UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANTHONY WILLIAMS, *et al.*	:	**Case No.: 1:08-CV-00046**
Plaintiffs,	:	
v.	:	**Chief Judge Edmund A. Sargus**
	:	
DUKE ENERGY INTERNATIONAL, INC., *et al.*	:	**Magistrate Judge Norah M. King**
	:	
Defendants.	:	
	:	

PLAINTIFFS' COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND APPROVAL OF INCENTIVE AWARDS AND MEMORANDUM IN SUPPORT

Pursuant to the Court's October 21, 2015 Order Granting Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, Setting Date for Hearing on Final Approval of Settlement (Doc. No. 247), and pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, Counsel for Plaintiffs Anthony Williams, BGR, Inc., Munafo, Inc. and Aikido of Cincinnati—Markovits, Stock & DeMarco, LLC and Freking, Myers & Reul, LLC[1] ("Plaintiffs' Counsel")—respectfully move this Court for (a) an award of attorneys' fees in the amount of twenty-four percent (24%) of the Settlement Sum, plus any accrued interest and net of expenses and administration costs incurred prior to preliminary approval, and (b) reimbursement of $719,029.23 in litigation expenses incurred prior to preliminary approval, and authority to reimburse post-preliminary approval administration expenses incurred on behalf of Plaintiffs and the Class in connection with the prosecution of this seven-year class action ("Action"). In

[1] Freking & Betz changed its name to Freking, Myers & Reul, LLC.

addition, Plaintiffs' Counsel request Court approval of incentive awards to the Lead Plaintiffs, Anthony Williams, BGR, Inc., Munafo, Inc., and Aikido of Cincinnati, in the amount of $20,000 per Lead Plaintiff, for the time, effort, and risk associated with acting as class representatives.

The grounds for this motion are set forth in the accompanying Memorandum in Support. A proposed form of Order is also attached.

MEMORANDUM IN SUPPORT

INTRODUCTION & PRELIMINARY STATEMENT

The settlement in this Action for $80,875,000 (the "Settlement" or "Settlement Sum") represents an outstanding result for the Plaintiff Class. Plaintiffs' Counsel respectfully submit that this result was achieved through their skill, tenacity and effective advocacy while litigating this Action for more than seven years on a purely contingent fee basis against a team of highly skilled attorneys representing Duke Energy Corporation, Duke Energy Ohio, Inc. and its related affiliates and subsidiaries (collectively, "Defendants"). The Settlement was achieved only weeks before trial and in the face of numerous hurdles and risks that posed a real threat of obtaining no recovery for the Class, much less the exceptional Settlement now before the Court for approval.

As detailed in the accompanying Declarations of Plaintiffs' Counsel ("Declarations") and Section II below, Plaintiffs' Counsel dedicated substantial resources to this litigation having collectively spent roughly 9,500 hours in its prosecution. Plaintiffs' Counsel's efforts included, among other things: drafting one original complaint and two detailed amended complaints; successfully convincing the Sixth Circuit to reverse the Court's order granting Defendants' motion to dismiss; obtaining class certification that Defendants vigorously opposed; engaging in extensive fact and expert discovery, including participation in 27 depositions and the review of

more than 65,620 pages of documents; opposing Defendants' motion for summary judgment; and diligently preparing for trial. Joint Decl., at ¶¶ 11-29.[2]

The Settlement was achieved in the face of considerable risks and challenges confronting this Action from the outset. As set forth in detail in the Declarations[3], Plaintiffs faced substantial hurdles in establishing Defendants' liability with respect to their civil RICO claim pursuant to 18 U.S.C. § 1962(c), common-law claims for fraud and civil conspiracy, as well their claims alleging violations of the Robinson-Patman Act of 1936, 15 U.S.C. § 13 and Ohio's Pattern of Corrupt Activity Act, O.R.C. § 2923.31. For example, Plaintiffs faced the substantial risk that a jury would accept Defendants' main argument that payments to favored customers qualified as legitimate option payments permissible under the law. Joint Decl., at ¶¶ 38-39. Also, Plaintiffs faced the risk that even if a jury concluded the payments were illegal, it still could have found that Plaintiffs were not entitled to a remedy, as Defendants argued that rebates to favored customers did not harm the Class, which paid and was required to pay the tariffed rate. *Id.* Modern case law is extremely sparse on the topic of whether Plaintiffs were entitled to monetary damages for the claims alleged against Defendants. *Id.* Plaintiffs also faced a substantial challenge in establishing jurisdiction for the Court. This point was realized when the District Court originally dismissed Plaintiffs' claims at the motion to dismiss stage of this case. *Id.* at ¶

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[2] The Joint Declaration of W.B. Markovits and Randolph Freking in Support of (A) Plaintiffs' Motion for Final Approval of Class Action Settlement and for Approval of Plan of Allocation, and (B) Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, and (C) Approval of Incentive Awards ("Joint Declaration" or "Joint Decl.") is filed contemporaneously herewith and an integral part of this submission. For the sake of brevity in this Memorandum, Plaintiffs respectfully refer the Court to the Joint Declaration for a detailed description of, among other things: the history of the Action; the nature of the claims asserted in the Action; the negotiations leading to the Settlement; the value of the Settlement to the Class, as compared to the risks and uncertainties of continued litigation; the terms of the Plan of Allocation for the Settlement proceeds; and a description of the services Plaintiffs' Counsel provided for the benefit of the Class.

[3] In addition to the Joint Declaration, the Declaration of Thomas F. Rehme in support of Plaintiffs' Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses is attached as Exhibit A.

13. In granting Defendants' motion to dismiss, the Court found that (1) the "filed-rate doctrine" deprived the Court of federal question subject matter jurisdiction, and (2) the Public Utilities Commission of Ohio ("PUCO") had exclusive jurisdiction over Plaintiffs' state law claims. *Id.* Thus, Plaintiffs' Counsel were forced to resuscitate this case by successfully convincing the Sixth Circuit to reverse the Court's decision and remand the case for this court to continue with the litigation. Upon remand, Plaintiffs' Counsel faced additional challenges while briefing and arguing against Defendants' motion for summary judgment. Settlement did not occur until one month prior to the scheduled start of trial, which was after numerous mediations and after the Court held oral argument on the motion for summary judgment.[4]

As compensation for their efforts on behalf of the Class, Plaintiffs' Counsel request a fee award in the amount of $19,237,432.98 (24% of the Settlement Sum after deducting litigation expenses incurred prior to preliminary approval) plus interest, and reimbursement of the litigation expenses incurred prior to preliminary approval in connection with the prosecution and resolution of the Action in the amount of $719,029.23, for a total award of $19,956,462.21. Plaintiffs' Counsel also seek approval for reasonable expenses to be incurred subsequent to preliminary approval, in amounts to be submitted periodically for approval by the Court. These expenses primarily will consist of: 1) costs related to the Class Benefit Fund Board, and 2) notice and claims expenses incurred by the Court-appointed Administrator, the Garden City Group. Pursuant to the Stipulation, Defendants have already funded, on a non-refundable basis, $1 million to be used for the initial expenses in these two categories.

The 24% requested for attorneys' fees is on the low end of the 20% to 50% range commonly awarded in comparable settlements. Using the lodestar method as a cross-check also reveals that a 3.66 multiplier is reasonable and typically awarded in complex class actions with

[4] *See* Joint Decl., ¶¶ 30-32.

substantial contingency risks such as this one. For these reasons, Plaintiffs' Counsel respectfully request that this Court award the requested attorneys' fees and expenses.

Pursuant to the Preliminary Approval Order: a) roughly more than 400,000 copies of the Settlement Notice were mailed to potential Class Members beginning on December 15, 2015; 2) Summary Notice was published in the *Cincinnati Enquirer, Dayton Daily News, Hillsboro Gazette* and *Wilmington News Journal*; 3) Summary Notice was sent to email addresses Duke had for some of the potential Class Members; 4) a Longform Notice was posted on the Class Action Website: www.dukeclassaction.com; and 5) a geographically-targeted ad was placed on social media websites such as Facebook. All forms of notice include the URL to the Class Action Website containing the Longform Notice. The Longform Notice specifically advises potential Class Members that Plaintiffs' Counsel seek fees equal to 24% of the Settlement after expenses, and out-of-pocket expenses of up to $2,000,000.[5]

FACTUAL BACKGROUND

In the interest of brevity, and to avoid unnecessary duplication, Plaintiffs' Counsel will not rehash the factual background of this seven-year class action. Rather, Plaintiffs' Counsel direct the Court to the accompanying Declaration, which provides a detailed description of this Action's factual and procedural background, as well as the events that led to the Settlement.[6]

LEGAL ARGUMENT

I. PLAINTIFFS' COUNSEL ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES FROM THE COMMON FUND.

A. Plaintiffs' Counsel's Request for a Percentage of the Fund Is Fair and Reasonable.

[5] *See* Joint Decl., at ¶¶ 42-43.
[6] *See, e.g.*, Joint Decl., at ¶¶ 8-40

The Supreme Court has long recognized that "a litigant or 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," the "common fund."[7]

"When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Rawlings v. Prudential Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). "In general, there are two methods for calculating attorney's fees: the lodestar and the percentage-of-the-fund." *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 498 (6th Cir. 2011). The percentage of the fund method is preferred in common fund cases. *See Rawlings*, 9 F.3d at 515 ("We are aware of the recent trend towards adoption of a percentage of the fund method in such cases."). It has been observed that "the percentage of the fund method more accurately reflects the results achieved." *Id.*, at 516 (internal citations omitted). "'[U]nder the percentage of the fund method, the court simply determines a percentage of the settlement to award the class counsel.'" *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 789 (N.D. Ohio 2010) (quoting *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 922 (N.D. Ohio 2003)).

As described below, Plaintiffs' Counsel's fee request in this case is reasonable under each of the *Ramey* factors courts must apply.

B. The Requested Attorneys' Fees Are Reasonable Under the Percentage of the Fund Method.

Cases within the Sixth Circuit have observed that the "benchmark" percentage for attorney fees in common fund class actions is 25%.[8] Plaintiffs' Counsel's request for an award of 24% of the common fund, therefore, is below the "benchmark" of 25%.

[7] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).
[8] *Fournier v. PFS Investments, Inc.*, 997 F. Supp. 828, 832 (E.D. Mich. 1998).

In this Circuit, "[c]ourts have noted that the range of reasonableness in common fund cases is from 20 to 50 percent of the common fund." *See Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, No. 10CV-14360, 2015 WL 1498888, at *15 (E.D. Mich. Mar. 31, 2015), *appeal filed*, No. 15-1551 (6th Cir. May 11, 2015) (citing *In re Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig.*, 137 F. Supp. 2d 1029, 1046 (S.D. Ohio 2001)); *In re Cincinnati Gas & Elec. Co. Sec. Litig.*, 643 F. Supp. 148, 150 (S.D. Ohio 1986); *see also Lonardo*, 706 F. Supp. 2d at 803 (26.4%); *Kritzer v. Safelite Solutions, LLC*, No. 2:10–cv–0729, 2012 WL 1945144, at *9-10 (S.D. Ohio May 30, 2012) (52%); *Gascho v. Global Fitness Holdings, LLC*, No. 2:11-CV-436, 2014 WL 1350509, at *37 (S.D. Ohio Apr. 4, 2014) (21%).

Recent scholarly empirical studies have found that (1) the percentage of the fund method is now preferred by courts; (2) nearly two thirds of awards using the percentage of the fund method fell between 25% and 35%, with the most common percentages being 25%, 30%, and 33%; (3) the mean award is 25.4% and the median is 25%; (4) over 80% of all percentage-of-the-fund fee awards were greater than or equal to 20% of the total settlement amount (and often much greater). *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010), at 833-34, 838.

Here, Plaintiffs' Counsel are applying for a fee award of $19,237,432.98, or 24% of the fund net of expenses and administrative costs incurred prior to preliminary approval, which is within "the range of reasonableness" for fee awards and at the low end of this Circuit's general spectrum for reasonableness, which ranges from 20 to 50 percent.[9] Furthermore, Plaintiffs'

[9] *See, e.g., In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2010 WL 3341200, at *1 (W.D. Ky. Aug. 23, 2010) (approving attorney fees of more than 50% of settlement, where settlement fund could potentially increase and bring attorney fees down to 20%); *In re Se. Milk Antitrust Litig.*, No. 2:07-CV 208, 2013 WL 2155387, at *2 (E.D. Tenn. May 17, 2013) (approving 1/3 for attorney fees where settlements totaled more than $300 million); *Shane Group*, 2015 WL 1498888 at *16 (finding 1/3 of settlement fund was reasonable); *Godec v. Bayer Corp.*, No. 1:10-CV-224, 2013 WL

Counsel's 24% fee request is reasonable when compared to other antitrust cases involving comparable settlement amounts.[10]

Along this spectrum of Sixth Circuit cases, Plaintiffs' Counsel's case was longer and more complex than cases where awards were at the 25% "benchmark" or higher. For example, in *Godec*, an award of 25% was granted even though the court was "not persuaded that [the case was] any more complex than the average class action."[11] Unlike *Godec*, this case is a complex class action involving antitrust and RICO claims relating to a regulated utility. "Antitrust class actions are inherently complex" and their "legal and factual issues are complicated and highly uncertain in outcome."[12] In this case, the computation of damages was complex, resulting in expert reports with vastly differing damage amounts. In particular, Defendants' theory computed damages at zero even if Plaintiffs were successful in proving liability. In *Kogan*, the court granted an award of nearly 30% premised in part on the plaintiffs having to "overcome

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1089549 (N.D. Ohio Mar. 14, 2013) (approving 25% attorney fees); *Clevenger v. Dillards, Inc.*, No. C–1–02–558, 2007 WL 764291, at *2 (S.D. Ohio Mar. 9, 2007) (approving fee award of 29% of gross settlement fund in ERISA case); *Kogan v. AIMCO Fox Chase, LP*, 193 F.R.D. 496, 503–04 (E.D. Mich. 2000) (approving attorney fee award of approximately 30% of the common fund).

[10] *See e.g.*, *In re Polyurethane Foam Antitrust Litig.*, No. 1:10 MD 2196, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015), *appeal filed sub. Nom. Direct Purchaser Class v. Defendants Liaison Counsel*, No. 15-3481 (6th Cir. May 5, 2015) (granting an attorney fee award of 30% or $44.35 million plus expenses from a $147.8 million Settlement Fund); *In re Polyurethane Foam Antitrust Litig.*, No. 1:10 MD 2196, 2015 WL 7348208, at *10 (granting an attorney fee of 20% for the six settlements and an overall fee award of 23.6%); *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 842 (N.D. Ill. 2015) (awarding a 1/3 fee of $15,333,333.33 from a $46 million common fund*); In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 756 (E.D. Pa. 2013) (awarding a 1/3 fee of $50,000,000 plus expenses from a $150,000,000 common settlement fund); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827, 2011 WL 7575003, at *2 (N.D. Cal. Dec. 27, 2011) (awarding a 30% fee of $121,506,674.60 plus expenses from a $405,022,242 common settlement fund); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. Feb. 27, 2015) (awarding a 25% fee from a $27,250,000 settlement fund).

[11] *Godec*, 2013 WL 1089549 at *3.

[12] *In re Prandin Direct Purchaser Antitrust Litig.*, No. 2:10-cv-12141-AC-DAS, 2015 WL 1396473, at *5 (E.D. Mich. Jan. 20, 2015); *In re Skelaxin (Metaxalone) Antitrust Litig.*, MDL No. 2343, 2014 WL 2946459, at *3 (E.D. Tenn. June 30, 2014) (same); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 533 (E.D. Mich. 2003) (noting that "[a]ntitrust class actions are inherently complex").

defendants' motion to dismiss[.]"[13] Here, however, Plaintiffs overcame a much greater challenge than simply defeating a motion to dismiss. Since the Court granted Defendants' motion to dismiss, Plaintiffs had to convince the Sixth Circuit Court of Appeals that the district court's dismissal decision should be reversed and remanded. After the Sixth Circuit reversed and remanded this matter, Plaintiffs navigated through extensive discovery, obtained class certification, and opposed Defendants' motion for summary judgment. This is unique from all the cases cited above because none of them had to overturn a district court's decision granting a defendant's motion to dismiss in order to regain standing to pursue damages against the defendants. In this case Plaintiffs faced and overcame the statistically-unfavorable position of reversing a trial court's grant of a motion to dismiss.

With respect to the length of time the litigation was pursued, the *Shane Group* class action was litigated for less than three years before reaching a settlement. Considering this amount of time, the court noted that the "one-third" attorneys' fees were reasonable "in light of the risk of litigation."[14] Three years is not even half the amount of time that was spent litigating the present case. Here, the risk of litigation continued for more than seven years and settlement was not reached until less than one month before trial, which was after the oral arguments on the Defendants' motion for summary judgment.

Taking into account the inherent complexity of this class action, the roughly seven years of litigation, the Sixth Circuit's reversal of the dismissal of this action, and the looming jury trial, Plaintiffs' Counsel's application for 24% attorneys' fees is justified and reasonable under the percentage of the fund method.

C. The Six Ramey *Factors Confirm that Plaintiffs' Counsel's Attorney Fee Request is Fair and Reasonable.*

[13] *Kogan*, 193 F.R.D. at 504.
[14] *Shane Group*, 2015 WL 1498888 at *15.

When reviewing the reasonableness of an attorney fee award requested in a class action, courts consider factors such as (1) the value of the benefit rendered to the class; (2) whether the services were undertaken on a contingent fee basis; (3) the value of the services rendered by the attorneys, if measured on an hourly basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides. *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009); *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996).[15]

Analyzing the six *Ramey* factors set out above makes it clear that the attorneys' fees requested are reasonable.[16] District courts in the Sixth Circuit "generally consider the most important factors to be the value of the benefit rendered and the value of the services on an hourly basis."[17]

1. The value of the benefit rendered to the Class supports the requested fee.

This class action was filed on behalf of residential and non-residential ratepayers to ensure that utility rebates offered to a select group of favored customers were equally offered to all ratepayers, and alleged violation of the Robinson-Patman Act of 1936, 15 U.S.C. § 13, *et seq.*, Ohio's Pattern of Corrupt Activity Act, Ohio Rev. Code § 2923.31, *et seq.*, a civil RICO claim

[15] More generally, Prof. Cond. R. 1.5 lists the following factors to be considered in determining the reasonableness of a fee: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

[16] *In re Countrywide*, 2010 WL 3341200 at *1.

[17] *Id.* (citing *In re Sulzer*, 268 F. Supp. 2d at 930).

pursuant to 18 U.S.C. § 1962(c), and common-law claims of fraud and civil conspiracy. The Settlement Sum of $80.875 million exceeds the entire amount of the alleged illegal rebate give to the favored customers. Given the previously discussed factual and legal hurdles faced by Plaintiffs' Counsel, this Settlement confers a tremendous benefit upon the Class.

2. The value of the services on an hourly basis supports the requested fee.

To determine whether the value of the services rendered on an hourly basis supports the requested fee, courts within this District and the Sixth Circuit conduct a lodestar cross-check.[18] In cases of this nature, fees representing multiples above the lodestar are regularly awarded to reflect the contingency fee risk and other relevant factors.

Here, Plaintiffs' Counsel spent a total of 9,491.86 hours of attorney and other professional support time prosecuting this Action.[19] This yields a lodestar for Plaintiffs' Counsel equal to approximately $5,254,251.25.[20] The requested 24% fee, which amounts to $19,237,432.98 (without interest) represents a multiplier of 3.66.[21] Multipliers greater than 3.66 are often used in the Sixth Circuit for similar complex class actions involving significant contingency risks.[22] Thus, the 3.66 multiplier is consistent with the law in this Circuit and confirms the reasonableness of the award. Furthermore, Plaintiffs' Counsel will continue spend

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[18] *See supra*, fn. 8; *see In re Countrywide*, 2010 WL 3341200 at *1; *In re Skechers Toning Shoe Products Liab. Litig.*, No. 3:11-MD-2308-TBR, 2013 WL 2010702, at *13 (W.D. Ky. May 13, 2013); *Godec*, 2013 WL 1089549 at *3.

[19] *See* Joint Decl., at ¶ 56; *see also* Exhibit 2 to the Joint Declaration.

[20] *See id*. ¶ 56; Exhibit 2 to the Joint Declaration.

[21] *See id*.; Exhibit 2 to the Joint Declaration.

[22] *See In re Cardinal Health*, 528 F. Supp. 2d 752, 767 (S.D. Ohio 2007) (lodestar multiplier of six); *Merkner v. AK Steel*, No. 1:09–CV–423–TSB (S.D. Ohio, Order filed Jan. 10, 2011, at p. 6) (awarding 10% of the cash portion of the settlement representing a lodestar multiplier of 5.3); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 736 n.44 (E.D. Pa. 2001) (finding fee award equivalent to 4.5 to 8.5 lodestar multiplier "unquestionably reasonable"); *In re Beverly Hills Fire Litig*., 639 F. Supp. 915, 924 (E.D. Ky. 1986) (finding a multiplier of 5 was appropriate); *see also In re Sulzer*, 268 F. Supp. 2d at 939 n.45 (noting that a review of 1,120 class action cases from 1973 through 2003 had effective multipliers averaging: "(a) 3.89 across all 1,120 cases, (b) 4.50 across the 64 cases where the recovery exceeded $100 million, and (c) 2.97 across the ten mass tort cases.").

substantial time working on this case in preparing for the April Fairness Hearing and working with GCG to administer the Settlement. This additional time and effort has not been considered when calculating the lodestar total and resulting multiplier listed above, which further supports the reasonableness of Plaintiffs' Counsel's fee request.

3. The risk of no compensation supports the requested fee.

Plaintiffs' Counsel prosecuted this case entirely on a contingent fee basis. *See* Joint Decl., at ¶ 70. Accordingly, Plaintiffs' Counsel took the considerable risk that they would never be compensated for either the time expended or out-of-pocket expenses incurred in litigating this Action. "[C]ontingency fee arrangements indicate that there is a certain degree of risk in obtaining a recovery."[23] Furthermore, the complexity of cases involving alleged antitrust violations increases the risk of obtaining an unfavorable jury verdict.[24] Given this is a class action involving antitrust claims as well as equally complex civil RICO claims, Plaintiffs' Counsel faced the very real risk that a jury could render a defense verdict and leave Plaintiffs with no recovery after almost eight years of litigation.

Accordingly, this factor supports an award of attorneys' fees.[25]

4. Society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others supports the requested fee.

In evaluating the reasonableness of a fee request, the Court considers society's stake in rewarding attorneys who produce a common benefit for class members in order to maintain an incentive to others: "[e]ncouraging qualified counsel to bring inherently difficult and risky but

[23] *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d at 1043.
[24] *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. at 523 ("Experience proves that, no matter how confident trial counsel may be, they cannot predict with 100% accuracy a jury's favorable verdict, particularly in complex antitrust cases.").
[25] *See In re Countrywide*, 2010 WL 3341200 at *11 (contingent fee supports an award of attorneys' fees).

beneficial class actions like this case benefits society." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. at534.

As the Court in *In re Telectronics* stated:

> [I]n litigating this case, Class and Plaintiff's Counsel expended significant resources of both times and monies … We believe that, without such a class action, small individual claimants would lack the resources to litigate a case of this magnitude. Attorneys who take on class action matters serve a benefit to society and the judicial process by enabling such small claimants to pool their claims and resources.
>
> 137 F. Supp. 2d at 1042-43

"Society also benefits from the prosecution and settlement of private antitrust litigation." *See e.g., Pillsbury Co.*, 459 U.S. 318 (1865); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D.at 534.

Here, as demonstrated above, Plaintiffs' Counsel's efforts in pursuing this Action provided and continue to provide a substantial benefit to society. Accordingly, this factor supports an award of attorneys' fees.

5. The complexity of the litigation supports the requested fee.

Courts in this Circuit also consider the complexity of the litigation in determining the reasonableness of an attorneys' fee award. This case was hardly a cakewalk for Plaintiffs' Counsel and Plaintiffs. While "[m]ost class actions are inherently complex,"[26] this one presented a number of complicated legal and factual issues concerning (1) the applicability of the "filed-rate doctrine"; (2) the jurisdiction of the district court to hear cases involving alleged illegal utility rebates; (3) whether side agreements were legitimate option payments or illegal rebates; and (4) whether plaintiffs were entitled to a remedy even if successful on proving liability. Joint Decl. at ¶ 73.

The Court is well aware that this case was hard fought right up to the time the parties reached a settlement in principle, only days before this Court would have issued its decision on

[26] *In re Telectronics*, 137 F. Supp. 2d at 1013.

Defendants' motion for summary judgment and commenced trial. At every stage of this case, Plaintiffs' Counsel grappled with novel, complex issues and were met with fierce resistance by determined opponents. Accordingly, this factor supports an award of attorneys' fees.

6. The professional skill and standing of counsel involved on both sides supports the requested fee.

Finally, courts in this Circuit evaluate the professional skill and standing of counsel in determining the reasonableness of a fee request. Here, the skill and standing of counsel for all parties was of the highest caliber.

Plaintiffs' Counsel include the law firms of (1) Markovits, Stock & De Marco, LLC, and (2) Freking, Myers & Reul, LLC[27]. Both law firms have considerable experience with similar litigation and have recovered hundreds of millions of dollars for consumers in similar settlements.[28] The individual Plaintiffs' attorneys are all experienced lawyers who have substantial experience in complex litigation and class actions. W. B. Markovits ("Markovits") practices in the area of complex civil litigation, with an emphasis on securities, antitrust, RICO, and False Claims Act cases. Markovits began his career as a trial lawyer at the U.S. Department of Justice Antitrust Division in Washington, D.C. He continued a focus on antitrust after moving to Cincinnati, where he became an adjunct professor of antitrust law at the University of Cincinnati Law School. Markovits has been involved in a number of notable cases, including: the Choice Care securities, antitrust, and RICO class action in which the jury awarded over $100 million to a class of physicians; a fraud/RICO case on behalf of The Procter & Gamble Company, which resulted in a settlement of $165 million; an eleven-year antitrust and RICO class action against Humana, including appeals that reached the United States Supreme Court,

[27] The attached Declaration of Thomas F. Rehme in Support of Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses documents the time and expenses incurred by prior counsel, Waite, Schneider, Bayless & Chesley Co., LPA.
[28] Joint Decl., at ¶¶ 2-5.

which culminated in a multi-million dollar settlement; and a national class action against Microsoft, in which he was chosen from among dozens of plaintiffs' attorneys to depose Bill Gates. He was also one of the lead counsel in the Fannie Mae and Freddie Mac securities cases.

Paul De Marco's ("De Marco") practice also focuses on class actions and other complex litigation. During his 25 years in Cincinnati, De Marco has been actively involved in successful litigation related to the U.S. Department of Energy's Fernald nuclear weapons plant, the Lucasville (Ohio) prison riot, Lloyd's of London, defective Bjork-Shiley heart valves, Holocaust-related claims against Swiss and Austrian banks, the Bankers Trust derivative scheme, Cincinnati's Aronoff Center, the San Juan DuPont Plaza Hotel fire, the Procter & Gamble Satanism rumor, the Hamilton County (Ohio) Morgue photograph scandal, defective childhood vaccines, claims arising from tire delamination and vehicle roll-over, racial hostility claims against one of the nation's largest bottlers, fiduciary breach claims against the nation's largest pharmacy benefits manager, and claims arising from the heatstroke death of NFL lineman Korey Stringer.

Louise Roselle ("Roselle") has practiced law for more than 40 years and tried many cases including both complex litigation and personal injury jury trials. She was co-lead counsel in the *Cook v. Rockwell* litigation in the United States District Court in Denver, Colorado resulting in a $928 million judgment, which was originally reversed by the Tenth Circuit Court of Appeals, but recently was reinstated on rehearing. Roselle received the 2009 Public Justice Trial lawyer of the Year award in honor of her contributions to the public interest through the *Cook v. Rockwell* case. Since 2003, she has acted as lead counsel in the *In re Hanford Nuclear Reservation Litigation* in the United States District Court for the Eastern District of Washington.

Randolph Freking ("Freking") has successfully represented many employees in trials in state and federal courts in Ohio and Kentucky since 1990, securing several million dollar plus jury verdicts. He also serves as a private mediator to resolve civil disputes whether they are employment, commercial or other types of disputes. Resumes for each firm are included with the Joint Declaration.

The quality of opposing counsel is also important in evaluating the quality of services rendered by Plaintiffs' Counsel.[29] Defendants were represented throughout this litigation by the law firms of (1) Porter, Wright, Morris & Arthur, LLP, and (2) Sidley Austin, LLP. In addition, until the case was remanded to the district court, Keating, Muething & Klekamp, PLL was counsel for Defendants. All of these firms are first-tier law firms with experience in defending against class action litigation. Notably, Sidley Austin has over 1,900 attorneys in offices around the globe. In addition, Defendants had in-house counsel who were reviewing and monitoring the case.

II. PLAINTIFFS' COUNSEL SHOULD BE REIMBURSED FOR REASONABLY-INCURRED OUT-OF-POCKET LITIGATION EXPENSES.

Plaintiffs' Counsel are also requesting reimbursement of the out-of-pocket expenses necessarily incurred and advanced by Plaintiffs' Counsel in the prosecution of the litigation prior to preliminary approval in the amount of $719,029.23. The chart set forth in Exhibit 3 to the Joint Declaration details the expenses broken down by category that Lead Counsel incurred and underwrote during the prosecution of this Action, all of which was at risk in this litigation. These expenses are a necessary part of litigation of this magnitude and scale and were essential to enable Plaintiffs to achieve the results now before this Court. "Under the common fund

[29] *See In re Delphi Corp. Sec. Deriv.& ERISA Litig.*, 248 F.R.D. 483, 504 (E.D. Mich. 2008) ("The ability of Co-Lead Counsel to negotiate a favorable settlement in the face of formidable legal opposition further evidences the reasonableness of the fee award requested."). Accordingly, this factor supports an award of attorneys' fees.

doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement, including expenses incurred in connection with document productions, consulting with experts and consultants, travel and other litigation-related expenses." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. at 535.

Plaintiffs' Counsel's expenses in this case are reasonable. There are four major categories of expenses: experts, notice, document management services and mediation.

Included in the amount of expenses is $353,803.61 paid to Plaintiffs' experts and consultants. *See also* Joint Exhibit 3 to the Joint Declaration. This encompasses nearly 50% of Plaintiffs' Counsel's total expenses. As detailed in the Joint Declaration, Plaintiffs' Counsel worked extensively with experts.[30] Experts were necessary in connection with issues such as the legality of side agreements with favored customers. Experts assisted Plaintiffs in discovery, motion practice, and mediation. Experts were also necessary in assisting Plaintiffs' Counsel in opposing the four experts Defendants designated in this case. And, critically, experts were indispensable in connection with determining a range for Class damages. Post-settlement, Plaintiffs' experts assisted Plaintiffs' Counsel in determining the Plan of Allocation. Plaintiffs' Counsel believes that the expert expenses were of fundamental importance in achieving the Settlement at issue.[31]

Another large expense was the cost of mailing the class notice to class members. This notice was required by the Order Approving Plaintiffs' Class Certification Plan and Directing Dissemination of the Class Action Notice to the Class. (Doc. No. 219).

[30] *See* Joint Decl., at ¶ 81.
[31] *Id.*

Plaintiffs' Counsel also obtained, reviewed, and analyzed more than 65,000 pages of documents from Defendants and numerous non-parties.[32] In order to effectively and efficiently review and analyze the documents, Plaintiffs' Counsel enlisted the services of a document management system that included document review capabilities. Plaintiffs' Counsel ultimately chose Media Stew, LLC to host the document management database. Media Stew's database allowed Plaintiffs' Counsel to quickly review documents, organize the documents, and provided a secure platform for hosting the documents. Media Stew's services were invaluable to Plaintiffs' Counsel and provided a substantial benefit to the Class. Furthermore, Media Stew's charges for hosting and providing an online database capable of searching all documents produced in this case were substantially less than other vendors used by Plaintiffs' Counsel in past cases, which permitted a large savings for the Class.

Plaintiffs' Counsel also incurred $9,155.00 for mediator fees.[33]

The expenses for which reimbursement is sought by Plaintiffs' Counsel include, in part, the Claims Administrator expenses associated with providing Court-ordered notice to the Class following class certification. GCG's additional expenses and fees in this case will be submitted for the Court's review during and after the administration of the Settlement.[34]

From the beginning of the case, Plaintiffs' Counsel recognized that they might not recover any of their expenses, and, at the very least, would not recover anything until the Action was successfully resolved.[35] Plaintiffs' Counsel also understood that, even assuming that the case was ultimately successful, an award of expenses would not compensate them for the lost use

[32] *Id.* at ¶¶ 16, 83.
[33] *See* Joint Decl., at ¶ 84.
[34] *Id.* at ¶ 87.
[35] *Id.*

of the funds advanced to prosecute this Action.[36] Thus, Plaintiffs' Counsel were motivated to, and did, take significant steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the Action.[37] Plaintiffs' Counsel carefully reviewed all expenses submitted to ensure that they accurately reflected costs necessarily incurred in obtaining the Settlement.[38]

As the Notice indicates, approval of the Settlement and Plan of Allocation is separate from the approval of Plaintiffs' Counsel's application for an award of fees and expenses. Any determination with respect to Plaintiffs' Counsel's application for an award of fees and expenses will not affect the Settlement, if approved.

III. THE COURT SHOULD APPROVE INCENTIVE AWARDS FOR THE FOUR CLASS REPRESENTATIVES.

Plaintiffs' Counsel are also requesting incentive awards totaling $80,000 for the four Class Representatives, or $20,000 each. Incentive awards are payments that are intended to cover the time and money that class representatives spend fulfilling their responsibilities. Courts approving incentive awards "have stressed that incentive awards are efficacious ways of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class." *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003). "Yet applications for incentive awards are scrutinized carefully by courts who sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain." *Id.* This is far from such a situation.

The Class Representatives devoted their time to this cause without any expectation of such a bounty. Their initiative, time, and effort were essential to the prosecution of the case and

[36] *Id.*
[37] *Id.*
[38] *Id.*

were central to the remarkable results achieved. Each Class Representative gave a deposition, produced documents and answered interrogatories. The Class Representatives also participated in settlement talks and, in some cases, attended mediation sessions. The Class Representatives had several meetings with Plaintiffs' Counsel and willingly gave of their time. Recently, in an antitrust case in Northern Ohio, Judge Zouhary awarded $35,000 to each class representative. *In re Polyurethane Foam Antitrust Litig.*, 2015 WL 7348208 at *13 ("Because the representative Plaintiffs actively participated in this litigation, and considering the relatively small incentive awards . . . this Court grants each Plaintiff a $35,000 incentive award.").

CONCLUSION

For the foregoing reasons, Plaintiffs' Counsel respectfully request this Court to grant their motion for an award of attorney's fees of 24% of the Settlement Fund, plus any accrued interest, net of Plaintiffs' Counsel's expenses and administration costs incurred prior to preliminary approval, and for reimbursement of Plaintiffs' Counsel's out-of-pocket litigation costs and expenses incurred prior to preliminary approval totaling $19,956,462.21, plus any accrued interest, and for incentive awards of $20,000 each for the four Class Representatives.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 18, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record in this matter who are registered on the CM/ECF.

/s/ W.B. Markovits
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