**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**

**IN RE: STEEL ANTITRUST LITIGATION**

Case No. 08-cv-5214

Honorable James B. Zagel

**THIS DOCUMENT RELATES TO ALL DIRECT PURCHASER ACTIONS:**

***Standard Iron Works v. ArcelorMittal, et al.,*** **Case No. 08-cv-5214**

***Wilmington Steel Processing Co., Inc. v. ArcelorMittal, et al.,*** **Case No. 08-cv-5371**

***Capow, Inc. d/b/a Eastern States Steel v. ArcelorMittal, et al.,*** **Case No. 08-cv-5633**

***Alco Industries, Inc. v. ArcelorMittal, et al.,*** **Case No. 08-cv-6197**

***Gulf Stream Builders Supply, Inc. v. ArcelorMital, et al.,*** **Case No. 10-cv-4236**

# MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

## TABLE OF CONTENTS


INTRODUCTION ........................................................................................................ 1

BACKGROUND ........................................................................................................ 2

I. LITIGATION HISTORY ........................................................................................ 2

II. PRIOR SETTLEMENTS AND FEE AWARD .......................................................... 3

III. CLASS COUNSEL'S WORK FROM AUGUST 2014 THROUGH THE PRESENT ...... 4

A. Settlement Administration and Contested Allocation Proceedings ............................ 4

B. Witness Interviews ................................................................................................ 5

C. Rule 23(f) Briefing ................................................................................................ 5

D. Motions to Compel Merits Discovery ..................................................................... 5

E. Merits Document Review and Depositions ............................................................. 6

F. Summary Judgment Opposition ............................................................................. 6

G. Settlement Negotiation and Drafting ...................................................................... 6

H. Settlement Notice, Approval and Future Administration ........................................... 7

I. Future Claims Administration .................................................................................. 7

J. Total Time and Expense ......................................................................................... 7

ARGUMENT ............................................................................................................ 8

I. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE ................ 8

A. Legal Standards ..................................................................................................... 8

B. The Requested Fees Are Fair and Reasonable As a Percentage of the Fund ............... 9

1. A 33% Contingent Fee Is Consistent with Class Counsel's Market Rate in Similar Cases ........................................................................ 11

2. A 33% Contingent Fee Is Consistent with the Market Rate Approved by Courts in Similar Cases ........................................................ 12

3. A 33% Contingent Fee Is Justified by the Risks of the Litigation ....................... 14

4. A 33% Fee Is Supported by the Amount and Quality of Class Counsel's Work and the Results Achieved for the Class ............................ 16

C. Lodestar/Multiplier Analysis Supports the Requested Fee Award ............................ 17

II. THE REQUESTED EXPENSE REIMBURSEMENT IS FAIR AND REASONABLE ........................................................................................ 20

III. INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES ............................ 21

CONCLUSION ........................................................................................................ 24

## TABLE OF AUTHORITIES

**Cases**

*Americana Art China Co., Inc. v. Foxfire Printing and Packaging, Inc.*, 743 F.3d 243 (7th Cir. 2014) ....8, 9, 16

*Blum v. Stenson*, 465 U.S. 886 (1984) ....10

*Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980)....1, 8

*Brown v. Pro Football, Inc.*, 839 F. Supp. 905 (D.D.C. 1993), *rev'd on other grounds*, 50 F.3d 1041 (D.C. Cir. 1995) ....20

*City of Greenville v. Syngenta Crop Prot., Inc.*, 904 F. Supp. 2d 902 (S.D. Ill. 2012)....12, 14, 20

*Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998) .... 2, 21-23

*Florin v. Nationsbank of Ga., N.A.*, 60 F.3d 1245 (7th Cir. 1995) ....18

*Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560 (7th Cir. 1994) ....9, 10, 14, 18

*Gaskill v. Gordon*, 160 F.3d 361 (7th Cir. 1998)....10, 12, 19

*Goldsmith v. Tech. Solutions Co.*, 92 C 4374, 1995 WL 17009594 (N.D. Ill. Oct. 10, 1995)....12

*Harman v. Lyphomed, Inc.*, 945 F.2d 969 (7th Cir. 1991) ....18

*Heekin v. Anthem, Inc.*, No. 1:05-CV-01908, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012) ....12

*In re Automotive Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2008 WL 63269 (E.D. Pa. Jan. 3, 2008)....15, 22, 24

*In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94C897, 2000 WL 204112 (N.D. Ill. Feb. 10, 2000) ....15, 16, 19

*In re Continental Illinois Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992) ....8, 18

*In re Dairy Farmers of America, Inc., Cheese Antitrust Litig.*, 80 F. Supp. 3d 838 (N.D. Ill. 2015) ....9, 13

*In re Fasteners Antitrust Litig.*, CIV.A. 08-MD-1912, 2014 WL 296954 (E.D. Pa. Jan. 27, 2014) ....13

*In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739 (E.D. Pa. 2013) .............................. *passim*

*In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002) ....................16

*In re Linerboard Antitrust Litig.*, MDL No. 1261,
2004 WL 1221350 (E.D. Pa. June 2, 2004) ............................................................ *passim*

*In re Lithotripsy Antitrust Litig.*, No. 98 C 8394, 2000 WL 765086
(N.D. Ill. June 12, 2000) ..........................................................................................12

*In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 09-cv-07666,
Dkt. No. 701 (N.D. Ill. Apr. 16, 2014) ..................................................................... *passim*

*In re Ready-Mixed Concrete Antitrust Litig.*, 1:05-CV-00979,
2010 WL 3282591 (S.D. Ind. Aug. 17, 2010) ...........................................................12, 13

*In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294 (3d Cir. 2005).................................................18

*In re ShagrinGas Co. v. BP Products*, No. 06-cv-03621, Dkt. No. 209
(N.D. Ill. June 24, 2010) ..........................................................................10, 12, 20

*In re Skelaxin (Metaxalone) Antitrust Litig.*, MDL No. 2343,
2014 WL 2946459 (E.D. Tenn. Jun. 30, 2014) ....................................................13, 18, 19

*In re Southeastern Milk Antitrust Litig.*, No. 08–MD–1000,
2013 WL 2155387 (E.D. Tenn. May 17, 2013)........................................................ *passim*

*In re Synthroid Marketing Litig.*, 264 F.3d 712 (7th Cir. 2001) .............................8, 14, 16, 20

*In re TFT-LCD (Flat Panel) Antitrust Litig.,* No. M07-18275I,
2013 WL 1365900 (N. D. Cal. Apr. 3, 2013) ..................................................................19

*In re Titanium Dioxide Antitrust Litig.*, 10–CV–00318,
2013 WL 6577029 (D. Md. Dec. 13, 2013)...............................................................13, 23

*In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340-SLR,
Dkt. No. 543 (D. Del. 2009) ..........................................................................................19

*In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741 (7th Cir. 2011) ...............................8, 14

*In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004).....................................24

*Jeffboat, LLC v. Dir., Office of Workers' Comp. Programs*, 553 F.3d 487
(7th Cir. 2009)...............................................................................................................19

*Kirchoff v. Flynn,* 786 F.2d 320 (7th Cir. 1986) ..........10

*Koszyk v. Country Fin. a/k/a CC Servs., Inc.*, No. 16-cv-3571, 2016 WL 5109196 (N.D. Ill. Sept. 16, 2016) ..........21

*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) ..........15

*Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399 (7th Cir. 2000) ..........11

*Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983) ..........15

*Retsky Family Ltd. Partnership v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856 (N.D. Ill. Dec. 10, 2001) ..........12

*Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560 (N.D. Ill. 2011) ..........12

*Skelton v. Gen. Motors Corp.*, 860 F.2d 250 (7th Cir. 1988) ..........18

*Smith v. Vill. Of Maywood*, 17 F.3d 219 (7th Cir. 1994) ..........19

*Sutton v. Bernard*, 504 F.3d 688 (7th Cir. 2007) ..........8

*Taubenfeld v. Aon Corp.*, 415 F.3d 597 (7th Cir. 2005) ..........9, 12

*Williams v. Rohm and Haas Pension Plan*, 658 F.3d 629 (7th Cir. 2011) ..........8, 9

**Other Authorities**

Fed. R. Civ. P. 23(h) ..........8

*Manual For Complex Litigation* § 14.121 (4th ed. 2004) ..........10

*Manual For Complex Litigation* § 21.724 (4th ed. 2004) ..........17

Eisenberg, Theodore and Miller, Geoffrey P., "Incentive Awards to Class Action Plaintiffs: An Empirical Study," 53 *UCLA Law Review* 1303 (2006) ..........23

Rubenstein, William B., *Newberg on Class Actions* § 14:6 (4th ed. 2009) ..........18

# INTRODUCTION

Co-Lead Class Counsel respectfully petition for a 33% attorneys' fee award from the $30 million settlement fund. The recent settlements bring finality to this complex and protracted case and deliver an outstanding result for the class. Upon final approval, the matter will close with a total recovery of $193.9 million for the class of approximately 5,300 direct purchasers.

The skill and persistence of Class Counsel created this outcome. This was not a case initiated by the government—or anyone else. Class Counsel developed the claims in the first instance and managed them through eight years of hard-fought litigation. Where, as here, the attorneys bore the risk of prosecuting a complex case on contingency, and delivered a meaningful common fund recovery for the class, a 33% fee award is fair and reasonable. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("this Court has recognized consistently that a [lawyer] who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole").

A 33% fee is the same percentage awarded by the Court in connection with the prior *Steel* settlements (*see* Dkt. No. 539) and falls well within the range typically awarded in similar matters. *See* pages 12-13, *infra*. The requested fee is further supported by a lodestar "cross check" analysis, which confirms the reasonableness of a $9.9 million fee award in the context of approximately $6 million in professional time devoted to the case that has not been compensated to date. *See* pages 17-19, *infra* (lodestar cross check).[1]

[1] To be clear, Class Counsel are requesting a 33% fee from the *net* common fund recovery, meaning the recovery after any adjustments for opt outs as provided in the settlement agreements. *See* Dkt. No. 654-1 at 4 (explaining "opt out reduction" terms, under which the net settlement fund will be somewhere between $29.55 million and $30 million). Class Counsel thus request a fee in the range of $9,751,500 to $9,900,000, depending on the opt out rate.

Class Counsel also respectfully request reimbursement of $465,602.62 in litigation expenses incurred since the prior fee and expense petition. All of these expenses were necessary to the prosecution and resolution of the claims, and are the type routinely awarded by courts in the class action settlement context. *See* page 20, *infra*.

Finally, Class Counsel request that the Court approve incentive awards of $50,000 for each of the five named class representatives. No incentive payments have been awarded in the case to date, and it is appropriate at this stage to compensate the named plaintiffs for their work on the class's behalf. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (approving incentive award "[b]ecause a named plaintiff is an essential ingredient of any class action"). The service awards are justified in light of the time and effort devoted to the case, the business risks incurred, the benefits secured for class members, and the fact that, had the named plaintiffs not stepped forward, the case would not exist. *See* pages 21-23, *infra*.

## BACKGROUND

### I. LITIGATION HISTORY

This litigation began in September 2008 with the filing of a detailed complaint alleging that eight Defendants, the nation's largest steel producers, conspired to restrict raw steel output on an industry-wide basis, causing injury to a class of direct purchasers. Dkt. No. 1.[2] Unlike many large antitrust class actions—which often stem from government investigations—Class Counsel built this case independently, from the ground up.

[2] A total of seven direct purchaser cases were filed in this district and consolidated before Judge Zagel: *Standard Iron Works v. ArcelorMittal, et al.*, No. 08 C 5214; *Wilmington Steel Processing Co., Inc. v. ArcelorMittal, et al.*, No. 08 C 5371; *Capow, Inc. v. ArcelorMittal, et al.*, No. 08 C 5633; *MPM Display, Inc. v. ArcelorMittal, et al.*, No. 08 C 5700; *REM Sys., Inc. v. ArcelorMittal, et al.*, No. 08 C 5942; *Alco Indus. Inc. v. ArcelorMittal, et al.*, No. 08 C 06197, and *Gulf Stream Builders Supply, Inc. v. ArcelorMittal, et al.*, No. 10 cv 4236. The *MPM Display* and *REM Systems* cases were voluntarily dismissed.

The procedural background includes, *inter alia*, (1) unusually fact-bound motion to dismiss briefing (Dkt. No. 132); (2) a detailed Court opinion denying Defendants' motions to dismiss (Dkt. No. 170); (3) protracted class certification discovery involving millions of pages of document review, motion practice, depositions, and several rounds of expert discovery; (4) class certification filings including voluminous briefs, expert reports, *Daubert* motions, and thousands of pages of supporting exhibits (*e.g.*, Dkt. Nos. 307, 389, 407); (5) a contested three-day class certification and *Daubert* hearing, including live testimony from experts and fact witnesses (*see* Dkt. Nos. 462, 463); and (6) a post-hearing round of briefing (*e.g.*, Dkt. No. 479).

At the close of the evidentiary hearing (in April 2014), the Court took the question of class certification under advisement.

## II. PRIOR SETTLEMENTS AND FEE AWARD

Before the Court's ruling on class certification, Plaintiffs settled with five of the eight Defendants for a total of $163.9 million in cash. After preliminary approval and notice, no class member objected to any aspect of the settlements or to Class Counsel's requested one-third fee award. The Court approved these settlements in October 2014, *see* Dkt. Nos. 535 and 536, and awarded attorneys' fees of 33% from the aggregate settlement fund to compensate Class Counsel for their work from the inception of the case through July 31, 2014. Dkt. No. 539 (order); *see also* Dkt. No. 519 & 519-1 (Class Counsel's 2014 fee petition). The Court also reimbursed Class Counsel for litigation expenses incurred from the inception of the case through July 31, 2014. *Id.*

Notably, the five plaintiffs serving as class representatives did not request or receive any incentive awards from the prior settlement funds.

## III. CLASS COUNSEL'S WORK FROM AUGUST 2014 THROUGH THE PRESENT

As explained above, the Court previously awarded interim attorneys' fees to Class Counsel, and in doing so considered lengthy submissions describing the work done and risks borne from the inception of the case through July 31, 2014. *See* Dkt. No. 519-1 at 2-5, 13 (summarizing work and risks from 2008 through July 2014); Dkt. No. 519-2 at 4-11 (same, as detailed in joint declaration of Class Counsel). The Court awarded 33% of the prior settlements as attorneys' fees based on, *inter alia*, the risks and the overall quality of Class Counsel's work. *See* Dkt. No. 539 at ¶ 4 (Order awarding fees) ("Class Counsel initiated and developed this case with no assistance from any prior government investigation or prosecution, and handled the matter effectively and without compensation through more than six years of hard-fought litigation. The issues were risky and difficult[.]").

The focus at this stage is Class Counsel's work from August 2014 through the present, none of which has been compensated to date, and all of which was at risk. A brief overview of the tasks completed during this phase is set forth below, with additional detail provided in the attached joint declaration of Class Counsel. *See* Ex. 1 hereto, Joint Declaration of Class Counsel Jeffrey Istvan and Michael Guzman ("Joint Decl.").[3]

### A. <u>Settlement Administration and Contested Allocation Proceedings</u>

After the initial settlements were approved in 2014, Class Counsel oversaw the distribution of more than $100 million to class members. This work included, *inter alia*, regular discussions with class members about the status of their claims; working with the settlement administrator to research, evaluate and resolve claims and finalize the allocation of settlement

[3] The Joint Declaration includes, *inter alia*, a summary of Class Counsel's work, detail on time and expenses, information on fees in similar cases, and an assessment of the risks of continued litigation and the benefits of settlement.

funds; preparing and submitting a proposed final plan of distribution to the Court (see Dkt. No. 589); and working to resolve disputes with class members who challenged their shares of the fund (see Dkt. Nos. 591-93 & 602-06). All of these claims and disputes were resolved by order of the Court (Dkt. No. 606) in complete accord with the recommendations of Class Counsel, and none of this time has been compensated to date because it came after the prior fee petition.

**B. Witness Interviews**

Class Counsel continued to build the case throughout 2015-16 by interviewing potential fact witnesses, including executives affiliated with the initial settling Defendants. Class Counsel prepared extensively and traveled both domestically and internationally to interview approximately ten current and former executives from ArcelorMittal, U.S. Steel, Gerdau, and AK Steel. These interviews were akin to key merits depositions in terms of the amount of document review and preparation required.

**C. Rule 23(f) Briefing**

On September 9, 2015, the Court certified a litigation class for the purpose of determining whether Defendants conspired in violation of the antitrust laws. Dkt. No. 577. Defendants filed a petition with the Seventh Circuit requesting review of that order pursuant to Rule 23(f), requiring a round of appellate briefing in which Plaintiffs convinced the Seventh Circuit to deny the petition. *See Standard Iron Works v. ArcelorMittal*, No. 15-8021, Dkt. No. 26-2 (7th Cir. 2015) (Plaintiffs' opposition and conditional cross-petition); Dkt. No. 28 (Seventh Circuit order denying Rule 23(f) petition).

**D. Motions to Compel Merits Discovery**

After the Court's class certification decision, the parties did not agree on the proper scope and sequence of merits discovery, leading to several rounds of motion practice. *E.g.*, Dkt. Nos. 614, 617, 630. The Court ordered that merits discovery proceed in "top down" fashion, *i.e.*,

starting with CEO-level depositions, after which Plaintiffs were instructed to summarize the depositions and make a showing about the need for more discovery. *See* Dkt. Nos. 621, 632; Hearing Tr., 11/19/15, at 29-32. Owing to the nature of these disputes—and the factual information requested by the Court—Plaintiffs devoted substantial time to reviewing the record to summarize the evidence and explain what remained to be done. *E.g.*, Dkt. Nos. 630, 644.

### E. Merits Document Review and Depositions

More generally, Class Counsel worked throughout the post-certification timeframe to identify the most relevant conspiracy evidence—particularly as to the three remaining Defendants—to begin preparing merits deposition exhibits and outlines. That work culminated with the taking of six senior executive depositions, *i.e.*, two witnesses from each of the three remaining Defendants. A substantial portion of Class Counsel's time in 2016 was devoted to labor-intensive preparation for these important depositions. *Cf.* 11/19/15 Hearing Tr. at 31 (Court describing these depositions as "exceptionally important").

### F. Summary Judgment Opposition

On April 6, 2015, and September 20, 2015, respectively, Defendants SSAB and Steel Dynamics moved for summary judgment. Dkt. Nos. 553, 582. Although the Court elected to hold these motions in abeyance pending further discovery (see 9/21/2015 Hearing Tr. at 34), Class Counsel nevertheless worked throughout 2015 and 2016 to review documents and develop the record in response to Defendants' factual contentions. Moreover, after the Court set a fall 2016 briefing schedule for summary judgment motions, Class Counsel began drafting their opposition papers, including both a memorandum of law and counterstatement of facts. The case settled a few weeks before these filings were due.

### G. Settlement Negotiation and Drafting

Throughout 2016, Class Counsel engaged in settlement discussions with the remaining

Defendants. As negotiations intensified in the summer and fall of 2016, Class Counsel conferred regularly with counsel for the remaining Defendants before finalizing the agreements in principle, drafting the settlement agreements, and working with the class administrator and bank on various settlement administration and escrow issues.

**H. <u>Settlement Notice, Approval, and Future Administration</u>**

Class Counsel drafted the class notice for the settlements, worked with the settlement administrator on the notice plan, prepared the preliminary approval papers, and handled the preliminary approval hearing. Class Counsel intend to do the same, on the Class's behalf, with respect to final approval (though obviously much of this work will take place in the future and, accordingly, is not reflected in the lodestar totals submitted herein).

**I. <u>Future Claims Administration</u>**

As with final approval, Class Counsel expect to devote significant time to settlement administration—time that is not included in the lodestar totals submitted herein.

**J. <u>Total Time and Expense</u>**

In total, Class Counsel devoted 12,472.83 hours, or $5,915,568.00 worth of professional time at historical rates ($6,136,867.25 at current rates), to prosecuting this case from August 1, 2014, through November 30, 2016, while advancing $465,602.62 million in litigation expenses, all of which was done on a fully contingent basis with no guarantee of recovery. *See* Ex. 1, Joint Decl., at ¶¶ 14-29.[4]

The requested 33% fee award of $9,900,000 thus represents a "multiplier" of 1.67 on Class Counsel's total hourly fee (or "lodestar") at historical rates (or 1.61 at current rates) for the post-July 2014 timeframe, which is well within the range of multipliers typically awarded in

[4] These figures do not include any time spent on researching or preparing this fee petition (or time associated with the 2014 fee petition).

similar contingent-fee common fund antitrust litigation. *See* pages 17-19, *infra* (collecting cases).

## ARGUMENT

### I. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE

#### A. Legal Standards

It is well-established that attorneys whose work creates a common class action settlement fund are "entitled to a reasonable attorney's fee from the fund as a whole." *Boeing*, 444 U.S. at 478; *see also Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) ("this payment scheme is based on the equitable notion that those who have benefited from litigation should share in its costs.") (internal quotation marks and citation omitted); *In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992) ("Having employed their professional skills to create a cornucopia for the class, the lawyers for the class were entitled under the principles of restitution to suitable compensation for their efforts."); Fed. R. Civ. P. 23(h) (authorizing reasonable fee awards to class counsel).

Courts in the Seventh Circuit take a market-based approach in evaluating class action fee requests. *See, e.g., Americana Art China Co., Inc. v. Foxfire Printing and Packaging, Inc.*, 743 F.3d 243, 246-47 (7th Cir. 2014) ("because we always seek to replicate the market value of an attorney's services—and because the market would assign value up front—a district court that leaves the matter of fees until the end of the litigation process must set a fee by approximating the terms that would have been agreed to *ex ante*") (internal quotation marks and citation omitted); *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744 (7th Cir. 2011) (same); *Williams v. Rohm and Haas Pension Plan*, 658 F.3d 629, 635-36 (7th Cir. 2011) (same).

Relevant considerations include, *inter alia*, the ordinary market rate for class counsel's

services, fee awards in similar matters, the nature of the particular case (including the risks of non-recovery), and the amount and quality of class counsel's work. *See, e.g., In re Synthroid Marketing Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time."); *id.* at 721 ("The market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case."); *see also Taubenfeld v. Aon Corp.*, 415 F.3d 597, 600 (7th Cir. 2005) (affirming fee award based on "awards made by courts in other class actions"; "the quality of legal services rendered"; and "the contingent nature of the case"); *Williams*, 658 F.3d at 636 (affirming award based on "available market evidence"; "the amount of work involved, the risks of nonpayment, and the quality of representation").

Balancing these and any case-specific factors is a matter committed to the sound discretion of the district court. *See, e.g., Americana Art*, 743 F.3d at 246.

### B. <u>The Requested Fees Are Fair and Reasonable As a Percentage of the Fund</u>

Two approaches are commonly used in awarding class action attorneys' fees: (i) the "percentage of recovery" method, under which the Court awards a percentage of the total common settlement fund; and (ii) the "lodestar" method, under which the fee award is a function of class counsel's lodestar (*i.e.*, reasonable hourly rates multiplied by the hours devoted to the case) times a "multiplier" adjustment to account for risk, quality, and outcome. *See generally In re Dairy Farmers of America, Inc., Cheese Antitrust Litig.*, 80 F. Supp. 3d 838, 844 (N.D. Ill. 2015) (explaining percentage and lodestar methods); *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 565 (7th Cir. 1994) (explaining use of lodestar "multiplier . . . to adequately compensate counsel for contingency").

The Court has discretion to apply either method, *see Americana Art*, 743 F.3d at 247, but the "percentage of recovery" method is a framework accepted by the private market and is by far the most commonly used approach in antitrust class actions, particularly where, as here, class counsel secures an all-cash settlement fund. *See* Dkt. No. 539 at 2 (this Court applying percentage method and awarding 33% fee from prior *Steel* settlement funds); *see also In re Dairy Farmers*, 80 Supp. 3d at 844 (awarding one-third fee and emphasizing that percentage method is favored); *In re ShagrinGas Co. v. BP Products*, No. 1:06-cv-03621, Dkt. No. 209 (N.D. Ill. June 24, 2010) (Zagel, J.) (applying percentage methodology) (copy attached as Ex. 2); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, No 1:09-cv-07666, Dkt. Nos. 693 and 701 (N.D. Ill. Apr. 16, 2014) (awarding one-third percentage fee in similar antitrust class action) (Ex. 3); *see generally Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund[.]").

The percentage of recovery method has many advantages, including ease of administration, consistency with traditional "common fund" principles, and alignment of class/lawyer interests. *See, e.g., Florin*, 34 F.3d at 566 ("there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration"); *Blum v. Stenson*, 465 U.S. 886, 890 n.16 (1984) ("under the common fund doctrine . . . a reasonable fee is based on a percentage of the fund bestowed on the class"); *Kirchoff v. Flynn,* 786 F.2d 320, 326 (7th Cir. 1986) (contingent percentage fee "automatically aligns interests of lawyer and client, rewards exceptional success, and penalizes failure").[5]

[5] *See also* Federal Judicial Center, *Manual For Complex Litigation* § 14.121 (4th ed. 2004) ("the vast majority of courts of appeals now permit or direct district courts to use the

Here, as noted in the Court's prior fee order, Class Counsel's 33% fee request is (1) consistent with the market rate for comparable legal services; (2) supported by fee awards in similar matters; (3) appropriate given the risks, the amount and quality of Class Counsel's work; and (4) supported by the results. Dkt. No. 539 at 2, ¶ 3.

**1. A 33% Contingent Fee Is Consistent with Class Counsel's Market Rate in Similar Cases.**

The attached Joint Declaration of Co-Lead Counsel details the extent to which a 33% contingent fee comports with the *ex ante* market rate for Class Counsel's services. *See* Ex. 1 ¶¶ 32-39. Class Counsel, including Co-Lead Counsel, are recognized nationally as effective high-stakes litigators; are retained often by sophisticated clients in antitrust and other complex matters; and commonly negotiate retainer agreements providing for a one-third (or sometimes greater) contingent fee from any successful recovery. *Id*.

Where, as here, a proposed contingent case involves large claims against sophisticated parties, Co-Lead Counsel typically negotiate for (i) full reimbursement of all litigation expenses, either concurrently or from any settlement or judgment and (ii) a percentage of recovery fee in the range of 25-50%. *Id*. A one-third fee falls well within that range and is both standard and accepted by the market, including in cases with large potential recoveries. *Id.* This data provides direct evidence of Counsel's standard market rate. *See* Dkt. No. 539 at 2 ("The Court finds that a 33% fee comports with the prevailing market rate"); *see also Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 408 (7th Cir. 2000) (one "measure of what is reasonable is what an attorney would receive from a paying client in a similar case.").[6]

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percentage-fee method in common fund cases" in part because "[i]n practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation" and "creates inherent incentive to prolong the litigation").

[6] The same contingent percentage fee structure typically applies when Co-Lead Counsel

### 2. A 33% Contingent Fee Is Consistent with the Market Rate Approved by Courts in Similar Cases.

"[A]ttorneys' fees from analogous class action settlements" can be used to evaluate the market rate for legal services, *Taubenfeld*, 415 F.3d at 600, and further demonstrate the reasonableness of Class Counsel's requested fee.

As the Court explained in its prior fee order, a 33% award is supported by "the Court's consideration of fee awards in similar complex litigation, including many recent antitrust class actions in which 33% fees were awarded for similar work." Dkt. No. 539, ¶ 3. *Accord City of Greenville v. Syngenta Crop Prot., Inc.*, 904 F. Supp. 2d 902, 909 (S.D. Ill. 2012) ("[c]ourts throughout the Seventh Circuit routinely . . . conclude that a one-third contingency fee is standard" in class actions) (collecting cases); *In re ShagrinGas Co.* (crediting plaintiffs' evidence "that the market range for legal services in a contingency matter such as this . . . is 30-33%") (Ex. 2).[7]

represents a class. *See* Ex. 1, Joint Decl. ¶¶ 32-39 (collecting cases). In the *Urethane Antitrust Litigation*, for example, Co-Lead Counsel were awarded one-third of the settlement fund to compensate class counsel for years of difficult litigation. *Id.* ¶ 36.

[7] *See also In re Plasma-Derivative Protein Therapies Antitrust Litig.*, Dkt. Nos. 693, 697, 697-1 and 701 (N.D. Ill. 2014) (one-third fee from settlements totaling $128 million) (Ex. 3); *Gaskill*, 160 F.3d at 364 (7th Cir. 1998) (affirming 38% fee award); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 598 (N.D. Ill. 2011) ("cases from within the Seventh Circuit show that an award of 33.3% of the settlement fund is within the reasonable range."); *Heekin v. Anthem, Inc.*, No. 1:05-CV-01908, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012) (reviewing Seventh Circuit authority and awarding one-third fee from $90 million fund); *In re Ready-Mixed Concrete Antitrust Litig.*, 1:05-CV-00979, 2010 WL 3282591, at *3 (S.D. Ind. Aug. 17, 2010) (approving one-third fee); *Retsky Family Ltd. Partnership v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (in a complex class action, "[a] customary contingency fee would range from 33 1/3% to 40%"); *In re Lithotripsy Antitrust Litig.*, No. 98 C 8394, 2000 WL 765086, *2 (N.D. Ill. June 12, 2000) ("33.3% of the fund plus expenses is well within the generally accepted range of attorneys['] fees in class-action antitrust lawsuits"); *Goldsmith v. Tech. Solutions Co.*, 92 C 4374, 1995 WL 17009594, at *8 (N.D. Ill. Oct. 10, 1995) ("courts in this District commonly award attorneys' fees equal to approximately one-third or more of the recovery").

The recent *Plasma-Derivative Protein Therapies* case is illustrative. As here, *Plasma* involved complex antitrust claims including alleged supply restriction. As here, *Plasma* class counsel devoted millions of dollars in time and expenses to litigating the case on a purely contingent basis. As here, the *Plasma* defendants settled in stages, with an initial settlement of $64 million and a subsequent final settlement for another $64 million. *See* Ex. 3 (compendium of relevant *Plasma* filings and orders). The *Plasma* court in turn awarded a one-third fee from *both* settlements as fair and reasonable compensation for class counsel's work. *Id.*

Many other recent complex antitrust cases are in accord, demonstrating the accepted nature of a one-third fee in this type of case. *See, e.g. In re Dairy Farmers*, 80 F. Supp. 3d at 842 (one-third fee from $46 million common fund settlement); *In re Southeastern Milk Antitrust Litig.*, No. 2:08–MD–1000, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013) (one-third fee); *In re Titanium Dioxide Antitrust Litig.*, 10–CV–00318, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (same); *In re Skelaxin (Metaxalone) Antitrust Litig.*, MDL No. 2343, 2014 WL 2946459, at *1 (E.D. Tenn. Jun. 30, 2014) ("one third fee is fair and reasonable and fully justified" and "within the range of fees ordinarily awarded") (collecting cases); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 748-52 (E.D. Pa. 2013) (noting that "in the last two-and-a-half years, courts in eight direct purchaser antitrust actions approved one-third fees"); *In re Fasteners Antitrust Litig.*, CIV.A. 08-md-1912, 2014 WL 296954, at *7 (E.D. Pa. Jan. 27, 2014) ("Co–Lead Counsel's request for one third of the settlement fund is consistent with other direct purchaser antitrust actions."); *Ready-Mixed Concrete*, 2010 WL 3282591, at *3 (one-third fee).

This authority confirms that a 33% fee award is within the range of reasonableness in comparable antitrust litigation, particularly given the case-specific risks described below.

**3. A 33% Contingent Fee Is Justified by the Risks and Challenges of the Litigation.**

The Seventh Circuit has emphasized that fee awards must be evaluated "in light of the risk of nonpayment," *Synthroid*, 264 F.3d at 718, and that "a higher risk of loss does argue for a higher fee." *Trans Union*, 629 F.3d at 746. *See also Florin*, 34 F.3d at 565 ("A court must assess the riskiness of the litigation by measuring the probability of success of this type of case *at the outset* of the litigation.") (emphasis in original).

The risk here was considerable, including for Class Counsel's work on the case from August 2014 to the present. A denial of class certification, for example, was a serious risk throughout the 2014-15 timeframe. The Defendants also sought appellate review of the Court's certification order, which created the risk of significant delay and/or reversal. And even after the Seventh Circuit denied Defendants' Rule 23(f) petition in December 2015, enormous risks remained on the merits, including summary judgment, renewed *Daubert* motions, other evidentiary challenges, trial risks, further stages of the case, post-trial motions, appeals, and much more. *See also* Ex. 1 ¶ 10 (joint declaration detailing case-specific risks). In short, there was never any guarantee that any of Class Counsel's time from mid-2014 to the present would be compensated. *See generally In re Linerboard Antitrust Litig.,* MDL No. 1261, 2004 WL 1221350, at *10 (E.D. Pa. Jun 2, 2004) ("an antitrust class action is arguably the most complex action to prosecute" because the "legal and factual issues are always numerous and uncertain in outcome") (citations omitted).

Given these potential pitfalls, the risks justify a 33% fee award to compensate Class Counsel for committing millions of dollars of professional time (and over $450,000 in out-of-pocket expenses) to advancing the claims of the class in the years since the prior settlements, all of which was done on a fully contingent basis. *See, e.g., Syngenta*, 904 F. Supp. 2d at 909

("Given the extreme difficulty presented by this matter and the attendant risk in investing years of attorney time carrying millions of dollars in litigation expenses with no guarantee of recovery, a substantial risk multiplier is warranted" and a "fee award of one-third of the fund is thus appropriate[.]"); *Southeastern Milk,* 2013 WL 2155387, at *5 ("counsel undertook this case on a contingency-fee basis and accepted a substantial risk of non-payment for legal work and reimbursement of out-of-pocket expenses advanced. The Court finds that the fee awarded should fully reflect the risk taken by these lawyers and is a very substantial factor in this case which weighs in favor of the requested [one-third] fee.").

The risks of litigating on the merits are further underscored by the fact that Class Counsel investigated and developed the claims on their own. There were no government investigations or indictments available to use as foundation or evidence. Class Counsel prosecuted the case on their own, with their own resources, and courts have long recognized that attorneys should be awarded a larger percentage fee in this situation to account for the greater risk and the fact that, absent counsel's independent work, the class would not have recovered anything at all.[8]

Antitrust policy favors this result. The Supreme Court has emphasized repeatedly that "the private cause of action plays a central role in enforcing this [antitrust] regime." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985); *see also Pillsbury Co.*

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[8] *See, e.g., In re Automotive Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2008 WL 63269, at *5 (E.D. Pa. Jan. 3, 2008) ("The risk of nonpayment is even higher when a defendants' *prima facie* liability has not been established by the government in a criminal action" and thus "warrants approval" of class counsel's one-third fee request.); *Linerboard*, 2004 WL 1221350, at *11 (same); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 2000 WL 204112, at *1 (N.D. Ill. Feb. 10, 2000) ("This case was not marked by any governmental investigations or prosecutions, leaving the development of the facts in the hands of private litigants . . . Because of the uncertainty of the outcome of the case and the enormous amount of work necessary to the prosecution of the charges, counsel for the Class Plaintiffs had to invest a great deal of time and money even while faced with the risk of non-recovery.").

*v. Conboy*, 459 U.S. 248, 262-63 (1983) (same); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 664 (7th Cir. 2002) (same). It is thus important to incentivize skilled counsel by rewarding them for success in this type of complex contingent case—particularly where, as here, the conduct at issue went uncharged by the government. *See generally Southeastern Milk*, 2013 WL 2155387 at *5 ("failing to fully compensate class counsel for the excellent work done and the various substantial risks taken would undermine society's interest in the private litigation of antitrust cases. Society's interests are clearly furthered by the private prosecution of civil cases which further important public policy goals, such as vigorous competition by marketplace competitors. Simply put, anti-competitive conduct such as that alleged in this case would likely go unchallenged absent the willingness of attorneys to undertake the risks associated with such expensive and complex litigation.").

**4. A 33% Fee Is Supported by the Amount and Quality of Class Counsel's Work and the Results Achieved for the Class.**

The Court should further consider the amount and quality of Class Counsel's work in its fee analysis, *Synthroid*, 264 F.3d at 721, as well as "the litigation's ultimate degree of success." *Americana Art*, 743 F.3d at 247 (court is permitted to consider success of the case as another factor supporting fee award). *Accord Brand Name Prescription Drugs*, 2000 WL 204112, at *2 ("There is no question that the results achieved by class counsel were extraordinary and that they are entitled to a substantial award."). Both factors fully support a 33% fee.

A large amount of work supports the requested fee. Class Counsel have devoted 12,472.83 hours in previously-uncompensated time to the case, and the very nature of the litigation—a nationwide antitrust class action against large Defendants represented by preeminent counsel—underscores the scope of the undertaking. *Linerboard*, 2004 WL 1221350, at *8 ("the quality and vigor of opposing counsel is relevant in evaluating the quality of

plaintiffs' counsel.").

The quality of work and outcome achieved also support a 33% fee. On every issue raised by Defendants and their capable counsel—from the motion to dismiss stage, to major discovery disputes, to dozens of contested class certification and *Daubert* issues, to the issues litigated in the merits phase—Class Counsel have argued their case professionally, and kept the matter moving forward. Class Counsel respectfully submit that their representation has been vigorous, efficient and effective, and that this played an important role in achieving the recent settlements for the Class. *See also* Dkt. No. 539 at 2, ¶ 3 (Court's prior order emphasizing that "amount and quality of Class Counsel's work" support 33% fee); *id.* at ¶ 4 (Class Counsel "handled the matter effectively"); *id*. at 3, ¶ 6 (Class Counsel "performed their work reasonably and efficiently").

Finally, the results for the Class support the requested fee award. As with the previous settlements, this $30 million recovery is a substantial amount of money—all cash, with only a small potential reduction for opt outs—and the settlement fund simply would not exist but for the efforts of Class Counsel to initiate and prosecute the case. Moreover, because the proposed claims process is user-friendly and straightforward, Class members will be in a position to receive their *pro rata* share of the settlement fund with a minimum of effort after this Court rules on the motion for final settlement approval and attorneys' fees. *See* Plaintiffs' Plan of Allocation and Distribution (attached as Ex. 4).

Accordingly, for all the reasons stated in Plaintiffs' preliminary approval papers, see Dkt. No. 654 (incorporated herein by reference), the settlements deliver a significant common fund benefit for class members, and support the requested 33% fee award.

### C. Lodestar/Multiplier Analysis Supports the Requested Fee Award

The Court may in its discretion "cross-check" a percentage fee award with the lodestar method to confirm its reasonableness. *See* Manual for Complex Litigation (Fourth) § 21.724.

As explained at page 9, *supra*, the lodestar method involves multiplying the hours devoted to the case by the relevant professional's hourly rate, then applying a case-specific "multiplier" to compensate for risk, outcome, and quality of work. *See generally In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 302-03 (3d Cir. 2005) (explaining lodestar cross-check method and emphasizing that it requires "neither mathematical precision nor bean-counting").

When using the lodestar method, a multiplier is generally "mandated" in successful cases in which counsel bore the risk of loss. *See, e.g., Florin*, 34 F.3d at 565; *Continental Illinois*, 962 F.2d at 569 ("the need for such an adjustment is particularly acute in class action suits"); *Florin v. Nationsbank of GA*, 60 F.3d 1245, 1247 (7th Cir. 1995) ("court[s] must also be careful to sustain the incentive for attorneys to continue to represent such clients on an 'inescapably contingent' basis") (citation omitted); *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 253 (7th Cir. 1988) ("the higher the risk . . . the greater the multiplier necessary to compensate plaintiff's attorney for bringing the action").

Typical multipliers range from 1-4 depending on the facts. As the Court explained in its prior fee order, a multiplier of approximately 2.0 falls "well within the range of reasonable multipliers awarded in similar cases" such that a "lodestar 'cross check' further supports a 33% fee award." Dkt. No. 539 at ¶¶ 5-7. *See also Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991) (multipliers from 1-4 have been approved); *Southeastern Milk*, 2013 WL 2155387, at * 4 ("multiplier of 1.90, clearly within, but in the bottom half of, the range of typical lodestar multipliers"); *Skelaxin,* 2014 WL 2946459, at *2 (collecting cases and awarding "multiplier between 2.1 and 2.5," which is "reasonable in light of what has been routinely accepted as fair and reasonable in complex matters such as this one"); *Flonase*, 951 F. Supp. 2d at 750-51 (multipliers of 1-4 are common in antitrust cases, and awarding one-third fee and 2.99

multiplier); *Newberg on Class Actions* §14.6 (4th ed. 2009) ("multiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied.").[9]

Here, the lodestar method shows that the requested fee award falls squarely within the range of reasonableness. Based on Class Counsel's historical rates (*i.e.*, the rates that were in effect at the time each hour was billed), the total lodestar from August 1, 2014, to November 30, 2016, is $5,915,568.00, which translates to a requested multiplier of 1.67.[10] Alternatively, based on current hourly rates (as distinct from historical rates), Class Counsel's total lodestar for this period is $6,136,867.25, which translates to a requested multiplier of 1.61.[11]

A multiplier of 1.67 at historical rates (or 1.61 at current rates) falls well within the range of reasonableness and appropriately compensates Class Counsel for bearing the significant contingent fee litigation risks described above. *See generally Gaskill*, 160 F.3d at 363 ("Because they shift part of the risk of loss from client to lawyer, contingent-fee contracts usually yield a larger fee in a successful case than an hourly fee would.").

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[9] *See also Southeastern Milk*, 2013 WL 2155387, at *4-5 (1.9 multiplier); *Skelaxin*, 2014 WL 2946459, at *2 (2.1-2.5 multiplier); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900, at *8 (N.D. Cal. Apr. 3, 2013) (average multiplier of 2.4-2.6); *Flonase*, 951 F. Supp. 2d at 750-51 (2.99 multiplier); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340-SLR, Dkt. No. 543 (D.Del. Apr. 23, 2009) (3.93 multiplier) (copy attached as Ex. 5); *Linerboard*, 2004 WL 1221350, at *16 (2.66 multiplier); *Brand Name Prescription Drugs,* 2000 WL 204112, at *3 (2.06 multiplier).

[10] The hourly rates on which this calculation is based are the same rates charged to paying clients for similar work. *See Jeffboat, LLC v. Dir., Office of Workers' Comp. Programs*, 553 F.3d 487, 489-90 (7th Cir. 2009) (recognizing "presumption that an hourly rate is reasonable where the attorney demonstrates that the hourly rate she has requested is in line with what she charges other clients for similar work."); Joint Decl., Ex. 1, at ¶ 24 (lodestar submissions here are based on the same rates charged to paying clients for similar work).

[11] Use of current billing rates is permitted under Seventh Circuit authority to account for the delay of payment associated with this type of case. *Smith v. Vill. of Maywood*, 17 F.3d 219, 221 (7th Cir. 1994).

## II. THE REQUESTED EXPENSE REIMBURSEMENT IS FAIR AND REASONABLE

Beyond attorneys' fees, Class Counsel are entitled to reimbursement of litigation costs of the type ordinarily charged to paying clients. *See Synthroid*, 264 F.3d at 722.

As background, the Court will recall that Class Counsel were reimbursed previously for all litigation expenses incurred from the inception of the case through July 31, 2014. *See* Dkt. No. 539. Class Counsel now respectfully request reimbursement of litigation expenses incurred from August 1, 2014, through November 30, 2016, in the amount of $465,602.62, which includes costs associated with, *inter alia*, maintenance of the e-discovery platform (on which millions of pages of documents were stored and reviewed), deposition-related costs, inside and outside copying, travel, computer research (*e.g.*, Westlaw, LEXIS and PACER costs), filing fees, phone charges, courier and postage costs, and the like, all of which was necessary to the prosecution of the case. *See* Ex. 1, Joint Decl. ¶ 30 (detailed itemization).[12]

Such costs are billed routinely to paying clients in similar matters, *id.*, and are well accepted as recoverable in the class action context. *See* Dkt. No. 539 (Court's prior expense award). *See also, e.g., In re ShagrinGas*, Dkt. No. 209 ("under the common fund doctrine attorneys may collect their related expenses") (copy attached as Ex. 2); *Syngenta*, 904 F. Supp. 2d at 910 (approving similar reimbursement); *Brown v. Pro Football, Inc.*, 839 F. Supp. 905, 916 (D.D.C. 1993) ("out-of-pocket costs for telephone, telecopier, air and local couriers, postage, photocopying, WESTLAW research, secretarial overtime, and counsels' travel expenses are routinely billed to fee-paying clients, and thus are all compensable") (citations omitted), *rev'd on other grounds*, 50 F.3d 1041 (D.C. Cir. 1995).

[12] Class Counsel do not seek reimbursement for costs and expenses associated with either this fee petition or the 2014-era fee petition, and have excluded such expenses from the totals submitted herein.

## III. INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES

"Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). "In deciding whether such an award is warranted, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Id. See also Koszyk v. Country Fin. a/k/a CC Servs., Inc.*, No. 16-cv-3571, 2016 WL 5109196, at *2 (N.D. Ill. Sept. 16, 2016) ("Incentive awards serve the important purpose of compensating plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred . . . and any other burdens sustained by the plaintiffs. Accordingly, service payments are commonly awarded to those who serve the interests of the class.") (citations omitted).

In the antitrust context, "courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred," particularly in cases in which "the class representatives launched [the] litigation despite the risk of retaliation inherent in suing a supplier." *Flonase*, 951 F. Supp. 2d at 752 (approving $50,000 award for named plaintiff). *See also In re Plasma-Derivative Protein Therapies Antitrust Litig.*, Dkt. No. 701 (N.D. Ill. Apr. 16, 2014) (minute entry approving $50,000 awards to each direct purchaser class representative in very similar antitrust case that involved a total common fund recovery of $128 million) (copies of relevant *Plasma* background papers attached as Ex. 3).

Here, as in the comparable *Plasma* case, incentive awards of $50,000 to each of the class representatives are reasonable and appropriate given the risks borne, work done, and class-wide benefits conferred by the named plaintiffs over eight years of complex litigation.

*First*, the class representatives stepped forward in the first instance to file large, hotly-contested claims against the country's most powerful steel producers, despite the "inherent" business risk associated with suing suppliers. *Flonase, supra*; *see also Automotive Refinishing Paint*, 2008 WL 63269, at *7 (incentive awards appropriate where "[t]he Class Representatives not only conferred benefits on all of the Class members, but also risked jeopardizing their existing relationships with their suppliers"); *Cook*, 142 F.3d at 1016 (risk of "retaliation" is a "significant" factor supporting incentive award). Moreover, the risk of retaliation is even greater in a case initiated by the named plaintiffs rather than the government, because the plaintiffs are viewed by their suppliers as being solely responsible for disrupting the industry.[13]

*Second*, the named plaintiffs devoted substantial time and effort to advancing the claims and protecting the interests of the class. For example, all five class representatives shouldered significant discovery burdens, including preserving and collecting voluminous documents and data from their archives and warehouse locations, and, eventually, producing thousands of pages of highly sensitive business information to the Defendants. Joint Decl. at ¶¶ 40-47. The class representatives also consulted on factual and strategy issues throughout the case, answered multiple rounds of interrogatories, prepared and sat for depositions, and represented the interests of the class in the settlement process with eight different Defendants. *Id. See, e.g., Flonase*, 951 F. Supp. 2d at 751 (approving $50,000 incentive award where named plaintiff "actively assisted in the preparation and prosecution of the case by collecting and producing records [and] preparing for and giving depositions").[14]

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[13] The risk of retaliation was tangible in this case, as one of the named plaintiffs, Alco, suffered delayed shipments as a result of its involvement. Joint Decl. ¶ 46.

[14] Standard Iron Works (the plaintiff in the first-filed case) played a particularly notable

*Third*, the class representatives' multi-year commitment resulted in extraordinary benefits for the Class. Without named plaintiffs willing to step forward and undertake the responsibilities summarized above, the $193.9 million recovery in this case would not exist, and these bottom line results fully support the requested incentive award. *See, e.g., Titanium Dioxide*, 2013 WL 6577029, at *1 (total of $175,000 incentive awards for three named plaintiffs in case with total class recovery of $163.5 million); *Plasma*, *supra* ($50,000 for each class representative in similar case with total class recovery of $128 million); *Flonase*, *supra* ($50,000 for one class representative and $40,000 for the other in antitrust case with $150 million in total settlements); *cf. Cook*, 142 F.3d at 1016 (approving incentive award of $25,000 in case that recovered only $13 million for the class).[15]

In sum, the requested incentive awards are fair and reasonable in light of what the class representatives did and achieved for the Class.

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role. For example, senior officers from Standard Iron conferred with Class Counsel during the pre-complaint investigation stage to provide detailed background on the industry, all of which informed the first-filed complaint. *See* Joint Decl. at ¶ 43 (explaining that Standard Iron, a steel fabricator in business since 1914, shared detailed market research regarding the drop in steel supply and rise in prices at issue).

[15] An empirical study of incentive awards found that, "when given, incentive awards constituted, on average, 0.16 percent of the class recovery." Eisenberg, Theodore and Miller, Geoffrey P., "Incentive Awards to Class Action Plaintiffs: An Empirical Study," 53 *UCLA Law Review* 1303, at 1338-39 (2006). Here, the total requested incentive award of $250,000 represents 0.13 percent of the $193.9 million total common fund recovery in the case.

## CONCLUSION

Based on the foregoing, Class Counsel respectfully request that their Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Incentive Awards for Class Representatives be granted.[16]

Dated: December 5, 2016

Respectfully submitted,

/s/ Jeffrey S. Istvan

Michael J. Guzman
Thomas W. Traxler, Jr.
**KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.**
Sumner Square
1615 M Street, NW, Suite 400
Washington, DC 20036
Tel.: (202) 326-7900

Jeffrey S. Istvan
Matthew Duncan
Adam J. Pessin
**FINE, KAPLAN AND BLACK, R.P.C.**
One South Broad Street, 23rd Floor
Philadelphia, PA 19107
Tel.: (215) 567-6565

***Counsel for Plaintiffs and the Proposed Settlement Class***

[16] As with the prior fee award, Co-Lead Counsel proposes to "allocate the fee award among co-counsel in a reasonable manner consistent with Co-Lead Counsel's assessment of each firm's contribution to the prosecution of the case." Dkt. No. 539, at 4, ¶ 9. *See also Plasma*, Dkt. No. 693 at 3 (recent case in this district awarding one-third fee and authorizing co-lead counsel to allocate fee based on each law firm's respective contributions to the litigation) (copy attached as Ex. 3); *Auto Refinishing Paint*, 2008 WL 63269, at *7 ("Courts generally approve joint fee applications which request a single aggregate fee award with allocations to specific firms to be determined by Co-Lead Counsel, who are most familiar with the work done by each firm and each firm's overall contribution to the litigation."); *Linerboard*, 2004 WL 1221350, at **17-18 (same); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533 n.15 (3d Cir. 2004) (noting "the accepted practice of allowing counsel to apportion fees amongst themselves").

**CERTIFICATE OF SERVICE**

I hereby certify that on this 5th day of December, 2016, I caused a true and correct copy of the foregoing **Class Counsel's Memorandum in Support of Motion for Attorneys' Fees, Reimbursement of Litigation Expenses, and Incentive Awards for Class Representatives** to be filed with the Court via the Court's ECF system, and served via e-mail to all counsel.

/s/ *Jeffrey S. Istvan*
Jeffrey S. Istvan