**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

| IN RE WRIGHT & FILIPPIS, LLC DATA SECURITY BREACH LITIGATION | Case No: 2:22-cv-12908-SFC<br><br>Hon. Sean F. Cox<br><br>**CLASS ACTION** |
|---|---|

**PLAINTIFFS' UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND SERVICE AWARDS**

Plaintiffs respectfully request that the Court (1) approve attorneys' fees in the amount of 33 and 1/3% of the Settlement Fund; (2) award Plaintiffs' reasonably incurred litigation expenses and costs up to $30,000; and (3) grant Plaintiffs Chiquita Braggs, Scott Hamilton, Diane Huff, Shawn Kolka, and Craig Mejia each a service award of $1,500 in recognition of their efforts on behalf of the Settlement Class as Class Representatives.

The undersigned counsel certifies that counsel communicated with opposing counsel, via email on March 21, 2024, explaining the nature of the relief to be sought by way of this Motion. On March 22, 2024, counsel for Defendant stated that Defendant does not oppose the relief requested herein.

Dated: March 25, 2024

Respectfully Submitted:

**THE MILLER LAW FIRM, P.C.**

By: */s/ E. Powell Miller*
E. Powell Miller (P39487)
Emily E. Hughes (P68724)
950 West University Drive
Rochester, MI 48307
Telephone: (248) 841-2200
epm@millerlawpc.com
eeh@millerlawpc.com

*Chair of Settlement Class Counsel*

**MIGLIACCIO & RATHOD LLP**
Nicholas A. Migliaccio
412 H St. NE, Third Floor
Washington, D.C. 20002
T: (202) 470-3520
nmigliaccio@classlawdc.com

**SHUB & JOHNS LLC**
Benjamin F. Johns
Samantha E. Holbrook
Four Tower Bridge
200 Barr Harbor Drive, Ste. 400
Conshohocken, PA 19428
bjohns@shublawyers.com
sholbrook@shublawyers.com

**MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN PLLC**
Gary M. Klinger
227 W. Monroe Street, Suite 2100
Chicago, IL 60606
T: (866) 252-0878
gklinger@milberg.com

*Settlement Class Counsel*

Kevin J. Stoops (P64371)
**SOMMERS SCHWARTZ, PC**
One Towne Square, Suite 900
Southfield, MI 48076
T: (248) 355-0300
kstoops@sommerspc.com

**LYNCH CARPENTER LLP**
Gary F. Lynch
1133 Penn Avenue, 5th Floor
Pittsburgh, PA 15222
T: (412) 253-6307
gary@lcllp.com

Adam G. Taub (P48703)
**ADAM TAUB ASSOC. CONSUMER LAW GROUP**
17200 W. Ten Mile Road, Suite 200

Southfield, MI 48075
T: (248) 746-3790
adamgtaub@clgplc.net

**MASON LLP**
Gary E. Mason
Danielle Lynn Perry
5101 Wisconsin Avenue NW,
Ste 305
Washington, DC 20016
T: (202) 429-2290
gmason@masonllp.com
dperry@masonllp.com

Edmund S. Aronowitz (P81474)
**ARONOWITZ LAW FIRM PLLC**
220 S. Main St, Suite 305
Royal Oak, MI 48067
T: (248) 716-5421
edmund@aronowitzlawfirm.com

**WILSHIRE LAW FIRM PLC**
Thiago Coelho
3055 Wilshire Blvd., 12th Floor
Los Angeles, CA 90010
T: (213) 381-9988
thiago@wilshirelawfirm.com

Caleb Marker (P70963)
**ZIMMERMAN REED LLP**
6420 Wilshire Blvd., Suite 1080
Los Angeles, CA 90048
Telephone: (877) 500-8780
caleb.marker@zimmreed.com

Brian C. Gudmundson*
Jason P. Johnston*
Michael J. Laird*

Rachel K. Tack*
**ZIMMERMAN REED LLP**
1100 IDS Center
80 South 8th Street
Minneapolis, MN 55402
T: (612) 341-0400
brian.gudmundson@zimmreed.com
jason.johnston@zimmreed.com
michael.laird@zimmreed.com
rachel.tack@zimmreed.com

Christopher D. Jennings*
Nathan I. Reiter III
**THE JOHNSON FIRM**
610 President Clinton Ave., Suite
300 Little Rock, AR 72201
T: (501) 372-1300
chris@yourattorney.com
nathan@yourattorney.com

Mason Barney*
**SIRI & GLIMSTAD LLP**
745 Fifth Avenue, Suite 500
New York, New York 10151
Tel: (212) 532-1091
mbarney@sirillp.com

*Additional Plaintiffs' Counsel*
**Admission Pending*

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

IN RE WRIGHT & FILIPPIS, LLC
DATA SECURITY BREACH
LITIGATION

Case No: 2:22-cv-12908-SFC

Hon. Sean F. Cox

**CLASS ACTION**

**BRIEF IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS**

## STATEMENT OF ISSUES PRESENTED

1. Whether this Court should award attorneys' fees in the amount of $966,666.66, which is equal to 33 and 1/3% of the $2,900,000.00 non-reversionary Settlement Fund, created for the benefit of the Class—to compensate Settlement Class Counsel for securing this substantial cash and non-cash benefit for a Class of individuals alleging class-wide damages stemming from the Defendant's Data Breach that occurred on or about January 26, 2022 to January 28, 2022.

**Plaintiffs' Answer: Yes.**

2. Whether this Court should award Plaintiffs' reasonably incurred litigation expenses and costs in pursuit of this matter up to $30,000?

**Plaintiffs' Answer: Yes.**

3. Whether this Court should award Plaintiffs Chiquita Braggs, Scott Hamilton, Diane Huff, Shawn Kolka, and Craig Mejia each a service award of $1,500.00, in recognition of their zealous efforts on behalf of the Settlement Class as Class Representatives, which has required their involvement in this case for over a year?

**Plaintiffs' Answer: Yes.**

## CONTROLLING AND MOST APPROPRIATE AUTHORITIES

- Fed. R. Civ. P. 23(h)
- *Gascho v. Global Fitness Holdings, LLC*,
  822 F.3d 269 (6th Cir. 2016)
- *In re Cardizem CD Antitrust Litig.*,
  218 F.R.D. 508 (E.D. Mich. 2003)
- *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*,
  248 F.R.D. 483 (E.D. Mich. 2008)
- *In re Rio Hair Naturalizer Prods. Liab. Litig.*,
  Case No. MDL 1055, 1996 WL 780512 (E.D. Mich. Dec. 20, 1996)
- *Ramey v. Cincinnati Enquirer, Inc.*,
  508 F.2d 1188 (6th Cir. 1974)
- *Arp v. Hohla & Wyss Enterprises, LLC*,
  Case No. 3:18-cv-119, 2020 WL 6498956 (S.D. Ohio Nov. 5, 2020)

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## I. INTRODUCTION

Settlement Class Counsel ("Class Counsel") have achieved a $2,900,000 all-cash, non-reversionary Settlement Fund on behalf of Plaintiffs and the Settlement Class ("Class") in this data breach action against Defendant Wright & Filippis, LLC, ("Defendant" or "W&F") stemming from a data breach that took place in January 2022 (the "Data Breach"). Obtaining this outstanding result did not come easily. Class Counsel, with Plaintiffs' assistance, shouldered significant risk, investigating the case pre-filing, engaging in informal discovery, and conducting arm's-length negotiations, including mediation with Judge Wayne Andersen (ret.) of JAMS.

The result achieved here, and the efficiency with which it was obtained, would not have been possible without the significant investment of time and resources by Class Counsel. Nor would such a result be possible without the vast experience that was brought to the table from their experience in other data breach cases, providing Class Counsel with the knowledge, experience, and data breach jurisprudence necessary to achieve this Settlement. Class Counsel's use of their accumulated knowledge and experience to efficiently obtain this Settlement, in a niche area of law, weighs strongly in favor of the reasonableness of the requested fee.

Accordingly, Plaintiffs respectfully request pursuant to Fed. R. Civ. P. 23(h), and the Parties' Settlement Agreement ("S.A."), that the Court approve attorneys' fees of 33 and 1/3% of the Settlement Fund, or approximately $966,666.66; their

reasonably incurred litigation expenses; and service awards of $1,500 for each named Plaintiff here. The requested fee is a percentage that is equal to the average approximate award in class actions. *See, e.g.*, *Bessey v. Packerland Plainwell, Inc.*, No. 4:06-cv-95, 2007 WL 3173972, at *4 (W.D. Mich. Oct. 26, 2007) (awarding one third of settlement fund as attorneys' fees and holding that "[e]mpirical studies show that, regardless [of] whether the percentage method or lodestar method is used fee awards in class actions average around one-third of the recovery") (citation omitted).

For the above reasons, and as explained further below, this Court should approve the requested fees, costs, expenses, and service awards.

## II. FACTUAL AND PROCEDURAL BACKGROUND

W&F experienced a massive Data Breach from January 26 to 28, 2022. Consolidated Amended Complaint ("CAC"), ECF No. 13, ¶ 4. W&F acknowledged that an unauthorized user may have had electronic access on its network to the Protected Health Information ("PHI") and Personally Identifiable Information ("PII") of roughly 877,584 individuals (its initial estimate), including current and former patients and customers. *See* Declaration of E. Powell Miller in Support of Plaintiffs' Unopposed Motion for Attorneys' Fees, Costs, Expenses, and Service Awards ("Miller Decl.") (**Exhibit A** hereto, ¶ 3). The Data Breach involved unauthorized access to Plaintiffs' and Class Members' PHI/PII, including, but not limited to: name, date of birth, patient number, social security number ("SSNs"),

financial account number, health insurance information, and driver's license number or state ID. *See* CAC, ¶ 50. On May 2, 2022, Defendant discovered that the Data Breach may have impacted PHI/PII, and, following its investigation, sent notice to Class Members on or about November 18, 2022. *Id.* ¶¶ 49, 51.

The CAC alleges that Plaintiffs' and Class Members' PHI/PII was compromised due to Defendant's negligence and other misconduct. CAC, ¶¶ 64-206. Plaintiffs allege that they and similarly situated Class Members have suffered injury as a result of Defendant's conduct, including: (i) actual identity theft; (ii) the compromise, publication, and/or theft of their PHI/PII; (iii) out-of-pocket expenses associated with the prevention, detection, and recovery from identity theft and/or unauthorized use of their PHI/PII; (iv) lost opportunity costs associated with effort expended and the loss of productivity addressing and attempting to mitigate the actual and future consequences of the Data Breach, including efforts spent researching how to prevent, detect, contest, and recover from identity theft; (v) the continued risk to their PHI/PII; (vi) future costs in terms of time, effort, and money that will be expended as result of the Data Breach; and (vii) the diminished value of W&F's services they received. *Id.*, ¶ 300.

Plaintiffs asserted the following causes of action in the CAC: (1) negligence; (2) negligence *per se*; (3) breach of implied contract; (4) unjust enrichment 278-292); (5) breach of fiduciary duty; (6) Michigan's Data Breach Prompt Notification

Law; (7) breach of confidence; and (8) declaratory relief. *See id.*, ¶¶ 235-338.

The Parties agreed to mediation and exchanged informal discovery under Fed. R. Evid. 408. On August 9, 2023, the Parties mediated with Judge Andersen and, subsequently, agreed to a mediator's proposal which called for the resolution of the claims of Plaintiffs and the Class in exchange for a Settlement Fund of $2,900,000 (a non-reversionary common fund). Shortly thereafter, the Parties memorialized this agreement in a Settlement Agreement (executed on October 13, 2023). *See* ECF 40-2. Plaintiffs moved for preliminary approval of the class action settlement on October 13, 2023. ECF No. 40. The Court issued preliminary approval of the class action settlement on January 4, 2024. ECF No. 42.

## III. SUMMARY OF BENEFITS PROVIDED TO THE CLASS

The Settlement resolves and releases all claims asserted by the Class against W&F concerning the Data Breach. It notes that the Parties did not "discuss the payment of attorneys' fees, costs, expenses, and/or service awards to Plaintiffs . . . until after the substantive terms of the Settlement Agreement had been agreed upon." ECF No. 40-2, S.A., § 8.4. Under the Settlement Agreement, Class Members will receive a non-reversionary "net benefit" of $2,900,000 (briefly summarized below).[1]

W&F has agreed to create a non-reversionary $2,900,000 Settlement Fund, which will be used to make payments to Settlement Class Members and pay the costs

[1] *See* ECF No. 40-2, PageID.2340-2369 for additional description of the S.A.

of Claims Administration, any Attorneys' Fees and Expenses Award, and any Class Representative Service Awards. ECF No. 40-2, S.A., §§ 1.26, 3.1. The Settlement Agreement permits Class Members to select one of the following:

***Documented Loss Payment***. Class Members may submit a claim for out-of-pocket losses, including the cost of data protection, up to a total of $5,000 per person, upon submission of a claim and supporting documentation. *Id*., § 3.2(a).

***Credit Monitoring***. In lieu of the Documented Loss Payment or the Cash Fund Payment, Class Members may elect to receive three years of free 3-credit bureau credit monitoring and identity theft insurance up to $1,000,000. *Id*. § 3.2(b).

***Cash Fund Payment***. In the alternative to the Documented Loss Payment or Credit Monitoring benefit, Class Members may submit a claim to receive a pro rata cash payment, calculated according to § 3.7 of the S.A. *Id*. § 3.2(c).

***Residual Funds***. If any funds remain in the Settlement Fund more than 120 days after distribution of initial payments to Class Members, a subsequent payment will be evenly made to all Class Members who elected the Cash Fund Payment option and who cashed or deposited the initial payment. If the average check amount is less than three dollars, the amount remaining will be distributed to a Court-approved non-profit recipient for which the Parties will seek Court approval.

***Security Commitments, Prospective Relief:*** In addition to the benefits described above, Defendant has agreed to adopt, continue, and/or implement data

and information security measures, at its expense, which are designed to strengthen W&F's data and information security. The Parties have agreed that W&F will implement these measures for at least two (2) years from the Effective Date of the Agreement, providing a continued benefit for Class Members. *See* S.A. § 2.1.

## IV. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE AND SHOULD BE APPROVED

The Settlement provides that Class Counsel may move the Court for an award of attorneys' fees not to exceed 33 and 1/3% of the Settlement Fund (approximately $966,666.66). ECF No. 40-2, S.A. § 9.1. Under Federal Rule of Civil Procedure 23(h), the Court may award "reasonable attorney's fees[.]" Fed. R. Civ. P. 23(h). As set forth below, the Court should calculate Class Counsel's fee using the "percentage-of-the-fund" method and find that the requested award of 33 and 1/3% of the Settlement Fund is reasonable and well supported by applicable case-law.

### A. The Percentage-of-the-Fund Method Should Be Used to Calculate Fees

In determining attorneys' fees and evaluating the reasonableness of those fees, courts use either the percentage-of-the-fund method or the lodestar method. *Waid v. Snyder (In re Flint Water Cases)*, 63 F.4th 486, 495 (6th Cir. 2023) (citing *Van Horn v. Nationwide Prop. and Cas. Ins. Co.*, 436 F. App'x 496, 498 (6th Cir. 2011)). "The lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved." *Rawlings v.*

*Prudential-Bache Props.*, 9 F.3d 513, 516 (6th Cir. 1993). Courts have discretion to choose the appropriate method based on the nuances of the class action. *Id.*

However, courts within "the Sixth Circuit have indicated their preference for the percentage-of-the-fund method in common fund cases." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532 (E.D. Mich. 2003). "When awarding attorney fees in a class action, district courts generally have discretion to choose whether to calculate fees based on the lodestar method—multiplying the number of hours reasonably expended by a reasonable hourly rate—or based on the percentage method—awarding class counsel a percentage of the monies recovered." *Lyngaas v. Curaden AG*, No. 17-10910, 2020 WL 5249203, at *1 (E.D. Mich. Sept. 3, 2020) (citing *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016)). "As the two methods measure the fairness of the fee with respect to different desired outcomes, it is necessary that district courts be permitted to select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Id.* at *1 (citing *Gascho*, 822 F.3d at 279 & *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993)).

In "choosing between the percentage and lodestar approaches," courts "look to the calculation method most commonly used in the marketplace at the time such a negotiation would have occurred." *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500-

01 (N.D. Ill. 2015); *see also, e.g.*, *Nilsen v. York Cty.*, 400 F. Supp. 2d 266, 278 (D. Me. 2005) ("There is good reason for using a market-oriented approach. If a consumer wanted to determine a reasonable plumber's, mechanic's or dentist's fee, the consumer would have to look to the market. Why should lawyers be different?").

With respect to class actions analogous to the present matter, "the normal practice . . . is to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery[.]" *Kolinek*, 311 F.R.D. at 501. The federal judiciary is in near unanimous agreement that the percentage-of-the-fund approach best yields the fair market price for the services provided by counsel to the class for purposes of determining a reasonable attorneys' fee award at settlement. *See Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) ("When the prevailing method of compensating lawyers for similar services is the contingent fee, then the contingent fee *is* the market rate.") (internal quotations omitted, emphasis in original); *see, e.g.*, *In re Cardizem*, 218 F.R.D. at 532 ("This Court's decision to apply the percentage-of-the-fund method is consistent with the majority trend[.]"). This is especially true where, as here, a settlement establishes a non-reversionary common fund for the benefit of settlement class members. *See Fournier v. PFS Invs., Inc.*, 997 F. Supp. 828, 831-32 (E.D. Mich. 1998) ("The lodestar method should arguably be avoided in situations where such a common fund exists because it does not adequately acknowledge (1) the result achieved or (2) the special skill of the attorney(s) in

obtaining that result. Courts and commentators have been skeptical of applying the formula in common fund cases. For these reasons, many courts have strayed from using lodestar in common fund cases and moved towards the percentage of the fund method which allows for a more accurate approximation of a reasonable award for fees.") (collecting cases); *Wise v. Popoff*, 835 F. Supp. 977, 980 (E.D. Mich. 1993).

Thus, in recent non-reversionary "common fund" cases such as this, district courts of the Sixth Circuit have applied the percentage-of-the-fund method in determining a reasonable attorneys' fee award. *See In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 502 (E.D. Mich. 2008) (noting that "the Sixth Circuit has observed a 'trend towards adoption of a percentage of the fund method in [common fund] cases'") (citations omitted).

The percentage-of-the-fund method is appropriate to utilize here because it best replicates the *ex ante* market value of the services that Class Counsel provided to the Class. *See Kolinek*, 311 F.R.D. at 501 (in consumer class actions, such as the present case, "the normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery").

The percentage-of-the-fund method also better aligns Class Counsel's interests with those of the Class because it bases the fee on the results the lawyers achieve for the class rather than on the number of motions they file, documents they review, and hours they work, and it avoids some of the problems the lodestar-times-

multiplier method can foster (such as encouraging counsel to delay resolution of the case when an early resolution may be in their clients' best interests). *N.Y.S. Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 243 (E.D. Mich. 2016) (while "[t]he lodestar method better accounts for the amount of work done . . . the percentage of the fund method more accurately reflects the results achieved") (citation omitted). It is also simpler to apply. *See, e.g.*, *Fournier*, 997 F. Supp. at 832 (noting that the percentage-of-the-fund method provides the "benefit" of "readily ascertainable fee amounts"); *Hillson v. Kelly Servs. Inc.*, 2017 WL 3446596, at *2 (E.D. Mich. Aug. 11, 2017) (stating that "[t]he percentage-of-recovery approach is easy to calculate" and "establishes reasonable expectations on the part of plaintiffs' attorneys") (citation omitted).[2] As another federal district court aptly explained:

> The lodestar [method] remains difficult and burdensome to apply, and it positively encourages counsel to run up the bill, expending hours that are of no benefit to the class. Moreover, … lodestar may result in undercompensation of talented attorneys. Experienced practitioners know that a highly qualified and dedicated attorney may do more for a class in an hour than another attorney could do in ten. The lodestar can end up prejudicing lawyers who are more effective with a lesser expenditure of time.

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[2] Awarding fees solely based upon the lodestar methodology might arguably create a perverse incentive for class counsel to reject or delay accepting a settlement merely to bill more hours pursuant to a more wasteful, unnecessary, and risky litigation strategy. That all said, Plaintiffs are, of course, willing to provide their collective Lodestar here if the Court so requests.

*Di Giacomo v. Plains All Am. Pipeline*, No. 99-4137, 2001 WL 34633373, at *6 (S.D. Tex. Dec. 19, 2001) (citations omitted).

**B. The Reasonableness of the Requested 33 and 1/3% Fee is Supported by the Sixth Circuit's Six-Factor Test**

The Sixth Circuit has articulated six factors that are "germane" to determining the reasonableness of a requested percentage to award as attorneys' fees: (1) the value of the benefit to the class; (2) society's stake in rewarding attorneys who produce the settlement's benefits, to maintain an incentive to others; (3) whether the work was performed on a contingent fee basis; (4) the complexity of the litigation; (5) the skill and standing of counsel on both sides; and (6) the value of the legal services performed on an hourly basis. *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974); *Gascho*, 822 F.3d at 280 (describing these factors as "germane" to the fee inquiry, and citing *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009)); *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996).

A "reasonable" fee in common-fund case typically ranges "from 20 to 50 percent." *Shane Grp. v. BCBS of Mich.*, 2015 WL 1498888, at *15 (E.D. Mich. Mar. 31, 2015); *In re S. Ohio Corr. Facility*, 173 F.R.D. 205, 217 (S.D. Ohio 1997), *rev'd on other grounds,* 24 F. App'x 520 (6th Cir. 2001) ("[t]ypically, the percentage awarded ranges from 20 to 50 percent of the common fund"); *see also Pratt v. KSE Sportsman Media, Inc.*, No. 1:21-cv-11404, 2023 WL 5500832, at *7 (E.D. Mich. Aug. 25, 2023) (finding 35% of common fund to be reasonable); *Mathias v. Accor*

*Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (Posner, J.) (referring to the "usual 33-40 percent contingent fee" charged by plaintiff's lawyers). The amount awarded is calculated as a percentage "from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Gascho*, 822 F.3d at 282 (calculating the percentage, as "[a]ttorney's fees are the numerator" and "the dollar amount of the Total Benefit to the class (which includes the 'benefit to class members,' the attorney's fees, and [potentially] the costs of administration)" is the denominator).

The relevant factors support approval of the requested attorneys' fee here.[3]

**1. Class Counsel Has Secured a Valuable Benefit for the Class**

The value of the benefit to the class is the most important factor in assessing the reasonableness of fees. *Dick v. Sprint Commc'ns Co. L.P.*, 297 F.R.D. 283, 299 (W.D. Ky. 2014) (citation omitted); *In re Delphi*, 248 F.R.D. at 503 (result achieved is "primary factor"). Assessing the overall value includes consideration of both tangible and intangible benefits. *See Gascho*, 822 F.3d at 282 (requiring "appropriate consideration" of "cash and noncash settlement components" in assessing the total benefits to the class). The risk of continued litigation also is considered in relation to the value of the benefit to the class under this factor. *Sprint*, 297 F.R.D. at 299.

In this case, the value of the benefit to the Class is the full Settlement Fund, or $2,900,000, *see* S.A., § 3. Accordingly, this factor weighs in favor of approval.

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[3] *Ramey*, *Gascho*, and *In re Cardizem* are attached as **Exhibits B-D**.

**2. Society Has a Stake in Incentivizing the Pursuit of Complex Data Privacy Litigation**

Society has a strong stake in rewarding attorneys who produce the type of benefits achieved by the settlement here. *See In re Cardizem*, 218 F.R.D. at 533; *see also Gascho*, 822 F.3d at 287 (class actions such as this action "have value to society[—]particularly when the individual injuries are too small to justify the time and expense of litigation—and as private law enforcement regimes that free public sector resources"). It is thus in society's interest to encourage litigation that protects important individual privacy rights that would not otherwise be safeguarded. *See In re Rio Hair Naturalizer Prods. Liab. Litig.*, No. MDL 1055, 1996 WL 780512, at *17 (E.D. Mich. Dec. 20, 1996) ("Without compensation to those who are willing to undertake the inherent complexities and unknowns of [] class action litigation" such as the type here, "enforcement of the federal . . . protection laws would be jeopardized."); *In re Cardizem*, 218 F.R.D. at 534 ("Encouraging qualified counsel to bring inherently difficult and risky but beneficial class actions . . . benefits society."). When individual class members seek relatively small statutory damages, "[e]conomic reality dictates that [their] suit proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).

Finally, the Class's reaction to the requested fee award also confirms its fairness and reasonableness. *See In re Delphi*, 248 F.R.D. at 504 ("The Class's

overwhelming favorable response lends further support to the conclusion that the requested fee award is fair and reasonable."). Notice was directly disseminated to every Class Member by postal mail and/or email. Those notices specifically stated that Class Counsel intends to apply for a fee of up to 33 and 1/3% of the Settlement Fund. *See* ECF No. 40-2, S.A. Ex. D, PageID.2399. Since the dissemination of notice to the 785,879[4] Class Members, as of March 15, 2024, no objections have been received, and only five requests for opt-outs. Thus, the Class, as a microcosm of society, has recognized the societal value of this litigation by giving the Settlement a resounding stamp of approval. As a result, this factor supports the requested award.

**3. Class Counsel Took the Case on a Contingency Basis, Thereby Confronting the Risk of Nonpayment**

Undertaking an action on a contingency basis lends additional support to the reasonableness of a requested fee award. *See In re Cardizem*, 218 F.R.D. at 533; *Stanley v. U.S. Steel Co.*, 2009 WL 4646647, at *3 (E.D. Mich. Dec. 8, 2009) ("Numerous cases recognize that the contingent fee risk is an important factor in determining the fee award."). When attorneys invest significant time and resources in pursuing the litigation, despite the risk they will not be compensated, this factor is generally satisfied. *In re Rio*, 1996 WL 780512, at *18; *Kogan v. AIMCO Fox*

[4] Following entry of the Preliminary Approval Order, and review of the class list provided by Defendant, including de-duplication, the Claims Administrator determined that the Class consisted of 785,879 individuals. Miller Decl., ¶ 3.

*Chase L.P.*, 193 F.R.D. 496, 504 (E.D. Mich. 2000). The contingent nature of the case is amplified where class counsel faces a formidable defendant, such as here. *See In re Cardizem*, 218 F.R.D. at 533.

Class Counsel pursued this action purely on a contingency basis. Miller Decl. ¶¶ 15, 19. Class Counsel conducted an extensive pre-filing investigation into the relevant facts and legal issues, which was informed by the vast experience and expertise accumulated during the prosecution of numerous other data breach cases. *Id.*, ¶¶ 16, 20. Class Counsel invested significant time, effort, and resources to the litigation without compensation. *Id.*, ¶ 16. Cognizant of the risk of nonpayment, Class Counsel nonetheless embarked on a fact-intensive investigation of W&F's practices, filed cases, worked to consolidate related cases, drafted and filed a master amended complaint, engaged in motion practice, and exchanged informal discovery. *Id.*, ¶ 17. Class Counsel also paid for and participated in a full-day mediation with renowned mediator Judge Wayne Andersen. *Id.*, ¶ 9. Class Counsel fronted this investment of time and resources, despite the significant risk of nonpayment inherent in this case. *Id.*, ¶¶ 16, 18. And given the defenses mounted by Defendant—led by highly qualified and competent defense counsel, who regularly defend complex class action data breach cases—success on the legal issues was far from certain. *Id.* ¶ 18.

Class Counsel understands that the Court could have granted Defendant's motion to dismiss, or in the alternative, Defendant could have opposed class

certification pursuant to Rule 23 (including appeal under subsection (f)), obtained summary judgment, trial, and/or post-judgment relief. *Id*. While Class Counsel believed they would overcome Defendant's pending motion to dismiss, in order to obtain class-wide relief, Class Counsel would still need to move and succeed on a motion for class certification under Rule 23. Caselaw addressing the application of Rule 23 in this context is far from established. *Id. See In re Cap. One Consumer Data Sec. Breach Litig.*, No. 119MD2915AJTJFA, 2022 WL 17176495, at *2 (E.D. Va. Nov. 17, 2022) ("Data breaches are a 'risky field of litigation' because they 'are uncertain and class certification is rare.'") (quoting *Fulton-Green v. Accolade, Inc.*, No. 18-274, 2019 WL 4677954, at *8 (E.D. Pa. Sept. 24, 2019)).

In considering the reasonableness of a fee request in a contingency-fee class action settlement, courts consider how the legal market would have assessed the case's risk at its inception and, in turn, how the market's risk assessment would have affected a hypothetical *ex ante* fee negotiation between counsel and potential client. *See Goodell v. Charter Commc'ns, LLC*, 2010 WL 3259349, at *1 (W.D. Wis. Aug. 17, 2010) ("The question is not how risky the case looks when it is at an end but how the market would have assessed the risks at the outset.").

As explained above, there was a significant threshold risk at its inception and would continue through class certification. There is no doubt this litigation is viewed by other counsel as risky and uncertain. Notwithstanding, Class Counsel moved

forward and negotiated the Settlement presently before the Court for approval.

Moreover, despite the serious risk of non-recovery to the Class, at the outset and for the duration of these adversarial proceedings, Class Counsel nevertheless expended a significant amount of attorney time and expenses investigating, prosecuting, and resolving the alleged claims without guarantee of reimbursement. Miller Decl., ¶ 19. As a result of the work Class Counsel devoted to this litigation, their law firms were forced to forgo representing clients in other matters that they otherwise would have taken on. *Id*. Hence, Class Counsel should be rewarded for accepting each Plaintiff's case and devoting substantial resources investigating and prosecuting it on behalf of the Class despite the foregoing peril.

Simply put, this litigation presented a substantial risk of non-recovery to the Class and thus non-payment to Class Counsel. The requested Fee Award appropriately and reasonably compensates Class Counsel for embarking on lengthy, time-consuming, and expensive litigation for the benefit of the Class, regardless of the previously mentioned risks.

**4. The Complexity of Litigation Supports the Requested Fees**

The complexity of the litigation reinforces the reasonableness of the requested fee award. *In re Cardizem*, 218 F.R.D. at 533. "[M]ost class actions are inherently complex." *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1013 (S.D. Ohio 2001). This case is no exception. Specifically, this matter involved multiple layers

of factual complexity, much of which was obscured at the outset due to the labyrinthine nature of the cybersecurity issues behind the Data Breach. This required extensive preliminary investigation into Defendant's privacy policies, its methods of data collection and storage, and the nature of its cybersecurity protocols.

This case also involved complex legal issues. If settlement was not reached, W&F may have successfully challenged Plaintiffs' claims under Rule 12(b)(1) and Rule 12(b)(6), or, as noted, opposed class certification or otherwise obtained relief via Rule 23(f), or obtained summary judgment, trial, and/or post-judgment relief. Miller Decl., ¶ 18. The sophisticated factual and legal questions here and the inherent uncertainty of data breach class action litigation combine to enhance the complexity of this case and support the reasonableness of the requested fees.

**5. The Parties Are Both Represented by Skilled Counsel**

The skill and standing of counsel on both sides, including their experience and professionalism, also validates the reasonableness of a requested fee award. *In re Rio*, 1996 WL 780512, at *18. When counsel for both parties have significant experience, "[t]he ability of [counsel] to negotiate a favorable settlement in the face of formidable legal opposition further evidences the reasonableness of the fee award requested." *In re Delphi*, 248 F.R.D. at 504. There is no dispute that both Parties were represented by skilled and experienced counsel. This factor is also satisfied.

**6. The Value of Services Performed on an Hourly Basis Is Reasonable**

The sixth and final factor assesses the value of the legal services performed on an hourly basis, also known as the "lodestar." *In re Cardizem*, 218 F.R.D. at 533; *see also Isabel v. City of Memphis*, 404 F.3d 404, 415 (6th Cir. 2005) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Here, as discussed, the percentage-of-the-fund method, not the lodestar method, is the appropriate method for computing a reasonable fee award. Thus, the only potential use for counsel's lodestar in this case would be to "cross-check" that amount with the fees requested by counsel as a percentage of the fund. Even then, however, courts throughout the Sixth Circuit note that a cross-check of counsel's lodestar is "not required." *Arp v. Hohla & Wyss Enterprises, LLC*, 2020 WL 6498956, at *7 (S.D. Ohio Nov. 5, 2020); *Love v. Gannett Co. Inc.*, 2021 WL 4352800, at *6 (W.D. Ky. Sept. 24, 2021) (a "cross-check isn't required," citing *Van Horn*, 436 F. App'x at 501); *Est. of McConnell v. EUBA Corp.*, 2021 WL 1966062, at *6 (S.D. Ohio May 17, 2021) (in considering the *Ramey* factors, "a lodestar cross-check" is "not required"). Rather, where the percentage-of-the-fund method is used to compute counsel's fee, a lodestar cross-check is optional and entirely discretionary. *See Van Horn*, 436 F. App'x at 501 (finding that district courts have complete discretion when deciding to calculate attorneys' fees based on the percentage-of-the-fund or lodestar methods, and thus a cross-check analysis is optional). *In re Delphi*, 248 F.R.D. at 503 (applying

percentage-of-the-fund-method in awarding fees in common-fund settlement, without addressing the *Ramey* factor pertaining to "the value of the services on an hourly basis"); *Fournier*, 997 F. Supp. at 832-33; *Arp*, 2020 WL 6498956, at *7-8.

In this case, like in *Delphi*, *Fournier*, and *Arp*, the circumstances giving rise to the Settlement demonstrate that there is no need to "cross-check" the requested fees (33 and 1/3% of the Settlement Fund) with the lodestar value of the time Class Counsel expended in the prosecution of this case. The "total benefit" to the Class is the entire Settlement Fund, or $2,900,000.

Moreover, as outlined in the Motion for Preliminary Approval (ECF No. 40), the non-reversionary common-fund settlement achieved in this case is a direct result of Class Counsel's expertise, thorough investigation, and efficient resolution of this matter. The Class Members therefore benefited from Class Counsel's extensive analysis into the Data Breach here and the law governing the applicable issues, the significant time and other resources (thousands of hours) that Class Counsel expended prosecuting related matters, and developing favorable jurisprudence on issues of critical important to the claims alleged herein. Miller Decl., ¶ 20.

Specifically, the aforesaid extensive efforts include combining the complex cyber-science behind the Data Breach and the applicable law, so as to prepare and litigate this case. *Id.*, ¶ 16. In sum, the Court should not view this Settlement, or even this case, in a vacuum, but rather as part of a multi-year project in which counsel

devoted substantial time, money, and other resources for the benefit of the Class—all on a contingency basis and without any guarantee of recovering fees for their work or being reimbursed their out-of-pocket expenses. *Id.*, ¶ 19. The result Class Counsel obtained here, and the efficiency in doing so, would have been impossible without the significant investments of resources of Class Counsel in prosecuting data breach cases, which provided Class Counsel with the knowledge, experience, and jurisprudence to achieve the present Settlement. *Id.* ¶ 20.

In *Arp*, for example, the court awarded counsel a percentage of a common settlement fund as a fee, notwithstanding the value of counsel's lodestar expended solely in that case, based on circumstances similar to those present here. Noting that "courts have broad discretion when it comes to awarding a reasonable fee and when weighing the *Ramey* factors," the *Arp* Court explained why "a lodestar cross-check is not required" in all cases, including this one:

> . . . lodestar in this case does not tell the whole story.
>
> What the lodestar in this case does not reflect is Class Counsel's work in other delivery driver cases that directly benefited the class in this case. . . . [Counsel] established an expertise in pizza delivery driver litigation, having expended thousands of hours on similar cases which informed and enhanced their representation of Plaintiff here. A firm's expertise in a niche area provides important context when analyzing the reasonableness of [] fees. . . . Class Counsel's success on a specific type of case or specific issue augments their ability to obtain a favorable result in cases of the same type.
>
> It would be inequitable for a court to reduce a fee award based on a lodestar cross-check without considering a law firm's work other

> cases raising the same or similar issues. That work may, as it did here, substantially enhance the result Class Counsel is able to achieve. This is true for several reasons, including that (1) successfully litigating a particular issue may improve the settlement prospects of cases raising the same issue, (2) developing expertise in a specific niche improves the firm's ability to effectively litigate within that niche, and (3) the work product from one case can be used in a case raising the same issue, resulting in value that is not adequately reflected in a lodestar calculation.
>
> . . . In most cases, the percentage-of-the-fund approach automatically factors into the award any enhancement to the settlement derived from Class Counsel's work in similar cases. The percentage approach encourages efficiency, judicial economy, and aligns the interests of the lawyers with the class.
>
> Thus, as this Court previously held, a lodestar cross-check is not required. In cases that involve the issues described above, a lodestar cross-check, if applied at all, should be afforded little weight[.]

*Arp*, 2020 WL 6498956, at *7-8 (citing *Mullins v. S. Ohio Pizza, Inc.*, 2019 WL 275711, at *5 (S.D. Ohio Jan. 18, 2019)); also citing *Brandenburg v. Cousin Vinny's Pizza, LLC*, 2019 WL 6310376 (S.D. Ohio Nov. 25, 2019) and *In re Cardinal Health Inc. Sec. Litigations*, 528 F. Supp. 2d 752, 762 (S.D. Ohio 2007)).

Like the counsel in *Arp*, Class Counsel here have the same type of expertise in the data breach context. Thus, the circumstances of this case likewise support awarding a percentage-of-the-fund fee as in *Arp*, *sans* regard to the value of lodestar. As in *Arp*, Class Counsel should be rewarded for efficiently obtaining an excellent, non-reversionary Settlement Fund that provides *meaningful* relief to all Settlement Class Members. As explained, this result would not have been possible without the

thousands of hours that Class Counsel devoted, over several years, to investigating data breach incidents and developing the law on critically important issues underlying the claims alleged here. *See also* Miller Decl., ¶ 20. These hours "directly benefitted the class in this case." *See Arp*, 2020 WL 6498956, at *7. When properly viewed in this context, the requested fee of 33 and 1/3% of the common fund is reasonable and appropriate here, regardless of the *number* of hours expended by counsel on the prosecution of this case. *Id.* ("A firm's expertise in a niche area provides important context when analyzing the reasonableness of a fee[.]").

Accordingly, the final *Ramey* Factor also confirms the reasonableness of the requested fee award of 33 and 1/3% of the Settlement Fund.

## V. THE REQUESTED ATTORNEYS' COSTS AND EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

The Settlement Agreement provides that Class Counsel may separately move for reasonably incurred litigation expenses and costs. ECF No. 40-2, S.A. § 9.1. Plaintiffs request an award of up to $30,000 in expenses.[5] These expenses include filing fees, costs of service of process, mediation fees, travel, research, copying, and other litigation-related expenses. This amount is reasonable under the circumstances here, in which numerous Plaintiffs' counsel worked to consolidate a number of separately-filed actions in an effort to efficiently prosecute this data breach action,

[5] Class Counsel will provide a final account of the litigation costs at the Final Approval Hearing and will include this amount in the proposed final approval order.

ultimately securing a common fund settlement for the Class.[6]

## VI. THE REQUESTED SERVICE AWARDS REFLECT PLAINTIFFS' INVOLVEMENT AND SHOULD BE APPROVED

Service awards are frequently awarded in common-fund cases within this Circuit. *See Hadix v. Johnson*, 322 F.3d 895, 898 (6th Cir. 2003). The approval of an incentive award is examined through the following factors: (1) the actions taken to protect the Class's interests and whether that resulted in a substantial benefit to the class; (2) the financial risk the class representative assumed; and (3) the time and effort that the class representative dedicated. *Lasalle Town Houses Coop. Assoc. v. City of Detroit*, 2016 WL 1223354, at *7 (E.D. Mich. Mar. 29, 2016). "The range of acceptable enhancement payments is discretionary, but courts have determined that a $5,000 payment is presumptively reasonable." *In re Marriott Int'l, Inc. Customer Data Sec. Breach Litig.*, 341 F.R.D. 128, 172 (D. Md. 2022) (citing *Burden v. SelectQuote*, 2013 WL 3988771, at *6 (N.D. Cal. Aug. 2, 2013)).

Plaintiffs spent considerable time protecting the interests of the Class through their involvement. Miller Decl., ¶¶ 21, 22. Plaintiffs assisted their respective counsel in investigating claims, drafting and reviewing the respective initial complaint and

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[6] "Under the common fund doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred in connection with document production, . . . travel and other litigation-related expenses." *New England Health Care Emps. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 634-35 (W.D. Ky. 2006), *aff'd sub nom. Fidel v. Farley*, 534 F.3d 508 (6th Cir. 2008).

the CAC, preserving and providing documents for informal discovery, and reviewing and approving the Settlement and filings related thereto. *Id.*, ¶ 22.

Based on the above, the service award of $1,500 for each Plaintiff is fair, reasonable, and thus, should be approved. *See, e.g.*, *In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *31 (N.D. Cal. Aug. 17, 2018) (approving service awards of roughly $5,700 for 105 plaintiffs); *Pfeiffer v. RadNet, Inc.*, 2022 WL 2189533, at *4 (C.D. Cal. Feb. 15, 2022) (awarding $1,500 for each named plaintiff).

## VII. CONCLUSION

Based on the above, Plaintiffs respectfully request that the Court (1) approve attorneys' fees in the amount of 33 and 1/3% of the Settlement Fund, or roughly $966,666.66; (2) approve the payment of Plaintiffs' reasonably incurred litigation expenses and costs up to $30,000; and (3) approve service awards for Plaintiffs in the amount of $1,500 each in recognition of their efforts on behalf of the Settlement Class as Class Representatives (proposed order attached as **Exhibit E** hereto).

March 25, 2024

Respectfully Submitted:

*/s/ E. Powell Miller*
E. Powell Miller (P39487)
Emily E. Hughes (P68724)
**THE MILLER LAW FIRM**
950 W. University Drive, Suite 300
Rochester, MI 48307
T: (248) 841-2200
epm@millerlawpc.com
eeh@millerlawpc.com

*Chair of Settlement Class Counsel*

Nicholas A. Migliaccio
Jason S. Rathod
**MIGLIACCIO & RATHOD LLP**
412 H. St. NE, Suite 302
Washington, DC 20002
T: (202) 470-3520
nmigliaccio@classlawdc.com
jrathod@classlawdc.com

Benjamin F. Johns
Samantha E. Holbrook
**SHUB & JOHNS LLC**
Four Tower Bridge
200 Barr Harbor Drive, Ste 400
Conshohocken, PA 19428
T: (610) 477-8380
bjohns@shublawyers.com
sholbrook@shublawyers.com

Gary M. Klinger
**MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN PLLC**
227 W. Monroe Street, Suite 2100
Chicago, IL 60606
T: (866) 252-0878
gklinger@milberg.com

*Settlement Class Counsel*

**SOMMERS SCHWARTZ, PC**
One Towne Square, Suite 900
Southfield, MI 48076
T: (248) 355-0300
kstoops@sommerspc.com

**LYNCH CARPENTER LLP**
Gary F. Lynch
1133 Penn Avenue, 5th Floor
Pittsburgh, PA 15222
T: (412) 253-6307
gary@lcllp.com

Adam G. Taub (P48703)
**ADAM TAUB ASSOC. CONSUMER LAW GROUP**
17200 W. Ten Mile Road, Suite 200
Southfield, MI 48075
T: (248) 746-3790
adamgtaub@clgplc.net

**MASON LLP**
Gary E. Mason
Danielle Lynn Perry
5101 Wisconsin Avenue NW, Ste 305
Washington, DC 20016
T: (202) 429-2290
gmason@masonllp.com
dperry@masonllp.com

Edmund S. Aronowitz (P81474)
**ARONOWITZ LAW FIRM PLLC**
220 S. Main St, Suite 305
Royal Oak, MI 48067
T: (248) 716-5421
edmund@aronowitzlawfirm.com

**WILSHIRE LAW FIRM PLC**
Thiago Coelho
3055 Wilshire Blvd., 12th Floor
Los Angeles, CA 90010
T: (213) 381-9988
thiago@wilshirelawfirm.com

Caleb Marker (P70963)

**ZIMMERMAN REED LLP**
6420 Wilshire Blvd., Suite 1080
Los Angeles, CA 90048
Telephone: (877) 500-8780
caleb.marker@zimmreed.com

Brian C. Gudmundson*
Jason P. Johnston*
Michael J. Laird*
Rachel K. Tack*
**ZIMMERMAN REED LLP**
1100 IDS Center
80 South 8th Street
Minneapolis, MN 55402
T: (612) 341-0400
brian.gudmundson@zimmreed.com
jason.johnston@zimmreed.com
michael.laird@zimmreed.com
rachel.tack@zimmreed.com

Christopher D. Jennings*
Nathan I. Reiter III
**THE JOHNSON FIRM**
610 President Clinton Ave., Suite 300
Little Rock, AR 72201
T: (501) 372-1300
chris@yourattorney.com
nathan@yourattorney.com

Mason Barney*
**SIRI & GLIMSTAD LLP**
745 Fifth Avenue, Suite 500
New York, New York 10151
Tel: (212) 532-1091
mbarney@sirillp.com

*Additional Plaintiffs' Counsel*
**Admission Pending*

## CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2022, I electronically filed the foregoing documents using the Court's electronic filing system, which will notify all counsel of record authorized to receive such filings.

*/s/ E. Powell Miller*
E. Powell Miller (P39487)
**THE MILLER LAW FIRM, P.C.**
950 W. University Dr., Ste. 300
Rochester, MI 48307
Tel: (248) 841-2200
epm@millerlawpc.com

**INDEX OF EXHIBITS**

| | |
|---|---|
| Exhibit A | Declaration of E. Powell Miller |
| Exhibit B | *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188 (6th Cir. 1974) |
| Exhibit C | *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269 (6th Cir. 2016) |
| Exhibit D | *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508 (E.D. Mich. 2003) |
| Exhibit E | Proposed Order |

# Exhibit A

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

IN RE WRIGHT & FILIPPIS, LLC DATA SECURITY BREACH LITIGATION

Case No: 2:22-cv-12908-SFC

Hon. Sean F. Cox

**CLASS ACTION**

**DECLARATION OF E. POWELL MILLER IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND SERVICE AWARDS**

I, E. Powell Miller, pursuant to 28 U.S.C. § 1746 hereby declare as follows:

1. I am the Founding Partner of The Miller Law Firm, P.C., located in Rochester and Detroit, Michigan and I am Chair of Settlement Class Counsel[1] in this Action. I am a member in good standing of the Michigan Bar and a member of the bar of this Court. I have personal knowledge of the facts set forth in this declaration and, if called as a witness, I could and would testify competently thereto.

2. I make this declaration in support of Plaintiffs' Unopposed Motion for Attorneys' Fees, Costs, Expenses, and Service Awards, filed herewith.

3. This case arises from a data breach (the "Data Breach") experienced by Wright & Filippis, LLC ("W&F" or "Defendant") on or about January 26, 2022 to

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[1] References to the collective counsel for Plaintiffs herein will be "Class Counsel."

January 28, 2022, that involved the potential unauthorized access of Personally Identifiable Information ("PII") and Private Health Information ("PHI"). Defendant initially believed that roughly 877,584 individuals were affected by the Data Breach (following the Court's Order granting preliminary approval of class action settlement, and review of the class list provided by Defendant, including de-duplication, the Claims Administrator determined that there are approximately 785,879 individuals in the Settlement Class).

4. Plaintiff Chiquita Braggs initiated this action against W&F by filing a complaint on behalf of herself and a class of other similarly situated individuals on November 30, 2022. ECF No. 1.

5. Beginning on December 1, 2022 and continuing through February 21, 2023, seven additional related complaints were filed against W&F. *See Mejia v. Wright & Filippis, Inc.*, No. 2:22-cv-12914-SFC (filed Dec. 1, 2022); *Cullin v. Wright & Filippis LLC*, No. 2:22-cv-12917-MFL (filed Dec. 1, 2022); *Thomason v. Wright & Filippis LLC*, No. 2:22-cv-12946-MFL (filed Dec. 5, 2022); *Hamilton v. Wright & Filippis, Inc.*, No. 2:22-cv-12961-VAR (filed Dec. 7, 2022); *Kolka, et al. v. Wright & Filippis, LLC*, No. 1:22-cv-12982-SFC (filed Dec. 9, 2022); *Eckel, et al. v. Wright & Filippis, LLC*, No. 2:22-cv-13023-TLL-PTM (filed Dec. 14, 2022); *Hayes, et al. v. Wright & Filippis, LLC*, No. 2:23-cv-10438-SFC (filed Fe. 21, 2023).

6. Prior to filing this action, my firm and other counsel for Plaintiffs conducted comprehensive pre-filing investigations concerning every aspect of the factual and legal issues underlying this action.

7. After discussion among counsel for the Plaintiffs in the related cases that had been filed by January 9, 2023, the Plaintiffs filed a motion to consolidate the cases under this case number. Joint Motion to Consolidate, ECF No. 8. On January 25, 2023, the Court granted this relief. Order Granting Consolidation, ECF No. 9. On February 24, 2023, Plaintiffs filed a Consolidated Amended Class Action Complaint ("CAC") on behalf of themselves and all others similarly situated on February 24, 2023. ECF No. 13. On March 3, 2023, the later-filed *Hayes* was consolidated into this action as well. ECF No. 15.

8. On April 10, 2023, W&F filed a motion to dismiss the CAC in its entirety. ECF No. 25. Plaintiffs filed their opposition on May 10. ECF No. 29.

9. Shortly thereafter, the Parties discussed the possibility of early resolution via mediation. To that end, the Court granted the Parties' stipulation to stay the proceedings pending mediation on May 26, 2023. ECF No. 34. The Parties subsequently set a mediation for August 9, 2023, with mediator Judge Wayne Andersen (ret.) of JAMS.

10. Prior to attending mediation, Plaintiffs drafted and served detailed pre-mediation discovery requests pertaining to the following areas of inquiry: cyber-

forensic reports, internal investigations, correspondence with government regulatory agencies, number of persons affected by the Data Breach, security measures taken post-Data Breach, the types of PII and PHI compromised during the Data Breach, the amount of insurance coverage, evidence of fraud or misuse, and a breakdown on various demographics of people affected by the Data Breach. W&F also served its own set of requests for documents and information on Plaintiffs, to which Plaintiffs responded on July 31, 2023.

11. Defendant produced its pre-mediation responses with sufficient time for Class Counsel to thoroughly evaluate and include it in their analysis of liability and damages. This pre-mediation information was utilized by both parties to draft and exchange mediation briefs outlining their respective positions.

12. The parties were unable to reach an agreement after a full day mediation with Judge Andersen held on August 9, 2023. However, each side subsequently accepted Judge Andersen's mediator proposal to settle the case for a $2,900,000 Settlement Fund to be created by Defendant. The Settlement Agreement ("S.A.") was executed on October 13, 2023. *See* ECF No. 40-2.

13. The Settlement Fund benefits will be distributed to Settlement Class Members pursuant to S.A. § 3.2 (ability to select one of three options) and the Notice and Distribution Plan (S.A. §§ 3.7, 6), less any amounts used to make payments for attorneys' fees, costs, expenses, and service awards.

14. If the case had not settled at mediation, the Parties would have completed their briefing on Defendant's pending motion to dismiss.[2] The Parties would have commenced formal discovery, and, assuming that the motion to dismiss was not granted, Plaintiffs would have had to prepare the case for class certification, summary judgment, and trial. Undoubtedly, further litigation would create substantial risks that the Class would not be certified and/or that the Class Members would recover significantly reduced relief or nothing at all.

15. All of the Plaintiffs' law firms working on this case are doing so on a contingency fee basis; none of them have received any reimbursement to date for their time or advanced expenses.

16. As noted, Class Counsel conducted an extensive pre-filing investigation into the relevant facts and legal issues, which was informed by the vast experience and expertise that they had accumulated during the prosecution of numerous other data breach cases. Specifically, the aforesaid extensive efforts include combining the complex cyber-science behind the Data Breach and the applicable law, so as to prepare and litigate this case. This included the investment of significant time, effort, and resources to this litigation without compensation.

[2] Prior to the mediation, the Parties had stipulated to extend W&F's responsive pleading deadline, so that W&F could file its pending reply brief if the August 9th mediation was unsuccessful. ECF No. 34.

Class Counsel, for example, paid for the mediation with retired Judge Andersen with no guarantee of reimbursement.

17. While Class Counsel was cognizant of the risk of nonpayment, they nonetheless embarked on a fact-intensive investigation of Defendant's practices, filed the pertinent cases, worked to consolidate related cases, engaged in settlement discussions with Defendant, exchanged informal discovery, engaged in contentious motion practice, drafted and filed an amended complaint, and proceeded to mediation.

18. Class Counsel invested this time and resources into the case despite the significant and inherent risk of nonpayment. Given the defenses mounted by Defendant—led by highly qualified and competent counsel, who regularly defend complex class action data breach cases—success on the relevant legal issues was far from certain. Class Counsel understands that the Court could have granted Defendant's motion to dismiss, or in the alternative, Defendant could have opposed class certification pursuant to Rule 23 (including appeal under subsection (f)), obtained summary judgment, trial, and/or post-judgment relief.

19. As a result of the work Class Counsel devoted to this litigation, their law firms were forced to forgo representing clients in other matters that they otherwise would have taken on. In sum, the Court should not view this Settlement, or even this case, in a vacuum, but rather as part of a multi-year project in which

counsel devoted substantial time, money, and other resources for the benefit of the Class—all on a contingency basis and without any guarantee of recovering fees for their work or being reimbursed their out-of-pocket expenses.

20. The result that Class Counsel obtained here, and the efficiency with which they obtained it, would have been impossible without the significant investments of resources that Class Counsel devoted in prosecuting other data breach cases over a number of years, which provided Class Counsel with the knowledge, experience, and jurisprudence to achieve the present Settlement. The Class Members therefore benefited from Class Counsel's extensive analysis into the Data Breach here and the law governing the applicable issues, the significant time and other resources (thousands of hours) that Class Counsel expended prosecuting related matters, and developing favorable jurisprudence on issues of critical important to the claims alleged herein.

21. Moreover, Plaintiffs Chiquita Braggs, Scott Hamilton, Diane Huff, Shawn Kolka, and Craig Mejia spent considerable time protecting the interests of the Class through their involvement in this case.

22. Specifically, each Plaintiff assisted their respective counsel with the investigation of their claims, aided in drafting and reviewing their respective complaints, and examined and ultimately approved the Consolidated Amended Complaint. Further, all of the Plaintiffs preserved documents that they would need

to render to Defendant in discovery, and each Plaintiff was consulted and remained actively engaged throughout the settlement process. And, as noted above, Plaintiffs responded to Defendant's pre-mediation requests for documents and information.

23. In recognition of the time, effort, and expense Plaintiffs incurred in pursuing the claims benefiting the Settlement Class, Plaintiffs respectfully request approval of a $1,500 service award to each Named Plaintiff in recognition of their efforts on behalf of the Settlement Class as a Class Representative.

24. Class Counsel further recommends that the Court award the requested attorneys' fees, costs, and expenses. As set forth in the accompanying brief, the requested attorneys' fee amount of 33 and 1/3% of the Settlement Fund is fair and reasonable under the facts and circumstances of this litigation and the Sixth Circuit's Six-Factor Test, is aligned with the average percentage afforded in analogous class action settlements, and is also commensurate with percentage fees awarded in other class action cases in this judicial district.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 25th day of March 2024, in Rochester, Michigan.

*<u>/s/ E. Powell Miller</u>*
E. Powell Miller

# Exhibit B

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Willner v. Syntel, Inc., E.D.Mich., May 2, 2017

508 F.2d 1188
United States Court of Appeals, Sixth Circuit.

Jean Whitehouse RAMEY, Plaintiff-Appellee,
v.
The CINCINNATI ENQUIRER, INC., and American Financial Corporation,Defendants-Appellants.
Angiolina MORELLI, Plaintiff-Appellee,
v.
The CINCINNATI ENQUIRER, INC., and American Financial Corporation,Defendants-Appellants.
Albert HARRIS, Plaintiff-Appellee,
v.
The CINCINNATI ENQUIRER, INC., and American Financial Corporation,Defendants-Appellants.
Jean W. RAMEY et al., Plaintiffs-Appellees,
v.
The E. W. SCRIPPS COMPANY et al., Defendants-Appellants.
Cecil F. SCHOEN, a.k.a. Cecile F. Schoen, Plaintiff-Appellant and Cross-Appellee,
v.
The CINCINNATI ENQUIRER, INC., et al., Defendants-Appellees and Cross-Appellants (3 cases).

Nos. 74-1110 to 74-1116.
|
Dec. 26, 1974.

**Synopsis**

Stockholder derivative suits wherein plaintiffs challenged legality of plan to purchase stock being divested by controlling shareholder. Suits were dismissed on grounds of mootness after trial but before adjudication and, thereafter, the United States District Court for the Southern District of Ohio, Western Division, David S. Porter, J., entered an order granting attorneys' fees and appeals were taken. The Court of Appeals, Harry Phillips, Chief Judge, held that derivative suits were of such benefit to corporation as to justify an award of attorneys' fees, that award of $750,000 in attorneys' fees was not an abuse of discretion under circumstances, that there were no legal grounds for the $115,000 award of 'prejudgment interest,' that judgment was modified to allow interest on award of attorneys' fees from date of entry, that there was no legal basis for awarding any part of attorneys' fees against controlling group or against minority shareholders in absence of an adjudication of fraud or misconduct, and that district court did not abuse its discretion in declining to accept pendent jurisdiction over cross claim wherein defendants sought to recover attorneys' fees and other expenses incurred by them in trial of cases.

Judgment modified in part, vacated in part, and otherwise affirmed, and case remanded.

West Headnotes (9)

**[1]** **Corporations and Business Organizations** Corporate benefit

Derivative suits, which challenged legality of proposed plan for purchasing stock being divested by majority stockholder and which were dismissed on grounds of mootness after trial but before adjudication, were of such benefit to corporation as to justify an award of attorneys' fees, even though no fund was brought into court and even though it may have been impossible to assign an exact monetary value to benefit conferred upon corporation, where there was evidence from which to conclude that plan was of such a high risk that it would have produced no corporate benefit for corporation commensurate with substantial debt that it would have assumed. R.C.Ohio § 1701.35; Securities Exchange Act of 1934, §§ 10(b), 14(a), 15 U.S.C.A. §§ 78j(b), 78n(a).

9 Cases that cite this headnote

**[2]** **Attorneys and Legal Services** Measure and Amount of Compensation; Value of Services

In determining the value of services rendered by lawyers who have tried a case before the court, a trial judge ordinarily has an infinitely better opportunity to evaluate those services than does an appellate court, and determinations made by judge on issue should not be set aside unless there is a clear abuse of discretion.

4 Cases that cite this headnote

**[3]** **Corporations and Business Organizations** Costs and Attorney Fees

Considerations that enter into fixing of reasonable attorneys' fees by court in a derivative suit include value of benefit rendered to corporation or its stockholders, society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others, whether services were undertaken on a contingent fee basis, value of services on an hourly basis, complexity of litigation, and professional skill and standing of counsel involved on both sides. R.C.Ohio § 1701.35; Securities Exchange Act of 1934, §§ 10(b), 14(a), 15 U.S.C.A. §§ 78j(b), 78n(a).

164 Cases that cite this headnote

**[4]** **Corporations and Business Organizations** Costs and Attorney Fees

Award of $750,000 in attorneys' fees in derivative suits that were dismissed on grounds of mootness after trial but before adjudication was not an abuse of discretion where benefits to corporation from litigation were substantial and, further, public had a stake in litigation, which was both difficult and complex, counsel for both sides were competent and of high standing in their profession, and contingent fee agreements could not possibly have compensated plaintiffs' counsel, or encouraged others, in relation to services performed. R.C.Ohio § 1701.35; Securities Exchange Act of 1934, §§ 10(b), 14(a), 15 U.S.C.A. §§ 78j(b), 78n(a).

40 Cases that cite this headnote

**[5]** **Interest** Particular cases and issues

Allowing prejudgment interest of $115,000 in stockholder derivative suits that were dismissed on grounds of mootness after trial but before adjudication was not legally justified where there was no evidence of fraud or overreaching, nor evidence of dilatory tactics or purposeful delay on part of defendants, and counsel for plaintiffs were otherwise amply compensated for their services by attorneys' fees awarded. R.C.Ohio § 1701.35; Securities Exchange Act of 1934, §§ 10(b), 14(a), 15 U.S.C.A. §§ 78j(b), 78n(a).

6 Cases that cite this headnote

**[6]** **Corporations and Business Organizations** Corporate benefit

If minority stockholder proceeds at his own expense in a derivative action resulting in a substantial benefit to corporation, he is entitled to recover reasonable counsel fees from corporation that has benefitted from his efforts. R.C.Ohio § 1701.35; Securities Exchange Act of 1934, §§ 10(b), 14(a), 15 U.S.C.A. §§ 78j(b), 78n(a).

2 Cases that cite this headnote

**[7]** **Corporations and Business Organizations** Costs and Attorney Fees

The obligation to reimburse a shareholder who brings a successful derivative suit is an obligation of the corporation. R.C.Ohio § 1701.35; Securities Exchange Act of 1934, §§ 10(b), 14(a), 15 U.S.C.A. §§ 78j(b), 78n(a).

3 Cases that cite this headnote

**[8]** **Corporations and Business Organizations** Costs and Attorney Fees

Fact that group with controlling interest in corporation and minority stockholders profited from sale of their stock at higher prices than those provided in original contract was no basis for assessing against them any part of attorneys'

fees awarded to counsel who filed derivative actions on behalf of corporation absent a finding that group or minority stockholders acted fraudulently or in bad faith, vexatiously, wantonly, or for oppressive reasons. R.C.Ohio § 1701.35; Securities Exchange Act of 1934, §§ 10(b), 14(a), 15 U.S.C.A. §§ 78j(b), 78n(a).

[9] **Federal Courts** Counterclaims, cross-claims, and third-party practice

Refusal to accept pendent jurisdiction over cross claim wherein defendants sought to recover attorneys' fees and other expenses incurred by them in trial of derivative suits that were dismissed on grounds of mootness after trial but before adjudication was not an abuse of discretion.

2 Cases that cite this headnote

**Attorneys and Law Firms**

***1190** John A. Lloyd, Jr., Frost & Jacobs, John L. Muething, Louis F. Gilligan, Cincinnati, Ohio, for appellants in Nos. 74-1110 to 74-1113.

Jerome Goldman, Douglas G. Cole, C. R. Beirne, Cincinnati, Ohio, for appellee in No. 74-1110.

Arnold Morelli, Cincinnati, Ohio, for appellee in No. 74-1111.

Irving Harris, Cincinnati, Ohio, for appellee in No. 74-1112.

James W. Henglebrok, Cincinnati, Ohio, Richard F. Stevens, H. Stephen Madsen, Baker, Hostetler & Patterson, Cleveland, Ohio, for appellants in Nos. 74-1114, 74-1115 and appellees in No. 74-1116.

C. R. Beirne, Cincinnati, Ohio for appellees in No. 74-1114.

Ambrose H. Lindhorst, Gene Mesh, Cincinnati, Ohio, David C. Bayne, Professor of Law University of Iowa College of Law, Iowa City, Iowa, for appellees in No. 74-1113.

Ambrose H. Lindhorst, Gene Mesh, Cincinnati, Ohio, for appellees in No. 74-1115 and appellants in No. 74-1116.

Before PHILLIPS, Chief Judge, and EDWARDS and McCREE, Circuit Judges.

**Opinion**

PHILLIPS, Chief Judge.

These are appeals from an order granting attorneys' fees in four stockholder derivative suits that were dismissed on grounds of mootness after trial but before adjudication. The District Judge's order awarded a total of $865,000 in attorneys' fees and $35,115.96 in expenses to be paid to plaintiffs' attorneys in four cases by defendants Enquirer[1] and Scripps,[2] with a contribution of $145,375.00 on the part of the minority shareholders to be paid by American Financial Corporation.[3]

This litigation had its genesis in an antitrust action filed against the E. W. Scripps Company by the Department of Justice in 1964. The Scripps-Howard interests, ***1191** while owning Cincinnati's only evening newspaper, The Cincinnati Post and Times Star, also acquired the majority interest in the stock of The Cincinnati Enquirer, Cincinnati's only morning newspaper. The antitrust action was tried before the same District Judge who rendered the judgment involved in the present appeal and was terminated by a consent decree requiring that Scripps divest itself within 18 months of its controlling interest in the Enquirer.

Early in 1970 the management of the Enquirer, ultimately supported by a majority of the minority shareholders, put together a bid to Scripps-Howard to purchase Scripps-Howard's 60 per cent share of the Enquirer stock. A stock acquisition agreement was signed which provided that the Enquirer would purchase all of the Enquirer stock owned by Scripps-Howard at $35 per share, 11 1/2 million dollars to be paid in cash and the balance to be paid by the issuance of 60,000 shares of preferred stock.

The details of the plan and its proposed financing by the Prudential Life Insurance Co. of America were as follows:

1) The Enquirer would purchase directly from the Scripps group 330,558 Enquirer shares at $35 a share, totalling $11,569,530.

2) Of this sum the Enquirer was to borrow $10,500,000 from the Prudential Life Insurance Co., to be repaid at 12 per cent interest over 16 years.

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3) The balance of 171,428 shares owned by the Scripps group would be purchased by the Enquirer by issuance and exchange of 60,000 newly authorized shares of convertible preferred stock that Scripps then agreed to sell (and Prudential by separate contract agreed to buy) for $6,000,000 in cash. The Enquirer would be obligated to pay a yearly dividend of $7.65 on each share of preferred stock and to redeem a minimum of 3,000 shares a year at $110 per share.

4) Under this arrangement the Prudential Life Insurance Co. would have invested $16,500,000, on which the Enquirer would be required to pay a return of 12 per cent on the loan and about ten per cent on the preferred stock. On default of the Enquirer's obligation on either the preferred stock or the debt, Prudential could acquire the entire assets of the Enquirer.

5) The Enquirer was able to contribute only one million dollars from its working capital to accomplish this purchase.

6) The redemption of preferred stock, plus the interest on the loan, would equal about one and one-half million dollars a year. Previously the Enquirer had been netting about two million dollars each year after taxes.

7) No provision was made for any offer to the minority stockholders of the Enquirer. At a stockholders' meeting on October 23, 1970, the stock acquisition plan described above was approved by a vote of 222,930 to 75,307, with the Scripps' 60 per cent of the shares not voting.

In October 1970 three stockholders' derivative suits (Ramey, Morelli and Harris) were filed to set aside this stock purchase plan, alleging, among other things, that the proxy statement contained untrue and misleading statements of material fact and that the plan violated various provisions of both federal and Ohio law.[4] Two of these suits (Ramey and Morelli) were filed before the stockholders' meeting and resulted in the order of the District Court on October 22 enjoining the execution of the purchase agreement until further order. The derivative action of Harris was filed on October 26. Later in November an action was filed on behalf of a stockholder named Schoen. This suit also attacked the acquisition agreement, essentially contending that the proposed transaction was fraudulent.

***1192** The cases were tried for about two months, concluding January 18, 1971. Ten days after the trial and before any opinion had been announced, the litigation was mooted when Scripps, making use of an escape clause in the acquisition agreement, terminated its proposed deal with the Enquirer group. This termination by Scripps was prompted by a bid of $35 a share (the same figure as the Enquirer bid, but extended to all minority shareholders) from a California-based trading stamp company called Blue Chip Stamps. Thereafter, and before the court had acted on a petition by the United States and the Enquirer to require the Scripps group to extend the Enquirer agreement, the American Financial Corporation offered Scripps-Howard $40 per share for its 60 per cent interest in the Enquirer's stock and offered the same amount per share to all of the minority shareholders. This offer was accepted by Scripps-Howard. AFC proceeded to acquire the entire Scripps-Howard interest and ultimately all of the minority shares.

The District Judge subsequently issued an informal opinion disclosing the findings of fact that he would have made and the conclusions of law that he would have entered had the case not been mooted. He then heard and decided the requests by the different attorneys for attorneys' fees.

In his fee opinion, the District Judge described the Emquirer-Scripps deal, as originally proposed, in the following language:

‘However, it is to be noted that the transaction would have changed the Enquirer stock from ‘safe’ to ‘risky’ or ‘high leverage.’ And the Enquirer-Scripps deal was accurately described as ‘thin.’ As stated by one of the Enquirer directors, it was no deal for ‘widows or orphans.“

In the same opinion he also said in part:

‘The purchase by a corporation of its own shares has a potential for abuse, and restrictive legislation has therefore grown up to meet the need to prevent such abuse. Hence, any time a corporation attempts to purchase its own shares, especially on a shoestring, the transaction has to be cast in a form which meets the legal requirements and a number of extremely difficult questions in the area of corporate law and finance arise. One restriction on purchase by a corporation of its own shares is the Impairment of Capital Statute, Ohio Revised Code 1701.35, which provides that after such purchase the ‘debts' of the corporation must not exceed its assets plus ‘stated capital.’ That explains why only so much money could be borrowed from Prudential and the balance had to be raised by sale of preferred stock which could be determined to be ‘equity’ and not ‘debt.’ In this case the preferred stock had warrants, voting powers, conversion privileges, redemption and other rights, and a difficult and serious question was presented as to whether, though cast in the form of ‘equity,’ it was not in law and in fact ‘debt.’ If the shares were ‘debt,’ the assets of the Enquirer after the

purchase of the Scripps shares would not have exceeded debts plus stated capital as required by ORC 1701.35, and the deal would have been illegal.

'That was just one of many complex questions. Another involved the corporate power and many others arose in connection with the proxy statement and the claims that statements therein were materially misleading. One of these was it was not accurate in its portrayal of the effect of the deal on the Enquirer's ability to pay dividends and its dividend policy. Another was that in describing the effect of the plan on the book value of the Enquirer stock (proxy statement, p. 6) instead of a drop from plus $15.42 per share to 'none,' the proxy statement should have shown a drop from $15.42 to minus $13.07. 'In the Enquirer case, by deciding to change stated capital as proposed from ***1193** $5 per share to $1 per share, the shareholders were saying in effect they chose to embark on the proposed corporate venture and in order to do so to completely change the capital structure of the Enquirer, eliminate the shareholders' equity, change its stock from 'safe' to 'risky,' and agreed to pay for the outstanding shares out of future earnings.

'We also considered the commentary and the chapter on the Model Corporation Act— the commentary to 5, 'Right of corporation to acquire and dispose of its own shares.' This points out that most statutes, like the Model Act, provide in substance that a corporation's own shares shall be purchased only out of surplus except in special situations specified in the statute. And of the many cases, one which we found noteworthy is Mountain States (State) Steel Foundries, Inc. v. C.I.R., 284 F.2d 737 (5 (4) Cir., 1960), where an impairment statute similar to Ohio's was under the glass.

'This should suffice to underline that a proposed acquisition of the Enquirer of its own shares, cast in the form it was, was not only 'thin' financially, but legally as well.

'As to economic benefit, while there is dispute, this much can be said. If the Enquirer had purchased the Scripps shares, that is, if the plan had not been restrained, the Enquirer would have paid out $17.5 million in principal and would have lost the income on investments owned by it which had to be liquidated to apply on the purchase price of the stock in the sum of $1,026,748. In addition, the Enquirer would have obligated itself to interest payment on the loan of $15,975,000, and dividend payments on preferred stock of $4,590,000, and payment of premiums on required preferred stock redemption of $600,000, which payments would have totaled $22,191,748, in addition to the $17.5 million in principal previously stated. Also, as to economic benefit, it can be said that the corporation, as Mr. Goldman contended, received nothing for the $17.5 million it paid for its own stock, or would have paid. If the deal had gone through, the book value of the stock would have gone from plus to minus, and it is probable the market value would have gone way down, at least temporarily. An incidental benefit conferred on the shareholders was that in the time it took to litigate Scripps kept its option open, and along came the Blue Chip offer to all shareholders for $35 a share, and the AFC offer to all shareholders of $40 a share, the difference between $40 and $35 being about. $2.5 million or more to Scripps alone.

'Nevertheless, in fixing the fee we have not gone on the assumption that there is an identifable fund, such as the interest on the obligation to Prudential. We have concluded that as far as economic benefit and other ways this case is unique, and, while we conclude that a significant service was performed by the applicants, and there is strong evidence of economic benefit, especially in the testimony . . .'

The District Judge then proceeded to decide the claims of the different attorneys for fees. He noted that the claims had totaled a maximum of $1,750,000. His award was less than half of that sum, $750,000, augmented by $115,000 of prejudgment interest, an item contended by appellants to be unprecedented on these facts. The District Judge also ordered that ten per cent of the fee be awarded to Mesh, the attorney for Schoen, with the balance to be divided one-third each to the three law firms representing Ramey, Morelli and Harris, respectively. He also ordered that $326,290.90 be paid by the Scripps-Howard group, $393,333,60, plus $35,115.95 expenses, by the Enquirer, and $145,375.50 by American Financial Corp., which had, by court order, withheld $2.00 a share for legal fees when it bought the shares of the minority stockholders.

***1194** The principal appellate issues appear to us to be these:

1) Did this litigation produce such a benefit for the corporation (The Cincinnati Enquirer, Inc.) as to justify the award of fees?

2) Did the District Judge abuse his discretion by awarding excessive fees?

3) Was the award of prejudgment interest legally justified?

4) Assuming attorneys' fees were justified in some sum, could they legally be awarded against any party other than the Enquirer?

5) Did the District Judge commit error in dismissing the Scripps-Howard indemnity cross-claim against the Enquirer and AFC?

1) The Corporate and Stockholder Benefit

The District Court's proposed findings of fact and conclusions of law in the original derivative actions found violations of state and federal laws that would have required preparation of an amended proxy statement and resubmission of the acquisition plan to the Enquirer shareholders. It is clear to this court that the District Judge made no findings of deliberate concealment or fraud. It also is clear that although appellants describe the violations found by the District Judge as 'technical,' nonetheless they would have served to require disclosures that would have alerted the Enquirer's minority stockholders further concerning the financial burden that their corporation was undertaking to assume.

There was testimony before the District Judge from which he could have concluded, as he did, that the Enquirer's management was proposing a high-risk plan. The cash payment of over one million dollars would have depleted the Enquirer's working capital, thereby impairing liquidity. The $16,500,000 obligation to Prudential, including the loan and the preferred stock, was about equal to the total asset value of the Enquirer. The plan would have raised the Enquirer's debt ratio to about 90% From a relatively low 21%. It is clear that such a highly leveraged capital structure could bring about a financial disaster if the Enquirer suffered even a temporary decline in revenues. The District Judge had ample reason to doubt that Enquirer earnings could service the Prudential loan and at the same time meet the preferred stock dividend and redemption requirements. Finally, we note that the plan of acquisition would have produced no corporate benefit for the Enquirer commensurate with the substantial debt that it would have assumed.

As we see the matter, plaintiffs' derivative suits succeeded in delaying consummation of the risky repurchase plan until two other companies made offers that would have accomplished the Scripps-Howard divestiture without the adverse effect upon the Enquirer's capital structure. Further, insofar as the derivative actions exposed inaccuracies and misleading statements in the proxy materials, this litigation constituted 'corporate therapeutics,' which benefits both the corporation and its stockholders. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). The plaintiffs' efforts also conferred an incidental benefit upon all of the Enquirer's shareholders. Had the initial repurchase plan not been delayed, the more attractive AFC offer presumably would not have been made.

On the record before us, we cannot hold clearly erroneous the findings of the District Court that the plaintiffs' suits resulted in a substantial benefit to the Enquirer. Fed.R.Civ.P. 52(a).

**[1]** We conclude that the services performed by plaintiffs' attorneys justify an award of fees, even though no fund has been brought into court and even though it may be impossible to assign an exact monetary value to the benefit conferred upon the corporation. In this respect the present case is controlled by Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), in which the Supreme Court outlined the following definitive view on the award ***1195** of attorneys' fees when no specific fund has been produced by the litigation:

'While the general American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery. A primary judge-created exception has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself. See Fleischmann Corp. v. Maier Brewing Co., 386 U.S. (714), at 718-719 (87 S.Ct. 1404, at 1408, 1409, 18 L.Ed.2d 475). To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense. This suit presents such a situation. The dissemination of misleading proxy solicitations was a 'deceit practiced on the stockholders as a group,' J. I. Case Co. v. Borak, 377 U.S. (426), at 432 (84 S.Ct. 1555, at 1560, 12 L.Ed.2d 423), and the expenses of petitioners lawsuit have been incurred for the benefit of the corporation and the other shareholders.

'The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a 'common fund' for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses.

. . . .ion

'Other cases have departed further from the traditional metes and bounds of the doctrine, to permit reimbursement in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them. This development has been most pronounced in shareholders' derivative actions, where the courts increasingly have recognized that the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in the corporation's favor. For example, awards have been sustained in suits by stockholders complaining that shares of their corporation had been issued wrongfully for an inadequate consideration. A successful suit of this type, resulting in cancellation of the shares, does not bring a fund into court or add to the assets of the corporation, but it does benefit the holders of the remaining shares by enhancing their value. Similarly, holders of voting trust certificates have been allowed reimbursement of their expenses from the corporation where they succeeded in terminating the voting trust and obtaining for all certificate holders the right to vote their shares. In these cases there was a 'common fund' only in the sense that the court's jurisdiction over the corporation as nominal defendant made it possible to assess fees against all of the shareholders through an award against the corporation.

'In many of these instances the benefit conferred is capable of expression in monetary terms, if only by estimating the increase in market value of the shares attributable to the successful litigation. However, an increasing number of lower courts have acknowledged that a corporation may receive a 'substantial benefit' from a derivative suit, justifying an award of counsel fees, regardless of whether the benefit is pecuniary in nature.

. . . .owl

***1196** 'In many suits under 14(a), particularly where the violation does not relate to the terms of the transaction for which proxies are solicited, it may be impossible to assign monetary value to the benefit. Nevertheless, the stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders.' Id. at 391-396, 90 S.Ct. at 625-627.)

Moreover, the fact that these suits became moot does not preclude recovery of attorneys' fees. So long as a substantial benefit is conferred upon the corporation, it is not necessary that the litigation be brought to a successful completion. Kahan v. Rosenstiel, 424 F.2d 161, 167 (3d Cir.), cert. denied, 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970); see Blau v. Rayette-Faberge, Inc., 389 F.2d 469, 473-474 (2d Cir. 1968).

We have no doubt that the District Court was warranted in awarding counsel fees to plaintiffs' attorneys.

2) Reasonableness of Fees

**[2]** The trial judge in determining the value of services rendered by lawyers who have tried a case before him ordinarily has an infinitely better opportunity to evaluate those services than does an appellate court. Therefore, appellate courts hold that the trial judge's determinations on legal fees should not be set aside unless there is a clear abuse of discretion.

In an early case the United States Supreme Court stated this principle clearly:

'The conclusion to which we have come is that, under the circumstances of this case, the Circuit Court had the power, in its discretion, to allow to the complainant, Vose, his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund and causing it to be subjected to the purposes of the trust. The allowances made for these purposes we have examined, and do not find anything therein seriously objectionable. The court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have.' Trustees v. Greenough, 105 U.S. 527, 537, 26 L.Ed. 1157 (1881)

**[3]** This circuit over the years has pointed out the considerations that enter into the fixing of reasonable fees by the court. They include 1) the value of the benefit rendered to the corporation or its stockholders, 2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others, 3) whether the services were undertaken on a contingent fee basis, 4) the value of the services on an hourly basis, 5) the complexity of the litigation, and 6) the professional skill and standing of counsel involved on both sides. Denney v. Phillips & Buttorff Corp., 331 F.2d 249 (6th Cir.), cert. denied, 379 U.S. 831, 85 S.Ct. 61, 13 L.Ed.2d 39 (1964); Pergament v. Kaiser-Frazer Corp., 224

F.2d 80 (6th Cir. 1955); In re Detroit Int'l Bridge Co., 111 F.2d 235 (6th Cir. 1940).

Denney presents a fact situation quite similar to the instant case in that no cash fund ever was developed from which fees could be paid:

'The derivative action concerned the purchase by the respondent of 60,000 shares of stock, owned by the controlling stockholders, in Wm. R. Moore Dry Goods Company for $2,700,000. While the derivative action was pending and before it was assigned for trial, the officers and directors rescinded the purchase of the Moore stock. On the former appeal we held that the purchase of the stock, at least, constituted constructive fraud. On remand we instructed the District Court to require the defendants (officers and directors of the respondent) to pay to the respondent interest on $2,700,000 from the date of the commencement of the action to the date of rescission and to fix attorneys' fees for the petitioners. ***1197** We held that the fact that the defendants rescinded the transaction before the court had an opportunity to pass upon the merits of the case would not defeat the right of counsel to compensation.

'The trial judge entered judgment for interest in the sum of. $40,800. Counsel for the respondent claim that this was the only fund recovered for the corporation. They further claim that under Tennessee law an allowance of attorneys' fees must be limited to an amount commensurate with this recovery. In support of this theory, counsel cite Southern v. Beeler, Atty. Gen., 183 Tenn. 272, 195 S.W.2d 857. More relevant to the issue in this case is Grant v. Lookout Mountain Co., 93 Tenn. 691, 28 S.W. 90, 27 L.R.A. 93. There the court held that since the minority stockholders by their action had benefited the corporation, it was therefore responsible for proper and reasonable attorneys' fees. The court further determined that the attorneys were entitled to a lien for their fees upon the land conveyed by the deeds which were canceled by the action of the minority stockholders.

'It cannot be said that the cancellation of the purchase of the Moore stock did not result from the action of the minority stockholders. Its cancellation inured to the benefit of the corporation by restoring $2,700,000 in assets in lieu of the Moore stock. After the rescission of the purchase of the Moore stock, or its resale, the trial judge entered an order impounding $270,000 of the corporation's funds out of which attorneys' fees might be paid. This order was made without prejudice to the contentions of any of the parties.

'The court granted judgment in favor of the petitioners for $235,000 attorneys' fees and for $6,227.98 expenses. The trial judge found that the services were of vest proportions and that they were effective. He took into consideration the time spent by the lawyers, the complexity of the legal questions involved, the results accomplished, the professional standing of petitioners, and the professional standing of respondent's lawyers. He viewed the transaction in its entirety based upon all the facts in the case. The judge also took into account the public policy aspect to stockholders' derivative action, i.e., that they serve a good purpose and should be encouraged rather than discouraged.' Id. 331 F.2d at 250-251.

The District Judge in the instant case found on substantial evidence that this was difficult and complex litigation, that the public had a stake in this and similar litigation, that the lawyers on both sides were competent and of high standing in their profession, and that plaintiffs' lawyers had contingent agreements that could not possibly compensate them (or encourage others) in relation to the services performed.

On the subject of amount of fees, the plaintiffs relied upon three witnesses, Mr. Jerome Goldman, Mr. James D. St. Clair, and Mr. Henry P. Jeffrey— all capable and experienced attorneys of excellent reputation. Their opinions as to fees earned in the subject litigation were $1,750,000, $1,500,000 and $1,250,000, respectively.

**[4]** It does not appear to this court that the defendants ever really anticipated escaping from payment of substantial attorney fees.[5] They called as expert witnesses the Honorable Earl Morris, former President of the American Bar Association, and Mr. Thomas Conlan, a prominent member of the Cincinnati Bar. Morris' total estimate of an appropriate fee was just under $400,000 and Conlan's was $465,000. While the $750,000 awarded by the District Judge exceeds the defendants' estimates, it is approximately ***1198** half of the plaintiffs' claims. As we have pointed out, the District Judge found that defendants' benefit from this litigation was substantial. He did not pin a specific figure upon the benefit, but he had before him testimony that would have allowed a finding of between $7,500,000 and $17,500,000. We find no abuse of discretion in the District Court's award of the sum total of fees.

We have considered the subsidiary argument between the attorneys for plaintiffs in the consolidated cases, who had stipulated to an equal division of fees between three firms representing Ramey, Morelli and Harris, and attorney Mesh


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in the Schoen case. Similarly, we find no abuse of discretion, and no basis in law or fact for either setting aside or increasing the ten percent of the total fee awarded to Mesh, the attorney for plaintiff Schoen.

3) Prejudgment Interest

**[5]** This court, however, finds no legal grounds for the $115,000 award of 'prejudgment interest.' The District Court said:

'In fixing the amount of the award now the Court must also take into account the fact that it should have been fixed sixteen months ago, and would have been but for the fact that the Enquirer's application to have Scripps pay part or all of the fee was delayed and much time was taken to try to get the matter settled.

'As a result the Enquirer and AFC have had use of the money, and, in that connection, a representative of AFC testified that they expected to make 15% Per annum from their capital. The money paid into a fund at the Court's direction when AFC offered to buy the minority shareholders has been on interest.'

We recognize that some courts have regarded prejudgment interest as being justified by the need for adequate compensation so as to make the injured party whole. See United States v. Michael Schiavone & Sons, Inc., 450 F.2d 875 (1st Cir. 1971); Louisiana & Arkansas Ry. v. Export Drum Co., 359 F.2d 311 (5th Cir. 1966).

In the instant case, however, we feel that the attorneys involved have been compensated amply for their services by the District Judge's fee award. Obviously, the District Judge allowed fees based not on quantum meruit alone but in substantial part upon the favorable results of their labors. As we have noted, he made no findings of fraud or overreaching that might justify punitive damages. We find no evidence of dilatory tactics or purposeful delay on the part of defendants.

In the instant case the attorneys' fees ultimately allowed were not a liquidated sum or a sum certain until the entry of the District Court's judgment for fees filed on October 10, 1973. In a recent case the Ninth Circuit stated:

'True, claims for 'reasonable' attorneys' fees, being unliquidated until they are determined by a court, are not entitled to pre-judgment interest as would be certain liquidated claims. But once a judgment is obtained, interest thereon is mandatory without regard to the elements of which that judgment is composed. Cf. United States v. Michael Schiavone & Sons, Inc., 450 F.2d 875 (1st Cir. 1971).' Perkins v. Standard Oil Co., 487 F.2d 672, 675 (9th Cir. 1973).

The judgment of the District Court is modified to allow interest on the award of $750,000 in fees from October 10, 1973.

4) Liability for the Attorneys' Fees

We now turn to the question of whether the attorneys' fees can be awarded legally against any party other than the Enquirer.

This appeal grows out of derivative actions filed on behalf of the Enquirer by four of its minority stockholders. The Enquirer itself was named as a nominal defendant, but the real defendants were Scripps-Howard and individual officers and directors of the Enquirer. As the Ramey complaint makes clear, it ***1199** was a corporate right of the Enquirer that the suits sought to enforce:

'This action is filed on behalf of Enquirer for its benefit and the benefit of its shareholders as a shareholder's derivative action to enforce a right and cause of action of Enquirer which should be enforced by said corporation, but on which said corporation refuses to act because it is being prevented from so doing by the Board of Directors of Enquirer . . ..'

Thus it appears that this case presents typical derivative actions within the meaning of the conventional hornbook definition:

'In legal effect, a stockholders' suit is one by the corporation conducted by the stockholder as its representative. The stockholder is only a nominal plaintiff, the corporation being the real party in interest.

'The suit is a derivative one, and is to be distinguished from a representative action brought by a stockholder as an individual and for his own benefit in behalf of himself and other stockholders similarly situated. Where plaintiff does not seek to enforce relief for the benefit of the corporation, it is not derivative and not a stockholders' suit.' 13 W. Fletcher, Private Corporations 5939 (perm. ed. 1970).

**[6]** It is a general principle of corporate law that a minority stockholder who proceeds at his own expense in a derivative action resulting in a substantial benefit to the corporation is entitled to recover reasonable counsel fees from the corporation that has benefitted from his efforts. See 19 Am.Jur.2d Corporations 588, at 111 (1965); 13 W. Fletcher, Private Corporations 6045 (perm. ed. 1970); 10 C. Wright & A. Miller, Federal Practice and Procedure 2675 (1973);

Annot., Litigation Expense— Corporate Charge, 39 A.L.R.2d 580, 583 (1955); Annot., Litigation Expense—Corporation Liability, 152 A.L.R. 909, 914 (1914).

**[7]** The cases make it clear that 'the obligation to reimburse a shareholder who brings a successful derivative suit is an obligation of the corporation.' Levine v. Bradlee, 378 F.2d 620, 622 (3d Cir. 1967). See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 389-390, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970) (assessing fees against corporation); Kahan v. Rosenstiel, 424 F.2d 161, 167 (3d Cir.), cert. denied, 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970) ('In derivative suits . . . the corporation which benefits from the suit . . . is directed to pay (attorneys' fees).'); Denney v. Phillips & Buttorff Corp., 331 F.2d 249 (6th Cir.), cert. denied, 379 U.S. 831, 85 S.Ct. 61, 13 L.Ed.2d 39 (1964) (assessing fees against corporation). Counsel fees in such cases are not awarded individually against other stockholders who may have profited from the derivative litigation, but against the corporation. Speaking for the court in Jones v. Uris Sales Corp., 373 F.2d 644, 648 (2d Cir. 1967), Judge Friendly explained the rationale for this rule as follows:

'The reason for the award of such fees in a stockholder's derivative suit . . . (is) that the plaintiff's efforts have conferred on the corporation a benefit for which the corporation would otherwise have had to pay itself.'

The present derivative actions were filed by minority stockholders of the Enquirer, not by minority stockholders of Scripps. There was no attorney-client relationship, derivatively or otherwise, between Scripps and the attorneys representing the four plaintiff minority shareholders.

Absent a finding that Scripps or the minority stockholders acted fraudulently or 'in bad faith, vexatiously, wantonly, or for oppressive reasons,' Hall v. Cole, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973), there is no legal basis for awarding any part of the attorneys' fees against the Scripps group or against the minority shareholders.[6] Under the ***1200** controlling law set forth above, the entire fee must be assessed against The Cincinnati Enquirer, Inc., the corporation whose stockholders initiated the derivative action.

**[8]** The fact that the Scripps group and the minority stockholders profited from the sale of their stock at higher prices than those provided in the original contract is no basis for assessing against them any part of the attorneys' fees awarded to counsel who filed the derivative actions on behalf of the Enquirer. Incidental benefits to Scripps or minority stockholders, in the absence of an adjudication of fraud or misconduct on their part, does not justify a judgment against them for any part of the attorneys' fees. See Schleit v. British Overseas Airways Corp., 133 U.S.App.D.C. 273, 410 F.2d 261, 262 (1969); Preston v. United States, 284 F.2d 514, 515-516 (9th Cir. 1960); Jett v. Merchants and Planters Bank, 228 F.2d 156, 159 (4th Cir. 1955).

Accordingly, the judgment of the District Court filed October 10, 1973, is vacated insofar as it awards any part of the attorneys' fees therein adjudicated to be paid by any party other than The Cincinnati Enquirer, Inc.

It appears that, pursuant to an order of the District Court, $2.00 per share was withheld from the purchase price received by some of the minority shareholders who accepted the AFC tender offer. This fund was to be used for payment of plaintiffs' attorneys' fees. In view of the foregoing opinion, it is clear that the sums so withheld must be paid to the shareholders affected. To the extent, however, that AFC contributed its own money to this fund, it may, if it wishes, make this fund available for payment of the attorneys' fees assessed against the Enquirer, its wholly-owned subsidiary.

5) Scripps Cross-Claim

**[9]** Scripps filed a cross-claim against the Enquirer on the basis of pendent jurisdiction, seeking to recover $291,842.29 in attorneys' fees and other expenses incurred by Scripps in the trial of these cases and $173,029.75 in attorneys' fees and other expenses incurred by Scripps in connection with the application for fees filed by plaintiffs' counsel. The District Court declined to accept pendent jurisdiction of this cross-claim. We hold that the District Court did not abuse its discretion in this respect.

6) Conclusion

The case is remanded to the District Court for further proceedings not inconsistent with this opinion, including modification of the judgment of October 10, 1973, so as to require payment by The Cincinnati Enquirer, Inc., of the fees allowed to the respective counsel, plus interest from October 10, 1973.

The costs of this appeal are taxed against The Cincinnati Enquirer, Inc.

1 Enquirer in this opinion will refer to the Cincinnati Enquirer, Inc., the owner of the newspaper, The Cincinnati Enquirer.

2 Scripps or Scripps-Howard will be used in this opinion to refer to the Scripps group of defendants, consisting of the E. W. Scripps Co., Scripps-Howard Investment Co. and Jack Howard.

3 Subsequently American Financial or AFC.

4 E.g., 10(b) and 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), 78n(a) (1970), and the rules thereunder, 17 C.F.R. 240.10b-5, 240.14a-9 (1974); Ohio Rev.Code Ann. 1701.35 (Page's Supp. 1973).

5 The District Judge said on this point:

'As the Court understands it, there is no dispute among the parties that the attorneys are entitled to fees. There is a dispute as to the amount to which they are entitled. In any event we conclude that the applicants are entitled to substantial fees and expenses herein.'

6 The only authority directly supporting an assessment against Scripps and the minority shareholders appears to be one law review article. Cole, Counsel Fees in Stockholders' Derivative and Class Actions— Hornstein Revisited, 6 U. Richmond L.Rev. 259, 279-81 (1972). Suffice it to say that we do not agree with the author's conclusions.

**All Citations**

508 F.2d 1188, Fed. Sec. L. Rep. P 94,925

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# Exhibit C

KeyCite Yellow Flag - Negative Treatment
Distinguished by Rikos v. Procter & Gamble Company, S.D.Ohio, November 30, 2021

822 F.3d 269
United States Court of Appeals, Sixth Circuit.

Amber GASCHO, on behalf of herself and all others similarly situated, et al., Plaintiffs–Appellees,
v.
GLOBAL FITNESS HOLDINGS, LLC, Defendant–Appellee,
Robert J. Zik, April Zik, and James Michael Hearon (14–3761); Joshua Blackman (14–3798), Objectors–Appellants.

Nos. 14–3761, 14–3798
|
Argued: June 9, 2015.
|
Decided and Filed: May 13, 2016.
|
Rehearing En Banc Denied June 20, 2016.*

* Judge Clay would grant rehearing for the reasons stated in his dissent; and Judge Moore recused herself from participation in this ruling.

**Synopsis**
**Background:** Consumers filed state court class actions against operator of fitness facilities, asserting claims for unjust enrichment, conversion, fraud, breach of contract, and violations of various state consumer protection laws, alleging lack of disclosure, improper deductions from bank accounts, and improper handling of contract cancellations. After consolidation and removal, parties entered into settlement agreement and sought court approval. The United States District Court for the Southern District of Ohio, George C. Smith, J., 2014 WL 3543819, approved the settlement agreement. Objecting class members appealed.

**Holdings:** The Court of Appeals, Stranch, Circuit Judge, held that:

[1] attorney fees award of $2.39 million did not render class action settlement unfair or unreasonable;

[2] claims process employed did not render settlement unfair or unreasonable:

[3] inclusion of clear-sailing and kicker clauses did not render settlement unfair or unreasonable; and

[4] failure of settlement to provide additional damages for consumers who allegedly had more favorable membership contracts or to include additional damages for claims under the Kentucky Health Spa Act did not render settlement unfair or unreasonable.

Affirmed.

Clay, Circuit Judge, filed dissenting opinion.

West Headnotes (17)

**[1]** **Federal Courts** Class actions
**Federal Courts** Costs and attorney fees

The Court of Appeals reviews both the district court's approval of a class action settlement agreement and class counsel's attorney fees request under an abuse-of-discretion standard.

38 Cases that cite this headnote

**[2]** **Compromise, Settlement, and Release** Class actions, claims, and settlements in general

The following factors are considered by the court in determining whether a proposed class action settlement is fair and reasonable: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

13 Cases that cite this headnote

[3] **Federal Courts** Costs and attorney fees

In applying the abuse-of-discretion standard to an award of attorney fees, as part of a class action settlement, the trial court is entitled to substantial deference because the rationale for the award is predominantly fact-driven. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

2 Cases that cite this headnote

[4] **Costs, Fees, and Sanctions** Class actions

When awarding attorney fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

21 Cases that cite this headnote

[5] **Costs, Fees, and Sanctions** Time Spent and Rates Charged

To determine the lodestar figure, a court calculating an attorney fees award multiplies the number of hours reasonably expended on the litigation by a reasonable hourly rate.

37 Cases that cite this headnote

[6] **Costs, Fees, and Sanctions** Class actions

A court calculating an attorney fees award in a class action may, within limits, adjust the lodestar figure to reflect relevant considerations peculiar to the subject litigation.

6 Cases that cite this headnote

[7] **Attorneys and Legal Services** Percentage method

To employ the percentage of the fund method for determining an attorney fees award in a class action, the court determines a percentage of the settlement to award to class counsel. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

54 Cases that cite this headnote

[8] **Attorneys and Legal Services** Lodestar and percentage methods compared or combined

As the two methods for determining an attorney fees award in a class action, which are the lodestar calculation and the percentage of the fund method, measure the fairness of the fees with respect to different desired outcomes, it is necessary that district courts be permitted to select the more appropriate method for calculating attorney fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

31 Cases that cite this headnote

[9] **Costs, Fees, and Sanctions** Findings, conclusions, and order

District court decisions regarding an attorney fees award in a class action must include a clear statement of the reasoning used in adopting a particular methodology and the factors considered in arriving at the fees award in order to allow effective appellate review for abuse of discretion. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

8 Cases that cite this headnote

[10] **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection

**Compromise, Settlement, and Release** Costs and Fees of Litigation

Attorney fees award of $2.39 million to consumers' attorneys did not render unfair or unreasonable consolidated class action settlement of consumers' claims against operator of fitness facility for unjust enrichment, conversion, fraud, breach of contract, and violations of state consumer protection laws, notwithstanding that only $1.5 million in settlement funds were actually disbursed to consumers; claimed hourly rates of between

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$180 to $450 were reasonable, number of hours charged was reasonable, as attorneys engaged in two-and-a-half years of litigation, extensive discovery, ongoing settlement negotiations, and formal mediation, which were necessary to prosecute the action, actual lodestar figure was almost $2.8 million, and total value of settlement fund if all class members exercised their right to file valid claims was $15.5 million. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

9 Cases that cite this headnote

[11] **Attorneys and Legal Services** Percentage method

When conducting a percentage of the fund analysis to determine an attorney fees award in a class action, courts must calculate the ratio between attorney fees and benefit to the class. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

29 Cases that cite this headnote

[12] **Compromise, Settlement, and Release** Costs and Fees of Litigation

If an attorney fee award in a class action settlement agreement lacks a rational connection to the amount distributed to the class, a district court may reject the settlement. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

1 Case that cites this headnote

[13] **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection

**Compromise, Settlement, and Release** Form, requisites, and sufficiency

Claims process for consumers to file valid claims did not render consolidated class action settlement unfair or unreasonable, in action against operator of fitness facility alleging unjust enrichment, conversion, fraud, breach of contract, and violations of state consumer protection laws; although direct payments were not made to identified class members, notices of settlement were sent to potential class members by both postcard and e-mails which provided direct link to allow online filing of claim, claims procedure was open so that class members could file claims even without receiving direct notice, claims administrator also published notice in 13 newspapers and maintained a website containing the notice, the actual claim form was short and straightforward, and 8% response rate was within acceptable range for consumer class action. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

6 Cases that cite this headnote

[14] **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection

**Compromise, Settlement, and Release** Costs and Fees of Litigation

Inclusion of clear-sailing clause, providing that defense clause would not oppose consumers' attorneys' application for attorney fees, and kicker clause, providing that amount of attorney fees approved by District Court would constitute full satisfaction of attorney fees award, did not render consolidated class action settlement unfair or unreasonable, in action against operator of fitness facility alleging unjust enrichment, conversion, fraud, breach of contract, and violations of state consumer protection laws, absent showing that the ratio between the attorney fees award and total relief provided to class created an inequitable situation or that the settlement was otherwise unfair to consumers. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

5 Cases that cite this headnote

[15] **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection

Alleged failure of consolidated class action settlement of consumers' claims against operator of fitness facility for unjust enrichment, conversion, fraud, breach of contract, and violations of state consumer protection laws to provide additional damages for class members who allegedly had more favorable membership contracts or to include additional damages for claims under the Kentucky Health Spa Act did

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not render settlement unfair or unreasonable; different in claimed damages based on more favorable contracts was only a few dollars more than the average class member recovered, costs and delays would likely result from individual damages calculations, and there was no showing that Kentucky Health Spa Act claims had significant additional value. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.; KRS 367.910.

1 Case that cites this headnote

[16] **Compromise, Settlement, and Release** Range of possible recovery

A court may not withhold approval of a class action settlement agreement simply because the benefits accrued from the agreement are not what successful plaintiffs would have received in a fully litigated case. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[17] **Attorneys and Legal Services** Compensation from Funds in Court; Common Fund

Fees and costs may be awarded to the counsel for objectors to a class action settlement if the work of the counsel produced a beneficial result for the class.

8 Cases that cite this headnote

**Attorneys and Law Firms**

***272** ARGUED: Joshua T. Rose, Hummel Coan Miller, Sage & Rose LLC, Louisville, Kentucky, for Appellants in 14–3761. Theodore H. Frank, Center for Class Action Fairness, Washington, D.C., for Appellant in 14–3798. Kenneth J. Rubin, Vorys, Sater, Seymour and Pease LLP, Columbus, Ohio, for the Gascho Appellees. ON BRIEF: Joshua T. Rose, Hummel Coan Miller, Sage & Rose LLC, Louisville, Kentucky, Gregory A. Belzley, Belzley Bathurst Attorneys, Prospect, Kentucky, for Appellants in 14–3761. Theodore H. Frank, Center for Class Action Fairness, Washington, D.C., for Appellant in 14–3798. Kenneth J. Rubin, Thomas N. McCormick, Vorys, Sater, Seymour and Pease LLP, Columbus, Ohio, Gregory M. Travalio, Mark H. Troutman, Isaac Wiles Burkholder & Teetor, LLP, Columbus, Ohio, for the Gascho Appellees. V. Brandon McGrath, Bingham Grenebaum Doll LLP, Cincinnati, Ohio, Richard S. Gurbst, Larisa M. Vaysman, Squire Patton Boggs (US) LLP, Cleveland, Ohio, for Appellee Global Fitness.

Before: KEITH, CLAY, and STRANCH, Circuit Judges.

STRANCH, J., delivered the opinion of the court in which KEITH, J., joined. CLAY, J. (pp. 294–304), delivered a separate dissenting opinion.

## OPINION

STRANCH, Circuit Judge.

This case involves challenges to the settlement of a consumer class action. Amber Gascho and other Plaintiffs (collectively, "Plaintiffs") sued Global Fitness Holdings, LLC alleging that between 2006 and 2012 Global sold gym memberships and incorrectly charged fees pertaining to cancellation, facility maintenance, and personal training contracts. When class counsel and Global announced the settlement, two objectors —Joshua Blackman and the Zik objectors—challenged its terms, both claiming that the settlement was unfair under Federal Rule of Civil Procedure 23(e). They argued that class counsel's fees were disproportionate to the claims paid, that the settlement unnecessarily required a claims process, and that the settlement contained "clear-sailing" and "kicker" provisions that suggest self-dealing by class counsel. The Zik objectors further argued that the settlement must be rejected because it failed to provide adequate compensation for the Kentucky plaintiffs' state-law claims and for plaintiffs who had signed an early, more favorable version of the contract.

***273** The district court approved the settlement based on a magistrate judge's 80–page Report and Recommendation (R & R), which addressed each objection. Both objectors appealed. We find that the district court did not abuse its discretion when approving the settlement, and therefore AFFIRM the district court's decision.

### *I. BACKGROUND AND PROCEDURAL HISTORY*

This case is one of a number of suits against fitness facilities. Each is a consumer class action consolidating numerous claims of small monetary value on behalf of individuals

who purchased memberships in such facilities and allege that they were charged improper fees. Global is a Kentucky LLC that operated fitness facilities under the brand name "Urban Active" in Ohio, Kentucky, Georgia, Nebraska, North Carolina, Pennsylvania, and Tennessee until October 2012, when it sold its assets to the entity doing business as LA Fitness. Plaintiffs filed suit against Global on behalf of a class of Ohio consumers in Ohio state court in 2011. Global removed the suit to federal court under the Class Action Fairness Act (CAFA). The Gascho case and several similar actions filed in other courts alleged that Global engaged in a variety of unfair sales practices relating to lack of disclosure to consumers, improper deductions from bank accounts, and improper handling of contract cancellations; the cases brought claims under theories of breach of contract, unjust enrichment, fraud, and various state consumer protection laws.

One such consumer class action, *Robins v. Global Fitness Holdings, LLC,* 838 F.Supp.2d 631 (N.D.Ohio 2012), was dismissed. The parties later stipulated to the dismissal of the resulting appeal, apparently after settling the case. In another suit brought in Kentucky state court in 2012, Global and plaintiffs' counsel (not related to class counsel or the objectors in this case) also attempted to settle claims, but class counsel in this litigation and counsel for the Zik objectors together objected to that settlement. The Kentucky court rejected that settlement for several reasons, including the "lack of value" of the settlement owing to the "dismal" participation rate of the class plaintiffs. The court stated that the low participation rate might have been because the settlement was a coupon settlement for the most part, and that those seeking a cash refund had to undergo a "cumbersome" process in which 90% of the cash refund claims were rejected. In denying approval of the settlement, the court noted that 1,444 out of the 242,243 potential class members—i.e., only 0.6% of the potential class —had claims of any kind that were approved.

**A. The approved Global settlement**

Global and class counsel reached a settlement in this case in September 2013, after more than two years of litigation that included extensive discovery. The settlement class consists of the approximately 606,246 people who signed a gym membership or personal training contract with Global from January 1, 2006 through October 26, 2012. *Id.* at 1496–97, 1491. Any class member who filed an approved claim received $5 in addition to any other claim award provided for in the settlement. The settlement also created three subclasses, defined as follows:

1. The "*FIF Subclass,*" which includes all class members who paid a $15 Facility Improvement Fee (FIF) or any other biannual $15 fee charged by the defendant between April 1, 2009 and October 26, 2012. The FIF Subclass has approximately 316,721 members, and all who filed ***274** approved claims were entitled to receive $20 in addition to any other claim award.

2. The "*Gym Cancel Subclass,*" which includes all class members who cancelled their gym membership contracts between January 1, 2006 and October 26, 2012. The Gym Cancel Subclass has approximately 387,177 people, and all who filed approved claims were entitled to receive $20 in addition to any other claim award.

3. The "*Personal Training Cancel Subclass,*" which includes all class members who cancelled a personal training contract between January 1, 2006 and October 26, 2012. The Personal Training Cancel Subclass has approximately 64,805 members, and all who filed approved claims were entitled to receive $30 in addition to any other claim award.

(R. 97–1, Settlement, PageID 1490, 1492, 1497.)[1] Each class member had the opportunity to recover once from each subclass to which she/he belonged. The maximum per-person recovery was therefore $75 (5+20+20+30). Class members were required to file a simple claim form and if total claims amounted to less than $1.3 million, approved claimants would have their awards increased in equal shares.

1 These numbers were modified slightly in a February 22, 2014 Joint Motion in which the parties stated that there were approximately 606,000 class members, 323,518 Gym Cancel subclass members, 300,017 FIF subclass members, and 50,038 Personal Training Cancel subclass members.

The settlement permitted class counsel to apply for $2.39 million in attorney's fees and costs, and contained a "clear sailing" clause: an agreement from Global not to oppose any application for that sum or less. The agreement also included a "kicker" clause: an agreement that in the event the court awarded less than $2.39 million for costs and fees, that amount would constitute full satisfaction of Global's obligation for costs and fees.

**B. The notice-and-claims process**

Jeffrey Dahl, president of Dahl Administration, LLC, a claims administration firm hired by class counsel to implement the

settlement, testified that he sent individualized notice by postcard to 601,494 class members, and email notice to just under half the class. After correcting the addresses of the 146,617 postcard notices returned as undeliverable and re-mailing them, 90.8% percent of the notices were successfully delivered to an address associated with a class member, though Dahl could not confirm how many notices reached the specific class member to whom they were addressed. Class members could either fill out a claim on paper or on a website provided in both the postcard and the email notice. The claim form itself required class members to provide basic contact information, identify which of the three subclasses they qualified for, and sign under penalty of perjury. Dahl testified that about 55,600 claims were made in total, and 49,808 claims were approved, resulting in a total class payment of $1,593,240. Dahl calculated that the average payout to a claimant was $31.99, and that the average payout to a claimant in the Gym Cancel Subclass was $41.28.

**C. The Blackman objection**

Joshua Blackman, a class member, objected through his counsel affiliated with the Center for Class Action Fairness. Though Blackman suffered no actual damages because he cancelled his gym membership for a full refund within three days of enrolling, he fell within the definition of ***275** the Membership Cancellation subclass, and made a claim for $25 under the settlement. Blackman states that he did not make a $20 claim for the FIF subclass because the class notice did not specify whether he was a member of that subclass. He almost certainly was not, as he was a gym member for only three days. Blackman alleged that the settlement was one-sided in favor of class counsel because it awarded $2.39 million for the legal services they rendered in representing the class but likely paid much less in class claims due to the class members' predictable low response to the claims-made process. Blackman argued that the terms of the settlement were counter to this court's decision in *In re Dry Max Pampers Litigation,* 724 F.3d 713 (6th Cir.2013), which forbids "preferential treatment" to class attorneys over unnamed class members. Invoking the Ninth Circuit's decision in *In re Bluetooth Headset Products Liability Litigation,* 654 F.3d 935 (9th Cir.2011), Blackman further objected to the settlement's clear sailing clause and kicker clause, and argued that any fee award in a claims-made settlement must be based on the claims paid only, rather than on the total amount made available by the settlement should all class members make a claim.

**D. The Zik objection**

The Zik objectors echo Blackman's objections and add that the settlement is unfair because it fails to provide sufficient relief for (1) class members who had an early version of the contract with allegedly more favorable cancellation terms, and (2) class members from Kentucky who can assert claims under the Kentucky Health Spa Act (KHSA). The Zik objectors argue in the alternative that, if the settlement is approved, they should be awarded attorney's fees because they benefited this class by successfully objecting to the *Seeger* settlement and because their Kentucky state court case likely drove Global and class counsel to settle in this case at the time they did.

**E. The fairness hearing and settlement approval**

Magistrate Judge King held a fairness hearing in February 2014, during which the parties argued their positions and testimony was taken from Dahl. In April 2014, the magistrate judge issued an 80–page R & R approving the settlement and the requested fees. The magistrate judge found the settlement in *Pampers* distinguishable because this case had been "vigorously litigated" for two-and-a-half years prior to settlement and involved "extensive" discovery and motion practice, and because class counsel obtained "significant monetary relief to class members" rather than the "illusory injunctive relief" obtained in the *Pampers* settlement. (R. 141, PageID 2841.)

The R & R found the proposed attorney's fees and costs to be reasonable based on the work performed and because the request was well below counsel's lodestar (hours worked on the case multiplied by counsel's hourly rate), and also noted the significance of the settlement's creation of an available benefit of $15.5 million (the total payout if all of the class members filed claims). The magistrate judge included a common fund cross check of the lodestar calculation. For this percentage fee calculation, the $15.5 million available award was proposed; Blackman argued that the relevant benefit is the $1.5 million actual payout. Instead of adopting either position, the R & R split the difference and found that "the potential monetary compensation to class members should be valued at $8,546,835, *i.e.,* the midpoint between the Available Benefit of $15,500,430 and the actual payment of $1,593,240," resulting ***276** in a "reasonable" ratio of 21%.[2] (*Id.* at 2874–75.) The R & R explained that the "clear sailing" clause was not an issue in light of the reasonable value of the class settlement, and that the "kicker" clause was "not improper in this case" because the parties negotiated a

reasonable attorney fee that the court upheld, so the class was not deprived of "any benefit, real or perceived." (*Id.* at 2849–52.) The R & R further determined that the claims-made process was reasonable, given the age of class address information, the lack of certainty that the postcards actually reached the named class members, and because the 8.2% response rate was "well within the acceptable range of responses in a consumer class action." (*Id.* at 2857–59.) Dahl had testified that response rates in consumer class actions generally range from 1 to 12 percent and, given the age of the address information, a claims-made process rather than a direct payout to class members was the norm.

2 The magistrate judge's calculations: $8,546,835 + attorneys' fees and costs of $2,390,000 + administration costs of $496,259 = $11,433,094 Total Class Benefit. $2,390,000 ÷ $11,433,094 = Fees constituting 20.904% of the Total Class Benefit.

Upon reviewing all the circumstances surrounding the fee request, the R & R also concluded that though class counsel had not submitted detailed billing records for review by the court, the lodestar award was justified because: class counsel provided the number of hours worked and averred under penalty of perjury that those hours were reasonably necessary to prosecute the action; class counsel's hourly rates were consistent with the market rate; class counsel indicated they would not submit a fee request for the hours they worked after the settlement date, which were substantial; the fee request resulted in a lodestar of less than one (meaning that the fee requested represented payment for fewer hours than were actually worked); and there was no objection to the reasonableness of the hourly rates or the number of hours worked despite "vigorous objections" to other aspects of the settlement.

Blackman and the Zik objectors filed objections to the magistrate judge's R & R. The district court overruled all objections to the R & R, and adopted and affirmed it. It issued a final order approving the class action settlement and final judgment in July 2014. The separate appeals of Blackman, Case No. 14–3798, and the Ziks, Case No. 14–3761, followed and were consolidated.

## *II. ANALYSIS*

**[1]** We review both the district court's approval of the settlement and class counsel's attorney fee request under an abuse-of-discretion standard. *In re Dry Max Pampers Litig.,* 724 F.3d at 717 (settlement); *Bowling v. Pfizer, Inc.,* 102 F.3d 777, 779 (6th Cir.1996) (fees).

### A. Fairness of the settlement

**[2]** Rule 23(e) governs class action settlements and mandates that the court may approve a settlement upon holding a fairness hearing and concluding that it is "fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(2). In 2007, we set out the factors that guide the court's inquiry and that we apply here:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

***277** *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp.,* 497 F.3d 615, 631 (6th Cir.2007).

The R & R determined that the following case specific factors weigh in favor of approving the settlement: (1) The parties' two-and-a-half years of litigation, extensive discovery, ongoing settlement negotiations, and formal mediation session all weighed against the possibility of fraud or collusion; (2) Discovery was "extensive," including the service of multiple sets of interrogatories, the production of over 400,000 documents, and over ten depositions, and required "significant Court involvement," (R. 141, PageID 2832); (3) The likelihood of plaintiffs' success on the merits was called into question by the dismissal of *Robins,* 838 F.Supp.2d at 631, which the *Gascho* court had noted presented similar facts and legal issues to those alleged here; (4) The litigation had been pending for nearly three years, resulting in millions of dollars in legal fees, and continued litigation would undoubtedly require years of extensive and costly litigation, including fact discovery, expert discovery, and motion practice; (5) Class counsel and representatives approved the settlement agreement; (6) Out of a pool of 605,000 class members, only 90 class members opted out and only 2 objections were filed; (7) The public interest favored settlement because it provided an immediate cash payout to class members for their compensable injuries in an amount the court found to be fair, reasonable, and adequate, and because settlement would conserve judicial resources.

In addition to the seven *UAW* factors, Blackman and the dissent cite our recent *Pampers* case, which addressed

whether the settlement gave "preferential treatment" to class counsel or named plaintiffs, while only "perfunctory relief to the unnamed class members." *Pampers,* 724 F.3d at 718. They also rely on the Ninth Circuit's decision in *Bluetooth,* which found that signs of collusion include a kicker clause, a clear sailing clause, or a situation in which class counsel "receive a disproportionate distribution of the settlement" or the "class receives no monetary distribution but class counsel are amply rewarded," 654 F.3d at 947 (internal quotation marks omitted).

The primary focus of the objections by Blackman and the dissent are these additional considerations introduced in *Pampers* and *Bluetooth.* They take issue with the district court's conclusion that relief to the class was "substantial" (as opposed to nominal) because, though a claims process was created to allow all class members to participate, only 8.2% of the class filed a claim. They argue that, because Global need only pay approximately $1.6 million—as opposed to more than $15.5 million in relief that plaintiffs argue counsel secured for the entire class—allowing class counsel to collect a fee of $2.39 million would constitute the "preferential treatment" for class counsel that *Pampers* forbids.

The central issue is how to value the benefit to the class: as (1) only the value of the claims actually approved, (2) the total relief available to the class if every member filed a claim, or (3) by splitting the difference between the two, as the district court did here. Blackman and the dissent argue that for the benefit calculation to be valid under *Pampers,* only the value of the claims actually approved may be used.

We do not find either *Pampers* or *Bluetooth* to be dispositive here. First, the *Pampers* case involved a Rule 23(b)(2) class for injunctive relief and does not discuss how to value cash benefits for a class that are secured by the work of class counsel but go unclaimed. 724 F.3d at 716. The relief at issue in *Pampers,* moreover, ***278** has little relation to the cash settlement obtained here. The *Pampers* settlement agreement allotted class counsel $2.73 million, even though "counsel did not take a single deposition, serve a single request for written discovery, or even file a response to [the defendant's] motion to dismiss." *Id.* at 718. The class members's purported benefits included (1) a refund for one box of diapers, if they retained a receipt and a UPC code from a box of diapers purchased up to eight years before (relief that had been available before the filing of a lawsuit), (2) changes to the Pampers box labeling to warn about diaper rash, and (3) minimal and obvious medical advice about diaper rash posted on the Pampers.com website. *Id.* at 718–19. The settlement contained no other cash relief whatsoever. The facts of *Bluetooth* itself also shed little light on the instant case, as that was a cashless settlement for the class at large that involved, among other things, $100,000 in *cy pres* awards[3], package labeling about acoustic safety, payments to the class representatives only, and up to $800,000 in attorney's fees for class counsel. *Bluetooth,* 654 F.3d at 939–40.

3 A *cy pres* award is "used to distribute unclaimed portions of a class-action judgment or settlement funds to a charity that will advance the interests of the class." Black's Law Dictionary (10th ed.2014).

Relying on *Pampers* and *Bluetooth,* Blackman asks us to approve a proposed per se rule of unfairness, arguing that "disproportionate allocation violates Rule 23(e) even without a showing of actual collusion." (Blackman Br. at 16.) Blackman's proposal depends on acceptance of two premises: first, it assumes that use of the percentage of the fund calculation method is mandated whenever class counsel settles a claim; and second, it requires that such calculation be based only on the value of the class claims paid as opposed to the total relief that class counsel's work obtained for the entire class.

As discussed below, the reasoned basis of ample precedent in our circuit and decisions from multiple other circuits counsel against these presumptions. These authorities demonstrate that it is within the discretion of a district court both to select a lodestar computation as the appropriate method of fee calculation and, if choosing to use or include a percentage of the fund calculation, to value the benefit to the class based on the total relief class counsel makes available to all the class members. Supreme Court authority, moreover, does not support the benefit calculation that Blackman proposes. The Court has held that class plaintiffs' "right to share the harvest of the lawsuit upon proof of their identity, *whether or not they exercise it,* is a benefit in the fund created by the efforts of class representatives and their counsel." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 480, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980) (emphasis added).

The subsections below focus on each of Blackman's and the dissent's bases for challenging the settlement in turn: that the attorney's fee was too high as a proportion of the claims paid, that the claims process was an improper barrier to the class obtaining relief, and that the clear sailing and kicker provisions were improper. The Zik objectors raise the

same concerns and some additional objections that will be addressed.

*1. Attorney's fee*

Blackman does not ask this court to find that the dollar payout to class claimants was unreasonable: he does not challenge the fundamental fairness of the amount the class itself received; instead, his objection ***279** is to the amount the attorneys received in comparison to the amount the class members claimed and received. The analysis the district court employed when approving class counsel's fee—grounded in our precedent—reaches the heart of the issue.

**[3]** In applying the abuse-of-discretion standard to an award of attorney's fees, the trial court is entitled to "substantial deference because the rationale for the award is predominantly fact-driven." *Imwalle v. Reliance Med. Prods., Inc.* 515 F.3d 531, 551 (6th Cir.2008). Such deference "is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.* (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

**[4]** "When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Rawlings v. Prudential–Bache Properties, Inc.,* 9 F.3d 513, 516 (6th Cir.1993). These two measures of the fairness of an attorney's award—work done and results achieved—can be in tension with each other. The lodestar method of calculating fees "better accounts for the amount of work done," whereas "the percentage of the fund method more accurately reflects the results achieved." *Id.*

**[5]** **[6]** **[7]** To determine the lodestar figure, the court multiplies the number of hours "reasonably expended" on the litigation by a "reasonable hourly rate." *Bldg. Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway,* 46 F.3d 1392, 1401 (6th Cir.1995). The court "may then, within limits, adjust the 'lodestar' to reflect relevant considerations peculiar to the subject litigation." *Adcock–Ladd v. Sec'y of Treasury,* 227 F.3d 343, 349 (6th Cir.2000). In contrast, to employ the percentage of the fund method, the court determines a percentage of the settlement to award to class counsel. *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.,* 268 F.Supp.2d 907, 922 (N.D.Ohio 2003).

**[8]** **[9]** As the two methods measure the fairness of the fee with respect to different desired outcomes, "it is necessary that district courts be permitted to select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Rawlings,* 9 F.3d at 516. District court decisions must include "a clear statement of the reasoning used in adopting a particular methodology and the factors considered in arriving at the fee" in order to allow effective appellate review for abuse of discretion. *Id.* This court has noted that there are advantages and drawbacks to each method. *Id.* at 516–17.

The advantages of the percentage of the fund method are that: "it is easy to calculate; it establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted litigation." *Id.* But, "a percentage award may also provide incentives to attorneys to settle for too low a recovery because an early settlement provides them with a larger fee in terms of the time invested." *Id.* With the lodestar method, the

> listing of hours spent and rates charged provides greater accountability. In addition, enhancing the lodestar with a separate multiplier can serve as a means to account for the risk an attorney assumes in undertaking a case, the quality of the attorney's work product, and the public benefit achieved. The lodestar method also encourages lawyers to assess the marginal value of continuing work on the case, since the method is ***280** tied to hours and rates, and not simply a percentage of the resulting recovery.

*Id.* But "the lodestar method has been criticized for being too time-consuming of scarce judicial resources." *Id.*

District courts have the discretion to select the particular method of calculation, but must articulate the "reasons for 'adopting a particular methodology and the factors considered in arriving at the fee.' " *Moulton v. U.S. Steel Corp.,* 581 F.3d 344, 352 (6th Cir.2009) (quoting *Rawlings,* 9 F.3d at 516). *Moulton* set out the germane factors:

> Often, but by no means invariably, the explanation will address these factors: "(1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides."

*Id.* (quoting *Bowling,* 102 F.3d at 780). Here, the district court employed the lodestar method to determine the fairness of the fee, then chose to cross-check it with the percentage-of-the-fund calculation. *See, e.g., Bowling,* 102 F.3d at 780; *Van Horn v. Nationwide Prop. & Cas. Ins. Co.,* 436 Fed.Appx. 496, 500–01 (6th Cir.2011).

*a. Lodestar method*

**[10]** Applying the factors enumerated in *Moulton,* the district court determined that the lodestar method was appropriate because the "results achieved" by the settlement are "substantial" and therefore the "interest in fairly compensating counsel for the amount of work done is great." (R. 141, PageID 2869.) It further noted that class counsel had devoted substantial time and energy (8,684 hours at the time of settlement) to the action despite the risk of not being compensated, the litigation was complex, opposing counsel was skilled, and limiting an award to a percentage of the actual recovery could dissuade counsel from undertaking similar consumer class actions in the future. The district court also correctly noted that several of the plaintiffs' claims involved fee shifting statutes, KRS 367.930(2); O.R.C. 1345.09(F)(2), and that the purpose of such statutes is to induce a capable attorney to take on litigation that may not otherwise be economically viable. *See, e.g., Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 552, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010) (explaining that a "reasonable" fee is one that is "sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case"). The court concluded that "[u]nder the circumstances of the case, the lodestar method will best ensure that Class Counsel is fairly compensated for their time and it will fairly account for the risk to Class Counsel and the policy underlying the fee shifting statutes." (R. 141, PageID 2869 (internal citation and quotation omitted).) It was undoubtedly within the court's discretion to select this method.

The district court approved class counsel's lodestar figure based on declarations from counsel about each person who billed hours on the case, their rates and experience, and what percentage of the billing was attributed to each lawyer or paralegal. Lawyers' rates varied from $180 to $450 per hour based on the lawyer's experience, with the average at $275.20 per hour after subtracting for costs.

Several of this court's opinions suggest that before approving class counsel's lodestar amount, the court should review the attorney's lodestar fee request in more detail than what was presented in class ***281** counsel's affidavits in this case. We have found that

> [t]he key requirement for an award of attorney fees is that the documentation offered in support of the hours charged must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the litigation.... Although counsel need not record in great detail each minute he or she spent on an item, the general subject matter should be identified.

*Imwalle,* 515 F.3d at 553 (internal quotation marks and citations omitted); *see also Rawlings,* 9 F.3d at 516–17.

Here, the district court acknowledged this body of case law and noted that the "best practice may have been to submit more detailed records of the costs and time expended in the litigation." (R. 141, PageID 2870.) Nonetheless, the court was "satisfied" that the number of hours billed and hourly rates of class counsel were reasonable because counsel "averred under penalty of perjury that the hours expended and costs incurred in the litigation were reasonably necessary to prosecute the action," the hourly rates were "consistent with those in the market" and the court's experience, class counsel had not billed for the significant number of attorney hours expended after the date of settlement, and despite vigorous objections to other aspects of the settlement, the objectors had not argued that class counsel's number of hours worked or hourly rates were unreasonable. (R. 141, PageID 2871–72.) Class counsel represented that, by the time the magistrate judge ruled on the fairness hearing, the actual lodestar had grown to almost $2.8 million, though it would only seek to recoup the $2.39 million it had already agreed on.

Blackman argues that the plaintiffs failed to sustain their "burden of providing for the court's perusal a particularized billing record," (Blackman Br. at 36 (quoting *Imwalle,* 515 F.3d at 553)), and that the R & R "drastically understated the problem" when opting to rely on the lodestar method as the basis for awarding counsel fees in the absence of detailed billing records, (Blackman Br. at 35). The dissent also challenges the adequacy of class counsel's billing records.

The district court appropriately addressed the *Moulton* factors and explained its rationale for choosing to use the lodestar method, and it would clearly have been within its discretion to rely on the lodestar method supported by adequate billing records. It is, however, a close question whether the minimal billing information provided suffices to justify the lodestar

award in light of our caselaw. We need not reach the issue, however, because the district court also employed the percentage of the fund cross-check and, as discussed below, that method independently validated the decision to award the attorney's fees in the case. *See Van Horn,* 436 Fed.Appx. at 501 (finding that a mistake in the district court's percentage of the fund analysis was not an abuse of discretion because the district court was justified in awarding the fee based on the lodestar alone); *Bowling,* 102 F.3d at 779–81 (6th Cir.1996) (affirming the district court's fee award, which was based on the percentage-of-the-fund and cross-checked with the lodestar, without reviewing the lodestar analysis).

*b. Percentage-of-fund cross check*

A percentage of the fund cross-check is optional, and we have repeatedly upheld a district court's determination that a fee award is reasonable based solely on a lodestar analysis. ***282** *Van Horn,* 436 Fed.Appx. at 500–01 (citing *Rawlings,* 9 F.3d at 516). Here we review the percentage-of-fund cross check for two reasons: (1) the issue of sufficiency of the records submitted for the lodestar analysis, and (2) Blackman's argument for a standard creating a per se violation of Rule 23(e). With respect to the second issue, we specifically address below the calculation method; the benefit to the class and its ratio to attorney's fees; and—central to the dispute here—what the district court may, within its discretion, choose to do.

**[11]** When conducting a percentage of the fund analysis, courts must calculate the ratio between attorney's fees and benefit to the class. Attorney's fees are the numerator and the denominator is the dollar amount of the Total Benefit to the class (which includes the "benefit to class members," the attorney's fees and may include costs of administration). The dispute here is over the first component—what the court may choose as the benefit to class members. Blackman argues that the benefit may be only the actual payments to class members and plaintiffs argue that it should be the entire benefit made available to the class through the efforts of counsel.

Because a settlement addresses the particular facts of and parties in a case, calculation of the denominator is necessarily case specific. To reach a resolution satisfactory to all parties, litigants may agree to cash and noncash settlement components. Calculating the ratio between attorney's fees and benefit to the class must include a method for setting the denominator that gives appropriate consideration to all components that the parties found necessary for settlement. Circuits have resolved the issue in several different ways, with a few establishing categorical rules but many maintaining a more case-specific approach and reviewing for abuse of discretion without mandating a particular method. Our circuit precedent fits within the latter approach.

Here, class counsel asserts that the "benefit to the class" portion of the denominator is the value of the settlement if all class members exercised their right to file valid claims. The magistrate judge calculated that available benefit to be $15,500,430.[4] Blackman counters that the $15.5 million figure is illusory because class counsel and Global could easily anticipate that only a fraction of the class would actually file a claim, given the testimony that only 5 to 8% of plaintiffs file claims in a typical consumer class action. Blackman's argument is that the benefit component of the denominator must be calculated based only on the amount of money actually paid to the class.

4 Though class counsel reiterates in its appellate brief that the available benefit is $17 million, we adopt the lower court's figure without further discussion because the difference is not dispositive, as either figure would lead to an acceptable ratio if used to calculate the denominator.

Here, the district court properly relied on Supreme Court authority recognizing that class plaintiffs' "right to share the harvest of the suit upon proof of their identity, *whether or not they exercise it,* is a benefit in the fund created by the efforts of class representatives and their counsel." *Boeing Co.,* 444 U.S. at 480, 100 S.Ct. 745 (emphasis added). *Boeing* concerned a case in which a common fund was created for the class, and the court recognized that "[t]o claim their logically ascertainable shares of the judgment fund, absentee class members need prove only their membership in the injured class." *Id. Boeing's* "latent claim" to the money left in the fund after class member claims had been paid did not affect the Court's determination that the "present rights" of class members ***283** to access that money through a claims process was a benefit to class members. *See id.* at 482, 100 S.Ct. 745. The Supreme Court held that the district court had not abused its discretion by awarding fees to class counsel based on the size of the entire fund as opposed to the portion of it for which claims had been approved. *Id.* at 477–78, 100 S.Ct. 745.

Despite *Boeing's* guidance, the circuits have split on the most appropriate way to value settlement funds, though

such differences are sometimes explainable based on factual distinctions in settlement structures. In a case where unclaimed funds would be distributed to a *cy pres* beneficiary as opposed to reverting back to the defendant, we noted that it is correct to weigh the amount allocated to the class rather than the amount actually disbursed in claims when determining whether an attorney's fee award is unreasonable:

> The thirty percent attorney's fee award, [the objectors] add, is too high, claiming that it "will exceed the recovery of the Class by over $100,000.00." Moulton Br. 32. But this estimate is wrong: The objectors focus on the amount *claimed* rather than the amount *allocated.* Claimants, it is true, will in the aggregate receive less than Class Counsel. But that is because just 4,026 class members submitted claims. Except for fees and costs, class members had the first shot at the settlement proceeds—nearly $2.5 million by our estimate—which exceed the amount paid to Class Counsel by some measure. That the public schools [the beneficiaries of the unclaimed residue of the fund] will receive $1.28 million in *unclaimed* funds does not reflect on the settlement's fairness.

*Moulton,* 581 F.3d at 352.

In another case involving funds that would not revert back to defendants if unclaimed, the Second Circuit held that a district court abused its discretion by calculating fees strictly based on the dollar amount paid to approved claimants, and expressly rejected the idea that basing an award on the benefit available to the class would create a windfall for class counsel. *Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 437 (2d Cir.2007). The court reasoned that "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not." *Id.*

Similarly, in a class action settlement involving a fund where all unclaimed money would revert to the defendant, the Eleventh Circuit affirmed a district court's award of 30 percent of the total recovery fund, and rejected the argument that the fee should only have consisted of 30 percent of the funds actually claimed. *Waters v. Int'l Precious Metals Corp.,* 190 F.3d 1291, 1296–97 (11th Cir.1999). *Waters* expressly noted that the district court had relied on the Supreme Court's reasoning in *Boeing* in reaching its conclusion and found that though the unclaimed funds would revert to the defendant, the relief was real and available to the class. *Id.* at 1297. The appellate court also noted that it was reviewing for abuse of discretion, and that a different result might be warranted on the facts of a different case. *Id.* at 1298.

The Ninth Circuit has also applied *Boeing* to determine that—with respect to a class action settlement involving a common fund holding money that would revert to the defendant if unclaimed—the district court erred by awarding class counsel a fee of only one third of the $10,000 actually claimed rather than a fee of one third of ***284** the entire $4.5 million settlement fund or a fee based on a lodestar calculation. *Williams v. MGM–Pathe Commc'ns. Co.,* 129 F.3d 1026, 1026–27 (9th Cir.1997) (per curiam).

The Third Circuit has not ruled on the issue, but in dicta noted that it would be unwise to impose on a district court a categorical rule in which a portion of a common fund that went unclaimed by class members and was then distributed under the agreement as a *cy pres* award must be discounted for the purpose of calculating attorney's fees:

> There are a variety of reasons that settlement funds may remain even after an exhaustive claims process—including if the class members' individual damages are simply too small to motivate them to submit claims. Class counsel should not be penalized for these or other legitimate reasons unrelated to the quality of representation they provided. Nor do we want to discourage counsel from filing class actions in cases where few claims are likely to be made but the deterrent effect of the class action is equally valuable.

*In re Baby Prods. Antitrust Litig.,* 708 F.3d 163, 178 (3d Cir.2013). The Third Circuit refused to mandate discounting of *cy pres* awards, though it noted that "awarding attorneys' fees based on the entire settlement amount rather than individual distributions creates a potential conflict of interest between absent class members and their counsel." *Id.* The court therefore concluded that when "a district court has reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class ... it [is] appropriate for the court to decrease the fee award." *Id.* It explained that "our approach is case by case, providing courts discretion to determine whether to decrease attorneys' fees where a portion of the fund will be distributed *cy pres.*" *Id.* at 179.

A case-by-case analysis honors both the principles that undergird the abuse of discretion review standard and the practical realities of examining a settlement reached by particular parties in their specific circumstances. A case-by-case approach allows a reviewing court to address the varying

danger of tacit collusion between the parties for unclaimed funds distributed through a *cy pres* award as in *Moulton* and *Baby Products,* as well as cases such as this one, where such funds are left with the defendant. The Third Circuit correctly noted that devaluing the available relief if it goes unclaimed could in many cases unduly penalize class counsel and have the lasting effect of discouraging the filing of class actions in cases where few claims are likely to be made but the deterrent effect of such a suit would be socially desirable. *See In re Baby,* 708 F.3d at 179. The latter policy concern reflects one of the purposes of consumer class actions—the need to insure that mistreatment of consumers will not be insulated because the damage suffered by an individual consumer is too small to justify the expense and time required to challenge the practice—both for the individual harmed and the attorney who represents that consumer.

Determining the appropriate relationship between fees and benefits to the class, however, can be significantly impacted by the facts of a case. For example, where class counsel had already been awarded more than the full lodestar value of their services but were seeking to apply a multiplier, the Fifth Circuit permitted a district court to determine fees relative to benefits distributed. *Strong v. BellSouth Telecomm., Inc.,* 137 F.3d 844, 851–52 (5th Cir.1998). It questioned reference to the percentage of the fund analysis in a lodestar case, but addressed the issue, holding ***285** that under the facts the district court did not abuse its discretion by focusing on the $1.5 million of benefits distributed to the class rather than the $64 million estimated value of the settlement fund that included coupon-like benefits. *Id.* at 851–53. In this context, the district court found class counsel's valuation of the relief to be "phantom" because class members had the option of continuing phone service *or* receiving a credit, making the relief akin to coupons or certificates, "where the true value of the award was less than its face value." *Id.* at 852.

In upholding the district court's method of determining fees, *Strong* acknowledged that in *Boeing* the Supreme Court had upheld the district court's decision to consider the potential awards available rather than the actual claims made. *Id.* It distinguished *Boeing* because there each member had an "ascertainable claim to part of [the] lump-sum judgment" that could be accessed "simply by proving their individual claims," whereas in *Strong* the agreement did not establish a fund and included the difficult to access "phantom" benefits rather than cash. *Id.* But far from creating a categorical rule requiring courts to consider only the benefits actually distributed, *Strong* noted that fees had already been awarded under the lodestar method and explained that "this course of action is not the usual one" and "under the atypical circumstances of this case, the district court did not abuse its discretion in considering the actual results of the settlement." *Id.* at 853.

In a recent decision on which the dissent relies, the Seventh Circuit varied from these cases by overturning a district judge's use of the value of the available settlement in the denominator of a percentage of fund calculation. *Pearson v. NBTY, Inc.,* 772 F.3d 778, 779–81 (7th Cir.2014). There, the settlement agreement was reached only eight months after suit was filed, and it called for the defendant to pay $3 per claim. *Id.* at 779, 781. *Pearson* held that the correct ratio to calculate is always that of "(1) the fee to (2) the fee plus what the class members received." *Id.* at 781. The court noted that its mandated ratio "gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class...." *Id.* Importantly, *Pearson* held that the value of the attorney's fees being sought there also failed under a lodestar analysis. *Id.*

*Pearson* addressed the import of *Boeing* to its decision, acknowledging that "it is true that an option to file a claim creates a prospective value, even if the option is never exercised." *Id.* at 782. Nonetheless, *Pearson* distinguished *Boeing* by noting that *Boeing* pertained to an existing judgment fund, and that each class member's claim on the fund was "undisputed" and "mathematically ascertainable." *Id.* In contrast, the court reasoned, the settlement in *Pearson* did not concern a litigated judgment, and "there was no expectation in advance of the deadline for filing claims that more members of the class would submit claims than did." *Id.* Well under one percent of the *Pearson* class members had filed claims for the $3 in relief at issue. *Id.*

**[12]** We find *Pearson's* efforts to distinguish *Boeing* unconvincing. No matter how the *Boeing* fund was structured, the Supreme Court found value in the work of class counsel that provided a fund from which class members could access their claims. Further, though it went unacknowledged by the Seventh Circuit, there *was* a claims process in *Boeing,* 444 U.S. at 479, 100 S.Ct. 745 ("members of the class can obtain their share of the recovery simply by proving their individual claims ***286** against the judgment fund"), and there was a possibility that unclaimed funds would revert back to the defendant, *id.* at 482, 100 S.Ct. 745 (acknowledging *Boeing's* "latent claim against unclaimed money in the judgment fund"). *Boeing's* factual features are not significantly different

from the settlement terms in this case as they involve a straightforward claims process and a provision that unclaimed funds will remain with the defendant. Considering these comparable facts, we see no reason why *Boeing's* application should turn on the existence of an actual escrow fund of money for the payment of claims.[5]

5 We disagree with the dissent's assertion that *Boeing,* while good law, has fallen into disfavor. Its sole case citation for this point is Justice O'Connor's statement regarding the denial of certiorari in *International Precious Metals Corp. v. Waters,* 530 U.S. 1223, 120 S.Ct. 2237, 147 L.Ed.2d 265 (2000). We do not find this statement to evidence rejection of *Boeing.* First, no other justices joined it. Justice O'Connor, moreover, did not argue for overruling *Boeing,* but simply for requiring "some rational connection between the fee award and the amount of the actual distribution to the class." *Id.* Our case-by-case approach is consistent with this statement; if a fee award lacks rational connection to the amount distributed to the class, a district court may reject the settlement.

The dissent also points to the Advisory Committee notes to the 2003 amendments to Rule 23, arguing that the Committee distinguished benefits from actual results. But the Committee did not define "result actually achieved" and, as *Boeing* makes clear, the total available benefit *is* a result actually achieved for the class. Further, nothing in the note would support the dissent's categorical rule—the Advisory Committee did encourage courts to scrutinize the claims procedure to ensure "significant actual payments to class members," but it also emphasized that "[a]t the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award." Fed.R.Civ.P. 23, 2003 Amend., Note to Subdivision 23(h). Only a case-by-case approach can balance these twin concerns.

The other cases noted do not suggest a different conclusion. While it may be true that a class settlement with a needlessly onerous claims process might warrant discounted relief using the case by case approach the Third Circuit (*In re Baby* ) discussed, that is a different matter—one of application as opposed to a general rule. Further, the Ninth Circuit (*Williams* ) imposed and the Eleventh Circuit (*Waters* ) upheld attorney's fees based on the whole value of the fund in cases where unclaimed money in the fund would revert back to the defendant. There is no meaningful distinction between a fund with a reversion provision and a defendant-paid-claims process, as here. In both cases, unclaimed funds wind up with the defendant.

As this survey of appellate decisions demonstrates, courts have upheld a variety of methods employed by district courts to determine benefit to the class. The only circuits that have crafted a strict rule have been the Ninth and Second (both holding that the district court erred by using the value of the funds actually distributed rather than the full value of the authorized fund when calculating attorney's fees), and the Seventh (holding the opposite, i.e., that courts *must* only consider the value of the funds actually distributed as opposed to the entire value of the funds made available to the class).

Rather than adopting the Seventh Circuit's categorical rule that Blackman and the dissent urge, we leave the determination of how to value the benefit provided to the class to a district court's discretion, exercised in accordance with our precedent. This respects the Supreme Court's position, as well as our own, that making claims available to all class members provides them with a benefit. In a case-by-case analysis, district courts are able to ***287** determine fees by considering all the facts of a case, and thereby address the concerns that Blackman and the dissent argue can be resolved only by a per se rule. Courts may do so, moreover, without the inherent problems recognized by Blackman in his ambiguous assertion he is not "proposing" that the blanket rule would extend to all cases where "Congress established fee-shifting statutes to vindicate specific rights beyond purely pecuniary ones." (Blackman Br. at 16 n. 2.) But consumer claims also may seek to vindicate rights beyond monetary ones and many of those cases, including this case, raise claims under both common law *and* fee shifting statutes. Blackman's counsel's inability to articulate a functional limiting principle for application of a per se rule to other categories of cases or settlements is evidence of the problematic nature of this blanket rule proposal.

Consumer class actions, furthermore, have value to society more broadly, both as deterrents to unlawful behavior—particularly when the individual injuries are too small to justify the time and expense of litigation—and as private law enforcement regimes that free public sector resources.[6] If we are to encourage these positive societal effects, class counsel must be adequately compensated—even when significant compensation to class members is out of reach (such as when contact information is unavailable, or when individual claims are very small).[7] An inflexible, categorical rule neglects these additional considerations.

6 *See* William B. Rubenstein, *On What A "Private Attorney General" Is—and Why It Matters,* 57 Vand. L.Rev. 2129, 2168 (2004) ("[Class counsel's] clients are not just the class members, but the public and the class members; their goal is not just compensation, but deterrence and compensation."); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers,* 155 U. Pa. L.Rev. 103, 106 (2006) ("[T]he deterrence of corporate wrongdoing is what we can and should expect from class actions."); William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action,* 74 UMKC L.Rev. 709, 724–25 (2006) ("By enabling litigation, the class action has the structural consequence of dividing law enforcement among public agencies and private attorneys general and of shifting a significant amount of that enforcement to the private sector.").

7 *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?,* 158 U. Pa. L.Rev.2043, 2047 (2010) (concluding that courts "should not be concerned about compensating class members in small-stakes class actions and, instead, should be concerned only with fully incentivizing class action lawyers to bring as many cost-justified actions as possible" because "the only function they serve is deterrence"); Hailyn Chen, Comment, *Attorneys' Fees and Reversionary Fund Settlements in Small Claims Consumer Class Actions,* 50 UCLA L.Rev. 879, 892 (2003) (arguing that courts should not limit attorney's fees to a percentage of actual claims because doing so will often "result in a fee that is so small as to prevent class action attorneys from pursuing such cases, which serve primarily a regulatory and deterrent function").

Although we decline to adopt a categorical rule, we recognize the validity of the dissent's concern about settlement structures that are contrived to discourage claims. A needlessly burdensome claims process was one problem with the settlement in *Pampers,* which provided class members a refund for one box of diapers, but only if the claimant had a receipt and a UPC code—including for diapers purchased up to eight years before the settlement. *See* 724 F.3d at 718. Given the low value of individual awards in most consumer class actions, a sworn statement attesting to the purchase may often be sufficient documentation. We also find troubling claim forms and websites that appear designed to confuse class members, either by ***288** omitting information on the claims process or by presenting this information in a confusing way. A claims process that includes these features may well be inappropriate for approval. But as we discuss in greater detail below, that is not the claims process here, which was transparent and not burdensome.

Having rejected a per se rule, we turn to the decision below. In performing the percentage of the fund cross-check, the district court took a middle of the road approach, selecting a midway point between the benefit available to the entire class and the actual payments made. It acknowledged that the claimants benefited from the potential for relief, but found that, under these particular circumstances, it might be appropriate to value that potential relief as different from money in the plaintiff's pocket. The $8.5 million figure the R & R selected recognizes that class counsel provided the valuable service of obtaining substantial relief for each class member who cared to invest the minimal time required to claim it and that in obtaining this relief, counsel undertook a substantial effort for which they deserve compensation.

Blackman protests that if a court is allowed to "split the baby," the parties can game the system by awarding members an inflated benefit then imposing an onerous process to limit claims, making the midpoint higher than if a more modest settlement award had simply been mailed to each class member. Blackman also argues that there is no universally-applicable "principled dividing line" between fully valuing a settlement where only .001% of the class participates and fully valuing a settlement where just under 10% of the class participates. It does not follow, however, that the only way to judge the validity of the claims process is to rely solely on the amount the claims process will *actually* pay to the class. And concern about gaming the system ignores the district court's discretionary right to reject the settlement under Rule 23(e) because the claims process is unduly burdensome.

Our job is to determine whether the district court's actions were an abuse of its discretion. We do not agree with Blackman's and the dissent's argument that the district court erred by not accepting the proposal of a per se rule of unfairness. Such a rule would require us to jettison the Supreme Court's guiding principles and our own circuit's past acknowledgement that there is value in providing a class member the ability to make a claim, whether she takes advantage of it or not. We do not abandon that foundational principle.

The question remains whether the district court's valuation of the benefit amount as the midpoint between the parties' positions was a proper exercise of its discretion. As a general matter, this procedure presents concerns and we do

not endorse a rule adopting a “midpoint” calculation. In the circumstances of this case, however, the decision is an acceptable way to quantify the court's recognition that having the ability to make a claim has value. Given the facts of this case and the well-reasoned opinions concluding that the settlement relief made available was fair to the class, we decide only that the method employed was within the court's discretion with respect to the case before it.

*2. The claims process*

**[13]** Blackman, the Zik objectors, and the dissent assert that the district court abused its discretion by approving the settlement given the claims process employed in this case. The court considered the objectors' position, and Dahl testified about the claims process at length during ***289** the Fairness Hearing. Here, class members were identified using the name and address provided at the time they initially signed a contract, between January 1, 2006 and October 26, 2012. Because notice was sent to class members in October 2013, each class member's contact information was between one and eight years old. Class counsel also indicated that Global had used four different electronic record management systems during the class period and had transferred information between them, causing class members' records to become incomplete and inaccurate.

Nearly 25% of the notice postcards were returned after the first mailing, suggesting that many class members had moved since joining a gym. Dahl cross-checked the rejected cards against available address databases, re-sent the cards and a far smaller number were returned. Ultimately, slightly more than 90% of the cards were delivered to an address associated with the member. Nonetheless, as Dahl testified, there is “no way of definitively saying they actually reached the class member.” (R. 139, PageID 2718.) In addition to the postcard program, Dahl also engaged in an email notice program in which 150,581 emails were delivered, created a website for the class, published notice in papers of record, and established a toll-free information helpline.

Dahl testified that the notice and claims program was “robust” and that both postcard and email notice prominently displayed the website or provided a direct link so that class members could easily file a claim online. According to Dahl, who has been the settlement administrator for hundreds of settlements, this method is “modern,” “grabs people's attention,” follows how people tend to consume media,” and “get[s] robust filing rates.” (R. 139, Fairness Hearing, PageID 2704–08.)

To file a claim, a class member had to click the link in the email, enter the website url from the postcard, or request that a form be sent via U.S. Mail. The claim form required basic information (name, address, phone number, and email address), that the claimant check boxes indicating subclass membership if applicable, and that the claimant to sign a statement on the form asserting “under penalty of perjury” that the information entered was true.

Dahl testified that, of the more than 3,000 settlements he has administered in his 20 years in the business, fewer than 20 involved direct payment rather than a claims process. Further, all of those direct payment cases involved a “current component to the data,” meaning that the recipients had relationships with the defendant that heightened the reliability of their address data, such as current employees, insurance policy holders, and clients with ongoing account relationships.[8] (R. 139, PageID 2711–12.) None of these direct distributions had data as “out of date” as Global's data. The claims procedure was open, meaning that class members could make claims even if they had not received direct notice. As a result, several hundred class members who were not in Global's records became claimants, and over 2,000 class members not appearing in Global's subclass records were granted subclass membership and will receive more money than they would have ***290** had Global just mailed checks based on its data.

8 Dahl's testimony is consistent with academic work on this issue. *See* Adam S. Zimmerman, *Funding Irrationality,* 59 Duke L.J. 1105, 1167 (2010) (observing that direct payments are practical when the parties have “a great deal of information” about potential claimants, but “more problematic” when parties “have less information about potential claimants”).

The objectors assert that a check simply should have been mailed to the address listed for each class plaintiff because common sense dictates that direct payment would have resulted in a payout greater than 8% of the claims made. This ignores the inadequate member data, the number of the checks that would not have reached the class members and the administrative costs of managing that procedure. Blackman's assumption that class counsel “structured the settlement to withhold benefit from 92% of the class,” (Blackman Br. at 19), moreover, is not supported by any evidence of an unduly burdensome component of the claims process. Here, there is every indication that Dahl diligently attempted to reach each class member: multiple forms of notice were provided, including ads in 13 different newspapers, a website, and a

dual email and postcard mailing approach targeting individual class members. The actual claim form was also short and straightforward.

Class counsel has provided a substantial number of citations to cases employing claims processes similar to this one, including in similar health club settlements. The objectors have provided no authority indicating that the claims process here was improper. Furthermore, Dahl's testimony that response rates in class actions generally range from 1 to 12 percent, with a median response rate of 5 to 8 percent, indicates that the 8 percent response rate was well within the acceptable range for a consumer class action.[9] Given this response, the obvious uncertainty about any class member's address, and Dahl's testimony about the robustness of the process, we conclude that the district court acted within its discretion when finding the claims process employed here to be appropriate.

9 In contrast, only 0.6% percent of claims were approved in *Seeger*, R. 118–10, PageID 2002, and slightly more than 0.5% of class members submitted claims in *Redman v. RadioShack Corp.,* 768 F.3d 622, 628 (7th Cir.2014).

*3. The clear sailing and kicker clauses*

The objectors and the dissent point to the settlement's clear-sailing and kicker-clauses as evidence of self-dealing by class counsel that would warrant a finding that the settlement was unfair under Rule 23(e). This court has recently noted different perspectives among the circuits with respect to clear sailing provisions:

> Courts have expressed mixed views about the relationship between clear-sailing provisions and adequacy of representation. In *Malchman v. Davis,* the Second Circuit said that, "where ... the amount of the fees is important to the party paying them, as well as to the attorney recipient, it seems ... that an agreement 'not to oppose' an application for fees up to a point is essential to the completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged." 761 F.2d 893, 905 n. 5 (2d Cir.1985), *cert. denied,* 475 U.S. 1143 [106 S.Ct. 1798, 90 L.Ed.2d 343] (1986), *abrogated on other grounds, Amchem Prods., Inc. v. Windsor,* 521 U.S. 591 [117 S.Ct. 2231, 138 L.Ed.2d 689] (1997). Other judges have been less impressed with clear-sailing provisions. In the view of a concurring judge in *Malchman,* such a "clause creates the likelihood that plaintiffs' counsel, in obtaining the defendant's agreement not to challenge a fee request within a stated ceiling, will bargain away something of value to the plaintiff class." *Id.* at 908 (Newman, J., concurring). Another danger is that "the lawyers ***291** might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *Weinberger* [*v. Great Northern Nekoosa Corp.*], 925 F.2d [518,] 520 [ (1st Cir.1991) ] (holding that courts should "scrutinize" fees requested pursuant to clear-sailing agreements to see whether they "are fair and reasonable").

*Gooch v. Life Investors Ins. Co. of Am.,* 672 F.3d 402, 425 (6th Cir.2012). After examining the specifics of the application, the *Gooch* court approved the settlement with the clear sailing provision. *Id.* at 426.

Neither clear sailing provisions nor kicker clauses have ever been held to be unlawful per se, but courts have recognized that their inclusion gives the district court "a heightened duty to peer into the provision and scrutinize closely the relationship between attorneys' fees and benefit to the class." *Bluetooth,* 654 F.3d at 948. Here, the R & R *did* peer into the relief to the class and the attorney's fees at issue, and found both to be appropriate.

Blackman argues that "most critically, the reversion and separate compartmentalization" brought about by a standalone attorney's fee and an agreement with a clear-sailing provision and kicker clause "precludes a district court from reallocating an excessive fee request to the class to fix any disproportion: a reduction in attorneys' fees goes to the defendant, thus deterring both courts and objectors from reducing the fee. The combination unfairly insulates the fee request from scrutiny." (Blackman Br. 18.)

**[14]** Blackman's concern is unwarranted here because the district court unreservedly found that the relief to the class was "substantial" and that class counsel's fee request was appropriate, findings it made within its legitimate discretion. (R. 141, PageID 2850.) The lengthy R & R extensively discussed both relief and fees, and did not exhibit any inclination to find that the former was inadequate or the latter was excessive. Blackman's argument that the court could not rewrite the settlement agreement to reallocate funds between the plaintiffs and class counsel is unpersuasive. If a court concludes that the ratio between attorney's fees and relief to the class creates an inequitable situation, it could reject the settlement on Rule 23(e) grounds and send the parties back to the negotiating table.

Though some courts have "disfavored" clear sailing agreements and kicker clauses, their inclusion absent more—as is the case here—does not show that the court abused its discretion in approving the settlement.

**B. The Zik objectors' contract claims and KHSA claims**

**[15]** In addition to echoing Blackman's arguments, the Zik objectors assert that the class settlement was not fair, reasonable, and adequate because it did not appropriately distinguish between the differing values of and legal theories underlying class members' claims. The Zik objectors assert that class counsel did not obtain any additional consideration for their "unique and valuable" contract claims or for legal rights afforded under the Kentucky Health Spa Act. (Zik Br. at 30–33.)

With respect to their contract claims, the Zik objectors allege that (1) their contract terms are clearer than subsequent versions of the contract about allowing only one month of additional fees upon cancellation (as opposed to two), and (2) their contracts do not contain a provision for a $10 cancellation fee, which later contracts did. They, like other plaintiffs, were charged two months of fees after they cancelled (one more than permitted under their contracts, they allege), and ***292** were charged the $10 cancellation fee. They argue that because their contracts terms are different, their claims are worth more and deserve a higher settlement value.[10]

10 The Ziks themselves (husband and wife) also appear to have been paying membership fees at the high end of the range of what plaintiffs were charged: $49/month for Robert and $44.99/month for April, as opposed to the class average of $26.76/month. The Zik objectors provide no information or evidence regarding the monthly membership fees of other would-be members of their subclass.

In explaining the reasons it found the amount awarded in the Gym Cancel Subclass to be "fair, reasonable, and adequate," despite some differences in the actual charges individual class members incurred, the R & R noted that

> The Zik Objectors sought to certify a class in the *Zik* action premised on a claim that Global Fitness acted in breach of "its members' membership agreements by charging its members one extra month of membership dues and a $10.00 cancellation fee when members terminate their membership agreement." As discussed ... the claims asserted in the *Zik* action are subsumed in the Gym Cancel Subclass, and an Allowed Claimant who cancelled his or her gym membership contract during the Class Period is entitled to an award of $25. The Claims Administrator has validated claims and calculated final award amounts for the Allowed Claimants: the average Class Payment is $31.99 and the average Gym Cancel Subclass Payment will be $41.28.

(R. 141, PageID 2844 (internal citations removed).) The court found the $31.99 and $41.28 figures to be "a significant recovery because it exceeds the $26.76 average monthly fee of a gym membership with Global Fitness between January 1, 2009 and July 2012." (*Id.*) Because the *Zik* class complaint sought the contract damages of payment for the one extra month charged after cancellation (the first month was legitimate, the second was not) and reimbursement for the $10 cancellation fee (with no mention of the FIF or other fees), the average Zik objector would receive about $36.76 in contract damages. This is only a few dollars more than the average claimant in the case, and several dollars *less* than the average Gym Cancel Subclass member, a group in which each member of the Zik objectors' proposed class would necessarily be a part. The court noted the closeness of the value of the settlement to the average class member and the expected damages of the average Zik objector and correctly found that this was an indicator of the settlement's fairness.

Rejecting the Zik objectors' argument that the settlement was unfair owing to its lack of individual damages calculations, the court found it appropriate to consider the risks of the litigation going forward and the costs and delays that would likely result from a settlement in which it was required to calculate and verify individual damage awards for the approved claimants, including those for which Global had no records. Given the close approximation of the payout to a typical Zik plaintiff's actual damages and the costs involved in individual calculations, the court could reasonably find that this weighed in favor of approving the settlement.

The Zik objectors also fail to present meaningful factual support for their argument that class counsel failed to extract sufficient value for their plaintiffs' possible Kentucky Health Spa Act (KHSA) claims. Instead they rely on class counsel's testimony in *Seeger* about the potential value of those claims. But as the Zik objectors ***293** acknowledge, the *Robins* court found no value in the plaintiffs' contract-based KHSA claims. *Robins,* 838 F.Supp.2d at 650–51. And the dearth of caselaw about the Act's other provisions make its utility difficult to predict. Though the Zik objectors' briefing on appeal is vocal

about the value of the relief attainable under the KHSA, they fail to provide detail or offer a theory of how the statute would be applied.

At the fairness hearing, the Zik objectors noted that the KHSA requires spas to register the costs of their membership plans with the Kentucky Attorney General, and that if they fail to register and provide the member a list of costs, the member is entitled to void the contract and obtain disgorgement of any difference. The Zik objectors hypothesize that a Kentucky member charged $39.99 per month for four years of membership when the plan registered with the Kentucky Attorney General called for a charge of $29.99 per month would be entitled to damages of $480 ($10/month).

Class counsel countered that:

> [T]here is no situation of Kentucky Health Spa members signing contracts for $49 when the contract was actually $29. We have all of that data from Urban Active's third party vendor software because we subpoenaed it, and we through our IT staff have done technical analysis of that data. And the vast majority of the cases, which we would put forth as violations of the Kentucky Health Spa Act actually show that Urban Active sold memberships for less than what the price was registered with the Kentucky Attorney General. So, again, that brings us straight back to the equitable argument, that while we are confident that we can prove a violation, we have significant hurdles in proving damages in excess of what we already negotiated as part of the settlement....

(R. 139, PageID 2782.) The court appropriately found significance in the Zik objectors' acknowledgement that class counsel "devoted a large percentage of [its] work ... to ESI discovery to be used for the purpose of proving the KHSA claims." (R. 141, PageID 2846 (citing R. 118, PageID 1935).) This suggests that the KHSA claims were adequately developed, and that class counsel considered the likelihood of success on the merits of those claims. And though the Zik objectors litigated their case for over three years, there does not appear to be anything in their briefing or in the record demonstrating that their hypothetical Kentucky class member who was overcharged $10/month exists, or that they have the factual basis to assert a viable KHSA claim on another theory.

**[16]** As the court below noted, in the context of determining whether to approve a class action consent decree, we have held that:

> A court may not withhold approval simply because the benefits accrued from the decree are not what a successful plaintiff would have received in a fully litigated case. A decree is a compromise which has been reached after the risks, expense, and delay of further litigation have been assessed. Class counsel and the class representatives may compromise their demand for relief in order to obtain substantial assured relief for the plaintiffs' class.

*Williams v. Vukovich,* 720 F.2d 909, 922 (6th Cir.1983) (internal citations omitted). Given that the relief sought achieved a number roughly equivalent to the extra month of dues charged and the cancellation fee the Zik objectors seek, while avoiding the costs and risk of additional ***294** litigation, there was merit to the settlement. *Williams* also cautioned that:

> Significantly, however, the deference afforded counsel should correspond to the amount of discovery completed and the character of the evidence uncovered. The court should insure that the interests of counsel and the named plaintiffs are not unjustifiably advanced at the expense of unnamed class members. Objections raised by members of the plaintiff class should be carefully considered.

*Williams,* 720 F.2d at 923 (internal citations omitted). As discussed above, class counsel has engaged in ample discovery and motion practice for a period of years, and specifically focused on the Kentucky Health Spa Act claims. There is therefore reason to believe that some deference is warranted. This case is a far cry from *Seeger* or *Pampers,* which were said to have settled before conducting discovery or having an opportunity to understand the relative strengths and weaknesses of their cases.

The Zik objections were carefully considered during the Fairness Hearing and in the orders of the lower court. Having failed to put forth any evidence suggesting that their proposed class's claims and—very importantly—realistic anticipated recovery are significantly different from what was obtained here, we conclude that the district court acted within its discretion when determining that the settlement was fair despite the Zik objectors' assertions.

### C. The Zik objectors' attorney's fee request

**[17]** The Zik objectors argue that the district court erred in refusing their request for fees. This court reviews a district court's award or denial of attorney's fees for an abuse of discretion. *Bowling,* 102 F.3d at 779. "Fees and costs may be awarded to the counsel for objectors to a class action settlement if the work of the counsel produced a beneficial

result for the class." *Olden v. Gardner,* 294 Fed.Appx. 210, 221 (6th Cir.2008); *see also Lonardo v. Travelers Indem. Co.,* 706 F.Supp.2d 766, 803–04 (N.D.Ohio 2010) ("Sixth Circuit case law recognizes that awards of attorneys' fees to objectors may be appropriate where the objector provided a benefit to the class by virtue of their objection."). Here, the district court found that because none of the Ziks' objections had merit, they had not provided the necessary benefit to the class to receive fees. Though the Zik objectors also argue that counsel provided some benefit to the class by objecting to the prior settlement in *Seeger* and helped drive the defendant to settle by advancing the *Zik* case, they have provided no authority indicating that the district court must award attorney's fees to counsel whose work in an entirely separate litigation may have provided some benefit to a class in the litigation before the court. Accordingly, we conclude that the district court acted within its discretion in denying attorney fees to the Zik objectors.

### *III. CONCLUSION*

For the reasons stated above, we AFFIRM the district court's order.

CLAY, Circuit Judge, dissenting.

Contrary to the focus of the majority opinion, this is not primarily a case about the theoretical policy considerations that should be taken into account in order to determine or apportion the economic or societal benefits of this form of consumer class action litigation. What the majority misses in its survey of the case law and academic literature is that the court below abused its discretion in approving a class action settlement which fails to adequately ***295** protect the interests of class members and unduly enriches class counsel at the expense of their own clients.

Rule 23 imposes obligations on class representatives, class counsel, and the district court to protect the interests of absent class members: class representatives may be appointed only if they will "fairly and adequately protect the interests of the class"; class counsel has the "duty" to do the same; and a court may approve a settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." Fed.R.Civ.P. 23(a)(4), (g)(4), (e)(2). We have previously described class counsel's duty as "fiduciar[ies]" of the class, whose performance as such "courts must carefully scrutinize." *In re Dry Max Pampers Litig.,* 724 F.3d 713, 718 (6th Cir.2013); *see also Rawlings v. Prudential–Bache Properties, Inc.,* 9 F.3d 513, 516 (6th Cir.1993). Because class counsel fell short of their obligations both under Rule 23 and as fiduciaries, and the district court failed to exercise the necessary careful scrutiny to determine that the settlement was fair, reasonable and adequate, I respectfully dissent.

When deciding whether to approve a class action settlement, courts look to several factors:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

*Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.,* 497 F.3d 615, 631 (6th Cir.2007). The circumstances of this settlement, including its disproportionate fee award, strongly suggest an abuse of discretion by the district court in approving the settlement, including the fee award.

The Ninth Circuit warned that courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth Headset Products Liab. Litig.,* 654 F.3d 935, 947 (9th Cir.2011). *Bluetooth* gave three examples of such signs: (1) "when counsel receive a disproportionate distribution of the settlement"; (2) "when the parties negotiate a 'clear sailing' arrangement[1] providing for the payment of attorneys' fees separate and apart from class funds, which carries 'the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class' "; and (3) "when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund." *Id.* (internal citations omitted). All three warning signs are present in this case.

1 A so-called "clear sailing" provision is an agreement on the amount of attorney's fees whereby "the party paying the fee agrees not to contest the amount to be awarded by the fee-setting court so long as the award falls beneath a negotiated ceiling." *Gooch v. Life Inv'rs Ins. Co. of Am.,* 672 F.3d 402, 425 (6th Cir.2012).

Class counsel, who were also class counsel in the court below, argue that we must consider the compensation to the class

and the award of attorney's fees separately. They obtained what they consider significant relief for the class—which, in congratulating themselves, they label "exceptional" at least five times in their brief—and therefore believe that they have rightly earned a hefty fee award. Objector Joshua Blackman, however, urges us to view the settlement and the fee award as inseparable. ***296** Because the class recovery was dwarfed by the fee award class counsel ultimately received—a fee award negotiated behind closed doors—the settlement and fee award represent an unconscionable elevation of the interests of class counsel over those of the class that should be rejected under *Dry Max Pampers. See* 724 F.3d at 717 (rejecting $2.73 million attorney fee award where the class itself received no cash whatsoever). To evaluate these arguments, both separately and together, it is necessary to retrace the relief, the settlement, the fee award, and the role of the district court.

At the time of the fairness hearing in this case, the deadline to file claims had passed, and although some of the payments were still being finalized, the claims administer, Jeffrey Dahl, had filed a declaration, docketed in the record, that identified 49,810 "Allowed Claimants"[2] out of a total gym membership of 605,735. (R. 136–1, Dahl Decl. of Feb. 11, 2014 at Page ID 2659.) Thus, when the fairness hearing took place, the district court was on notice that only some 8.2% of class members had obtained monetary relief. Dahl testified at the fairness hearing that the median response rate in a study of consumer class actions was 5–8%. (R. 139, Fairness Hr'g Tr. at Page ID 2722.) These figures are consistent with the recent observation of the Third Circuit that "consumer claim filing rates rarely exceed seven percent, even with the most extensive notice campaigns." *Sullivan v. DB Investments, Inc.,* 667 F.3d 273, 329 n. 60 (3d Cir.2011) (en banc) (quoting finding of special master). Dahl's testimony, and Plaintiffs' argument, might be recharacterized to ask whether the district court, aware of the low customary response rate in consumer class actions, should have approved a settlement in which 91.8% of the class—whose interests class counsel were under a fiduciary obligation zealously to represent—is left with absolutely nothing.

2 This was later amended to 49,808 in a later declaration from Dahl, docketed between the fairness hearing and the magistrate judge's report and recommendation. (R. 140–1, Dahl Decl. of Mar. 21, 2014 at Page ID 2797.).

The majority opinion's argument regarding the propriety of the district court's approval of the settlement is predicated entirely on acceptance of the status quo. Focusing on the average payment amount to a claimant—and not the average payout spread across all class members—the magistrate judge described the recovery, which by that point had been fixed at $1,593,240, as "substantial."[3] (R. 141, Report and Recommendation at Page ID 2844.) And perhaps this case may exceed the average claim rate of consumer class actions. However, there is another interpretation of class counsel's performance in this scenario: class counsel spent years litigating this case and, as a result of the claims process in whose design they participated, their clients were left with little to show for their counsel's efforts. From this perspective, class counsel did poorly in absolute terms.

3 Unclaimed funds were to be redistributed pro rata to claimants only if the total payout were less than $1.3 million, and were capped at that amount. Class counsel also did not see fit to include a *cy pres* beneficiary, as there often is in cases like this; all unclaimed funds were to revert to Defendant. *Compare Moulton v. U.S. Steel Corp.,* 581 F.3d 344, 351 (6th Cir.2009) (awarding unclaimed funds to a nearby school district).

In the district court's view, this purportedly substantial recovery and the protracted proceedings—which had already dragged on for nearly three years by the time of the report and recommendation—were enough to justify class counsel's requested $2,390,000 fee award. (*Id.* at ***297** Page ID 2831–32, 2835–36, 2841.) The district court first justified its findings under the lodestar approach, a method of compensating counsel based on hours of work at the applicable rates (and sometimes a multiplier), and then performed a so-called "percentage of the fund cross-check" whereby it calculated the percentage of the fee award as a proportion of its valuation of an $8.5 million constructive common fund.[4] *See Rawlings,* 9 F.3d at 516–17 (approving both lodestar and percentage-of-the-fund methods in this Circuit). Such cross-checks against the other method are not uncommon. *See Van Horn v. Nationwide Prop. & Cas. Ins. Co.,* 436 Fed.Appx. 496, 500 (6th Cir.2011); *Bowling v. Pfizer, Inc.,* 102 F.3d 777, 780 (6th Cir.1996). Even if Blackman had not raised issues about the allocational fairness of this fee relative to the class payout, the fee award could not be sustained under either of these methodologies.

4 District courts are required to explain their reasons for "adopting a particular methodology and the factors considered in arriving at the fee." *Moulton,* 581 F.3d at 352. Such explanations often discuss the following factors: "(1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a

> contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides." *Id.*

Although "the lodestar method has been criticized for being too time-consuming of scarce judicial resources," the "listing of hours spent and rates charged provides greater accountability." *Rawlings,* 9 F.3d at 516. Class counsel failed to submit the voluminous records contemplated by *Rawlings* and instead submitted perfunctory, impenetrable bullet-point lists in two affidavits in which they simply asserted that they had kept contemporaneous records. (R. 114–1, McCormick Decl. at Page ID 1865–80; R. 114–2, Troutman Decl. at Page ID 1881–1903.) To these bullet lists were appended the lengthy curriculum vitae of class counsel. (*Id.*) With no such contemporaneous records actually submitted by class counsel, the message to the district court was obvious: we are experienced litigators; just trust us that we did this work. The district court took class counsel at their word, although it chided counsel that "the best practice may have been to submit more detailed records of the costs and time expended in the litigation." (R. 141, Report and Recommendation at Page ID 2870.)

Confronted with counsel's uncorroborated sworn statements, the district court should not have been so trusting. This Circuit places the "burden of providing for the court's perusal a particularized billing record" on the party seeking fees. *Imwalle v. Reliance Med. Products, Inc.,* 515 F.3d 531, 553 (6th Cir.2008) (quoting *Perotti v. Seiter,* 935 F.2d 761, 764 (6th Cir.1991)) (upholding fee award where counsel "submitted 52 pages of detailed, itemized billing records that specify, for each entry, the date that the time was billed, the individual who billed the time, the fractional hours billed (in tenths of an hour), and the specific task completed"). Reviewing case law, *Imwalle* held that "[a]lthough counsel need not record in great detail each minute he or she spent on an item, the general subject matter should be identified." 515 F.3d at 553 (citations omitted). District courts, *Imwalle* noted, have reduced fee awards "where billing records 'lumped' together time entries under one total so that it was 'impossible to determine the amount of time spent on each task.' " *Id.* (quoting ***298** *Cleveland Area Bd. of Realtors v. City of Euclid,* 965 F.Supp. 1017, 1021 (N.D.Ohio 1997)). In the bullet points at issue here, there was no description of the specific task or of the subject matter—apart, of course, from what counsel simply termed the "Litigation." For example:

- I[, Thomas McCormick, class counsel,] have 11 years of experience in handling complex litigation and billed at my standard hourly rates of $260 per hour in 2011, $350 in 2012; and $375 in 2013. My time constitutes over 52% of the time billed by Vorys in the Litigation.

(R. 114–1, McCormick Decl. at Page ID 1868.) Such "documentation" is completely inadequate and should not have been accepted, especially coming from attorneys who touted their experience in the succeeding pages. *Cf. McCombs v. Meijer, Inc.,* 395 F.3d 346, 360 (6th Cir.2005) (affirming fee award where the district court found that "*entries* made by [the plaintiff's] counsel were sufficient even if the description *for each entry* was not explicitly detailed") (emphases added). In approving the $2.39 million fee award, the magistrate judge relied on this deficient recitation and the oral representation of class counsel that the lodestar by the time of the fairness hearing was "just shy of $2.8 million." (R. 141, Report and Recommendation at Page ID 2871.) That the fee ultimately awarded was below its orally asserted lodestar should not, alone, save it. *See, e.g., Hensley v. Eckerhart,* 461 U.S. 424, 433–37, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (allowing district court to reduce lodestar amount for inadequate documentation and limited success).

In performing its percentage-of-the-fund cross-check, the district court also committed legal error because it miscalculated the value of the fund. Following the approach of *Lonardo v. Travelers Indem. Co.,* 706 F.Supp.2d 766 (N.D.Ohio 2010), it chose as its valuation the midpoint of the $1,593,240 actual payout to class members and the "Available Benefit" of $15,500,430, the maximum payout if all class members were to file claims, for a final valuation of $8,546,835. (R. 141, Report and Recommendation at Page ID 2875.) It then added administration costs ($496,259) and the attorney's fee itself for a "Total Class Benefit" of $11,433,094, of which the requested fee award was 20.9%—an acceptable percentage, in its view. (*Id.*)

Not only has no Circuit in the country approved of such a methodology, it is premised on the faulty and fictional premise that counsel should be given credit for compensation that the class did not receive—in other words, for millions of dollars that would never leave Defendant's coffers. We have long held that "[w]hen awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done *as well as for the results achieved.*" *Rawlings,* 9 F.3d at 516 (emphasis added). *Rawlings* further stated that "the percentage of the fund method more accurately reflects the results achieved."

*Id.* With the claims deadline months past, the district court knew that neither the $15.5 million "Available Benefit" nor the $8.5 million midpoint figure could ever materialize. Yet the district court could have predicted this beforehand simply because it was presiding over a claims-made consumer class action, which would have an extremely low response rate, as courts have begun to recognize. *See Sullivan,* 667 F.3d at 329 n. 60.

This is the predictable "economic reality" of claims-made class actions, and one that we must acknowledge. *Dry Max Pampers,* 724 F.3d at 717 (quoting *Strong v. BellSouth Telecomms., Inc.,* 137 F.3d 844, 849 (5th Cir.1998)). The defense bar, at least, recognizes this; among defense ***299** counsel, low participation rates under claims-made class action settlements are both common knowledge and a selling point: class members recover—and a defendant pays—much less when class members opt in than when a defendant disburses funds directly to class members.[5] The problem is not, as the majority seems to think, with settlement procedures that are intended to discourage claims. Even without overt efforts on the part of defense counsel to thwart claims, opt-in claims procedures naturally depress response rates to single-digit percentages for the very predictable reason that class members simply are not sufficiently incentivized to bother to opt in.

5 Wystan M. Ackerman, *Class Action Settlement Structures,* 63 Federation of Defense and Corporate Counsel Quarterly 35 (2012) (claiming that the "principal advantage" of opt-in, claims-made settlements from the perspective of the defense is that defendants would pay much less than if they simply mailed out checks).

The Seventh Circuit rightly rejected a hypothetical total maximum payout of $14.2 million in a consumer class action in which $1 million was paid out as "fiction," holding that the district court should have computed the percentage of the fund by calculating the " 'ratio of (1) the fee to (2) the fee plus what the class members received.' " *Pearson v. NBTY, Inc.,* 772 F.3d 778, 781 (7th Cir.2014) (quoting *Redman v. RadioShack Corp.,* 768 F.3d 622, 630 (7th Cir.2014)).[6] *See also Strong,* 137 F.3d 844. This is a simple, common-sense rule: in assessing the fairness of the division of the payout between class counsel and the class, courts should look to the amounts actually pocketed by both parties. Thus, the district court should have used the $1,593,240 actually paid as the benefit to the class for the calculation of its fee.

6 On this basis, the court also held, correctly, that "administrative costs should not have been included in calculating the division of the spoils between class counsel and class members. Those costs are part of the settlement but not part of the value received from the settlement by the members of the class." *Id.*

Yet if valuations based on counterfactual maximum payouts are fiction, they are the sort of fiction in which courts, including the Supreme Court some decades ago, have indulged. In *Boeing Co. v. Van Gemert,* 444 U.S. 472, 480, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980), the Supreme Court held that the "right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel." *Accord Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 437 (2d Cir.2007). Although *Boeing* has never been directly overruled, it has hardly been met with universal acclaim. In a statement respecting the denial of a petition for certiorari in *Int'l Precious Metals Corp. v. Waters,* 530 U.S. 1223, 120 S.Ct. 2237, 147 L.Ed.2d 265 (2000), Justice O'Connor expressed serious misgivings about a fee award of $13,333,333 based on a reversionary fund of $40 million, the unclaimed portion of which (all but the $6,485,362.15 actually paid out to the class) would revert to the defendant:

> We had no occasion in *Boeing,* however, to address whether there must at least be some rational connection between the fee award and the amount of the actual distribution to the class. The approval of attorney's fees absent any such inquiry could have several troubling consequences. Arrangements such as that at issue here decouple class counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery. ***300** They potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing [sic] class counsel to settle lawsuits in a manner detrimental to the class.

120 S.Ct. at 2237–38. The Advisory Committee notes to the 2003 amendments to Rule 23 that "[o]ne fundamental focus" of a district court's analysis "is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members.... For a percentage approach to fee measurement, results achieved is the basic starting point." Fed.R.Civ.P. 23, 2003 Amend., Note to Subdivision 23(h).

The Advisory Committee had no power to abrogate *Boeing,* but it nonetheless distinguished benefits from actual results.[7]

7 The Note's caution that "in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award," for which it cites *Blanchard v. Bergeron,* 489 U.S. 87, 95, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989), appears to refer to the irrefutable fact that class counsel should have an incentive to seek and be compensated for obtaining injunctive or declaratory relief, and does not necessarily support basing a fee award on funds never actually claimed or paid out.

In *Pearson,* the Seventh Circuit also found *Boeing* distinguishable from constructive common fund cases because *Boeing* was actually litigated to a judgment of $3,289,359 plus interest, and "[n]othing in the court's order made Boeing's liability for this amount contingent upon the presentation of individual claims." 772 F.3d at 782 (quoting *Boeing,* 444 U.S. at 479 n. 5, 100 S.Ct. 745). In a case involving an actual, quantifiable common fund with a *cy pres* beneficiary, we valued "settlement proceeds," which, by virtue of the *cy pres* beneficiary, the defendant had to pay out, as the amount received by both the class members and the *cy pres* beneficiary for calculation of attorney's fees. *Moulton v. U.S. Steel Corp.,* 581 F.3d 344, 352 (6th Cir.2009). Such valuations are intuitive when courts are forced to calculate liabilities or a defendant actually agrees to pay out a certain sum. In so-called "constructive common fund" cases where the vast majority of class members do not claim their awards, but in which unclaimed money remains with the defendant, district courts should not be allowed to engage in unreasonable, counterfactual valuations of the fund—even supposed compromise measures, as the district court did here.

The correct valuation of the benefit of the class at $1.59 million leads naturally to Blackman's preferred approach of treating the $1.59 million class payout in the context of the $2.39 million attorney fee award. In a case involving a "clear sailing" agreement not to contest fees before the court, the Eighth Circuit described settlement terms and a negotiated fee amount as a "package deal." *Johnston v. Comerica Mortgage Corp.,* 83 F.3d 241, 246 (8th Cir.1996). By *Johnston's* sound logic, the fee award and the settlement must be considered together because the fee amount was, for all intents and purposes, negotiated between the parties and memorialized in the settlement agreement, as the other settlement terms were. Courts have frequently expressed "the fear that class actions will prove less beneficial to class members than to their attorneys," as here. *Weinberger v. Great N. Nekoosa Corp.,* 925 F.2d 518, 524 (1st Cir.1991). Courts' concerns are twofold—not only might class counsel benefit more than the class, but they might also benefit at the expense of the class. A defendant, concerned only with its total payout, has little incentive to be concerned with "the allocation between the class payment and ***301** the attorneys' fees." *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Products Liab. Litig.,* 55 F.3d 768, 820 (3d Cir.1995). *See also Dry Max Pampers,* 724 F.3d at 717; *Strong,* 137 F.3d at 849–50. *Weinberger* recognized that class counsel could, in essence, sell out its client: "the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." 925 F.2d at 524.

To decide whether that was the case here, it is worth doing a little arithmetic. The amount that the attorneys received exceeded the amount the class received by just over 50%; put differently, calculating the "relevant" ratio that *Pearson* and *Redman* proposed—which compares the amounts received by class counsel and the class as a percentage of the defendant's total payout, exclusive of administration costs—reveals that the attorney's fees represent 60% of Defendant's payout. *See Redman,* 768 F.3d at 630 (rejecting fee award where 55% of the defendant's payout went to attorney's fees). Even though the $1.59 million paid to the class was a more substantial result than the "perfunctory," non-cash relief at issue in *Dry Max Pampers,* which Blackman concedes, that case compels us to consider the allocation of relief between class counsel and the class. 724 F.3d at 718. Because of its concerns about the misallocation of relief between class counsel and the class, *Dry Max Pampers* rejected a settlement that "g[ave] preferential treatment to class counsel" as demonstrating "disregard" of their "fiduciary responsibilities." *Id.* A fee award that exceeds the recovery of the class by 50%, as the $2.39 million attorney fee award granted by the district court in this case did, seemingly constituted a windfall to the attorneys that the district court should not have allowed in the proper exercise of its discretion.

Two particular clauses in the settlement relating to the fee award are of additional concern: the "clear sailing" clause, whereby Defendant agreed not to contest any attorney's fee request up to $2,390,000, and the "kicker" clause, which stipulated that if the district court were to award less than $2,390,000 in attorney's fees, the unpaid balance would revert to Defendant. (*See* R. 97–1, Settlement, at Page ID 1499–1500.) Blackman sees both these clauses as evidence of yet further "self-dealing" on the part of class counsel at

the expense of the class. (Blackman Br. at 17.) The clear sailing clause required Defendant to file a notice with the district court at least 21 days before the fairness hearing stating that it did not oppose the requested fee amount up to the $2,390,000 cap. The kicker clause, in seemingly uncontroversial legalese, stipulated that whatever payment the district court approved "shall constitute full satisfaction of Defendant's obligations" to pay the attorney's fee. (R. 97–1, Settlement, at Page ID 1499.) A clause two paragraphs prior, stating that "such payments shall have no effect on ... the Class Payment" precluded any potential pro rata distribution of unpaid attorney's fees—and sent such unpaid fees right back to Defendant. (*Id.*)

Plaintiffs defend the use of the clear sailing clause, and argue that we have upheld clear sailing agreements in the past, as in *Gooch v. Life Inv'rs Ins. Co. of Am.,* 672 F.3d 402 (6th Cir.2012), which held that "not every 'clear sailing' provision demonstrates collusion." *Id.* at 426 (affirming use of clear sailing provision "where the 'clear sailing' provision caps attorney compensation at approximately 2.3% of the total expected value of the settlement to the class members"). However, as *Weinberger* acknowledged, clear sailing agreements necessarily suggest conflict between the class and its counsel, for "the very existence of a clear sailing ***302** provision increases the likelihood that class counsel will have bargained away something of value to the class." 925 F.2d at 525 (citing *Malchman v. Davis,* 761 F.2d 893, 908 (2d Cir.1985) (Newman, J., concurring), *abrogated on other grounds by Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)).

Plaintiffs also accuse Blackman of predicating his argument "on the erroneous factual assumption that negotiations concerning attorneys' fees affected the relief available to the class," and point to the district court's finding that class counsel negotiated the fee award only after agreeing to the other settlement terms. (Pls. Br. at 47.) In support of their fee request, class counsel from the two lead firms submitted affidavits to the district court in which they averred the following:

> The parties did not begin negotiations on attorneys' fees and costs until after the substantive relief was agreed upon between Plaintiffs and Urban Active. Thus, it is clear that the Settlement resulted from arms'-length negotiation and fair dealing with the named Plaintiffs and classes' [sic] best interests in mind.

(R. 97–10, Decls. of Thomas McCormick and Mark Troutman at Page ID 1605, 1610). While the blatantly self-serving and conclusory language of the second sentence might have raised serious red flags, the district court held that the risk of collusion was "lessened" because of the order of negotiations. (R. 141, Report and Recommendation at Page ID 2850.) In *General Motors,* the Third Circuit declined to "place such dispositive weight on the parties' self-serving remarks" about counsel's assurances about the order in which the settlement and fees had been negotiated. 55 F.3d at 804.

*General Motors* also expressed skepticism about this nearly simultaneous form of negotiation, with no intervening court involvement. *Id.* (citing *Court Awarded Attorney's Fees, Report of the Third Circuit Task Force,* 108 F.R.D. 238 (1985)) ("even if counsel did not discuss fees until after they reached a settlement agreement, the statement would not allay our concern since the *Task Force* recommended that fee negotiations be postponed until the settlement was judicially approved, not merely until the date the parties allege to have reached an agreement"). *See also Pearson,* 772 F.3d at 786 (dismissing similar arguments as "not realistic"). Quoting the same Third Circuit task force report, the Ninth Circuit explained that "[e]ven if the plaintiff's attorney does not consciously or explicitly bargain for a higher fee at the expense of the beneficiaries, it is very likely that this situation has indirect or subliminal effects on the negotiations." *Staton v. Boeing Co.,* 327 F.3d 938, 964 (9th Cir.2003). Class counsel cannot be unaware that fee negotiations are nigh—that is, after all, how plaintiffs' lawyers finance their work—and that knowledge simply might cause them to push less hard for the interests of their clients, even if they fail to realize that they are doing so.

With subconscious or even overt collusion a serious risk, the district court possesses a vital role in monitoring potential collusion. The Ninth Circuit held in *Bluetooth* that "when confronted with a clear sailing provision, the district court has a *heightened duty to peer into the provision and scrutinize closely the relationship between attorneys' fees and benefit to the class,* being careful to avoid awarding unreasonably high fees simply because they are uncontested." 654 F.3d at 948 (emphasis added and citations omitted). *Gooch,* the only Sixth Circuit case to date to have considered the validity of clear ***303** sailing provisions, did not explicitly adopt the Ninth Circuit requirement of heightened scrutiny of such provisions, but *Bluetooth* was correct that district courts must be especially wary when the parties agree not to contest fees in class actions. *See Gooch,* 672 F.3d at 426. To its credit, the district court did not simply "ignore[ ] the clear sailing fee provision," as the court below did in *Bluetooth,*

and instead discussed it at some length. 654 F.3d at 948. The court below nonetheless greatly underestimated how the very presence of the clear sailing provision was itself evidence of possible collusion, and thereby cast doubt on the fairness of the settlement as a whole, including the adequacy of class counsel's representation. *See* Rule 23(e)(2), (g)(4).

The inclusion of the so-called "kicker clause," which allowed unpaid attorney's fees to revert to Defendant, only "amplifies the danger of collusion already suggested by a clear sailing provision." *Bluetooth,* 654 F.3d at 949. *Bluetooth* recognized that these two types of suspicious clauses are intimately related: "[t]he clear sailing provision reveals the defendant's willingness to pay, but the kicker deprives the class of that full potential benefit if class counsel negotiates too much for its fees." *Id.* At some point in the settlement negotiations, the parties presumably wished to resolve what would happen if the district court decided to award less than the $2.39 million cap, and agreed that, should the district court do so, any remaining funds would revert to Defendant—rather than being distributed to class members. The district court reasoned that this clause was in no way problematic and had no practical effect because class counsel were awarded the full $2.39 million in attorney's fees. (R. 141, Report and Recommendation at Page ID 2852.) Yet as with the clear sailing clause, the district court overlooked the extent to which the inclusion of this provision in the agreement may have been the product of compromised representation by class counsel who were willing to deprive their clients of Defendant's full set-aside for fees, so long as they themselves were paid off. The Seventh Circuit rightly held that it is impossible to discern any "justification for a kicker clause," which should be subject to a "strong presumption of [ ] invalidity." *Pearson,* 772 F.3d at 787.

Consumer class actions may indeed confer societal benefits. Yet allowing such purportedly desirable litigation to remain economically viable should not guide a district court's fairness inquiry under Rule 23. Class counsel are fiduciaries of the class, not of the public at large, and should not be able to justify a poor result for their clients because of the nobility of their mission. The majority cites some scenarios in which "significant compensation to class members is out of reach," such as small claims and unavailable contact information for class members. Indeed, acquiescence to the dysfunctional procedures associated with the status quo of opt-in settlements fails to provide "an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class." *Id.* at 781. In fact, the desirable deterrent effect on defendants' behavior might even be expected to increase as the payout to class members grows.

The "package deal" that this settlement, including its disproportionate fee award, offered to the class was a bad one relative to what it offered class counsel. *See Johnston,* 83 F.3d at 246. The disparity is so great that it calls into question whether class counsel may have violated their "fiduciary obligations" to class members. *Dry Max Pampers,* 724 F.3d at 718. As in *Dry Max Pampers,* "[t]he reality is that this settlement benefits class counsel vastly ***304** more than it does the consumers who comprise the class." *Id.* at 721. Accordingly, it should have flunked any fairness inquiry the district court made under Rule 23(e).

**All Citations**

822 F.3d 269, 94 Fed.R.Serv.3d 1009

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# Exhibit D

In re Cardizem CD Antitrust Litigation, 218 F.R.D. 508 (2003)


KeyCite Yellow Flag - Negative Treatment
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218 F.R.D. 508
United States District Court, E.D. Michigan, Southern Division.

In re CARDIZEM CD ANTITRUST LITIGATION.

No. 99–MD–1278
|
MDL No. 1278
|
Oct. 10, 2003.

**Synopsis**
Plaintiffs in class action antitrust suit against manufacturers of name brand and generic versions of drug diltiazem moved for approval of settlement agreement and award of attorney fees. The District Court, Edmunds, J., held that: (1) proposed settlement was fair, adequate, reasonable, and consistent with public interest; (2) allocation plan was fair and reasonable; and (3) award of reasonable attorney fees and expenses for private plaintiffs' counsel and state attorneys general was warranted.

Motions granted.

See also 332 F.3d 896.

West Headnotes (17)

**[1]** **Federal Civil Procedure** Factors, grounds, objections, and considerations in general

Confronted with request for settlement-only class certification, district court need not inquire whether case, if tried, would present intractable management problems, for proposal is that there be no trial. Fed.Rules Civ.Proc.Rule 23(b)(3)(D), 28 U.S.C.A.

1 Case that cites this headnote

**[2]** **Federal Civil Procedure** Antitrust plaintiffs

Numerosity requirement was satisfied, for purpose of determining whether to certify settlement class in antitrust suit against manufacturers of name brand and generic versions of drug diltiazem; over 13 million prescriptions for brand name version of drug were filled nationally during single year. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

**[3]** **Federal Civil Procedure** Antitrust plaintiffs

Commonality requirement was satisfied, for purpose of determining whether to certify settlement class in antitrust suit against manufacturers of name brand and generic versions of drug diltiazem; although plaintiffs' damage amounts differed, their claims all derived from same set of salient facts. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

**[4]** **Federal Civil Procedure** Antitrust plaintiffs

Claims of managed care companies and individual consumer were typical, for purpose of determining whether to certify settlement class in antitrust suit against manufacturers of name brand and generic versions of drug diltiazem; like all class members, proposed class representatives sought to recover for inflated prices they allegedly paid as result of manufacturers' illegal agreement. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

**[5]** **Federal Civil Procedure** Antitrust plaintiffs

Proposed class representatives satisfied adequacy requirement, for purpose of determining whether to certify settlement class in antitrust suit against manufacturers of name brand and generic versions of drug diltiazem; representatives and their counsel had labored for years litigating instant claims and attempting to

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convince manufacturers of need to resolve their legitimate claims. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

108 Cases that cite this headnote

**[6]** **Federal Civil Procedure** Antitrust plaintiffs

Questions of law and fact common to the class predominated, for purpose of determining whether to certify settlement class in antitrust suit against manufacturers of name brand and generic versions of drug diltiazem; judicial economy and fairness to parties made settlement of claims in one action far more desirable than litigation of numerous separate actions litigating similar issues. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

5 Cases that cite this headnote

**[7]** **States** Parens patriae

States, by their Attorneys General, had authority, in parens patriae or other representative capacity, to settle and release indirect purchaser antitrust claims against drug manufacturers.

6 Cases that cite this headnote

**[8]** **Compromise, Settlement, and Release** Class actions, claims, and settlements in general

Factors considered by court when deciding whether to approve proposed class action settlement agreement include: (1) likelihood of success on merits weighed against amount and form of relief offered in settlement; (2) risks, expense, and delay of further litigation; (3) judgment of experienced counsel who have competently evaluated strength of their proofs; (4) amount of discovery completed and character of evidence uncovered; (5) whether settlement is fair to unnamed class members; (6) objections raised by class members; (7) whether settlement is product of arm's length negotiations as opposed to collusive bargaining; and (8) whether settlement is consistent with public interest. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

**[9]** **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection

Proposed settlement of consumers', third-party payors' and states' class action antitrust suit against manufacturers of name brand and generic versions of drug diltiazem would be approved as fair, adequate, reasonable, and consistent with public interest; settlement offered plaintiffs 85% of their claimed damages, risks of continued litigation were significant, arm's length agreement was negotiated after extensive discovery and independent analysis of all relevant matters, and number of opting out or objecting plaintiffs was negligible. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

19 Cases that cite this headnote

**[10]** **Compromise, Settlement, and Release** Views or advice of counsel

Deference court affords opinion of experienced counsel, when deciding whether to approve proposed class action settlement agreement, should correspond to amount of discovery completed and character of evidence uncovered. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

11 Cases that cite this headnote

**[11]** **Compromise, Settlement, and Release** Antitrust, trade regulation, fraud, and consumer protection

Plan for allocating settlement funds, obtained in class action antitrust suit against manufacturers of name brand and generic versions of drug diltiazem, would be approved as fair and reasonable.

2 Cases that cite this headnote

**[12]** **Attorneys and Legal Services** Antitrust

Attorney fee award of 17% of settlement fund, plus 17% of accrued interest in settlement fund, was reasonable in class action antitrust suit

against manufacturers of name brand and generic versions of drug diltiazem; result obtained was extraordinary, counsel had spent thousands of hours working on complex case during past five years, work was of highest quality, and there had been no objections to fee request.

13 Cases that cite this headnote

[13] **Attorneys and Legal Services** Lodestar and percentage methods compared or combined

Trial court has discretion to calculate award of attorney fees by using either (1) percentage of fund calculation, or (2) lodestar/multiplier approach; overriding requirement is that award be reasonable under circumstances.

20 Cases that cite this headnote

[14] **Attorneys and Legal Services** Percentage method

Factors court uses to evaluate reasonableness of requested fee percentage award are: (1) value of benefit rendered to plaintiff class; (2) value of services on hourly basis; (3) whether services were undertaken on contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain incentive to others; (5) complexity of litigation; and (6) professional skill and standing of counsel involved on both sides.

27 Cases that cite this headnote

[15] **Attorneys and Legal Services** Reasonableness in general

**Attorneys and Legal Services** Reimbursement of Expenses

Under common fund doctrine, class counsel were entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in prosecution of claims and in obtaining settlement, including expenses incurred in connection with document productions, consulting with experts and consultants, travel and other litigation-related expenses.

47 Cases that cite this headnote

[16] **Costs, Fees, and Sanctions** Class actions; incentive awards

Representative plaintiffs, in settled class action antitrust suit against manufacturers of name brand and generic versions of drug diltiazem, were entitled to incentive awards; plaintiffs had incurred significant demands on their time and expenses, including submission to depositions and responding to discovery requests for the benefit of absent class members, and total awards requested equaled only .002% of settlement fund.

12 Cases that cite this headnote

[17] **Attorneys and Legal Services** Antitrust

**States** Costs and fees

State attorneys general, who had participated in private plaintiffs' class action antitrust suit against manufacturers of name brand and generic versions of drug diltiazem, were entitled to recover reasonable attorney fees and expenses; fees sought were only 2.2% of settlement fund, result obtained was extraordinary, and attorneys general had spent thousands of hours working on complex case during past five years.

2 Cases that cite this headnote

**Attorneys and Law Firms**

***510** Stephen Lowey, Richard W. Cohen, Lowey, Dannenberg, White Plains, NY, Lowey Dannenberg Benporad & Selinger, P.C., Joseph J. Tabacco, Todd Seaver, ***511** Berman DeValerio Pease Tabacco Burt & Pucillo, San Francisco, CA, for State Law Plaintiffs, Aetna, Inc., Cobalt Corporation and Charles Zuccarini.

Paul F. Novak, Attorney General of Michigan, Lansing, MI, Robert Hubbard, Attorney General of New York, Liason Counsel for Plaintiff States.

Joseph Rebein, James Eiszner, Joseph Matye, Shook Hardy & Bacon, Kansas City, MO, for Aventis, Inc.

Louis M. Solomon, Hal S. Shaftel, Michael S. Lazaroff, Proskauer Rose, LLP, New York City, for Andrx Pharmaceuticals, Inc.

**ORDER NO. 76**

**MEMORANDUM OPINION GRANTING (1) JOINT MOTION OF STATE LAW CLASS PLAINTIFFS AND STATE ATTORNEYS GENERAL FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION; (2) STATE LAW CLASS PLAINTIFFS' COUNSELS' JOINT PETITION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND INCENTIVE AWARDS FOR NAMED PLAINTIFFS; AND (3) STATE ATTORNEYS' GENERAL MOTION FOR ATTORNEYS' FEES AND ENFORCEMENT COSTS**

EDMUNDS, District Judge.

This matter came before the Court at an October 1, 2003 hearing on (1) the joint motion of State Law Class Plaintiffs and State Attorneys General for final approval of the Class Action Settlement and Plan of Allocation, (2) State Law Class Plaintiffs' counsels' joint petition for attorneys' fees, reimbursement of expenses and incentive awards for Named Plaintiffs, and (3) State Attorneys' General motion for attorneys' fees and enforcement costs. The Court preliminarily approved the Class Action Settlement on January 29, 2003. (Order No. 59.) A fairness hearing was conducted on October 1, 2003. Upon careful consideration of the above-referenced motions, briefs, affidavits, declarations, and exhibits filed in support of these motions, the objections to the proposed Class Action Settlement, and party representations at the October 1, 2003 fairness hearing, this Court GRANTS Plaintiffs' motions.

## I. Background

### A. State Law Plaintiffs' Class Action

These cases began after an intensive private investigation, conducted by Co–Lead Counsel for the State Law Plaintiffs in June 1998, two months before the first class action case was filed. Lowey Dannenberg Bemporad & Selinger ("LDBS") was informed of the existence of the September 1997 HMRI/Andrx Agreement by a confidential source in June 1998. Thereafter, LDBS engaged in an intensive pre-litigation investigation of factual and legal issues relevant to this litigation. (Pls.'s Motion, 9/22/03 Lowey Decl. (describing in detail pre-litigation investigation).) In August 1998, Norman Morris, a California pharmacist, and Betty Morris, his wife who was a consumer of Cardizem CD, retained LDBS and Co–Lead Counsel Berman DeValerio Pease Tabacco Burt & Pucillo ("BDPT") to commence the first lawsuit related to the September 1997 HMRI/Andrx Agreement. LDBS and BDPT filed a comprehensive California state law complaint on the Morris's behalf in California state court on August 20, 1998 as a putative class action (the "*Betnor* action"). The following day, *The Wall Street Journal* published a story concerning the *Betnor* complaint. This publicity led to inquiries to Co–Lead Counsel from in-house counsel at Aetna and Cobalt (formerly known as "United Wisconsin Services"), the parent company of Wisconsin Blue Cross, about the possibility of their serving as class representative plaintiffs.

Within several months, actions were filed in 11 different states and the District of Columbia. All were filed in state courts, under state antitrust and related laws, by consumers and health insurers. In late 1998 and early 1999, various wholesalers, or retailers who had obtained assignments of claims from wholesalers, filed direct purchaser class actions under the Sherman Antitrust Act, reiterating the allegations of the *Betnor* complaint, but asserting federal antitrust claims not available to the State Law Plaintiffs who ***512** were indirect purchasers of Cardizem CD. *See Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

Ultimately, State Law Plaintiffs filed 19 separate state law actions in 12 different states and the District of Columbia. In every case, Defendants removed the cases to the federal courts situated in the district where the state court actions were filed. In every instance, State Law Plaintiffs filed motions to remand the actions to the state courts in which they originated. Throughout late 1998 and early 1999, State Law Plaintiffs litigated issues of federal subject matter jurisdiction related to removal and remand in federal district courts throughout the United States. Prior to centralization of these cases in this Court by the Judicial Panel on Multidistrict Litigation ("JPML") in June 1999, federal district courts in California, the District of Columbia, Michigan, and Minnesota denied motions to remand. The District of Kansas granted a motion for remand in the case pending before it, and that case has proceeded on a parallel track with the actions before this Court under the supervision of Co–Lead Counsel. All other remand motions were heard by this Court after their transfer by the JPML.

All removed actions (except the remanded Kansas action and the Michigan action which had already been removed to this Court in 1998) were transferred to this Court by order of the JPML on June 11, 1999 or thereafter as tag-along cases. *In re Cardizem CD Antitrust Litig.,* 1999 U.S. Dist. LEXIS 9285 (J.P.M.L. June 11, 1999). In 2001, additional cases were commenced in this Court, one by the Litigating States (identified below) and another by the Individual Blue Cross Plaintiffs.[1] Ultimately, the Plaintiffs fell into five groups: (1) the consumers and third party payers who filed the joint motion for final approval of the Class Action Settlement (the "State Law Class Plaintiffs"); (2) the Litigating States, which have coordinated their prosecution and settlement with the State Law Class Plaintiffs, assumed lead representation of consumers as well as their states' agencies, and joined in the motion for final approval; (3) the direct purchasers, who settled in 2002 (the "Sherman Act Class Plaintiffs"); (4) the retail pharmacy chain store Plaintiffs which opted out of the Sherman Act Class and have settled with HMRI (now Aventis) but not Andrx (the "Sherman Act Individual Plaintiffs"); and (5) the Individual Blue Cross Plaintiffs.

1 Blue Cross Blue Shield of Massachusetts, Blue Cross Blue Shield of Michigan, Blue Cross Blue Shield of Minnesota, and Excellus Health Plan, Inc. (the "Individual Blue Cross Plaintiffs").

In October 1999, this Court heard and determined all remand motions which had not previously been decided by the transferor courts. On October 14, 1999, this Court ordered two cases remanded to Florida state court on the grounds that there was no federal question subject matter jurisdiction, and denied the remand motions in cases emanating from six other states, holding that the Court had subject matter jurisdiction over these cases. *See In re Cardizem CD Antitrust Litig.,* 90 F.Supp.2d 819 (E.D.Mich.1999). The two Florida actions have been prosecuted on a parallel track with the actions before this Court under the supervision of Co–Lead Counsel.

On October 22, 1999, Co–Lead Counsel for the State Law Plaintiffs filed a single coordinated pleading in which the allegations of all State Law Plaintiffs' actions before this Court were pleaded under a single Amended Coordinated Class Action Complaint. This coordinated pleading, and its subsequent amendments, enhanced the manageability of the prosecution and defense of the numerous separate actions.

In late 1999, Defendants separately moved for dismissal of all State Law Plaintiffs' complaints on the grounds that they failed to state a claim for relief for various reasons, on grounds of federal preemption, and on the grounds that the "Noerr–Pennington" doctrine was a complete defense to all claims. This Court, in Order No. 12, denied the Defendants' motions. *See In re Cardizem CD Antitrust Litig.,* 105 F.Supp.2d 618 (E.D.Mich.2000), *aff'd,* 332 F.3d 896 (6th Cir.2003), *r'hrg and r'hrg en banc denied,* 2003 U.S.App. LEXIS 15575 (6th Cir. July 24, 2003). It determined numerous issues of law, including the limits of Noerr–Pennington immunity, the limited scope of preemption ***513** doctrines, the meaning of the Sixth Circuit's "necessary predicate" standard for pleading antitrust injury, and the availability of various states' laws to indirect purchaser plaintiffs seeking damages caused by conduct alleged to be in violation of federal antitrust laws.

Contemporaneously with Defendants' motions to dismiss, Plaintiffs moved for a partial summary declaratory judgment holding that the September 1997 HMRI/Andrx Agreement was *per se* illegal under the antitrust and/or consumer protection laws of each of the states in which State Law Plaintiffs had asserted claims. This Court, in its Order No. 13, granted Plaintiffs' motion for partial summary judgment. *See In re Cardizem CD Antitrust Litig.,* 105 F.Supp.2d 682 (E.D.Mich.2000), *aff'd,* 332 F.3d 896 (6th Cir.2003), *r'hrg and r'hrg en banc denied,* 2003 U.S.App. LEXIS 15575 (6th Cir. July 24, 2003). Defendants obtained leave from this Court to pursue interlocutory appeals of Orders No. 12 and 13 under 28 U.S.C. § 1292(b). *See* Order No. 16 (certifying for appeal two issues (1) an issue presented in Defendants' motions to dismiss concerning the proper interpretation of the Sixth Circuit's "necessary predicate" standard for pleading antitrust injury; and (2) the Court's *per se* ruling because this would affect discovery and trial). State Law Plaintiffs, as well as the other Plaintiffs in this multi-district litigation, and Defendants engaged in extensive briefing of the two appeals during 2001 and argued the appeals on April 30, 2002. These parties entered into a Settlement Agreement in January 2003, nine months after the appeals of Orders No. 12 and 13 were argued and five months before the appeals were decided. The parties indicate that they entered into the Settlement Agreement in an effort to mitigate their respective risks arising from these appeals. The Sixth Circuit's June 2003 decision affirming this Court's decisions does not alter any of the terms of the Settlement Agreement.

In Late 1999, State Law Plaintiffs also moved for class certification under the laws of the various states covered by the Coordinated Class Action Complaints. In 2000, the Court adopted State Law Plaintiffs' suggestion that the class

certification motion and related discovery proceed on an exemplar basis using a proposed single state and the law of that single state. The State Law Plaintiffs proceeded with their motion to certify, on an exemplar basis, a class of consumers and third party payers who paid pharmacies in Michigan for Cardizem CD and/or its generic bioequivalents. After eleven months of discovery, including extensive expert discovery, and an evidentiary hearing in February 2001 at which the parties' respective experts testified, this Court granted in part and denied in part State Law Plaintiffs' motion. The Court held that certification of a class was appropriate under the Michigan Antitrust Reform Act for consumers and third party payers who would have paid less for Michigan prescriptions for branded Cardizem CD and generic bioequivalent versions of Cardizem CD (collectively "CD") if a generic had been introduced earlier. *See In re Cardizem CD Antitrust Litig.,* 200 F.R.D. 326 (E.D.Mich.2001). The Court also certified an "unjust enrichment" class of all consumers and third party payers who paid Michigan pharmacies for Cardizem CD. *Id.* at 351–52. Defendants unsuccessfully petitioned the Sixth Circuit for leave to appeal this decision pursuant to Fed.R.Civ.P. 23(f).

This Court considered other motions brought by State Law Plaintiffs, and granted in part Plaintiffs' motion for leave to amend their complaints so as to redefine the requirements for class membership for their antitrust and unjust enrichment classes, *see In re Cardizem CD Antitrust Litig.,* No. 99md1278, MDL No. 1278, 2000 WL 33180833, 2000–2 Trade Cas. (CCH) ¶ 73,112 (E.D.Mich. Sept. 21, 2000), and granted Plaintiffs' motion for leave to amend their Coordinated Class Action Complaints to make certain changes to conform their allegations to the evidence and to expand the class allegations to include consumers and third party payers who overpaid pharmacies for generic Cardizem CD manufactured by companies which were not Defendants (the so-called "umbrella damages" theory). (Orders No. 17 and 20.) Defendants moved to dismiss and/or strike various claims of Plaintiffs' Third Amended Complaint and claims ***514** pleaded in the Litigating States' Complaint, including the umbrella damages allegations. These motions were briefed and argued, but will become moot if the Proposed Settlement is approved.

State Law Plaintiffs also moved to certify a nationwide unjust enrichment class consisting of all consumers and third party payers who paid retail pharmacies in the United States to fill prescriptions of Cardizem CD and generic bioequivalents of Cardizem CD, including generics not manufactured by Defendants. That motion is still pending, and it too will become moot if the Proposed Settlement is approved.

**B. State Attorneys General Enforcement Action**

In the fall of 1999, while the State Law Plaintiffs' Class Action was pending, the New York Attorney General's office initiated an investigation into the circumstances under which generic versions of Cardizem CD were entering the market. (Pls.' Motion, 9/22/03 Novak Decl. ¶ 3.) The investigation arose from allegations that Defendants had entered into an anti-competitive agreement with respect to Cardizem CD and its bioequivalent generic alternatives. The investigation was subsequently joined in 2000 by additional investigating states, including Michigan, California, and Washington.

On May 14, 2001, New York, Michigan, Arizona, California, Idaho, Indiana, Maine, Minnesota, New Mexico, North Carolina, Oklahoma, Utah, Vermont, Washington, and West Virginia, by and through their Attorneys General, and the District of Columbia (collectively, "Litigating States"), filed a complaint against Defendants in this Court in their proprietary capacities on behalf of departments, bureaus, and agencies of state government as injured purchasers or reimbursers; and as *parens patriae* on behalf of natural persons in their collective States, and their respective States' quasi-sovereign interests in fair competition and the health of their citizenry, and/or in their sovereign capacities. The Litigating States asserted claims for monopolization, attempted monopolization, and agreements in restraint of trade in the market for Cardizem CD and its generic bioequivalents, in violation of federal and state antitrust and unfair competition or consumer protection laws. The Litigating States sought injunctive relief, civil penalties, damages, disgorgement, restitution, and other equitable relief.

In July 2001, the Litigating States filed an Amended Complaint which increased the number of Litigating States from sixteen to twenty-nine. A Second Amended Complaint was filed in September 2001, and in January 2003, the Attorneys General further amended their Complaint to include all states. (Pls.'s Motion, 9/22/03 Decl. of State Liaison Counsel Paul Novak (providing a detailed description of the litigation history of the State Attorneys General Enforcement Action).) The Plaintiff States' Third Amended Complaint was filed in January 2003 solely for purposes of this Proposed Settlement. It added Fed.R.Civ.P. 23 class certification allegations for certain Plaintiff States, and added the states of Alabama, Colorado, Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska,

New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, and Virginia (collectively, "Joining States"), as joining states in the Settlement.[2]

2 "Litigating States" are Alaska, Arizona, Arkansas, California, Connecticut, the District of Columbia, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Puerto Rico, Rhode Island, South Carolina, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. The "Joining States" are Alabama, Colorado, Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, and Virginia.

After the Litigating States filed suit in this Court in May 2001, they assumed the lead representation of consumers in their respective states and jointly prosecuted the actions in cooperation with State Law Plaintiffs.

Contemporaneous with the intensive motion practice described above, the parties also engaged in extensive discovery. The State Law Plaintiffs and the Litigating States reviewed ***515** hundreds of boxes of Defendants' and third parties' documents (over one million pages were produced), reviewed over 50 statements taken under oath by the FTC, and took more than 25 oral depositions of witnesses, including senior executives of Defendants, market forecasters, and scientists. The Litigating States further coordinated data and document production efforts for over 120 separate governmental entities. (9/22/03 Novak Decl. ¶ 8.) Discovery disputes were brought to the Court for resolution by motion practice only after meet-and-confer sessions among the various parties' attorneys appointed by the Court to the Discovery Committee. (Order No. 6.) There were more than 30 meet-and-confer sessions of the Discovery Committee and at least 11 discovery-related motions.

### C. Mediation and Settlement

In early 2002, at the suggestion of the Court, all parties with cases before this Court agreed to participate in mediation in an effort to reach a settlement. Beginning in March 2002, and culminating in January 2003, counsel for State Law Plaintiffs and the Litigating States engaged in protracted negotiations with Defendants using the services of nationally-recognized mediator Eric Green. After numerous starts and stops and difficult negotiations over virtually every term of settlement, the parties reached agreement on the $80 million amount in late 2002, and the complex terms of the Settlement Agreement in January 2003. The Settlement Agreement was negotiated jointly by Co–Lead Counsel for State Law Plaintiffs and representatives of Michigan's and New York's Attorneys General, principally assisted by Assistant Attorneys General of California and Washington, acting on behalf of all of the Litigating States.

Contemporaneously, a separate intramural negotiation occurred over the allocation of the $80 million in the settlement fund among state agencies, consumers, and third party payers. State Attorneys' General negotiated for United States individual consumers and the states themselves. (9/22/03 Novak Decl. ¶ 12.) To negotiate for third-party payers, State Law Plaintiffs' Co–Lead Counsel used the services of in-house counsel at Aetna and Cobalt, together with an outside consultant, Mark D. Fischer, Chairman of Rawlings & Associates PLLC of Louisville, Kentucky, a law firm which is nationally known for its specialized practice representing health insurers, and the author of *The Rawlings & Associates National Subrogation Law Manual,* an annual comprehensive publication of research and analysis of every state's laws concerning health insurance subrogation and reimbursement claims. (9/22/03 Lowey Decl. ¶ 61; 9/18/03 Lawrence Decl. ¶ 11.) At Mr. Fischer's suggestion, State Law Plaintiffs also retained the services of Fred Curtiss, Ph.D., a pharmacist and economist specializing in managed care economics. Dr. Curtiss is the editor-in-chief of *The Journal of Managed Care Pharmacy,* and an expert in the emerging field of pharmacoeconomics. After extensive arm's length negotiations, including the exchange of data and discussions between the economists for the State Attorneys General and Dr. Curtiss, the allocation of net settlement proceeds reflected in Article III of the Settlement Agreement (55% to third-party payers and 45% to individual consumers) was agreed to by all parties.

A further final intramural allocation determination of how to allocate funds available to third-party payers based upon CD purchases in different states was reached by State Law Plaintiffs' counsel in consultation with Mr. Fischer. This resulted in a weighted ratio of 3:2 between claims for purchases which occurred in certain "*Illinois Brick* repealer" states that had been pled in the State Law Plaintiffs' complaints and purchases which occurred in other states. Similar allocation factors have been approved in other cases for third party payers. *See In re Lorazepam & Clorazepate Antitrust Litig.,* 205 F.R.D. 369 (D.D.C.2002).[3]

3 LDBS was lead counsel, and Cobalt was a class representative for the "United Wisconsin Class" of third party payers in that case and thus had experience with the issues of weighted allocation of settlement funds in state law indirect purchaser antitrust litigation.

**D. The Settlement**

**1. The State Settlement Fund**

Under the Settlement Agreement, the parties agreed that $7 million be set aside to pay ***516** states' designated governmental agency claims and in satisfaction of the states' potential remedies and civil penalties. Subject to this Court's approval, the State Settlement Fund will be used to pay the legal fees and costs of the Litigating States in an amount not to exceed $2,500,000. (Settlement Agreement ¶ I.PP.)

**2. The Consumer Distribution Plan**

Forty-five percent (45%) of the "Net Settlement Fund" will be allocated to pay the claims of consumer members of the Class. (*Id.* Article III.F.1.) The Net Settlement Fund will equal the Aggregate Settlement Fund less (1) the State Settlement Fund, (2) attorneys' fees and expenses, and other amounts awarded by the Court to State Law Plaintiffs and their counsel, (3) Court-approved costs of notice, and (4) settlement administration fees and costs. If the Court approves all fees and expenses applied for in their full amount, the net amount available for distribution to consumer class members will be approximately $25 million, less any costs incurred for consumer claims administration.

**3. The Third Party Payer Distribution Plan**

Fifty-five percent (55%) of the Net Settlement Fund will be allocated to pay the claims of Third Party Payer Class members ("TPP") and TPP settlement administration costs. (*Id.* Article III.F.2.) If the Court approves all fees and expenses applied for, the net amount available for distribution to third party payer class members will be approximately $30 million.[4]

4 Included in the $30 million estimate is whatever share of the third party payers' allocable share of the net settlement that would have been payable to the Individual Blue Cross Plaintiffs if they had not opted out of the settlement class. (Settlement Agreement, Article I.V. and Article IV.A.1.) That amount will be paid to Defendants. Defendants may or may not use all or any portion of that reverter to settle the claims of the Individual Blue Cross Plaintiffs.

The Settlement Agreement's settlement reduction and "blow provision" termination contingency clauses (*Id.* Articles IV.A and X.A.4) were not triggered due to the paucity of opt-outs and are therefore now irrelevant.[5] The Settlement Agreement also provides for a specific and general release of all claims relating to the allegations in this lawsuit. This release will operate to terminate this litigation once the Settlement Agreement becomes effective as defined in that Agreement. (*Id.* Article I.CC.; Article I.N.)

5 The Settlement Agreement, at Article X, sets forth certain other conditions under which the Settlement Agreement may terminate. In the event of termination, the parties shall be returned to the *status quo ante* and settlement funds paid, less certain amounts dedicated to the costs of class notice, shall be returned to Defendants in proportion to their respective contributions. A principal condition remaining at this time is judicial approval of the settlement. (Settlement Agreement, Article X.C., D.)

**E. Preliminary Approval of Proposed Settlement**

On January 29, 2003, this Court issued Order No. 59, preliminarily approving the Proposed Settlement. Also, for purposes of the Settlement and Settlement Agreement only and pending final approval of the Proposed Settlement, the Court conditionally certified a Settlement Class consisting of:

> All consumers and Third Party Payers (including any assignees of such consumers or Third Party Payers) who purchased and/or paid all or part of the purchase price of Cardizem CD Products dispensed pursuant to prescriptions in the United States (including Puerto Rico) during the period January 1, 1998, through the date of this Preliminary Approval Order and all Designated Governmental Agencies. Excluded from the Settlement Class are Defendants and any of their officers and directors. Included in the Settlement Class are any and all members of any class or classes asserted in any State Action.

(Order No. 59 ¶ 5.) The Court preliminarily found that the proposed Settlement Class met all the applicable requirements of Fed.R.Civ.P. 23. (*Id.* ¶ 6.)

The Court also preliminarily approved Aetna, Inc., Cobalt Corporation, and Charies Zuccarini as class representatives. In addition to any *parens patriae* or functionally ***517** equivalent authority that any of the Attorneys General of the

Plaintiff States may have under state law, the Court further preliminarily approved the Attorneys General of Alaska, Alabama, Arkansas, California, Connecticut, Georgia, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Montana, Nebraska, Nevada, North Carolina, Oklahoma, South Carolina, Utah, Wisconsin, and Wyoming as additional class representatives (collectively, with Aetna, Inc., Cobalt Corporation, and Charles Zuccarini, the "Class Representatives") on behalf of natural person members of the Settlement Class residing in their respective states. (*Id.* ¶ 7.)

Finally, Order No. 59 set October 1, 2003, as the date for the hearing seeking final approval of the Proposed Settlement ("Fairness Hearing"). (*Id.* ¶ 19.)

A fairness hearing was held on October 1, 2003, and this Court now determines whether final approval of the Proposed Settlement and Plan of Allocation should be granted. First, the Court considers Plaintiffs' request that the conditionally certified settlement class now be unconditionally certified.

## II. Analysis

### A. Class Certification for Purposes of Settlement

In its Order preliminarily approving the Proposed Settlement, the Court conditionally certified the Settlement Class, defined in the Settlement Agreement as:

> All consumers and Third Party Payers (including any assignees of such consumers or Third Party Payers) who purchased and/or paid all or part of the purchase price of Cardizem CD Products dispensed pursuant to prescriptions in the United States during the period January 1, 1998 through the date of the Preliminary Approval Order and all Designated Governmental Agencies. Excluded from the Class are Defendants and any of their officers and directors. Included in the Settlement Class are any and all members of any class or classes asserted in any of the State Actions.

Order No. 59 at ¶ 5. The Court also preliminarily approved Plaintiffs Aetna, Inc. ("Aetna"), Cobalt Corporation ("Cobalt"), and Charles Zuccarini as class representatives ("State Law Plaintiffs"). *Id.* at ¶ 6. Plaintiffs now request that the Court unconditionally certify this class for settlement purposes under Fed.R.Civ.P. 23.

**[1]** Under Fed.R.Civ.P. 23, the Court must engage in a two-step analysis to determine whether to certify this as a class action for settlement purposes. First, the Court must determine whether Plaintiffs have satisfied the prerequisites for maintaining a class action under Rule 23(a). Then, under Rule 23(b), the Court must determine whether there are additional elements that would justify the class certification. *See* Fed.R.Civ.P. 23(a), Advisory Committee's Note, 1966 Amendment, Subdivision (a). "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, 619, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

Applying this two-step analysis, this Court certifies the proposed class for settlement purposes.

#### 1. The Requirements of Rule 23(a) Are Satisfied

Rule 23(a) provides that class members may maintain a class action as representatives of a class if they satisfy four prerequisites:

> (a) the class members are so numerous that joinder of all members is impracticable;
>
> (b) the action addresses questions of law or fact common to the class;
>
> (c) the claims or defenses of the class representatives are typical of the claims or defenses of the class; and
>
> (d) the class representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

This Court has already determined that the class certification prerequisites were sufficiently ***518** demonstrated by State Law Plaintiffs in April 2001 when it certified an exemplar class for certain consumers and third party payers with Cardizem CD purchases in the state of Michigan. *In re Cardizem CD Antitrust Litig.,* 200 F.R.D. 326, 334–51 (E.D.Mich.2001). Class representatives here, Mr. Zuccarini, Aetna, and Cobalt, have similarly satisfied each of the prerequisites necessary to certify a nationwide class action for settlement purposes.

##### a. The Settlement Class is Sufficiently Numerous—Rule 23(a)(1)

**[2]** This Court has previously determined the numerosity prerequisite has been satisfied, relying on public data that identified over 13 million prescriptions for Cardizem CD

filled in the United States in 1998. *Id.* at 335. Over 1,819 third party payers and 37,387 consumers have already filed proofs of claim, claiming entitlement to share in the distribution of the Settlement Fund as Class members. (Pls.' Motion, 9/19/03 Glenn Aff. ¶ 10; 9/19/03 Potter Aff.) Joinder is clearly impractical. *See In re Lorazepam & Clorazepate Antitrust Litig.,* 205 F.R.D. at 401.

**b. There Are Questions of Law and Fact Common to the Class—Rule 23(a)(2)**

**[3]** The second criterion under Rule 23(a) is commonality. Commonality requires that "there be questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). It is not required that all questions of law and fact be common. The "existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir.1998). In this case, the commonality criterion is satisfied because all of the State Law Plaintiffs' claims derive from the same set of salient facts. Even if the members of the proposed class possess different avenues of redress, "their claims stem from the same source." *Id.*

The commonality prerequisite of Rule 23(a)(2) is met for all members of the Settlement Class as every class member's claim is that his or her or its respective state's laws prohibit Defendants' conduct as alleged in State Law Plaintiffs' Third Amended Coordinated Class Action Complaints ("the Complaints") and provides rights of recovery to persons injured by such conduct. Indeed, the Complaints, which cover the claims of Plaintiffs who or which filed complaints in numerous state courts all share the same verbatim allegations of fact, *see* the Complaints, and virtually identical claims of unjust enrichment and substantially similar claims under their respective states' trade practices acts. Each Class member (consumers, state agencies, and third party payers alike) has a common interest in establishing that he, she, or it was financially injured by Defendants' conduct and in an aggregate damages computation. *See In re Cardizem CD Antitrust Litig.,* 200 F.R.D. at 335. Class members' differing damages do not impair the commonality of their claims. *See Desiano v. Warner–Lambert,* 326 F.3d 339, 350 (2d Cir.2003) (observing that the "[p]laintiffs' suit raises no apportionment difficulties because each [health benefit provider] and its patient co-payer has its own, segregable, claim for economic harm, to the extent of their respective co-pay").

**c. The Claims of Class Representatives Aetna, Cobalt, and Mr. Zuccarini Are Typical of Those of the Class —Rule 23(a)(3)**

**[4]** Aetna one of the largest managed care companies in the United States, and Mr. Zuccarini, a Michigan consumer, have already been found by this Court in Order No. 25 to be both typical of end payer class members and adequate representatives for a Michigan class. *In re Cardizem CD Antitrust Litig.,* 200 F.R.D. at 337. The same analysis applies to Aetna's, Cobalt's, and Mr. Zuccarini's participation as class representatives for the proposed Settlement Class. Aetna provides health payment benefits to over 23 million people and has agreements with over 46,000 participating pharmacies in the United States, covering every state and territory in the United States and the District of Columbia. (Third Am. Compl. ¶ 9(g)(2); 9/19/03 Lawrence Decl. ¶ 2 (citing slightly lower numbers due to member attrition).) ***519** As such, Aetna's claims for relief are typical of the claims of every Class member in every state who claims he, she, or it overpaid at the pharmacy for Cardizem CD or its generic equivalents. Moreover, as a consumer and third party payer, Mr. Zuccarini and Cobalt each seek to recover for the inflated prices they paid for Cardizem CD and its generic bioequivalents and to disgorge the amounts received by Defendants as a result of their conduct. Both claims are typical of all United States consumers and third party payers. *See In re Lorazepam & Clorazepate Antitrust Litig.,* 205 F.R.D. at 369, 387, 401 (observing that "the state agencies' and consumers' claims are typical because they arose at the same time in the same market and are based on the same theory of damages", "the [third party payer's claims] are typical of their respective class members in that they allege illegal combination, conspiracy, or agreement by the defendants which resulted in anticompetitive injuries").

**d. Aetna, Cobalt, and Mr. Zuccarini Have Adequately Represented the Class—Rule 23(a)(4)**

**[5]** Aetna, Cobalt, and Mr. Zuccarini have been prosecuting this case vigorously since 1998 and 1999, and this Court has determined that Aetna, Mr. Zuccarini, and its counsel are adequate to prosecute the Michigan antitrust claims. The same result applies to the class representatives' ability to prosecute claims under the laws of other states. *See In re Lorazepam & Clorazepate Antitrust Litig.,* 205 F.R.D. at 401 (finding Cobalt, then known as "United Wisconsin Services Corporation," adequate to represent multi-state third party payer class); *In re Warfarin Sodium Antitrust Litig.,* 212 F.R.D. 231, 250–51 (D.Del.2002) (finding named consumers

and third party payers, including Cobalt, adequate class representatives whose claims were typical in nationwide settlement of claims of prescription drug overcharges). The State Attorneys General and private counsel involved in this litigation are experienced antitrust litigators who have adequately represented the interests of the Settlement Class. Unlike the settlement under review in *Amchem,* 521 U.S. at 601–02, 117 S.Ct. 2231, this settlement was not a "pre-packaged" deal arranged before litigation began and without any intent by the parties to ever litigate the claims. On the contrary, as the docket reveals, State Law Plaintiffs and their counsel have labored for years litigating these claims and attempting to convince Defendants of the need to resolve their legitimate claims.

**2. The Requirements of Rule 23(b)(3) Are Satisfied —Questions of Law and Fact Common to the Class Predominate**

**[6]** Fed.R.Civ.P. 23(b)(3) provides that a court can certify an action as a class action if the "court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." This Court has previously concluded that common questions predominate over individual ones in the proof of the State Law Plaintiffs' claimed injuries and damages, and that in the case of the exemplar Michigan class, maintenance of a class action was superior to other available methods to fairly and efficiently adjudicate this controversy. *In re Cardizem CD Antitrust Litig.,* 200 F.R.D. at 351. The same logic applies here to claims of the other members of the class. Judicial economy as well as fairness to the parties makes settlement of these claims in one action far more desirable than litigation of numerous separate actions litigating similar issues. *See In re Warfarin Sodium Antitrust Litig.,* 212 F.R.D. at 243–51 (finding predominance in similar nationwide settlement class of all United States consumers and third party payers of the prescription drug Coumadin).

**3. Conclusion**

State Law Plaintiffs have satisfied all of the requirements under Rule 23. Accordingly, this Court certifies the proposed class for settlement purposes.

***520 B. Final Approval of Class Action Settlement**

State Law Plaintiffs and the certified State Law Plaintiff Class, and their counsel, together with the Attorneys General of both the "Litigating States" and the "Joining States" (collectively "Plaintiff States") request that this Court grant final approval, pursuant to Federal Rule of Civil Procedure 23(e) and the corresponding authority of Plaintiff States[6], to the compromise by settlement of the above-captioned coordinated class action cases in accordance with the terms of the "Settlement Agreement By and Among Plaintiff States, State Law Plaintiffs, Aventis, Carderm Capital and Andrx" dated January 24, 2003 (the "Settlement Agreement"). The terms of settlement embodied in the Settlement Agreement are referenced herein as the "Proposed Settlement."

6 15 U.S.C. § 15c(c) requires court approval of settlements of *parens patriae* claims asserted by state attorneys general under 15 U.S.C. § 15c(a). Plaintiff States seek court approval of similar claims asserted on behalf of consumers by States pursuant to authority specified below in § B.1. Plaintiff States seek court approval of all aspects of the settlement, including settlement of state proprietary claims.

The Settlement Agreement was preliminarily approved by this Court in Order No. 59 on January 29, 2003. The Notice program approved by the Court has now been completed. (9/19/03 Aff. of Thomas R. Glenn, Vice President of Operations of Complete Claims Solutions, the settlement administrator for third party payer class members; 9/18/03 Aff. of Matthew B. Potter, Rust Consulting, Inc.; 9/19/03 Aff. of Andrew Novak of Kinsella Communications, Inc.)

The Settlement Class consists of consumers and third party payers who or which paid, in whole or in part, for prescriptions of branded Cardizem CD and generic bioequivalent versions of Cardizem CD (collectively, "CD") filled in the United States between January 1, 1998 and January 29, 2003 (the "Class Period"). Class members and the Plaintiff States will share in a gross settlement fund of $80,000,000, plus interest from January 2003,[7] pursuant to the allocation provisions of Article III of the Settlement Agreement and the Government Compensation Plan, Consumer Distribution Plan and Third Party Payer Distribution Plan, which are Exhibits D, E, and F, respectively, to the Settlement Agreement.

7 Through September 11, 2003, accrued interest totaled $454,292.97.

The Settlement Agreement, if approved, will conclude more than five years of investigation, litigation, state enforcement, and settlement-related proceedings. Among third party payer class members, comprised of hundreds of commercially sophisticated managed care companies, hundreds of union health and welfare benefit plans and thousands of self-funded health benefit plans, more than 1,800 proofs of claim were filed. The only objection filed by a third party payer, Health Care Services Corporation, was withdrawn after the October 1, 2003, fairness hearing, and there are only a handful of opt-outs (primarily the four health insurers which have been litigating their claims separately from the class since 2001).[8] Two of the class representatives, Aetna and Cobalt, are large health insurers with experience as class representatives in prescription drug overcharge litigation.[9] The response by third party payers indicates knowledgeable class members' overwhelming approval of the Settlement. Also, there were a negligible number of consumer opt-outs and only two consumer objections.

8 Blue Cross Blue Shield of Massachusetts, Blue Cross Blue Shield of Michigan, Blue Cross Blue Shield of Minnesota, and Excellus Health Plan, Inc. (the “Individual Blue Cross Plaintiffs”).

9 *See In re Synthroid Marketing Litig.,* 188 F.R.D. 287 (N.D.Ill.1999) (Aetna as class representative), and *In re Lorazepam & Clorazepate Antitrust Litig.,* 205 F.R.D. 369 (D.D.C.2002) (Cobalt as class representative). *See also* 9/19/03 Lawrence Decl., 9/19/03 Bartlett Decl., and 9/19/03 Nash Decl.

Before deciding whether to grant final approval of the Proposed Settlement, this Court discusses the State Attorneys' General authority to settle their respective consumer citizens' claims.

**1. State Attorneys' General Authority to Settle All Consumer Claims**

**[7]** Plaintiff States, by their Attorneys General, have the authority to settle and ***521** release indirect purchaser claims in a *parens patriae* or other representative capacity. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 607, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982), the United States Supreme Court observed that “a State has a quasi-sovereign interest in the health and well being—both physical and economic —of its residents in general.” That federal authority is supplemented by state statutory provisions and case law. The developing state law establishing the State Attorneys' General authority to represent consumers can be divided into four categories: (1) *parens patriae* authority expressly conferred by the state legislature, (2) authority expressly conferred by the state legislature that is the functional equivalent of *parens patriae* authority, (3) judicially recognized authority to represent consumers, or (4) authority to proceed as a class representative of consumers pursuant to Fed.R.Civ.P. 23. *See In re Lorazepam & Clorazepate Antitrust Litig. (“Lorazepam”),* 205 F.R.D. at 386–87. In that case, the United States District Court for the District of Columbia found that each of the State Attorneys General had authority to represent consumers and to settle and release their claims. *Id.* at 386. Specifically, the *Lorazepam* Court found that:

> *Fourteen* of these *states*—California, Colorado, Delaware, the District of Columbia, Hawaii, Idaho, Massachusetts, Nevada, Ohio, Oregon, Rhode Island, South Dakota, Utah, and West Virginia—have expressly conferred *parens patriae* authority. *Sixteen states*—Alaska, Arizona, Florida, Illinois, Kansas, Maryland, Mississippi, New Hampshire, New York, North Carolina, North Dakota, Pennsylvania, Vermont, Virginia, Wisconsin, and Wyoming—have express statutory authority to represent consumers in a capacity which is the functional equivalent of *parens patriae. Thirteen states*—Alabama, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, Tennessee, Texas, and Washington —have had state and/or federal courts interpret statutory provisions to effectively grant *parens patriae* authority or have determined that their attorney general has such authority under state common law.... *[E]ight states*—Arkansas, Connecticut, Georgia, Indiana, Iowa, Nebraska, Oklahoma, and South Carolina—... represent their respective citizen-consumers pursuant only to Federal Rule of Civil Procedure 23.

*Id.* at 386–87 (citations omitted) (emphasis added).

Because this area of law continues to develop, there are a few changes to the placement of states in the various categories used by the *Lorazepam* Court. The revised placement of states is as follows:

Thirteen states and the Commonwealth of Puerto Rico—California, Colorado, Delaware, the District of Columbia, Hawaii, Idaho, Nevada, Ohio, Oregon, Puerto Rico, Rhode Island, South Dakota, Utah, and West Virginia—have expressly conferred *parens patriae* authority upon their Attorneys General. *See id. See also* P.R. Laws Ann. tit. 32, §§ 3341–3344. (Pls.' Motion, Ex. A.)

Seventeen states—Alaska, Arizona, Florida, Illinois, Iowa, Kansas, Maryland, Mississippi, New Hampshire, New York, North Carolina, North Dakota, Pennsylvania, Vermont, Virginia, Wisconsin, and Wyoming—have express state statutory authority to represent consumers in a capacity that is the functional equivalent of *parens patriae* authority. *See Lorazepam,* 205 F.R.D. at 386–87. *See also* Fla. Stat. Ann. § 501.207; Iowa Code § 714.16(7); N.Y. Exec. Law § 63(1) (McKinney's 1994), N.Y. Gen. Bus. Law §§ 340, 342 (McKinney's 1999) and N.Y. Gen. Bus. Law § 349 (McKinney's 1988). (Pls.' Motion, Ex. A.)

Fifteen states—Alabama, Arkansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, South Carolina, Tennessee, Texas, and Washington—have had state and/or federal courts either interpret statutory provisions to grant effectively *parens patriae* authority to the Attorney General, or determine that the particular State Attorney General possesses *parens patriae* authority, or its functional equivalent, as a matter of state common law (or civil law in the case of Louisiana). *See Lorazepam,* 205 F.R.D. at 386–87. *See also* ***522** *State v. Snow,* 230 Ark. 746, 324 S.W.2d 532, 534 (1959); *Commonwealth ex rel Chandler v. Anthem Ins. Cos.,* 8 S.W.3d 48, 55 (Ky.Ct.App.1999); *In re Certified Question,* 465 Mich. 537, 638 N.W.2d 409 (2002); S.C.Code Ann. §§ 39–5–10, *et seq., State ex rel Condon v. Hodges,* 349 S.C. 232, 562 S.E.2d 623 (S.C.2002); Tenn.Code Ann. § 8–6–109(b)(1), *Sage v. Appalachian Oil Co.,* Nos. 92–CV–716, 2:93–CV–229, 1994 WL 637443, 1994–2 Trade Cas. (CCH) ¶ 70,745 (E.D.Tenn. Sept.7, 1994); Wash. Rev.Code § 19.86, *Blewett v. Abbott Labs.,* 86 Wash.App. 782, 938 P.2d 842 (1997). (Pls.' Motion, Ex. A.)

Six State Attorneys General—Connecticut, Georgia, Indiana, Massachusetts, Nebraska, and Oklahoma—represent their consumer-citizens' claims solely in a representative capacity pursuant to Fed.R.Civ.P. 23.[10]

10 The Attorneys General of Alaska, Arkansas, California, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Wisconsin, and Wyoming assert claims on behalf of their consumer residents primarily pursuant to their respective state's *parens patriae* or similar authority and secondarily as a class representative of consumer residents pursuant to Fed.R.Civ.P. 23.

Having determined that the State Attorneys General have authority to settle consumer claims, the Court now considers whether it should grant final approval to the Proposed Settlement.

**2. Standards for Court Approval of Settlement**

In deciding whether to grant final approval of the Proposed Settlement[11], this Court must determine, after holding a fairness hearing, whether the settlement is "fair, adequate, and reasonable, as well as consistent with the public interest." *Bailey v. Great Lakes Canning, Inc.,* 908 F.2d 38, 42 (6th Cir.1990). The Court's determination also requires consideration of "whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." *Manual for Complex Litigation (Third)* § 30.42 at 238 (1995).

11 *Parens patriae* settlements entered into by state Attorneys General are analyzed under a standard and procedure similar to that used to consider private class action settlements under Fed.R.Civ.P. 23. *See New York v. Reebok Int'l, Ltd.,* 903 F.Supp. 532, 533 (S.D.N.Y.1995), *aff'd,* 96 F.3d 44 (2d Cir.1996).

**[8]** Relevant factors considered by the Court include: (a) the likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement; (b) the risks, expense, and delay of further litigation; (c) the judgment of experienced counsel who have competently evaluated the strength of their proofs; (d) the amount of discovery completed and the character of the evidence uncovered; (e) whether the settlement is fair to the unnamed class members; (f) objections raised by class members; (g) whether the settlement is the product of arm's length negotiations as opposed to collusive bargaining; and (h) whether the settlement is consistent with the public interest. *See Granada Invs., Inc. v. DWG* Corp., 962 F.2d 1203, 1205 (6th Cir.1992); *Williams v. Vukovich,* 720 F.2d 909, 922–23 (6th Cir.1983); *Kogan v. AIMCO Fox Chase, L.P.,* 193 F.R.D. 496, 501–02 (E.D.Mich.2000); *Steiner v. Fruehauf Corp.,* 121 F.R.D. 304, 305–06 (E.D.Mich.1988).

**3. Evaluation of the Settlement Under Applicable Standards**

**[9]** Evaluated under the applicable standards, this Court finds that the Settlement is a fair, adequate, and reasonable resolution of these very complex cases.

**a. The Likelihood of Success on the Merits Weighed Against the Amount and Form of the Relief Offered in the Settlement Favors Approval**

Pursuant to the Proposed Settlement, Class members will obtain the immediate and certain benefit of cash. The gross cash settlement of $80 million under the Proposed Settlement represents more than eighty-five (85%) percent of the total amount which the Litigating States' expert economist has estimated all United States end-payers were overcharged. (Pls.' Motion, 9/19/03 Rausser ***523** Aff.)[12] The recovery to the Class under the negotiated Proposed Settlement is well within the range of reasonableness in relation to claimed damages. *See e.g., In re Warfarin Sodium Antitrust Litig.,* 212 F.R.D. at 258 (observing that "[t]he settlement amount of $44.5 million represents more than 33% of the maximum possible recovery," and finding that this is "a very reasonable settlement when compared with recovery percentages in other class actions."). Moreover, the $80 million settlement amount is more than 70% of the amount paid to settle the direct purchaser class claims. In light of the enormously greater prosecution hurdles facing indirect purchasers, the State Law Plaintiffs' and State Attorneys' General settlement compares quite favorably.

12 Dr. Rausser computed nationwide end-payer damages attributable to an assumed eleven-month delay of the entry of generic versions of Cardizem CD. Plaintiffs claim that damages continued to accrue after generic competition began because CD prices continued to be higher than they would have been but for the delay of generic competition. Plaintiffs also claim that damages should be measured until the date in the future when the prices of CD are the same as they would have been without any delay of generic competition. Defendants contended, without conceding any liability, that if they were liable, the liability would have terminated when the Cardizem CD monopoly ended, or, alternatively, when Andrx's 180–day exclusivity period terminated. Dr. Rausser's analysis conservatively assumes that this date would occur 2.5 years after Andrx's generic entry. (9/19/03 Rausser Aff. ¶ 6.) The damages period was certain to be a fiercely contested issue on summary judgment and/or trial. However, even with a longer damages period, the settlement amount represents a substantial recovery.

For use in settlement negotiations, State Law Plaintiffs had expert economist, Cornerstone Research, Inc., prepare a damages analysis on a national basis and on a state-by-state basis. In those negotiations, State Law Plaintiffs disclosed to Defendants certain summary results of Cornerstone's analysis, among the results disclosed was Cornerstone's conclusion that, for the period July 1998 through a projected market equilibrium date in 2003, national aggregate single damages for consumer and third party payer class members in the 19 states under whose laws State Law Plaintiffs had asserted antitrust-related claims were in a range with a low end of $67 million. Assuming all United States consumers and third party payers had valid state law damages antitrust-related claims, Cornerstone estimated that aggregate damages for the four and one-half year damage period would be in a range with a low end of $150 million. (9/22/03 Lowey Decl. ¶ 41.) These damages estimates were based on certain assumptions of fact that were hotly contested by Defendants and on which Plaintiffs would bear the burden of proof at trial. Mindful of these facts, the settlement amount compares favorably with the Cornerstone damages' estimates and represents a substantial recovery.

Of course, before recovering damages on any scale, Plaintiffs would first have to succeed in proving liability, an all-or-nothing proposition. The risks of continued litigation are discussed next.

**b. The Risks, Expenses, and Delay of Continued Litigation Favor Approval**

Settlements should represent "a compromise which has been reached after the risks, expense and delay of further litigation have been assessed." *Williams,* 720 F.2d at 922. Accordingly, this Court examines the risks, expense, and delay Plaintiffs would face if they continued to prosecute this complex litigation through trial and appeal and weighs those factors against the amount of recovery provided to the Class in the Proposed Settlement.

This Court has previously observed that "[t]he prospect of a trial necessarily involves the risk that Plaintiffs would obtain little or no recovery." Order No. 49 at 7. Likewise, this Court and the Sixth Circuit have clarified that a *per se* ruling still leaves for a later time "all issues of causation, injury and damages." *In re Cardizem CD Antitrust Litig.,* 105 F.Supp.2d at 692, 332 F.3d at 909. Experience proves that, no matter how confident trial counsel may be, they cannot predict with 100% accuracy a jury's favorable verdict, particularly in complex antitrust litigation. *See e.g., In re Brand Name Prescription Drugs Antitrust Litig.,* No. 94 C 897, MDL 997, 1999 WL 33889, 1999–1 U.S. Trade Cas. (CCH) ¶ 72,446 (N.D.Ill.), *aff'd in part, vacated in part,* 186 F.3d 781, 785 (7th Cir.1999) (plaintiff class suffered directed verdict after eight weeks of trial); *United States*

*Football League v. Nat'l Football League,* 644 F.Supp. 1040 (S.D.N.Y.1986) (antitrust jury awarded $1.00 in nominal damages to successful plaintiffs), *aff'd,* ***524** 842 F.2d 1335 (2d Cir.1988). In addition to these general litigation risks, Plaintiffs faced specific litigation hurdles that would have to be overcome for successful prosecution at trial and on appeal.

Plaintiffs faced significant risks regarding the causation element of their claims. This was an "all or nothing" issue in this case. Part of this risk arose from a statement the FTC made in connection with the resolution of its administrative proceeding against HMRI and Andrx, which began in March 2000.

The FTC prosecuted its administrative complaint separate and apart from the actions before this Court; and, on the eve of trial, the FTC dismissed its case and entered into a consent agreement with HMRI and Andrx on April 2, 2001. The FTC also issued an "Analysis to Aid Public Comment," stating that, based on its investigation, it did not believe that Defendants' September 1997 Agreement delayed the introduction of Andrx's generic version of Cardizem CD. While Plaintiffs disagree with the FTC and believe the statement has no precedential value, it highlights one of the primary risks Plaintiffs would face absent the Proposed Settlement. If found admissible, the statement would have certainly had a negative impact on Plaintiffs' cases. This statement weakened the Plaintiffs' settlement position and justified moderation of their demand, notwithstanding the letter of clarification Plaintiffs' received from FTC staff. (4/20/01 Ltr. to Pls. from Richard Feinstein, Asst. Director, Bureau of Competition, FTC.)

During the course of this litigation, Defendants have vigorously challenged Plaintiffs' claims with multi-faceted and complex causation arguments; *i.e.,* that, regardless of the September 1997 HMRI/Andrx Agreement, Andrx had no intention of coming to market while its patent litigation with HMRI was pending, and furthermore, Andrx could not have come to market any earlier due to various financial and technical reasons. While Plaintiffs' counsel believe they have persuasive circumstantial evidence to refute these defenses (which helped them to obtain a favorable settlement), they could not ignore the risk that Plaintiffs could lose their entire case on this issue at trial.

Plaintiffs would also have faced other additional potentially dispositive defenses at trial. Had the parties proceeded to trial, the assumptions underlining Dr. Rausser's damages estimate would have been the subject of serious dispute between the parties. Most notably, Defendants would have argued that, for various supply logistics, manufacturing, and FDA approval reasons, generic manufacturers (including Andrx) did not possess the capability to come to market any sooner than they actually did. As a result, Defendants would have argued that Dr. Rausser's $93.7 million damage estimate vastly overstates the actual damages since such damages are predicated upon the assumption that the September 1997 HRMI/Andrx Agreement caused the Introduction of generic CD to be delayed for eleven months. As Dr. Rausser indicates, to the extent Defendants successfully established that any of the generic manufacturers were unable to market their lower cost generic versions of Cardizem CD at any point in time during that eleven month period, the damages figure would decrease accordingly. (9/19/03 Rausser Aff. ¶ 4.)

Plaintiffs faced a significant risk that they would be unable to persuade a jury of Andrx's ability or willingness to market a generic version of Cardizem CD at any point in time prior to the date it first sold generic Cardizem CD in June 1999. Andrx asserts that, at the time of the September 1997 Agreement, it was a relatively young company with limited capital, little experience in launching generic products, and unproven manufacturing capabilities. Andrx also claims that it was experiencing difficulty achieving the dissolution rates specified in its generic Cardizem CD ANDA. According to Andrx, raw material problems, particularly in calibrating the spray rate of the machines that coated the capsules with a permeable polymer, plagued the company throughout the alleged "but-for" period preceding the launch of generic Cardizem CD in June 1999. Plaintiffs carefully analyzed the evidence of these manufacturing obstacles and consulted with a drug development expert to evaluate the strengths and weaknesses of Andrx's position. ***525** The defense would be a significant focus of any trial of these cases and could result in no award at trial.

The parties were also cognizant, during the negotiations, that Defendants had attacked Plaintiffs' legal ability to obtain indirect purchaser recovery under various states' laws. These issues were extensively briefed by the parties and only partially resolved when the parties entered into the Settlement Agreement. Although Plaintiffs were confident of their position on this issue, the issue was not without legal risk.

Furthermore, State Law Plaintiffs faced a daunting task of obtaining certification of multiple states' classes over

Defendants' intense opposition. At the time of settlement, class certification had not been granted in states other than Michigan, and Defendants had informed the Court that they intended to move to de-certify the Michigan class.

Finally, continued prosecution through trial and appeal would have caused substantial additional expenses and delay. Although significant discovery has already taken place, substantial additional effort and expense would be required to prepare this matter for trial. This would include (1) completion of fact and expert discovery, (2) preparing witnesses, experts, and exhibits, and (3) completion of pre-trial motion practice, including probable motions for summary judgment.

In light of the above, this Court finds that the certain and immediate benefits to the Class represented by the Settlement outweigh the possibility of obtaining a better result at trial, particularly when factoring in the additional expense and long delay inherent in prosecuting this complex litigation through trial and appeal.

**c-d. The Judgment of Experienced Counsel and the Amount and Character of Discovery Weigh in Favor of Approval**

**[10]** In approving a proposed settlement, the Court also considers the opinion of experienced counsel as to the merits of the settlement. As the Sixth Circuit observed, "[t]he court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs. Significantly, however, the deference afforded counsel should correspond to the amount of discovery completed and the character of the evidence uncovered." *Williams,* 720 F.2d at 922–23 (internal citations omitted). *Accord, Manual for Complex Litigation (Third)* § 30.42 at 240 (1995).

Unlike many class action settlements negotiated solely by private sector lawyers without the involvement of the class representatives, the settlement in this case was negotiated and approved by highly sophisticated representatives of the Plaintiff Class. In-house counsel for Aetna and Cobalt, who took a hands-on role throughout the five-year history of this litigation, participated in negotiations and reviewed and approved the settlement and allocations. (9/18/03 Lawrence Decl. ¶¶ 6, 11; 9/19/03 Nash Decl. ¶ 8.)

The Court may also rely upon the participation of State Attorneys General as a factor in favor of the fairness and adequacy of the Settlement. This case was jointly litigated by the twenty-nine Litigating States in conjunction with the State Law Plaintiffs and all States' Attorneys General who subsequently joined the Settlement. As the chief law enforcement officers in their respective states, the State Attorneys General are expressly empowered to enforce their state antitrust and consumer protection laws and to obtain damages for consumers in their states. That Attorneys General are active participants in this Settlement helps ensure that the Settlement is fair and reasonable and benefits the entire Plaintiff Class. *See, e.g., State of New York v. Reebok Int'l Ltd.,* 96 F.3d at 48 (observing that the motivating factor for states acting as *parens patriae* for their citizens is the enforcement of the antitrust law); *In re Toys "R" Us Antitrust Litig.,* 191 F.R.D. 347, 351 (E.D.N.Y.2000) (observing that "participation of the State Attorneys General furnishes extra assurance that consumers' interests are protected"); *In re Mid–Atlantic Toyota Antitrust Litig.,* 564 F.Supp. 1379, 1386 (D.Md.1983) (observing that "the presence of public law enforcement officers in the settlement process is an appropriate element for the Court to consider in approving the settlement").

***526** This Court finds that Class Counsel and Counsel for the Litigating States have substantial experience in litigating and resolving similarly complex matters, including pharmaceutical overcharge antitrust cases. This Court also finds that those Counsel negotiated the Settlement Agreement at arm's length, after extensive discovery, and independent analysis of all relevant matters, and thus it defers to Counsel's conclusion that the Proposed Settlement is fair, adequate, and reasonable. At the time the parties entered into the Settlement Agreement, fact discovery had almost been completed. Plaintiffs' Counsel's Declarations and Affidavits reveal that they had (1) thoroughly investigated the claims against Defendants; (2) retained and worked with expert witnesses in evaluating aggregate damages to the Class and Defendants' highly technical production-related causation defenses; and (3) sufficiently developed the facts concerning Defendants' liability and damages to make a highly informed decision regarding the Proposed Settlement.

Counsel for Plaintiffs engaged four expert economists of national reputation to evaluate the economic theory of their claims and potential damages based on sales data produced by Defendants, Plaintiffs, and the pharmaceutical industry itself. Independent of the formal discovery obtained in litigation, Plaintiffs' Counsel also commissioned a data report from IMS, the recognized industry leader in data collection for the pharmaceutical industry. Based upon this information,

Plaintiffs were able to make an informed judgment of the merits of their claims, the potential damages arising therefrom, and any potential weaknesses in their arguments. All of this weighs in favor of the Court's approval of the Settlement.

**e-f. The Lack of Objections (and Opt–Outs) by Class Members Highlights the Fairness of the Settlement to Unnamed Class Members and Favors Approval**

**(1) Third Party Payers**

Pursuant to Order No. 59, preliminarily approving the Proposed Settlement, more than 13,000 copies of the Notice of Settlement of Class Actions, Proof of Claim, and Notice of Exclusion (the TPP “Notice Packets”) were mailed directly to third party payer Class Members in this action in February 2003. A second mailing of more than 13,000 amended TPP Notice Packets were mailed to class members in March 2003. (9/19/03 Glenn Aff. ¶¶ 4–5.)

Notice of the Settlement included a description of the Class, the procedural status of the litigation, description of class members' rights under Fed.R.Civ.P. 23(b)(3), the significant terms of the Settlement, a general description of the proposed plan of allocation of the settlement proceeds, and a description of the process of court approval. The Summary Notice for third party payers was also published in two industry publications. (9/19/03 Glenn Aff. ¶ 6). A toll-free information number established for the benefit of third party payer class members received 563 calls, and an Internet website (*www.cardizemtppsettlement.com* ) posted information about the settlement and enabled users to view or download all relevant documents. The website has had more than 11,000 visits. (9/19/03 Glenn Aff. ¶ 9.)

From this large, and largely sophisticated, constituency, the only managed care companies which opted out were the four Individual Blue Cross Plaintiffs, on behalf of themselves and the self-funded plans they administer. Only one other self-funded third party payer plan opted out. The only objection filed by a third party payer, Health Care Services Corporation, was withdrawn after the October 1, 2003 fairness hearing. No other third party payer member of the class has filed an objection to the Settlement. By contrast, more than 1,800 proofs of claim have been filed by third party payers, claiming total CD purchases of more than $1.37 billion. (9/19/03 Glenn Aff. ¶ 10.)

**(2) Consumers**

Pursuant to Order No. 59, preliminarily approving the Proposed Settlement, the consumer settlement administrator, Rust Consulting, Inc., mailed (as of September 12, 2003) 43,551 long-form notice packets to consumers who requested information about the Proposed Settlement through calls or e-mails. ***527** (Pls.' Motion, 9/19/03 Potter Aff. ¶ 6.) The long-form notice packet included a one-page summary letter, an eight-page notice booklet, a four-page common question and answer brochure, and a three-page consumer claim registration and opt-out form. (*Id.* ¶ 5.) In addition, to resolve issues concerning a third party subpoena served by the New York Attorney General's office, Biovail included the summary notice in its magazine *CardiSense,* which it mailed to approximately 137,000 individuals who indicated that they are currently taking Cardizem CD. In addition, Biovail mailed the summary notice to approximately 385,000 individuals who had previously indicated that they had taken Cardizem CD.

The claims administrator also designed and maintained a website on the internet to provide claimants with information about the settlement (*www.cardizemsettlement.com).* As of September 12, 2003, there had been more than 100,000 visits to this website, from which Rust Consulting received 7,757 requests for claim registration packets. (*Id.* ¶ 10.) Rust Consulting also established a toll-free telephone number for consumer class members to obtain recorded information or speak with customer service representatives, beginning on May 13, 2003, and continuing through the present. As of September 12, 2003, more than 95,000 phone calls had been made to the toll-free number, and more than 29,000 callers spoke with customer service representatives. (*Id.* ¶ 17.) In addition, from July 8, 2003, to August 3, 2003, there was a television media campaign to publicize the consumer settlement. Beginning with this campaign, daily calls to the toll-free settlement information number increased fifteen-fold.

As of September 12, 2003, Rust Consulting had received 21,963 proofs of claim via mail and 15,424 claims via the internet. As of September 12, 2003, Rust Consulting had received 316 opt outs, one “comment” that Plaintiffs and the Court respond to as an objection, and one other objection filed by Attorney Gordon Ball on behalf of his client, Ms. Eugenia Wynne Sams. Ms. Sams also filed a notice of intent to appear and be heard through counsel and/or in person at the October 1, 2003 final approval hearing.[13] Accordingly, consumer opt

outs to date have been less than 1% of the number of consumer claimants.

13 This Court, in an effort to better assess the fairness, adequacy and reasonableness of the Proposed Settlement and Allocation Plan, required the appearance of objectors at the October 1, 2003 final approval hearing. (Order No. 75.)

A certain number of opt-outs and objections are to be expected in a class action. *See e.g., In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 478 (S.D.N.Y.1998) (observing that "[i]n litigation involving a large class, it would be 'extremely unusual' not to encounter objections."). If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.[14] *Id.* at 478–79. *See also In re Orthopedic Bone Screw Prods. Liab. Litig.,* 176 F.R.D. 158, 185 (E.D.Pa.1997).

14 The only other entities which filed notices of exclusion do not appear to have been class members. Plaintiffs represent that they consist of a credit union with no purchases of CD, and the Sherman Act Individual Plaintiffs, which are chain drug stores whose counsel filed letters in which they state that they do not believe they are class members. (9/19/03 Glenn Aff. ¶ 6.)

That the overwhelming majority of class members have elected to remain in the Settlement Class, without objection, constitutes the "reaction of the class," as a whole, and demonstrates that the Settlement is "fair, reasonable, and adequate." Moreover, the two objections are not well-founded.

In the first objection filed by a consumer, Mr. Patrick D. Corcoran of Minnetoka, Minnesota, states that "it is wrong to provide a higher level of award to consumers who had no prescription drug coverage than to those consumers who had such coverage which they paid for at their own expense." (Pls.' Motion, Ex. B.) This objection is without merit. As Plaintiffs convincingly explained, the reason cash consumers will be paid a higher recovery amount under the Settlement is that the cost difference between a branded version and a generic version of Cardizem CD would have been assumed ***528** entirely by the cash consumer (as opposed to being shared between an insured consumer and his/her insurer). Consequently, the cash consumer's "out of pocket" expense will be higher, and his/her recovery should reflect that difference.

The second objection is filed by counsel Gordon Ball on behalf of Tennessee consumer Eugenia Wynne Sams. Sams raises four objections, all without merit and bordering on frivolousness. To place her objections in context, the Court first examines Ms. Sams' background, and her role in this multi-district litigation.

Ms. Sams took Cardizem CD from June 8, 1993 through August 28, 1998. Sams estimates that she paid approximately $35/month for Cardizem CD. As to her Cardizem CD purchases from June of 1993 through December 1997, Sams testified that after she satisfied her $200 medical deductible, her insurer, BCBS, paid 80% of her prescription costs and she was responsible for the remaining 20%. In January 1998, Sams switched insurers, paying only a $15 co-pay. Sometimes she purchased a one-month supply of Cardizem CD, other times she purchased a three-month supply. Sams has never taken a generic version of Cardizem CD. (Sams' 1/8/02 Dep. at 16–17, 21, 22–25, 33–34, 36, 42–56, 76–78, 86–93.)

At the fairness hearing and at her deposition, Ms. Sams testified that, after Attorney Ball first contacted her in 1998 and asked her if she took Cardizem, and she agreed to file suit against Defendants, she has not taken an active interest in this litigation. Other than reviewing her initial complaint, gathering her personal paperwork concerning her Cardizem CD purchases, appearing at a deposition requested by Defendant HMRI (now Aventis), Ms. Sams has been content to let her attorney, Mr. Ball, monitor this litigation. (Sams' 1/8/02 Dep. at 67, 71, 73–75.)

Sams' action has never been certified as a class. Accordingly, she represents only herself. Her action, along with the others described above, were transferred to this Court by the Judicial Panel on Multidistrict Litigation in June 1999. Pursuant to this Court's Case Management Orders coordinating pretrial proceedings in all the State Law Actions involved in this multidistrict litigation, Co–Lead Counsel was designated for the State Law Plaintiffs and given responsibility for handling all pretrial litigation, discovery, and settlement negotiations. (Case Management Order Nos. 1–8.) Mr. Ball is not one of the counsel so designated by the Court.

After settlement negotiations began, Mr. Ball filed a motion for a suggestion of a remand on behalf of Ms. Sams, arguing that pretrial proceedings had been completed and a remand was required, or, alternatively, Mr. Ball should be allowed to participate in pretrial settlement negotiations. Mr. Ball's motion was denied. In Order No. 45, this

Court observed that Mr. Ball's request was contrary to the procedures set forth in this Court's Case Management Order No. 7, ¶ 14 and would frustrate a recognized purpose for consolidating multidistrict litigation for pretrial proceedings. *See Manual for Complex Litigation (Third)* § 31.132 at 254 (1995) (observing that “[o]ne of the values of multidistrict proceedings is that they bring before a single judge all of the cases, parties, and counsel comprising the litigation” and “therefore afford a unique opportunity for the negotiation of a global settlement.... In managing the litigation, therefore, the transferee judge should take appropriate steps to make the most of this opportunity and facilitate the settlement....”). This Court observed that this is an accepted method for creating order out of what would otherwise be chaos if each individual plaintiff's counsel were allowed to engage in uncoordinated discovery and fractured settlement negotiations. *See In re Ivan F. Boesky Sec. Litig.,* 948 F.2d 1358, 1365 (2d Cir.1991) (approving the practice of appointing lead counsel for settlement negotiations in complex multidistrict litigation because “[c]ompelling defendants to negotiate with a single negotiator authorized to speak for all the classes eliminates opportunities for divisive settlement shopping”, “promotes fair and comprehensive resolutions”, and “diminishes the costs that multilateral bargaining would impose on each class.”). (Order No. 45 filed 10/30/02.)

While settlement negotiations were proceeding, Mr. Ball filed a renewed motion for suggestion of remand on behalf of Ms. Sams. ***529** In Order No. 55, this Court denied Mr. Ball's renewed motion, finding that it provided no reason for the Court to depart from the reasoning set forth in Order No. 45. The Court reiterated that coordinated pretrial proceedings were not completed, that Co–Lead Counsel had sole responsibility for pretrial discovery and settlement negotiations, and that this was an accepted method of pretrial management. The Court further observed that, contrary to Sams' arguments, discovery relevant to her claim had been pursued, received, and considered in settlement negotiations between Co–Lead Counsel for the State Law Plaintiffs, the Plaintiff States (including the Attorney General of Tennessee), and Defendants. (Order No. 55 filed 1/29/03.)

Mr. Ball then filed a motion to remand on behalf of Ms. Sams before the Judicial Panel on Multidistrict Litigation (“JPML”). In an Order dated June 17, 2003, the JPML denied Mr. Ball's motion, agreeing with this Court's assessment that a remand of the *Sams* action would be premature because coordinated pretrial proceedings were ongoing.

Sams' first objection merely reargues the remand issue previously rejected twice by this Court and once by the JPML. The objection does not address the fairness, adequacy, or reasonableness of the Proposed Settlement. Accordingly, it is overruled. The second objection is likewise overruled because it fails to address the fairness, adequacy, and reasonableness of the Proposed Settlement and merely restates a legal argument previously rejected by this Court; *i.e.,* that the Tennessee Attorney General lacks authority to represent Tennessee consumers in this action. (Order No. 68.)

Ms. Sams' final two objections do raise fairness concerns. Both address the Proposed Allocation Plan for disbursement of the Settlement Funds and argue that the distribution formula is not fair because it (1) fails to distinguish between states that allow indirect purchasers to recover antitrust damages and those that do not, and (2) fails to distinguish between Tennessee, which Sams' argues allows recovery for full consideration paid by the consumer, and states that do not allow such recovery. Both objections are overruled.

Class Counsel convincingly argued that the Proposed Allocation Plan is fair, adequate, and reasonable. Distinctions between states' laws were considered during settlement negotiations. It was decided, however, that the Proposed Plan was the best way to get the most cash to consumers. Applying a cost/benefit analysis, it was decided that the increased administration costs necessarily incurred in connection with screening so as to distinguish between consumers of states conferring arguably greater or lesser benefits would result in decreased benefits to consumers. It was also determined that the increased complexity necessarily required on claims forms would decrease the number of consumers taking advantage of this settlement. Settlement always involves a cost/benefit analysis and compromise. This settlement is no different.

Objector Sams does not offer an alternative plan. Moreover, her fairness arguments fail to address the fact that indirect purchaser recovery in Tennessee was not a settled issue at the time the Settlement Agreement was entered into and likewise fail to address the fact that her “full consideration” argument may be more difficult to prove than she portrays. *See Sherwood v. Microsoft Corp.,* No. M2000–01850, 2003 WL 21780975 (Tenn.Ct.App. July 31, 2003); *Orlando's Bakery v. Nutrinova Nutrition Specialities & Food Ingredients (“Sorbates Antitrust Litig.”),* No. 99–560–11, Slip Op. at 14–15 (20th Judicial Dist., Davidson County, Tenn. Feb. 6, 2002) (Memorandum and Final Order approving proposed

settlement and plan of distribution in class action antitrust suit). Ms. Sams' objections also fail to consider the additional litigation risks, expenses and delay avoided by the Proposed Settlement and Allocation Plan. Finally, this Court observes that, despite her complaints, Objector Sams has chosen not to opt-out of the Settlement Class. Rather, she has chosen to object and file an appeal despite knowledge that, pursuant to the Settlement Agreement, an appeal will delay disbursement of Settlement Funds to consumers who are typically elderly and ill ***530** and at risk of dying before her appeal is heard or decided.

This Court finds that the overwhelming positive Class response to the Proposed Settlement weighs heavily in favor of approval. *See Kogan,* 193 F.R.D. at 502.

**g. The Fact that the Settlement is the Product of Arm's Length Negotiations as Opposed to Collusive Bargaining Favors Approval**

This Settlement comes after more than four years of vigorous litigation and is the product of arm's length settlement negotiations among counsel for State Law Plaintiffs and the Plaintiff States and Defendants in a mediation process that consumed almost one year. These negotiations and the ultimate Settlement Agreement were closely monitored by Professor Eric D. Green, an experienced and respected mediator appointed by the Court. Counsel for Plaintiffs and Defendants attended a three-day mediation session in June, 2002, at which time demands and offers were communicated through Professor Green. (9/22/03 Lowey Decl. ¶ 58.) At no time prior to this mediation session had substantive settlement discussions occurred between any Plaintiff and HMRI (now Aventis), and only preliminary negotiations had taken place between State Law Plaintiffs and Andrx. At the conclusion of this mediation session, Plaintiffs and Defendants were unable to agree to any of the material terms of what ultimately became the Settlement Agreement. Thereafter, through numerous telephonic sessions between the parties and with, at times, Professor Green, the process advanced. After two face-to-face conferences between counsel for Plaintiffs and Defendants, the parties were able to finally agree to the terms of the Settlement Agreement. The parties reached impasse frequently during the process, and Professor Green was often called upon to mediate the disputes. (*Id.* at ¶ 60.)

Additionally, in-house counsel for the Class Representatives oversaw negotiations and approved the Settlement and have submitted their declarations in support of final approval. (9/18/03 Lawrence Decl. ¶ 11; 9/19/03 Nash Decl. ¶ 8.) All decisions concerning offers, counter-offers, and acceptance and rejection of settlement offers, were made by Class Representative Plaintiffs Aetna and Cobalt themselves, through their respective in-house counsel, and a committee of the Assistant Attorneys General of the Litigating States, in consultation with Co–Lead Class Counsel. The involvement of States' Attorneys General and in-house counsel for third party payer Class Representatives in this action is further evidence of the arm's length and “client-driven” nature of the Settlement. (9/19/03 Lowey Decl.; 9/18/03 Lawrence Decl.; 9/19/03 Nash Decl.; 9/22/03 Novak Decl.)

In light of the above, this Court finds that the Settlement was negotiated at arm's length, and this factor weighs in favor of approval.

**h. The Settlement's Consistency with Public Interest Favors Approval**

There is a strong public interest in private antitrust litigation. *See e.g., Pillsbury Co. v. Conboy,* 459 U.S. 248, 262–63, 103 S.Ct. 608, 74 L.Ed.2d 430 (1983). Likewise, there is a strong public interest in encouraging settlement of complex litigation and class action suits because they are “notoriously difficult and unpredictable” and settlement conserves judicial resources. *Granada,* 962 F.2d at 1205 (internal quotes and citation omitted.) *Accord, In re Warfarin Sodium Antitrust Litig.,* 212 F.R.D. at 254; *Steiner,* 121 F.R.D. at 305. Settlement of this antitrust action serves the public interest by ensuring effective enforcement of the antitrust laws and deterrence of anti-competitive conduct in the marketplace. *See Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.,* 381 U.S. 311, 318, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965). This is particularly important in the pharmaceutical industry where the potential harm to society caused by agreements to prevent or delay entry of cheaper generic products has recently received considerable attention.

**4. Conclusion**

Having considered the above, this Court finds that the proposed Settlement merits FINAL APPROVAL.

***531 C. Approval of the Allocation Plan**

**[11]** Plaintiffs also seek approval of their Plan of Allocation which allocates the settlement funds, net of Court-approved fees and expenses (“Net Settlement Fund”).[15] For the

following reasons, this Court APPROVES Plaintiffs' Plan of Allocation.

15 The specifics of how the Consumer Settlement Fund will be distributed to consumers will be the subject of a further motion once all claims are processed.

First, the only third party payer class member that had objected to the Plan of Allocation, Health Care Services Corporation, withdrew the objection after the October 1, 2003, fairness hearing.

Second, only two consumer class member have objected to the Plan of Allocation, and, as discussed above, those objections are without merit.

Third, the Plan provides a fair and reasonable method of calculating Class member damages based on each Class member's actual purchase of CD, in conformance with Plaintiffs' experts' damage calculation methodology; and also provides a fair and reasonable method for determining each Class members' *pro rata* share of the Net Settlement Fund.

Fourth, the Plan adequately describes: (1) the method of calculating each Class member's damages and *pro rata* share of the Net Settlement Fund; (2) the contents and method of disseminating a Claims Notice form; (3) the manner in which claims will be initially reviewed and processed; and (4) the process for handling and resolving challenged claims. It also includes deadlines for completing tasks related to distributing each Class member's *pro rata* share of the Net Settlement Fund: (1) preparation and dissemination of the Claims Notice form; (2) receipt by the Settlement Administrator of completed Claims Notice forms and supporting documentation; (3) curing deficiencies in any Claims Notice form or supporting documentation submitted by Class members; and (4) challenging and resolving disputes over the Settlement Administrator's determination of each Class member's distribution amount.

**D. Approval of State Law Class Plaintiffs' Counsels' Joint Petition for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards**

State Law Class Plaintiffs' Counsel ("Plaintiffs' Counsel") also filed a Joint Petition for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards for Named Plaintiffs. The joint petition is made on behalf of 21 law firms representing Plaintiffs in numerous actions brought in various state and federal courts nationwide. Specifically, Plaintiffs' Counsel request that the Court (1) approve an award of $13,600,000 (17% of the gross settlement fund), plus 17% of interest accrued on escrowed settlement funds to Plaintiffs' Counsel for attorneys' fees; (2) approve reimbursement to Plaintiffs' Counsel of $1,355,045.98 for current expenses incurred in connection with this litigation;[16] and (3) approve incentive awards to certain representative plaintiffs in the following amounts: $75,000 each for Aetna and Cobalt, and $2,500 each for four individual plaintiffs. For the reasons set forth below, the Court GRANTS Plaintiffs' Counsel's requests.

16 Plaintiffs' Counsel informs the Court that it will seek approval of additional expenses incurred up to the date of final distribution to Class members at an appropriate time.

**1. Attorneys' Fees and Interest**

**[12]** This Court finds that the percentage-of-the-fund method is the proper method for compensating Plaintiffs' Counsel, and that an attorneys' fee award of 17% of the Settlement Fund plus 17% of the accrued interest in the Settlement Fund, is reasonable under the circumstances presented here. Courts in the Sixth Circuit have approved similar percentage awards, and consideration of factors identified by the Sixth Circuit justify such an award.

**a. Reasonable Percentage–of–the–Fund Attorneys' Fees are Properly Awarded in Common Fund Cases**

**[13]** The Settlement Fund is a "common fund," and it is well established that "a lawyer who recovers a common fund for the benefit of persons other than himself or his ***532** client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). Trial courts within the Sixth Circuit have discretion to calculate an award of attorneys' fees by using either (1) a percentage of the fund calculation, or (2) a lodestar/multiplier approach. *Rawlings v. Prudential–Bache Properties, Inc.,* 9 F.3d 513, 516–17 (6th Cir.1993). The overriding requirement is that the award "be reasonable under the circumstances." *Id.* at 516.

In *Rawlings,* the Sixth Circuit observed that the recent trend has been towards application of a percentage-of-the-fund method in common fund cases. *See id.* As recognized by this Court in Order No. 49, courts in the Sixth Circuit have indicated their preference for the percentage-of-the-fund method in common fund cases. *See, e.g., In re F & M Distributors, Inc. Sec. Litig.,* Case No. 95–CV–71778–DT,

1999 U.S. Dist. LEXIS 11090 (E.D. Mich. June 29, 1999) (choosing percentage-of-the-fund as the better method for determining attorneys' fees in a securities class action); *In re Rio Hair Naturalizer Prods. Liab. Litig.,* MDL No. 1055, 1996 WL 780512, *16 (E.D.Mich. Dec.20, 1996) (observing that "more commonly, fee awards in common fund cases are calculated as a percentage of the fund created, typically ranging from 20 to 50 percent of the fund"); *Fournier v. PFS Invs., Inc.,* 997 F.Supp. 828, 832–33 (E.D.Mich.1998) (choosing percentage-of-the-fund method in class action securities litigation). In *Fournier,* the court observed that:

> The lodestar method should arguably be avoided in situations where such a common fund exists because it does not adequately acknowledge (1) the result achieved or (2) the special skill of the attorney(s) in obtaining that result. Courts and commentators have been skeptical of applying the formula in common fund cases.... [M]any courts have strayed from using lodestar in common fund cases and moved towards the percentage of the fund method which allows for a more accurate approximation of a reasonable award for fees.

*Id.* at 831–32 (internal citations omitted).

This Court agrees, as it did in Order No. 49, with Judge Cook's observations in *F & M Distribs. Inc. Sec. Litig.,* that (1) "the lodestar method is too cumbersome and time-consuming of the resources of the Court"; and (2) "more importantly, the 'percentage of the fund' approach more accurately reflects the result achieved." 1999 U.S. Dist. LEXIS 11090, at *8 (internal quotes and citations omitted). This Court's decision to apply the percentage-of-the-fund method is consistent with the majority trend, and, more importantly, is reasonable under the circumstances presented here.

**b. The Requested Fee is Within the Range Considered Reasonable and Fair**

Applying the percentage of the fund approach, this Court finds that the requested fee in the amount of 17% of the Settlement Fund is fair and reasonable in light of the complex legal and factual difficulties and substantial procedural difficulties presented in this litigation. In 1998, when these cases began, Aetna negotiated a fee structure which allowed it to limit the amount of legal fees Plaintiffs' Counsel would request from the Court to 17% of the gross recovery obtained. (9/19/03 Lawrence Decl. ¶ 5.) Aetna and Cobalt fully support Plaintiffs' Counsel's petition for a fee equal to 17% of the gross settlement. (*Id.* at ¶ 13; 9/19/03 Nash Decl. ¶ 10.)

The State Attorneys General likewise support Plaintiffs' Counsel's fee petition. These State Attorneys General, represented by very experienced staff counsel, worked closely with Plaintiffs' Counsel from the time they first became involved in this litigation, and recognize the significant work, achievement, and risk undertaken by Plaintiffs' Counsel prior to their intervention.

The requested 17% fee is well within the 20–30% range of reasonable attorneys' fees generally awarded in this Circuit. *See F & M Distribs. Inc. Sec. Litig.,* 1999 U.S. Dist. LEXIS 11090, at *8–10 (awarding a 30% fee award after observing that "[w]hen using a percentage-of-the-fund approach to calculate attorneys' fees, twenty-five percent has traditionally been the benchmark standard, 'with the ordinary range for attorney's fees between 20–30%.' ") (quoting ***533** *Fournier,* 997 F.Supp. at 832). *See also In re Kmart Corp. Sec. Litig.,* Consolidated Master File No. 95–CV–75584, 1998 U.S. Dist. LEXIS 23092, at *21 (E.D.Mich. Oct. 30, 1998) (awarding attorneys' fee of 20% of the common fund); *Manners v. Am. Gen. Life Ins. Co.,* No. 3–98–0266, 1999 WL 33581944, at *7, 1999 U.S. Dist. LEXIS 22880, at *20 (M.D.Tenn. Aug. 11, 1999) (awarding attorneys' fees of 20% of the common fund). This Court, in Order No. 49, awarded Sherman Act Class Counsel 30% of a $110 million settlement fund. State Law Class Plaintiffs' Counsel faced similar legal and procedural difficulties as the Sherman Act Class Counsel during the course of this litigation, and also faced substantial additional difficulties as indirect purchasers.

**c. Evaluating Sixth Circuit Factors, the Requested Fee is Reasonable**

**[14]** Courts in the Sixth Circuit evaluate the reasonableness of a requested fee percentage award using six factors: (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides. *Bowling v. Pfizer, Inc.,* 102 F.3d 777, 780 (6th Cir.1996); *Smillie v. Park Chem. Co.,* 710 F.2d 271, 275 (6th Cir.1983).

Considering the above factors, this Court finds that Plaintiffs' Counsel's requested fee award is reasonable under the circumstances. First, the result obtained on behalf of the Class is extraordinary and fully supports the requested fee percentage. As discussed above, the Settlement represents a

very high percentage of the total damages to the Class as estimated by separate experts retained by State Law Plaintiffs and the State Attorneys General.

Secondly, there is no question that Plaintiffs' Counsel spent thousands of hours litigating this complex case over the past five years. Counsel's work throughout the substantial motion practice and discovery process has been of the highest quality. The requested fee percentage would equate to a lodestar multiplier of approximately 1.2. This is both reasonable and well within the range of multipliers awarded by courts in complex cases such as this. *See Manners,* 1999 WL 33581944, at *31, 1999 U.S. Dist. LEXIS 22880, at *93 (awarding multiplier of 3.8 and observing that "[t]his multiplier is well within the range of multipliers for similar litigations, which have ranged from 1–4 and have reached as high as 10."); Order No. 49 at 20 (awarding Sherman Act Class Plaintiffs 30% of the common fund and finding that a lodestar multiplier of 3.7 was reasonable under the circumstances). The Court is also mindful that Plaintiffs' Counsel's services will still be needed to assist in the claims resolution process and may be needed to defend any objectors' appeals.

The third through sixth factors also support the requested attorneys' fee. Plaintiffs' Counsel undertook representation of the Class on a contingent fee basis, thus bearing the risk of recovery inherent in litigation, and expended millions of dollars in attorney time and expenses in their prosecution of this litigation over the past five years. Plaintiffs' Counsel also faced the substantial legal talent and financial resources of Defendants, which increased the risk of litigating this action.

Moreover, the complexity of this case cannot be overstated. Antitrust class actions are inherently complex, and this case in particular presented a number of complicated factual and legal issues. As previously recognized in Order No. 49, this extraordinarily complex case raised a multitude of difficult issues in the areas of antitrust law, patent law, and laws governing pharmaceutical drugs. (Order No. 49 at 4.) These included:

- regulatory issues arising out of the Hatch–Waxman Act;
- patent law issues relevant to the Defendants' patent litigation underlying the September 1997 Agreement;
- the intricacies of the pharmaceutical industry from a sales and marketing perspective;
- the scientific and production processes involved with investing and commercializing ***534** branded and generic pharmaceutical productions; and
- the FDA regulations applicable to reviewing and approving pharmaceutical products and new manufacturing facilities and processes.

(Order No. 49 at 20–21.) Notwithstanding this complexity, Plaintiffs' Counsel, from the very beginning of this litigation, demonstrated a thorough understanding of the case, the industry, Defendants' business operations, and effectively and efficiently prosecuted and settled this matter.

This Court would be remiss if it failed to acknowledge the high level of competence, experience, skill and hard work demonstrated by Counsel on both sides throughout this litigation. Both Plaintiffs' Counsel and Defendants' Counsel are all seasoned, highly competent professionals with years of experience in litigating complex antitrust actions. From the date this action began, Plaintiffs' Counsel has aggressively prosecuted and Defendants' Counsel has vigorously defended on their clients' behalf, while displaying the utmost skill, courtesy, and professionalism.

Finally, this Court considers society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others. As already noted, Plaintiffs' Counsel obtained an excellent settlement for the Class in this complex and hard-fought case. "Society's stake in rewarding attorneys who can produce such benefits in complex litigation such as in the case at bar counsels in favor of a generous fee...." *F & M Distribs., Inc. Sec. Litig.,* 1999 U.S. Dist. LEXIS 11090, at *18. Society also benefits from the prosecution and settlement of private antitrust litigation. *See, e.g., Pillsbury Co.,* 459 U.S. at 262–63, 103 S.Ct. 608; *Minnesota Mining & Mfg. Co.,* 381 U.S. at 318, 85 S.Ct. 1473. Furthermore, in bringing this litigation, Plaintiffs' Counsel focused the attention of the FTC, the United States Congress, state legislatures, and State Attorneys General on anticompetitive conduct in the pharmaceutical industry that delays generic competition. This litigation has elevated the public debate on the intersection of patent and antitrust law. Congress has since worked to amend Hatch–Waxman's exclusivity provisions to curb the very abuses alleged in this action, and the President of the United States issued an Executive Order directed at those abuses (*www.whitehouse.gov/news/releases/2002/10/20021021–2.html).* This case has helped put prescription drug pricing and marketing tactics at the forefront of media, Congressional, and judicial scrutiny.

Encouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this case benefits society.

**d. The Class Representatives Support the Fee Petition and Class Members Have Not Objected to the Requested Fee**

Following notice to the Class of the Proposed Settlement and disclosure that State Law Plaintiffs' Counsel would request 17% of the aggregate settlement amount, no Class members have objected to the contemplated award of attorneys' fees. In light of the composition of the Class, which includes sophisticated, knowledgeable health insurers that have a significant stake in the outcome of this litigation, the absence of objection is remarkable. As previously noted, Class Representatives Aetna and Cobalt fully support the fee request. (9/18/03 Lawrence Decl. ¶ 13; 9/19/03 ¶ 9.) This favorable response lends further support to this Court's conclusion that the requested fee is reasonable and fair.

**e. Conclusion**

Taking into consideration the above factors, this Court awards Plaintiffs' Counsel 17% of the Settlement Fund, plus 17% of the accrued interest on the Settlement Fund.

**2. Reimbursement of Reasonable Expenses**

**[15]** In addition to their request for Attorneys' fees, Plaintiffs' Counsel seek reimbursement of $1,355,045.98 in expenses.[17] ***535** Under the common fund doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement, including expenses incurred in connection with document productions, consulting with experts and consultants, travel and other litigation-related expenses. “Expense awards are customary when litigants have created a common settlement fund for the benefit of a class.” *F & M Distribs., Inc. Sec. Litig.,* 1999 U.S. Dist. LEXIS 11090, at *20 (approving reimbursement of $584,951.20 in expenses).[18]

17 The Class was notified that Plaintiffs' Counsel would apply for fees and expenses totaling approximately $16 million. (Pls.' Prelim. Approval Motion, Ex. H, Notice of Settlement of Class Action.) Plaintiffs' Counsel are requesting an attorneys' fee award of $13,600,000 plus 17% of interest accrued on the Settlement Fund, and reimbursement of expenses currently totaling approximately $1,355,045.98. Thus, the amount actually sought by Plaintiffs' Counsel for fees and expenses (approximately $15 million) is almost $1 million less than the amount set forth in the Notice.

18 Plaintiffs' Counsel advise that they will, at the appropriate time, also seek reimbursement of additional expenses up until the date of final distribution incurred in connection with settlement administration and possible appeals.

Upon review of the numerous affidavits submitted by Plaintiffs' Counsel in support of this request, the Court finds the requested amount to be fair and reasonable. (Pls.' Jt. Petition, Expense Decl., Exs. B–V.) In determining whether the requested expenses are compensable in this common fund, the Court has considered whether the particular costs are the type routinely billed by attorneys to paying clients in similar cases. *See In re Synthroid Marketing Litig.,* 264 F.3d 712, 722 (7th Cir.2001). The Court finds that the categories of expenses for which Plaintiffs' Counsel seek reimbursement are the type routinely charged to their hourly fee-paying clients and thus should be reimbursed out of the Settlement Fund. Likewise, considering the detailed affidavits submitted in support of the request for reimbursement, this Court is persuaded that these expenses are reasonable.

**3. Incentive Awards to Named Plaintiffs**

**[16]** Finally, Plaintiffs' Counsel request the approval of incentive awards to six of the representative plaintiffs in this action—two institutional and four consumer plaintiffs —whose contributions to the litigation merit special consideration. Such awards are common in class actions such as this. *See F & M Distribs., Inc. Sec. Litig.,* 1999 U.S. Dist. LEXIS 11090, at *20. In Order No. 49, this Court approved incentive awards to the Sherman Act Class Plaintiff representatives. Similar to the named plaintiffs in that action, the named Plaintiffs identified to receive incentive awards here each undertook varying levels of burden and risk on behalf of the Class. These Plaintiffs incurred significant demands on their time and expenses, including submission to depositions and responding to discovery requests for the benefit of absent Class members.

The Notice to the Class advised that Plaintiffs' Counsel would seek incentive awards up to $250,000 in the aggregate. No Class members objected. The requested incentive awards total only $160,000, with $75,000 each for Aetna and Cobalt, and $2,500 each for Plaintiffs Betty Morris, Charles Zuccarini, Larry S. Sizemore, and Marshall J. Ross. The Court GRANTS

Plaintiffs' Counsel's request. These incentive awards equal only two-tenths of one percent (.002%) of the Settlement Fund and are well-deserved.

In this litigation, Aetna's and Cobalt's corporate counsel, pharmacy benefits personnel and administrative personnel were required to dedicate hundreds of hours of time to the prosecution of these cases and responses to discovery. (9/18/03 Lawrence Decl. ¶¶ 4–12; 9/19/03 Nash Decl. ¶¶ 4–8; 9/19/03 Bartlett Decl. (Cobalt).) Plaintiff Aetna provided the Class with the services of corporate counsel Gerald Lawrence throughout the five-year history of this litigation. (9/18/03 Lawrence Decl. ¶¶ 4–12.) Aetna also provided the Class with the services of two senior executives of its pharmacy benefits division, as well as the assistance of numerous other employees. (*Id.* ¶¶ 4, 7, 9.) Plaintiff Cobalt provided the Class with five of its corporate counsel, its principal fraud investigator, and its pharmacy benefits manager to aid in the ***536** prosecution of this case. (9/19/03 Bartlett Decl. ¶ 5; 9/19/03 Nash Decl. ¶ 5.) Aetna and Cobalt's efforts included (1) investigating the case with outside counsel before filing the class action complaint, (2) negotiating a fee agreement with Class Counsel with limitations that benefit the entire class financially, (3) responding to Defendants' discovery demands, (4) sending in-house counsel to New York for numerous settlement discussions with Defendants, and (5) directing Class Counsel in the negotiation of the Settlement in this action. (9/18/03 Lawrence Decl. ¶¶ 3–12; 9/19/03 Nash Decl. ¶¶ 4–8; 9/22/03 Lowey Decl. ¶¶ 8, 28–29, 59, 62; 9/19/03 Bartlett Decl. ¶ 5.)

Individual named Plaintiffs, Betty Morris, Charles Zuccarini, Larry S. Sizemore, and Marshall J. Ross, deserve incentive awards because they devoted a significant amount of time to the prosecution of this matter for the benefit of absent Class members, including oral depositions and responses to discovery requests.

### E. State Attorneys' General Motion for Attorneys' Fees and Enforcement Costs

**[17]** The State Attorneys General also seek approval of their application for $2.5 million in attorneys' fees and enforcement costs. Of the $2.5 million sought, approximately $1,766,480.97 is allocated to attorneys' fees based upon the time devoted to this case by the Litigating States. (State AGs' Motion, Ex. A.) The remaining amount, approximately $733,519.03, is allocated to enforcement costs incurred in connection with prosecuting this case. (State AGs' Motion, Ex. B.) The $2.5 million in attorneys' fees and enforcement costs, if approved, are to be divided between the States as they deem appropriate. For the reasons stated below, this Court GRANTS the State Attorneys' General motion.

Through the cooperative efforts of the State Attorneys' General and State Law Plaintiffs in years of pre-litigation investigation, litigation, and settlement negotiation, a substantial and fair settlement has been achieved with all Defendants, providing $80 million in cash for distribution to consumers, third party payers, and designated governmental entities. In the States' Settlement Agreement with Defendants, the States agreed to cap their combined attorneys' fees and costs at $2.5 million. The requested combined attorney fee and cost award is reasonable and fair to consumers in the Plaintiff States.

From the time they entered this litigation, Litigating States have aggressively prosecuted their claims against Defendants. They participated in more than twenty-five depositions held in various parts of the United States. (9/22/03 Novak Decl. ¶ 7.) Litigating States received, analyzed, and produced over 35,000 pages of document and electronic drug utilization data covering millions of transactions from their own respective state departments and agencies. (*Id.* at ¶ 8.) They consulted with economic experts familiar with the pharmaceutical industry, who reviewed detailed purchasing data for Cardizem CD and its generic bioequivalents, to assess the damages that consumers and state departments and agencies each suffered. (*Id.* at ¶ 9.) They engaged in months of hard-fought settlement negotiations, which included an intensive three-day in-person mediation session, two additional in-person negotiations, several follow-up telephonic mediation sessions with Eric Green, the nationally recognized mediator approved by the Court, and numerous direct negotiations between counsel, before settlement was reached.

#### 1. The Requested Attorneys' Fees Are Fair and Reasonable

##### a. The "Percentage of the Fund" Method is Appropriate to Determine Attorneys' Fees

As discussed above, the Sixth Circuit has acknowledged that the trend of the courts in different federal judicial circuits has been to employ the percentage of the fund method to calculate attorneys' fees in common fund cases. *Rawlings,* 9 F.3d at 515–16 (citing *Swedish Hosp. Corp. v. Shalala,* 1 F.3d 1261 (D.C.Cir.1993); *Camden I Condo. Ass'n, Inc. v. Dunkle,* 946 F.2d 768 (11th Cir.1991); ***537** *Court Awarded Attorneys Fees,* Report of the Third Circuit Task Force, 108 F.R.D. 237

(1985)). As this Court has previously held, application of the percentage-of-the-fund approach is appropriate under the circumstances presented in this litigation. (Order No. 49 at 17–18.)

**b. The Requested Percentage Fee is Reasonable**

This Court has already articulated the applicable standard for determining the reasonableness of a percentage fee. These include the following six factors, identified by the Sixth Circuit: (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides. *Bowling,* 102 F.3d at 780; *Smillie,* 710 F.2d at 275.

This Court finds that the State Attorneys General requested fee recovery of approximately $1.76 million (approximately 2.2% of the total recovery of $80 million) is reasonable under the facts articulated by the Sixth Circuit.

First, the "value of the benefit rendered to the plaintiff class" is substantial. Through the efforts of the State Attorneys General, working in tandem with the State Law Plaintiffs, a substantial cash settlement of $80 million was obtained. As discussed above, this $80 million settlement is an excellent result and compares favorably with the $110 million received by the Direct Purchasers in the Direct Purchaser Class Settlement.

Second, the State Attorneys' General fee is an appropriate figure when considering the "value of services on an hourly basis." Over 14,000 hours were spent collectively by the Litigating States with over 12,000 of that total expended by Assistant Attorneys General. (State AGs' Motion, Ex. A.) Based upon this figure, an attorneys' fee award of approximately $1.76 million would yield a blended hourly compensation rate of less than $150 per hour. Attorneys' fees for Assistant Attorneys General should be assessed with reference to the fee that a private practitioner with comparable experience and skill would charge. *Illinois v. Sangamo Constr. Co.,* 657 F.2d 855, 860 (7th Cir.1981). Under this standard, a blended rate of less than $150 per hour compares favorably with the rates at which private antitrust practitioners of similar experience and skill would charge their clients.

Third, the Court assesses "whether the services were undertaken on a contingent fee basis." They were not. This should not, however, be a basis for denying the requested fee award. Many state antitrust laws expressly provide that the state is entitled to "reasonable attorneys fees" without regard to whether the fees are on a contingency basis or not. *See, e.g.,* Mich. Comp. Laws Ann. § 445.778(1).

Fourth, the Court considers "society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others." An award of attorneys' fees to the States benefits state governments in a time of constrained budgets and limited resources. As observed by the United States Court of Appeals for the Seventh Circuit, awarding reasonable attorneys' fees to state enforcers, particularly during periods when state budgetary resources are constrained, provides an incentive for states to enforce antitrust laws in the face of anti-competitive injuries. *Sangamo Constr. Co.,* 657 F.2d at 860.

Fifth, the Court evaluates "the complexity of the litigation." This Court has already discussed the complexity of this case. This was not the typical *per se* price-fixing conspiracy where sellers of a commodity were indicted and pled guilty, and damages were readily ascertained. Rather, this case presented difficult legal and logistical problems which Plaintiff States were able to surmount. Each legal issue was hotly contested, and the damage aspects of the case alone presented Plaintiff States with the Herculean task of gathering, coordinating, and studying pricing information from the multitude of state departments, agencies, and compacts that either purchased or provided pharmacies with reimbursements for the purchase of Cardizem CD. This information, collected over ***538** many months for over 120 separate governmental entities in the 29 Litigating States, included electronic data that recorded millions of transactions. (9/22/03 Novak Decl.¶ 8.) The State Attorneys General additionally obtained and analyzed approximately $241,000 worth of data from IMS Health, Inc., the recognized leader in data collection for the pharmaceutical industry.

The Litigating States faced particular challenges in addressing the discovery obligations of those 120 separate governmental agencies, each of whom received discovery requests from Defendants regarding purchase data, rebate relationships, the existence of drug utilization review procedures, the ability to substitute alternative products for Cardizem CD, and a host of other factors. These complexities were in addition to a host of other complexities involved in this case; i.e., the FDA regulatory approval process, complex manufacturing

defenses raised by Defendants, and other issues discussed above.

Finally, the Court evaluates "the professional skill and standing of counsel involved on both sides" of the litigation. Again, as discussed above, Defendants in this case both retained counsel whose reputations in the antitrust community are well established. The Litigating States also had the benefit of several Assistant Attorneys General who have multiple years of state and federal *parens patriae* and class action experience, much of it involving the pharmaceuticals industry. (State AGs' Motion, Ex. A.) The expertise of the State Attorneys General in the area of complex antitrust and class action litigation has been recognized by the federal judiciary. *In re Lorazepam & Clorazepate Antitrust Litig.,* 205 F.R.D. at 380.

**c. Conclusion**

Applying the above factors, this Court concludes that the requested attorneys' fee is fair and reasonable. When the State Attorneys General "entered the fray" in this case, State Law Plaintiffs were faced with the prospect of fighting class action certification decisions on a state-by-state basis. Although Defendants challenged the State Attorneys' General enforcement powers, it is difficult to refute the argument that the State Attorneys' General civil penalty powers, disgorgement rights, *parens patriae* and functionally equivalent authority, and other unique enforcement tools brought greater bargaining support to Plaintiffs and improved the benefit of settlement to consumers and the Class. Moreover, the State Attorneys' General work here is not finished. They will continue to manage the processing of an anticipated 50,000 consumer claim forms, to answer inquiries from consumers, and to supervise the distribution of the Settlement Fund.

**2. The Requested Expenses Are Reasonable**

The State Attorneys General also request that they be reimbursed $733,519.03 for expenses they reasonably incurred in the prosecution of this case. Upon review of the documentation provided in support of this request, the Court finds the requested expenses were reasonable and necessarily incurred in connection with the prosecution of this matter. (State AGs' Motion, Ex. B; 9/22/03 Novak Decl.) The State Attorneys General reasonably incurred expenses to prepare expert liability and damages analysis, to obtain approximately $241,000 worth of data for experts' analysis supplied by IMS Health Inc., to pay for depositions and transcripts, travel, telephone long distance charges, and research charges. Accordingly, this Court approves the reimbursement of $733,519.03 in expenses to the State Attorneys General.

## III. Conclusion

For the foregoing reasons, this GRANTS (1) the Joint Motion of State Law Class Plaintiffs and State Attorneys General for Final Approval of the Class Action Settlement and Plan of Allocation, (2) State Law Class Plaintiffs' Counsels' Joint Petition for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards for Named Plaintiffs, and (3) State Attorneys' General Motion for Attorneys' Fees and Enforcement Costs.

**All Citations**

218 F.R.D. 508, 2003-2 Trade Cases P 74,205

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# Exhibit E

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

| IN RE WRIGHT & FILIPPIS, LLC DATA SECURITY BREACH LITIGATION | Case No: 2:22-cv-12908-SFC<br>Hon. Sean F. Cox<br>**CLASS ACTION** |
|---|---|

**[PROPOSED] ORDER AWARDING ATTORNEYS' FEES, EXPENSES, AND AN SERVICE AWARDS**

This matter came before the Court for a duly noticed hearing on May 30, 2024 (the "Fairness Hearing"), upon *Plaintiffs' Unopposed Motion for Attorneys' Fees, Costs, Expenses, and Service Awards* (the "Fee and Expense Application") in the above-captioned consolidated action ("Action"). The Court has considered the Fee and Expense Application and all supporting and other related materials, including the matters presented at the Fairness Hearing. Due and adequate notice of the Class Action Settlement Agreement and Release entered into on October 13, 2023 (the "Settlement Agreement")[1] having been given to the Settlement Class Members, the Fairness Hearing having been held, and the Court having considered all papers filed

[1] Unless otherwise defined herein, all capitalized terms used have the meanings set forth and defined in the Settlement Agreement.

and proceedings held herein and otherwise being fully informed in the premises and good cause appearing therefore:

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT**:

1. This Court has personal jurisdiction over Plaintiffs, Defendant Wright & Filippis, LLC ("Defendant" or "W&F"), and all Settlement Class Members, and subject matter jurisdiction over the Action to approve the Settlement Agreement and all exhibits attached thereto.

2. Notice of the Fee and Expense Application was provided to potential Settlement Class Members in a reasonable manner, and such notice complies with Rule 23(h)(1) of the Federal Rules of Civil Procedure and due process requirements.

3. Class Counsel is hereby awarded attorneys' fees in the amount of 33 and 1/3% of the Settlement Fund or $966,666.66 (nine hundred sixty-six thousand, six hundred sixty-six dollars and sixty-six cents), which shall be paid out of the Settlement Fund. Such payment shall be made pursuant to the terms of the Settlement Agreement.

4. Class Counsel is hereby awarded costs and litigation expenses in an amount not to exceed $30,000, which shall be paid out of the Settlement Fund. Such payment shall be made pursuant to the terms of the Settlement Agreement.

5. Plaintiffs Chiquita Braggs, Scott Hamilton, Diane Huff, Shawn Kolka, and Craig Mejia are each individually awarded $1,500 as a Service Award in

recognition of their efforts on behalf of the Settlement Class, which shall be paid out of the Settlement Fund. Such payment shall be made pursuant to the terms of the Settlement Agreement.

6. Pursuant to Section 9.2 of the Settlement Agreement, unless otherwise ordered by the Court, Class Counsel shall have the sole and absolute discretion to allocate any approved Fee Award and Costs amongst themselves.

7. In making these awards, the Court has considered and found that:

a. Class Counsel and Plaintiffs' Counsel have prosecuted the Action and achieved the Settlement with skill, perseverance, and diligent advocacy;

b. The Action involves numerous complex factual and legal issues and was actively litigated and, in the absence of a settlement, would have involved lengthy proceedings with uncertain resolution of the numerous complex factual and legal issues;

c. Had Class Counsel and Plaintiffs' Counsel not achieved the Settlement, a risk would remain that Plaintiffs and the Settlement Class may have recovered less or nothing from W&F;

d. Public policy considerations support the requested fee, as only a small number of firms have the requisite expertise and resources to successfully prosecute cases such as the Action;

e. Notice was disseminated and posted advising that Class Counsel may move for an award of attorneys' fees up to (33 1/3%) (thirty-three and one-third percent) of the Settlement Fund, and, separately, reasonably incurred litigation expenses and costs (i.e., Fee Award and Costs), and that Class Representatives may seek a Service Award in an amount up to $1,500 (One Thousand Five Hundred Dollars) per Class Representative;

f. The attorneys' fee award is fair, reasonable, appropriate and consistent with the awards in similar common fund cases, in view of the applicable legal principles and the particular facts and circumstances of the Action;

g. The costs and expenses incurred were reasonable and necessary to the prosecution of the Action; and

h. Plaintiffs contributed their time and efforts to the prosecution of this Action for the benefit of the Settlement Class.

8. In the event the Settlement is terminated, the Parties to this Agreement, including Class Members, shall be deemed to have reverted to their respective status in the Action immediately prior to the execution of this Agreement, and, except as otherwise expressly provided, the Parties shall proceed in all respects as if this Agreement and any related orders had not been entered. In addition, the Parties agree that in the event the Settlement is terminated, any orders entered pursuant to the Agreement shall be deemed null and void and vacated and shall not be used in or

cited by any person or entity in support of claims or defenses. Pursuant to Section 9.3 of the Settlement Agreement, the Settlement is not conditioned upon the Court's approval of an award of Class Counsel fees, costs, expenses, or Service Awards.

9. The Settlement Administrator shall pay any attorneys' fees, costs, and expenses awarded by the Court to Class Counsel in the amount approved by the Court, from the Settlement Fund within five (5) Business Days after the Effective Date.

10. The Settlement Administrator shall pay the Service Awards approved by the Court to the Class Representatives from the Settlement Fund. Such Service Awards shall be paid by the Settlement Administrator, in the amount approved by the Court, within five (5) Business Days after the Effective Date.

**IT IS SO ORDERED.**

Date: ______________________, 2024. ________________________________
HONORABLE SEAN F. COX
UNITED STATES DISTRICT JUDGE