UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ROBERTO RAMIREZ and THOMAS IHLE, Plaintiffs, -against- J.C. PENNEY CORPORATION, INC., MICHAEL DASTUGUE, JANET DHILLON, KENNETH HANNAH, MICHAEL KRAMER, RONALD JOHNSON, and MYRON E. ULLMAN, III, Defendants.	Civil Action No. 6:14-cv-00601-RWS-KNM CLASS ACTION

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND CASE CONTRIBUTION AWARDS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

Rules

I. PRELIMINARY STATEMENT

Pursuant to FED. R. CIV. P. 23(h), Roberto Ramirez and Thomas Ihle ("Named Plaintiffs") respectfully submit this memorandum in support of their motion for an award of attorneys' fees to Class Counsel[1] for services rendered in this Action, reimbursement of litigation costs and expenses incurred in successfully prosecuting this Action and administrating this Settlement, and Case Contribution Awards.

Class Counsel is concurrently filing a motion and supporting memorandum of law for final judicial approval of the Agreement under FED. R. CIV. P. 23(e) (the "Settlement Memorandum"), and the Declaration of Samuel E. Bonderoff in Support of (1) Unopposed Motion for Final Approval of Proposed Settlement, Certification of Settlement Class and Approval of the Plan of Allocation, and (2) Motion for An Award of Attorneys' Fees, Reimbursement of Litigation and Administration Expenses, and Case Contribution Awards (the "Bonderoff Declaration" or "Bonderoff Decl.").

A. Brief Procedural History

Named Plaintiffs, by and through Class Counsel, brought this Action on behalf of themselves and all other Persons who were participants in or beneficiaries of the J. C. Penney Corporation, Inc. Savings, Profit Sharing and Stock Ownership Plan (the "Plan") at any time from November 1, 2011 through May 31, 2016 (the "Class Period"), and whose Plan accounts included investments in the J.C. Penney Common Stock Fund (the Settlement Class").[2] Bonderoff Decl. at ¶ 4. The Parties agreed to and this Court has preliminarily approved a proposed Settlement of this

[1] Capitalized terms used herein are defined in the Amended Class Action Settlement Agreement and Release, dated May 31, 2016 (the "Settlement Stipulation") (Dkt. No. 68-1).

[2] The Settlement Class excludes Defendants and their immediate family members.

ERISA case for $4.5 million (*see* Dkt. No. 76), which will provide a substantial recovery to the Settlement Class members. The proposed Settlement, if finally approved by the Court, will resolve all claims asserted by Named Plaintiffs and the Settlement Class.

Class Counsel has vigorously prosecuted this Action on behalf of Plaintiffs, the Plan and its participants (the "Participants"). After reviewing numerous publically available documents, including but not limited to news articles, press releases, analyst reports and regulatory filings, the Named Plaintiffs, by and through Class Counsel, filed an Amended Complaint on August 25, 2014. *See* Bonderoff Decl. at ¶ 5. On November 7, 2014, Defendants filed a Motion to Dismiss which was later denied on September 29, 2015. On January 8, 2016, the Court ordered the Parties to pursue nonbinding mediation. On February 22, 2016, Defendants filed a Motion for Reconsideration of the Court's denial of their Motion to Dismiss.

Prior to the mediation order, and in accordance with the controlling discovery orders, the Parties had begun to move forward with substantial discovery efforts. When the mediation was scheduled, the Parties then narrowed their focus on discovery to facilitate settlement negotiations. Defendants produced what would be, if printed, in excess of one hundred thousand pages of damages-related trade data (the "Plan Data"). *See* Bonderoff Decl. at ¶ 8.

B. Settlement Negotiations

In January 2016, the Parties agreed upon a well-known, respected and experienced mediator, Robert A. Meyer, of JAMS (the "Mediator"). Bonderoff Decl. at ¶ 7. Later that same month, the Parties met and conferred and agreed to mediate this action on March 24, 2016, in Dallas, Texas. In anticipation of mediation, Defendants produced voluminous Plan Data and the Parties spoke several times via telephone conferences to set forth their positions regarding

Plaintiffs' likelihood of successfully prosecuting their claims and the potential damages if Plaintiffs could prove their claims.

The Parties then met for an in-person mediation on March 24, 2016, which commenced at 9:00 a.m. and continued until approximately 7:30 p.m. The mediation concluded favorably for the Class with the Parties executing a Term Sheet setting forth the material terms of the Settlement. Extensive negotiations over the remaining terms of the settlement stipulation continued until May 31, 2016, when the Settlement Stipulation was executed. Bonderoff Decl. at ¶ 9.

C. The Fees, Expenses and Case Contribution Awards Sought

As discussed below, this motion is premised on a number of factors, including the substantial monetary result Class Counsel have achieved for members of the Class; the numerous and substantial risks undertaken, on a wholly contingent basis, by Class Counsel; Class Counsel's vigorous and skillful prosecution of the Action, and; the lack of any objections received to date by members of the Class to the requested fees.

As compensation for their efforts on behalf of the Class, Plaintiffs' counsel respectfully request that the Court award attorneys' fees equal to 30% of the $4,500,000 Gross Settlement Fund, or $1,350,000. Plaintiffs' counsel also seeks reimbursement of $46,462.41 in out-of-pocket expenses which they reasonably and necessarily incurred in litigating Class members' claims. Bonderoff Decl. at ¶ 19.

The percentage method of fee awards has become the prevailing method for awarding fees in common fund cases within the Fifth Circuit and throughout the United States. *Union Asset Mgmt. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012); *Vassallo v. Goodman Networks, Inc.*, No. 4:15CV97-LG-CMC, 2016 U.S. Dist. LEXIS 142379, at *8 (E.D. Tex. Oct. 13, 2016); *Shaw v.*

Toshiba Am. Info., 91 F. Supp. 2d 942, 963-67 n.15 (E.D. Tex. 2000) (Heartfield, J.) (collecting cases within Fifth Circuit approving of percentage award).

The fee requested is unquestionably fair and reasonable when considered under the applicable standards and, as discussed below, is well within the normal range of awards made in contingent fee matters for class actions in the Fifth Circuit and in ERISA Actions across the country, particularly in view of the number of hours spent litigating this action and the considerable risks attendant in bringing and pursuing this Action. Furthermore, under a "lodestar" analysis, the time spent by plaintiffs' counsel in common fund cases, as outlined below, has been routinely multiplied by a factor of 3 to 4.5 times in order to compensate them for having undertaken the very real risk of receiving no compensation at all and for the delay from the time the services were rendered until payment. The fees sought represent a 1.73 multiplier of petitioning counsel's total lodestar which exceeds $781,000 and which reflects over 978 hours of professional time.

Additionally, as demonstrated below, expenses borne by Class Counsel have been fair and reasonable, and the Case Contribution Awards of $5,000 for each of the Named Plaintiffs are fair and reasonable.

Notice was sent to 55,331 Class members[3] based upon the Plan's records. The Notice stated that Plaintiffs' Counsel would seek an award of attorneys' fees not in excess of 30% of the amount recovered in the Settlement and actual case expenses incurred, as well as Case Contribution Awards not to exceed $5,000 per Named Plaintiff. The deadline for Class members

[3] *See* Declaration of Abigail Schwartz of Rust Consulting, Inc. (the "Rust Consulting Decl."), attached as Exhibit 2 to the Declaration of Samuel E. Bonderoff (the "Bonderoff Decl.") at ¶¶ 11, 15.

to object to the Plaintiffs' Counsel's Fee Request is July 10, 2017. No objections have been received to date.[4]

II. THE REQUESTED FEE IS FAIR AND REASONABLE AND SHOULD BE APPROVED

A. A Reasonable Percentage of the Fund Recovered is an Appropriate Approach to Awarding Attorneys' Fees in Common Fund Cases

For their efforts in creating a common fund for the benefit of the Class, Plaintiffs' Counsel seeks a reasonable percentage of the fund recovered for the Class. It is well established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to attorneys' fees based upon the benefit obtained. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991). The Supreme Court and the Fifth Circuit have recognized that "[a] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Barton v. Drummond Co.*, 636 F.2d 978, 982 (5th Cir. 1981) (citing *Van Gemert*, 444 U.S. at 478); *see also Camden I*, 946 F.2d at 771 ("Attorneys in a class action in which a common fund is created are entitled to compensation for their services from the common fund, but the amount is subject to court approval.").

Dell, the controlling authority regarding attorneys' fees in common-fund class action cases, the Fifth Circuit "endorse[d] the district courts' … use of the percentage method" when calculating attorneys' fees in common fund class action cases. 669 F.3d at 644. When using the "percentage method . . .[,] the court awards fees as a reasonable percentage of the common fund." *Id.* at 642. "[D]istrict courts in [the Fifth] Circuit regularly use the percentage method," which "allows for

[4] Any objections filed will be addressed before July 19, 2017 pursuant to the Preliminary Approval Order.

easy computation" and "aligns the interests of class counsel with those of the class members." *Id.* at 643; *see also Bethea v. Sprint Communs. Co. L.P.*, No. 3:12-cv-322-CWR-FKB, 2013 U.S. Dist. LEXIS 7696, at *8 (S.D. Miss. Jan. 18, 2013) ("adopt[ing] the percentage-of-the-fund approach" to calculate attorneys' fees in a common fund class action case). When using the percentage method, a lodestar cross-check is helpful "to avoid windfall fees, i.e., to ensure that the percentage approach does not lead to a fee that represents an extraordinary lodestar multiple. *Vassallo*, 2016 U.S. Dist. LEXIS 142379 at *9 (internal quotations and citations omitted). Under the percentage method, the Court first determines the "value conferred to the class" and then applies the twelve factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), "to determine whether the percentage should be adjusted upward or downward." *Id.* The value conferred on the class is based upon the settlement agreement. *Id.*

There is no general rule regarding what a reasonable percentage of a common fund is. *Bethea*, 2013 U.S. Dist. LEXIS 7696 at *8. "[I]t is not unusual for district courts in the Fifth Circuit to award percentages of approximately one third" however, awards commonly fall between 20% at the lower end, and 50% at the higher end. *Smith v. Tower Loan of Miss.*, Inc., 216 F.R.D. 338, 369 (S.D. Miss. 2003). At 30%, Class Counsel's fee request falls squarely within the acceptable range.

The Court must now apply the *Johnson* factors: (1) the time and labor required; (2) the novelty and difficulty of the relevant questions; (3) the skill required to properly carry out the legal services; (4) the preclusion of other employment by the attorney as a result of his acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the clients or the circumstances; (8) the results obtained, including the amount recovered for the clients; (9) the experience, reputation, and ability of the attorneys; (10) the

"undesirability" of the case; (11) the nature and length of the professional relationship with the clients; and (12) fee awards in similar cases. *Johnson*, 488 F.2d 714 at 717-19. The *Johnson* factors support the approval of this fee request.

B. Consideration of the *Johnson* Factors Justifies a Fee Award of 30% in this Case

1. The Claims Against J.C. Penney Required Substantial Time and Labor

Prosecuting and settling these claims demanded considerable time and labor, making this fee request reasonable. The Parties litigated this lawsuit for approximately two years. Throughout the pendency of the Action, Class Counsel expended significant resources preparing the case. Class Counsel spent many hours speaking with Named Plaintiffs and reviewing thousands of pages of documents, including Plan governing documents and materials, Securities and Exchange Commission filings, Department of Labor filings, public statements, news articles and publications. Bonderoff Decl. ¶ 5. This information was essential to Class Counsel's ability to understand the nature of Defendants' conduct and potential remedies.

Class Counsel also devoted extensive time and effort to researching and preparing various motions and responses, including the oppositions to Defendants' motion to dismiss and motion for reconsideration. *See* Bonderoff Decl. ¶ 5.

Prior to, and in preparation for mediation, Class Counsel conducted substantial discovery. Bonderoff Decl. ¶ 6. In further preparation for mediation, Class Counsel worked with experts to evaluate the trade data produced by Defendants and calculate and refine damage numbers. *Id.* at ¶ 8. Also prior to mediation Class Counsel had multiple phone calls with the mediator Robert A. Meyer of JAMS and Defendants' Counsel. *Id.* at ¶ 3. Class Counsel attended the successful one-day mediation, however even after the Agreement was reached, several weeks of detailed

discussions followed concerning the specific terms of the Settlement, which was executed in May 2016. *Id.* at ¶ 9.

Indeed, Class Counsel's work paid great dividends for the Settlement Class. All of the above-described efforts were necessary in achieving the Settlement currently before this Court. Bonderoff Decl. ¶ 11. The time and resources Class Counsel devoted to prosecuting and settling this Action readily justify the fee that is being requested.

2. The Issues Involved Were Novel and Difficult and Required the Skill of Highly Talented Attorneys

Whether Defendants breached the fiduciary duty of prudence owed to Plaintiffs, the Plan, and the Settlement Class was a contested issue that was by no means certain. No consistent jurisprudence for ERISA stock fund claims has emerged since *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), which abrogated approximately twenty years-worth of appellate jurisprudence. The management of this effort presented challenges most law firms are simply not able to meet.

Litigation of this Action required counsel highly trained in class action law and procedure as well as the specialized ERISA issues presented here. Class Counsel possess these attributes, and their participation added immense value to the representation of this large Settlement Class. Bonderoff Decl. ¶ 1.

As demonstrated by their resume, "Class Counsel in this case belong to what they credibly maintain is a small and select group of experienced class counsel who have litigated numerous ERISA pension benefit class actions." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 352 (S.D.N.Y. 2014); *see* Bonderoff Decl. Ex. 1. The Bonderoff Declaration includes descriptions of the background and experience of Class Counsel. As those submissions

demonstrate, Class Counsel are experts in the highly specialized field of ERISA class action litigations, experience they have brought to bear in achieving this settlement.

The quality and vigor of opposing counsel is also important in evaluating the services rendered by Class Counsel. *See Billitteri v. Secs. Am.*, Inc., 2011 WL 3585983, *7 (N.D. Tex. Aug. 4, 2011) ("[B]ecause of the extremely effective work of opposing counsel . . . The skill required here . . . certainly justifies the contemplated award"); *Shaw*, 91 F. Supp. 2d at 970 (finding the presence of "very skilled [opposing] counsel from two of the largest, if not the two largest, Texas-based law firms" as relevant to a *Johnson* analysis). Defendants are represented by Proskauer Rose LLP, one of the top ranked national and global law firms, particularly well regarded in the areas of labor and employment law.[5] They were worthy, highly competent adversaries. Bonderoff Decl. ¶ 11; *see also Schwartz v. TXU Corp.*, 2005 WL 3148350, *30 (N.D. Tex. Nov. 8, 2005) ("The standing of opposing counsel should be weighed in determining the fee, because such standing reflects the challenge faced by plaintiffs' attorneys"). The fact that Class Counsel achieved this settlement for the Class in the face of such formidable legal opposition further evidences the quality of their work

3. Class Counsel Achieved a Superb Result

Even though there were significant litigation risks faced by the Settlement Class here, Class Counsel took great risk, demonstrated great skill, and obtained an extraordinary result for the Settlement Class. Bonderoff Decl. ¶ 11. Rather than facing years of costly and uncertain litigation, the overwhelming majority of the Settlement Class will receive an immediate cash benefit. One exceptional point to note is the fact that the Gross Settlement Fund will not be reduced by costs of

[5] *See, e.g.*, http://bestlawfirms.usnews.com/profile/proskauer-rose-llp/rankings/13804; http://www.vault.com/company-profiles/law/proskauer-rose-llp/company-overview.aspx

settlement administration as such expenses have been and will continue to be covered by Defendants.

4. The Claims Presented Serious Risk

In this action, Class Counsel undertook substantial risk. Indeed, ERISA "law was unsettled on several issues relating to liability and/or damages." *Colgate*, 36 F. Supp. 3d 344 at 351. For example, during the mediation, Defendants maintained that the Plan benefitted from net sales, and thus after offsets for gains on those sales, there would be no damages even if liability were proven.

No consistent jurisprudence for ERISA stock fund claims has emerged since *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), abrogated approximately twenty years-worth of appellate jurisprudence. *See generally*, *Murray v. Invacare Corp.*, 125 F. Supp. 3d 660 (N.D. Ohio 2015) (motion to dismiss denied); *In re BP p.l.c. Sec. Litig.*, No. MDL No. 10-md-2185, 2015 U.S. Dist. LEXIS 27138 (S.D. Tex. Mar. 4, 2015) (motion to dismiss denied in part, but interlocutory appeal granted by the Fifth Circuit); *In re HP ERISA Litig.*, No. 3:12-cv-06199-CRB, 2015 U.S. Dist. LEXIS 78007 (N.D. Cal. June 15, 2015) (motion to dismiss granted, appeal pending); *In re JPMorgan Chase & Co. ERISA Litig.*, 2016 U.S. Dist. LEXIS 2709 (S.D.N.Y. Jan. 8, 2016) (motion to dismiss granted).

Furthermore, claims alleging imprudence based upon undue risk have not fared well after the Supreme Court's *Dudenhoeffer*. *See Rinehart v. Lehman Bros. Holdings Inc.*, No. 15-2229, 2016 U.S. App. LEXIS 5114 (2d Cir. Mar. 18, 2016) (affirming Rule 12 dismissal of claims that Lehman Brothers was an imprudent investment for an ERISA plan). While Named Plaintiffs believe that *Rinehart* was wrongly decided and is distinguishable on the facts from those alleged

herein, they nevertheless recognize that the settlement value of the undue risk claim is minimal, at best, at this time.

Consideration of the "litigation risks" factor under *Johnson* "recognizes that counsel should be rewarded for taking on a case from which other law firms shrunk. Such aversion could be due to any number of things, including social opprobrium surrounding the parties, thorny factual circumstances, or the possible financial outcome of a case. All of this and more is enveloped by the term 'undesirable.'" *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1336 (S.D. Fla. 2001). Further, "[t]he point at which plaintiffs settle with defendants . . . is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them." *Skelton v. Gen'l Motors Corp*., 860 F.2d 250, 258 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989). "Undesirability" and relevant risks must be evaluated from the standpoint of plaintiffs' counsel as of the time they commenced the suit – not retroactively, with the benefit of hindsight. *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp*., 540 F.2d 102, 112 (3d Cir. 1976); *Walco*, 975 F. Supp. at 1473. Prosecuting this Action was risky from the outset.

5. Class Counsel Assumed Considerable Risk to Pursue this Action on a Pure Contingency Basis and Were Precluded from Other Employment as a Result

Despite the risks inherent in this litigation, Class Counsel proceeded on a wholly contingent fee basis, risking their time and own money with no guarantee of compensation. Bonderoff Decl. at ¶ 4. Unlike Defendants' Counsel (who are from one of the premier law firms in the Country and were presumably paid substantial hourly rates, and reimbursed for their out-of-pocket expenses on a regular basis), Class Counsel have not yet been compensated for any of their time or expenses, and have prosecuted this Action faced with the very real risk that they might never be compensated for their efforts or recover their out-of-pocket expenses.

In "[r]ecognizing the contingent risk of nonpayment in [class action] cases, courts have found that class counsel ought to be compensated . . . for risk of loss or nonpayment assumed by carrying through with the case." *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 859-60 (E.D. La. 2007) (citing *In re Combustion, Inc.*, 968 F. Supp. 1116, 1132 (W.D. La. 1997)); *see also Billitteri*, 2011 WL 3585983, at *7 (finding the contingency fee arrangement of a class action "particularly relevant" to the *Johnson* analysis "considering the difficulty presented by the facts and legal questions in [such] case[s] and the very real risk of obtaining no recovery at all"); *King v. United SA Fed. Credit Union*, 744 F. Supp. 2d 607, 618 (W.D. Tex. 2010) (finding the fact that "[c]lass counsel undertook [the] case on a contingency fee basis" relevant to the *Johnson* analysis).

Public policy concerns – in particular, ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims – support the requested fee. The *Colgate* court recognized, among other things that:

> Protecting workers' retirement funds is of genuine public interest. Public policy relies on private sector enforcement of the pension laws as a necessary adjunct to Department of Labor intervention. Counsel's fees should reflect the important public policy goal of "providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." [*Goldberger*] at 51. While court awarded fees must be reasonable, setting fees too low or randomly will create poor incentives to bringing large class action cases.

Colgate, 36 F. Supp. 3d at 352 (further citations omitted). The holding is equally applicable here, as the Settlement unquestionably adds funds to Plan accounts. The fee requested, well within the range of other court approved fees in other ERISA common fund cases, is reasonable and in no way random, and should be approved.

The time Class Counsel spent on this case was time that could not be spent on other matters. This fact, along with the risks assumed by pursuing this action on a purely contingency fee basis and public policy concerns strongly supports the requested attorneys' fees.

6. The Requested Fee Comports with Fees Awarded in Similar Cases

The fee sought here matches the fee typically awarded in similar cases both in this Circuit and across the country. "[I]t is not unusual for district courts in the Fifth Circuit to award percentages of approximately one third" however, awards commonly fall between 20% at the lower end, and 50% at the higher end. *Smith v. Tower Loan of Miss.*, Inc., 216 F.R.D. 338, 369 (S.D. Miss. 2003). Indeed, "[F]ederal district courts across the country have, in the class action settlement context, *routinely* awarded class counsel fees in excess of the 25 percent 'benchmark,' even in so-called 'mega-fund' cases." *In re Lease Oil Antitrust Litig*., 186 F.R.D. 403 (S.D. Tex. 1999). (35.1 percent)); *see also Gaskill v. Gordon*, 942 F. Supp. 382, 387-88 (N.D. Ill. 1996) (finding that 33 percent is the norm, and awarding 38 percent of settlement fund), *aff'd*, 160 F.3d 361 (7th Cir. 1998); *In re Crazy Eddie Sec. Litig*., 824 F. Supp. 320, 326 (E.D.N.Y. 1993) (33.8 percent); *In re Ampicillin Antitrust Litig*., 526 F. Supp. 494, 498 (D.D.C. 1981) (45 percent); *Beech Cinema, Inc. v. Twentieth-Century Fox Film Corp*., 480 F. Supp. 1195, 1199 (S.D.N.Y. 1979) (approximately 53 percent), *aff'd*, 622 F.2d 1106 (2d Cir. 1980); *Zinman v. Avemco Corp*., 1978 WL 5686 (E.D. Pa. Jan. 18, 1978) (50 percent).

Class Counsel's fee request falls within the range of the private marketplace, where contingency fee arrangements often approach or equal forty percent of any recovery. *Continental*, 962 F.2d at 572 ("The object in awarding a reasonable attorneys' fee . . . is to simulate the market."); *RJR Nabisco, Inc. Sec. Litig*., Fed. Sec. L. Rep. (CCH) ¶ 94, 268 (S.D.N.Y. 1992) ("[W]hat should govern [fee] awards is … what the market pays in similar cases"). And, "[i]n tort

suits, an attorney might receive one-third of whatever amount the Plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Blum v. Stenson,* 465 U.S. 886, 904 (1984) (Brennan, J., concurring); *see also Kirchoff v. Flynn,* 786 F.2d 320, 323, 325 n.5 (7th Cir. 1986) (noting "40 percent is the customary fee in tort litigation"); *In re Public Serv. Co. of N.M.*, 1992 WL 278452, *7 (S.D. Cal. July 28, 1992) ("If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery.").

The record here leaves no doubt that Class Counsel's fee request is appropriate and comports with attorneys' fees awarded in similar cases across the Fifth Circuit. *See, e.g., In re Shell Oil Refinery,* 155 F.R.D. 552 (E.D. La. 1993) (awarding "1/3 in fees from a settlement fund of $170,000,000") (cited in *In re Combustion,* 968 F. Supp. at 1139); *In re Combustion,* 968 F. Supp. at 1136, 1142 (awarding 36% on a settlement fund of $127,396,000); *Teichler v. DSC Commc'ns Corp.,* CA 3-85-2005-T (N.D. Tex. Oct. 22, 1990) ("plaintiffs' counsel awarded $10 million on a settlement of $30 million in securities class action") (cited in *In re Catfish Antitrust Litig.*, 939 F. Supp. at 500); *Kleinman v. Harris,* Civil Action No. 3:89-CV-1869-X (N.D. Tex. June 21, 1993) ("approving fee of approximately one-third of benefit achieved of $1,170,000") (cited in *In re Catfish Antitrust Litig.*, 939 F. Supp. at 500); *Faircloth v. Certified Fin. Inc.*, 2001 WL 527489, *9 (E.D. La. May 16, 2001) *(*awarding 33.34% on a $1,534,321 settlement fund); *In re Vioxx,* 2013 WL 5295707, at *4-5 (awarding 33%); *Barrera v. Nat'l Crane Corp.*, 2012 WL 242828, at *5 (W.D. Tex. 2012) (awarding one-third); *Finkel v. Docutel/Olivetta Corp.*, CA3-84-0566-T (N.D. Tex. Feb. 23, 1990) ("awarding fees amounting to 33% of settlement fund") (cited in *In re Catfish Antitrust Litig.*, 939 F. Supp. at 500); *In re Lomas Fin. Corp. Sec. Litig.*, No. CA-

3-89-1962-G (N.D. Tex. Jan. 28, 1992) ("approving fee of almost one-third of benefit") (cited in *In re Combustion*, 968 F. Supp. at 1139).

C. The Lodestar Crosscheck Confirms the Reasonableness of the Requested Fee

As this Court has recognized, a lodestar cross-check is helpful "to avoid windfall fees, i.e., to ensure that the percentage approach does not lead to a fee that represents an extraordinary lodestar multiple. *Vassallo*, 2016 U.S. Dist. LEXIS 142379 at *9 (internal quotations and citations omitted). In cases applying the lodestar method to award fees "'multipliers of between 3 and 4.5 have been common.'" Courts in the Fifth Circuit consider multipliers used in comparable cases across other courts. *Newby v. Enron Corp. (In re Enron Corp. Sec.)*, 586 F. Supp. 2d 732, 752 (S.D. Tex. 2008); *see Rabin v. Concord Assets Group, Inc.*, No. 89 Civ. 6130 (LBS), 1991 WL 275757, at *2 (S.D.N.Y. Dec. 19, 1991) (multiplier of 4.4) (citation omitted); *see also Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995) ("Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation."); *see also Keith v. Volpe*, 501 F. Supp. 403, 414 (C.D. Cal. 1980) (multiplier of 3.5); *In re Rite Aid*, 146 F. Supp. 2d 706 (E.D. Pa. 2001) (multipliers of 4.5-8.5); *In re WorldCom, Inc. Sec. Litig.*, No. 02 CIV 3288 (DLC), 2004 WL 2591402, at *17 (S.D.N.Y. Nov. 12, 2004) (multiplier of 2.46); *In re Lucent Tech., Inc. Sec. Litig.*, 327 F. Supp. 2d 426 (D.N.J. 2004) (multiplier of 2.13); *Kurzweil v. Philip Morris Cos., Inc.*, Nos. 94 Civ. 2373 (MBM), 94 Civ. 2546 (BMB), 1999 WL 1076105, at *3 (S.D.N.Y. Nov. 30, 1999) (recognizing that multipliers of between 3 and 4.5 are common in federal securities cases).

The requested fee of 30% of the fund, or $1.35 million, represents a multiplier of 1.73 of the lodestar, and is within a reasonable range, confirming that the requested percentage fee would not lead to a windfall.

III. CLASS COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED FOR THE SETTLEMENT CLASS

Plaintiffs' Counsel also request that the Court grant their application for reimbursement of $46,462.41 in litigation costs incurred in connection with the prosecution of this litigation. The appropriate analysis to apply in deciding whether expenses are compensable in a common fund case of this type is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. *See DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 334 (W.D. Tex. 2007); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients.") (citation omitted); *In re Merrill Lynch & Co. Research Reports Sec. Litig*., 246 F.R.D. 156 (S.D.N.Y. 2007) ("Counsel is entitled to reimbursement from the common fund for reasonable litigation expenses") (citation omitted). All of the various categories of expenses for which counsel seek reimbursement herein are the type of expenses routinely charged to hourly paying clients and, therefore, should be reimbursed out of the common fund.

Notably, the Notice informed members of the Class that Class Counsel would seek reimbursement of their expenses incurred in the prosecution of the Action. *See* Rust Decl. Ex. A. The deadline for Class members wishing to object to the Settlement and/or Class Counsel's fee application is July 10, 2017. To date, no member of the Class has objected to Class Counsel's request. Accordingly, Named Plaintiffs respectfully request this Court reimburse the litigation expenses incurred by Class Counsel as a result of their prosecution of this action.

IV. THE REQUESTED CASE CONTRIBUTION AWARDS TO PLAINTIFFS

Each of the Named Plaintiffs has expended effort and time for the benefit of this Action, and an incentive award is appropriate. Case contribution awards "compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Altier v. Worley Catastrophe Response, LLC*, 2012 WL 161824, *15 (E.D. La. Jan. 18, 2012) (quoting *Sullivan v. DB Inv., Inc.*, 667 F.3d 273, 333 n.65 (3rd Cir. 2011)). "It is not unusual for a court to make an 'incentive award' to named plaintiffs because of their sacrifices in pursuit of litigation on behalf of the class." *Cook v. Howard*, 2013 WL 943664, *3 n.4 (S.D. Miss. Mar. 11, 2013) (quoting *In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 503-04 (N.D. Miss. 1996)). Courts have consistently found service awards to be an efficient and productive way to encourage members of a class to become class representatives. *See, e.g., McClain v. Lufkin Indus., Inc.*, 2010 WL 455351, *24 (E.D. Tex. Jan. 15, 2010) (granting "named Plaintiffs, Class Representatives, and Class Members . . . individual Participation Awards" amounting to a "total of $134,000" divided among "twenty-two individuals"); *In re Catfish Antitrust Litig.*, 939 F. Supp. at 504 ("approving incentive awards of $10,000 to each of the four named plaintiffs"); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000) ("approving incentive awards of $25,000 to each of two named plaintiffs"); *Spicer v. Chi. Bd. Options Exchange, Inc.*, 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases approving service awards ranging from $5,000 to $100,000, and awarding $10,000 to each named plaintiff).

As provided for in the Notice, Plaintiffs respectfully request this Court award each of the six Named Plaintiffs an incentive award of $5,000 each, for a total of $30,000. *See* Rust Decl. Ex. A. Throughout the litigation, each of the Named Plaintiffs monitored and participated in this litigation, by, including but not limited to: reading the draft initial and amended complaints;

communicating regularly with Class Counsel regarding developments in the Action; reviewing Defendants' motion to dismiss; discussing with Class Counsel the motion to dismiss, mediation and settlement strategy; and gathering and producing documents in accordance with the controlling discovery order. *See* Bonderoff Decl. at ¶ 22-23 and Exhs. 4-5 attached thereto. As outlined for each in their separate declarations attached to the Joint Declaration, the Named Plaintiffs spent approximately one hundred hours monitoring and participating in this litigation. *Id*.

"The requested amount is in line with those awarded in similar complex class actions." *Colgate*, 36 F. Supp. 3d at 354 (awarding $5,000 each to six plaintiffs in similar ERISA class action, citing *Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chas Bank, N.A.*, 09 Civ. 686, 2012 U.S. Dist. LEXIS 79418, 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (awarding $50,000 each to three named class representatives); *In re Marsh ERISA Litig.*, 265 F.R.D. 128 at 151 (awarding $15,000 each to three named plaintiffs); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 264 (S.D.N.Y. 2003) (awarding $15,000 to class representative)).

V. CONCLUSION

For the foregoing reasons, Named Plaintiffs respectfully request that the Court approve the fee and expense application and enter the order submitted herewith awarding Class counsel 30% of the Gross Settlement Fund, or $1.35 million in fees and reimbursement of $46,462.41 in litigation expenses and award each Named Plaintiff $5,000 as Case Contribution Awards.

Dated: June 23, 2017

By: */s/ Samuel E. Bonderoff*
Samuel E. Bonderoff

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Certificate of Service

I hereby certify that on June 23, 2017, a copy of the foregoing Memorandum of Law in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Case Contribution Awards was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System. I further certify that the foregoing will be provided to the Settlement Administrator today for posting on the dedicated settlement website, www.jcperisaclassaction.com.

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