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Class Counsel

[Additional Counsel Listed on Signature Page]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

MATTHEW EDWARDS, et al., individually and on behalf of all others similarly situated,

Plaintiffs,

v.

NATIONAL MILK PRODUCERS FEDERATION, aka COOPERATIVES WORKING TOGETHER; DAIRY FARMERS OF AMERICA, INC.; LAND O'LAKES, INC.; DAIRYLEA COOPERATIVE INC.; and AGRI-MARK, INC.,

Defendants.

Case No. 11-CV-04766-JSW

[consolidated with 11-CV-04791-JSW and 11-CV-05253-JSW]

CLASS ACTION

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARDS

Date: December 16, 2016
Time: 9:00 a.m.
Dept: Courtroom 5
Judge: Hon. Jeffrey S. White

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on December 16, 2016, at 9:00 a.m., or as soon thereafter as the matter may be heard by the Honorable Judge Jeffrey S. White of the United States District Court of the Northern District of California, Oakland Division, in Courtroom 5, 2nd Floor, located at 1301 Clay Street, Oakland, CA 94612, plaintiffs will and hereby do move the Court for an order awarding:

1) attorneys' fees in the total amount of $17,333,33.33 to plaintiffs' counsel (equal to $33^{1/3}$% of the common fund established by the settlement between the parties);

2) reimbursement of expenses incurred in the total amount of $2,396,886.21; and

3) service awards in the amount of $5,000 for each of the eighteen class representatives.

This motion is based on the concurrently filed memorandum of points and authorities; the supporting declarations of lead and co-counsel, of the eighteen class representatives, and of expert Richard Pearl; all pleadings and other papers on file in this action, any matters of which the Court may take judicial notice, and upon such further evidence and argument as may be presented at the hearing on the motion.

STATEMENT OF ISSUES

1) Over a five year period that carried past the close of merits discovery and through the completion of summary judgment briefing, counsel have dedicated more than six million in attorney time and advanced over two million in expenses, without any guarantee of reimbursement. Counsel is now seeking $33^{1/3}$% of the $52 million fund they created in fees, or $17,333,333, for the excellent results they achieved on behalf of the class to settle this prolonged and perilous litigation. Should the Court in its discretion approve counsel's fee request as fair and reasonable?

2) Counsel incurred $2,396,886.21 in out-of-pocket expenses necessary to litigate this case. Should the Court in its discretion approve reimbursement of this amount as fair and reasonable?

3) Each class representative actively participated in the litigation, including responding to nine sets of discovery and sitting for a deposition. Should the class representatives be awarded $5,000 each for their service?

SUMMARY OF ARGUMENT

Over a five year period that continued past the close of merits discovery and through the completion of summary judgment briefing, counsel have dedicated more than six million in attorney time and advanced over two million in expenses, without any guarantee of reimbursement. Counsel is now seeking $33^{1/3}$% of the $52 million fund they created in fees, or $17,333,333, for the excellent results they achieved on behalf of the classes to settle this prolonged and perilous litigation.

As detailed in section I, lead counsel Hagens Berman provided for a clear division of labor among itself and the four co-counsel firms involved to avoid duplication of efforts. Section II then details the works these firms performed on behalf of the classes over the past five years, including case investigation and filing, defeating motions to dismiss, pre-certification discovery, defeating a *Daubert* motion, obtaining class certification, overcoming a petition for review to the Ninth Circuit, aggressively pursuing discovery in preparation for trial, exchanging twelve expert reports on the merits, responding to multiple motions to decertify and additional *Daubert* motions, fully briefing cross motions for summary judgment, and finally settling the case for $52 million in cash. This extraordinary effort took more than 12,000 hours of attorney and paralegal time.

As shown in section III(A), the requested fees are reasonable as a percentage of the fund. The $52 million in cash is an exceptional result by any measure. The lack of controlling precedent on the antitrust immunity at issue and the complex econometrics involved in establishing impact and pass-through are among the substantial risks counsel faced. The skill with which counsel confronted these and other challenges, and the contingent nature of their fees, also support the reasonableness of the percentage. And it is consistent with awards made in other cases.

Moreover, as demonstrated in section III(B), cross check against the lodestar also establishes the reasonableness of the requested fees. The five accompanying declarations submitted by lead and co-counsel detail the work underlying their combined lodestar of $6,470,731. The accompanying declaration of Richard Pearl, market surveys, and case law establish that the requested rates are within the typical range. And the imputed multiplier of 2.7 is within the range awarded by the courts.

Further, in section IV, counsel request $2,396,886 in unreimbursed out-of-pocket expenses.

Finally, as detailed in section V and the eighteen accompanying declarations of the class representatives, awards in the amount of $5,000 each are well within the usual norms of modest compensation paid to class representatives to compensate them for their services.

Since lead counsel's inception in 1993, the firm has been recognized in courts throughout the United States for ably handling major class litigation and obtaining outstanding results for its clients. This case is no exception. Counsel respectfully request that the Court grant this motion.

I. The Leadership Structure and Clear Division of Labor Ensured Non-Duplicative Efforts

Lead counsel Hagens Berman Sobol Shapiro developed the case and filed the original complaint. When other firms with clients in additional states voiced interest in the litigation, lead counsel teamed up with them to broaden the class representation. These other firms, Gustafson Gluek, Ademi & O'Reilly, Reinhardt Wendorf & Blanchfield, and Berk Law, served as co-counsel.

Lead counsel prides itself on efficiently litigating cases. Thus, to avoid duplication of effort, lead counsel generally handled all non-plaintiff-specific work on behalf of the classes, while co-counsel handled the litigation effort specific to their clients, including responding to the nine sets of discovery propounded by the defendants and defending the named plaintiff depositions. In addition, in the post-class certification stage of document review, co-counsel were assigned ranges to review and code. In this manner, lead counsel ensured there was no unnecessary duplication of effort.[1]

II. The Work Undertaken by Class Counsel Over the Course of the Five-Year Litigation

A. Plaintiffs investigate the claims and draft the complaint.

As soon as lead counsel was alerted to defendants' supply reduction scheme, they investigated the underlying facts, researched the applicable antitrust laws, and drafted the complaint. After the original complaint was filed on September 26, 2011, lead counsel filed two additional complaints adding named plaintiffs from other states. These cases were deemed related and consolidated before the Court. Lead counsel later filed a consolidated amended complaint.[2]

B. Plaintiffs defeat two rounds of motions to dismiss.

Defendants National Milk Producers Federation, Dairy Farmers of America, Land O'Lakes, Dairylea, and Agri-Mark fought the case every step of the way. Combined, defendants were represented by Steptoe & Johnson, Williams & Connolly, Baker & Miller, Eimer Stahl, Gibson Dunn, Bond Schoeneck & King, Shipman & Goodwin, and Keker & Van Nest.

On December 22, 2011, defendants moved to dismiss for lack of subject matter jurisdiction and for failure to state claims under the various state antitrust and consumer protection statutes. After the Court afforded plaintiffs opportunity to amend, defendants again moved to dismiss for lack of subject matter jurisdiction, for failure to state claims, and based on the filed rate doctrine. Lead counsel successfully opposed these motions, which were denied by the Court on October 30, 2012.[3]

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[1] Declaration of Elaine T. Byszewski in Support of Plaintiffs' Motion for Fees, Costs, and Service Award (Byszewski Decl.), ¶¶ 2-3.

[2] *Id*. at ¶ 4.

[3] *Id*. at ¶¶ 5-8. Defendant Dairlyea also moved to dismiss based on lack of personal jurisdiction, but later withdrew the motions. Co-counsel Gustafson Gluek handled these oppositions. *See* Byszewski Decl., ¶ 6 n. 5; Kilene Decl., ¶ 6.

C. Plaintiffs engage in extensive discovery prior to class certification.

1. Plaintiffs aggressively pursue discovery from defendants, including written discovery, documents, and data.

At the outset of discovery lead counsel sought and obtained key admissions from defendants regarding their participation in the conspiracy and the number of cows prematurely slaughtered pursuant to their supply reduction scheme. Lead counsel also propounded and negotiated responses to multiple sets of document requests that resulted in the production of approximately 250,000 documents from the combined defendants, including critical data sets necessary for plaintiffs to demonstrate their ability to model impact and damages at class certification.[4]

Defendant	Pre-certification production
National Milk Producers Federation	NMPF0000001-26990
Dairy Farmers of America	DFA2013-0000001-59550
Land O'Lakes	LOL0000001-59658
Dairylea	D0000001-98974
Agri-Mark	AMCA0000001-3704

2. Plaintiffs also obtain discovery from third party witness.

In addition to discovery directed at defendants, lead counsel also issued subpoenas on third parties, including former members of DFA's board of directors and defendants' real time expert economist throughout the course of the conspiracy, Dr. Scott Brown. Lead counsel negotiated with counsel for Dr. Brown, and coordinated with counsel in a "copy cat" state court action filed in Missouri, to obtain thousands of documents regarding Dr. Brown's work on behalf of defendants.[5]

3. Plaintiffs respond to voluminous discovery requests from defendants and each sit for a deposition.

Prior to class certification, each plaintiff responded to five sets of discovery, including multiple sets requesting production of documents:

Defendant	Pre-certification requests
Land O'Lakes	First Set of Interrogatories
Land O'Lakes	First Set of Requests for Production
Land O'Lakes	Second Set of Requests for Production
Agri-Mark	First Set of Interrogatories
Agri-Mark	First Set of Requests for Production

In responding to these, lead counsel would create a general template and then co-counsel would work with their clients on the plaintiff-specific responses.[6]

[4] *Id.* at ¶ 9.

[5] *Id.* at ¶ 10.

[6] *Id.* at ¶ 11; Kilene Decl., ¶ 6; Ademi Decl., ¶ 6; Blanchfield Decl., ¶ 6; Berk Decl., ¶ 6.

In addition, co-counsel defended the depositions of the proposed class representatives:[7]

Plaintiff	State	Date Deposed
Boys and Girls Club of the East Valley	Arizona	October 30, 2013
Jonathan Rizzo	Arizona	October 29, 2013
Matthew Edwards	California	November 12, 2013
Paul Thacker	D.C.	May 7, 2014
Scott Cook	Kansas	November 12, 2013
Danell Tomasella	Massachusetts	November 7, 2013
Kory Pentland	Michigan	September 11, 2013
Lori Curtis	Missouri	April 24, 2014
Mary Anderson	Nebraska	September 17, 2013
Julie Ewald	Nevada	October 18, 2013
Sheila Jackson	New Hampshire	April 25, 2014
Scott Weber	Oregon	November 8, 2013
Jennifer Clites	South Dakota	October 1, 2013
John Peychal	Tennessee	April 29, 2014
Kathleen Davis	Tennessee	April 29, 2014
John Murray	Vermont	November 13, 2013
Brandon Steele	West Virginia	January 21, 2015
Jeffrey Robb	Wisconsin	September 23, 2013

4. Plaintiffs take and defend expert depositions pre-certification.

In addition to the party depositions, defendants also deposed plaintiffs' expert economist in support of class certification – not once, but twice – and, in addition to defending those depositions, lead counsel took the deposition of defendants' expert economist in opposition to class certification.[8]

D. After multiple rounds of class certification briefing, including seven expert reports and a *Daubert* motion, the Court certifies 18 state classes.

On October 28, 2013, lead counsel moved for class certification on behalf of the residents of sixteen states. The moving papers included two multi-state surveys of law, 55 documentary exhibits, a compendium of named plaintiff declarations, and the declaration of Dr. Connor, plaintiffs' expert economist on antitrust impact and pass through to the indirect purchaser classes. Defendants vigorously opposed the motion. Along with their opposition brief, defendants filed seven non-expert declarations and two expert reports in support. Together, Mr. Kaplan and Dr. Hanssens opined on

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Gustafson Gluek also assisted with the template for the responses to LOL's First Set of Interrogatories and First Set of Requests for Production. Byszewski Decl., ¶ 11; Kilene Decl., ¶ 6.

[7] Byszewski Decl., ¶ 12; Kilene Decl., ¶ 6; Ademi Decl., ¶ 6; Blanchfield Decl., ¶ 6; Berk Decl., ¶ 6. Each co-counsel firm except Gustafson Gluek also defended the deposition of one of lead counsel's clients. *See* Byszewski Decl., ¶ 12; Ademi Decl., ¶ 6; Blanchfield Decl., ¶ 6; Berk Decl., ¶ 6. Lead counsel defended the deposition of its client plaintiff Edwards. Byszewski Decl., ¶ 12.

[8] Byszewski Decl., ¶ 13.

the lack of antitrust impact and pass through. Their expert declarations and exhibits in support exceeded 700 pages, and the back up data supporting these materials was in excess of 7 GB. Defendants also filed a *Daubert* motion to exclude the testimony of Dr. Connor. Undaunted, lead counsel filed a reply in support of class certification and in opposition to the *Daubert* motion, along with a detailed rebuttal report by Dr. Connor.

Thereafter the Court issued an order requesting supplemental briefing – and the battle of the experts continued. On June 13, 2014, lead counsel submitted a supplemental brief in support of class certification, with a supplement declaration of Dr. Connor in support. Defendants then filed their supplemental brief in opposition to class certification, with a reply declaration of Mr. Kaplan in support. And lead counsel submitted their supplemental reply in support of class certification, with a supplemental reply declaration of Dr. Connor in support. Not content to let plaintiffs have the last word, defendants also filed a sur-reply, which lead counsel opposed procedurally.

On September 16, 2014, the Court granted the motion, certifying the state classes.[9]

E. Defendants unsuccessfully petition the Ninth Circuit for interlocutory review – and seek a writ of certiorari with the Supreme Court – asserting the unprecedented scope of the certified classes.

Continuing to fight this case using every procedural mechanism available to them, Defendants petitioned the Ninth Circuit for permission to appeal under Rule 23(f), which was denied on December 3, 2014. Undeterred, defendants then sought a writ of certiorari with the United States Supreme Court, arguing that the case involved the improper certification of "one of the most expansive classes in history." The Supreme Court denied review on April 27, 2015.[10]

F. The parties engage in an unsuccessful mediation.

During this time, the parties participated in mediation before the retired Hon. Layn R. Phillips. Lead counsel exchanged mediation briefs with counsel for defendants and made progress on the structure of a settlement, but a gulf remained as to the settlement amount.[11]

G. Plaintiffs disseminate notice of class certification to millions of class members.

Lead counsel then worked with a third party administrator to develop a class notice plan, which it proposed to the Court. After it was approved, lead counsel spent approximately $500,000 on implementation of the notice plan.[12]

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[9] *Id*. at ¶¶ 14-16.
[10] *Id*. at ¶ 17.
[11] *Id*. at ¶ 18.
[12] *Id*. at ¶ 19.

H. Plaintiffs aggressively pursue discovery in preparation for trial.

1. Plaintiffs obtain and review additional documents and data.

Following class certification, lead counsel propounded and negotiated responses to two sets of interrogatories and three additional sets of document requests, which resulted in the production of approximately 375,000 additional documents from the combined defendants.[13]

Defendant	Pre-certification production
National Milk Producers Federation	NMPF0026991-27134
Dairy Farmers of America	DFA2013-0059551-275890
Land O'Lakes	LOL0059659-105841
Dairylea	D0098975-201489
Agri-Mark	AMCA0003705-14462

Lead counsel requested co-counsel to assist with review and coding of these documents. To avoid duplication of effort, lead counsel assigned non-overlapping ranges to three co-counsel firms.[14]

2. Plaintiffs take 30(b)(6) depositions of each defendant.

In preparation for trial, lead counsel took depositions of the following defendant witnesses both in their personal capacity and as 30(b)(6) designees. Accordingly, some of these depositions went for two days:[15]

Defendant	Deponent	Title
NMPF	Jerome Kozak	President and CEO
DFA	John Wilson	SVP and Chief Fluid Marketing Officer
DFA	Michael Lichte	Vice President of Dairy Marketing and Business Planning
Land O'Lakes	Thomas Wegner	Director of Economics and Dairy Policy
Agri-Mark	Richard Stammer	President and CEO

3. Plaintiffs obtain the FAPRI model from Dr. Brown and depose him.

In addition, lead counsel aggressively pursued production of the highly confidential model that Dr. Brown used to forecast the effect of defendants' conspiracy on milk prices. This model was an extension of the model developed by agricultural economists at the Food and Agricultural Policy Research Institute to perform economic analyses for the United States government. In addition to obtaining production of the model, lead counsel also deposed Dr. Brown in preparation for trial.[16]

[13] *Id.* at ¶ 20.

[14] *Id.*; Kilene Decl., ¶ 6; Ademi Decl., ¶ 6; Blanchfield Decl., ¶ 6.

[15] Byszewski Decl., ¶ 21.

[16] *Id.* at ¶ 22.

4. Plaintiffs respond to additional discovery requests from defendants.

Following class certification, each plaintiff responded to four additional sets of discovery, including multiple sets of interrogatories:

Defendant	Post-certification requests
Land O'Lakes	Second Set of Interrogatories
Dairy Farmers of America	First Set of Interrogatories
Dairy Farmers of America	First Set of Requests for Admission
Dairy Farmers of America	First Set of Requests for Production

In responding to these, lead counsel would create a general template and then co-counsel would work with their clients on the plaintiff-specific responses. In total, plaintiffs responded to a total of 37 interrogatories, 41 requests for production of documents, and 79 requests for admission.[17]

5. The parties exchange 12 expert reports on the merits, including five regarding impact and damages.

In March 2015, the parties exchanged expert reports on the merits. Defendants' reports included Dr. Murphy and Mr. Gallagher, with opinions relating to Capper Volstead immunity, and Dr. Cropp, regarding the operation of the milk market. Plaintiffs' reports included Dr. Connor on the economic principles underlying the CWT conspiracy and Dr. Sunding on impact and damages.

In April 2016, the parties exchanged their rebuttal reports. Dr. Connor provided a rebuttal to the opinions of Dr. Murphy, Mr. Gallagher, and Dr. Cropp. And Dr. Cropp provided a rebuttal to the opinions of Dr. Connor. In addition, defendants submitted the reports of Mr. Kaplan and Dr. Sumner to rebut the opinions of Dr. Sunding regarding impact and damages.

Thereafter, lead counsel sought opportunity for Dr. Sunding to respond to the opinions of Mr. Kaplan and Dr. Sumner, which the Court permitted. So Dr. Sunding provided a rebuttal report, and the parties exchanged further rebuttal reports in January of this year.[18]

6. The parties engage in six additional expert depositions.

In addition to the 30(b)(6) depositions, lead counsel also deposed defendants' experts, including Mr. Gallagher and Mr. Kaplan (now for a second time). Lead counsel also defended the depositions of plaintiffs' experts. This included Dr. Connor (now for a third time). And it included Dr. Sunding, who was deposed for the first time after submitting his expert report on the merits, for a second time after he submitted his rebuttal report, and for a third time in conjunction with the further rebuttal reports in January of this year.[19]

[17] *Id.* at ¶ 23; Kilene Decl., ¶ 6; Ademi Decl., ¶ 6; Blanchfield Decl., ¶ 6; Berk Decl., ¶ 6.
[18] Byszewski Decl., ¶¶ 24-26.
[19] *Id.* at ¶ 27.

I. Plaintiffs respond to two motions to decertify and two additional *Daubert* motions – and the parties fully brief cross motions for summary judgment.

In May 2015, defendants filed their motion for summary judgment, with twelve declarations in support, including 56 exhibits. In June 2015, lead counsel filed plaintiffs' cross motion for summary judgment and the opposition to defendants' motion. In support, plaintiffs submitted their expert declarations and 109 documentary exhibits. Defendants filed a reply in support of their motion and opposition to the cross motion. And lead counsel replied in support of the cross motion.

In June 2015, defendants also filed their second *Daubert* motion – this time to exclude the opinions of Dr. Sunding. Heavy on the econometrics, this briefing was quite complex and contentious, and defendants objected to lead counsel's efforts to submit a rebuttal report from Dr. Sunding. The Court permitted the report, but ordered Dr. Sunding to sit for another deposition and defendants to then submit a renewed motion. So in January of 2016 the parties again briefed the *Daubert* motion to exclude Dr. Sunding.

Likewise, following the cross summary judgment briefing, in September 2015, defendants also moved to decertify the classes. In October 2015, lead counsel filed an opposition, including 38 exhibits, and in October 2015, defendants filed their reply. But because this briefing was also heavily intertwined with the expert battle between Dr. Sunding and Mr. Kaplan, the Court also ordered defendants to submit a renewed decertification motion following Dr. Sunding's further deposition. So in January of this year the parties again briefed defendants' motion to decertify.[20]

J. Shortly after the Court takes these motions under submission, the parties settle and plaintiffs obtain preliminary approval of the agreement.

The hearing on the cross motions for summary judgment, as well as defendants' *Daubert* and decertification motions, were set for hearing in March 2016. After the Court took these motions off calendar and under submission, the parties participated in another mediation session before the Hon. Phillips. While this did not result in settlement of the case, the parties were able to bridge the gap on the settlement amount in a series of follow up discussions. Thereafter, lead counsel prepared the term sheet and the settlement agreement, obtained preliminary approval from the Court, and coordinated with the third party administrators to effectuate notice. And even after this fee motion is submitted, lead counsel – without the prospect of further fees – will continue its work on behalf of the settlement class by briefing the final approval motion, implementing the distribution plan if approved, and responding to continuing inquiries from the settlement class.[21]

[20] *Id*. at ¶¶ 28-30.

[21] *Id*. at ¶ 31.

III. THE REQUESTED ATTORNEYS FEES ARE REASONABLE

Under Rule 23(h), in a certified class action, "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."[22] Here, plaintiffs agreed that their attorneys could seek fees from the recovery in an amount to be approved by the Court.[23] This reflects the common fund doctrine, which also provides a basis in law for a reasonable award of attorneys' fees. The United States Supreme Court "has recognized consistently 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."[24] And the Court explains that a district court's "[j]urisdiction over the fund involved in the litigation allows a court to prevent [] inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit."[25]

In the Ninth Circuit, there are two primary methods to calculate attorneys' fees in making an award under Rule 23(h): lodestar and percentage of recovery. In a common fund case, a district court has the discretion to choose either.[26] And whichever is chosen as the primary method to calculate attorneys' fees, the Ninth Circuit encourages district courts to conduct "a cross-check using the other method."[27] Counsel here request 33$^{1/3}$% percent of the $52 million settlement fund, or $17,333,333. Applying a lodestar cross-check, this amounts to a 2.7 multiplier on counsel's lodestar of $6,470,731. Under either method, these fees are reasonable and fair.

A. The Requested Fee Award Is Reasonable As a Percentage of the Fund.

"The typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement value, with 25% considered the benchmark."[28] As noted in more than one decision from the Northern District, "in most common fund cases, the award exceeds that benchmark."[29] And

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[22] Fed. R. Civ. P. 23(h).

[23] Byszewski Decl., ¶ 32.

[24] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

[25] *Id.*

[26] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). The antitrust and consumer statutes at issue also provide a basis in law for an award of attorneys' fees; where the authorization for fees is statutory, a lodestar and multiplier analysis with a percentage-of-the-fund cross check is appropriate. *Id*. at 941-42, 44-45.

[27] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015).

[28] *Johnson v. Gen. Mills, Inc.*, No. SACV 10-00061-CJC, 2013 WL 3213832, at *6 (C.D. Cal. June 17, 2013); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (noting that 25% is benchmark and "usual" range of awards is 20–30%); *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997) ("common fund fees commonly range from 20% to 30% of the fund created").

[29] *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2007); *Knight v. Red Door Salons, Inc.*, No. 08-01520 SC, 2009 WL 248367, at *6 (N.D. Cal. Feb. 2, 2009) (same).

"typical contingency fee agreements provide that class counsel will recover 33% if the case is resolved before trial."[30] When evaluating whether the percentage sought by counsel is reasonable, the Court may consider the following factors: (1) the results achieved; (2) the risk involved with the litigation; (3) the skill required and quality of work by counsel; (4) the contingent nature of the fee; and (5) awards made in similar cases.[31] Each of these factors support the percentage sought here.

1. The exceptional results achieved support the requested fees.

Recovery of $52 million in cash for the class is an exceptional result. In his report on the merits, Dr. Sunding estimated total class damages to be $181 million. So this settlement represents recovery of almost 30% of total damages suffered by indirect purchaser class members.[32] The Ninth Circuit has reacted favorably to a very similar settlement. In *Rodriguez v. West Publishing Corp.*, the district court approved a $49 million antitrust settlement, representing thirty percent of the total damages, estimated by the class expert to be $158 to $168 million. The Ninth Circuit held that the "negotiated amount is fair and reasonable no matter how you slice it" and that the fact of a cash settlement was a "good indicator of a beneficial settlement."[33] So too here.

2. The substantial risks the case posed support the requested fees.

The risk associated with a case plays an important role in determining a fair fee award.[34] Here the risk to counsel was substantial. Given defendants' admissions regarding the existence of the conspiracy, they fought all the harder on every defense available to them and took advantage of every procedural mechanism.

- First, the availability of the Capper Volstead immunity for defendants' supply restraint was a relatively untested area of law and – if successfully invoked – would have meant the end of the case for plaintiffs.
- Second, defendants vigorously opposed class certification – including an appeal to the Ninth Circuit and then to the Supreme Court asserting the unprecedented scope of the certified classes – and moved to decertify multiple times.

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[30] *Fernandez v. Victoria Secret Stores*, 2008 WL 8150856, at *16 n.59 (C.D. Cal. July 21, 2008).

[31] *Vizcaino*, 290 F.3d at 1048-1050; *Steinfeld v. Discover Fin. Servs.*, No. C 12-01118 JSW, 2014 WL 1309692, at *1 (N.D. Cal. Mar. 31, 2014).

[32] Byszewski Decl., ¶ 33.

[33] 563 F.3d 948, 964-65 (9th Cir. 2009). *See also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004) (approving $44.5 settlement, recovery of 33% of single damages); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 124 (S.D.N.Y. 2009) (approving $336 million settlement, recovery of 31% of single damages), *aff'd*, 405 F. App'x 532 (2d Cir. 2010); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 478 (S.D.N.Y. 1998) (approving settlements of $1.027 billion, recovery of 33%-41% of single damages).

[34] *Online DVD*, 779 F.3d at 955.

- Third, the availability of data necessary to show antitrust impact and pass through – and to control for the ever-evolving list of variables that defendants contended plaintiffs must control for – posed risks to counsel. This risk was especially acute for California, which as a sizable state is responsible for a significant portion of the damages (potentially nearly half), because defendants mounted unique defenses as to both the data and immunity statute. And defendants forced counsel to engage in the most demanding and cutting edge econometrics in antitrust litigation, filing highly technical Daubert challenges at both class certification and summary judgment. Indeed, twelve of the nineteen expert reports submitted during the course of the litigation involving impact and damages.
- Fourth, at every step of the way, plaintiffs' counsel faced a platoon of defense firms, as the five defendants combined were represented by Steptoe & Johnson, Williams & Connolly, Baker & Miller, Eimer Stahl, Gibson Dunn, Bond Schoeneck & King, Shipman & Goodwin, and Keker & Van Nest.
- Finally, as with any trial – and in particular a complex class action antitrust trial – plaintiffs faced the very real risk of walking away with nothing.

Litigation risks of this sort in a complex and long-drawn-out class action weigh strongly in favor of awarding fees above the benchmark.[35]

3. The skill required and quality of work support the requested fees.

The untested antitrust immunities at issue, defendants' scorched-earth strategies, and the complex econometrics involved called for skillful prosecution of this case. Fortunately, counsel have significant skill and experience litigating antitrust claims and complex class actions, which they put to good use here. Counsel prevailed on class certification and, after persevering for several more years, achieved a noteworthy $52 million settlement. Their demonstrated skill and experience supports an upward departure from the 25% benchmark.

As detailed in section II, counsel devoted extensive time and resources over the span of five years in order to advance plaintiffs' claims. Counsel vigorously litigated this matter through class certification, through fact and expert discovery, and through the filing of cross motions for summary judgment and multiple *Daubert* and decertification motions. The analysis of the documents and data

[35] Byszewski Decl., ¶ 34. *See Ching v. Siemens Indus., Inc.*, No. 11-CV-04838-MEJ, 2014 WL 2926210, at *4 (N.D. Cal. June 27, 2014); *see also Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th Cir. 2003) (affirming 33% fee award where district court noted that counsel achieved excellent results in a risky and complicated class action despite vigorous opposition throughout the litigation).

produced by defendants was a continuous effort throughout much of the course of the litigation, and the battle of the experts hard fought. Counsel's tenacious time commitment to the case, and constant willingness to advance whatever costs and expenses were necessary and appropriate as the case proceeded forward, further supports the requested fee award.[36]

4. The contingency representation also supports the requested fee award.

The attorneys' fee award in this matter should take into account the heightened risks of representing the classes on a *purely contingent basis* over the span of so many years. The contingent nature of the work was even riskier in this case because counsel needed to advance substantial costs that would not have been recouped if the litigation had been unsuccessful. Indeed, counsel's representation of the classes entailed over two million dollars of expense.[37] In addition, given the extreme time commitment required both to develop and pursue the plaintiffs' claims, and to defend and respond to defendants' vigorous litigation of its defenses, counsel necessarily had to martial its resources in a manner that caused it to pass on other case opportunities to litigate this case. In cases such as this, the public interest is best served by rewarding attorneys who assume representation on a contingent basis, by way of an enhanced fee to compensate them for the very real risk that they might be paid nothing for their work.[38]

5. Awards made in similar cases support the requested fee award.

Here, the request for attorneys' fees in the amount of one-third of the common fund falls within the range of acceptable attorneys' fees in the Ninth Circuit. Many courts have awarded this percentage, [39] including this one.[40]

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[36] Byszewski Decl., ¶¶ 36-37.

[37] *Vizcaino*, 290 F.3d at 1050 (representation "entailed hundreds of thousands of dollars of expense").

[38] Byszewski Decl., ¶ 38. *See Vizcaino*, 290 F.3d at 1050; *In re Omnivision*, 559 F. Supp. 2d at 1047.

[39] *See, e.g., Morris*, 54 F. App'x at 664 (affirming 33% fee award); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000) (affirming fee award equal to one-third of recovery); *In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming 33% fee award); *Lusby v. GameStop Inc.*, No. C12-03783 HRL, 2015 WL 1501095, at *4 (N.D. Cal. Mar. 31, 2015) (granting 33% fee award and collecting cases regarding the same); *Burden v. SelectQuote Ins. Servs.*, No. C 10-5966 LB, 2013 WL 3988771, at *5 (N.D. Cal. Aug. 2, 2013) (awarding 33% of fund); *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW, 2010 WL 1687829, at *1 (N.D. Cal. Apr. 22, 2010) (awarding 30% fee); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989) (awarding 32.8% fee); *Linney v. Cellular Alaska P'ship*, No. C-96-308 DLJ, 1997 WL 450064, *7 (N.D. Cal. 1997) (awarding 33.3% fee); *see also In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *18, n. 12 (C.D. Cal. June 10, 2005) (noting more than 200 federal cases have awarded fees higher than 30%); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 450 (E.D. Cal. 2013) (granting 33% fee award and collecting cases).

[40] *Davis v. Cole Haan, Inc.*, No. 11-CV-01826-JSW, 2015 WL 7015328, at *6 (N.D. Cal. Nov. 12, 2015) (approving 33% fee award)

B. Using Lodestar As a Cross-Check Further Supports the Requested Fees.

Lodestar is calculated "by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer."[41] Generally, district courts "should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case."[42] "[L]awyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee."[43] This case was no exception. As discussed above in section I, plaintiffs' counsel thoughtfully staffed this action and litigated it both efficiently and effectively.

Moreover, counsel's hourly rates are in line with market rates in this district. Here, counsel's hourly rates in this action range from $350 to $950, with the upper-end reserved for the most experienced partners, and hourly rates for paralegals/support staff range from $150-$265.[44] These rates are within the ranges accepted by other courts in this district.[45] And plaintiffs also submit an expert declaration from attorney and treatise author Richard Pearl – including survey data – concluding that the rates presented by counsel compare favorably to prevailing hourly rates.

Finally, a court may give an upwards adjustment to a lodestar (through a positive multiplier) to reflect a host of "reasonableness" factors, including: (1) the amount involved and the results obtained; (2) the time and labor required; (3) the novelty and difficulty of the questions involved;

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[41] *In re Bluetooth*, 654 F.3d at 941; *see also G. F. v. Contra Costa Cty.*, No. 13-CV-03667-MEJ, 2015 WL 7571789, at *15 (N.D. Cal. Nov. 25, 2015); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1176 (S.D. Cal. 2007) ("Although counsel have not provided a detailed cataloging of hours spent, the Court finds the information provided to be sufficient for purposes of lodestar cross-check.").

[42] *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008); *see also Blackwell v. Foley*, 724 F. Supp. 2d 1068, 1081 (N.D. Cal. 2010) ("An attorney's sworn testimony that, in fact, [she] took the time claimed . . . is evidence of considerable weight on the issue of the time required.").

[43] *Moreno*, 534 F.3d at 1112.

[44] Byszewski Decl., ¶ 40; Kilene Decl., ¶ 8; Ademi Decl., ¶ 8; Blanchfield Decl., ¶ 8; Berk Decl., ¶ 8. Current rates, rather than historical rates, should be applied to compensate for the delay in payment. *See Brown v. Hain Celestial Grp., Inc.*, No. 3:11-CV-03082-LB, 2016 WL 631880, at *8 (N.D. Cal. Feb. 17, 2016).

[45] *Pecover v. Electronic Arts. Inc.*, No. 08-cv-02820-CW, slip op. (N.D. Cal. May 30, 2013) (approving Hagens Berman hourly rates for partners ranging from $600-$800)*; Stuart v. RadioShack Corp.*, No. C-07-4499, 2010 WL 3155645, at *6 (N.D. Cal. Aug. 9, 2010) (finding rates ranging between $600 and $1,000 reasonable); *In re Apple Inc. Secs. Litig.*, No. 5:06-CV-05208, 2011 WL 1877988, at *5 (N.D. Cal. May 17, 2011) (approving hourly rate of $836); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900, at *9 (N.D. Cal. April 3, 2013) (approving hourly rates up to $1000); *In re Conseco Life Ins. Co. Life Trend Ins. Mktg. & Sales Practice Litig.*, No. C 10-02124 SI, 2014 WL 186375, at *2 (N.D. Cal. Jan. 16, 2014) (approving hourly rates up to $850).

(4) the skill requisite to perform the legal service properly; (5) the preclusion of other employment by the attorney due to acceptance of the case; (6) the customary fee; (7) the experience, reputation, and ability of the attorneys; and (8) awards in similar cases.[46] These are referred to as the *Kerr* "reasonableness" factors after the Ninth Circuit's opinion in *Kerr v. Screen Extras Guild, Inc*., 526 F.2d 67, 70 (9th Cir. 1975). Foremost among these considerations is the "benefit obtained for the class."[47] This factor – and each of the others – supports the requested multiplier of 2.7, which is well within the range awarded in other cases.

1. The exceptional result counsel achieved for class supports the fee award.

As discussed above in section III(A)(1), the result achieved on behalf of the settlement class strongly supports an upwards adjustment from the lodestar.

2. The significant resources counsel expended supports the fee award.

As detailed above in section II and the concurrently filed declarations of counsel, they have worked tirelessly on this case from inception through class certification, through fact and expert discovery, and through summary judgment, Daubert, and decertification briefing. As of the end of September 2016, lead counsel and the four co-counsel firms have spent over 12,000 hours of combined attorney and paralegal time for a total lodestar of $6,470,731. The firms have also invested a combined $2,396,886 in out-of-pocket costs and expenses, for a total investment of $8,867,617. This commitment of time, personnel, and money to the settlement class supports the requested award.[48]

3. The novel and difficult questions presented by this case, requiring extraordinary skill by counsel, supports the requested fee award.

The third and fourth *Kerr* factors – the novelty of the questions presented by the litigation and the skill required to perform the legal services properly – both support the requested award. As discussed above in sections III(A)(2) & (3), the novel antitrust immunity at issue and the complex econometrics underlying the impact and pass-through analyses on behalf of the sixteen state classes certified by the Court required advocacy and skill beyond routine litigation.

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[46] *In re Bluetooth*, 654 F.3d at 941-42. The Supreme Court has since called into question the relevance of two of the original *Kerr* factors: the contingent nature of the fee and the "desirability" of the case. *See Resurrection Bay Conserv. All. v. City of Seward*, 640 F.3d 1087, 1095 (9th Cir. 2011). Other factors such as "time limitations imposed by the client or the circumstances" and "the nature and length of the professional relationship with the client" do not apply here.

[47] *In re Bluetooth*, 654 F.3d at 942.

[48] Byszewski Decl., ¶¶ 40-44; Kilene Decl., ¶¶ 8-10; Ademi Decl., ¶¶ 8-10; Blanchfield Decl., ¶¶ 8-10; Berk Decl., ¶¶ 8-10.

4. Counsel forewent other opportunities due to their commitment to this case.

Counsel has dedicated an efficient and streamlined team to this litigation. The consequence of dedicating a team of experienced antitrust attorneys has meant that many of these professionals worked nearly exclusively on this case for significant periods of time. As discussed above in section III(A)(4), this commitment – forgoing other cases and projects – further supports the requested fees.

5. The requested fee is reasonable when compared to similar litigation.

The sixth and eighth *Kerr* factors, the customary fee in similar cases, also support counsel's request for a multiplier of 2.7 – which is well within the range awarded by other courts,[49] including this one.[50] In *Steinfeld*, the Court approved a multiplier of 3.5 where, as here, counsel "accepted the case on a contingency basis, they obtained an excellent result for Class Members, they were required to do additional work after the fee motion was filed, and they will continue to do work relating to administration of the settlement."[51] And the use of risk multipliers is critical to "incentivize attorneys to represent class clients, who might otherwise be denied access to counsel."[52] Thus, the Ninth Circuit has admonished that a "district court must apply a risk multiplier to the lodestar" when, as here, "(1) attorneys take a case with the expectation they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence the case was risky."[53]

6. The reputation and ability of counsel supports the requested fee award.

Lead counsel is one of the most well-respected class action litigation firms in the country and has litigated some of the largest class actions in history, including the tobacco litigation,[54] *In re Visa MasterCard Litigation*,[55] and the *In re Toyota Motor Corp. Unintended Acceleration Litigation*.[56]

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[49] *See, e.g., Vizcaino*, 290 F.3d at 1050-51 (upholding a 28% fee award that constituted a 3.65 multiple of lodestar); *id*. at 1052-54 (noting district court cases in the Ninth Circuit approving multipliers as high as 6.2); *Lane v. Facebook, Inc*., No. C 08-3845 RS, 2010 WL 2076916, at *2 (N.D. Cal. May 24, 2010) (multiplier of 2 appropriate); *In re Cathode Ray Tube (CRT) Antitrust Litig*., No. C-07-5944 JST, 2016 WL 4126533, at *10 (N.D. Cal. Aug 3, 2016) (multiplier of 1.96 appropriate); *Dyer v. Wells Fargo, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) (multiplier of 2.83 appropriate); *see also McIntosh v. McAfee, Inc.*, No. C06-07694 JW, 2009 WL 673976, at *2 (N.D. Cal. 2009) (recognizing a range from "2 to 4 or even higher"); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (multiplier of 3.6 "well within the acceptable range for fee awards in complicated class action litigation"). *See also* Byszewski Decl., ¶ 45.

[50] *Steinfeld v. Discover Fin. Servs.*, No. C 12-01118 JSW, 2014 WL 1309692, at *2 (N.D. Cal. Mar. 31, 2014).

[51] *Id*. *See also* Byszewski Decl., ¶ 31.

[52] *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016).

[53] *Id*. *See also* Byszewski Decl., ¶ 35.

[54] In the historic litigation against Big Tobacco, Hagens Berman represented 13 states and advanced groundbreaking legal claims to secure a global settlement worth $260 billion.

[55] *In re Visa-MasterCard Litig*., No. CV-96-5238 (E.D.N.Y.). Hagens Berman was co-lead counsel in a case alleging antitrust violations by Visa and MasterCard. The case settled for $3 billion

Lead counsel has over 65 lawyers in offices across the country. Since its founding in 1993, the firm has been recognized in courts throughout the United States for its ability and experience in handling major class litigation efficiently and obtaining outstanding results for its clients. Further details regarding lead counsel and co-counsel are included in the accompanying declarations.[57]

IV. THE REQUESTED COSTS ARE REASONABLE.

Counsel are also entitled to reimbursement for their out-of-pocket expenses incurred in creating the common fund.[58] Reasonable litigation expenses include court fees, service, copying, postage, legal research, experts and consultants, depositions, and travel.[59] As detailed in the accompanying declaration, counsel request reimbursement of $2,396,886.21 in expenses.[60]

V. THE REQUESTED SERVICE AWARDS ARE REASONABLE.

Plaintiffs also request that the Court approve the service awards in the amount of $5,000 each for the eighteen class representatives. Service awards for class representatives are routinely provided to encourage individuals to undertake the responsibilities of representing the class and to recognize the time and effort spent on the case. As the Ninth Circuit recognized in *In re Online DVD-Rental Antitrust Litig.*, "incentive awards that are intended to compensate class representatives for work undertaken on behalf of a class are fairly typical in class action cases."[61]

As detailed in the accompanying compendium of declarations, the eighteen class representatives spent a significant amount of time assisting in the litigation of this case. Each aided with the filing of a complaint, responded to written discovery, produced documents, and sat for a deposition. For these reasons, the service awards do not create a conflict of interest between the class representatives and the settlement class. And the requested awards of $5,000 each are "well within the usual norms of modest compensation paid to class representatives."[62]

VI. CONCLUSION

Plaintiffs respectfully request an award of $17,333,333 in attorneys' fees, $2,396,886 in expenses, and $5,000 in service awards for each of the eighteen class representatives.

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in cash and changes in practices valued at $20 billion.

[56] *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, No. 8:10ML2151 JVS (C.D. Cal.). Hagens Berman recovered $1.6 billion for the classes.

[57] Byszewski Decl., ¶ 46 & Ex. A; Kilene Decl., ¶ 2 & Ex. A; Ademi Decl., ¶ 2 & Ex. A; Blanchfield Decl., ¶ 2 & Ex. A; Berk Decl., ¶ 2 & Ex. A.

[58] *OmniVision*, 559 F. Supp. 2d at 1048.

[59] *See, e.g., In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1995).

[60] Byszewski Decl., ¶¶ 42-44; Kilene Decl., ¶¶ 10-11; Ademi Decl., ¶¶ 10-11; Blanchfield Decl., ¶¶ 10-11; Berk Decl., ¶¶ 10-11.

[61] 779 F.3d at 943.

[62] *Id.*

Respectfully submitted,

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