UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE AUTOMOTIVE PARTS ANTITRUST LITIGATION	:	**Master File No. 12-md-02311** **Honorable Sean F. Cox**
IN RE: EXHAUST SYSTEMS CASES	:	
THIS DOCUMENT RELATES TO: **ALL DIRECT PURCHASER ACTIONS**	:	**2:16-cv-03701-SFC-RSW** **2:16-cv-13968-SFC-RSW** **2:18-cv-12166-SFC-RSW**

DIRECT PURCHASER PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, LITIGATION COSTS AND EXPENSES, AND SERVICE AWARDS TO THE CLASS REPRESENTATIVES

Pursuant to Rules 23 and 54 of the Federal Rules of Civil Procedure, Direct Purchaser Plaintiffs Manny's Auto Supply, Inc. and Irving Levine Automotive Distributors, Inc. hereby move the Court for an award of attorneys' fees, litigation costs and expenses, and service payments to the class representatives, from the proceeds of the settlement with the Bosal, Eberspächer, Faurecia, Meritor and Tenneco Defendants. In support of this motion, Direct Purchaser Plaintiffs rely upon the accompanying memorandum of law and the Declarations attached thereto, which are incorporated by reference.

Dated: September 14, 2020

Respectfully submitted,

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DIRECT PURCHASER PLAINTIFFS' MEMORANDUM IN SUPPORTOF MOTION FOR AN AWARD OF ATTORNEYS' FEES, LITIGATION COSTS AND EXPENSES, AND SERVICE AWARDS TO THE CLASS REPRESENTATIVES

TABLE OF CONTENTS

STATEMENT OF ISSUES PRESENTED ii
STATEMENT OF CONTROLLING OR MOST APPROPRIATE AUTHORITIES iii
INDEX OF AUTHORITIES iv
I. INTRODUCTION 1
II. BACKGROUND AND SUMMARY OF WORK PERFORMED TO DATE 2
III. CLASS NOTICE 3
IV. THE WORK PLAINTIFFS' COUNSEL PERFORMED FOR THE BENEFIT OF THE SETTLEMENT CLASSES 4
V. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE 6
A. THE PERCENTAGE-OF-THE-RECOVERY METHOD PREVIOUSLY EMPLOYED BY THE COURT IN THIS MDL IS APPROPRIATE FOR ASSESSING THE FEE REQUEST. 6
B. THE REQUESTED FEE CONSTITUTES A FAIR AND REASONABLE PERCENTAGE OF THE SETTLEMENT FUNDS. 7
C. THE FACTORS IDENTIFIED BY THE SIXTH CIRCUIT SUPPORT THE REQUESTED FEE. 9
1. PLAINTIFFS' COUNSEL OBTAINED A VALUABLE BENEFIT FOR THE CLASSES. 10
2. THE VALUE OF THE SERVICES ON AN HOURLY BASIS CONFIRMS THAT THE REQUESTED FEE IS REASONABLE. 10
3. THE REQUESTED FEE IS FAIR AND REASONABLE GIVEN THE REAL RISK THAT COUNSEL COULD HAVE RECEIVED NO COMPENSATION FOR THEIR EFFORTS. 11
4. SOCIETY HAS AN IMPORTANT STAKE IN THIS LAWSUIT AND IN AN AWARD OF REASONABLE ATTORNEYS' FEES. 12
5. THE COMPLEXITY OF THIS CASE SUPPORTS THE REQUESTED FEE. 13
6. SKILL AND EXPERIENCE OF COUNSEL 13
VI. THE COURT SHOULD AUTHORIZE INTERIM LEAD COUNSEL TO DETERMINE FEE ALLOCATIONS. 15
VII. REIMBURSEMENT OF LITIGATION COSTS AND EXPENSES INCURRED IN THE PROSECUTION OF THIS LITIGATION 16
VIII. AN AWARD OF SERVICE AWARDS TO THE CLASS REPRESENTATIVES IS APPROPRIATE 16
IX. CONCLUSION 19

STATEMENT OF ISSUES PRESENTED

1. Should the Court award Plaintiffs' Counsel attorneys' fees of 30% of the Bosal, Eberspächer, Faurecia, Meritor and Tenneco settlement funds?

   Suggested Answer: Yes.

2. Should the Court award Plaintiffs' Counsel litigation costs and expenses from the settlement funds?

   Suggested Answer: Yes.

3. Should the Court award the class representatives, Manny's Auto Supply, Inc. and Irving Levine Automotive Distributors, Inc., service payments of $25,000 each?

   Suggested Answer: Yes.

STATEMENT OF CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Fed. R. Civ. P. 23(h)

Fed. R. Civ. P. 54(d)

Bowling v. Pfizer, Inc., 102 F.3d 777 (6th Cir. 1996)

Rawlings v. Prudential-Bache Properties, Inc.,
9 F.3d 513 (6th Cir. 1993)

INDEX OF AUTHORITIES

Page(s)

Cases

Behrens v. Wometco Enters., Inc.,
118 F.R.D. 534 (S.D. Fla. 1988) 14
Bessey v. Packerland Plainwell, Inc.,
2007 WL 3173972 (W.D. Mich. 2007) 7
Bowling v. Pfizer, Inc.,
102 F.3d 777 (6th Cir. 1996) 10
Gascho v. Global Fitness Holdings, LLC,
822 F.3d 269 (6th Cir. 2016) 6
Godshall v. Franklin Mint Co.,
2004 WL 2745890 (E.D. Pa., Dec. 1, 2004) 8
Hadix v. Johnson,
322 F.3d 895 (6th Cir. 2003) 16, 17
Heekin v. Anthem, Inc.,
2012 WL 5878032 (S.D. Ind. Nov. 20, 2012) 8
Hillson v. Kelly Servs. Inc.,
2017 WL 279814 (E.D. Mich. 2017) 17
Huyer v. Buckley,
849 F.3d 395 (8th Cir. 2017) 1
In re AremisSoft Corp., Sec. Litig.,
210 F.R.D. 109 (D.N.J. 2002) 8
In re Automotive Parts Antitrust Litig.,
2016 WL 8201516 (E.D. Mich. Dec. 28, 2016) 6, 7
In re Automotive Refinishing Paint Antitrust Litig.,
2008 WL 63269 (E.D. Pa. Jan. 3, 2008) 16
In re Cardinal Health Inc. Sec. Litig.,
528 F. Supp. 2d 752 (S.D. Ohio 2007) 10
In re Cardizem CD Antitrust Litig.,
218 F.R.D. 508 (E.D. Mich. 2003) 1, 13, 16
In re Cendant Corp. Sec. Litig.,
404 F.3d 173 (3d Cir. 2005) 15
In re Copley Pharm., Inc. Albuterol Prods. Liab. Litig.,
50 F.Supp.2d 1141 (D. Wy. 1999) 15
In re Domestic Air Transp. Antitrust Litig.,
148 F.R.D. 297 (N.D. Ga. 1993) 15
In re Domestic Drywall Antitrust Litig.,
2018 WL 3439454 (E.D. Pa. July 17, 2018) 8
In re Dry Max Pampers Litig.,
724 F.3d 713 (6th Cir. 2013) 17
In re FAO Inc. Sec. Litig.,
2005 WL 3801469 (E.D. Pa., May 20, 2005) 8
In re Fasteners Antitrust Litig.,
2014 WL 296954 (E.D. Pa. Jan. 27, 2014) 8

In re Flonase Antitrust Litig.,
951 F. Supp. 2d 739 (E.D. Pa. 2013) 8
In re Folding Carton Antitrust Litig.,
84 F.R.D. 245 (N.D. Ill. 1979) 13
In re Gen. Instrument Sec. Litig.,
209 F. Supp. 2d 423 (E.D. Pa. 2001) 8
In re Linerboard Antitrust Litig.,
292 F.Supp.2d 631 (E.D. Pa. 2003) 13
In re Linerboard Antitrust Litig.,
2004 WL 1221350 (E.D. Pa., June 2, 2004) 8, 15
In re Losetrin 24 Fe Antitrust Litig.,
2020 WL 4035125 (D.R.I. July 17, 2020) 8
In re Losetrin 24 Fe Antitrust Litig.,
2020 WL 5201275 (D.R.I. Sept. 1, 2020) 8
In re Parking Heaters Antitrust Litig.,
2019 WL 8137325 (E.D.N.Y Aug. 15, 2019) 8
In re Polyurethane Foam Antitrust Litig.,
2015 WL 1639269 (N.D. Ohio Feb. 26, 2015) 8, 13
In re Prandin Direct Purchaser Antitrust Litig.,
2015 WL 1396473 (E.D. Mich. Jan. 20, 2015) 8, 18
In re Ready-Mixed Concrete Antitrust Litig.,
2010 WL 3282591 (S.D. Ind. Aug. 17, 2010) 8
In re Skelaxin (Metaxalone) Antitrust Litig.,
2014 WL 2946459 (E.D. Tenn. Jun. 30, 2014) 8, 18
In re Southeastern Milk Antitrust Litig.,
2013 WL 2155387 (E.D. Tenn. May 17, 2013) 8
In re Titanium Dioxide Antitrust Litig.,
2013 WL 6577029 (D. Md. Dec. 13, 2013) 8
In re Warfarin Sodium Antitrust Litig.,
391 F.3d 516 (3d Cir. 2004) 15
In re Western States Wholesale Natural Gas Litig.,
2019 WL 4597502 (D. Nev. Aug. 5, 2019) 8
Isabel v. City of Memphis,
404 F.3d 404 (6th Cir. 2005) 10
Jones v. Diamond,
636 F.2d 1364 (5th Cir. 1981) 12
Klein v. PDG Remediation, Inc.,
1999 WL 38179 (S.D.N.Y., Jan. 28, 1999) 8
Kornell v. Haverhill Ret. Sys.,
790 F. App'x 296 (2d Cir. 2019) 1
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2006 WL 3505851 (N.D. Okla., Dec. 4, 2006) 8
Machesney, v. Lar-Bev of Howell, Inc.,
2017 WL 2437207 (E.D. Mich. Jun. 2017) 17
Missouri v. Jenkins,
491 U.S. 274 (1989) 11

Moore v. United States,
63 Fed. Cl. 781 (2005) 8
New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.,
234 F.R.D. 627 (W.D. Ky. 2006) 8
Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,
483 U.S. 711 (1987) 11
Powers v. Eichen,
229 F.3d 1249 (9th Cir. 2000) 1
Rawlings v. Prudential-Bache Properties, Inc.,
9 F.3d 513 (6th Cir. 1993) 6
Seaman v. Duke University,
2019 WL 4674758 (E.D.N.C. Sept. 25, 2019) 8
Shane Group, Inc. v. Blue Cross Blue Shield of Michigan,
825 F.3d 299 (6th Cir. 2016) 16
Standard Iron Works v. Arcelormittal,
2014 WL 7781572 (N.D. Ill. Oct. 22, 2014) 8
Thacker v. Chesapeake Appalachia, L.L.C.,
695 F. Supp. 2d, 521 (E.D. Ky. 2010) 7
Vista Healthplan, Inc. v. Cephalon, Inc.,
2020 WL 1922902 (E.D. Pa. April 21, 2020) 8
Williams v. Sprint/United Mgmt. Co,
2007 WL 2694029 (D. Kan., Sept. 11, 2007) 8

Statutes

28 U.S.C. § 1715 3

Rules

Fed. R. Civ. P. 23(h) 3, 6
Fed. R. Civ. P. 23(h)(1) and (2) 6

I. INTRODUCTION

Through the efforts of the class representatives, Manny's Auto Supply, Inc. and Irving Levine Automotive Distributors, Inc. (together, "Plaintiffs"), and Plaintiffs' counsel, settlements totaling $13,798,000 have been reached with Bosal, Eberspächer, Faurecia, Meritor and Tenneco in the *Automotive Exhaust Systems* direct purchaser case. In addition, the Bosal, Eberspächer, Faurecia, Meritor, and Tenneco settlements included provisions requiring them to cooperate with Plaintiffs' counsel in the prosecution of the litigation. Defendants provided cooperation in the form of documents and detailed proffers of information.

The law firms responsible for achieving the settlements respectfully move for an order: (1) awarding attorneys' fees of 30% of the settlement funds[1]; (2) awarding $57,048.07 in litigation costs and expenses that have been incurred in the prosecution of this litigation; and (3) authorizing service awards of $25,000 to the class representatives. For the reasons set forth herein, Plaintiffs'

[1] DPP counsel are asking the Court to award attorneys' fees as a percentage of the gross settlement fund, not as a percentage of the net amount after deduction of costs and expenses. In connection with a fee award in the direct purchaser cases—*Wire Harness*—Judge Battani deducted reimbursed costs and expenses from the settlement funds before applying a percentage to calculate the fees, and thereafter DPP counsel did so when they petitioned the Court for fees, which was reflected in the Court's orders.

But DPP counsel believe that the vast majority of percentage fee awards in antitrust cases are based on the gross settlement fund. *See, e.g.*, *In re Refrigerant Compressors Antitrust Litig.*, 2:09-md-02042 (E.D. Mich. July 16, 2014); *In re Packaged Ice Antitrust Litig.,* 2011 WL 6209188, at *17; *In re Foundry Resins Antitrust Litig.,* No. 2:04-md-1638 (S.D. Ohio Mar. 31, 2008); *Delphi*, 248 F.R.D. at 505 (attorneys' fees awarded on gross settlement fund); *In re Cardizem CD Antitrust Litig.,* 218 F.R.D. 508, 531-535 (E.D. Mich. 2003) (awarding costs in addition to percentage of the fund fee). Indeed, district courts' decisions to award fees on the gross recovery have been affirmed throughout the country in the face of direct challenges. *See*, *e.g.*, *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000) (affirming an award on the gross, because "the choice of whether to base an attorneys' fee award on either net or gross recovery should not make a difference so long as the end result is reasonable"); *Kornell v. Haverhill Ret. Sys.*, 790 F. App'x 296, 298–99 (2d Cir. 2019) (summary order) (affirming decision to award fees on the gross fund rather than the net as reasonable); *Huyer v. Buckley*, 849 F.3d 395, 398–99 (8th Cir. 2017) (same). Therefore, DPP counsel respectfully request that the Court award fees on the gross settlement fund.

counsel respectfully submit that the requested fee, expense, and service awards are reasonable and fair under both well-established Sixth Circuit precedent concerning such awards in class action litigation and the court's prior decisions awarding fees, expenses, and service awards in the *Automotive Parts Antitrust Litigation*.

II. BACKGROUND AND SUMMARY OF WORK PERFORMED TO DATE

The *Automotive Exhaust Systems* case is part of the overall *Automotive Parts Antitrust Litigation* that was centralized in this Court by the Judicial Panel on Multidistrict Litigation in 2012. The background of the *Automotive Exhaust Systems* case is set forth in the related Memorandum in Support of Direct Purchaser Plaintiffs' Motion for Final Approval of Proposed Settlements, which was filed on September 14, 2020, and will not be fully repeated here.

In summary, Plaintiffs' counsel has:

- Investigated the industry and drafted the initial complaint against the Defendants;
- Participated in cooperation meetings with counsel for the DOJ amnesty applicant and another Defendant;
- Researched and drafted oppositions to motions to dismiss filed by Defendants;
- Researched and drafted a motion for reconsideration of the Court's Order dismissing Boysen;
- Drafted, negotiated and stipulated to several discovery orders, including a Protective Order, an Order Regarding Non Discoverability of Certain Expert Materials and Communications, an Order Regarding Production of Electronically Stored Information and Hard Copy Documents, and an Order Regarding Deposition Protocol;
- Responded to Defendants' discovery request;
- Reviewed, analyzed, and coded documents obtained from Defendants;
- Engaged in extensive settlement negotiations with each of the Defendants (in the case of Bosal with the assistance of a mediator);
- Prepared settlement agreements with each of the Defendants;

- Drafted the settlement notices, orders, and the preliminary and final approval motion and memoranda in support; and
- Worked with the claims administrator to design and disseminate the class notices and a claim form, and to create and maintain a settlement website.

III. CLASS NOTICE

On August 14, 2020, the Notice of Proposed Settlements of Direct Purchaser Class Action with the Bosal, Eberspächer, Faurecia, Meritor, and Tenneco Defendants and Hearing on Settlement Approval and Related Matters, and Claim Form (the "Notice") was mailed to the potential members of the settlement classes. The Notice was also posted on-line at www.autopartsantitrustlitigation.com. On August 24, 2020, a summary notice was published in *Automotive News*, an online banner notice appeared over a 21-day period on www.AutoNews.com (the digital version of *Automotive News*), and an Informational Press Release was issued nationwide via PR Newswire's "Auto Wire," which targets auto industry trade publications.[2]

As required by Fed. R. Civ. P. 23(h), the Notice informed the class members that Plaintiffs' counsel would request an award of attorneys' fees of up to 30% of the settlement funds and reimbursement of expenses (Notice at 5). It also explained how class members could exclude themselves or object to the requests. *Id*. at 4-5.

[2] Counsel for the Bosal, Eberspächer, Faurecia, and Meritor Defendants have informed Settlement Class Counsel that their clients fulfilled their obligations under 28 U.S.C. § 1715 (the "Class Action Fairness Act of 2005" or "CAFA"), by disseminating the requisite notice to the appropriate federal and state officials at least ninety days prior to the final approval hearing. Counsel for the Tenneco Defendants has informed Settlement Class Counsel that the requisite CAFA notice has been sent out, but that the 90-day period for finally approving the Tenneco settlement will not be completed until December 3, 2020. Plaintiffs submit that an order finally approving the settlements with the Bosal, Eberspächer, Faurecia, and Meritor Defendants may properly be entered as of the date of the final approval hearing and that an order finally approving the settlement with the Tenneco Defendants may properly be entered on December 4, 2020, when the 90-day CAFA period has been satisfied.

The deadline for objections or requests for exclusion is October 5, 2020. To date, there have been no objections to the settlements, the fee or expense request, or the request for service awards for the class representatives, or any requests for exclusion from any of the settlement classes. Plaintiffs' counsel will provide the Court with a final report on any objections or requests for exclusion before the settlement hearing scheduled for November 5.

IV. THE WORK PLAINTIFFS' COUNSEL PERFORMED FOR THE BENEFIT OF THE SETTLEMENT CLASSES

The initial Automotive Exhaust Systems complaint was filed in November 2016 against Defendants Bosal Nederland, B.V.[3]; Bosal Industries-Georgia, Inc.; Bosal USA, Inc.; Friedrich Boysen GmbH & Co. KG; Eberspächer Exhaust Technology GmbH & Co. KG; Eberspächer North America, Inc.; Faurecia SA[4]; Faurecia Emissions Control Technologies, USA, LLC; Faurecia Exhaust Systems, Inc.; and Meritor, Inc. f/k/a ArvinMeritor, on behalf of direct purchasers of Automotive Exhaust Systems.[5]

In July 2018, Plaintiffs filed a Complaint against Defendants Tenneco Inc., Tenneco Automotive Operating Co., Inc., and Tenneco GmbH.[6] In November 2018, Plaintiffs filed a Complaint against Defendant Boysen USA, LLC.[7]

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[3] On August 30, 2018, Bosal Nederland B.V. was dismissed from this lawsuit. *See* 2:16-cv-03701, ECF No. 63.

[4] On August 28, 2017, Faurecia SA was voluntarily dismissed from this lawsuit. *See* 2:16-cv-03701, ECF No. 17.

[5] Doc. No. 1, *Manny's Auto Supply, Inc. and Irving Levine Automotive Distributors, Inc. v. Bosal Nederland, B.V., et al.,* 2:16-cv-13968 (E.D. Mich. Nov. 9, 2016).

[6] Doc. No. 1, *Manny's Auto Supply, Inc. and Irving Levine Automotive Distributors, Inc. v. Tenneco Inc., et al.,* 2:16-cv-03701, 2:18-cv-12166-SFC-EAS, (E.D. Mich.).

[7] Doc. No. 1, *Manny's Auto Supply, Inc. and Irving Levine Automotive Distributors, Inc. v. Boysen USA, LLC.,* 2:16-cv-03701, 2:18-cv-13688 (E.D. Mich. Nov. 26, 2018).

In the meantime, Plaintiffs' counsel received and reviewed electronically stored information, transactional data, and other relevant information about the Automotive Exhaust Systems conspiracy from Defendants. They also responded to Defendants' motions to dismiss. Bosal Nederland B.V. filed a motion to dismiss in August 2017; Plaintiffs' opposition to the motion to dismiss was filed in March 2018. In September 2017, Defendant Friedrich Boysen GMBH & Co. KG filed a motion to dismiss; Plaintiffs' opposition to the motion to dismiss was filed in October 2017.

Plaintiffs' counsel was also exploring settlement possibilities with the Defendants. After months of discussions, the first settlement was reached in February 2018. Following extended discussions, the second settlement was reached in May 2018. Another settlement was reached in October 2019.

In addition, Plaintiffs' counsel scheduled mediations with two of the Defendants. An agreement with one of the defendants was reached through direct negotiation and resulted in an executed settlement agreement in January 2019. The other mediation went forward, preceded by the submission of a confidential mediation statement, and took place in June 2018. The mediation required extended discussion and ultimately led to a final settlement agreement in June 2020.

Working with the settlement administrator, Plaintiffs' counsel prepared and disseminated notices and claim forms for each of the settlements. The preliminary and final settlement approval papers were drafted and filed. The final fairness hearing on the settlements and the motion for an award of attorneys' fees, litigation expenses, and service awards to the class representatives is scheduled for November 5.

V. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE.

Federal Rule of Civil Procedure 23(h) provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." As discussed above, Plaintiffs' counsel have complied with the requirements of Rule 23(h)(1) and (2) (notice to the class of the attorneys' fees request and an opportunity to object). What remains for the Court to determine is whether the requested fee is reasonable and fair to the class members and Plaintiffs' counsel under the circumstances of this case. As discussed below, Plaintiffs' counsel believe their attorneys' fee request of 30% of the settlement funds in this case is fair and reasonable and well-supported by applicable law.

A. THE PERCENTAGE-OF-THE-RECOVERY METHOD PREVIOUSLY EMPLOYED BY THE COURT IN THIS MDL IS APPROPRIATE FOR ASSESSING THE FEE REQUEST.

As the court has previously observed, Sixth Circuit law gives district courts discretion to select an appropriate method for determining the reasonableness of attorneys' fees in class actions. *In re Automotive Parts Antitrust Litig.*, 2016 WL 8201516, at *1 (E.D. Mich. Dec. 28, 2016) (citations omitted). *See generally Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016) (discussing the advantages and disadvantages of the two methods). In this MDL, the Court has used the percentage-of-the-fund method. *E.g., In re Automotive Parts Antitrust Litig.*, 2016 WL 8201516, at *1 (collecting cases) (holding that "the percentage-of-the-fund … method of awarding attorneys' fees is preferred in this district because it eliminates disputes about the reasonableness of rates and hours, conserves judicial resources, and aligns the interests of class counsel and the class members"). *See Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *In re Packaged Ice Antitrust Litig.,* 2011 WL 6209188, at *16 (E.D. Mich. Dec. 13, 2011); *In re Delphi Corp. Sec. Derivative & ERISA Litig.*, 248 F.R.D. 483, 502 (E.D.

Mich. 2008). Plaintiffs' counsel respectfully request that here, as in all other cases in the *Automotive Parts Litigation* to date, the Court apply the percentage-of-the-fund method.

B. THE REQUESTED FEE CONSTITUTES A FAIR AND REASONABLE PERCENTAGE OF THE SETTLEMENT FUNDS.

Plaintiffs' counsel respectfully request a fee of 30% of the proceeds of the settlement funds that were created by their efforts and will benefit the settlement classes. As detailed below, there is substantial precedent to support the requested fee.

A 30% fee is well within the range of fee awards approved as reasonable by this Court and many others. To date in the *Automotive Parts Litigation*, the Court has approved several fee awards of one-third of the settlement fund in question, finding that percentage to be reasonable. *In re Automotive Parts Antitrust Litig.*, 2016 WL 8201516, at *2 (E.D. Mich. Dec. 28, 2016) (awarding counsel for the Truck and Equipment Dealer Plaintiffs 33.33% of a $4,616,499 settlement fund in the *Wire Harness* and *Occupant Safety Systems* cases); 12-cv-00102-MOB-MKM, Doc. 401 (awarding counsel for the Auto Dealer Plaintiffs 33.33% of a $55,500,504 settlement fund in *Wire Harness*).

The requested 30% award is also consistent with a wealth of authority from courts in the Sixth Circuit (and others) approving class action fees in the range of 30% to one-third of a common fund. *See Bessey v. Packerland Plainwell, Inc.*, 2007 WL 3173972, at *4 (W.D. Mich. 2007) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery") (internal quotation marks omitted); *Thacker v. Chesapeake Appalachia, L.L.C.,* 695 F. Supp. 2d, 521, 528 (E.D. Ky. 2010) ("Using the percentage approach, courts in this jurisdiction and beyond have regularly determined that 30% fee awards are reasonable"). District courts in the Sixth Circuit and elsewhere have awarded 30% or more of settlement funds as reasonable attorneys' fees in antitrust cases. For

example, this Court recently awarded 30% of the settlement funds in *Ceramic Substrates* to DPP counsel, 2:16-cv-03801-SFC-RSW (July 16, 2020) (ECF No. 19 at 2), and three other cases in the *Automotive Parts* MDL.[8] The Court also awarded 30% of the $30 million in settlement proceeds to plaintiffs' counsel in *In re Refrigerant Compressors Antirust Litig.*, 2:09-md-02042-SFC (June 6, 2014) (ECF No. 496 at 2).

Other district courts in this Circuit have also awarded fees representing 30% or more of settlement funds. *See, e.g.*, *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473 (E.D. Mich. Jan. 20, 2015) (one-third of $19 million fund); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 2946459, *1 (E.D. Tenn. Jun. 30, 2014) (one-third of $73 million fund); *In re Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013) (one-third of $158.6 million fund); *In re Foundry Resins Antitrust Litig.,* Case No. 2:04-md-1638 (S.D. Ohio Mar. 31, 2008) (one-third of $14.1 million fund); *In re Polyurethane Foam Antitrust Litig.,* 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015) (30% of a $148.7 million fund). DPP counsel's fee request of 30% of the settlement funds is fully supported by these and many other decisions.[9]

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[8] *Ignition Coils*, 2:13-cv-01401-SFC-RSW (E.D. Mich. July 16, 2020) (ECF No. 118), *Valve Timing Control Devices*, 2:13-cv-02501-SFC-RSW (E.D. Mich. July 16, 2020) (ECF No. 22), and *Brake Hoses*, 2:16-cv-03601 (E.D. Mich. July 16, 2020) (ECF No. 29).

[9] *See, e.g., In re Losetrin 24 Fe Antitrust Litig.,* 2020 WL 5201275, at *5 (D.R.I. Sept. 1, 2020) (approving a magistrate judge's recommendation of a fee award of one-third from a $120 million settlement. The magistrate judge's recommendation is *In re Losetrin 24 Fe Antitrust Litig.*, 2020 WL 4035125 (D.R.I. July 17, 2020)); *Vista Healthplan, Inc. v. Cephalon, Inc.*, 2020 WL 1922902, at *31-*32 (E.D. Pa. April 21, 2020) (one-third fee from a $65.8 million settlement); *Seaman v. Duke University*, 2019 WL 4674758, at *8 (E.D.N.C. Sept. 25, 2019) (one-third fee from a $54.5 million settlement); *In re Parking Heaters Antitrust Litig.*, 2019 WL 8137325 (E.D.N.Y Aug. 15, 2019) (one-third fee from a $12.2 million settlement); *In re Western States Wholesale Natural Gas Litig.*, 2019 WL 4597502 (D. Nev. Aug. 5, 2019) (33% of a $29,250,000 settlement); *In re Domestic Drywall Antitrust Litig.*, 2018 WL 3439454, at *20 (E.D. Pa. July 17, 2018) (awarding one-third of $190 million settlement); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 1:09-cv-07666 (N.D. Ill. Jan. 22, 2014) (awarding one-third interim fee from initial settlement in multi-defendant case); *Standard Iron Works v. Arcelormittal,* 2014 WL 7781572, at

C. THE FACTORS IDENTIFIED BY THE SIXTH CIRCUIT SUPPORT THE REQUESTED FEE.

Once the Court has selected a method for awarding attorneys' fees, the next step is to consider the six factors the Sixth Circuit has identified to guide courts in weighing a fee award in a common fund case, which are: (1) the value of the benefit rendered to the class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an

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*1 (N.D. Ill. Oct. 22, 2014) (attorneys' fee award of one-third of $163.9 million settlement); *In re Fasteners Antitrust Litig.*, 2014 WL 296954, *7 (E.D. Pa. Jan. 27, 2014) ("Co–Lead Counsel's request for one third of the settlement fund is consistent with other direct purchaser antitrust actions."); *In re Titanium Dioxide Antitrust Litig.,* 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (one-third fee from $163.5 million fund); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 748-52 (E.D. Pa. 2013) (noting that "in the last two-and-a-half years, courts in eight direct purchaser antitrust actions approved one-third fees," and awarding one-third fee from $150 million fund, a 2.99 multiplier); *In re Linerboard Antitrust Litig.,* 2004 WL 1221350 (E.D. Pa., June 2, 2004) (30% of $202 million fund awarded, a 2.66 multiplier); *In re OSB Antitrust Litig.,* Master File No. 06-826 (E.D. Pa.) (fee of one-third of $120 million in settlement funds); *Heekin v. Anthem, Inc.*, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012) (awarding one-third fee from $90 million settlement fund); *In re Ready-Mixed Concrete Antitrust Litig.*, 2010 WL 3282591, at *3 (S.D. Ind. Aug. 17, 2010) (approving one-third fee); *Williams v. Sprint/United Mgmt. Co,* 2007 WL 2694029, at *6 (D. Kan., Sept. 11, 2007) (awarding fees equal to 35% of $57 million common fund); *Lewis v. Wal-Mart Stores, Inc.,* 2006 WL 3505851, at *1 (N.D. Okla., Dec. 4, 2006) (awarding one-third of the settlement fund and noting that a "one-third [fee] is relatively standard in lawsuits that settle before trial."); *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.,* 234 F.R.D. 627, 635 (W.D. Ky. 2006) ("[A] one-third fee from a common fund case has been found to be typical by several courts.") (citations omitted), *aff'd*, 534 F.3d 508 (6th Cir. 2008); *In re AremisSoft Corp., Sec. Litig.,* 210 F.R.D. 109, 134 (D.N.J. 2002) ("Scores of cases exist where fees were awarded in the one-third to one-half of the settlement fund.") (citations omitted); *Klein v. PDG Remediation, Inc.,* 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"); *Moore v. United States,* 63 Fed. Cl. 781, 787 (2005) ("one-third is a typical recovery"); *In re FAO Inc. Sec. Litig.*, 2005 WL 3801469, at * 2 (E.D. Pa., May 20, 2005) (awarding fees of 30% and 33%); *Godshall v. Franklin Mint Co.*, 2004 WL 2745890, at *5 (E.D. Pa., Dec. 1, 2004) (awarding a 33% fee and noting that "[t]he requested percentage is in line with percentages awarded in other cases"); *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 433-44 (E.D. Pa. 2001) (awarding one-third of a $48 million settlement fund).

incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides. *E.g., Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996); *In re Wire Harness Cases*, 2:12-cv-00101 (E.D. Mich.) (Doc. 495), at 3-5. When applied to the facts of this case, these factors indicate that the requested fee constitutes fair and reasonable compensation for Plaintiffs' counsel's efforts in creating the settlement funds.

1. PLAINTIFFS' COUNSEL OBTAINED A VALUABLE BENEFIT FOR THE CLASSES.

The result achieved for the class is the principal consideration when evaluating a fee request. *E.g., Delphi,* 248 F.R.D. at 503. Here, Plaintiffs' counsel have achieved an excellent recovery of $13,798,000 for the settlement classes.

2. THE VALUE OF THE SERVICES ON AN HOURLY BASIS CONFIRMS THAT THE REQUESTED FEE IS REASONABLE.

When fees are awarded using the percentage-of-the-fund method, this Court and others have applied a lodestar "cross-check" on the reasonableness of a fee calculated as a percentage of the fund. *In Re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 754 (S.D. Ohio 2007); *In re Packaged Ice Antitrust Litig.,* 2011 WL 6209188, at *18. Use of a lodestar cross-check is optional, however, and because it is only a check, the court is not required to engage in a detailed review and evaluation of time records. *Cardinal*, 528 F. Supp. 2d at 767. Here, the amount of time Plaintiffs' counsel have expended in instituting the case and bringing it to a successful conclusion makes clear that the fee requested is well "aligned with the amount of work the attorneys contributed" to the recovery and does not constitute a "windfall." *See id.*

To calculate the lodestar, a court first multiplies the number of hours counsel reasonably expended on the case by their reasonable hourly rate. *See Isabel v. City of Memphis*, 404 F.3d 404, 415 (6th Cir. 2005). Here, as described above, a substantial amount of time has been spent by

Plaintiffs' counsel litigating the case and achieving the settlement. That work was managed with an eye toward efficiency and avoiding duplication.

As set forth in the law firm Declarations submitted as Exhibit 1 with this motion, Plaintiffs' counsel have expended 4,418.60 hours from the inception of the case through August 14, 2020. Applying the historical rates charged by counsel to the hours expended yields a lodestar value of $2,589,348.25.[10] A 30% fee would be $4,139,400. Without taking into account future work on the case, the current multiplier is a modest 1.60. After the deadline for requests for exclusion, and before the date of the hearing on the fee request, Plaintiffs' counsel will file a supplemental report setting forth any opt-outs or objections, and an updated lodestar and multiplier that will reflect work done after this motion was filed.

Plaintiffs' counsel submit that the hours expended on this case since inception, while substantial, were reasonable and necessary. One of the recognized benefits of using the percentage-of-the-fund method is that it better aligns the interests of class counsel with the interests of class members and eliminates any incentive to unnecessarily expend hours. Here, Plaintiffs' counsel efficiently achieved an excellent recovery for the class members without burdening the Court or the parties with unnecessary expenditures of time, effort, or money.

3. THE REQUESTED FEE IS FAIR AND REASONABLE GIVEN THE REAL RISK THAT COUNSEL COULD HAVE RECEIVED NO COMPENSATION FOR THEIR EFFORTS.

The Defendants are represented by highly experienced and competent counsel. Absent the settlements, the Defendants and their counsel were prepared to defend this case through trial and

[10]The Supreme Court has held that the use of current rates, as opposed to historical rates, is appropriate to compensate counsel for inflation and the delay in receipt of the funds. *Missouri v. Jenkins*, 491 U.S. 274, 282-84 (1989); *see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987). Nevertheless, Plaintiffs' counsel have submitted their lodestar information at their lower historical rates, rather than at their current (higher) rates.

appeal. Litigation risk is inherent in every case, and this is particularly true with respect to class actions. Therefore, while the Plaintiffs were optimistic about what would be the eventual outcome of this litigation, they must acknowledge the risk that the Defendants could prevail on certain legal or factual issues, which could result in the reduction or elimination of any potential recovery.

The risk factor attempts to compensate class counsel in contingent fee litigation for having taken on the risk of receiving less than their normal hourly rates, or even nothing at all. *See, e.g. Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981), *overruled on other grounds*, *Int'l Woodworkers of Am. AFL-CIO and its Local No. 5-376 v. Champion Intern. Corp*., 790 F.2d 1174 (5th Cir. 1986); *In re Packaged Ice Antitrust Litig.,* 2011 WL 6209188, at *19 (risk of non-payment a factor supporting the requested fee). As this Court has observed, success is not guaranteed even in those instances where a settling defendant has pleaded guilty in a criminal proceeding brought by the DOJ, which is not required to prove impact or damages. *See, e.g., In re Automotive Parts Antitrust Litig.,* 12-MD-02311, 2:12-cv-00103, Doc. 497, at 11 (E.D. Mich. June 20, 2016). In this case, there were no guilty pleas with respect to Automotive Exhaust Systems; the Department of Justice did not seek recovery for the class members, leaving that up to private attorneys, here Plaintiffs' counsel.

When Plaintiffs' counsel commenced this case there was a risk that they would recover nothing, or an amount insufficient to support a fee that equaled their lodestar. Therefore, the risk of non-payment is another factor that supports the requested fee. *In re Wire Harness Cases*, 2:12-cv-00101 (E.D. Mich.) (Doc. 495), at 4.

4. SOCIETY HAS AN IMPORTANT STAKE IN THIS LAWSUIT AND IN AN AWARD OF REASONABLE ATTORNEYS' FEES.

It is well established that there is a "need in making fee awards to encourage attorneys to bring class actions to vindicate public policy (*e.g.*, the antitrust laws) as well as the specific rights

of private individuals." *In re Folding Carton Antitrust Litig.*, 84 F.R.D. 245, 260 (N.D. Ill. 1979). Courts in the Sixth Circuit weigh "society's stake in rewarding attorneys who [win favorable outcomes in antitrust class actions] in order to maintain an incentive to others . . . Society's stake in rewarding attorneys who can produce such benefits in complex litigation such as in the case at bar counsels in favor of a generous fee . . . Society also benefits from the prosecution and settlement of private antitrust litigation." *In re Cardizem*, 218 F.R.D. 508, 534 (E.D. Mich. 2003) (internal quotation marks omitted). *Accord, Delphi,* 248 F.R.D. at 504.

In this regard, the substantial recovery Plaintiffs' counsel have obtained makes it clear that antitrust violations will be the subject of vigorous private civil litigation to deter similar future conduct. Since society gains from competitive markets that are free of collusion, Plaintiffs' counsel's work benefitted the public.

5. THE COMPLEXITY OF THIS CASE SUPPORTS THE REQUESTED FEE.

The Court is well aware that "[a]ntitrust class actions are inherently complex . . . ." *In re Cardizem*, 218 F.R.D. at 533. S*ee also In re Packaged Ice Antitrust Litig.,* 2011 WL 6209188, at *19; *In re Linerboard Antitrust Litig.,* 292 F.Supp.2d 631, 639 (E.D. Pa. 2003) ("An antitrust class action is arguably the most complex action to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome.") (citations and internal quotation marks omitted). This case is no exception.

6. SKILL AND EXPERIENCE OF COUNSEL

The skill and experience of counsel on both sides of the "v" is another factor that courts may consider in determining a reasonable fee award. *E.g., Polyurethane Foam,* 2015 WL 1639269, at * 7; *Packaged Ice,* 2011 WL 6219188, at *19. The Court appointed four firms with national

reputations as leaders in antitrust and other complex litigation: Kohn, Swift & Graf, P.C., Preti, Flaherty, Beliveau & Pachios, LLP, Freed Kanner London & Millen, LLC, and Spector Roseman & Kodroff, P.C., as Interim Lead Counsel for all the direct purchaser cases. By doing so the Court recognized that they have the requisite skill and experience in class action and antitrust litigation to effectively prosecute these claims. Fink Bressack has ably served as liaison counsel for this and all the direct purchaser cases.

When assessing this factor, courts may also look to the qualifications of the defense counsel opposing the class. Here, the quality of defense counsel is top-notch. Each firm has an excellent reputation in the antitrust bar, significant experience, and extensive resources at its disposal.

But in the final analysis, as more than one court has observed, "[t]he quality of work performed in a case that settles before trial is best measured by the benefit obtained." *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir 1990). As explained *supra*, a very substantial cash benefit was obtained for the settlement classes in this case, which provides the principal basis for awarding the attorneys' fees sought by Plaintiffs' counsel.

Given the excellent result achieved, the complexity of the claims and defenses, the work performed by Plaintiffs' counsel, the real risk of non-recovery (or recovery of less than the amount of the settlement funds), formidable defense counsel, the delay in receipt of payment, the substantial experience and skill of Plaintiffs' counsel, the modest multiplier on the lodestar, and the societal benefit of this litigation, a 30% attorneys' fee award from the settlement funds would be reasonable compensation for Plaintiffs' counsel's work.

VI. THE COURT SHOULD AUTHORIZE INTERIM LEAD COUNSEL TO DETERMINE FEE ALLOCATIONS.

Plaintiffs' counsel have worked collectively on this litigation under the supervision of Interim Lead Counsel appointed by the Court. This Court and courts generally have approved joint fee applications that request a single aggregate fee award, with allocations to specific firms to be determined by the lead counsel, who know the most about the work done by each firm and the relative contribution each firm has made to the success of the litigation.[11] Interim Lead Counsel—Kohn Swift, Preti Flaherty, Freed Kanner, and Spector Roseman—have directed this case from its inception and are best "able to describe the weight and merit of each [counsel's] contribution." *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *17-18 (citation omitted, alteration in original); *see also In re Copley Pharm., Inc. Albuterol Prods. Liab. Litig.*, 50 F.Supp.2d 1141, 1148 (D. Wy. 1999), *aff'd*, 232 F.3d 900 (10th Cir. 2000). From an efficiency standpoint, leaving the allocation in this case to Kohn Swift, Preti Flaherty, Freed Kanner, and Spector Roseman makes good sense because it relieves the Court of the "difficult task of assessing counsels' relative contributions." *In re Prudential Ins. Co. Amer. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 329 n. 96 (3d Cir. 1998); *see also In re Cendant Corp. Sec. Litig.*, 404 F.3d 173 (3d Cir. 2005) (lead counsel given substantial authority to allocate fees awarded by Court).

Plaintiffs' counsel therefore request that the Court (as it has in connection with every other fee award in the direct purchaser cases) approve the aggregate amount of the fees requested, with the specific allocation of the fee among firms to be performed by Interim Lead Counsel. *See Polyurethane Foam, supra.* To the extent that there are disputes that cannot be resolved by counsel,

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[11] *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533 n.15 (3d Cir. 2004) (noting "the accepted practice of allowing counsel to apportion fees amongst themselves"); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 357 (N.D. Ga. 1993) ("Ideally, allocation is a private matter to be handled among class counsel").

the Court would retain the jurisdiction necessary to decide them. *See In re Automotive Refinishing Paint Antitrust Litig.,* 2008 WL 63269, at *8 (E.D. Pa. Jan. 3, 2008) (co-lead counsel to allocate fees with the court retaining jurisdiction to address any disputes).

VII. REIMBURSEMENT OF LITIGATION COSTS AND EXPENSES INCURRED IN THE PROSECUTION OF THIS LITIGATION

Plaintiffs' counsel respectfully request an award of litigation costs and expenses in the amount of $57,048.07, which reflects expenses incurred in the prosecution of this litigation. Expenses for telephone calls, faxes, and internal copying are not included. As the court stated in *In re Cardizem*, "class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of this litigation, including expenses incurred in connection with document productions, travel and other litigation-related expenses." 218 F.R.D. at 535.

The out-of-pocket expenses paid or incurred by each law firm are set forth in the Declarations attached as Exhibit 1. These expenses were reasonable and necessary to pursue the case and to obtain the substantial settlements reached in this litigation.

VIII. AN AWARD OF SERVICE AWARDS TO THE CLASS REPRESENTATIVES IS APPROPRIATE.

Plaintiffs' counsel request that the Court award a $25,000 service payment to each class representative. The Sixth Circuit has noted that such awards may be appropriate under some circumstances. *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 311 (6th Cir. 2016); *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003). In surveying decisions from other courts, the Court explained that:

> Numerous courts have authorized incentive awards. These courts have stressed that incentive awards are efficacious ways of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class. Yet applications for incentive awards are scrutinized carefully by courts who

> sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain.

Hadix v. Johnson, 322 F.3d at 897 (internal citations omitted).

Awards to the class representatives are appropriate here. They stepped forward to represent the classes. The case had a successful resolution that will benefit all the class members. This is not a case where the class representatives compromised the interests of the class for personal gain. The class representatives were not promised service awards. Each settlement was negotiated by Plaintiffs' Counsel and then presented to the class representatives for their review and approval without any discussion of service awards. The prospect of such awards was not a reason why the representative plaintiffs approved these settlements. *Hillson v. Kelly Servs. Inc.*, 2017 WL 279814, at *6 (E.D. Mich. 2017). Moreover, this is not a case where the requested service awards will dwarf the amounts that class members will receive through the claims process. Some class members may receive hundreds of thousands of dollars.[12]

The class representatives devoted a significant amount of time and effort to representing the interests of the class members, including but not limited to the following:

- Assisting counsel in developing an overall understanding of the Automotive Exhaust Systems market;
- Discussing with counsel preservation of electronic and hard-copy documents and taking steps to implement preservation plans;
- Discussing with counsel collecting documents for review and potential production to Defendants;

[12] In cases where courts have rejected incentive awards, the awards were so disproportionately large relative to the cash benefits to the class that the courts called the class representative's adequacy into question. For example, in *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013), the Court reversed the award of $1,000 payments to the class representatives when class members received "nearly worthless injunctive relief." In *Machesney, v. Lar-Bev of Howell, Inc.*, 2017 WL 2437207, at *11 (E.D. Mich. Jun. 2017), the court did not approve a proposed $15,000 incentive payment because it was "30 times more than the maximum that any class member could receive under the proposed settlement."

- Assisting counsel in preparing responses to Defendants' request for discovery;
- Reviewing pleadings and keeping apprised of the status of the litigation; and
- Reviewing the settlements and conferring with counsel to determine whether the settlements were in the best interests of the class.

Finally, service awards of this size or larger are not uncommon in lengthy, highly complex antitrust cases. Indeed, the court previously approved $50,000 incentive awards to the Class Representatives in *Wire Harness*. 2:12-cv-00101-MOB-MKM Doc # 495, at 6, ¶23. *See also In re Prandin Direct Purchaser Antitrust Litig*., 2015 WL 1396473, at *5 (granting each class representative an award of $50,000); *In re Skelaxin (Metaxalone) Antitrust Litig*., 2014 WL 2946459, at *1 (same). The class representatives here put in great effort and provided commendable service on behalf of the members of the settlement classes to help create $13,798,000 in settlement funds. The requested awards of $25,000 are fair to the class representatives and the settlement classes and are appropriate under the facts and the law.

IX. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for an award of attorneys' fees, litigation costs and expenses, and service awards to the class representatives.

Dated: September 14, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2020, I electronically filed the foregoing document with the Clerk of the court using the ECF system, which will send notification of such filing to all counsel of record registered for electronic filing.

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