UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

ALICE H. ALLEN AND LAURENCE E. ALLEN, d/b/a Al-lens Farm, GARRET SITTS AND RALPH SITTS, JONATHAN AND CLAUDIA HAAR, behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Docket No. 5:09-cv-00230-cr
DAIRY FARMERS OF AMERICA, INC., DAIRY MARKETING SERVICES, LLC, and DEAN FOODS COMPANY,	)	Judge Christina Reiss
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

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INTRODUCTION

In the course of this hard fought litigation, Plaintiffs have successfully negotiated a settlement against Defendant Dean Foods Company ("Dean") in the amount of $30,000,000. As we have previously advised the Court, we believe this to be the largest antitrust settlement in the history of this Court and it represents a result that no governmental agency or other private plaintiffs have been able to achieve against Dean (or other alleged co-conspirators) in the past decade. Plaintiffs respectfully request an award of $8,500,000 in attorneys' fees (approximately twenty-eight percent of the recovery from Dean), plus accrued interest,[1] and $1,500,000 as partial reimbursement of out-of-pocket expenses.

The requested fee award is consistent with the percentage awards approved by courts in the Second Circuit, supported by Plaintiffs' actual lodestar and expenses (which are significantly *larger* than the amount sought), and strongly supported by the factors considered in the Second Circuit for determining the reasonableness of a fee award. Of particular significance are the following considerations:

- Numerous decisions in the Second Circuit and other jurisdictions establish that the percentage award requested here, approximately 28% of the settlement, plus reimbursement of out-of-pocket expenses, is well within the range of awards approved as reasonable (see cases cited *infra*).
- Plaintiffs' lodestar in this matter is more than $11 million, and out-of-pocket expenses of more than $2 million have been incurred. Thus, while Second Circuit

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1/ Consistent with the settlement agreement, Dean paid the settlement funds into an escrow account shortly after preliminary approval. By "accrued interest," plaintiffs are simply referring to the portion of the interest accumulating in that account that is allocable to attorneys' fees and expenses. Because the funds were not paid until the settlement was preliminarily approved, the amount of interest is very limited.

law supports calculation of a reasonable fee using a *multiplier* of actual lodestar to compensate for risk and other factors, here the requested award is less than actual lodestar through April 30, 2011 (and in fact represents less than 80% of actual lodestar).

- The $30 million represents an exceptional result for the class in a matter in which neither law enforcement authorities nor other private plaintiffs have invested the time and resources required to pursue this relief on behalf of injured parties.
- A significant award in an antitrust matter such as this is particularly appropriate because of the complexity of the matter and the critical public policies advanced by private actions to enforce the antitrust laws.
- The requested fee award is also appropriate because of the degree of risk entailed in this litigation. As the Court is aware, virtually every claim and issue in this case has been vigorously contested. Plaintiffs and their counsel have invested enormous time and resources to vindicate the interests at stake in this litigation, recognizing that Dean (and co-conspirators) would vigorously contest this matter, that the experience in *In re Southeastern Milk Antitrust Litigation*, No. 08-md-1000 (S.D. Tenn.), indicated that lengthy and resource-intensive litigation was almost inevitable to secure relief, and that the case posed the inherent and substantial risks that accompany antitrust litigation of this kind.
- Finally, Plaintiffs believe the quality of representation is this case strongly supports such an award. Plaintiffs have successfully pursued this matter to date, and achieved a historic settlement with Dean, litigating the matter against extremely able defense

counsel represented by major firms (presumably paid on an hourly basis) who have devoted enormous resources to the defense of this matter.

The factual predicate for the fee and expenses request is set forth in the accompanying declarations by counsel for the Plaintiffs' firms: the Declaration of Kit A. Pierson on behalf of Cohen Milstein Sellers & Toll PLLC; the Declaration of Robert G. Abrams on behalf of Baker Hostetler; the Declaration of Andrew D. Manitsky on behalf of Gravel and Shea; and the Declaration of Charles E. Tompkins on behalf of Shapiro Haber & Urmy, LLC.

BACKGROUND

This matter was filed on October 8, 2009. (Dkt. No. 1). In the original complaint and subsequent amendments to the complaint, Plaintiffs have sought relief on behalf of a class of more than nine thousand farmers producing and pooling milk in Federal Milk Marketing Order 1. (*Id*., see also Dkt. Nos. 16, 117). The litigation challenges a conspiracy that has evolved and continued over the past decade and involves a broad range of anticompetitive conduct. (*Id*.).

Although Dean and other defendants originally sought an abbreviated schedule based on the work undertaken in the *Southeastern Milk* litigation, (Dkt. No. 59), the course of this litigation quickly confirmed Plaintiffs' representations to the Court about the complexities and challenges of the litigation. Indeed, the Defendants themselves soon took the position that there were "significant differences" between the matters at issue in *Southeastern Milk* and this case, arguing that this litigation involved "a different geographic region, different alleged conduct occurring at different times, and several different parties." (Dkt. No. 53). Dean and/or its co-defendants served discovery requests on more than seventy companies and individuals, served extensive discovery requests on each of the Plaintiffs, and noticed numerous depositions. (Declaration of Kit A. Pierson ("Pierson Decl.") ¶ 13) (attached hereto as Exhibit 1).

Plaintiffs, as the parties bearing the burden of proof, had to review millions of pages of documents (including materials produced in the *Southeastern Milk* litigation as well as subsequent productions) to determine the nature and scope of the conspiracy's actions in the Northeast, assess its impact on farmers, evaluate class certification issues, and prepare for likely defenses. (*Id*. ¶ 14). The inherent difficulty of this undertaking was compounded by the expedited schedule on which the case proceeded – a schedule that has ultimately served the litigation well, but has also involved significant challenges and time and resource requirements for counsel. As the Court is aware, the Dean settlement has been vigorously contested by the remaining defendants and certain proposed interveners. (Dkt. Nos. 188, 189, 190, 191, 192).[2] Pending the settlement's approval, counsel has had to prepare fully both for class certification issues as well as the merits of the case. (Pierson Decl. ¶¶ 10, 14).

As the litigation proceeded on this intensive basis, Plaintiffs and Dean engaged in serious settlement negotiations. (*Id*. ¶ 3). These discussions culminated in a settlement agreement subject to preliminary and final approval by the Court following the procedures contemplated by Federal Rule of Civil Procedure 23.

The Court issued an order granting Preliminary Approval of a settlement between Plaintiffs and Dean on May 4, 2011. (Dkt. No. 297). As part of its Preliminary Approval Order, the Court approved and directed the dissemination of a Notice and Summary Notice to Settlement Class members. (*Id*. at 16-17). The Notice informs the Settlement Class that Settlement Class Counsel may petition the Court for "up to one-third of the Settlement ($10 million) in attorneys' fees, plus reimbursement of the costs and expenses for investigating the

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2/ Discovery has now confirmed that with the exception of the Maine interveners, counsel retained for the other interveners were paid by DFA/DMS and entities on DMS's Board.

facts, litigating the case, and negotiating and administering the Settlement." (Dkt. No. 160, Exhibit B-1 at 7). The Notice also provides the Settlement Class with estimated recoveries for class members based on different scenarios in which the Court awards Settlement Class Counsel $1,500,000 in unreimbursed expenses and 30%, 20%, or 10% of the Settlement Fund in attorneys' fees. (*Id*. at 5). The Notice makes clear that the amount and reasonableness of the fee award is ultimately a matter for the Court to decide. (*Id*. at 7).

In accordance with this Notice, Plaintiffs now petition the Court for reasonable attorneys' fees in the amount of $8,500,000, or approximately twenty-eight percent of the recovery from Dean, plus interest, and out-of-pocket expenses arising out of the litigation up to and including April 30, 2011, in the amount of $1,500,000.

ARGUMENT

I. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE.

A. An Award of Fees from the Common Fund Created by the Settlement is Appropriate.

Settlement Class Counsel have created a substantial benefit for the Settlement Class and are entitled to recover reasonable attorneys' fees. The Supreme Court, in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980), explained that "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *See also Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). Such an award is particularly appropriate here where the conduct and injuries addressed have gone unremedied for a sustained period of time and could not practicably have been challenged, particularly given the resources available to Dean and the vigor of its defense, without the commitment of significant time and resources by Plaintiffs and Settlement Class Counsel. Needless to say, that devotion of time and resources has involved significant risk.

The Supreme Court has also emphasized the importance of private litigation for effective enforcement of the antitrust laws. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 331 (1979); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972). Similarly, the Second Circuit has explained that "[i]n the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced …" *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir. 1973).

Fee awards in cases like this appropriately incentivize attorneys to act as private attorneys' general to enforce compliance with the antitrust laws and secure relief for injured parties (particularly injured parties challenging anticompetitive conduct by defendants with far greater resources). Awards of attorneys' fees allow and ensure the zealous enforcement of class members' legal rights. "[A] financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid." *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 687 (M.D. Ala. 1988). "To make certain that the public is represented by talented and experienced trial counsel the remuneration should be both fair and rewarding." *Eltman v. Grandma Lee's, Inc.*, No. 82-cv-1912, 1986 WL 53400, at *9 (E.D.N.Y. May 28, 1986).

B. The Percentage Method is the Appropriate Method for Calculation of the Attorneys' Fee Award in this Matter.

It is within the Court's discretion to apply either the percentage-of-the-fund method or the lodestar method to award attorneys' fees. *McDaniel v. County of Schenectady,* 595 F.3d 411, 417 (2d Cir. 2010)*; Goldberger*, 209 F.3d at 45-47. Since *Goldberger*, courts in the Second Circuit – as in many other jurisdictions – have indicated a strong preference for the percentage-of-the-fund method. As the Second Circuit explained in *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*:

> The trend in this Circuit is toward the percentage method, which 'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.' In contrast, the 'lodestar creates an unanticipated disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits.'

396 F.3d 96, 121 (2d Cir. 2005) (citations omitted). *See also In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02-MDL-1484, 2007 WL 4526593, at *13 (S.D.N.Y. Dec. 20, 2007) ("[T]he trend in the Second Circuit has been to express the attorneys' fees as a percentage of the total settlement.").

The disadvantages of the lodestar method were recently described by the Second Circuit in the *McDaniel* case:

> The lodestar method is not perfect. It creates an incentive for attorneys to bill as many hours as possible, to do unnecessary work, and for these reasons also can create a disincentive to early settlement. Under certain conditions, moreover, lodestar awards can create the near opposite incentive, encouraging attorneys to settle before trial even when it is not in their clients' best interest. While under the lodestar method lawyers share the "downside" risk of trial (i.e., the possibility of an adverse judgment, and hence no fee), they do not share in the potential economic "upside" (i.e., fees as a percentage of a large common fund), especially since trial requires comparatively fewer resources than the process of trial preparation.

McDaniel, 595 F.3d at 418 (citations omitted). Based on similar considerations, the percentage-of-the-fund method is now mandatory in two other Circuits and favored in others.[3] The Second Circuit has explained that where the percentage method is used, lodestar remains useful as a "cross check" on the reasonableness of the requested percentage. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (citing *Goldberger*, 209 F.3d at 49-50).

3/ *See, e.g., Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) (percentage method is generally favored "in common fund cases because it allows courts to award fees from the fund `in a manner that rewards counsel for success and penalizes it for failure.'") (citation omitted).

C. The Requested Award is Fair and Reasonable.

The Plaintiffs' fee request in this case – approximately 28 % of the settlement fund – falls well within the range of fees awarded on a percentage basis in complex common fund cases. Numerous courts in this and other circuits have granted requests for larger percentages of the common fund for payment of attorneys' fees. *See, e.g., In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, No. 03-MD-1542 (D. Conn. Oct. 1, 2010) (approving 33.3% attorneys' fee award); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146-47 (S.D.N.Y. 2010) (awarding fees of 33.33% of 35 million settlement fund); *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2008 WL 63269, at *6 (E.D. Pa. Jan. 3, 2008) (awarding fees of one-third of $39 million settlement fund); *In re Priceline.com Inc. Sec. Litig.*, No. 00-cv-1884, 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (awarding 30% of $80 million fund); *Hicks v. Morgan Stanley & Co.*, No. 01-cv-10071, 2005 WL 2757792, at *7 (S.D.N.Y. Oct. 24, 2005) (fee of thirty percent of $10 million settlement fund plus expenses was reasonable); *Spann v. AOL Time Warner, Inc.*, No. 02-cv-8238, 2005 WL 1330937, at *8-9 (S.D.N.Y. June 7, 2005) (awarding fees of 33.33%); *In re Medco Health Solutions, Inc. Pharmacy Benefits Management Litig.*, No. 03 MDL 1508, 2004 WL 1243873, at *11 (S.D.N.Y. May 25, 2004) (approving fees of 30% of Settlement Fund, representing 1.786 times counsel's lodestar), *affd. sub nom. Cent. States Se. and Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (awarding fees of one-third of settlement fund); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370-73 (S.D.N.Y. 2002) (awarding 33% of settlement fund); *Adair v. Bristol Tech. Sys., Inc.*, No. 97-cv-5874, 1999 WL 1037878, at *4 (S.D.N.Y. Nov. 16, 1999)

(awarding 33% of settlement fund); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 597 (S.D.N.Y. 1992) (fee award of thirty percent is "eminently reasonable").

Moreover, as Judge Posner observed in *Matter of Continental Illinois Securities Litigation*, 962 F.2d 566, 572 (7th Cir. 1992), an objective of awarding a reasonable attorneys' fee "is to simulate the market. … The [Co-Lead] Counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis." As the United States District Court for the Southern District of New York explained in *In re RJR Nabisco, Inc. Securities Litigation*, No. 88-cv-7905, 1992 WL 210138, at *7 (S.D.N.Y. Aug. 24, 1992), "class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client."

In a non-class case proceeding on a contingency basis, the customary contingent fee award would likely be in the range of thirty to forty percent. *See, e.g.*, *Kirchoff v. Flynn*, 786 F.2d 320, 323 (7th Cir. 1986) ("40% is the customary fee in tort litigation"); *Alpine Pharmacy*, 481 F.2d at 1051 (discussing 32% fee for pretrial settlement); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("in private contingency fee cases, particularly in tort matters, [P]laintiffs' [C]ounsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."); *In re Shell Oil Refinery*, 155 F.R.D. 552, 571 (E.D. La. 1993) ("The customary contingency fee is between 33 l/3% and 40%.").

D. Application of the Second Circuit's Test for Reasonableness Strongly Supports the Requested Award.

The Second Circuit analyzes the reasonableness of a fee award, regardless of the method used to calculate it, according to six factors (the "*Goldberger* Factors"):

> (1) counsel's time and labor; (2) the litigation's complexities and magnitude; (3) the litigation risks; (4) quality of representation; (5) the relationship of the requested fee to the settlement; and (6) considerations of public policy.

Goldberger, 209 F.3d at 50. "In applying these criteria, a Court essentially makes no more than a qualitative assessment of a fair legal fee under all the circumstances of the case." *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 466 (S.D.N.Y. 2004) (internal quotation marks and citations omitted). Consideration of these factors further demonstrates the reasonableness of the requested fee in this case.

1. Counsel's Time and Labor

Final Approval of the Dean settlement will represent the culmination of over 31,000 hours of legal work. (Pierson Decl. ¶ 9). Given the complexity and challenges of this litigation, and the expedited schedule, Plaintiffs' counsel has had every incentive to conduct this work in an efficient manner commensurate with the needs of the case. Settlement Class Counsel reviewed millions of pages of documents produced in discovery and has prepared for and conducted over fifty depositions. (*Id*. ¶ 10). These depositions were conducted in an efficient manner – in most casees attended by only a single counsel for plaintiffs and, with a single exception (with the Court's approval) completed in one day. (*Id*. ¶ 15). Counsel also defended eighteen depositions, including those of several third-party witnesses, and sought and received data and documents from over twenty third parties. (*Id*. ¶ 10). The depositions taken and defended by Settlement Class Counsel occurred in over twenty locations in the Northeast based on the residence of the witnesses involved. (*Id*.).

Settlement Class Counsel also responded to discovery requests, producing over 11,000 pages of documents and responding to interrogatories. (*Id*. ¶ 10). Counsel participated in many in-person and telephonic conferences with Defendants to navigate the complex issues presented by document discovery in this case. (*Id*.). Indeed, as a result of numerous meet and confer sessions, Plaintiffs have largely avoided the need to resolve discovery issues through motions to

compel. (*Id*. ¶ 17).

Settlement Class Counsel have filed extensive briefs devoted primarily to the numerous legal defenses asserted in the motions to dismiss, preliminary approval of the Dean settlement, and various scheduling and procedural issues. (*Id*. ¶ 10). Settlement Class Counsel also performed significant work on Plaintiffs' class certification motion. (*Id*.). This work, in addition to considerable research and extensive briefing, included intensive and exhaustive consultation with Plaintiffs' economic experts. (*Id*. ¶ 11).

The first *Goldberger* factor is clearly met. *See In re Visa Check/Mastermoney Antitrust Litig.*, No. 96-CV-5238, 2008 WL 1787674, at *6 (E.D.N.Y. April 14, 2008) (finding that lead counsel was entitled to significant recovery because, *inter alia*, lead counsel devoted a significant number of hours to representing the class' interests during the litigation); *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510, 2007 WL 2743675, at *14 (E.D.N.Y. Sept. 18, 2007) ("While formal discovery was limited and counsel did not engage significantly in 'the major attorney time use[s] . . . namely depositions, trial or appeal,' the extensive investigation, analysis, motion practice and settlement negotiations which have taken place over the last four years demonstrate that counsel has expended significant time and effort in furtherance of this litigation." (Internal citation omitted)).

2. The Litigation's Complexity and Magnitude

Courts have noted that antitrust class actions are "arguably the most complex action to prosecute. . . . [T]he legal and factual issues involved are always numerous and uncertain in outcome." *In re Linerboard Antitrust Litig*., 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003) (quoting *In re Motorsports Merchandise Antitrust Litig*., 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)); *see also Wal-Mart Stores*, 396 F.3d at 122 (affirming district court's fee because, *inter alia*, "antitrust cases, by their nature, are highly complex"); *In re Shopping Carts Antitrust Litig.*,

MDL No. 451, 1983 WL 1950, at *7 (S.D.N.Y. Nov. 18, 1983) ("antitrust price fixing actions are generally complex, expensive and lengthy."). Even by the standards of antitrust matters, this case is highly complex.

Given the complicated nature of this action and the associated uncertainty regarding the key legal and factual issues, Settlement Class Counsel were required to vigorously and extensively prosecute this case. As explained by the Court in its Preliminary Approval Order, Plaintiffs, in defending their case against dismissal, were compelled to stave off Dean's and the other Defendants' zealous assertions of a broad array of alleged defenses. (Dkt. No. 297). Following resolution of the motion to dismiss, Plaintiffs' counsel had to develop a very complex factual record both pertaining to the appropriateness of class certification and the liability and damages issues presented by the case. This case is clearly a complex matter and satisfies the second *Goldberger* factor. *See, e.g.*, *Global Crossing*, 225 F.R.D. at 467 (second *Golberger* factor met where liability rested on examination of company business models, mental states of company employees, and motivations of relevant alleged participants).

3. Litigation Risks

Courts of this Circuit have recognized the risk of litigation to be "'perhaps the foremost factor' to be considered in determining whether to award an enhancement." *In re Elan Sec. Litigation*, 385 F. Supp. 2d 363, 374 (S.D.N.Y. 2005) (quoting in part *Goldberger*, 209 F.3d at 54). As one commentator has explained:

> [C]ourts have been careful to award a fully compensable reasonable fee based on the underlying economic inducement for class action lawyers to pursue potentially expensive or complex common fund class litigation. These lawyers assume the risk of no compensation unless they successfully confer common fund benefits on the class, based on their reasonable expectation that they will share in the recovery in a fair proportion, in contrast to receiving a fee based initially on time-expended criteria that fail to give the *results obtained* factor primary consideration.

1 Alba Conte, ATTORNEY FEE AWARDS § 1.09 at 16 (2d ed. 1993) (footnote omitted) (emphasis in original). Fee awards must be sufficient to encourage skilled and determined counsel to take on difficult cases and see them through to completion, which can potentially take years and the investment of enormous time and resources. *See, e.g., Alpine Pharmacy*, 481 F.2d at 1050 (the incentive for "the private attorney general" is particularly important in the area of antitrust because of the role played by private litigation in enforcing the law). It is also "well-established that litigation risk must be measured as of when the case is filed." *Goldberger,* 209 F.3d at 55.

An antitrust case of this complexity and magnitude, in which the defendants have significant resources and experienced counsel, necessarily poses very significant risks for the Plaintiffs. In order to prevail, Plaintiffs must demonstrate not only that an unlawful conspiracy existed, but also that it has caused antitrust impact and damages. Even if the Plaintiffs navigate the pretrial challenges (such as the motions to dismiss filed by Dean and others), and succeed in establishing liability at trial, they are at risk of a small (or no) damages recovery. *See, e.g., United States Football League v. Nat'l Football League,* 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) (finding liability, but awarding nominal damages). If the Plaintiffs establish liability and damages at trial, they are at risk of having the judgment overturned on appeal. *See, e.g.,, Anixter v. Home-Stake Prod. Co.,* 77 F.3d 1215, 1218-19 (10th Cir. 1996) (overturning verdict obtained after many years of litigation); *MCI Commc'ns Corp. v. AT&T*, 708 F.2d 1081, 1166-67 (7th Cir. 1983) (remanding antitrust judgment for new trial on damages); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1020 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974) (after multiple appeals, including appeal to the United States Supreme Court, plaintiffs, putative class and counsel had no recovery).

Here, Settlement Class Counsel have vigorously prosecuted this case for almost two years, and expended enormous time and financial resources, without any assurance of compensation for the work they performed on behalf of the Class, or reimbursement of their out-of-pocket expenses. "[N]o matter how confident one may be of the outcome of litigation, such confidence is often misplaced." *West Virginia v. Chas. Pfizer & Co., Inc.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970). Given the significant litigation and contingency risks, the third *Goldberger* factor is also met. *See Global Crossing*, 225 F.R.D. at 467; *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 523-24 (E.D.N.Y. 2003) (noting that the commitment of resources weighs in favor of a "higher compensation").

4. Quality of Representation

Both Settlement Class Counsel and counsel for defendants are highly-experienced practitioners in complex litigation generally and antitrust litigation in particular. The Dean settlement was reached only after vigorous prosecution of the case and significant arms'-length negotiations against highly-competent and experienced opposing counsel. *See Global Crossing*, 225 F.R.D. at 467 ("the quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work."). *See also Marsh*, 265 F.R.D. at 148 ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement."); *In re Lorazepam & Clorazepate Antitrust Litig.*, MDL No. 1290, 2003 WL 22037741, at *9 (D.D.C. June 16, 2003) (quoting *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 912 F. Supp. 97, 101 (S.D.N.Y. 1996) ("The caliber of opposing counsel was clearly of the highest order and required that counsel for plaintiffs and the Class be capable of providing comparable services."). Moreover, a recovery of $30,000,000 is a significant success and of substantial benefit to the Class, and speaks to Settlement Class Counsel's competence, experience, and diligence in obtaining the Dean settlement. Settlement Class Counsel have been

confronted with highly skilled attorneys and have achieved an excellent result for the class in the face of such challenges. The fourth *Goldberger* factor supports the fee request here. *See, e.g.*, *Global Crossing*, 225 F.R.D. at 467 (noting the relationship between the quality of counsel and the recovery obtained in an analysis of the fourth *Goldberger* factor); *Marsh*, 265 F.R.D. at 148 ("The ability of Plaintiffs' Counsel to obtain a favorable settlement for the Class in the face of such formidable legal opposition confirms the quality of their representation of the Class. Accordingly, the Court finds that this *Goldberger* factor weighs in favor of approving the requested fee award.").

5. Relationship Between the Requested Fees and the Settlement

The fifth *Goldberger* factor also supports the attorneys' fee request. In this case, Plaintiffs are requesting approximately twenty-eight percent of the recovery of the Class. As evidenced by numerous cases cited *supra*, this percentage "is consistent with [and even modest in light of] fees awarded in comparable class action settlements in the Second Circuit." *Hicks*, 2005 WL 2757792, at *9 (fee of thirty percent of $10,000,000 settlement fund in addition to out-of-pocket expenses was reasonable where counsel had spent considerable time and effort litigating case over two-year period) (collecting cases). In fact, awards of thirty percent of the settlement, more than the percentage sought here, have been called "eminently reasonable." *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 597 (S.D.N.Y. 1992). *Accord* cases cited at page 8-9, *supra*.

Moreover, consideration of the lodestar in this case as a "cross check" strongly confirms the reasonableness of Plaintiffs' request. "Percentage-of-recovery awards of attorneys' fees are appropriate even though such awards are often greater than those awards that would be granted to attorneys under the lodestar method," because "attorneys take upon themselves the risk that litigation will not be successful, including the risks of non-reimbursed expenditures and the

opportunity cost of attorney time dedicated to the case." *Hicks*, 2005 WL 2757792, at *9. Conversely, the $8.5 million fee request in this case represents *less* than the $11 million lodestar of Settlement Class Counsel calculated at *historical* rates *only* through April 30, 2011.[4]

Using lodestar as a cross-check in this case would support the reasonableness of the request even if the fee request was a 2.0 multiplier or more of actual lodestar (since this compensates counsel for factors such as delay in receiving payment and the risk of non-recovery). For example, in *In re AOL Time Warner Shareholder Derivative Litig.*, No. 02-cv-6302, 2010 WL 363113, at *22 (S.D.N.Y. Feb. 1, 2010), the court recently explained that a requested multiplier of 1.60 was "a relatively low multiplier, measured by the range more recently awarded by various judges in this district and others." Other cases have approved substantially higher multipliers. *See, e.g.*, *Wal-Mart Stores*, 396 F.2d at 123 (3.5 multiplier); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 354 (S.D.N.Y. 2005) (4.0 multiplier); *In re Comverse Technology, Inc. Sec. Litig.*, No. 06-cv-1825, 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) (awarding multiplier of 2.78); *In re Interpublic Sec. Litig.*, Nos. 02-cv-6527, 03-cv-1194, 2004 WL 2397190, at *12 (S.D.N.Y. Oct. 26, 2004) (approving 3.96 multiplier and explaining that "in recent years multipliers of 3 and 4.5 have become common").[5]

[4/] Settlement Class Counsel have elected to calculate their lodestar at historic rates, even though calculation at current rates is appropriate and has been endorsed by courts in this Circuit. *See, e.g.*, *Hicks*, 2005 WL 2757792, at *10 ("Current 'market rates' are proper because such rates more adequately compensate for inflation and loss of the use of funds.").

[5/] Counsel's hourly rates, regardless of where counsel reside, should be used in performing the lodestar cross-check. *See In re Agent Orange Product Liab. Litig.*, 818 F.2d 226, 232-34 (2d Cir. 1987) (use of "forum rule" in calculating lodestar is against public policy, "makes little sense" and "distort[s] dramatically the purposes of the lodestar calculation" where many non-local counsel are involved in the action); *see also In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 488-89 (S.D.N.Y. 1988) (awarding a percentage-based fee resulting in a 3.97 multiplier of co-lead counsel's lodestar, calculated based on the rates submitted by petitioning

As explained *supra*, here the fee request is actually for an amount significantly less than actual lodestar through April 30, 2011 (representing less than 80% of actual lodestar). Thus, application of the lodestar test clearly supports the reasonableness of the fee request here.[6]

6. Public Policy Considerations

Public policy concerns favor the award of reasonable attorneys' fees in antitrust class actions. As the Second Circuit has noted, "[i]n the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation." *Alpine Pharmacy*, 481 F.2d at 1050; *see also In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02-MDL-1484, 2007 WL 313474, at *21 (S.D.N.Y. Feb. 1, 2007); *WorldCom*, 388 F. Supp. 2d at ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."); *Visa Check/Mastermoney.*, 297 F. Supp. 2d at 524 ("The fees awarded must be reasonable, but they must also serve as an inducement for lawyers to make similar efforts in the future."); *see also Manual for Complex Litigation, Fourth* § 14.121 (2004) (noting that sizable percentage fee awards are justified in part because they "ensur[e] that competent counsel continue to be willing to undertake risky, complex, and novel litigation").

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counsel because they were the prevailing rates normally charged for similar work performed by attorneys of like skill in antitrust law).

[6] In light of this precedent, even if only a fraction of the $11 million lodestar (augmented by a modest multiplier) were used as a cross-check on the fee request in this case, it would support the reasonableness of Plaintiffs' request. Moreover, the proposed settlement with Dean did not obviate the need for development of a full class certification record and appropriate merits discovery, given the opposition to the Dean settlement, the risk that the litigation against Dean would proceed to trial if the settlement were not approved, and the discovery schedule (which necessitates completion of discovery prior to the final approval hearing).

Here, Settlement Class Counsel have expended enormous time and resources in order to obtain and secure final approval of the Dean settlement. Even with approval of the requested fee, they will be compensated for less than eighty percent of their time calculated at historic rates up to April 30, 2011. Conversely, courts in this Circuit have endorsed percentage fee awards that compensate class action counsel at amounts greater than their total lodestar. The requested fee is reasonable and appropriately incentivizes competent counsel to prosecute complex and risky but meritorious antitrust class actions in the future.

II. THE EXPENSES REQUESTED ARE REASONABLE.

Plaintiffs request reimbursement of costs incurred in litigating this case and obtaining the Dean settlement through April 30, 2011, in the amount of $1,500,000. This amount actually is $500,000 *less* than the total expenditures of Settlement Class Counsel on the instant litigation during this time period. (Pierson Decl. ¶ 11).[7]

The requested expenses were reasonable and necessary in this litigation, and were expended for the direct benefit of the Class. "Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *In re Arakis Energy Corp. Sec. Litig.*, No. 95 CV 3431, 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001), *cited in Visa Check/Mastermoney*, 297 F. Supp. 2d at 525; *see, e.g.*, *Duffy v. Modern Concrete Corp.*, No. 07-CV-962, 2008 WL 822111, at *5 (E.D.N.Y. Mar. 25, 2008) (noting that courts typically award "those reasonable out-of-pocket expenses incurred by the attorney and which are normally charged fee-paying clients") (quoting *Reichman v. Bonsignore, Brignati & Mazzotta, P.C.*, 818 F.2d 278, 283 (2d Cir. 1987)); *Mitland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239

[7] Settlement Class Counsel reserve the right to seek additional reimbursement of out-of-pocket expenses from any recovery ultimately obtained from other defendants in this matter. Counsel recognize that any such award will be a matter within the Court's discretion based on an assessment of reasonableness.

(S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation of those clients.") (internal quotation and citation omitted); *In re Dreyfus Aggressive Growth Mut. Fund Litig.*, No. 98-cv-4318, 2001 WL 709262, at *7 (S.D.N.Y. June 22, 2001) (granting expenses in securities class action); *Wallace on Behalf of Northeast Utilities v. Fox*, 7 F. Supp. 2d 132, 142 (D. Conn. 1998) (granting costs summarily); *In re Fine Host Corp. Sec. Litig.*, 3:97-CV-2619, 2000 WL 33116538, at *6 (D. Conn. Nov. 8, 2000) (same); *In re EPDM Antitrust Litig*,. No. 03-MD-1542 (D. Conn. Oct. 1, 2010) (grant of expenses separate and in addition to attorneys' fees).

III. THE COURT SHOULD APPROVE THE REQUESTED INCENTIVE AWARD TO NAMED PLAINTIFFS.

Plaintiffs request that the Court approve incentive awards for the three sets of class representatives, Alice and Laurance Allen, Garret and Ralph Sitts, and Jonathan and Claudia Haar, in the amount of $7,500 each, or $22,500 total. The Dean settlement allows for such awards from the Settlement Fund. (*See* Dkt. 301, Exhibit A ¶ 12.1).

"An incentive award is meant to compensate the named plaintiff for any personal risk incurred by the individual or any additional effort expended by the individual for the benefit of the lawsuit." *Dornberger v. Metropolitan Life Insurance Co*., 203 F.R.D. 118, 124 (S.D.N.Y. 2001) (internal quotation marks and citations omitted). *See Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 187-88 (S.D.N.Y. 1997) (approving incentive awards for class plaintiffs who "provided valuable assistance to counsel in prosecuting the litigation"). Throughout the litigation of this case, the class representatives have communicated closely with Settlement Class Counsel, provided documents and information essential to the litigation of this case and Plaintiffs' discovery obligations, and submitted to depositions. (Pierson Decl. ¶ 20). The class

representatives have also provided assistance to Settlement Class Counsel in their prosecution of this case by providing information (including documents) pertaining to the issues presented by this case. (*Id*.).

The amounts requested by Plaintiffs are reasonable in light of other incentive awards approved by courts in this Circuit. *See Roberts*, 979 F. Supp. at 188 (incentive awards between $2,500 and $85,000 are reasonable depending on the extent of participation in the litigation); *Dornberger*, 203 F.R.D. at 124-25 (incentive award of $10,000 reasonable where plaintiff provided documents and information and traveled to New York to submit to deposition). Additionally, the requested incentive awards are modest in relation to the net recovery from Dean from which they would be provided. *See Dornberger*, 203 F.R.D. at 125.

CONCLUSION

The fee request in this case is fully in accord with Second Circuit law, the result achieved for the class, the complexities and risks presented by this litigation, and the quality and zealousness of the representation provided to the class. Accordingly, Plaintiffs respectfully request that Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards for Class Representatives be granted.

Dated: June 3, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June, 3, 2011, a copy of the foregoing **Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards for Class Representatives and Memorandum in Support of Plaintiffs' Motion for Award of Attorneys' fees, Reimbursement of Expenses, and Incentive Awards for Class Representatives**, including accompanying exhibits was electronically filed. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ *Brent W. Johnson*
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