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UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

LINCOLN ADVENTURES, LLC, a Delaware Limited Liability Company, and MICHIGAN MULTI-KING, INC., a Michigan Corporation, on Behalf of Themselves and All Those Similarly Situated, Plaintiffs, vs. THOSE CERTAIN UNDERWRITERS AT LLOYD'S, LONDON MEMBERS OF SYNDICATES, et al. Defendants.	No. 2:08-cv-00235-CCC-JAD CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES/CHARGES AND SERVICE AWARDS Motion Return Date: September 18, 2019

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I. INTRODUCTION

Through this Partial Settlement, the Settling Defendants have agreed to pay nearly $22 million and adopt five years of business reforms in the Lloyd's insurance market for the benefit of the Settlement Class.[1] Plaintiffs' Counsel fought long and hard to secure these benefits for the Settlement Class, and all on a contingency basis.[2]

From the filing of this Action in 2007, through endurance of a five-year stay, and intense discovery and litigation battles both before this Court and courts in the United Kingdom, Class Counsel have expended incredible amounts of energy and time for the benefit of the Settlement Class. And like the litigation, this Partial Settlement was achieved only through skill and persistent efforts over the course of many years. Negotiations were at arms' length and the Partial Settlement reached only after the Settlement Master, the Honorable Layn Phillips (ret.), brokered a cease fire through a series of mediation sessions here in the United States and across the Atlantic, where Defendants are based.

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[1] Here, and throughout, capitalized terms have the same meaning as set forth in the Stipulation of Partial Class Action Settlement (ECF 89-2).

[2] *See* Joint Declaration of Rachel L. Jensen and Robert S. Schachter in Support of Plaintiffs' Motions for: (1) Final Approval of Partial Class Action Settlement; and (2) an Award of Attorneys' Fees and Expenses/Charges and Service Awards (the "Joint Declaration"), ¶¶17-28 (describing efforts to lift the stay and litigate the motion to dismiss); ¶¶29-39 (documentary discovery efforts); ¶¶40-41 (testimony taken); ¶¶42-55 (discovery motion practice); ¶¶56-60 (Named Plaintiffs' efforts); ¶¶61-62 (expert work); ¶¶63-75 (mediation efforts).

For the result achieved on behalf of the Settlement Class, for the years of hard work to secure it, Class Counsel seek attorneys' fees of one-third of the cash component of the Partial Settlement, which does not even take into account the benefit of the business reforms secured. Class Counsel also seek a partial award of their litigation expenses and $15,000 each in service awards for the Named Plaintiffs. These requests are fair and reasonable in light of the applicable legal standards, counsel's extensive litigation efforts, and the results achieved to date.

For all the reasons discussed herein and in the concurrently filed declarations of counsel, Plaintiffs respectfully request that their motion be granted in its entirety.

II. PROCEDURAL HISTORY

The Court is familiar with the procedural history of this Action and has granted preliminary approval of the Partial Settlement, so Plaintiffs do not repeat the decade-long proceedings that culminated in this Partial Settlement. Plaintiffs respectfully refer the Court to their motion for preliminary approval (ECF 89-1 at 12-17[3]) and the concurrently filed Joint Declaration for a detailed recitation of the initiation, litigation, and Partial Settlement, and incorporate it by reference.[4]

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[3] Page number citations to docket entries ("ECF") refer to the page numbers generated by the electronic case filing (CM/ECF) system.

[4] Class Counsel and other Plaintiffs' Counsel have also submitted declarations concerning their respective firms' lodestars and expenses. *See* Declaration of Rachel L. Jensen ("Jensen Decl."), Declaration of Robert S. Schachter ("Schachter Decl.") (the Jensen and Schachter Declarations are referred to collectively as "Class Counsel Declarations"); Declaration of Van Bunch ("Bunch Decl."); Declaration of

As detailed in the Joint Declaration, Plaintiffs' Counsel have, and continue to, marshal considerable resources and time to the successful prosecution of this Action. They have litigated this case for 12 years both in this Court and abroad, incurring, so far, more than $20 million in lodestar and nearly $1.9 million in expenses, all on a contingency basis. *See* Joint Declaration, n.11. The Joint Declaration details the sustained efforts of Plaintiffs and their counsel in the litigation, as well as the Parties' multi-year settlement negotiations, ably assisted by the Court-appointed Settlement Master, the Honorable Layn Phillips (ret.). *See* Joint Declaration, ¶¶9-10. Through this motion, Plaintiffs' Counsel seek to recoup only a portion of attorneys' fees and litigation expenses incurred to date, reserving the right to request an award of the balance and any future fees and expenses with any later settlement or judgment in Plaintiffs' favor.

III. LEGAL STANDARD FOR ATTORNEY FEE AWARDS

It is well established that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."[5] *Boeing Co. v. Van Gemert*, 444 U.S. 472,

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Ellen Meriwether ("Meriwether Decl."); Declaration of Robert Foote ("Foote Decl."); Declaration of Peter S. Pearlman ("Pearlman Decl."); and Declaration of David M. Foster ("Foster Decl.") (the Bunch, Meriwether, Foote, Pearlman and Foster Declarations are collectively referred to as "Other Plaintiffs' Counsel Declarations").

[5] Here, and throughout, citations and internal quotation marks are omitted, and emphasis is supplied, unless otherwise noted.

478 (1980). The rationale is that "persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched. . . ." *Id.* In addition, such an award encourages skilled counsel to seek redress for damages inflicted on entire classes of persons, and to discourage future misconduct of a similar nature. *See, e.g.*, *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 405 (D.N.J. 2006).

The ultimate decision as to the proper amount of attorneys' fees and expenses rests with the sound discretion of the district court after conducting a thorough judicial review of the fee application. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005); *In re Lucent Tech., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 431 (D.N.J. 2004). The standard for evaluating fee awards is reasonableness. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Here, the requested fee is eminently reasonable.

IV. THE REQUESTED ATTORNEYS' FEE IS REASONABLE

On May 3, 2019, the Court granted preliminary approval of the Partial Settlement, and the class notice, which informed Settlement Class Members that Class Counsel would seek attorneys' fees not to exceed one-third of the Settlement Amount and payment of their litigation expenses of $1.85 million, and service awards of $15,000 for each class representative. *See* ECF 93; *see also* ECF 89-1 at 27-28 & ECF 89-2 at 108. In the over 1,900 claims received to date (the claims deadline is not until October 25, 2019), not one has objected to the requested fee, expenses, or service

award. *See* Joint Declaration, ¶84. Plaintiffs respectfully ask the Court to exercise its discretion to award the full amounts requested here.

A. The Percentage-of-Recovery Method Is the Favored Approach in Common Fund Settlements

The Supreme Court has long held that, in common-fund settlements, class counsel is entitled to a reasonable fee based "on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). Consistent with this rule, the Third Circuit approves awards of attorneys' fees using the percentage-of-recovery method, although district courts have the discretion to award fees based on either this method or the lodestar method.[6] *See, e.g.*, *In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006) (percentage-of-recovery method has long been used in common-fund cases); *Varacallo v. Mass. Mutual Life Ins. Co.*, 226 F.R.D. 207, 248-49 (D.N.J. 2005). In recent years, the percentage-of-recovery method has emerged as the favored one, with the lodestar method subject to criticism. *See, e.g.*, American Law Institute, *Principles of the Law of Aggregate Litigation* §3.13(b) (2010) ("[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases."); *see Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 254-59 (1985) (concluding that fees in traditional common fund cases should be awarded

[6] The lodestar method calculates fees by multiplying the number of hours by hourly rates determined to be suitable for the region and experience of counsel. The lodestar figure may be adjusted upward or downward to reflect the particular circumstances of the case. *See In re Rite Aid*, 396 F.3d at 305.

based on a percentage of the recovery); *see also Selection of Class Counsel, Report of the Third Circuit Task Force*, 208 F.R.D. 340 (2002).[7] Whether the percentage-of-recovery or the lodestar method is used, Plaintiffs' fee request is reasonable.

To apply the percentage-of-recovery method, the Court selects a reasonable percentage that takes into account all the circumstances of the case, then multiplies the gross settlement amount by that percentage, and awards counsel the resulting amount. Courts in this Circuit have awarded attorneys' fees of 33%, including by this Court in the related MDL 1663 proceedings. *See In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 155 (D.N.J. 2013) (Cecchi, J., presiding) (approving 33% fee award in MDL 1663); *see also In re Liquid Aluminum Sulfate Antitrust Litig.*, No. 16-md-2687 (JLL)(JAD), 2018 WL 7108059, at *1 (D.N.J. Dec. 3, 2018) (awarding attorney fee of one-third (plus expenses) in common fund of $10.7 million); *In re Merck & Co., Inc., Vytorin ERISA Litig.*, No. 08-cv-285 (DMC), 2010 WL 547613, at *9-*11 (D.N.J. Feb. 9, 2010) (awarding attorney fee of one-third (plus expenses) in RICO common fund of $41.5 million). As explained below, the requested attorney fee of one-third is fair and reasonable under all the circumstances.

[7] In the cited Task Force Reports, the Third Circuit analyzed the application of the percentage of the fund approach to compensating attorneys who achieve a common fund recovery on behalf of a class. Both Task Force Reports support the percentage of the fund approach as the preferable method of awarding fees in common fund cases due in part to the shortcomings and difficulties inherent in the lodestar approach.

B. The Fee Is Reasonable Based on the *Gunter* Factors

In *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190 (3d Cir. 2000), the Third Circuit set forth factors for assessing the reasonableness of an attorney fee award under the percentage-of-fund method. The *Gunter* factors include: (1) size of the fund created and number of persons benefiting from the settlement; (2) presence/absence of substantial objections to the fee; (3) skill of plaintiffs' counsel; (4) complexity and duration of the litigation; (5) risk of nonpayment; (6) amount of time devoted to the litigation; and (7) awards in similar cases. *Id.* at 195 n.1.[8] The Third Circuit has since emphasized that the *Gunter* factors "need not be applied in a formulaic way" because each case is different, and in certain cases, one factor may outweigh the rest. *See In re AT&T*, 455 F.3d at 166. As described below, the *Gunter* factors warrant awarding the full requested fee here.

1. Plaintiffs' Counsel Achieved an Excellent Result in this Partial Settlement

The result achieved for the benefit of the class is one of the primary factors for assessing a requested fee award. *See Hensley*, 461 U.S. at 436 ("the most critical factor is the degree of success obtained").

[8] The analysis of the *Gunter* factors overlaps with the *Girsh* factors used to assess the appropriateness of the Partial Settlement. *See In re Genta Sec. Litig.*, No. 04-2123 (JAG), 2008 WL 2229843, at *9 (D.N.J. May 28, 2008); *Demmick v. Cellco P'ship*, No. 06-cv-2163 (JLL), 2015 WL 13643682, at *15 (D.N.J. May 1, 2015).

As the Court found preliminarily, the Partial Settlement provides a fair, reasonable, and adequate result for the Settlement Class. *See* ECF 93 at 5. Indeed, through their persistent efforts, Plaintiffs' Counsel have created a partial settlement fund of nearly $22 million, with the possibility of a future recovery from the 10 Non-Settling Defendants, and five years of business reforms. *See* Joint Declaration, ¶¶76-78. This result is not only favorable substantively but procedurally as well, given the time value of money. The Partial Settlement provides immediate benefits to the Settlement Class (albeit on a partial basis) without further delay, further fees and expenses, the uncertainty of ongoing litigation in this Court, and the near certainty that appeals would be sure to follow.

Further, while the exact number of persons benefiting from the Partial Settlement is not yet known, the number is expected to be large. One relevant metric is the class notice. In accordance with this Court's preliminary approval order (ECF 93 at 9-10), the Claims Administrator mailed direct notice to more than 197,000 potential Settlement Class members. *See* Declaration of Eric J. Miller ("Miller Decl."), concurrently filed herewith, at ¶8. The class notice has generated a substantial amount of interest from the Settlement Class. For example, to date, the Settlement Website has been visited more than 37,500 times by more than 28,000 unique visitors. *See id.*, ¶13. Considering the number of Lloyd's insureds who will be

benefited by this Partial Settlement and the size of the common fund created on their behalf, this factor weighs in favor of approval of the fee request.

2. No Settlement Class Member Has Objected to the Fee

In addition, courts consider the class's reaction in awarding fees. As mentioned above, the class notices advised potential Settlement Class Members that:

> Class Counsel will request to be awarded attorneys' fees in an amount not to exceed one-third of the Settlement Amount and partial payment of their outstanding litigation expenses of no more than $1,850,000, both of which will be paid out of the Settlement Fund. In addition, Class Counsel will seek a service award of $15,000 for each of the two Plaintiffs for their many years of time and effort in this Lawsuit, which will be paid out of the Settlement Fund.

ECF 89-2 at 108; *see id.* at 114. The class notices also invited Settlement Class Members to voice any objection to the "application for attorneys' fees and expenses or the requested service awards to the class representatives."[9]

To date, however, no Settlement Class Member has objected to the requested fee award, requested expenses, or service awards. *See* Joint Declaration, ¶84. Courts find the lack of objections to be strong evidence that the fee request is reasonable. *See In re Lucent Tech.*, 327 F. Supp. 2d at 435; *In re Elec. Carbon*, 447 F. Supp. 2d at 406 ("The absence of objections to a fee request, or the imposition of minimal objections, is seen as an indicator that the fee request is fair."); *In re Remeron Direct Purchaser*

[9] As the Notices and Settlement Website advise Settlement Class Members, the deadline for any objection is August 28, 2019. If any objections are filed, Class Counsel will respond in their reply brief, due September 11, 2019.

Antitrust Litig., No. 03-cv-0085 (FSH), 2005 WL 3008808, at *13 (D.N.J. Nov. 9, 2005) ("*In re Remeron DP*").

Here, the absence of objections to date – either to the Partial Settlement or to the requested fee – weighs strongly in favor of awarding the entire amount requested by Plaintiffs' Counsel here. *See, e.g.*, *In re Rite Aid*, 396 F.3d at 305 (awarding fee despite two objections); *In re AT&T*, 455 F.3d at 170 (awarding fee despite eight objections); *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 121 (D.N.J. 2012) (awarding fees despite one objection).

3. Plaintiffs' Counsel Have Been Tenacious and Skilled in Their Representation of the Settlement Class

The skill of the attorneys representing Plaintiffs and the Settlement Class also weighs in favor of the fee request. Plaintiffs' Counsel include some of the preeminent class-action firms in the country, and have decades of experience prosecuting and trying complex MDL actions.[10] Plaintiffs' Counsel here have extensive experience in antitrust and RICO litigation and have also been actively involved in many cases involving the insurance industry. *See id.* Through their skill and effort, Class Counsel were able to defeat Defendants' motion to dismiss the SAC, and through protracted, hard-fought and creative negotiations, successfully obtain a favorable partial recovery from the Settling

[10] For the benefit of a complete record, Plaintiffs' Counsel respectfully submit their current firm resumes herewith. *See* Jensen Decl., Ex. H; Schachter Decl., Ex. D; Bunch Decl., Ex. E; Meriwether Decl., Ex. D; Foote Decl., Ex. E; Pearlman Decl., Ex. D; Foster Decl., Ex. D.

Defendants, with the possibility of future recoveries from the other defendants. *See generally* Joint Declaration, ¶¶17-28 (detailing efforts on lifting the stay, drafting the complaint and beating the motion to dismiss); *id.* at ¶¶63-75 (detailing mediation efforts). The Partial Settlement is the clearest reflection of counsel's skill and evidence of Plaintiffs' Counsel's hard work and sustained efforts. *See In re Lucent Tech.*, 327 F. Supp. 2d at 436; *In re Remeron DP*, 2005 WL 3008808, at *13.

The quality of opposing counsel is also relevant to the evaluation of class representation. *See In re Lucent Tech.*, 327 F. Supp. 2d at 437. Here, the Settling Defendants have been represented vigorously by able counsel from prominent, national law firms. The fact that Class Counsel negotiated such a favorable settlement sitting across the table of those counsel weighs in favor of the fee request.

4. This Action Presents Complex Issues

As this Court is aware, this Action involves nationwide civil RICO, conspiracy, and other state law claims against foreign defendants. The excellent result obtained by Class Counsel against the Settling Defendants was no *fait accompli*. In the 12 years this Action has been pending, Plaintiffs' Counsel have (a) engaged in an extensive factual investigation; (b) filed a complaint, which was twice amended, to set forth the detailed factual bases for the Claims; (c) successfully opposed dispositive motions; (d) served requests for production of documents which included 57 individual requests for production; (e) reviewed and analyzed more than 1.8 million

pages of documents; (f) propounded interrogatories; (g) propounded a data request; (h) engaged in extensive meet-and-confer efforts with Defendants about their productions, electronically stored information ("ESI") and documents; (i) took and defended 45 depositions (tabling others pending decisions on discovery motions); (j) litigated (and continue to litigate) more than a dozen discovery motions; (k) retained counsel in London to assist with discovery in the United Kingdom; (l) retained experts on issues germane to the case; and (m) engaged in extensive settlement negotiations spanning seven years. *See* Joint Declaration, ¶8.

Although Plaintiffs' Counsel will continue vigorously prosecuting the Action against the Non-Settling Defendants to a successful conclusion, the Partial Settlement will provide the Settlement Class with a substantial benefit right now. This factor also weighs in favor of approval of the fee request.

5. Plaintiffs' Counsel Have Represented the Settlement Class on a Contingent Basis for Over a Decade

Plaintiffs' Counsel undertook this Action on an entirely contingent fee basis, assuming substantial risk that they would have to devote a significant amount of time and incur substantial expenses without any assurance of compensation for all their hard work and efforts. Courts in this District have consistently recognized that the risk of non-payment is an important factor in assessing the requested fee. *See, e.g.*, *In re Lucent Tech.*, 327 F. Supp. 2d at 438 ("[T]he intrinsically speculative nature of this contingent fee case enhances the risk of non-payment and bolsters the Court's analysis

under this factor."); *In re Genta*, 2008 WL 2229843, at *10 ("The contingent fee agreement further substantiates the proprietary of the attorneys' fees award."); *see, e.g.*, *Milliron v. T-Mobile USA, Inc.*, No. 08-cv-4149 (JLL), 2009 WL 3345762, at *11 (D.N.J. Sept. 10, 2009) (awarding 33 1/3% fees (plus expenses) in recognition, *inter alia*, of contingent nature of representation).

Likewise, sister Circuits have held that contingency representation and the burden carried by counsel may warrant an upward adjustment for fee awards:

> It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* §21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.

In re Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1299 (9th Cir. 1994).

The risk of non-payment in contingency fee representation is even more pronounced in complex class actions, like this one, as they are highly technical, expert-intensive, and protracted. Contingent counsel advance their time, expertise, work product, and expenses to subsidize litigation that faces heightened pleading standards and many substantive challenges. In fact, there are many class actions in which counsel expend thousands of hours, incur substantial expenses, and yet receive no remuneration despite their diligence and expertise. Plaintiffs' Counsel are aware of many hard-fought lawsuits in which, because of the discovery of facts unknown when

case was commenced, or changes in the law during the pendency of the case, or a decision of a judge or jury following a trial on the merits, or excellent legal services on the plaintiff's side of the "v" result in zero fees. Even obtaining a favorable jury verdict is not a guarantee of success, as it may be reversed on appeal. *See, e.g.*, *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (verdict of $81 million for plaintiffs reversed on appeal and judgment entered for defendant).

The risk of non-payment as it pertains to the Non-Settling Defendants was (and is) likewise high. The risk existed since the outset and remains, particularly given that the case was stayed for five years, and Defendants were able to delay (while memories faded) for years before Plaintiffs received one shred of paper in discovery. Since the stay was lifted, Defendants have staged a formidable defense, asserting myriad defenses and blocking discovery in the UK courts. Notwithstanding this very real specter of non-payment, Plaintiffs' Counsel have committed enormous resources of both time and money to the vigorous and successful prosecution of this Action. Accordingly, the risk of non-payment in this case weighs heavily in favor of awarding the requested fees.

6. Plaintiffs' Counsel Have Devoted a Tremendous Amount of Time Representing the Settlement Class

Over the past decade, Plaintiffs' Counsel have devoted a tremendous amount of time litigating the Action. Through May 31, 2019, Plaintiffs' Counsel have spent

more than 35,000 hours prosecuting this Action for an aggregate lodestar of approximately $20 million and have incurred over $1.85 million in expenses.[11]

The complexity of this Action required a significant amount of work. Through effective leadership, Class Counsel have managed this case in an efficient manner. Given the number of Defendants in the Action (over 23 Syndicates), not to mention third-party brokers and Lloyd's-related entities with relevant information, work has been allocated to specific firms to avoid duplication, and discrete teams of lawyers were designated to deal with specific areas of the litigation and with specific Defendants or third parties. In addition, where appropriate, work has been assigned to associates and paraprofessionals with lower billing rates. These decisions evidence an appropriate allocation of resources. This commitment of time and effort by Class Counsel weighs in favor of approval of the fee request.

7. The Requested Fee Is in Line with Similar Awards

The Court must take into consideration amounts awarded in similar actions when approving attorney fees. Specifically, the Court must (1) compare the actual award requested to other awards in comparable settlements; and (2) ensure that the award is consistent with what an attorney would have received if the fee were negotiated on the open market. *See In re Ins. Brokerage*, 282 F.R.D. at 122-23; *see*

[11] Joint Declaration, n.11; Jensen Decl., Exs. A-B; Schachter Decl., Exs. A-B; Bunch Decl., Exs. A-B; Meriwether Decl., Exs. A-B; Foote Decl., Exs. A-B; Pearlman Decl., Exs. A-B; and Foster Decl., Exs. A-B.

also Demmick, 2015 WL 13643682, at *17. Considering both factors, the requested fee award is clearly fair, reasonable and appropriate.

First, the comparison of the fee sought with fees awarded in other class actions militates strongly in favor of granting the fee requested. Courts in this Circuit have awarded 33 1/3% of the common fund as attorneys' fees, including in related MDL 1663. *See In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. at 155 (awarding one-third of the common fund for attorneys' fee); *see, e.g.*, *In re Liquid Aluminum Sulfate*, 2018 WL 7108059, at *1 (attorneys' fee of one-third (plus expenses) awarded on a common fund amount of $10.7 million); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (review of 289 settlements demonstrates "average attorney's fees percentage [of] 31.71%" with a median value that "turns out to be one-third"); *Hall v. AT&T Mobility LLC*, No. 07-cv-5325 (JLL), 2010 WL 4053547, at *21 (D.N.J. Oct. 13, 2010) (attorneys' fee of one-third (plus expenses) awarded on a common fund amount of $18 million); *In re Merck & Co.*, 2010 WL 547613, at *9-*11 (in a RICO action, attorneys' fee of one-third (plus expenses) awarded on a common fund amount of $41.5 million); *Milliron*, 2009 WL 3345762, at *14 (attorneys' fee of one-third (plus expenses) awarded on a common fund amount of $13.5 million). The fee request is consistent with these other complex fee litigation awards.

Second, the percentage-of-the-fund method of awarding attorneys' fees in class actions should approximate the fee that would be negotiated if the lawyer were

offering his or her services in the private marketplace. *See In re Remeron DP*, 2005 WL 3008808, at *16. "The object . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation." *Id.* A one-third fee request reflects commonly negotiated fees in the private marketplace. *See id.* ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation."); *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("[I]n private contingency fee cases . . . plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."). For these reasons, as well, the requested fee is reasonable.

C. A Lodestar Cross-Check Buttresses the Reasonableness of the Requested Fee

The Third Circuit has recommended that district courts perform a lodestar cross-check to ensure the reasonableness of the requested attorneys' fees. *In re AT&T*, 455 F.3d at 164 ("The lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method."); *In re Rite Aid*, 396 F.3d at 300, 305.

To perform a lodestar cross-check, district courts divide the proposed fee award by the lodestar calculation,[12] which will yield a lodestar multiplier. *See In re AT&T*,

[12] The courts have noted that the lodestar calculation need not entail mathematical precision or bean counting. The courts may rely on summaries submitted by the attorneys and need not review actual billing records. *In re Rite Aid*, 396 F.3d at 306-07; *see also In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2007 WL 1652303, at *9 (D.N.J. June 5, 2007). When performing this analysis, the court should apply

455 F.3d at 164. When the lodestar is used as a cross-check, "the focus is not on the necessity and reasonableness of every hour of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 270 (D.N.H. 2007).[13]

The lodestar multiplier "attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *In re Rite Aid*, 396 F.3d at 305-06. In this Circuit, multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied. *See In re AT&T*, 455 F.3d at 172-73 (approving a multiplier of 1.28); *In re Safety Components Int'l Sec. Litig.*, 166 F. Supp. 2d 72, 104 (D.N.J. 2001) (a multiplier of 2.81 was reasonable); *In re Suprema Specialties, Inc. Sec. Litig.*, No. 02-cv-168 (WHW), 2008 WL 906254, at *11-*12 (D.N.J. Mar. 31, 2008) (a multiplier of 1.1 was reasonable); *In re Merck & Co.*, 2010 WL 547613, at *13 (award of one-third of the common fund, with the resulting multiplier of 2.786 "is reasonable under the circumstances");

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blended billing rates that approximate the fee structure of all the attorneys who worked on the matter. *In re Rite Aid*, 396 F.3d at 306.

[13] *See also In re Am. Apparel, Inc.*, No. 10-06352 MMM (JCGx), 2014 WL 10212865, at *23 (C.D. Cal. July 28, 2014) ("In contrast to the use of the lodestar method as a primary tool for setting a fee award, the lodestar cross-check can be performed with a less exhaustive cataloging and review of counsel's hours."); *In re Apollo Grp. Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT, 2012 WL 1378677, at *7 n.2 (D. Ariz. Apr. 20, 2012) ("an itemized statement of legal services is not necessary for an appropriate lodestar cross-check").

Milliron, 2009 WL 3345762, at *14 (attorneys' fee of one-third amounted to a 2.21 multiplier, which was "well within the range of reasonableness").

Here, a lodestar cross-check confirms the reasonableness of the fee requested for over 12 years of hard work fending off sophisticated foreign defendants and their counsel. Plaintiffs' Counsel's lodestar totals $20,096,471.80, which reflects more than 35,000 hours of professional time during a period of over a dozen years. *See* Joint Declaration, ¶98 & n.11. Thus, Class Counsel's requested fees of $7,317,000 represent a ***negative*** multiplier – 0.36 – of the lodestar amount. *Id*. Thus, the fee will only partially compensate Plaintiffs' Counsel for the risk undertaken in this Action and their time expended to date. Considering the circumstances of this Action, a negative multiplier, far lower than multipliers approved by Courts in this Circuit, is certainly fair and reasonable.[14]

V. THE LITIGATION EXPENSES ARE REASONABLE

As set forth in the class notice, Plaintiffs' Counsel request an award of $1.85 million in litigation expenses necessarily incurred to prosecute and resolve this Action on behalf of the Settlement Class. ECF 89-2 at 108; *see id.* at 114.

It is well established that "[c]ounsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and

[14] Plaintiffs will seek to recover the remainder of their attorneys' fees in any future settlement and/or at the successful conclusion of the Action against one or more of the Non-Settling Defendants.

appropriately incurred in the prosecution of the case." *In re Cendant Corp., Derivative Action Litig.*, 232 F. Supp. 2d 327, 343 (D.N.J. 2002); *In re Safety Components*, 166 F. Supp. 2d at 108. This includes expenses that are reasonable, necessary, directly related to the litigation, and normally charged to a fee-paying client. *See In re Ins. Brokerage*, 282 F.R.D. at 124-25 (approving expenses); *Saini v. BMW of N. Am., LLC*, No. 12-cv-6105(CCC), 2015 WL 2448846, at *19 (D.N.J. May 21, 2015) (same); *In re Safety Components*, 166 F. Supp. 2d at 108 (same); *In re Elec. Carbon*, 447 F. Supp. 2d at 412 (same); *Varacallo*, 226 F.R.D. at 256-57 (same).

In the prosecution of this complex case, Plaintiffs' Counsel have expended a total of $1,874,797.34 in litigation expenses through May 31, 2019, and continue to do so. *See* Joint Declaration, ¶99. These expenses exceed the $1.85 million amount stated in the class notices, so Plaintiffs' Counsel only seek that amount and will seek payment of any additional litigation expenses at the time of a later application, if any. *See* Joint Declaration, ¶¶99-101. Plaintiffs' Counsel have understood throughout that, even if Plaintiffs were ultimately successful, any award of litigation expenses would not compensate them for the lost use of funds advanced to prosecute this Action. *See id.* As such, Plaintiffs' Counsel were sufficiently motivated to, and did, take significant steps to minimize expenses wherever practicable without jeopardizing the vigorous and efficient prosecution of this Action. *See, e.g.*, *Beesley v. Int'l Paper Co.*, No. 3:06-cv-703-DRH-CJP, 2014 WL 375432, at *3 (S.D. Ill. Jan. 31, 2014) ("Class

Counsel had a strong incentive to keep expenses at a reasonable level due to the high risk of no recovery when the fee is contingent.").

Plaintiffs' Counsel's expenses are detailed in the accompanying fee and expense declarations with the specific categories incurred and amount for each. Joint Declaration, ¶¶99-101, Jensen Declaration, Ex. B; Schachter Declaration, Ex. B; Bunch Decl., Ex. B; Meriwether Decl., Ex. B; Foote Decl., Ex. B; Pearlman Decl., Ex. B; and Foster Decl., Ex. B. Each of these expenses was necessarily incurred and of the type routinely charged to clients billed by the hour, including the cost of experts and consultants, service of process, online legal and factual research, travel, and mediation. *See also Vincent v. Reser*, No. C 11-03572 CRB, 2013 WL 621865, at *5 (N.D. Cal. Feb. 19, 2013) (awarding expenses for "three experts and the mediator, photocopying and mailing expenses, travel expenses, and other reasonable litigation related expenses"). These expenses are all of the types that are routinely approved. *See In re Ins. Brokerage*, 282 F.R.D. at 124-25 (approving these categories of expenses); *Saini*, 2015 WL 2448846, at *19 (same). The Court should award the requested litigation expenses.

VI. THE SERVICE AWARDS ARE REASONABLE

Class Counsel also request that the Court award $15,000 each to the two named Plaintiffs (an aggregate of $30,000) in recognition of their many years (and counting) of service and diligence in protecting the interests of absent Settlement Class

Members. Courts routinely approve awards to compensate named plaintiffs for the service they provide, and the risk incurred during the course of the class litigation. *See, e.g.*, *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 342 (E.D. Pa. 2007) ("It is particularly appropriate to compensate named representative plaintiffs with incentive awards when they have actively assisted plaintiffs' counsel in their prosecution of the litigation for the benefit of the class."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) ("courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation").

Indeed, the requested service awards are typical of complex class actions and in line with the amount given in past awards in similar cases. *See, e.g.*, *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 WL 1221350, at *18-*19 (E.D. Pa. June 2, 2004) (approving $25,000 service award to each class representative); *In re Liquid Aluminum Sulfate*, 2018 WL 7108059, at *2 (approving $15,000 service award to each class representative).

Here, the named Plaintiffs – Lincoln Adventures, LLC and Michigan Multi-King, Inc. – have spent countless hours and traveled across the country and to the United Kingdom for this case. They have diligently and patiently monitored this case for over a decade; provided documents and information requested by Defendants; reviewed with their counsel important pleadings; sat for full-day depositions; and

traveled to, and participated in, several multi-day mediation sessions here and abroad. *See* Joint Declaration, ¶¶56-60.

"Like the attorneys in this case, the class representatives have conferred benefits on all other class members, and they deserve to be compensated accordingly." *In re Linerboard*, 2004 WL 1221350, at *18. As the named Plaintiffs have actively and effectively fulfilled their obligations as representatives of the Settlement Class, the requested service awards are both appropriate and reasonable.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court award attorneys' fees in the amount of $7,317,000; litigation expenses of $1,850,000; and service awards in the amount of $15,000 to Plaintiffs Lincoln Adventures and Michigan Multi-King each.

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Respectfully submitted,

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