IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MYLAN PHARMACEUTICALS, INC., *et al.*,	:	
	:	Master Docket No. 2:12-cv-03824-PD
Plaintiff,	:	Consolidated
	:	
v.	:	Civ. No. 12-3824
	:	Indirect Purchaser Action
WARNER CHILCOTT PUBLIC LIMITED COMPANY, *et al.*,	:	
	:	
	:	
Defendants.	:	
	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PAYMENT OF INCENTIVE AWARDS TO NAMED PLAINTIFFS

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I. INTRODUCTION

Plaintiffs' counsel have succeeded in obtaining $8,000,000 in cash (the "Settlement") for the benefit of the Class in settlement of the above-captioned action (the "Action").[1] This is a highly favorable recovery in the face of substantial risk and is the result of Plaintiffs' Counsel's vigorous, persistent, and skilled efforts. In consideration of Plaintiffs' Counsel's efforts and the excellent results achieved for Plaintiffs International Brotherhood of Electrical Workers 38, Health and Welfare Fund ("IBEW 38"), International Union of Operating Engineers Local 132, Health and Welfare Fund ("Local 132"), and the Laborers Health and Welfare Trust Fund for Northern California ("Laborers Trust") (collectively "Plaintiffs" or "Named Plaintiffs") and the Class, Class Counsel hereby applies for an award of attorneys' fees in the amount of 33.33% of the Net Settlement Fund and reimbursement of litigation expenses incurred in prosecuting this Action in the amount of $2,369,014.[2]

Concomitantly, each of the Named Plaintiffs seeks a service award of $10,000. The Named Plaintiffs took the risk of filing complaints against prescription drug suppliers, and each participated throughout the litigation by producing documents and discovery, submitting to depositions, providing information to prosecute the case, and overseeing Plaintiffs' counsel. The service awards are well deserved, and the amounts sought are consistent with awards in prior antitrust cases.

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[1] Unless otherwise defined herein, all capitalized terms have the meaning ascribed to them in the Settlement Agreement dated July 11, 2014 ("Settlement Agreement"). ECF No. 657-3.

[2] The "Net Settlement Fund" is the Settlement Fund, net of attorneys' fees, litigation expenses, cost of notice and administration, and service awards. Assuming the Court approves the requested reimbursement of litigation expenses and service awards, the Net Settlement Fund, for purposes of determining attorneys' fees (*i.e.*, before deduction of attorneys' fees), will be $5,100,985. One third of the Net Settlement Fund equates to $1,700,328, or 21.3% of the $8,000,000 Settlement Fund. *See* Declaration of Walter W. Noss in Support of Indirect Purchaser Plaintiffs' Motion for: (1) Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds; and (2) Award of Attorneys' Fees and Expenses ("Noss Decl."), ¶¶46-7.

For all the reasons set forth herein, and in Noss Decl., Class Counsel respectfully submits that the requested attorneys' fees and service awards are fair and reasonable under the applicable standards and should, therefore, be awarded by the Court. The costs and expenses requested by Plaintiffs' counsel are likewise reasonable in amount, and they were necessarily incurred in the successful prosecution of the Action. Accordingly, they too should be approved.

II. FACTUAL AND PROCEDURAL HISTORY

The Noss Decl. is an integral part of this submission. The Court is respectfully referred to it for a detailed description of the factual and procedural history of the litigation, the claims asserted, the work performed by Lead Counsel, the settlement negotiations, and the numerous risks and uncertainties presented in this litigation.

III. THE COURT SHOULD APPROVE THE FEE REQUEST

A. Lead Counsel Is Entitled to Compensation Based upon the Benefits Created by the Litigation

The Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The Third Circuit and courts within this district have reached the same conclusion. *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 205 (3d Cir. 2005) ("[W]e agree with the long line of common fund cases that hold that attorneys 'whose efforts create, discover, increase, or preserve a [common] fund' . . . are entitled to compensation."); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 192 (E.D. Pa. 2000) ("[T]here is no doubt that attorneys may properly be given a portion of the settlement fund in recognition of the benefit they have bestowed on class members.").

Courts have also recognized that, in addition to providing just compensation, awards of attorneys' fees from a common fund serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons and to discourage future misconduct of a similar nature. *See Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d

Cir. 2000) (stating that the goal of awarding fees from common fund is to "ensur[e] that competent counsel continue to be willing to undertake risky, complex, and novel litigation"). Indeed, the Supreme Court has "emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws." *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("[w]ithout doubt, the private cause of action plays a central role in enforcing this [antitrust] regime").[3] Consequently, common fund fee awards of the type requested here encourage and support meritorious class actions and thus promote private enforcement of, and compliance with, antitrust laws.

B. The Court Should Award Attorneys' Fees Using the Percentage of Recovery Method

The Supreme Court has frequently acknowledged that it is proper to award attorneys' fees in common fund cases on a percentage-of-the-fund basis. *See Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-67 (1939); *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class"). In this Circuit, "[t]he percentage-of-recovery method is generally favored [over the lodestar method] 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.'" *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) ("*Rite Aid I*"); *Gunter*, 223 F.3d at 195. Given the fact that this Action is a "'paradigmatic common fund' case" (*In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 852, 860 (W.D. Pa. 1995)), Lead Counsel respectfully submits that the Court should apply the percentage of fund method, cross-checked against the lodestar. *See Ikon*, 194 F.R.D. at 193; *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir.

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[3] *See also In re Southeastern Milk Antitrust Litig.*, No. 2:08–MD–1000, 2013 WL 2155387, *5 (E.D. Tenn. May 17, 2013) ("failing to fully compensate class counsel for the excellent work done and the various substantial risks taken would undermine society's interest in the private litigation of antitrust cases. Society's interests are clearly furthered by the private prosecution of civil cases which further important public policy goals, such as vigorous competition by marketplace competitors.").

1998), cert. denied, *Johnson v. Prudential Insurance Company of America*, 525 U.S. 1114 (1999).

C. Application of the *Gunter* and *Prudential* Factors Supports Lead Counsel's Request for a 33.33% Fee

To determine whether the percentage of a potential fee award is reasonable, a district court must consider the factors identified in *Gunter*, 223 F.3d 190, and *Prudential*, 148 F.3d at 317. *See In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524, 541 (3d Cir. 2009). The *Gunter/Prudential* 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. *Diet Drugs*, 582 F.3d at 540; *In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 103 (E.D. Pa. 2013), appeal dismissed (July 25, 2013).

The Third Circuit has also instructed that a district court should "cross-check the percentage award at which [it] arrive[s] against the 'lodestar' award method, which is normally employed in statutory fee-award cases." *Gunter*, 223 F.3d at 195 n.1; *see also Prudential*, 148 F.3d at 333. These factors "need not be applied in a formulaic way. Each case is different, and in certain cases, one factor may outweigh the rest." *Gunter*, 223 F.3d at 195 n.1.

As demonstrated below, eight of the nine relevant *Gunter* and *Prudential* factors weigh in favor of the requested fee, and the ninth factor is neutral.

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

The Settlement provides the entire Class of Doryx indirect purchasers with immediate and certain payment of $8 million, plus accrued interest. This amount, less attorneys' fees, litigation

expenses, notice and administration costs, and incentive awards to the three Named Plaintiffs, as may be awarded by the Court, will then be distributed to Class Members *pro rata*, based on their unreimbursed purchases of Doryx during the Class Period. Accordingly, all members of the Class who file a Proof of Claim – subject to a $100 minimum threshold of unreimbursed expenditures – will benefit from the Settlement. *See* Plan of Allocation, ECF No. 657-8. Since "[e]very dollar of the net fund will be distributed to class members[,] [t]his factor counsels in favor of approval of the requested fee." *Flonase*, 291 F.R.D. at 103.

2. The Presence or Absence of Substantial Objections

Objections were required to be postmarked by November 5, 2014. As of the date of the present filing, Class Counsel and the Claims Administrator are not aware of any objections to the request for attorneys' fees and reimbursement of out-of-pocket expenses or to the Settlement. *See* Noss Decl., ¶36; Keough Decl., ¶¶20-21.[4] The absence, or minimal number, of objections to a fee request has been deemed significant evidence that the requested fee is fair. *See Rite Aid I*, 396 F.3d at 305 (stating that the fact that only two class members objected to the fee request supports approval of the fee); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 515 (W.D. Pa. 2003) ("[t]he absence of substantial objections by other class members to the fee application supports the reasonableness of Lead Counsel's request").

3. The Skill and Efficiency of the Attorneys Involved

The Third Circuit has explained that the goal of the percentage fee award device is to ensure "that competent counsel continue to be willing to undertake risky, complex, and novel litigation." *Gunter*, 223 F.3d at 198. In this regard, "'[t]he single clearest factor reflecting the quality of class counsels' services to the class are the results obtained.'" *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 149 (E.D. Pa. 2000).

As explained in the concurrently filed Noss Decl., and acknowledged by this Court in its Order approving settlement of the Direct Purchaser class action (ECF No. 665 at 8, 12) ("D.P.

[4] If any objections are received after the date of this submission, Lead Counsel will address them in the reply brief, which will be filed with the Court by November 21, 2014.

Final Order"), Plaintiffs' counsel faced very real risks in litigating this case. Nevertheless, Plaintiffs' counsel's efforts have resulted in a settlement that provides a substantial monetary benefit to the Class. In large measure, this is due to Plaintiffs' counsel's expertise and skill in litigating complex antitrust class actions, which this Court has had the opportunity to observe over the course of more than two years of litigation. *See* Plaintiffs' Counsel's firm resumés attached as Exhibit A to the concurrently filed declarations of Daryl F. Scott, Peter Safirstein, Ira Richards, and Joe P. Leniski, Jr. in Support of the Application for Award of Attorneys' Fees and Reimbursement of Expenses (collectively, "Plaintiffs' Counsel's Declarations").

Furthermore, although it is hard to measure litigation efficiency, it should be noted that Plaintiffs' counsel spent 10,804.7 hours litigating the indirect purchaser case,[5] while counsel for the direct purchasers devoted more than 20,860 hours to the case and settled it at an earlier juncture. *See* ECF No. 572-12 at 7. This is a strong indicator of efficiency. The skill and efficiency demonstrated by Plaintiffs' counsel supports the requested fee. *See Flonase*, 291 F.R.D. at 104; *In re Remeron End-Payor Antitrust Litig.*, No. CIV. 02-2007 FSH, 2005 WL 2230314, at *28 (D.N.J. Sept. 13, 2005).

Finally, the quality of opposing counsel is also relevant to the evaluation of class representation. *See Ikon*, 194 F.R.D. at 194; *In re Equity Funding Corp. of Am. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977); *In re King Resources Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Co. 1976). Here, Defendants were vigorously represented by experienced, knowledgeable, and able counsel from White & Case LLP and McCarter & English LLP, two very prominent firms with ample resources. This factor plainly weighs in favor of the requested fee.

4. The Complexity and Duration of the Litigation

Antitrust class actions are inherently complex and arguably the most complex class actions to prosecute because the legal and factual issues are always complicated and uncertain in

[5] *See* Declaration of Daryl F. Scott ("Scott Decl."), ¶¶5, 6; Declaration of Peter Safirstein ("Safirstein Decl."), ¶¶5, 6; Declaration of Ira Richards ("Richards Decl."), ¶¶5, 6; and the Declaration of Joe P. Leniski, Jr. ("Leniski Decl."), ¶¶5, 6.

outcome. *See In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004) quoting *In re Motorsports Merchandise Antitrust Litig*., 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000) ("As to the complexity of the case, '[a]n antitrust class action is arguably the most complex action to prosecute."); *In re Auto. Refinishing Paint Antitrust Litig*., MDL Docket No. 1426, 2008 WL 63269, at *4-*5 (E.D. Pa. Jan. 3, 2008) ("This litigation, like most antitrust cases, has been exceedingly complex, expensive, and lengthy."). This antitrust action was no different.

As an initial matter, Plaintiffs faced formidable obstacles to proving their case and it was never certain that they would ultimately prevail. This case challenged an alleged anticompetitive scheme known as "product hopping," which, while effective in blocking generic competition, has undergone relatively little prior judicial review. Defendants asserted substantial factual and legal defenses,[6] which this Court characterized in its ruling on the motions to dismiss as "compelling," (June 12, 2013 Order, at 3-4 (ECF No. 280)). And the Court also expressed skepticism that the '"product hopping' scheme alleged here constitute[d] anticompetitive conduct," and invited Defendants to renew their arguments at summary judgment. *Id.* Defendants accepted the Court's invitation, and their summary judgment motions were pending at the time the Settlement was reached. Thus, there was a very real risk that the Plaintiffs would lose summary judgment based on Defendants' "compelling" arguments.

Moreover, as set forth in the Noss Decl., the discovery process and expert work in this case was exceedingly difficult and complex. Class Counsel: (a) collected and conducted a targeted review of over six million pages of documents; (b) responded and produced documents in response to three sets of document requests, comprising of over 7,400 pages of documents;

[6] Defendants' factual and legal defenses included, among other things: (1) that the Doryx reformulations did not cause any anticompetitive harm, and even if they did, the harm was outweighed by procompetitive benefits; and (2) that Mylan and other generic manufacturers' own conduct, not Defendants' conduct, impaired generic competition for Doryx. *See Abbott Labs. v. Teva Pharms. USA, Inc*., 432 F. Supp. 2d 408, 422 (D. Del. 2006) ("[I]f plaintiffs show anticompetitive harm from the formulation changes, that harm will be weighed against any benefits presented by the Defendants").

(c) responded to three sets of interrogatory requests; (d) prepared the Named Plaintiffs for, and defended, their depositions; (e) engaged in numerous meet-and-confer teleconferences regarding the scope of discovery; (f) participated in the vast majority of the 110 depositions conducted in the Direct and/or Indirect actions; (g) engaged in third-party discovery; (h) engaged experts in economics, pharmacoeconomics, pharmaceutics, FDA regulations, and drug manufacturing, dermatology, biostatistics, gastroenterology, and damages; (i) prepared for and defended eight expert depositions; (j) opposed three motions to strike or exclude Plaintiffs' expert reports or declarations; (k) submitted 20 expert reports, including joint reports on behalf of all plaintiffs and reports specific to Indirect Purchaser Plaintiffs; and (l) participated, or took the lead, in the depositions of 22 of Defendants' experts. Noss Decl., ¶4. Further, additional work will be devoted to settlement approval (preparation for the final approval hearing and responding to class member inquiries) and administration.

Finally, as demonstrated by the amount of work performed by Plaintiffs' counsel, this case was exceedingly hard fought over the more than two years it was pending. In the absence of the Settlement, the litigation would inevitably involve substantially more time and money – for continued pre-trial motions, trial, post-trial motions, and the appellate process – likely necessitating thousands of additional attorney hours. Consequently, by reaching the Settlement, Class Counsel has obtained "a substantial benefit undiminished by further litigation expenses, without the delay, risk and uncertainty of continued litigation." *In re Computron Software, Inc.*, 6 F. Supp. 2d 313, 318 (D.N.J. 1998). The "Complexity and Duration" factor weighs heavily in favor of the requested fee. *See* D.P. Final Order at 8 (direct purchaser case "was a complex and expensive case").

5. The Risk of Nonpayment

Class Counsel undertook this class action on a contingency fee basis. Thus, for more than two years, Class Counsel carried both the substantial out-of-pocket costs of litigation and the risk of not being paid for its services. Contingency risk alone is a factor supporting the requested fee. As the Fifth Circuit has stated, "[l]awyers who are to be compensated only in the

event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result." *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981) overruled on other grounds by *Int'l Woodworkers of Am., AFL-CIO & its Local No. 5-376 v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986); *see also In re Heritage Bond Litig.*, No. 02-ML-1475, 2005 WL 1594389, at *14 (C.D. Cal. June 10, 2005) ("The risks assumed by Class Counsel, particularly the risk of non-payment or reimbursement of expenses, is a factor in determining counsel's proper fee award."); *Hall v. AT & T Mobility LLC*, Civil Action No. 07-5325 JLL, 2010 WL 4053547, at *20 (D.N.J. Oct. 13, 2010).

Additionally, the risk of loss in this case was not illusory. As this Court held in approving the settlement and fee request in the direct purchaser case, "Plaintiffs faced the risk that I would rule that: (1) product hopping was not anticompetitive; (2) Defendants had legitimate business justifications for the product changes; or (3) Plaintiffs suffered no damages." D.P. Final Order at 8. Similarly, as noted above, the Court made clear at the motion to dismiss hearing that it considered Defendants' defenses "compelling." ECF No. 280 at 3-4. Nevertheless, instead of dropping the case at that point, Plaintiffs' counsel invested thousands of additional hours and over ***$2,369,014*** in hard costs in litigating what was – from the outset – an exceedingly risky case. *See* Noss Decl., ¶¶8, 56.

In light of the "numerous and significant risks of nonpayment," there is simply no doubt that this factor supports the requested fee award. D.P. Final Order at 12; *Rowe v. E.I. Dupont d3e Nemours and Co.*, Civil Nos. 06-1810, 06-3080, 2011 WL 3837106, at *20-*21 (D.N.J. Aug. 26, 2011) (finding that where counsel diligently prosecuted class members' claims despite the risk that counsel's significant time and efforts could go uncompensated weighed in favor of accepting counsels' fee request); *In re AT & T Corp.*, 455 F.3d 160, 171 (3d Cir. 2006).

6. The Amount of Time Devoted to the Case by Plaintiffs' Counsel

To date, Plaintiffs' counsel have expended over 10,804 hours and advanced over $2,369,014 in expenses on this case. *See* Noss Decl., ¶¶8, 56; Scott Decl., ¶¶5, 6; Leniski, Decl., ¶¶5, 6; Safirstein Decl., ¶¶5, 6, and Richards Decl., ¶¶5, 6. These numbers reflect Plaintiffs'

counsel's commitment to vigorously pursuing this case for the benefit of Named Plaintiffs and the Class, as well as the vigorous defense mounted by Defendants. Additionally, more time – uncompensated – will be spent ensuring that the Settlement is approved and, if approved, properly distributed to the Class. *See Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 253 (D.N.J. 2005) (fee award will be sole compensation for counsel "despite the continuing responsibilities [counsel] will have in responding to Class Member inquiries, assisting the Claim Evaluator, consulting on individual cases, and any post-judgment proceedings and appeals."); *Remeron End-Payor*, 2005 WL 2230314, at *30. The foregoing unquestionably represents a very significant commitment of time, personnel, and out-of-pocket expense outlays to this case, and weighs in favor of the requested fee.

7. Awards in Similar Cases

With respect to this *Gunter* factor, "the court must (1) compare the award requested with other awards in comparable settlements; and (2) ensure that the award is consistent with what the attorney would have received had the fee been negotiated on the open market." *Hall*, 2010 WL 4053547, at *21. As to the first prong of the inquiry, "[a] one-third fee award is standard in complex antitrust cases of this kind." *Flonase*, 291 F.R.D. at 104. It is also "consistent with awards in other complex antitrust actions involving the pharmaceutical industry." *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085, 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005) (citing *In re Relafen Antitrust Litig.*, No. 01-12239-WGY (D. Mass. April 9, 2004) (awarding 33.33% fee of a $175 million settlement); *In re Buspirone Antitrust Litig.*, No. 01–CV–7951 (JGK) (S.D.N.Y. April 1, 2003) (awarding a 33.33% fee of a $220 million settlement); *North Shore Hematology-Oncology Associates, P.C. v. Bristol Myers Squibb Co.*, No. 1:04cv248 (EGS) (D.D.C. Nov. 30, 2004) (awarding a 33.33% fee of a $50 million settlement); *In re Terazosin Hydrocholride Antitrust Litig.*, No. 99–MDL–1317 (S.D. Fla. Apr. 19, 2005) (awarding a 33.33% fee of a $72.5 million settlement)). And, more specifically, as this Court recognized in awarding 33.33% in the direct purchaser litigation, "[f]ee awards similar to the [one-third] fee requested by Class Counsel here have been awarded in similar cases, including

numerous Hatch-Waxman antitrust class actions similarly alleging impaired generic competition." D.P. Final Order at 12, citing *Gunter*, 223 F.3d 195 n.1 and ECF No. 572-12, at 20 (collecting cases).

"The requested fee of 33 1/3 % is also consistent with a privately negotiated contingent fee in the marketplace." *Hall*, 2010 WL 4053547, at *21. "Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation." *Remeron Direct Purchaser*, 2005 WL 3008808, at *16; *see also In re Orthopedic Bone Screw Prods. Liab. Litig.*, No. 1014, 2000 WL 1622741, at *7 (E.D. Pa. Oct. 23, 2000) (noting that "plaintiffs' counsel in private contingency fee cases regularly negotiate agreements providing for thirty to forty percent of any recovery."). Thus, the requested fee award is strongly supported by both subparts of this final *Gunter* factor. *See* D.P. Final Order at 14 ("a one-third contingency is standard in individual litigation; in antitrust litigation, a higher contingency would be reasonable, given the complexities and risks involved").

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

Although Plaintiffs' Counsel coordinated with counsel for other private plaintiffs in litigating portions of this case, they were they only lawyers representing indirect purchasers, and they were "not assisted by a government investigation." *Flonase*, 291 F.R.D. at 104. Accordingly, "the entire value of the benefits accruing to class members is properly attributable to the efforts of class counsel." *AT & T*, 455 F.3d at 173. This factor weighs in favor of the proposed fee.

9. Any Innovative Terms of Settlement

The terms of the Settlement, while providing a monetary benefit to the Class, are otherwise standard. "In the absence of any innovative terms, this factor neither weighs in favor nor against the proposed fee request." *Flonase*, 291 F.R.D. at 105; *Bradburn Parent Teacher Store, Inc. v. 3M (Minnesota Mining and Manufacturing Co.*, 513 F. Supp. 2d 322, 340 (E.D. Pa 2007) (counsel's fee request not adversely affected by settlement without innovative terms).

D. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee

In addition to applying the percentage approach to determine attorneys' fees in common fund cases like this one, courts in this Circuit often apply the lodestar method to "cross-check" whether the fee determined under the percentage approach is reasonable. *See AT & T*, 455 F.3d at 164 ("we have recommended that district courts use the lodestar method to cross-check the reasonableness of a percentage-of-recovery fee award"); *Gunter*, 223 F.3d at 195 n. 1. "The lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method." *AT & T*, 455 F.3d at 164. The lodestar multiplier is calculated by dividing the attorneys' fees that class counsel seeks by class counsel's associated lodestar. *See Cullen*, 197 F.R.D. at 150 n.6. In performing a lodestar analysis, "[t]he district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *Rite Aid I*, 396 F.3d at 306-07.

Here, the cumulative number of hours expended by Plaintiffs' Counsel is 10,804.7, and the resulting lodestar for the services performed is $5,587,968.[7] The requested fee is, therefore, much less than the lodestar. A multiplier of less than one (*i.e.*, 0.3[8]) demonstrates that the requested fee is within the range of reasonableness, because the Third Circuit has recognized that "multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *Prudential*, 148 F.3d at 341; *see also Hall*, 2010 WL 4053547, at *22 ("A multiplier of less than one, as is the case here, is therefore quite reasonable for a lodestar."); *Vizcaino v. Microsoft Word*, 290 F.3d 1043, 1051 (9th Cir. 2002) (finding multipliers ranged as high as 19.6, though most run from 1.0 to 4.0).[9] *A fortiori*, the attorneys' fees sought

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[7] *See* Scott Decl., ¶5; Leniski Decl., ¶5; Safirstein Decl., ¶5, and Richards Decl., ¶5.

[8] The multiplier was calculated as follows: $8,000,000 - $2,899,014 = $5,100,986. 1/3 of $5,100,986 = $1,700,328 (fee requested). $1,700,328 divided by $5,587,968 = 0.3.

[9] *See also Remeron End-Payor*, 2005 WL 2230314, at *31 ("An examination of recently approved multipliers reveals that the [1.73] multiplier requested here is on the low end of the spectrum."); *Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718, at *24 (E.D. Pa. Aug. 14, 2006) (approving a percentage fee award that translated to a 4.77 multiplier in case that settled after one year) *Nichols v. SmithKline Beecham Corp.*, No. Civ.A. 00-6222, 2005 WL 950616, at

are plainly reasonable using a lodestar cross-check. *See* D.P. Final Order at 13 (finding lodestar cross-check confirms reasonableness where "[t]he requested fee is . . . 44 percent less than the lodestar and below the range normally approved in comparable cases.").

IV. PLAINTIFFS' COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

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. *See Ikon*, 194 F.R.D. at 192; *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 525 (E.D. Pa. 1990). To be reimbursable, the expenses must be "adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *See In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001); *Lazy Oil Co. v. Wotco Corp.*, 95 F. Supp. 2d 290, 323 (W.D. Pa. 1997).

Here, Plaintiffs' Counsel expended $2,369,014 in out-of-pocket costs, which are divided into categories and itemized in the declarations submitted by each individual firm. *See* Scott Decl., ¶6; Leniski Decl., ¶6; Safirstein Decl., ¶6 and Richards Decl., ¶6. These expenses are well-documented, based on the books and records maintained by each firm, and reflect the costs of prosecuting this litigation. They include, among other things, fees for experts; costs associated with creating and maintaining an electronic document database; online legal research costs; travel and lodging expenses; copying; mail; telephone; and deposition transcripts. Reimbursement of similar expenses is routinely permitted. *See* 2005 WL 2230314, at *32 (approving reimbursement of "costs expended for purposes of prosecuting this litigation, including substantial fees for experts; substantial costs associated with creating and maintaining an electronic document database; travel and lodging expenses; copying costs; and the costs of

*24 (E.D. Pa. Apr. 22, 2005) (approving multiplier of 3.15); *Linerboard*, 2004 WL 1221350, at *4 (approving a 2.66 multiplier); *Weiss v. Mercedes-Benz of N. Am., Inc.*, 899 F. Supp. 1297, 1304 (D.N.J. 1995), *aff'd*, 66 F.3d 314 (3d Cir. 1995) (approving a 9.3 multiplier); *In re Rite Aid Corp. Secs. Litig.*, 146 F. Supp. 2d 706, 736 (E.D. Pa. 2001) (multiple of over 6).

deposition transcripts"); *Flonase*, 291 F.R.D. at 106 (approving reimbursement of $1,848,720.15 for expenses incurred litigating the case, nearly half of which was "fees paid to experts, investigators, accountants, *etc*.").[10]

It is also important to recognize that since the expenses were incurred with no guarantee of recovery, Plaintiffs' Counsel had a strong incentive to incur only reasonable and necessary expenses. Moreover, although direct comparison to other cases is not always relevant, it should be noted that the expenses sought in this case are roughly comparable to those reimbursed in other antitrust litigation. *See In re Relafen Antitrust Litig*., No. 01-12239-WHY, at 7-8 (ECF No. 297) (D. Mass. Apr. 9, 2004) (awarding approximately $1.8 million in expenses incurred in 28 months). Accordingly, Plaintiffs' counsel respectfully request that their expenses be reimbursed.

V. SERVICE AWARDS ARE WARRANTED FOR NAMED PLAINTIFFS

Class Counsel request that the Court approve service awards of $10,000 for each of the Named Plaintiffs. The Notice of Proposed Class Action Settlement informed Class Members that Class Counsel would apply for such awards and, to date, there have been no Class Member objections.

In pursuing this litigation, Named Plaintiffs have acted as private attorneys general, seeking a remedy for what appeared to be a public wrong and, in effect, providing private enforcement of the law. It is well recognized that private class action suits are a primary weapon in the enforcement of the antitrust laws. *See, e.g.*, *Pillsbury Co.* 459 U.S. at 262-63 (1983); *P.D.Q. Inc. of Miami v. Nissan Motor Corp. in USA*, 61 F.R.D. 372, 380 (S.D. Fla. 1973) (private civil suits are an important tool in enforcing the antitrust laws). Only by providing private litigants with adequate compensation for the services they provided and the risks they

[10] *See also In re Am. Bus. Fin. Services Inc. Noteholders Litig.*, Case No. 05-232, 2008 WL 4974782, at *18 (E.D. Pa. Nov. 21, 2008) (approving reimbursement of expenses for "delivery and freight, class notice costs, duplication costs, online legal research, travel, meals, experts, telephone, fax services, transcripts, postage, messenger, mediator, filing and court fees, service fees, [and] transportation" based on declarations of counsel); *Safety Components*, 166 F. Supp. 2d at 108.

incurred during the course of the class action litigation will they be encouraged to serve as named plaintiffs. *See Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000) ("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." (citation omitted)).

Here, the Named Plaintiffs diligently and completely fulfilled their roles as representatives of the Class. Each of the Named Plaintiffs, among other things, actively assisted in the preparation and prosecution of the case by searching for, collecting, and producing voluminous documents and data and assisting Plaintiffs' counsel in understanding and interpreting those documents, responding to interrogatories, consulting with Plaintiffs' counsel concerning the progress of the litigation, preparing for and giving depositions, and agreeing to participate in what could have been a multi-week trial.[11] Absent the hard work of the Named Plaintiffs, there would have been no recovery. *See* Noss Decl., ¶57.

Finally, the amounts requested are plainly in line with incentive awards granted by this Court and others. *See* D.P. Final Order at 14 (awarding $50,000 to each of the three named plaintiffs); *Linerboard*, 2004 WL 1221350 at *18 (approving $25,000 to each representative of the classes); *Remeron End-Payor*, 2005 WL 2230314, at *32 ($30,000 for each of the two TPPs and $5,000 for each of three individual consumers).[12]

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[11] *See* Noss Decl., ¶56; Declaration of Class Representative International Brotherhood of Electrical Workers 38, Health and Welfare Fund, ¶5; Declaration of Class Representative International Union of Operating Engineers Local 132, Health and Welfare Fund, ¶5; and Declaration of Laborers Health and Welfare Trust Fund for Northern California, ¶5.

[12] *See also Auto. Refinishing Paint*, 2008 WL 63269, at *7 ($30,000 service award approved); *Godshall v. Franklin Mint Co.*, No. 01-CV-6539, 2004 WL 2745890, at *4 (E.D. Pa. Dec.1, 2004) ($20,000 service ward approved); *In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 504 (N.D. Miss. 1996) (awarding each of the named plaintiffs $10,000); *Yap v. Sumitomo Corp. of America*, No. 88 Civ. 700, 1991 WL 29112, *9 (S.D.N.Y. Feb. 22, 1991) ($30,000 incentive awards to the named plaintiffs); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) ($50,000 incentive award to named plaintiff); *In re Dun & Bradstreet Credit Services Customer Litig.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (two incentive awards of $55,000 and three incentive awards of $35,000).

For these reasons, Class Counsel respectfully submit that the requested service awards for the Named Plaintiffs are both appropriate and reasonable in amount.

VI. CONCLUSION

Throughout this litigation, Plaintiffs and Class Counsel were faced with determined adversaries represented by experienced and highly regarded counsel. Without any assurance of success, Plaintiffs and their Counsel pursued this litigation to a successful conclusion. Accordingly, for the reasons set forth above and in the Noss Decl., the Court should award Class Counsel attorneys' fees of 33.33% of the Net Settlement Fund. The Court should also grant Class Counsel's request for reimbursement of $2,369,014 in expenses, and the request of each of the Named Plaintiffs for service awards in the amount of $10,000.

DATED: November 7, 2014

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on November 7, 2014, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court for the Eastern District of Pennsylvania using the CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

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