.2001)* (awarding 25% of combined $320 million settlement); *In re DaimlerChrysler AG Sec. Litig., No. 00–0993(KAJ) (D.Del. Feb. 5, 2004)* (awarding 22.5% of $300 million settlement).[22]

22 Although less persuasive because the jurisprudential basis upon which fee awards are granted often varies by circuit, Co–Lead Counsel also have cited fee decisions in securities class actions and other complex common fund cases with comparable settlements in *other* federal circuits also have approved fee awards significantly higher than the awards sought in the Schering fee application. *See, e.g., In re Cardinal Health, Inc. Sec. Litig.,* 528 F.Supp.2d 752, 767 (S.D.Ohio 2007) (awarding 18% of $600 million settlement); *In re BankAmerica Corp. Sec. Litig.* 228 F.Supp.2d 1061, 1066 (E.D.Mo.2002) (awarding 18% of $490 million settlement); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.,* No. 03 MDL 1529 LLM, 2006 WL 3378705, at *3 (S.D.N.Y. Nov.16, 2006), *aff'd,* 272 Fed. Appx. (2d Cir.2008) (awarding 21.4% of $455 million settlement); *In re Checking Account Overdraft Litig.,* No. 09–MD–0236–JLK, 2011 WL 5873389, at *22 (S.D.Fla. Nov.22, 2011) (awarding 30% of $410 million 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) (awarding 20% of $410 million settlement).

***31** In *Sullivan* where the Third Circuit affirmed an award of 25% of a $295 million settlement in a non-securities class action, Judge Rendell, writing for the Court *en banc,* stated:

> [I]n Cendant PRIDES, we discussed fee awards in class actions in which the settlement fund exceeded $100 million and which relied upon the POR method, finding that "the attorneys' fee awards ranged from 2.8% to 36% of the total settlement fund." 243 F.3d at 737. Similarly, in Rite Aid, we found no abuse of discretion in a district court's reliance on three studies that demonstrated an average percentage fee recovery in large class action settlements of 31%, 27–30%, and 25–30%. 396 F.3d at 303. Here, the District Court determined that the 25% fee requested by counsel fell within this range.

Sullivan, 667 F.3d 273, 332.

Comparing the POR awarded in other cases of similar size is necessary to the analysis of the seventh *Gunter* factor, but not sufficient. To be meaningful, the analysis must also take account of several variables that bear on the "similarity" of the cases. As *Sullivan* holds:

> We are cognizant that a comparison of this award to fees ordered in other cases is a complex analytical task, in light of variations in the efforts exerted by attorneys and the presence of complex legal and factual issues. That said, we have emphasized "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."

Sullivan, 667 F.3d 273, 332.

These additional variables that can influence the amount of a fee award may include the stage at which the case settles, the amount of discovery conducted, including the number of documents and depositions, the complexity of the issues and the amount of hours the case required. An extreme illustration would be a comparison of the fee awards in two of the largest settlements ever reached, *Tyco* and *Cendant,* both of which

involved settlement amounts of approximately $3.2 billion but produced vastly different fee awards of $464 million (*Tyco*) and $55 million (*Cendant*). The amount of discovery conducted in *Tyco* was vast, including 83 million pages of documents reviewed and 220 depositions conducted. In sharp contrast, *Cendant* involved one million pages of documents reviewed and no depositions.[23] (*See In re Enron Securities, Derivative & ERISA Litigation Conclusions of Law, Findings of Fact and Order re: Award of Attorneys' Fees, Fed. Sec. L. Rep. [2008 TRANSFER BINDER] ¶ 94,836 at 95,447–48 (S.D. TX 2008).* As our analysis of the other *Gunter* factors previously discussed makes abundantly clear, the Schering Action was settled on the courthouse steps only after a lengthy five-year pitched battle over a potentially meritorious but highly uncertain case—unaided by restatements, criminal convictions or parallel government actions—that required massive discovery and complex circumstantial proof.

23 Of course, these variables are also likely to be reflected in the lodestars as they were in *Tyco* ($172 million) and *Cendant* ($8 million). (*Id.*)

***32** In light of other awards in similar cases, we believe the 16.92% sought by Co–Lead Counsel is extremely reasonable—if not modest—and strongly supports the Schering Fee Application. *See Rite Aid,* 396 F.3d at 303–04 (distinguishing *Cendant PRIDES*).

8. The Eighth Factor: Did the Benefits Accrue from the Efforts of Class–Counsel or Others?

The record in this case compels the conclusion that all the benefits accruing to the class derive exclusively from the efforts of Plaintiffs' Counsel. As we have already observed, there was no one else on the scene that could have produced the result here—no government agency or corporate litigant to lead the charge and the Settlement Fund is the product solely of the efforts of Plaintiffs' Counsel.

9. The Ninth Factor: The Amount That Could Be Negotiated in a Private Contingency Fee Agreement

In several cases, courts within the Third Circuit have observed that "attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class commercial litigation." *In re Remeron Direct Purchaser Antitrust Litigation, 2005 WL 3008808 (D.N.J.2005) (Hochberg, J); Lucent, 327 F.Supp.2d at 442* ("[t]he 17% fee is also considerably less than what is typically earned in contingent fee arrangements and negotiated and non-class action litigation. If this were a non-class action case, the customary contingent fee would likely range between 30% and 40% over the recovery"); *In re Ikon Office Solutions, Inc., 194 F.R.D. 166, 194 (E.D.Pa.2000)* ("In private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery.") Measured against the private market as observed by these district courts, the fee award requested by the Schering Co–Lead Plaintiffs compares favorably.

It is well-established that "courts may give some of these *[Gunter/Prudential]* factors less weight in evaluating a fee award." *AT & T, 455 F.3d at 166*. Given the significant differences in the risk and reward considerations between representing a client in private non-class action contingent litigation and serving as lead counsel in a PSLRA securities class action, we would accord this factor much less weight.[24]

24 In individual contingency cases, the lawyer need communicate only with her clients, often a single individual, and they are able together to definitively decide to accept a settlement. Under the PLSRA securities class action regime, lead counsel must keep the entire class informed of any settlement, which is subject to judicial review and to objections by absent class members. In private contingent litigation, the fee agreement is enforceable subject to ethical limitations (*see M.R.P.C. 1.5*), while fee agreements in PLSRA securities class actions receive a mild "presumption" but are always subject to judicial review and "the court's duty to act as a fiduciary guarding the rights of absent class members". *AT & T, 455 F.3d at 169*.

10. The Tenth Factor: Any Innovative Terms in Settlement

The settlement in the Schering Action is plain vanilla—cash in exchange for releases and is a neutral factor.

11. An Additional Factor: The Views of Lead Plaintiff Group Members

We take additional comfort that the fee award requested by Schering Co–Lead Counsel is reasonable from the strong support expressed by each of the four members of the Schering Lead Plaintiff Group. As attested in the Schering Declaration and the underlying Declarations submitted on behalf of each member of the Schering Lead Plaintiff Group, "Lead Plaintiffs—each of which was substantially involved in the prosecution and negotiation of the settlement

—considered the size of the recovery obtained particularly in light of the considerable risks of litigation and collectively agreed to allow co-lead counsel to apply for 16.92% of the settlement fund." (Schering Decl. ¶ 140; see Exhibits 2, 3, 4, 5A and 5B.) All the members are "sophisticated institutional investors ... [who] have evaluated the Fee and Expense Application and believe it to be fair, reasonable and warranting consideration *and approval by the Court."* (Schering Decl. ¶ 140; emphasis supplied.) Each of the Declarations by members of the Schering Lead Plaintiff Group confirm that they unanimously support Co–Lead Counsel's fee application: "Arkansas Teachers fully supports Co–Lead Counsel's Motion for an Award of Attorneys' Fees ..." (Schering Decl. Ex. 2 at ¶ 8); *accord,* Ex. 3 ¶ 8 (LAMPER "fully supports"); Ex. 4 ¶ 8 (MissPERS "fully supports"); Ex. 5A ¶ 8 (OAG[25] "we support").

25 In the case of *Mass PRIMB,* the declaration supporting the requested fee award was made by an Assistant Attorney General on behalf of the Office of the Massachusetts Attorney General of the Commonwealth of Massachusetts ("OAG"). (Schering Decl. Ex. 5A.)

***33** As members of the Schering Lead Plaintiff Group were involved throughout the case, have significant financial stakes in maximizing recovery, and owe fiduciary duties both to the class and to their various funds, we think their judgment on the performance of Plaintiffs' Counsel and the compensation to be provided to the lawyers they supervised in achieving a very impressive result warrants consideration. (*See,* discussion above, Section IV, 1. D: Weight, If Any, To be Accorded Views Expressed by the Lead Plaintiffs; *see also Lucent, 327 F.Supp.2d at 440* ("Significantly, the Lead Plaintiffs, both of whom are institutional investors with great financial stakes in the outcome of the litigation, have reviewed and approved Lead Counsel's fees....").) The unanimous views of Lead Plaintiffs supporting the requested 16.92% of the Settlement Fund sought weighs heavily in favor of the fee request. *See Gunter, 223 F.3d at 199* ("[A] client's views regarding her attorneys' performance and their request for fees should be considered when determining a fee award.")

12. The Lodestar Cross–Check

In the Third Circuit, the lodestar of plaintiffs' counsel is used as a "cross-check" to test whether the fee that would be awarded under the POR approach is reasonable. *See Sullivan, 667 F.3d at 330; AT & T, 455 F.3d at 164*. In "cross-checking" the POR award against the lodestar, the Third Circuit has emphasized that the calculation is "not a full-blown lodestar inquiry" and need not entail "mathematical precision" or "bean counting". *AT & T, 455 F.3d at 169, n. 6, quoting Rite–Aid, 396 F.3d at 306*. Accordingly, "the district court may rely on summaries submitted by counsel and need not review billing records." *Rite–Aid, 396 F.3d at 306–307*.[26]

26 Under the full "lodestar method," the number of hours each timekeeper spent on the case is multiplied by a reasonable hourly rate, and that "lodestar" figure is then adjusted by applying a multiplier to reflect such factors as the risk and contingent nature of the litigation, the result obtained and the quality of the attorney's work. The lodestar multiplier is intended to "account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *Rite Aid, 396 F.3d at 305–06* .

Where, as here, a lodestar is utilized as a cross-check, the potential award under the POR approach is compared to the value of the billable time devoted to the case or "lodestar" To produce this ratio, the putative POR award is divided by the lodestar (which consists of the value of billable time devoted to the case calculated by multiplying the total hours submitted by counsel by the blended current billing rates of all attorneys and paraprofessionals who worked on the case). (*See AT & T, 455 F.3d at 169*.) When the multiplier yielded is very large, the lodestar cross-check serves the salutary purpose of alerting the trial judge to reconsider whether its POR calculation is reasonable. Conversely, where the ratio of the POR to the lodestar is relatively low, the cross-check can confirm the reasonableness of the potential award under the POR method.

Here, the summaries submitted by Plaintiffs' Counsel show an aggregate of 126,177.49 hours was spent on the prosecution and resolution of the Schering Action. (Schering Decl. ¶ 152.) Based on these summaries, the Schering Plaintiffs' Counsel lodestar is $59,450,367.00[27] (derived by multiplying each firm's hours by the current hourly rates for attorneys, paralegals and other professional support staff).[28]

27 In keeping with the Third Circuit's determination that the "cross-check" does not involve "bean counting" or "mathematical precision," we have not fly-specked the summaries submitted by Plaintiffs' Counsel. Although Co–Lead Counsel did not attempt to substantiate the reasonableness of the billing rates charged, we have perused these rates and compared them against the 2012 *National Law Journal* ("NLJ") Annual Billing Survey, which samples law firm billing rates. The NLJ reports New York based law firm DLA Piper charges up to

$ 1,200 per hour for partners and New York based law firm Kelley Drye & Warren charges up to $950 hourly per partner. Patton Boggs, based in Washington, D.C., charges $990 per hour and Locke Lord in Dallas charges $1,285 hourly for their highest charging partner. It has been widely reported from public bankruptcy records that as long ago as 2008–2009, partners at top New York law firms, including Paul Weiss Rifkind Wharton & Garrison and Shearman & Sterling, both of whom represent the Defendants in the Schering Action, were charging well over $1,000 per hour. (*See* A. Kotz, "Bankruptcy Rates Top $1,000 Mark in 2008–09," *American Lawyer,* December 16, 2009.) Based on our limited unscientific review, we find no basis to conclude the rates contained in the summaries are inordinately high. Senior Partners at Co–Lead Counsel, including Max Berger (BLB & G), Jonathan Plasse (Labaton) and Lawrence Sucharow (Labaton) all charged hourly rates of $975. Messrs. Graziano (BLB & G) and McDonald (Labaton), the partners who managed the day-to-day litigation, charged $875 and $775 per hour, respectively. Mr. Cecchi's (CBCOB & A) billing rate of $750 per hour is lower than the top rate the NLJ reports is charged by the New Jersey-based Gibbons firm of $815.

28 In utilizing the blended billing rates to calculate the lodestar, the courts allow the use of *current* billing rates at the time the calculation is made rather than the billing rates actually in effect at the time the hours were recorded. Although counterintuitive, this is intended to compensate for delay in receiving fees. *Missouri v. Jenkins, 491 U.S. 274, 283–8, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989); In re Enron Securities, Derivative & ERISA Litigation Conclusions of Law, Findings of Fact and Order re: Award of Attorneys' Fees, Fed. Sec. L. Rep. [2008 TRANSFER BINDER] ¶ 94,836 at 95,449(S.D. TX 2008); In re Rent–Way Securities Litigation, 305 F.Supp.2d 491, 517, n. 10 (N.D. PA 2003); In re Ikon Office Solutions, Inc. Securities Litigation, 194 F.R.D. 166, 194 (E.D.Pa.2000).*

***34** The requested fee of 16.92% of the Settlement Fund, which would amount to $80,031,600,[29] would yield an extremely modest multiplier of approximately 1.3, reflecting the extensive time and effort demanded by this case. Thus, the "premium" or bonus over the billable time actually devoted to the case produced by the POR method to compensate Plaintiffs' Counsel for all the risks undertaken in this long, complex and uncertain case is only 30% of the value of the time charges actually devoted to the case. Not surprisingly, this very low 1.3 multiplier is well within the parameters allowed by courts throughout the Third Circuit and provides compelling evidence that the requested attorneys' fee is reasonable. Indeed, lodestar multipliers well above 1.3 and up to four are often used in common fund cases. *Prudential,* 148 F.3d at 341; *see also AT & T,* 455 F.3d at 172 (approving a 1.28 multiplier and noting the Third Circuit's prior "approv[al] of a lodestar multiplier of 2.99 in ... a case [that] 'was neither legally nor factually complex.' ") (citation omitted); *In re Schering–Plough Corp. Enhance ERISA Litig.,* No. 08–1432, 2012 WL 1964451, at * 6 (D.N.J. May 31, 2012) (Cavanaugh, J.) (awarding 1.6 multiplier); *Lucent,* 327 F.Supp.2d at 443 (awarding 2.13 multiplier in $517 settlement); *DaimlerChrysler,* No. 00–0993 (awarding 4.2 multiplier); *In re AremisSoft Corp. Sec. Litig.,* 210 F.R.D. 109, 135 (D.N.J.2002) (awarding 4.3 multiplier); *In re Ikon Office Solutions, Inc. Sec. Litig.,* 194 F.R.D. 166, 195 (E.D.Pa.2000) (awarding 2.7 multiplier and noting that it was "well within the range of those awarded in similar cases").

29 The requested fee award would apply the 16.92% to the Settlement Fund *plus* interest earned on the fund. (Schering Decl. ¶ 16.) Our calculation does not reflect any interest.

We conclude the *Lodestar* cross-check confirms that the requested 16.92% POR is reasonable and strongly supports Co–Lead Counsel's request.

13. The Orloff Objection

The only objection to the Schering fee application is filed jointly by the Orloff Family Trust d/t/d 12/13/01 and Dr. Marshall J. Orloff IRA (the "Orloff Objection") (S.ECF 338).[30] The basis for the Orloff Objection is hard to understand and harder still to reconcile with well-established Third Circuit law.[31] The substance of the Orloff Objection[32] appears to consist entirely of an attack on the lodestar of Plaintiffs' Counsel:

30 The Orloff Objection also purports to lodge an objection to the Schering settlement itself, which the Objection asserts "is not fair to class members." As this issue is beyond the scope of our authority, we do not address this aspect of the Orloff Objection. We are, however, constrained to observe that the Orloff Objection is bereft of any indication, much less argument, as to why this settlement, which we conclude pursuant to the first *Gunter* factor is extremely impressive, is "not fair" or should be rejected.

31 It appears that the Orloffs and their attorney, Mr. Turkish, are professional objectors having submitted at least 10 objections in other recent securities class action

settlements, including five this year alone. (*See* Schering Reply Memorandum of Law at 11 n. 7; Reply Ex. 3.) As Lead Counsel points out, the Objection bears the erroneous caption of the "Southern District of New Jersey" suggesting it was carelessly marked-up from one of the objections the Orloffs have recently filed in the Southern District of New York. (*See Reply Ex. 3.*)

[32] We are aware that Co–Lead Counsel contend the Orloff Objection fails to comply with the requirements for the submission of objections in the Court's Preliminary Order of Approval and, therefore, any objection by Orloff is waived. (*See* Schering Reply Memorandum at 11–12, n. 8.) Because we believe that the Orloff Objection is so substantively flawed, we need not pause to consider this or other technical objections which are preserved, and remain available, should Orloff persist in trying to advocate his Objection further.

"Plaintiffs' Counsel lodestar—which is derived by multiplying their hours by each firm's current hourly rates for attorneys, paralegals and other professional support staff is $59,450,367.00. Accordingly, the requested 16.92% fee, which amounts to $80,031,600, represents a modes multiplier of approximately 1.3."

The request is neither modes or reasonable. The court must engage in a detailed analysis of counsel's billing to determine the reasonable [sic] of the lodestar calculation. Under such an analysis the billed charges are unreasonably high. Further, there is no justification for using a 1.3 multiplier. In a settlement this large, percentages should not persuade; the court must award a reasonable fee based on the actual time and effort by counsel.

***35** (Orloff Objection at 3–4.)

As we understand the gravamen of this Objection, it is that "the court must award a reasonable fee based on the actual time and effort by counsel." (Orloff Objection at 4.) In other words, the main contention in the Orloff Objection is that the fee award should be based on the lodestar method—a position incompatible with well-settled controlling Third Circuit case law, none of which is even mentioned in the Orloff Objection. As Chief Judge Scirica stated in *Rite Aid, 396 F.3d at 306:* "[W]e reiterate that the percentage of common fund approach is the proper method of awarding attorneys' fees".

Of similar ilk is the assertion in the Orloff Objection that "The court must engage in a detailed analysis of counsel's billing...." (Orloff Objection at 3.) As *Rite Aid* holds: "The lodestar cross-check calculation need not entail mathematical certainty nor bean counting .... and may rely on summaries submitted by the attorneys and need not review actual billing records." *396 F.3d at 306–307*. Indeed, "ultimately, the fact-intensive Prudential/Gunter analysis must trump all other considerations." *Sullivan, 667 F.3d at 331, n. 64*. The Orloff Objection would substitute a full-blown lodestar method complete with a "detailed analysis of counsel's billing" for the fact intensive *Prudential/Gunter* analysis designed to provide a reasonable award under the POR method. In all events, even if the lodestar were more than a "cross-check", the *ipse dixit* assertion that a multiple of 1.3 "is neither modest or [sic] reasonable" (Orloff Objection at 3) is contrary to controlling precedent. *See, e.g., AT & T, 455 F.3d at 172*. "[W]e think a multiplier of 1.28 is well within a reasonable range...." For these reasons and more, we conclude the Orloff Objection lacks merit and should be rejected[33]

[33] Even though the filing of the Orloff Objection itself demonstrates the Motion for a Fee Award was accessible to Class members, the Orloff Objection complains, without any supporting evidence whatsoever, that "the fee motion was not posted on the settlement website". (Objection at 4.) As a factual matter, this *ipse dixit* assertion appears to be baseless as both the Motion for a Fee Award and Supporting Declarations were posted on the website on July 3, 2013. (*See* Supplemental Declaration of Stephan A. Thurin ¶ 7.) Nowhere does the Orloff Objection dispute that members of the class were made fully aware of the amount of fees being sought through the Notice Packets transmitted to them. Accordingly, we do not believe there is any basis to defer the objection deadline or final hearing as sought by the Orloff Objection. Our conclusion is fortified by the conspicuously low number of objections given the extremely large number of Notice Packets delivered to class members—the Orloff Objection is the only objection received to the Schering fee application.

B. Co–Lead Counsel's Request for Reimbursement for Litigation Expenses

Co–Lead Counsel's fee application also seeks reimbursement for litigation expenses reasonably incurred in and necessary to the prosecution of the Schering Action in the amount of $3,620,049.63. (Schering Decl. ¶¶ 170–78; Exs. 7A–7E.) In support, each of the law firms comprising Plaintiffs' Counsel has submitted a declaration attesting to the accuracy of their expenses along with a summary categorizing the type of expenses incurred and the amounts incurred in each category. (Schering Decl. Exs. 7A–7E.)

It is well established that the kind of expenses for which reimbursement is sought here may be properly recovered by counsel. *See Schering–Plough, 2012 WL 1964451, at *8. In re Safety Components, Inc. Sec. Litig., 166 F.Supp.2d 72, 108 (D.N.J.2001)* ("[c]ounsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action" (*citing Abrams v. Lightolier, Inc., 50 F.3d 1204, 1225 (3d Cir.1995)); Hall, 2010 WL 4053547, at *23* ("Courts have generally approved expenses arising from photocopying, use of the telephone and fax, postage, witness fees, and hiring of consultants.").[34]

34 Many of the expenses were paid out of two litigation funds created by Co–Lead Counsel and maintained by BLB & G or G & E, Co–Lead Counsel *in Merck.* (*See* Schering Decl. ¶ 171; Exs. 9 and 10 .) Co–Lead Counsel collectively contributed $2,389,500.00 to the Schering Litigation Fund and the Schering Litigation Fund contributed $515,000.00 to the Joint Litigation Fund. (Schering Decl. ¶ 171.)

***36** As to the amount of expenses, Co–Lead Counsel represents, "from the very beginning of the case, Co–Lead Counsel were well aware that they might not recover any of their out-of-pocket expenses until the Action was successfully resolved. Thus, Co–Lead Counsel were instructed to, and did, take significant steps to minimize expenses as much as practicable without jeopardizing the efficient prosecution of the case" (Schering Decl. ¶ 169.) Out of the total expenses, almost 80% were for outside experts and consultants $2,225,217 (61%) and document production copying costs ($624,873) (17%). (*See* Schering Decl. ¶¶ 172 to 173.)

We believe that the amount of expenses correlate best with the level of effort required, *i.e.,* the hours billed, to achieve the result, rather than the amount of the settlement.[35] Not surprisingly, Professors Eisenberg and Miller found the strongest associations between costs and hours. *See T. Eisenberg and G. Miller, "Attorneys' Fees and Expenses in Class Action Settlements: 1993 2008" at p. 26.* We observe here the ratio of expenses to the lodestar (value of time devoted) confirms that expenses are about 6% of the value of time which does not seem out of the ordinary or suggest expenses were too high.

35 Comparing the expenses incurred to the size of the settlement, as some commentators have done, including NERA, seems to us less informative because enormous settlements can be achieved very quickly and ought to result in lower expenses, while a hard-fought lengthy litigation that produces a much lower settlement would be expected to generate far higher expenses.

We have also compared the litigation expenses requested here to NERA's statistics on the median expenses awarded in settlements of similar size in its *Recent Trends In Securities Class Action Litigation: 2012 Full Year Review at p. 34.* For settlements between $100 million and $500 million, the median expenses were 1.4% of the settlement value for settlements between 1996 and December 2009 and 1.2% of the settlement value for settlements between January 2010 and December 2012. Even though the Schering Action was extremely complex, protracted and involved massive discovery, the expenses of $3,620,049 are only .7% of the Settlement Fund which is well below the median expenses of between $5.6 million and $6.6 million. The litigation expenses are also way below the mean and median expenses found by Professors Eisenberg and Miller who analyzed all types of class action costs and expenses from 1993 to 2008. They found mean (average) costs from 1993 to 2008 were 2.8% of the recovery and the median costs were 1.8% and from 2003 to 2008 mean costs were 2.7% of recovery and median costs were 1.7%. *See T. Eisenberg and G. Miller, "Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008" at 26.*

Each member of the Schering Lead Plaintiff Group supports the reimbursement request and attests that "the litigation expenses being requested for reimbursement to Co–Lead Counsel are reasonable and represent costs and expenses necessary for the prosecution and resolution of this complex securities fraud action...." (Schering Decl. ¶ 7 of Exs. 2, 3, 4 and 5A.) No objection whatsoever has been filed to the portion of the fee application seeking reimbursement of litigation costs. *In re Par Pharmaceuticals, 2013 WL 3930091 (D.N.J. July 29, 2013); Lucent Technologies, Inc. Securities Litigation, 327 F.Supp.2d 426, 463 (D. N.J.2004.* These factors give additional comfort that the expenses for which reimbursement is sought are reasonable.

C. Request for Reimbursement of Costs and Expenses Incurred by Members of Lead Plaintiff Group

***37** The members of the Schering Lead Plaintiff Group also seek reimbursement of costs and expenses in the aggregate amount of $102,447.26 incurred by them in their representation of the Class. Each member of the Schering Lead Plaintiff Group has submitted a declaration by a representative detailing the time and effort devoted to their

roles as Lead Plaintiff and the cost of their time, which could not be devoted to their other regular activities. (Schering Decl. ¶ 178; *see* Exs. 2, 3, 4 to 5B to Schering Decl.)

The Third Circuit favors encouraging class representatives, by appropriate means, to create common funds and to enforce laws—even approving "incentive awards" to class representatives.[36] *Sullivan, 667 F.3d at 333, n. 65*. Although the PSLRA specifically prohibits incentive awards or "bonuses" to Lead Plaintiffs, it specifically authorizes an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. § 77z–1(a)(4). Indeed, Congress explicitly acknowledged the importance of awarding appropriate reimbursement to class representatives. *See H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995)* ("The Conference Committee recognizes that lead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and grants the courts discretion to award fees accordingly.")

36 In *Sullivan,* a non-securities case where incentive awards are not prohibited by statute as they are under the PSLRA, Judge Rendell writing for the Court of Appeals *en banc* specifically approved "the district court's decision to grant incentive awards to class representatives." The Court noted "Incentive awards are not uncommon in class action litigation and particularly where ... a common fund has been created for the benefit of the entire class.... The purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws." (*Sullivan,* 667 F.3d at 333, n. 65.)

Here, members of the Schering Lead Plaintiff Group, ATRS, MPERS, LAMPERS and MassPRIM, seek reimbursement of their costs and expenses in the amounts of $8,020.00, $39,080.00, $19,575.00, and $35,772.26, respectively. The amount of time and effort devoted to this action by the members of Lead Plaintiff Group is detailed in the accompanying declarations of their respective representatives. (*See Schering Decl. Exs. 2, 3, 4, 5B.*)

Reasonable payments to compensate class representatives for the time and effort devoted by them have been approved. *See In re Am. Int'l Grp. Inc. Sec. Litig., 2012 WL 345509, at *6 (S.D.N.Y. Feb.2, 2012)* ("Courts ... routinely award ... costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." (citation and internal quotations omitted)); *In re Satyam Computer Servs. Ltd. Sec. Litig., No. 09–MD–2027–BSJ, slip op. at 3–4 (S.D.N.Y. Sept. 13, 2011)* (awarding a combined $193,111 to four institutional lead plaintiffs); *In re Marsh & McLennan Co. Inc. Sec. Litig., No. 04–cv–08144, 2009 WL 5178546, at *21 (S.D.N.Y. Dec.23, 2009)* (awarding a combined $214,657 to two institutional lead plaintiffs).

Here, members of the Schering Lead Plaintiff Group have collectively devoted more than 700 hours to the Action, which included time spent, *inter alia:* (i) reviewing pleadings and case materials; (ii) corresponding with Co–Lead Counsel about the status and strategy of the case; (iii) responding to document requests and producing more than 15,000 pages of documents; (iv) preparing for depositions and being deposed; and (v) preparing for, attending and participating in, multiple in-person mediation sessions and other settlement negotiations. (*Schering Decl. Exs. 2, 3, 4, 5B.*)

D. The Schering Recommendations

***38** In applying the various factors mandated by Third Circuit case law to determine whether under the POR method the fee award requested by Co–Lead Plaintiffs of 16.92% of the Settlement Fund is reasonable, we have attempted "to evaluate what class counsel actually did and how it benefitted the class." *AT & T, 455 F.3d at 165–66*. Based on our analysis of the *Gunter-/Prudential* factors, we believe Co–Lead Counsel achieved an outstanding settlement for the Class which was due exclusively to Co–Lead Counsel's perseverance and skill in prosecuting a very difficult and lengthy case without any assistance from restatements, criminal convictions or companion SEC proceedings. Plaintiffs' Counsel undertook this case purely on a contingency basis and accepted the significant risk that the enormous amounts of time and money they invested in this case might not be recovered. The requested fee award is unanimously supported by the four institutional members of the Lead Plaintiff Group and the lodestar "cross-check" confirms that the award sought is reasonable. In light of the foregoing and for the reasons discussed at length in the Report and Recommendation, we recommend the Court **GRANT** Co–Lead Counsels' motion for an award of attorneys' fees in the amount of 16.92% of the Settlement Fund (including interest earned on the fund amount).

We also recommend that the Court **GRANT** the motion of Co–Lead Counsel to be reimbursed for expenses in the amount of $3,620,049.63.

We also recommend that the Court **GRANT** the motion of Lead Plaintiffs to be reimbursed for costs and expenses in the total amount of $102,447.26

E. The Merck Fee Application

We now apply the reasonableness factors to the separate fee application by Merck's Co–Lead Counsel which seeks attorneys' fees up to 28% of the Settlement Fund (including interest thereon, reimbursement of litigation expenses in the amount of $4,367,376,895 and reimbursement of members of the Merck Lead Plaintiff Group for costs and expenses in the amount of $109,865.30

We recognize that the Merck and Schering Actions were different cases brought on behalf of completely different Classes by a completely different Lead Plaintiff Group and involved different challenges and risks. At the same time, however, overlap does exist between these cases. After all, the Merck and Schering Actions arose out of a nucleus of common fact, were litigated in parallel, discovery was coordinated by Co–Lead Counsel in both cases, there was overlap in the law firms comprising Co–Lead Counsel and Liaison Counsel in both cases, and some expenses were shared through a Joint Litigation Fund. (Schering Decl. ¶ 171.) As a result, the analysis of certain of the *Gunter/ Prudential* reasonableness factors in the Merck Action, such as the duration and complexity of the litigation and the skill and efficiency of the attorneys involved, is similar to the Schering Action discussed at length above.[37] In evaluating the fee application by Co–Lead Counsel in the Merck Action, some comparisons between the Schering and Merck Actions are inevitable and we will take notice of significant similarities and differences where we believe it is appropriate and to do so will advance the analysis.

37 We hasten to add that while the Merck Lead Plaintiff Group and Co–Lead Counsel faced the challenges and the complexity that were present in the Schering Action, as discussed below, there were a host of additional challenges and risks in the Merck Action that were not present in the Schering Action.

1. The First Factor: Size of the Fund Created and the Number of Persons Benefitted

***39** The Merck settlement created a $215 million cash Settlement Fund. It would be among the fifty largest securities class action settlements of all time, the seventh largest ever attained within the Third Circuit and the third largest securities class action settlement ever by a pharmaceutical company. (*See* Merck Decl. ¶ 8.) The creation of this very sizeable Settlement Fund is all the more impressive given the presence of very significant obstacles relating only to the Merck Action that Co–Lead Counsel needed to confront and overcome to achieve it, and the absence of factors traditionally contributing to increased settlement size, such as a financial restatement, criminal pleas by officers, a companion SEC enforcement action, an accounting firm defendant or Section 11 claim.

As we have already observed, the lack of any significant decrease in the price of Merck shares in the wake of the initial public disclosure on January 14, 2008 that Vytorin had failed the ENHANCE trial—while Schering stock plummeted losing approximately $3.5 billion in value—was a potentially fatal vulnerability in the Merck Action. Not surprisingly, Defendants repeatedly attempted to exploit this possible "show stopper" throughout the Merck Action, including in their summary judgment motion, opposition to class certification, and in their attempt to obtain interlocutory review by the Third Circuit of the Court's Order certifying the class.

Ironically, as Co–Lead Counsel successfully surmounted each of these potentially dispositive attacks and thereby moved the Merck Action along the path toward success, they also significantly increased their own financial risk. Viewed purely from the perspective of Merck Co–Lead Counsel's financial risk, losing their investment of time and expenses expended at the motion to dismiss stage is bad enough—but losing at the summary judgment stage after four years of litigation and massive discovery is vastly more costly—and losing at trial or on appeal is even worse. Undaunted, Merck Co–Lead Counsel persevered to the verge of trial refusing to acquiesce to any settlement that they believed failed adequately to compensate the Class—just as they would be expected to do.

Measured against investor losses on January 14, 2008, when the Vytorin lack of success in the ENHANCE trial was first publicly disclosed—which were zero—the settlement achieved in the Merck Action is literally incomparable.

Indeed, on January 14, 2008, any Merck shareholders for whom Vytorin's success in the ENHANCE trial was material to their investment decision could have sold without incurring any financial loss.

Even measured against the much more problematic investor losses sustained more than two months later, on March 31, 2008, when Merck shares lost $14 billion in value, the $215 million settlement represents more than 1.5% of these investor "losses". According to NERA's analysis, the median settlement value of cases in which investor losses exceed $10 billion is only.7%. *NERA, Recent Trends in Securities Class Action Litigation: 2012 Full Year Review at p. 32.* For a case where investor losses were $14 billion, the median settlement would be about $98 million. Accordingly, the $215 million Settlement Fund is more than twice the median settlement for investor losses of this size.

***40** There is also no doubt that an enormous number of Merck investors will benefit from the settlement. As of July 1, 2013, 729,295 Settlement Notice Packets were sent to potential class members. (Merck Decl. ¶¶ 1126, 151; Ex. F, Decl. of Stephanie A. Thurin ¶ 8.) Thereafter, 26,873 additional Settlement Notice Packets were mailed to class members for a cumulative total of 758,388 as of August 12, 2013. (Suppl. Decl. of Stephanie A. Thurin ¶¶ 3, 4.)

Thus, we conclude that the size of the Settlement Fund achieved by Merck's Co–Lead Counsel is an outstanding result, especially in light of the extremely significant difficulties and risks presented by the case. We believe this factor weighs heavily in favor of the suggested fee award.

2. The Second Factor: Number Of Objections By Class Members

For the second *Gunter* factor, "the Court evaluates the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel." *Merck ERISA,* 2010 WL 547613, at *10. As of July 1, 2013, class members had been sent 725,295 settlement notice packets (Merck Decl. ¶¶ 126, 151) apprising them Co–Lead Plaintiffs on behalf of Plaintiffs' Counsel would apply to the Court for an award of attorneys' fees not to exceed 28%. (Merck Decl. Ex. A, p. 2 to Ex. F.) Accordingly, the Class Members were fully informed of the amount Co–Lead Counsel would seek as attorneys' fees. *See Lucent, 327 F.Supp.2d at 435, n. 10.*

The deadline for filing objections expired on August 5, 2013. (Merck Decl. ¶ 123.) We understand that only two objections to the amount of fees sought by Merck Co–Lead Counsel were received (Lead Plaintiffs' Memorandum of Law in Response to Objections at 1)—an exceptionally low number of objections. Even though the Merck shareholder base consists of a substantial number of institutional holders —not a single institution objected to Co–Lead Counsel's fee request. (Merck Lead Plaintiff Memorandum in Response to Objections at 2–3, n. 2.) In the words of the Court of Appeals decision in *Rite Aid,* which is squarely in point:

> The class's reaction to the fee request supports approval of the requested fees. Notice of the fee request and the terms of the settlement were mailed to 300,000 class members, and only two objected. *We agree with the District Court such a low level of objection is a "rare phenomenon." Id. at 610.* Moreover, as the court noted, a significant number of investors in the class were "sophisticated" institutional investors that had considerable financial incentive to object had they believed the requested fees were excessive. *Id. at 608 and n. 5.* The District Court did not abuse its discretion in finding the absence of substantial objections by class members to the fee requests weighed in favor of approving the fee request.

396 F.3d 309 (emphasis supplied). The filing of only two objections here, both in our view lacking in merit (as discussed below), neither by an institution, constitutes an equally "rare phenomenon" and overwhelmingly supports the Merck Fee Application.

3. The Third Factor: The Skill and Efficiency of Co–Lead Counsel

***41** Like Co–Lead Counsel in the Schering Action, Co–Lead Counsel in the Merck Action are at the top of the Plaintiffs' Securities Class Action Bar. Indeed, both G & E and BLB & G, which is Co–Lead Counsel in both cases, have platinum reputations and records of high achievement in securities class actions.

The quality of their work in this case was especially impressive. Co–Lead Counsel fought this very complex, difficult and extremely risky case for almost five years. In the process, they successfully overcame Defendants' opposition to class certification, resisted Defendants' motions to dismiss, for summary judgment, and for interlocutory appeal to the Third Circuit from this Court's order granting class certification. In achieving these results and preparing the case for trial, Lead Counsel were required to master a host of

complex issues, including protocols for clinical trials, the science behind the drugs at issue, and the complex statistical principles needed to prove that Defendants improperly unblinded the ENHANCE data and learned the trial results long before publicly disclosing them. *See Rowe,* 2011 WL 3837106, at *20 (finding that "complex issues raised in [the] litigation required counsel with numerous areas of expertise .... [including] specialized understanding of on-going scientific, regulatory, political/legislative and legal developments").

Defendants' counsel in this case were top attorneys from highly respected law firms who mounted a ferocious defense. The high quality and vigor of defense counsel bears on the evaluation of the quality of services rendered by Class Counsel. *See, e.g., In re Warner Commc'ns Sec. Litig.,* 618 F.Supp. 735, 749 (S.D.N.Y.1985) ("The quality of opposing counsel is also important in evaluating the quality of Lead Counsels' work.").

In the final analysis, Co–Lead Counsel fielded a team that convinced Merck's very accomplished defense team and sophisticated clients that they were ready, willing and able to try this very complex and very risky case to verdict and that a sufficient chance existed that a very large verdict in favor the Class would be returned that Defendants were willing to pay $215 million to settle the Merck Action and forego pursuit of their very formidable legal and factual defenses.

In the context of this lengthy and contentious case, the equivalent of a legal brawl, the Merck Co–Lead Counsel were as efficient as possible. They used highly advanced technology to manage the twelve million documents and coordinated with Co–Lead Counsel in the Schering Action to maximize the litigation effort and attempt to avoid duplication. (*See* Merck Decl. ¶ ¶ 60, 64.) In the end, they succeeded in obtaining a very large recovery for Class Members in the face of very substantial risks of recovering nothing. *See, e.g., In re Ins. Brokerage Antitrust Litig.,* 282 F.R.D. 92, 121 (D.N.J.2012) ("The substantial settlement sum negotiated by Class Counsel ... further evidences their competence"). We conclude the skill and efficiency of Co–Lead Counsel strongly support the suggested fee award.

4. The Fourth Factor: Complexity and Duration

***42** The fourth *Gunter* factor requires examination of the complexity and duration of the litigation. As this Court previously has observed, by nature "securities class actions are inherently complex." *Louisiana Mun. Police,* 2009 WL 4730185, at *8 (D.N.J.2009) (Cavanaugh, J.). Here, this complexity was compounded by the medical and scientific issues necessary to understand clinical trial protocols and the science behind the drugs at issue, and the statistical analyses that Co–Lead Counsel were required to learn to effectively prosecute their claims. Beyond the complicated subject matter, numerous legal obstacles confronting the Merck Co–Lead Counsel pervaded the case and required exceptional effort and skill to maneuver around them-especially the extremely significant legal challenges posed by the failure of Merck's shares to decline appreciably in response to the January 14, 2008 disclosures, which Defendants pressed at every opportunity.

This complex and hotly-contested securities fraud litigation lasted for nearly five years and epitomizes the kind of drawn out and complicated case contemplated by the fourth *Gunter* factor. This *Gunter* factor also strongly supports Co–Lead Counsel's fee application. *See Schering–Plough ERISA, 2012 WL 1964451, at *7* ("This is a significantly complex litigation that has been ongoing for four years. This factor weighs in favor of an award of attorneys' fees".); *Merck ERISA, 2010 WL 547613, at *10* ("inherently complex suit" that was "ongoing for more than two years" warranted fee award).

5. The Fifth Factor: The Risk of Non–Payment

In applying the *Gunter/Prudential* factors, the Third Circuit has made clear that "each case is different, and in certain cases, one factor may outweigh the rest." *Gunter, 223 F.3d at 195, n. 1. Accord, AT & T, 456 F.3d at 166; Rite Aid, 396 F.3d at 301*. We believe the fifth *Gunter* factor, the risk of non-payment, is particularly significant in the Merck Action. *See Esslinger v. HSBC Bank Nevada, N.A., No. 10–cv–3213, 2012 WL 5866074, at *13 (E.D.Pa. Nov.20, 2012)* ("This [risk of non-payment] factor allows courts to award higher attorneys' fees for riskier litigations"); *In re Pet Food Prods. Liab. Litig, No. 07–cv–2867, 2008 WL 4937632, at *22 (D.N.J. Nov.18, 2008), aff'd in part, vacated in part on other grounds, 629 F.3d 333 (3d Cir.2010)* ("Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees").

Plaintiffs' Counsel undertook this action on an entirely contingent fee basis, knowing they very likely would be committing to a very complex, lengthy and expensive battle that carried an extreme risk that the litigation would yield no, or very little, recovery and leave them uncompensated for their huge investment of time, as well as for their significant out-of-pocket expenses. (Merck Decl. ¶ 145–147.) As things

transpired, there existed an very large chance that Plaintiffs would recover nothing, despite having devoted enormous amounts of time and money to five years of contentious litigation and taken the case to the eve of trial.

(a) The Risk In Establishing Loss Causation and Damages

***43** From the inception of the Merck Action through the settlement, the Merck Lead Plaintiff Group and the Plaintiffs' Counsel were faced with a potentially fatal obstacle. As a matter of law, Plaintiffs would have to prove their losses on their Merck investments were proximately caused by Defendants' fraud (*e.g.,* the concealing of material information—the ENHANCE results). *Dura, 544 U.S. at 341–42*. Standing between the Merck Lead Plaintiff Group and this indispensable element of their claims was the acknowledged fact that Merck's stock did not drop by a statistically significant amount on January 14, 2008 when the "top line" ENHANCE results were publicly disclosed. On that day, Merck and Schering announced that Vytorin did not outperform Zocor and Schering's stock price plunged significantly, losing $3.5 billion in value while Merck's stock barely moved. Accordingly, Plaintiffs faced a stark prospect of not being able to establish loss causation, and thus recovering nothing. *Semerenko v. Cendant Corp. ., 223 F.3d 165 (3d Cir.2000)*. *In Semerenko,* me Third Circuit stated "where the value of the security does not actually decline as a result of our alleged misrepresentation, it cannot be said that there is in fact an economic loss attributable to that misrepresentation. In the absence of a correction in the market price, the cost of the alleged misrepresentation is still incorporated into the value of the security and may be recovered at any time simply by reselling the security at the inflated price." *Id., 233 F.3d at 185*.

To be sure, the Merck Co–Lead Counsel fought hard to overcome this potentially fatal problem arguing that the January 14, 2008 announcement of the ENHANCE results was not a complete disclosure of the alleged fraud and that, following that announcement, Merck officers made additional false and misleading statements in furtherance of the fraud. Plaintiffs' theory was that critical new information about the ENHANCE results was disclosed on March 30, 2008, at the American College of Cardiology ("ACC") conference. Throughout the Merck Action, Defendants vehemently argued that since the January 14, 2008 announcement disclosed that the ENHANCE trial had failed, that announcement fully cured any alleged fraud. Indeed, at the time of the settlement, briefing on Defendants' latest attempt to exploit this issue—their motion to exclude any expert testimony by Dr. Greg Jarrell as to any injury subsequent to January 14, 2008—was almost complete and could have demolished the case. In short, Merck Lead Plaintiff and Co–Lead Counsel faced a huge risk that a jury, the judge or the Third Circuit on appeal, would agree with Defendants and that they would recover nothing.

(b) The Risk In Proving Defendants' Scienter

Other challenges abounded. Like the Schering Lead Plaintiff, the Merck Lead Plaintiff would have had to show that more than a year before Defendants disclosed the results of the ENHANCE trial, the Merck Defendants reviewed the trial data and applied statistical analyses which revealed that the trial had failed. As we observed in the Schering Fee Application, this was no easy task for Schering Co-lead Counsel because no Defendant ever admitted wrongdoing nor was subject to criminal or other governmental sanctions and the Schering scientists were well down the corporate ladder from the senior officers. But, the proof was far more difficult in the Merck Action because the ENHANCE trial was run by Schering, not Merck. As a result, the difficulties in establishing these facts (and Defendants' *scienter*) were greater for Merck's Co-lead Counsel because (i) all the trial data was maintained by Schering employees; (ii) Schering, not Merck, statisticians engaged in the purported early review and statistical analysis of the trial data; and (iii) the purported communication of the news of the trials' failure from Schering to Merck occurred during a meeting where the CEO of Schering (if it could ever be shown he had received the information) communicated it to the CEO of Merck for which there was no documentation concerning the substance of the meeting nor any corroborating testimony. In short, Lead Plaintiffs in the Merck Action had no "smoking gun" and a much harder road to hoe than the Schering Plaintiff Group.

***44** The Third Circuit Task Force on Selection of Class Counsel explained the very important link between the significant risk faced by Class Counsel and compensating Class Counsel for accepting this risk with a "premium" for success:

> It is plaintiffs' counsel who work to obtain whatever recovery any member of the class who has not opted out of the litigation will receive. The fact that there will be no payment if there is no settlement or trial victory means that there is greater risk for plaintiffs' counsel in these class action cases than in cases in which an hourly rate or flat fee is guaranteed. The *quid pro quo* for the risk, and for

> the delay in receiving any compensation in the best of circumstances, is some kind of risk premium if the case is successful.

74 Temple L.Rev. 689, 691–692 (2001) (footnote omitted).

We believe the extremely substantial risk of non-recovery in the Merck Action weighs heavily in favor of the fee application. See T. Eisenberg and G. Miller, "Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008 at 18; (2009) Cornell Faculty Working Paper 64 at p. 11. *("[S]tandards applied to attorney fees uniformly indicate that greater risk warrants an increased fee ... courts systematically reward risk ... and [t]he difference within a case category between high risk cases and other cases was statistically significant only for the large Securities category.") (Emphasis supplied.)*

6. The Sixth Factor: Amount of Time Devoted By Plaintiffs' Counsel

Given the complexity and five-year duration of the Merck Action, and the scorched-earth defense mounted by top-notch defense counsel, it is by no means surprising Merck Plaintiffs' Counsel devoted enormous time and effort to the Merck Action—the case demanded it. Since its inception, Plaintiffs' Counsel expended 105.341.76 hours—valued at approximately $45 million (as calculated for purpose of the lodestar) (*see* Merck Decl. ¶ 136; Ex. M). The enormous time and effort devoted by Plaintiffs' Counsel, necessitated by the magnitude and complexity of the case, which was at high risk throughout the Merck Action, also strongly supports the suggested fee award.

7. The Seventh Factor: Awards in Similar Cases

The Co–Lead Plaintiffs' suggestion that we recommend an award of 28% of the Settlement Fund would place the fee award toward the higher end of the spectrum of fee awards in settlements of this size. Whether the suggested POR is justified depends on an evaluation of ta number of variables.

In *Sullivan,* the Third Circuit considered the propriety of awarding attorneys' fees of 25% of the $293 million Settlement Fund. There, an objector contended the fee award was unjustified by the Court of Appeals jurisprudence arguing "this being a default judgment case, which entailed minimal motions practice and discovery ." *667 F.3d at 329*. There, where "the Special Master and District Court observed that counsel devoted nearly 39,000 hours to litigating this matter ..."—less than 40% of the time devoted by Plaintiffs' Counsel here—the Court rejected the objection stating, in salient part, "[w]e find no abuse of discretion in the District Court's conclusion that the complexity and duration of the litigation supported the requested fee." (*Id. at 331*.)

***45** In applying this seventh *Gunter* factor—comparing the award to awards in similar cases—the Court of Appeals in *Sullivan* stated:

> Finally, the objectors' assertion that the award improperly exceeds the awards in similar cases is equally unavailing. In *Cendant PRIDES,* we discussed fee awards in class actions in which the settlement fund exceeded $100 million and which relied upon the POR method, finding that "the attorneys' fee awards ranged from 2.8% to 36% of the total settlement fund." *243 F.3d at 737*. Similarly, in *Rite Aid,* we found no abuse of discretion in a district court's reliance on three studies that demonstrated an average percentage fee recovery in large class action settlements of 31%, 27–30%, and 25–30%. *396 F.3d at 303*. Here, the District Court determined that the 25% fee requested by counsel fell within this range. (App'x 320.)

(*Id. at 332–333*.)

Although *Sullivan* was an antitrust case, the Court of Appeals relied on *Rite Aid,* which sustained the district court's application of *Gunter's* seventh factor as favoring approval of a 25% POR award of a $126 million Settlement Fund. Relying on three studies of class action settlements, the Court in *Rite Aid* stated:

> In comparing this fee request to awards in similar cases, the District Court found persuasive three studies referenced by Professor Coffee: one study of securities class action settlements over $10 million that found an average percentage fee recovery of 31%; a second study by the Federal Judicial Center of all class actions resolved or settled over a four-year period that found a median percentage recovery range of 27–30%; and a third study of class action settlements between $100 million and $200 million that found recoveries in the 25–30% range were "fairly standard." *Id* . at 610. We see no abuse of discretion in the District Court's reliance on these studies.

Rite Aid, 396 F.3d 294, 303.

NERA's most recent study of attorneys fee awards in securities class actions shows that for settlements between $100 million and $500 million, the median attorneys' fee award for the period January 1996 to December 2009 was 22.8% and for the most recent two-year period from January

2010 to December 2012, the median attorneys' fees award was 18.2%. *NERA, Recent Trends in Securities Class Action Litigation: 2012, Full Year Review at January 29, 2013 at p. 34.* As NERA notes, "typically fees and expenses grow with settlement size but less than proportionately, *i.e.,* the percentage fees ... shrink as the settlement size grows." (*Id. at 34.*) Given the extremely broad—and possibly overly inclusive—settlement range used by NERA, and the inverse correlation between the settlement size and the percentage awarded, it is reasonable to believe the median percentage would increase at the lower end of the $100 million to $500 million range, which is where the $215 million would be situated. At the $25 million to $100 million settlement range, the median is 28.8% for settlements between January 1996 and December 2005 and 25% for the period January 2010 to December 2012. This suggests that the median for settlements between $100 and $300 million would lie between the two ranges.

***46** Significantly, the Court of Appeals in *Sullivan* emphasized that application of the "awards in similar cases," seventh *Gunter factor,* does not involve simplistic comparisons or "formulaic applications of the appropriate range":

> We are cognizant that a comparison of this award to fees ordered in other cases is a complex analytical task, in light of variations in the efforts exerted by attorneys and the presence of complex legal and factual issues. That said, we have emphasized "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." *Cendant PRIDES, 243 F.3d at 736*.

Sullivan 667 F.3d 273, 333).

Applying this criteria, Judge Rendell observed: [A]lthough this case may have lacked some of the contested motion practice and extensive discovery elicited in some of the other cases receiving similar percentage awards, the case presented other challenges...." (*Id. at 333, citations omitted.*) Thus, the Court of Appeals sustained the 25% fee awarded, holding:

> [T]he District Court here properly considered the relevant *Gunter* and *Prudential* factors, and determined that the case presented all of the factors we had recognized as supporting a higher award: "complex and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case by class counsel." (App'x 320 (*quoting Cendant PRIDES, 243 F.3d at 741*).)

The Merck Action involved all the factors the Court of Appeals recognized as supporting higher awards. Complex and novel legal issues permeated the case, there was extensive discovery and more than a hundred thousand hours were spent on a case that epitomized "acrimonious litigation". Unlike *Sullivan,* which may have "lacked some of the contested motion practice and extensive discovery," *667 F.3d 333,* the Merck Action featured extensive motion practice—dismissal, summary judgment, class certification, interlocutory review and *in limine* motions, and involved massive discovery involving review, assimilation and analysis of 12 million pages of documents and the depositions of 45 witnesses.

Given the vast range of attorneys' fee awards in class actions, including securities class actions settling at levels exceeding $100 million, each of which depended on weighing numerous variables impacting the particular decision, it is difficult, if not impossible, to liken the Merck Action to an identical case. Certain observations, however, can be made.

The suggested attorneys' fee award of 28% of the Settlement Fund is within the broad range of awards identified in *Cendant PRIDES* and also well within the ranges of studies of fee awards subsequently referred to by the Court of Appeals in both *Sullivan* and *Rite Aid.* The suggested award, however, would be exceed the median attorneys' fee award observed by NERA in settlements of this size. However, this simply means that the award would be among the 50% of fee awards falling above the "median," which by definition is the point at which that half the fee awards will fall below the "median" and half will exceed the "median".

***47** Giving weight to the factors the Third Circuit in *Sullivan* "recognized as supporting a higher award: 'complex and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case by class counsel' " (*Sullivan 667 F.3d at 333*), we find them all present in the Merck Action. In addition, however, we also believe that the extremely risky nature of the Merck Action combined with the magnitude of the endeavor undertaken by Plaintiffs' Counsel in the Merck Action which would, and did, require an enormous investment of time and money on a purely contingent basis, more than two and one half times the hours expended in *Sullivan*—unaided by any other contributing factors like indictments or restatements that would be expected to enhance the likelihood of recovery—strongly supports "a higher award" in the Merck Action. As in *Sullivan,* "the risk of nonpayment remained ever-present

throughout the litigation and settlement proceedings." *667 F.3d at 332*. Indeed, it remains unclear to the end, whether the Merck Action ultimately could have survived the January 14, 2008 disclosures—a Sword of Damocles that again was raised by Defendants' *in limine* motion seeking to preclude testimony by one of the key plaintiffs' experts as to any post January 14, 2008 damage that was on the verge of submission when the case was settled.[38] On balance, we believe the seventh *Gunter* factor also supports the suggested fee award.

38 Given this Court's previous rulings, including its holding on class certification that it would be premature to decide this issue, we recognize it would be reasonable for Merck Co–Lead Counsel and Defendants' Counsel to expect the motion to be denied. But that would merely have forestalled, not disposed of, this critical legal overhang. Certainly, an enormous risk existed that the jury, the Court on post-trial motions or the Third Circuit could decide that causation, damages and/or materiality were foreclosed by the admitted failure of Merck's share price to react when the basic information about Vytorin's performance in the ENHANCE trial was disclosed on January 14, 2008.

8. The Eighth Factor: Were the Benefits Acquired from the Efforts of the Class–Counsel or Others

As is true in the Schering Action, the record in the Merck Action compels the conclusion that all the substantial benefits accruing the Merck Class derived exclusively from the herculean efforts of Plaintiffs' Counsel. As we have already observed, there was no one else on the scene that could have contributed to, much less produced, the result here—no government agency or corporate litigant led the charge, no restatement or criminal conviction provided aid or leverage. In short, we conclude the Settlement Fund is the product solely of the efforts of Plaintiffs' Counsel and this weighs heavily in favor of the suggested fee award.

9. The Ninth Factor: The Amount That Could Be Negotiated in a Private Contingency Fee Agreement

As we noted in applying this factor in the Schering Action, a number of courts within the Third Circuit have observed attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class commercial litigation. Although the suggested Fee Award compares favorably to the private contingency fee levels, for the reasons discussed in the Schering Fee Application, we accord this factor little weight.[39] (*See note 24, supra.*)

39 As we discuss in detail in the next session, ABP, a member of the Merck Lead Plaintiff Group, negotiated an individual fee agreement with G & E, one of the Merck Co–Lead Counsel containing a fee arrangement limiting G & E's fee to 15% of the first $500 million recovered in a class action that contemplated a single Lead Plaintiff and only one Lead Counsel to share the fee award. As the agreement contemplated a class action not an individual private action, and one not involving a group lead plaintiff or co-lead counsel sharing the fee—we address it below in Section 11(b).

10. The Tenth Factor: Innovative Factors in the Settlement

Like the Schering Action, the terms of the settlement are plain vanilla involving cash in exchange for releases and is a neutral factor.

11. An Additional Factor: The Views of Lead Plaintiff Group Members

(a) The Merck Lead Plaintiff Group

***48** At the inception of the case, the four institutions, ADP, IFM, Jacksonville and Detroit, determined to join together to form a group they denominated as the "Institutional Investor Group" to seek appointment under the PSLRA as a Group Lead Plaintiff. By forming the Institutional Investor Group, the members were able to aggregate their losses and enhance their likelihood of having the "largest financial interest in the relief sought by the class" in the Merck Action and thereby becoming the "presumptive" lead plaintiff. *See* 15 U.S.C. § 78u(a)(3)(B)(iii). Not surprisingly, in the Memorandum of Law filed by the Institutional Investor Group in support of, among other relief, their appointment as Lead Plaintiff, they relied on the cumulative loss suffered by the four members: "[t]he Institutional Investor Group, *combined,* purchased over 6.9 million shares of Merck stock suffering losses of $38,390,726 in connection with its transactions." (Memorandum of Law in Support of Institutional Investor Group's Motion for Appointment as Lead Plaintiff at 2; emphasis supplied); *see also Id. at 15* ("[T]he Institutional Investor Group believes that it has a greater financial interest in this action than any other class member who has come forward by virtue of its approximate losses of over $38 million.") In its July 2, 2008 Order, this Court appointed each member of the Institutional Investors Group as Lead Plaintiff.

It was the entire Lead Plaintiff Group, not any one member acting alone, that retained Co–Lead Counsel. In the Motion to be Appointed as Lead Plaintiff, the Institutional Investor Group requested the Court to approve the counsel retained by the "Group". In support of the Institutional Investor Group's selection of counsel, the Group represented *"[t]he Institutional Investor Group retained counsel* to represent the class, subject to the Court's approval. This Court should not disturb Lead Plaintiffs' choice ...." (*Id. at 15; emphasis added.*) It further states: "[I]n that regard, *the Institutional Investor Group has selected and retained* the law firm of Grant & Eisenhofer and Bernstein Litowitz Berger & Grossman LLP as Co-lead Counsel, and Carella Byrne and Seeger Weiss as Co–Liaison Counsel, for the Class." (*Id.; emphasis supplied.*)

Each of the four institutional members of the Merck Co–Lead Plaintiff Group has submitted a declaration supporting the settlement. As to the Co–Lead Counsel's Fee Application, three of the four members fully support an attorneys' fee award of 28% of the Settlement Fund.[40] (Merck Decl. ¶ 130.) As Lead Plaintiff member IFM stated in its accompanying declaration, "IFM fully supports a fee award of 28% of the Settlement Fund, which takes into account the hard fought nature and long history of the case, the excellent results achieved and the substantial risks that Class Counsel undertook pursuing these difficult claims." (IFM Decl. ¶ 13; Ex. C to Merck. Decl.) In its declaration, Lead Plaintiff member Jacksonville echoed this view: "[I]n a case of this magnitude and degree of complexity where counsel has demonstrated superior skill and ability, Jacksonville P & G believes a fee of 28% is a reasonable fee award. Jacksonville has authorized counsel to present this fee request to the Court...." (Ex. D, ¶ 16.) In expressing this view, Lead Plaintiff Jacksonville specifically stated, among other reasons, the substantial recovery obtained for the class ... would not have been possible without the tremendous efforts of Co–Lead Counsel." (*Id. at ¶ 7.*) Finally, Detroit, a member of the Merck Lead Plaintiff Group, also states "a fee of 28% is a reasonable attorneys' fee award." (Ex. E, ¶ 6.)

40 According to the Merck Co–Lead Counsel's Memorandum of Law, the 28% suggested fee award was the product of discussions with the members of the Merck Lead Plaintiff Group: "Co-lead Plaintiffs requested that Plaintiffs' Counsel not seek a fee greater than 28% of the Settlement Agreement and Lead counsel agreed." (Merck Lead Plaintiffs' Memorandum of Law at 18.) Merck does not mention or illuminate this discussion.

***49** The remaining member of the Merck Lead Plaintiff Group is ABP. In a declaration submitted on behalf of ABP, it states:

> ABP's retainer with G & E, which was entered before joining with Co–Lead Plaintiffs and Co–Lead Counsel, contains a provision capping G & E's attorneys' fees at 15% of any recovery by settlement or judgment of up to $500 million. ABP has also been made aware of the time and expenses incurred by other Co–Lead Counsel. ABP understands that Court-appointed Special Masters (Mr. Greenberg and Mr. Lerner) have been charged to review the applications for attorneys' fees and expenses, and to file with the Court a report and recommendation that determines what they conclude is the amount of attorneys' fees and expenses that should be awarded to Class Counsel. In light of this procedure established by the Court, ABP will not now take a position on the specific amount of attorneys' fees that should be awarded; rather ABP will await the report and recommendation of the Special Masters and evaluate that recommendation when it is made, but expects it will defer to the Special Masters.

(Merck Decl. Ex. B ¶ 13.)

(b) The Effect, If Any, of the G & E Retainer Letter

We do not believe the 15% fee cap in the individual retainer letter between ABP and G & E can, or should, control the amount of fees to be awarded to Plaintiffs' Counsel in the Merck Action. On its face, the letter is only between G & E and ABP, and specifically provides that "ABP will seek to be Lead Plaintiff. It is only "if ABP is successful in obtaining Lead Plaintiff designation that 'G & E will request and ABP will support a fee of 15 percent up to $500 million....' " Thus, neither the letter nor the fee agreement appears to contemplate the Group appointment that ultimately occurred or the appointment of Co–Lead Counsel.[41] *(Compare Cendant I, 264 F.3d at 224, n. 4 ("The retainer agreement declared to members of the Group have agreed to proceed together to seek Co–Lead Plaintiff position"* and states *the funds, if selected, will seek the appointment of BRB and BLBH as co-lead counsel.")*

41 In this context, we construe the reference in the retainer letter to G & E's "attempting to get other counsel to agree to the proposed fee schedule," as referring to local New

> Jersey liaison counsel and any other that might work on behalf of G & E as sole lead counsel.

As ABP acknowledges, the Retainer Agreement with G & E "was entered before joining with the Co–Lead Plaintiffs and Co–Lead Counsel".[42] None of the other members of the Institutional Investor Group—which retained Co–Lead Counsel—nor the other law firms comprising Plaintiffs' Counsel, including Co–Lead Counsel BLB & G, are signatories to the G & E engagement letter or bound by it. According to its submission to the Court, the members of the Institutional Investors Group *collectively* retained Co–Lead Counsel and Liaison counsel and requested the Court to defer to the Group's decision. Here, the three other members of the Institutional Investors Group support a fee award of 28% made by Co–Lead Counsel on behalf of all Plaintiffs' Counsel.

42 The retainer letter was executed on May 29, 2008, five days before the Institutional Investor Group made its submission reflecting ABP's joinder with the other members of the Lead Plaintiff Group and retention of Co–Lead Counsel.

Significantly, APG (which acted for ABP) also attests it was kept abreast of the time and money G & E devoted to the case on a monthly basis and expresses the view that the 59,593 hours of time expended by G & E's lawyers and paralegals, which created a lodestar value of $24,634,856 over the five years the case was prosecuted, "was reasonable, and necessary to prosecute the action and achieve the result." (Merck Decl. Ex. B, ¶ 11.) ABP also appears to recognize that the fee award should be decided based on an evaluation of the relevant factors stating, "APB will await the report and recommendation of the Special Masters and evaluate that recommendation when it is made, but expects it will defer to the Special Masters." (Merck Decl. Ex. B ¶ 13.) It bears emphasis that nowhere does ABP suggest that the fee cap in its letter agreement with G & E should limit the fee award in the Merck Action.

***50** Given the extremely large lodestar, which all the members of the Merck Lead Plaintiff Group appear to agree was reasonable and necessary to achieve the superb result, application of the individual retainer letter to the Fee Application would, in our view, drastically short-change Plaintiffs' Counsel. Indeed, if a fee of 15% were awarded—which would produce a fee of $32,250,000 for all Plaintiffs' Counsel to share—the lodestar would be .71%. In other words, for all their effort and the risk they accepted, the Plaintiffs' counsel would receive a "negative" premium and be providing a 30% discount from their non-contingent billing rates. This result would contravene the very purpose of utilizing the POR method which "allows courts to award fees from the fund in a manner that rewards counsel for success...." *Rite Aid, 396 F.3d at 300 (quotation and citation omitted).*

In the final analysis, we conclude the G & E engagement letter should have no application here, and that the full support provided by the three member majority of the Merck Lead Plaintiff Group, who actively supervised Co–Lead Counsel in prosecuting the Merck Action, for a Fee Award in the amount of 28% and ABP's recognition that there were "significant risks," that the "settlement represents an excellent recovery for the class" (Merck Decl. Ex. 2 ¶ 9) and that G & E's "lodestar of $24,634,856.50 over the course of almost five years the was prosecuted ... was reasonable and necessary to proceed with the action and achieve the result" (*Id. at ¶ 11*) adds further support for the Fee Application.

(c) The Lodestar Cross-check

We now turn to the lodestar "cross-check" to stress test whether the suggested fee award of 28% of the Settlement Fund would be reasonable. In performing the cross-check, we apply the same rules enunciated by the Third Circuit discussed in the section of this Report and Recommendation addressing the fee application in the Schering Action and will not repeat them here. Suffice it to say, the abbreviated "cross-check" does not constitute a "full blown" lodestar calculation, and neither "bean counting" nor "mathematical precision" is required, and summaries may be relied on. *Rite Aid, 396 F.3d at 306–307*.

In the Merck Declaration, Co–Lead Counsel have submitted a summary of the lodestar for the hours expended by each of the law firms comprising Plaintiffs' Counsel. (Merck Decl. ¶ 136 and Exhibit M.) The following summary is contained in Exhibit M:

Summary of Plaintiffs' Counsel Hours, Lodestar and Expenses by the Firm

FIRM NAME	TOTAL HOURS	LODESTAR	EXPENSES

Grant & Eisenhofer, P.A.	59,593.7	$24,634,856.50	$3,515,697.07
Bernstein Litowitz Berger & Grossmann LLP	30,817.5	$13,813,696.25	$ 575,860.01
Labaton Sucharow LLP	11,341.9	$ 4,339,199.00	$ 221,249.83
Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C.	2,362.36	$ 1,638,020.00	$ 37,921.75
Klausner & Kaufman, P.A.	112.9	$ 73,385.00	$ 14,911.17
Seeger Weiss LLP	1,113.40	$ 442,746.00	$ 1,737.12
TOTAL	**105,341.76**	**$44,941,902.75**	**$4,367,376.95**

***51** (Merck Decl. Ex. M.)
In the supporting declarations submitted by each of the law firms, they included in the lodestar summary itemized hours expended on the case by each individual within the firm, provided the billing rates "that would be charged for their services on non-contingency matters" in their markets for legal services, along with declarations of partners from each law firm summarizing tasks and attesting to the preparation of the summaries from daily time records. (*See* Merck Decl. Exs. G, H, I, J, K and L.)

The summaries submitted by Merck Plaintiffs' Counsel show an aggregate of 105,341.76 hours was spent on the prosecution and resolution of the Merck Action. (*See* Merck Decl. ¶ 136.) Based on these summaries, the Merck Plaintiffs' Counsel lodestar is $44,941.902.75 (derived by multiplying their hours by each law firm's current hourly rates for attorneys, paralegals and other professional support staff).[43]

43 As in the Schering Action, in keeping with the Third Circuit instructions for utilizing the abbreviated lodestar "cross-check", we have not fly-specked the summaries. We previously observed, however, that the hourly rates charged here by partners at Co–Lead Counsel BLB & G are in line with rates charged by other comparable law firms, including Paul, Weiss, Rifkind Wharton & Garrison, the Defendants lead counsel in the Merck Action. (*See note 27 supra.*) The same holds true for G & E. Indeed, the top rate charged by G & E is by Daniel L. Berger, a very experienced class action lawyer, whose hourly rate is $875 and appears to be extremely reasonable, if not a bargain.

The suggested 28% of the $215 million Settlement Fund would yield a fee of $60,204,000 (plus interest) under the POR method. This potential POR fee award divided by the $44,941,902 lodestar would produce a multiplier of only 1.34.

We believe this multiplier is extremely modest given the duration of the action, the complexity and difficulty and the very substantial investment of time and money required from Merck Co–Lead Counsel to shepherd the case to a successful conclusion against a powerful pharmaceutical company with top defense counsel and, perhaps most importantly, the very substantial risk that Plaintiffs' Counsel could come away completely empty-handed. As the Third Circuit stated in language directly applicable here: "We think the multiplier of 1.28 is well within a reasonable range, particularly given the district court's emphasis on the significant time and effort devoted to the case by class counsel." *AT & T, 455 F.3d at 173*. Indeed, "[M]ultipliers ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *In re Prudential, 148 F.3d 283, 341 (3d Cir.1998)* In short, we believe that all the factors that could justify a multiplier toward the higher end of the 1 to 4 accepted rate are present in the Merck Action. *See Cendant PRIDES, 243*

F.3d at 742 ("[I]n all the cases in which the 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 may exceed 2.99.") Viewed purely from the perspective of a lodestar calculation, we believe the presence in the Merck Action of numerous factors the Third Circuit cases have identified as supporting a multiplier toward the higher end of the accepted range, including risk, complexity and duration, a multiplier here of at least 2, if not higher, would be appropriate. Applying this multiplier to the lodestar of $44,941,902 would produce a fee of $89,883,804—almost $30 million more than the suggested 28% POR would yield.

***52** The extremely low multiplier in this case embodies many of the factors *Gunter and Prudential* require be applied to select the POR and provides powerful confirmation that an award at the 28% level suggested by Co–Lead Counsel and approved by three members of Lead Plaintiff Group is reasonable.[44]

44 Given the extremely low multiple yielded by the lodestar cross-check and the abbreviated nature of the crosscheck procedure, we have not found it necessary to seek clarification of certain questions raised by our review of the underlying Declarations. We note, for example, that G & E's lodestar appears to be understated by virtue of the omission of any time accrued by senior partner Jay Eisenhofer, Esq., who we know devoted substantial time to the settlement negotiations—attending several lengthy meetings, including one held at the courthouse that lasted the better part of the day, and a number of telephone conferences. We also observe that the Labaton firm, which is Co–Lead Counsel in the Schering Action, and on May 5, 2008 commenced the initial Merck class action in the District of New Jersey on behalf of Genesee County Employees' Retirement System ("GCERS"), Civil Action No. 2:08 CV 2177, devoted more than $4 million to the overall lodestar in the Merck Action although it had no "official" role in the Merck Action. The Merck Declaration's description of the roles played by the numerous law firms comprising Plaintiffs' Counsel omits any indication of the role played by the Labaton firm in the Merck Action. (*See* Merck Decl. ¶ 135, n. 7.) In his accompanying declaration for the Labaton firm (Exhibit I), Mr. McDonald described his firm's role "as counsel to named plaintiff GCERS and describes several tasks undertaken in collaboration with Lead Counsel, which included providing GCERS with "regular updates on the status of the action". (Exhibit I, Paragraph 2.) Mr. McDonald enumerates other activities performed by Labaton which appear to have provided value to the Merck Class especially given the overlap of certain legal and factual issues with the Schering Action. The members of the Merck Lead Plaintiff Group appear to support compensation for the Labaton firm's activities by virtue of including its charges within the lodestar, which is described by Co–Lead Counsel as "fair and reasonable". (Schering Decl. ¶ 150.) After the appointment of the lead plaintiff, "the primary responsibility for compensation shifts from the court to that lead plaintiff, subject, of course, to ultimate court approval." *In re Cendant Sec. Litig., 404 F.3d 198 (3d Cir.2005) ("Cendant II").* As Judge Becker observed, "any such compensation will normally come directly out of the class's recovery, and the PSLRA ensures that lead plaintiff has a large stake in that recovery. Any compensation paid to non-lead counsel may substantially reduce the recovery of the lead plaintiffs. Thus, lead plaintiff will have a direct financial interest in keeping down the fees of non-lead counsel." *404 F.3d at 198–99*. We interpret the Merck Declaration as vouching that the tasks were performed at the instance of Co–Lead Counsel and we believe they may be appropriately included in the lodestar. On the other hand, briefing GCERS—which is not a Lead Plaintiff—appears to duplicate Lead Counsel's role and to be excluded under *Cendant II, 404 F.3d at 201* ("non-lead counsel cannot be compensated out of the class' recovery for monitoring the work of lead counsel on behalf of individual clients"). In all events, we have concluded further "mathematical precision" is not required because it would not affect the lodestar cross-check. Even if we were to overcompensate by recalculating the lodestar cross-check without any of Labaton's time, the multiple still would be only 1.48—still a very low multiple—well within an acceptable range providing strong support to the suggested few award.

(d) The Objections

— The DeJulius Objection

One of the only two objections to the Fee Application received in the Merck Action was submitted by an individual named Franklin DeJulius ("DeJulius"), who purchased 2 shares in Merck on February 7, 2008—almost a month after the January 14, 2008 disclosures revealed that Vytorin had failed the ENHANCE trial—and who appears to have liquidated his entire portfolio on June 10, 2008. (DeJulius Objection, Ex. A.) Represented by the law firm of Verdiramo & Verdiramo, DeJulius contends that "Class Counsel have requested a 28% fee award in this case while requesting 17% in a companion case *with similar risk."* (DeJulius

Objection at 1; emphasis added.) Mr. DeJulius, however, provides no analysis, much less any basis, for his premise that the two cases presented similar risk profiles. In reality, as we already have concluded, the Merck Action had a vastly higher risk profile. Apart from the overarching risk presented by the failure of Merck's shares to drop meaningfully on January 14, 2008—the Merck Plaintiffs had much more difficult issues of proof because the ENHANCE trial was conducted by Schering scientists, not Merck's, which provided significant additional challenges. In addition, the allegations that Schering defendant Carrie Cox, a Schering executive, had engaged in substantial insider trading might have assisted the Schering Plaintiff Group to establish *scienter,* but there were no similar insider trading claims in the Merck Action.[45]

45 DeJulius also argues without any support that "Class Counsel has not stated in its fee affidavits that no portion of the lodestar claimed in this case [Merck] was claimed in the Schering Plough case ." (Objection at 1.) This assertion is contradicted by both the Merck Declaration and the Schering Declaration. The Merck Declaration unequivocally states: "Plaintiff Counsel have expended 105,341.76 hours in the investigation, prosecution and resolution of *the Action* against Defendants." (Merck Decl. ¶ 136; emphasis added.) The "Action" is explicitly defined as the "above-captioned action", which is the Merck Action. (Merck Decl. ¶ 1.) Likewise, the Schering Declaration attests that "Plaintiffs' Counsel have expended 125,177.49 hours in the investigation, prosecution and resolution of the Action." (Schering Decl. ¶ 152.) The "Action" is explicitly defined as the "above captioned action", which is the Schering Action. (Schering Decl. ¶ 1.)

Based on the conclusory premise that the Schering and Merck Actions presented identical risk, which we consider counterfactual, Mr. DeJulius submits an article authored by Brian J. Fitzpatrick entitled "An Empirical Study of Class Action Settlements and Their Fee Awards," *7 J. Empirical Legal Stud. 81 (2010),* and argues that the fee awards in the Schering and Merck Actions should be conflated: "[T]he Court should treat the two fee requests in this case as one fee request, with one lodestar cross-check." (DeJulius Objection at 1.)

As a threshold matter, the Third Circuit in *Rite Aid* declined an objector's invitation to conflate two different, but related cases stating in language applicable here:

> Kaufmann contends we should assess the aggregate $334 million settlement fund created by the Rite Aid I and Rite Aid II settlements. Class counsel respond we should consider only the $126 .6 million from the Rite Aid II settlement. Even though the settlement in Rite Aid II resulted in the termination of the Rite Aid I appeal, *these are separate settlements, involving distinct legal issues and risks with which class counsel had to contend.* The Rite Aid I settlement resulted in a recovery of $193 million with a fee award of $48.25 million. That fee award is not under review. *Accordingly, we will not conflate the two distinct settlements and will consider only the reasonableness of the attorneys' fees based on the Rite Aid II settlement.*
>
> ***53** *Rite Aid, 396 F.3d 294, 302, n. 11. (Emphasis supplied.)*

Here, the Schering and Merck Actions were separate class actions on behalf of completely different classes of securities holders in different public companies. As in *Rite Aid,* the cases involved different legal issues and risks—and they had completely different Lead Plaintiffs. Mr. DeJulius provides no justification for his perfunctory contention and we can think of no sensible reason to conflate the fee applications—after the cases were resolved.

Based on the single Fitzpatrick article, which is not predicated on Third Circuit jurisprudence or limited to securities class actions,[46] Mr. DeJulius argues that the "mean" (or average) "fee for cases that settle for between $100 million and $250 million is just slightly higher at 17.9%" and, therefore, "this court may not award class counsel more than 17% in either of the two cases." (DeJulius Objection at 2.) In language equally applicable to the DeJulius Objection here, the Third Circuit has squarely rejected slavish adherence to statistical "ranges" or "averages": "[T]hese varying ranges of attorneys' fees 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."*[47] *Cendant PRIDES, 243 F.3d at 736. Accord, Sullivan, 667 F.3d at 333*.

46 The article on which Mr. DeJulius relies is based on only an extremely limited two-year study of various types of class actions during 2006 and 2007 from across the country. As the article itself notes, "[T]he courts that use the percentage of the settlement method usually rely on a multifactor test" (which the article by footnote observes involves using different numbers of factors in different circuits) "and like most multifactor tests, it can plausibly yield a variety of results." (Class Action Fee Awards at

p. 833.) Even though the limited two-year sample was country-wide, not from the Third Circuit, the sample size (*i.e.,* number of settlements) was limited in specific categories so the standard deviation was extremely high. Thus, the mean (or average) settlement between $100 and $250 million was 17.9%, but had a large standard deviation of 5.5%.

47 Even if formulaic application of ranges were not contrary to Third Circuit law, which it is, the reliance on this single article disregards other more germane studies that address securities class actions, such as the often cited surveys by courts in the Third Circuit, *see, e.g., Cendant PRIDES, 243 F.3d at 737* and *Lucent, 327 F.Supp.2d at 440–441,* and others published by respected economists, such as NERA and Cornerstone Research. Mr. DeJulius provides no evidentiary foundation for considering Professor Fitzpatrick's study in the form of expert testimony or other evidentiary basis.

Of course, the DeJulius Objection is grounded in precisely on the kind of "formulaic" adherence to averages the Third Circuit has uniformly rejected. *Sullivan, 667 F.3d at 333; Cendant PRIDES, 243 F.3d at 736*. In *AT & T,* the Court of Appeals rejected the same discredited argument DeJulius makes here. There, the objector, like DeJulius, contended "[C]ourts are increasingly finding that class counsel can be reasonably compensated by a fee award that is substantially less than 20% of the settlement fund ... They cite a study, which they cited to the District Court, concluding the average award for fees and costs in class action cases whose settlements were valued over $100 million was 15.1%, and the average award for fees and costs in all cases was 18.4%." *455 F.3d at 172*. In upholding the district court's exercise of discretion in setting the fee, the Court of Appeals noted the distinctions advanced by class counsel to justify the award, which emphasized the "extent of litigation to create the Settlement Fund during the four years of litigation was 48,000 hours lead counsel spent on the case" and the "significant disparity between the originally requested fee award and the lodestar cross-check." *455 F.3d at 172*. As the *AT & T* court stated, "we think the multiplier of 1.28 is well within a reasonable range, particularly given the district court's emphasis on the significant time and effort devoted to the case by class counsel." *455 F.3d at 173*. In short, the Court of Appeals found the fee not to be excessive because the district court "justified its approval by demonstrating *the case was not an average case." (Id. at 173.)* In sustaining the district court's exercise of discretion, the Court of Appeals pointed to "the size of settlement fund, the difficulty and length of the litigation, and the fact that all the benefits accruing to class members are properly credited to the efforts of class counsel." *(Id. at 174.)* These are the exact same factors we have concluded are present here. The *reducto ad absurdum* of the theory espoused by Mr. DeJulius is that all the recent Third Circuit cases sustaining fee awards above 17%, which he designates as the "market rate," are wrong and should be reconsidered. In light of Third Circuit decisions, such as *Sullivan,* an *en banc* 2011 decision by the Third Circuit, sustaining a fee award of "25% of the $293 million principle settlement fund," Mr. DeJulius' *ipse dixit* "one percentage fits all" theory is contrary to the controlling Third Circuit law. *See also, AT & T, 455 F.3d at 172* (rejecting reliance on "a study ... concluding average award for fees and costs in class actions valued over $100 million was 15.1%.")

***54** Contrary to the DeJulius' Objection, *Sullivan* squarely held that the "fact-intensive *Prudential/Gunter* analysis must trump all other considerations." *667 F.3d at 331*. Accordingly, we conclude that Mr. DeJulius' contention that the "average" based on a single article constitutes a "market rate" that must dictate the amount of fees awarded in the Merck Action in which an enormous benefit for the class was produced entirely by the superb and dogged performance of Plaintiffs' Counsel should be rejected.

— The Orloff Objection

The only other objection to the Merck fee application is by the Orloff Family Trust d/t/d 12/13/01 and Dr. Marshall Orloff (the "Orloff Objection")—the same serial objectors who also objected to the Schering Fee Application. The objection to the Merck Fee Application appears to be cut from the same standard form as the Orloff Objection in the Schering Action—even containing the identical incorrect caption denominating the court as the "Southern District of New Jersey." It erroneously states that "class counsel fails to disclose their actual lodestar in their motion...." (Orloff Objection at 5.) In fact, the Merck Declaration is pellucid in stating:

> As summarized in Exhibit M hereto, Plaintiffs' Counsel have expended 105,341.76 hours in the investigation, prosecution and resolution of the Action against Defendants, for a collective lodestar value of $44,941,902.75 through May 31, 2013. *Under the lodestar approach, a fee award of 28% of the Settlement Fund yields a multiplier of 1.34 on the lodestar.* This multiplier is within the range of multipliers awarded in actions where similar settlements have been achieved. *See* Fee Memorandum at Legal Arg. § I.C.2 (i). (Emphasis supplied.)

Merck Declaration at ¶ 38. (Footnote omitted.)

The balance of the perfunctory objection is *in haec verba* with the Orloff Objection to the Schering Fee Application. For the reasons already discussed at length in the Schering Fee Application, we believe the Orloff objection lacks merit and should be rejected.

F. Merck Co–Lead Counsel's Request for Reimbursement for Litigation Expenses

Merck Co–Lead Counsel's fee application also seeks reimbursement for litigation expenses reasonably incurred in and necessary to the prosecution of the Action in the amount of $4,367,376.95 (Merck Decl. ¶¶ 154.) In support, each of the law firms comprising Plaintiffs' Counsel have submitted declarations attesting to the accuracy of their expenses along with a summary categorizing the type of expenses incurred and the amounts incurred in each category. (Merck Decl. Exs. G, H, I, J, K and L.)

It is well-established that the kinds of expenses for which reimbursement is sought may be properly recovered by counsel. *In re Safety Components, Inc. Sec. Litig., 166 F.Supp.2d 72, 108 (D.N.J.2001)* ("[c]ounsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action"); *Hall, 2010 WL 4053547, at *23* ("Courts have generally approved expenses arising from photocopying, use of the telephone and fax, postage, witness fees, and hiring of consultants.").

***55** As Co–Lead Counsel represents, "from the very beginning of the case, Co–Lead Counsel were well aware that they might not recover any of their out-of-pocket expenses until the Action was successfully resolved. Thus, Co–Lead Counsel were instructed to, and did, take significant steps to minimize expenses as much as practicable without jeopardizing the efficient prosecution of the case" (Merck Decl. ¶ 153.) Out of the total expenses, almost 66% were for outside experts and consultants $2,293,300 (54%) and document production copying costs ($503,388) (11%). (*See* Merck Decl. ¶¶ 156 to 157; *See* Merck Decl. Ex. G Declaration of Daniel L Berger, Esq., Ex 2 "internal copying $503,988.) Other major expenses included responding to third-party subpoenas ($191,835.74) and a mock trial ($200,493).

Members of the Lead Plaintiff Group have expressed views "that the litigation expenses being requested for reimbursement to Co–Lead Counsel are reasonable and expenses necessary for the prosecution and resolution of this complex securities fraud action...." (Merck Decl. Ex. D, ¶ 17.) (*See also,* Ex. C, G & E expenses "were reasonable and necessary".) No objection to the reimbursement of litigation expenses has been filed which further supports the application. *In re Par Pharmaceuticals, 2013 WL 3930091 (D.N.J. July 29, 2013); Lucent, 327 F.Supp.2d at 463.)*

In the Merck Action, the ratio of expenses to the lodestar reflects expenses that are under 10% of the value of time. We have also compared the litigation expenses requested here against NERA's analysis of the median expenses awarded in settlements of similar size in *Recent Trends In Securities Class Action Litigation: 2012 Full Year Review.* For settlements between $100 million and $500 million, the median expenses were 1.4% for settlements between 1996 and December 2009 and 1.2% for settlements between January 2010 and December 2012. Although, the $4,367,000 is well above the median which would be $3.0 million and $2.6 million, respectively, the members of the Lead Plaintiff Group and Co–Lead Counsel had every incentive control the expenditures—they might never be recovered—and the complexity, difficulty and length of the Merck Action could explain why the expenses would be among the half of cases above the median. The expenses, however, appear to be well within the 2.7%–2.8% "mean" or average of the recovery for class actions as found by Professors Eisenberg and Miller, which would be $5,805,000–$6,020,000. We note that in *AT & T,* where the lodestar was only $21.25 million based on 48,000 hours devoted to the case (*455 F.3d at 169, 172*), the district court "approved class counsels' request for reimbursement of expenses in the amount of $5,465,996.79 finding the expenses were reasonably and appropriately incurred during the prosecution of this case, and sufficiently documented in the declarations." *455 F.3d at 160*.

On the current record, however, we are unable to approve the reimbursement request. Given the correlation between the time billed to a case and the expenses incurred (*see* Eisenberg & Miller at 26), we are concerned by the incongruity between the significantly higher amount of expenses incurred in the Merck Action compared to the much lower expenses incurred in the Schering Action, which had a significantly higher lodestar. In the Schering Action, the litigation expenses were $3,620,049.60 based on total hours of 126,177.49 and a total lodestar value of $59,450,360. In contrast, the litigation expenses in the Merck Action were more than $700,000 higher at $4,367,376.95 based on total hours of 105,341.76 for a total lodestar value of $44,941,902.75. Apparently, we

are not alone in expecting the litigation expenses would be lower in the Merck Action than in the Schering Action. In the Notices of the Motion for Reimbursement of Litigation Expenses sent to the Classes in the two Actions, the Schering Class was informed reimbursement for litigation expenses would not exceed $5,250,000 while the Merck Class was informed reimbursement of litigation expenses would not exceed $5,000,000–$250,000 less than in the Schering Action. (*Compare* Schering Decl. Ex. 6, Ex. A. at p. 2 *with* Merck Decl. Ex. F, Ex. A. at p. 2.)

***56** The Merck Declaration does not attempt to explain the disparity of more than $700,000. In light of the close coordination of discovery between the Merck and Schering Actions, the overlap of lead counsel, and the shared litigation expense funds, we are unable to rule out at least the possibility that some expenses that were properly attributable to the Schering Action inadvertently were shifted to the Merck Action.

Accordingly, we are constrained to temporarily defer our recommendation on this aspect of the application and request Merck Co–Lead Counsel to submit by September 6, 2013 a supplemental declaration containing additional information addressing the reason for the disparity and providing additional support for the request. We also request the supplemental declaration contain confirmation from Co–Lead Counsel that they have carefully reviewed the expenses from all the other law firms included in the lodestar and that none of the Merck expenses for which reimbursement is sought were incurred in connection with activities that under *Cendant II* are not appropriately charged to the Class as opposed to individual clients.[48] As no objection has been made to the Merck application for reimbursement of litigation expenses and no viable appeal could be filed on this specific aspect of the Merck Fee Application, we believe that ample time exists to receive the additional information and be able to provide the Court with our recommendation in advance of the Hearing.

48 Unlike the lodestar cross-check calculation, where we concluded the possible inclusion of time charges that *Cendant II* holds are properly chargeable to an individual client rather than the Class, made no difference to the "cross-check" because the multiple was so low, expenses incurred by any of the various law firms for services performed for individual clients who are not members of the Merck Lead Plaintiff Group or expenses related to performing other tasks for which compensation is foreclosed by *Cendant II,* no matter how small would adversely impact the Merck Class dollar for dollar.

G. Members of Merck Lead Plaintiff Group Request for Reimbursement of Costs and Expenses

The members of the Merck Lead Plaintiffs' firms also seek reimbursement of costs and expenses in the aggregate amount of $109,865.31 incurred by them directly relating to their representation of the Class. (Merck Decl. ¶ 163.) Each of the Lead Plaintiffs have submitted a declaration by a representative detailing the time and effort devoted to their roles as members of the Merck Lead Plaintiff Group and cost of their time which could not be devoted to their other regular activities. (Merck Decl. ¶ 161; *see* Exs. B, C, D and E to Merck Decl.)

As noted in our discussion of the Schering fee application, the Third Circuit favors encouraging class representatives, by appropriate means, to create common funds and to enforce laws—even approving "incentive awards" to class representatives. *Sullivan, 667 F.3d at 333, n. 65*. Although the PSLRA specifically prohibits incentive awards or "bonuses" to Lead Plaintiff, it specifically authorizes an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. § 77u–4(a)(4). Indeed, Congress explicitly acknowledged the importance of awarding appropriate reimbursement to class representatives. *See H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995)* ("The Conference Committee recognizes that lead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and grants the courts discretion to award fees accordingly.")

***57** Here, Merck Lead Plaintiffs, ABP, IFM, Jacksonville and Detroit, seek reimbursement of their reasonable costs and expenses incurred directly in connection with their representation of the Class in the amounts of $34,557.41, $45,682, $13,455.90 and $16,170, respectively. (Merck Decl. ¶ 161.) The amount of time and effort devoted to this Action by the Lead Plaintiffs is detailed in the accompanying declarations of their respective representatives. (*See* Merck Decl. Exs. B, C, D. and E.) The time charges sought range from $22 per hour to $161 per hour, which appear reasonable.

Here, members of the Merck Lead Plaintiffs Group have collectively devoted more than 700 hours to the Merck Action, which included time spent, *inter alia:* (i) reviewing

pleadings and case materials; (ii) corresponding with Co–Lead Counsel about the status and strategy of the case; (iii) responding to document requests and producing documents; (iv) preparing for depositions and appearing at depositions; and (v) preparing for, attending and participating in, multiple in-person mediation sessions and other settlement negotiations. *(Merck Decl. Exs. B, C, D and E.)* We conclude the amount of time devoted by each of the members of the Merck Lead Plaintiff Group and the out-of-pocket expenditures for which reimbursement is sought appear reasonable.

H. The Merck Recommendations

In applying the various factors mandated by Third Circuit case law to determine under the POR method a reasonable fee to be awarded to Co–Lead Counsel, we have attempted "to evaluate what class counsel actually did and how it benefitted the class." *AT & T, 455 F.3d at 165–66*. Based on our analysis, we believe Co–Lead Counsel achieved an outstanding settlement for the Class which was due exclusively to Co–Lead Counsels' perseverance and skill in prosecuting a very difficult and lengthy case without any assistance from restatements, criminal convictions or companion SEC proceedings. Plaintiffs' Counsel undertook this case purely on a contingency basis and accepted the extremely significant risk their enormous amounts of time and money invested in this case might not be recovered. The suggested 28% fee award is supported by the three of the four institutional members of the Merck Lead Plaintiffs Group (while the fourth member ABP has reserved its view pending our Report and Recommendation) and the lodestar "cross-check" strongly confirms that a 28% fee award sought is extremely reasonable, reflecting the herculean effort demanded by this complex five-year litigation. Finally, we note the extremely low number of objections which the Third Circuit has characterized as a "rare phenomenon" reinforces our view. In light of the foregoing and for the reasons discussed at length in the Report and Recommendations, we recommend the Court **GRANT** Merck Co–Lead Counsels' motion for an award of attorneys' fees in the amount of 28% of the Settlement Fund (plus interest).

***58** For the reasons stated above, we **DEFER** our recommendation with respect to the motion of Co–Lead Counsel to be reimbursed for expenses in the amount of $4,367,376.95, pending receipt of supplemental information requested *no later than September 6, 2013* .

We also recommend that the Court **GRANT** the motion of Lead Plaintiffs to be reimbursed for costs and expenses in the total amount of $109,865.31.

All Citations

Not Reported in F.Supp.2d, 2013 WL 5505744

End of Document

2016 WL 312108
United States District Court, E.D. Pennsylvania.

IN RE VIROPHARMA INC. SECURITIES LITIGATION.

CIVIL ACTION NO. 12-2714
|
Signed 01/25/2016

MEMORANDUM

Jones, II, J.

***1** Presently before the Court is the unopposed Motion filed by Carpenters' Local 27 Benefit Trust Funds ("Lead Plaintiff") for Settlement, (Dkt No. 91), including a Memorandum of Law in Support thereof, (Dkt No. 91-1 [hereinafter Settlement Mot.]), and Lead Plaintiff's Motion for Attorneys' Fees and Expenses, (Dkt No. 92), and Memorandum of Law in Support thereof. (Dkt No. 92-1 [hereinafter Attorneys' Fees Mot.].) The Court heard oral argument on both Motions on December 17, 2015. For the following reasons, both Motions are GRANTED.

I. Background

a. Underlying Claim

On May 17, 2012, Pete Castro filed the initial complaint in this Court. (Dkt No. 1.) On July 23, 2012, Mr. Castro moved for appointment as lead plaintiff and the appointment of Pomerantz Haudek Grossman & Gross LLP and Berger & Montague as co-lead counsel. (Dkt No. 17.) Also on July 23, 2012, Carpenters Local 27 Benefit Trust Funds moved to be appointed as Lead Plaintiff, with Labaton Sucharow LLP as Lead Counsel and Goldman Scarlato & Penny, P.C. as liaison counsel. (Dkt No. 20.) On August 8, 2012, Mr. Castro submitted his non-opposition to Carpenters' Local 27 Defined Benefit Trust Fund's Motion. (Dkt No. 22.) Carpenters' Local 27 Defined Benefit is a pension fund for active and retired members of Local 27, including more than 9,000 beneficiaries. (Carpenters' Local 27 Defined Benefit Trust Fund Declaration, Dkt No. 91, Ex. 1 [hereinafter Carpenters' Decl.] ¶ 1.) Pursuant to provisions of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. § 78u-4, the Court appointed Carpenters' Local 27 Defined Benefit Fund as Lead Plaintiff in this action and approved its selection of Labaton Sucharow LLP as Lead Counsel. (Dkt No. 24.) Lead Counsel worked with liaison counsel Goldman Scarlato & Penny, P.C., and additional counsel Robbins Geller Rudman & Dowd LLP (collectively "Plaintiff's Counsel"). Defendants were represented by counsel from Morgan, Lewis & Bockius LLP (collectively "Defendants' Counsel").

On October 19, 2012, Lead Plaintiff filed its Amended Class Complaint against ViroPharma, Vincent J. Milano (Chief Executive Officer), Charles A. Rowland, Jr. (Chief Financial Officer), Thomas F. Doyle (Vice President Strategic Initiatives), and J. Peter Wolf (General Counsel) (collectively "Defendants") for violations of Section 10(b) and 20(a) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, due to Defendants' alleged misrepresentations to the market regarding Vancocin, an antibiotic drug indicated to treat *Clostridium Difficile* Associated Diarrhea ("CDAD"). (Dkt No. 35 [hereinafter AC]; Johnathan Gardner Declaration,[1] Dkt No. 91-2 [hereinafter Gardner Decl.] ¶¶ 13-14.)[2] This action was brought on behalf of investors who between December 14, 2011 and April 9, 2012, inclusive (the "Class Period"), acquired ViroPharma Securities[3] (collectively the "Settlement Class"). (AC ¶ 1.) Lead Plaintiff had purchased ViroPharma Securities during the Class Period. (AC ¶ 30.)

1 Jonathan Gardner is a Member of Labaton Sucharow (Lead Counsel). His declaration was submitted pursuant to Fed. R. Civ. P. 23.

2 To prepare the Amended Class Complaint, Lead Counsel conducted a pre-filing investigation that included interviewing 35 former ViroPharma employees, and contacting 73 additional potential witnesses. (Gardner Decl. ¶¶ 3, 24.) In addition, in preparing the Amended Class Complaint, Lead Counsel reviewed and analyzed documents filed by ViroPharma with the SEC, press releases, news articles, research reports by financial analysts, and other publications concerning Vancocin. (Gardner Decl. ¶ 24.) Lead Counsel also consulted with an expert regarding federal regulation of drug development. (Gardner Decl. ¶ 25.)

3 "ViroPharma Securities" refers to ViroPharma's publicly traded common stock, its 2.0% Senior Convertible Notes due 2017, and its exchange-traded call and put options. (Gardner Decl. ¶ 13 n. 4; Notice at 11.)

***2** Lead Plaintiff's Amended Complaint contained three counts. Counts I and II alleged violations of Section 10(b) of

the Exchange Act and Rule 10b-5 promulgated thereunder. (AC ¶¶ 196-218.) Count III alleged violations of Section 20(a) of the Exchange Act. (AC ¶¶ 219-25.)

The Amended Complaint contained the following allegations. During the Class Period, Vancocin was the only drug approved by the Food and Drug Administration (the "FDA") to treat CDAD. (AC ¶ 2.) The patent for Vancocin expired in 1996. (AC ¶ 4.) However, generics were generally barred from entering the market because the FDA had a bioequivalence requirement requiring human testing. (AC ¶¶ 4, 42, 44-49.) Thus, ViroPharma had a virtual monopoly on the market for treating CDAD. (AC ¶ 2.) Moreover, during the Class Period, ViroPharma made an incredible 97% profit margin on its sales of Vancocin. (AC ¶ 3.) Vancocin represented over half of ViroPharma's 2011 revenues. (AC ¶¶ 3, 39.)

However, in 2006, the FDA changed its position regarding the proof necessary to establish bioequivalence, allowing for laboratory testing instead of testing on human subjects, thereby substantially lowering the barriers to entry for generics. (AC ¶¶ 5, 50-51, 65-66.) At the time, ViroPharma estimated that it could lose as much as 60-90% of the Vancocin market within months if generics were approved by the FDA. (AC ¶¶ 5, 43.) On March 17, 2006, ViroPharma filed a Citizen's Petition with the FDA requesting a stay of the FDA's action. (AC ¶¶ 6, 52-53.) In 2007, three competitor pharmaceutical companies submitted applications to the FDA for approval of generic versions of Vancocin. (AC ¶¶ 8, 55.) The pending Citizen's Petition blocked approval of generic Vancocin applications by ViroPharma's competitors until the Citizen's Petition was resolved. (AC ¶ 7.)

In 2008, Congress passed the QI Program Supplemental Funding Act of 2008 (the "QI Act"), Pub. L. 110-379, 122 Stat. 4075 § 3560, which permitted the FDA to grant an additional three years of marketing exclusivity for "old antibiotics," such as Vancocin, under the Hatch-Waxman Act, Pub. L. 98-417, 98 Stat. 1585, if the drug company could demonstrate that the "old antibiotic" could be administered for a "new condition of use." (AC ¶¶ 9, 57-64.) ViroPharma, submitted a supplemental New Drug Application ("sNDA") for a label change to the FDA which attempted to show that Vaconcin had a new condition of use due to a study ViroPharma licensed from Genzyme (the "Genzyme Study"). (AC ¶¶ 10-11, 68-70; Gardner Decl. ¶ 16.) ViroPharma also amended its Citizen's Petition requesting three additional years of marketing exclusivity under the QI Act. (AC ¶ 12.)

In February 2011, the FDA rejected the sNDA. (AC ¶¶ 71, 75-77.) Along with the rejection, the FDA allegedly sent a letter to ViroPharma explaining that the Genzyme Study could not be used to compare Vancocin to what was studied in the Genzyme Study. (AC ¶ 76.) A new efficacy claim must be supported by an adequate and well-controlled trial, pursuant to 21 C.F.R. § 314.126. Thus, argues Lead Plaintiff, as early as February 2011, Defendants knew that their Citizen's Petition to have Vancocin affirmed for a new condition of use would fail, as the FDA had warned ViroPharma that the Genzyme Study did not constitute an adequate and well-controlled trial as to Vancocin's purported new condition of use. (AC ¶ 77.) Lead Plaintiff further alleges that the FDA told ViroPharma again on May 20, 2011, and May 24, 2011 that the Genzyme Study was not designed to show Vancocin's efficacy and that the Study could not be used to support a claim for efficacy of a new condition of use. (AC ¶ 157.)

***3** ViroPharma amended the sNDA and resubmitted it in June 2011. (AC ¶ 71.) On December 14, 2011, the FDA approved the sNDA and label change. (AC ¶¶ 72, 87.) Lead Plaintiff alleges that in the letter approving the label change, the FDA explained that Vancocin's new label did not support a finding of a new condition of use. (AC ¶¶ 88-90, 159.) Regardless, Lead Plaintiff alleges, Defendant released a press release announcing that "[a]s a result of today's sNDA approval, ViroPharma believes Vancocin meets the requirements for, and thus has, three years of [marketing] exclusivity, and that generic vancomycin capsules will not be approved during this period." (AC ¶¶ 17-18, 91, 95-99.) ViroPharma's stock increased roughly seventeen percent (17%) on the day of the announcement. (AC ¶¶ 19, 100.) This date marks the beginning of the Class Period.

On December 22, 2011, ViroPharma filed a supplement to its Citizen's Petition. (AC ¶¶ 107-12.) The supplement stated that "Vancocin's labeling was fundamentally and extensively changed in the new sNDA with numerous new conditions of use." (AC ¶ 110.) On January 5, 2012, ViroPharma issued a press release stating that "as a result of our sNDA approval, we believe Vancocin…meets the requirements for, and thus has, three years of exclusivity and that generic vancomycin capsules will not be approved during this period…" (AC ¶ 113.) On January 11, 2012, Mr. Milano made a presentation at the J.P. Morgan Global Healthcare Conference where he stated "we believe we've gotten three years of exclusivity by taking advantage of the legislation that provides all the antibiotics three years of exclusivity, if you can update

the label with meaning safety and efficacy data, which we did through the licensing of data from a study that Genzyme had done…" (AC ¶ 118.) On February 28, 2012, ViroPharma issued a press release announcing their 2011 year-end results, announcing "the approval of our Vancocin sNDA leading to modernized labeling and, we believe, three years of exclusivity." (AC ¶ 125.) On February 28, 2012, Mr. Milano stated that ViroPharma "received the sNDA approval for Vancocin, which we believe merits three years of additional exclusivity." (AC ¶ 128.) That same day, ViroPharma submitted its Annual Report on Form 10-K with the Securities and Exchange Commission (the "SEC") and included similar statements about ViroPharma's belief that Vancocin would retain its marketing exclusivity. (AC ¶ 131.) In total, Lead Plaintiff alleges that Defendants made at least eight material misrepresentations and omissions in press releases, SEC filings, conference calls, public statements, and letters. (AC ¶¶ 75-96, 98-99, 110-11, 113-15, 118-20, 122, 125-26, 128, 132-33.) Lead Plaintiff alleges that all of these statements were false and misleading because ViroPharma knew that the FDA would not approve Vancocin for a new condition of use solely on the basis of the Genzyme Study.

On April 9, 2012, the FDA denied ViroPharma's Citizen's Petition, which terminated ViroPharma's market exclusivity over Vancocin. (AC ¶¶ 22, 92, 134; Gardner ¶ 20.) In its denial letter, the FDA wrote that ViroPharma's failure to conduct an assessment of the safety and effectiveness of the product for the claimed new condition of use in pediatric patients, as required by the Pediatric Research Equity Act, clearly showed that ViroPharma "did not believe [its] labeling changes constituted a new indication…" (AC ¶ 93.) That same day, the FDA approved three generic versions of Vancocin produced by ViroPharma competitors. (AC ¶ 94.) ViroPharma shares declined by roughly twenty two percent (22%). (AC ¶¶ 22-23, 147.) This date marks the end of the Class Period.

b. Procedural History

On December 20, 2012, Defendant filed a Motion to Dismiss. (Dkt No. 41.) Following extensive briefing and oral argument, the Court denied the Motion to Dismiss. (Dkt Nos. 60, 61.) On July 15, 2014, Defendants answered the Amended Complaint. (Dkt No. 72.) Following another period of extensive briefing, on September 5, 2014, the Court denied Defendants' request for certification for interlocutory appeal of the Court's denial of the Motion to Dismiss. (Dkt No. 78.)

***4** At the Federal Rule of Civil Procedure 16 conference, the parties requested mediation. The parties conducted expedited discovery in preparation for mediation. (Gardner Decl. ¶ 3.) During this process, Lead Counsel reviewed almost five thousand documents (totaling over 39,000 pages). (Gardner Decl. ¶¶ 3, 35-39.) Lead Counsel served document subpoenas on the FDA and ANI Pharmaceuticals, Inc. ("ANI"), the current owner of Vancocin. (Gardner Decl. ¶ 40.) Lead Counsel reviewed thousands of pages of documents produced in response to these subpoenas. (Gardner Decl. ¶ 40.) In response to a subpoena form ANI, Lead Counsel produced roughly 3,500 pages. (Gardner Decl. ¶ 41.) Lead Counsel also hired Forensic Economics, Inc. to conduct an expert analysis of the damages at issue in the case. (Gardner Decl. ¶¶ 42-43.) Finally, prior to the mediation, Lead Counsel also consulted a regulatory expert, David B. Ross, M.D., Ph.D. (Gardner Decl. ¶¶ 44-45.) Dr. Ross was responsible for regulatory oversight of Vancocin at the FDA from 1996-2004. (Gardner Decl. ¶ 44.)

On January 5, 2015, all parties participated in an arm's-length mediation session facilitated by the Honorable Layn R. Phillips, United States District Court Judge (Ret.). (Gardner Decl. ¶¶ 5, 60-61.) Between January 5, 2015 and February 5, 2015, the parties continued to participate in mediation communications with Judge Phillips's assistance. (Gardner Decl. ¶¶ 60-61.) On February 5, 2015, the parties reached an agreement to settle the dispute. (Settlement Agreement, Dkt No. 87-3 [hereinafter SA]; Gardner Decl. ¶ 63.)

c. The Settlement Agreement

On April 29, 2015, Lead Plaintiff filed an Unopposed Motion for Preliminary Approval of Settlement and Approval of Notice to the Settlement Class, (Dkt No. 87), which the Court granted on May 7, 2015. (Dkt No. 88.) Pursuant to that Order, members of the Settlement Class received Notice of the terms of the Settlement (the "Notice"). (Dkt No. 91, Ex. 3-A [hereinafter Notice].) No members of the Settlement Class filed objections.

On September 24, 2015, Lead Plaintiff filed an Unopposed Motion for Settlement, (Dkt No. 91), and Memorandum of Law in support thereof. (Settlement Mot.) On October 22, 2015, Lead Plaintiff filed an Unopposed Response in Support of the Motion. (Resp.)

Defendants admit no wrongdoing. (SA at 4 ¶ O, 32-33 ¶¶ 47-48.) While admitting no underlying liability, Defendants executed the Settlement Agreement after concluding "that continuation of the Action would be protracted and expensive, and [that they] have taken into account the uncertainty and risks inherent in any litigation, especially a complex case like this Action, and believe that the Settlement set forth in this Settlement Agreement is in their best interests." (SA at 4 ¶ O.)

Similarly, while maintaining that their claims are meritorious and supported by evidence, Lead Plaintiff executed the Settlement Agreement because they "are mindful of the inherent problems of proof and the possible defenses to the claims alleged in the Action," and, therefore, "believe that the Settlement set forth in this Settlement Agreement confers substantial monetary benefits upon the Settlement Class and is in the best interest of the Settlement Class." (SA at 4 ¶ N.)

The Settlement Agreement has three main points. First, the parties agree to certification of the following class for the purposes of settlement only:

> [A]ll Persons that purchased or otherwise acquired ViroPharma Securities between December 14, 2011 and April 9, 2012, inclusive, and were damaged thereby.

***5** (SA at 12 ¶ 1mm, 15 ¶ 3.)[4] The parties further agreed to the certification of the Lead Plaintiff as Class Representative for the Settlement Class and the appointment of Lead Counsel as Class Counsel for the Settlement Class. (SA at 15 ¶ 3.)

[4] The Settlement Agreement clarifies that the following persons are excluded from the Settlement Class: "Defendants; the Company's officers, directors, and employees during the Class Period; the Company's successors, and assigns; any person, entity, firm, trust, corporation or other entity related to, affiliated with, or controlled by any of the Defendants, as well as the Immediate Families of the Individual Defendants. Also excluded from the Settlement Class are those Persons who submit valid and timely requests for exclusion from the Settlement Class in accordance with the requirements set forth in the Notice." (SA at "Certain Definitions" ¶ 1mm.)

Second, Lead Plaintiff and every member of the Settlement Class agreed to release all claims against settling Defendants and dismiss such claims with prejudice. (SA at 15 ¶¶ 4-5.)

Third, the parties agreed to a settlement amount of eight million dollars ($8,000,000.00) in cash, to be placed in a Settlement Fund. (SA at 12 ¶ 1*ll*, 16 ¶ 6.) This represents an average recovery before reduction for litigation fees and expenses of approximately $0.49 per allegedly damaged common share and approximately $2.13 per allegedly damaged note. (Notice at 2.) After deducting attorneys' fees and expenses, notice and relevant administration costs, banking fees, and applicable taxes, the balance will go to the members of the Settlement Class (the "Net Settlement Fund"). (SA at 17 ¶ 9.) After expected deductions, this recovery reflects approximately $0.33 per share and $1.42 per note. (Notice at 2.) A clear process is outlined for how putative class members can become "Authorized Claimants" in the "Plan of Allocation." (SA at 24-26 ¶ 30.)

II. Notice

Notice to members of a putative class action pending settlement must be directed in a "reasonable manner to all class members who would be bound by the proposal, Fed. R. Civ. P. 23(e)(1)," and be "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). Class members must "have certain due process protections in order to be bound by a class settlement agreement." *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 145 (3d Cir. 2005) ("*Diet Drugs*").

In the Court's Preliminary Approval Order, the Court appointed the Garden City Group, LLC as Claims Administrator. (Dkt No. 88.) The Claims Administrator was instructed to disseminate copies of the Notice of Pendency of Class Action and Proposed Settlement and Motion for Attorneys' Fees and Expenses and the Proof of Claim. (Dkt No. 88; Dkt No. 91, Ex. 3 [hereinafter Mailing Decl.].) The Notice contained information about (1) the nature and procedural history of the case, (2) the material terms of the Settlement, including (a) the recovery under the Settlement, (b) the Plan of Allocation, (c) a description of the claims that will be released in the Settlement; (d) explanation of the right and the mechanism by which Settlement Class members could exclude themselves from the Settlement; (e) the Fee Application; (f) and an explanation of the right and the mechanism by which Settlement Class members could object to the Settlement, the Plan of Allocation, and/or the Fee Application. (Notice.) The Notice explained that someone would be an Authorized Claimant if he or she purchased or otherwise acquired ViroPharma Securities during the Class Period. (Notice at 3, 5.) The following actions were taken to provide the Notice to the Settlement Class:

(1) 18,618 copies of the Notice were mailed to potential Settlement Class members and their nominees;

(2) a summary of the Notice was published in *Investor's Business Daily* on June 3, 2015;

***6** (3) a summary of the Notice was published over the *PR Newswire* on June 5, 2015;

(4) the Notice, the Proof of Claim form, the Settlement Agreement and its exhibits, and the Preliminary Approval Order were all posted on a case-specific website identified in the Notice;

(5) relevant Settlement documents were posted on Lead Counsel's firm website.

(Mailing Decl. ¶¶ 3-8; Gardner Decl. ¶¶ 64-69.) To date, no objections have been filed.

The Court finds that the Notice met the requirements of Federal Rule of Civil Procedure 23. *See, e.g.*, *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 91 (3d Cir. 1985). ("[F]irst-class mail and publication regularly have been deemed adequate under the stricter notice requirements...of Rule 23(c)(2).").

III. Class Certification

a. Legal Standard

The Court is permitted to certify a class for settlement purposes only so long as the Court finds that the Settlement Class satisfies the Federal Rule of Civil Procedure 23 requirements. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 778 (3d Cir. 1995) ("*GMC*"). Plaintiffs must satisfy the four prerequisites of Federal Rule of Civil Procedure 23(a):

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or 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 interests of the class.

Fed. R. Civ. P. 23(a).If the prerequisites of Rule 23(a) are met, plaintiffs then must prove that "the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Under Rule 23(b)(3), class certification "is permissible when the court 'finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.' " *In re Hydrogen Peroxide*, 552 F.3d 305, 310 (3d Cir. 2008) ("*Hydrogen Peroxide*") (quoting Fed. R. Civ. P. 23(b)(3)). The two requirements of Rule 23(b)(3) are commonly referred to as "predominance" and "superiority." *Hydrogen Peroxide*, 552 F.3d at 310.

"The requirements set out in Rule 23 are not mere pleading rules." *Id.* at 311. A request for class certification "may be [granted] only if the court is "satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Beck v. Maximus, Inc.*, 457 F.3d 291, 297 (3d Cir. 2006) (quoting *General Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982) (internal quotations omitted)). A court must "assess all of the relevant evidence admitted at the class certification stage." *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 779 (3d Cir. 2009) (quoting *Hydrogen Peroxide*, 552 F.3d at 317, 323) (internal quotations omitted).

b. Rule 23(a) Factors

i. Numerosity

***7** The Court must find that the class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *see generally In re Prudential Ins. Co. Amer. Sales Practices Litig.*, 148 F.3d 283, 309 (3d Cir. 1998) ("*Prudential*"). Although no minimum number is required to maintain a class action suit, the Third Circuit has held that "classes in excess of forty members" will generally satisfy the numerosity requirement. *Vista Healthplan, Inc. v. Cephalon, Inc.*, 2015 WL 3623005, at *13 (E.D. Pa. 2015); *see also Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001).

During the Class Period, there were approximately seventy million shares of issued and outstanding ViroPharma Securities. (AC ¶ 172.) Notice was mailed to 18,618 potential

Settlement Class members and their nominees. (Mailing Decl. ¶¶ 3-6.) The Court finds that the Settlement Class is sufficiently numerous.

ii. Commonality

To find commonality, Lead Plaintiff must "share at least one question of fact or law with the grievances of the prospective class." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). "A finding of commonality does not require that all class members share identical claims." *Prudential*, 148 F.3d at 310.

Common questions dominate the Class, including whether Defendants' statements to the investing public during the Class Period caused the price of ViroPharma's securities during the Class Period to artificially inflate. The Court finds that the putative class shares commonality.

iii. Typicality

"Rule 23(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class." *Weiss v. York Hosp.*, 745 F.2d 786, 809 (3d Cir. 1984). "The heart of this requirement is that the plaintiff and each member of the represented group have an interest in prevailing on similar legal claims." *Seidman v. Am. Mobile Sys., Inc.*, 157 F.R.D 354, 360 (E.D. Pa. 1994). "[C]ases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims." *Baby Neal*, 43 F.3d at 58; *see also In re Cmty Bank of N. Va.*, 418 F.3d 277, 303 (3d Cir. 2005).

Lead Plaintiff's claims are typical of the claims of the members of the Class. Lead Plaintiff and all Settlement Class members allege violations of the federal securities laws stemming from Defendants' same course of conduct.

iv. Adequacy of Representation

Adequacy of representation is met by a two-fold showing: "that (1) class counsel is competent and qualified to conduct the litigation; and (2) class representatives have no conflicts of interests." *Hawk Valley, Inc. v. Taylor*, 301 F.R.D. 169, 183 (E.D. Pa. 2014) (citing *New Directions Treatment Services v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007)).

Both are met here. First, Plaintiff's Counsel was appointed precisely because of their expertise and ability to represent the class in this matter. (*See, e.g.*, Labaton Sacharow LLP Firm Resume, Securities Class Action Litigation, Dkt No. 91, Ex. 4-A [hereinafter Labaton Resume]; Goldman Scarlato & Penny, P.C. Firm Resume, Dkt No. 91, Ex. 5-A [hereinafter Goldman Resume]; Robbins Gellar Rudman & Dowd LLP Firm Resume, Dkt No. 91, Ex. 6-A [hereinafter Robbins Resume].) Second, no conflicts of interests have been identified between either Lead Plaintiff and the Settlement Class members, or Lead Counsel and the Settlement Class members. Finally, Notice was sent to 18,000 prospective Settlement Class members and nominees and no Settlement Class member has filed an objection to Lead Counsel, or the amount that they seek in their fee petition.

c. Rule 23(b)(3) Factors

***8** The parties seek certification of the class under Rule 23(b)(3), which requires common questions of law or fact to predominate over individual questions, and that the class action structure is the superior method of litigating the claims.

i. Predominance

The predominance factor is "readily met" in many securities fraud actions. *Amchem Prods., Inc.*, 521 U.S. at 625. The central issues for Lead Plaintiff and for the putative class members are whether or not Defendants' statements to investors during the Class Period violated securities law, and whether such violations artificially inflated the cost of ViroPharma Securities during the Class Period. The only issues that would be distinct for Lead Plaintiff and each Settlement Class member would be the amount of damages owed. However, "[a]lthough individual damage claims will differ depending on when and what type of stock was acquired, these issues cast no doubt on the finding of predominance." *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 178 (E.D. Pa. 2000) ("*Ikon*") (citing *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985) and *In re Data Access Sys. Sec. Litig.*, 103 F.R.D. 130, 138-40, 42 (D.N.J. 1984)). The Court finds predominance.

ii. Superiority

Under the superiority factor analysis, the Court considers "the class members' interest in individually controlling the prosecution or defense of separate actions...the desirability...or concentrating the litigations of the claims in the particular forum," whether there is already any litigation filed by class members, and any difficulties in managing the class action. Fed. R. Civ. P. 23(b)(3). Class certification is the superior way to manage a case with this many Settlement Class members, all complaining of the same behavior by Defendants. The alternative would produce individual suits throughout the country, redundantly wasting judicial resources to litigate the same claims over and over.

d. Conclusion

The Court grants Lead Plaintiff's Motion to certify the class for the purposes of Settlement.

IV. Settlement

A federal class action may be settled only with the approval of a court. Fed. R. Civ. P. 23(e). "[T]he district court acts as a fiduciary who must serve as a guardian of the rights of absent class members." *GMC*, 55 F.3d at 785 (quoting *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) (internal quotations omitted)).

a. The Court finds that the Settlement deserves an initial presumption of fairness.

The Court may apply an "initial presumption of fairness when the Court finds that: (1) the negotiations occurred at arm's-length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *Id.*; *see also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("*Warfarin*"); *In re Cendant Corp. Litig.*, 264 F.3d 201, 232 n. 18 (3d Cir. 2001) ("*Cendant*"). First, the parties negotiated the Settlement at arm's-length, with the assistance of an experienced mediator, Judge Phillips. (Gardner Decl. ¶¶ 60-62.) "[T]he participation of an independent mediator in settlement negotiations virtually insures [*sic*] that the negotiations were conducted at arm's length and without collusion between the parties." *Hall v. AT&T Mobility LLC*, 2010 WL 4053547, at *7 (D.N.J. 2010) (quoting *Bert v. AK Steel Corp.*, 2008 WL 4693747) (internal quotations omitted). Second, substantial expedited discovery occurred. (Gardner Decl. ¶¶ 3, 35-39.) Third, as discussed in greater detail *supra* in the Court's analysis of the class certification requirement for adequacy of representation, Plaintiff's Counsel are experienced with securities litigation class actions. (*See, e.g.*, Labaton Resume; Goldman Resume; Robbins Resume.) Fourth, no member of the Settlement Class objected. (Gardner Decl. ¶¶ 3, 5, 35-45, 60-62.) The Court finds that an initial presumption of fairness applies to the Settlement.

b. The Settlement is fair, adequate and reasonable under the *Girsh* factors and the *Prudential* considerations.

***9** "The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh v. Jepson,* 521 F.2d 153, 156 (3d Cir.1975). District courts must conduct independent analysis into the settlement to ensure its fairness. Final approval of a class action settlement requires the district court to determine whether "the settlement is fair, adequate, and reasonable." *Stoetzner v. U.S. Steel Corp.,* 897 F.2d 115,118 (3d Cir. 1990) (*quoting Walsh v. Great Atlantic & Pacific Tea Co., Inc.,* 726 F.2d 956, 965 (3d Cir. 1983) (internal quotations omitted)); *see also Cendant,* 264 F.3d at 231. Even where there is a presumption of fairness, the Third Circuit advises courts to consider the following factors (the "*Girsh* factors") in deciding whether to approve a settlement of a class action under Rule 23(e), including:

(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 the 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.

Girsh, 521 F.2d at 157 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)). The Circuit also advises the Court to address the following considerations (the "*Prudential* considerations"):

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 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.

Prudential, 148 F.3d at 323. District courts "must make findings as to each of the *Girsh* factors, and the *Prudential* factors where appropriate" in an "independent analysis of the settlement terms." *In re Pet Foods Prods. Liab. Litig.*, 629 F.3d 333, 350-51 (3d Cir. 2010). Finally, the Circuit advises district courts to conduct "a thorough analysis of settlement terms" to determine "the degree of direct benefit provided to the class," including whether "the number of individual awards compared to both the number of claims and the estimated number of class members, the size of the individual awards compared to claimants' estimated damages, and the claims process used to determine individual awards."*In re Baby Products Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013).

.i. The *Girsh* factors

1. Complexity, expense and likely duration of litigation

This factor is intended to capture "the probable costs, in both time and money, of continued litigation." *GMC*, 55 F.3d at 812 (internal citations omitted). Settlement was roughly two and half years after the case was first filed. As of this date, the case has been ongoing for almost four years. In total, Plaintiff's Counsel invested 4,517.25 hours of time to this case. (Gardner Decl. ¶¶ 11, 83.) As described in greater detail *infra*, under the Court's lodestar analysis, such work would cost $2,660,617.50 in attorneys' fees, with an additional $155,197.23 in expenses. (Gardner Decl. ¶¶ 83-92.) If this case were to continue, through motions for class certification, summary judgment, trial, and appeals, that number would grow many millions greater.

***10** If this case were to proceed to trial, it would likely take years. The projected length of the case arises from the complexity of the case. In order for the Settlement Class to succeed at trial, they would likely have to show that Defendants knowingly made materially false and misleading statements to the market that omitted material information that the FDA had told Defendants regarding the success of their Citizen's Petition. They would then have to show that ViroPharma Securities traded at artificially inflated prices during the Class Period due to Defendants' material omissions. This is a complicated matter necessarily requiring extensive briefing.

By way of example, Defendants' Motion to Dismiss took nearly seventeen months to resolve. The Court heard oral argument, and the parties submitted supplemental memoranda of law. Like the Motion to Dismiss, for any motions for class certification or summary judgment, the Court would expect that oral argument and an extensive briefing schedule would be required. Moreover, both a motion for class certification and a motion for summary judgment would be heavily reliant on experts; leading to potential *Daubert* challenges and battles between competing expert reports. Given the length of time to resolve the arguably simpler Motion to Dismiss, the projected schedule for resolution of class certification and summary judgment would require a significant number of months.

Further, if the Court were to grant the class certification motion, Defendants would likely seek reconsideration or seek permission to appeal the class certification decision. Even after resolving class certification, and summary judgment, trial would be another massive undertaking. "This is partly due to the inherently complicated nature of large class actions alleging securities fraud: there are literally thousands of shareholders, and any trial on these claims would rely heavily

on the development of a paper trial [*sic*] through numerous public and private documents." *Ikon*, 194 F.R.D. at 179.

When considering the class certification process, interlocutory appeal of the class certification, summary judgment motion practice, trial, post-trial motions, and the likely appeal of the trial by the losing party, this matter could take years to resolve. This factor weighs heavily in favor of approving the Settlement.

2. The reaction of the class to the settlement

No member of the class has filed any objections to the Settlement. In addition, no member of the Settlement Class opted out. Lead Plaintiff supports the Settlement. (Carpenters' Decl. ¶ 5.) The fact that no one objected weighs heavily in favor of Settlement.

3. The stage of the proceedings and the amount of the discovery completed

Under the third factor, the Court considers "the degree to which the litigation has developed prior to settlement." *In re Rent-Way*, 305 F.Supp.2d 491, 502 (W.D. Pa. 2003). The Court determines "whether counsel had an adequate appreciation of the merits of the case before negotiating." *GMC*, 55 F.3d at 813. "This factor captures the degree of case development that class counsel have accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Cendant*, 264 F.3d at 235.

This case reached Settlement after the parties fully briefed Defendants' Motion to Dismiss, and after expedited discovery. There was extensive briefing regarding the Motion to Dismiss. (Gardner Decl. ¶¶ 27-30.) Further, extensive briefing followed a motion for certification of interlocutory appeal. (Gardner Decl. ¶¶ 32-33.) This briefing procedure allowed the parties to grapple with the relative strengths and weaknesses of their positions.

***11** Further, the parties met and conferred multiple times pursuant to Federal Rule of Civil Procedure 26(f). (Gardner Decl. ¶¶ 34-35.) The parties also proposed a confidentiality agreement and a proposed Federal Rule of Evidence 502(d) Order. (Gardner Decl. ¶ 34.) During expedited discovery in preparation for mediation, Defendants produced approximately five thousand core documents. (Gardner Decl. ¶¶ 3, 36-39.) Lead Counsel served document subpoenas on the FDA and ANI, and reviewed thousands of pages of documents produced in response to these subpoenas. (Gardner Decl. ¶¶ 40-41.) In response to a subpoena from ANI, Lead Counsel produced roughly 3,500 pages. (Gardner Decl. ¶ 41.) Lead Counsel also hired Forensic Economics, Inc. to conduct an expert analysis of the damages at issue in the case. (Gardner Decl. ¶¶ 42-43.) Finally, prior to the mediation, Lead Counsel also consulted a regulatory expert. (Gardner Decl. ¶¶ 44-45.)

The case settled following this expedited discovery process. Thus, the case settled prior to the class certification stage, prior to any motions for summary judgment, and even prior to full discovery. However, though expedited, the discovery was merits-based. (Gardner Decl. ¶ 40.) The parties produced a substantial amount of discovery. (Gardner Decl. ¶ 40.)

In short, the Court finds that this case settled at a time in which Lead Plaintiff, and Lead Counsel, had developed a significant appreciation for the merits of the case. They had fully briefed the main issues in the case and conducted merits-based expedited discovery. *Cf. Cendant*, 264 F.3d at 236 (affirming settlement where "Lead Counsel mainly engaged in only informal discovery"). Lead Plaintiff has accumulated sufficient information and understanding to negotiate the Settlement.

Moreover, when the settlement results from arm's-length negotiations, the Court "affords considerable weight to the views of experienced counsel regarding the merits of the settlement." *McAlarnen v. Swift Transp. Co., Inc.*, 2010 WL 365823, at *8 (E.D. Pa. 2010); *see also In re General Instrument Sec. Litig.*, 209 F.Supp.2d 423, 430 (E.D. Pa. 2001) ("*General Instrument*") ("Significant weight should be attributed to the belief of experienced counsel that the settlement is in the best interests of the class."). This case settled after an arm's-length negotiation mediated by Judge Phillips.

In conclusion, both in deference to Plaintiff's Counsel's support of the Settlement, and upon the Court's independent review that Lead Plaintiff was in an appropriate stance to evaluate the relative merits of the claims, the Court finds that this factor weighs in favor of approving the Settlement.

4. The risks of establishing liability and damages.

"By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *GMC*, 55 F.3d at 814. Class action securities litigation cases are notoriously difficult cases to prove. *See, e.g.*, *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009) ("To be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action.").

Section 10(b) of the Exchange Act makes it unlawful for any person, through the use of "any means of interstate commerce, the mails, or any national securities exchange, to employ… any manipulative or deceptive devise or contrivance in contravention of rules" promulgated by the SEC. 15 U.S.C. § 78j. Rule 10b-5 prohibits the making of "any untrue statement of a material fact" or the omission of "a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading" connected to the purchase or sale of securities. 17 C.F.R. § 240.10B-5 (1951). Lead Plaintiff's allegations concern omissions of material fact. To state a claim for omissions under Section 10(b) of the Exchange Act and Rule 10b-5, a plaintiff must allege: (1) a material misrepresentation or omission; (2) scienter; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005) (internal citations omitted); *see also In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 268 (3d Cir. 2005) ("[A] plaintiff must show that (1) the defendant made a materially false or misleading statement or omitted to state a material fact necessary to make a statement not misleading; (2) the defendant acted with scienter; and (3) the plaintiff's reliance on the defendant's misstatement caused him or her injury.") (internal quotations omitted).

***12** Section 20(a) provides that:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t. Section 20(a) is a derivative cause of action, predicated upon § 10(b) liability.

Liability in this type of case will be difficult to prove. The Court notes that two aspects of this case would be particularly difficult to prove: (1) scienter and (2) loss causation. First, proving that Defendants acted with knowledge or recklessness[5] as to the alleged falsity of their omissions would present difficulties. "Since stockholders normally have 'little more than circumstantial and accretive evidence to establish the requisite scienter,' proving scienter is an 'uncertain and difficult necessity for plaintiffs.'" *Smith v. Dominion Bridge Corp.*, 2007 WL 1101272, at *5 (E.D. Pa. 2007) (quoting *General Instrument*, 209 F.Supp.2d at 430). One of Lead Plaintiff's strongest arguments would be that Defendants Doyle and Rowland sold some of their ViroPharma Securities during the Class Period. (Gardner Decl. ¶ 49.) However, as Lead Plaintiff admits, Defendants Doyle and Rowland also retained significant ViroPharma Securities. (Gardner Decl. ¶ 49.) Moreover, Defendants Milano and Wolf did not sell stock during the Class Period. (Gardner Decl. ¶ 49.) Further, internal communications from the Class Period could show that the Defendants genuinely believed that they would succeed in netting three additional years of marketing exclusivity for Vancocin. (Gardner Decl. ¶ 50.)

5 Actual knowledge, rather than recklessness, would be required if the Court determined that the safe harbor provisions of the PSLRA were triggered. 15 U.S.C. § 78U-5(c).

In addition, scienter could likely only be shown by proving that the communications from the FDA to ViroPharma disclosed the FDA's clear intent to reject Defendants' Citizen's Petition. Lead Plaintiff correctly theorizes that Defendants would have had strong defenses regarding whether these communications in fact showed the FDA's intent given that the FDA's interim communications are not binding as agency actions and the FDA's own documents from that time may have showed that they had not yet decided the Citizen's Petition. (Gardner Decl. ¶ 40.) Overall, the Court agrees with Lead Plaintiff that proving scienter would be a risky proposition. (Gardner Decl. ¶¶ 48-55.)

Second, proving loss causation and damages would be equally difficult. Lead Plaintiff would need to show that Defendants' omissions caused the drop in the ViroPharma Securities' prices following the corrective disclosure. Such proof would

necessitate a battle of the experts. Lead Plaintiff would be permitted to present expert testimony on their theory of loss causation, and Defendants would be permitted to submit a rebuttal expert report arguing that the omissions had no impact on the value of ViroPharma Securities. *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S.Ct. 2398, 2425 n. 8 (2014). Of note, Lead Plaintiff points the Court to the fact that at the end of the Class Period, ViroPharma promulgated three separate disclosures pertaining to Vancocin, only one of which allegedly contained material misstatements or omissions. (Gardner Decl. ¶ 57.) As such, to prove causation, Lead Plaintiff would need to show that the fraudulent disclosure was the cause of the drop in stock price, not the information contained in the non-fraudulent disclosures released around the same time. (Gardner Decl. ¶ 57.)

***13** Further, this issue of causation directly impacts the difficulty in proving damages. "The conflicting damage theories of defendants and plaintiffs would likely have resulted in an expensive battle of the experts and it is impossible to predict how a jury would have responded." *In re Corel Corp. Inc. Sec. Litig.*, 293 F.Supp.2d 484, 492 (E.D. Pa. 2003).

Lead Plaintiff and Lead Counsel considered such issues and determined that the Settlement was in the best interest of the Settlement Class. (Gardner Decl. ¶¶ 8-9.) The Court agrees. This factor weighs heavily in favor of the Settlement.

5. The risks of maintaining the class action through trial.

With any class action, the Court may decertify or modify the class during the litigation should the class prove unmanageable. Fed. R. Civ. P. 23(c)(1). Even if the Court certified the class, there is always a risk that the class would be modified or decertified. However, there is nothing specific to the record to suggest that a putative certification of the Settlement Class would be particularly vulnerable to decertification. As such, this factor weighs neither in favor nor against approving the Settlement.

6. The ability of the defendants to withstand a greater judgment.

The Court must consider whether the Defendants "could withstand a judgment for an amount significantly greater than the Settlement." *Cendant*, 264 F.3d at 240. This factor is not alone dispositive. "[I]n any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 323 (3d Cir. 2011). In this case, the Court finds that Defendants could likely pay more; however, this factor is not dispositive.

7. The range of reasonableness of the settlement fund in light of the best possible recovery and in light of the attendant risks of litigation.

The last two factors analyze "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing...compared with the amount of the proposed settlement." *Prudential*, 148 F.3d at 322 (quoting *GMC*, 55 F.3d at 806). These factors ask "whether the settlement represents a good value for a weak case or a poor value for a strong case." *Warfarin*, 391 F.3d at 538. "The touchstone of this examination is the 'economic valuation of the proposed Settlement.'" *Erie County Retirees Ass'n*, 192 F.Supp.2d 369, 376 (W.D. Pa. 2002) (quoting *In re Safety Components, Inc. Sec. Litig.*, 166 F.Supp.2d 72, 92 (D.N.J. 2001)). However, there is no specific formula, threshold, or equation that a Court must use to determine whether a settlement amount is reasonable. Even a settlement that is only a "fraction of the potential recovery" can be deemed appropriate. *In re Sunrise Sec. Litig.*, 131 F.R.D. 450, 457 n. 13 (E.D. Pa. 1990).

The proposed Settlement is reasonable considering the best possible recovery for the Settlement Class and the risks of further litigation. The Settlement is reasonable both in contrast to other settlements of its ilk, and to the maximum potential recovery in this case. First, the Settlement is larger than the median reported settlement amount of $6-6.5 million in 2014. *Compare* Renzo Comolli & Svetlana Starykh, Recent Trends in Securities Class Action Litigation: 2014 Full-year Review [Hereinafter Nera Rpt], Nera Economic Research Associates, Inc., 28 (Jan. 20 2015), *available at* http://www.nera.com/content/dam/nera/publications/2015/PUB_2014_Trends_0115.pdf (reporting $6.5 million as the median) *with* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, Securities Class Action Settlements: 2014 Review and Analysis [Hereinafter Cornerstone Rpt], Cornerstone Research, at 6 (2015), *available*

at https://www.cornerstone.com/GetAttachment/701f936e-ab1d-425b-8304-8a3e063abae8/Securities-Class-Action-Settlements-2014-Review-and-Analysis.pdf (reporting $6.0 million as the median).[6]

6 The NERA and Cornerstone Research studies provide the Court with comprehensive reporting on nationwide trends in securities class actions. *C.f. In re Omnivision Techs, Inc.*, 559 F.Supp. 2d 1036, 1042 (N.D. Cal. 2007) (relying on a 2005 NERA report); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 2007 WL 313474, at *10 (S.D.N.Y. 2007) (relying on a 2005 Cornerstone Research report); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *14 (E.D. Pa. 2004) (citing a 1996 NERA study).

***14** Second, the Settlement is a healthy percentage of the total possible recovery. Lead Plaintiff retained an expert to analyze the alleged damages. (Gardner Decl. ¶ 6.) Lead Plaintiff's expert estimated that the Settlement Class sustained damages ranging from approximately $78.5 million (representing the one-day drop following the corrective disclosure) to $90 million (representing the two-day drop following the corrective disclosure). (Gardner Decl. ¶ 6.) Thus, the settlement of $8 million reflects roughly 9-10% of the maximum estimated losses. Across the last ten years, in cases where the estimated recovery was roughly the same as this case, the median settlement as a percentage of estimated recovery was about 5%. *See* CORNERSTONE RPT, *supra*, 8 (reporting that in cases between 2005 and 2013, where the estimated damages ranged between $50-124 million, the median settlement as a percentage of estimated damages was 5.0%); NERA RPT, *supra*, 32 (reporting that in cases between 1996 and 2014, where the estimated damages ranged between $50-99 million, the median settlement as a percentage of projected investor losses was 4.8%); *see also Ikon*, 194 F.R.D. at 183-84 (approving 5.2-8.7% recovery of estimated maximum losses).

Moreover, this estimated damages range represents the maximum estimated losses if a jury found that ViroPharma Securities prices dropped entirely due to Defendants' material misrepresentations or omissions. As previously addressed, around the time ViroPharma made its last allegedly fraudulent statement, ViroPharma also made two non-fraudulent disclosures. In proving causation, Lead Plaintiff faced a real risk that a jury would find that the other disclosures were at least partly responsible for the drops in prices. Thus, while the recovery is only 9-10% of the maximum estimated losses, it likely reflects an even higher percentage of the estimated losses Lead Plaintiff could have foreseeably recovered. This factor weighs in favor of approving the Settlement.

ii. The *Prudential* considerations

None of the *Prudential* considerations weighs against Settlement: (1) following extensive briefing on substantive issues, expedited discovery, and an arm's-length mediation process, Lead Plaintiff, and Lead Counsel, appropriately understood the merits of the case such that they could knowingly enter into the Settlement; (2) given that there were no objections by the Settlement Class and that no persons opted out of the Settlement Class, there are no claims by other classes or subclasses related to the underlying facts of this case; (3) there are no known other claimants beyond those represented by the Settlement Class; (4) Settlement Class members were accorded the right to opt out of the Settlement, and none chose to do so; (5) as discussed in greater detail *infra*, the demand for attorneys' fees is reasonable; and (6) the Plan of Allocation is fair and reasonable.

As to the sixth factor, "[t]he court's principal obligation is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund." *Walsh*, 726 F.2d at 964. Pursuant to the Notice, any Settlement Class members who wished to participate in the distribution of the Settlement had to submit a valid proof of claim no later than September 21, 2015. (Notice at 6-8; Dkt No. 88.) As the Notice outlines, after deducting attorneys' fees and expenses, Notice and relevant administration costs, banking fees, and taxes, the remaining fund amount (the "Net Settlement Fund") will be distributed according to the Plan of Allocation. (Notice at 6-7, 10; SA at 17 ¶ 9; Gardner Decl. ¶ 70.) The Plan of Allocation outlines that the Net Settlement Fund will be distributed on a *pro rata* basis among Authorized Claimants. (Notice at 11.) The Notice explains that the maximum recovery available for call options and put options is three percent of the Net Settlement Fund. (Notice at 11.)

The Plan of Allocation describes formulas for determining the Total Inflation Loss[7] and the Net Trading Loss,[8] disaggregated by the type of ViroPharma Security and the date of sale. (Notice at 11-13.) The Plan of Allocation explains that the Authorized Claimant will recover the Total Inflation Loss, or the Net Trading Loss, whichever is lesser. (Notice at 14.) These formulas were developed with Lead Plaintiff's expert. (Gardner Decl. ¶ 72.) Only Authorized Claimants

whose prorated shares will be greater than $10.00 will receive payment. (Notice at 14.) The Garden City Group, under Lead Counsel's oversight, will determine each Authorized Claimant's *pro rata* share. (Gardner Decl. ¶ 73.)

7 An Inflation Loss is the amount of loss calculated based on the amount of inflation in the price of ViroPharma common stock, notes or call options, or deflation in the price of ViroPharma put options based on methodology described in the Plan of Allocation. (Notice at 11.) The Total Inflation Loss is the sum of all Inflation Losses for all transactions in all ViroPharma Securities. (Notice at 13.)

8 A Trading Loss is the amount by which the amount paid for ViroPharma Securities purchased or acquired during the Class Period, excluding all fees, taxes, and commissions, (the "Purchase Amount") exceeds the amount received for sales of ViroPharma Securities sold during the Class Period, excluding all fees, taxes, and commissions (the "Sales Proceeds"). (Notice at 11.) A Trading Gain means the amount by which the Sales Proceeds exceeds the Purchase Amount for each transaction. An Authorized Claimant has a Net Trading Gain when his or her total Trading Gains exceed or are equal to his or her Total Trading Losses. (Notice at 13.)

***15** If there is any balance remaining in the Net Settlement Fund six months after all litigation fees and expenses, taxes, and payments to Authorized Claimants have been made, and enough balance remains, Lead Counsel shall reallocate such remaining balance to the Authorized Claimants. (Notice at 14.) If any amount remains after reallocation, but such amount is too small for further reallocation, the remaining balance shall go to the Council of Institutional Investors, a non-profit organization. (Notice at 14.) The Court finds that this procedure is fair and reasonable.

iii. Conclusion

In sum, all of the *Girsh* and *Prudential* factors are either neutral or weigh in favor of the Settlement, with the sole exception that Defendants could likely withstand a greater judgment. Given that the Settlement came two and half years into a well-litigated case, after an arm's-length negotiation process meditated by the Honorable Layn R. Phillips, United States District Court Judge (Ret.), with no objections coming from the over 18,000 member Settlement Class, and with the Settlement Fund reflecting an above-average recovery, this Court approves the Settlement. Further, the Court approves the Plan of Allocation.

V. Attorneys' Fees

"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 common fund doctrine provides 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." *GMC*, 55 F.3d at 820 n. 39 (citing *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759 (9th Cir. 1977)). This Court must conduct a "thorough judicial review" to determine whether and how much of an award counsel is due. *Prudential*, 148 F.3d at 333; *GMC*, 55 F.3d at 819. The determination rests with the discretion of the Court. *Id.* at 821.

Plaintiff's Counsel requests an award of 30% of the Settlement Fund. In support of this Motion, Lead Counsel submitted a declaration related to fees and expenses. (Jonathan Gardner on behalf of Labaton Sucharow LLP Declaration, Dkt No. 91, Ex. 4 [hereinafter Labaton Decl.].)

a. Legal Standard

The percentage-of-recovery method is "generally favored" in cases involving a settlement that creates a common fund. *Sullivan*, 667 F.3d at 330; *In re. AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006) ("*AT&T*"); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) ("*Rite Aid*"); *Cendant*, 243 F.3d at 734. Where the Lead Plaintiff approves the Lead Plaintiff's counsel's request fee award – as Lead Plaintiff does here – the Court should afford the fee requested a presumption of reasonableness. *Cendant*, 264 F.3d at 220.

The Court should also consider:

(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.

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n. 1 (3d Cir. 2000). The factors "need not be applied in a formulaic way...and in certain cases, one factor may outweigh the rest." *Diet Drugs*, 582 F.3d at 541.

Second, the Court should compare the proposed percentage against the lodestar cross-check. The lodestar cross-check is performed by calculating the "lodestar multiplier." *AT&T,* 455 F.3d at 164. The multiplier is determined by dividing the requested fee award, determined from the percentage-of-recovery method, by the lodestar. *Id.* To determine the lodestar method's suggested total, the court multiplies "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." *Rite Aid,* 396 F.3d at 305. To determine the number of hours used in calculating the lodestar, courts must exclude hours that are "excessive, redundant, or otherwise unnecessary." *McKenna v. City of Phila.,* 582 F.3d 447, 455 (3d Cir. 2009) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

b. Analysis

***16** In this case, Plaintiff's Counsel requests 30% of the Settlement Fund. Because Lead Plaintiff approves of the Attorneys' Fees, the Court affords the attorneys' fees requested a presumption of reasonableness. *Cendant*, 264 F.3d at 220. The Court determines that the fees are appropriate under the required factors as well.

i. *Gunter* Factors

1. **The size of the fund created and the number of persons benefitted**

The "most critical factor" for the Court to weigh is "the degree of success obtained." *Hensley*, 461 U.S. at 436 The Settlement established a common fund of $8,000,000, intended for roughly 18,000 Settlement Class members. (Gardner Decl. ¶ 79.) As discussed in greater detail *supra* during the Court's analysis of the *Girsh* factors, the Court finds that 9-10% recovery of the total estimated maximum losses is a higher than average recovery for cases of this type. This factor weighs in favor of the award of attorneys' fees.

2. The presence or absence of substantial objections by members of the Class to the settlement terms and/or fees requested by counsel

No Settlement Class member filed any objections. (Gardner Decl. ¶ 95.) Lead Plaintiff supports the request for attorneys' fees. (Carpenters' Decl. ¶ 6.) This factor weighs in favor of the award of attorneys' fees.

3. The skill and efficiency of the attorneys involved

The skill and efficiency of the attorneys involved are 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." *In re Computron Software, Inc.*, 6 F.Supp.2d 313, 323 (D.N.J. 1998).

First, as described *supra* during the Court's analysis of the *Girsh* factors regarding risks, this outcome is an extremely favorable resolution for the Settlement Class given the risks attendant with securities litigation. Second, as discussed *supra* during the Court's analysis of the class certification requirement for adequacy of representation, Plaintiff's Counsel is highly experienced in this area of litigation and was chosen specifically due to their expertise in these matters. (*See* Labaton Resume, Goldman Resume, Robbins Resume.) Third, opposing counsel in this case is as highly regarded as Plaintiff's Counsel. Both sides litigated this case aggressively and professionally. The submissions from the parties were consistently well-researched, of high-quality, and timely submitted. The Court notes with appreciation that the parties conducted expedited discovery without any Court intervention. This factor weighs in favor of the award of attorneys' fees.

4. The complexity and duration of the litigation

As addressed *supra* in the Court's analysis of the *Girsh* factor on the stage of the proceedings, this case settled fairly early in the life of the case. However, this posture reflects the comprehensive and substantial briefing the parties completed for Defendants' Motion to Dismiss and motion to certify for interlocutory appeal. In addition, in preparation for mediation, the parties conduct expedited discovery. Throughout this process, Plaintiff's Counsel zealously represented the Lead Plaintiff and Settlement Class.

Moreover, even if the Settlement Class could recover a larger judgment at trial, such recovery would be postponed for years. The Settlement secures a lesser, but actual, payment for the Settlement Class now, rather than the speculative promise of a larger payment years from now. "Here, the trial, as...all securities fraud trials, will be long and complex...Thus, the complexity, expense and duration of the litigation weigh in favor of settlement." *Hoffman Elec., Inc. v. Emerson Elec., Co.*, 800 F.Supp. 1279, 1285 (W.D. Pa. 1992). This factor weighs in favor of the award of attorneys' fees.

5. The risk of nonpayment

***17** Plaintiff's Counsel worked on an entirely contingent basis. (Gardner Decl. ¶ 11.) "Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of approval." *In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451, at *7 (D.N.J. 2012). In litigating this case for nearly four years now, without pay, shouldering all expenses, Plaintiff's Counsel took on significant risk of non-payment. Given the length and complexity of this case, this factor weighs in favor of the award of attorneys' fees.

6. The amount of time devoted to the case by Plaintiff's Counsel

Plaintiff's Counsel estimates that they invested more than 4,500 hours of attorney and other professional and paraprofessional time on this case. (Gardner Decl. ¶ 11.) This factor weighs in favor of the award of attorneys' fees.

7. The awards in similar cases

"In common fund cases, fee awards generally range from anywhere from nineteen percent (19%) to forty-five percent (45%) of the settlement fund." *Bredbenner v. Liberty Travel, Inc.*, 2011 WL 1344745, at *21 (D.N.J. 2011). The median award for attorneys' fees for securities class action settlements of this size is roughly twenty five percent (25%). *See NERA Rpt*, *supra*, at 34 (reporting that between 2012-2014, settlements worth between $25-100 million awarded a median percentage of 25%). In this Circuit, "awards of thirty percent are not uncommon in securities class actions." *Ikon*, 194 F.R.D at 194; *see also Esslinger v. HSBC Bank Nev., N.A.*, 2012 WL 5866074, at *12 (E.D. Pa. 2012) (approving 30% of the settlement amount); *In re Sterling Financial Corp. Sec. Class* Action, 2009 WL 2914363, at *3 (E.D. Pa. 2009) (approving thirty percent award); *Smith v. Dominion Bridge Corp.*, 2007 WL 1101272, at *9 (E.D. Pa. 2007) (awarding one-third); *In re Ravisent Technologies, Inc. Sec. Litig.*, 2005 WL 906361, at *11 (E.D. Pa. 2005) ("[C]ourts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses."); *In re Corel Corp. Inc. Sec. Litig.*, 293 F.Supp.2d 484, 497 (E.D. Pa. 2003) (awarding one-third); *In re Aetna Inc. Sec. Litig.*, 2001 WL 20928, at *14 (E.D. Pa. 2001) ("[A]wards of thirty percent are commonly awarded in other settlements of securities fraud cases."). The Court finds that the thirty percent recovery is appropriate given the size of the recovery.

ii. Lodestar cross-check

To conduct the lodestar cross-check, the Court will compute the hours worked by all Plaintiff's Counsel and multiply such amounts against the appropriate hourly rates. Lead Counsel spent 2,952.90 hours on the case. (Labaton Decl., Ex. B [hereinafter Labaton Lodestar Rpt.]; Summary of Lodestars, Dkt No. 91, Ex. 7 [hereinafter Lodestar Summary]; Labaton Decl. ¶ 6.) Based on Lead Counsel's current billing rates, the total lodestar amount for attorney and professional time for Lead Counsel was $1,807,603.50. (Labaton Lodestar Rpt.; Lodestar Summary; Labaton Decl. ¶ 6.) Liaison counsel spent 542.10 hours on the case. (Paul J. Scarlato on behalf of Goldman Scarlato & Penny, P.C., Dkt No. 91, Ex. 5 [hereinafter Goldman Decl.] ¶ 7; Lodestar Summary.) Based on liaison counsel's billable rates, the lodestar analysis totals $376,759.50. (Goldman Decl. ¶ 7; Goldman Decl., Ex. B [hereinafter Goldman Lodestar Rpt.]; Lodestar Summary.) Additional plaintiff's counsel spent 1,022.25 hours on the case. (David W. Mitchell on behalf of Robbins Geller Rudman & Dowd LLP, Dkt No. 91, Ex. 6 [hereinafter Robbins Decl.] ¶ 6; Lodestar Summary.) Based on additional plaintiff's counsel's billable rates, the lodestar analysis totals

$476,254.50. (Robbins Decl. ¶ 6; Robbins Decl., Ex. B [hereinafter Robbins Lodestar Rpt.]; Lodestar Summary.)

***18** Plaintiff's Counsel, and relevant staff, in total, incurred 4,517.25 billable hours. (Lodestar Summary; Gardner Decl. ¶ 92.) The hourly billing rates of all of Plaintiff's Counsel range from $610 to $925 for partners, $475 to $750 for of counsels, and $350 to $700 for other attorneys. (Gardner Decl. ¶ 91.) The total lodestar amount is $2,660,617.50. (Lodestar Summary; Labaton Lodestar Rpt.; Goldman Lodestar Rpt.; Robbins Lodestar Rpt.; Gardner Decl. ¶¶ 83, 92.)

Given that 30% of the Settlement Fund reflects $2,400,000, the lodestar multiplier here is negative 0.90. (Gardner Decl. ¶ 92.) The lodestar cross-check confirms that the percentage-of-recovery method produces an appropriate recovery. The Court grants the Motion for Attorneys' Fees.

VI. Expenses

Counsel in a class action are entitled to reimbursement of expenses that were "adequately documented and reasonable and appropriately incurred in the prosecution of the class action." *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995).

Lead Counsel requests $89,650.74 in expenses, including costs for meals/hotels/transportation, duplicating, postage, telephone/facsimile, messenger/overnight delivery, filing, witness and other court fees, court reporting and transcripts, online legal and financial research fees, experts, and contributions to Litigation Expense Fund. (Lodestar Summary; Labaton Decl. ¶¶ 8-9.) Liaison counsel requests $751.73 in expenses including duplicating, postage, messenger/overnight delivery, and online legal and financial research fees. (Lodestar Summary; Goldman Decl. ¶ 9.) Additional plaintiff's counsel requests $64,794.76 in expenses including filing, witness and other fees, transportation, hotels and meals, telephone, messenger/overnight delivery, expert report, photocopies, online legal and financial research services. (Lodestar Summary; Robbins Decl. ¶¶ 8-9.)

In total, Plaintiff's Counsel requests $155,197.23 in expenses. (Lodestar Summary; Gardner Decl. ¶¶ 11, 75, 83, 98, 100.) This amount includes $72,468 related to investigation of the claims and expert analysis, and $31,208.33 in mediation fees assessed by Judge Phillips. (Gardner Decl. ¶ 102.) Lead Plaintiff supports the application for expenses.

The Court finds the expenses reasonable and grants all expenses requested.

All Citations

Not Reported in Fed. Supp., 2016 WL 312108, Fed. Sec. L. Rep. P 99,007

End of Document

2015 WL 12843830
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

KING DRUG COMPANY OF FLORENCE, INC., et al., on behalf of themselves and all others similarly situated, Plaintiffs,

v.

CEPHALON, INC., et al., Defendants.

Master Docket No. 2:06-cv-01797-MSG
|
Signed 10/15/2015

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ORDER GRANTING FINAL JUDGMENT AND ORDER OF DISMISSAL APPROVING DIRECT PURCHASER CLASS SETTLEMENT AND DISMISSING DIRECT PURCHASER CLASS CLAIMS AGAINST THE CEPHALON DEFENDANTS

The Honorable Mitchell S. Goldberg, United States District Judge

***1** Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and in accordance with the terms of the Settlement Agreement between Defendants Cephalon, Inc., Teva Pharmaceutical Industries Ltd., Teva Pharmaceuticals USA, Inc., and Barr Pharmaceuticals, Inc. (collectively, the "Cephalon Defendants"), and Direct Purchaser Class Plaintiffs' Lead Counsel acting pursuant to the authority provided by the Court's Order dated August 18, 2009 (ECF No. 196), on behalf of Plaintiffs King Drug Co. of Florence, Inc. ("King Drug"), Rochester Drug Co-operative, Inc. ("RDC"), Burlington Drug Company Inc. ("Burlington"), J.M. Smith Corp. d/b/a Smith Drug Co. ("Smith Drug"), Meijer, Inc. and Meijer Distribution, Inc. ("Meijer"), Stephen L. LaFrance Pharmacy d/b/a SAJ Distributors, Inc. and

Stephen L. LaFrance Holdings, Inc. ("SAJ" and together with King Drug, RDC, Burlington, Smith Drug, and Meijer, the "Plaintiffs"), and on behalf of the Direct Purchaser Class, dated April 17, 2015, 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 the Cephalon 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, July 27, 2015, this Court certified a class for purposes of settlement ("Direct Purchaser Class"):

> All persons or entities in the United States and its territories who purchased Pro vigil in any form directly from Cephalon at any time during the period from June 24, 2006 through August 31, 2012 (the "Class"). 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: Rite Aid Corporation, Rite Aid HDQTRS. Corp., JCG (PJC) USA, LLC, Eckerd Corporation, Maxi Drug, Inc. d/b/a Brooks Pharmacy, and CVS Caremark Corporation, Walgreen Co., The Kroger Co., Safeway Inc., American Sales Co. Inc., HEB Grocery Company, LP, Supervalu, Inc., and Giant Eagle, Inc., and their officers, directors, management, employees, subsidiaries, or affiliates in their own right and as assignees from putative Direct Purchaser Class members as more fully described in Paragraph 10 of the Settlement Agreement ("Opt Out Plaintiffs").

3. The Court has appointed King Drug, RDC, Burlington, Smith Drug, Meijer, and SAJ 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).

***2** 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 October 15, 2015 Fairness Hearing, it is hereby determined that all Direct Purchaser Class members are bound by this Order and Final Judgment.

7. In determining that the Settlement should be given final approval, the Court makes the following findings of fact and conclusions of law.

8. The Court has fully considered the *Girsch* factors and the *Prudential* factors and finds that, considered together, the factors overwhelmingly favor approval of the Settlement. *See Girsch v. Jepson,* 521 F. 2d 153 (3d Cir. 1975); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 148 F. 3d 283 (3d Cir. 1998).

9. No class members have opted out of the Settlement or objected to any part of it, and class members who will be collectively entitled to approximately 96% of the monetary recovery here have submitted letters to the Court explicitly and affirmatively supporting the Settlement. Four of the named plaintiffs, outside counsel for the country's three largest pharmaceutical distributors and six other class members, collectively who made approximately 96% of the purchases at issue in this case, wrote to the Court to express their support for the Settlement. These class members are business entities which have participated in other, similar cases and possess the incentive and knowledge to assess the fairness, reasonableness and adequacy of the Settlement. The overwhelming positive reaction of the class, which is a *Girsch* factor that is critical to the Court's fairness analysis, strongly supports the Court's conclusion that the Settlement is fair, reasonable and adequate.

10. The amount of the Settlement, plus interest accrued from August 6, 2015 (the date upon which the Cephalon Defendants deposited such amount into an escrow account held in trust by Morgan Stanley Smith Barney LLC that is earning interest for the benefit of the Direct Purchaser Class) confers a monetary benefit on the Direct Purchaser Class that is substantial.

11. Every issue in this highly complex antitrust case has been vigorously litigated for almost a decade. The litigation between the Direct Purchaser Class and the Cephalon Defendants is in an advanced stage, with all discovery having been completed and the parties having completed dispositive motion briefing, and was poised for trial at the time of the Settlement. Class Counsel thus had an adequate appreciation of the merits of the case.

***3** 12. Class Counsel faced significant risks in taking their claims against the Cephalon Defendants to trial, including the risk that a jury might not find in their favor on any of a number of issues and that any jury verdict could result in a lengthy post-trial motion and appellate process. By contrast, the Settlement provides the Direct Purchaser Class with immediate relief without the delay, risk and uncertainty of continued litigation.

13. The Settlement of this Direct Purchaser Class Action was not the product of collusion between the Direct Purchaser Class Plaintiffs and the Cephalon 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 the Cephalon Defendants, with the assistance of a mediator.

14. 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.

15. 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 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.

16. All claims against the Cephalon Defendants in *King Drug Company of Florence, Inc., etal. v. Cephalon, Inc., etal,* No. 2:06-cv-1797-MSG (E.D. Pa.), 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.

17. 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 the Cephalon Defendants, any past, present, and future[1] 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 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:

***4** (1) the alleged delayed entry of generic versions of Provigil (modafinil);

(2) conduct with respect to the procurement and enforcement of United States Reissue Patent Number 37,516 or United States Patent Number 5,618,845;

(3) any conduct relating to Nuvigil that was alleged in, could fairly be characterized as being alleged in, is related to an allegation made in, or could have been alleged in the Direct Purchaser Class Action, such as intending to convert market demand from Provigil to Nuvigil;

(4) the sale, marketing or distribution of Provigil or its generic equivalent, except as provided for in paragraph 19 herein (the "Released Claims").

[1] For the avoidance of doubt, Ranbaxy Laboratories, Ltd., Ranbaxy Pharmaceuticals, Inc., Mylan Laboratories, Inc., and/or Mylan Pharmaceuticals, Inc. are excluded from the definition of 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 of the Cephalon Defendants released under this paragraph. Nothing in the Settlement Agreement dismisses or releases the claims of Plaintiffs and the Direct Purchaser Class against Ranbaxy Laboratories, Ltd., Ranbaxy Pharmaceuticals, Inc., Mylan Laboratories, Inc., and/or Mylan Pharmaceuticals, Inc.

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 Reissue Patent Number 37,516 or United States Patent Number 5,618,845, 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.

18. 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 18, 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.

***5** 19. The releases set forth in paragraphs 17 and 18 of this Order shall not release claims between Plaintiffs, members of the Direct Purchaser Class, and the Released Parties unrelated to the allegations in *King Drug Company of Florence, Inc., et al. v. Cephalon, Inc., et al,* No. 2:06-cv-1797-MSG (E.D. Pa.), 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 *King Drug Company of Florence, Inc., et al. v. Cephalon, Inc., et al,* No. 2:06-cv-1797-MSG (E.D. Pa.).

20. 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 of 27.5% of the Settlement (including the interest accrued thereon), reimbursement of the reasonable costs and expenses incurred in the prosecution of this action in the amount of $3,581,091.19.00, and incentive awards totaling $500,000.00 collectively for the six named plaintiffs, and such motion has

been on the docket and otherwise publicly available since September 17, 2015.

21. In awarding attorneys' fees, reimbursement of expenses and incentive awards for the class representatives, the Court makes the following findings of fact and conclusions of law.

22. 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).

23. The Court has fully considered the *Gunter* factors and the *Prudential* factors and finds that, considered together, the factors overwhelmingly favor granting Class Counsel's requested attorneys' fee, reimbursement of expenses and incentive awards for the class representatives. *See Gunter v. Ridgewood Energy Corp.*, 223 F. 2d 193 (2d Cir. 2000); *In re Prudential, supra.*

24. No class members have objected to any part of Class Counsel's requested 27.5% fee award, and class members who will be collectively entitled to approximately 96% of the monetary recovery here have submitted letters to the Court explicitly and affirmatively supporting Class Counsel's requested fee. Four of the named plaintiffs, outside counsel for the country's three largest pharmaceutical distributors and six other class members, collectively whom made approximately 96% of the purchases at issue in this case, wrote to the Court to express their support for Class Counsel's requested fee. These class members are business entities which have participated in other, similar cases and possess the incentive and knowledge to object to Class Counsel's requested fee. The overwhelming positive reaction of the class, which is a *Gunter* factor, strongly supports the Court's conclusion to grant Class Counsel's requested fee.

25. As noted above, the Settlement has conferred a monetary benefit on the Direct Purchaser Class that is substantial.

26. The Settlement here is directly attributable to the skill and efforts of Class Counsel, who are highly experienced in prosecuting these types of cases.

27. In prosecuting this action, Class Counsel have expended more than 59,000 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 highly complex case that was vigorously litigated for almost a decade, and their time was expended at significant risk of non-payment.

***6** 28. Class Counsel's requested fee is lower than attorney fee awards in numerous other, Hatch-Waxman cases alleging delayed generic entry, where the courts in such cases have routinely granted a fee award of 33⅓%. Class Counsel's requested fee is also consistent with and/or lower than the fee that would have been negotiated had the case been subject to a private contingent fee agreement.

29. A 27.5% fee award would equate to a lodestar multiplier of approximately 4.12. Such a multiplier is within the range of those frequently awarded in common fund cases.

30. Upon consideration of Class Counsel's petition for fees, costs and expenses, Class Counsel are hereby awarded attorneys' fees totaling $140,800,000.00 (representing 27.5% of the Settlement Fund) and costs and expenses totaling $3,581,091.19, 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 King Drug, RDC, Burlington, and Smith Drug are hereby awarded $100.000.00. and each of Meijer and SAJ are hereby awarded $50.000.00. 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 Final Judgment and Order 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 Final Judgment and Order 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 and/or costs and/or expenses and/or incentive awards from any source other than the Settlement Fund, including the Cephalon Defendants.

***7** 31. 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.

32. 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 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 the Cephalon 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 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 released Party in responding to any action purporting to assert Released Claims.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2015 WL 12843830

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2008 WL 906472
Only the Westlaw citation is currently available.
United States District Court,
M.D. Pennsylvania.

Sarah MARTIN and Jeffrey S. Martin, w/h, and William Heverly, individually and on behalf of all others similarly situated, Plaintiffs,
v.
FOSTER WHEELER ENERGY CORPORATION, Defendant.

No. 3:06-CV-0878.
|
March 31, 2008.

Attorneys and Law Firms

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Kerry A. Dziubek, Nelson Johnson, Arnold & Porter LLP, New York, NY, Lester Sotsky, Arnold & Porter LLP, Washington, DC, Marianne J. Gilmartin, Stevens & Lee, PC, Scranton, PA, for Defendant.

MEMORANDUM

A. RICHARD CAPUTO, District Judge.

***1** Presently before the Court is Plaintiffs' motion for attorneys' fees and costs for Class Counsel. (Doc. 55.) Also before the Court is a motion for attorneys' fees and costs by the Objector Plaintiffs to the Settlement. (Doc. 63.) For the reasons set forth below, the Court will grant in part and deny in part Plaintiffs' motion for Class Counsel's fees and costs. Class Counsel for Plaintiffs will receive thirty percent (30%) of the Settlement fund, or $480,000.00 in attorneys' fees, and $6,116.81 in costs. The Court will grant Plaintiffs' request for an award to the Class Representatives. Sarah Martin will receive $4,000.00, Jeffrey S. Martin will receive $4,000 .00, and William Heverly will receive $2,000.00 as an incentive award from the Fund. (Doc. 55.) Likewise, the Court will deny the Objector Plaintiffs' motion, as the Objector Plaintiffs did not confer a substantial benefit on the class. (Doc. 63.)

BACKGROUND

The present motion requests attorneys' fees and costs for Plaintiffs' Class Counsel. The facts of the case were previously discussed in detail in this Court's Order of December 14, 2007. (Doc. 62.) Therefore, only the facts relevant to this motion will be discussed here. The Class Members sued based upon water problems they believed were traceable to amounts of trichloroethylene ("TCE") caused by Defendant in the Class Members' private wells. The parties conducted settlement negotiations which led to a Settlement presented to the Court on April 16, 2007 as a Joint Motion for Preliminary Approval of Class Action Settlement. (Doc. 41.) The Settlement included an agreement by Foster Wheeler to pay one million, six hundred dollars ($1.6 million) to the class for settling and releasing their claims. (Doc. 41.) The Settlement also included a forty-thousand dollar ($40,000) Alleged Water-Related Fund for purposes of funding solutions for Class Members with specific water related problems traceable to the abandonment of the Class Members' wells. (Doc. 41.) The Court approved this Joint Motion on April 19, 2007. (Doc. 43.) Objections to the Settlement were filed by a group of Objector Plaintiffs on July 23, 2007. (Doc. 49.) A Fairness Hearing was held on August 7, 2007. (Doc. 58.) The Settlement was approved by the Court on December 14, 2007. (Doc. 62.)

On July 31, 2007, Plaintiffs made this motion for attorneys' fees and costs for Class Counsel, requesting a fee of thirty-three and one-third percent (33⅓%) of the Settlement Fund. (Doc. 55.) Class Counsel also requested a division of the ten-thousand dollar ($10,000) award to the Class Representatives. (Doc. 55.) The Objector Plaintiffs filed a motion for attorneys' fees and costs on December 20, 2007 in the amount of $36,510.47. (Doc. 63.) These motions are fully briefed and ripe for disposition.

DISCUSSION

I. Motion for Attorneys' Fees by Plaintiffs for Class Counsel

"There are two basic methods for calculating attorneys' fees-the percentage-of-recovery method and the lodestar method."

In re Prudential Ins. America Sales Practice Litig. Agent Actions, 148 F.3d 283, 333 (3d Cir.1998). The percentage-of-recovery method is generally used in cases involving a common fund, and allows courts to award attorneys' fees from the fund based upon a percentage of the plaintiffs' recovery. *Id.* (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.,* 55 F.3d 768, 821 (3d Cir.1995)). In contrast, the lodestar method is more often used in statutory fee-shifting cases. *Id.* (citing *In re General Motors,* 55 F.3d at 821.) The lodestar method may also be used when "the nature of the recovery does not allow the determination of the settlement's value necessary for application of the percentage-of-recovery method." *Id.* Although each method is generally applied to certain types of cases, it is recommended that courts use a second method of fee calculation to cross-check the fee calculation. *Id.*

***2** In this case, the percentage-of-recovery method is the appropriate vehicle for calculating attorneys' fees in light of the common settlement fund. *Id.* at 333-34; *Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190, 195 n. 1 (3d Cir.2000); *Brytus v. Spang & Co.,* 203 F.3d 238, 243 (3d Cir.2000); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.,* 55 F.3d 768, 821 (3d Cir.1995).

A. Percentage-of-Recovery

In determining the appropriateness of the fee award in a common fund class action, the Court, in determining the percentage-of-recovery, should consider a list of non-exclusive factors: (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. *Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190, 195 n. 1 (3d Cir.2000) (citing *In re Prudential,* 148 F.3d at 336-40). "These factors need not be applied in any formulaic way. Since each case is unique, certain factors may outweigh others." *In re Rent-Way Sec. Litig.,* 305 F.Supp.2d 491, 513 (W.D.Pa.2003). The Court will consider each of these factors in turn.

1. Size of the Fund and Number of Persons Benefitted

The size of the Settlement Fund in this case is one-million, six-hundred and forty thousand dollars ($1.64 million). However, Class Counsel does not seek a fee from the forty-thousand dollar ($40,000.00) Alleged Water-Related Fund. Generally, the larger the size of the settlement fund, the smaller the percentage-of-recovery award is for class counsel. *In re Prudential Ins.,* 148 F.3d at 339. In this case, the size of the class and the fund is not particularly large, and therefore there is little danger for an inflated fee based upon a very large class or recovery. *See Erie County Retirees Ass'n v. County of Erie, Pennsylvania,* 192 F.Supp.2d 369, 379 (W.D.Pa.2002).

As noted in *Erie,* as the size of the settlement fund decreases, so does the size of each class member's recovery. In this case, Category 1 members would receive approximately four percent (4%) of their assessed property value, an average of $4,800 per parcel, and an additional $20,200 per designated parcel for damages other than diminution in property value. Category 2 members would receive approximately four percent (4%) of their assessed property value, an average of $4,800 per parcel. Category 3 members would receive approximately two percent (2%) of their assessed property value, an average of $3,000 per parcel.

Here, a recovery of attorneys' fees of thirty-three and one third percent (33⅓%) would greatly decrease the recovery of the Class Members. Such a recovery would grant the Class Counsel over one half-million dollars in fees. Such a recovery would be inordinately large, given the recovery of the class and the early settlement of this case.

***3** Overall, this factor weighs heavily against Class Counsel's petition for an attorneys' fee of thirty-three and one-third percent (33⅓%), as the recovery would be unduly large given the size of the Fund.

2. Substantial Objections

The Court previously addressed the reaction of the Class to the settlement in its December 14, 2007 Order. (Doc. 62.) At that time, it was noted that out of the approximately one-hundred and forty-seven (147) parcels that fall within the affected area, twenty (20) have indicated that they wish to be excluded from the Settlement. (Doc. 62.) Therefore, approximately 85% has opted in to the settlement, or otherwise expressed no issues with the settlement. Of the 85% of the settlement class, four (4) class members objected to the property valuation, and the other objectors were opposed to the settlement based on a variety of other reasons. (Doc. 62.)

The Court-appointed Class Administrator, A.B. Data, Ltd. mailed Notices to class members. (Verkhovskaya Aff. ¶¶ 8-12, Doc. 61 Ex. B.) A.B. Data also provided website and

telephone services to respond to Class Member Inquriies. (Verkhovskaya Aff. ¶¶ 13-16, Doc. 61 Ex. B.) The Notices advised class members that Class Counsel would seek attorneys' fees of forty percent (40%) and reimbursement for costs, as well as an award for the Class Representatives. (Doc. 61 Ex. C.) There have been no objections on the basis of this notice.

At the Fairness Hearing, Mr. David A. Garrison, Esq., on behalf of the Objecting Plaintiffs, stated that the Objecting Plaintiffs objected to the fee petition filed by Class Counsel. (Fairness Hr'g Tr. 255-57, Aug. 7, 2007, Doc. 71.) However, the Court specifically told the Objecting Plaintiffs that "I'll hear you making an objection. I'm not going to count this as an objection unless you file a paper because there's-that triggers a briefing requirement under the local rules." (Fairness Hr'g Tr. 257, Aug. 7, 2007, Doc. 71.) Mr. Garrison stated that he was authorized to object to the fee petition at the Fairness Hearing. (Fairness Hr'g Tr. 257, Aug. 7, 2007, Doc. 71.) The Court responded that "[A]uthorized to object to it but maybe not file a brief is going to fail for the lack of a brief. So, file it. If you're going to file objections to the fee petition, they must be in writing, the objections, and you must follow the local rules as far as the briefing schedule. Let me make that clear." (Fairness Hr'g Tr. 257, Aug. 7, 2007, Doc. 71.) The Court noted a third time that "[I]t's of no consequence until you file a document, objection and then file a brief." (Fairness Hr'g Tr. 257, Aug. 7, 2007, Doc. 71.) The Court was abundantly clear that to file objections to the fee petition, the Objector Plaintiffs would be required to file a brief. However, no objections or brief were filed by the Objector Plaintiffs, so the Court notes that they no longer object to the fee petition.

As there have been no substantial objections to the attorneys' fees by Class Counsel, this factor weighs in favor of granting Class Counsel's petition for attorneys' fees.

3. Skill and Efficiency of Attorneys

***4** The skill and efficiency of the attorneys 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 the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.' " *In re Ikon Office Solutions, Inc., Sec. Litig.,* 194 F.R.D. 166, 194 (E.D.Pa.2000) (quoting *In re Computron Software, Inc.,* 6 F.Supp.2d 313, 323 (D.N.J.1998)). Class Counsel has submitted the affidavit of Mr. Marrone detailing the experience and qualifications of the attorneys working on behalf of the Class Members. (Marrone Aff., Doc. 61 Ex. A.) The attorneys are well-qualified in the field of complex litigation matters, including class action litigation. The attorneys for the Class Members also worked diligently to reach a settlement early in the litigation process, therefore avoiding high costs. Therefore, this factor also weighs in favor of approving the fee request.

4. Complexity and Duration of Litigation

The complexity and duration of this litigation weigh in favor of granting Class Counsel's request for attorneys' fees of thirty-three and one-third percent (33⅓ %). The Complaint was filed on April 26, 2006. (Doc.1.) The Joint Motion for Preliminary Approval of the Class Action was filed approximately one (1) year later, on April 16, 2007. (Doc. 41.) As noted in the Court's Order approving Settlement, the litigation is complex, expensive, and likely to last a long amount of time. (Doc. 62.) This is due to the nature of pollution from TCE. Furthermore, there are complicated issues of fact and science concerning the source of TCE and its impact on the various Class Members. Such a claim would require extensive discovery and scientific evidence, requiring the Plaintiffs to prove that the Defendant was the source of the TCE, that Plaintiffs' property was decreased in value, among other liability concerns. The Court further noted in its December 14, 2007 Order that complicated issues of medical monitoring exist, which is an unsettled area of the law. (Doc. 62.) Due to the complexity and potential duration of the case, this factor weighs in favor of the Class Counsel.

5. Risk of Nonpayment

The fifth factor considers "the risk of nonpayment" by the defendant. *Gunter,* 223 F.3d at 195 n. 1. Such a risk is high when a defendant is near insolvency. *Id.* at 199. Furthermore, the risk of nonpayment is "acute" where a defendant lacks "significant unencumbered hard assets against which plaintiffs could levy had a judgment been obtained." *Cullen,* 197 F.R.D. at 150. The chance of bankruptcy or nonpayment by Foster Wheeler is small, and this Court previously held that "[t]here is no doubt Foster Wheeler could withstand a greater judgment." (Doc. 62.) Therefore, the risk of nonpayment is quite low in that regard.

However, Class Counsel undertook this action on a contingent fee basis. Therefore, they "assum[ed] a substantial risk that they might not be compensated for their efforts." *In re Datatec Sys., Inc. Sec. Litig.,* No. 04-CV-525 (GEB), 2007 WL 4225828, at *7 (D.N.J. Nov.28, 2007). The *Datatec* court noted that " '[c]ounsel's contingent fee risk is an

important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable.' " *Id.* (quoting *In re Prudential-Bache Energy Income P'ship Sec. Litig.,* No. 888, 1994 WL 202394, at *16 (E.D.La. May 18, 1994)). Therefore, because Class Counsel took this case on a contingency basis, the risk of nonpayment favors the granting of the petition to Class Counsel.

6. Amount of Time Devoted to Case by Plaintiffs' Counsel

***5** As discussed below in the calculation of the Lodestar, Plaintiffs' Class Counsel billed a total of five-hundred and ninety-nine (599) hours for work done by partners, associates, and paralegals. As stated in the Court's December 14, 2007 Order, there has been little discovery from what the Court can determine. (Doc. 62.) However, there has been an extensive amount of investigation performed by Class Counsel. As stated in Mr. Marrone's Affidavit, the time spent on the case included initial case fact research and investigation; initial consultation with experts; extensive document review and analysis; research and drafting the Complaint; research and drafting the Motion to Amend Complaint; responding to defendant's opposition to the Motion to Amend Complaint and conducting argument on the Motion before this Court; inquiring with the U.S. Environmental Protection Agency and with the Pennsylvania Department of Environmental Protection on behalf of the Class; attending "town hall" meetings with Class Members; responding to inquiries from Class Members with requests and other advocacy with defendant, the U.S. Environmental Protection Agency, and the Pennsylvania Department of Environmental Protection; and negotiating and implementing the settlement of this action. (Marrone Aff. Doc 61 Ex. A ¶ 2.) The time that Class Counsel devoted to this case represents a substantial commitment to this litigation and its Settlement, and this factor weighs in favor of an award of thirty percent (30%).

7. Awards in Similar Cases

The Settlement Fund in this case amounts to one-million, six-hundred and forty thousand dollars ($1.64 million). District courts within the Third Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses, in settlements of this size. *In re Ravisent Tech., Inc. Sec. Litig.,* No. Civ. A. 00-CV-1014, 2005 WL 906361, at *11 (E.D.Pa. Apr.18, 2005) (citing *In re CareSciences, Inc. Sec. Litig.,* Civ. A. No. 01-5266 (E.D.Pa. Oct. 29, 2004) (awarding one-third recovery of $3.3 million settlement fund, plus expenses); *In re Penn Treaty Am. Corp.,* Civ. A. No. 01-1896 (E.D.Pa. Feb.5, 2004) (awarding 30% of $2.3 million settlement fund); *In re Corel Corp. Sec. Litig.,* 293 F.Supp.2d 484, 495-98 (E.D.Pa.2003) (awarding one-third of $7 million settlement fund, plus expenses); *Erie Forge and Steel, Inc. v. Cyprus Minerals Co.,* Civ. Action No. 94-404 (W.D.Pa.1996) (33.3% fee from $3.6 million recovery)). *See also Sala v. Nat'l R .R. Passenger Corp.,* 128 F.R.D. 210 (E.D.Pa.1989) (awarding 33% of the first million dollars of settlement, plus 30% of the remainder between one and two million dollars of a $1.79 million fund). Although an award of thirty percent (30%) to thirty-five (35%) is warranted in a case this size, the smaller cases of less than $2.5 million generally award closer to thirty percent (30%). Therefore, an award of thirty percent (30%) is warranted in this type of case, where the recovery by the Class is $1.64 million.

8. Other Factors

***6** In *Prudential,* the Third Circuit Court of Appeals considered three (3) other factors that may be relevant to consider in an attorneys' fees case. First, the Court considered the value of benefits to class members attributable to Class Counsel as compared to other groups, such as government agencies conducting investigations. *In re Prudential,* 148 F.3d at 338. Second, the court considered 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. *Id.* at 340. Third, the court looked for "innovative" terms of settlement. *Id.* at 339. The *Prudential* court held that attorneys' fees in class action cases requires the district court to consider "what class counsel actually did and how it benefitted the class." *Id.* at 342.

To the extent these factors are applicable to this case, they also weigh in favor of a thirty percent (30 %) recovery for Class Counsel. In this case, the Class Counsel negotiated a contingent fee agreement with Class Representative Sarah Martin for forty percent (40%), which is larger than the percent fee requested. Furthermore, the Settlement terms have created an Alleged Water-Related Fund for purposes of funding solutions for class members with specific water related problems traceable to the abandonment of the class members' wells. Such a term is "innovative," as mentioned in *Prudential.* Thus, the *Prudential* factors further weigh in favor of granting Class Counsel an award of attorneys' fees.

9. The Award

After the balancing of the *Gunter* and *Prudential* factors, the Court finds that Plaintiffs' counsel is entitled to attorneys'

fees. However, the Court will award thirty percent (30%), rather than the requested thirty-three and one-third percent (33⅓%). This decision is largely based upon the size of the award ($1.64 million for all class members). Furthermore, as discussed previously, cases of this size generally award thirty percent (30%) recovery in fees, because the recovery for the Class Members is greatly affected by a large percentage recovery of attorneys' fees. Because of the modest size of the recovery for the Class Members, a small change in percentage recovery creates a large difference in the amount received by each Class Member. As the first *Gunter* factor, the size of the award, has great weight in the recovery of this size, the Court will reduce the fees to thirty percent (30%), or $480,000.00.

B. Lodestar Methodology

In addition to using the percentage-of-recovery calculation, the Third Circuit Court of Appeals has suggested that it is "sensible" for a district court to cross-check the percentage-of-recovery calculation with a lodestar calculation. *In re Prudential,* 148 F.3d at 333. In calculating the lodestar, the "initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on litigation times a reasonable hourly rate." *Blum v. Stetson,* 465 U.S. 886, 888, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

***7** In calculating the reasonable rate, the Court looks to the prevailing market rates in the relevant community. *Loughner v. Univ. of Pittsburgh,* 260 F.3d 173, 180 (3d Cir.2001). The Court should considered the experience and skill of the prevailing party's attorney, and compare the rates to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Maldonado v. Houstoun,* 256 F.3d 181, 184 (3d Cir.2001). The prevailing party bears the burden of demonstrating that the requested hourly rates are reasonable. *Id.*

The Court must also determine whether the number of hours spent on the litigation was a reasonable number of hours. The Court "should review the time charged, decide whether the hours claimed were reasonably expended for each for the particular purposes described, and then exclude those that are 'excessive, redundant, or otherwise unnecessary.' " *Public Interest Research Group of N.J., Inc. v. Windall,* 51 F.3d 1179, 1188 (3d Cir.1995) (citations omitted). Thus, a trial court will "exclude from this initial fee calculation hours that were not reasonably expended on the litigation." *Hensley v. Eckerhart,* 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Thus, using the lodestar methodology, the Court can cross-check the percentage-of-recovery method for reasonableness.

In Thomas More Marrone's Affidavit in support of the application for attorneys' fees, Mr. Marrone indicated the hourly rate and number of hours worked for each partner, associate, and paralegal for Feldman Shepherd Wohlgelernter Tanner & Weinstock. (Marrone Aff. Doc 61. Ex. A-1.) Mr. Alan M. Feldman, a partner, billed one and one-half (1.5) hours at a rate of five-hundred and fifty dollars ($550.00) per hour for a total of eight-hundred and twenty-five dollars ($825.00). Mr. Ezra Wohlgelernter, also a partner, billed six and nine-tenths (6.9) hours, at a rate of five-hundred dollars ($500.00) per hour, for a total of three-thousand, four-hundred and fifty dollars ($3,450.00). Mr. Danile S. Weinstock, also a partner, billed fifty-six and one-tenth hours (56.1), at a rate of five-hundred dollars per hour, for a total of twenty-eight thousand and fifty dollars ($28,050.00). Mr. Marrone himself billed one-hundred and fifty-three and eight-tenths hours (153.8) at a rate of five-hundred dollars ($500.00) per hour, for a total of seventy-six thousand, nine-hundred dollars ($76,900.00). Mr. Thomas W. Grammar, an associate, billed three-hundred twelve and four-tenths hours (312.4) at a rate of three-hundred and thirty-five dollars ($335.00) for a total of one-hundred and four thousand, six-hundred and fifty-four dollars ($104,654.00). Finally, two paralegals, Mr. Robert S. Hrouda and Ms. Wanda Brown, billed fifty-seven (57) and eleven and three-tenths (11.3) hours respectively, each at a rate of one-hundred and ten dollars ($110.00) per hour. Mr. Hrouda billed a total of six-thousand, two-hundred and seventy dollars ($6,270.00), and Ms. Brown billed a total of one-thousand, two-hundred and forty-three dollars ($1,243.00). The work amounted to a total of five-hundred and ninety-nine (599) hours, for a bill of two-hundred, twenty-one thousand, three-hundred and ninety-two dollars ($221,392.00).

***8** Mr. Marrone's affidavit also includes the qualifications and experience of each attorney who worked on this matter. Based upon the qualifications and experience of these attorneys in complex litigation and class action work, the Court finds that the rates for the partners and associates, which range from three-hundred and thirty-five dollars ($335.00) per hour to five-hundred and fifty ($550.00) per hour is reasonable for a Philadelphia law firm. Furthermore, the number of hours spent by Class Counsel on this litigation is reasonable, considering the early Settlement of the case. Therefore, the lodestar is equal to two-hundred,

twenty-one thousand, three-hundred and ninety-two dollars ($221,392.00).

The Court must also consider the lodestar multiple in its cross-check of the attorneys' fees. The lodestar multiplier is calculated by dividing the attorneys' fees that Class Counsel seeks, by the total number of hours Class Counsel expended on litigation multiplied by Class Counsel's hourly rates. *Cullen,* 197 F.R.D. at 151 n. 6. Lodestar multiples of less than four (4) are well within the range awarded by district courts in the Third Circuit. *See In re Prudential,* 148 F.3d at 341 (holding that lodestar "[m]ultiples ranging from one to four are frequently awarded in common fund cases where the lodestar method is applied"). In this case, the Court's award of thirty percent (30%) Class creates a lodestar multiple of 2.17[1], which is within the acceptable range awarded by district courts in the Third Circuit. Therefore, the cross-check also supports the award of thirty percent (30%) of the Settlement fund. As the *Gunter* factors and Lodestar cross-check weigh in favor of granting the Class Counsel's petition for fees, the Court will award thirty percent (30%) of the Settlement fund, or $480,000.00.

1 In the Court's calculation, 30 % of $1.6 million is equal to $480,000.00. $480,000.00 divided by $221,392.00 equals 2.17, which is the lodestar multiplier.

C. Costs

Class Counsel has also requested reimbursement of litigation costs in the amount of $6,116.81. These expenses include, but are not limited to copying, medical records, expert witnesses, transcripts, on-line research, travel, fees to the Environmental Protection Agency, postage and delivery services. A large percentage of these litigation costs are attributable to copying and transportation. These expenses are both proper and reasonable. Therefore, Class Counsel will be awarded reimbursement of these expenses from the Settlement Fund.

II. Award to the Class Representatives

The Class Representatives seek an incentive award of ten-thousand dollars ($10,000). Class Counsel requests that Mr. Heverly be awarded status as a Class Representative for purpose of the incentive award, as he was added as a Class Representative after the Martins became Objectors to the Settlement.

"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.' " *Cullen v. Whitman Med. Corp.,* 197 F.R.D. 136, 145 (E.D.Pa.2000) (quoting *In re S. Ohio Corr. Facility,* 175 F.R.D. 270, 272 (S.D.Ohio 1997)).

***9** Additionally, the Notice mailed to Class Members informed them of the requested incentive awards, and no one has objected. *See Mehling v. New York Life Ins. Co.,* Civ. A. No. 99-5417, 2008 WL 597725, at *11 (E.D.Pa. Mar.4, 2008) (noting that there had been no objections to the Class Representatives' incentive award).

Mr. Heverly was added as a Class Representative after the Martins became Objector Plaintiffs. Since that time, Mr. Heverly was involved in several ways, such as speaking to Class Counsel on the telephone regarding concerns of the Class prior to the need for another Class Representative. He also talked over the Settlement with Class Counsel, spent time preparing with the hearing with Counsel, and took a day to attend the hearing, ready to testify if necessary. For his work as an additional Class Representative, Mr. Heverly will be awarded $2,000.00. The remainder will be divided between Sarah and Jeffrey Martin, for their work as Class Representatives from the inception of the litigation. Therefore, Plaintiffs' motion for an award to the class representatives will be granted so that Sarah Martin will receive $4,000.00, Jeffrey S. Martin will receive $4,000.00, and William Heverly will receive $2,000.00 as an incentive award from the Fund. (Doc. 55.)

III. Motion for Attorneys' Fees by Objector Plaintiffs

An objector to a class action settlement is generally not entitled to an award of attorneys' fees. *In re Rent-Way Sec. Litig.,* 305 F.Supp.2d 491, 520 (W.D.Pa.2003). However, objectors may recover " 'attorneys' fees and expenses if the settlement was improved as a result of their efforts.' " *Id.* (quoting *Spark v. MBNA Corp.,* 289 F.Supp.2d 510, 513 (D.Del.2003)). "Absent a showing that the objector substantially enhanced the benefits to the class under the settlement, the objector is not entitled to a fee." *Id.*

In this case, counsel for Objector Plaintiffs submitted Objections prior to the Fairness Hearing on July 23, 2007. (Doc. 49 .) The Objections outlined nine (9) potential issues regarding the proposed Settlement. Objector Plaintiffs argue that counsel is entitled to attorneys' fees because they raised a number of issues in their Objections which contributed

to the Court's analysis of the Settlement, and therefore the Plaintiffs were benefitted. Objector Plaintiffs specifically note that they objected to the language in the release of liability, which noted that the released claims shall not include claims arising "solely" due to result of exposure to trichloroethylene ("TCE"). The Objector Plaintiffs also raised concerns regarding medical monitoring.

Other district courts have held that attorneys' fees for objectors does not require that an economic benefit to the class occur, or even that the objection influenced the court's decision. *In re AOL Time Warner ERISA Litig.,* No. 02 CV 8853(SWK), 2007 WL 4225486, *2 (S.D.N.Y. Nov.28, 2007). The district court for the Southern District of New York noted that "some courts have rewarded objectors' counsel for advancing non-frivolous arguments and 'transform[ing] the settlement hearing into a truly adversarial proceeding.' " *Id.* (quoting *Frankenstein v. McCrory Corp.,* 425 F.Supp. 762, 767 (S.D.N.Y.1977)).

***10** Although the Objector Plaintiffs did contribute to the Fairness Hearing through their Objections, the Objector Plaintiffs have not shown that they have "substantially enhanced the benefits to the class." The district courts in the Third Circuit have not adopted a view like that of the Southern District of New York in considering what constitutes a "benefit" to the class. *See In re Rent-Way,* 305 F.Supp. at 520 (finding that the objectors were not entitled to attorneys' fees when lead counsel's reduction of attorneys' fees were not premised on their objections); *Spark,* 289 F.Supp.2d at 513. The *Sparks* court noted that objectors attorneys' fees are unusual. "[C]ases in which objectors are awarded attorney's fees are few and far between. In such cases, the objectors expended large amounts of time, money and resources, aided the court considerably in its consideration of proposed settlement and fee awards, and the class members were ultimately benefitted as a result of the objectors' efforts. *Spark,* 289 F.Supp.2d at 514-15 (citing *In re Harnischfeger Indus., Inc. Sec. Litig.,* 212 F.R.D. 400, 413-15 (E.D.Wis.2002), *In re Horizon/CMS Healthcare Corp. Sec. Litig.,* 3 F.Supp.2d 1208, 1214 (D.N.M.1998)). In *Sparks,* the court noted that the objector had done nothing more than propose an alternative fee scheme. *Id.* In this case, the objectors provided several objections, but none of these objections were adopted by the Court. These objections do not provide the substantial benefit required to overcome the presumption that they are not entitled to attorneys' fees. *Id.* Therefore, the Court will deny Objector Plaintiffs' motion for attorneys' fees and costs. (Doc. 63.)

CONCLUSION

For the reasons stated above, the Plaintiffs' motion for attorneys' fees and costs for class counsel will be granted in part and denied in part. (Doc. 55.) Class Counsel for Plaintiffs will receive $480,000.00 in attorneys' fees and $6,116.81 in costs. Plaintiffs' motion for an award to the Class Representatives will be granted so that Sarah Martin will receive $4,000.00, Jeffrey S. Martin will receive $4,000.00, and William Heverly will receive $2,000.00 as an incentive award from the Fund. (Doc. 55.) The motion for attorneys' fees and costs for the Objector Plaintiffs will be denied. (Doc. 63.)

An appropriate Order follows.

ORDER

NOW, this *31st* day of March, 2008, **IT IS HEREBY ORDERED** that Plaintiffs' motion for attorneys' fees and costs for Class Counsel (Doc. 55) is **GRANTED IN PART** and **DENIED IN PART** as follows:

(1) Class Counsel for Plaintiffs are granted a fee of 30% from the Settlement Fund, excluding the Alleged Water-Related Fund, which is calculated as $480,000.00 from the Settlement Fund.

(2) Class Counsel for Plaintiffs are granted $6,116.81 from the Settlement Fund for costs.

The motion to grant an award to the Class Representatives (Doc. 55) is **GRANTED** as follows:

***11** (1) Sarah Martin receives $4,000.00 as an incentive award from the Fund.

(2) Jeffrey S. Martin receives $4,000.00 as an incentive award from the Fund.

(3) William Heverly receives $2,000.00 as an incentive award from the Fund.

The motion for attorneys' fees and costs by the Objector Plaintiffs (Doc. 63) is **DENIED.**

2008 WL 906472

All Citations

Not Reported in F.Supp.2d, 2008 WL 906472

End of Document

2014 WL 12538188
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

MOORE, et al., Plaintiffs,

v.

GMAC MORTGAGE, et al., Defendants.

Civ. No. 07-4296
|
Signed September 18, 2014
|
Filed 09/19/2014

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ORDER

Paul S. Diamond, District Judge

***1** Lead Class Counsel have petitioned for an award of attorneys' fees, reimbursement of litigation costs, and case contribution awards for Named Plaintiffs. (Doc No. 291.) In a separate Order of this date, I have granted Plaintiffs' Motion to approve Settlement and to certify the Class for settlement purposes. Because I find the requested attorneys' fees, costs, and case contribution awards to be appropriate, fair, and reasonable, I will grant Plaintiffs' unopposed request. Class Counsel have requested $1,875,000.00 in attorneys' fees and reimbursement of $454,097.14 in litigation costs, for a total award of $2,329,097.14. In addition, each Named Plaintiff requests a case contribution award of $5,000.00. These monies are to be paid from the Settlement Fund and in accordance with the terms of the Settlement Agreement.

Attorneys' Fees

"[A] thorough judicial review of fee applications is required in all class action settlements." In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 819 (3d Cir. 1995). This is especially true where, as here, the Parties negotiate class relief and attorneys' fees simultaneously, creating a potential conflict of interest. In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 333 (3d Cir. 1998) (quoting Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991)) ("When parties are negotiating settlements, the court must always be mindful of the danger that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees.").

In evaluating a proposed award of attorneys' fees, I must consider the following factors:

> (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.

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) (citing Prudential, 148 F.3d at 336-40). I must also consider

> (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 Prudential, 148 F.3d at 338-40).

Courts calculate fee awards either using the lodestar approach —multiplying hours worked on the case by a reasonable hourly billing rate—or by awarding a percentage of the total amount recovered in settlement. Diet Drugs, 582 F.3d at 540. In common fund cases, the Third Circuit favors the percentage-of-recovery method over the lodestar approach. Id.; see also G.M. Trucks, 55 F.3d at 821 ("Courts use the percentage of recovery method in common fund cases on the theory that the class would be unjustly enriched if it did not compensate the counsel responsible for generating the valuable fund bestowed on the class.").

***2** The Third Circuit approves the use of the lodestar method, however, as a "cross-check of the court's primary fee calculation using the percentage-of-recovery methodology." Prudential, 148 F.3d at 342. Because the lodestar calculation serves only as a verification of the primary calculation, it "need entail neither mathematical precision nor bean-counting." In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 305-6 (3d Cir. 2005) (approving as "proper" an "abridged lodestar analysis" as cross-check for percentage-of-recovery calculation); see also O'Keefe v. Mercedes-Benz USA, LLC, 214 F.R.D. 266, 311 (E.D. Pa. 2003) (lodestar cross-check "only meant to be a cursory overview"). The lodestar cross-check is "suggested," but not mandatory. In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 735 (3d Cir. 2001). "The lodestar crosscheck, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method." In re AT&T Corp., 455 F.3d 160, 164 (3d Cir. 2006).

I find that the Gunter/Prudential factors weigh in favor of approving the Petition. In light of the risks and difficulties of continued litigation (as I have documented in today's companion Order), the negotiated Settlement Fund of $6,250,000 represents a substantial benefit to the 122,963 Class Members. There have been no objections to the proposed fee award. Class Counsel are experienced in both class action and RESPA litigation, as evidenced by the Declaration and Exhibits in support of the fee request. (Doc. No. 292.) Litigation in this matter has been protracted and complex, spanning more than seven years. Class Counsel's contingent fee depended on Plaintiffs prevailing in this matter, which was by no means certain. Class Counsel have devoted 7,423 hours to litigating this case over the past seven years, participating in several mediation sessions, filing numerous briefs, and conducting discovery. The fees requested, which constitute 30% of the Settlement Fund, resemble awards in similar cases. See Order at 5-6, Liguori v. Wells Fargo & Co., No. 08-479 (E.D. Pa. Feb. 8, 2013) (approving 30% fee award); Alexander v. Washington Mut., Inc., Civ. No. 07-4426, 2012 WL 6021103, at *3 (E.D. Pa. Dec. 4, 2012) (approving fee award of 30% and collecting cases approving same). Class Counsel investigated, litigated, and negotiated the Settlement without the aid of any other group, such as a government agency. In re Certainteed Fiber Cement Siding Litig., MDL 2270, 2014 WL 1096030, at *26 (E.D. Pa. Mar. 20, 2014). The requested fee award is also consistent with a privately negotiated fee award. See id. (fee arrangements in private contingent fee cases range from 30% to 40%). Finally, the Settlement provides for an innovative distribution system, which will proceed in three phases. Class Counsel urge that this system will increase efficiency and ensure that all Participating Class Members receive their portion of the recovery.

A lodestar cross-check also supports the reasonableness of this fee award. The lodestar equals "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Class Counsel have calculated a lodestar of $3,458,963.10, resulting in a multiplier of .54. (Doc. No. 291 at 32-33.) The number of hours billed (7,423) is conservative: Class Counsel has not billed for work done on behalf of the Class on a matter in the Northern District of California (which was voluntarily dismissed and refiled in this Court), and will not bill for the future work in implementing the Settlement. (Id. at 25 n.16, 34.)

"The value of an attorney's time generally is reflected in his normal billing rate." Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973). Because a "reasonable hourly rate" reflects an attorney's experience and expertise, the rates for individual attorneys vary. See O'Keefe, 214 F.R.D. at 310 (applying blended hourly rates in lodestar calculation). The hourly rates used in the lodestar calculation reasonably range from $325 per hour for an associate to $860 per hour for an experienced bankruptcy partner. (Doc. No. 292, Exs. 11-16.) The .54 multiplier is well within the range of multipliers approved as reasonable in this Circuit. See, e.g., In re Cendant Corp., 243 F.3d at 742 (3d Cir. 2001) (suggesting a lodestar multiplier of 3 "is the appropriate ceiling for a fee award").

Expenses

***3** Class Counsel are also entitled to recover for litigation expenses. Alexander, 2012 WL 6021103, at *5 (quoting In re Cendant Corp. Derivative Action Litig., 232 F. Supp. 2d 327, 343 (D.N.J. 2002)) ("[C]ounsel 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."). Class Counsel have properly documented these costs and no objections have been filed. (Doc. No. 292, Exs. 12-16.)

Case Contribution Awards

Named Plaintiffs Moore, Holden, and McMillon assisted Class Counsel by responding to document requests and consulting with Counsel about developments in the case. Additionally, the $5,000 request is consistent with case contribution awards in similar cases. Order at 6, Liguori, No. 08-479 ($7,500 award in RESPA case); Order Awarding Attorneys' Fees, Litigation Costs, and Case Contribution Awards at 2, Alston v. Countrywide Fin. Corp., No. 07-3508 (E.D. Pa. July 29, 2011) ($7,500 award in RESPA case); Briggs v. Hartford Fin. Servs. Grp., Inc., No. 07-5190, 2009 WL 2370061, at *10 (E.D. Pa. July 31, 2009) (unopposed $10,000 award in an insurance class action was "a modest sum relative to the $2.35 million overall settlement fund").

AND NOW, this 18th day of September, 2014, on consideration of Plaintiffs' Unopposed Motion for an Award of Attorneys' Fees, Litigation Costs and Case Contribution Awards for the Named Plaintiffs (Doc. No. 291), and having found the Settlement of this matter to be fair, reasonable, and adequate, it is hereby **ORDERED** as follows:

1. This Court has jurisdiction over the subject matter of this application and all matters relating thereto, including all Class Members.

2. All of the capitalized terms used herein shall have the same meanings as set forth in the Settlement Agreement executed on December 10, 2013.

3. Plaintiffs' Counsel are awarded attorney fees in the amount of $1,875,000.00 and reimbursement of litigation expenses in the sum of $454,097.14, to be paid from the Settlement Fund. No other fees, costs or expenses may be awarded to Plaintiffs' Counsel in connection with the Settlement. The Attorneys' Fees and Expenses shall be paid to Plaintiffs' Counsel in accordance with the terms of the Agreement.

4. The Named Plaintiffs are hereby awarded $5000.00 each as a Case Contribution Award, as defined in the Agreement, in recognition of their contributions to this Action.

AND IT IS SO ORDERED.

September 18, 2014.

All Citations

Not Reported in Fed. Supp., 2014 WL 12538188

End of Document

2016 WL 3457218
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

Warren H. SCHULER, individually and on behalf of other persons similarly situated, Plaintiff,

v.

The MEDICINES COMPANY, et al., Defendant.

Civil Action No.: 14-1149 (CCC)
|
Signed June 23, 2016
|
Filed 06/24/2016

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Brian J. McMahon, J. Brugh Lower, Gibbons, PC, Newark, NJ, for Defendant.

OPINION

CECCHI, District Judge

I. INTRODUCTION

***1** Plaintiff Warren H. Schuler ("Lead Plaintiff") brings this action on behalf of himself and all other similarly situated individuals (collectively, "Plaintiffs") against Defendants the Medicines Company ("MDCO"), Clive A. Meanwell, Paul M. Antinori, and Glenn P. Sblendorio (collectively, the "Individual Defendants" and, together with MDCO, "Defendants") for violation of federal securities laws. ECF No. 1. On February 25, 2016, the Court granted preliminary certification of the settlement class and collective action and preliminarily approved the settlement. ECF No. 59. Presently before the Court are Plaintiffs' unopposed motions for final approval of the settlement and for an award of attorneys' fees. ECF Nos. 65, 66. The Court held a final fairness hearing on June 7, 2016. ECF No. 69. For the reasons that follow, the Court grants final certification of the settlement class and collective action, approves the settlement agreement, awards litigation costs and expenses, and dismisses this action with prejudice.

II. BACKGROUND

A. Summary of Factual Allegations

Lead Plaintiff brings this action on behalf of investors who purchased the securities of MDCO between January 8, 2013 and February 12, 2014 (the "Class Period"). See Corrected First Amended Class Action Complaint ("Compl." or "Complaint"), ECF No. 28, ¶ 1. MDCO is a pharmaceutical company that focuses on acute cardiovascular care, surgery and perioperative care, and serious infectious disease care. During the Class Period, one of its most promising products in development was cangrelor, an anti-platelet blood thinner that was once expected to generate up to $450 million in annual sales. Id. ¶¶ 27-29. Lead Plaintiff alleges that Defendants knowingly or recklessly made materially false and misleading misstatements about cangrelor and the results of clinical trials MDCO conducted for cangrelor. Id. ¶¶ 59-86. The Complaint further alleges that investors were harmed when the Food and Drug Administration ("FDA") criticized the cangrelor drug trial and ultimately recommended against approving cangrelor for its proposed indications, causing the value of MDCO stock to fall. Id. ¶¶ 87-98.

B. Procedural History

On February 21, 2014, Plaintiff David Serr commenced a securities class action against Defendants.[1] ECF No. 1. On July 18, 2014, the Court appointed Warren Schuler as Lead Plaintiff, Pomerantz LLP as Lead Counsel, and Lite DePalma Greenberg, LLC, as liaison counsel. ECF No. 26. On September 17, 2014, Lead Plaintiff filed a corrected First Amended Complaint against Defendants, alleging violations of Section 10(b) of the Securities Exchange Act of 1934 (the "Act"), 15 U.S.C. § 78j(b), Section 20(a) of the Act, 15 U.S.C. § 78t(a), and Securities and Exchange Commission Rule 10b–5, 17 CFR § 240.10b–5 (2013). See Compl. ¶¶ 122-138.

1 Although this action was initially commenced with David Serr as the named plaintiff, on May 6, 2014, Warren Schuler moved to be appointed as lead Plaintiff, with no opposition. ECF No. 22

***2** On November 17, 2014, Defendants moved to dismiss the Complaint. ECF No. 31. On June 22, 2015, after

Defendants' motion to dismiss was fully briefed, the FDA approved cangrelor for one indication. See ECF No. 58 Ex. A at 2. On July 16, 2015, the Court heard oral argument on Defendants' motion to dismiss and recommended that the parties pursue mediation. See ECF Nos. 55, 66-1 at 8. After a full-day mediation on November 2, 2015, the parties reached an agreement to settle this matter. See ECF No. 66-1 at 8.

On February 25, 2016, the Court issued an order granting: (1) preliminary approval of the parties' settlement (the "Settlement"); and (2) preliminary certification of a settlement class consisting of "[a]ll persons who purchased or otherwise acquired the securities of ... MDCO between January 8, 2013 and February 12, 2014." ECF No. 59 ¶¶ 1-2. The Court further ordered Lead Counsel or the Claims Administrator to use reasonable efforts to cause a copy of the Notice of Proposed Settlement, Motion for Attorneys' Fees and Expenses, Settlement Fairness Hearing, and the Proof of Claim and Release forms to be mailed to all Class Members by no later than April 5, 2016. See id. ¶ 4(b).

By May 31, 2016, Lead Counsel mailed 37,488 Notice Packets to potential Class Members. Supplemental Declaration of Ryan Kao ("Supp'l Kao Decl."), ECF No. 68-4, ¶ 3. In addition, the Claims Administrator published the Summary Notice in Investor's Business Daily and over PR Newswire and maintained a website and a toll-free telephone number dedicated to this Settlement. Declaration of Ryan Kao ("Kao Decl."), ECF No. 65-3, ¶¶ 10-12. Class Members who wished to be excluded from the Class were required to submit a request in writing no later than May 17, 2016. Supp'l Kao Decl. ¶ 5. Lead Counsel have received no requests for exclusion or objections to the Settlement. Id.; see also Tr.[2] 3:2-5, 4:9-10.

2 "Tr." refers to the transcript of the Final Fairness Hearing held on June 7, 2016.

C. Terms of the Settlement Agreement

The Settlement Agreement provides that Defendants will pay $4,250,000 ("Settlement Amount") into an escrow account for the benefit of the Class. See ECF No. 58, Ex. ¶¶ 2.0. The Settlement Amount is inclusive of all payments to Class Members as well as to Lead Counsel and Lead Plaintiff.

Lead Counsel seeks an award of $1,402,500[3] in attorneys' fees, which represents 33% percent of the common fund created by the Settlement Agreement, and an award of $33,569.20 in expenses incurred while prosecuting this litigation. In addition, Lead Plaintiff requests an award in the amount of $3,500 to compensate him for his time and service to the Class. To date, there have been no objections to the forgoing requests for litigation fees and expenses.

3 Plaintiffs' Motion for Award of Attorneys' Fees and Expenses and Lead Plaintiff Award initially stated that 33% of the Settlement Amount equaled $1,141,666.67. See ECF No. 70. Plaintiffs have since clarified that 33% of the Settlement Amount is in fact $1,402,500. Id. This error was purely typographical. Moreover, as the notice to Class Members stated merely that Lead Counsel would seek "fees up to 33% of the Settlement Amount," see ECF No. 28 Ex. C at 2, this adjustment is of no consequence and could not have caused confusion to the Class Members.

III. CLASS CERTIFICATION

Federal Rule of Civil Procedure 23 requires the Court to engage in a two-step analysis to determine whether to certify a class action for settlement purposes. First, the Court must determine whether Plaintiffs have satisfied the prerequisites for maintaining a class action as set forth in Rule 23(a). Second, if Plaintiffs can satisfy these prerequisites, the Court must then determine whether the requirements of Rule 23(b) are met. See Fed. R. Civ. P. 23(a) advisory committee's note.

A. Rule 23(a) Requirements

***3** For a lawsuit to be maintained as a class action, four prerequisites must be met: (1) numerosity: the class is so numerous that joinder of all members is impracticable; (2) commonality: there are questions of law or fact that are common to the class; (3) typicality: the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) adequacy of representation: the representative parties will fairly and adequately protect the interests of the class. See Fed. R. Civ. P. 23(a).

i. Numerosity

There is no minimum number of individuals necessary for certification of a class, and a prospective class that includes over forty members will generally satisfy the numerosity requirement. See Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001); Eisenberg v. Gaenon, 766 F.2d 770, 785-86 (3d Cir. 1985). As of June 7, 2013, 148 claims were fully processed. Tr. 4:16-22. In addition, Lead Counsel's damages expert estimates that 33.6 million shares of MDCO common

stock were affected by Defendants' alleged misconduct during the Class Period, suggesting that there may be thousands of potential class members. See P1. Br. in Support of Final Approval of Class Settlement, ECF No. 66-1, at 26. Defendants do not contest that estimate. Accordingly, the Court finds that the numerosity requirement is satisfied.

ii. Commonality

Next, Plaintiffs must demonstrate that there are questions of fact or law common to the class to satisfy the commonality requirement. Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 (1982)). "Their claims must depend upon a common contention" such that the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id.

Here, the questions common to the Class include: (1) whether Defendants made misrepresentations concerning cangrelor and the clinical trial; (2) whether Defendants acted knowingly or recklessly in issuing the alleged false and misleading statements; and (3) whether the price of MDCO securities during the Class Period was artificially inflated by Defendants' misconduct. These questions are common to all Class Members. Accordingly, the Court finds that the commonality requirement is satisfied.

iii. Typicality

Third, Rule 23(a)(3) requires that a representative plaintiff's claims be "typical of the claims ... of the class. The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." Barnes v. Am. Tobacco Co., 161 F.3d 127, 141 (3d Cir. 1998) (citation omitted). As with numerosity, the Third Circuit has "set a low threshold for satisfying" typicality, stating that "[i]f the claims of the named plaintiffs and putative Class Members involve the same conduct by the defendant, typicality is established ...." Newton v. Merrill Lynch, Pierce. Fenner & Smith. Inc., 259 F.3d 154, 183-84 (3d Cir. 2001); see also Baby Neal v. Casey, 43 F.3d 48, 58 (3d Cir. 1994). The typicality requirement "does not mandate that all putative Class Members share identical claims." Newton, 259 F.3d at 184 (citation omitted); see also Hassine v. Jeffes, 846 F.2d 169, 176-77 (3d Cir. 1988).

Here, the claims made by the Lead Plaintiff and those made on behalf of the other Class Members arise out of a common course of conduct by Defendants, involve the same legal theories, and are capable of class-wide resolution. Further, there is no evidence that Lead Plaintiff's claims are materially different than those of any other Class Member. See, e.g., In re Pet Food Prods.Liab. Litis., 629 F.3d 333, 342 (3d Cir. 2010) (affirming the District Court's certification of the settlement class where "the claims of the class representatives [were] aligned with those of the Class Members since the claims of the representatives ar[o]se out of the same conduct and core facts"). Thus, the typicality requirement is also satisfied.

iv. Adequacy of Representation

***4** Finally, when making an adequacy determination, the Court must consider (l)the qualifications, experience, and general abilities of the plaintiffs' lawyers to conduct the litigation; and (2) whether the interests of the lead plaintiffs are sufficiently aligned with the interests of the absentees. See In re Warfarin Sodium Antitrust Litis., 391 F.3d 516, 532 (3d Cir. 2004); In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litis., 55 F.3d 768, 800 (3d Cir. 1995). Here, Lead Counsel has extensive experience litigating complex securities class actions and obtaining class action settlements. See Declaration of Murielle J. Steven Walsh in Support of Final Approval of Settlement, Plan of Allocation, and Awards to Lead Counsel and Lead Plaintiff, ("Walsh Decl."), ECF No. 66-2, ¶ 2. Further, there is no indication that Lead Plaintiff's interests are antagonistic to those of the class. Consequently, the adequacy requirement is met.

B. Rule 23(b)(3) Requirements

The Court must next consider whether this class action comports with the requirements of Rule 23(b)(3). Under Rule 23(b)(3), the Court must find that "the questions of law or fact common to Class Members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). For the reasons set forth below, the Court finds that this class action meets the predominance and superiority requirements.

i. Predominance

To satisfy the predominance requirement, parties must do more than merely demonstrate a "common interest in a fair compromise;" rather, they must provide evidence that the proposed class is "sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997): see also Sullivan v. DB Invs., Inc., 667 F.3d 273, 297 (3d Cir. 2011) (noting that the predominance requirement is "more stringent" than the Rule 23(a) commonality requirement). For the reasons set forth below, the Court finds that the predominance requirement is satisfied.

a. Section 10(b) and Rule 10b–5 Claims

Here, all of Plaintiffs' Section 10(b) and Rule 10b–5 claims involve common questions of law or fact. In general, to succeed on Section 10(b) and Rule 10b–5 claim, a plaintiff must prove: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1192 (2013). " '[T]he questions of whether Defendants' statements or omissions were material, whether they were made in connection with the purchase or sale of securities, and whether they were made with scienter, are necessarily common to each class member given that Defendants' conduct alone is relevant to their proof.' " In re NeuStar. Inc. Sec. Litis., 2015 WL 5674798, at *6 (E.D. Va. Sept. 23, 2015) (quoting Menkes v. Stolt-Nielsen S.A., 270 F.R.D. 80, 91 (D. Conn. 2010)). "Additionally, class members would prove loss causation through common evidence like event studies, expert testimony, or other evidence demonstrating that the 'misrepresentation or omission was one substantial cause of the investment's decline in value.' " Id. (quoting Katyle v. Penn Nat. Gaming, Inc., 637 F.3d 462, 472 (4th Cir. 2011)).

Finally, a presumption of class-wide reliance is created where the plaintiff makes the following showings: "(1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed." Halliburton Co. v. Erica P. John Fund, Inc., 134 S.Ct. 2398, 2408 (2014) (citation omitted). Here, Plaintiffs can show that: (1) the alleged misrepresentations were in SEC filings and public presentations; (2) they concerned the efficacy of the Company's new drug, which was once expected to generate up millions in annual sales; (3) MDCO securities traded on NASDAQ; and (4) Class members, by definition, purchased or acquired MDCO securities during the Class Period. Accordingly, the Court finds that the common questions of law or fact underlying Plaintiffs' Section 10(b) and Rule 10b–5 claims predominate over questions affecting only individual Class Members.

b. Section 20(a) Claims

***5** To prove a violation of Section 20(a), a "plaintiff must prove that one person controlled another person or entity and that the controlled person or entity committed a primary violation of the securities laws." In re Suprema Specialties, Inc. Sec. Litig., 438 F.3d 256, 284 (3d Cir. 2006). Here, each Class Member's Section 20(a) claim "should be identical given that [the Individual] Defendants' conduct alone is relevant to satisfying the applicable standard, and given that each [C]lass [M]ember's claim arises from the same statements made by [the Individual] Defendants." Menkes, 270 F.R.D. at 91. Thus, Plaintiff's Section 20(a) claims also satisfy the predominance requirement.

ii. Superiority

To satisfy the superiority requirement, the Court must "balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." Georgine v. Amchem Prods., Inc., 83 F.3d 610, 632 (3d Cir. 1996) (citing Katz v. Carte Blanche Corp., 496 F.2d 747, 757 (3d Cir. 1974) (en banc)). Factors relevant to this Court's superiority analysis include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Johnston v. HBO Film Memt., Inc., 265 F.3d 178, 185 (3d Cir. 2001) (citing Fed. R. Civ. P. 23(b)). In addition, "[c]lass

actions have been held to be especially appropriate where 'it would be economically infeasible for [individual Class Members] to proceed individually.' " Id. (quoting Stephenson v. Bell Atl. Corp., 177 F.R.D. 279, 289 (D.N.J. 1997)).

For the following reasons, the Court finds that this class action satisfies the superiority requirement. First, the record in this case does not indicate an interest among Class Members in individually controlling the prosecution of separate actions. As stated above, no Class Member has requested exclusion from the class action. This suggests a lack of interest in pursuing claims individually. Second, the parties do not dispute that this Court is an appropriate forum for the lawsuit. Moreover, "[t]o litigate the individual claims of even a tiny fraction of the potential Class Members would place a heavy burden on the judicial system and require unnecessary duplication of effort by all parties." Henderson v. Volvo Cars of N. Am., LLC, Civ. No. 09-4146(CCC), 2013 WL 1192479, at *6 (D.N.J. Mar. 22, 2013). By contrast, nothing in the record indicates that the litigation of Plaintiffs' claims as a class action would be unmanageable. Thus, the superiority requirement is satisfied.

IV. FINAL APPROVAL OF THE SETTLEMENT

Having certified the proposed class action under Rule 23, the Court must evaluate the fairness of the Settlement pursuant to Rule 23(e). Under Rule 23(e), approval of a class settlement is warranted only if the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Acting as a fiduciary responsible for protecting the rights of absent class members, the Court is required to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." In re Cendant Corp. Litis., 264 F.3d 201, 231 (3d Cir. 2001) (quoting Gen. Motors Corp., 55 F.3d at 785). This determination rests within the sound discretion of the Court. Girsh v. Jepson, 521 F.2d 153, 156 (3d Cir. 1975). In Girsh, the Third Circuit identified nine factors to be used in the approval determination:

> ***6** (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) and the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. at 157 (internal quotation marks, alterations, and citation omitted).

Additionally, a presumption of fairness exists where a settlement has been negotiated at arm's length, discovery is sufficient, the settlement proponents are experienced in similar matters, and there are few objectors. Warfarin, 391 F.3d at 535. Finally, settlement of litigation is especially favored by courts in the class-action setting. "The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." Gen. Motors Corp., 55 F.3d at 784; see also Warfarin, 391 F.3d at 535 (explaining that "there is an overriding public interest in settling class action litigation, and it should therefore be encouraged"). Turning to each of the Girsh factors, the Court finds as follows:

A. Complexity, Expense, and Likely Duration of the Litigation

The first factor is intended to capture "the probable costs, in both time and money, of continued litigation." Gen. Motors Corp., 55 F.3d at 812 (internal quotations and citation omitted). Here, the "risk, expense, complexity, and likely duration of further litigation" were likely to be substantial. This case is extremely factually complex and would have been expensive and time-consuming to litigate, requiring expert testimony about biochemistry and clinical medical practice regarding blood thinners and loading doses, FDA clinical drug trials, and the significance of the indication for which a drug is approved, among other issues. By reaching a settlement, the parties have avoided the significant expenses connected with these issues and provided immediate and substantial benefits for the settlement class. Thus, this factor weighs in favor of approval.

B. Reaction of the Class to the Settlement

This second factor "attempts to gauge whether members of the class support the settlement." In re Lucent Techs., Inc., Sec. Litig., 307 F. Supp. 2d 633, 643 (D.N.J. 2004) (internal quotation marks and citation omitted). The Third Circuit has found that "[t]he vast disparity between the number of potential Class Members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement." Cendant Corp., 264 F.3d at 235. Here, the

Court has received no timely objections to the Settlement. Therefore, this factor weighs in favor of approval.

C. The Stage of the Proceedings and the Amount of Discovery Completed

Third, the Court considers the stage of the proceedings and the amount of discovery completed in order to evaluate the degree of case development that Lead Counsel has accomplished prior to settlement. "Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." Cendant Corp., 264 F.3d at 235 (quoting Gen. Motors Corp., 55 F.3d at 813). "Generally, post-discovery settlements are viewed as more likely to reflect the true value of a claim as discovery allows both sides to gain an appreciation of the potential liability and the likelihood of success." In re Auto. Refinishing Paint Antitrust Litig., 617 F. Supp. 2d 336, 342 (E.D. Pa. 2007) (citing Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1314 (3d Cir. 1993)).

***7** Although there has been no formal discovery, Lead Counsel had ample information to evaluate the prospects for the Class and to assess the fairness of the Settlement. Prior to settlement, Lead Counsel: (1) reviewed and analyzed public filings, annual reports, press releases, quarterly-earnings-call and industry-conference transcripts, and other public statements; (2) conducted extensive investigation and analysis of publicly available scientific literature, data, presentations, and other relevant materials, including the detailed analyses contained in the FDA's briefing documents; (3) reviewed and analyzed stock trading data relating to MDCO as well as reports by major financial news services and analysts; (4) consulted with an FDA expert; (5) investigated biochemical, pharmaceutical, and medical company practices with respect to the process of seeking FDA approval of new drugs and devices; (6) researched the FDA's rules and procedures; (7) drafted the initial complaint and the detailed Corrected First Amended Class Action Complaint to comply with the Private Securities Litigation Reform Act of 1995 ("PSLRA") and to include highly technical allegations regarding the FDA and the new drug application process, as well as pharmaceutical industry-specific allegations; (8) researched and drafted an opposition to Defendants' motion to dismiss; (9) prepared for and attended an oral argument on Defendants' motion to dismiss; and (10) prepared for and engaged in a mediation, including drafting a mediation statement. Accordingly, the Court is satisfied that, by the time the parties reached a settlement, Lead Counsel "had developed enough information about the case to appreciate sufficiently the value of the claims." In re Nat'l Football League Players Concussion Injury Litis., No. 15-2206, 2016 WL 1552205, at *19 (3d Cir. Apr. 18, 2016) (affirming district court's determination that the third Girsh factor was satisfied where the parties had engaged in informal discovery and ten months of settlement discussions). Therefore, this factor weighs in favor of approval.

D. Risks of Establishing Liability

Fourth, the risks of establishing liability should be considered to "examine what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them." Cendant Corp., 264 F.3d at 237 (quoting Gen. Motors Corp., 55 F.3d at 814). "The inquiry requires a balancing of the likelihood of success if 'the case were taken to trial against the benefits of immediate settlement.' " In re Safety Components Int'l, Inc. Sec. Litig., 166 F. Supp. 2d 72, 89 (D.N.J. 2001) (quoting In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 319 (3d Cir. 1998)).

Here, Lead Counsel faced several significant obstacles to establishing liability. Investigating and proving liability would have required considerable and expensive consultation with experts in biochemistry, clinical medical practice, and the substantive and procedural law of FDA new drug applications. In addition, proving scienter would have required Lead Counsel to educate a jury about running a clinical trial and interpreting and portraying trial results, primarily through highly technical expert testimony and circumstantial evidence. See In re AT&T Corp. Sees. Litig., 455 F.3d 160, 170 (3d Cir. 2006) (emphasizing that "the difficulty of proving actual knowledge under § 10(b) of the Securities Exchange Act ... weighed in favor of approval of the fee request" (citation omitted)). In contrast, the Settlement provides immediate and certain recovery for the Class Members. In light of the uncertainty of success at trial and the certain, immediate benefit provided by the Settlement, this factor weighs in favor of approval.

E. Risks of Establishing Damages

This fifth factor, like the factor before it, "attempts to measure the expected value of litigating the action rather than settling it at the current time." Cendant Corp., 264 F.3d at 238 (quoting Gen. Motors Corp., 55 F.3d at 816). Here, establishing loss causation and damages at trial would have required Lead Counsel to disentangle the market's reaction to various contemporaneous news items, similarly requiring expensive testimony by financial economics experts using

complex methodologies that are highly contested within the field. "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 such as general market conditions." In re Warner Commc'ns Sec. Litig., 618 F. Supp. 735, 744–5 (S.D.N.Y. 1985). The Court agrees that Plaintiffs faced significant risks in establishing damages. Thus, this factor weighs in favor of approval.

F. Risks of Maintaining Class Action Status through Trial

Although the continued significance of this sixth factor in the settlement-only context is unclear, see Prudential, 148 F.3d at 321, the Court nonetheless finds that this factor weighs in favor of approval. The Court may, at any time before final judgment, decide to decertify a class if the class proves to be unmanageable. Fed. R. Civ. P. 23(c)(1)(C). Defendants may choose to challenge the certification of a litigation class if the case were to move forward. Thus, because there are significant risks in maintaining class certification, the Court finds that this factor weighs in favor of settlement approval.

G. The Settling Defendant's Ability to Withstand a Greater Judgment

***8** The seventh factor examines whether Defendants "could withstand a judgment for an amount significantly greater than the settlement." Cendant Corp., 264 F.3d at 240. This factor weighs in favor of settlement. As discussed above, Lead Counsel has determined that settlement is appropriate in light of the significant risks in proving liability. Moreover, even if Defendants had the ability to pay more, it does not mean that they would be required to pay more following a trial. See Warfarin, 391 F.3d at 538 (noting that "the fact that [defendant] could afford to pay more does not mean that it is obligated to pay any more than what the ... class members are entitled to under the theories of liability that existed at the time the settlement was reached"). Thus, this factor weighs in favor of approval.

H. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The eighth and ninth factors, concerning the range of reasonableness of the settlement fund in light of the best possible recovery and the attendant risks of litigation, also weigh in favor of approval.

> The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved. The percentage recovery, rather[,] must represent a material percentage recovery to plaintiff in light of all the risks considered under Girsh.

In re Cendant Corp. Sec. Litis., 109 F. Supp. 2d 235, 263 (D.N.J. 2000) (internal quotation marks and citation omitted). Here, Lead Counsel represents that the Settlement Amount reflects approximately 4.0% of the estimated recoverable damages in this case. See ECF No. 66-1 at 23. This percentage falls squarely within the range of previous settlement approvals. See, e.g., In re AT&T, 455 F.3d at 169 (affirming settlement for 4% of total damages). Moreover, the Settlement Amount is the product of an arm's-length transaction by experienced counsel and facilitated by an experienced mediator. Accordingly, the Settlement is presumed to be fair and reasonable. See Warfarin, 391 F.3d at 534.

Therefore, the nine Girsh factors weigh in favor of approval. In addition, as discussed above, the settlement agreement was reached after arm's-length negotiations between counsel and after completion of, and access to, a significant amount of research, investigation, and analysis. Thus, the Settlement represents a fair, reasonable, and adequate result for the settlement class considering the substantial risks Plaintiffs face and the immediate benefits provided by the Settlement. See Reibstein v. Rite Aid Corp., 761 F. Supp. 2d 241, 255-56 (E.D. Pa. 2011).

V. ATTORNEYS' FEES AND EXPENSES AND LEAD PLAINTIFF AWARD

Finally, having found that final certification of the Class for settlement purposes is warranted and that the Settlement is fair and reasonable, the Court turns to Plaintiffs' request for litigation fees and expenses. Under the common fund doctrine, "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 Diet Drugs (Phentermine/ Fenfluramine/ Dexfenfluramine) Prod. Liab. Litig., 582 F.3d 524, 540 (3d Cir. 2009) (citations omitted). This ensures that "competent counsel continue to be willing to undertake risky, complex, and novel litigation."

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 198 (3d Cir. 2000) (citation omitted). "In addition, counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." Safety Components. Inc, 166 F. Supp. 2d at 108 (citing Abrams v. Liehtolier. Inc., 50 F.3d 1204, 1225 (3d Cir. 1995)). For the reasons set forth below, this Court grants the requested awards.

A. Attorneys' Fees

***9** Here, Lead Counsel seeks an award of $1,402,500 in attorneys' fees, which represents 33% of the common fund created by the Settlement. When calculating attorneys' fees in common-fund cases such as this one, the percentage-of-recovery method is generally favored. See In re Diet Drugs, 582 F.3d at 540 (citation omitted). Nevertheless, the Third Circuit has suggested that, in addition to the percentage-of-recovery approach, district courts should "cross-check" the percentage fee award against the "lodestar" method. In re Rite Aid Corp. Sec. Litis., 396 F.3d 294, 305 (3d Cir. 2005) (citing Prudential, 148 F.3d at 333).

i. Percentage-of-Recovery Analysis

In evaluating whether a percentage fee award is reasonable, this Court must consider the following factors:

> (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, 582 F.3d at 541 (citing Gunter, 223 F.3d at 336-40; Prudential, 148 F.3d at 336-40). These factors "need not be applied in a formulaic way because each case is different, and in certain cases, one factor may outweigh the rest." Id. at 545 (internal citations and quotation marks omitted).

Regarding the first factor, the size of the common fund is $4,250,000 and is expected to benefit over 148 people. Tr. 3:17, 4:16-22. Lead Counsel represented to the Court that based on the claims processed as of June 7, 2016, Class Members would receive up to approximately 33% of their recognized losses.[4] Tr. 5:4-7. Accordingly, the first factor is met. Next, the second factor is satisfied because, as stated above, there have been no objections to the Settlement or to Lead Counsel's fee request. The absence of objections indicates that the settlement terms and the attorneys' fees are reasonable. See In re Rite Aid Corp. Sec. Litis., 396 F.3d 294, 305 (3d Cir. 2005). The third, fourth, and fifth factors are likewise met because, as discussed above, Lead Counsel are skilled attorneys, this litigation was highly complex, fraught with risk, and would likely have taken years to resolve.

4 At the final fairness hearing on June 7, 2016, Lead Counsel represented that 148 Class Members had already filed claims, though more were expected to file claims before the June 13, 2016 deadline. Tr. 4:16-22. Lead Counsel represented that the percentage of losses recovered was subject to change as more Class Members submitted claims. Tr. 5:2-7.

The sixth factor—time devoted to the litigation—also supports the requested fee award. Lead Counsel and their professionals have spent, in the aggregate, 644.40 hours litigating this case, with a lodestar of $396,439. Walsh Decl. ¶ 19. The requested fee would result in a lodestar multiplier of 3.57, which is reasonable under the Third Circuit's precedent. See Prudential, 148 F.3d at 341 (noting that lodestar multipliers ranging from one to four are frequently awarded in common fund cases); AT&T, 455 F.3d at 172 (noting the Third Circuit's prior "approv[al] of a lodestar multiplier of 2.99 in ... a case [that] was neither legally nor factually complex." (internal quotation marks and citation omitted)).

***10** The seventh factor is also satisfied because Lead Counsel's request for a fee award of 33% of the Settlement Amount falls within the range of reasonable fee awards. See Brumley v. Camin Cargo Control, Inc., No. CIV.A. 08-1798 JLL, 2012 WL 1019337, at *12 (D.N.J. Mar. 26, 2012) ("The Third Circuit has noted that fee awards generally range from 19% to 45% of the settlement fund when the percentage-of-recovery method is utilized to assess the reasonableness of requested attorneys' fees.") (citing In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litis., 55 F.3d 768, 822 (3d Cir. 1995)); In re Safety Components, Inc. Sec. Litis., 166 F.

Supp. 2d 72, 109 (D.N.J. 2001) (granting a requested fee of one-third of a $4,309,205.36 settlement fund). In addition, the ninth factor is met because "[t]he attorneys' fees request of one-third of the settlement fund ... comports with privately negotiated contingent fees negotiated on the open market." Id.

Further, the fee request meets the eighth factor because Lead Counsel did not benefit from the work of any government investigations or enforcement actions against Defendants. See In re Diet Drugs, 582 F.3d at 544 (affirming fee award where the District Court concluded that "while Class Counsel was in some sense beholden to the scholars who linked the diet drugs to VHD, and ... to the FDA for its efforts to remove the drugs from the market, Class Counsel had not relied on 'the government or other public agencies to do their work for them as has occurred in some cases' " (internal citation omitted)).

Finally, although the tenth factor regarding innovation does not appear to be directly applicable here given the Settlement's traditional terms, the Court finds that, overall, the fee requested is reasonable in light of the foregoing considerations. See Brumley, 2012 WL 1019337, at *12.

ii. Lodestar Cross-Check

The lodestar cross-check is performed 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." Rite Aid, 396 F.3d at 305. When performing this analysis, the court "should apply blended billing rates that approximate the fee structure of all the attorneys who worked on the matter." Id. at 306. Thus, the lodestar multiplier is equal to the proposed fee award divided by the product of the total hours and the blended billing rate. If the lodestar multiplier is large, the award calculated under the percentage-of-recovery method may be deemed unreasonable, and a trial judge may consider reducing the award appropriately. Id. at 306. The multiplier, however, "need not fall within any pre-defined range, provided that the [d]istrict [c]ourt's analysis justifies the award." Id. at 307. Further, the Court is not required to engage in this analysis with mathematical precision or "bean-counting." Id. at 306. Instead, the Court may rely on summaries submitted by the attorneys and is not required to scrutinize every billing record. Id. at 306-07.

As discussed above, Lead Counsel submits that the total number of hours expended by attorneys and their professionals is 644.40, with a lodestar of $396,439. Walsh Decl. ¶ 19. This lodestar value is based on the blended billing rates of all attorneys and professionals involved in the case, see id., and results in a lodestar multiplier of 3.57, see ECF No. 65-1 at 2. Multipliers of one to four are often used in common fund cases. Prudential, 148 F.3d at 341; see also AT&T, 455 F.3d at 172 (noting the Third Circuit's prior "approv[al] of a lodestar multiplier of 2.99 in ... a case [that] 'was neither legally nor factually complex.' " (citation omitted)); Meijer, Inc. v. 3M, No. 04-5871, 2006 WL 2382718 at *24 (E.D. Pa. Aug. 14, 2006) (approving a 4.77 multiplier); In re Rite Aid Corp. Sees. Litis., 362 F. Supp. 2d 587, 589-90 (E.D. Pa. 2005) (approving a multiplier of 6.96); In re AremisSoft Corp. Sec. Litis., 210 F.R.D. 109, 135 (D.N.J. 2002) (approving a multiplier of 4.3).

***11** Accordingly, and in light of the high risk of non-payment and the excellent result achieved in this Settlement, the Court finds that Lead Counsel's requested fees are also reasonable under the lodestar analysis. Therefore, the Court will grant Lead Counsel's fee in full.

B. Attorneys' Expenses

Lead Counsel seeks an award of $33,569.20 in expenses incurred while prosecuting this litigation. "Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." In re Safety Components, Inc. Sec. Litis., 166 F. Supp. 2d 72, 108 (D.N.J. 2001) (citing Abrams v. Lightolier. Inc., 50 F.3d 1204, 1225 (3d Cir. 1995)). The Court has received no objection to Lead Counsel's requested expenses. Moreover, from the submissions, it appears the expenses requested by Lead Counsel were adequately documented, reasonable, and appropriately incurred in the litigation of this matter. Accordingly, the Court grants Lead Counsel's motion for an award of attorneys' expenses.

C. The Lead Plaintiff Award

Finally, Lead Plaintiff requests an award in the amount of $3,500 to compensate him for his time and service to the Class. The PSLRA permits a lead plaintiff to receive an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class." 15 U.S.C. § 78u-4(a)(4). "[T]here are no set factors that a District Court must employ in determining the amount of class

representative incentive awards." Brady v. Air Line Pilots Ass'n, 627 Fed.Appx. 142, 146 (3d Cir. 2015) (affirming an award of $640,000).

The Court finds that Lead Plaintiff has adequately represented the Class and is therefore entitled to his requested compensation. Lead Plaintiff reviewed filings, gathered transaction records, conferred with Lead Counsel about the litigation, and remained apprised about the progress of the case and the Company generally. See Declaration of Warren H. Schuler in Support of Final Approval of Settlement, ECF No. 67, ¶¶ 3-4. These are the types of activities courts have found to support reimbursement to class representatives. See, e.g., In re Evergreen Ultra Short Opportunities Fund Sec. Litig., No. CIV.A. 08-11064-NMG, 2012 WL 6184269, *2 (D. Mass. Dec. 10, 2012) (awarding $54,626 to institutional lead plaintiffs who had "worked closely with counsel throughout the case, communicated with counsel on a regular basis, reviewed and provided input with respect to counsel's submissions, provided information, produced documents, and participated in settlement discussions"); In re Marsh & McLennan Cos. Sec. Litig., No. 04 Civ. 8144, 2009 WL 5178546, at *21 (S.D.N.Y. Dec. 23, 2009) (awarding over $200,000 to lead plaintiffs 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 Xcel Energy, Inc., 364 F. Supp. 2d 980, 1000 (D. Minn. 2005) (awarding $100,000 to eight lead plaintiffs who "communicated with counsel throughout the litigation, reviewed counsels' submissions, indicated a willingness to appear at trial, and were kept informed of the settlement negotiations, all to effectuate the policies underlying the federal securities laws"). Accordingly, the Court grants Lead Plaintiff's requested award.

VI. CONCLUSION

***12** For the reasons set forth above, the Court certifies the Rule 23 class action, approves the proposed Settlement in full, awards attorneys' fees and expenses and a lead-plaintiff award, and dismisses this action with prejudice. An appropriate order accompanies this Opinion.

All Citations

Not Reported in Fed. Supp., 2016 WL 3457218

End of Document

2020 WL 996418
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

Gordon STEVENS, individually and as the representative of a class of similarly situated person, and on behalf of the SEI Capital Accumulation Plan, Plaintiff

v.

SEI INVESTMENTS COMPANY, et al., Defendants

CIVIL ACTION NO. 18-4205
|
Signed 02/26/2020
|
Filed 02/28/2020

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MEMORANDUM OPINION

NITZA I. QUIÑONES ALEJANDRO, J.

INTRODUCTION

***1** Before this Court is a *motion for final approval of class action settlement agreement* and a *motion for approval of attorneys' fees, expenses and class representative service award*, [ECF 41], filed by Plaintiff Gordon Stevens pursuant to Federal Rule of Civil Procedure ("Rule") 23. Previously, this Court granted preliminary approval to the underlying class action settlement agreement (the "Settlement Agreement"). [ECF 40]. A hearing was held on December 18, 2019, at which the Court heard oral argument on Plaintiff's unopposed motion for final approval of the Settlement Agreement. Counsel for all parties appeared. For the reasons stated herein, the motion for final approval of the class action settlement and motion for attorneys' fees and expenses are both granted.

BACKGROUND

Plaintiff Gordon Stevens, on behalf of himself and all others similarly situated, brought this class action against Defendants SEI Investments Company, SEI Investments Management Corporation, SEI Capital Accumulation Plan Design Committee, SEI Capital Accumulation Plan Investment Committee, and SEI Capital Accumulation Plan Administration Committee (collectively, "Defendants") asserting claims for breach of fiduciary duty under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, relating to the SEI Capital Accumulation Plan (the "Plan"). In summary, Plaintiff alleged that the Plan's fiduciaries retained SEI-affiliated investments in the Plan that a prudent and unbiased fiduciary would not have retained. Defendants denied the allegations and asserted various affirmative defenses. During the parties' initial pretrial conference with this Court, the parties agreed to engage in early mediation.

In preparation for the mediation, the parties engaged in focused discovery, which included the production of more than 6,800 pages of documents by Defendants. Plaintiff's counsel also retained and consulted with an expert. In addition, the parties exchanged written mediation statements outlining their factual and legal positions. The parties then engaged in a full-day mediation before Hunter R. Hughes, III, an experienced and well-respected mediator who has successfully resolved numerous high-stakes class actions, including those involving ERISA breach of fiduciary duty claims. Although a settlement was not reached at the initial mediation, the parties continued their settlement discussions through the mediator. With the assistance of the mediator, the parties eventually reached a settlement.

The Terms of the Settlement

The Settlement, the full terms of which are set forth in the Settlement Agreement, provides substantial economic benefits to the certified class (the "Class"). The Settlement creates a total settlement fund of $6.8 million (the "Settlement Fund"), to be reduced by any amount approved by this Court for attorneys' fees and costs, administrative expenses, and a class representative service award. Within 120 days

after the settlement effective date, the net settlement fund will be distributed to Class Members in proportion to their average quarterly account balances. Current Plan participants ("Current Participants") will have their Plan accounts automatically credited with their share of the Settlement Fund. Former Plan participants ("Former Participants") are required to submit a claim form, which allows them to receive a direct payment by check or elect to have their distribution rolled over into an individual retirement account or other eligible employer plan. Under no circumstances will any monies revert to SEI. Any uncashed checks will revert to the Qualified Settlement Fund and will be paid to the Plan for the purpose of defraying administrative fees and expenses of the Plan. The Settlement also provides various prospective relief with respect to the management of the Plan, which will benefit current and future participants. As consideration for these settlement benefits, Defendants will receive a mutual release of all claims between the parties. Notably, an independent fiduciary found that "[t]he terms of the release, including the release of claims by the Plan, are reasonable."

Preliminary Approval and Class Notice

***2** By Order dated July 31, 2019, this Court granted preliminary approval to the proposed Settlement and provisionally certified the proposed class. Pursuant to this Court's Preliminary Approval Order, Analytics Consulting, LLC ("Analytics") was appointed to serve as the Settlement Administrator. As part of its responsibilities, Analytics sent notice to the relevant governmental officials under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, *et seq.*, effected publication notice, and sent direct notice to Class Members in accordance with the plan for notice, which this Court found to be the best notice practicable under the circumstances and consistent with the requirements of due process. Notice was mailed to 5,734 Settlement Class members. Of those notices, only 2.65% were returned as undeliverable. One objection—challenging Class Counsel's requested attorneys' fees and explicitly declining to object to any terms of the settlement—was received.

Pursuant to the terms of the Settlement, the Settlement was submitted to an independent fiduciary for review following the Court's preliminary approval order. After reviewing the Settlement and other case documents, and interviewing counsel for each of the parties, the Independent Fiduciary concluded that: (1) "[t]he Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan, the non-monetary consideration and the amount of any attorneys' fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims forgone," (2) "[t]he terms and conditions of the transaction are no less favorable to the Plan than comparable arm's-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances," and (3) "[t]he transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest."

DISCUSSION

When granting final approval of a class action settlement, a district court must hold a hearing and conclude that the proposed settlement is fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e)(2); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 295 (3d Cir. 2011); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 258 (3d Cir. 2009). Although there is a strong judicial policy in favor of voluntary settlement agreements, *Pennwalt Corp. v. Plough*, 676 F.2d 77, 79-80 (3d Cir. 1982), courts are generally afforded broad discretion in determining whether to approve a proposed class action settlement. *Eichenholtz v. Brennan*, 52 F.3d 478, 482 (3d Cir. 1995). "The law favors settlement particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab.*, 55 F.3d 768, 784 (3d Cir. 1995). In addition to conservation of judicial resources, "[t]he parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial." *Id.*

In *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), the Third Circuit set forth factors (often called the "*Girsh* factors") that a district court should consider when reviewing a proposed class action settlement. The *Girsh* 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 defendant 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.

In re Ins. Brokerage Antitrust Litig., 579 F.3d at 258 (citing *Girsh*, 521 F.2d at 157). No one factor is dispositive. *Hall v. Best Buy Co.*, 274 F.R.D. 154, 169 (E.D. Pa. 2011). Further, a "court may approve a settlement even if it does not find that each of [the *Girsh*] factors weighs in favor of approval." *In re N.J. Tax Sales Certificate Antitrust Litig.*, 750 F. App'x 73, 77 (3d Cir. 2018).

***3** In *Krell v. Prudential Ins. Co. of Am. (In re Prudential)*, 148 F.3d 283 (3d Cir. 1998), the Third Circuit identified additional nonexclusive factors (the "*Prudential* factors") for courts to consider for a "thorough going analysis of settlement terms." *See also In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 350 (3d Cir. 2010). The *Prudential* factors often overlap with the *Girsh* factors, and include:

(1) 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 factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages;

(2) the existence and probable outcome of claims by other classes and subclasses;

(3) the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved or likely to be achieved for other claimants;

(4) whether class or subclass members are accorded the right to opt-out of the settlement;

(5) whether any provisions for attorneys' fees are reasonable; and

(6) whether the procedure for processing individual claims under the settlement is fair and reasonable.

In re Pet Food, 629 F.3d at 350. Only the *Prudential* factors relevant to the litigation in question need be addressed. *In re Prudential*, 148 F.3d at 323-24.

With these principals in mind, this Court will consider each of the *Girsh* factors and the relevant *Prudential* factors in its review of the proposed class action settlement.

Girsh Factors

1. The complexity, expense, and likely duration of the litigation

It is well-recognized that "ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation." *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015); *see also Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *2 (S.D. Ill. July 17, 2015) (noting that ERISA 401(k) cases are "particularly complex"); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) ("Many courts have recognized the complexity of ERISA breach of fiduciary duty actions."). Needless to say, had the Settlement not been reached, this matter would likely have proceeded to trial on the issues of liability and determination of damages. The continued prosecution of Plaintiff's claims against Defendants would have required significant additional expense to the Class and a substantial delay before any potential recovery. Though at the time the parties reached the Settlement, the parties had exchanged more than 6,800 pages of documents and participated in a mediation, much work remained, including fact depositions, expert discovery, and motion practices with respect to class certification and summary judgment. Further, no matter the outcome of a trial, it is likely that one or all of the parties would have appealed, leading to further litigation costs and delay in any realized recovery. Thus, the avoidance of unnecessary expenditure of time and resources benefits all parties and weighs in favor of approving the settlement. *See In re Gen. Motors*, 55 F.3d at 812 (concluding that lengthy discovery and potential opposition by the defendant were factors weighing in favor of settlement).

2. The reaction of the class to the settlement

***4** "The Third Circuit has looked to the number of objectors from the class as an indication of the reaction of the class." *In*

re Certainteed Corp. Roofing Shingle Prods. Liab. Litig., 269 F.R.D. 468, 485 (E.D. Pa. 2010) (citing *In re Cendant Corp. Litig.*, 264 F.3d 201, 234-35 (3d Cir. 2001)). "Courts have generally assumed that 'silence constitutes tacit consent to the agreement.' " *In re Gen. Motors*, 55 F.3d at 812 (quoting *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313 n.15 (3d Cir. 1993)). A low number of objectors or opt-outs is persuasive evidence that the proposed settlement is fair and adequate. *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 415 (E.D. Pa. 2010) (citing *In re Cendant*, 264 F.3d at 234-35).

Here, Defendants identified more than 5,734 individuals who meet the Class definition. Those individuals identified as potential Class members were mailed notices and Class forms. As of the date of the final approval hearing, no Class Member had objected to the substantive terms of the proposed settlement (other than an objection to the proposed attorneys' fee award, discussed below). This factor is persuasive evidence of the fairness and adequacy of the proposed settlement, and weighs in favor of a final approval. *See In re Cendant*, 264 F.3d at 234-35.

3. The stage of the proceedings and the amount of discovery completed

The third *Girsh* factor "captures the degree of case development that class counsel [had] accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Cendant*, 264 F.3d at 235. When evaluating this third *Girsh* factor, courts must evaluate the procedural stage of the case at the time of the proposed settlement to assess whether counsel adequately appreciated the merits of the case while negotiating. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004). "[C]ourts generally recognize that a proposed class 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). Settlements reached following discovery "are more likely to reflect the true value of the claim." *Boone v. City of Phila.*, 668 F. Supp. 2d 693, 712 (E.D. Pa. 2009) (citing *Bell Atl. Corp.*, 2 F.3d at 1314).

As set forth above, this case has been actively litigated from its commencement. Prior to reaching a settlement, Class Counsel conducted a thorough investigation, prepared a detailed complaint, obtained more than 6,800 pages of documents from Defendants, retained and consulted with an expert regarding potential damages suffered by the Plan, exchanged fulsome mediation statements with Defendants, and engaged in a full-day mediation with an experienced and well-regarded mediator. As a result of these pre-settlement efforts, the parties had ample opportunity to identify and grasp the strengths and weaknesses of each party's case. Consequently, this Court finds that this factor weighs in favor of approval.

4. The risks of establishing liability

This *Girsh* factor weighs the likelihood of ultimate success against the benefits of an immediate settlement. The existence of obstacles, if any, to the plaintiff's success at trial weighs in favor of settlement. *In re Warfarin*, 391 F.3d at 537; *In re Prudential*, 148 F.3d at 319. This factor should be considered to "examine what potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them." *In re Cendant*, 264 F.3d at 237 (quoting *GM Trucks*, 55 F.3d at 814). "The inquiry requires a balancing of the likelihood of success if 'the case were taken to trial against the benefits of immediate settlement.' " *Wallace v. Powell*, 288 F.R.D. 347, 369 (M.D. Pa. 2012) (quoting *Prudential II*, 148 F.3d at 319).

***5** In this case, the outcome of this matter with respect to liability is far from certain. Defendants have denied any liability throughout this litigation. The proposed settlement avoids the risk that Defendants be found not liable. Thus, this Court finds that this factor weighs in favor of approval.

5. The risks of establishing damages

This factor "attempts to measure the expected value of litigating the action rather than settling it at the current time." *In re Cendant*, 264 F.3d at 238-39. The Court looks at the potential damage award if the case were taken to trial against the benefits of immediate settlement. *Prudential II*, 148 F.3d at 319. In *Warfarin Sodium I*, the trial court found that the risk of establishing damages strongly favored settlement, observing that "[d]amages would likely be established at trial through a 'battle of experts,' with each side presenting its figures to the jury and with no guarantee whom the jury would believe." *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 256 (D. Del. 2002), *aff'd* 391 F.3d 516, 537 (3d Cir. 2004). Similarly, in *In re Cendant*, the Third Circuit reasoned

that there was no compelling reason to think that "a jury confronted with competing expert opinions" would accept the plaintiff's damages theory rather than that of the defendant, and thus the risk in establishing damages weighed in favor of approval of the settlement. 264 F.3d at 239. The same is likely true here. Accordingly, this factor weighs in favor of approval.

6. The risks of maintaining the class action through trial

Because "the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action," *In re Gen. Motors*, 55 F.3d at 817, this factor measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial. As noted above, this action has been vigorously litigated by both sides from the outset. As such, it is likely that the issue of class certification would have been the subject of vigorous dispute. Further, even if class certification were granted in this matter, class certification can always be reviewed or modified before trial, so "the specter of decertification makes settlement an appealing alternative." *Skeen v. BMW of N. Am., Ltd. Liab. Co.*, 2016 WL 4033969, at *15 (D. N.J. July 26, 2016). Accordingly, this factor weighs in favor of approval.

7. The ability of defendants to withstand a greater judgment

This factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the settlement." *In re Cendant*, 264 F.3d at 240. Though the parties acknowledge that Defendants have the ability to withstand a judgment greater than the settlement amount, where the defendants' ability to pay greatly exceeds the potential liability, this factor is generally neutral. *In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 489 (E.D. Pa. 2010). Because this is the case here, this factor is neutral.

8-9. The range of reasonableness of settlement in light of best possible recovery and all attendant risks of litigation

The last two *Girsh* factors, often considered together, evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case. *In re Warfarin*, 391 F.3d at 538. In order to assess the reasonableness of a settlement in cases seeking monetary relief, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *In re Prudential*, 148 F.3d at 322.

***6** In light of the questions of fact and law present in this litigation, the value of the proposed settlement substantially outweighs the mere possibility of future relief. Here, the Class is receiving a significant settlement amount that offers real economic benefits to Class Members. On a per-capita basis, the $6.8 million recovery provides approximately $1,200 per Class Member. On a gross basis, the recovery represents approximately 1.3% of Plan assets. In addition, the $6.8 million recovery represents more than 31% of the maximum proposed loss. This percentage compares favorably to other class action settlements. *See, e.g., In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses"); *In re PNC*, 440 F. Supp. At 435-36 (approving settlement amount that represented 12% of estimated losses because it "constitute[d] a very reasonable range of settlement when compared to the best possible recovery discounted by the attendant risks of proceeding to trial"). The Settlement also provides prospective relief that is beneficial to all existing and future Plan participants. As previously noted, the expense of a trial and use of the parties' resources would have been substantial, especially in conjunction with the post-trial motions and appeals that would have likely followed a trial on the merits. Thus, a settlement is advantageous to all parties. Therefore, these factors weigh in favor of approval.

Relevant *Prudential* Factors

1. Factors that bear on the maturity of the underlying substantive issues

This case was settled at a relatively mature point in the proceedings. As discussed above, there has been discovery on the merits and Class Counsel is aware of the complexity and risk inherent in a trial on the merits. In addition, the parties participated in a meaningful and successful private mediation. As such, the litigants were in a position to fully evaluate the strengths, weaknesses, and merits of their case. The advanced development of the record weighs in favor of approval. *See Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 215 (E.D. Pa. 2011) (finding settlement reasonable where underlying substantive issues were "mature in light of the

experience of the attorneys, extent of discovery, posture of case, and mediation efforts undertaken.").

2. Results achieved by settlement for individual class members versus the results achieved—or likely to be achieved—for other claimants

This factor weighs in favor of approval since no class members opted out and most Settlement Class Members will receive Settlement benefits automatically without having to take any action, while others will receive allocations after their submission of a claim form.

3. Whether class or subclass members are afforded the right to opt out of the settlement

Pursuant to this Court's Order of July 31, 2019, a class was preliminarily certified pursuant to Federal Rule of Civil Procedure 23(b)(1). As such, Class Members were not given the opportunity to opt out. As part of the Class notice process approved by this Court, however, Settlement Class Members were provided robust notice and the opportunity to file objections to the Settlement. No members filed any objections to the substantive terms of the Settlement.

4. Whether any provisions for attorneys' fees are reasonable

As part of the Class notice process approved by this Court, Class members were advised that Plaintiff would seek an award of attorneys' fees of no more than one-third of the settlement amount. As discussed in greater detail, several Class Members have objected to such an award. For the reasons discussed in greater detail below, the attorneys' fees and expenses sought and agreed to in this case are reasonable. Thus, this factor weighs in favor of approval.

5. Whether the procedure for processing individual claims under the class action settlement is fair and reasonable

The claims processing procedures put in place by the Settlement are fair and reasonable. Indeed, Settlement Class Members who are Current Participants in the Plan will automatically receive allocations without the need to fill out and submit claim forms. Class members who are Former Participants in the Plan will receive allocations following submission of claim forms. This factor supports approval of the Settlement.

In summary, in light of the presumption of fairness that attaches to the Settlement, *see In re Warfarin*, 391 F.3d at 539, and upon consideration of each of the *Girsh* factors and the relevant *Prudential* factors, this Court finds that the proposed class action settlement is fair and reasonable.

Class Certification

***7** As noted, by Order dated July 31, 2019, this Court provisionally certified the following proposed class:

> All persons who participated in the SEI Capital Accumulation Plan, including all Beneficiaries and Alternate Payees, at any time from September 27, 2012 through June 30, 2019, excluding persons who were members during the Class Period of the SEI Capital Accumulation Plan Investment Committee.

Although this Court previously certified the Class, it must again determine whether class certification is appropriate under Rule 23. *In re Prudential*, 148 F.3d at 308.

A plaintiff seeking class certification must satisfy all requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 465 (2013); *see also Marcus v. BMW of North America*, 687 F.3d 583, 590 (3d Cir. 2012). "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). A district court's analysis of a motion for class certification "must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim.' " *Amgen Inc.*, 568 U.S. at 465-66 (quoting *Wal-Mart*, 564 U.S. at 351). However, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether Rule 23 prerequisites for class certification are satisfied." *Id.* "Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008).

To satisfy the Rule 23(a) requirements:

(1) the class must be "so numerous that joinder of all members is impracticable" (numerosity); (2) there must be "questions of law or fact common to the class" (commonality); (3) "the claims or defenses of the representative parties" must be "typical of the claims or defenses of the class" (typicality); and (4) the named plaintiffs must "fairly and adequately protect the interests of the class" (adequacy of representation, or simply adequacy).

Marcus, 687 F.3d at 590-91 (citations omitted).

Here, Plaintiff seeks certification of the proposed class, as provisionally certified, pursuant to Rule 23(b)(1). This Rule permits certification when the court finds that "prosecuting separate actions by ... individual class members would create a risk of ... adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B).

Rule 23(a) Requirements

1. Numerosity

Under Rule 23(a)(1), the court must determine whether the potential class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). Although "Rule 23(a)(1) does not require a plaintiff to offer direct evidence of the exact number and identities of the class members ... in the absence of direct evidence, a plaintiff must show sufficient circumstantial evidence specific to the products, problems, parties, and geographic areas actually covered by the class definition to allow a district court to make a factual finding." *Hayes*, 725 F.3d at 357. "Only then may the court rely on 'common sense' to forgo precise calculations and exact numbers." *Id.*

***8** Here, the Settlement Class includes more than 5,000 Settlement Class Members. Given the number and likely geographic distribution of the Settlement Class Members, joinder of all Settlement Class Members would be impracticable. Thus, the proposed Settlement Class satisfies Rule 23's numerosity requirement for settlement purposes. *Liberty Lincoln Mercury Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 73 (D.N.J. 1993).

2-3. Commonality and Typicality

Pursuant to Rule 23(a)(2), a court must determine whether "there are questions of law or fact common to the class," ordinarily known as "commonality." Fed. R. Civ. P. 23(a)(2). Under the Rule, commonality "requires the plaintiff to demonstrate that the class members 'have suffered the same injury.' " *Wal-Mart*, 564 U.S. at 350. It "does not require identical claims or facts among class member[s]." *Marcus*, 687 F.3d at 597 (citations omitted). "For purposes of Rule 23(a)(2), even a single common question will do." *Id.* Claims common to the entire class "must depend on a common contention ... [that is] of such a nature that it is capable of classwide resolution ... [and] that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551.

Under Rule 23(a)(3), a court must also determine whether "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). Typicality and commonality are closely related and often merge. *Marcus*, 687 F.3d at 597. Typicality, however, "derives its independent legal significance from its ability to 'screen out class actions in which the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are present.' " *Id.* at 598. "If a plaintiff's claim arises from the same event, practice, or course of conduct that gives rise[ ] to the claims of the class members, factual differences will not render that claim atypical if it is based on the same legal theory as the claims of the class." *Id.*

Typicality ensures that the putative class members' and the representative's interests "are aligned 'so that the latter will work to benefit the entire class through the pursuit of [his or her] own goals.' " *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183 (3d Cir. 2001) (citations omitted). Typicality is met "when the named plaintiffs and the proposed class members 'challenge [ ] the same unlawful conduct." *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 394 (E.D. Pa. 2001) (quoting *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir.

1994)). Complete "factual similarity is not required; just enough factual similarity so that maintaining the class action is reasonably economical and the interests of other class members will be fairly and adequately protected in their absence." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009).

Here, a single overarching common question—whether Defendants' Administrative Fee practice related to in-network services provided through ASH violated ERISA—cuts across every claim of every Settlement Class Member. *Rodriquez v. Nat'l City Bank*, 726 F.3d 372, 832 (3d Cir. 2013) ("[T]here may be many legal and factual differences among the members of a class, as long as all were subjected to the same harmful conduct by the defendant."). In addition, Plaintiff asserts the same ERISA claim, under the same legal theories, for the same wrongful conduct, as the other Settlement Class Members. As such Rule 23(a)(2) and (3)'s requirements of common question of law or fact and typicality are satisfied.

4. Adequacy

***9** Under Rule 23(a)(4), a court must determine whether the proposed class representative "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To meet the adequacy requirement, a finding must be made that (1) plaintiff's interests do not "conflict with those of the class" and (2) the proposed class counsel are "capable of representing the class." *Newton*, 259 F.3d at 185. The Third Circuit has "recognized that the linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class," *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 183 (3d Cir. 2012), and "not proof of vigorous pursuit of the claim." *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 307 (3d Cir. 2005). This requirement serves "to ensure that the putative named plaintiff has the incentive to represent the claims of the class vigorously." *Dewey*, 681 F.3d at 184.

Here, there is no conflict between the proposed Class Representative and the Class because, as with all members of the Class, Plaintiff seeks compensation for the same claims from the same Defendants. Plaintiff has no interests that are antagonistic to or in conflict with the Class he seeks to represent and his alleged injuries are identical to those suffered by Settlement Class Members. In addition, Class Counsel have substantial experience prosecuting large-scale class actions, including ERISA class actions involving breach of fiduciary duty claims. Accordingly, both prongs of the adequacy inquiry are met.

Rule 23(b)(1) Requirements

Having found that Plaintiff has satisfied each of the Rule 23(a) prerequisites, this Court must determine pursuant to Rule 23(b)(1) whether "prosecuting separate actions by or against individual class members would create a risk of ... adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). This is clearly the case here where Plaintiff's claims are premised on his allegation that the Plan's fiduciaries retained SEI-affiliated investments in the Plan that a prudent and unbiased fiduciary would not have retained. Plaintiff's evidence regarding Defendants' conduct will significantly impact the claims of other Plan participants. Indeed, breach of fiduciary duty claims under ERISA—like Plaintiff's claims here—are "paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009).

After carefully concluding the requisite vigorous analysis of the factors in Rules 23(a) and (b), this Court finds that the requirements of Rule 23 are met and that certification of the proposed class is proper.

Request for Attorneys' Fees and Expenses

As compensation for their legal services and efforts, Class Counsel have requested that this Court approve the portion of the settlement that provides for reimbursement of attorneys' fees in an amount equal to one-third of the total settlement amount, or $2,266,666.00, litigation expenses in the amount of $17,734.97, and settlement administration expenses in the amount of $42,436.00. This amount was contemplated and agreed to in the Settlement Agreement and disclosed to Class Members. The notice provided to potential Class Members expressly informed them that Class Counsel would apply for an award of attorneys' fees in an amount not to exceed one-third of the total settlement amount, reimbursement of costs and administrative expenses, and a $10,000.00 service award for the Class Representative in recognition of his services as

class representative. To date, no Class Member has objected to the substantive terms of the Settlement. However, one member objected to the attorneys' fee award, an objection which includes the signatures of seventy-seven (77) other members joining the objection. In support of their request for fees and reimbursement of costs and expenses, counsel rely upon two declarations of counsel summarizing their time and the expenses incurred on behalf of the Class. (*See* Decls. of Kai Richter and R. Andrew Santillo).

***10** Rule 23(h) provides that "[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." "[A] thorough judicial review of fee applications is required in all class action settlements." *Gen. Motors*, 55 F.3d at 819. Awarding fees is within the discretion of the court, so long as the court employs the proper legal standards, follows the proper procedures, and makes findings of fact that are not clearly erroneous. *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 727 (3d Cir. 2001).

Attorneys' Fees

There are two methods of calculating attorneys' fees in class actions—the percentage-of-recovery method and the lodestar method. *In re Prudential*, 148 F.3d at 332-33. The percentage-of-recovery approach "applies a certain percentage to the settlement fund," while the lodestar method "multiplies the number of hours class counsel worked on a case by a reasonable hourly billing rate for such services." *Sullivan v. DB Inv. Inc.*, 667 F.3d 273, 330 (3d Cir. 2011). The percentage-of-recovery approach is more appropriate where, as here, there is a common fund. *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006) (finding that the percentage 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."); *Harshbarger v. Penn Mut. Life Ins. Co.*, 2017 WL 6525783, at *2 (E.D. Pa. Dec. 20, 2017) ("The reasonableness of attorneys' fee awards in common fund cases ... is generally evaluated using a [percentage of recovery] approach followed by a lodestar cross-check.").

In determining what constitutes a reasonable award under the percentage-of-recovery approach, the Third Circuit has directed district courts to consider the ten factors identified in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190 (3d Cir. 2000) and *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) (the "*Gunter/Prudential* factors"); *to wit*:

> (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 plaintiff's 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.

Gunter, 223 F.3d at 195 n.1; *see also Prudential*, 148 F.3d at 336-40; *Diet Drugs*, 582 F.3d at 541. Although district courts should "engage in robust assessments of the [*Gunter/Prudential* factors] when evaluating a fee request," these factors are not exhaustive and should not be applied in a formulaic way. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 301-02 (3d Cir. 2005). This Court will apply each factor to determine the reasonableness of the attorneys' fees request.

1. The size of the fund created and the number of persons benefitted

The first *Gunter* factor "consider[s] the fee request in comparison to the size of the fund created and the number of class members to be benefitted." *In re Ocean Power Techs., Inc.*, 2016 WL 6778218, at *26 (D.N.J. Nov. 15, 2016) (quoting *Rowe v. E.I. DuPont de Nemours & Co.*, 2011 WL 3837106, at *18 (D.N.J. Aug. 26, 2011)). Here, the parties negotiated a settlement with a common fund of $6.8 million that confers a benefit upon 5,734 Settlement Class Members. Even after deduction of the requested attorneys' fees and expenses, the $6.8 million fund is large enough to provide approximately $1,200.00 per Class Member. Similar recoveries have been described as "excellent" or "substantial" in other ERISA cases in this District. *See, e.g., Huffman v Prudential Ins. Co. of America*, 2019 WL 1499475, at *6 (E.D. Pa. Apr. 5, 2019) (finding around $1,000.00 per class member "an excellent result" in ERISA class action); *In re Schering-Plough Corp.*, 2012 WL 1964451, at *6 (finding around $900 per class member to be a "substantial" benefit in ERISA case). The Settlement also confers a non-monetary

benefit upon those Settlement Class Members who remain in the Plan because it requires Defendants to provide (1) independent review of the design of Defendants' investment lineup and investment policy statement; (2) a guarantee that SEI will continue to pay recordkeeping fees that otherwise would be payable from Plan assets; and (3) fiduciary training for all members of the Plan's Investment Committee. This factor strongly supports approval of the requested fee.

2. The presence or absence of substantial objections by members of the class

***11** *Gunter* advises that a court should consider "the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel." *Gunter*, 223 F.3d at 195 n.1. More than 5,700 Class Notices were sent to Settlement Class Members notifying them that Defendants had agreed to pay the requested attorneys' fees, expenses, and class representative service award. No objections to the substantive terms of the Settlement were filed. However, one Class Member, Ms. Laura L. Salminen, filed an objection to the requested attorneys' fee award, which included the signatures of seventy-seven (77) other Class Members.

Ms. Salminen's objection primarily challenges the proposed method of determining Class Counsel's attorneys' fees. Ms. Salminen advocates for a modified hours-billed or lodestar method. As stated above, percentage-of-recovery is generally the customary and favored method for determining an attorneys' fee award in ERISA class action settlements resulting in common fund settlements. In making her objection, Ms. Salminen ignores the significant risks undertaken by counsel when they undertake representation of ERISA class actions on a contingency basis and the Third Circuit's long-favored percentage-of-recovery method for calculating attorneys' fees in common fund cases such as this. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998). Further, Ms. Salminen's arguments that the Court should not take ERISA-specific considerations into account, including the complexity, risk of non-payment, and amount routinely awarded in similar ERISA cases, are directly contrary to law. Indeed, all three considerations are factors that courts in this Circuit consider in approving percentage-of-recovery attorneys' fees in a common fund case. *See In re Diet Drugs*, 582 F.3d 524, 541 (3d Cir. 2009). While Ms. Salminen's objection is noted, this Court finds that it carries little weight when balanced with the other factors.

3. The skill and efficiency of the attorneys involved

Class Counsel's skill and efficiency 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 the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *In re Viropharma Inc. Secur. Litig.*, 2016 WL 312108, at *16 (E.D. Pa. Jan. 25, 2016) (quoting *In re Computron Software, Inc.*, 6 F. Supp. 2d 313, 323 (D.N.J. 1998)). Here, Class Counsel have substantial experience prosecuting large-scale class actions, including ERISA class actions like the case *sub judice*. This experience undoubtedly contributed to the favorable outcome negotiated with equally experienced opposing counsel. Therefore, this factor also weighs in favor of approval.

4. The complexity, expense, and likely duration of the litigation

The fourth *Gunter* factor is intended to capture "the probable costs, in both time and money, of continued litigation." *In re Gen. Motors*, 55 F.3d at 812 (quoting *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 801 (3d Cir. 1974)). As noted, the claims in this action have been the subject of hard-fought litigation since its commencement. Notwithstanding the parties' progress in this matter prior to reaching settlement, if this case were to go to trial, it would involve substantial additional discovery and motion practice at great expense to the parties. Moreover, even if Plaintiff would have recovered a larger judgment at trial on behalf of the Settlement Class Members, their actual recovery would likely be postponed for years. There is also the possibility that Plaintiff would not recover anything. The Settlement Agreement secures a recovery for the Settlement Class now, rather than the "speculative promise of a larger payment years from now." *In re Viropharma Inc.*, 2016 WL 312108, at *16. This factor, therefore, weighs in favor of approval.

5. The risk of non-payment

***12** Class Counsel undertook this action on an entirely contingency fee basis. "Courts routinely recognize that the

risk created by undertaking an action on a contingency fee basis militates in favor of approval." *In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451, at *7 (D.N.J. 2012); *see also In re Ocean Power Techs, Inc.*, 2016 WL 677218, at *28. Class Counsel has litigated this case without pay from the inception and has shouldered the risk that the litigation would yield little-to-no recovery. Accordingly, the fifth *Gunter/Prudential* factor weighs in favor of approving the attorneys' fees request.

6. The amount of time devoted to the case by plaintiff's counsel

The sixth *Gunter/Prudential* factor considers the amount of time Class Counsel devoted to the litigation. *Gunter*, 223 F.3d at 199. Class Counsel estimates that over 700 hours of attorney and other professional and paraprofessional time were expended on this case. These hours are reasonable for a complex class case such as this.[1] Thus, the sixth *Gunter/Prudential* factor weighs in favor of approving the attorneys' fees request.

1 The hours expended in this case are further discussed in the lodestar crosscheck below.

7. The awards in similar cases

While there is no benchmark for the percentage of fees to be awarded in common fund cases, the Third Circuit has noted that reasonable fee awards in percentage-of-recovery cases generally range from nineteen to forty-five percent of the common fund. *In re Gen. Motors*, 55 F.3d at 822. In complex ERISA cases, courts in this Circuit and others also routinely award attorneys' fees in the amount of one-third of the total settlement fund. *See In re Merck & Co., Inc. Vytorin Erisa Litig.*, 2010 WL 547613, at *9 (D.N.J. Feb. 9, 2010); *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *4 (D. Minn. July 13, 2015). Accordingly, this factor weighs in favor of approval.

8. Value of benefits attributable to the efforts of class counsel relative to the efforts of others

Class Counsel were the only ones investigating the claims at issue in this case, and they alone initiated and actively litigated this federal action. Because Class Counsel were the only attorneys pursuing the claims at issue in this case, this factor weighs in favor of approval.

9. Percentage fee that would have been negotiated

Class Counsel agreed to litigate this case on a contingency fee basis and successfully negotiated a settlement. Were this case brought on behalf of an individual, the customary contingency fee would likely range between thirty and forty percent of the recovery. *Wallace v. Powell*, 288 F.R.D. 347, 375 (M.D. Pa. 2012) ("In private contingency fee cases, attorneys routinely negotiate agreements for between thirty percent and forty percent of the recovery."); *In re Ikon Ofc. 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."). Here, Class Counsel's requested percentage is commensurate with customary percentages in private contingency fee agreements. Thus, this factor supports approval.

10. Innovative terms of the settlement

The Settlement Agreement does not contain any innovative terms. This factor is neutral as it neither weighs in favor of, nor against, approval.

Lodestar Cross-Check

In common fund cases such as this one, the lodestar method is sometimes used to "cross-check the reasonableness of a percentage-of-recovery fee award." *Sullivan*, 667 F.3d at 330. The purpose of the cross-check is to ensure that the percentage approach does not result in an "extraordinary" lodestar multiple or a windfall. *See In re Cendant*, 264 F.3d at 285. The Third Circuit has stated that a lodestar cross-check entails an abridged lodestar analysis that requires neither "mathematical precision nor bean counting." *In re Rite Aid*, 396 F.3d at 305. The Court need not receive or review actual billing records when conducting this analysis. *Id.* at 307.

***13** Under the lodestar method, a court begins the process of determining the reasonable fee by calculating the "lodestar," *i.e.*, the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *see also McKenna v.*

City of Phila., 582 F.3d 447, 455 (3d Cir. 2009). Once the lodestar is determined, the court must then determine whether additional adjustments are appropriate. *McKenna*, 582 F.3d at 455. A reasonable hourly rate in the lodestar calculation is "[g]enerally ... calculated according to the prevailing market rates in the relevant community," taking into account "the experience and skill of the ... attorney and compar[ing] their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001). The prevailing market rate is usually deemed reasonable. *Pub. Interest Research Grp. v. Windall*, 51 F.3d 1179, 1185 (3d Cir. 1995).

"In calculating the second part of the lodestar determination," *i.e.*, the time reasonably expended, a district court should "review the time charged, decide whether the hours set out were reasonably expended for each of the particular purposes described and then exclude those that are excessive, redundant, or otherwise unnecessary." *Pa. Envtl. Def. Found. v. Canon-McMillan Sch. Dist.*, 152 F.3d 228, 232 (3d Cir. 1998). As noted in *Hensley*, lawyers are required to use judgment when billing their clients so as not to bill clients for "excessive, redundant, or otherwise unnecessary" hours. *Id.* at 434. "Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." *Id.* at 434 (citations omitted). Ultimately, district courts have "substantial discretion in determining what constitutes ... reasonable hours." *Lanni v. New Jersey*, 259 F.3d 146, 149 (3d Cir. 2001).

Attached to the Richter and Santillo Declarations, Class Counsel included a summary of the hours worked by the partners, associates, and professional support staff involved in this litigation. These summaries were prepared from contemporaneous, daily time records that are regularly prepared and maintained by the respective firms. Class Counsel and support staff are claiming 717.3 hours for work done at hourly rates ranging from $250 to $875. After reviewing the Attorney Declarations, it appears that Class Counsel is not requesting compensation for any time that was "excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434. These hourly rates are also well within the range of what is reasonable and appropriate in this market. That is, the hourly charged rates for the attorneys are the same as the regular current rates charged for their services in standard non-class matters, including contingent and non-contingent matters. The attorneys have substantial experience in complex class action litigation, and their hourly rates are within the range charged by attorneys with comparable experience levels for litigation of a similar nature.

Having found the hourly rates and hours expended reasonable, as of October 21, 2019, the aggregate lodestar calculation is $368,143.50 for the 717.3 hours of attorney and support staff work. Class Counsel's request for $2,266,666.00 (one-third of the settlement amount) will result in Class Counsel receiving approximately 6.16 times the lodestar. Courts frequently approve attorneys' fees awards for amounts in excess of the calculated lodestar. Indeed, multiples ranging from 1 to 8 are often used in common fund cases. *See In re Rite Aid Sec. Litig.*, 362 F. Supp. 2d 587, 590 (E.D. Pa. 2005) (approving a 6.96 multiplier); *Steiner v. Am. Broadcasting Co.*, 248 F. App'x 780, 783 (9th Cir. 2007) (holding a 6.85 multiplier "falls well within the range of multipliers that courts have allowed"); *Viafara v. MCIZ Corp.*, 2014 WL 1777438, at *14 (S.D.N.Y. May 1, 2014) ("Courts award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."). Such multipliers are necessary to compensate counsel for the risk of assuming the representation on a contingency fee basis. *City of Detroit v. Grinnell*, 495 F.2d 448, 470 (2d Cir. 1974). Moreover, Class Counsel is expected to perform additional work in connection with this case following this Court's approval. As such, the multiplier will likely be lower by the time the matter is closed and Class Counsel's work is complete.

***14** Therefore, having considered the relevant *Gunter/ Prudential* factors and performed the lodestar cross-check, this Court approves the reasonable amount of attorneys' fees requested.

Reimbursed Litigation and Administrative Expenses

Class Counsel also seeks approval of the portion of the Fee Agreement which entitles them to reimbursement of their litigation and administrative expenses. Courts recognize that " '[t]here 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) (quoting *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 179 (E.D. Pa. 2000)). This includes reimbursement for settlement administration. *See In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 225 (E.D. Pa. 2014).

Class Counsel claims that they incurred $60,170.97 in such expenses during the pendency of this litigation. This amount includes: (1) $24,936 for the Settlement Administrator, who was/is responsible for the administration of the class notice, claims review, and payment distribution services; (2) $2,500 for the Escrow Agent, who was/is responsible for handling the $6.8 million settlement fund; and (3) $15,000 for the Independent Fiduciary, who evaluated the overall fairness of the settlement, including fee awards. After carefully reviewing the documentation supporting the reimbursement request, this Court finds that the litigation and administrative expenses listed by Class Counsel are reasonable and expected in this type of case. Therefore, Class Counsel's request to be reimbursed $60,170.97 in expenses is granted.

Service Award

Class Counsel also seek this Court's approval of a Service Award, in the amount of $20,000.00, to Plaintiff Gordon Stevens, for his willingness to undertake the risks and the burden as a class representative in this litigation. "Incentive awards are not uncommon in class action litigation[.]" *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000). These payments "compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation[.]" *Bredbenner v. Liberty Travel, Inc.*, 2011 WL 1344745, at *22 (D.N.J. Apr. 8, 2011) (internal citations and quotations omitted). Incentive awards also " 'reward the public service' of contributing to the enforcement of mandatory laws." *Id.* (quoting *In re Cendant*, 232 F. Supp. 2d at 344).

This Court recognizes that there would be no benefit to the Settlement Class Members if Plaintiff had not stepped forward and prosecuted this matter to the current resolution. In doing so, Mr. Stevens devoted time and energy to the litigation, including assisting Class Counsel with discovery and mediation. The requested award is well within the range of awards made in similar cases. *See, e.g., Barel v. Bank of America*, 255 F.R.D. 393, 402-03 (E.D. Pa. Jan. 16, 2009) (awarding $10,000.00 incentive award); *Brown v. Progressions Behavioral Health Servs., Inc.*, 2017 WL 2986300, at *7 (E.D. Pa. July 13, 2017) (awarding $10,000 to each named plaintiff because they "were actively involved in the litigation since before it was commenced, they provided the information and documents that formed the basis for the lawsuit" and "the service award payments represent a small fraction of the $452,586 Settlement Fund."). Settlement Class Members were also notified that Class Counsel would request this individual award for Mr. Stevens. Notably, no Settlement Class Member objected to the proposed Service Award. Accordingly, this Court approves the requested award of $10,000.00 to Plaintiff Gordon Stevens.

CONCLUSION

***15** For the reasons stated herein, this Court grants final approval of the proposed class action settlement, awards Class Counsel reasonable attorneys' fees in the amount of $2,266,666.00 and the reimbursement of litigation and administrative expenses in the amount of $60,170.97, and awards the sum of $10,000.00 to the Class Representative, Gordon Stevens. An Order consistent with this Memorandum Opinion follows.

All Citations

Slip Copy, 2020 WL 996418

End of Document

2016 WL 1743268
Only the Westlaw citation is currently available.
United States District Court, M.D. Pennsylvania.

Antonio TAVARES, on behalf of himself and similarly situated employees, Plaintiffs,
v.
S-L DISTRIBUTION CO., INC., and S-L Routes, LLC, Defendants.

1:13-cv-1313
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Signed 05/02/2016

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MEMORANDUM

Hon. John E. Jones III, District Judge

***1** The Court is in receipt of Plaintiffs' unopposed Motion for Final Approval of the Class Action Settlement, filed April 13, 2016. (Doc. 122). A fairness hearing was held in this matter on April 20, 2016. Based on the submissions of the parties and the testimony at the hearing, and for the reasons that follow, the Motion shall be granted.

I. FACTUAL & PROCEDURAL BACKGROUND

Plaintiffs in the above-captioned matter are delivery drivers employed by the Defendants,[1] who reside in Massachusetts and make deliveries to stores in Massachusetts. Defendants are a Delaware corporation with its principal place of business in Pennsylvania, as well as its wholly-owned subsidiary, a Pennsylvania limited-liability company. They are in the business of selling snack food products to retail stores, and maintain several warehouses in Massachusetts for the purpose of distributing certain brands of snack foods.

1 In the fairness hearing on April 20, 2016, Defendants noted that they contest this characterization of Plaintiffs, whom they view solely as independent contractors. (Transcript, Doc. 129, p. 12).

Defendants entered into written Distributor Agreements with each Plaintiff, pursuant to which Plaintiffs were classified as independent contractors. The Agreements also provided that "any disputes or claims which arise between the parties shall be governed by, subject to, and construed in accordance with, the laws of the Commonwealth of Pennsylvania without giving effect to its conflicts of law or choice of law provisions." (Doc. 17-1, p. 21).

Plaintiffs commenced this action by filing a Class Action Complaint (Doc. 1-3, pp. 4-11), and later an Amended Class Action Complaint (Doc. 1-3, pp. 13-21), in the Massachusetts Superior Court. Plaintiffs' claims arise from their central contention that, under the Massachusetts Wage Act, they should be correctly characterized as employees of Defendants and not independent contractors. The matter was subsequently removed to federal court and then transferred to this Court. After Defendants filed an Answer (Doc. 44), Plaintiffs moved for partial summary judgment, seeking a declaration that Massachusetts law applies to their claims that they were wrongly classified as independent contractors. (Doc. 46).[2] Following a full briefing, this Court issued a Memorandum and Order on January 14, 2014, granting Plaintiffs' Motion. (Doc. 70). However, in their brief in support of the instant Motion, Plaintiffs note that "S-L disputes that Massachusetts Law, including the Wage Act, properly applies to these claims. Rater, S-L asserts that Pennsylvania law applies, as expressly provided in the Distributor Agreements." (Doc. 123, p. 3, fn. 6).

2 Under the Massachusetts Wage Act, an individual performing services for another is considered to be an employee unless the employer proves, by a preponderance of the evidence, that
(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
(2) the service is performed outside the usual course of the business of the employer; and,
(3) the individual is customarily engaged in an independently established trade, occupation,

> profession or business of the same nature as that involved in the service performed.

M.G.L. 149 § 148B; *see also Somers v. Converged Access, Inc.*, 911 N.E.2d 739, 747 (Mass. 2009).

In Pennsylvania, courts rely on a common-law test and consider the following factors in determining whether an individual is an employee or an independent contractor:

> Control of manner work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one employed is engaged in a distinct occupation or business; which party supplies the tools; whether payment is by the time or by the job; whether work is part of the regular business of the employer, and also the right to terminate the employment at any time.

Hammermill Paper Co. v. Rust Engineering Co., 243 A.2d 365, 370 (Pa. 1968). In factual scenarios similar to the instant one, the party claiming the master-servant relationship bears the burden of proving it. *See Johnson v. Angretti*, 73 A.2d 666, 669-70 (Pa. 1950).

***2** Litigation in this matter continued on for over a year, until the Court was informed that a settlement had been reached pursuant to a status report filed by Plaintiffs on September 4, 2015. (Doc. 114). An unopposed Motion for Preliminary Approval of the Class Action Settlement and Certification of the Settlement Class (Doc. 120) containing the settlement agreement as an attached exhibit (Doc. 120-1) (the "Agreement") was granted on December 28, 2015. (Doc. 121). The Order appointed the law firms of Winebrake & Santillo, LLC and Lichten & Liss-Riordan, P.C. as class counsel. (*See id.* at ¶ 3). The Order also approved the notice and claim forms attached to the Agreement as Exhibits B-D and directed the parties to strictly follow their agreed-upon notice and claim protocols. (*Id.* at ¶ 4). Following that Order, class counsel sent the approved forms[3] to all the identified class members, thereby affording them an opportunity to participate in, exclude themselves from, or object to the terms of the settlement. No class members objected to the terms; however, seven class members have elected to exclude themselves from the settlement, including several named representatives of the class. (Doc. 123, p. 16).

3 Two slightly different notice and response forms were sent to the class members depending on whether they are currently engaged in business with the Defendants, or had engaged with them during the relevant claim period but are no longer currently employed.

As noted above, on April 13, 2016, Plaintiffs filed an unopposed Motion for Final Approval of the Class Action Settlement, (Doc. 122), as well as a Brief in Support of the Motion, (Doc. 123). A fairness hearing was held in this matter on April 20, 2016. For the following reasons, the Motion shall be granted and the settlement shall be approved.

II. DISCUSSION

A. Class Certification

As an initial matter, we note that the decision of certain class members, even named class representatives, to exclude themselves from the settlement does not prevent a court from approving a class certification and settlement, so long as the proposed class meets the requirements established by Rule 23 and the agreement reached by the parties is fair, adequate and reasonable. *See Martin v. Foster Wheeler Energy Corp*, Civ. Action No. 3:06-CV-0878, 2007 WL 4437221, at *6 (M.D.Pa., Dec. 14, 2007) (approving a settlement for a class action in which 20 of the 147 class members excluded themselves); *In re Nat'l Football League Players Concussion Injury Litig.*, —— F.3d ——, 2016 WL 1552205, at *16 (3d Cir. April 18, 2016) (upholding a district court ruling in favor of class action certification and settlement for over 20,000 class members where 202 members opted out and 95 objected to the settlement terms).

To establish a class action, a case "must satisfy the four requirements of Rule 23(a) and the requirements of either Rule 23(b)(1), (2) or (3)." *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 590 (3d Cir. 2012). The party seeking the class certification bears the burden of establishing each element of the class certification rule by a preponderance of the evidence. Actual, and not presumed, conformity with the rule requirements is essential. *Id.* at 591.

i. Rule 23(a)

To satisfy Rule 23 (a),

> (1) the class must be "so numerous that joinder of all members is impracticable (numerosity)"; (2) there must be questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class (typicality); and (4) the named plaintiffs must fairly and adequately protect the interests of the class (adequacy of representation, or simply adequacy).

Marcus, 687 F.3d at 590-91 (internal quotations and citations omitted).

In the instant case, Plaintiffs seek final class certification for the class as defined by the parties' Class Action Settlement Agreement and Release, that is:

> all individuals who, either individually or through a business entity or entities in which the individual had an ownership interest, sold and distributed snack food products in Massachusetts pursuant to written Distributor Agreements with S-L Distribution Co., Inc. and/or S-L Routes, LLC, or their predecessors, which individuals are listed on Exhibit A of the Agreement.

***3** (Doc. 123, p. 13).

We begin our analysis with a consideration of numerosity. The class size here encompasses 224 individuals, 178 of which have submitted claims.[4] (*Id.*, p. 24). This number exceeds the typical numerosity requirement, usually satisfied when "the potential number of plaintiffs exceeds forty." *Marcus*, 687 F.3d at 595. Thus, the class is sufficiently numerous to warrant certification.

4 The thirty-nine members who have not filed claims failed to respond to the notice. They will receive a second, thirty-day window in which to file a claim after initial settlement checks are issued, as in class counsel's experience, the distribution of settlement checks often causes other class members to come forward with claims. Once this period has passed, a second distribution of the remaining settlement funds will ensue. (Doc. 123, pp. 16-17).

Next we consider the requirement of commonality. "A putative class satisfies Rule 23(a)'s commonality requirement if 'the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.' *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir.1994).... [T]hat bar is not a high one." *Rodriguez*, 726 F.3d at 382. "[E]ven a single common question will do." *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 482 (3d Cir. 2015) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2556 (2011)). Here, all Plaintiffs, including remaining named Plaintiffs Itto Mosso and Jorge Delgado, allege that they were misclassified as independent contractors and that, pursuant to the Massachusetts Wage Act, they should have been hired by Defendants as employees. (*See* Doc. 123, p. 25). Thus, the success of all their claims turns on this Court's interpretation of the Act, and whether certain aspects it, critical to Plaintiffs' success, have been preempted by the Federal Aviation Administration Authorization Act. Because of this common argument, the cases put forth by the class members and the named representatives share questions of law and fact that determine their ability to receive the requested remedy. Thus, the commonality requirement is easily met.

The third 23(a) requirement is typicality. "Typicality ... derives its independent legal significance from its ability to screen out class actions in which the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are present." *Marcus*, 687 F.3d at 598. However, "[i]f the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183-84 (3d Cir. 2001). The briefs and testimony heard at the fairness hearing have not indicated that any class members are situated in a way that is markedly different from the class representatives. Rather, the named plaintiffs and the class members performed materially the same duties and responsibilities, as all were or continue to be delivery drivers employed by Defendants. (Doc. 123, p. 26). More importantly, they were all subject to substantially similar Distributor Agreements, and all allege the same injury – that the agreements misclassified them as independent contractors instead of employees. (*Id.*). Thus, they were all subject to the same conduct by Defendants, which impacted all the class members in the same way, as they all have the same compensation structure. Thus, the typicality requirement is also met.

***4** The last 23(a) requirement is adequacy. The Court must consider whether the class representatives and class counsel will fairly and adequately protect the interests of the class. To be an adequate representative, "(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975). Defendants have not contested this point (nor have they contested any other) and there appears no reason to find that Plaintiff's interests are antagonistic to those of the potential class; indeed, they are willing to settle this lawsuit under the same terms and conditions as those presented to the other class members.

There is also no reason to find that Plaintiff's counsel is unqualified. Plaintiffs are represented by counsel with considerable experience in employment rights litigation, and counsel has successfully negotiated a large number of suits

arising under wage and hour laws in the past. (*See* Docs. 122-4, 122-5). Further, though several members of the class have opted to exclude themselves from the settlement, we find it notable that those members have not objected to the settlement and have indeed requested that class counsel continue to represent them in Plaintiffs' ongoing independent litigation. (Transcript, Doc. 129, pp. 6-7). Thus, there is no reason to find that Plaintiff and Plaintiff's counsel have not adequately represented the class.

ii. Rule 23(b)

"If the Rule 23(a) requirements are met, then a court must consider whether the class fits within one of the three categories of class actions set forth in Rule 23(b)." *In Re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 392 (3d Cir. 2015). In this case, Plaintiff proposes that the class fits within Rule 23(b)(3), a category that requires the Court to determine "whether (1) common questions predominate over any questions affecting only individual class members (predominance) and (2) class resolution is superior to other available methods to decide the controversy (superiority)." *In re Nat'l Football League*, 2016 WL 1552205, at *16 (citing FED. R. CIV. P. 23(b)(3)). "Rule 23(b)(3) includes a nonexhaustive list of factors pertinent to a court's 'close look' at the predominance and superiority criteria." *Amchem*, 521 U.S. at 615-16 (citing FED. R. CIV. P. 23(b)(3)). These include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id.

a. Predominance

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). This standard is "far more demanding than the commonality requirement of Rule 23(a), requiring more than a common claim." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir.2008) (internal citations omitted). However, courts are "nonetheless 'more inclined to find the predominance test met in the settlement context." *In re Nat'l Football League*, 2016 WL 1552205, at *21 (quoting *Sullivan v. DB Investments, Inc.*, 667 F.3d 272, 304, n. 29 (3d Cir. 2011) (*en banc*)). The "nature of the evidence ... determines whether the question is common or individual." *In re Hydrogen Peroxide*, 552 F.3d at 311 (citing *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir.2005)). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 172 (3d Cir.2001). If common issues that determine liability predominate, class certification is appropriate even if damages must still be proven individually. *See Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir.1985).

***5** In the context of a predominance analysis, we reiterate that the Court's interpretation of the Massachusetts Wage Act, and specifically whether certain aspects of the Act are preempted by the Federal Aviation Administration Authorization Act, predominates over all of Plaintiffs' claims. The resolution of the preemption issue will be the same in each case, and will impact the rights of every class member in the same way. Further, the facts of each case are largely constrained by the Distributor Agreements, which we have already described as substantially similar to one another. While we note that the damages to be awarded in each Plaintiff's claim would require individual calculation because some Plaintiffs may not have worked as frequently or for as many weeks as others, this disparity does not create cause to defeat class certification. Importantly, the Agreement provides that all class members' damages awards will be calculated in the same way, and the only differentiating factor will be the number of weeks that each worked. As the Third Circuit in *Newton*, 259 F.3d at 172, emphasized, a class is prime for certification where the essential elements of each class members' claims are identical and proving them as to one would extend to all. Here too, we find that the proposed class is sufficiently cohesive such that representation through class action is warranted. *See Amchem*, 521 U.S. at 623 (noting that predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.").

b. Superiority

"Rule 23(b)(3)'s superiority requirement 'asks the court to balance, in terms of fairness and efficiency, the merits of

a class action against those of alternative available means of adjudication." *In re Nat'l Football League*, 2016 WL 1552205, at *22 (quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534 (3d Cir. 2004)). Here, the class action prevents the litigation of hundreds of duplicative lawsuits. Further, without a class action, individual plaintiffs' damages amounts could be small enough to render separate suits impracticable. *See Amchem*, 521 U.S. at 616 (noting that any interests of individuals in conducting separate lawsuits "may be theoretic rather than practical" where "the amounts at stake for individuals may be so small that separate suits would be impracticable."). In light of this reasoning we find that, like the requirements of Rule 23(a), the predominance and superiority requirements pursuant to Rule 23(b)(3) are also met. Class certification is thus appropriate and shall be granted for purposes of effectuating the proposed settlement.

B. Fairness of the Class Action Settlement

We move now to consider the terms of the settlement. In the instant case, the parties have agreed to a $2,850,000 non-reversionary settlement fund, from which attorneys' fees and expenses are to be paid, as well as enhancement awards for the named Plaintiffs and a $5,000 award to Plaintiff Antonio Oliveira.[5] This results in a net fund of $2,070,000, to be distributed to 178 settlement class members. The average individual payout will be approximately $11,692, determined based on a ratio of weeks the particular Plaintiff worked compared to the total weeks worked by all other claimants during the relevant time period.[6] Further, because the fund is non-reversionary, the plaintiffs who have opted to exclude themselves from the settlement have perhaps unintentionally benefited the remaining class members. Those who opted out were set to receive approximately $160,207.21 of the fund, all of which will now go to the class, and enhance each claimants' award by an average of $900. (Doc. 123, p. 20).

5 The $5,000 award to Plaintiff Antonio Oliveira is to be paid in exchange for releasing the Defendants from claims that were or could have been asserted in his MCAD charge, and/or the cross-filed action in this suit. (*See* Doc. 120-1, ¶ 5(C)).

6 Specifically, each class members' initial payment amount will be calculated from the $2,070,000 remainder of the fund (referred to in the Agreement as the "net settlement amount") by multiplying the net settlement amount by the number of individual class member's workweeks during the payment period and then dividing that amount by the total combined work weeks of all class members. (*See* Doc. 120-1, p. 3). Each class member's second payment amount shall be calculated by subtracting the initial payment amount from the net settlement amount, and multiplying that number by the individual claimant's work weeks during the payment period, again divided by all claimants' total combined workweeks. (*See* Doc. 120-1, p. 4).

***6** In exchange for the settlement, all class members release the Defendants from all claims arising through the "Final Approval Date." The ability to reassert a class action claim in state or federal court is waived. (Doc. 123, p. 21).

"Before approving the settlement of a class action, a district court must certify that the settlement comports with Rule 23 and is 'fair, reasonable and adequate.'" *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 382 (3d Cir. 2013) (quoting FED. R. CIV. P. 23(e)). The Third Circuit has advised that

> where settlement negotiations precede class certification, and approval for settlement and certification are sought simultaneously, we require district courts to be even "more scrupulous than usual" when examining the fairness of the proposed settlement. This heightened standard is intended to ensure that class counsel has engaged in sustained advocacy throughout the course of the proceedings, particularly in settlement negotiations, and has protected the interests of all class members.

In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 534 (3d Cir. 2004) (citing *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 317 (3d Cir. 1998)). In order to assist in this examination, the Third Circuit has developed a nine factor test. Known as the Girsh Factors, the nine factors a court must consider when determining the fairness of a 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.

Girsh v. Jepson, 521 F.2d 153, 158 (3d Cir. 1975). Plaintiff's brief indicates that the parties have agreed that all nine factors weight in favor of a finding that the settlement is fair. As noted above, there are no objectors to the settlement terms or amount. However, in "[a]cting as a fiduciary responsible for protecting the rights of absent class members, the Court is required to 'independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished.'" *Hegab v. Family Dollar Stores, Inc.*, Civ. A. No. 11-1206(CC), 2015 WL 1021130, at *5 (D.N.J., Mar. 9, 2015) (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001)). Our own review, laid out below, indicates that the settlement award is fair, and thus we shall approve it.

i. The complexity, expense, and likely duration of the litigation

"The first factor captures the probable costs, in both time and money, of continued litigation." *Warfarin*, 391 F.3d at 535-36 (internal citations and quotations omitted). As this case has continued on for over three years, the parties have already contributed significant resources in both time and money thus far. If this case were to proceed to trial, both parties would incur even greater attorneys' fees and litigation expenses. Plaintiffs' counsel has emphasized that "this lawsuit would require the Court to resolve complex and hotly-contested legal issues pertaining to preemption, merits issues, damages, and the propriety of Rule 23 class certification," involving expert testimony, and competing motions regarding the permissible use of "representative" trial testimony. (Doc. 123, p. 30). Furthermore, Defendants have already expressed their intent to appeal the Court's summary judgment ruling, in which we held that Massachusetts law, and not Pennsylvania law, applies to the proceedings. All of this would absorb additional time and resources of the parties. As a result of these concerns, this first factor weighs strongly in favor of approval of the settlement, which would provide immediate and significant benefits to the settlement class. *See Hegab*, 2015 WL 1021130, at *5 (noting that where a settlement provides "immediate and substantial benefits for the settlement class," and continued litigation would be lengthy and expensive, the first *Girsh* factor weighs in favor of settlement).

ii. The reaction of the class to the settlement

***7** The second Girsh factor "attempts to gauge whether members of the class support the settlement." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 318 (3d Cir. 1998) (citing *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313 n. 15 (3d Cir. 1993)). As noted, there has not been a single objection to the settlement. Though seven members have opted to exclude themselves from the settlement (representing 3.1% of the settlement class), Plaintiffs' counsel has represented that they have not done so because they were displeased with the settlement terms as pertaining to the class members, but because they feel that particular circumstances of their claims entitle them to significantly greater relief. (*See* Transcript, Doc. 129, p. 7; Doc. 123, p. 19). The excluded members intend to litigate their claims independently, as they are entitled to do. We do not find that their decision in any way negatively reflects on the settlement terms. Further, the relatively small percentage of class members that have elected to opt out of the settlement does not present a barrier to our approval. *See Warfarin*, 391 F.3d at 536 (upholding a district court decision to approve settlement where a small number of class members objected to or opted to exclude themselves from the settlement); *In re Nat'l Football League Players Concussion Injury Litig.*, —— F.3d ——, 2016 WL 1552205, at *16 (3d Cir. April 18, 2016) (ruling in favor of class action certification and settlement for over 20,000 class members where approximately 1.4% of class members either opted out or objected to the settlement terms). Thus, this second factor also weighs in favor of approval of the settlement.

iii. The stage of the proceedings and the amount of discovery completed

In order for a settlement to be considered fair, the parties must demonstrate "'an adequate appreciation of the merits of the case before negotiating.' (*In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 813 (3d Cir. 1995)). 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. Here, the parties submit

that they have engaged in extensive discovery in the two years leading up to the settlement. (Doc. 123, p. 31). Further, they conducted two separate and thorough mediation sessions with an experienced mediator before reaching a settlement. (*Id.*). This information, as well as a detailed legal analysis of the risks of further litigation for both parties, led both to the conclusion that negotiations were prudent. (*Id.*). As such, we see no reason to suspect that the parties lacked adequate understanding of the merits of their respective positions before entering into negotiations. We thus find that this factor also points in favor of approval of the settlement.

iv. The risks of establishing liability and damages

"The fourth and fifth *Girsh* factors survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement." *In re Prudential*, 148 F.3d at 319. "However, in doing so, a court need not conduct a 'mini-trial and must, to a certain extent, give credence to the estimation of the probability of success proffered by class counsel.'" *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 207, 238 (D.N.J. 2005) (citing *In re Ikon Office Solutions, Inc. Sec. Litig.*, 166, 181 (E.D. Pa. 2000)). Here, as in the first *Girsh* factor, Plaintiffs' counsel have assured the Court that they are aware of several important risks they face before they can establish liability. Again, they point to the appeal that Defendants would likely take regarding this Court's decision to apply Massachusetts law. Further, Plaintiffs emphasize the possibility that, if they win on appeal, this Court could still find the Massachusetts Wage Act to be preempted. Even if the Act were not preempted, Plaintiffs would still need to qualify as employees under the definition provided by that Act.

Further, Plaintiffs note that Defendants vigorously dispute whether the damages Plaintiffs seek are of the type recoverable under the Act. Plaintiffs' counsel currently estimates that Plaintiffs have incurred a total of $6,902,346 in charges and expenses, $4,232,192 of which are due to "route loan repayments." This distinction is important because the route loan repayments go towards the ownership of a distinct delivery route, which can be sold by Plaintiffs in the open marketplace should they no longer wish to perform services under the Distributor Agreements. (Doc. 123, p. 11). Thus, the payments Plaintiffs made to Defendants have arguably caused Plaintiffs to build equity and receive value, in that the routes represent an asset. Defendants plan to argue that as such, Plaintiffs are not entitled to receive damages in exchange for these payments, as they are not of the type protected by the Wage Act. (*Id.*). If these arguments are meritorious, it goes without saying that they could translate into an outcome where the Plaintiffs would be entitled to receive substantially less than they feel they are owed, or nothing at all. In weighing the risks of these potential outcomes against the immediate and definite settlement the class would enjoy, it is clear that this factor too weighs in favor of the Court's approval of the proposed settlement.

v. The risks of maintaining the class action through trial

***8** "'Because the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial.'" *Hegab*, 2015 WL 1021130, at *8 (quoting *Warfarin*, 391 F.3d at 537). "Under Rule 23, a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable." *In re Prudential*, 148 F.3d at 321. However, "[i]n a settlement class, this factor becomes essentially 'toothless' because 'a district court need not inquire whether the case, if tried, would present intractable management problems ... for the proposal is that there be no trial.'" *In re Nat'l Football League*, 2016 WL 1552205, at *25 (quoting *In re Prudential*, 148 F.3d at 321). Thus, this factor weighs only slightly in favor of settlement approval and is deserving of minimal consideration. *Id.* (noting that the lower court correctly determined that "the likelihood of obtaining and keeping a class certification if the action were to proceed to trial ... deserved only minimal consideration.").

vi. The ability of Defendants to withstand greater judgment

This *Girsh* factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *In re Warfarin*, 391 F.3d at 537-38 (internal quotations and citations omitted). This factor "is most relevant when the defendant's professed inability to pay is used to justify the amount of the settlement." *In re Nat'l Football League*, 2016 WL 1552205, at *25-26. Where a defendant does not claim the potential for financial instability as a justification for the size of the settlement, courts have found this factor to be neutral. *Id.*; *see also Haught v. Summit*

Resources, 1:15-cv-0069, 2016 WL 1301011, at *17-18 (M.D.Pa April 4, 2016). Here, Defendants have not asserted an inability to pay any more than the settlement amount. Thus, we find here too that this factor weighs neither for nor against approval of the proposed settlement.

vii. The range of reasonableness of the settlement fund in light of the best possible recovery and all the attendant risks of litigation

The last two *Girsh* factors ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial. In order to assess the reasonableness of a proposed settlement seeking monetary relief, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement."

In re Prudential, 148 F.3d at 322 (quoting *G.M. Trucks*, 55 F.3d at 806). As the lower court noted in *In re Prudential*, to calculate the best possible settlement for Plaintiffs would be "exceedingly speculative," particularly given the significant risks of litigation presented here and Defendant's propositions regarding the attenuation of Plaintiffs' claims. *Id.* Plaintiffs' counsel emphasizes that the settlement procures 30% of the total alleged losses for Plaintiffs, and 77% of the alleged losses "not attributable to the especially vulnerable Route Loan Repayments." (Doc. 123, p. 38). We are thus persuaded that the settlement is reasonable in light of the best possible recovery for Plaintiffs, and conclude that the final two *Girsh* factors weigh in favor of settlement approval.

This concludes our analysis of the nine *Girsh* factors. Seven of the nine factors weigh strongly in favor of approving the proposed settlement, while the fifth and sixth factors (the risks of maintaining the class action through trial, and the ability of the Defendants to withstand a greater judgment) are either not as strongly persuasive in favor of approval, or neutral. As such, we find that the majority of the factors weigh in favor of approval of the proposed settlement, and that our approval is therefore warranted.

C. Enhancement Awards

***9** The parties' proposed settlement agreement provides for a $15,000 enhancement award for each of the two the class representatives who have not opted to exclude themselves from the class: Mssrs. Mosso and Delgado. (Doc. 123, p. 39). Thus, $30,000 in total is to be detracted from the settlement fund in order to procure these enhancement awards. "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." *Hegab v. Family Dollar Stores, Inc.*, 2015 WL 1021130, at *16 (internal quotations and citations omitted) (approving an enhancement award of $7,500 to the named plaintiff). "'An incentive payment to come from the attorneys' fees awarded to plaintiff's counsel need not be subject to intensive scrutiny, as the interests of the corporation, the public, and the defendants are not directly affected.'" *Varacallo*, 226 F.R.D. at 257 (quoting *In re Cendant Corp. Derivative Action Litig.*, 232 F.Supp.2d 327, 344 (D.N.J. 2002)). However, where an enhancement award would be paid solely from the settlement fund, thereby depleting the financial resources of the class members, a court "carefully reviews this request to ensure its fairness to the class." *Id.* Such is the case here.

A thorough history exists on the approval of reasonable enhancement awards. In *Varacallo*, the District Court for the District of New Jersey amply detailed this history, wherein courts approved enhancement awards ranging from $1,000 to $50,000. *Id.* at *257-58 (approving $10,000 enhancement awards for five named plaintiffs, and $3,000 and $1,000 awards for two others). However, "incentive awards will not be freely distributed without a substantial basis to demonstrate that the individual provided services for the Class and incurred risks during the course of the litigation." *Id.* at 258.

Here, parties explain that the two named Plaintiffs have been "reliable and diligent" in their assistance to counsel throughout the class action. (Doc. 123, p. 39). Furthermore, at the fairness hearing, counsel for Plaintiffs explained that, in his experience, there is often great hesitation on the part of plaintiffs to come forward in these types of class actions, as they fear negative repercussions in the employment market. (Transcript, Doc. 129, p. 4). In this age of information technology, future employers can quickly become aware of a plaintiff's involvement in employment rights litigation. Rightly or wrongly, plaintiffs, and particularly delivery drivers, often fear they will not find work after the litigation is resolved, due to their involvement. (*Id.* at pp. 4-5). Thus, the requested enhancement awards serve not only to compensate Mssrs. Mosso and Delgado for their participation, but also to reward them for their bravery in bringing this litigation forward, as it has resulted in beneficial effects for a large

class of drivers. The rewards further incentivize other drivers to participate in other meritorious litigation in the future. Finally, we note that the proposed enhancement awards do not fall outside of those awards previously approved by courts in similar cases, though they may perhaps be on the higher range of the spectrum of approved awards. *See Varacallo*, 226 F.R.D. at 257-58. Given the foregoing analysis, the Court finds that Plaintiffs are entitled to their requests.

D. Attorneys' Fees

"A thorough judicial review of fee applications is required in all class action settlements." *In re General Motors Corp.*, 55 F.3d 768, 819 (3d Cir. 1995). Rule 23(h) provides that "[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." FED. R. CIV. P. 23(h). "The awarding of fees is within the discretion of the Court, so long as the Court employs the proper legal standards, follows the proper procedures, and makes findings of fact that are not clearly erroneous." *Hegab*, 2015 WL 1021130, at *10 (citing *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 727 (3d Cir. 2001)). In the instant case, Defendants agree to pay attorneys' fees in the amount of $750,000, which includes settlement administration expenses and litigation costs in the amount of $15,745. (Doc. 123, p. 39-40). Thus, the total payment to Plaintiffs' attorneys in exchange for their services amounts to $734,255. (*Id.*).

***10** "Relevant law evidences two basic methods for evaluating the reasonableness of a particular attorneys' fee request—the lodestar approach and the percentage-of-recovery approach." *Hegab*, 2015 WL 1021130, at *11 (internal quotation marks and citation omitted). "The lodestar method is generally 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.* (citing *In re Cendant Corp.*, 243 F.3d at 732). The lodestar is also preferable where "the nature of the settlement evades the precise evaluation needed for the percentage of recovery method." *In re Gen. Motors*, 55 F.3d at 821; *see also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005). However, "[t]he percentage-of-recovery method is preferred in common fund cases, as courts have determined 'that Class Members would be unjustly enriched if they did not adequately compensate counsel responsible for generating the fund.'" *Hegab*, 2015 WL 1021130, at *11 (quoting *Varacallo*, 226 F.R.D. at 249 (internal quotation marks and citation omitted)). The Court has discretion to decide which method to employ.

The parties submit, and we concur, that in the instant case the percentage-of-recovery method is preferable to evaluate the reasonableness of the attorneys' fee request. Here, there is a clearly delineated common fund which lends itself well to valuation. Further, the fund is also not so small that a percentage-of-recovery method would not be sufficient to compensate Plaintiffs' attorneys. Also, the percentage-of-recovery method has functioned here to incentivize counsel to obtain the maximum possible recovery in the shortest time possible given the circumstances, as it is meant to do. *See Varacallo*, 226 F.R.D. at 249. Thus, we shall proceed under the percentage-of-recovery method.

There are ten factors that the Third Circuit has identified in considering whether an attorneys' fee award is reasonable under the percentage-of-recovery method. Known as the *Gunter/Prudential* factors, these are:

1. The size of the fund and the number of persons benefited;
2. Whether members of the class have raised substantial objections to the settlement terms or fee proposal;
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 fee 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 be been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained;
10. Any innovative terms of settlement.

In re Diet Drugs, 582 F.3d 524, 541 (3d Cir. 2009). "Trial courts must 'engage in a robust assessment of the [*Gunter/Prudential*] factors when evaluating a fee request.'" *Id.* (quoting *In re Rite Aid*, 396 F.3d at 302). "'Determining an appropriate award, however, is not an exact science.'"

Varacallo, 226 F.R.D. at *248 (internal citation omitted). With this guidance in mind, we consider each factor in turn.

i. The size of the fund and number of persons benefited

"In considering the size of the expected recovery under the proposed settlement, ... percentage awards generally decrease as the amount of the recovery increases. ... The basis for this inverse relationship is the belief that '[i]n many instances the increase [in recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel.'" *In re Prudential*, 148 F.3d at 339 (quoting *In re First Fidelity Bancorporation Secs. Litig.*, 750 F.Supp. 160, 164 n. 1 (D.N.J.1990)). In *Erie Cnty. Retirees Ass'n v. Cnty. of Erie*, 192 F.Supp.2d 369, 381 (W.D.Pa. 2002), the court noted that in class action settlements worth millions of dollars, the attorneys' fees are often limited to 25% of the settlement value "in order to prevent a windfall to counsel." *Id.* In cases where the recovery exceeds $100 million, courts have found that further decrease in the percentage of guaranteed attorneys' fees may be warranted. *Id.* at 331 (noting that the district court "found a range of 4.1% to 17.92% in cases where the recovery exceeded $100 million.").

***11** As already noted, the class size here is 224, with 178 claims filed, and the size of the fund is $2,850,000.00, from which attorneys' fees, litigation costs and enhancement awards are to be subtracted. By Plaintiffs' calculation, this fund results in an average individual payout of $11,692 and a median payout of roughly $10,444. (Doc. 123, p. 41). Thus, the number of individuals who must be compensated from the fund are not so numerous that their recovery will not be significant, and the size of the fund is well within the range that previous case law has found amenable to a 25% attorneys' fee award. Here, the total amount of attorneys' fees amounts to 25.76% of the fund, thereby avoiding a windfall. We thus find that the percentage of the fund is facially reasonable and counsels in favor of approving the proposed attorneys' fees request.

ii. Whether members of the class have raised substantial objections to the settlement terms or fee proposal

As already discussed in our consideration of the *Girsh* factors, the members of the class have not raised a single objection to any portion of the settlement agreement, including the settlement terms or the fee proposal. Though not overly significant, this absence nonetheless causes this factor to weigh in favor of approval of the requested attorneys' fees. *See Erie Cnty.*, 192 F.Supp.2d at 379 ("Given the complexity of the analysis with respect to the attorneys' fees request, we will afford some, albeit not significant, weight to the lack of objections.").

iii. The skill and efficiency of the attorneys involved

As noted above, class counsel are skilled and experienced litigators who have handled complex employment rights class actions numerous times before. Thus, this factor also weighs in favor of approving the requested attorneys' fees. *See Hegab*, 2015 WL 1021130, at *12 ("[C]lass counsel are experienced in litigating and settling consumer class actions. Class counsel obtained substantial benefits for the class members— ... a consideration that further evidences class counsels' competence. Thus, this factor also weighs in favor of approval of the fee award."); *Haught v. Summit Resources*, 1:15-cv-0069, 2016 WL 1301011, at *9 (same).

iv. The complexity and duration of the litigation

This factor is identical to the first *Girsh* factor. As noted there, this case has stretched on for over three years. Despite this timeline, it is clear that many unresolved and hotly contested issues remain. As noted in our consideration of the *Girsh* factors, Defendants have already expressed their intent to file an appeal of at least one matter in this case, and both parties have indicated the strength of their arguments and their willingness to diligently pursue each matter. This, combined with the uncertainty and complexity of many of the legal issues presented, *see Schwann v. FedEx Ground Package System, Inc.*, Civ. Action No. 11-11094-RGS, 2014 WL 496882, at *3 (D. Mass. Feb. 7, 2014) ("[T]he question of whether business expenses and deductions borne by employees are recoverable under the Wage Act us unsettled under state law. ..."), indicates that this factor also weighs in favor of approval of the attorneys' fees.

v. The risk of nonpayment

Here, the parties note that Plaintiffs' counsel always works on a contingency fee basis. (Doc. 123, p. 41). Thus, the risks inherent in litigation extend to the uncertainty surrounding whether counsel will receive payment and, as continually

noted, the Plaintiffs have indicated that though they believe a favorable outcome is merited, it is by no means a certainty. Indeed, courts have noted that where plaintiffs' counsel faces a risk of nonpayment or lesser payment should the case proceed to the trial phase, that risk should be considered when assessing attorneys' fee awards. *See Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 199 (3d Cir. 2000) ("[T]he risk that counsel takes in prosecuting a client's case should also be considered when assessing a fee award."); *In re Lucent Technologies, Inc., Securities Litig.*, 327 F.Supp.2d 426, 438 (D.N.J. 2004) ("[T]he intrinsically speculative nature of this contingent fee case enhances the risk of non-payment and bolsters the Court's analysis"). As such, this factor weighs in favor of approving the proposed attorneys' fees.

vi. The amount of time devoted to the case by Plaintiffs' counsel

***12** Plaintiffs' counsel submits that they have spent 776 attorney hours working on the instant case. (Doc. 123, p. 42; *see* Doc. 122-4; Doc. 122-5). The amount of time Plaintiffs' counsel devoted to the case is thus in line with that which other courts have found to favor approval of proposed fee awards. *See Hegab*, 2015 WL 1021130, at *13 (finding that over 1,000 hours of contingent work over the course of three years weighed in favor of approval). We arrive at the same conclusion and find that this factor too supports approval of the fee award.

vii. The fee awards in similar cases

"There is no consensus on what percentage of a common fund is reasonable, although several courts in this circuit have observed that percentage of recovery fee awards generally range from 19% to 45%, with 25% being typical." *Erie Cnty.*, 192 F.Supp.2d at 378 (approving a fee award of 38% of the total fund); *see In re Lucent*, 327 F.Supp.2d at 438 ("While percentages awarded have varied considerably, most awards range 'from nineteen percent to forty-five percent of the settlement fund'") (quoting *In re Cendant Corp.*, 243 F.3d at 736). Here, the parties have proposed an attorneys' fee award that constitutes approximately 25% of the total fund. This is in line with the percentage that has been considered typical in the past, and thus this factor too weighs in favor of approval.

viii. The value of benefits attributable to the efforts of class counsel, relative to the efforts of other groups

This factor seeks to compare the actions of government prosecutions and agency litigation to the instant private litigation. *See In re Diet Drugs*, 582 F.3d 524, 544 (3d Cir. 2009) (discussing "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."). Specifically, the Third Circuit has explained that comparing a case to other similar cases can give plaintiffs' counsel a "litigation roadmap" such that their work is less arduous. *Id.* In *In re Diet Drugs*, this factor was specifically addressed in the context of another case being litigated in Texas against the same defendant, Wyeth, which preceded that of the Third Circuit plaintiffs. *Id.* (noting the "contributions of lawyers who, while conducting contemporaneous diet drugs litigation in Texas state courts, obtained millions of pages of discovery from Wyeth and took 43 depositions before a single deposition took place in the MDL."). Here, however, Plaintiffs' counsel has clarified that there is no such preceding case against Defendants, and no comparable government or agency litigation exists to provide guidance or comparison to the work of counsel. (Transcript, Doc. 129, p. 8). Thus, we find that this factor neither weighs for nor against approval of the requested fee award.

ix. The percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement

This analysis requires the Court to evaluate "whether the requested fee is consistent with a privately negotiated contingent fee in the marketplace. '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.'" *Hegab*, 2015 WL 1021130, at *14 (quoting *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27013, *44-45, 2005 WL 1362974). At the fairness hearing, Plaintiffs' counsel noted that counsel would typically charge a 33% contingency fee, as is customary in standard industry practice. (Transcript, Doc. 129, p. 8). As 33% is obviously a greater amount than the 25% attorney fee award Plaintiffs' counsel are now requesting, we find that this factor also points in favor of approval of the proposed fee.

x. Innovative terms of settlement

***13** In certain cases, a district court may find that "class counsels' representation and the results achieved [by the settlement agreement] were 'nothing short of remarkable.'" *See In re Prudential*, 148 F.3d 283, 339. Particularly where a settlement involved "innovative" or unique terms, such a finding may be warranted. *Id.* (describing the findings of the lower court regarding plaintiffs' counsels' work on the settlement, including "the availability of full compensatory relief, the extensive and comprehensive outreach, and the multi-tiered review process designed to ensure fair scoring of claims," among other characteristics). Here, Plaintiffs' counsel worked diligently to procure a monetary settlement for the class, but also to establish a "cost-effective dispute resolution provision" for those currently employed with S-L. (Doc. 123, p. 21). Specifically, it became apparent to counsel that most of their clients live and work in Massachusetts, but their Distributor Agreements contain a choice of forum clause that restricts any dispute to resolution by the Pennsylvania courts, without any provision for mediation or arbitration at all. (*Id.*). Because Plaintiffs' disputes tend to be based in contract-law, they are well-suited to arbitration. (*Id.*, p. 22). They are also generally comprised of relatively "low-value" claims and ill-suited to formal litigation, (*id.*), which this Court recognizes can be preclusively expensive for some parties, particularly when they must travel long distances and take time off from work to reach the chosen forum. Thus, the Plaintiffs still currently working with Defendants lacked an efficient and accessible dispute resolution mechanism. (*Id.*); (Transcript, Doc. 129, p. 10).

To remedy this shortfall, Plaintiffs' counsel negotiated for the inclusion of a provision within the Settlement Agreement, providing "that any future claims brought by a [driver] be submitted to informal resolution and if the claim is not resolved, then to arbitration, and that the ability to assert a class action claim in state or federal court is waived." (Doc. 123, p. 21). The arbitration is to be conducted in a location near the individual driver's territory, rather than in Pennsylvania. (*Id.*, p. 21-22). Further, Defendants agree to pay all arbitration costs beyond a $200 filing fee. (*Id.*, p. 22). Finally, acceptance of the arbitration provision is not mandatory for Plaintiffs who still wish to retain the terms of dispute resolution set by the original Distributor Agreements. Rather, Plaintiffs are still free to collect their settlement payment even if they choose not to adopt the alternative dispute resolution provision. (*Id.*, p. 23). To date, three Plaintiffs have chosen to opt out of the provision. (Transcript, Doc. 129, p. 11).

The procurement of this provision is a clear example of an innovative settlement term that provides Plaintiffs with a right they did not have prior to the settlement. Beyond monetary value, the arbitration provision provides current delivery drivers with a quick and cost-effective means of addressing any grievance or disagreement that may arise between themselves and Defendants, without resorting to the courts. As no employment relationship is perfect, we have no doubt that such disagreements will indeed arise again, and Plaintiffs' counsel has done them a great service by identifying and remedying this need while all parties were at the bargaining table. As such, we find that this factor weighs in favor of approving the proposed attorneys' fee agreement.

Thus concludes our analysis of the ten fee award reasonableness factors. "The 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.'" *In re Diet Drugs*, 582 F.3d at 545 (quoting *In re AT & T Corp.*, 455 F.3d 160, 166 (3d Cir. 2006)). Here, we determine that the vast majority of the factors weigh in favor of approving the proposed fee award, and that any remaining factors are neutral, and thus do not weigh against such approval. Therefore, we hold that the requested fee award is fair and reasonable under the percentage-of-recovery method. We turn now to the lodestar cross check.

xi. Lodestar Analysis

"[I]t is sensible for a court to use a second method of fee approval to cross check its conclusion under the first method. ..." In re General Motors, 55 F.3d 768, 820-21 (3d Cir. 1995). Thus, we turn to the lodestar method to ensure that our initial analysis under the percentage-of-recovery method was not inaccurate. In its own cross check, the district court in *Hegab* provided a detailed explanation of the lodestar calculation that we referenced in our analysis in *Haught*, 2016 WL 1301011, at *11-12. Because of its clarity, we excerpt from that opinion again here.

> ***14** The lodestar analysis is performed 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: *see also In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524, 540 (3d Cir.2009). When performing this analysis, the Court "should apply blended billing rates that approximate the fee structure of all the attorneys who worked on the matter." *In re Rite Aid.* 396 F.3d at 306. The lodestar figure is presumptively reasonable when it is calculated using a reasonable hourly rate and a reasonable number of hours. *Planned Parenthood of Cent. N.J. v. Att'y Gen. of N.J.*, 297 F.3d 253, 265 n. 5 (3d Cir.2002) (citations omitted). After calculating the lodestar amount, the Court may increase or decrease the amount using the lodestar multiplier. The multiplier is calculated by dividing the requested fee by the lodestar figure. "The multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *In re Rite Aid.* 396 F.3d at 305–06 *Hegab*, 2015 WL 1021130, at *14-15.

We begin by calculating the lodestar figure. The affidavits of Plaintiffs' counsel indicate that they have worked a total of 781.1 hours on the matter since its inception in February 2013.[78] (Doc. 122-4; Doc. 122-5). Counsels' hourly rates include $400-600/hour for senior attorneys, $275 per hour for a junior attorney, and $100 per hour for a paralegal. (*Id.*). While the Plaintiffs' brief does not provide the "blended" rate that the attorneys used to calculate their overall lodestar amount of $320,662, when this amount is divided by the hours worked, the rate used appears to be approximately $410.52 per hour, which is reasonable given all of the rates normally charged and the rates typical for this geographic region given the experience of the attorneys involved. Thus, we conclude that the lodestar figure of $320,662 is presumptively reasonable.

7 It appears that there was a typographical error in the submission by Winebrake & Santillo, LLC, and that 442.1 hours (and not 4421 hours) is the correct figure for the hours worked, based on the provided hourly break-down chart. (Doc. 122-4, ¶ 21). This, added to the 339 hours submitted by Lichten & Liss-Riordan, P.C., sums for a total of 781.1 hours.

8 As indicated above, our analysis of comparative case law has already shown this is a reasonable amount of time as compared to time spent on cases of a similar nature and the complexity of the matters involved.

We next calculate the multiplier. The requested attorneys' fee is $734,255, which, when divided by the lodestar amount, provides lodestar multiplier of 2.29. Accepted multipliers are those up to and including "slightly above 3." *Keller v. TD Bank, N.A.*, 2014 WL 5591033, at *16 (E.D.Pa. Nov. 4, 2014). A lodestar multiplier of 2.75 was recently approved in *In re Staples Inc. Wage & Hour Employment Practices Litig.*, 2011 WL 5413221, at *5 (D.N.J. Nov. 4, 2011). However, courts have declined to implement multipliers of 5.1 and 4.07 as these have been found too high. *In re Prudential*, 148 F.3d at 340-41; *In re Rite Aid*, 396 F.3d at 306.

Given the risks inherent in contingent work generally, the high quality of the attorneys' work in this case, and the comparative reasonableness of the lodestar multiplier requested here, the Court sees no reason to determine that a multiplier of 2.29 is too high. Further, in light of the somewhat more relaxed standard that the Court need apply in regard to the lodestar analysis as a cross-check,[9] there appears no indication that our initial percentage-of-recovery analysis was erroneous. Thus, in reliance on the percentage-of-recovery method conducted above, and the lodestar cross check, this Court concludes that the requested attorneys' fee is fair and adequate.

9 "[W]e reiterate that the percentage of common fund approach is the proper method of awarding attorneys' fees. 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. *See Prudential*, 148 F.3d at 342 (finding no abuse of discretion where district court "reli[ed] on time summaries, rather than detailed time records"). Furthermore, the resulting multiplier need not fall within any pre-defined range, provided that the District Court's analysis justifies the award. Lodestar multipliers are relevant to the abuse of discretion analysis. But the lodestar cross-check does not trump the primary reliance on the percentage of common fund method." *In Re Rite Aid*, 396 F.3d at 305-06.

E. Litigation Fees

***15** In total, Plaintiffs' counsel requests $15,745 in litigation fees and expenses. The firm of Winebrake & Santillo, LLC, has submitted an itemized list detailing $6,745 in costs, including a mediation fee of $5,231.07 and various photocopying and travel expenses. (Doc. 122-4, ¶ 22). Lichten & Liss-Riordan, P.C. has also submitted a detailed listing of expenses, including travel and service administrative costs totaling $6,174.80. (Doc. 128). This supplied documentation does not include costs of mailing, copying and administration fees that the firm estimates at

$3,500.00, or travel costs for Attorney Lichten's travel to the fairness hearing of April 20, 2016. (*Id.*). "Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1224-25 (3d Cir. 1995). We find that counsel's expenses were adequately documented and were reasonably and appropriately incurred through the course of litigation in this case. Thus, we approve the requested litigation fees in the amount of $15,745.

F. Notice

Finally, we briefly consider the notice requirement. Rule 23(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED. R. CIV. PRO. 23(e). As noted above, the Court reviewed and approved the parties' proposed notice and claim forms on December 28, 2015, as part of the Order granting the parties' Motion for Preliminary Approval of the Class Action Settlement and Certification of the Settlement Class. (Doc. 121). In Plaintiffs' Brief, Plaintiffs represent that each Plaintiff was mailed an individualized notice form describing the lawsuit, the total settlement value, the attorneys' anticipated payments, and also the class enhancement awards. (Doc. 123, p. 15). The notice form also provided each Plaintiff with his or her estimated payout amount (presuming that all of the settlement class members returned claim forms). (*Id.*). As noted above, Plaintiffs' counsel also submits that once the initial settlement payments are distributed, class members who did not respond to the initial notice and claim forms will have a second opportunity to file a claim. Given these efforts, the Court has no reason to conclude that notice was not adequately provided to the class.

III. CONCLUSION

"The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation. ... These economic gains multiply when settlement also avoids the costs of litigating class status—often a complex litigation within itself." *In re Gen. Motors*, 55 F.3d 768, 784 (3d Cir. 1995). In light of the foregoing analysis, the Court shall certify the proposed class and approve the Settlement Agreement in its entirety. A separate order shall issue.

All Citations

Not Reported in Fed. Supp., 2016 WL 1743268

End of Document

2015 WL 9268445
Only the Westlaw citation is currently available.
United States District Court, M.D. Pennsylvania.

Florence WALLACE, et al., Plaintiffs,
v.
Robert J. POWELL, et al., Defendants.
William Conway, et al., Plaintiffs,
v.
Michael T. Conahan, et al., Defendants.
H.t., et al., Plaintiffs,
v.
Mark A. Ciavarella, Jr., et al., Defendants.
Samantha Humanik, Plaintiff,
v.
Mark A. Ciavarella, Jr., et al., Defendants.

CIVIL ACTION NOS. 3:09–cv–286, 3:09–cv–0291, 3:09–cv–0357, 3:09–cv–0630
|
Signed 12/21/2015

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MEMORANDUM

A. Richard Caputo, United States District Judge

***1** Plaintiffs in this consolidated action comprising both individual cases and putative class actions have moved for final approval of a settlement agreement (the "Settlement") between Plaintiffs and Defendants Robert J. Powell; Vision Holdings, LLC; and Powell Law Group, P.C. (collectively "Powell Defendants"). (Doc. 1676.) The Settlement received preliminary approval on July 24, 2015. (Doc. 1699.) Now, following the final approval hearing held on December 16, 2015, Plaintiffs seek final certification of the Classes for settlement, approval of the Settlement, and an award of attorneys' fees and costs. For the reasons that follow, the Classes will be certified, the Settlement will be approved, and attorneys' fees and costs will be awarded as requested.

I. Background

A. Facts

This civil action arises out of the alleged conspiracy related to the construction of two (2) juvenile detention facilities, and the subsequent detainment of juveniles in these facilities, orchestrated by two former Luzerne County Court of Common Pleas judges: Michael Conahan ("Conahan") and Mark Ciavarella ("Ciavarella"). The juvenile detention facilities, PA Child Care ("PACC") and Western PA Child Care ("WPACC"),[1] were both constructed by Mericle Construction, Inc. Plaintiffs in this action—juveniles or the parents of juveniles who appeared before Ciavarella—seek redress from the former judges as well as the individuals and business entities involved in the construction and operation of these facilities for the alleged conspiracy and resulting deprivations of Juvenile Plaintiffs' rights.

[1] PACC, WPACC, and Mid–Atlantic Youth Services, Inc. ("MAYS") are the Provider Defendants. Provider Defendants, along with Consulting Innovations and Services, Inc., Gregory R. Zappala, Robert J. Powell, Powell Law Group P.C., Perseus House, Inc. d/b/a Andromeda House, Beverage Marketing of PA., Inc., Pinnacle Group of Jupiter, LLC, Vision Holdings, LLC, Mark A. Ciavarella, Jr., Michael T. Conahan, Barbara Conahan, and Cindy Ciavarella, and all of the aforesaids' lawyers, agents, and employees, and subsidiary and parent organizations in their capacities as such, are "Non–Released Parties" under the terms of the Settlement Agreement.

***2** The individual and class complaints assert, in part, the following causes of action against some or all of the Powell Defendants: (1) 42 U.S.C. § 1983 claims alleging a conspiracy to violate Plaintiffs' constitutional rights; (2) violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.*; (3) conspiracy to violate RICO; and (4) state–law civil conspiracy.

B. Procedural History

The first of these consolidated cases, *Wallace v. Powell*, No. 09–CV–286, was filed on February 13, 2009, against multiple defendants, including the Powell Defendants. Although the case was originally filed as a class action, the *Wallace* complaint was subsequently amended in May 2009 to proceed on behalf of a number of individual juvenile and parent plaintiffs. Shortly thereafter, *Conway v. Conahan*, No. 09–CV–291, and *H.T. v. Ciavarella*, No. 09–CV–357, were filed as putative class actions, both naming the Powell Defendants, among others, as Defendants. Subsequently, *Humanik v. Ciavarella*, No. 09–CV–630, was filed on behalf of a single individual Plaintiff. The remaining cases against the Powell Defendants pending before this Court are *Clark v. Ciavarella*, No. 09–2535, *Dawn v. Conahan*, No. 10–797, *Belanger v. Ciavarella*, No. 10–1405, *Elia v. Powell*, Nos. 11–0465, 11–0466, and *Gillette v. Ciavarella*, No. 11–658. These cases, together with *Wallace*, *Conway*, *H.T.*, and *Humanik*, are referred to collectively herein as the "Civil Actions."

The *Conway* and *H.T.* Plaintiffs filed the Master Complaint for Class Actions in June 2009. (Doc. 136.) At the same time, the *Wallace* and *Humanik*Plaintiffs filed the Master Long Form Complaint for Individual Actions. (Doc. 134.)

On December 16, 2011, Plaintiffs and Defendants Robert K. Mericle and Mericle Construction, Inc. (collectively "Mericle Defendants") filed a Joint Motion for Preliminary Approval of Class Action Settlement. (Doc. 1005.) On February 28, 2012, following a preliminary approval hearing, I issued an order conditionally certifying the Settlement Classes, preliminarily approving the class action settlement, and approving the notice plan. (Doc. 1084.) On November 19, 2012, I held a final approval hearing on the Mericle Settlement. The Mericle Settlement was granted final approval on December 14, 2012. (Doc. 1268.) As to the non–settling Defendants, including the Powell Defendants, discovery remained ongoing at that time.

On October 16, 2013, Plaintiffs and the Provider Defendants filed a Joint Motion for Preliminary Approval of Class Action Settlement. (Doc. 1448.) On November 27, 2013, following a preliminary approval hearing, I issued an order conditionally certifying the Settlement Classes, preliminarily approving the class action settlement, and approving the notice plan. (Doc. 1491.) On June 10, 2014, I held a final approval hearing on the Provider Defendant Settlement. The Provider Defendant Settlement was granted final approval on July 7, 2014. (Doc. 1539.)

C. The Settlement Agreement

Under the terms of the Settlement Agreement, the parties agree to settle the Civil Actions (*i.e.*, the *H.T.*, *Conway*, *Wallace*, and *Humanik* Actions) to provide a final resolution of Plaintiffs' claims against the Powell Defendants. Solely for the purposes of settlement, two (2) settlement classes are established: (1) the "Juvenile Settlement Class," which

consists of "all juveniles who appeared before former Luzerne County Court of Common Pleas Judge Mark A. Ciavarella between January 1, 2003 and May 28, 2008 [the "Class Period"] who were adjudicated or placed by Ciavarella"; and (2) the "Parent Settlement Class," which consists of the parents and/or guardians of juveniles who appeared before Ciavarella between January 1, 2003 and May 28, 2008, and, who in connection with the juvenile's appearance: "(i) made payments or had wages, social security or other entitlements garnished; (ii) had costs, fees, interest and/or penalties assessed against them or their child; (iii) suffered any loss of companionship and/or family integrity." (Doc. 1676, Ex. 1, *Master Settlement Agreement*, "*MSA*", ¶ 1(r) & 1(ff).) The Juvenile Settlement Class and the Parent Settlement Class are referred to collectively as the "Settlement Classes," and the members of the Settlement Classes are the "Settlement Class Members." (*Id*. ¶ 1(yy).) Pursuant to the terms of the Settlement Agreement, the Powell Defendants agree to establish a settlement fund of no less than $4,750,000.00, which will be used to pay settlement costs and claims by Class Members.[2] (*Id*. ¶ 5(b).)

[2] The Settlement Agreement provides that the Powell Defendants may be required to make an additional payment, which under no circumstances shall be greater than $2,750,000,00, based upon Defendant Robert J. Powell's net worth.

1. Basic Benefits

***3** The Juvenile Settlement Class will be divided into three (3) Settlement Categories for purposes of recovery from the Cash Settlement Fund:

> **(1) Probation Category:**each qualifying Juvenile Settlement Class member who never spent any time in PACC, WPACC, or any other juvenile detention facility as a result of an adjudication of delinquency by former Judge Ciavarella during the period from January 1, 2003 through May 28, 2008;
>
> **(2) Non–PACC/WPACC Category:** each qualifying Juvenile Settlement Class Member who was placed in a detention facility as a result of an adjudication of delinquency or placement by former Judge Ciavarella during the period from January 1, 2003 through May 28, 2008 but who never spent any time in PACC and/or WPACC; and
>
> **(3) PACC/WPACC Category:** each qualifying Settlement Class Member who was placed in PACC or WPACC as a result of an adjudication of delinquency or placement by former Judge Ciavarella during the period from January 1, 2003 through May 28, 2008.

(Doc. 1676, Ex. A–2, at 6.) Each qualifying Juvenile in the Probation Category shall receive one (1) point. Each qualifying Juvenile in the Non–PACC/WPACC Category shall receive two (2) points. Each qualifying Juvenile in the PACC/WPACC Category shall receive five (5) points. As explained in further detail below, these points will determine how much each Juvenile will recover from the Settlement.

Each qualifying member of the Parent Settlement Class who, as a result of his or her juvenile's adjudication of delinquency or placement by former Judge Ciavarella during the period from January 1, 2003 through May 28, 2008, who either (i) made payments to Luzerne County or had wages, social security or other entitlements garnished or withdrawn by Luzerne County; or (ii) had court–ordered services or paid court–ordered costs, fees, interests, and/or penalties assessed against them or their child, shall receive the actual amount of monies paid, garnished, or withdrawn. Members of the Parent Settlement Class will be paid from this Settlement Fund only if they did not already receive full reimbursement in the Mericle Settlement and/or the Provider Defendant Settlement. Moreover, the total amount of funds to be paid to members of the Parent Settlement Class may be reduced *pro rata* if the total exceeds the amount allocated to the Parent Settlement Class.

2. The Allocation Plan

The Cash Settlement Fund will be divided among qualifying Settlement Class Members according to the Plan of Allocation. First, court–approved costs and fees will be taken out of the Cash Settlement Fund. The remaining amount (the "Net Settlement Fund") will be divided into (1) the Juvenile Fund; (2) the Parent Fund; and (3) the Holdback Fund. Each fund is described below:

> **JUVENILE FUND:** Seventy percent (70%) of the Net Settlement Fund will comprise the Juvenile Fund.
>
> Each qualifying member of the Juvenile Settlement Class who submits a valid and timely Proof of Claim Form will be assigned to a Settlement Category and awarded a number of points as described above. The total number of points for all members of the Juvenile Settlement Class will be divided into the Juvenile Fund to determine the monetary value of each point. Each member of the Juvenile Settlement Class

will receive the value of each point multiplied by his or her points, as determined by his or her Settlement Category.

***4 PARENT FUND:** Fifteen percent (15%) of the Net Settlement Fund will comprise the Parent Fund.

Each qualifying member of the Parent Settlement Class who submits a valid and timely Proof of Claim Form will be awarded a specific amount of money based on the amount of payments documented in the Records or in records provided by the member of the Parent Settlement Class showing payments made in his or her own name.

HOLDBACK FUND: Fifteen percent (15%) of the Net Settlement Fund will comprise the Holdback Fund.

The Holdback Fund will remain in escrow until all final accounting is complete for the Cash Settlement Fund. With written permission from the Court, the Holdback Fund may be used to pay settlement costs and attorneys' fees. The Holdback Fund will also be used to pay all costs of the appeal process, and all additional payments to members of the Settlement Classes resulting from successful appeals. If funds remain in the Holdback Fund after payment of all costs, fees, and appeals, the remaining funds will be paid to qualifying members of the Juvenile Settlement Class who submit timely and valid Proof of Claim Forms in proportion to the number of points assigned to each such member of the Juvenile Settlement Class.

(Doc. 1676, Ex. A–2, at 7–8.)

A Proof of Claim form was disseminated to each potential claimant for whom Class Counsel had an address with the Notice of the Settlement. That form required each Juvenile and/or Parent choosing to participate in the Settlement to provide necessary information and to provide a release for obtaining relevant records. Based upon the responses of each Claimant and a review of all documentation submitted by the Claimant and/or released at the request of the Claimant, the Claims Committee calculated the points for all members of the Settlement Class who timely submitted a valid claim form.

3. Individual Payment Amounts and Appeal Process

If a Claimant believes that the value amount assigned by the Claims Committee was "wrongly determined," the Claimant has the option to appeal the amount to a Court–appointed Special Master for Allocation Appeals. In cases where an appeal is lodged by a Claimant, the Notice of Settlement provides:

> The Special Master will re–assess the Claims Committee's decision. This reassessment will include a complete review of your Proof of Claim Form, the information available in the Records, and any additional written documentation provided by you in support of your claim. If appropriate, the Special Master will allow your claim and/or change the Settlement Category assigned by the Claims Committee or the amount of your payment from the Cash Settlement Fund, and your award will be adjusted under the terms of the Plan of Allocation.

The Notice of Settlement further states that the "determinations made by the Special Master are final and shall not be subject to any further review or appeal."

In order to properly fund the Allocation Appeal Process consistent with the Settlement Agreement, fifteen percent (15%) of the Cash Settlement Fund will not be distributed, but instead be held back in the Escrow Account for the benefit of any successful Allocation Appellants and the costs associated with the Allocation Appeal Process. The hold back will amount to $712,500.00. In the event that the hold back amount is not fully depleted, the balance will be returned to the Holdback Fund and will be distributed in accordance with the Settlement Agreement.

4. Release

***5** In exchange for the relief provided under the Settlement Agreement, the named Plaintiffs and the Settlement Class Members will release and dismiss all claims against the Powell Defendants.[3] The remaining defendants ("Non–Released Parties") shall receive no release or dismissal of any claims as a result of the Settlement Agreement. In addition, Settlement Class Members agree and covenant not to sue the Powell Defendants over any matter that could have been alleged in these Civil Actions.

[3] In Plaintiffs' Settlement Agreement with the Provider Defendants, which I approved on July 7, 2014 (Doc. 1539), the parties included a provision stating that it would be the "express intention of the Parties that, to the fullest extent possible, Plaintiffs shall in all future litigation against Non–Released Parties [including the Powell Defendants] eliminate all claims for contribution and/or indemnity that might be asserted against the Released Parties." (Doc. 1448–1, at 21.) The Settlement Agreement with the Provider Defendants also stated that in any future settlement agreement with any of the Non–Released Parties [including the Powell Defendants],

> "Plaintiffs would include a provision barring any Non–Released Party from bringing any contribution claim, any indemnity claim, or any other claim related in any way to the claims, allegations, and/or facts in the Actions against the Released Parties." (*Id.* at 21–22.) Such a provision was indeed included in the Settlement Agreement at issue with the Powell Defendants. (Doc. 1676–1, at 16– 17.)

5. Notice

Federal Rule of Civil Procedure 23(e) provides that "[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). Federal Rule of Civil Procedure 23(c)(2)(B) provides that in any class action maintained under subdivision (b)(3), the court shall "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).

Here, notice of the Settlement was disseminated to potential Settlement Class Members through a variety of means, including direct mailings, a toll–free call center, publication in newspapers, and a website. With respect to direct mailings, Class Counsel mailed a total of 4,056 copies of the Notice of Settlement and Proof of Claim Form to the last known addresses of potential Class Members by first–class mail, postage pre–paid. Additionally, the toll–free call center established by Class Counsel, which was open to receive calls twenty–four (24) hours a day, seven (7) days a week, answered over 1,378 calls. Class Counsel staffed the call center with non–lawyer customer service representatives who were trained to respond to particular questions from Class Members concerning the litigation and the terms of the Settlement. And, when the call center's customer service representatives were unable to answer questions about the Settlement, the representatives arranged for the callers to speak with Class Counsel. In addition to direct mailings of the Class Notice, Class Counsel also caused the Notice of Settlement to be published in the *Times Leader* and the *Citizens' Voice*. Finally, Class Counsel maintained a website containing information about the Settlement. Since August 10, 2015, the website has received 2,736 visits.

II. Discussion

A. Class Certification

Even though the Settlement Agreement has already been preliminarily approved, there must still be a final determination as to whether to certify the class and grant final approval of the Settlement. *See In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 797 (3d Cir. 1995). The Federal Rules of Civil Procedure provide that class action settlements must be approved by the Court. *See* Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled...only with the court's approval."); *see also Ripley v. Sunoco, Inc.*, 287 F.R.D. 300, 306 (E.D. Pa. 2012) ("Class action settlements must be approved by the Court."). However, "the ultimate inquiry into the fairness of the settlement under Fed. R. Civ. P. 23(e) does not relieve the court of its responsibility to evaluate Rule 23(a) and (b) considerations." *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 299 (3d Cir. 2005).

***6** As such, "before approving a class settlement agreement, 'a district court first must determine that the requirements for class certification under Rule 23(a) and (b) are met.'" *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 296 (3d Cir. 2011) (en banc) (quoting *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 341 (3d Cir. 2010)). Rule 23(a) of the Federal Rules of Civil Procedure contains four (4) threshold requirements that every putative class must satisfy:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or 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 interests of the class.

Fed. R. Civ. P. 23(a). These requirements are referred to as numerosity, commonality, typicality, and adequacy of representation. If these four (4) prerequisites are satisfied, "a district court must then determine that the proposed class fits within one of the categories of class actions enumerated in Rule 23(b)." *Sullivan*, 667 F.3d at 296.

Here, Plaintiffs seek certification pursuant to Rule 23(b)(3). Under this provision, certification is proper where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

The factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 257–58 (3d Cir. 2009) (citation omitted). In other words, to certify a class, the district court must find that the evidence more likely than

not establishes each fact necessary to meet the requirements of Rule 23. *Id.* at 258.

1. Rule 23(a)

a. Numerosity

The first requirement for a class action is that the class is so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a). There is no single magic number that satisfies the numerosity requirement. *Logory v. Cnty. of Susquehanna*, 277 F.R.D. 135, 140 (M.D. Pa. 2011) (citation omitted). However, the Third Circuit has opined that while there is technically no minimum class size, "generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001).

Here, each of the Settlement Classes includes thousands of individuals. As such, the numerosity requirement is satisfied. *See, e.g., Williams v. City of Phila.*, 270 F.R.D. 208, 215 (E.D. Pa. 2010) (numerosity requirement satisfied where putative class could number in the hundreds or thousands).

b. Commonality

To satisfy Rule 23(a)(2), there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Satisfaction of the commonality requirement requires that plaintiffs demonstrate that their claims "depend upon a common contention," the resolution of which "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal–Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545, 2551 (2011). Commonality does not require an identity of claims or facts among class members; commonality will be satisfied if the named plaintiffs share at least one (1) question of fact or law with the grievances of the prospective class. *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 184 (3d Cir. 2001). The Supreme Court has indicated that commonality does require the plaintiff to demonstrate that the class members have suffered the same injury. *Wal–Mart*, 131 S.Ct. at 2551 (citation omitted).

***7** Here, the allegations in the complaints raise the following issues relating to liability of the defendants, including the Powell Defendants:

- Whether the defendants acted in conspiracy with each other;
- Whether the actions of the private–party defendants, allegedly taken in concert with Ciavarella and Conahan, rendered the defendants state actors for purposes of section 1983;
- Whether defendants either conspired to construct the PACC and WPACC facilities and fill them through violations of Plaintiffs' rights, or conspired to set in motion a series of acts that they reasonably knew or should have known would cause Ciavarella to violate Plaintiffs' rights;
- Whether Plaintiffs' detentions in the PACC and WPACC facilities were unlawful;
- Whether various defendants organized an association–in–fact enterprise;
- Whether various defendants participated in the conduct or the affairs of the enterprise through a pattern of racketeering activity.

Thus, given all of the above questions of law and fact that are common to the class, the commonality prong of Rule 23(a)(2) is met.

c. Typicality

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). The typicality and commonality requirements are "closely related and often tend to merge." *Marcus v. BMW of N. Am., L.L.C.*, 687 F.3d 583, 597 (3d Cir. 2012) (citing *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir.1994)). Factual differences will not render a claim atypical if the claim "arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *Baby Neal*, 43 F.3d at 58 (citation and internal quotation marks omitted). When analyzing typicality, a court must compare the situation of the proposed representative to that of the class as a whole by considering "the similarity of the legal theory and legal claims; the similarity of the individual circumstances on which those theories and claims are based; and the extent to which the proposed representative may face significant unique or atypical defenses to her claims." *In re Schering*

Plough Corp. ERISA Litig., 589 F.3d 585, 597–98 (3d Cir. 2009) (citation omitted).

Here, the claims of the Representative Plaintiffs, as identified in the Settlement Agreement, are typical of the Juvenile Settlement Class Members and the Parent Settlement Class Members. With respect to the Juvenile Settlement Class, the gravamen of the Representative Plaintiffs' claims is that, as a result of the alleged conspiracy, Ciavarella and Conahan had an undisclosed financial interest and conflict–of–interest in adjudicating children delinquent and sending them to placement. And, like all other Juvenile Settlement Class Members, the Representative Plaintiffs were denied their constitutional right to an impartial tribunal when they appeared before Ciavarella. As such, the legal theories for all Juvenile Plaintiffs, that their adjudications were unconstitutional, will be the same. Thus, the typicality requirement is satisfied as to the Juvenile Settlement Class.

***8** The claims of the Parent Settlement Class Representatives are also typical of all Parent Settlement Class Members. Specifically, all Parent Settlement Class Members assert RICO claims based on the alleged conspiratorial conduct of Defendants, which resulted in the payment of court fees, fines, interest, and penalties. As the legal theories for all Parent Settlement Class Members will be the same, the typicality requirement for class certification under Rule 23(a)(3) is satisfied.

d. Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement has two (2) components: "(1) concerning the experience and performance of class counsel; and (2) concerning the interests and incentives of the representative plaintiffs." *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 181 (3d Cir. 2012) (citation omitted). Essentially, the adequacy inquiry considers whether "the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the individual's claims and those asserted on behalf of the class." *Hassine v. Jeffes*, 846 F.2d 169, 179 (3d Cir. 1988) (citations omitted).

The qualifications and performance of class counsel under Rule 23(a)(4) is based upon the factors set forth in Rule 23(g). *See Sheinberg v. Sorensen*, 606 F.3d 130, 132 (3d Cir. 2010) ("Although questions concerning the adequacy of class counsel were traditionally analyzed under the aegis of the adequate representation requirement of Rule 23(a)(4)... those questions have, since 2003, been governed by Rule 23(g)."). That subsection lists several non–exclusive factors that a district court must consider in determining counsel's ability to fairly and adequately represent the interests of the class, including: (1) "the work counsel has done in identifying or investigating potential claims in the action," (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action," (3) "counsel's knowledge of the applicable law," and (4) "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).

Here, Class Counsel have the experience, skill, and qualifications necessary to conduct this litigation. In particular, the individual attorneys in this action have extensive experience in complex class action litigation involving mass actions and civil rights claims. Consistent with their qualifications, Class Counsel, throughout this litigation, have demonstrated considerable ability in prosecuting this case. Specifically, Class Counsel have performed substantial work, and expended considerable time and resources, in presenting the facts and complex legal issues implicated in this litigation, as Class Counsel have prepared multiple complaints, responded to numerous motions to dismiss, engaged in mediation, and reviewed discovery. Class Counsel have pursued this action vigorously and with great dedication on behalf of all Plaintiffs. Thus, based on Class Counsel's work to date in this litigation, it is apparent that these attorneys have fairly and adequately represented the interests of the Settlement Class Members.

With respect to the second prong of the adequacy inquiry, the Third Circuit has "recognized that the linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class." *Dewey*, 681 F.3d at 183 (citations omitted). The adequacy requirement "is designed to ferret out" intra–class conflicts, and to ensure that the named plaintiffs have the incentive to represent the claims of the class. *Id.* at 184 (citations and internal quotation marks omitted). If any conflicts "undercut the representative plaintiffs' ability to adequately represent the class" and those conflicts are "fundamental," Rule 23(a)(4) cannot be satisfied. *Id.* at 184–85.

***9** The Representative Plaintiffs fairly and adequately protected the interests of the Juvenile Settlement Class and the Parent Settlement Class in this action. Here, the interests of the Representative Plaintiffs are consistent with the Settlement Class Members, and there appears to be no conflicts between or among the groups. As discussed, the Representative Juvenile Plaintiffs were damaged as a result of Defendants' allegedly unlawful conduct, including the Powell Defendants' alleged conduct, and the Representative Juvenile Plaintiffs would have to prove the same wrongdoing as the Juvenile Settlement Class Members to establish Defendants' (and the Powell Defendants') liability. Similarly, the Representative Parent Plaintiffs were damaged as a result of the alleged conspiratorial conduct of Defendants, including the Powell Defendants, which resulted in the payment of court fees, fines, interest, and penalties, and which would require all Parent Plaintiffs to demonstrate the same wrongdoing to establish Defendants' liability. Thus, as the interests of the named plaintiffs are not antagonistic to those of the classes, and nothing in the record suggests that the Representative Plaintiffs acted in conflict with the Settlement Classes or failed to vigorously pursue the claims of all Class Members, the adequacy requirement is satisfied here.

2. Rule 23(b)(3)

Besides meeting the four (4) threshold requirements under Rule 23(a), a proposed class must also satisfy one (1) of the three (3) sub–parts of Rule 23(b). *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 527 (3d Cir. 2004). Here, Plaintiffs seek to maintain this class action under Rule 23(b)(3), which allows for a class action to proceed if "questions of law or fact common to class members predominate over any questions affecting only individual members," and if "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These requirements are commonly separated into the "predominance" and "superiority" requirements. *See In re Cmty. Bank of N. Va.*, 418 F.3d at 308–09.

a. Predominance

The predominance inquiry under Rule 23(b)(3) "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Sullivan*, 667 F.3d at 297 (citation and internal quotation marks omitted). Parallel with Rule 23(a)(2)'s commonality element, which provides that a proposed class must share a common question of law or fact, Rule 23(b)(3)'s predominance requirement imposes a more rigorous obligation upon a reviewing court to ensure that issues common to the class predominate over those affecting only individual class members. *Id*. (citing *Ins. Brokerage*, 579 F.3d at 266). Thus, the Third Circuit "'consider[s] the Rule 23(a) commonality requirement to be incorporated into the more stringent Rule 23(b)(3) predominance requirement, and therefore deem[s] it appropriate to analyze the two factors together." *Id*. (quoting *Ins. Brokerage*, 579 F.3d at 266). And, Third Circuit precedent "provides that the focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Id*. at 298.

In assessing predominance, "a court at the certification stage must examine each element of a legal claim 'through the prism' of Rule 23(b)(3)." *Marcus*, 687 F.3d at 600 (quoting *In re DVI, Inc. Secs. Litig.*, 639 F.3d 623, 630 (3d Cir. 2011)). Thus, a plaintiff must "demonstrate that the element of [the legal claim] is capable of proof at trial through evidence that is common to the class rather than individual to its members." *Id*. (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008)).

i. Liability for Section 1983 Violations

If Plaintiffs' claims were tried, proof of the Powell Defendants' liability to the Juvenile Settlement Class Members for section 1983 violations, including conspiracy to violate section 1983, would be directed to (1) whether the Settling Defendants acted in conspiracy with each other and in concert with Ciavarella and Conahan–*i.e.*, under color of law–to deprive Juvenile Settlement Class Members of their constitutional rights, and (2) whether these actions caused violations of Juvenile Class Members' constitutional rights. *Elmore v. Cleary*, 399 F.3d 279, 281 (3d Cir. 2005) (citation omitted).

10** Plaintiffs' proffered evidence of the claimed section 1983 violations would therefore focus exclusively on the ***Powell Defendants' conduct, and not on the conduct of the individual juveniles. Further, the Powell Defendants' alleged conduct identically affected each member of the class. As a result of the Powell Defendants' allegedly unlawful and conspiratorial conduct, each Juvenile Settlement Class Member appeared before an identically partial tribunal, and each allegedly had his or her rights violated by

identical, class–wide conduct in violation of the Constitution. Therefore, because the section 1983 claims against the Powell Defendants rely on the same course of conduct, common proof of such conduct, and damage as a result of that conduct, the predominance requirement of Rule 23(b)(3) is met for these claims.

ii. Liability for Civil RICO Claims

The elements of a civil RICO claim under section 1962(c) are (1) the conducting of (2) an enterprise (3) through a pattern, (4) of racketeering activity (5) which results in injury to the plaintiffs' business or property. *Tapp v. Proto*, 718 F. Supp. 2d 598, 625 (E.D. Pa. 2010) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)). For a section 1962(d) claim, a plaintiff must establish (1) an agreement to commit the predicate acts of fraud, and (2) knowledge that those acts were part of a pattern of racketeering activity conducted in such a way as to violate section 1962(a), (b), or (c).*Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989) (citation omitted).

Like the section 1983 claims, the RICO claims of the Settlement Class Members center on the Powell Defendants' alleged involvement in a scheme to build and operate private, for–profit juvenile detention facilities and to fill those facilities for the purpose of ensuring substantial monetary gains for the defendants. The Powell Defendants' alleged RICO liability again turns on significant, common issues of law and fact, focusing on the Powell Defendants' alleged conduct–conduct common as to all Settlement Class Members.

For each Settlement Class Member, the question of whether the RICO statute was violated turns on the following common issues of law and fact: (1) the existence of an enterprise affecting interstate commerce; (2) Defendants' alleged association with the enterprise; and (3) Defendants' alleged participation in the conduct or the affairs of the enterprise through a pattern of racketeering activity. Here, "the same acts of...fraud will be proffered by plaintiffs to establish a pattern of racketeering activity applicable to all of the plaintiffs' claims," and "[a]ll of the issues concerning a violation of 1962(c) appear to be common to the claims of all class members." *McMahon Books, Inc. v. Willow Grove Assocs.*, 108 F.R.D. 32, 39 (E.D. Pa. 1985). The same is logically true of the section 1962(d) conspiracy claims; the question of whether Defendants conspired to violate section 1962(c) focuses solely on the alleged conduct of Defendants, and is common to all Settlement Class Members. Although individual issues might arise in the course of establishing the damages suffered by individual Settlement Class Members if this case were tried, those issues do not predominate in the context of all of the common issues and facts relevant to the RICO claims.

Here, the "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Accordingly, the predominance element is satisfied here.

b. Superiority

According to Rule 23(b)(3), the considerations relevant to the superiority inquiry include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

***11** Fed. R. Civ. P. 23(b)(3). The superiority requirement requires a district court "to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *In re Cmty. Bank of N. Va.*, 418 F.3d at 309 (citation and internal quotation marks omitted). And, when "confronted with a request for settlement–only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial." *Amchem Prods., Inc. v.* Windsor, 521 U.S. 591, 620 (1997).

A class resolution in the manner proposed in the instant Settlement is superior to other available methods for resolution of this action against the Powell Defendants. First, proceeding as a class action in this case is far superior to allowing "piecemeal litigation" of the exact same claims in countless lawsuits. *Logory*, 277 F.R.D. at 146 (citation omitted). Second, where a claim is small in comparison to the costs of prosecuting a lawsuit, a class action allows for litigation costs to be spread among the injured parties. *See In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 264 (E.D. Pa. 2012). Indeed, "[a]ddressing the rights of those who would not otherwise be appropriately incentivized to bring their own singular claims was precisely the aim of

the Advisory Committee in promulgating Rule 23(b)(3)." *Logory*, 277 F.R.D. at 146 (citing *Amchem*, 521 U.S. at 617). Third, this is an appropriate forum for concentrating the claims of the Settlement Classes because the Court has subject matter jurisdiction over the claims and personal jurisdiction over the parties. *See Esslinger v. HSBC Bank Nev., N.A.*, No. 10–3213, 2012 WL 5866074, at *5. Lastly, the difficulties in managing a class action need not be considered because the Settlement will avoid trial. *See Amchem*, 521 U.S. at 620. For these reasons, the superiority requirement is satisfied.

3. Conclusion as to Class Certification for Settlement Purposes

Because all of the Rule 23(a) and (b)(3) requirements have been met, the Classes will be certified for settlement purposes.

B. Notice

In class actions, a district court obtains personal jurisdiction over the absentee class members "by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306 (3d Cir. 1998) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985)). Rule 23 contains two (2) distinct notice provisions. *See id.* at 326. First, Rule 23(c)(2) requires that class members be given the best notice practicable, including individual notice to all members who can be identified through reasonable efforts. Fed. R. Civ. P. 23(c)(2).[4] Second, Rule 23(e) requires all class members to be notified of the terms of any proposed settlement. Fed. R. Civ. P. 23(e). This notice is designed "to summarize the litigation and the settlement" and "to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation." *Prudential*, 148 F.3d at 327 (citation and internal quotation marks omitted).

4 The notice, in clear and concise language, must state:
(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).
Fed. R. Civ. P. 23(c)(2).

***12** Here, the Notice of the Powell Defendant Settlement contained the information required by Rules 23(c)(2) and 23(e). Specifically, the Notice detailed the nature of the action, the definition of the Juvenile Settlement Class and the Parent Settlement Class, the claims of the Settlement Classes, the terms of the Settlement Agreement, and the right to object or request exclusion from the terms of the Settlement. The Notice also informed members of their opportunity to be heard at the fairness hearing, to enter an appearance through an attorney of their choice, and that the Settlement would be binding on members that did not opt out.

Additionally, Plaintiffs' efforts to notify the Settlement Class Members satisfied the requirements of Rule 23 and due process. The Notice was sent to potential Settlement Class Members by first–class mail based on the last known addresses of these individuals. Notice was also published in two (2) local newspapers, and information about the proposed Settlement was available through a detailed website. Based on the extensive individual notice, as well as the published notice, the notice requirements of both Rule 23 and the Due Process Clause have been satisfied. *See Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3d Cir. 1985) ("[F]irst–class mail and publication regularly have been deemed adequate under the stricter notice requirements...of Rule 23(c)(2).").

C. Fairness of the Settlement

Certified federal class actions may only be settled with court approval. *See* Fed. R. Civ. P. 23(e). While the approval of a class action settlement is committed to the sound discretion of the district court, "it can endorse a settlement only if the compromise is fair, adequate, and reasonable.'" *Eichenholtz v. Brennan*, 52 F.3d 478, 482 (3d Cir. 1995) (citation and internal quotation marks omitted). This is especially true in cases such as this one "where settlement negotiations precede class certification, and approval for settlement and certification are sought simultaneously." *In re Warfarin*, 391 F.3d at 535 (citation omitted).

As a preliminary matter, there is an initial presumption of fairness for the settlement if a court finds that: "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *Id.* Here, all four (4) requirements are satisfied.

First, the Settlement Agreement was reached after protracted arm's length negotiations for many months, through numerous face–to–face meetings and teleconferences. (Doc. 1706, at 22.) Second, Class Counsel have engaged in extensive discovery, including the review of hundreds of thousands of pages of documents and the depositions of representatives of the Provider Defendants and Robert J. Powell. (*Id.* at 23.) Third, as discussed, counsel for both parties have extensive experience in similar matters. Lastly, after providing the Notice of Class Action Settlement to Class Members through first–class mail, print publication, and the internet, not a single objection was received, out of a class of approximately 3,910. Only eleven (11) Class Members sought to exclude themselves from the Settlement, which is less than a one percent (1%) opt–out rate.[5] Therefore, there is an initial presumption of fairness for the settlement.

[5] Although Class Counsel noted in their brief that twelve (12) Class Members had sought to exclude themselves from the Settlement, Class Counsel noted at the final approval hearing held on December 16, 2015, that one (1) of those twelve (12) individuals had contacted counsel and informed them that they no longer would be opting out of the Settlement. Therefore, the total number of Class Members who have sought to exclude themselves from the Settlement is now eleven (11).

***13** In addition to the initial presumption of fairness, the Third Circuit has identified nine (9) factors, known as the *Girsh* factors, to be considered when determining whether a proposed class action settlement is fair, reasonable, and adequate. *See Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). These 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; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

In re Warfarin, 391 F.3d at 534–35 (citing *Girsh*, 521 F.3d at 157). The settling parties bear the burden of proving that the *Girsh* factors weigh in favor of approval of the settlement. *In re Pet Food Prods. Liab. Litig.*, 629 F.3d at 350 (citing *Gen. Motors*, 55 F.3d at 785).

1. Complexity, Expense, and Duration of Litigation

The first *Girsh* factor "captures the probable costs, in both time and money, of continued litigation." *In re Warfarin*, 391 F.3d at 535–36. Here, the Settlement Agreement provides financial benefits to the Class more quickly than litigation of the numerous complex issues involved in this case could, an especially important aspect considering that many of the Class Members were juveniles at the time of the alleged constitutional violations and other bad acts. As recognized by Plaintiffs, this case raises complex legal issues with respect to the RICO and section 1983 claims. Additionally, a trial on the merits would require hours of attorney preparation and the expenditure of hundreds of thousands of dollars. Likewise, even if this case proceeded to trial against the Powell Defendants, a "complicated, lengthy trial," would ensue, and the "inevitable...post–trial motions and appeals would not only further prolong the litigation but also reduce the value of any recovery to the class." *Id.* at 536. As such, the first *Girsh* factor weighs in favor of approving the Powell Defendant Settlement.

2. Reaction of the Class to the Settlement

"The second *Girsh* factor 'attempts to gauge whether members of the class support the settlement.'" *In re Warfarin*, 391 F.3d at 536 (quoting *Prudential*, 148 F.3d at 318). The Third Circuit has noted that a vast disparity between the number of potential class members who received notice of a proposed settlement and the number of objectors "creates a strong presumption that this factor weighs in favor of the Settlement." *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001). Similarly, "[c]ourts have generally assumed that 'silence constitutes tacit consent to the agreement.'" *Gen. Motors*, 55 F.3d at 812 (quoting *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313 n.15 (3d Cir. 1993)).

The reaction of the class strongly favors approval of the Settlement. Here, following extensive notice, both to potential Settlement Class Members individually and by general publication, none of the class of approximately 3,910 potential Class Members objected to the proposed Settlement. Furthermore, only eleven (11) Settlement Class Members opted out of the Settlement, which is less than a one percent (1%) opt–out rate. The lack of objections and the low number of opt outs demonstrate a general acceptance of the Settlement by Class Members. *See, e.g., Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118–19 (3d Cir.1990) (approving settlement where "only" 29 objections were made in a 281–member class);

Ripley v. Sunoco, Inc., 287 F.R.D. 300, 312 (E.D. Pa. June 26, 2012) (reaction of the class favored approval of settlement where "less than 1 percent of the eligible class members opted out of the settlement"). The second *Girsh* factor thus strongly counsels in favor of settlement approval.

3. Stage of the Proceedings and Amount of Discovery Completed

***14** The third *Girsh* factor "captures the degree of case development that class counsel had accomplished prior to settlement," and allows the court to "determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin*, 391 F.3d at 537 (citation, internal quotation marks, and alterations omitted); *see also Gen. Motors*, 55 F.3d at 813 ("Given the purpose of this inquiry,...it is...appropriate to measure the stage by reference to the commencement of proceedings either in the class action at issue or in some related proceeding.").

When analyzing this *Girsh* factor, courts also examine whether the settlement resulted from arm's–length negotiations. *See In re Corel Corp. Sec. Litig.*, 293 F. Supp. 2d 484, 491 (E.D. Pa. 2003). When the settlement results from arm's–length negotiations, the court will afford "considerable weight to the views of experienced counsel regarding the merits of the settlement." *McAlarnen v. Swift Transp. Co., Inc.*, Civ. A. No. 09–1737, 2010 WL 365823, at *8 (E.D. Pa. Jan. 29, 2010); *see also In re Gen. Instrument Secs. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001) ("Significant weight should be attributed to the belief of experienced counsel that the settlement is in the best interests of the class.").

The Settlement was preliminarily approved in July, 2015, years after the commencement of this litigation. An agreement was reached only after a failed mediation and numerous telephone conferences and face–to–face meetings between counsel for the parties. During that time, considerable time, effort, and money was expended by both parties, including the production and review of over 200,000 pages of documents and hundreds of Plaintiff Fact Sheets. Moreover, numerous pleadings and motions were also filed, and responded to, by Plaintiffs and the Powell Defendants in this action, including motions to dismiss, motions for summary judgment, certification of a litigation class, and numerous other disputes between the parties. As such, at this stage of the proceedings "'the parties certainly had a clear view of the strengths and weaknesses of their cases.'" *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 461 (D.N.J. 2008) (citation, internal quotation marks, & alteration omitted). The third *Girsh* factor therefore weighs in favor of settlement approval.

4. Risks of Establishing Liability

The fourth *Girsh* factor "examines what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them." *Sullivan*, 667 F.3d at 322 (citation, internal quotation marks, & alteration omitted). "[T]he more risks that Plaintiffs may face during litigation the stronger this factor favors approving a settlement." *Esslinger*, 2012 WL 5866074, at *9 (citing *Prudential*, 148 F.3d at 319). This inquiry requires balancing the likelihood of success if the case were taken to trial against the benefits of immediate settlement. *In re Safety Components, Inc. Secs. Litig.*, 166 F. Supp. 2d 72, 89 (D.N.J. 2001) (quoting *Prudential*, 148 F.3d at 319).

As previously noted, Plaintiffs face a difficult task of proving all elements of their claims should these actions proceed to trial. While Plaintiffs did not provide, in detail, the risks of establishing liability in this case, this is understandable in this case "[g]iven that the litigation [will] continue against other defendants, [and] the parties may [have been] reluctant to disclose fully and candidly their assessment of the proposed settlement's strengths and weaknesses that led them to settle separately". *In re Processed Egg Prods.*, 284 F.R.D. at 271 (citation and internal quotation marks omitted).

***15** In addition, possible appeals, summary judgment motions, and trial still remain if the Settlement is not approved. Thus, as this case involves difficult factual and legal issues which would have translated into protracted litigation and accumulating expenses, in both time and money, this factor weighs in favor of approval.

5. Risks of Establishing Damages

The next *Girsh* factor "attempts to measure the expected value of litigating the action rather than settling it at the current time." *In re Cendant Corp. Litig.*, 264 F.3d at 239 (citation and internal quotation marks omitted). This factor involves a balancing of risks. *In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 488 (E.D. Pa. 2010).

Here, even if Plaintiffs were able to establish liability, they would still be tasked with proving the appropriate amount of damages against the Powell Defendants. For Juvenile Plaintiffs that only seek presumed damages with respect to the section 1983 claims, proving damages may not present

a daunting task. However, Juvenile Plaintiffs seeking more than presumed damages may face significant obstacles in establishing individual damages. The issue of individualized damages could very well lead to a "battle of the experts" with no guarantee whom the jury would believe. *See In re Cendant Corp. Litig.*, 264 F.3d at 236. Furthermore, even if damages are established, post–trial motions and appeals present increased risk to the recovery of damages.

In the instant case, the risks of establishing damages factor is neutral. Although some Plaintiffs may face difficulty in establishing individualized or special damages, establishing presumed damages suffered by the Juvenile Settlement Class as a whole would not present the same risks. As such, this factor does not weigh for or against approval.

6. Risks of Maintaining the Class Action through Trial

The sixth *Girsh* factor "measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial" in light of the fact that "the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the class action." *Sullivan*, 667 F.3d at 322. The value of a class action depends largely on the certification of the class because not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits. *Gen. Motors*, 55 F.3d at 817. However, a "district court retains the authority to decertify or modify a class at any time during the litigation if it proves to be unmanageable." *Id.* (citing *Prudential*, 148 F.3d at 321).

If the Settlement were rejected, the Powell Defendants would likely vigorously oppose class certification. And, the Court of Appeals for the Third Circuit has recognized: "There will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." *Prudential*, 148 F.3d at 321. The sixth *Girsh* factor therefore slightly favors settlement approval.

7. Ability of Defendants to Withstand a Greater Judgment

The seventh *Girsh* factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the settlement." *In re Warfarin*, 391 F.3d at 537–38 (citation, quotations, and alteration omitted). The parties' briefs are silent on this issue. Therefore, based on the lack of information submitted with respect to this factor, I am not in a position to determine whether the Powell Defendants could withstand a greater judgment than that provided under the Settlement. Thus, the seventh *Girsh* factor is neutral.

8. Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

***16** The last two *Girsh* factors evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case. *In re Warfarin*, 391 F.3d at 538 (citing *Prudential*, 148 F.3d at 322). "The factors test two (2) 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." *Id.* In conducting this analysis, the court must guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution. *Sullivan*, 667 F.3d at 324. To assess the reasonableness of a settlement in a case seeking primarily monetary relief, such as this one, a court should compare "'the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing...with the amount of the proposed settlement.'" *In re Warfarin*, 391 F.3d at 538 (quoting *Prudential*, 148 F.3d at 322).

Pursuant to the terms of the Settlement Agreement, the Powell Defendants agree to establish a settlement fund of no less than $4,750,000.00, which will be used to pay settlement costs and claims by Class Members. Although Plaintiffs do not set forth an exact estimation of the damages they would likely recover if successful, Plaintiffs discuss the obstacles that must be surmounted before any damages may be awarded. These hurdles could substantially reduce, if not eliminate, any recovery by Plaintiffs.

Additionally, Plaintiffs retained an ethics expert, Professor Lynn A. Baker, to offer an opinion as to the fairness and reasonableness of the Settlement reached between Plaintiffs and the ***Provider*** Defendants. Professor Baker has served as an ethics expert in multiple large–dollar, large–group settlements. Professor Baker, based upon her experience, opined that all of the components of the Provider Defendant Settlement Agreement were fair, reasonable, and appropriate under the circumstances. Because the Settlement Agreement reached here with the Powell Defendants yields additional monetary benefits over and above what the Settlement Class Members received in the Provider Defendant Settlement,

Professor Baker's expert opinion also supports a finding that the Settlement Agreement reached here is reasonable.

9. *Prudential* Factors

In addition to the *Girsh* factors, courts in the Third Circuit also consider the following factors outlined in *Prudential*:

> 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 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.

Prudential, 148 F.3d at 323.

In this case, none of the *Prudential* factors weigh against approval, and three (3) factors weigh in favor of settlement: (1) whether members are accorded the right to opt out; (2) whether any provisions for attorneys' fees are reasonable; and (3) whether the procedure for processing individual claims under the Settlement is fair and reasonable. As noted, the Settlement Class Members were given the opportunity to opt out. The attorneys' fees sought by Class Counsel, as discussed below, are reasonable in light of the time expended litigating this action. And, finally, the procedure for processing individual claims under the Settlement is fair and reasonable, and the procedure has been explained clearly in forms available to Settlement Class Members.

10. Summary of *Girsh* and *Prudential* Factors

***17** After consideration of the *Girsh* factors and the relevant *Prudential* factors, I conclude that the Settlement is fair, reasonable, and adequate under Rule 23(e). As discussed, a few factors do not weigh in favor of settlement. Not every factor need weigh in favor of settlement, however, in order for the Settlement to be approved. *See In re Cendant Corp. Litig.*, 264 F.3d at 242–43 (affirming final settlement approval when not all factors weighed in favor of approval). Because the ultimate balance of the *Girsh* and *Prudential* factors when considered together weigh in favor of settlement, the Settlement will be approved.

D. Attorneys' Fees and Costs

Under Rule 23(h) of the Federal Rules of Civil Procedure, "[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." Fed. R. Civ. P. 23(h). A district court must conduct a "thorough judicial review of fee applications...for all class action settlements." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 299 (3d Cir. 2005) (quoting *Prudential*, 148 F.3d at 333 (internal quotations omitted)).

> In assessing attorneys' fees, courts typically apply either the percentage–of–recovery method or the lodestar method. 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." *Prudential*, 148 F.3d at 333 (internal quotations omitted). The lodestar method is more typically applied in statutory fee–shifting cases because it allows courts 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" or in cases where the nature of the recovery does not allow the determination of the settlement's value required for application of the percentage–of–recovery method. *Id*. Regardless of the method chosen, we have suggested it is sensible for a court to use a second method of fee approval to cross–check its initial fee calculation. *Id*.

Id. As such, the percentage–of–recovery method will be employed to determine the proper fee to award Class Counsel, and then the lodestar will be utilized as a cross–check to ensure the reasonableness of the award. *See id*.

1. Application of the Percentage–of–Recovery Method

Class Counsel request a combined award of common benefit attorneys' fees, disbursements, and costs of $1,456,357.91 under the percentage–of–recovery method. This amounts to 30.66% of the gross Settlement Amount. The Third Circuit has instructed district courts to consider ten (10) factors when undertaking a percentage–of–recovery analysis: (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) 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 settlement terms. *In re Diet Drugs*, 582 F.3d 524, 541 (3d Cir. 2009) (citations omitted). The award factors, however, "need not be applied in a formulaic way" because each case is different, "and in certain cases, one factor may outweigh the rest." *Rite Aid*, 396 F.3d at 301 (citation and internal quotation marks omitted).

a. Size of the Fund and Number of Beneficiaries

***18** The Settlement Agreement establishes a common fund of $4,750,000.00 and notice has been disseminated to over 3,000 individuals. In general, as the size of the settlement fund increases the percentage of the award decreases. *See Prudential*, 148 F.3d at 339. The basis for this inverse relationship is the belief that "[i]n many instances the increase [in recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *Id*. (citation omitted). As explained below, Class Counsel's requested fees in this case represent approximately 30.66% of the common benefit fund, which is within the range of reasonable fees, on a percentage basis, in the Third Circuit.[6] *See, e.g., Esslinger*, 2012 WL 5866074, at *12 (thirty percent (30%) fee award reasonable considering size of the fund); *In re Processed Egg Prods. Antitrust Litig.*, 2012 WL 5467530, at *3 (approving a thirty percent (30%) fee award for $25,000,000.00 settlement). And, while the size of the common fund "is certainly substantial, it is not a 'mega–fund' that would dictate an award at the low end of the sliding scale." *Frederick v. Range Resources–Appalachia, L.L.C.*, No. 08–288, 2011 WL 1045665, at *10 (W.D. Pa. Mar. 17, 2011) ($22,000,000.00 settlement does not qualify as a "mega–fund"). Accordingly, this factor weighs in favor of finding the fee request reasonable.

6 At the final approval hearing held on December 16, 2015, Class Counsel stated that the 0.66% of this 30.66% represents the amount requested in costs. Therefore, Class Counsel's request for attorney fees would amount to 30.0% of the Settlement Amount.

b. Presenceor Absence of Substantial Objections by Class Members

As discussed above with respect to the *Girsh* factors, no objections were filed to the Settlement by any Settlement Class Member. Similarly, no objections have been filed to Class Counsel's fee application. The absence of objections supports the reasonableness of the fee request. *Frederick*, 2011 WL 1045665, at *10 (citation omitted); *In re Amer. Inv. Life Ins. Co. Annuity & Mktg. & Sales Practices Litig.*, 263 F.R.D. 226, 244 (E.D. Pa. 2009) ("The small number of objections and the objections' lack of merit indicate that the class is satisfied with the fee award") (citation omitted). This factor also weighs in favor of the requested award of attorneys' fees.

c. Skill and Efficiency of the Attorneys Involved

The quality of representation of Class Counsel considers "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." *In re Ikon Office Solutions, Inc., Secs. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) (citation and internal quotation marks omitted). As set forth in greater detail above, Class Counsel are highly experienced, as the individual attorneys in this action have litigated numerous complex class actions involving mass actions and civil rights claims. Additionally, Class Counsel's ability to successfully negotiate the Settlement "demonstrates the significant skill and expertise of counsel." *In re Processed Egg Prods. Antitrust Litig.*, 2012 WL 5467530, at *3. Likewise, counsel for the Powell Defendants have extensive experience defending complex litigation and class actions. Thus, this factor supports the reasonableness of the fee award.

d. Complexity and Duration of the Litigation

The Third Circuit has stated that "complex 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). These factors all support the requested fee award. The litigation itself has been

pending for nearly seven (7) years, during which Class Counsel participated in mediation, engaged in discovery, and submitted numerous, well–researched filings. Class Counsel have briefed motions for partial summary judgment and their motion for certification of a litigation class, and they defended Defendants' motions to dismiss and motions for summary judgment. Equally significant is the complex nature of this litigation, and the alleged judicial corruption scheme for which these actions seek redress. Therefore, the complexity and duration of the litigation supports the requested fee award.

e. Risk of Nonpayment

***19** This factor allows courts to award higher attorneys' fees for riskier litigation. *Esslinger*, 2012 WL 5866074, at *13. Here, Class Counsel undertook this complex civil rights/RICO litigation on a contingent fee basis without any guarantee of payment. Class Counsel, in litigating this case, incurred hundreds of thousands of dollars in costs and expenses while facing the risk of not being reimbursed. The risk of nonpayment, therefore, weighs in favor of granting the requested fee award. *See, e.g., In re Processed Egg Prods. Antitrust Litig.*, 2012 WL 5467530, at *4 (noting that any contingency fee arrangement includes a risk of non–payment).

f. Amount of Time Devoted by Class Counsel

In connection with the Mericle Settlement, I found that Class and Plaintiffs' Counsel had spent 34,900 hours prosecuting this matter. (Doc. 1268.) That amount of time has only increased since the entry of my December 14, 2012 Order, and during the processing of the Provider Defendant Settlement.

According to the motion for attorneys' fees, Class and Plaintiffs' Counsel have spent an additional 3,657.6 hours prosecuting this matter solely against the Powell Defendants. To date, the time spent by Class and Plaintiffs' Counsel total in excess of 40,000 hours. Such a large number of hours represents a substantial commitment to this litigation. Furthermore, the amount of time spent on this case prior to final approval of the Settlement reflects the complexity of Plaintiffs' claims, not the inefficiency of their counsel. Presumably, the thousands of hours counsel spent working on this matter prevented those individuals from litigating other cases. This factor thus strongly favors granting the motion for attorneys' fees.

g. Awards in Similar Cases

In the Third Circuit, "fee awards in common fund cases generally range from 19% to 45% of the fund." *Esslinger*, 2012 WL 5866074, at *15 (citation omitted). Many courts, including several in the Third Circuit, have considered 25% to be the "benchmark" figure for attorney fee awards in class action lawsuits, "with adjustments up or down for significant case–specific factors." *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 262 (D. Del. 2002) (gathering case law and awarding 22.5% in fees on a $10.01 million settlement fund). And, courts in the Third Circuit have found a thirty percent (30%) fee reasonable in cases raising violations of constitutional rights. *See, e.g., Delandro v. Cnty. of Allegheny*, No. 06–927, 2011 WL 2039099, at *14 (W.D. Pa. May 24, 2011) ("[T]he Court finds that a percentage of thirty percent (30%)...is in fact identical to, the percentage awarded in a number of other strip–search class action settlements in this Circuit.");*Boone v. City of Phila.*, 668 F. Supp. 2d 693, 714 (E.D. Pa. 2009) ("30% fee percentage is commensurate with other strip–search class actions").

In the previous Mericle Settlement, I approved a combined award of attorneys' fees and costs of 24.4%. (Doc. 1268.) In the previous Provider Defendant Settlement, I approved a 29.3% award of combined attorney fees and costs. (Doc. 1539.) Accordingly, in this settlement, Class Counsel's request for a **combined** award of attorneys' fees and costs of 30.66% is within the range of percentages in similar cases both in the amount of settlement and subject matter of the case.

h. Value of Benefits Attributed to Class Counsel

The eighth factor the Court must consider is the degree to which the benefits of the settlement are attributable to Plaintiffs' counsel as opposed to the efforts of other actors, such as, for example, government investigators. *See In re Diet Drugs*, 582 F.3d at 541. While government investigation uncovered the alleged conspiracy orchestrated by Ciavarella and Conahan which resulted in the indictment of the former judges, "[t]here is no contention...that the settlement could be attributed to work done by other groups, such as government agencies." *Esslinger*, 2012 WL 5866074, at *14. This factor supports the requested fee.

i. Negotiated Fee in a Contingent Fee Arrangement

***20** In private contingency fee cases, attorneys routinely negotiate agreements for between thirty percent (30%) and forty percent (40%) of the recovery. *See In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 123 (D. N.J. 2012); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000). The requested fee is within this range.

j. Innovative Settlement Terms

In their submission, Class Counsel did not identify any particularly "innovative" terms in the Settlement Agreement. Thus, this factor neither weighs against nor for the proposed fee request. *See, e.g, McDonough v. Toys "R" Us, Inc.*, 834 F. Supp. 2d 329, 345 (E.D. Pa. 2011) ("In the absence of any innovative terms, this factor neither weighs in favor or against the proposed fee request.").

2. Lodestar Cross–Check

The lodestar cross–check gauges the reasonableness of the attorneys' fee award as a whole. *Milliron v. T–Mobile, USA, Inc.*, 423 F. App'x 131, 136 (3d Cir. 2011). In performing the lodestar cross–check, the court multiplies "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." *Rite Aid*, 396 F.3d at 305. Then, the court may apply a multiplier to "account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *Id* at 305–06. If the multiplier that must be used in order to obtain the result reached by application of the percentage–of–recovery method "is too great, the court should reconsider its calculation under the percentage–of–recovery method." *Id*. at 306. But, because the cross–check is not the primary analysis in common fund cases, it does not require "mathematical precision [ ] or bean–counting." *Id*. In evaluating the hours reasonably spent on the case, the court does not have to "review actual billing records" but can "rel[y] on summaries submitted by the attorneys." *See id*.

According to Plaintiffs' submission, the lodestar for Class Counsel is $1,067,373.25. This amount was based upon the hourly rates I previously approved in the Mericle and Provider Defendants' Fee Awards. Because the total attorneys' fee and award requested amounts to $1,425,000.00, the resulting multiplier is approximately 1.34%. Therefore, the lodestar multiplier in this matter (1.34%) is within the Third Circuit's range of one (1) to four (4). *Prudential II*, 148 F.3d at 341. Accordingly, the lodestar cross–check supports the requested award.

3. Reimbursement of Costs and Expenses

In addition to an award of attorneys' fees, Plaintiffs' counsel seeks reimbursement of expenses in the amount of $31,357.91. The Federal Rules of Civil Procedure provide that a court "may award reasonable attorney's fees and nontaxable costs" to Plaintiffs' counsel. Fed. R. Civ. P. 23(h). Reimbursement is particularly appropriate when no class members have objected to it. *In re Processed Egg Prods. Antitrust Litig.*, 2012 WL 5467530, at *7. Here, no Class Member has objected to the fact that Class Counsel's expenses would be reimbursed from the Settlement.

Plaintiffs' counsel are requesting a **combined** award of attorneys' fees and costs totaling $1,456,357.91. From that amount, all expenses first will be paid to reimburse the expenses incurred by each of the firms. The remainder will be considered the total fee award and will be distributed at the discretion of Co–Lead Counsel. As this request is reasonable, Plaintiffs' motion for an award of fees and costs will be approved.

4. Allocation of Fees

***21** Lastly, the motion seeks to allow Lead Counsel to allocate the fee among counsel entitled to share the award. District courts may generally rely on lead counsel to distribute attorneys' fees among those involved. *Milliron*, 423 F. App'x at 134. Allocation of fees in this manner is rationale because counsel "are most familiar with the work done by each firm and each firm's overall contribution to the litigation," and this process "conserves the time and resources of the courts." *In re Processed Egg Prods. Antitrust Litig.*, 2012 WL 5467530, at *7 (citation omitted). Co–Lead Counsel will therefore be permitted to distribute the fee award to those attorneys who assisted in creation of the Settlement Fund. Of course, should all counsel not agree with Co–Lead Counsel's allocation of fees, the ultimate allocation will then be made by the Court. *See In re Diet Drugs Prods. Liab. Litig.*, No. 99–20593, 2002 WL 32154197, at *24 (E.D. Pa. Oct. 3, 2002).

III. Conclusion

For the above stated reasons, the Settlement Classes will be certified, the Settlement will be approved, and the requested attorneys' fees and costs will be awarded.

An appropriate order follows.

All Citations

Not Reported in Fed. Supp., 2015 WL 9268445

End of Document

2016 WL 6661336
Only the Westlaw citation is currently available.
Not for Publication
United States District Court, D. New Jersey.

Stanley YEDLOWSKI, etc., Plaintiffs,

v.

ROKA BIOSCIENCE, INC., et al., Defendants.

Case No. 14-CV-8020-FLW-TJB
|
Signed 11/10/2016

Attorneys and Law Firms

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Opinion

WOLFSON, United States District Judge

***1** Before the Court are the motions for final approval of a proposed settlement and an award of attorneys' fees and reimbursement of expenses filed by Lead Plaintiff Stanley Yedlowski, through counsel the Rosen Law Firm, PA. This settlement will resolve all claims asserted against Defendants Roka Bioscience, Inc., Paul G. Thomas, and Steven T. Sobieski. Defendants, through counsel Proskauer Rose LLP, support the motions for final approval of settlement and take no position on the motion for an award of attorneys' fees and reimbursement of expenses.

For the reasons set forth below, Lead Plaintiff's motion for final approval of the parties' $3.275 million settlement is granted. Lead Counsel is awarded $982,500 in attorney's fees and $20,972.82 in costs. Lead Plaintiff is awarded the nominal sum of $3,000. All attorney's fees, costs, and nominal awards are payable from the settlement fund.

I. FACTUAL BACKGROUND

This case is a securities class action brought on behalf of investors who bought Roka common stock in, pursuant to, or traceable to, Roka's July 17, 2014 Initial Public Offering, including persons who bought Roka common stock between July 17, 2014 and March 26, 2015.

Defendant Roka sells tests to detect foodborne pathogens to large-scale food testers such as food manufacturers and commercial testing labs. Roka's tests can only be run on its stand-alone, single purpose platform. In March 2014, shortly before the IPO, Roka discovered that with some customers, its test to detect *Listeria* (a foodborne pathogen) generated unacceptable levels of false positives, i.e., incorrect results showing that a testing sample contains *Listeria* when it does not. Roka implemented a change in the test protocol to reduce the chances of false positives.

Roka's IPO registration statement (the "IPO Registration Statement") disclosed that Roka's *Listeria* test had generated sporadic false positives. The IPO Registration Statement also represented that the change in the test protocol had adequately addressed customers' false positives problems. Roka held its IPO in July 2014, selling its stock at $12/share, raising $55.8 million.

The Complaint alleges that by the time of the IPO, Defendants already knew, but did not disclose, that (a) Roka's solution to the problem of false positives for *Listeria* had failed, and (b) Roka had begun to lose customers because of the *Listeria* false positives. The Complaint alleges that in the run up to the IPO, Roka received daily complaints of Listeria false positives and that five of Roka's testing platforms had been returned by dissatisfied customers. The Complaint also alleges that Roka received regular complaints from its customer Silliker, a testing lab which ran Roka's tests for food producer Hillshire Farm. The Complaint alleges that Hillshire Farm stopped using Roka's tests altogether before the IPO because it could not trust the *Listeria* test results.

In a November 6, 2014 conference call and press release, Roka announced that the *Listeria* false positives problem had caused its revenue growth to stall. Lead Plaintiff alleges that because of Roka's precarious financial condition, the stall dramatically increased the chance that Roka would ultimately fail. The next trading day, Roka's stock price fell from its previous close of $8.34 to close at $3.00. The Complaint alleges that the market only learned the true scope of the false positives problem when, on March 26, 2015, following another quarter of zero sales growth, Roka announced that its sales would not increase substantially until Roka replaced the *Listeria* tests. Roka's stock price fell from $4.01 to $3.13 over the next two trading days.

II. PROCEDURAL HISTORY

***2** This Action was filed on December 24, 2014. In April 2015, the Court appointed Mr. Stanley Yedlowski as Lead Plaintiff and The Rosen Law Firm, P.A. as Lead Counsel. Lead Plaintiff and named plaintiff Pratik Pitroda ("Plaintiffs") timely filed their Complaint alleging violations of Section 11 of the Securities Act of 1933 (the "Exchange Act") against Defendants Roka, Thomas, and Sobieski.

In July 2015, following appointment of Lead Plaintiff and Lead Counsel and filing of an Amended Complaint, Defendants filed a letter motion seeking to have the Court strike, discount, or otherwise limit consideration of facts the Amended Complaint attributed to confidential witnesses. After considering Defendants' letter, Plaintiffs' response, and Defendants' reply, the Court declined to award any of the relief sought in Defendants' letter motion.

In September 2015, Defendants filed a motion to dismiss the Amended Complaint. A month later, Plaintiffs filed their opposition. The Court then stayed further briefing on Defendants' motion to dismiss while the Parties explored settlement discussions. To facilitate settlement discussions, the Settling Parties retained a mediator, the Hon. Faith S. Hochberg, U.S.D.J. (Ret.). Prior to a formal mediation, the parties submitted confidential mediation statements and replies.

The Settling Parties then held an all-day mediation before Judge Hochberg on December 15, 2015. Defendants' insurer also attended the mediation. There, the Parties signed a settlement term sheet, whose principal term was that the Action would be dismissed for a cash payment of $3.275 million.

The Parties then negotiated and drafted the Settlement Agreement. Plaintiffs filed for preliminary approval on May 20, 2016, and, on June 28, 2016, the Court granted Plaintiffs' motion; preliminarily approved the proposed settlement; certified the putative class for settlement purposes; approved the form and content of the proposed Individual Notice, Claim Form, and Summary Notice; authorized the mailing and publication of the notice materials; and scheduled a Fairness Hearing for November 9, 2016.

The Stipulation was conditioned on Lead Plaintiff's ability to conduct confirmatory discovery to determine whether the underlying facts were consistent with Lead Plaintiff's original understanding that the proposed settlement is fair, reasonable, and adequate. Defendants therefore made available to Lead Counsel some 8,074 documents, consisting of more than 377,000 pages.

The production consisted of documents from March 1 through August 31, 2014 that fit into at least one of the following categories: (*i*) documents that were generated by anyone on a list of Roka custodians who had been involved with the *Listeria* assay and that included at least one term on a list of search terms relating to the *Listeria* assay; (*ii*) minutes of meetings of Roka's Senior Management Team, and materials generated in preparation for those meetings; (*iii*) minutes of Roka's Board of Directors, and materials generated in preparation for those meetings; or (*iv*) Roka's complaint log during the relevant time period. Lead Counsel and defendants' counsel engaged in arm's-length negotiations to determine the lists of custodians and search terms used to generate the confirmatory discovery production.

Lead Counsel also interviewed three present or former Roka officials or employees, including Roka's former Chief Financial Officer and its Director of Product Marketing. After conducting their review, Lead Counsel and its clients have represented to the court that they continue to believe that the proposed settlement is fair, reasonable, and adequate and in the best interests of the Class.

***3** On or before July 21, 2016, the Claims Administrator (Strategic Claims Services ("SCS")) mailed copies of the Court-approved Individual Notice and Claim Form by first-class mail to 49 potential Class Members for whom address information was available from Roka's transfer agent. SCS also mailed the notice materials to another 1,524 custodial banks and other institutions identified from SCS's proprietary databases. SCS later mailed the notice materials to an additional 2,582 potential Class Members identified by nominees or other individuals. Thus, SCS sent a total of 4,155 sets of notice materials to potential Class Members and Nominees. In addition, SCS sent the Individual Notice and Claim Form to the Depository Trust Company (the "DTC") for publication on the Legal Notice System. SCS also caused the Court-approved Summary Notice to be published once in *The Wall Street Journal* and in *Investor's Business Daily*, as well as on *Globe Newswire.* SCS also posted information and documents about the proposed settlement on its website.

The matter came before the Court for a Fairness Hearing on November 9, 2016. Counsel for the parties appeared. The

parties did not appear. Lead Plaintiff's Counsel represented on the record that given the number of eligible claims that had been received, the projected recovery for individual class members would be between 16% and 18.5% of their losses, depending upon the number of currently deficient claims that may later be cured. With neither party wishing to make any additional supplements to the record, the Court summarized its findings, to be set forth in the opinion to follow.

III. TERMS OF SETTLEMENT

On May 17, 2016, the parties' counsel executed a Stipulation setting forth the terms of the settlement. The proposed settlement agreement provides for a payment of $3.275 million in cash (the "Settlement Amount") into a settlement fund to resolve all claims in this action. The $3.275 million has been paid into an escrow account in accordance with the terms of the Stipulation.

The Stipulation also states that notice and administrative costs, as well as Lead Counsel's fees and expenses, will be paid from the settlement fund. The remainder of the fund will be distributed to eligible Class Members. The Stipulation does not specify an allocation between Plaintiff's counsel and the class, leaving that issue for Lead Plaintiff's application to this Court.

IV. JURISDICTION

This Court has subject-matter jurisdiction over Plaintiffs' claims under § 22 of the Securities Act, 15 U.S.C. § 77v, as well as under the general federal-question statute, 28 U.S.C. § 1331. The Court has personal jurisdiction over defendants, plaintiffs, and all other Class Members. "In the class action context, the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 306 (3d Cir. 1998).

V. CLASS CERTIFICATION

The Third Circuit has consistently observed that "Rule 23 is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiffs' and counsel's ability to fairly and adequately protect class interests." *In re Comm. Bank of N. Va.*, 622 F.3d 275, 291 (3d Cir. 2010) (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 799 (3d Cir. 1995)) (alterations omitted). In order to approve a class settlement agreement, "a district court must determine that the requirements for class certification under Federal Rule of Civil Procedure 23(a) and (b) are met and must determine that the settlement is fair to the class under Federal Rule of Civil Procedure 23(e)." *In re Insurance Brokerage Antitrust Litigation*, 579 F.3d 241, 257-58 (3d Cir. 2009); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 341 (3d Cir. 2010). ("a district court first must determine that the requirements for class certification under Rule 23(a) and (b) are met.")

***4** "The requirements of [Rule 23] (a) and (b) are designed to insure that a proposed class has 'sufficient unity so that absent class members can fairly be bound by decisions of class representatives.' " *In re Prudential Ins. Co.*, 148 F.3d at 309 (quoting *Amchem*, 521 U.S. at 621). Under Rule 23(a), the prerequisites to class certification are:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or 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 interests of the class

Fed. R. Civ. P. 23(a); see also *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997). "Upon finding each of these prerequisites satisfied, a district court must then determine that the proposed class fits within one of the categories of class actions enumerated in Rule 23(b)." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 296 (3d Cir. 2011).

Certification pursuant to Rule 23(b)(3), applicable in cases like the one presently before the Court in which Plaintiffs seek monetary compensation, is permitted where (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3); see *Collins v. E.I. DuPont de Nemours & Co.*, 34 F.3d 172, 180 (3d Cir. 1994); *Amchem*, 521 U.S. at 618 ("Among current applications of Rule 23(b)(3), the 'settlement only' class has become a stock device"). The "factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class the district court must find that the

evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23." *In re Insurance Brokerage*, 552 F.3d at 258 (citations and internal quotations omitted). Accordingly, "[c]lass certification is proper only if the [ ] court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23 are met." Id. (internal quotation marks omitted).

"Even if it has satisfied the requirements for certification under Rule 23, 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.*, 148 F.3d at 316 (internal quotation marks omitted); see Fed. R. Civ. P. 23(e)(2) (stating that a district court may approve a proposed settlement "only after a hearing and on finding that it is fair, reasonable, and adequate"). In *In re Insurance Brokerage* the Third Circuit affirmed the applicability of nine factors, established in *Girsh v. Jepson* 521 F.2d 153, 157 (3d Cir. 1975), which are to be considered when determining the fairness of a proposed settlement. "In cases of settlement classes, where district courts are certifying a class and approving a settlement in tandem, they should be 'even more scrupulous than usual when examining the fairness of the proposed settlement.' " *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016), as amended (May 2, 2016) (quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534 (3d Cir. 2004)).

***5** Finally, as the Supreme Court has observed, when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial. But other specifications of [Rule 23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context." *Amchem*, 521 U.S. at 620 (citation omitted); see Id. "[I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed." Id. at 621. Thus, it is important to "apply[ ] the class certification requirements of Rules 23(a) and (b) separately from [the] fairness determination under Rule 23(e)." *In re Prudential Ins. Co.*, 148 F. 3d at 308.

Plaintiffs move to certify a class of investors who bought Roka common stock in, pursuant to, or traceable to, Roka's July 17, 2014 Initial Public Offering, including persons who bought Roka common stock between July 17, 2014, and March 26, 2015.

A. Rule 23(a) Factors

The Court first determines whether Plaintiffs have satisfied the prerequisites for maintaining a class action as set forth in Rule 23(a).

1. Numerosity

With respect to numerosity, a party need not precisely enumerate the class members to proceed as a class action. *In re Lucent Tech. Inc., Sec. Litig.*, 307 F. Supp. 2d 633, 640 (D.N.J. 2004). "No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (citing 5 James Wm. Moore et al., Moore's Federal Practice S 23.22[3][a] (Matthew Bender 3d ed. 1999)).

Here, Roka's stock was listed on the NASDAQ, and more than 14 million of its shares were traded during the Class Period and 2,631 potential class members have been identified. The numerosity requirement has been met.

2. Commonality

Commonality requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The threshold for establishing commonality is straightforward: "[t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 596-97 (3d Cir. 2009) (quoting *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)) (emphasis added). Indeed, as the Third Circuit pointed out, "[i]t is well established that only one question of law or fact in common is necessary to satisfy the commonality requirement, despite the use of the plural 'questions' in the language of Rule 23(a)(2)." *In re Schering Plough*, 589 F.3d at 97 n.10. Thus, there is a low threshold for satisfying this requirement. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183 (3d Cir. 2001); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986) (highlighting that the threshold of commonality is not high (quotations and citations omitted)).

Moreover, this requirement does not mandate that all putative class members share identical claims, see *Hassine v. Jeffes*, 846 F.2d 169, 176-77 (3d Cir. 1988), and that "factual differences among the claims of the putative class members do not defeat certification." *Baby Neal*, 43 F.3d at 56. In that regard, class members can assert a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice. *Hassine*, 846 F.2d at 177-78. "Even where individual facts and circumstances do become important to the resolution, class treatment is not precluded." *Baby Neal*, 43 F.3d at 56.

***6** Courts will usually find commonality if the plaintiffs charge defendants with a common course of misconduct – particularly where, like here, the misrepresentations appeared in the Defendants' public statements that were disseminated to all investors. See, e.g., *In re Schering-Plough Corp./ ENHANCE Sec. Litig.*, No. CIV.A. 8-397 DMC/JAD, 2012 WL 4482032, at *4 (D.N.J. Sept. 25, 2012).

3. Typicality

Rule 23(a)(3) requires that the representative's claim be typical of those of the members of the class. "The concepts of commonality and typicality are broadly defined and tend to merge, because they focus on similar aspects of the alleged claims." *Newton*, 259 F.3d at 182. "Both criteria seek to assure that the action can be practically and efficiently maintained and that the interests of the absentees will be fairly and adequately represented." *Baby Neal*, 43 F.3d at 56; see *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Despite their similarity, commonality – like numerosity – evaluates the sufficiency of the class itself, and typicality – like adequacy of representation – evaluates the sufficiency of the named plaintiff. See *Hassine*, 846 F.2d at 177 n.4; *Weiss v. York Hosp.*, 745 F.2d 786, 810 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985).

Specifically, Rule 23(a)(3) requires that "the claims ... of the representative parties [be] typical of the claims of the class." See Fed. R. Civ. P. 23(a)(3). Typicality acts as a bar to class certification only when "the legal theories of the named representatives potentially conflict with those of the absentees." *Georgine v. Amchem Prods.*, 83 F.3d 610, 631 (3d Cir. 1996); *Newton*, 259 F.3d 183. "If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." Id. at 184. In other words, the typicality requirement is satisfied as long as representatives and the class claims arise from the same event or practice or course of conduct and are based on the same legal theory. *Brosious v. Children's Place Retail Stores*, 189 F.R.D. 138, 146 (D.N.J. 1999); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 923 (3d Cir. 1992) ("Factual differences will not render a claim atypical if the claim arises from the same event or practice of course of conduct that gives rise to the claims of the class members, and it is based on the same legal theory.").

Here, Lead Plaintiff's claims are similar to those of the other members of the Class. As evidenced by his sworn Certification, Lead Plaintiff bought Roka stock during the Class Period. Just like the other members of the proposed Class, Lead Plaintiff bought Roka stock in response to, or pursuant to or traceable to, Roka's Registration Statement, which allegedly contained false statements, and suffered damages when the false statements materialized. His claims stand or fall with those of the class. Accordingly, Lead Plaintiff's claims are typical.

4. Adequacy

A class may not be certified unless the representative class members "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Rule 23(a)'s adequacy of representation requirement 'serves to uncover conflicts of interest between named parties and the class they seek to represent.' " *In re Pet Food Prod. Liab. Litig.*, 629 F.3d 333, 343 (3d Cir. 2010) (quoting *Amchem*, 521 U.S. at 625). Class representatives "must be part of the class and possess the same interest and suffer the same injury as the class members." Id. (citation and internal quotation marks omitted).

***7** This requirement has traditionally entailed a two-pronged inquiry: first, the named plaintiff's interests must be sufficiently aligned with the interests of the absentees; and second the plaintiff's counsel must be qualified to represent the class. General Motors, 55F.3d at 800; *Newton*, 259 F.3d at 187 (same). A named plaintiff is "adequate" if his interests do not conflict with those of the Class. *In re Prudential Ins. Co.*, 148 F.3d at 312. Pursuant to Rule 23(g), adequacy of class counsel is considered separately from the determination of the adequacy of the class representatives. Both prongs of the adequacy requirement are satisfied here.

(i) Adequacy of the Proposed Class Representative

Lead Plaintiff has no interests that are antagonistic to those of the members of the proposed Class and has no unique defenses from the proposed Class. Lead Plaintiff

purchased Roka stock traceable to the Registration Statement. Lead Plaintiff, on his own behalf and on behalf of all members, seeks to recover from Defendants damages caused by Defendants' alleged unlawful conduct. Lead Plaintiff's interests are congruent with and not antagonistic to other Class Members' interests.

(ii) Rule 23(g) Adequacy of the Proposed Class Counsel

Rule 23(g) requires a court to assess the adequacy of proposed class counsel. To that end, the court must consider the following: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. *Nafar v. Hollywood Tanning Sys., Inc.*, No. 06-CV-3826 DMC, 2008 WL 3821776, at *7 (D.N.J. Aug. 12, 2008). Lead Counsel has successfully prosecuted securities class actions in courts throughout the country. In this action, Lead Counsel has devoted considerable time to, inter alia, researching and filing the initial and amended complaints, responding to Defendants' motion to dismiss, and reaching and negotiating the specific terms of the Settlement Agreement. Lead Counsel should be appointed as counsel to the Settlement Class.

B. Rule 23(b)(3) Factors: Common Questions Predominate and the Class Is Superior to Other Methods of Adjudication

After meeting the threshold requirements of Rule 23(a), a plaintiff must establish that the proposed class meets the requirements of Rule 23(b)(3). To certify a class under Rule 23(b)(3), the Court must find that: [T]he questions of law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Rule 23(b)(3) requires that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). In this case, both considerations weigh in favor of class certification.

Here, Lead Plaintiff satisfies the predominance and superiority criteria of Rule 23(b)(3). In determining whether common questions predominate, courts have focused on the claims of liability against defendants. See *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977). Smith, 2007 WL1217980, at * 9 (citing cases)("The focus of the predominance inquiry is on liability, not damages."). When common questions are a significant aspect of a case and they can be resolved in a single action, class certification is appropriate. See 7A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, § 1788, at 528 (1986).

***8** Here, the existence of common questions and their predominance over individual issues are exemplified by the fact that if every class member were to bring an individual action, each plaintiff would be required to demonstrate the same omissions or misrepresentations to prove liability. Thus, this case is an example of the principle that the predominance requirement is "readily met" in many securities class actions. *Amchem*, 521 U.S. at 625. The Rule sets out several factors relevant to the superiority inquiry: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action. Essentially, the superiority requirement "asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *In re Prudential Ins. Co.*, 148 F.3d at 316 (internal citations and quotations omitted); *In re Warfarin*, 392 F.3d at 532-33. Many, if not most, of the Class members are individuals for whom prosecution of a costly damages action on their own behalf is not a realistic or efficient alternative. The District of New Jersey is an appropriate forum because all Defendants reside here.

As to Rule 23(b)(3)(D), there will be no difficulties in managing this Settlement Class. This Court balances the fairness and efficiency of certifying a class against other possible methods of adjudication. Without a class action, investors who have been defrauded by securities law violations but whose losses do not run into several million dollars would likely have no practical recourse. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("[m]ost of the plaintiffs would have no realistic day in court if a class action were not available.") And if individuals do have the means to litigate their own action, absent a class action, this Court might have to try numerous lawsuits. *Good v. Nationwide Credit, Inc.*, No. CV 14-4295, 2016 WL 929368, at *8 (E.D. Pa. Mar. 14, 2016); see also *Smilow*, 323 F.3d at 41 ("The core purpose of Rule 23(b)(3) is to vindicate the claims of ... groups of people whose individual claims would

be too small to warrant litigation"). Thus, a class action is the superior method of adjudication and satisfies Rule 23(b)(3).

Moreover, solely for the purposes of settlement, Defendants do not dispute that the Class should be certified in accordance with Rule 23(b)(3).

Finally, when confronted with a request for settlement-only class certification, the Court need "not inquire whether the case, if tried, would present intractable management problems ... for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620.

As stated earlier, common legal and factual questions are shared amongst the class members and Plaintiffs in this action. Specifically, class members and Plaintiffs challenge the same alleged omissions or misrepresentations. Having weighed all the factors and considered all the requirements of class certification, the Court finds that it is appropriate to certify the class for settlement purposes.

VI. ADEQUACY OF NOTICE

The Court ruled in the Preliminary Approval Order that the class-notice materials and the proposed method of dissemination (by first-class mail and publication) met the requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, and the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), "constitute[d] the best notice practicable under the circumstances, and constitute[d] due and sufficient notice to all persons entitled to such notice." Now that notice has been provided to the Class, the Court reaffirms its earlier findings concerning the adequacy of the Notice Program.

Where, as here, the parties have sought simultaneously to certify a settlement class and settle a class action, the Court must consider Fed. R. Civ. P. 23(c)(2)'s notice requirements for class certification as well as Rule 23(e)'s notice requirements for settlement or dismissal. See, e.g., *In re Prudential Ins. Co.*, 148 F.3d at 326-27.

For classes certified under Fed. R. Civ. P. 23(b)(3), such as the Class in this action, Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The Rule also prescribes that the notice state "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on class members under Rule 23(c)(3)." *Id.* Rule 23(e) is less specific, requiring only that notice of a proposed settlement be given "in a reasonable manner." Thus, if the notice satisfies Rule 23(c), it will also satisfy Rule 23(e). See, e.g., *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 448 (S.D.N.Y. 2004). The Constitution's Due Process Clause also imposes certain minimum notice requirements. As the Supreme Court has observed, however, the " 'mandatory notice pursuant to [Rule 23(c)(2)] ... is designed to fulfill requirements of due process to which the class action procedure is of course subject.' " *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974) (quoting Fed. R. Civ. P. 23, 1966 Amendment Advisory Comm. Note to Subdiv. (d)(2)). Due process considerations are therefore satisfied if the notice conforms to Rule 23(c)(2).

***9** Additionally, the Securities Act, in provisions added by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), imposes certain notice requirements specifically for settlements of securities class actions. *See* 15 U.S.C. § 77z-1. The PSLRA requires that the notice contain the following information:

- Statement of recovery – "[t]he amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis";
- Statement of potential outcome of case – the amount of damages per share recoverable if the plaintiffs were to prevail on every claim, but, if the parties are unable to agree on damages, "a statement from each settling party concerning the issue or issues on which the parties disagree";
- Statement of attorneys' fees – a statement of fees and costs to be applied for in the aggregate and on an average per-share basis;
- Identification of lawyers' representatives – the name, telephone number, and address of counsel available to answer questions; and
- Reasons for settlement – "[a] brief statement explaining the reasons why the parties are proposing the settlement."

Id. The notice must also include a cover page summarizing all of these topics. *Id.*

A. Best Practicable Notice Methodology

The means by which notice was provided to potential Class Members met all applicable requirements for adequacy of notice and due process. The Individual Notice was sent by first class mail to all potential Class Members who could be identified through reasonable efforts – meaning all potential Class Members for whom names and addresses were available. In addition to mailing the Individual Notices to all potential Class Members for whom it had names and addresses, the Claims Administrator mailed the Individual Notices to thousands of nominees and other institutions that might have purchased Roka common stock beneficially owned by potential Class Members. The Claim Administrator also posted the Individual Notice (as well as other documents relating to the lawsuit and the settlement) on its website. The website and the notice materials provided telephone numbers (including a toll-free number) that potential Class Members could call if they had questions. The Claims Administrator also arranged for publication of the Court-approved Summary Notice in *The Wall Street Journal* and *Investor's Business Daily* as well as on wire services.

The Summary Notice contained pertinent information about the class action and settlement required by Rules 23(c)(2) and 23(e) and by principles of due process.

These procedures fully satisfied Rule 23(c)(2)'s requirement of individual notice "to all members who can be identified through reasonable effort." See, e.g., *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 449 (notice by first-class mail, publication of summary notice, posting on website, and toll-free number collectively satisfied Rule 23(c)(2)'s requirements).

B. Sufficient Content of the Notice

The potential Class Members will have received the "best notice that is practicable under the circumstances" as required by Rule 23(c)(2) if the notice "contain[s] sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class." *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 435 (3d Cir. 2016) (internal quotations omitted). The notice in this case met that standard.

***10** The notice materials informed potential Class Members of the relevant aspects of the claims in the Complaint and the terms of the proposed settlement, including:

- The nature of the case, a statement of the claims and defenses, and a statement about how the settlement fund will be allocated among eligible Class Members if the proposed settlement is approved;
- The right of potential Class Members to exclude themselves from the Class, to object to any aspect of the proposed settlement, or to appear at the Fairness Hearing – and the processes and deadlines for doing so;
- The date of the Fairness Hearing;
- The terms of the release of claims; and
- The binding effect of any judgment – whether favorable or not – on all persons who do not exclude themselves from the Class, and the impact on Class Members if the proposed settlement is approved.

The content of the notice thus complied with Rule 23(c)(2). See, e.g., *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 109-10 (D.N.J. 2012) (approving settlement notices after finding that they included all essential elements to properly apprise class members of their rights). In addition, consistent with the requirements of the PSLRA, the Individual Notice:

- Set out the amount of the settlement on an aggregate and a per-share basis, as well as the proposed plan of distribution;
- Informed potential Class Members of the parties' disagreement regarding damages and explained each party's position on that issue;
- Stated the amount of attorneys' fees and expenses sought on an aggregate and a per-share basis;
- Provided potential Class Members with the name, address, and telephone number of Lead Counsel; and
- Explained why the parties proposed the settlement.

The Individual Notice thus met the PSLRA's requirements. See, e.g., *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 254-55 (D.N.J. 2000) (approving notice based on consideration of PSLRA factors), *aff'd*, 264 F.3d 201 (3d Cir. 2001).

Accordingly, the notice procedures and the contents of the Individual Notice and the Summary Notice satisfied all applicable requirements, including those of Rules 23(c)(2)

and 23(e), the PSLRA, and the U.S. Constitution. See, e.g., *In re Prudential Ins. Co.*, 148 F.3d at 328; *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 119-20 (D.N.J. 2002) (approving similar notice procedures and content). The Court therefore reaffirms its finding in the Preliminary Approval Order that the notices and notice methodology were the best practicable under the circumstances and met all applicable requirements and finds that the Notice Program was implemented as required by the Preliminary Approval Order.

VII. FINAL APPROVAL OF SETTLEMENT

At the outset, the Court expresses that the law encourages and favors settlement of civil actions in federal courts, particularly in complex class actions. *In re Warfarin*, 391 F.3d at 535; see *In re General Motors*, 55 F.3d 768, 784 (3d Cir. 1995)("the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation"). Accordingly, when a settlement is reached on terms agreeable to all parties, it is to be encouraged. *Bell Atlantic Corp. v. Bolger*, 2F.3d 1304, 1314 n.16 (3d Cir. 1993). The Third Circuit applies "an initial presumption of fairness in reviewing a class settlement when: (1) the negotiations occurred at arms [*sic*] length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Nat'l Football League*, 821 F.3d at 436 (internal quotations omitted). This presumption applies even where, as here, "the settlement negotiations preceded the actual certification of the class ...." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004).

***11** This Court observes that Judge Hochberg has signed a Declaration (submitted with plaintiffs' motion papers) attesting to the integrity of the mediation process and recommending the proposed settlement as "reasonable, hard-fought, arm's length, and fairly reflective of the risks and potential rewards of the claims being settled" [Hochberg Decl., ¶ 9]. The Court finds that the negotiations between the parties were at arm's length. As will be made clear in the Court's further analysis, the other relevant factors in this case indicate that the proposed settlement is entitled to an initial presumption of fairness.

Nevertheless, a class action settlement may not be approved under Rule 23(e) without a determination by this Court that the proposed settlement is "fair, reasonable and adequate." See *In re Cendant*, 264 F.3d at 231; see also Fed. R. Civ. P. 23(e)(1)(A). The Third Circuit has on several occasions stressed the importance of Rule 23(e), noting that "the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members." *In re General Motors*, 55 F.3d at 785 (citations and quotations omitted); see also *Amchem*, 521 U.S. at 623 (noting that the Rule 23(e) inquiry "protects unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise") (citations omitted). However, in cases such as this, where settlement negotiations precede class certification and approval for settlement and certification are sought simultaneously, the Third Circuit requires district courts to be even "more scrupulous than usual" when examining the fairness of the proposed settlement. See *In re General Motors*, 55 F.3d at 805. This heightened standard is intended to ensure that class counsel has engaged in sustained advocacy throughout the course of the proceedings, particularly in settlement negotiations, and has protected the interests of all class members. See *In re Prudential Ins. Co.*, 148 F.3d at 317.

As this Court observed earlier, the Third Circuit has articulated a set of nine "Girsh factors" that courts should consider when determining the fairness of a proposed 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; [and]
>
> (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 quotations omitted); see, e.g., *In re Johnson & Johnson Deriv.*

Litig., 900 F. Supp. 2d 467, 479-85 (D.N.J. 2012) (reciting and applying the Girsh factors). "The settling parties bear the burden of proving that the Girsh factors weigh in favor of approval of the settlement." *In re Pet Food Prods.*, 629 F.3d at 350. "A district court's findings under the Girsh test are those of fact." *In re Nat'l Football League*, 821 F.3d at 437, as amended (May 2, 2016).

Since Girsh, the Third Circuit has held that, "because of a 'sea-change in the nature of class actions' after Girsh was decided thirty-five years ago, it may be helpful to expand the Girsh factors to include, when appropriate, the following non-exclusive factors":

> ***12** [1] [T]he maturity of the underlying substantive issues ...; [2] the existence and probable outcome of claims by other classes and subclasses; [3] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved – or likely to be achieved – for other claimants; [4] whether class or subclass members are accorded the right to opt out of the settlement; [5] whether any provisions for attorneys' fees are reasonable; and [6] whether the procedure for processing individual claims under the settlement is fair and reasonable.

In re Pet Food Prods., 629 F.3d at 350 (quoting *In re Prudential Ins. Co.*, 148 F.3d at 323). "Unlike the Girsh factors, each of which the district court must consider before approving a class settlement, the Prudential considerations are just that, prudential." *In re Nat'l Football League Players*, 821 F.3d at 437 (internal quotations omitted). The Girsh and Prudential factors are well established law and their continued application in the class settlement context has been reaffirmed by Third Circuit as recently as April of this year. See *In re Nat'l Football League Players*, 821 F.3d at 437.

The proposed settlement here satisfies the Girsh factors as well as the applicable Prudential considerations.

A. Complexity, Expense, and Likely Duration of Litigation

The first Girsh factor captures "the probable costs, in both time and money, of continued litigation." *In re Gen. Motors*, 55 F.3d at 812. "By measuring the costs of continuing on the adversarial path, a court can gauge the benefit of settling the claim amicably." *Id.* "Settlement is favored under this factor if litigation is expected to be complex, expensive and time consuming." *In re Royal Dutch/Shell Transp. Sec. Litig.*, 2008 WL 9447623, at *17 (D.N.J. Dec. 9, 2008).

"Federal securities class actions by definition involve complicated issues of law and fact." *Id.* This case is no exception. Continued litigation and trial of this action would require the parties to investigate and the Court to adjudicate numerous complicated factual issues, including:

- Each of Roka's customers' experience with the *Listeria* assay before Roka promulgated its new process;
- Each customer's experience with the *Listeria* assay after promulgation of the new process;
- The extent to which each customer was following the new workflow and/or adhering to good laboratory practices;
- The information that Roka (and especially Roka's management and Board) received about each customer's ability to use the *Listeria* assay successfully – both before and after the new process was promulgated;
- Roka's belief that customers would be able to employ the new workflow and that the new process would suffice to solve customers' false-positive problems;
- Roka's consideration of the prospect of adopting a modified, "detuned" *Listeria* assay;
- Roka's financial position; and
- Roka's public disclosures relating to all of the above matters.

Plaintiff's Post Settlement Discovery involved reviewing over 8,000 documents; full-blown discovery would involve hundreds of thousands. Plaintiff would have to review vast stores of internal correspondence, correspondence with underwriters and customers, and scientific materials and test results. The Parties would crisscross the country taking depositions of current and former employees of Roka, Roka's customers, and the IPO underwriters, at great cost. Plaintiff identified several potential witnesses who reside in various parts of California; several who reside in Ohio; several who reside in New Jersey and New York; and several who reside in Pennsylvania.

***13** In addition, Defendants would take the depositions of Plaintiffs, and of Plaintiffs' experts (who reside in North Carolina and Buffalo), and Plaintiffs would take the depositions of Defendants' experts. To survive summary judgment, and at trial, Plaintiff would require expert testimony on – at a minimum – scientific issues, class action

damages, and loss causation. *In re Pfizer Inc. Sec. Litig.*, No. 4-CV-9866-LTS-HBP, 2014 WL 3291230, at *3 (S.D.N.Y. July 8, 2014), vacated on other grounds, 819 F.3d 642 (2d Cir. 2016) (granting summary judgment because "Plaintiffs' failure to proffer admissible [expert] loss causation and damages evidence is fatal to Plaintiffs' claims."). Indeed, while this case is still in the pleadings stage, Plaintiff has already consulted with experts on two of these topics (scientific issues and damages).

In addition, the parties would need to litigate and the Court would need to adjudicate damages issues and the loss-causation defense available to defendants under the Securities Act. Many of those issues would involve complex expert testimony on pathogen testing, damages, and loss causation. Continued litigation of this case would therefore be complex, expensive, and lengthy. See, e.g. *In re Genta Sec. Litig.*, No. CIV. A. 04-2123 JAG, 2008 WL 2229843, at *3 (D.N.J. May 28, 2008) ("This [securities fraud] action involves complex legal and factual issues, and pursuing them would be costly and expensive."); *In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525 (GEB), 2007 WL 4225828, at *3 (D.N.J. Nov. 28, 2007) ("[R]esolution of [accounting and damages issues] would likely require extensive and conceptually difficult expert economic analysis.... Trial on [scienter and loss causation] issues would lengthy and costly to the parties.").

This factor supports approval.

B. Class's Reaction to Settlement

The second *Girsh* factor "gauge[s] whether members of the class support the settlement." *In re Prudential Ins. Co.*, 148 F.3d at 318. A lack of significant objections by class members weighs in favor of approving the settlement. *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 578 (E.D. Pa. 2003)("unanimous approval of the proposed settlement[ ] by the class members is entitled to nearly dispositive weight in this court's evaluation of the proposed settlement."); see also *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313, n.15 (3d Cir. 1993) (stating that "silence constitutes tacit consent to the agreement" where 30 objectors out of approximately 1.1 million shareholders was considered an "infinitesimal number").

Here, 4,155 sets of notice materials were mailed out to potential class members and nominees. To date, no Class Member has objected to any aspect of the Settlement. Bravata Dec. at ¶11. The deadline to object to the Settlement was October 20, 2016. Id. The deadline to seek exclusion was October 5, 2016. *Id.* at ¶10. To date, only one Class Member has sought exclusion from the Settlement. *Id.* at ¶10; Rosen Dec. Ex. 4. The Class Member seeking exclusion, moreover, would not be entitled to any share of the settlement; because he bought shares for less than the post-disclosure price, he has no recognized loss. Rosen Dec. ¶12. Accordingly, the reaction of the Settlement Class has been overwhelmingly favorable, thus supporting final approval.

C. Stage of Proceedings and Amount of Discovery Completed

The goal of the third Girsh factor is to "capture[ ] the degree of case development that class counsel accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) (citing *General Motors*, 55 F.3d at 813). "Even settlements reached at a very early stage and prior to formal discovery are appropriate where there is no evidence of collusion and the settlement represents substantial concessions by both parties.... Indeed, courts in this district have approved settlements while the case was in the pre-trial stage and formal discovery had not yet commenced." *In re Johnson & Johnson*, 900 F. Supp. 2d at 482; accord, e.g., *In re Nat'l Football League*, 821 F.3d at 436-37 ("To the extent objectors ask us to require formal discovery before presuming that a settlement is fair, we decline the invitation. In some cases, informal discovery will be enough for class counsel to assess the value of the class claims and negotiate a settlement that provides fair compensation."). Courts in this Circuit frequently approve class action settlement despite the absence of formal discovery. See, e.g., *Schuler v. Medicines Co.*, No. CV 14-1149 (CCC), 2016 WL 3457218, at *7 (D.N.J. June 24, 2016) (approving settlement prior to discovery because of counsel's investigation); *In re Johnson & Johnson*, 900 F. Supp.2d at 483 ("Even settlements reached at a very early stage and prior to formal discovery are appropriate where there is no evidence of collusion and the settlement represents substantial concessions by both parties.")

***14** Here, Plaintiff and his counsel had a sufficient understanding of their claims and defenses in this action. Final approval is appropriate here because, by the time the parties negotiated the Stipulation, Lead Counsel (*i*) had an opportunity to review the relevant public facts pertaining to plaintiffs' claims, (*ii*) had consulted with damages and forensic accounting experts, (*iii*) had engaged in briefing on defendants' motion to dismiss, (*iv*) had participated in mediation with a respected mediator, and (*v*) had received

factual information from Roka in connection with the mediation. Lead Counsel also was later able to conduct confirmatory discovery, with access to more than 377,000 pages of documents and interviews of three present or former Roka officials.

These efforts enabled plaintiffs and their attorneys to explore the facts and circumstances underlying their claims and to assess the potential risks and rewards of litigating versus settling. Accordingly, the adequacy of the discovery conducted to date favors approval of the settlement. See, e.g., *In re Johnson & Johnson*, 900 F. Supp. 2d at 482-83 (approving derivative settlement without formal discovery, but where the parties had "engaged in informal sharing of documents" and "extensive motion practice" and where plaintiffs' counsel had reviewed publicly available materials and consulted with experts).

D. Risks of Establishing Liability and Damages

"The fourth and fifth [*Girsh*] factors survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefits of an immediate settlement." *In re Johnson & Johnson*, 900 F. Supp. 2d at 483 (internal quotations omitted). "By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *General Motors*, 55 F.3d at 814. In making this assessment, however, "a court should not conduct a mini-trial and must, to a certain extent, give credence to the estimation of the probability of success proffered by class counsel." *In re Lucent Techs., Inc. Sec. Litig.*, 307 F. Supp. 2d 633, 644-45 (D.N.J. 2004) (internal quotations omitted). In complex cases, "[t]he risks surrounding a trial on the merits are always considerable." *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1301 (D.N.J. 1995).

1. Liability

Plaintiff faced several obstacles if this case progressed. Chiefly, as Defendants pointed out in their Motion to Dismiss and the Amended Complaint acknowledged, the IPO Registration Statement warned that Roka had experienced false positives, and had to redesign the Listeria test's testing process to address the problem. The IPO Registration Statement also disclosed that the new workflow might fail and that Roka might lose customers or traction as a result. *Id.*

Plaintiff alleged, based on the accounts of former Roka employees, that Roka's new process already had failed and that it already had lost customers as a result, thus making Defendants' statements actionable. But the Post-Settlement Discovery complicates certain of the inferences to be drawn from Plaintiff's factual allegations:

a. It is true that Roka lost Hillshire Farm as an indirect customer (through a contract lab). But notwithstanding any pre-IPO Hillshire *Listeria* false positive issues, Hillshire did not abandon Roka's tests until after the IPO. Rosen Dec. ¶9.a.

b. It is true that Roka lost customers before the IPO because of the *Listeria* false positives problem as Plaintiff alleges. But all but one of these were customers who had simply accepted Instruments for evaluation, while the existing customer was not a critical Roka customer. Rosen Dec. ¶9.b.

***15** c. It appears that many customers, though not all, did successfully adopt the new workflow. Rosen Dec. ¶9.c.

While Lead Plaintiff contends he could nevertheless have establish liability, Plaintiff admits that the facts unearthed in Post-Settlement Discovery may have presented a substantial obstacle to recovery.

Beyond these risks, even if Plaintiff prevailed on liability and damages at trial, Defendants would appeal the verdict, leading to greater expenses, further delays, and a recovery for the Class that may be less than the Settlement Amount or possibly no recovery at all. This Settlement allows the Class to recover promptly without incurring additional risk or costs.

2. Damages

As to the amount of damages, while Plaintiff's prima facie damages in a Section 11 action are limited only by (as relevant here) the difference between the offering price and the value of a security at the time the suit was filed, Defendants have available to them an affirmative defense of negative causation. 15 U.S.C. § 77k(e). In applying this negative causation defense, courts limit recovery to the drop in stock price immediately following a corrective disclosure. See *In re Royal Dutch/Shell Transp. Sec. Litig.*, 404 F. Supp. 2d 605, 610 (D.N.J. 2005) ("Both prior to and after the enactment of the PSLRA in 1995, "[t]he damages of a purchaser were always understood to be the difference between the purchase price and the true value of the shares (adjusted for any negative causation) as disclosed after the revelation of the

fraud to the public, followed by a reasonable period (usually no longer than a week or ten days) during which the market took cognizance of the fraud and the publicly traded price was presumed, under the 'efficient market' hypothesis ..., to reflect an adjustment for the fraud.") (quotation omitted). Here, that means the Class could recover for the stock drops on November 7, 2014, of $5.34, and potentially on March 27 and 30, 2015, of $0.88.

Defendants, however, would also argue that the stock drops following the corrective disclosures were caused by things unrelated to the alleged misrepresentations. First, Defendants have already argued that the damages on March 27 and 30, 2015, were not caused by the materialization of the concealed risk, because the risk had already been fully revealed on November 7, 2014. Defendants argue, and the Post-Settlement Discovery appears to have substantiated, that the reason Roka was unable to secure new customers after the November 6, 2014 earnings call was that on the call it had publicly committed to developing a new *Listeria* test. Defendants' argument, if accepted, cuts damages from $30.9 million to $26.6 million.

Second, the Registration Statement did disclose that there was some risk that the new process would not work and that Roka would lose customers as a result. Defendants would argue that a portion of the November 7, 2014 drop was caused by the materialization of this disclosed risk – not by the fact that, as of the time of the IPO, the risk of losing customers had already occurred. Plaintiff would have to respond to Defendants' argument with expert evidence. Thus, there was substantial risk that the amount of damages recoverable at trial would be significantly reduced.

E. Risks of Maintaining Class Certification

***16** The risk of obtaining and maintaining class certification through trial also supports approval of the Settlement. Plaintiffs had not yet moved for class certification at the time of the settlement. Defendants would oppose class certification if this case proceeded. Plaintiff would have to rely on expert testimony to establish that damages can be established on a class-wide basis. *Fort Worth Employees' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 141-42 (S.D.N.Y. 2014) (certifying class for liability only in Section 11 case because plaintiffs had not provided an expert model permitting class-wide adjudication of damages). Defendants' expert would conclude that damages could not be established on a class-wide basis, resulting in a battle of the experts at class certification and trial that Plaintiff might lose. See id. Should Defendants succeed, the Court would need to hold mini-trials on damages; it is not clear whether most investors would appear for such trials, given the small amounts of money at stake. The risk that the Court would deny class certification further supports the settlement. *See Rent-Way*, 305 F. Supp. 2d at 506.

Moreover, even if the Class was certified for other than settlement purposes, "[t]here will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." *In re Prudential Ins. Co.*, 148 F.3d at 321; see also *In re Rent-Way Securities Litigation*, 305 F. Supp. 2d 491, 506-07 (W.D. Pa. 2003) ("[A]s in any class action, there remains some risk of decertification in the event the Propose[d] Settlement is not approved. While this may not be a particularly weighty factor, on balance it somewhat favors approval of the proposed Settlement.").

F. Defendants' Ability to Pay

This *Girsh* factor "addresses whether Defendants could withstand a [monetary] judgment for an amount significantly greater than the [proposed] Settlement." *In re Johnson & Johnson*, 900 F. Supp. 2d at 484 (internal quotations omitted); *Cendant*, 264 F.3d at 240 (same).

Since its founding, Roka has consistently incurred losses, with an accumulated deficit of $109.1 million by March 31, 2014. The accumulated deficit reached $185.3 million by June 30, 2016. [Roka BioScience, Inc., Form 10-Q for the 3 months ended June 30, 2016, at 3, filed August 5, 2016]. Yet Roka only had cash, cash equivalents, and short-term investments of $16.8 million as of June 30, 2016. *Id.* Indeed, at the time that the motion briefs were filed, Roka's market capitalization was about $11 million – down 95% since the IPO.

Defendants held three applicable insurance policies, each with a face amount of $5 million. Yet these policies deplete as they pay Defendants' attorneys' fees. Given the costs of modern litigation, these policies would be mostly depleted by the time of trial. Thus, the Settlement today is more than what Defendants could potentially pay down the road after their insurance coverage is depleted through further litigation.

Given Roka's financial state and the status of its insurance policies, this factor weighs in favor of approval.

G. Range of Reasonableness of Settlement Fund

"The last two [Girsh] factors evaluate whether the settlement represents a fair and good value for a weak case or a poor value for a strong case." *In re Johnson & Johnson*, 900 F. Supp. 2d at 484 (internal quotations omitted). "In conducting this evaluation, it is recognized that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and [courts should] guard against demanding to[o] large a settlement based on the court's view of the merits of the litigation." *Id.* at 484-85 (internal quotations omitted). These factors inquire " 'whether the settlement is reasonable in light of the best possible recovery and the risks the parties would race if the case went to trial.' " *Pro v. Hertz Equip. Rental Corp.*, No. CIV.A. 06-3830 DMC, 2013 WL 3167736, at *5 (D.N.J. June 20, 2013) (quoting *Prudential*, 148 F.3d at 322).

***17** According to Cornerstone Research, in 2015, cases with damages of less than $50 million settled for a median of 6.7% of total maximum estimated damages. [Laarni T. Bulan, *et al*, Securities Class Action Settlements: 2015 Review and Analysis, at 9 (Rosen Dec. Ex. 6)]. According to Lead Plaintiffs' memorandum in support of preliminary approval [at 9], "Lead Plaintiff's maximum estimate of class damages (the Class wins on every point and the factfinder accepts the Class's damages model) is approximately $30.9 million," so the Settlement Amount of $3.275 million "recovers about 10.5% of maximum potential damages" – above the median recovery in securities class action settlements. Even taking into account Defendants' claim that Plaintiff could not recover for the March 27-30 price drop, the Settlement Amount of $3.275 million, against maximum likely damages of $26.6 million, recovers 12.3% of maximum damages – almost twice as much as the median settlement. After the parties initial briefing, Lead Plaintiff submitted a reply in further support of the settlement on November 2, 2016. In the Reply, Lead Counsel represented that, as of November 2, 2016, SCS (the claims administrator) had received 1,791 claim forms, including 482 valid claims representing recognized losses of $17,698,523 and 44 deficient claims representing losses of $2,373,742. At the November 9, 2016 hearing, Lead Counsel represented on the record that, accordingly, the actual recovery in this case would be between 16% and 18.5% of claimed losses, depending upon how many of the deficient claims, if any, are ultimately cured. Actual recovery will thus exceed either of the parties initial estimates and will be well above the median settlement in this area.

The recovery is particularly noteworthy in light of the obstacles to recovery. In this case, Plaintiff could not point to an accounting restatement, derivative action brought on behalf of the company, or civil or criminal government investigation. Nor could Plaintiff point to an admission of wrongdoing from Roka, nor even an internal investigation of wrongdoing.

Courts in this Circuit have routinely approved settlements providing similar percentages of recovery – or even far less. See, e.g., *In re Viropharma Inc. Sec. Litig.*, 2016 WL 312108, at *14 (E.D. Pa. Jan. 25, 2016) (approving settlement of 9% to 10% of maximum estimated loss, and noting that, between 1996 and 2014, median settlement amount was 4.8% of projected investor losses ranging between $50 million and $99 million); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 714-15 (E.D. Pa. 2001) (noting that securities class actions that settled between 1995 and 1999 recovered between 5.5% and 6.2% of estimated losses); see also, e.g., *In re Amer. Bus. Fin. Servs. Inc. Noteholders Litig.*, 2008 WL 4974782, at *3, *9, *13 (E.D. Pa. Nov. 21, 2008) (approving settlement for 2.5% of damages); *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 183-84 (E.D. Pa. 2000) (approving settlement for 5.2% to 8.7% of claimed damages).

The Court also observes that the mediator in this case, Judge Hochberg, declared that the Settlement "constitutes a good result for the plaintiffs". Hochberg Dec. ¶20.

The Settlement Amount is therefore well within the range of reasonableness. Having found that the Girsh factors weigh in favor of approval, the Court turns next to the Prudential factors.

H. Maturity of Underlying Issues and Existence of Other Litigation

The Third Circuit suggested in Prudential that courts may consider such additional factors as "the maturity of the underlying substantive issues" and the existence and probable outcomes of other individual and/or class actions involving the same underlying facts. *In re Prudential Ins. Co.*, 148 F.3d at 323. Those considerations are inapposite here.

Unlike some other types of class actions (such as certain consumer and product-liability class actions), this securities class action does not present particularly novel legal or factual issues that need to mature before the Court can assess the fairness and adequacy of the proposed settlement. Nor have

any other individual or class actions been filed against Roka concerning the IPO Registration Statement.

I. Availability of Opt-Out Rights

The Prudential court held that courts may also consider the availability of opt-out rights. 148 F.3d at 323. Such rights exist here. Dissatisfied potential Class Members are free to exclude themselves from the proposed settlement if they follow the Court's instructions for opting out.

J. Reasonableness of Attorneys' Fees

The *Prudential* decision also authorizes consideration of the reasonableness of the plaintiffs' request for attorneys' fees. *Id.* The fee request in this case does not present any issues. First, the parties reached an agreement on the Settlement Amount without any discussion of fees, which will be paid out of the settlement fund in an amount approved by the Court. The Settlement Agreement itself says nothing about the amount of fees that plaintiffs may seek; nor does it provide that defendants will not object to a fee request below any particular amount. This case thus does not raise the specter of a "clear sailing" agreement, because the settlement does not provide either for "the payment of attorneys' fees separate and apart from class funds," *Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918, 925 (internal quotations omitted), *vacated as* moot after settlement, 772 F.3d 608 (9th Cir. 2014), or for defendants' agreement not to contest class counsel's fee request up to a particular amount, see, e.g., *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1990) (describing "clear sailing agreement" as one in which defendant "would not contest the [fee] petition and would pay any sum up to [a specified amount] awarded by the district court").

***18** Second, plaintiffs' fee request is independent of the proposed settlement. The Stipulation provides that the settlement – if approved – can take effect regardless of how the Court rules on plaintiffs' fee request and that plaintiffs cannot terminate the settlement based on the amount of fees awarded. [§ XII.C, at 44]

Third, the Court will award, as will be explained later, a reasonable fee considering the work performed and the interests of the class members.

K. Reasonableness of Claim-Processing Procedures

The claim-processing procedures are the standard ones used in securities class-action settlements. Class Members may submit Claim Forms to the Claims Administrator, which will make initial determinations about eligibility for settlement relief. Any Class Member whose claim has been rejected in whole or in part may contest the rejection by submitting an explanation of his or her position to Lead Counsel. If the dispute cannot be resolved, Lead Counsel will submit it to the Court for final decision. [§ I.E, at 26-27]

Having considered all of the Girsh and Prudential factors, this Court approves the settlement as fair and reasonable.

VIII. ATTORNEY'S FEES

Lead Counsel seeks an award of attorneys' fees of one-third of the $3.275 million Settlement Amount, or $1,091,666. The Court is persuaded by Lead Counsel's submissions that a significant fee is warranted in this case, but finds that an award of 30% of the recovery, or $982,500, better protects the interests of the class members, while still adequately compensating class counsel.

Attorneys' fees are typically assessed through the percentage-of-recovery method or through the lodestar method. *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006). The percentage-of-recovery method applies a certain percentage to the settlement fund. See *Welch & Forbes, Inc. v. Cendant Corp.*, 243 F.3d 722, 732 n.10 (3d Cir. 2001). The lodestar method multiplies the number of hours class counsel worked on a case by a reasonable hourly billing rate for such services. *In re AT&T*, 455 F.3d at 164.

In common fund cases such as this one, the percentage-of-recovery method is generally favored because "it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.' " *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d. 294, 300 (3d Cir. 2005) (quoting omitted); *In re Lucent Technologies*, 327 F.Supp.2d at 431. However, the Third Circuit has recommended that district courts use the lodestar method to cross-check the reasonableness of a percentage-of-recovery fee award. See *Rite Aid*, 396 F.3d at 305. The cross-check is performed by dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier. "[W]hen the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award." *Rite Aid*, 396 F.3d at 306. The lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method. *In re AT&T*, 455 F.3d at 164.

A. Lodestar Cross-Check

Before the Court applies the percentage-of-recovery method therefore, it will briefly delineate the total lodestar amounts for attorneys, paralegals and law clerk time calculated at current market rates and by using those numbers, perform a lodestar cross-check to confirm the reasonableness of the fee request. Having reviewed the attorneys' declarations, the Court is satisfied that the hourly rate charged for each of the attorneys and his/her staff is based upon a reasonable hourly billing rate for such services in the given geographical area, the nature of the services provided and the experience of the lawyer. *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 (3d Cir. 2000). Having determined that the hourly rates are reasonable and the amount of hours spent prosecuting this case is also reasonable, the Rosen Law Firm's lodestar i.e., the value of its work had it been paid on an hourly basis, is $317,500, for 520.9 hours at a blended hourly rate of $610 per hour. *See* Rosen Fee Dec. ¶3. This includes, among other things, the time spent in the initial investigation of the case, researching legal issues, consulting with a scientific expert, preparing and filing the Amended Complaint, briefing Defendants' request to strike confidential witness allegations, opposing Defendants' motion to dismiss, consulting with a damages expert, drafting a mediation brief, preparing for and attending mediation, reviewing documents produced in confirmatory discovery, negotiating and drafting the Settlement and the Settlement Agreement, drafting papers in support of preliminary approval, overseeing claims administration, and drafting papers in support of final approval. *Id.* The multiplier generated here by the ratio of the requested fee to Lead Counsel's lodestar is 3.4.

***19** In this circuit, multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied. *In re AT&T*, 455 F.3d at 172; see e.g., Weiss, 899 F.Supp. at 1304; *Muchnik v. First Fed. Savings & Loan Ass'n*, 1986 WL 10791 (E.D. Pa. 1986). Lead Counsel's proposed 3.4 multiplier is on the higher end of the range, which gives this Court pause due to the early stage at which the litigation was settled. In *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 742 (3d Cir. 2001), the Third Circuit observed that "[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." When, as in Cendant, litigation was settled at an early stage, the Third Circuit, in reversing the district court below, "strongly suggest[ed] that a lodestar multiplier of 3 ... is the appropriate ceiling for a fee award, although a lower multiplier may be applied in the District Court's discretion." *In re Cendant*, 243 F.3d at 742. See also *Rite Aid*, 396 F.3d at 303 (explaining that the lodestar multiplier of 3 was appropriate in Cendant because the case was "neither legally nor factually complex," was of short duration, involved a limited amount of motion practice, and required only 5,600 hours of work by counsel). Here, while the Court recognizes the good work of Lead Counsel in bringing this matter to a prompt resolution, the matter was settled before the adjudication of the motion to dismiss, was not legally or factually complex, necessitated only confirmatory discovery, and required the expenditure of only 521 hours by Lead Counsel.

As such, the Court finds that while a multiplier on the higher end of the accepted range is warranted, a multiplier of 3.4 is simply too high in this case of short duration, uncomplicated legal issues, and relatively limited hours. Looking to the Third Circuit's decisions in the area of securities settlements, the Court is persuaded that a 30% fee of $982,500 is appropriate. I look to, for example, *In re Veritas Software Corp. Sec. Litig.*, 396 Fed.Appx. 815, 818 (3d Cir. 2010), where the Third Circuit affirmed a final approval of settlement, observing that "[w]hile the 30% fee is admittedly large, the District Court took into account that class counsel spent four years, and thousands of hours of attorneys' labor, litigating this case. The final lodestar multiplier of 1.52 was well within the range of attorneys' fees awarded and approved by this Court." Recalculating the lodestar in this case on the basis of a 30% award, therefore, gives rise to a multiplier of 3.09, which this Court finds acceptable.

B. Percentage of Recovery

When analyzing a fee award in a common fund case under the percentage-of-recovery method, the Court considers several factors, many of which are similar to the Girsh factors as enunciated previously. See *Rite Aid*, 396 F.3d at 301 n.9. These include:

(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 301 (citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000)). This list is not exhaustive. In Prudential, the Third Circuit noted three other factors that may be relevant and important to consider: (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, *Prudential*, 148 F.3d at 338; (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, Id. at 340; and (3) any "innovative" terms of settlement, Id. at 339. The 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." *Rite Aid*, 396 F.3d at 301 (quoting *Gunter*, 223 F.3d at 195 n.1). The Court may give some of these factors less weight in evaluating a fee award. See *In re Cendant*, 264 F.3d at 283; *Prudential*, 148 F.3d at 339. Moreover, the analysis of the Gunter factors overlaps with the Grish factors used to assess the appropriateness of the settlement. In that regard, the Court will refer to its earlier findings when reviewing this fee application.

1. The Fund Is Substantial and Confers a Benefit Upon The Class Members

***20** The first *Gunter* factor "consider[s] the fee request in comparison to the size of the fund created and the number of class members to be benefitted." *Rowe v. E.I. DuPont de Nemours & Co.*, 2011 WL 3837106, at *18 (D.N.J. Aug. 26, 2011). That is because the sheer magnitude of damages has a heavy impact on the amounts defendants are willing to pay to settle their liability. *Bredbenner v. Liberty Travel, Inc.*, No. CIV.A. 09-1248 MF, 2011 WL 1344745, at *19 (D.N.J. Apr. 8, 2011) (awarding fee of one third of settlement fund because case involved relatively small fund and relatively few class members). Thus, granting counsel a similar percentage of a smaller fund may simply punish counsel for having litigated a smaller case. Moreover, because of fixed costs and economies of scale, attorneys' fees and costs do not increase dollar-for-dollar with the size of the case. Thus, it takes a greater percentage of the settlement to support litigation in a smaller case.

As securities class actions go, this is a relatively small one. The median damages in securities class action which settled in 2015 was $330 million. [Laarni T. Bulan, et al, Securities Class Action Settlements: 2015 Review and Analysis, at 7 (Rosen Dec. Ex. 5)]. In this case, total maximum damages are about $30.9 million – ten times less. The $3.275 million Settlement, while substantial, is plainly not a mega-fund. *Id.* That said, in this case, only 2,631 potential class members have been identified. Bravata Dec. ¶5. Moreover, so far the fund has only received 482 valid claims and 44 deficient claims that are potentially curable. This is a relatively small number for a securities class action; the fact that there are relatively fewer Class Members ensures that each Class Member will receive a proportionally greater payment.

2. To Date No Class Members Have Objected To The Fee Request

The Individual Notice explicitly provided that Lead Counsel would apply for an award of attorneys' fees of up to one-third of the Settlement. The Notice also advised Class Members that they could object to the Settlement and explained the procedure for doing so. *Id.* As of this date, no Class Member has objected to the attorneys' fees or expenses requested. Bravata Dec. ¶10. Additionally, to date only one Class Member – who bought only 280 shares and would not have been entitled to any Settlement proceeds because he has no recognized losses – has sought to be excluded from the Settlement. Rosen Dec. Ex. 4. The deadline to object to the Settlement was October 20, 2016. Bravata Dec. ¶11. The deadline to opt out of the Settlement was October 5, 2016. *Id.* ¶10.

Accordingly, the Class's reaction strongly supports a fee award at or beneath the cap set forth in the Individual Notice. See, e.g., *Chemi v. Champion Mortgage*, No. 2:05-CV-1238(WHW), 2009 WL 1470429, at *4 (D.N.J. May 26, 2009) (lack of objections and single opt-out weighed strongly in favor of settlement). This Court believes that an award below the ceiling set forth in the Individual Notice is appropriate to best protect the interests of the class and finds a 30% fee reasonable and within the expectations established by the notice sent to the class members.

3. Lead Counsel Prosecuted This Action With Skill And Efficiency

The skill and efficiency factor under *Gunter* also weighs heavily in favor of a 30% award. Lead Counsel's skill and efficiency 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 the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *Hall v. AT&T Mobility LLC*, No. CIV.A. 07-5325 JLL, 2010 WL 4053547, at *19 (D.N.J. Oct. 13, 2010).

Lead Counsel's success in quickly bringing this litigation to a successful conclusion is perhaps the best indicator of the experience and ability of the attorneys involved.

***21** The experience of Lead Counsel is set forth in firm resume of the Rosen Law Firm attached as Exhibit 2-A to the Rosen Declaration. As that submission shows, Lead Counsel is highly experienced in the complex field of securities fraud class action litigation. See *Knox v. Yingli Green Energy Holding Co. Ltd.*, 136 F. Supp. 3d 1159, 1165 (C.D. Cal. 2015) ("The Rosen Law Firm is "highly qualified [and] experienced" in securities class actions").

The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered by Lead Counsel. See, e.g., *Ikon*, 194 F.R.D at 194. Defense counsel in this case were skilled attorneys from Proskauer Rose LLP, one of the leading securities litigation defense firms in the country. Defendants' lead counsel was Ralph Ferrara, a former General Counsel of the SEC who has been recognized by Chambers and Best Lawyers as one of the top securities litigation and white collar defense practitioners in the U.S. Achieving this favorable Settlement while opposing Proskauer and Mr. Ferrara satisfies this Gunter factor.

4. The Complexity, Expense, and Likely Duration of Litigation Weigh in Favor of the Court's Award

The fourth Gunter factor is intended to capture "the probable costs, in both time and money, of continued litigation" and favors the requested fee. See *In re General Motors*, 55 F.3d at 812 (quoting *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 801 (3d Cir. 1974)). Although the legal issues in this case are not particularly complex, securities class actions are by nature particularly expensive to prosecute, usually requiring expert testimony on, at least questions of damages and loss causation. The $3.275 million recovery is substantial in light of the recoverable damages, and the substantial risks and expenses that the Class would have faced by litigating to trial. In this case even were Plaintiffs' claims to survive Defendants' motion to dismiss, Plaintiffs would then be obligated to conduct discovery, move for class certification, and face Defendants' motion for summary judgment. Then, by surviving these steps, Plaintiffs would need to take their case to a jury. If the jury found in Plaintiffs' favor, they would still face Defendants' post-trial motions and likely appeal. Collecting a judgment requires crossing every one of these hurdles, but each of these steps involves significant risks. *In re HiCrush Partners L.P. Sec. Litig.*, No. 12-CIV-8557 CM, 2014 WL 7323417, at *16 (S.D.N.Y. Dec. 19, 2014) ("Over the last five years, nearly 48% of all securities class actions have been dismissed on motions prior to trial, while plaintiffs who succeeded at trial have found their judgments overturned on post-trial motions or appeal").

Considering the magnitude and expense of this securities case, a 30% fee award is reasonable.

5. Lead Counsel Undertook the Risk of Non-Payment

Lead Counsel undertook this action on an entirely contingent fee basis, taking the risk that the litigation would yield no or very little recovery and leave it uncompensated for its time, as well as for its out-of-pocket expenses. Courts across the country have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744, at *28 (D.N.J. Oct. 1, 2013). The risk of non-payment is especially high in securities class actions, as they are "notably difficult and notoriously uncertain." See *Trief v. Dun & Bradstreet Corp.*, 840 F. Supp. 277, 281 (S.D.N.Y. 1993). Legal precedents are continually making it more difficult to plead securities class actions. *In re BP p.l.c. Sec. Litig.*, 852 F. Supp. 2d 767, 820 (S.D. Tex. 2012) ("The Court is acutely aware that federal legislation and authoritative precedents have created for plaintiffs in all securities actions formidable challenges to successful pleading.").

***22** Here, Lead Counsel undertook this litigation on a contingency basis and with no guarantee its time or expenses would be reimbursed. In light of the difficulty of undertaking such a, Lead Counsel should be reimbursed for its time and expenses.

6. Lead Counsel Spent Significant Time Investigating and Litigating the Case

The sixth Gunter factor looks at counsel's time devoted to the litigation. *Gunter*, 223 F.3d at 199. This factor is

usually considered with the lodestar cross-check to look at reasonableness of counsel's requested fee. I have reviewed the affidavits in this case and find the over 520 hours expended by the Rosen Law Firm to be significant, although not necessarily as extensive as those observed in some other securities actions that progress to a later stage of litigation.

7. The Court's Award Is Consistent With Awards in Similar Cases

The 30% fee the Court awards here is appropriate and comfortably within the range of fees typically awarded. While there is no benchmark for the percentage of fees to be awarded in common fund cases, the Third Circuit has observed that fee awards generally range from 19% to 45% of the settlement fund. *General Motors*, 55 F.3d at 822. For smaller securities fraud class actions, "courts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses." *In re Ravisent Techs., Inc. Sec. Litig.*, No. CIV.A.00-CV-1014, 2005 WL 906361, at *11 (E.D. Pa. Apr. 18, 2005) (collecting cases). The 30% fee awarded here is in the typical range for settlements in this Circuit and is appropriate given the early stage at which this litigation was resolved. *Schuler v. Medicines Co.*, No. CV 14-1149 (CCC), 2016 WL 3457218, at *8 (D.N.J. June 24, 2016) (awarding one third of settlement as fees in case that settled before decision on motion to dismiss); *In re Merck & Co., Inc. Vytorin Erisa Litig.*, No. CIV.A. 08CV-285DMC, 2010 WL 547613, at *11 (D.N.J. Feb. 9, 2010) ("review of 289 settlements demonstrates "average attorney's fees percentage [of] 31.71% with a median value that turns out to be one-third") (quoting *In re Remeron Direct Purchaser Antitrust Litig.*, No. CIV.03-0085 FSH, 2005 WL 3008808, at *15 (D.N.J. Nov. 9, 2005)); *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 101 (D.N.J. 2001) (awarding one third and citing representative fee awards, which ranged from 27.5% to 33.8% with a median of 33⅓%).

8. The $3.275 Million Recovery Is Solely Attributable to the Efforts OF Class Counsel

The result achieved for Class Members here is solely attributable to the efforts and skill of Class Counsel. Unlike in many securities class actions, here Class Counsel did not have the advantage of a Securities and Exchange Commission investigation or any other governmental enforcement proceeding. Class Counsel assumed the entire risk and expense of prosecuting the case and negotiated this favorable settlement without the assistance of any other governmental or private party. The fact that Lead Counsel received no help from any government investigation is a "significant factor" supporting the fee award. *AT&T*, 455 F.3d at 173 (citing *Prudential*, 148 F.3d at 338); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 749 (E.D. Pa. 2013).

9. The Awarded Fee Percentage Is Consistent With Contingent Fee Arrangements in Privately Negotiated Non-Class Litigation

***23** A 30% fee is also consistent with typical fee awards in non-class cases. See *In re RJR Nabisco, Inc. Sec. Litig.*, No. 818 (MBM), 1992 WL 210138, at *7 (S.D.N.Y. Aug. 24, 1992) ("What should govern [contingent fee] awards is not the essentially whimsical view of a judge, or even a panel of judges, as to how much is enough in a particular case, but what the market pays in similar cases."). If this were an individual action, the customary contingent fee would likely range between 30 and 40 percent of the recovery. See, e.g., *Ikon*, 194 F.R.D. at 194; *Blum*, 465 U.S. at 903 n. *19 (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."). Lead Counsel's fee of 30% of the Settlement fund comports with these private standards. Further, Lead Plaintiff supports Lead Counsel's fee application. Yedlowski Dec. ¶7.

Thus, this factor supports the Court's award of 30% of the Settlement Fund to Lead Counsel.

B. Lead Counsel's Expenses Were Reasonable and Necessary to Litigate the Action

"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." *In re Cendant Corp., Deriv. Action Litig.*, 232 F. Supp. 2d 327, 343 (D.N.J. 2002). In this case, Class Members stated that Lead Counsel may seek reimbursement of expenses not to exceed $50,000. (Dkt. #45-4, at 2). Lead Counsel requests that this Court reimburse the $20,972.82 of litigation expenses that counsel advanced in connection with this Action. Rosen Fee Dec.¶6. This Court finds that these expenses, which are set forth in the Rosen Declaration, were reasonably necessary for the prosecution of this litigation. Rosen Fee Dec. ¶7. Approximately $19,150 of Lead Counsel's expenses consist of expert and investigation and mediation fees. *See* Rosen Fee Dec. ¶6. The remaining $1,800 consists primarily of press releases notifying the Class and online legal research. *Id.* Courts have held that all of these items are properly charged to the Class. *In re Cendant Corp., Derivative Action Litig.*,

232 F. Supp. 2d at 344 (consultants and computer-assisted research); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 482 (S.D.N.Y. 2013) (mediator's fees); *Katz v. China Century Dragon Media, Inc.*, No. LACV1102769JAKSSX, 2013 WL 11237202, at *8 (C.D. Cal. Oct. 10, 2013) (press releases). No opposition to the expense application has been received. Bravata Dec. ¶11.

C. Lead Plaintiff is Entitled to a Nominal Award

Lastly, Lead Counsel requests an award of $3,000 to Lead Plaintiff Stanley Yedlowski for his time committed to this litigation. The PSLRA does not provide for incentive awards for lead plaintiffs to compensate them for their service as lead plaintiffs. However, it does acknowledge that "Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." 15 U.S.C. 78u-4(a)(4). "The Conference Committee recognizes that lead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and grants the courts discretion to award fees accordingly." H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995). "[T]he Third Circuit favors encouraging class representatives, by appropriate means, to create common funds and to enforce laws—even approving 'incentive awards' to class representatives." *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744, at *56 (D.N.J. Oct. 1, 2013).

In this case, Lead Plaintiff (a) reviewed pleadings; (b) discussed the case with Lead Counsel; (c) approved settlement authority for and made himself available at the Mediation; and (d) independently followed developments regarding Roka. Yedlowski Dec. ¶¶3, 5. In total, Lead Plaintiff spent 75 hours on this case. *Id.* ¶ 6. These are the kinds of activities that warrant reimbursement for class representatives for their lost wages and business opportunities. *ScheringPlough*, 2013 WL 5505744, at *56 (reviewing pleadings, corresponding with Lead Counsel, and preparing for and attending mediation); *In re Par Pharm. Sec. Litig.*, No. CIV.A. 06-3226 ES, 2013 WL 3930091, at *11 (D.N.J. July 29, 2013) (similar); *Schuler*, 2016 WL 3457218, at *11 (reviewed filings, conferred with lead counsel, remained apprised about the case and the company).

***24** The Notice disseminated to the Class informed Class Members of Lead Plaintiff's intention of seeking a reimbursement for the reasonable time and expenses of Lead Plaintiff in pursuing the litigation not to exceed $3,000. No Class member has objected to this award. Bravata Dec. ¶11. Courts regularly make similar awards to lead plaintiffs. *In re Par Pharm. Sec. Litig.*, No. CIV.A. 06-3226 ES, 2013 WL 3930091, at *11 (D.N.J. July 29, 2013) (awarding $18,000 to lead plaintiff); *Ray v. Lundstrom*, No. 4:10CV3177, 2012 WL 5458425, at *5 (D. Neb. Nov. 8, 2012) (awarding $2,000 in case that settled before discovery); *Schuler*, 2016 WL 3457218, at *11 ($3,500 in case that settled before discovery).

Finally, Lead Plaintiff was one of only two investors who moved for appointment. Lead Plaintiff's willingness to take on responsibilities in a difficult case should be rewarded. Accordingly, the Court awards Lead Plaintiff the nominal amount of $3,000 as compensation for his time and efforts in representing the Class.

IX. CONCLUSION

Lead Plaintiff's motion for final approval of the parties' $3.275 million settlement is granted. Lead Plaintiff's motion for the award of attorney's fees is granted, Lead Counsel is awarded $982,500 in fees and $20,972.82 in costs, and Lead Plaintiff is awarded the nominal sum of $3,000, all payable from the settlement fund.

All Citations

Not Reported in Fed. Supp., 2016 WL 6661336

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