UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

JOINT DECLARATION OF W.B. MARKOVITS AND RANDOLPH H. FREKING IN SUPPORT OF (A) PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION, (B) PLAINTIFFS' COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS'FEES AND REIMBURSEMENT OF LITIGATION EXPENSES, AND (C) APPROVAL OF INCENTIVE AWARDS

W.B. Markovits and Randolph H. Freking being duly sworn, declare as follows:

1. W.B. Markovits is a member of the law firm Markovits, Stock & DeMarco, LLC ("MSD"). Randolph H. Freking is a member of the law firm of Freking, Myers & Reul, ("FMR").[1] MSD and FMR are Court-appointed lead counsel in this Action ("Plaintiffs' Counsel"). This joint declaration is respectfully submitted in support of: (a) Plaintiffs'[2] Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation and (b) Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, and (c) for Approval of Incentive Awards ("Declaration"). We each have personal knowledge of all material matters related to the Action based upon our active supervision and participation in the prosecution and settlement of this Action. Unless otherwise indicated, the statements in this Declaration are based on our personal knowledge.[3] Resumes for each firm are included with the Declaration.

2. Plaintiffs' Counsel are 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 focusing 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

[1] Freking, Myers & Reul was formerly known as Freking & Betz.
[2] Plaintiffs Anthony Williams, BGR, Inc., Munafo, Inc. and Aikido of Cincinnati ("Lead Plaintiffs" or "Class Representatives") and the classes they represent will collectively be referred to as "Plaintiffs".
[3] W. B. Markovits's knowledge stems from, in part, prior employment at Waite, Schneider, Bayless & Chesley, Co., L.P.A. ("WSBC"). WSBC served as counsel from the inception of the case, through the motion to dismiss stage, to the point where the Sixth Circuit reversed and remanded. W.B. Markovits worked on the Action at WSBC before forming MSD, which was named as class counsel together with Freking & Betz (now Freking, Myers, & Reul) in the class certification order.

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, 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.

3. Paul De Marco's ("De Marco") practice also focuses on class actions and other complex litigation. During his 27 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. De Marco is an Appellate Law Specialist certified by the Ohio State Bar Association, has argued before the United States Supreme Court, *Arthur Anderson LLP v. Carlisle*, 129 S.Ct. 1896 (2009), and has handled appellate matters in dozens of federal and state courts throughout the country. Along with Markovits, De Marco prepared the appellate briefs in *Williams v. Duke Energy Int'l, Inc.*, 681 F.3d 788 (6th Cir. 2012), and he orally argued the case.

4. 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.

5. 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. Freking and his firm have successfully handled class and collective actions under federal employment law, most significantly under the Age Discrimination in Employment Act, the WARN Act, and the Fair Labor Standards Act. As this case involved other types of issues, he sought co-counsel for this matter, initially WSBC and, later MSD.

6. The Court, having overseen these proceedings for more than seven years, is familiar with the case and its complex legal and factual issues. Accordingly, this Declaration does not purport to detail each and every event that occurred during the Action. Rather, it provides highlights of the events leading to the Settlement and the basis upon which Lead Plaintiffs and Plaintiffs' Counsel recommend its approval.

7. This Declaration describes: (a) the efforts undertaken by Plaintiffs and Plaintiffs' Counsel in prosecuting this Action; (b) the Notice to the members of the Settlement Class; (c) the Settlement, and the risks that Plaintiffs and Plaintiffs' Counsel considered in determining that the Settlement provides an outstanding recovery for the Class; (d) the proposed Plan of Allocation

for the Settlement; (e) the fee and expense application by Plaintiffs' Counsel; and (f) the request to approve Incentive Awards for the Class Representatives.

I. PROSECUTION OF THE ACTION

8. This case involves an alleged illegal and fraudulent rebate scheme initiated by predecessor, CG&E[4], of Duke Energy International, Inc. and Duke Energy Ohio ("Defendants" or "Duke"), a public utility serving southwestern Ohio. In 2004, CG&E filed a Rate Stabilization Plan ("RSP") with the PUCO. Through this RSP, CG&E sought a significant electricity rate increase. Various parties intervened to object, including three major trade associations—the Ohio Energy Group ("OEG"), the Industrial Energy Users of Ohio ("IEU"), and the Ohio Hospital Association ("OHA"). Twenty-two customers belonging to these trade associations—companies such as Procter & Gamble, AK Steel, General Electric, and General Motors—suddenly withdrew their objections and switched to supporting the RSP.

9. Plaintiffs alleged that years later, due to a whistleblower lawsuit in state court, was this 180° reversal explained: CG&E had secretly arranged for most of the charges comprising the rate increase—known as "riders"—to be refunded to the 22 customers, not by CG&E directly but by one or more of its non-utility affiliates. To effectuate the scheme, Plaintiffs alleged, CG&E drafted, and the 22 favored customers entered into, a series of agreements—the operative set being the so-called "option agreements"—involving CG&E's unregulated affiliate, Cinergy Retail Sales ("CRS"). Over a four-year period, from January 1, 2005 through December 31, 2008, the favored customers received payments totaling $73,151,788. The rest of CG&E's electricity customers—including residents, businesses, non-profit organizations, and municipalities—received no such payment.

10. Defendants contended that the payments to favored customers were for legitimate

[4] While this case has been pending, Cinergy, Inc., CG&E's parent, and Duke Energy Corp. merged.

option agreements. Plaintiffs contended that the so-called "option agreements" were simply a construct by which CG&E indirectly funneled illegal rebates to the favored customers in return for their support of CG&E's rate increase.

11. This Class Action was filed on January 16, 2008 on behalf of residential and non-residential ratepayers alleging in part that the utility rebates offered to a select group of favored customers should be equally offered to all ratepayers. Plaintiffs brought claims alleging violations 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 pursuant to 18 U.S.C. § 1962(c), and common-law claims of fraud and civil conspiracy. The probability of any ratepayers receiving an award under these claims was uncertain at the beginning of this litigation.

12. Defendants filed a motion to dismiss on March 21, 2008. On May 30, 2008, Plaintiffs filed an amended complaint, in part adding Defendant General Motors Corporation. Duke renewed its motion to dismiss on June 30, 2008. General Motors filed a motion to dismiss on August 25, 2008. In September 2008, Plaintiffs filed a motion for preliminary injunction and on October 31, 2008 filed a motion to certify a class. The district court stayed the motion to certify a class until disposition of the motion to dismiss.

13. On March 31, 2009, the district court dismissed the state and federal claims for a lack of subject-matter jurisdiction, citing reasons related to electricity rate regulation by the Public Utilities Commission of Ohio ("PUCO"). The district court determined that the state and federal damages claims were not judicially cognizable – the former due to the PUCO's "exclusive" jurisdiction, the latter due to the "filed rate doctrine" – and entered judgment for Duke.

14. Plaintiffs appealed the dismissal to the Sixth Circuit Court of Appeals. On June 4, 2012, the Sixth Circuit reversed and remanded the case to the district court. *Williams v. Duke Energy, Int'l, Inc.*, 681 F.3d 788. The Sixth Circuit found that when a public utility in Ohio "indirectly" pays rebates to selected customers, rather than across the board to all similarly situated customers, it violates Ohio's two anti-rebate statutes, Ohio Revised Code ("O.R.C.") §§ 4905.32 and 4905.33(A). *Id.* at 804. Violating either of these statutes constitutes a felony. *Id.*, citing O.R.C. §§ 4905.56 and 4905.99. When a public utility conspires with others to violate those statutes, it is liable for civil conspiracy. *Id.* at 804-805. When it deprives its customers of benefits through a pattern of racketeering including mail and wire fraud, money laundering and obstruction of justice, it violates federal RICO and the Ohio Corrupt Practices Act ("OCPA"). *Id.* at 801-804. When it deprives customers of benefits by omitting material facts, it is liable for common law fraud. *Id.* at 804. And when it engages in price discrimination among business consumers of electricity on a continuous basis from 2005 to 2009, it is liable for a violation of federal price discrimination laws. *Id.* at 799-801.

15. Defendants filed a petition for a writ of certiorari, which was denied by the Supreme Court on January 15, 2013. (Doc. No. 140).

16. Upon remand to the district court, discovery commenced. Because of the complexity of the issues involved and the massive amount of relevant information, the fact discovery phase of this litigation spanned two years. Over that period, 65,000 pages of documents were produced and reviewed. Early in discovery Plaintiffs served subpoenas on the three trade associations and the twenty-two favored customers that comprised them. Then Plaintiffs' Counsel took the depositions of the three trade association representatives. To prepare for these depositions, Plaintiffs' Counsel reviewed all of the documents produced as well as

documents available on the Internet. In total, Plaintiffs' Counsel participated in 27 depositions in this Action.

17. Extensive time was spent in this case on Internet searches to obtain all publicly available documents. PUCO documents are on the PUCO website and countless hours were spent reviewing the filings related to the RSP and the Cinergy-Duke merger and other relevant PUCO proceedings. Documents filed with the Securities and Exchange Commission ("SEC") were also reviewed because these documents contained Defendants' disclosures concerning issues relevant to this litigation.

18. Plaintiffs' Counsel took depositions of former and current Duke employees. To prepare for these depositions, Counsel reviewed all the documents related to the witness as well as other relevant documents. Deposition outlines were prepared and documents were designated as potential exhibits. Several of these depositions involved travel because the witnesses were out of state.

19. In addition to document review, Internet searches and depositions, Plaintiffs also spent hours on investigations and analyses.

20. Plaintiffs retained Media Stew, LLC to computerize the records and build a searchable database. Media Stew also worked with Plaintiffs in preparing demonstratives for trial.

21. Plaintiffs retained four experts: Dr. David E. Dismukes of Acadian Consulting Group, LLC; Kent Marcum; Jonathan W. Marshall; and Dr. Harvey Rosen of Burke, Rosen & Associates. Plaintiffs worked with the experts to insure that they had all the information and documentation that they requested to review for the purpose of preparing their reports and rendering their opinions.

22. Plaintiffs' experts wrote extensive reports detailing their opinions concerning the liability and damage issues in the case. Defense counsel deposed all four experts.

23. In addition to their own discovery efforts, Plaintiffs also responded to Defendants' discovery requests. Each Lead Plaintiff answered interrogatories, produced documents and gave a deposition. In addition, Plaintiffs answered extensive contention interrogatories.

24. There were disputes concerning documents that Defendants withheld on the basis of privilege. In January 2014, Plaintiffs filed a motion to compel the production of documents. (Doc. No. 175). Defendants vigorously opposed this motion. Duke's privilege assertions as to certain withheld emails from the key month of December 2004 were briefed extensively. *See* (Doc. Nos. 175, 176, 179). Although Plaintiffs were able to secure production of several of the withheld documents pursuant to an order issued by Magistrate Judge Abel, Doc. No. 187, the fate of other presumptively damning emails withheld by Duke based on privilege remained uncertain by the time fact discovery ended on October 15, 2015. Indeed, the privilege issues surrounding those emails still were unresolved at the time of the summary judgment hearing on June 3, 2015. When the case settled, the dispute concerning these documents was still ongoing.

25. Defendants also had four experts who produced expert reports. Plaintiffs' Counsel deposed all four experts. For each expert deposition, Plaintiffs' Counsel reviewed the expert's report, including that expert's curriculum vitae and any exhibits cited and consulted with Plaintiffs' corresponding expert. In further preparation for these expert depositions, Plaintiffs' Counsel reviewed hundreds of documents, previous opinions and/or testimony given by each expert, and any legal authorities mentioning such expert. Plaintiffs' Counsel then drafted extensive deposition outlines and designated dozens of potential exhibits. This was an undertaking that required a substantial investment of time and expense.

26. Plaintiffs filed a second amended complaint on September 18, 2013. This complaint dropped General Motors as a defendant and all claims against it.

27. On March 31, 2014, following motions and briefing, the court certified a class generally consisting of ratepayers who received retail electric generation service from Duke between January 1, 2005 and December 31, 2008 and did not receive rebates under the side agreements. (Doc. No. 183). The class was divided into two subclasses: Residential Ratepayers and Non-Residential Ratepayers. Plaintiffs retained Garden City Group, LLC ("GCG") to give notice to the class. Over 387,388 notices were mailed and in addition 49,013 notices were e-mailed. One hundred fifty five (155) class members have opted out of the class.

28. On March 2, 2015, Defendants filed their motion for summary judgment. The motion was fully briefed and argued on June 3, 3015.

29. A jury trial was scheduled to commence on July 27, 2015. Plaintiffs had prepared their exhibit lists, demonstratives, witness lists and final pretrial statement at the time that the case settled.

II. SETTLEMENT EFFORTS

30. The Settlement was reached only after prolonged, arm's-length settlement bargaining undertaken in good faith with full knowledge of the case and its attendant risks. The first mediation occurred in December 6, 2012, shortly after the Action was remanded to the district court. This mediation was before Magistrate Judge Norah McCann King. Prior to meeting with the mediator, the parties prepared confidential mediation statements for the mediator's benefit. At this time, before any substantive discovery was conducted, no resolution was reached. A little over a month later, on January 25, 2013, a second mediation before Magistrate Judge King occurred. By this time, even though there had been some discovery, there

was a great deal more discovery to be done before trial. Again, no resolution was reached.

31. On March 13, 2015, the parties mediated the case in Washington, D.C. before Eric Green, a mediator who has successfully settled many complex cases. Again, no resolution was reached.

32. The next mediation was a court-ordered mediation before Judge Sargus, the trial judge. This mediation was on June 16, 2015, shortly after the summary judgment motion had been argued. Again, the case was not settled. On June 23, 2015 and July 20, 2015, the parties met with Judge Sargus and reached a settlement in principle, subject to ironing out the settlement terms through further negotiations.

33. The agreement in principle was to settle the Action for $80,875,000, subject to the execution of a formal stipulation and the Court's approval. The parties signed a memorandum of understanding on September 14, 2015, and continued negotiating the terms required for their Stipulation. The Stipulation of Class Action Settlement ("Stipulation") was signed and filed with the Court on October 21, 2015 (Doc. No. 246-1), and on the same day, the Court issued its Order Granting Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice and Setting Date for Settlement Fairness Hearing. ("Order") (Doc. No. 247). We have never experienced such a long and painstaking process from the time of the agreement in principle to the parties' presentation of their Settlement at the preliminary approval stage.

34. Pursuant to the Stipulation, one million dollars of the settlement amount was deposited into an escrow account on November 12, 2015.

35. All negotiations were arm's-length negotiations. All of the mediators were professional and well qualified to help the parties try to resolve this case. After the initial agreement was reached, counsel for both parties spent significant time exchanging, reviewing,

and analyzing additional data for the final settlement documents.

36. We support the Settlement as fair and reasonable, and also certify that it was reached at arm's-length. Our endorsement of the Settlement is informed by our and our co-counsel's thorough understanding of the strengths and weaknesses of the claims and defenses in the Action gained through the extensive and rigorous prosecution of this matter, as described above. Additionally, we evaluated the facts and applicable law and based on the recognition of the substantial risk and expense of continued litigation, concluded that the Settlement is in the best interests of the Class and will provide an immediate and meaningful recovery.

37. The principal reason for our consent to the Settlement is that it provides an immediate and substantial benefit to the Class in the form of a significant monetary recovery. The benefit of the present Settlement must be compared to the risk that no recovery might be achieved after a contested trial and likely appeals, possibly many months, or even years, into the future. We likewise considered and relied on: the difficulties and risks involved in proving the operative allegations; the potential for adverse opinions on the outstanding summary judgment motion; the attendant risks of litigation, especially in a complex action such as this, including the ability to maintain class status through to judgment and on an eventual appeal; the uncertain prospects for Plaintiffs' theory of damages; and the delays and uncertainties inherent in such litigation, including appeals.

38. The Settlement is a particularly exceptional result in light of the considerable risks and challenges confronting this Action from the outset. 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-Patnam 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: the payments to favored customers qualified as legitimate option payments permissible under the law. Also, Plaintiffs faced the risk that even if a jury concluded that the payments were illegal, jurors still could have concluded that Plaintiffs were not entitled to a remedy. Modern case law is extremely sparse on the topic of whether Plaintiffs were entitled to monetary damages for the claims alleged against Defendants.

39. But for the Settlement achieved on September 16, 2015, this Action either would have faced potential dismissal upon resolution of the summary judgment motion, or would have proceeded to trial. The claims advanced by the Class in this Action involve numerous complex legal and factual issues. If the Action were to proceed to trial, Plaintiffs would have to overcome significant defenses. Among other things, the Plaintiffs and Defendants disagree about (i) whether Lead Plaintiffs or the Class have suffered any damages, (ii) whether Defendants' agreements with third parties were option contracts, and (iii) whether Lead Plaintiffs or the Class were harmed by the conduct alleged in the Complaint. Plaintiffs and Defendants also disagree on the appropriate methodology for determining damages, if liability were established. This Settlement enables the Class to recover without incurring any additional risk, costs, or delay.

40. Defendants have expressly denied and continue to deny all assertions of wrongdoing or liability against them arising out of any of the conduct, statements, or acts, alleged, or that could have been alleged, in the Action. Defendants also continue to believe that the claims asserted against them in the Action are without merit. Defendants have agreed to enter into the Settlement, as embodied in the Stipulation, to avoid the uncertainty, burden and expense of further protracted litigation.

III. NOTICE TO THE SETTLEMENT CLASS MEMBERS

41. The Order required that notice to the Class be disseminated by December 20, 2015. The Court set a March 20, 2016 deadline for Class Members to submit objections to the Settlement, the Plan of Allocation or the Fee and Expense Application. The Court set a final approval hearing date of April 18, 2016.

42. Pursuant to the Court's Order, Plaintiffs' Counsel instructed GCG, the Court-approved Claims Administrator for the Settlement, to disseminate a postcard notice ("Postcard Notice") to potential Class Members via regular U.S. Mail. The Postcard Notice is a trifold postcard that includes a perforated card that serves as a claim form for Class Members to complete and mail back to GCG for processing. In addition to mailing the Postcard Notice, GCG has been instructed to: (1) publish a Longform Notice on the Class Website, which is located at www.dukeclassaction.com; (2) make available on the Class Website an electronic Proof of Claim form; (3) advertise the Summary Notice and Class Website through geographically-targeted ads on social media websites such as Facebook; (4) issue a press release of approximately 1,000 words over PR Newswire's Ohio and Midwest Region Hispanic newsline containing the content of the Summary Notice; (5) email an electronic version of the Postcard Notice to potential Class Members, for whom Duke had email addresses; and (6) publish Summary Notice in the *Cincinnati Enquirer*, *Dayton Daily News*, *Hillsboro Gazette* and *Wilmington News Journal*. GCG began this process on December 15, 2015.

43. The Notice contains a thorough description of the litigation and the Settlement. The Notice also contains the proposed Plan of Allocation and Class Members' rights to participate and/or object to the Settlement, the Plan of Allocation, or the Fee and Expense Application. The Notice informs Class Members of Plaintiffs' Counsel's intention to apply for an award of

attorneys' fees in an amount that will not exceed 24% of the $80,875,000 Settlement Fund net of litigation and claims administration expenses incurred prior to preliminary approval, and for reimbursement of litigation expenses not to exceed $2 million, which may include the reasonable costs and expenses of Plaintiffs' Counsel directly related to their representation of the Class. The Notice also informs Class Members that the request for Incentive Awards for Class Representatives will not exceed $80,000.

44. The Notice fairly apprises Class Members of their rights with respect to the Settlement and, therefore, is the best notice practicable under the circumstances, and complies with the Court's Order, Rule 23 of the Federal Rules of Civil Procedure, and due process. This notice plan complies with Fed. R. Civ. P. 23 and due process because, among other things, it informs Settlement Class Members of: (1) the nature of the action; (2) the essential terms of the settlement, including the definition of the Settlement Class and the claims asserted; (3) the binding effect of a judgment if the Settlement Class Member did not previously request exclusion; (4) the process for objection, including the time and method for objecting and that Settlement Class Members may make an appearance through counsel; (5) the Class Representatives' request for an incentive award and Class Counsel's request for reimbursement of attorneys' fees and expenses; and (6) how to make inquiries.[5]

45. To disseminate the Notice, Duke identified all persons who fall within the definition of the Class and whose names and addresses could be identified with reasonable effort from or through Duke's records. GCG obtained the names and addresses of potential Class Members from Duke.

46. In accordance with the Order, proof of mailing and publication will be filed with the Court no later than 14 calendar days before the April 18, 2016 fairness hearing.

[5] *See* Fed. R. Civ. P. 23(c)(2)(B)

IV. THE PLAN OF ALLOCATION IS FAIR AND SHOULD BE APPROVED

47. Pursuant to the Order, and as explained in the Notice, all Class Members wishing to participate in the settlement are to file a valid Proof of Claim on or before April 13, 2016. The deadline may be extended by Court Order.

48. All Class Members who file valid Proof of Claim forms will receive a distribution of the Net Settlement Fund, after deduction of fees and expenses approved by the Court and taxes incurred on interest income earned by the Settlement Fund. The distribution will be made in accordance with the Plan of Allocation set forth and described in detail in the Notice.

49. The Plan of Allocation was prepared by Plaintiffs' Counsel in close consultation with Plaintiffs' damages experts. The Plan of Allocation reflects Plaintiffs' damages experts' analyses under the demanding standards set forth in the relevant case law.

50. The Plan of Allocation is consistent with Plaintiffs' allegations. We respectfully submit that the Plan of Allocation is fair, reasonable, and adequate, and should be approved by the Court.

51. At this time, it is not possible to make an exact determination as to how much any individual Class Member may receive from the Settlement until claims are processed and the number of Claim Days for the Class and the amount of the Non-Residential Class Members' usage totals are determined. The minimum payout for a valid and timely claim from an eligible Residential Class Member who qualifies for the entire Class Period will be a total of approximately $40; that amount may go up to a maximum of approximately $400 depending on the total number of Claim Days calculated for the Class. Non-Residential Class Members will receive fixed, and possibly variable amounts based upon usage, for each qualifying day they paid

a tariffed rate during the Class Period, from a settlement fund not to exceed $25,000,000. The minimum payout for a valid and timely claim from an eligible Non-Residential Class Member that qualifies for the entire Class Period will be a total of approximately $200; that amount may go up to a maximum of approximately $4,000 depending on the total number of Claim Days calculated for the Class. Class Members who qualify for lesser time periods will receive lesser total payouts so long as they are $10.00 and above.

52. Pursuant to the Settlement, Defendants will set aside $80,875,000 for Settlement of this Action, which will include the payment of attorneys' fees and expenses; the payment of all federal, state and local taxes on any income earned by the Settlement Fund and the reasonable costs incurred in connection with determining the amount of and paying taxes owed by the Settlement Fund (including reasonable expenses of tax attorneys and accountants); the costs and expenses incurred in connection with providing notice to Class Members and administering the Settlement on behalf of the Class Members; the establishment of a fund not to exceed $25,000,000 for Residential Class Members; the establishment of a fund not to exceed $25,000,000 for Non-Residential Class Members; and, the establishment of an $8,000,000 Class Benefit Fund, which shall be used to fund and promote programs and projects related to energy programs to leverage settlement dollars with respect to Class Members, thereby providing a direct benefit to Class Members.

53. Payments to Residential Class Members, Non-Residential Class Members, and for programs under the Class Benefit Fund will not be distributed until the Court has approved the Settlement, and the time for any petition for rehearing, appeal or review, whether by certiorari or otherwise, has expired.

V. APPLICATION FOR ATTORNEYS' FEES

54. The Notice mailed to the members of the Class stated that Plaintiffs' Counsel would apply for an award of attorneys' fees on behalf of themselves not to exceed 24% of the $80,875,000 Settlement Fund net of expenses incurred prior to preliminary approval, as well as reimbursement of expenses incurred and advanced by Plaintiffs' Counsel in prosecuting this litigation not to exceed $2 million.

55. Plaintiffs' Counsel is applying for fees of 24% of the net Settlement Fund (after litigation and claims administration expenses), and is seeking reimbursement of out-of-pocket litigation expenses of $719,029.23.

56. In prosecuting this Action over the course of more than seven years, Plaintiffs' Counsel expended 9,491.86 hours resulting in a lodestar of $5,254,251.25 million. *See* Exhibit 2[6] (summarizing the collective lodestar and hours of all Plaintiffs' Counsel). The total requested fee, therefore, yields an estimated 3.66 multiplier with respect to Plaintiffs' Counsel's lodestar.

57. With regard to work performed and expenses incurred prosecuting this Action, Plaintiffs' Counsel have submitted this joint declaration in support of an award of attorneys' fees and reimbursement of litigation expenses. The lodestar summaries were prepared from contemporaneous time records regularly prepared and maintained by Plaintiffs' Counsel. Plaintiffs' Counsel have reviewed the contemporaneous time records and they are available at the request of the Court.

58. The rates billed by Plaintiffs' Counsel are comparable to peer plaintiffs' and defense-side law firms litigating matters of similar magnitude.

59. Plaintiffs' Counsel submit that the requested award of fees is fair and reasonable

[6] Plaintiffs' Counsel possess daily detailed time summaries, including hourly rates, for each person contributing to the lodestar total and will submit them for the Court's review upon Your Honor's request.

based upon the significant risk of the litigation and the quality of representation by Plaintiffs' Counsel in achieving the exceptional Settlement. Indeed, as discussed in the accompanying memorandum of law, courts regularly award fee requests exceeding 24% of a common fund, and with lodestar multipliers of four to five. In fact, the request here is on the low end of average percentage and below the average lodestar multiplier for cases that settle for comparable sums. Plaintiffs' Counsel submit that this case would merit a fee award at the very "top end" of the customary fee award scale, given the exceptional recovery that has been achieved by Plaintiffs' Counsel's singular efforts in the face of incomparable risks – as detailed herein.

60. "[I]n the Southern District of Ohio, the preferred method is to award a reasonable percentage of the fund, with reference to the lodestar and the resulting multiplier."[7] District courts within the Sixth Circuit also recognize the percentage-of-the fund method as the preferred method.[8] The percentage of the fund method is the "preferred method" because "the lodestar method is cumbersome; the percentage-of-the-fund approach more accurately reflects the result achieved; and the percentage-of-the-fund approach has the virtue of reducing the incentive for plaintiffs' attorneys to over-litigate or 'churn' cases."[9]

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[7] *In re Nationwide Fin. Servs. Litig.*, No. 2:08-CV-00249, 2009 WL 8747486, at *13 (S.D. Ohio Aug. 19, 2009); *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 381 (S.D. Ohio 2006) (same); *see also In re Teletronics Pacing, Sys., Inc.*, 186 F.R.D. 459, 483 (S.D. Ohio 1999) (noting that "the preferred method in common fund cases has been to award a reasonable percentage of the fund to Class Counsel as attorneys' fee"), *rev'd on other grounds*, 221 F.3d 870 (6th Cir. 2000); *In re DPL Inc., Sec. Litig.*, 307 F. Supp. 2d 947, 952 (S.D. Ohio 2004) (finding the percentage of the fund method the appropriate method for determining attorneys' fees in a common fund class action).

[8] *In re Se. Milk Antitrust Litig.*, No. 2:07-Cv 208, 2013 WL 2155387, at *2 (E.D. Tenn. May 17, 2013) (noting that the percentage-of-the-fund method "clearly appears to have become the preferred method on common fund cases."); *In re Prandin Direct Purchaser Antitrust Litig.*, No. 2:10-cv-12141, 2015 WL 1396473, at *4 (E.D. Mich. Jan. 20, 2015) (noting that '[t]he Settlement Fund is a 'common fund,' and courts have long recognized that a lawyer who recovers such a fund is entitled to a reasonable attorneys' fee from that fund as a whole.") (Internal citation omitted); *Stanley v. U.S. Steel Co.*, No 04-74654, 2009 WL 4646647, at *1 (E.D. Mich. Dec. 8, 2009) ("Particularly, where counsel's efforts create a substantial common fund for the benefit of the a class(SIC.), they are entitled to payment from the fund based on a percentage of that fund.").

[9] *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473 at *4 (E.D. Mich. Jan. 20, 2015).

61. The Sixth Circuit also considers six factors (collectively referred to as the *Ramey* factors): "(1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee 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."[10] The second *Ramey* factor employs a "lodestar cross check" to confirm the reasonableness of the award. Our fee request in this case is reasonable under each *Ramey* factor.

62. Cases within the Sixth Circuit have observed that the "benchmark" percentage for attorney fees in common fund class actions is 25%,[11] but the range of reasonableness can range anywhere from 20 to 50 percent.[12] Plaintiffs' Counsels' request for an award of 24% of the common fund, therefore, is below the "benchmark" of 25% and at the low end of this Circuit's general spectrum for reasonableness, which ranges from 20 to 50 percent.[13] Furthermore, Plaintiffs' Counsel's 24% fee request is reasonable when compared to other antitrust cases

[10] *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009) (citing *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996)).

[11] *Fournierv. PFS Investments, Inc.*, 997 F. Supp. 828, 832 (E.D. Mich. 1998).

[12] *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, No. 10-CV-14369, 2015 WL 1498888, at *15 (E.D. Mich. Mar. 31, 2015) *appeal filed*, No. 15-1551 (6th Cir. May 11, 2015) (noting that "[c]ourts have noted that the range of reasonableness in common fund cases is from 20 to 50 percent of the common fund."); *In re Countrywide Fin. Corp., Customer Data Sec. Breach Litig.*, MDL No. 1998, 2009 WL 5184352, at *11 (W.D. Ky. Dec. 22, 2009) (noting that a 25% fee award generally is the benchmark attorney fee award in a class action when the fees are taken out the common fund); *Fournier*, 977 F. Supp. at 832 ("The 'benchmark' percentage for this standard has been 25% (of the common fund), with the ordinary range for attorney's fee between 20-30%.").

[13] *See, e.g., In re Countrywide*, 2010 WL 3341200 at *1 (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.*, 2013 WL 2155387, at *2 (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 1089549, at *3 (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).

involving comparable settlement amounts.[14]

63. Along this spectrum of Sixth Circuit cases, this 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."[15] Unlike *Godec*, this case is an antitrust class action. "Antitrust class actions are inherently complex" and their "legal and factual issues are complicated and highly uncertain in outcome."[16] In this case, the mere computation of damages was so complex that it required expert reports from both sides with competing theories that arrived at vastly differing 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 defendants' motion to dismiss[.]"[17] Here, however, Plaintiffs overcame a much greater challenge than simply defeating a motion to dismiss. Since the district 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 to the

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[14] *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*, *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, *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.*, MDL No. 2031, 2015 WL 753946, at *16 (N.D. Ill. Feb. 20, 2015) (awarding a 1/3 fee of $15,333,333.33 from a $46MM 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 (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. 2015) (awarding a 25% fee from a $27,250,000 settlement fund).

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

[16] *In re Prandin*, 2015 WL 1396473 at *5; *In re Skelaxin (Metaxalone) Antitrust Litig.*, MDL No. 2343, 2014 WL 2946459, at *3 (E.D. Tenn. June 30, 2014) (same); *In re Cardiem CD Antitrust Litig.*, 218 F.R.D. 508, 533 (E.D. Mich. 2003) (noting that "[a]ntitrust class actions are inherently complex").

[17] *Kogan*, 193 F.R.D. at 504.

district court, Plaintiffs navigated through extensive discovery, obtained class certification, and opposed Defendants' motion for summary judgment. In this case, not only did Plaintiffs face the statistically-unfavorable position of overturning a trial court's dismissal of the case on a motion to dismiss – here, the Plaintiffs were successful in overturning the district court's dismissal.

64. With respect to the length of time the litigation was pursued, the *Shane Group* antitrust 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."[18] 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 district court received and held oral arguments on the motions for summary judgment.

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

66. Plaintiffs' Counsel are actively engaged in complex federal civil litigation, particularly the litigation of class actions. Our experience in the field allowed us to identify the complex issues involved in this case and to formulate strategies to effectively prosecute them. We believe that our reputations as attorneys who will zealously carry a meritorious case through the trial and appellate levels, as well as our demonstrated ability to vigorously develop the evidence in this case, placed us in a strong position in settlement negotiations with Defendants.

67. Moreover, throughout the case, Plaintiffs' Counsel made every effort to operate as efficiently as possible and to avoid unnecessary duplication. At all times, Plaintiffs' Counsel

[18] *Shane Group*, 2015 WL 1498888 at *15.

carefully supervised and monitored the work assignments to ensure that the work quality was consistent and non-duplicative. The significant time and effort devoted to this case by Plaintiffs' Counsel, and their commitment to the efficient management of the litigation, support approval of the requested award.

68. As set forth in great detail above, this class action was exceedingly complex, even by complex litigation standards. As such, Plaintiffs' Counsel's 9,491.86 hours of time, with a lodestar of $5,254,251.25, was totally at risk for more than seven years.

69. Frequently, plaintiffs' attorneys take contingent cases such as this and, after expending hundreds of thousands of hours and hundreds of thousands of dollars out of pocket, receive nothing. The risk of non-payment in complex cases such as this one is real. Even if one succeeds or is *en route* to success, there could be changes in the law or unexpected evidence that fells the plaintiffs' case. A large fee is not guaranteed by virtue of the commencement of a class action. It takes hard and diligent work by skilled counsel to develop facts and theories that will withstand motion practice and succeed at trial or persuade defendants to enter into serious settlement negotiations.

70. Unlike counsel for most defendants, who are paid substantial hourly rates and reimbursed for their expenses on a regular basis, Plaintiffs' Counsel have not been compensated for any of the roughly 9,500 hours they expended, or the more than $715,000 in litigation expenses they incurred over the seven years of litigation. Plaintiffs' Counsel would not have been compensated for their time or expenses had they been unsuccessful. In undertaking that responsibility, Plaintiffs' Counsel obligated themselves to ensure that sufficient dollars and attorney resources were dedicated to the prosecution of this litigation. When Plaintiffs' Counsel undertook to act for Plaintiffs and the Class, we were aware that the only way we could be

compensated was to achieve a successful result.

71. Class action lawsuits are also exceedingly expensive to litigate successfully. Outsiders often focus on the gross fees awarded but ignore that those fees are used to fund enormous overhead expenses incurred during the course of many years of litigation, are taxed by federal, state, and local authorities, and, when reduced to a bottom line, are far less imposing to plaintiffs' law firms than the gross fee award appears.

72. Along with high costs, class action lawsuits generally carry with them a high risk of non-payment. A high risk of non-payment generally counsels in favor of increasing the fee award to attorneys who secure a recovery for their client. *See In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d 14, 17-18 (D.D.C. 2003). Courts are aware that without such an incentive, plaintiffs' lawyers might be less willing to take on cases that involve either unsettled legal issues or clients who might otherwise go unrepresented. Public policy is served, therefore, by awarding somewhat higher fees to lawyers who assume the risk of such representation. Courts have recognized that the risk of non-payment in complex cases is very real. A judgment may be affirmed on appeal and still that is no assurance of recovery. *See, e.g., Beckman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (dismissal of 11-year-old case by en banc decision following jury verdict and affirmance by a First Circuit panel). A sudden change in the law can eviscerate even a promising case. *See e.g., In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469 (S.D.N.Y. 2010) (after completion of extensive foreign discovery, 95% of plaintiff's damages were eliminated by the Supreme Court's reversal of 40 years of unbroken circuit court precedent in *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010). And many cases have simply been lost after investment of thousands of hours of time and millions of dollars of costs at summary judgment or after trial. *See e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997)

(reversal of $81 million jury verdict against accounting firm); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict following two decades of litigation); *In re JDS Uniphase Corp. Sec. Litig.*, No C-02-1486 CW (EDL), 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (defense verdict after four weeks of trial).

73. 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,"[19] 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.

74. In this case, the risk of non-payment incurred by Plaintiffs' Counsel could not have been higher, inasmuch as the case was initially dismissed in 2009 and then reversed and remanded in 2012 by the Sixth Circuit Court of Appeals.

75. Defendants were represented by several highly-respected defense firms, who aggressively defended this case. At their depositions, Defendants' witnesses were well-prepared and of strong demeanor. Presenting these issues to a jury would have involved enormous time, expense and complexity against exceedingly well-funded and savvy Defense Counsel.

76. Taking into account the magnitude and risk of non-payment in this class action case, the requested fee is reasonable and justified.

77. As discussed above, Plaintiffs' Counsel devoted a tremendous amount of time to this case and did so steadfastly in the face of increasing adversity. *See* Exhibit 2. The efforts expended by Plaintiffs' Counsel were extensive, time-consuming, challenging and undertaken in

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

the face of substantial risks, as detailed above. We believe that the persistence and quality of those efforts were responsible for the superior result achieved in this case. This factor supports the fee requested.

78. In sum, given the complexity and magnitude of this Action, the risks associated with it, the responsibility undertaken by Plaintiffs' Counsel, the difficulty of proof on damages, the experience of Plaintiffs' Counsel and Defendants' Counsel, and the contingent nature of Plaintiffs' Counsel's agreement to prosecute this Action, Plaintiffs' Counsel believe that the requested attorneys' fees are reasonable and should be approved.

V. THE REQUESTED REIMBURSEMENT OF LITIGATION EXPENSES

79. 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 in the amount of $719,029.23. The chart set forth in Exhibit 3[20] details these expenses – broken down by category – Plaintiffs' Counsel incurred and underwrote during the prosecution of this Action, all of which were 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 the Court – the $80,875,000 million Settlement. Courts have typically found that such expenses are reimbursable from a fund recovered by counsel for the benefit of the class.

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

81. Included in the amount of expenses is $353,803.61 paid to Plaintiffs' experts and consultants. This encompasses nearly 50% of Plaintiffs' Counsel's total expenses. Experts were

[20] Plaintiffs' Counsel possess and upon the Court's request will provide support for such litigation expenses.

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. We believe that the expert expenses were of fundamental importance in achieving the Settlement at issue.

82. Another large expense was the cost of mailing the class notice to class members. This notice was required by the Class Certification Order. The notice cost $278,913.82.

83. Plaintiffs' Counsel obtained, reviewed and analyzed more than 65,000 pages of documents from Defendants and numerous non-parties. 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 Lead Counsel and provided a substantial benefit to the Class. Media Stew's costs were $23,316.47.

84. Plaintiffs' Counsel also incurred $9,155.65 for mediator fees.

85. Prior to submitting their expenses to the Court in connection with this motion, Plaintiffs' Counsel reviewed all of the expenses.

86. The expenses for which reimbursement is sought by Plaintiffs' Counsel do not include the Claims Administrator expenses associated with providing Court-ordered notice to the Class of the Settlement and administering claims. Due to the size of this process, the Claims

Administrator expects the total costs related to claims administration in this case to be approximately $1 million. Those amounts will be requested separately on behalf of the Claims Administrator, after the settlement administration is complete.

87. From the beginning of the case, Lead 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. 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 of the funds advanced to prosecute this Action. 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. Plaintiffs' Counsel carefully reviewed all expenses submitted to ensure that they accurately reflected costs necessarily incurred in obtaining the Settlement.

88. 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.

VII. PLAINTIFFS' COUNSEL REQUESTS THAT THE COURT APPROVE INCENTIVE AWARDS FOR THE FOUR CLASS REPRESENTATIVES

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

90. We believe that an incentive award of $20,000 for each class representative is reasonable and consistent with the awards in other cases.

VIII. CONCLUSION

For the reasons set forth above and in the accompanying memoranda, we respectfully submit that the Settlement and Plan of Allocation are fair, reasonable and adequate and should be approved; and that the application for an award of attorneys' fees and reimbursement of expenses is also fair and reasonable, and should be granted. We also submit that the incentive awards of $20,000 each for the class representatives are fair and reasonable.

I declare under the penalty of perjury under the laws of the State of Ohio that the foregoing is true and correct to the best of my knowledge.

Executed this 18th day of December 2015, in Cincinnati, Ohio.

/s/ W.B. Markovits
W.B. Markovits, Esq.

I declare under the penalty of perjury under the laws of the State of Ohio that the foregoing is true and correct to the best of my knowledge.

Executed this 18th day of December 2015, in Cincinnati, Ohio.

/s/ Randolph H. Freking
Randolph H. Freking, Esq.