IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATCHITOCHES PARISH HOSPITAL SERVICE DISTRICT, on behalf of itself and all others similarly situated, Plaintiffs, v. TYCO INTERNATIONAL, LTD.; TYCO INTERNATIONAL (U.S.), INC.; TYCO HEALTHCARE GROUP, L.P.; and THE KENDALL HEALTHCARE PRODUCTS COMPANY, Defendants.	)	Civil Action No. 05-12024 (PBS) Leave to File Granted on: February 16, 2010

MEMORANDUM IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

DOCKETED CASES

STATUTES

I. INTRODUCTION AND OVERVIEW

Class Counsel for Natchitoches Parish Hospital Service District ("NPH"), JM Smith Corporation d/b/a Smith Drug Company ("Smith Drug"), and the Class[1] (together "Plaintiffs" or "the Class") respectfully submit this Memorandum in Support of Class Counsel's Motion for an Award of Attorneys' Fees, and Reimbursement of Expenses, and Incentive Awards for the Class Representatives pursuant to Fed. R. Civ. P. 23(h) and 54(d).

Class Counsel aggressively prosecuted this very complex antitrust class action on a wholly contingent basis, working over 47,000 hours and incurring over $4 million in unreimbursed out-of-pocket expenses. Through their efforts, Class Counsel have obtained, for the benefit of the Class, a cash settlement of $32.5 million (the "Settlement"), plus interest (the "Settlement Fund"). As described below, this highly favorable result was achieved through the skill, competence, perseverance and diligence of Class Counsel in the face of vigorous and skillful opponents, and significant legal and factual hurdles.[2] As compensation for their efforts, Class Counsel seek an award of attorneys' fees in the amount of one-third (33-1/3%) of the Settlement Fund and reimbursement of expenses.

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[1] Pursuant to this Court's August 29, 2008 Order, the Class is comprised of:

> All persons who purchased sharps containers directly from Covidien, or its predecessor, Tyco Healthcare, at any time between October 4, 2001 and August 29, 2008. Excluded from the Class are Tyco, Tyco's parents, subsidiaries and affiliates.

Also excluded from the Class are Kar-Kel, Inc., VWR, Inc. and Saint Vincent's Health Center, who chose to opt out.

2 Class Counsel has litigated many antitrust class cases, particularly in the contexts of the medical device and prescription pharmaceutical industries, for more than a decade. Over those years, Class Counsel has collectively developed certain specialties which allow for the efficient and effective organization and litigation of these types of cases, as was done here.

Class Counsel also seek incentive awards of $35,000 for each of the two Class Representatives, NPH and Smith Drug. Each participated actively throughout this litigation, including, among other things, responding to discovery requests (including the production of documents and data), preparing for and appearing at depositions, regularly communicating with Class Counsel concerning the progress of the litigation, participating in mediation and settlement discussions, and preparing for and testifying at trial in Boston.

An extensive description of this complex litigation, including a description of Class Counsel's work prior to reaching the Settlement, and the numerous and substantial risks that Class Counsel faced (and would continue to face absent the Settlement) is set forth in Plaintiffs' Memorandum in Support of Motion for Entry of an Order Granting Final Approval of Settlement (the "Settlement Motion") and the accompanying Affidavit of Class Counsel Andrew Kelly (the "Kelly Aff."), submitted concurrently herewith.[3]

As more fully described below, the following factors deserve favorable consideration by the Court in considering this application:

1. The size of the Settlement Fund, which is immediate payment of $32.5 million in cash, plus interest, is unquestionably substantial, and will provide a significant guaranteed recovery to the Class. This recovery is significant particularly in light of the numerous risks faced by Class Counsel.

2. Not a single Class Member has raised any objection to any term of the Settlement or

[3] Class Counsel also submit, as Exhibits E-Q to the Kelly Affidavit, the affidavits of the (13) thirteen individual firms that acted as Class Counsel in this action, detailing the professional experience and qualifications, services rendered, and hours and expenses incurred by each firm. Also attached to the Kelly Affidavit are the Affidavits of NPH (Ex. B), Smith Drug (Ex. C), and Berdon Claims Administration, LLC (Ex. D).

to Plaintiffs' request for attorneys' fees, expenses and incentive awards. *See* Kelly Aff. at ¶ 66. Unlike many class actions, the Class here is comprised of sophisticated business entities that are more than capable of lodging objections. The lack of objections from Class Members, coupled with the positive endorsements by the Class Representatives, (*see* Kelly Aff. at Exs. B and C), confirm the excellent result that was reached, and is strong evidence supporting Class Counsel's fee and expense request.

3. The litigation was vigorously and effectively prosecuted at all stages by Class Counsel. It was Class Counsel's skill, experience and continuous hard work – which included trying this case for (13) thirteen days to a jury -- that enabled this complex antitrust action to be brought to a successful resolution resulting in a $32.5 million immediate cash benefit to the Class.

4. The litigation proceeded for over four years, and was settled only after completion of fact and expert discovery, significant motion practice (including, among other things, extensive class certification, summary judgment, *Daubert*, and *in limine* briefing and argument), extensive mediation efforts spanning many months, trial preparation, and (13) thirteen days of trial by jury. *See* Kelly Aff. at ¶ 4. The efforts in obtaining class certification and defeating Tyco's summary judgment motion are of particular note in light of evolving case law and the complexity of issues relating to: (a) class-wide impact and the methodology for assessing damages; and (b) exclusionary conduct involving commitment contracts.

5. Class Counsel faced significant risks in pursuing this litigation. From the outset, Class Counsel confronted determined opposition by Tyco and its well-staffed and highly competent legal team, who vigorously denied any wrongdoing and asserted numerous defenses. The risks faced by Class Counsel were particularly poignant once trial commenced due to the inherent uncertainty of a

jury verdict, Tyco's Motion for Judgment as a Matter of Law, and the Ninth Circuit's mid-trial issuance of a potentially unfavorable opinion (*Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group, L.P.*, 2010 U.S. App. LEXIS 259 (9th Cir. Jan. 6, 2010)), the latter two of which could have resulted in a dismissal of Plaintiffs' claims either by this Court or on appeal. The risk to Class Counsel was compounded because Class Counsel worked on a contingent fee basis and therefore received no compensation during the entire course of litigation, while devoting over 47,000 hours and incurring over $4 million in out-of-pocket expenses aggressively prosecuting this action with no assurance of eventual reimbursement and loss of use of those funds over the duration of litigation. *See* generally Kelly Aff. at ¶¶ 67-68.

6. The fee request of one-third is consistent with fee awards in similar cases and with case law from this District as well as other federal courts, which routinely make such awards. Moreover, the one-third contingency fee agreement here readily approximates market conditions in the context of non-class contingency fee arrangements involving complex business litigation, where contingency fees of one-third (or more) are common.

7. Public policy is served through the compensation of counsel who undertake to prosecute private claims on a contingent basis on behalf of injured persons or businesses who may not otherwise press forward with purely individual claims. Without a fee that takes in account the efforts and hard work expended, Class Counsel would be unable to continue to bring complex class actions that serve to protect the interests of the public.

For these reasons, which are detailed more completely below and in the Kelly Affidavit, Class Counsel respectfully request that the Court approve Class Counsel's Motion for an Award of

Attorneys' Fees, and Reimbursement of Expenses, and Incentive Awards for the Class Representatives.

II. HISTORY OF THE LITIGATION

This Action, which was commenced on October 5, 2005, was brought by a class consisting of direct purchasers of sharps containers from Tyco. Plaintiffs alleged that Tyco violated Sections 1 and 2 of the Sherman Act by allegedly entering into: (a) exclusionary agreements which required customers to purchase sharps containers almost exclusively from Tyco; and (b) exclusive dealing arrangements under which Group Purchasing Organizations ("GPOs") agreed not to broker the sharps containers of Tyco's competitors. Plaintiffs claimed that the Class overpaid for sharps containers by tens of millions of dollars as a result of these contracting practices.

A. Discovery

Class Counsel conducted extensive fact and expert discovery after the filing of the Complaint, which was preceded by an extensive prefiling investigation. *See* Kelly Aff. at ¶¶ 21-29. Specifically, Class Counsel: (a) drafted comprehensive document requests and interrogatories which were served upon Tyco, as well as subpoenas directed to various third-parties, including the seven largest national GPO's and several of Tyco's competitors in the sharps container market, such as Becton Dickinson, Daniels, and Stericycle; (b) analyzed over (4) four million of pages of documents received from Tyco, the national GPO's and Tyco's competitors, as well as organized these documents into a computerized substantively-searchable database; (c) assisted the Class Representatives in responding to extensive interrogatories, the production of purchase and other records, sitting for depositions, and testifying at trial; (d) identified the necessary deponents and traveled around the country to take (18) eighteen depositions of Tyco's current and former

employees, (12) twelve third-party depositions of the national GPOs and Tyco's competitors, and Tyco's experts Dr. Janusz Ordover, Margaret Guerin-Calvert, and Thomas Hughes; and (e) retained and worked closely with Prof. Einer Elhauge and Dr. Hal Singer, who were the Class's liability and damages experts. *Id.*[4]

B. Motion Practice

Class Counsel also engaged in significant motion practice throughout this case. *See* Kelly Aff. at ¶¶ 30-41. First, Class Counsel engaged in an enormous effort to successfully certify the class, at a time when the First Circuit was in the midst of creating new class certification standards.[5] Over the course of one and a half years, Class Counsel: (a) worked closely with Prof. Elhauge to comprehensively review the record evidence regarding, *inter alia*, the economic structure, pricing, and contracting practices of Tyco and various GPOs, in order to demonstrate that class-wide impact was provable on a class-wide basis; (b) worked closely with Dr. Singer to demonstrate that there was a reliable method for computing aggregate damages for the entire Class; and (c) gathered evidence to rebut the opinions of Tyco's class certification experts, Prof. Ordover and Ms. Guerin-Calvert, and deposed those experts. In total, Class Counsel submitted (14) fourteen briefs, declarations, supplemental memoranda and other authority in their efforts to obtain class certification. *Id*. at ¶ 34.

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[4] Between issues relating to class certification, liability, damages and *Daubert* challenges, (21) twenty-one expert reports and/or declarations were exchanged by the parties. All the experts, except for the court-appointed independent economic expert, Dr. Orley Ashenfelter, were deposed. *Id.* at ¶¶ 25, 27, 30.

[5] On March 28, 2008, the First Circuit issued *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008), which held that when a proposed class relies on a "novel or complex theory as to injury…the district court must engage in a searching inquiry on the viability of that theory and the existence of the facts necessary for the theory to succeed." *Id.* at 26. Pursuant to that opinion, this Court engaged in an in-depth analysis inquiring as to whether Prof. Elhauge's reports provided both analytical and factual support for Plaintiffs' theory of injury.

Second, Class Counsel engaged in extensive *Daubert* briefing. Class Counsel successfully challenged the opinions of Tyco's industry expert, Thomas Hughes, regarding competition and pricing in the sharps containers market, by demonstrating, *inter alia*, that Mr. Hughes did not possess the expertise, training or experience to opine on such areas, and had not conducted the analysis necessary to render his opinions. *See, id*. at ¶¶ 37, 40. Class Counsel also successfully defeated Tyco's *Daubert* motion directed towards Prof. Elhauge, which entailed: (a) responding to the declarations of Dr. Daniel McFadden -- a Nobel-prize winning economist that Tyco retained -- who claimed that Prof. Elhauge's conclusions were unsupported and incomplete from an econometric standpoint; (b) deposing Dr. McFadden; (c) assisting in the selection and retention of Dr. Orley Ashenfelter, an independent expert who assisted the Court in the *Daubert* process; (d) briefing issues as requested by Dr. Ashenfelter; and (e) engaging in a two-day *Daubert* hearing in which Class Counsel examined Prof. Elhauge, Dr. Ordover and Dr. McFadden. *Id.* at ¶¶ 36-41.

Finally, Class Counsel also engaged in briefing and argument which resulted in a denial of Tyco's motion for summary judgment which was aimed at all of Plaintiffs' claims, and also substantially defeated the vast majority of Tyco's motions *in limine* which sought to severely limit the evidence that the Class could present during trial. *Id.* at ¶¶ 42-44.

C. Trial

After aggressively litigating the case through discovery and class certification, Class Counsel began preparing for trial once informed of the trial date. *Id.* at ¶ 45. Doing so required that Class Counsel expend immense effort in refining and focusing a complex case that Plaintiffs would have to present to a jury in just (24) twenty-four trial hours,[6] as well as contend with the logistics of moving

[6] This was later reduced to 20.5 hours after the holiday break.

a trial team to Boston, and the strategic concerns of litigating the case with a two week break due to the winter holidays. In order to narrow and define the issues to be tried before the Court and jury, Class Counsel: (a) reviewed the extensive document database to select documents critical to Plaintiffs' presentation of the case; (b) reviewed hundreds of hours of deposition testimony in order to distill essential testimony to be presented to the jury; (c) worked with Tyco in submitting a joint pretrial memorandum to the Court; (d) prepared proposed jury instructions and proposed *voir dire* for submission to the Court; (e) retained and worked with trial consultants to run a mock jury presentation in which Class Counsel tested the strengths and weaknesses of Plaintiffs' case; and (f) retained and worked with graphic designers to prepare visual aids to effectively communicate with the jury. *Id.* at ¶¶ 10-13. Class Counsel also drafted (2) two *motions in limine*, and responded to (11) eleven such motions filed by Tyco, and participated in oral argument on such motions before this Court at the final pretrial conference on November 23, 2009. *Id.* at ¶ 4.

Armed with this extensive trial preparation, Class Counsel proceeded with (13) thirteen days of trial, during which time Class Counsel made an opening statement, examined and cross-examined (12) twelve live witnesses, played (8) eight videos of deposition testimony, and introduced over (100) one hundred exhibits**.** *Id.* at ¶¶ 14, 50-52. Additionally, in the midst of trial, Class Counsel provided the Court with a damages tutorial to assist the Court in understanding the workings of Dr. Singer's damages methodology. *Id.* at ¶ 52 n.8. Finally, after Plaintiffs' rested their case-in-chief, Class Counsel worked round the clock during the holiday break preparing to examine any number of Tyco witnesses that could possibly be called to testify live during Tyco's case-in-chief, and also began drafting a brief on the issue of whether Tyco's commitment contracts, standing alone, constituted a violation of Sections 1 and 2 of the Sherman Act. *Id.* at ¶ 51.

After full discovery, significant pre-trial practice and thirteen days of trial, Class Counsel was in a position to reach the $32.5 million cash Settlement for the Class. The negotiation of this Settlement also was an extended and time consuming process, which unfolded over a period of several months and intensified only as the trial proceeded after the holiday break. *Id.* at ¶¶ 54-58.

III. CLASS COUNSEL'S FEE REQUEST IS REASONABLE

A. The Percentage-of-the-Fund Method is the Appropriate Method for Calculating Attorneys' Fees in This Case

Courts have long recognized that a lawyer who recovers a "common fund" on behalf of a class is entitled to reasonable attorneys' fees and expenses from the fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Court Awarded Attorney Fees: Report of the Third Circuit Task Force*, 108 F.R.D. 237, 241 (1985) (a common fund allows "fair and just allowances for expenses and counsel fees"). The Supreme Court has consistently held in common fund cases that it is appropriate for attorneys' fees to be determined on a percentage-of-the-fund ("POF") basis. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-66 (1939).

While district courts in the First Circuit have the discretion to use either a POF or lodestar method in making an attorney fee award in a common fund case, the First Circuit has acknowledged the "distinct advantages that the [POF] method can bring to bear" in that it is less burdensome to administer, reduces the possibility of collateral disputes, enhances efficiency throughout the litigation, is less taxing on judicial resources and better approximates the clearly stated preference for use of the POF method in determining fees. *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305-07 (1st Cir. 1995)("contrary to popular belief it is the lodestar method, not the [POF] method, that breaks from precedent."); *In re Lupron Mktg and*

Sales Practices Litig., 2005 U.S Dist. LEXIS 17456, *10-11 (D. Mass. Aug. 17, 2005)(accord).[7] Hence, most courts use the POF method with a lodestar cross-check. *See New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 2009 U.S. Dist. LEXIS 97364, *7 (D. Mass. Oct. 20, 2009) (Saris, J.) ("the weight of the case law [] approves of percentage of the fund as the methodology for determining attorneys' fees, with a lodestar calculation as a pragmatic cross-check."); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2005) (Young, C.J.) (utilizing percentage-of-the-fund method with lodestar as a cross-check).

B. Application of the Relevant Factors Supports the Requested Fee Here

A district court in the First Circuit has "extremely broad" latitude in determining an appropriate fee award under the POF method. *In re Tyco Int'l Ltd. MDL Litig.*, 535 F.Supp.2d 249 (D.N.H. 2007)(quoting *In re Thirteen Appeals*, 56 F.3d at 309). Unlike other Circuits, the First Circuit does not require district courts to use a fixed list of factors in determining the appropriateness of a requested fee award. *Id.* Nonetheless, district courts have typically focused on a mix of the following considerations:

(1) the extent of the benefit obtained;

(2) the reaction of the class members to the proposed settlement and proposed attorneys' fees;

(3) the skill and efficiency of the attorneys involved;

(4) the amount of time devoted to the case by counsel;

(5) the complexity and duration of the litigation;

[7] Additionally, the majority of the Circuit Courts of Appeal have approved the use of the POF method in common fund cases. *See In re Lupron*, 2005 U.S. Dist. LEXIS at *10-11 (citing the Courts of Appeals for the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuits).

(6) the risk that the litigation will be unsuccessful;

(7) fee awards in similar cases;

(8) the manner in which the fee request was negotiated between counsel and the lead plaintiff(s); and

(9) public policy considerations, if any.

See, e.g., In re TJX Co. Retail Security Breach Litig., 584 F.Supp.2d 395, 401 (D. Mass. 2008)(listing factors); *In re Tyco*, 2007 U.S. Dist. LEXIS at *51 (same); *In re Lupron*, 2005 U.S. Dist. LEXIS at 12 (same). Each of these factors weighs strongly in favor of the requested fee here.

1. The extent of the benefit obtained

The Class is comprised of over 6,000 business entities (primarily hospitals, clinics, and wholesalers), as identified by Tyco's sales records. These Class Members will share in the $32.5 million cash Settlement Fund, net of any attorneys' fees, expenses and incentive awards granted by the Court. Their recovery is both quantifiable and immediate. Upon the Settlement becoming final, all Class Members need do in order to receive their *pro rata* share of the net Settlement Fund is submit the claim form which was made available to them via multiple sources, including direct mailing. The magnitude of this recovery is substantial, both in absolute terms and particularly when assessed in light of the considerable obstacles and risks faced by Class Counsel in this case. *See In re Relafen,* 2004 U.S. Dist. LEXIS at *19 (multi-million dollar cash settlement fund for direct purchases of prescription drug conferred a substantial benefit on the class)*; In re Veeco Instruments Secs. Litig.*, 2007 U.S. Dist. LEXIS 85554, *22-23 (S.D.N.Y. Nov. 7, 2007)($5.5 million settlement conferred substantial benefit in securities class action in view of fact that defendants were represented by well-staffed team of lawyers who challenged plaintiffs at every stage of litigation up until eve of trial). As detailed in the Kelly Affidavit (¶¶ 7-8, 59-61) and in Plaintiffs' Settlement

Motion (pp. 13-21), these obstacles were numerous, significant, time consuming and costly.

In light of these risks and obstacles, Class Counsel believe that the Settlement of $32.5 cash million is an outstanding recovery in this case. This is particularly true considering that Tyco calculated damages to be zero. *See, e.g., In re General Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 432 (E.D. Pa. 2001) (awarding a one-third fee, and finding that a $48 million fund was "quite large" and exceeds "twice the amount that defendants' expert claimed plaintiffs could recover under the best circumstances").

2. The reaction of the class members to the proposed settlement and proposed attorneys' fees

On January 29, 2010, following preliminary approval, individual notice of the Settlement was mailed to Class Members, published in a healthcare trade journal and posted on the websites of certain of Class Counsel and the Claims Administrator.[8] *See* Berdon Aff. at ¶¶ 3-6 (Ex. D to the Kelly Affidavit). The notice informed Class Members that Class Counsel would be seeking fees of up to one-third of the Settlement Fund, reimbursement of expenses, and incentive awards for each of the Class Representatives.

Class Counsel has received ***no*** objections from the Class to date, (*see* Kelly Aff. at ¶ 66)[9] indicating the overwhelming support of the Class for the settlement and for the requested award of fees, expenses, and incentive awards. The lack of objections, particularly in a class consisting of sophisticated entities, is a "rare phenomenon," *see In re Rite Aid Sec. Litig.*, 396 F.3d 294, 305 (3rd

[8] The notice was posted on the websites of Garwin Gerstein & Fisher, LLP and Berdon Claims Administration, LLC.

[9] As clearly stated in the notice, the deadline for receipt of objections is March 1, 2010. In the event that an objection is received, Class Counsel will promptly inform the Court.

Cir. 2005), and strongly supports the requested fee. *See also In re Relafen*, 2004 U.S. Dist. LEXIS at * 20 (in approving fee request, noting that no member of the class, which was comprised of business entities, objected to the requested fee award). Here, however, the Class's support of the Settlement and fee request is not limited to the absence of objections: NPH and Smith Drug have both affirmatively endsorsed their support for (and lack of objection to) the Settlement and the fee request. NPH's CEO, Mark Marley, has represented to the Court that, "the [Settlement] is an excellent result, and on behalf of Natchitoches, I fully support approval of this settlement," [and] I also support, on behalf of Natchitoches, Class Counsel's request for attorneys' fees." *See* Kelly Aff. at Ex. B (Marley Aff. at ¶¶ 9-10). Similarly, Smith Drug's Director of Services, William Brice**,** has also expressed the belief that he believes the Settlement to be "an excellent result," and also supports Class Counsel's fee request. *Id.* at Ex. C (Brice Aff. at ¶¶ 9-12). Such active support for the Settlement and for Class Counsel's fee request is remarkable.

3. The skill and efficiency of the attorneys involved

Class Counsel include some of the preeminent antitrust firms in the country, and have decades of experience in prosecuting and trying complex actions.[10] As detailed above and in the

[10] The background, experience, accomplishments and qualifications, including firm resumes of Class Counsel, are included in the Kelly Affidavit as Exhibits E-Q. In describing the efforts of many of the same Class Counsel in another complex antitrust class action, Judge Edmunds in *In re Cardizem CD Antitrust Litig.*, No. 99-73259 (E.D. Mich. Nov. 26, 2002) stated (in approving the requested fee of 30% of a $110 million settlement) that "this Court would be remiss if it failed to acknowledge the experience, hard work and skill demonstrated by Class Counsel in this matter. Their excellent performance on behalf of the Class in this hotly contested case justifies the award they seek." *Id.* at 21. *See also In re Remeron Direct Purchaser Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27013, *37 (D.N.J. Nov. 9, 2005)(with respect to the same Class Counsel, noting that, "[t]he settlement entered with Defendants is a reflection of Class Counsel's skill and experience"); *In re Relafen*, 2004 U.S Dist. LEXIS at *19 (with respect to the same Class Counsel, Chief Judge Young noted that "the [s]ettlement was obtained as a direct result of Class Counsel's skillful advocacy.")

Kelly Affidavit, Class Counsel's experience and skill are amply evidenced by Class Counsel's effective prosecution of this action, including the highly favorable Settlement achieved.[11] This skill also resulted in the granting of class certification; denial of Tyco's motion for summary judgment; denial of Tyco's *Daubert* motions; the granting, in part, of Plaintiffs' *Daubert* motion; significant favorable rulings on several motions *in limine*; comprehensive trial preparations leading to a successful presentation at trial of Plaintiffs' case in chief and defense against Tyco's case that occurred prior to settlement; and hard-fought but successful settlement negotiations. *See generally*, Kelly Aff.

Class Counsel's skill and efficiency has also been specifically recognized by this Court.[12]

4. The amount of time devoted to the case by counsel

Class Counsel have expended over 47,000 hours and advanced over $4 million in expenses on this case. *See* Kelly Aff. at ¶¶ 67-68. As the court observed in *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 207, 252 (D.N.J. 2005), "[o]ver the course of years, it is reasonable that so much time would have been spent on these complex cases, particularly given the excellent counsel of Defendants and their contested nature." Such was the case here. As detailed above and in the Settlement Motion and Kelly Affidavit (and attachments thereto), from the pre-complaint investigation through discovery, comprehensive trial preparation and trial itself, Class Counsel have

[11] *See, e.g., In re Pharm. Ind. AWP Litig.,* 2008 U.S. Dist. LEXIS 111818, *82 (D. Mass. Dec. 15, 2008)(Saris, J.)(in awarding 30% fees from a $28.6 million settlement, noting that class counsel "vigorously and effectively pursued the Class Members' claims…in this highly complex case [and] that the Settlement was obtained as a direct result of their advocacy."); *In re TJX,* 584 F.Supp.2d at 408 (fact that class counsel was comprised of attorneys from firms experienced in type of litigation at issue and demonstrated "more than satisfactory skill and effort in the course of their advocacy" weighed in favor of granting requested fee award).

[12] *See* Jan. 8, 2010 Trial Trans. at pp. 12-13 (addressing counsel for both parties and noting that "[i]t

expended an enormous amount of time, energy and resources in litigating this case against highly-skilled adversaries.

Moreover, Class Counsel have worked and will likely continue to work a significant number of hours in connection with administering the Settlement. *See Varacallo*, 226 F.R.D. at 252 (fee award will be sole compensation for counsel "despite the continuing responsibilities [counsel] will have in responding to Class Member inquiries, assisting the Claim Evaluator, consulting on individual cases, and any post-judgment proceedings and appeals").

The foregoing represents a very significant commitment of time, personnel and out-of-pocket expense outlays to this case, all with no guarantees of recovery.

5. The complexity and duration of the litigation

Antitrust class actions are invariably complex. "An antitrust class action is arguably the most complex action to prosecute." *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000). This antitrust case is no exception to the rule. If anything, over the course of its four year duration, this case proved to be more complex than the typical antitrust class case in three significant respects. First, First Circuit precedent regarding the standards for class certification was evolving during the time that the parties were engaged in a protracted and fiercely contested battle over class certification, which involved, *inter alia*, a "robust economic debate between [] two highly qualified antitrust titans with respect to [common impact]." *See Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd.*, 247 F.R.D. 253, 273 (D.Mass. 2008)(Saris, J.) (citing *New Motor Vehicles, infra* at p. 6 n.5). Second, difficult and complicated economic issues surrounding Tyco's *Daubert* challenge to Plaintiffs' economist, Prof. Elhauge, resulted in the appointment of an

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was beautifully tried all throughout. The briefing has always been outstanding.")

independent expert to assist the Court in the *Daubert* process. Third, the core of this case consisted of a complex web of many complicated contractual relations between Tyco, GPO's and direct purchasers, and involved the application of antitrust law (*i.e.*, the law of exclusive dealing under Sections 1 and 2 of the Sherman Act as applied to commitment contracts) which was evolving throughout the tenure of this case (and is still evolving).

6. The risk that the litigation will be unsuccessful

A determination of a fair fee must include consideration of the inherent nature of contingent antitrust actions, which entails the highly uncertain nature of the fee, the wholly contingent outlay of extremely large out-of-pocket sums by class counsel and the fact that the risk of failure (for both class members and class counsel) may be extremely high. *See, e.g., Milliron v. T-Mobile USA, Inc.*, 2009 U.S. Dist. LEXIS 101201, *33 (D.N.J. Sept. 10, 2009)(noting that the risk of taking a case on contingency is "a real and important factor" because "success is never guaranteed and counsel face[s] serious risks since both trial and review are unpredictable.")(quotation omitted). As such, numerous courts have observed that the risk assumed by an attorney is "perhaps the foremost" factor in determining the appropriate fee award. *In re Lupron*, 2005 U.S. Dist. LEXIS at * 15 (quoting *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 54 (2nd Cir. 2000)); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2009 U.S. Dist. LEXIS 120953, *53 (S.D.N.Y. Dec. 23, 2009)(the risk associated with a case "bears heavily" upon the determination of an appropriate fee award).

As detailed above and in the Kelly Affidavit, the risks of non-recovery were abundant throughout this case. Class Counsel undertook comprehensive, time-consuming discovery, obtaining and reviewing millions of pages of documents before any dispositive motions were even filed. As the case proceeded, Class Counsel undertook substantial additional risk, expending tens of thousands

of additional hours and millions of dollars in out-of-pocket expenses investigating the Class's claims, conducting dozens of depositions, retaining and working with experts (and rebutting the opinions of defense experts), briefing numerous dispositive and discovery motions,[13] preparing for trial, and actually trying the case. *See, e.g., In re Tyco*, 535 F.Supp.2d at 268 (in securities class action, noting that had class lost at summary judgment trial class counsel would have lost the tens of millions of dollars expended as well as attorney time invested).

Moreover, aside from the inherent risks of a jury trial, Tyco filed a detailed motion for Judgment as a Matter of Law ("JMOL") on the twelfth day of trial which argued for the dismissal of all of Plaintiffs' claims. Specifically, Tyco argued that, *inter alia*, absent its (in Tyco's view, lawful) commitment contracts, Plaintiffs' remaining claims relating to Tyco's sole-source contracts could not establish the requisite levels of market foreclosure.[14] And, one day later, the Ninth Circuit issued its opinion in *Allied*, which affirmed a lower court ruling that Tyco's commitment and sole-source contracting practices related to another medical device did not violate Section 1 of the Sherman Act. If this Court (addressing Tyco's JMOL) gave weight to Tyco's arguments and/or the *Allied* decision, Plaintiffs faced the possibility of no recovery at all.

[13] As aforementioned, in light of evolving First Circuit case law and Tyco's *Daubert* challenge to Plaintiffs' expert's methodologies for assessing common impact, Class Counsel was faced with considerable risk that the class would not be certified. *See, e.g., In re Marsh & McLennan*, 2009 U.S. Dist. LEXIS at *52-53 (changes in standards for class certification increased risks significantly).

[14] This Court had indeed previously indicated that it might not permit Plaintiffs' claims relating to Tyco's commitment contracts to go to the jury and would potentially subtract damages resulting from such contracts. *See* Day 11 Trial Trans. at pp. 8-13, 141. While Plaintiffs believed that they had strong legal arguments against partitioning Plaintiffs' claims in such a manner, Plaintiffs had no assurance that this Court (or the First Circuit or Supreme Court) would agree with such arguments.

7. Fee awards in similar cases

A comparison with attorneys' fees awarded in similar cases also supports the fee requested by Class Counsel in the present case. The requested fee is consistent with awards granted in other complex antitrust class action cases brought by direct purchasers alleging overcharges in the healthcare industry. These cases, which involved pharmaceutical rather than medical device products, also involved significant settlements, and fees of one-third were approved by the courts in all but one instance where 30% was requested and granted. *See In re Relafen Antitrust Litig*., No. 01-12239, 2004 U.S. Dist. LEXIS 28801 (D. Mass. April 9, 2004) (Young, C.J.) (one-third of $175 million); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-cv-340 (D. Del. April 23, 2009)(Robinson, J.)(one-third of $250 million); *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27013 (D.N.J. Nov. 9, 2005) (Hochberg, J.) (one-third of $75 million); *In re Buspirone Antitrust Litig.*, No. 01-CV-7951, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. April 11, 2003) (Koeltl, J.) (one-third of $220 million); *In re Cardizem CD Antitrust Litig.*, MDL No. 1278 (E.D. Mich. Nov. 26, 2002) (Edmonds, J.) (30% of $110 million); *North Shore Hematology-Oncology Associates, P.C. v. Bristol Myers Squibb Co.*, No. 1:04cv248 (D.D.C. Nov. 30, 2004) (Sullivan, J.) (one-third of $50 million); and *In re Terazosin Hydrochloride Antitrust Litig.*, No. 99-MDL-1317, 2005 U.S. Dist. LEXIS 43082 (S.D. Fla. Apr. 19, 2005) (Seitz, J.) (one-third of $74 million). All of these awards were sought and granted without a single objection from class members. Here, too, there are no objections. *See* Kelly Aff. at ¶ 66.

Courts within this District have consistently awarded fees of one-third of a settlement fund. *See In re Relafen Antitrust Litig.*, 231 F.R.D. at 77 (end-payor class)(noting that one-third was "not out of proportion with large class actions.")(citing Eisenberg & Miller, *Attorney's Fees in Class*

Action Settlements: An Empirical Study, 1 Journal of Empirical Legal Studies (2004)(noting that "one-third is the benchmark for privately-negotiated contingent fees"); *In re Relafen Antitrust Litig.*, 2004 U.S. Dist. LEXIS at * 20-21(direct purchaser class)("the requested 33 1/3% percent fee award is well within the applicable range of percentage fund awards.")(citations omitted); *Mowbray v. Waste Management Holdings*, C.A. No. 98-11534-WGY (D. Mass. Aug. 2, 2001); *Wilensky v. Digital Equip. Corp.*, C.A. No. 94-10752-JLT (D. Mass. July 11, 2001); *Chalverus v. Pegasystems, Inc.*, C.A. No. 97-12570-WGY (D. Mass. Dec. 19, 2000); *In re Peritus Software Services Inc.*, C.A. No. 98-10578-WGY (D. Mass. Feb. 28, 2000).[15] A fee of one-third is also well within the range of fees awarded in other districts, as reflected by the direct purchaser cases collected above. *See also In re Rite Aid Corp. Sec. Litig.*, 146 F.Supp.2d 706, 735 (E.D. Pa. 2001)(review of 289 settlements demonstrates "average attorney's fees percentage [of] 31.71%" with a median value that "turns out to be one-third").[16]

[15] *See also In re Picturetel Corp. Sec. Litig.*, C.A. No. 97-12135-DPW (D. Mass. Nov. 4, 1999); *Zeid v. Open Environment Corp.*, C.A. No. 96-12466-EFH (D. Mass. June 24, 1999); *Morton v. Kurzweil Applied Intelligence Co.*, C.A. No. 10829-REK (D. Mass. Feb. 4, 1998); *In re Bay Fin. Corp. Sec. Litig.*, C.A. No. 89-2377-WD (D. Mass. Nov. 4, 1996); *In re Copley Pharm, Inc. Sec. Litig.*, C.A. No. 94-11897-WGY (D. Mass. Feb. 8, 1996).

[16] While a few courts have used what is sometimes termed a "declining percentage" approach in cases involving "megafunds," which are typically characterized as common funds exceeding $100 million, Plaintiffs respectfully submit that such an approach is not applicable here due to the amount of the fund. *See, e.g., Conley v. Sears, Roebuck and Co.*, 1998 U.S. Dist. LEXIS 7503, *22 (D. Mass. May 1, 1998)(Saris, J.)(observing that some courts apply declining percentage approach to cases in which the fund is "unusually large."); *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 975 (7th Cir. 2003)(classifying "megafunds" as common funds exceeding $100 million); *Stop & Shop Supermarket v. Smithkline Beecham Corp.*, 2005 U.S. Dist. LEXIS 9705, *31 (E.D. Pa. May 20, 2005)(same). Even if the Settlement constituted a "megafund," Class Counsel respectfully submit that an award of one-third would still be appropriate given the specific facts of this litigation.

8. The manner in which the fee request was negotiated between counsel and the lead plaintiffs[17]

Prior to the filing of the complaint in this case, Class Counsel and the Class Representatives, NPH and Smith Drug, signed a letter of engagement in good faith in which Class Counsel agreed to bear the costs of the litigation, and to be compensated if and when a recovery was achieved for the Class.

Various courts have observed that "the percentage-of-the-fund method of awarding attorney's fees in class actions should approximate the fee that would be negotiated if the lawyer were offering his or her services in the private marketplace." *See In re Remeron Direct Purchaser Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27013, 46 (D.N.J. Nov. 9, 2005). *See also Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989); *In re Synthroid Marketing Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time"); *In re Thirteen Appeals*, 56 F.3d at 307; (endorsing percentage-of-the-fund method because its results-oriented approach better approximates the workings of the marketplace).

Class Counsel has contracted with their clients for contingency fees of one-third, or greater, in non-class cases. This practice is consistent with court decisions recognizing that attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation. *See, e.g., In re Remeron*, 2005 U.S. Dist. LEXIS at *43; *In re Relafen*, 231

[17] While not all district courts in the First Circuit examine this factor, *see, e.g., In re TJX*, 584 F.Supp.2d at 401; *In re Lupron*, 2005 U.S. Dist. LEXIS at *12 (listing typical considerations in fee request assessment), Class Counsel have included it for completeness.

F.R.D. at 81 n.22 (citing Eisenberg & Miller, *infra*)("one-third is the benchmark for privately-negotiated contingent fees….").

9. Public policy considerations

As the Supreme Court has observed, the class action vehicle enables a large group of people to band together and press claims that would otherwise be prohibitively expensive to litigate. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). When the class action vehicle results in the creation of a common fund for the benefit of the class, public policy is one of the major rationales for awarding attorneys' fees to those prosecuting private claims for violation of the antitrust, securities or consumer protection laws. *See Trapanotto v. Aetna Life Ins. Co.,* 1996 U.S. Dist. LEXIS 10458, *32-33 (S.D.N.Y. July 25, 1996)(citation omitted); *In re Lupron*, 2005 U.S. Dist. LEXIS at *23 (in awarding attorneys' fees, noting public interest in obtaining redress for prescription drug consumers and making defendants disgorge proceeds of predatory market behavior); *In re Tyco*, 535 F.Supp.2d at 270 (without a fee that reflected the risk and effort involved in litigation, attorneys might hesitate in future to be similarly aggressive and persistent in bringing claims).

Such public policy considerations weigh in favor of the requested fee here. As was the case in *In re Tyco*, where the district court there found that public policy considerations favored granting the requested fees, this case was extremely complex and hotly contested in all respects. As aforementioned, Class Counsel devoted over 47,000 hours and over $4 million in costs into maintaining and bringing the case to trial on a contingent basis. Without a fee award that takes into account the enormous efforts and risks undertaken by Class Counsel in prosecuting this case, Class Counsel would be unable to continue to bring large complex antitrust class actions that serve to protect the interests of those who may not otherwise prosecute such claims individually. *See, e.g.,*

id.; Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 198 (3rd Cir. 2000)(noting the "stated goal in percentage fee-award cases of ensuring that competent counsel be willing to undertake risky, complex and novel litigation" and recognizing "the importance of financial incentives to entice qualified attorneys to devote their time to complex, time-consuming cases in which they risk non-payment."). Accordingly, this factor strongly supports the fee request here.

C. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee

As noted above, although the First Circuit does not require courts to cross-check the percentage award against the lodestar in its determination of the reasonableness of the fee, *see, e.g., In re Relafen*, 231 F.R.D at 81, such a cross-check here reveals that Class Counsel's requested fee award is reasonable.

Class Counsel have worked over 47,000 hours on this case, which is collectively over $20 million in time based on current billing rates. *See* Kelly Aff. at ¶ 69.[18] A one-third fee award would equate to a "multiplier" of .529 (actually a "divider" of roughly 53% of the lodestar). An examination of recently approved multipliers in other complex antitrust class cases reveals that the multiplier requested here is much lower than fees commonly awarded. *See, e.g., Nichols v. Smithkline Beecham Corp.*, 2005 U.S. Dist. LEXIS 7061, *78 (E.D. Pa. April 22, 2005)(noting that "[t]he fee awarded [in the Buspar litigation] resulted in a multiplier of 8.46."); *Stop & Shop Supermarket Co. v. Smithkline Beecham Corp.*, No. 03-4578, 2005 U.S. Dist. LEXIS 9705, *60 (E.D. Pa. May 19, 2005)(approving multiplier of 15.6 in the Paxil litigation); *Oncology & Radiation Ass., P.A. v. Bristol-Meyers Squibb Co. et al.*, No. 01-02313 (D.D.C. Sept. 3, 2004)(9.77 multiplier

[18] Class Counsel carefully allocated assignments in a manner that effectively prosecuted the case while avoiding duplication of effort. *See* Kelly Aff. at ¶¶ 48, 67.

awarded in Taxol antitrust litigation); *In re Relafen,* 2004 U.S Dist. LEXIS at *19 (4.88 multiplier awarded); *North Shore Hematology-Oncology Ass., P.C. v. Bristol-Meyers Squibb Co.*, No. 04-248 (D.D.C. Nov. 30, 2004)(8.1 multiplier awarded in Platinol antitrust litigation).[19]

IV. CLASS COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

It is well-settled that counsel who have created a common fund for the benefit of a class are entitled to be reimbursed for their out-of-pocket expenses reasonably incurred in creating the fund. *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999). Expenses are compensable where the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'") (citation omitted); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients.") (citation omitted). The categories of expenses for which Class Counsel seek reimbursement here are the type of expenses routinely charged to hourly-fee paying clients, and therefore, should be reimbursed out of the common fund. Specifically, Class Counsel's expenses of over $4 million, as detailed in affidavits that appear as exhibits to the Kelly Affidavit, reflect costs expended for purposes of prosecuting this litigation, including expert fees; costs associated with computerized research and the creation of an electronic document database; travel

[19] Where not available in published opinions, Class Counsel have calculated these multipliers based upon fee petition filings made in the above-cited cases. These supporting documents are available for review at the Court's request.

and lodging expenses; copying costs; the costs of court reporters and deposition transcripts; and the costs of preparing for and conducting the trial.[20] Reimbursement of similar expenses is routinely permitted.[21]

A large component of these expenses (over $2 million) consists of fees paid to experts and trial consultants who were instrumental in, among other things, helping Plaintiffs seek class certification; establish causation; calculate damages; refute Tyco's defenses; prepare for trial; and in obtaining this favorable Settlement for the Class. These expenses were necessarily incurred in obtaining this result for the Class.[22]

V. INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES ARE APPROPRIATE AND REASONABLE

Class Counsel request that the Court approve an incentive award in the amount of $35,000 each for the two Class Representatives, NPH and Smith Drug. To date, no Class member has objected to the requested incentive awards.

In instituting this litigation, these Class Representatives have acted as private attorneys

[20] Dr. Hal Singer (Plaintiffs' damages expert) and TrialGraphix (who assisted Plaintiffs in the preparation and presentation of evidence and demonstratives at trial) have not yet been paid their final balances of $55,804.10 and $120,538.40, respectively, inasmuch as both agreed to be paid upon final approval in order to be paid directly from the settlement proceeds. *See* Affidavit of Bruce E. Gerstein on behalf of Garwin Gerstein & Fisher LLP, at ¶18 (attached as Exhibit E to the Kelly Affidavit).

[21] *See In re Remeron,* 2005 U.S. Dist. LEXIS 27013 at, *49, (citing *Oh v. AT & T Corp.*, 225 F.R.D. 142, 154 (D.N.J. 2004) (finding the following expenses to be reasonable: "(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and express services, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, court and witness fees, (9) overtime and temp work, (10) postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund-pro hac vice.")).

[22] The individual affidavits of Class Counsel list "contribution to the litigation fund" (or similar phrase) as an expense. Class Counsel made individual contributions to this fund, which was in turn

general seeking a remedy for what appeared to be a public wrong, in effect providing private enforcement of the law. It has long been held that private class action suits are a primary weapon in the enforcement of the laws for the protection of the public. *See, e.g., P.D.Q. Inc. of Miami v. Nissan Motor Corp. in USA*, 61 F.R.D. 372, 380 (S.D. Fla. 1973) (private civil suits are an important tool in enforcing the antitrust laws).

As noted in their Affidavits to the Court, the Class Representatives diligently fulfilled this role. NPH and Smith Drug actively pursued the Class's interests by filing suit on behalf of the members of the Class and undertaking the responsibilities attendant upon serving as representative plaintiffs, including responding to document requests and interrogatories, and keeping themselves appraised of the progress of the case. As Class Representatives, each took on the significant burden of being deposed multiple times; Smith Drug's President and Director of Services (Ken Couch and Bill Brice, respectively), and NPH's CEO and Director of Materials (Mark Marley and Steve Crowder, respectively) all submitted to deposition. NPH also submitted to deposition as a third-party in the *Daniels* litigation against Tyco. Furthermore, Mssrs. Marley, Crowder and Brice all traveled from Louisiana and/or South Carolina in order to prepare for and then testify before this Court at trial. *See* Kelly Aff. at Exs. B (Marley Aff. at ¶ 8) and C (Brice Aff. at ¶ 8).

Numerous courts have found it appropriate to specially reward named class plaintiffs for the benefits they have conferred, and the amount requested here is in line with typical awards of such type. *See, e.g., In re Lupron,* 2005 U.S. Dist. LEXIS at *24-25 (awarding a total of $100,000 to named plaintiffs and noting that "the named plaintiffs participated actively in the litigation…"); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) ("Incentive awards

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used to pay the reasonable expenses described above.

are not uncommon in class action litigation and particularly where . . . a common fund has been created for the benefit of the entire class") (internal quotations and citation omitted); *Remeron,* 2005 U.S. Dist. LEXIS 27013, at *50 ($30,000 each to named plaintiffs); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) ($50,000 incentive award to named plaintiff); *In re Dun & Bradstreet Credit Services Customer Litig.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (two incentive awards of $55,000 and three incentive awards of $35,000); *In re Revco Sec. Litig.*, 1992 U.S. Dist. LEXIS 7852, *21 (N.D. Ohio May 6, 1992) ($200,000 incentive award to named plaintiff); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250-51 (S.D. Ohio 1991) ($50,000 incentive awards to each of the six named plaintiffs).

For these reasons, the requested incentive awards for the named plaintiffs are both appropriate and more than reasonable in amount.

VI. CONCLUSION

For the reasons set forth above and in the Kelly Affidavit, Class Counsel respectfully request that the Court approve the fee and expense application and enter an Order awarding Class Counsel fees in the amount one third of the Settlement Fund (which includes the $32.5 million Settlement and a proportionate share of the interest thereon through the date of the award), and reimbursement of expenses in the amount of $4,127,391.02. Class Counsel also request that the Class Representatives, NPH and Smith Drug, receive incentive awards of $35,000 each for their efforts on behalf of the Class in the prosecution of this action.

Dated: February 23, 2010

Respectfully submitted,

/s/ *Elena K. Chan*

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on February 23, 2010.

/s/ *Elena K. Chan*