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**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)

**MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER
PLAINTIFFS' MOTION FOR REIMBURSEMENT OF EXPENSES**

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Interim Co-Lead Counsel for the Direct Purchaser Plaintiffs (“DPPs” or “Plaintiffs”) submit this memorandum of law in support of their application for \$2,842,916.67 million, or one-third of the SIGMA and Star Settlement Funds, for reimbursement of litigation expenses reasonably incurred and to be incurred in connection with prosecuting this action against McWane, Inc., and its divisions Clow Water Systems Co., Tyler Pipe Company, and Tyler Union (collectively, “McWane”). Plaintiffs have moved separately for final approval of their settlements with SIGMA Corporation and its subsidiary SIGMA Piping Products Corporation (collectively, “SIGMA”), and with Star Pipe Products, Ltd. (“Star”).

As directed by the Court, Plaintiffs gave notice to members of the Settlement Classes of their intention to seek such reimbursement of expenses, and, while the deadline to object will not expire until January 8, 2016, to date no objections have been received.

I. BACKGROUND

A. Facts and Procedural History

This litigation commenced in early 2012, when multiple class action complaints were filed against defendants McWane, SIGMA, and Star 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, SCAC ¶¶142–52; (2) monopolization by McWane of the domestic market from February 17, 2009 to the present, SCAC ¶¶ 153–60; and (3) a conspiracy between McWane and Sigma to monopolize and unreasonably restrain trade in the domestic market from September 22, 2009 to the present. Defendants’ unlawful conduct is alleged to have caused Plaintiffs to pay supra-competitive prices for DIPF, SCAC ¶¶ 161–74.

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 for the DPPs. Dkt. No. 61. Co-Lead Counsel immediately began to work to organize the plaintiffs, and to continue their fact development in preparation for drafting their Consolidated Amended Complaint (“CAC”), which was filed on July 11, 2012. Dkt. No. 78. *See* Declaration of Richard J. Kilsheimer in Support of Direct Purchaser Plaintiffs’ Motion for Reimbursement of Expenses dated December 29, 2015 (“Kilsheimer Decl.”) ¶ 4.

In September 2012, defendants filed two motions to dismiss the CAC for failure to state a cause of action and for lack of standing. Dkt. Nos. 95 and 96. DPPs filed their opposition briefs in November 2012 (Dkt. Nos. 102 and 103), and on March 5, 2013, the Court denied defendants’ motions in their entirety. Dkt. No.

116. *Id.* ¶5.

By April 30, 2013, Interim Co-Lead Counsel successfully negotiated an agreement with defendants that provided Plaintiffs with, among other things, the expedited production of the defendants' entire production in the related FTC action, along with related transcripts, exhibits, and post-trial briefing. Dkt. 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 from the end of the period as alleged by the FTC. *Id.* ¶6.

In November 2011, DPPs moved to amend the CAC to reflect these new allegations, extending the scope of the price-fixing conspiracy to include incidents in and around June 2010 and March 2011. Dkt. No. 159. Defendants opposed the amendment, but DPPs again prevailed. Dkt. No. 183. The Second Consolidated Amended Complaint ("SCAC") was filed on February 10, 2014. Dkt. No. 186. 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. Dkt. Nos. 201, 202 and 204. After opposition and reply briefing, and a hard-fought oral argument on the motions, the Court denied defendants' three motions to dismiss in their entirety. Dkt. No. 271. *Id.* ¶¶ 7-8.

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.*, Dkt. No. 241. On July 28, 2014, the Court ordered that the parties complete their respective document production by August 29, 2014. Dkt. No. 258. 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. Dkt. No. 176. *Id.* ¶ 9.

In accordance with the Court's fast-track schedule, DPPs responded to 111 requests for documents, producing over 65,000 pages of documents to defendants, and responded to detailed interrogatories from Star. To accomplish this, Interim Co-Lead Counsel, as well as other attorneys representing DPPs, 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. At the same time, DPPs continued to pursue discovery from defendants and began to notice and prepare for numerous depositions of defendants and third parties that were scheduled to be taken in a compressed time period. Interim Co-Lead Counsel also worked closely with their expert economists, who were preparing their analysis in support of class certification. Counsel's efforts on behalf of the DPPs were thorough, exhaustive, and time and resource-intensive. *Id.* ¶ 10.

In October 2014, this Court stayed discovery and ordered the parties to participate in settlement discussions with the assistance of a Court-appointed mediator. These discussions ultimately led to the SIGMA and Star Settlements. *Id.* ¶ 11.

The discovery stay has now been lifted, and the Court has entered a schedule that requires fact discovery to be completed by April 29, 2016. Dkt. No. 234. Plaintiffs are to serve their opening class certification papers by May 31, 2016, and McWane is to serve its motion for summary judgment by September 30, 2016. *Id.* ¶ 12.

II. THE EXPENSE REQUEST

Co-Lead Counsel seek a total of \$2,842,916.67 (one-third of the SIGMA and Star Settlement Funds) for costs and expenses incurred or to be incurred in the prosecution of this lawsuit.¹

Attorneys for the Settlement Class have incurred the following expenses in this litigation from inception of the case through November 30, 2015:

¹ Because both the SIGMA and Star Settlements are being paid over time, Plaintiffs request that the award of expenses by the Court be applied to the Settlement Funds as the monies are received. To date, these defendants have paid a total of \$2,842,916.67 into the Settlement Funds, from which Plaintiffs seek \$ 947,638.89, or one-third. As future payments are received, Plaintiffs request that the award by the Court grant one-third of those amounts to Plaintiffs as expenses.

	Firm	Lit Fund Assessments	Declared Out-of-Pocket Expenses	Total Amount
1.	Kaplan Fox & Kilsheimer LLP	\$190,000.00	\$115,476.30	\$305,476.30
2.	Cohen Milstein Sellers & Toll PLLC	115,000.00	\$122,818.55	\$237,818.55
3.	Berger & Montague, P.C.	\$80,000.00	\$6,374.61	\$86,374.61
4.	Cera LLP	\$25,000.00	\$47,121.81	\$72,121.81
5.	Cohn Lifland Pearlman Hermann & Knopf LLP	--	\$966.32	\$966.32
6.	Duane Morris LLP	\$155,000.00	\$32,915.31	\$187,915.31
7.	Fine Kaplan & Black, R.P.C.	--	\$441.64	\$441.64
8.	Fox & Rothschild LLP	\$7,500.00	\$1,992.88	\$9,492.88

	Firm	Lit Fund Assessments	Declared Out-of-Pocket Expenses	Total Amount
9.	Goldman Scarlato & Penny, P.C.	\$60,000.00	\$3,334.11	\$63,334.11
10.	Grant & Eisenhofer P.A.	\$60,000.00	\$14,116.86	\$74,116.86
11.	Greenan Peffer Sallander & Lally LLP	--	\$26.18	\$26.18
12.	Heins Mills & Olson, P.L.C.	\$5,000.00	\$281.09	\$5,281.09
13.	Labaton Sucharow LLP	\$90,000.0	\$10,516.74	\$100,516.74
14.	Lewis Roca Rothgerber LLP	--	\$10,390.49	\$10,390.49
15.	Lite Depalma Greenberg LLC	\$107,500.00	\$4,542.58	\$112,042.58
16.	Nussbaum Law Group, P.C.	--	\$18.40	\$18.40

	Firm	Lit Fund Assessments	Declared Out-of-Pocket Expenses	Total Amount
17.	Sloan & Associates, P.C.	--	\$1,690.70	\$1,690.70
18,	Sterns & Weinroth	7,500.00	\$5,137.20	\$12,637.20
19.	Randy J. Christiansen	5,000.00	--	\$5,000.00
20.	Zaremba Brownell & Brown, PLLC	5,000.00	--	\$5,000.00
	Totals	\$912,500.00	\$378,161.77	\$1,290,661.77

See Declaration of Richard J. Kilsheimer in Support of Direct Purchaser Plaintiffs' Motion for Reimbursement of Expenses dated December 29, 2015. *Id.* ¶¶ 13-17 Ex.1-18.

The out-of-pocket expenses incurred by each firm includes, among other things, funds expended for commercial and in-house copying, computer research, travel expenses, court and *pro hac* related fees, and postage. The costs are set forth by category in individual declarations submitted by each firm. *Id.* ¶14, Ex. 1-18.

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.* ¶ 16. For example, firms that worked closely with the proposed class representatives to help respond to discovery demands appropriately incurred related expenses such as commercial copy charges and travel expenses. *Id.*

The litigation fund assessments contributed by each firm were used to fund major joint expenses necessary to prosecute a complex case of this nature, and 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.* ¶ 18.

In addition, DPPs have incurred \$446,023.98 of unpaid costs beyond the amounts remaining in the litigation fund. These incurred but unpaid costs represent amounts due to the DPPs’ expert economists, who are engaged in the indispensable but expensive work that will ultimately support the DPPs’ motion for class certification, and their opposition to McWane’s motion for summary judgment, and ultimately to provide testimony for trial. *Id.* ¶ 19.

The DPPs’ paid and unpaid incurred expenses through November 30, 2015 can be summarized as follows:

Litigation Fund Assessments	\$912,500.00
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Out-of-Pocket Expenses	\$378,161.77
Excess Unpaid Expenses	\$446,023.98
Total	\$1,736,685.75

Id. ¶ 20.

Interim Co-Lead Counsel seek the remaining \$1,106,230.92 of their request to be awarded to fund the continuing litigation against McWane, which stands to substantially benefit the Settlement Class Members. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, FOURTH §13.21 (2004) (“partial settlements may provide funds needed to pursue the litigation . . .”); 1 Alba Conte, *Attorney Fee Awards* § 2:20 (3d ed. 2004) (courts have “permitted class plaintiffs who have settled with fewer than all defendants to expend class-settlement monies, or a portion thereof, for litigation expenses to prosecute the action against remaining, non-settling defendants”) (collecting cases).

For the reasons set forth below, Interim Co-Lead Counsel respectfully submit that the requested expenses are fair and reasonable under the applicable legal standards.

III. ARGUMENT

A. 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 Certain Teed 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 ”); *In re Par Pharm. Sec. Litig.*, No. Civ. A. No. 06-3226 (ES), 2013 WL 3930091, at *11 (D.N.J. July 29, 2013) (same); *In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ. 03-0085 FSH, 2005 WL 3008808, at *18 (D.N.J. Nov. 9, 2005) (same); *In re Cendant Corp., Derivative Action Litig.*, 232 F. Supp. 2d 327, 343 (D.N.J.2002) (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). Courts have time and again approved an award of one-third, if not more, of a common fund to attorneys. *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995) (in common fund cases “fee awards have ranged from nineteen percent to forty-five percent of the settlement fund”).

Attorneys for the DPP’s have incurred unreimbursed expenses totaling \$1,736,685.75, 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 DPP's expert and consulting economists; private investigatory work; electronic data collection and processing; computerized research; travel and lodging; copying; third-party discovery; and Court-ordered mediation. *See* Kilsheimer Decl. ¶¶ 14-20.

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, Remeron*, 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.”); *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) *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005) (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.”).

B. Class Counsel's Application For Reimbursement Of Future Expenses Is Reasonable And Warrants Approval

In addition to the expenses incurred through November 30, 2015, Interim Co-Lead Counsel seek \$1,106,230.92 from the SIGMA and Star Settlement Funds to help fund DPPs' ongoing litigation against McWane. DPPs make this request as the parties enter deposition discovery in earnest, with a large number depositions of defendants, Plaintiffs and nonparties expected to be noticed shortly.² These depositions will require travel across the country, as well as expenses for court reporters and videographers. In addition, expert discovery will require significant additional funds, as economists will play a major role in the upcoming battle for class certification, as well as in the motion for summary judgment by McWane, and ultimately at trial. The outcome of the litigation has the potential to provide substantial benefits for the same class members that are eligible to share in the Star and SIGMA Settlement Funds, and thus a grant of a fund to defray future expenses is appropriate.

Many courts have granted similar requests to use partial settlement funds to help fund future litigation. *See, e.g. In re Enron Corp. Sec., Derivative & "Erisa" Litig.*, No. H-01-3624, 2003 WL 22962792, at *1, *10 (S.D. Tex. Nov. 5, 2003)

² The parties have not served their notices of depositions yet, although they are negotiating dates and locations. Prior to the stay numerous depositions had been noticed by all parties. Most, but not all, of these will be re-noticed.

(37.5% of the settlement fund allocated to an expense fund to be used for past and future litigation expenses); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C 07-05634 CRB, 2015 WL 3396829, at *1-2 (N.D. Cal. May 26, 2015) (approving approximately \$13 million in attorneys' fees, \$3 million in expenses, and \$3 million "for future expenses to be used in ongoing litigation against the non-Settling Defendants" from an approximately \$39.5 million settlement fund); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 641, 643 (E.D. Pa. 2003) (noting that a partial settlement "provides class plaintiffs with an immediate financial recovery that ensures funding to pursue the litigation against the non-settling defendants").³

³ See also *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2011 WL 717519, at *13 (E.D. Mich. Feb. 22, 2011) (awarding \$750,000 of settlement to fund future expenses incurred in further prosecution of the class action); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 cv 897, MDL 997 (N.D. Ill. Feb. 18, 1998) (authorizing disbursement of \$6 million from settlement funds to pay anticipated trial preparation expenses of class counsel) (Kilsheimer Decl. Ex. 19); *In re Microcrystalline Cellulose Antitrust Litig.*, No. 01-cv-111, MDL No. 1402 (E.D. Pa. June 15, 2005) (granting class counsel's request to use up to \$2.5 million of a settlement fund to pay litigation expenses against remaining defendant) (Kilsheimer Decl. Ex. 20); *In re Plastics Additives Antitrust Litig.*, No. 03-cv-2038 (E.D. Pa. Feb. 17, 2006) (awarding \$750,000 of the settlement proceeds for use in future litigation) (Kilsheimer Decl. Ex. 21); *High Fructose Corn Syrup Antitrust Litig.*, No. 95-1477, MDL No. 1087 (C.D. Ill. Feb. 15, 1997) (awarding \$500,000 of settlement proceeds for payment of future litigation); (Kilsheimer Decl. Ex. 22); *In re Automotive Refinishing Paint Antitrust Litig.*, MDL No. 1426 (E.D. Pa. Oct. 13, 2004) (awarding \$1 million for future litigation expenses and administrative expenses of the settlement fund) (Kilsheimer Decl. Ex. 23); *In re Graphite Electrodes Antitrust Litig.*, No. 97-cv-4182 (E.D. Pa. Nov. 20, 2002) (permitting

Because it would substantially benefit the Settlement Classes, the Court should award \$1,106,230.92 of the Star and SIGMA Settlement Funds for expenses to be incurred in the continued prosecution of this litigation against McWane.

C. Reasonable Notice Of The Requested Application And Opportunity To Object Has 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 has provided reasonable notice of this motion, and has 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 are apprised of their rights. Pursuant to the Court’s October 1, 2015 Order [Dkt. No. 331], GCG mailed Notice Packets to Settlement Class Members whose addresses GCG had compiled from the defendants’ transaction data. Castaneda Decl. ¶¶ 6-9.⁴ A court-approved summary notice was also published in the November 2, 2015 issue of the *Wall Street Journal* *Id.* ¶ 10. Additionally, GCG has established a

class counsel to use \$450,000 from proceeds of partial settlement for future pretrial and trial expenses) (Kilsheimer Decl. Ex. 24).

⁴ The “Castaneda Declaration” or “Castaneda Decl.” refers to the “Declaration of Lori Castaneda Regarding Notice and Settlement Administration,” which was filed contemporaneously with this motion.

Settlement website (www.DIPFDirectSettlement.com) to provide information and important deadlines to Settlement Class members. *See id.* ¶ 11. This website has been operational since October 30, 2015. *Id.* 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 (Castaneda Declaration Exhibit A). In the section entitled “How will the lawyers be paid?” the notice provides:

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 both the SIGMA Settlement Fund and the Star Settlement Fund an award of \$2,842,916.67 (one-third of the total amount of the SIGMA and Star Settlements) for costs and expenses incurred and to be incurred in the prosecution of the lawsuit.

Id. The notice also explains the process and sets deadlines for opting out or objecting to the request for expenses. *See generally* Long Form Notice (Castaneda Declaration Exhibit A).

Interim Co-Lead Counsel will make their request for expenses available to class members on the settlement website, as soon as practicable after filing it with the Court. The deadline to object is January 8, 2016. This is a sufficient amount of time for Settlement Class Members to object to a motion for reimbursement of expenses. Indeed, courts have found far less time to be adequate. *See, e.g., In re Imprelis*

Herbicide Mktg., Sales Practices and Prods. Liab. Litig., 296 F.R.D. 351 (E.D. Pa. 2013) (granting fee award where class members had two weeks to review motion); *Batmanghelich v. Sirius XM Radio, Inc.*, No. CV 09-9190 VBF, 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, who have already been informed of Plaintiffs’ intention to request up to one-third of the SIGMA and Star Settlement amounts, will have reasonable opportunity to review Plaintiffs’ motion for reimbursement of expenses and will have time to object.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court grant their motion for reimbursement of current and future litigation expenses.

Dated: December 29, 2015

Respectfully submitted,

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