UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE NYC BUS TOUR ANTITRUST LITIGATION	Master Case File No. 13-CV-0711 (ALC)(GWG) **RELATED TO ALL CASES** **ECF Case** **JURY TRIAL DEMANDED**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF FEE AND EXPENSE AWARD

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INTRODUCTION

Class Plaintiffs have reached an agreement with Defendants to settle this class action for $19 million on behalf of purchasers of Defendants' hop-on, hop-off bus tours in New York City. Plaintiffs respectfully request that the Court award class counsel Susman Godfrey LLP ("SG") attorneys' fees of one-third of that amount ($6,270,000), a figure well within the range approved by courts in this Circuit. *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 623 (S.D.N.Y. 2012) (Carter, J.) ("Class and Plaintiff's Counsel's request for one-third of the Fund is reasonable and consistent with the norms of class litigation in this circuit." (quotation omitted)). Here, the requested award is particularly warranted by the results achieved through the settlement; the tremendous efforts of counsel; and the significant risks overcome.

First, the settlement is an outstanding result for consumers by any measure. The $19 million settlement is a significant recovery for the class, nearly two-thirds of the estimated alleged pre-trebling damages as of the class certification briefing. Individual class members submitting claims will receive $20 per ticket—an award within the estimated range of potential full treble damages awards—reduced on a *pro rata* basis depending on the number of claims filed. Unlike many class action settlements, this is an all-cash settlement, and none of the proceeds will revert to Defendants. After all claims are paid, any remaining funds will go to the Department of Justice, Antitrust Division, and/or the New York Attorney General's Office. SG hired the top firms in the country for class notice (Kinsella Media) and settlement administration (Rust Consulting) to ensure the success of the settlement, and has worked closely with these top-tier firms to implement a widespread notice plan with both domestic and international elements, including individual mail or email notice to hundreds of thousands of class members.

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Second, the $19 million settlement was achieved through aggressive prosecution of the case by SG. After being appointed lead counsel, SG participated in 29 depositions (including the depositions of senior current and former employees of Defendants), briefed class certification, prepared a detailed expert report on damages, and reviewed more than 500,000 pages of documents and several gigabytes of transaction data. The settlement was reached after fact discovery was nearly complete, and only after protracted, arm's-length settlement negotiations, including two full-day mediations facilitated first by Judge Gorenstein and later by Antonio Piazza, an experienced and highly respected mediator.

Third, SG faced and overcame substantial risks to achieve this settlement. SG invested nearly $3 million in time and money into this case, with the real possibility of getting nothing in return. SG undertook this litigation on a wholly contingent basis, with no assurance either of payment or of recouping its expenses from a settlement or judgment. And the case was risky from the outset. For example, although Plaintiffs allege that Defendants' merger gave them sufficient market power to raise and sustain prices above a competitive level, Defendants vigorously disputed the Plaintiffs' definition of the market, and fought the notion that there were any barriers to entry, citing the recent arrival of new operators of hop-on, hop-off bus tours in New York City. Defendants also contested the conclusions of Plaintiffs' expert on damages, submitting the report of their own expert, and arguing that prices were not inflated due to the Defendants' joint venture, using the pricing trends of other tourism options in the New York market as benchmarks. Finally, class certification was a hotly disputed issue; the Supreme Court's decision in *Comcast v. Behrend*, 133 S.Ct. 1426 (2013),which raised the bar for the proof required of plaintiffs on damages, and recent cases refusing to certify consumer class actions on ascertainability grounds, posed significant risks. Finally, at the time the settlement was reached,

Daubert motions and motions for summary judgment had not been filed, and a trial, post-trial motions, and appeals were still to come. Notwithstanding these obstacles, SG achieved a $19 million cash settlement that will provide consumers with substantial relief for the alleged damages Plaintiffs suffered.

For these reasons, and those stated further below, SG respectfully moves this Court for an award of attorneys' fees of $6,270,000. SG also seeks reimbursement for $863,629.46 in litigation expenses and a $20,000 service award for each of the two named plaintiffs to compensate their efforts in bringing this case to a successful resolution.

BACKGROUND

A. Lead Counsel's Role in Litigation

1. Consolidated Complaint

Plaintiffs including named plaintiffs Ms. Bhandari and Ms. Nobel have filed five different class action complaints against Defendants. *See Bhandari v. Twin America*, No. 13-cv-0711; *Hanson vs. Twin America*, No. 12-cv-9066; *Nobel v. Twin America*, No. 12-cv-9128; *Hinton vs. Twin America*, No. 12-cv-9175; and *Mercado v. Twin America*, No. 13-cv-1973. In its Order of April 5, 2013 (Dkt. # 36), the Court appointed Susman Godfrey LLP to serve as Interim Lead Counsel for the plaintiff Class. In its Order of April 24, 2013 (Dkt. # 38), this Court consolidated the foregoing class actions under Docket No. 13-cv-0711 for all purposes, including trial.

The current consolidated complaint (Dkt. # 83) alleges that Defendants engaged in a *per se* unlawful conspiracy to fix prices above the market rate, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The complaint also alleges monopolization of the relevant market in violation of Section 2 of the Sherman Act, *id.* § 2, and an illegal merger in violation of

Section 7 of the Clayton Act, *id.* § 18. The price-fixing allegations developed by SG were not asserted in any other complaint.

2. Discovery and Litigation Efforts

Between May 2013 and February 2014, Plaintiffs served a total of seven sets of document requests and one set of interrogatories on Defendants. Between July 2013 and February 2014, Plaintiffs served a total of 19 third-party subpoenas, calling for both documents and deposition testimony. Plaintiffs received and reviewed over 500,000 documents from these entities and several gigabytes of transactional data. *See* Declaration of William Christopher Carmody In Support of Motion for Final Approval of Settlement ("Carmody Decl."), ¶ 7.

On December 6, 2013, Plaintiffs commenced merits depositions. To date, Plaintiffs have taken or defended 29 depositions, many in cooperation with the United States Department of Justice and the New York Attorney General ("Government Entities"). These included defenses of Plaintiffs' proposed class representatives, economic expert, and declarant regarding class notice and administration, as well as depositions of Defendants' employees, officers, damages expert, and corporate designees, and multiple third parties subpoenaed by Plaintiffs, Defendants, and the Government Entities. *Id.*

On November 4, 2013, Plaintiffs filed a motion for class certification, which was supported by a declaration from an economic expert and a declaration on the feasibility of class notice and administration. (Dkt. # 70-77). Defendants opposed that motion on January 10, 2014, including a declaration of their own expert disputing Plaintiffs' conclusions concerning class certification, and Plaintiffs filed their reply brief on February 26, 2014. (Dkt. # 97-98). All experts were deposed. Fact discovery was scheduled to end on April 28, 2014.

Class Counsel invested significant time and out-of-pocket costs—advanced at Class Counsel's own risk—in developing the econometric models that supported the class certification

motion and that would have formed the basis for additional expert reports and trial testimony. During discovery, Defendants produced several gigabytes of transaction data from different transaction databases. In consultation with economic experts, Class Counsel worked over several months to synthesize the different databases into a single set of data and analyze that data to determine how the alleged restraint affected consumer prices. This required Class Counsel to spend hundreds of hours working with the transaction databases, conferring with defendants about the many issues raised by the databases, and consulting with expert economists about the types of econometric analysis that would be appropriate. The class certification schedule meant that Class Counsel conducted this analysis before any similar work occurred in the Government Action, making Class Counsel effectively the leader across the two actions in the sophisticated economic analysis that forms the heart of any antitrust case.

3. Developing Notice Plan to Class Members

Class Counsel developed an innovative way to ensure that the maximum possible recovery from the Settlement would flow directly to individual class members. Class Counsel knew from working with Defendants' transaction databases that some of the databases had detailed information—individual customer names, contact information, and tickets bought by tour—that could be used to provide not just individual notice but also a streamlined way for class members appearing in the databases to submit claims. Class Counsel worked closely with the Claims Administrator to design notice and claim forms that would prepopulate with information from Defendants' own transaction databases, eliminating the need for those individual class members to search for credit card records or other receipts to support their claim. This inventive method has proven to be a great success: the Claims Administrator successfully sent 345,264 PIN numbers to Class Members identified through Defendants' databases, which could be used to obtain prepopulated claim forms online.

B. The Settlement

Settlement discussions began last year with several informal discussions between the parties. *See* Carmody Decl. ¶¶ 10-11. On December 12, 2013, Judge Gorenstein held a Settlement Conference. *Id.* ¶ 12; Dkt. # 88. Prior to that conference, the parties submitted letters to the Court outlining their positions on the merits and for settlement. The parties exchanged demands and offers both before and during that conference.

The parties hired a private mediator, Antonio Piazza, to facilitate further discussions. *Id.* ¶ 13. Mr. Piazza is the principal of Mediated Negotiations, and has been involved with the settlement of over 4,000 cases since 1981, including numerous consumer class actions filed in federal court. *See* Declaration of Antonio Piazza In Support of Motion for Preliminary Approval of Settlement ("Piazza Decl."), Dkt. # 106, ¶ 2. Mr. Piazza is one of the most highly respected and competent mediators in the country.

On March 12, 2014, Mr. Piazza conducted a mediation between the parties in San Francisco. *Id.* ¶ 3. In advance of the mediation, counsel for the parties submitted detailed mediation statements setting forth their positions on the key liability and damages issues. *Id.* ¶ 4. After a spirited, full-day mediation, the parties reached an agreement, which was memorialized in a written term sheet that contained the terms of this Settlement, signed on March 12, 2014. The mediator effectively assisted the parties in coming to a fair and equitable resolution despite the rival positions taken by opposing counsel and their clients. Mr. Piazza believes that the proposed $19 million settlement is fair and eminently reasonable, and is a highly successful result for members of the proposed Class in light of the considerable risks faced by Class Plaintiffs in obtaining class certification, establishing liability, and securing adequate damages for members of the Class. *Id.* ¶ 10.

Defendants have agreed to pay $19,000,000 in exchange for dismissals with prejudice and a release of claims. *See* Declaration of William Christopher Carmody in Support of Final Approval of Settlement with Defendants, Ex. 1. No unclaimed funds will revert to Defendants; instead, any residual funds will be given to the Government Entities. *Id.* ¶ 19. The Settlement Agreement also provides that "Class Plaintiffs' Counsel may, at their discretion and election, choose to submit an application or applications to the Court (the 'Fee and Expense Application') for distributions to them from the Gross Settlement Fund, for an award of attorneys' fees or reimbursement of expenses incurred in connection with prosecuting the Action, and for an award of an incentive compensation to the Class Plaintiffs, not to exceed $20,000 for each Class Plaintiff, for their efforts in prosecuting this case." *Id.* The notice sent to the class similarly informed class members that "Class Counsel will ask the Court for attorneys' fees up to one-third of the Settlement Fund, plus reimbursement of expenses." (Dkt. # 105-6, Question 17). The notice also advised Class members that Class Counsel would apply for service awards to Class plaintiffs. *See id.*

C. Efforts and Risks of Class Counsel and Plaintiffs

1. Attorney Time and Lodestar

In this entirely contingent action, as of August 15, 2014, SG collectively spent 4,638.25 hours, representing a lodestar of $1,873,699, and advanced expenses of $863,629,699, in investigating, prosecuting and settling these claims. *See* Carmody Decl. ¶¶ 19-20, 24. This lodestar is calculated at historical rates and is not adjusted upward to reflect current hourly rates, as courts permit. All time spent litigating this matter was reasonably necessary and appropriate to prosecute the action, and the results achieved further confirm that the time spent on the case was proportionate to the amounts at stake. *See* Carmody Decl. ¶ 20. Based on a one-third fee

($6,270,000), class counsel's aggregate lodestar yields a "crosscheck" multiplier of 3.35, much less than the multipliers approved in other cases, as further discussed below.

2. Counsel's Expenses

SG advanced $863,629.46 in costs and expenses on behalf of the Class. Carmody Decl. ¶ 24. The expenses are the type of expenses typically billed by attorneys to paying clients in the marketplace and include such costs as fees paid to experts, mediation fees, notice costs, computerized research, document production and storage, court fees, reporting services, and travel in connection with this litigation. *Id.*

LEGAL STANDARD

Federal Rule of Civil Procedure 23(h) provides: "In a certified class action, a court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." The Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Courts in this Circuit have consistently adhered to the principle that "where an attorney creates a common fund from which members of a class are compensated for a common injury, the attorneys who created the fund are entitled to 'a reasonable fee – set by the court – to be taken from the fund.'" *In re Interpublic Sec. Litig.*, No. Civ. 6527 (DLC), 2004 U.S. Dist. LEXIS 21429, at *30-*31 (S.D.N.Y. Oct. 27, 2004) (citation omitted). "The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing,* 444 U.S. at 478.

"Courts may award attorneys' fees in common fund cases under either the 'lodestar' method or the 'percentage of the fund' method." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). "The lodestar method multiplies hours reasonably expended against

a reasonable hourly rate." *Id.* "Courts in their discretion may increase the lodestar by applying a multiplier based on factors such as the riskiness of the litigation and the quality of the attorneys." *Id.* "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." *Id.* (quotations and citation omitted). "Irrespective of which method is used, the '*Goldberger* factors' ultimately determine the reasonableness of a common fund fee." *Id.* The *Goldberger* factors, which are weighed in the discretion of the Court, include:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000) (citation omitted).

"In applying these criteria, a Court essentially makes … a qualitative assessment of a fair legal fee under all the circumstances of the case." *Marsh & McLennan*, 2009 WL 5178546, at *15 (citation and internal quotation omitted). Thus, the court should "approximate the reasonable fee that a competitive market would bear." *Johnson v. City of New York*, No. 08-cv-3673 (KAM)(LB), 2010 WL 5818290, at *4 (E.D.N.Y. Dec. 13, 2010) (citing *McDaniel v. County of Schenectady*, 595 F.3d 411, 420 (2d Cir. 2010)); *see also McDaniel,* 595 F.3d at 422 (district court's focus should be "on mimicking a market"). "[T]he percentage approach most closely approximates the manner in which private litigants compensate their attorneys in the marketplace contingency fee model." *In re Lloyd's Am. Trust Fund Litig.*, No. 96-cv-1262 (RWS), 2002 WL 31663577, at *26 (S.D.N.Y. Nov. 26, 2002).

ARGUMENT

A. SG'S FEE REQUEST IS REASONABLE

1. One-Third Is a Reasonable Percentage of the Common Fund

"The trend in this Circuit is to use the percentage of the fund method to compensate attorneys in common fund cases like this one." *Morris v. Affinity Health Plan, Inc.*, 859 F.Supp.2d 611, 622 (S.D.N.Y. 2012) (Carter, J.). The Second Circuit has explained that the percentage method "'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation,'" and noted that the "trend in this Circuit is toward the percentage method." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (citation omitted); *see also Fogarazzo v. Lehman Bros., Inc.*, No. 03 Civ. 5194 (SAS), 2011 WL 671745, at *2 (S.D.N.Y. Feb. 23, 2011) ("The trend in this Circuit is toward the percentage method"); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at * 14 (S.D.N.Y. Dec. 23, 2009) (McMahon, J.) ("[T]he percentage method continues to be the trend of district courts in this Circuit and has been expressly adopted in the vast majority of circuits").

The percentage method is especially appropriate in cases such as this one where individual class members lack the financial incentives to pursue litigation on their own. In the context of wage and hour cases, this Court explained that "[w]here relatively small claims can only be prosecuted through aggregate litigation, and the law relies on prosecution by 'private attorneys general,' attorneys who fill the private attorney general role must be adequately compensated for their efforts" and the use of the percentage method is appropriate for individual class members who "cannot afford to retain counsel at fixed hourly rates . . . yet they are willing to pay a portion of any recovery they may receive in return for successful representation." *Morris*, 859 F. Supp. 2d at 622. While the Government Entities also filed suit against

Defendants, Class Plaintiffs are the only plaintiffs who seek monetary relief that will directly go to consumers, who cannot reasonably retain counsel individually to pursue their small claims.

2. One-Third is Well Within the Range of Reasonable Percentages

As this Court has explained, the requested fee of one-third of the Fund "is reasonable and consistent with the norms of class litigation in this circuit." *Morris*, 859 F. Supp. 2d at 623 (quoting *Gilliam v. Addicts Rehabilitation Center Fund*, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008)). The requested one-third fee is less than the 35% that SG would obtain on the open market under its standard contingency deal in these circumstances. *See* Carmody Decl. ¶ 18; *see also id.* ¶23. "Although *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany* does not address a common fund fee petition, it supports class counsel's request for one-third of the fund because 'reasonable, paying client[s],' 522 F.3d 182, 191 (2d Cir. 2008), typically pay one-third of their recoveries under private retainer agreements." *Morris*, 859 F. Supp. 2d at 623.

Numerous other courts in the Second Circuit have awarded similar fees in cases with similar or larger funds. *See, e.g., Central States Southeast and Southwest Areas Health and Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229 (2d Cir. 2007) (affirming 30% award of a $42.5 million settlement); *Anwar v. Fairfield Greenwich Ltd.,* Master File No. 09-cv-118 (VM), 2012 WL 1981505 *3 (S.D.N.Y. June 1, 2012) (Marrero, J.) (fee request of $2,568,664.56, representing 33% of the settlement fund, "is well within the percentage range that courts within the Second Circuit have awarded in other complex litigations"); *In re Sadia S.A. Sec. Litig*., No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *3 (S.D.N.Y. Dec. 28, 2011) (awarding 30% of $27 million settlement fund); *Hayes v. Harmony Gold Mining Co.*, No. 08 Civ. 03653 (BSJ)(MHD), 2011 WL 6019219, at *1 (S.D.N.Y. Dec. 2, 2011) (awarding 33.3% of $9 million settlement fund), *aff'd*, 509 F. App'x 21 (2d Cir. 2013); *In re Initial Pub. Offering*

Sec. Litig., 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33-1/3% fee of $510 million net settlement fund); *In re Priceline.com, Inc. Sec. Litig.*, 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (awarding 30% of $80 million fund); *In re Oxford Health Plans, Inc. Sec. Litig.*, No. MDL–1222 (CLB) slip op. at 7 (S.D.N.Y. June 12, 2003) (awarding 28% of $300 million fund); *Maley v. Del Global Tech. Corp.,* 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (awarding 1/3 of settlement fund); *Newman v. Caribiner Int'l Inc.*, No. 99 Civ. 2271 (S.D.N.Y. Oct. 19, 2001) (same); *Lemmer v. Golden Books Family Entm't Inc.*, No. 98 Civ. 5748 (S.D.N.Y. Oct. 12, 1999) (same); *Maywalt v. Parker & Parsley Petroleum Co.*, 963 F. Supp. 310, 313 (S.D.N.Y. 1997) (same), *aff'd sub nom., Olick v. Parker & Parsley Petroleum Co.*, 145 F.3d 513 (2d Cir. 1998); *Moelis v. Hyperion Capital Mgmt. Inc.*, No. 94 Civ. 3328 (S.D.N.Y. Oct. 16, 1997) (same); *In re JWP, Inc. Sec. Litig.*, No. 92 Civ. 5815 (S.D.N.Y. Jan. 24, 1997) (same); *In re In-Store Adver. Sec. Litig.*, No. 90-CIV 5594 (S.D.N.Y. Dec. 18, 1996) (same); *In re SLM Int'l, Inc. Sec. Litig.*, No. 94 Civ. 3327 (S.D.N.Y. July 23, 1996) (same); *In re Columbia Sec. Litig.*, No. 89 Civ. 6821 (S.D.N.Y. Feb. 15, 1995) (same); *In re Wedtech Sec. Litig.*, No. M21-46, MDL 735 (S.D.N.Y. July 30, 1992) (same); *In re Allstar Inns Sec. Litig.*, No. Civ. A. 88-CIV 9282, 1991 WL 352491 (S.D.N.Y. Nov. 20, 1991) (35%).

Class Counsel respectfully submit that in light of the result achieved here in the face of significant risks, the requested one-third fee is reasonable.

B. The Requested Fee is Reasonable Under Lodestar "Crosscheck"

The Second Circuit also permits courts to utilize a lodestar "crosscheck" to further test the reasonableness of a percentage-based fee. *See Goldberger*, 209 F.3d at 50. The "lodestar" is calculated by multiplying the number of hours reasonably expended on the litigation by each particular attorney or paralegal by their current hourly rate, and totaling the amounts for all timekeepers. Additionally, "[u]nder the lodestar method of fee computation, a multiplier is

typically applied to the lodestar." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004). "The multiplier represents the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *Id.* (citing *Goldberger*, 209 F.3d at 47); *Savoie*, 166 F.3d at 460.[1] Unlike many firms on the class action side, SG represents plaintiffs and defendants and a small percentage of its cases are class cases; when entering into result-based fee deals, SG strives for at least a 3 to 1 return on its investment in time to account for the risks of litigation and the opportunities forgone, including the opportunity to work on hourly billing cases that provide a steady and predictable income stream. *See* Carmody Decl. ¶ 23.

In this entirely contingent action, as of August 15, 2014, SG collectively spent 4,638.25 hours, representing a lodestar of $1,873,699, and advanced $863,629.46 in expenses, in investigating, prosecuting and ultimately settling these claims. *See* Carmody Decl. ¶¶ 19-20, 24. This lodestar is calculated at historical rates and is not adjusted upward to reflect current hourly rates, as courts permit.[2] Based on a one-third fee ($6,270,000), class counsel's aggregate lodestar yields a "crosscheck" multiplier of 3.35.

"Courts regularly award lodestar multipliers from 2 to 6 times lodestar" in this Circuit, *Morris*, 859 F.Supp.2d at 623-24, and regularly award lodestar multipliers significantly greater than the 3.35 multiplier sought here. *See e.g., Maley*, 186 F. Supp. 2d at 369 (awarding fee equal

[1] "Where the lodestar fee is used as 'a mere cross-check' to the percentage method of determining reasonable attorneys' fees, 'the hours documented by counsel need not be exhaustively scrutinized by the district court.'" *WorldCom,* 388 F. Supp. 2d at 355 (quoting *Goldberger*, 209 F.3d at 50).

[2] The Supreme Court and Second Circuit have both approved the use of current rates, rather than historic rates, in the lodestar calculation. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998). Using current rates helps "compensate for the delay in receiving compensation, inflationary losses, and the loss of interest." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989) (citation omitted). Class Counsel's reported time is recorded in historical hourly rates, which are generally lower than current hourly rates.

to a 4.65 multiplier as "well within the range awarded by courts in this Circuit and courts throughout the country"); *see also In re EVCI Career Colleges Holding Corp. Sec. Litig.,* No. 05 Civ. 10240 (CM), 2007 WL 2230177, at *17 n.7 (S.D.N.Y. July 27, 2007) ("Lodestar multipliers of nearly 5 have been deemed 'common' by courts in this District."); *Morris*, 859 F.Supp.2d at 623-24 (awarding lodestar that was "3.04 times their own lodestar, and 2.01 times the total of their lodestar and Plaintiff's Counsel's lodestar combined").

Class Counsel's hourly rates are also reasonable. The blended hourly rate[3] for partners is $562.31. The blended hourly rate for associates is $313.43. The blended hourly rate for paralegals is $257.29. Carmody Decl. ¶ 21. These rates are consistent with other awards in this District.[4] *See Brennan v. N.Y. Law Sch.*, No. 10 Civ. 0338, 2012 U.S. Dist. LEXIS 135095, at *13 (S.D.N.Y. Aug. 15, 2012) (courts "should generally use the hourly rates employed in the district in which the reviewing court sits in calculating the presumptively reasonable fee").

C. The *Goldberger* Factors Support the Requested Fee Award

The "'*Goldberger* factors' ultimately determine the reasonableness of a common fund fee," *Wal-Mart*, 396 F.3d at 121, and the Court should "approximate the reasonable fee that a competitive market would bear." *Johnson*, 2010 WL 5818290 at *4. The requested one-third fee is reasonable because it is less than the 35% of the gross recovery that SG would obtain on the open market under its standard contingency deal in these circumstances. *See* Carmody Decl. ¶ 18; *see also Morris*, 859 F. Supp. 2d at 623 (approving one-third fee request partly because

[3] The blended rate for a particular group is calculated by taking the total lodestar for that group and dividing it by the hours spent by that group.

[4] One source commonly used by courts in this Circuit is the National Law Journal Survey to determine the fairness of fee rates. *See, e.g.*, *Williamsburg Fair Hous. Comm. v. N.Y. City Hous. Auth.*, No. 76 Civ. 2125, 2005 U.S. Dist. LEXIS 5200, at *35 (S.D.N.Y. Apr. 4, 2005) (observing that "a recent billing survey made by the National Law Journal shows that senior partners in New York City charge as much as $ 750 per hour and junior partners charge as much as $ 490 per hour"). The National Law Journal survey for 2012 shows that partners at New York firms charge between $330 to $1200 and associates range between $215 to $760 and a 2013 survey shows that nearly 20% of large firms had at least one partner changing more than $1,000 per hour. *See* Carmody Decl. Ex. 1.

clients "typically pay one-third of their recoveries under private retainer agreements"); *In re Lloyd's*, 2002 WL 31663577, at *26 (looking to "the manner in which private litigants compensate their attorneys in the marketplace contingency fee model"). Each of the *Goldberger* factors also weighs strongly in favor of the one-third fee.

1. Time and Labor Expended By Counsel (*Goldberger* Factor 1)

The first *Goldberger* factor, which addresses the "the time and labor expended by counsel," strongly supports approval of the requested fee. SG committed substantial time and resources to achieve an excellent recovery in this case. As noted above and in the Declaration, SG spent 4,638.25 hours prosecuting this case. SG conducted extensive fact discovery, including participation in 29 depositions; litigated a fiercely contested class certification motion where the Defendants raised an array of legal and factual contentions; synthesized the Defendants' transaction data (housed on several different databases) and was the first to devise a damages model; presented a detailed and fact-intensive expert report on damages and predominance; deposed Defendants' expert and prepared for and defended the depositions of Plaintiffs' expert, and engaged in two full-day mediations. The time and lodestar figures will only increase as counsel prepare for final-approval proceedings, handle claims administration issues, and continue to respond to class member inquiries. The reasonableness of the fee request is supported by the substantial amount of time and resources dedicated to the litigation by SG.

2. Magnitude and Complexity of the Litigation (*Goldberger* Factor 2)

The second *Goldberger* factor, which addresses the "the magnitude and complexities of the litigation," also strongly supports approval of the requested fee. The requested fee award is also reasonable in light of the magnitude and complexity of the litigation. Antitrust price-fixing conspiracy cases are notoriously complex and difficult to litigate. *See, e.g., Wal-Mart,* 396 F.3d at 122 (acknowledging the district court's finding that "antitrust cases, by their nature, are highly

complex."); *In re Currency Conversion Fee Antitrust Litig.,* 263 F.R.D. 110, 129 (S.D.N.Y. 2009) *aff'd sub nom. Priceline.com, Inc.* v. *Silberman,* 405 F. App'x 532 (2d Cir. 2010) (noting that "antitrust cases are typically complex"); *Weseley,* 711 F. Supp. at 719 (antitrust class actions "are notoriously complex, protracted, and bitterly fought").

This case is no exception. The complaint alleges a scheme whereby Defendants—formerly the two largest providers of hop-on, hop-off bus tours in New York City—joined forces to implement fare increases they could not do separately, causing consumers to overpay for bus tickets. In Defendants' answer, mediation submissions and opposition to class certification, Defendants raised many defenses, including market definition and market power issues, barriers to entry defenses, damages issues, and defenses to class certification, among others. The scope of discovery, and dueling economic expert reports on the impact of the merger and other factors on bus price changes, confirms the complexity of the litigation. If the litigation had not been settled, SG would have faced additional obstacles as Defendants continued to mount a vigorous defense. There would have been further fact discovery, expert discovery, contested *Daubert* motions and motions for summary judgment, and a trial that would require substantial fact and expert testimony, and certain appeals thereafter. In sum, the "magnitude and complexity" of this litigation weighs strongly in favor of the requested fee.

3. The Risk of the Litigation (*Goldberger* Factor 3)

The third *Goldberger* factor, which addresses the "risk of the litigation," also strongly supports approval of the requested fee. The Second Circuit has identified "the risk of success as 'perhaps the foremost' factor to be considered in determining [a reasonable fee award]." *Goldberger*, 209 F.3d at 54 (citation omitted); *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 592 (S.D.N.Y. 2008) ("Courts have repeatedly recognized that 'the risk of the litigation'

is a pivotal factor in assessing the appropriate attorneys' fees to award to plaintiffs' counsel in class actions."). SG confronted and overcame a host of significant risks in reaching the Settlement.

"Contingency risk is the principal, though not exclusive factor, courts should consider in their determination of attorneys' fees." *In re Dreyfus Aggressive Growth Mut. Fund Litig.*, No. 98 CV 4318 (HB), 2001 WL 709262, at *6 (S.D.N.Y. June 22, 2001); *Flag Telecom*, 2010 WL 4537550, at *27 ("Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award."); *In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (it is "appropriate to take this [contingent-fee] risk into account in determining the appropriate fee to award"). Unlike counsel for the Defendants, who are paid hourly rates and reimbursed for their expenses on a regular basis, SG has not been compensated for any of its time (above 4,600 hours) with a lodestar value of over $1.8 million, or for any of its more than $850,000 in litigation expenses incurred since the case commenced. Moreover, SG would not have been compensated for its time or expenses at all had it been unsuccessful in this litigation. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974) ("[D]espite the most vigorous and competent of efforts, success is never guaranteed."); *Marsh & McLennan*, 2009 WL 5178546, at *18 ("In numerous class actions . . . plaintiffs' counsel have expended thousands of hours and advanced significant out-of-pocket expenses and received no remuneration whatsoever." (citing examples of cases dismissed)).

The risk of no recovery in complex cases of this type is real, and is heightened when Plaintiffs' counsel press to achieve the very best result for those they represent. Moreover, in antitrust class actions in particular, "[t]he risks of establishing liability and damages at trial, and

of maintaining the Class throughout the trial . . . militate in favor of approval [of settlement]." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 511 (E.D.N.Y. 2003); *see also*; *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (antitrust class actions "are notoriously complex, protracted, and bitterly fought").

This case is no exception. For example, although Plaintiffs allege that Defendants' merger gave them sufficient market power to raise and sustain prices above a competitive level, Defendants have vigorously disputed that there is any identifiable market, that the prices are supracompetitive, and that there are any barriers to entry into the alleged market. Defendants also vigorously contested the conclusions of Plaintiffs' damages expert in quantifying the alleged overcharge, argued that relevant benchmarks show that the prices of the relevant tours have been below the prices that the benchmarks indicate would have existed without the joint venture, and asserted that Plaintiffs' damages expert's model returns false positives. Defendants also contested the prerequisites to class certification. Although Plaintiffs dispute these defenses, they posed real risks.

Even if lead plaintiffs here had successfully certified a class, defeated Defendants' anticipated summary judgment motions and prevailed at trial on both liability and damages, no judgment would have been secure until after the rulings on the inevitable post-judgment motions and appeals became final—a process that would likely take years. A firm's success in contingent litigation, such as this, is never assured, and there are many class actions in which plaintiffs' counsel expended tens of thousands of hours and received nothing for their efforts. *See, e.g.*, *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998) ("[T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal.").

The only certainties from the outset of this litigation were that there would be no fee without a successful result, and that a successful result, if any, could be achieved only after lengthy and difficult effort. SG therefore respectfully submits that the fully contingent nature of their retention in this high-risk action weighs strongly in favor of the requested fee.

4. The Quality of the Representation (*Goldberger* Factor 4)

The third *Goldberger* factor, which addresses the "the quality of representation," also strongly supports approval of the requested fee. Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award and in assessing the quality of the representation. *See*, *e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). SG respectfully submits that the $19,000,000 cash settlement achieved in face of the complexity of the litigation, the relatively small size of each plaintiff's damages, and the real risk that the case could be dismissed and/or the class not certified, evidences the quality of SG's representation. Unlike many class action settlements, the $19 million settlement is for cash, not coupons or other forms on non-monetary relief. Further, the settlement does not allow for unclaimed proceeds to revert back to the Defendants under any circumstances. Rather, any remaining proceeds, if any, will go to the Department of Justice, Antitrust Division, and/or the New York Attorney General's Office.

Regarding the skills of SG, the Court previously appointed SG as Class Counsel in contested motion practice because the firm met all the requirements of Rule 23(g). *See Morris*, 859 F.Supp.2d at 621-22 (noting that Rule 23(g) requires the court to consider "the work counsel has done in identifying or investigating potential claims in the action, ... counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, ... counsel's knowledge of the applicable law, and ... the resources counsel will

commit to representing the class") (internal quotation marks omitted)).

The SG lawyers working on this case are experienced antitrust lawyers who have substantial experience prosecuting large-scale antitrust class actions. *See* Carmody Decl. ¶ 3. The work that SG has performed in litigating and settling this case, and the substantial resources they have committed to prosecuting the case, demonstrates their commitment to the Class and to representing the Class's interests. *See Morris*, 850 F.Supp.2d at 622.

The high quality of Class Counsel is further reflected in the aptitude of their adversaries. Defendants are represented by skilled and highly regarded counsel from prestigious firms (Covington & Burling and Paul Hastings LLP) with well-deserved reputations for vigorous advocacy in the defense of complex civil cases. Courts have repeatedly recognized that the caliber of the opposition faced by plaintiffs' counsel should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance, and in this case it supports approval of the requested fee. *See*, *e.g.*, *Anwar*, 2012 WL 1981505, at *2 (considering "the quality and vigor of opposing counsel"); *Marsh & McLennan*, 2009 WL 5178546, at *19 (reasonableness of fee was supported by fact that defendants "were represented by first-rate attorneys who vigorously contested Lead Plaintiffs' claims and allegations"); *Marsh ERISA Litig.*, 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 sum, all of the customary metrics indicative of high quality of representation weigh in favor of the requested fee.

5. Requested Fee In Relation to the Settlements (*Goldberger* Factor 5)

The fifth *Goldberger* factor, which addresses "the requested fee in relation to the settlement," also strongly supports approval of the requested fee. In *Costco*, the court held that "the fact that the requested fee is comparable to fees that courts have found reasonable . . .

weighs in favor of the fee's reasonableness." 705 F. Supp. 2d 244. As discussed above, the proposed award represents one-third of the value of the Settlement, which is well within the range of fees awarded by courts in this Circuit in similarly-sized class actions.

6. Public Policy Considerations (*Goldberger* Factor 6)

Finally, the sixth *Goldberger* factor, which addresses "public policy considerations," strongly supports approval of the request fee. Public policy considerations strongly favor incentivizing skilled private attorneys to undertake this type of litigation, especially since the action is on behalf of small claimants who lack the financial incentive to obtain a recovery on their own behalf. *See Anwar*, 2012 WL 1981505, at *3 ("The Supreme Court has recognized that absent a class action, small claimants individually may lack the economic resources to vigorously litigate their rights. Attorneys who take on class action matters on a contingent fee basis, enabling litigants to pool their claims, provide a service to the judicial process." (citing *Eisen v. Carlisle & Jacqueline,* 417 U.S. 156, 161, 94 S.Ct. 2140 (1974)); *see also WorldCom*, 388 F. Supp. 2d at 359 ("[T]o 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"); *Hicks v. Stanley*, No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("'To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding'" (citation omitted)). These policy interests are strong in this case, where an individual plaintiff's damages may only be $5 or $10, far less than the millions of dollars in time and money needed to litigate a case of this kind.

They are also especially salient in the antitrust context, where the Supreme Court has long recognized that private actions are needed to supplement governmental actions to enforce

the antitrust law. *See Wal-Mart Stores,* 396 F.3d at 122 ("[I]t is especially important to provide appropriate incentives to attorneys pursuing antitrust actions because public policy relies on private sector enforcement of the antitrust laws."). This need is felt here: while the Government Entities pursued antitrust allegations in this case, only the plaintiffs are pursuing treble damages remedies under the antitrust laws, and the Government Entities did not bring an action for damages that would directly go to consumers.

* * *

The reaction of the Settlement Class to date also supports the reasonableness of a requested fee. *See Veeco*, 2007 WL 4115808, at *10; *Maley*, 186 F. Supp. 2d at 374. Commencing on July 16, 2014, the Claims Administrator successfully sent 345,264 PIN numbers to Class Members identified through defendants' databases, which could be used to obtain prepopulated claim forms online, and implemented a Notice Program that reach an estimated 80% of the domestic target audience most likely to contain Class Members. These notices notified them that SG would seek up to one-third of the Settlement Amount and payment in litigation expenses. Although the September 5, 2014 deadline for objections to the requested fee has not yet passed, no objections have been received to date and there has been only one request for exclusion from the Class.

COUNSEL'S EXPENSES SHOULD BE REIMBURSED

It is well established that counsel who create a common fund are entitled to an award of the expenses that they advance to a class. *LeBlanc-Sternberg v. Fletcher*, 143 F.3d. 748, 763 (2d Cir. 1998); *Anwar*, 2012 WL 1981505, at *3 (granting expenses); *In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011); *Veeco*, 2007 WL 4115808, at *10.

Plaintiffs' counsel request reimbursement of all litigation costs and expenses advanced during this litigation, which currently total $863,629.46. The expenses advanced in this litigation are described in the papers filed in support of this application. *See* Carmody Decl. ¶ 24. They are the type of expenses typically billed by attorneys to paying clients in the marketplace and include such costs as fees paid to experts, mediation fees, notice costs, computerized research, document production and storage, court fees, reporting services, and travel in connection with this litigation. *Anwar*, 2012 WL 1981505, at *3 (reimbursing expenses such as "mediation fees, expert witness fees, electronic legal research, photocopying, postage, and travel expenses, each of which is the type 'the paying, arms' length market' reimburses attorneys" (quoting *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004)). The fact that Plaintiffs' Counsel were willing to expend their own money, where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary.

These expenses were reasonable and necessary in this litigation, and have been expended for the direct benefit of the Class. *See* Carmody Decl. ¶ 24. "Courts routinely note that counsel is entitled to reimbursement from the common fund for reasonable litigation expenses." *Anwar*, 2012 WL 1981505, at *3 (citing *Reichman v. Bonsignore, Brignati & Mazzotta, P.C.*, 818 F.2d 278, 283 (2d Cir. 1987)); *see, e.g.*, *Visa Check*, 297 F. Supp. 2d at 525 (noting that it is common practice to grant expense request and awarding $18.7 million in expenses where the "lion's share of these expenses reflects the cost of experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, on-line legal research, and travel expenses."); *In re Arakis Energy Corp. Sec. Litig.,* No. 95-cv-3431(ARR), 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001) ("Courts in the Second Circuit normally grant expense requests in

common fund cases as a matter of course."); *In re Vitamins Antitrust Litig.*, No. 99-197(TFH), MDL No. 1285, 2001 WL 34312839, at *13 (D.D.C. July 16, 2001) ("[A]n attorney who has created a common fund for the benefit of the class is entitled to reimbursement of . . . reasonable litigation expenses from that fund . . . . Courts have routinely awarded expenses for which counsel would normally directly bill their clients."). These expenses should be reimbursed.[5]

SERVICE AWARDS FOR NAMED PLAINTIFFS ARE APPROPRIATE

Request is also made for payment out of the settlement funds of incentive compensation awards for each of the two class representatives in the amount of $20,000, totaling $40,000.[6] These plaintiffs have generously contributed their time for the benefit of the Class. The named plaintiffs spent time searching for documents and reviewing pleadings. They spent hours preparing for and attending their videotaped depositions, where Defendants' counsel probed them in depth about the case and on an array of personal matters, and Ms. Nobel traveled from Denver to New York for hers. Each of the plaintiffs also participated in a lengthy settlement conference before Judge Gorenstein. They also evaluated and approved the final settlement reached with the assistance of Mr. Piazza, and have kept abreast of the case through to the present date. The Notice to the Class advised Class members that Class Counsel would apply for incentive awards of up to $20,000 each. *See* Doc. No. 105-6, Question 17. To date, no objection has been received.

"Courts consistently approve awards in class action lawsuits to compensate named plaintiffs for the services they provide and burdens they endure during litigation." *Anwar*, 2012

[5] The Settlement also provides that Notice and Administrative Costs, Taxes and Expenses and Escrow Agent Costs shall be paid from the Gross Settlement Fund as they become due. Settlement Agreement ¶¶ 9, 16. Class Counsel seeks the Court's approval to continue making those payments as they become due. Current amounts are set forth in the Carmody Declaration, ¶ 25.

[6] The named plaintiffs are Natasha Bhandari and Tracey L. Nobel.

WL 1981505, at *3. Courts have approved similar incentive awards to compensate named plaintiffs for services provided during the litigation. *See, e.g.*, *Currency Conversion,* 263 F.R.D. at 131 (awarding $350,000 incentive awards to the named representatives in class action antitrust lawsuit, ranging from $3,000 to $45,000 per representative); *In re Remeron End-Payor Antitrust Litig.*, No. Civ. 02-2007 FSH, Civ. 04-5126 FSH, 2005 WL 2230314, *15 (D. N.J. Sep 13, 2005) (granting incentive awards of $30,000 each to two plaintiffs); *In re Linerboard Antitrust Litig.*, No. MDL 1261, Civ.A. 98-5055, Civ.A. 99-1000, Civ.A. 99-1341, 2004 WL 1221350, at *18 (E.D.Pa. June 2, 2004) (approving $25,000 to each representative of the classes); see also *Anwar*, 2012 WL 1981505 *4 (awarding $25,000 to class representative); *Duchene v. Michael Cetta, Inc.,* No. 06 CIV 4576 (PAC)(GWG), 2009 WL 5841175, at *9 (S.D.N.Y. Sept. 10, 2009) (award of $25,000 representing 0.8% of $3,150,000 settlement amount); (award of $ 25,000 representing 0.8% of $ 3,150,000 settlement amount); *Dornberger v. Metro. Life Ins. Co*., 203 F.R.D. 118 (S.D.N.Y. 2001) (noting case law supports payments of between $2,500 and $85,000 to representative plaintiffs in class actions); *Yap v. Sumitomo Corp. of Am.*, No. 88 Civ. 700 (LBS), 1991 WL 29112, at *9 (S.D.N.Y. Feb. 22, 1991) ($30,000 incentive awards to the named plaintiffs). Here, the total incentive awards requested represent a mere 0.2% of the settlement fund.

CONCLUSION

For the reasons set forth herein, SG respectfully requests that this Court award its requested fees in the amount of $6,270,000, expenses in the amount of $863,629.46, and incentive compensation awards in the amounts proposed.

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Respectfully submitted,

/s/ William Christopher Carmody

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served on counsel of record via Pacer on August 15, 2014.

/s/ William Christopher Carmody
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