UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS LAUMANN, et al., representing themselves and all others similarly situated, Plaintiffs, v. NATIONAL HOCKEY LEAGUE, et al., Defendants.	12-cv-1817 (SAS) ECF Case

PLAINTIFFS' APPLICATION FOR AN AWARD OF ATTORNEYS' FEES, SERVICE AWARDS, AND REIMBURSEMENT OF EXPENSES

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In light of this Court's June 16, 2015 Preliminary Approval Order, and in advance of the August 31, 2015 Fairness Hearing, lead counsel Langer Grogan & Diver, P.C. respectfully submits this application and the accompanying declarations in support of an award of $6.5 million in attorneys' fees and expenses reasonably incurred in this action in the amount, as well as approval of service awards for class representatives Thomas Laumann, Robert Silver, David Dillon and Garrett Traub of $10,000 each.[1]

I. INTRODUCTION

Plaintiffs request that the Court award the requested amounts for the following reasons:

First, the results Plaintiffs and their counsel obtained align directly with the goals of the litigation, achieving both increased choices and lowered costs for consumers of NHL hockey broadcasts. A conservative valuation of these settlement benefits places their worth at between $20.9 and $28.7 million. *See* Declaration of Professor Ian Ayers ("Ayers Decl."), ¶¶ 14-29. The settlement thus achieves a substantial portion of the relief sought on behalf of the class.

Second, Plaintiffs structured the settlement to ensure that the money paid to the attorneys is separate from, and does not in any way reduce, the benefits obtained by class members. While the request is analogous to a percentage of a common fund, the award will be paid by the Defendants and does not diminish the relief provided to the class. The parties did not broach the topic of fees in the negotiations until they had reached an agreement in principal on the substantive terms of the settlement, and Class Counsel emphasized during the negotiations that the outcome of the fee negotiation would have no impact on the relief afforded to the class. *See* Declaration of Howard Langer ("Langer Decl."), at ¶ 8.

[1] This motion is made by Lead Counsel Langer Grogan & Diver, P.C. together with Plaintiffs' Counsel Klein Kavanagh Costello, LLP, Boni & Zack LLC, Cohen Milstein Sellers & Toll PLLC, Kohn, Swift & Graf, P.C., Motley Rice, LLC, and Pomerantz, LLP (collectively referred to as "Class Counsel") on behalf of all Plaintiffs.

Third, the award sought represents a compromise whereby Defendants will pay an amount that is in line with Plaintiffs' lodestar and actual out-of-pocket expenses. As detailed in Plaintiffs' declarations and supporting papers, the overall lodestar expended in connection with the *Laumann* litigation was $5.75 million using their attorneys' current hourly rates and $5.11 million using their historic rates. *See* Declaration of David White ("White"), Exs. C and D. Class Counsel also advanced $1.32 million in litigation expenses without any assurance that they would ever be reimbursed. *See id*., Ex. E. The amount here sought ($6.5 million) represents more than $500,000 less than Plaintiffs' counsel's combined fees and expenses. Counting only the attorneys' fees submitted by plaintiffs' counsel ($5.7 million), the percentage is between sixteen and twenty-one percent of the range of values estimated by Dr. Ayres. *See* Declaration of Stephen A. Saltzburg In Support of Plaintiffs' Petition for An Award of Attorneys' Fees and Expenses ("Saltzburg Dec."), ¶ 12.

The request is also reasonable because Class Counsel was able to achieve efficiencies by prosecuting simultaneously both the MLB and NHL matters.[2] Class Counsel is only seeking 50% of the time and expenses that applied to both matters. Had Class Counsel only pursued the NHL matter, the time and expenses applied for here would be significantly greater.

Fourth, Class Counsel have performed the work necessary to produce the result before the Court without any payment for more than three years. The risk undertaken by counsel thus justifies the requested amount. *See* Declaration of Stephen A. Saltzburg in Support of Plaintiffs' Petition for an Award of Attorneys' Fees and Costs ("Saltzburg Decl."), § A.

Fifth, given the risks undertaken and result obtained by Class Counsel, there is a strong public policy interest supporting the award. The private enforcement of the Sherman Act by class

[2] *Garber v. Office of the Commissioner of Baseball*, 12-CV-3704, involving some of the same plaintiffs and many of the same defendants, was filed on May 9, 2012.

actions such as this one ought to be encouraged by the award of a fee that rewards and compensates the professional services undertaken to produce this result.

In addition, for the reasons discussed below, the named Plaintiffs made a significant contribution to the litigation, justifying the requested service awards.

II. BACKGROUND

The Agreement follows three years of hard-fought litigation and several months of intense negotiation.

A. Counsel Conducted a Lengthy Investigation Before Filing

Lead counsel began its investigation of the National Hockey League's broadcasting practices in October 2011, a full five months before the complaint was filed. *See* Declaration of Edward Diver ("Diver Decl."), at ¶ 2. During this five-month period, counsel spent considerable time investigating the myriad of issues involved in the cases. *Id*. at ¶ 3.

Five months of investigation was necessary here because the case presented a uniquely complicated factual situation, involving a web of interrelated agreements between and among the teams and the league, national broadcasters, local regional sports networks ("RSNs") and over-the-air stations, and multichannel video programming distributors ("MVPDs"). Diver Decl., ¶ 4.[3] Understanding these complex relationships and the various rules and restraints imposed at various levels of production and distribution was critical to the case, as was understanding the ownership and control of the relevant entities. *Id*. Lead Counsel researched these relationships, which were set out in the initial complaint, before filing suit. *Id*.

The case also presented a unique set of potential legal obstacles to relief. Counsel did not agree to prosecute the action until it was satisfied that consumers would be able to defeat a

[3] The Court itself has recognized that the case is "unusually complex." *Laumann v. Nat'l Hockey League*, No. 12-CV-1817, 2015 WL 3542322, at *10 (S.D.N.Y. May 29, 2015).

number of likely defenses, including, for example, that the plaintiffs would not be able to establish antitrust standing, that the challenged practices were protected by various statutes, regulations, and exceptions to the antitrust laws, and that the leagues' status as joint ventures protected them from liability. Diver Decl., ¶ 6. Class counsel also investigated the many issues involved with certifying the actions for class treatment, including the applicability of any arbitration clauses, the requirements of Rule 23, and the ability to establish damages. *Id*.

While doing this research, Lead Counsel began assembling a team of counsel to assist them in prosecuting the case, including Cohen Milstein Sellers & Toll PLLC, Kohn Swift & Graf P.C., Klein Kavanagh Costello LLP, and Pomerantz LLP. Diver Decl., ¶ 7. While these firms ultimately determined to go forward and have continued to participate as counsel in these cases (as have Boni & Zack LLC and Motley Rice LLC, which subsequently joined the case), a number of other law firms declined the invitation to participate in the lawsuit in light of the risks associated with so complex a challenge to the broadcasting practices at issue. *Id*., ¶ 8.

B. Counsel Defeated the Defendants' Initial Motions to Dismiss

Plaintiffs filed their initial complaint on March 12, 2012. On July 27, 2012, the Defendants filed their motion to dismiss the complaint in its entirety (submitting a joint memorandum with the defendants in the *Garber* action). The Defendants' eighty-six pages of briefing (including their initial memorandum and the reply memorandum, filed September 21, 2012) described a laundry-list of arguments and defenses including: (1) that, as a matter of law, their practices did not reduce output or injure competition; (2) that the plaintiffs could not claim the loss of choice as an injury; (3) that the consumers lacked antitrust standing as indirect purchasers under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); (4) that the television defendants did not participate in any cognizable antitrust conspiracy; (5) that the plaintiffs lacked antitrust standing for having injury too remote from the violation under *Associated General*

Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983); (6) that the plaintiffs lacked standing to seek injunctive relief; (7) that the broadcasts at issue are "core" or "necessary" practices of the leagues that are consequently immune from antitrust scrutiny; (8) that the leagues and clubs should be treated as a "single entity" for purposes of antitrust analysis; (9) that the teams could not conspire to restrain trade by virtue of the ownership and control of certain rights by the league; (10) that the plaintiffs had failed to allege a relevant product market; and (11) that the defendants do not possess monopoly power. *See* Mem. Supp. Defs. Mot. to Dismiss the Complaints, Docket No. 75 (S.D.N.Y. July 27, 2012).

Plaintiffs filed their opposition on September 5, 2012, responding to each of the Defendants' proposed bases for dismissal.

On December 5, 2012, the Court issued its opinion denying in large part the Defendants' motion, but granting it as to certain discrete issues as to some parties. In particular, the Court accepted that even though all Plaintiffs properly alleged antitrust injury, those who were subscribers to MVPDs but not also purchasers of out-of-market packages lacked antitrust standing because of the "remoteness" of their injuries. *Laumann v. Nat'l Hockey League*, 907 F. Supp. 2d 465, 484-85 (S.D.N.Y. 2012). The Court also found that while the Plaintiffs had adequately pleaded a claim for monopolization under Section 2 of the Sherman Act against the league defendants, those claims should be dismissed as to the television defendants. *Id*. at 491-92. The Court rejected each of Defendants' other arguments. As a result, no claims were dismissed from the case entirely—every claim alleged by the Plaintiffs could be asserted by the named plaintiffs who purchased out-of-market packages against at least some of the Defendants.

C. Counsel Conducted Significant Discovery

Discovery began shortly after the Court's decision on the motions to dismiss. The Laumann Defendants together produced nearly 300,000 documents, which constituted over 4

million pages. Diver Decl., ¶ 17. The Plaintiffs made extensive efforts to limit the time and cost of reviewing these documents by using technology to filter documents for targeted review. *Id.* Nevertheless, the review process required a very substantial investment by counsel, especially of attorney time. *Id*.

In addition to the documentary discovery, the Plaintiffs obtained and processed substantial transactional databases with millions of records. Diver Decl., ¶ 18.

A total of seventeen depositions were taken for the *Laumann* case (in addition to eleven depositions that were of baseball witnesses and baseball-only plaintiffs for the *Garber* case). Diver Decl., ¶ 19. Plaintiffs' counsel took the depositions of nine defense fact witness, including NHL Commissioner Gary Bettman and Deputy Commissioner William Daly. *Id*. Class counsel defended the depositions of the four named plaintiffs. *Id.* All four of the economic experts were deposed at the class certification stage, three taken by class counsel and one by defendants' counsel of plaintiffs' expert. *Id.*

Scores of requests for admission and interrogatories were served and answered by the parties in these cases. *Id*., ¶ 20. Fact discovery continued until January 2014, although supplemental productions continued to be made as late as February 2015. *Id*., ¶ 21.

In addition to reviewing the massive discovery record, class counsel conducted extensive research of sources outside of that record. *Id*., ¶ 22. Central to the plaintiffs' case was the extensive understanding of the history of the league, its broadcasting practices, and the application of the antitrust laws. This wide ranging research looked to such sources as scholarly books and articles, congressional history, and original sources going back to the beginning of televised sports. *Id*.

Counsel also conducted extensive research of the records in prior cases involving sports,

broadcasting, and antitrust law. *Id*., ¶ 24. Class counsel also devoted substantial resources to understanding the practices and history of broadcasting in other sports, both in the United States and internationally, as well as researching the law and economics of broadcasting more generally. *Id*., ¶ 25.

D. Counsel Rebuffed Defendants' Attempts to End the Litigation by Compelling Arbitration

From before the filing of the complaint, plaintiffs' counsel devoted extensive energy ensuring that any arbitration clauses would not present significant obstacles to litigation either on an individual or a class basis. Diver Decl., ¶ 26. When the case was filed, DirecTV's and Comcast's user agreements contained arbitration clauses; the NHL's did not, and it has never asserted arbitration as a defense in this case (although it did later add an arbitration clause to the NHL.com "Terms of Service"). *Id*., ¶ 27.

Under the governing law of the Second Circuit at the time, no plaintiff's arbitration clause was enforceable to prevent class adjudication. *Id*., ¶ 28. *In re American Express Merchants' Litigation*, 667 F.3d 204 (2d Cir. 2012), decided weeks before the filing of the present action, precluded the use of such clauses where, as here, such a clause would have the effect of preventing the effective vindication of rights under the Sherman Act. *Id*. The television defendants hoped for a reversal of that decision by the Supreme Court. The parties agreed that they would defer any arbitration motions until that case was made final. The Supreme Court granted *certiorari* November 9, 2012. *Id*.

Notwithstanding the earlier agreement, the television defendants unsuccessfully moved to stay the case pending the resolution of *Amex* in the Supreme Court. On January 7, 2013, shortly after the opening of fact discovery, the television defendants jointly moved to stay the proceedings pending the Supreme Court's resolution of *Amex*. *Id*., ¶ 29. The Defendants argued

that that case may be determinative of the application of certain plaintiffs' arbitration clauses, and that delaying discovery would avoid wasting resources. The Plaintiffs opposed the motion on the basis that the result of *Amex* would have no practical effect on the litigation, because even if the arbitration clauses at issue were enforceable, they would apply only to the claims against certain defendants. *Id*. No party and no claim would be eliminated from the case, it would only effect which claims particular plaintiffs had against particular defendants.

On March 6, 2013, the Court denied the television defendants' motion, concluding that "staying the case would merely delay litigation and likely result in greater inefficiencies to the Court and litigants than simply permitting the litigation to proceed on schedule." 2013 WL 837640, at *3.

The Supreme Court reversed the Second Circuit on June 20, 2013. *Am. Express v. Italian Colors Rest*., 133 S. Ct. 2304 (2013). Subsequently, Plaintiff Silver, who had purchased NHL Center Ice through DirecTV, entered into an agreement to stay his claims against DirecTV, which was entered as a stipulation by this Court on August 9, 2013 (Docket 130). Comcast did not agree to enter into a similar agreement with Garrett Traub, who had purchased Center Ice through Comcast. Instead, on August 19, 2013, Comcast filed a motion to compel arbitration and stay the claims of all plaintiffs, including the plaintiffs who had no contractual relationship with Comcast. It argued that it was entitled to enforce any arbitration clause of any defendant in the case, and that even those claims by individuals whose relevant agreements did not contain arbitration clauses should be stayed.

Plaintiffs did not oppose Comcast's motion to stay Mr. Traub's claims against Comcast, but otherwise opposed the motion. The Court asked for, and the parties submitted, supplemental letter briefing on the issue of equitable estoppel. (Docket Nos. 165 & 166.)

On November 25, the Court granted Comcast's motion to stay the claims of the named plaintiffs with contractual relationships with Comcast, but otherwise denied their motion. 989 F. Supp. 2d 329. The effect of the ruling was essentially the same as the stipulation entered into with DirecTV: plaintiffs could assert their claims against any defendants with whom they did not have arbitration agreements, but could not assert them against the MVPD through which they purchased Center Ice. Diver Decl., ¶35. All plaintiffs, all defendants, and all claims remained in the case in this Court.

E. Counsel Defeated Defendants' Motions for Summary Judgment

Plaintiffs' motion for class certification was originally due on August, 9, 2013. On June 28, 2013, however, well before the close of discovery, the NHL defendants requested a pre-motion conference concerning a proposed motion for summary judgment. The Court held a conference on July 15, 2013. Following that conference, and by agreement of the parties, the schedule was altered to permit the defendants to move for summary judgement at a later date, but still before Plaintiffs' motion for class certification. Diver Decl., ¶ 38.

Pursuant to this revised case plan, the Plaintiffs served the expert report of Dr. Roger Noll, professor emeritus at Stanford University, on February 18, 2014. Professor Noll, considered by many to be the leading expert in sports and broadcast economics for over forty years, produced a 121-page report (plus exhibits) addressing the core economic issues, including, among others, market definition, market power, and anticompetitive effects. *Id*., ¶ 39. Professor Noll also addressed preliminarily the procompetitive justifications the Defendants had discussed in their answers and previous briefing. *Id*. Defendants never attempted to deny or rebut the vast majority of this report. *Id*.

On April 22, 2014, the Defendants submitted their summary judgment papers. The NHL Defendants, the Comcast Defendants, the DirecTV Defendants, and the Major League Baseball

Defendants each filed separate motions, supported by separate memoranda, which together totaled ninety pages and were accompanied by hundreds of pages of declarations and exhibits. *Id*., ¶ 40. Like their motions to dismiss, these motions asserted a wide-ranging array of defenses encompassing arguments that (1) consumers had not been injured; (2) the defendants had at least five decisive "procompetitive justifications"; (3) the plaintiffs lacked standing for both monetary and injunctive relief; and (4) the television defendants did not participate in any agreements in restraint of trade or conspiracies to restrain trade.

Plaintiffs responded on May 27, 2014, with a comprehensive 90-page memorandum addressing each of the issues raised by all of the defendants and providing substantial documentary and economic evidence to support the plaintiffs' position. *Id*., ¶ 41. On August 4, 2014, the Court ruled in Plaintiffs' favor, denying all of the motions in full. *Laumann v. NHL*, 56 F. Supp. 3d 280 (S.D.N.Y. 2014).

F. Counsel Obtained Certification of Rule 23(b)(2) Class

Class certification litigation began shortly after the Court's decision denying summary judgment. Class counsel worked closely with Professor Noll on all issues related to class certification, including the classwide nature of his merits conclusions and his damages model, which had been worked on for well over a year, and continued to be improved and modified during the class certification briefing period. Diver Decl., ¶ 43.

Class certification involved extensive expert discovery, with Dr. Noll producing two reports and sitting for a day-and-a-half-long deposition. The Defendants relied on the reports of three separate economists, each of whom filed a report and sat for a full-day deposition. *Id*., ¶ 44.

The Defendants both opposed class certification and moved to exclude certain of the opinions of Dr. Noll, filing over seventy pages of briefing, three expert declarations, and eleven fact declarations. *Id*., ¶ 45. Plaintiffs responded to all of Defendants' papers and submitted a

reply report by Dr. Noll, which prompted Defendants' filing of two sur-rebuttal expert reports and then two more supplemental expert reports. *Id*. Shortly thereafter, the Court held a three-day hearing on March 17 through March 19, 2015, at which the Court heard the testimony of each of the four economic expert witnesses.

On May 14, 2015, the Court granted in part and denied in part the plaintiffs' motion for class certification, and granted in part and denied in part the defendants' motion to exclude certain testimony of Professor Noll. In particular, the Court granted Plaintiffs' request to certify a Rule 23(b)(2) class, clearing the way for Plaintiffs to seek injunctive relief on behalf of all class members. *Laumann v. NHL*, -- F. Supp. 3d --, 2015 WL 2330107, (S.D.N.Y. May 14, 2015).

G. Counsel Negotiated a Settlement That Increases Consumer Choice and Decreases Prices for Out-of-Market NHL Telecasts.

The first settlement discussions were held with the parties in both cases in December 2013, before briefing for either summary judgment or class certification. Following a series of meetings with separate groups of defendants, the parties met with Magistrate Judge Dolinger on December 16, 2013, pursuant to a referral by this Court. Diver Decl., ¶ 48.

All parties understood that settlement of these cases presented unique complications. While the Defendants' interests are overlapping, they differ in important ways. Plaintiffs have always insisted on practice changes, and not merely monetary relief, as a necessary component of any settlement. *Id*., ¶ 49. Finding a settlement of this kind to which all parties could agree was going to be difficult, as the parties each recognized. At the same time, settling with certain parties while the remaining parties continued to litigate the legality of the practices at issue presented challenges of equal or greater magnitude. *Id*.

It became apparent that no settlement was likely until at least after the Court's resolution of the Defendants' anticipated summary judgment motions. No further substantial discussions

were held following up on the meeting with Magistrate Judge Dolinger. Diver Decl., ¶ 50.

In November 2014, following the Court's decision on summary judgment, but before the completion of the briefing on class certification, serious discussions between plaintiffs' counsel and counsel for the NHL began. Langer Decl., ¶ 3. As a result of four months of often heated negotiations, the plaintiffs and the NHL negotiated a basic framework for settlement. *Id*. That framework required that the DirecTV and Comcast defendants participate in the settlement, although they had not been party to the discussions to that point. In March 2015, the television defendants joined the negotiations. *Id*.

After a month of negotiations with all defendants, the parties remained far apart, leading them to seek the assistance of a mediator, Judge Stephen Orlofsky, former United States District Judge for the District of New Jersey. *Id*., ¶ 4. Judge Orlofsky conducted five separate full-day, in person mediation sessions in Philadelphia and New York over the course of several weeks. *Id*., ¶ 5. He also participated regularly in less formal communications among the parties up until the day the settlement agreement was finalized. *Id*., ¶ 6.

The Agreement provides relief for Class members and the broader public through both increased consumer choice and lower prices. In addition to its existing league-wide bundle, the NHL will offer an unbundled Game Center Live Internet package ("GCL") for the next five years – allowing for the purchase of single-team packages for a price at least twenty percent below the price of the bundled package. Agreement at § B.[4] Consumers will thus be presented with the unprecedented choice between a season-long package of an individual team from outside their local markets, or a league-wide out-of-market bundle.

The Agreement also mandates price concessions for consumers. For the 2015-2016 GCL

[4] Plaintiffs filed the Agreement, including exhibits, as part of their motion for preliminary approval. *See* Dkt. 352, Ex. 1.

season, the NHL will discount early-bird, renewal and full season prices by 17.25% over the prior year's prices. Agreement, ¶ 44. Comcast and DirecTV will also provide three weeks of free access to NHL Center Ice for their subscribers for the next two seasons, thereby reducing the full-season package price by 12.5%. *Id*. Taken as a whole, these benefits represent a significant departure from the *status quo* that inures to the benefit of the class.

The attorneys' fees and costs were not discussed until the parties had reached an agreement regarding the consumer benefits. Langer Decl., ¶ 8.

III. STANDARD

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The Second Circuit has instructed district courts considering the reasonableness of fee requests by class action counsel to act 'as a fiduciary who must serve as a guardian of the rights of absent class members.'" *In re Initial Public Offering Sec. Litig.*, 671 F. Supp. 2d 467, 502 (S.D.N.Y. 2009). (Scheindlin, J.) (quoting *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000)). However, where, as here, "money paid to the attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members." *McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006).

"[T]he parties to a class action properly may negotiate not only the settlement of the action itself, but also the payment of attorneys' fees." *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (citing *Evans v. Jeff D.*, 475 U.S. 717, 734-35, 738 n. 30 (1986)). As Judge Posner observed in *In Re Continental Illinois Securities Litigation*, 962 F. 2d 566, 570 (7th Cir. 1992), the parties negotiating attorneys' fees are adversarial market

participants (the defendants who must pay the fee want to minimize the payment, while the lawyers receiving it wish to maximize it), leading to a reasoned outcome reflecting the fact that the "markets know market value better than judges do." Thus, "[a] court can generally assume that the defendants have closely examined the plaintiffs' fee request and agreed to pay only a reasonable amount… ." *M. Berenson Co., Inc. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 829 (D. Mass. 1987) (*citing In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 582 (3d Cir.1984)). This is particularly true where the negotiations were overseen and assisted by seasoned mediators. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998).

In common fund cases, the Court may reference the "percentage of the fund" and "lodestar" methods of awarding fees for comparison's sake to the negotiated outcome here. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007). While this is not a common fund case, as such, "the overwhelming trend" in the Second Circuit is to utilize the percentage of the fund method. *See In re Platinum & Palladium Commodities Litigation*, No. 1:10-cv-03617-WHP, Slip Op. at 3 (S.D.N.Y. July 7, 2015). District courts are also encouraged to review counsel's lodestar as a "cross-check" to affirm its reasonableness. *McDaniel v. County of Schenectady*, 595 F.3d 411, 421-22 (2d Cir. 2010). The reasonableness of a fee calculated by either of these methods is determined by the factors outlined in *Goldberger*, 209 F.3d at 50. *See also Blessing v. Sirius XM Radio Inc.* 507 Fed. Appx. 1, 4 (2d Cir. 2012).

In *Goldberger*, a common fund case, the Second Circuit set forth six factors for district courts to take into consideration: (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. These factors, while not strictly applicable in non-common fund cases, remain a useful benchmark that underscores the

reasonableness of the present request.

The Supreme Court has warned that "the determination of fees 'should not result in a second major litigation.'" *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011) (citing, *inter alia*, *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). Plaintiffs must meet their burden of providing appropriate documentation. Nevertheless, "trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." *Id.* at 2216.

IV. ARGUMENT

Plaintiffs submit that the requested fees and expenses are reasonable. All of the *Goldberger* factors support the request: experienced Class Counsel devoted a substantial amount of time and expense into highly complex and risky litigation, producing high-quality work against several top-tier defense firms and achieving a valuable result for class members. The Agreement provides significant benefits to consumers in the form of increased choice and decreased price, representing a substantial portion of the maximum available relief. It is conservatively valued at between $21 and $28 million. Ayers Decl., ¶¶ 14-29. That achievement could not have been achieved without the dedicated and skilled work of Class Counsel – nor without their substantial investment of time and money, amounting to more than 9,400 hours of work over the four-year lifespan of the litigation with a collective lodestar of $5.7 million, together with costs in the amount of $1.32 million. *See* Declaration of Joshua Snyder of Boni & Zack ("Snyder Dec."); Declaration of Jeffrey Dubner of Cohen Milstein Sellers & Toll ("Dubner Dec."); Declaration of Kevin Costello of Klein Kavanagh Costello ("Costello Dec."); Declaration of Robert LaRocca of Kohn Swift & Graf ("LaRocca Dec."); Declaration of Peter

Leckman of Langer, Grogan & Diver ("Leckman Dec."); Declaration of Michael Buchman of Motley Rice ("Buchman Dec."); Declaration of Marc Gross of Pomerantz ("Gross Dec."); and White Decl., Ex. A, and E.

Given the novelty of the case, Class Counsel's significant out-of-pocket expenses underscore the level of risk undertaken here. Saltzburg Decl., ¶ 9. Nor was there any conflict of interest between Class Counsel and the class, because the fee award cannot diminish the relief awarded to the class and was negotiated separately and subsequent to the determination of that relief. With all of this in mind, a full award of the requested amount is consistent with the public policy concerns that animate Rule 23 -- encouraging skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature.

A. The Fee and Expense Request Is Reasonable

The first, second, and fourth *Goldberger* factors all deal with the complexity of the litigation and the quantity and quality of counsel's work in that litigation. These factors all strongly support a finding that the fee request here is reasonable.[5]

As detailed in Plaintiffs' declarations and supporting papers, Counsel have applied for half of the time they expended on matters that applied to both the NHL and related MLB litigation. Taking this time plus the time specifically allotted to the NHL matter, Class Counsel expended 9,475 hours overall to bring this litigation from conception through preliminary approval. *See* Snyder Dec., Ex. A; Dubner Dec., Ex. A; Costello Dec., Ex. A; LaRocca Dec., Ex. A; Leckman Dec., Ex. A; Buchman Dec., Ex. A; Gross Dec., Ex. A. These hours were

[5] It bears emphasis that the agreed upon amount of $6.5 million encompasses both attorneys' fees of Class Counsel, as well as their incurred expenses. *See* White Decl., Exs. A-E. The Court may compensate Class Counsel for reasonable expenses necessary to the representation of the Class. *See In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y 2003).

appropriately divided as between partner-level attorneys, associate-level attorneys and professional staff, especially in light of the highly technical and sophisticated nature of the antitrust claims here at issue. *Id*. Given the enormity of this litigation's requirements—involving millions of pages of discovery, multi-pronged dispositive motions, class certification and *Daubert* disputes, attempts to compel arbitration, deep economic analysis, and unusually complicated econometric models—the time spent is reasonable and, indeed, quite efficient.

The fact that this matter was litigated in tandem with the related *Garber* matter further demonstrates the reasonableness of this request. Counsel is only seeking compensation for half of the time and expenses that applied to both cases (*e.g.*, all common hearings and all work involving the television defendants) –even though all of this time was necessary to bring the NHL matter to resolution.

As set forth in the declaration of Professor Saltzburg, achieving these results while expending less than 10,000 hours of time demonstrates great efficiency. Saltzburg Decl., ¶ 15. Professor Saltzburg cites *In re Linerboard Antitrust Litigation*, in which he served as an expert, as an example. There, the Court analyzed the time expended in complex antitrust cases:

> While the total number reported -- 51,268 hours -- is obviously substantial, through effective management petitioners held down the number of hours and other resources required to effectively prosecute the case. Fee Petition at 22. Fewer hours of attorney time were expended in this case than in comparable litigation. For instance, *In re Flat Glass* involved fewer defendants and more firms and the fee petition covered 83,067 hours. *In re Commercial Tissue Antitrust Litigation* involved a comparable number of defendants, a similar industry, a conspiracy covering a similar time period and was resolved at a comparable stage but the fee petition covered 87,849 hours excluding time expended by the Attorney General of Florida in a separate action which was consolidated with the class action. *Id*. This development should be rewarded when it reflects, as in this case, the efficiency of counsel in maximizing total recovery to the class by minimizing attorneys' fees expenses.

In re Linerboard Antitrust Litigation, 2004 WL 1221350, at *13 (E.D. Pa. 2004)

The magnitude and complexity of this litigation further justifies the fee request. The Court has previously characterized this litigation as "an unusually complex and sweeping class action lawsuit." *Daubert* Order, 2015 WL 2330036, at *10. *See also Park v. Thomson Corp.*, 263 F.R.D. 110, 123 (S.D.N.Y. 2008) ("Antitrust cases, by their nature, are highly complex.") (quoting *Wal-Mart Stores*, 396 F.3d at 122). One need look no further than the sophisticated testimony on cutting-edge econometric modeling offered during the three-day evidentiary hearing in March 2015 to gauge the complexity of challenging the NHL's territorial restraints on competition. Indeed, defendants would not have gone to the trouble and expense of hiring three economists—one a Nobel laureate—were the issues not "unusually complex."

The risk is exemplified by the fact that no other private class actions challenging the defendants' packages had been successfully brought before. Saltzburg Decl., ¶ 9b. Only after the settlement of this case was publicized were copycat actions filed by other lawyers (copying large swaths of the complaint in this case verbatim) against the National Football League and DirecTV. *Id*.

Further, Counsel provided a high quality of representation to the Plaintiffs and the Class in this litigation. Class Counsel include some of the foremost plaintiffs' counsel practicing antitrust law in the country today, with decades of experience and hundreds of millions of dollars in recoveries to their credit. Plaintiffs have faced and responded to several onslaughts of arguments filed by Defendants' veritable armies of lawyers, matching them issue for issue and rising to the occasion at each turn.[6] The quality of their work in this litigation is evident by the results they have obtained, and has drawn favorable comments from the Court. *See, e.g.,*

[6] For example, Class Counsel's informal count of defense counsel present at the class certification hearing estimated the number of attorneys for the *Laumann* and *Garber* defendants to be somewhere over 50. By contrast, Class Counsel never broke double digits.

Transcript of March 19, 2015 Hearing at 590:19-20.

Class counsel's collective lodestar confirms the reasonableness of the requested fee. In *Arbor Hill Concerned Citizens Neighborhood Assoc. v. County of Albany*, 522 F.3d 182 (2d Cir. 2008), the Court of Appeals recast its formulation of the "lodestar" fee as the "presumptively reasonable fee," which should be calculated using the district court's determination of a "reasonable hourly rate." *Id.*, 522 F.3d at 190. *Arbor Hill* clarified that "the reasonable hourly rate is the rate a paying client would be willing to pay" in the district where the case was litigated "to litigate the case effectively." *Arbor Hill*, 522 F.3d at 184, 190. Class Counsel's hourly rate here ($475-$980 for partners and $265-$675 for associates) is well within the reasonable rate for attorneys practicing complex litigation in the Southern District of New York. A January 2014 *National Law Journal* survey found that New York's hourly rates were the highest in the country, with firms whose largest office is in New York charging an average of $882 per hour for partners and $520 per hour for associates. Karen Sloan, *$1,000 Per Hour Isn't Rare Anymore*, Nat'l L.J., Jan. 13, 2014, at 1. *See also, e.g.*, *In re Platinum & Palladium Commod. Litig.*, Slip Op. at 6-7 (citing *National Law Journal* survey yielding an average hourly partner billing rate of $982 in New York); *City of Providence v. Aeropostale, Inc*., No. 11-Civ.-7132 (CM), 2014 WL 1883494, at *13 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 2015 WL 3604407 (2d Cir. June 10, 2015) (approving billing rates of attorneys in New York firms ranging from $335 to $875 per hour).

By way of additional comparison, the law firms defending the NHL defendants (Skadden), Comcast (Davis Polk), DirecTV (Alston & Bird), and Madison Square Garden

(Quinn Emanuel) were each included in *National Law Journal*'s January 2014 survey.[7] Each of these firms have partner billing levels well above the effective hourly rate sought by Class Counsel here. Skadden, whose largest office is in Manhattan, has a top partner hourly rate of $1150 with an average of $1035. *Id.* Davis Polk, whose largest office is also in Manhattan, has a top partner hourly rate of $985 with an average of $975. *Id.* Alston & Bird, whose largest office is in Atlanta rather than New York City, has a top partner hourly rate of $875 and an average of $675. Quinn Emanuel, whose largest office is in Manhattan, has a top partner hourly rate of $1,075 and average rate of $915. Plaintiffs' requested rates fall comfortably within—and indeed, on the low side—of these measures.[8]

A lodestar cross-check similarly demonstrates that the requested award is reasonable. Class Counsel's overall lodestar through preliminary approval is $5.75 million using current hourly rates and $5.11 million using historic hourly rates. As demonstrated by the extensive litigation history recounted above, this lodestar reflects Class Counsel's efficient litigation of this case. Moreover, although "multipliers of two to six times total lodestar . . . are regular[ly] awarded in this district," *Johnson v. Brennan*, No. , 2011 WL 4357376, at *21 (S.D.N.Y. Sept. 16, 2011), Class Counsel's request here ($6.5 million) represents less than their total lodestar and incurred expenses ($7.1 million).

B. Class Counsel Achieved Substantial Relief for Class Members

Consistent with the fifth *Goldberger* factor, the Court may examine the results of the litigation in adjudging the reasonableness of the fee request. The results obtained by the

[7] *See* "Billing Rates Across the Country: The National Law Journal's Annual Survey of Law Firm Billing Rates for Partners and Associates," *available at* http://www.nationallawjournal.com/id=1202636785489/Billing-Rates-Across-the-Country?slreturn=20150622120638 (last visited July 20, 2015).

[8] The same pattern holds for associates. According to the *National Law Journal*, Skadden's highest associate billing rate is $845 and its average is $620; Davis Polk's highest is $975 and its average $615; and Alston & Bird's highest is $575 and its average $425.

Plaintiffs and their counsel will significantly benefit the class. It significantly increases the choices available to class members and other hockey fans, while reducing the cost not just of these new choices, but of the unbundled package on both the Internet and television platforms.

In support of this petition, Plaintiffs submit the Declaration of Professor Ian Ayres. Professor Ayres is the William K. Townsend Professor at Yale Law School, and a Professor at Yale's School of Management, as well as the former editor of the Journal of Law, Economics and Organization and an elected member of the American Academy of Arts and Sciences. *See* Ayres Decl., Appx. 2. Professor Ayres explains that even using a conservative set of assumptions about the subscriber rate for the new and newly discounted options, the value of the settlement is between $20.9 million and $28.7 million. Ayers Decl., ¶¶ 14-29. This figure reflects the combined value of the elements of injunctive relief included in the Agreement. The unbundled, single-team GameCenterLive Internet broadcasts to be offered by the NHL at a price 20% less than the pre-existing option are estimated to be worth between $14.5 million and $24.2 million over the five-year term. Ayers Decl., Table 4, at 15. Second, the NHL's 17.5% discount GCL for the upcoming season and the MVPDs' agreement to offer free weeks for two years to their television subscribers is worth between $4.6 million and $6.4 million. *Id.*

Plaintiffs' counsel lodestar alone ($5.7 million) represents between sixteen and twenty-one percent of the range of values estimated by Dr. Ayres. *See* Saltzburg Dec., ¶ 12. This is well within the acceptable range identified by Courts using the "percentage of the fund" method. *See City of Providence*, 2014 WL 1883494 at *12 (collecting cases and determining that an award representing 33% of the settlement fund in mature, complex litigation was appropriate); *Fogarazzo*, 2011 WL 671745 at *4 (approving a percentage-based award of 33%). Thus, whatever method is chosen by the Court, it is clear that Class Counsel should be awarded the full

amount recited in the Agreement.

C. An Award in the Full Amount Has No Effect on Class Relief

Another justification for the requested award is that it can in no way diminish the relief provided to the class. The fee and cost award is a separate payment from the Defendants to Class Counsel that is segregated from the settlement benefits for the Class. *See* Agreement, Docket No. 352-1 at ¶ 55 ("Any award shall not reduce any obligations described in any other paragraph."). Relatedly, the fee and cost amount memorialized in the Agreement was negotiated separate and apart from the class relief. *See* Langer Decl., ¶ 8. The topic of fees was not broached in the negotiations until an agreement in principal had been reached between the parties. *Id.* "Under these circumstances, the danger of conflicts of interest between attorneys and class members is diminished." *In re Sony SXRD Rear Projection Television Class Action Litigation*, No. 06-CV-5173(RPP), 2008 WL 1956267 at *15 (S.D.N.Y. May 1, 2008); *accord Shapiro v. JPMorgan Chase & Co.*, Nos. 11-CV-8331(CM)(MHD), 11-CV-7961(CM), 2014 WL 1224666, at *19 (S.D.N.Y. March 24, 2014); *Blessing v. Sirius XM Radio Inc.*, No. 09-CV-10035(HB), 2011 WL 3739024, at *4 (S.D.N.Y., Aug. 24, 2011).

In addition, the request is reasonable because it is the product of an extensive, arm's length negotiation. *In re Sony SXRD Rear Projection Television Class Action Litigation*, 2008 WL 1956267 at *15. As recounted in Mr. Langer's declaration, the negotiations were among the most difficult he has engaged in in his career. *See* Langer Decl., ¶ 7. They lasted months and included five separate full-day sessions with former Judge Orlofsky and countless telephone conferences among the parties and separately with Judge Orlofsky. *Id*. That these negotiations were overseen so closely by Judge Orlofsky further supports the reasonableness of the award. *Id., citing McBean,* 233 F.R.D. at 392. The structure of the Agreement and negotiation posture from which this request emerges therefore strongly support this petition.

D. The Request Is Justified by the Risk Undertaken by Class Counsel

The third *Goldberger* factor recognizes that the reasonableness of a fee award ought to reflect the risk associated with Class Counsel's litigation effort. *See Shapiro*, 2014 WL 1224666 at *21, *quoting Goldberger*, 209 F.3d at 54 ("The Second Circuit has identified 'the risk of success as 'perhaps the foremost' factor to be considered in determining' a reasonable fee award.") Litigation risk "must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55. "No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended." *Detroit v. Grinnell Corp.*, 495 F. 2d 448, 470 (2d Cir. 1974).

The risks of bringing this case were substantial. *See* Saltzburg Decl., ¶ 9. The practices at issue had been in place for many years before Plaintiffs brought this case, and, despite having obvious anticompetitive effects and being highly unpopular with consumers, had not attracted substantial challenges by consumers before this case. Indeed, the potential pitfalls of the litigation were illustrated by the only prior consumer challenge to the NHL's or MLB's broadcasting practices under federal antitrust laws, *Kingray v. NHL Enterprises, Inc*., No. 00-1544 (S.D. Cal. July 2, 2002), whose complaint was dismissed.

While the government had challenged sports leagues' geographical restraints on broadcasting in the past, it had not done so in over fifty years. The particular practices subject to challenge were not in place when the last federal government actions occurred. The few cases challenging sports broadcasting practices in more recent years were typically brought by individual teams (or, in the case of collegiate sports, universities). Many of the defenses asserted in this case, including those related to consumer standing, consumer injury, arbitration, and the

roles of the networks and MVPDs, were not relevant to those actions. No case had ever been brought that dealt with the full array of factual and legal issues that are presented here. Saltzburg Decl., ¶ 9b.

This case was an unprecedented challenge to the manner in which the NHL and its broadcasting partners had conducted business for decades without interruption. Class Counsel have performed the work without any payment for more than three years. Class Counsel also advanced $1.32 million in expenses for numerous experts, consultants, mediation and other necessary litigation expenses without any assurance that any of these substantial expenses would ever be reimbursed. Saltzburg Decl., ¶ 11. The substantial risk undertaken by counsel thus justifies the requested amount.

E. Public Policy Supports the Request

Courts in the Second Circuit acknowledge that, in addition to providing just compensation for the work performed, awards of fair attorneys' fees ought also to serve to encourage competent counsel "to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature." *City of Providence*, 2014 WL 1883494 at *11 (collecting cases in support). As with securities law, private enforcement of antitrust law "is a necessary adjunct to government intervention," *Fogarazzo*, 2011 WL 671745 at *3, because the public sector agencies entrusted with its prosecution do not have sufficient resources to address abuse in every form. *See Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 711 F.3d 1264, 1270 n. 14 (11th Cir. 2013) ("Public policy encourages private enforcement, as government resources are inherently limited, and private parties are usually most directly affected by the [exclusionary] conduct.") (alteration in original); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("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."). Given the nature of this factor to "consider what fee would adequately encourage plaintiffs' counsel to continue bringing cases of merit in the future," *In re Initial Public Offering Securities Litigation*, 671 F. Supp. 2d at 511, the relatively modest magnitude of this award supports its full grant.

F. The Service Awards Request is Reasonable

Finally, Class Counsel respectfully move the Court for the service awards of $10,000 each for class representatives Thomas Laumann, Robert Silver, David Dillon and Garrett Traub, as recited in the Agreement. Agreement at ¶ 54. Such awards are routinely rewarded in this context, in order to recognize the vigor of these individuals in pursuing their claims on behalf of a class. *Sewell v. Bovis Lend Lease, Inc.*, No. 09 Civ. 6548(RLE), 2012 WL 1320124, at *14 (S.D.N.Y. April 16, 2012) (collecting cases). Each of the named Plaintiffs maintained an active role in the litigation over the past three years. They collected documents in order to respond to the Defendants' requests. They were each deposed and most had to travel significant distances. And they exposed themselves to repeated (and inaccurate) criticism by Defendants in public filings challenging their standing to sue and their ability to represent a class. The awards sought here are in an amount that is routinely granted in similar circumstances; indeed, "much larger awards have also been granted." *Id.* (granting service awards of $10,000 and $15,000 to named plaintiffs and collecting cases with awards ranging from $15,000 to $425,000).

V. CONCLUSION

For the reasons set forth above, the request of Class Counsel for an award of $6.5 million in fees and costs should be granted. In addition, service awards in the amount of $10,000 each for class representatives Thomas Laumann, Robert Silver, David Dillon and Garrett Traub should be granted.

Respectfully Submitted,

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