IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re DENTAL SUPPLIES ANTITRUST LITIGATION	No. 1:16-CV-00696-BMC-GRB ALL CASES

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PAYMENT OF SERVICE AWARDS TO THE CLASS REPRESENTATIVES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules

Other Authorities

I. INTRODUCTION

After more than three years of hard-fought litigation, Co-Lead Counsel,[1] on behalf of Plaintiffs and the Settlement Class (the "Class") have achieved a settlement of $80 million in cash with no right of reversion (the "Settlement"). Class Counsel prosecuted this matter on a purely contingent basis and have received no payment for their services or reimbursement of the millions of dollars of expenses (including expert costs) that they expended on behalf of Plaintiffs and the Class without any guarantees of recovery.

Co-Lead Counsel now submit this memorandum in support of their request for an order: (i) awarding attorneys' fees in the amount of one-third of the $80 million cash value of the Settlement (the "Settlement Fund") plus interest ($26.67 million plus accrued interest); (ii) reimbursing Class Counsel for reasonably incurred litigation expenses in the amount of $4,395,366.43; (iii) approving service awards of $50,000 for each of the seven Class Representatives; (iv) authorizing up to $200,000 to be paid from the Settlement Fund for future expert work related to claims administration; and (v) authorizing Co-Lead Class Counsel to appropriately allocate the fee award.[2]

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[1] On January 9, 2019, the Court granted preliminary approval of the Settlement, preliminarily certified the Settlement Class (defined below) for purposes of settlement, and appointed Berger Montague PC, Cohen Milstein Sellers & Toll PLLC, Hausfeld LLP, and Susman Godfrey LLP (collectively, "Co-Lead Counsel")—whom the Court had previously appointed as Interim Co-Lead Class Counsel, *see* ECF No. 2—as Class Counsel for the Settlement Class. *See* Order Preliminarily Approving Settlement, Certifying the Settlement Class for Purposes of Settlement, Appointing Class Counsel, and Approving Issuance of Notice to the Class, ECF No. 317 (the "Preliminary Approval Order"), ¶ 8. Other leading antitrust firms, acting under the direction of Class Counsel, have served as counsel for the Class. All Plaintiffs' counsel are collectively referred to as "Class Counsel." Class Counsel are seeking attorneys' fees and reimbursement of expenses. *See* Declaration of Eric L. Cramer, Esq. on Behalf of Class Counsel in Support of Plaintiffs' Motion for Final Approval of Class Settlement and Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Awards to the Class Representatives ("Cramer Decl."); Cramer Decl. Exs. 1-33. Class Counsel will seek final certification of the Settlement Class in their motion for final approval of the Settlement. *See* Cramer Decl. ¶ 2 n.2.

[2] The Court appointed named Plaintiffs Arnell Prato, D.D.S., P.L.L.C., d/b/a/ Down to Earth Dental ("Down to Earth Dental"); Evolution Dental Sciences, LLC ("Evolution"); Howard M. May, DDS, P.C.

The Settlement will provide immediate, meaningful, and certain benefits to Class members. Specifically, each of the approximately 200,000 Class members[3] who submits a valid claim will receive its *pro rata* share of the $80 million Settlement Fund after reduction for attorneys' fees, reimbursed expenses, service awards, and administrative costs ("Net Settlement Fund"). Defendants have no right of reversion, and thus Class members will receive the full benefit of the Net Settlement Fund.

The substantial Settlement was the result of Class Counsel, having devoted more than 35,000 hours in attorney and paralegal time to this litigation and incurring close to $4.4 million in out-of-pocket costs. *See* Cramer Decl. ¶¶ 39, 45. Class Counsel took enormous risks in pursuing this case. The investment of substantial time and money alone would not have sufficed to achieve the Settlement given the complex factual, legal, and economic issues raised in this litigation. Co-Lead Counsel, with assistance of other Class Counsel, applied their skill and extensive antitrust experience to prosecuting this litigation on behalf of, and to the benefit of, the Class. *See* Cramer Decl. ¶¶ 33-37.

Class Counsel's request for an attorneys' fee award of one-third of the cash value of the Settlement Fund (plus interest accrued in escrow)—*i.e.*, an award of $26.67 million plus

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("Dr. May"); Casey Nelson, D.D.S. ("Dr. Nelson"); Jim Peck, D.D.S. ("Dr. Peck"); Bernard W. Kurek, D.M.D. and Larchmont Dental Associates, P.C. (together, "Dr. Kurek"); and Keith Schwartz, D.M.D., P.A. ("Dr. Schwartz") (collectively, "Plaintiffs") as Class Representatives on behalf of the Settlement Class. *See* Preliminary Approval Order, ¶¶ 1 n.1, 10. The Settlement Class is defined as:

> All persons or entities that purchased Dental Products directly from Schein, Patterson, Benco, Burkhart, or any combination thereof, during the period beginning August 31, 2008 through and including March 31, 2016 (the "Class Period"). Excluded from the Class are Schein, Patterson, Benco, and Burkhart (including their subsidiaries, affiliate entities, and employees), and all federal or state government entities or agencies.

See id. ¶ 4.

[3] *See* Declaration of James T. McClave, Ph.D. Concerning Proposed Dental Litigation Settlement Allocation Plan, ECF No. 310-5, ¶ 2 (estimating size of the Settlement Class).

interest—is well within the guidelines established by relevant precedent. Courts in the Second Circuit frequently award fees to class counsel of one-third of the cash value of comparable class action settlements.[4] Additionally, a lodestar cross-check of Class Counsel's requested fee award confirms its reasonableness. The total lodestar for Class Counsel at historical rates is $18,358,220.70. *See* Cramer Decl. ¶ 39. The requested fee award therefore reflects a lodestar "multiplier" of 1.45. *Id*. Class Counsel's requested multiplier is modest in comparison to the multipliers for attorneys' fees awarded in other class action cases in the Second Circuit and elsewhere.[5] Additionally, Class Counsel have and will continue to perform additional work

[4] *See, e.g.*, *In re Municipal Derivatives Antitrust Litig.*, No. 08-cv-02516-VM, 2016 WL 11543257, at *1 (S.D.N.Y. July 8, 2016) (one-third fee from $101 million settlement fund); *In re Facebook, Inc. IPO Sec. and Derivative Litig.*, No. 12-md-2389-RWS, 2015 WL 6971424, at *10 (S.D.N.Y. Nov. 9, 2015) (one-third fee from $26.5 million settlement fund); *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 05-cv-2237-CS, 2011 WL 12627961, at *4 (S.D.N.Y. Nov. 28, 2011) (one-third fee from $20.25 million settlement fund); *In re U.S. Foodservice, Inc. Pricing Litig.*, No. 07-md-1894, ECF No. 521 (D. Conn. Dec. 9, 2014) (one-third fee from $297 million settlement fund in a case that settled before summary judgment) (attached as Ex. 1); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010) (one-third fee from $35 million settlement fund); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515-16 (S.D.N.Y. 2009) (one-third award from $510.3 million net settlement fund); *Spann v. AOL Time Warner Inc.*, No. 02-CV-8238-DLC, 2005 WL 1330937, at *3, 9 (S.D.N.Y. June 7, 2005) (one-third fee from $2.9 million settlement fund); *Beckman v. KeyBank, NA*, 293 F.R.D. 467, 481-82 (S.D.N.Y. 2013) (fee aware of 33% of $4.9 million settlement); *In re Buspirone Antitrust Litig.*, No. 01-md-1413, 2003 U.S. Dist. LEXIS 26538, at *11 (S.D.N.Y. Apr. 11, 2003) (one-third fee from $220 million settlement) (no Westlaw citation available); *In re Lloyd's Am. Trust Fund Litig.*, No 96-cv-1262-RWS, 2002 WL 31663577, at *26–27 (S.D.N.Y. Nov.26, 2001) (noting that "[i]n this district alone, there are scores of common fund cases where fees alone . . . were awarded in the range of 33–1/3% of the settlement fund" and observing that lodestar multiples of between 3 and 4.5 had "become common"); *In re Med. X-Ray Film Antitrust Litig.*, No. 93-cv-5904-CPS, 1998 WL 661515, at *7 (E.D.N.Y. Aug. 7, 1998) (awarding one-third of an approximately $40 million settlement fund as "well within the range accepted by courts in this circuit").

[5] *See, e g.*, *In re Domestic Drywall Antitrust Litig.*, No. 13-md-2437, 2018 WL 3439454, at *20 (E.D. Pa. July 17, 2018) (finding that a multiplier of 1.66 on attorneys' fees of $63.4 million was "reasonable and lower than in [analogous] cases"); *In re U.S. Foodservice*, No. 07-md-1894, ECF No. 521 (D. Conn. Dec. 9, 2014) (2.23 multiplier on attorneys' fees of $99 million) (Ex. 1) *In re Urethane Antitrust Litig. (Urethane III)*, No. 04-md-1616, ECF No. 3276 (D. Kan. Jul. 29, 2016) (attached as Ex. 2) (multiplier of 3.2 on attorneys' fees of $278.33 million); *In re Neurontin Antitrust Litig.*, No. 02-cv-2731, ECF No. 105 (D.N.J. Aug. 6, 2014) (multiplier of 1.99 on attorneys' fees of $63.5 million) (attached as Ex. 3); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 750-51 (E.D. Pa. 2013) (2.99 multiplier on attorneys' fees of $50 million); *Beckman v. KeyBank, NA*, 293 F.R.D. 467, 481-82 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers") (listing cases); *In re DDAVP Direct Purchaser Antitrust Litig.*, 2011 WL 12627961, at *4 (multiplier of

beyond the February 28, 2019 deadline for the submission of time in this action, including: working with the Settlement Administrator on claims and distribution-related issues, preparing and filing necessary papers in connection with the final approval hearing, and finalizing the claims process and distribution the settlement funds. This time-consuming work will not be complete until the last settlement payment is made, the taxes on the escrow accounts are paid, and a final report is made to the Court. *See* Cramer Decl. ¶ 36. That work, which will not be separately compensated, will further bring down the effective multiplier in the case.

Class Counsel's request for reimbursement of expenses is similarly reasonable and appropriate. All expenses for which reimbursement is sought were necessarily and reasonably incurred in the prosecution of the litigation, which required Class Counsel's retention of two highly respected economic experts to analyze evidence, research and write reports, and respond to the reports of the four experts proffered by Defendants; involved nearly 100 depositions of Defendant, Plaintiff, and third-party witnesses; required Class Counsel to store, organize, and search close to a million of pages of documents and huge amounts of data; and involved the briefing of numerous discovery and dispositive motions, including motions to dismiss, class certification, and *Daubert* motions.

Finally, the requested $50,000 service award for each of the seven Class Representative is appropriate and in line with applicable precedent. Each Class Representative significantly contributed to the prosecution of this litigation by, among other things, producing documents,

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1.9 on attorneys' fees of $6.8 million); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-cv-340, 2009 U.S. Dist. LEXIS 133251, *16-17 (D. Del. Apr. 23, 2009) (multiplier of 3.93 on an award of $80.33 million in attorneys' fees); *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 799-803 (S.D. Tex. 2008) (5.2 multiplier on a $68 8 million fee award and collecting similar cases); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (multiple of 3.46 for attorneys' fees of $220 million); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (6.96 multiplier on attorneys' fees of $31.6 million); *In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, at *26–27 (noting that lodestar multiples of between 3 and 4.5 are common).

responding to discovery requests, sitting and preparing for depositions, and regularly communicating with Class Counsel regarding developments in the case. The requested service award amounts are appropriate under applicable law given the risks taken and effort expended.

II. FACTUAL BACKGROUND

A. Investigation and Complaints

Following extensive investigation and consultation with economic experts, Co-Lead Counsel filed the first of more than 30 class complaints in January 2016. *See* Cramer Decl. ¶ 5. Later that year, on February 12, 2016, the Court consolidated all class cases, and designated *SourceOne Dental, Inc. v. Patterson Companies, Inc., et al*., No. 15-cv-5440, as a related case. *See* ECF No. 2. In the same order, the Court appointed Berger Montague PC, Cohen Milstein Sellers & Toll PLLC, Hausfeld LLP, and Susman Godfrey LLP as Interim Co-Lead Class Counsel for the proposed Class. *Id*.

Plaintiffs filed their first Consolidated Class Action Complaint ("CCAC") on February 26, 2016, consolidating all related class cases and designating Plaintiffs as representatives for the proposed Class. ECF No. 30. Plaintiffs alleged that since at least August 31, 2008, Defendants and alleged co-conspirator Burkhart Dental Supply Co. ("Burkhart") had engaged in a long-running conspiracy in the market for the distribution of dental supplies and equipment to fix prices, artificially enhance margins, and suppress competition in violation of the antitrust laws (the "Conspiracy"). The alleged Conspiracy encompassed an alleged overarching agreement to suppress price competition, by coordinating, among other ways: (a) directly, through interfirm communications, and indirectly, through dental manufacturers and a third-party data collection company, to impose artificially inflated gross margin levels and monitor and enforce those levels; (b) directly and indirectly to prevent and restrain competition by boycotting, refusing to

deal with, and jointly pressuring manufacturers not to deal with entities that threatened margin erosion such as group purchasing organizations, Amazon.com, and low-cost distributors; and (c) directly to restrict the movement of customers from one Defendant to another by limiting the hiring of each other's sales representatives and restricting new hires from soliciting prior clients. *See* SCCAC ¶¶ 45-48, 75-77, 87; Cramer Decl. ¶ 7.

B. Defendants' Motions to Dismiss

Two months after Plaintiffs filed the CCAC, Defendants filed a joint motion to dismiss on May 4, 2016. ECF No. 62. After extensive briefing, on September 28, 2016, the Court denied Defendants' motion in its entirety. *In re Dental Supplies Antitrust Litig.*, 16-CV-696-BMC-GRB, 2016 WL 5415681, at *1 (E.D.N.Y. Sept. 28, 2016).

Following the Court's order denying Defendants' motion to dismiss, Plaintiffs requested leave to file a Second Consolidated Class Action Complaint ("SCCAC") to add an alleged co-conspirator, Burkhart, as a named defendant. ECF No. 114. The Court granted leave, and Plaintiffs filed the SCCAC on October 22, 2016. ECF No. 116.

Burkhart filed a motion to be dismissed from the action on January 13, 2017, ECF No. 134, which was followed by another round of briefing on Burkhart's motion. Cramer Decl. ¶ 10. In an order dated September 20, 2017, the Court determined that it lacked personal jurisdiction over Burkhart, and dismissed Burkhart from the action pursuant to Fed. R. Civ. P. 12(b)(2). *In re Dental Supplies Antitrust Litig.*, No. 16-CV-696-BMC-GRB, 2017 WL 4217115, at *1 (E.D.N.Y. Sept. 20, 2017).

C. Discovery

The discovery process in this case was time-intensive, expensive, and hotly contested. Plaintiffs filed several motions to compel the production of documents, both from Defendants

and from third parties. *See* Cramer Decl. ¶ 11. Defendants produced more than 600,000 documents, and third parties produced hundreds of thousands of additional documents. *Id*. Defendants deposed all seven of the named Plaintiffs in the case, and Plaintiffs conducted nearly 100 depositions of Defendant and third-party witnesses. *Id.* Fact discovery spanned eighteen months, beginning on February 9, 2016, just before Plaintiffs filed the CCAC, and continuing until August 10, 2017. *Id.* ¶ 13.

Discovery issues related to Defendants' productions of transactional data were hotly contested and particularly complex. Plaintiffs served their document and data requests on May 5, 2016, but Defendants did not produce what Plaintiffs' experts deemed usable data until January 2017. *Id.* ¶ 12. While data productions *began* in January 2017, Defendants did not complete their data productions until July 21, 2017, fewer than two months prior to the deadline for Plaintiffs to submit their class and merits expert reports. *Id.*

After Defendants completed their respective data productions, the combined database ultimately included more than 900 million transactional records, amounting to more than a terabyte of data—which was extremely large and unwieldy. *See* Declaration of James T. McClave in Support of Plaintiffs' Motion for Extension of Time to Complete Discovery, ECF No. 224-2, ¶ 5. Plaintiffs' expert econometrician, Dr. McClave, opined that Defendants' initial data productions were rife with errors and omissions, *id.*¶ 4, and Plaintiffs continued to receive supplemental productions as late as August 2017, just six weeks before Plaintiffs' expert reports were due. *See* Supplemental Declaration of James T. McClave in Support of Plaintiffs' Motion for Extension of Time to Complete Discovery, ECF No. 225, ¶ 2. This created challenges for Plaintiffs' experts in working with the data and in timely performing classwide impact and damages analyses. *See* Cramer Decl. ¶ 5. Ultimately, Plaintiffs served four expert reports

(including opening and rebuttal reports) from their two expert witnesses, Dr. McClave and Prof. John Solow. Defendants served expert reports from four separate experts. Plaintiffs deposed all four of Defendants' experts and defended depositions of both of Plaintiffs' experts. *Id.* ¶ 14.

Throughout the course of the litigation, Co-Lead Counsel coordinated with counsel in a variety of related actions, including (i) counsel for the plaintiff in the related *SourceOne* action; (ii) counsel for Archer and White Sales, Inc. ("Archer & White"), a low-cost distributor alleging that Defendants' anticompetitive conduct impaired its ability to compete in the action *Archer and White Sales, Inc. v. Henry Schein, Inc., et al.*, No. 12-cv-00572-JRG (E.D. Tex.); and (iii) the Federal Trade Commission ("FTC") in its investigation of Defendants' allegedly anticompetitive conduct, which was followed by an administrative action filed by the FTC against Defendants. *See* Cramer Decl. ¶ 15.

The discovery record in this case was immense. Because this matter was consolidated for purposes of discovery with the *SourceOne* action, Co-Lead Counsel obtained all discovery materials that were produced in *SourceOne* as well as substantial additional materials that Plaintiffs requested specific to this action. *Id*. Co-Lead Counsel coordinated with SourceOne's counsel throughout the discovery process to avoid duplicative document requests and depositions. *Id*. Co-Lead Counsel similarly coordinated on discovery issues with counsel for Archer & White. *Id.* Plaintiffs obtained numerous discovery materials from Archer & White, including recorded phone conversations in which Defendant employees and others discussed prices and margins. *Id*. Co-Lead Counsel also consulted with the FTC regarding discovery in the FTC's related investigation into Defendants' conduct that followed Plaintiffs' case, including regarding issues relating to Defendants' document and data productions. *Id*. The FTC brought suit against Defendants on February 12, 2018 based in substantial part on the discovery taken by

Plaintiffs in this action. *Id*. The FTC action, in which trial before an administrative law judge took place from October 2018 through February 2019, alleges some of the same conduct challenged by Plaintiffs here. *Id*.

D. Class Certification and *Daubert* Motions

After the close of fact and expert discovery, Plaintiffs filed their Motion for Class Certification on February 22, 2018. ECF No. 263. Defendants filed memoranda in opposition to the Motion for Class Certification as well as *Daubert* motions to exclude the opinions of Plaintiffs' expert witnesses, Drs. McClave and Solow, from consideration at class certification. *See* ECF Nos. 272, 274. Defendants contended, among other things, that: (1) the evidence does not support Plaintiffs' allegations that Defendants conspired to restrain trade, and that, in any event, the conduct was diffuse and could not be adjudicated on a classwide basis; (2) Plaintiffs cannot demonstrate common impact and classwide damages because prices and margins for dental supplies were supposedly highly variable; (3) individualized inquiries are required to determine whether each Class member was overcharged; and (4) Dr. McClave's models used invalid benchmarks and had certain other statistical flaws, rendering them unreliable for purposes of demonstrating common impact and classwide damages. *See* Cramer Decl. ¶ 16. Although Plaintiffs believed they were likely to overcome these challenges, Defendants' motions raised substantial risks to the viability of Plaintiffs' claims and their ability to proceed as a litigation class. Briefing on the Motion for Class Certification and *Daubert* motions concluded on June 28, 2018. *See* ECF Nos. 293-94.

E. Mediation and Settlement

On February 23, 2018, after extensive mediation briefing, Co-Lead Counsel and counsel for Defendants attended a mediation before the Honorable Diane Welsh, a highly respected

mediator and former United States Magistrate Judge for the Eastern District of Pennsylvania. *See* Cramer Decl. ¶ 19. No agreement was reached at the mediation, but the Parties continued their settlement discussions in the following months. *Id.* Plaintiffs' and Class Counsel's negotiations were informed by the assistance of their expert econometrician, Dr. McClave, and his consulting firm, Info Tech, Inc. *Id.* ¶ 23.

On August 16, 2018, the day of the scheduled hearing on Defendants' motion to exclude the opinions of Dr. McClave, the Parties reached an agreement in principle for a classwide settlement. *See id.* ¶ 20. The Parties negotiated the specific terms of the Settlement over the next six weeks before executing the Agreement on September 28, 2018. *Id.* ¶ 24. Plaintiffs informed the Court in writing of the Settlement on the same day. *See* ECF No. 305.

On November 12, 2018, Plaintiffs filed the Motion for Preliminary Approval of Class Settlement, for Certification of Class for Settlement Purposes, for Appointment of Class Counsel, and to Issue Appropriate Notice to the Class, ECF No. 308 (the "Preliminary Approval Motion"). The Preliminary Approval Motion included a proposed Plan of Allocation and Notice Plan, both of which were prepared by Class Counsel with the aid of an experienced settlement administrator, Heffler Claims Group (the "Settlement Administrator"). Cramer Decl. ¶ 26. The Court granted the Preliminary Approval Motion on January 9, 2019. *See generally* Preliminary Approval Order.

Pursuant to the Preliminary Approval Order, the Settlement Administrator, in consultation with Co-Lead Counsel, commenced and completed the mailing of direct notice and publication notice to the Settlement Class on February 22, 2019. Cramer Decl. ¶¶ 30-31.[6] As of

[6] Under the Court-approved notice plan, the Long-Form Notice was to be posted on the settlement website but not mailed directly to Class members. *See* Preliminary Approval Order, ¶ 16; Preliminary Approval Motion at 30-31. The Long-Form Notice that was initially posted to the Settlement website included an incorrect estimate of Class Counsel's expenses. Cramer Decl. ¶ 31 n.5. The initial Long-Form

the date of this Motion, no Class members have objected to the Settlement or requested to opt out of the Settlement Class. *Id.* ¶ 32.

III. THE COURT SHOULD APPROVE CO-LEAD COUNSEL'S REQUEST FOR ATTORNEYS' FEES

Class Counsel's fee request satisfies all applicable legal and factual requirements, and is amply justified in the circumstances of this case. The U.S. Supreme Court has "recognized consistently that . . . a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This common fund doctrine is based on the inherent powers of the federal court to "prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Id.*

In common fund cases, the court may award attorneys' fees as a percentage of the settlement fund or as a multiplier of class counsel's "lodestar." *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). The Second Circuit favors the percentage-of-recovery method of calculating fee awards in common fund cases. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) ("The trend in this Circuit is toward the percentage method . . ."); *In re Vitamin C Antitrust Litig.*, No. 06-md-1738-BMC, 2012 WL 5289514, at * 9 (E.D.N.Y. Oct. 23, 2012) (same). Second Circuit courts favor fee awards under the percentage method because it "directly aligns the interests of the class and its counsel and provides a

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Notice incorrectly stated that Class Counsel would seek reimbursement of expenses "not to exceed $3,500,000," a figure that did not account for certain of Class Counsel's expert costs. *Id.* After detecting the error, on March 14, 2019, Co-Lead Counsel promptly instructed the Settlement Administrator to (1) correct the Long-Form Notice on the Settlement website, changing $3,500,000 to $5,000,000; and (2) post an explanation on the website, noting that the originally-posted Long-Form Notice included an incorrect expense figure. *Id.* The Settlement Administrator reports that no Class members had requested a mailed copy of the Long-Form Notice prior to the correction having been made. The Short-Form Notice that the Settlement Administrator directly mailed to the Class members did not include an estimate of Class Counsel's expenses. *Id.*

powerful incentive for the efficient prosecution and early resolution of litigation[,]" *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 348 (S.D.N.Y. 2014), and because it "spares the court and the parties the 'cumbersome, enervating, and often surrealistic process of lodestar computation.'" *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-md-1775-JG, 2011 WL 2909162, at *5 (E.D.N.Y. July 15, 2011) (quoting *Goldberger*, 209 F.3d at 50). When the percentage method is used, "[t]he lodestar method can then be used as a 'cross-check'" to ensure that application of the percentage-of-the-fund method results in a reasonable fee award. *Vitamin C*, 2012 WL 5289514, at *9.

Class Counsel's request for a fee of one-third of the $80 million Settlement Fund, in light of the successful prosecution of this complex and demanding litigation, is reasonable and appropriate. The criteria used to determine whether a common fund fee is reasonable—often referred to by courts in the Second Circuit as the "*Goldberger* factors"—include:

(1) the time and labor expended by counsel;

(2) the magnitude and complexities of the litigation;

(3) the risk of the litigation;

(4) the quality of the representation;

(5) the requested fee in relation to the settlement; and

(6) public policy considerations.

Vitamin C, 2012 WL 5289514, at *9-10 (quoting *Goldberger*, 209 F.3d at 50). All six factors support a finding that the requested fee is reasonable here.

A. Time and Labor of Class Counsel

The substantial time and money expended by Class Counsel on behalf of the Class support the requested fee award. Class Counsel have spent 35,049.3 hours prosecuting the

litigation from the inception of the case through February 28, 2019. *See* Cramer Decl. ¶ 39. A summary of Class Counsel's efforts is set out in Section II above and in the Cramer Decl. ¶¶ 33-36. In addition, Class Counsel will continue to devote time to this case through the final distribution of all settlement funds. *See generally In re Facebook, Inc. IPO Sec. and Derivative Litig.*, 2015 WL 6971424, at *10 (considering class counsel's future efforts to oversee the claims process in awarding a 33% fee); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-cv-0085, 2005 WL 3008808, at * 15 (D.N.J. Nov. 9, 2005) (observing that class counsel would "likely incur hundreds of additional hours in connection with administering the settlement, without prospect for further fees"). And due to the substantial demands and long duration of the case, Class Counsel have also necessarily forgone other litigation opportunities. *See Brown v. Phillips Petroleum Company*, 838 F.2d 451, 455 (10th Cir. 1988) (granting fee application and emphasizing that substantial work on the litigation "precluded or reduced their opportunity for other employment"); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1209 (S.D. Fla. 2006) ("Taking on this resource-sapping, risk-based venture also precluded Class Counsel from accepting other contingent matters during the period of representation."). Accordingly, this factor supports the requested fee.

B. Magnitude and Complexities of the Litigation

This action, like most antitrust cases, was complex. *See, e.g.*, *Wal-Mart*, 396 F.3d at 122 ("[A]ntitrust cases, by their nature, are highly complex."); *Vitamin C*, 2012 WL 528951 4, at *4 ("[F]ederal antitrust cases are complicated, lengthy, and bitterly fought, as well as costly.") (internal quotations and citations omitted); *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 263 (2d Cir. 2001) (noting the "factual complexities of antitrust cases"); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) (noting that

antitrust cases are "generally complex, expensive and lengthy" and that antitrust class actions in particular "have a well-deserved reputation as being most complex"); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (antitrust class actions "are notoriously complex, protracted, and bitterly fought"). This more than three-year-old litigation involved two years of discovery, an unusually large number of depositions, hundreds of thousands of documents and data comprising hundreds of millions of transactions, extensive motion practice, substantial expert discovery, and full briefing on Plaintiffs' motion for class certification and Defendants' *Daubert* motions. Cramer Decl. ¶¶ 34-35. Fact and expert discovery were very expensive given the enormous volume of documents and data that Plaintiffs and their experts reviewed and analyzed. *Id.* ¶¶ 11-12, 49. Motions to dismiss, discovery motions, motions for class certification, and *Daubert* motions were fully briefed and, in some instances, argued. Accordingly, this factor supports the requested fee.

C. The Risks of the Litigation

Class Counsel took enormous risks in pursuing this case, and Plaintiffs faced significant legal risks throughout the course of the litigation. "It is well-established that litigation risk must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55. At the time this case was initially filed, Plaintiffs and Class Counsel had only the information that existed in the public domain on which to rely. There were immense risks in embarking on a large-scale litigation against the three largest dental products distributors on a contingent basis with no guarantee of recovery. These risks further demonstrate the reasonableness of the requested fee. *See, e.g., In re Stanley v. U.S. Steel Co.*, No. 04-cv-74654, 2009 WL 4646647, at *3 (E.D. Mich. Dec. 8, 2009) ("A contingency fee arrangement often justifies an increase in the award of attorneys' fees." (internal quotation marks and citation omitted)); *Lucas v. Kmart Corp.*, No. 99-cv-01923, 2006

WL 2729260, at *6 (D. Colo. July 27, 2006) ("Given the risk of non-recovery, this factor weighs heavily in favor of the requested fee." (citation omitted)).

Each stage of the case presented additional legal risks. Plaintiffs' Motion for Class Certification and Defendants' two *Daubert* motions were pending before the Court at the time of Settlement. Should Plaintiffs have failed to prevail on any of those class-related motions, the case may have effectively ended, or at minimum, would have been substantially diminished. Further, in the event that the Court denied Defendants' *Daubert* motions and granted Plaintiffs' motion to certify the Class, Plaintiffs would still face the additional hurdles of Defendants' motions for summary judgment, numerous other exclusionary motions, and a jury trial. Given the complexity of the factual and legal issues here, the number of defendants, the conflicting expert testimony, the extraordinarily voluminous discovery record, and the stakes at issue, the trial could have lasted many weeks. Post-trial motions followed by appeals would have been all but inevitable, delaying resolution by many more years.

Overall, despite Plaintiffs' confidence in the strength of the case, the third *Goldberger* factor supports Class Counsel's fee request.

D. Quality of Representation

The fourth *Goldberger* factor assesses the role that plaintiffs' counsel played in obtaining the results achieved. *Goldberger*, 209 F.3d at 55. Courts addressing this factor typically consider the experience, reputation, and ability of class counsel in evaluating the fee request, *see, e.g.*, *In re Warner Commc'n Sec. Litig.*, 618 F. Supp. 735, 748-49 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986), as well as the results obtained by class counsel. *See Goldberger*, 209 F.3d at 55; *Vitamin C*, 2012 WL 5289514, at *10 (noting with respect to some of the same lawyers serving as Co-Lead Counsel here that "Class Counsel is abundantly qualified and has been victorious on

a number of motions . . ."); *In re Domestic Drywall Antitrust Litig.*, 2018 WL 3439454, at *18 (observing with respect to some of the same lawyers serving as Co-Lead Counsel here that "it bears repeating that the result attained is directly attributable to having highly skilled and experienced lawyers represent the class in these cases"). Co-Lead Counsel are among the most highly experienced firms in the country in litigating complex antitrust class actions. All four firms are widely recognized as among the country's top antitrust litigation firms, each having led multiple complex cases to successful conclusions, including some of the most successful antitrust cases of all time. Over the course of the more than three years of litigating this action, Class Counsel defeated motions to dismiss, prevailed on discovery motions, fully briefed class certification, negotiated settlement terms over the course of more than six months, and obtained an $80 million cash Settlement for the Class. The $80 million Settlement exceeds the monetary value of similar healthcare-related antitrust class action settlements, many of which were brought by some of the same Class Counsel as here on behalf of similar classes of direct purchasers of medical products.[7] The results here speak for themselves, particularly in light of the very high quality of opposing counsel from top defense firms. Without Plaintiffs' numerous victories

[7] *See, e.g.*, *Castro v. Sanofi Pasteur Inc*., No. 11-cv-7178, 2017 WL 4776626, at *7 (D.N.J. Oct. 23, 2017) (granting final approval of $61.5 million settlement and awarding attorneys' fees of one-third in a case alleging anticompetitive conduct artificially inflating the price of certain vaccines to medical providers); *In re Hypodermic Prods. Antitrust Litig.*, No. 05-cv-1602, ECF No. 461 (D.N.J. Apr. 10, 2013) (granting a one-third fee from $45 million settlement in a case alleging anticompetitive conduct artificially inflating the prices of hypodermic products purchased by medical providers) (attached as Ex. 4); *Natchitoches Parish Hosp. Svc. Dist. v. Tyco*, No. 05-cv-12024, ECF No. 407 (D. Mass. Mar. 12, 2010) (granting one-third fee from $32.5 million settlement in a case alleging anticompetitive conduct artificially inflating the prices of sharps containers purchased by medical providers) (attached as Ex. 5); *In re Endosurgical Prods. Direct Purchaser Antitrust Litig.*, No. 05-cv-8809, ECF No. 196 (C.D. Cal. May 12, 2009) (granting one-third fee from $13 million settlement for direct and indirect purchaser classes combined in a case alleging anticompetitive conduct artificially inflating the prices of endosurgical products purchased by medical providers) (attached as Ex. 6); *Meijer, Inc. v. Abbott Labs.*, No. 07-cv-5985, ECF No. 514 (N.D. Cal. Aug. 11, 2011) (granting a fee of one-third from $52 million settlement in a case involving alleged anticompetitive conduct artificially inflating the price of the drugs Norvir and Kaletra to drug purchasers) (attached as Ex. 7).

throughout the litigation, such an exceptional settlement result would not have been possible. Defendants did not agree to settle until fact and expert discovery had been completed, and Plaintiffs' motion for class certification and Defendants' *Daubert* motions were fully briefed and pending before the Court. Thus, the fourth *Goldberger* factor further supports granting the requested fee award.

E. The Requested Fee in Relation to the Settlement

The requested fee represents one-third of the Settlement, resulting in a modest overall lodestar multiplier of 1.45. The requested award is fair given the extensive overall high-level effort that was required to achieve these excellent results.

1. The Fee is Reasonable Under the Percentage Method.

Courts in the Second Circuit routinely award attorneys' fees of one-third or more of settlement funds in complex class action cases. *See supra* n.4. The requested fee here of one-third is therefore in line with fees awarded by other Courts in the Second Circuit in comparable complex class action litigation settlements. *See Klein v. PDG Remediation, Inc.*, No. 95-cv-4954-DAB, 1999 WL 38179, at *4 (S.D.N.Y. Jan. 28, 1999) ("33% of the settlement fund . . . is within the range of reasonable attorney fees awarded in the Second Circuit"); *In re Med. X-Ray Film Antitrust Litig.*, 1998 WL 661515, at *7 (holding that class counsel's request for one-third of the $39.4 million settlement fund "is well within the range accepted by courts in this circuit"); *see also Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000) (identifying "comparing awards in similar cases" as an "important factor in fee-award cases").

Many courts in other circuits have also awarded fees of one-third or greater in analogous common fund antitrust cases.[8] These cases further demonstrate that the requested fee is

[8] *See, e.g.*, *In re Urethane Antitrust Litig.* (*Urethane III*), No. 04-md-1616, ECF Nos. 3251, 3276 (D. Kan. Jul. 29, 2016) (awarding attorneys' fees of one-third of the settlement funds of $835 million) (Ex. 2); *In*

reasonable. *See Lewis v. Wal-Mart Stores, Inc.*, No. 02-cv-0944, 2006 WL 3505851, at *1 (N.D. Okla. Dec. 4, 2006) (awarding one-third of the settlement fund in case settling after three years of litigation and noting that "[a] contingency fee of one-third is relatively standard in lawsuits

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re Domestic Drywall Antitrust Litig., 2018 WL 3439454, at *20 (one-third fee on settlements totaling $190 million); *Dahl v. Bain Capital Partners, LLC*, No. 07-cv-12388, ECF Nos. 1051, 1095 (D. Mass. Feb. 2, 2015) (attached as Ex. 8) (33% fee from $590.5 million fund in an antitrust case that settled before class certification); *In re Vitamins Antitrust Litig.*, No. 99-md-1285, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (approving fee award of 34.6% of $365 million fund); *In re Neurontin Antitrust Litig.*, No. 02-cv-2731, ECF No. 105 (D.N.J. Aug. 6, 2014) (awarding attorneys' fees of one-third of $190 million settlement fund) (Ex. 3); *Standard Iron Works v. ArcelorMittal*, No. 08-cv-5214, 2014 WL 7781572, at *1 (N.D. Ill. Oct. 22, 2014) (awarding attorneys' fees of 33% of settlement funds of $163.9 million in case that settled prior to class certification); *In re Titanium Dioxide Antitrust Litig.*, No. 10-cv-00318, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (one-third fee from $163.5 million settlement fund); *In re Urethane Antitrust Litig.* (*Urethane II*), No. 04-md-1616, ECF No. 2210 (D. Kan. Dec. 13, 2011) (one-third fee from $84 million settlement fund) (attached as Ex. 9); *In re Southeastern Milk Antitrust Litig.*, No. 08-md-1000, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013) (one-third fee from $158.6 million settlement fund); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d at 748-52 (granting attorneys' fees of one-third from a $150 settlement fund and commenting that "in the last two-and-a-half years, courts in eight direct purchaser antitrust actions approved one-third fees"); *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, at *15 (awarding one-third fee from $75 million settlement fund); *In re Doryx Antitrust Litig.*, No. 12-3824 (E.D. Pa. Sept. 15, 2014) (awarding one-third fee from $15 million settlement fund); *Marchbanks Truck Serv., Inc. v. Comdata Network, Inc.*, No. 07-cv-1078, 2014 WL 12738907 (E.D. Pa. July 14, 2014) (awarding one-third fee from $130 million settlement fund); *In re Fasteners Antitrust Litig.*, No. 08-cv-1912, 2014 WL 296954, at *7 (E.D. Pa. Jan. 27, 2014) (awarding one-third fee from $17.6 million settlement fund); *In re Wellbutrin XL Antitrust Litig.*, No. 08-cv-2431, ECF No. 485 (E.D. Pa. Nov. 7, 2012) (awarding one-third fee from $37.5 million settlement fund) (attached as Ex. 10); *Rochester Drug Co-Operative, Inc. v. Braintree Laboratories, Inc.*, No. 07-cv-142, ECF No. 243 (D. Del. May 31, 2012) (awarding one-third fee from $17.5 million settlement fund) (attached as Ex. 11); *In re Metoprolol Succinate Antitrust Litig.*, No. 06-cv-0052, ECF No. 193 (D. Del. Feb. 21, 2012) (awarding one-third fee from $20 million settlement fund) (attached as Ex. 12); *In re Wellbutrin SR Antitrust Litig.*, No. 04-cv-5525, 2011 U.S. Dist. LEXIS 158833, at *20 (E.D. Pa. Nov. 21, 2011) (awarding one-third fee from $49 million settlement fund) (Westlaw citation unavailable); *In re Urethane Antitrust Litig. (Urethane I)*, No. 04-md-1616, ECF No. 995 (D. Kan. July 22, 2009) (one-third fee from $58.9 million settlement fund) (attached as Ex. 13); *In re Tricor Direct Purchaser Antitrust Litig.*, U.S. Dist. LEXIS 133251, at *14-15 (awarding one-third fee from $250 million settlement fund) (Westlaw citation unavailable); *Southeastern Milk*, 2013 WL 2155387, at *8 (awarding one-third fee from $158.6 million settlement fund); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, No. 09-cv-07666, ECF Nos. 693, 697, 697-1, 701 (N.D. Ill. 2014) (awarding one-third fee from $128 million settlement fund) (attached as Ex. 14); *Whittington v. Taco Bell of Am., Inc.*, No. 10-cv-01884, 2013 WL 6022972, at *6 (D. Colo. Nov. 13, 2013) (awarding fees and costs totaling 39% of settlement fund after three years of litigation); *In re Apollo Grp. Inc. Sec. Litig.*, No. 04-cv-2147, 2012 WL 1378677, at *7 (D. Ariz. Apr. 20, 2012) (awarding one-third fee from $145 million settlement fund); *Williams v. Sprint/United Mgmt. Co.*, No. 03-cv-2200, 2007 WL 2694029, at *6 (D. Kan. Sept. 11, 2007) (awarding a 35% fee plus expenses from $57 million settlement fund after four years of litigation); *In re United Telecommc'ns Sec. Litig.*, No. 90-cv-2251, 1994 WL 326007, at *3 (D. Kan. June 1, 1994) (awarding 33.3% fee).

that settle before trial").[9]

2. Market-Rate Fee Agreements Support the Requested Award.

If this were a non-representative action, the customary fee arrangement would be contingent and in the range of one-third to 40% of any recovery. *See Blum v. Stenson*, 465 U.S. 886, 903 (1984) (concurring opinion) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery."); *Montague v. Dixie Nat. Life Ins. Co.*, No. 09-cv-00687, 2011 WL 3626541, at *2-3 (D.S.C. Aug. 17, 2011) ("In non-class contingency fee litigation, a 30% to 40% contingency fee is typical."); *Flournoy v. Honeywell Int'l, Inc.*, No. 05-cv-184, 2007 WL 1087279, at *2 (S.D. Ga. Apr. 6, 2007) ("Forty percent fee contracts are common for complex and difficult litigation. . . .").

The Supreme Court has recognized that an appropriate fee is intended to approximate what counsel would receive if they were bargaining for their services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285 (1989) ("[W]e have consistently looked to the marketplace as our guide to what is 'reasonable' [for purposes of awarding attorneys' fees]." (citation omitted)); *see also Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany*, 522 F.3d 182, 193 (2d Cir. 2007) ("'[A] district court should consider the rate [a] reasonable, paying client would pay, and use that rate to calculate the presumptively reasonable fee."). Because a contingency fee negotiated at the outset of this litigation, given the risks at that

[9] *See also Moore v. United States*, 63 Fed. Cl. 781, 787 (Fed. Cl. 2005) ("one-third is a typical recovery"); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d at 748 ("[I]n the last two-and-a-half years, courts in eight direct purchaser antitrust actions approved one-third fees"); *In re Universal Service Fund Tel. Billing Practices Litigation*, No. 02-md-1468, 2011 WL 1808038, at *2 (D. Kan. May 12, 2011) ("[A]n award of one-third of the fund falls within the range of awards deemed reasonable by courts." (citation omitted)); *Shaw v. Interthinx, Inc.*, No. 13-cv-01229, 2015 WL 1867861, at *6 (D. Colo. Apr. 22, 2015) ("The customary fee awarded to class counsel in a common fund settlement is approximately one third of the total economic benefit bestowed on the class.").

time, would have been in the range of one-third to 40% of the recovery, an attorneys' fee of one-third is reasonable.

3. The Requested Fee is Reasonable Under the Lodestar Crosscheck.

A lodestar crosscheck of the requested fee confirms its reasonableness. When using the percentage method, courts may also require "documentation of hours as a 'cross check' on the reasonableness of the requested percentage," *Goldberger*, 209 F.3d at 50, "to ensure that an otherwise reasonable percentage fee would not lead to a windfall." *Colgate-Palmolive*, 36 F. Supp. 3d at 353. Lodestar is calculated by multiplying the number of hours that counsel expended by their reasonable hourly rates. *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002).

Class Counsel have spent 35,049.3 hours litigating the action, producing a total lodestar amount of $18,358,220.70 based on each firm's historical hourly rates.[10] No attorneys are billed in excess of their standard hourly rates, which have been accepted by courts in other contingency cases and are in line with rates that are charged to (and paid by) hourly clients. *See Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) ("The 'lodestar' figure should be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'"). Moreover, Co-Lead Class Counsel did not allow

[10] "Historical rates" refers to the standard billable rates of Class Counsel at the time the relevant services were performed. By contrast, the current rate method involves using current billable rates for all attorneys in the case at the time the fee petition is submitted, even for time spent at the outset of the case when those rates may have been lower. Class Counsel have chosen to use the more conservative, historical rate method even though the Second Circuit has *approved* the use of current rates for purposes of calculating lodestar in order to account for inflation and the delay in payment. *See LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) (applying current rates to account for "the delay in payment"); *see also In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, No. 00-cv-9413-GBD, 2009 WL 762438, at *4 (S.D.N.Y. Mar. 24, 2009) ("Courts have upheld use of 'current' rates to compensate for inflation and delay in payment."). Class Counsel's application of historical rates as opposed to current rates therefore reflects the conservative nature of Class Counsel's calculated lodestar, which further supports the reasonableness of the requested fee and the lodestar multiplier.

Class Counsel firms to bill for "contract attorneys;" only time from firm employees were permitted. *See* Cramer Decl. ¶ 42. The document review rates included in the lodestar calculation were capped, so many of the rates charged are, in fact, lower than the standard billable rates for those attorneys. *Id.* Class Counsel's hourly rates are market rates for lawyers of similar quality litigating matters of similar magnitude in New York City. *See, e.g.*, *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-03419-GBD, ECF Nos. 817, 817-1, 837 (S.D.N.Y. Dec. 7, 2017) (approving partner rates of $800 to $975 and associate rates of $325 to $600, *see* ECF No. 817-1) (attached as Ex. 15).

Once lodestar is determined, courts typically enhance it by a positive multiplier "to reflect consideration of a number of factors, including the contingent nature of success and the quality of the attorney's work." *Maley*, 186 F. Supp. 2d at 370. Here, a fee award of one-third of the Settlement Fund reflects a multiplier of 1.45 on Class Counsel's historical lodestar. This lodestar crosscheck multiplier is significantly lower than multipliers that other courts in this Circuit have found to be reasonable. *See Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5 as reasonable and observing that '"multipliers of between 3 and 4.5 have become common'"); *Maley*, 186 F. Supp. 2d at 369 (awarding a "modest multiplier" of 4.65, which was "well within the range awarded by courts in this Circuit and courts throughout the country"); *In re NASDAQ Market–Makers Antitrust Litig.*, 187 F.R.D. at 489 (awarding a 3.97 multiplier and finding fee awards of 3 to 4.5 to be "common"); *In re Sumitomo Copper Litig.*, 74 F.Supp.2d 393, 399 (S.D.N.Y.1999) (awarding a 27.5% fee on $134.6 million commodities fraud settlement and finding a 3 to 4.5 multiplier to be common); *In re Credit Default Swaps Antitrust Litig.*, No. 13-md-02476-DLC, 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (awarding a $253.8 million fee that represented a multiplier of "just over 6" in a case that settled prior to class

certification); *Colgate-Palmolive*, 36 F. Supp. 3d at 353 (multiplier of 5.2).

F. Public Policy

Public policy favors the award of reasonable attorneys' fees in antitrust class actions such as this one. The Supreme Court has recognized "the fundamental importance to American democratic capitalism of the regime of the antitrust laws," and the "central role" that private causes of action play in enforcing this regime. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985); *see also Southeastern Milk*, 2013 WL 2155387, at *5 ("Society's interests are clearly furthered by the private prosecution of civil cases which further important public policy goals, such as vigorous competition by marketplace competitors"). Similarly, courts "have recognized the importance that fair and reasonable fee awards have in encouraging private attorneys to prosecute class actions on a contingent basis . . . on behalf of those who otherwise could not afford to prosecute." *In re Marsh ERISA Litig.*, 265 F.R.D. at 150 (internal quotation marks omitted). This factor is especially salient here where the FTC enforcement action followed the Plaintiffs' case and not the other way around. As the Second Circuit has noted, "[i]n the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation." *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir. 1973).[11]

[11] *See also In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *18 ("It is important to encourage top-tier litigators to pursue challenging antitrust cases such as this one. Our antitrust laws address issues that go to the heart of our economy. Our economic health, and indeed our stability as a nation, depend upon adherence to the rule of law and our citizenry's trust in the fairness and transparency of our marketplace."); *In re WorldCom Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("If the Lead Plaintiff had been represented by less tenacious and competent counsel, it is by no means clear that it would have achieved the success it did here on behalf of the Class. In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."); *Southeastern Milk*, 2013 WL 2155387, at *5 ("[F]ailing to fully compensate class counsel for the excellent work done and the various

Public policy considerations similarly support the requested fee here. Rather than providing a windfall, the requested award serves the public policy goal of encouraging private enforcement of the antitrust laws, while fairly compensating those counsel who made a substantial commitment of time and resources on behalf of the class. Accordingly, the sixth *Goldberger* factor supports the requested fee award.

IV. THE COURT SHOULD APPROVE CO-LEAD COUNSEL'S REQUEST FOR REIMBURSEMENT OF EXPENSES

Class Counsel's request for reimbursement of their reasonably incurred expenses should be granted. "It is well established that counsel who obtain a common settlement fund for a class are entitled to the reimbursement of expenses that they advance to a class." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2015); *In re Arakis Energy Corp. Sec. Litig.*, No. 95-cv-3431-ARR, 2001 WL 1590512, at * 17 n.12 (E.D.N.Y. Oct. 31, 2001) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."). In a common fund case, compensable expenses include all "reasonable expenses normally charged to a fee paying client." 5 NEWBERG ON CLASS ACTIONS §16:5 (5th ed.) (collecting cases). "Litigating complex contingent cases such as this one requires counsel to incur significant expenses." *In re Marsh ERISA Litig.*, 265 F.R.D. at 150.

To date, Class Counsel have incurred $4,395,366.43 in unreimbursed litigation expenses while prosecuting this action. *See* Cramer Decl. ¶ 45. Eighty-two percent of the litigation expenses, $3.59 million, were for expert work, Cramer Decl. ¶ 53, which courts consider

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substantial risks taken would undermine society's interest in the private litigation of antitrust cases . . . . Simply put, anti-competitive conduct such as that alleged this case would likely go unchallenged absent the willingness of attorneys to undertake the risks associated with such expensive and complex litigation."); *Eltman v. Grandma Lee's, Inc.*, No. 82-cv-1912-ILG, 1986 WL 53400, at *9 (E.D.N.Y. May 28, 1986) ("To make certain that the public [interest] is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.") (internal quotations omitted).

"essential to the litigation and invaluable to the Class." *See Colgate-Palmolive*, 36 F. Supp. 3d at 353 ("Courts routinely award [expert] costs.").

Class Counsel also incurred significant expenses to establish and maintain databases for the vast amount of documents and transaction data produced in this litigation. Cramer Decl. ¶ 49.[12] Finally, Class Counsel incurred other reasonable expenses in prosecuting the action that would typically be billed to fee-paying clients, including: (i) mediator fees; (ii) court fees and service of process; (iii) online factual and legal research; (iv) court reporters and transcripts; (v) travel and meals; (vi) document hosting for certain third-party discovery requests; and (vii) other expenses, such as postage and delivery. Cramer Decl. ¶ 50. These collective expenses were reasonably incurred and expended for the direct benefit of the Class, and should therefore be reimbursed. *See Yang v. Focus Media Holding Ltd.*, No. 11-cv-9051-CM, 2014 WL 4401280, at *19 (S.D.N.Y. Sept. 4, 2014) (approving mediator fees, expert fees, computer research, photocopying, postage, meals, and court filing fees). Accordingly, Class Counsel's request for reimbursement of litigation costs and expenses should be granted.

[12] *See also Kindle v. Dejana*, 308 F. Supp. 3d 698, 716 (E.D.N.Y. 2018) (awarding reimbursement of expenses that included "fees for converting documents obtained in discovery into the proper format for Plaintiff's document database [and] fees for vendor hosting the document database"); *In re Lidoderm Antitrust Litig.*, No. 14-md-02521, 2018 WL 4620695, at *4 (N.D. Cal. Sept. 20, 2018) (approving reimbursement of $3.9 million in costs in addition to a fee award of one-third of the $34.9 million settlement where expenses included "document hosting services" and "sales data purchased from third-parties"); *Castro v. Sanofi Pasteur Inc.*, No. 11-cv-7178, 2017 WL 4776626, at *10 (D.N.J. Oct. 23, 2017) (approving reimbursement of $7.2 million in costs in addition to a fee award of one-third of the $61.5 million settlement where expenses included substantial charges for "hosting and managing the millions of pages of documents produced in discovery on a secure database" (internal quotation marks omitted)); *Hernandez v. Merrill Lynch & Co.*, No. 11-cv-8472-KBF, 2013 WL 1209563, at *10 (S.D.N.Y. Mar. 21, 2013) (finding expenses for "document hosting and retrieval" to be reasonable).

V. THE COURT SHOULD APPROVE CO-LEAD COUNSEL'S REQUEST FOR EXPERT COSTS RELATED TO CLAIMS ADMINISTRATION

Because of the large volume of data involved, Class Counsel anticipate that administration of the Settlement will require the assistance of Plaintiffs' expert consultants to address any issues that may arise related to the Class member data. *See* Cramer Decl. ¶ 57. Accordingly, separate and apart from Plaintiffs' request for reimbursement of litigation expenses, Plaintiffs and Class Counsel also request that the Court authorize Plaintiffs to pay up to $200,000 from the Settlement Fund (in addition to the $400,000 already authorized by the Court for claims administration expenses, *see* Preliminary Approval Order ¶ 18) for anticipated future expert work related to claims administration.

VI. THE REQUESTED SERVICE AWARDS TO THE SEVEN CLASS REPRESENTATIVES ARE REASONABLE

The Court should also approve Class Counsel's request for service awards of $50,000 for each of the seven Class Representatives. Courts have long held that private class action suits are critical in enforcing the antitrust laws for the protection of the public. *See, e.g.*, *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 573 n.10 (1982) (noting "private suits are an important element of the Nation's antitrust enforcement effort"). Accordingly, "[a]t the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class." 5 NEWBERG ON CLASS ACTIONS § 17:1 (5th ed.). Class Counsel request that the Court approve service awards of $50,000 for each of the seven Class Representatives, namely Down to Earth Dental, Evolution, Dr. May, Dr. Nelson, Dr. Peck, Dr. Kurek, and Dr. Schwartz.

The awards requested here are well deserved. Without the efforts of the Class Representatives, the Class would have recovered nothing. Further, each of the Class

Representatives has expended considerable time and effort to aid in the prosecution of this case, including devoting substantial time towards document productions, traveling to and attending depositions, preparing for those depositions in advance with Class Counsel, and regularly communicating with Class Counsel regarding developments in the case. Cramer Decl. ¶¶ 58-59; *see generally Viafara v. MCIZ Corp.*, No. 12-cv-7452- RLE, 2014 WL 1777438, *16 (S.D.N.Y. 2014) ("Service awards are common in class action cases and serve to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs."); *In re Marsh ERISA Litig.*, 265 F.R.D. at 150 ("Case law in [the Second Circuit] and other circuits fully supports compensating class representatives for their work on behalf of the class, which has benefited from their representation.").

The total requested service award of $350,000 represents just 0.44% of the $80 million Settlement Fund, a modest percentage when compared to service awards approved in other class actions. Courts in analogous cases have awarded equivalent or greater service awards.[13] The

[13] *See, e.g.*, *In re Domestic Drywall Antitrust Litig.*, 2018 WL 3439454, at *20 (granting service awards of $50,000 each to the four class representatives); *In re Urethane Antitrust Litig. (Urethane III)*, No. 04-md-1616, ECF No. 3276, at ¶ 5 (D. Kan. Jul. 29, 2016) (Ex. 2) (granting service awards of $150,000 to $200,000 to class representatives); *In re High-Tech Emp. Antitrust Litig*., No. 11-cv-02509, 2015 WL 5158730, at *17-18 (N.D. Cal. Sept. 2, 2015) (awarding between $100,000 to $140,000 to each of five class representatives following final approval of settlements amounting to $415 million); *In re Neurontin Antitrust Litig*., No. 02-cv-2731, ECF No. 105 ¶ 31 (D.N.J. Aug. 6, 2014) (approving $190 million settlement and granting service awards of $100,000 to each class representative) (Ex. 3); *Marchbanks*, 2014 WL 12738907, at *1 (approving $130 million settlement of antitrust class action and granting service award of $150,000 to one class representative and service awards of $75,000 to each of two other class representatives); *Titanium Dioxide*, 2013 WL 6577029, at *1 (awarding $125,000 to lead class representative from $163.5 million settlement fund); *In re DDAVP Direct Purchaser Antitrust Litig.*, 2011 WL 12627961, at *5 (granting service awards to three plaintiffs totaling $90,000, or 0.44% of the $20.25 million settlement fund); *Ivax Corp. v. Aztec Peroxides, LLC*, No. 02-cv-00593, ECF No. 78 (D.D.C. Aug. 24, 2005) (granting service awards of $100,000 to each class representative in an antitrust price-fixing class action from the $21 million in settlement funds) (attached as Ex. 16); *Roberts v. Texaco, Inc*., 979 F. Supp. 185, 203-04 (S.D.N.Y. 1997) (awarding $85,000 to a single named plaintiff as part of a $115 million settlement); *In re Revco Secs. Litig*., No. 89-cv-593, 1993 WL 497188, at *3-6 (N.D. Oh. Sep. 14, 1993) (awarding supplemental award of $90,000 to class representative who previously received

Court should therefore approve these appropriate and reasonable service awards to the Class Representatives.

VII. CO-LEAD COUNSEL SHOULD BE GIVEN AUTHORITY TO DISTRIBUTE THE AWARDED ATTORNEYS' FEES

Co-Lead Counsel also request that the Court authorize them to distribute any attorneys' fees and cost reimbursement awarded from the settlements in a manner which, in the opinion of Co-Lead Counsel, fairly compensates plaintiffs' counsel for the services each rendered on behalf of the Class. "Courts generally approve joint fee applications which request a single aggregate fee award with allocations to specific firms to be determined by Co-Lead Counsel, who are most familiar with the work done by each firm and each firm's overall contribution to the litigation." *In re Auto. Refinishing Paint Antitrust Litig.*, No. 10-md-1426, 2008 WL 63269, at *7 (E.D. Pa. Jan. 3, 2008).[14] The Court should therefore authorize Co-Lead Counsel to appropriately allocate the fee award.

service award of $200,000); *In re Revco Secs. Litig.*, No. 89-cv-593, 1992 WL 118800, at *7 (N.D. Oh. May 6, 1992) (awarding a single class representative $200,000 following $29,750,000 settlement).

[14] *See also McKinney on behalf of Res. Capital Corp. v. Cohen*, No. 17-cv-1381-LLS, 2017 WL 2271541, at *3 (S.D.N.Y. May 9, 2017) (ordering co-lead counsel "to appropriately distribute any Plaintiffs' attorneys' fees that may be awarded by the Court"); *In re DDAVP Direct Purchaser Antitrust Litig.*, 2011 WL 12627961, at *5 ("Co-Lead Counsel shall allocate the fees and expenses among all of the Class Counsel"); *In re U.S. Foodservice, Inc. Pricing Litig.*, No. 07-md-1894, ECF No. 521, at ¶ 15 (D. Conn. 2014) ("Lead Class Counsel shall allocate the fees and expenses among all Class Counsel") (Ex. 1); *In re Urethane Antitrust Litig. (Urethane III)*, No. 04-md-1616, ECF No. 3276, at ¶ 4 (D. Kan. Jul. 29, 2016) (Ex. 2) ("The award of attorneys' fees shall be allocated among plaintiffs' counsel by agreement among Co-Lead Counsel in a manner that, in Co-Lead Counsel's good-faith judgment, reflects each plaintiffs' counsel's contribution to the institution, prosecution and resolution of the litigation against Defendants."); *In re Auto. Refinishing Paint Antitrust Litig.*, 2008 WL 63269, at *7 ("Courts generally approve joint fee applications which request a single aggregate fee award with allocations to specific firms to be determined by Co-Lead Counsel, who are most familiar with the work done by each firm and each firm's overall contribution to the litigation.").

VIII. CONCLUSION

For the reasons stated above, Plaintiffs and Class Counsel respectfully request that the Court approve Plaintiffs' Motion and enter an order (1) awarding attorneys' fees in the amount of one-third of the $80 million Settlement Fund plus interest accrued while in escrow ($26.67 million plus interest); (2) approving reimbursement of reasonably incurred expenses as they appear on the books and records of the firms acting as Class Counsel in this litigation in the amount of $4,395,366.43; (3) authorizing an additional allocation of up to $200,000 to be paid from the Settlement Fund for future expert work related to claims administration; (4) granting service awards of $50,000 for each of the seven Class Representatives; and (5) authorizing Co-Lead Class Counsel to appropriately allocate the fee award..

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Respectfully submitted,

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