IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

IN RE DUCTILE IRON PIPE FITTINGS ("DIPF") DIRECT PURCHASER ANTITRUST LITIGATION	Civ. No. 12-711 (AET)(LHG) Hearing Date: May 10, 2018

MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARDS

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I. INTRODUCTION

Settlement Class Counsel for the Direct Purchaser Plaintiffs ("DPPs") respectfully submit this brief in support of their motion for:

(i) an award of attorneys' fees of $2,929,166.67 (one-third the total amount of the McWane Settlement);

(ii) reimbursement of unreimbursed incurred expenses of $1,181,667.59; and

(iii) incentive awards of $15,000 each to eight current and former named Plaintiffs, including City and County of Denver; Coastal Plumbing Supply Company Inc.; GCO, Inc. f/k/a Groeniger & Co.; Hi Line Supply Co. Ltd.; John Hoadley & Sons, Inc.; Mountain States Supply LLC; Mountainland Supply LLC; and Public Works Supply Co., Inc.[1]

As directed by the Court, Settlement Class Counsel has given notice to members of the Settlement Classes of their intention to seek such attorneys' fees and reimbursement of expenses, and the grant of incentive awards. While the time to object will not expire until April 20, 2018, no objections have been received to date.

[1] Public Works Supply Co., Inc. ("Public Works"), served as a named Plaintiff and proposed class representative until February 24, 2016, when its former President, Scott Lindquist, passed away. Because Public Works had no other employees or officers, it voluntarily dismissed its individual action and terminated its role as a class representative, although it continued to participate in the consolidated action as an absentee class member. Letter from Elana Katcher to the Hon. Anne E. Thompson, May 20, 2016, ECF No. 364.

II. HISTORY OF THE LITIGATION

This litigation commenced nearly six years ago in early 2012, when multiple class action complaints were filed against defendants McWane, SIGMA, and Star[2] (collectively, "Defendants") for violations of the federal antitrust laws. The Defendants are the three largest sellers of ductile iron pipe fittings ("DIPF") in the United States. DPPs purchased fittings directly from one or more Defendants during the relevant time periods noted below.

Plaintiffs assert that Defendants violated the antitrust laws in three ways: (1) a price-fixing conspiracy among all Defendants between January 11, 2008, and June 30, 2011, Second Consolidated Amended Complaint, Feb. 10, 2014, ECF No. 186 ("SCAC") ¶¶142–52; (2) monopolization by McWane of the market for Domestic DIPF from February 17, 2009, to the present, *id.* ¶¶ 153–60; and (3) a conspiracy between McWane and SIGMA to monopolize and unreasonably restrain trade in the Domestic DIPF market from September 17, 2009, to the present. Defendants' unlawful conduct is alleged to have caused DPPs to pay supra-competitive prices for DIPF, *id.* ¶¶ 161–74.

On May 14, 2012, the Court appointed Robert N. Kaplan of Kaplan Fox & Kilsheimer LLP and Kit A. Pierson of Cohen Milstein Sellers & Toll PLLC to serve as Interim Co-Lead Counsel for the DPPs. Order Appointing Co-Lead Counsel, ECF

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[2] "McWane" is McWane, Inc. and its divisions Clow Water Systems Co., Tyler Pipe Company, and Tyler Union; "SIGMA" is SIGMA Corporation and its subsidiary SIGMA Piping Products Corporation; and "Star" is Star Pipe Products, Ltd.

No. 62. Co-Lead Counsel immediately began to work to coordinate among the Plaintiffs and to continue to develop facts in preparation to draft a Consolidated Amended Complaint ("CAC"), which was filed on July 11, 2012. ECF No. 78.

In September 2012, Defendants filed two motions to dismiss the CAC for failure to state a claim and for lack of standing. ECF Nos. 95, 96. DPPs filed opposition briefs in November 2012 (ECF Nos. 102, 103), and on March 5, 2013, the Court denied Defendants' motions in their entirety. Op., ECF No. 116.

By April 30, 2013, Interim Co-Lead Counsel had successfully negotiated an agreement with Defendants that provided DPPs with, among other things, the Defendants' entire production in the related Federal Trade Commission action, along with corresponding transcripts, exhibits, and post-trial briefing. Joint Stipulation & Disc. Order, ECF No. 131. Counsel spent several months after the production of this voluminous record, which totaled approximately 450,000 documents, conducting a thorough search and review that ultimately led to an expansion of the price-fixing allegations spanning two additional years.

In November 2013, DPPs moved to amend the CAC to incorporate these new allegations. Pls.' Mot. for Leave to File Second Consolidated Am. Compl., Nov. 19, 2013, ECF No. 159. Defendants opposed the amendment, but DPPs again prevailed. Order Granting Pls.' Mot. for Leave to File Second Consolidated Am. Compl., Jan. 31, 2014, ECF No. 184. The SCAC was filed on February 10, 2014. ECF No. 186. On March 10, 2014, all Defendants moved to dismiss the new

allegations, and SIGMA again moved to dismiss prior claims that charged it with conspiring with McWane to restrain trade and monopolize the Domestic DIPF market. ECF Nos. 201, 202, 204. After opposition and reply briefing, and a hard-fought oral argument on the motions, the Court denied defendants' motions to dismiss in their entirety. Op., Aug. 13, 2014, ECF No. 271.

During the summer of 2014, the Court ordered the parties to negotiate an expedited schedule for completing fact discovery and briefing their respective motions for class certification and summary judgment. *See, e.g.*, ECF No. 241. On July 28, 2014, the Court ordered that the parties complete their respective document production by August 29, 2014. ECF No. 261. On August 18, 2014, the Court entered an order requiring fact discovery to be completed by December 10, 2014, class certification motions to be filed by December 23, 2014, and summary judgment motions to be filed by March 31, 2015. ECF No. 275.

In accordance with the Court's fast-track schedule, DPPs responded to 111 requests for documents, producing over 65,000 pages to defendants, and responded to detailed interrogatories and requests for admissions from Star. To accomplish this, Interim Co-Lead Counsel, as well as other DPP Counsel under their supervision, worked closely with the eight named class representatives to identify, retrieve, and process a voluminous amount of potentially responsive hard-copy and electronic documents, and to obtain information sufficient to respond to interrogatories and subsequent queries concerning the DPPs' transaction data.

In October 2014, this Court stayed discovery and ordered the parties to participate in settlement discussions with the assistance of a Court-appointed mediator, the Honorable Joel B. Rosen, U.S.M.J. (Ret.). ECF No. 311. These discussions ultimately led to settlements with SIGMA and Star, which were finally approved by this Court in January 2016. ECF Nos. 352, 353.

In the spring of 2016, after the stay was lifted, DPPs resumed their pursuit of discovery from McWane, ultimately taking fourteen depositions of McWane's executives and key nonparty witnesses across the country. At the same time, Interim Co-Lead Counsel, assisted by other DPPs counsel, prepared for and defended the depositions of each of the proposed class representatives.[3] Interim Co-Lead Counsel also worked closely with their expert economist, who was preparing his analysis in support of class certification.

Fact discovery closed on April 29, 2016. Shortly before this date, McWane served notices to re-depose each of the proposed class representatives in an effort to learn what had been revealed to DPPs by Star, which was cooperating with DPPs under the terms of their settlement agreement. Interim Co-Lead Counsel successfully fended off these efforts on the grounds that they were an effort to infringe upon Plaintiffs' work product, were untimely, and were otherwise procedurally improper. Mot. for Protective Order, Apr. 29, 2016, ECF No. 360.

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[3] Public Works was not deposed due to the death of Mr. Lindquist.

DPPs filed their motion for class certification on May 27, 2016, to which McWane responded on July 29, 2016. ECF Nos. 370, 395. On July 26, 2016, McWane filed a motion to exclude from any certified class all entities that it claimed were subject to an arbitration clause with it. ECF No. 391. Plaintiffs fended off this motion. Op., Sept. 28, 2016, ECF No. 416. Within days of the Court's decision denying McWane's motion to exclude, the parties decided to resume their settlement discussions, and the Court accordingly stayed the proceedings on October 19, 2016. ECF No. 419.

The parties selected the Honorable Layn Phillips, U.S.D.J. (Ret.), to mediate, as Judge Phillips had recently concluded a successful mediation involving McWane's counsel and Plaintiffs' counsel in a separate antitrust litigation involving cast iron soil pipes and fittings. The parties believed that Judge Phillips's familiarity with the parties would facilitate the mediation. Judge Phillips held an in-person mediation session on December 15, 2016, which was followed by several additional weeks of continued efforts by telephone. Although Judge Phillips was able to bring the parties closer together, these efforts were unsuccessful in the near term.

In the months that followed, the parties concluded briefing Plaintiffs' motion for class certification and McWane's motion to exclude the report and opinions of Plaintiffs' expert economist, Dr. Russell Lamb. After oral argument on these motions, on June 23, 2017, the Court ordered the parties to renew their attempts to

mediate. ECF No. 450. Because Judge Phillips was unavailable, the parties selected Mr. Gregory Lindstrom, an experienced mediator who had assisted Judge Phillips in the December 15, 2016 session. The parties attended sessions before Mr. Lindstrom on July 27, 2017, and September 13, 2017. During the September 13 session, an agreement-in-principle was reached, which was subsequently formalized into a final settlement agreement.

A fuller recitation of the work performed by DPPs' counsel in this litigation is set forth in Paragraphs 6-46 of the Declaration of Elana Katcher in Support of Final Approval of Settlement and DPPs' Request for Attorneys' Fees, Expenses, and Incentive Awards, dated April 10, 2018.

III. DPPS' COUNSEL'S REQUEST FOR ATTORNEYS' FEES SHOULD BE GRANTED

Co-Lead Counsel now seek an award of attorneys' fees in the amount of $2,929,166.67, which represents one-third of the total McWane settlement amount. Throughout the five-and-a-half years that this action has been pending, Counsel's efforts on behalf of the DPPs have been thorough, exhaustive, and time- and resource-intensive. However, they have not yet received any fees for their work.

District courts may award reasonable attorneys' fees and expenses from the settlement of a class action under Federal Rules of Civil Procedure 23(h) and 54(d)(2). There are two methods for determining whether a request for attorneys' fees is fair and reasonable: the percentage-of-recovery method and the lodestar method.

In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 732 (3d Cir. 2001). The percentage-of-recovery method awards counsel a percent of the amount recovered for the class, and thus resembles a contingent fee. *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2008 WL 63269, at *3 (E.D. Pa. Jan. 3, 2008). The lodestar method provides counsel with an amount equal to the number of hours spent working on the case multiplied by "a reasonable hourly billing rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000).

In this Circuit, the percentage-of-recovery method is favored. *In re Cendant Corp. PRIDES Litig.*, 243 F.3d at 732. However, the lodestar method is used as a "cross-check" to ensure that the result under the percentage-of-recovery method is reasonable. *Id.* at 742.

A. DPPs' Counsel's Request is Fair and Reasonable Under the Percentage-of-Recovery Method.

The one-third share of the recovery that is requested is a fair and reasonable portion of a settlement to be awarded and is typical of that awarded in other complex antitrust class actions with few or no objectors in the Third Circuit and beyond.

In determining what percentage fee is appropriate, courts in this Circuit typically consider seven factors:

> (1) The size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Gunter, 223 F.3d at 195 n.1. These factors "need not be applied in a formulaic way. Each case is different, and in certain cases, one factor may outweigh the rest." *Id.* Collectively, the *Gunter* factors support DPPs' Counsel's fee request.

1. Size of the fund created and the number of persons benefited.

DPPs' expert economist, Dr. Russell L. Lamb, has previously identified 608 distinct members of the Price-Fixing Class, 302 distinct members of the McWane/SIGMA Conspiracy Class, and 221 distinct members of the ¶Certification at 21, May 27, 2016, ECF No. 371.

If approved, the Settlement is expected to result in a much larger payment per class member than prior settlements in this action. That is because the definition of each Settlement Class excludes fifty-three large companies, referred to as the "Known Opt-Outs," which previously agreed with McWane to either: (i) release their claims against McWane; or (ii) opt-out of any litigation or settlement class certified in the Action. The Known Opt-Outs represent about 68.1% of net purchases of Open-Spec DIPF during the relevant period and 76.7% of the net purchases of Domestic DIPF. Katcher Decl. ¶ 3.

The Settlement Classes are composed of the smallest direct purchasers—those who did not reach agreements with McWane to settle or opt-out—and for whom recovery on a class basis is their only feasible avenue for redress. As the Settlement Fund will be shared only among Settlement Class Members, each of them is expected to receive more from the Settlement Fund than they would have had McWane not reached separate agreements with its largest customers outside this litigation. Katcher Decl. ¶ 4.

Thus, the $8,787,500 settlement is a substantial benefit to the Settlement Class Members.

2. Absence of Objections.

On February 9, 2018, the notice of the settlement was mailed to potential class members. As of April 9, 2018, no Settlement Class Member had objected to the request for fees. The deadline to object to the Settlement is April 20, 2018. DPPs respectfully request the opportunity to respond to any objection that is asserted after the date of this filing.

3. Skill and Efficiency of Attorneys Involved.

"Lead Counsel's skill and efficiency is 'measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.'"

Castro v. Sanofi Pasteur Inc., No. 11-7178(JMV)(MAH), 2017 WL 4776626, at *8 (D.N.J. Oct. 23, 2017) (quoting *Yedlowski v. Roka Bioscience, Inc.*, No. 14-8020(FLW)(TJB), 2016 WL 6661336, at *20 (D.N.J. Nov. 11, 2016)).

On May 15, 2012, the Court appointed Robert N. Kaplan of Kaplan Fox & Kilsheimer LLP and Kit A. Pierson of Cohen Milstein Sellers & Toll PLLC to serve as Interim Co-Lead Counsel after a competitive process and on the basis of their qualifications and experience.[4] As reflected in their firm resumes, Mr. Kaplan and Mr. Pierson, as well as their respective firms, both have extensive experience in antitrust class actions.[5]

Interim Co-Lead Counsel have performed extensive work investigating and litigating the claims in the action, and, as a result of those efforts, DPPs successfully opposed multiple motions to dismiss, blocked an effort by McWane to demolish the classes prior to certification through an asserted arbitration clause, and reached meaningful class-wide settlements with each Defendant. Counsel have mastered an enormous documentary record, including the complete record of the related FTC proceedings, as supplemented with documents obtained from Defendants in this action. Counsel have taken and defended depositions of key witnesses and have worked closely with DPPs' economists.

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[4] ECF No. 62.

[5] ECF Nos. 15-3, 164. *See also* Katcher Decl. Exh. 1 and 2.

In addition, each of the firms that has performed work in this action has submitted their firm resumes in connection with this motion. *See* Katcher Decl. Exh. 1 - 21. These resumes demonstrate that the classes had the benefit of a highly qualified group of attorneys with deep experience in complex litigation generally, and antitrust class actions specifically.

Defendants were also represented by formidable law firms that vigorously opposed at every step DPPs' efforts to seek redress for the class. *Beneli v. BCA Fin. Servs., Inc.*, No. 16-2737, 2018 WL 734673, at *18 (D.N.J. Feb. 6, 2018) ("the quality and vigor of opposing counsel is also important in evaluating the services rendered by Class Counsel."). McWane, in particular, has been represented by the same able counsel that had tried the related action before the FTC, and then fought the results of that action all the way through an appeal to the Eleventh Circuit and a petition for *certiorari* in the Supreme Court. *See In the Matter of McWane, Inc. & Star Pipe Prods., Ltd.*, 2014-1 Trade Cases P 78670, 2014 WL 556261, at *17 (F.T.C. Jan. 30, 2014) (on McWane's appeal, reversing Administrative Law Judge's finding that McWane and SIGMA conspired to restrain trade in the domestic fittings market); *McWane, Inc. v. F.T.C.*, 783 F.3d 814 (11th Cir. 2015) (decision on McWane's appeal of monopolization claim to the Eleventh Circuit); *McWane, Inc. v. F.T.C.*, 136 S. Ct. 1452 (2016) (Supreme Court's denial of McWane's petition for writ of *certiorari*).

Thus, highly experienced and dogged counsel enabled DPPs to achieve the monetary settlement obtained for the classes here.

4. The Complexity and Duration of the Litigation

"[A]n antitrust class action is arguably the most complex action to prosecute." *In re Linerboard Antitrust Litig.*, MDL No. 1261, Nos. 98-5055/99-1000/99-1341, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004) (quoting *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)), *amended*, 2004 WL 1240775 (E.D. Pa. June 4, 2004). "The legal and factual issues involved are always numerous and uncertain in outcome." *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d at 1337. As set out above, this litigation has been no exception.

By settling this litigation after argument on their class certification motion and McWane's *Daubert* motion but before summary judgment and trial, DPPs have avoided risks that could have led to nonrecovery. On the other hand, DPPs aggressively litigated this action to the full extent possible up until the time of settlement.

The present settlement was reached after over five years of vigorous litigation, and were the litigation to have gone through summary judgment and trial and appeal, it would have lasted much longer. *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000) (An antitrust "trial would take weeks, if not months to complete, notwithstanding the massive pretrial preparation that would be

required of the parties.”).

The length of time DPPs’ counsel has devoted to litigating this action mitigates in favor of the fee award. *See In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *10.

5. Risk of Nonpayment

As detailed below, DPPs’ counsel have invested well over five years of time and substantial out-of-pocket expenses, while bearing the risk of receiving no compensation at all for their efforts. Katcher Decl. ¶ 5. While DPPs were awarded one-third of the SIGMA and Star Settlement Funds for costs and expenses, they opted to request no attorneys’ fees in connection with those settlements because of the more pressing need to build up a litigation fund as they approached the unavoidably expensive endeavor of class certification. *See* Katcher Decl. ¶ 53

Courts in this Circuit consider the risk of undertaking an expensive contingent case, requiring years of investment in time and money, with no guarantee of recovery, militates in favor of the granting of a fee award. *See, e.g.*, *In re Schering-Plough Corp. Enhance Sec. Litig.*, Nos. 08-397(DMC)(JAD)/08-2177(DMC)(JAD), 2013 WL 5505744, at *28 (D.N.J. Oct. 1, 2013) (recognizing that “Plaintiffs’ Counsel undertook this Action on a purely contingent fee basis, assuming an enormous risk that the litigation would yield potentially little, or no, recovery and leave them uncompensated for their significant investment of time and very substantial

expenses.”).

6. Amount of Time Devoted to the Case by DPPs’ Counsel

DPPs’ counsel have spared no effort in pressing the claims of their class members. Between the date of the appointment of Interim Co-Lead Counsel in May 2015, through the date preliminary approval of this settlement was granted, the twenty-one firms that have worked on this case have expended 26,473.35 hours to litigate this case. If that time was billed at each timekeeper’s ordinary, historic rates (*i.e.*, 2012 rates for 2012 time, 2013 rates for 2013 time, etc.), that time would have had a value of $13,544,430.25.[6]

The attorneys’ fee award DPPs seek in the amount of $ 2,929,166.67 is approximately 22% of the value of the time actually expended in pressing the claims of the classes. This time could have otherwise been used by these firms (highly experienced, qualified counsel) in litigating other matters. This factor strongly favors granting the award sought. *Lazy Oil, Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 323 (W.D. Pa 1997) (“In addition to noting the vast amount of work which was required in prosecuting this case, we also note Class Counsels’ representation that their involvement in this litigation required them to abstain from working on other matters.”).

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[6] The breakdown of that time by firm is included in Paragraph 46 in the Katcher Declaration, and by both firm and timekeeper in the declarations submitted by each individual firm as Exhibits 1 to 21 of the Katcher Declaration.

7. Awards in Similar Cases

The one-third attorneys' fee award sought in this case is a reasonable amount that falls well within the range of amounts approved by courts within this Circuit in antitrust class actions with few or no objectors. *See, e.g.*, *Castro*, 2017 WL 4776626, at *9 (in an antitrust class action with no objectors finding that "[t]he one-third fee is within the range of fees typically awarded within the Third Circuit through the percentage-of-recovery method; the Circuit has observed that fee awards generally range from 19% to 45% of the settlement fund"); *Marchbanks Truck Serv., Inc. v. Comdata Network, Inc.*, No. 07-1078(JKG), 2014 WL 12738907, at *2 (E.D. Pa. July 14, 2014) ("fee awards of one-third of the settlement amount are commonly awarded in this Circuit"); *In re K-Dur Antitrust Litig.*, No. 01-1652, ECF 1058 (D.N.J. Oct. 5, 2017) (awarding fee of 33⅓% of settlement fund); *In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 104 (E.D. Pa. 2013) (in antitrust action with two objections, awarding fees equaling one-third of the settlement after noting that a "one-third fee award is standard in complex antitrust cases of this kind"); *In re Wellbutrin XL Antitrust Litig.*, No. 08-cv-2431, ECF 485 (E.D. Pa. Nov. 7, 2012) (awarding fee of 33⅓% of settlement fund); *In re Wellbutrin SR Antitrust Litig.*, No. 04-5525, 2011 U.S. Dist. LEXIS 158833, *14-15 (E.D. Pa. Nov. 21, 2011) (same); *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2008 WL 63269, at *3-7 (E.D. Pa. Jan. 3, 2008) (awarding fees equaling one-third of the settlement fund); *OSB*, No. 2:06-cv-

00826-PD, Order, ECF 947, at *3 (finding fee award of one-third of $120 million in settlement funds "reasonable and well-earned"); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 342 (E.D. Pa. 2007) (approving a percentage of recovery of 35%, plus reimbursement of expenses).[7]

In addition, courts approving similar awards have observed that "[a]ttorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation." *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085(FSH), 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005) (citing cases).

B. The Lodestar Check Confirms that the Requested Award is Fair and Reasonable.

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[7] *See also Steele v. Welch*, No. 03-6596, 2005 WL 3801469, at *2 (E.D. Pa. May 20, 2005) (finding requested fee of 33%, plus expenses, to be reasonable) (Baylson, J.); *Mylan Pharms., Inc. v. Warner Chilcott Public Ltd., Co.,* No. 12-3824, ECF 665 (E.D. Pa. Sept. 15, 2014) ("*Doryx*") (awarding 33⅓% of settlement); *In re Neurontin Antitrust Litig.*, No. 02-1830, ECF 114 (D.N.J. Aug. 6, 2014) (same); *In re Hypodermic Prods. Antitrust Litig.*, No. 05-1602, ECF 461 (D.N.J. Apr. 10, 2013) (same); *Rochester Drug Co-Operative, Inc. v. Braintree Labs., Inc.,* No. 07-00142, ECF 243 (D. Del. May 31, 2012) ("*Miralax*") (same); *In re Metoprolol Succinate Antitrust Litig.*, No. 06-52, ECF 193 (D. Del. Feb. 21, 2012) (same); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340, 2009 U.S. Dist. LEXIS 133251, *17 (D. Del. April 23, 2009) (same); *In re Corel Corp. Sec. Litig.*, 293 F. Supp. 2d 484, 497-98 (E.D. Pa. 2003) (awarding 331/3% of settlement fund and noting, "[t]his District has observed that fee awards frequently range between nineteen and forty-five percent of the common fund."); *In re Ravisent Techs., Inc. Sec. Litig.*, No. 00-1014, 2005 WL 906361, at *11 (E.D. Pa. Apr. 18, 2005) ("courts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses"); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 134 (D.N.J. 2002) ("Scores of cases exist where fees were awarded in the one-third to one-half of the settlement fund.") (citations omitted); *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 433-34 (E.D. Pa. 2001) (approving one-third fee request).

As discussed in Section III.A.6. above, the lodestar (the result of multiplying the number of hours worked by each timekeeper's actual historic hourly rate) is $13,543,718.25, and the lodestar multiplier (calculated by dividing a requested fee award by the lodestar) is .22.

"Courts in this Circuit have found multipliers up to four as reasonable in light of the risks of litigation." *In re Fasteners Antitrust Litig.*, MDL No. 08-1912, 2014 WL 296954, at *8 (E.D. Pa. Jan. 27, 2014)

Here, DPPs' counsel will receive what is referred to as a "negative multiplier" from the requested fee award. That is because the hours expended dwarf in value the amount that will be recovered if the Court grants their request. This confirms that the award sought is fair and reasonable. *Castro*, 2017 WL 4776626, at *9 ("Because the lodestar cross-check results in a negative multiplier, it provides strong evidence that the requested fee is reasonable.").

IV. DPPS' COUNSEL'S REQUEST FOR EXPENSES SHOULD BE GRANTED

DPPs' Counsel request reimbursement from the Settlement Fund of expenses in the amount of $1,181,567.59.

A. Summary of Incurred Expenses and Income

As set forth below, Attorneys for the Settlement Class have incurred substantial expenses in this litigation from inception of the case through January 10, 2018.

The out-of-pocket expenses incurred by each firm include, among other things, funds expended for commercial and in-house copying, computer research (*e.g.*, Westlaw/LEXIS), travel expenses, court and *pro hac vice* related fees, and postage. The costs are set forth by category in individual declarations submitted by each firm. *Id.* ¶¶ 48-50, Ex. 1-22. These declarations were reviewed by Interim Co-Lead Counsel to ensure that the amounts charged were consistent with the role played by each firm in the litigation to date. *Id.* ¶ 51. For example, firms that worked closely with the proposed class representatives to help respond to discovery demands or to prepare for depositions appropriately incurred related expenses such as commercial copy charges and travel expenses. *Id.*

Each firm contributed assessments to be used to fund major joint expenses necessary to prosecute a complex case of this nature, which are the type of expenses that are regularly reimbursed by courts. Examples of such costs that were paid from the litigation fund include expert fees, electronic discovery costs, and the services of a financial consultant and Court-appointed mediator to assist with settlement negotiations. *Id.* ¶¶52, 55.

In addition, on January 28, 2016, the Court awarded Counsel one-third of the Star and SIGMA settlement amounts as reimbursement for $1,736,685.75 in incurred expenses, and $1,106,230.92 to be used for future expenses. ECF No. 351. Instead of immediately reimbursing any firm for their prior expenditures, Counsel

deposited the total amount of $2,842,916.67 into an escrow account to fund the remainder of the litigation. *Id.* ¶ 53.

Expenditures from the litigation fund were as follows:[8]

Litigation Fund Expenditures	
Experts	$3,400,242.80
E-Discovery Vendor	$77,549.92
Court Reporters	$38,895.56
Documents (costs of obtaining FTC and third-party documents, including telephone records)	$24,905.42
Settlement Expenses (mediator and financial consultant)	$20,364.77
Check Order Fee	$74.00
Total	$3,562,032.47

Thus, DPPs' Counsel's unreimbursed incurred expenses through January 10, 2018, can be calculated as follows after subtracting the prior Expense Award:

Total Unreimbursed Incurred Expenses	
Litigation Fund Expenditures	$3,562,032.47
Unreimbursed Out-of-Pocket Expenses	$462.551.79

[8] As set forth in the Paragraph 52-56 of the Katcher Declaration, there were separate escrow accounts for the attorneys' assessments and for the expense award fund created after the SIGMA and Star funds. For simplicity, the chart included in this brief refers to the expenditures from both funds as "litigation fund expenditures."

Total Expenses	$4,024,584.26
SIGMA and Star Expense Award	($2,842,916.67)
Total Expense Request	$1,181,667.59

For the reasons set forth below, Interim Co-Lead Counsel respectfully submit that an expense award in the amount of $1,181,667.59 is fair and reasonable under the applicable legal standards.

B. Plaintiffs' Counsel's Application for Reimbursement of Incurred Expenses Is Reasonable and Warrants Approval

It is well-established that counsel who create a common fund for the benefit of a class are entitled to be reimbursed for expenses reasonably incurred in creating that fund. *See In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 226 (E.D. Pa. 2014) ("[c]ounsel in common fund cases [are] entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case ") (quoting *In re Cendant Corp., Derivative Action Litig.*, 232 F. Supp. 2d 327, 343 (D.N.J. 2002)); *In re Par Pharm. Sec. Litig.*, No. 06-3226(ES), 2013 WL 3930091, at *11 (D.N.J. July 29, 2013) (same); *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, at *17-18 (same).

Attorneys may be reimbursed for costs that are "incidental and necessary expenses incurred in furnishing effective and competent representation." *Planned Parenthood of Cent. N.J. v. Attorney Gen. of State of N.J.*, 297 F.3d 253, 267 (3d Cir. 2002) (quoting 122 CONG. REC. H12160 (daily ed. Oct. 1, 1976) (statement of

Rep. Drinan)). Attorneys for the DPPs have incurred unreimbursed expenses totaling $1,181,667.59, which were incidental and necessary to representation of the Settlement Classes. These expenses were reasonably incurred to prosecute this litigation, and include costs related to DPPs' expert and consulting economists; depositions; private investigatory work; electronic data collection and processing; computerized research; travel and lodging; copying; third-party discovery; and Court-ordered mediation. *See* Katcher Declaration ¶¶ 49-56.

Expenses of this nature and magnitude are typical of those incurred during the litigation of large antitrust class actions, and reimbursement is routinely permitted. *See In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, at *17 (finding the following expenses to be reasonable: "(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and express services, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, court and witness fees, (9) overtime and temp work, (10) postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund-pro hac vice") (quoting *Oh v. AT&T Corp.*, 225 F.R.D. 142, 154 (D.N.J. 2004))); *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 411-12 (D.N.J. 2006) (approving thirteen categories of expenses supported by declarations of individual law firms); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003) (noting that it is common practice to grant expense requests where the "lion's share

of these expenses reflects the costs of experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses"), *aff'd sub nom.*, *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96 (2d Cir. 2005). They should be reimbursed here.

V. DPPS' COUNSEL'S REQUEST FOR INCENTIVE AWARDS TO THE EIGHT CLASS REPRESENTATIVES SHOULD BE GRANTED

Settlement Class Counsel respectfully request that the Court award $15,000 to each of the eight current and former named Plaintiffs, each of which has actively served the interest of the absent members of the proposed classes since early 2012 and throughout their tenure as class representatives. Declarations have been submitted by or on behalf of each of the named Plaintiffs detailing the specific work done on behalf of the classes and the time that was devoted to this litigation by employees of the Plaintiffs – time that would have otherwise been devoted to the ordinary affairs of the Plaintiffs, most of which are small businesses. These declarations have been submitted as Exhibits 23 to 30 of the Katcher Declaration.

Each representative worked with DPPs' counsel in the early days of the litigation to help them understand the industry and shape the claims, often through telephone and in-person interviews. Throughout the litigation, the representatives continued to make themselves available for both factual discussions and to monitor and provide input on the case. Together, they helped DPPs' counsel respond to 111 requests for documents, searched for and produced over 65,000 pages of documents

to Defendants, responded to detailed interrogatories, and prepared and sat for their own depositions – all this was doggedly undertaken with often substantial disruption to their own businesses.[9]

Each proposed class representative has devoted substantial time and energy to securing a benefit for the larger class and did so without promise of any award above that received by absentee class members. However, in the Third Circuit "[i]ncentive awards are 'not uncommon in class action litigation and particularly where . . . a common fund has been created for the benefit of the entire class.'" *In re Auto. Refinishing Paint Antitrust Litig.*, 2008 WL 63269, at *7 (quoting *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000)). Here, each class representative "spent a significant amount of their own time and expense litigating these cases for the benefit of the absent members of the settlement class, and as is recognized by a multitude of courts, their efforts should not go unrecognized." *In re Remeron End-Payor Antitrust Litig.*, Nos. 02-2007(FSH)/04-5126(FSH), 2005 WL 2230314, at *32 (D.N.J. Sept. 13, 2005) (approving incentive awards of up to $30,000 per class representation).

The $120,000 total amount sought for incentive awards is about 1.4% of the

[9]As set forth in more detail in the declaration of its counsel, Susan R. Schwaiger, Public Works Supply Co., Inc. withdrew as a class representative on May 23, 2016, after the death of its President Scott B. Lindquist. Prior to his death, Mr. Lindquist was an active and eager class representative and was fully engaged in preparing for his deposition.

McWane Settlement Amount of $8,787,500, and about 0.7% of the $17,316,250 recovered for the classes from all three settlements. This percentage is in line with what is typically approved by courts in this Circuit. *See Castro*, 2017 WL 4776626, at *10 (approving $100,000 incentive awards, noting that "given the significant roles the class representatives played throughout the litigation, the service awards are warranted."); *Sakalas v. Wilkes Barre Hosp. Co.*, No. 11-0546, 2014 WL 1871919, at *5 (M.D. Pa. May 8, 2014) (approving $7,500.00 (or 1.57%) of a $475,000.00 settlement fund and finding the percentage to be not out of the mainstream for class action service awards in the Third Circuit).

In addition, no objection has been received to date to the request for incentive awards.

VI. REASONABLE NOTICE OF THE REQUESTED APPLICATION AND OPPORTUNITY TO OBJECT HAVE BEEN GIVEN TO THE CLASS

Federal Rule of Civil Procedure 23(h)(1) provides that "[n]otice of the motion [for an award of attorneys' fees and costs] must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." Interim Co-Lead Counsel have provided reasonable notice of this motion and have afforded Settlement Class Members an ample opportunity to object.

Garden City Group, LLC ("GCG"), the Court-appointed claims administrator, effectuated a notice program designed to ensure that Settlement Class Members were apprised of their rights. Pursuant to the Court's Preliminary Approval Order

(ECF No. 473), on February 9, 2018, GCG mailed the Court-approved notice to approximately 6,560 addresses associated with Settlement Class members using the sales data produced by the Defendants. *See* Declaration of Lori Castaneda Regarding Notice and Settlement Administration for the McWane Settlement ("Castaneda Decl.") ¶ 9. A summary notice was also published in the February 12, 2018 issue of the *Wall Street Journal*. *Id.* ¶ 12. Additionally, GCG operated a Settlement website (www.DIPFDirectSettlement.com) to provide information and important deadlines to Settlement Class members. *See id.* ¶ 13. Further details regarding the notice program and its effectiveness can be found in the Castaneda Declaration.

The Notice Packets expressly notified potential Settlement Class Members that Interim Co-Lead Counsel would be seeking Court approval of, *inter alia*, reimbursement of litigation expenses. *See* Long Form Notice ¶ 17 (Castenada Declaration Exhibit A). In the section entitled "How will the lawyers be paid?" the notice provided:

> You are not personally responsible for payment of attorneys' fees or expenses for Class Counsel. At this time, Class Counsel will ask the Court to approve from the McWane Settlement Fund an award of up to $2,929,166.67 (one-third the total amount of the McWane Settlement) for attorneys' fees, in addition to reimbursement from the McWane Settlement Fund, not to exceed $1,200,000.00, for Class Counsel's out-of-pockets costs and expenses incurred in the prosecution of the lawsuit. Class Counsel will also seek incentive awards of no more than $15,000.00 for each of the eight entities who served as proposed class representatives while the case was pending[.]

Id. The notice also explains the process and sets deadlines for opting out or objecting

to the request for attorneys' fees, expenses, and incentive awards. *See generally* Long Form Notice (Castenada Declaration Exhibit A).

Interim Co-Lead Counsel will make this motion and the accompanying papers available to class members on the settlement website, as soon as practicable after filing it with the Court. The deadline to object is April 20, 2018. This is a sufficient amount of time for Settlement Class Members to object to a motion for reimbursement of expenses. *See, e.g.*, *Batmanghelich v. Sirius XM Radio, Inc.*, No. 09-9190(VBF)(JCx), 2011 U.S. Dist. LEXIS 155710, at *5 (C.D. Cal. Sept. 13, 2011) ("Plaintiff's application for attorneys' fees and costs and a Class Representative service payment was filed with the Court and made available for Class Members to review on the settlement website two weeks prior to the deadline for Class Members to file objections to the Settlement, giving Class Members adequate time to review the application and object to the attorneys' fees, costs and/or service payment.").

Thus, Settlement Class members will have reasonable opportunity to review Plaintiffs' motion for reimbursement of expenses and will have time to object.

VII. CONCLUSION

For the foregoing reasons, Settlement Class Counsel respectfully request that the Court grant their motion for an award of attorneys' fees, reimbursement of expenses, and grants of incentive awards to the proposed class representatives.