IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY D. KOLTON, *et al*.,	)	
	)	
Plaintiffs,	)	No. 16-cv-3792
	)	
v.	)	The Honorable Charles Kocoras
	)	
MICHAEL W. FRERICHS, Illinois State Treasurer,	)	
	)	
	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO
PLAINTIFFS' SUPPLEMENTAL DECLARATION AND
EXPERT REPORT IN SUPPORT OF PLAINTIFFS' MOTION
FOR AWARD OF ATTORNEYS' FEES

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The Defendant, Michael Frerichs, in his official capacity as Illinois State Treasurer (the "Treasurer"), by his counsel, Kwame Raoul, Illinois Attorney General, submits the following response to Class Counsel's Supplemental Joint Declaration and the Supplemental Expert Report of Professor Charles Silver (Appendix A and B to Dkt. 138).

INTRODUCTION

In further support of their request that the Court award them attorneys' fees in the amount of $9,500,000, Class Counsel have submitted declarations stating that their billing rates are $600 - $900 per hour, with a blended rate of $770 per hour, and have asserted that they have spent 1706 hours on this case. They also submit a supplemental expert report from Professor Charles Silver, opining that the resulting multiplier of 7.23 is acceptable. But a closer look shows that each aspect of Class Counsel's lodestar calculation is inappropriate. First, Class Counsel's rates of $600-$900 hour are quite excessive when civil rights litigators in Chicago, who have been described as "top tier," command rates in the range of $450 - $550 per hour. Second, an analysis of Class Counsel's detailed billing records shows that Class Counsel spent too much time on briefing in the district court and on researching, drafting, and defending their fee petition, and their hours should be reduced accordingly.

Finally, Class Counsel's own expert admits that Class Counsel's requested multiplier of 7.23 "falls at the high end of the range." Supplemental Expert Report of Professor Charles Silver (Dkt. 138-5) ¶ 17. But the true multiplier that Class Counsel is requesting is much higher if the Court were to apply a reasonable hourly rate and a reasonable number of hours—more in the range of 8.54 to 13.16. Moreover, the cases that Professor Silver cites as applying similar multipliers are all distinguishable from this one, as many are in highly specialized areas such as shareholder derivative suits, bankruptcy, or antitrust; many of these cases involved sophisticated business entities as plaintiffs, and the court and/or the plaintiffs approved the proposed attorneys'

fee in advance; and many of the requested awards represented fairly low percentages of exceptionally high settlements or judgments in favor of the plaintiff classes. Since none of these factors are involved here, Class Counsel's cases provide little support for a multiplier that they admit "falls at the high end of the range." In contrast, the Seventh Circuit has suggested "that a multiplier of 2 may be a sensible ceiling." *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998). Class Counsel have provided no real justification for applying a lodestar multiplier of 7.23 to 13.16, and a multiplier of 1.5 to 2 would be more in line with cases in this circuit.

Thus, every aspect of Class Counsel's lodestar calculation—the requested hourly rate, the hours requested, and the multiplier sought—show that the requested award of $9.5 million is grossly excessive. If the Court were to accept Class Counsel's hours of 1706.15, the requested award of $9,500,000 is equivalent to a rate of $5,568.09 per hour. Such an award is well beyond the bounds of anything that Class Counsel could reasonably expect to recover *ex ante*, and is therefore excessive and unfair. The Treasurer respectfully requests that the Court deny Class Counsel's request for $9.5 million in attorneys' fees, and instead award Class Counsel a reasonable attorneys' fee award based on their lodestar.

ARGUMENT

I. Class Counsel's claimed hourly rates are too high.

Class Counsel has requested rates of $600 - $900 per hour, resulting in a blended hourly rate of $770 per hour. Dkt. 138-5 ¶ 5. Terry Saunders claims that $800 per hour is her "usual and customary rate" for complex litigation, and alleges that this rate was approved and accepted in *In re Automotive Parts Antitrust Litigation*, No. 12-md-02311 (E.D. Mich.), a multi-district antitrust case in Michigan. Supplemental Declaration of Terry Rose Saunders (Dkt. 138-2) ¶ 5. Arthur Susman states that his requested hourly rate of $800 per hour is "[b]ased on the market as [he] understand[s] it," and based on his experience in drafting and defending fee petitions over the

years. Supplemental Declaration of Arthur T. Susman (Dkt. 138-3) ¶¶ 5, 7. Mr. Susman does not provide any information indicating that he has requested or received this rate from any court, nor does he provide any information that any clients have paid him this hourly rate. Thomas Doyle claims that his billing rate at Wexler Wallace for 2016 to 2017 was $600, his rate for 2018 was $700, and his rate for 2019 was $900. Declaration of Thomas A. Doyle (Dkt. 138-4) ¶ 5 and Exhibit A. However, these rates are not reasonable because they far exceed the market rate for civil rights litigation in Chicago.

The starting point for calculating an appropriate fee award is to determine a "reasonable" hourly rate for each biller. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In determining reasonable rates, courts look to the "market rates" for the services rendered. *People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir. 1996).[1] But as Judge Posner pointed out, there is an "important qualification" to this approach: "the reasonable fee is capped at the prevailing market rate *for lawyers engaged in the type of litigation for which the fee is being sought*." *Cooper v. Casey*, 97 F.3d 914, 920 (7th Cir. 1996) (emphasis in original). In *Cooper*, a Section 1983 prisoner rights case, the Seventh Circuit reversed a fee award to Kirkland & Ellis LLP because the lower court ignored evidence that "a competent civil rights lawyer could have been hired to represent the plaintiffs at a lower rate." *Id.* at 920-21; *see also Gastineau v. Wright*, 592 F.3d 747, 749 (7th Cir. 2010) (affirming reduction in hourly rates). As Judge Posner explained:

> Suppose the best lawyer in the United States charges $ 1,000 an hour and is worth every cent of it. Only his practice has nothing to do with civil rights; he is, let us say, an antitrust trial lawyer. He is requested to represent an indigent civil rights

[1] Class Counsel have the burden of establishing their market rate. *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 554-55 (7th Cir. 1998). If they provide evidence of their market rate, then the burden shifts to defendants to demonstrate why a lower rate should be awarded. *Id.* An attorney's self-serving affidavit cannot alone establish the market rate for that attorney's services. *Harper v. City of Chicago Heights*, 223 F.3d 593, 605 (7th Cir. 2000).

> plaintiff, and he does so, giving the case his best shot and, despite his inexperience in civil rights litigation, doing a superb job. Would he be entitled to an award of fees at the rate of $ 1,000 an hour? Not if the judge could have procured competent counsel for the plaintiff at a much lower rate. It is no more reasonable to pay a lawyer $ 1,000 an hour for services that can be obtained at $ 200 an hour than it is to pay $ 1,000 for an automobile hood ornament that you could buy elsewhere for $ 200. Judges have to be careful when they are spending other people's money.

Cooper, 97 F.3d at 920.

Thus, the key factors for determining a reasonable rate is the "local market rate" (*i.e.*, the rates in Chicago) for similar work (*i.e.*, civil rights litigation). *Montanez v. Simon*, 755 F.3d 547, 553 (7th Cir. 2014). Here, Class Counsel is undoubtedly experienced, but they have not focused their careers on *civil rights* cases like this one. In 2016, the *Cerajeski* court made this point in considering Ms. Saunders and Mr. Susman's attorneys' fee request in that case:

> While Ms. Saunders and Mr. Susman are undoubtedly experienced litigators, their litigation experience involves securities law, class actions, antitrust law, ERISA law, and complex business litigation. . . . What is missing for purposes of establishing that their typical hourly rates should be used for Ms. Cerajeski's case, however, is any relevant appellate, constitutional, and civil rights litigation experience.

Cerajeski v. Zoeller, No. 1:11-cv-01705, 2016 U.S. Dist. LEXIS 24633, at *15 (S.D. Ind. Feb. 29, 2016). "Because Ms. Saunders' and Mr. Susman's primary practice areas are not similar to Ms. Cerajeski's appellate constitutional challenge to Indiana's treatment of unclaimed property, their general hourly rates [were] not 'the best evidence' of a reasonable hourly rate" in that case. *Id*. at *16. Accordingly, the court rejected Class Counsel's requested rates of $700 and $750 per hour and instead awarded plaintiff's counsel $350 per hour based on rates of civil rights litigators in Indianapolis (the relevant market in that case). *Id*. at *13-14, 21-22.

A. The market rate for civil rights litigation in Chicago is substantially lower than Class Counsel's claimed rates.

Here, Class Counsel have not provided any evidence of the market rate for civil rights litigation in Chicago. However, a survey of recent attorneys' fee awards to civil rights litigators in Chicago shows that the top end of the civil rights litigation market is $450 to $550 per hour.

In *Fields v. City of Chicago*, a Section 1983 case arising out of a wrongful conviction, the court held that $550 per hour was a reasonable rate for attorney Jon Loevy, who had more than 25 years' experience and leads a prominent Chicago-area law firm concentrating in plaintiff's Section 1983 litigation. No. 10 C 1168, 2018 U.S. Dist. LEXIS 2, at *10-11 (N.D. Ill. Jan. 1, 2018); *see also Adamik v. Motyka*, No. 12 C 3810, 2018 U.S. Dist. LEXIS 124178, at *5 (N.D. Ill. July 25, 2018) (describing Loevy as "well known in this district for having obtained a number of multi-million dollar jury verdicts in § 1983 cases" and observing that his hourly rate was between $495 and $505). Despite Loevy's reputation and expertise, the *Fields* court found that Loevy did not "provide[ ] persuasive evidence supporting the much higher $750 rate that he requests." *Fields*, 2018 U.S. Dist. LEXIS 2, at *10.

In *Awalt v. Marketti*, the court rejected an hourly rate of $600 for Arthur Loevy, which was $50 an hour greater than the rate requested for Jon Loevy and Michael Kanovitz, whom the court "considered to be in the 'top tier of civil rights trial attorneys in the Chicago area.'" No. 11 C 6142, 2018 U.S. Dist. LEXIS 86109, at *7-8 (N.D. Ill. May 23, 2018), *quoting Jimenez v. City of Chicago*, No. 09 C 8081, 2012 U.S. Dist. LEXIS 162322, at *6 (N.D. Ill. Nov. 14, 2012). The court rejected Arthur Loevy's additional years of experience as a basis for the additional $50 per hour, finding that "at this level of expertise, an attorney's number of years of experience is largely irrelevant." The Court accordingly limited Arthur Loevy's rate to the "top tier" rate to $550 per hour. *Awalt*, 2018 U.S. Dist. LEXIS 86109, at *7-8.

In other recent cases, the courts in this district have awarded experienced, well-known civil rights litigators rates ranging from $450 to $495 per hour:

- In *Adamik,* the court held that $495 was a reasonable hourly rate for attorney Ed Genson, a "nationally renowned criminal defense attorney" who acted as one of plaintiff's attorneys, rather than the $550 per hour he had requested. 2018 U.S. Dist. LEXIS 124178, at *7. The court found it appropriate to award Genson a rate on the lower end of Jon Loevy's rate because he had "not attained the same level of recognition for civil rights work as Loevy." *Id*. at 9.

- In *Teague v. Miehle*, the court awarded Irene Dymkar, a civil rights litigator with 40 years of experience, $475 per hour rather than the $495 per hour that she had requested. No. 14 C 6950, 2019 U.S. Dist. LEXIS 44597, at *9 (N.D. Ill. Mar. 19, 2019).

- In *Johansen v. Wexford Health Sources*, which involved a jail detainee's claim for inadequate medical care under § 1983 and the Fourteenth Amendment, the Court awarded Mark Smolens, a litigator with more than thirty years of Section 1983 experience, a rate of $475 per hour rather than $600 per hour. No. 15-cv-2376, 2021 U.S. Dist. LEXIS 53955, *11-12 (N.D. Ill. Mar. 23, 2021).

- In *Haywood v. Wexford Health Sources, Inc.*, the court awarded Alan Mills, a litigator with 40 years of experience in civil rights litigation, a rate of $450 per hour, rather than the $924 per hour rate he had requested. No. 16 CV 3566, 2021 U.S. Dist. LEXIS 104363, at *32, *39 (N.D. Ill. June 3, 2021).

Based on these rates, the Treasurer submits that a reasonable hourly rate for Class Counsel, who are experienced attorneys but not as experienced in civil rights litigation, would be, at most, $450 and $500 per hour.

B. Class Counsel improperly rely on rates in specialized areas of the law other than civil rights, rates in other markets, and rates charged by senior partners in large law firms.

In support of their requested hourly rates, Class Counsel rely on the declaration of their expert, Professor Charles Silver. But each of Professor Silver's data points are distinguishable. First, Professor Silver points to a survey conducted by the National Association for Legal Fee Analysis (NALFA) of lawyers in the country's 16 largest markets who represent plaintiffs or defendants in class action, and asserts that the average hourly rates for senior partners are

comparable to the rates requested here. Dkt. 138-5 ¶ 7. But as discussed above, a national survey of attorneys who prosecute all kinds of class actions (including antitrust and mass torts) is of little help in determining an appropriate rate for a civil rights case in Chicago.

Professor Silver then points to the rates requested by senior partners in bankruptcy cases as supporting Class Counsel's rates. Dkt. 138-5 ¶¶ 8-13. But again, bankruptcy is a highly specialized area of the law, and the rates paid to top bankruptcy lawyers across the country has little relevance to the proper rate for civil rights litigation in Chicago.

Next, Professor Silver opines that, in performing lodestar cross-checks on settlements, "judges have often approved rates of $800 or more for senior attorneys." Dkt. 138-5 ¶ 14. In particular, Silver points to *Pantelyat v. Bank of Am., N.A.*, No. 16-cv-8964, 2019 WL 402854, at *10 (S.D.N.Y. Jan. 31, 2019), as supporting such rates. But *Pantelyat* was litigated in New York rather than Chicago, with correspondingly higher legal rates, and again is not a civil rights case.

Finally, Professor Silver also points to the rates charged by "senior partners at large law firms" as further justifying Class Counsel's rates in this case. Dkt. 138-5 ¶¶ 15-16. However, there are three problems with this argument. First, Class Counsel are not senior partners at large law firms; rather, all three attorneys are either solo practitioners or practiced in small law firms. Dkt. 138-2 ¶ 3; Dkt. 138-3 ¶ 3; Dkt. 138-4 ¶ 1.[2] Thus, the billing rates for senior partners at large law firms are irrelevant. Moreover, even for attorneys that practice at large law firms, the proper comparator is not what an attorney at a large firm can bill a business client, but rather the market rate for civil rights litigation—which, as discussed above, is considerably below the rates claimed by Class Counsel.

[2] In March 2016, Wexler Wallace employed 15 attorneys. *See* https://web.archive.org/web/20160307171407/http://www.wexlerwallace.com/our-firm/our-professionals/ (last visited Nov. 17, 2021).

Finally, while senior partners at large law firms bill at higher rates, those rates are based on the understanding that the senior partner will generally perform only the highest level of strategic work and supervise associates in performing lower-level research. *Vigilant Ins. Co. v. Eemax, Inc*., 362 F. Supp. 2d 225, 227 (D.D.C. 2005) ("It is reasonable to expect that, where the legal issues and factual analysis are fairly straightforward, lower-level associates must have the laboring oar, and senior-level associates or partners must function in a supervisory capacity."); *Northon v. Rule*, 494 F. Supp. 2d 1183, 1187 (D. Or. 2007) ("Additionally, the imbalance between the time spent by the senior attorney in relation to the junior attorneys unreasonably inflated defendants' fee request. It is expected that litigation is often performed in teams and that the team leader delegates responsibility according to the talent of each team member and oversees the entire project."); *Gold v. NCO Fin. Sys.*, No. 09cv1646, 2010 U.S. Dist. LEXIS 86433, at *3-4 (S.D. Cal. Aug. 20, 2010) ("Fees are properly reduced when the task is overstaffed, . . . Overstaffing can include . . . failure to appropriately delegate tasks to staff or colleagues with lower billing rates.").

Here, Class Counsel have billed hundreds of hours for research and other tasks that could have been performed by more junior attorneys at correspondingly lower rates. For example, Mr. Susman billed 1.75 hours for research on ascertainability in April and May of 2016; Mr. Doyle billed hours in March and May of 2016 for research on how to serve a state official in his official capacity (the total amount is unclear because both entries are block-billed); Mr. Doyle billed 2.4 hours in March 2018 for research on the law of the case doctrine; and Ms. Saunders, Mr. Susman, and Mr. Doyle together billed more than five hours for research on class certification issues in May 21 and 22, 2019, in connection with their renewed motion for class certification. Such tasks do not justify a premium billing rate. *See Gusman v. Unisys Corp.*, 986 F.2d 1146,

1151 (7th Cir. 1993) (courts may reduce fees for lawyers who did not "achieve the time savings implied by their higher rates.")

II. Class Counsel's claimed hours are excessive.

While Class Counsel's claimed hourly rate is too high, their claim hours are excessive given the tasks actually performed. In support of their lodestar calculation, Class Counsel have provided the Court only with the total hours incurred by each attorney in the case. *See, e.g.*, Dkt. 138-2. Class Counsel have not provided the Court with any breakdown of these hours by task or by category. Class Counsel have provided a breakdown by time period only for Thomas Doyle, and only because Mr. Doyle has increased his billing rate from $600 per hour in 2016-17 to $700 per hour in 2018 and $900 per hour in 2019. *Id.*

Class Counsel did provide their daily billing records to Treasurer's Counsel. Based on a review of those records, Class Counsel's hours may be categorized as follows:

Date Range	Category	Claimed Hours
2/2016 – 5/2016	Complaint	45.55
5/2016 – 6/2016	Discovery	13.90
6/2016 – 9/2016	Responding to Motion to Dismiss	132.15
9/2016 – 4/2017	First Appeal	208.90
9/2017 – 11/2017	Amended Complaint	47.15
5/2016 – 6/2018	Class certification	123.10
3/2018 – 1/2019	Second Appeal	207.90
1/2019 – 6/2019	Renewed class certification	84.95
3/2019 – 10/2021	Settlement	657.05
10/2020 – 10/2021	Fees	186.75
	Total Hours	1707.40

A. The Court should reduce Class Counsel's hours for time spent briefing motions in the district court.

When Class Counsel's hours are analyzed in this way, it becomes obvious that Class Counsel's hours for some tasks are clearly excessive. For example, consider Class Counsel's response to the Defendant's motion to dismiss. Class Counsel spent over 132 hours to draft a 13-page response to Defendant's 13-page motion to dismiss, review the Defendant's 7-page reply, and review the Court's 17-page opinion. *See* Dkt. 16, 21, 22, 23. This hardly represents the level of efficiency that justifies hourly rates of $800 per hour. Or Plaintiff's two motions for class certification. Class Counsel spent 123 hours researching and briefing their original class certification motion. This includes drafting a seven-page motion that relied on no facts outside the Amended Complaint and Defendant's Answer, reviewing the Defendant's ten-page response, and drafting a six-page reply. Dkt. 47, 52, 53. And when the case was remanded after the second appeal, Plaintiffs spent another 85 hours on their renewed motion for class certification—again, hardly a model of efficiency.

Plaintiffs' counsel should have been more efficient, especially considering the high hourly rates that they have requested based on their alleged expertise and experience. *See Gusman*, 986 F.2d at 1151. "[T]here is a point at which thorough and diligent litigation efforts become overkill." *Andrews v. Chevy Chase Bank FSB*, No. 05-C-0454, 2010 WL 959996, at *2 (E.D. Wisc. Mar. 12, 2010). In a Truth in Lending Act case that presented "novel and difficult issues" and was "far more complicated" than usual, the court found that spending 255 hours on a summary judgment motion presenting "complex issues" was excessive and cut that time in half. *Id.* at *4; *see also Zeidler v. A&W Rest.*, No. 99 C 2591, 2001 U.S. Dist. LEXIS 22716, at *12 (N.D. Ill. May 21, 2001) (finding 225 hours on motion for summary judgment "mind-boggling" and "staggering").

Accordingly, the Treasurer submits that a 50% reduction is appropriate for the 340.2 hours Class Counsel spent on briefing in the district court. *See, e.g.*, *Hispanics United of DuPage County v. Vill. of Addison*, 157 F. Supp. 2d 962, 970 (N.D. Ill. 2001) ("Rather than using a line-by-line deduction to eliminate duplicative conferences or research, this Court decided to use the flat percentage discounts disclosed herein. This method has been approved by the Seventh Circuit.").

B. The Court should reduce the hours allowed for "fees on fees."

Finally, Class Counsel has spent a staggering 186.75 hours researching, drafting, and defending their petition for attorneys' fee petition, in addition to hiring an expert on attorneys' fees to assist them. This represents more than 12 percent of the hours spent on merits of the litigation.[3] Where "the fee claims are exorbitant or the time devoted to presenting them is unnecessarily high," the Court may "refuse further compensation." *Muscare v. Quinn*, 680 F.2d 42, 45 (7th Cir. 1982). The request here is so excessive that it should be drastically reduced in accordance with binding Seventh Circuit case law requiring proportionality between awards of attorneys' fees on the merits and "fees on fees."

There is ample case law in the Seventh Circuit to guide this Court's exercise of discretion in assessing Class Counsel's request for "fees on fees," and all of it confirms that Class Counsel's request here is excessive. The leading case is *Ustrak v. Fairman*, 851 F.2d 983 (7th Cir. 1988), in which the district court awarded the plaintiff's counsel 108.5 hours for the preparation of two fee petitions, an allowance that "leap[ed] out" at the Seventh Circuit and could not be upheld, "even under the most deferential standard of review." *Id*. at 986, 988. Counsel had spent about 453 hours on the merits of the case, so the request for fees on fees

[3] Class Counsel spent 186.75 hours on fee-related issues, and 1520.65 hours on the merits of the litigation (1707.4 hours sought less 186.75 hours spent on fees). 186.75 divided by 1520.65 is 12.3%.

amounted to 15 minutes spent on fees for every hour on the merits (a ratio of 25%), which the Seventh Circuit considered to be "the tail wagging the dog, with a vengeance." *Id*. at 987-88. Noting that "lawyers litigate fee issues with greater energy and enthusiasm than they litigate any other type of issue," the Seventh Circuit disallowed two-thirds of the requested time for fees on fees, *id*., resulting in an award of fees on fees of about eight percent of the fees on the merits.

The Seventh Circuit revisited "fees on fees" in *Spegon*. There, counsel spent approximately the same amount of time pursuing fees as he did on the merits of the case, about 25 hours. 175 F.3d at 554. The district court allowed only 1.6 hours on fees, and the Seventh Circuit affirmed, holding that the district court did not abuse its discretion. *Id*., *citing Kurowski v. Krajewski*, 848 F.2d 767, 776 (7th Cir. 1988). The Seventh Circuit found that spending a similar amount of time on fees and the merits (a ratio of 100%) was "patently unreasonable." *Id*. at 554. The final award for fees on fees was about six percent of the fees on the merits.

The next year, in *Uphoff v. Elegant Bath, Ltd*., 176 F.3d 399, 411 (7th Cir. 1999), the Seventh Circuit again upheld a district court's decision to significantly cut a request for "fees on fees." The plaintiffs' counsel had spent "just under 100 hours litigating the merits of the case," and sought compensation for 9.9 hours of attorneys' time in connection with the preparation of fee motions (a ratio of 10%). *Id*. at 411. The district court reduced the hours for fees to 1.6, which is less than two percent of the hours for the merits, and the Seventh Circuit affirmed. *Id*.

Here, Class Counsel's inclusion of 186.50 hours related to fees, when multiplied by Class Counsel's requested rate of $800 per hour, results in a requested award of over $149,000 of "fees on fees." Clearly, such a request is way out of line. Accordingly, the Court should reduce the amount of hours allowed for Class Counsel's fee petition by at least 50%. *See, e.g., Alcazar-Anselmo*, No. 07 C 5246, 2011 WL 3236024, at *6 (N.D. Ill. Jul. 27, 2011) ("If a prevailing

party could recover fees for all the work on a fees petition, he could be motivated to pile on the hours for a petition. The Court has discretion, and uses it, to deny this request for proving fees."); *Eli Lilly & Co., LLC v. Zenith Goldline Pharmaceuticals, Inc.*, 264 F. Supp. 2d 753, 784 (S.D. Ind. 2003) (denying "entirely any fees incurred in preparing the extravagant fee and cost petition").

If the Court were to reduce the hours allowed for briefing in the district court, as well as hours spent on Class Counsel's fee petition, by 50%, this results in a revised total of 1444 hours:

Date Range	Category	Claimed Hours	Revised Hours
2/2016 – 5/2016	Complaint	45.55	45.55
5/2016 – 6/2016	Discovery	13.90	13.90
6/2016 – 9/2016	Responding to Motion to Dismiss	132.15	66.08
9/2016 – 4/2017	First Appeal	208.90	208.90
9/2017 – 11/2017	Amended Complaint	47.15	47.15
5/2016 – 6/2018	Class certification	123.10	61.55
3/2018 – 1/2019	Second Appeal	207.90	207.90
1/2019 – 6/2019	Renewed class certification	84.95	42.48
3/2019 – 10/2021	Settlement	657.05	657.05
10/2020 – 10/2021	Fees	186.75	93.38
	Total Hours	1707.40	1443.93

For this reason, the Treasurer submits that 1444 hours is a more appropriate number of hours for Class Counsel's lodestar calculation.

III. Class Counsel's requested multiplier is excessive.

Class Counsel argues that their requested fee award of $9.5 million represents their lodestar multiplied by a multiplier of 7.23. Dkt. 138-5 ¶ 5. But as discussed above, both Class Counsel's requested rates and their requested hours are excessive. If the Court were to adjust

either the requested rates, the requested hours, or both, then the requested fee award of $9.5 million represents Class Counsel's lodestar multiplied by a multiplier of 8.54 to 13.16:

Proposal	Hours	Rates	Lodestar	Multiplier
Class Counsel's proposal	1706.15	$600-900 (average $770)	$1,314,530	7.23
Reasonable hours, same rate	1444.00	$770	$1,111,880	8.54
Same hours, reasonable rate	1706.15	$500	$853,075	11.13
Reasonable hours and rates	1444.00	$500	$722,000	13.16

A. Class Counsel's cases applying high multipliers are distinguishable.

In support of a 7.23 multiplier, Class Counsel rely on the supplemental report of their expert, Charles Silver. But even Plaintiffs' expert admits that the requested multiplier of 7.23 "falls at the high end of the range." Dkt. 138-5 ¶ 17. Professor Silver argues that courts "have awarded similar or larger multipliers in other cases" (*id.*), citing to seven cases, but each of those cases are distinguishable from this one. Many of these cases are based on highly specialized areas such as shareholder derivative suits, bankruptcy, or antitrust. Moreover, many of these cases involved sophisticated business entities as plaintiffs, and the court and/or the plaintiffs approved the proposed attorneys' fee in advance. Finally, many of the requested awards represented fairly low percentages of exceptionally high settlements or judgments in favor of the plaintiff classes. Since none of these factors are involved here, Class Counsel's cases provide little support for a multiplier that they admit "falls at the high end of the range."

Silver claims that *Am.'s Mining Corp. v. Theriault*, 51 A.3d 1213, 1252 (Del. 2012), applied a multiplier of 66 (Dkt. 138-5 ¶ 17); however, this is not an accurate statement of the attorneys' fees award in the case. First, this was a shareholder derivative suit, and the plaintiffs' counsel in that case won more than $2 billion in damages for their clients. *Am.'s Mining Corp.*, 51 A.3d at 1218. The Delaware Supreme court "explicitly disapproved" the award of fees based

on a lodestar approach. *Id.* at 1254. Applying the factors required by Delaware law, the court found that the $2 billion award was an extraordinary result for an exceptionally difficult and complex case. *Id*. at 1255-56. The court further noted that the plaintiffs' counsel had a contingent fee agreement with their clients, that they had "invested a significant number of hours" (8,597 hours), and had "incurred more than one million dollars in expenses." *Id*. at 1256-57. Nevertheless, the court reduced the award sought by plaintiffs' counsel from 22.5% to 15% of the recovery, based in part on the size of the overall judgment. *Id*. at 1258. On review, the Delaware Supreme Court concluded that the 15% award was not an abuse of discretion considering all these factors. *Id*. at 1262-63.

Silver next points to *In re Merry-Go-Round Enters., Inc*., 244 B.R. 327, 335, 345 (D. Md. 2000) as applying a multiplier of 19.6. Dkt. 138-5 ¶ 17. But in that bankruptcy case, the court pre-approved the trustee's 40% contingency fee agreement as reasonable under 11 U.S.C. § 328(a), and declined to reduce the trustee's fee after the fact, finding that the trustee "diligently fulfilled her fiduciary duty in soliciting and negotiating the agreement" and that there were no "developments not capable of being anticipated when the agreement was approved that make the agreement improvident." *In re Merry-Go-Round Enters., Inc*., 244 B.R. at 345. Where a bankruptcy court approves a contingent fee in advance, there is generally no need to apply a lodestar analysis. *Id*. at 342. Moreover, the court specifically found that the common fund doctrine, and the need for the court to determine "whether the lawyer's self-determined contingency fee is fair as part of its obligation to approve a settlement" did not apply to bankruptcy cases like this one, where the beneficiaries approved the contingent fee in advance. *Id*. at 343-44. Thus, this case is not relevant to the Court's determination of what constitutes a fair fee in this case.

While *Health Republic Ins. Co. v. United States* did involve multiplier of 18-19, there are two important differences between that case and this one. First, the plaintiffs' counsel in that case sought an attorneys' fee award of "only five percent" of the class's recovery, a factor that the court found to "weigh[] heavily in favor of reasonableness when compared to other fee awards in typical common fund cases," especially when compared with the higher rates that certain plaintiffs had agreed to pay their own attorneys prior to class certification. No. 16-cv-259C, 2021 U.S. Claims LEXIS 1956, at *26-27 (Fed. Cl. Sep. 16, 2021). Second, although this case was a class action, a class action in the Court of Federal Claims requires that each class member affirmatively opt in to the class action. *Id*. at *5. Thus, each class member affirmatively chose to join the class knowing that their own recoveries would be reduced by five percent to pay the attorneys for the class. *Id*. at *28-29. Moreover, the class members in this case were insurance companies, "sophisticated entities with access to in-house legal counsel" who were "no strangers to the task of determining what costs are acceptable to bear relative to the risks involved in a particular venture." *Id*. at *29. The objectors' "affirmative choice to join these cases and pay, at most, the five percent fee identified in the class notices point[ed] strongly in favor of approving Class Counsel's fee." *Id*.

In *Stop & Shop Supermarket Co. v. Smithkline Beecham Corp.*, plaintiffs' counsel sought 30% of a $100 million settlement based on 4,239.8 hours expended. No. 03-4578, 2005 U.S. Dist. LEXIS 9705, at *40-41 (E.D. Pa. May 19, 2005). The court found that this fee award "would result in a lodestar multiplier of 23.59," a result that "would be *unprecedented*." *Id*. at 53-54. The court found that a 30 percent award was "not fair and reasonable," and reduced the award to 20 percent. *Id*. at 58, 60. The court recognized that 20 percent still resulted in a high multiplier of 15.6, but found that this factor was "neutralized with respect to the reasonableness

of a percentage fee award of 20% by the extraordinary support Plaintiffs have shown for counsel's request for fees." *Id*. at * 60. Like the plaintiffs in *Health Republic Ins. Co*., the settlement class was "made up of approximately 90 sophisticated businesses," and none of those plaintiffs had objected to the award of fees in this case. *Id*.

The attorney's fee award of *In re Buspirone*, No. 01-md-1410 (S.D.N.Y. Apr. 11, 2003), apparently resulted in a lodestar multiplier of 8.46. Dkt. 138-5 ¶ 7, *Stop & Shop Supermarket Co.*, 2005 U.S. Dist. LEXIS 9705, at *56. But this case is again distinguishable as a multi-district litigation that combined four patent disputes, 22 antitrust action, and "twelve tag-along cases." *In re Buspirone Patent & Antitrust Litig*., 185 F. Supp. 2d 363, 365 (S.D.N.Y. 2002). Moreover, the plaintiffs in this case were sophisticated entities: "generic drug makers who seek or have sought to enter the buspirone market, direct purchasers of buspirone products, end-payors who have purchased buspirone, consumer protection organizations, or their representatives, and thirty States." *Id*. at 365-66. Thus, although the court does not discuss the basis for the award, the plaintiffs' agreement to the requested fee presumably contributed to the court determining that the requested fee was fair and reasonable. *La. Wholesale Drug Co. v. Bristol-Meyers Squibb Co. (In re Buspirone Antitrust Litig.)*, No. 01-CV-7951, 2003 U.S. Dist. LEXIS 26538, at *11 (S.D.N.Y. Apr. 11, 2003).

While *In re Credit Default Swaps Antitrust Litig*., No. 13-MD-2476, ECF No. 554 (S.D.N.Y. April 18, 2016), resulted in a multiplier of 6.36, class counsel's fee was 13.61% of a $1.86 billion settlement fund. *Id*. ¶¶ 7, 8(a). And again, the "determinations of the sophisticated investors that were substantially involved in the prosecution" of the case supported the class counsel's fee. *Id*. ¶ 8(c). Moreover, the fee sought conformed to the sliding fee scheduled negotiated by the lead plaintiff (a sophisticated investor) at the outset of the action. *Id*. ¶ 8(d).

Similarly, *Spartanburg Regional Health Servs. District, Inc. v. Hillenbrand Indus., Inc*., No. 03-CV-2141, ECF No. 377 (D.S.C. Aug. 15, 2006), involved a class "composed of sophisticated business entities," including over 6,000 hospitals and 16,200 nursing homes. *Id*. at 5. The court found that the overall absence of objections from these sophisticated class members "further indicates the reasonableness of the award and the class members' appreciation" of class counsel's efforts. *Id*. Moreover, the court found that class counsel had spent 39,347 hours on the case, and had incurred nearly $4.5 million in expenses, a factor that supported an award of 25% of the settlement (reduced from the 33% class counsel had originally requested). *Id*. at 8, 11. Based on an hourly rate of $500 per hour, the court found that the lodestar analysis resulted in a multiplier slightly above six. *Id*. at 10. "Although this multiplier is at the high end of the acceptable range, it is justified by the exceptional results achieved in this case" – specifically, a settlement at "the high end of the spectrum for cash awards paid in any antitrust case in the history of American jurisprudence." *Id*.

B. Cases in the Seventh Circuit support a multiplier of 1.5 to 2.

It is significant that Class Counsel have not pointed to a single case from the Seventh Circuit approving a multiplier anywhere near the range that Class Counsel seeks. In *Harman v. Lyphomed, Inc.*, the Seventh Circuit noted that multipliers "anywhere between one and four" have been approved by the courts in this circuit, but noted that a multiplier of four was "quite rare." 945 F.2d 969, 976 (7th Cir. 1991), *citing In re Cenco, Inc. Sec. Litig.*, 519 F. Supp. 322, 325 (N.D. Ill. 1981). And in later cases, the Seventh Circuit has suggested "that a multiplier of 2 may be a sensible ceiling." *Cook*, 142 F.3d at 1013, *citing Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988). When approving a recent nationwide settlement, a court in this district approved a 1.5 multiplier and noted that "[e]mpirical evidence of multipliers across many cases demonstrates that most multipliers are in the relatively modest 1-2 range." *In re NCAA*

Student-Athlete Concussion Injury Litig., 332 F.R.D. 202, 225 (N.D. Ill. 2019), *quoting* William B. Rubenstein, *Newberg on Class Actions* § 15:78 (5th ed.).

Similarly, in one of Class Counsel's cases, the court noted that, of eighteen megafund cases analyzed in another case by the Third Circuit, "all but two cases in which lodestar multipliers were reported had multipliers between 1 and 2.95." *Stop & Shop Supermarket Co.*, 2005 U.S. Dist. LEXIS 9705, at *54-55, *citing In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 742 (3d Cir. 2001). The other two cases involved lodestar multipliers of 7-10 and 32, but both awards were vacated by the Third Circuit. *Stop & Shop Supermarket Co.*, 2005 U.S. Dist. LEXIS 9705, at *54-55; *see also In re Cendant Corp. Prides Litig.,* 243 F.3d at 742 (finding that the district court had "strayed from all responsible discretionary parameters" by awarding a fee which resulted in a lodestar between 7 and 10 without explaining how such a high multiplier was justified).

Here, Class Counsel have provided no real justification for applying a lodestar multiplier of 7.23 to 13.16. A multiplier of 1.5 to 2 would be more reasonable and more in line with cases in this circuit.

IV. Taken together, Class Counsel's lodestar calculation shows that the requested attorneys' fee award is inordinate.

Thus, every aspect of Class Counsel's lodestar calculation—the requested hourly rate, the hours requested, and the multiplier sought—show that the requested award of $9.5 million is grossly excessive. Put another way, if the Court were to accept Class Counsel's hours of 1706.15, the requested award of $9,500,000 is equivalent to a rate of $5,568.09 per hour. If the Court were to reduce Class Counsel's hours to 1,444 hours, Class Counsel's requested award would be equivalent to an effective rate of $6,578.95 per hour. Either way, Class Counsel's

requested award is well beyond the bounds of anything that Class Counsel could reasonably expect to recover *ex ante*, and is therefore excessive and unfair.

The question then becomes what attorneys' fee award would be reasonable in these circumstances. The Treasurer respectfully suggests that an attorneys' fee award of $1,444,000 would be appropriate and reasonable, because it is based on a reasonable rate of $500 per hour and reasonable number of hours (1,444), and applying of a multiplier of two, which the Seventh Circuit has suggested is a "sensible ceiling" for multipliers. But in no event should the award exceed $2,629,060, which is Class Counsel's requested lodestar with a multiplier of two, as shown in the table below.

Proposal	Hours	Rates	Lodestar	Multiplier	Award
Reasonable hours and rates	1444.00	$500	$722,000	2	$1,444,000
Same hours, reasonable rate	1706.15	$500	$853,075	2	$1,706,150
Reasonable hours, same rate	1444.00	$770	$1,111,880	2	$2,223,760
Class Counsel's proposal	1706.15	$600-900 (average $770)	$1,314,530	2	$2,629,060

For this reason, the Treasurer requests that the Court award Class Counsel attorneys' fees in the amount of $1,444,000.

CONCLUSION

For these reasons, Defendant respectfully requests that the Court deny Class Counsel's request for $9.5 million in attorneys' fees, and award Class Counsel a reasonable attorneys' fee award based on their lodestar.

Respectfully submitted,

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