IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

IN RE SOUTHEASTERN MILK ANTITRUST LITIGATION	)	**Master File No. 2:08-MD-1000**
	)	**Judge J. Ronnie Greer**
THIS DOCUMENT RELATES TO:	)	
***Sweetwater Valley Farm, Inc., et al. v. Dean Foods, et al.*, No. 2:07-CV-208**	)	

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

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Following four years of intense litigation and over one year of pre-filing investigation, Plaintiffs' counsel, on behalf of the class of Southeast Dairy Farmers, successfully negotiated settlements in the amount of $140,000,000 with Defendant Dean Foods and $5,000,000 and substantial structural changes with Defendants SMA and Baird (collectively, "Settling Defendants"). Plaintiffs believe this is the largest and most substantial antitrust settlement obtained in this District. In accordance with Sixth Circuit guidance, Plaintiffs respectfully request an award of $48,333,333 in attorneys' fees (one-third of the recovery from Settling Defendants) and $7,408,920 as reimbursement for Class Counsel's out-of-pocket expenses.

The requested fee award is consistent with the percentage awards approved by courts in the Sixth Circuit in similar antitrust and complex class action cases, is supported by Class Counsel's actual lodestar (out of pocket costs and fees absent any multiplier), and is strongly supported by the factors considered by the Sixth Circuit for determining the reasonableness of a fee award. Of particular significance are the following considerations:

- Numerous decisions in the Sixth Circuit and other jurisdictions establish that the percentage award requested here, 33.3% of the settlements, plus reimbursement of out-of pocket expenses, is well within the range of awards approved as reasonable in large contingency cases.
- Class Counsel's lodestar in this matter is over $46,000,000, and out-of-pocket expenses of more than $7,000,000 have been incurred. Thus, although courts within the Sixth Circuit support calculation of a reasonable fee using a multiplier of lodestar of over 2 to compensate for risk borne by plaintiffs and other factors, here the requested award is 1.03 of the total lodestar.
- The requested award is particularly appropriate in an antitrust matter such as this

because of the complexity of the matter and the critical public policies advanced by private actions to enforce the antitrust laws.

- The requested fee award also is appropriate because of the degree of risk entailed in this litigation. Class Counsel represented the class on a contingency basis, and received no revenue from outside sources. As the Court is well aware, every claim and issue in this case has been vigorously contested by Defendants who are represented by premier law firms – Williams & Connolly (DC), Dechert (DC), Winston & Strawn (Chicago), Andrews Kurth (Dallas), Stinson Morrison Hecker (Kansas City), and Patton Tidwell Schroeder (Texas). There is no doubt that Plaintiffs and their counsel have invested significant time and resources in the prosecution of this litigation.
- Finally, Plaintiffs believe the quality of the representation in this case strongly supports such an award. Plaintiffs achieved settlements with the Settling Defendants, while litigating against able defense counsel represented by major law firms that devoted enormous resources to the defense.

The factual predicate for this fee and expense request are set forth in the accompanying declarations by Class Counsel. *See* Declaration of Robert G. Abrams, Lead Class Counsel Baker & Hostetler ("Abrams Decl."), and attached supporting Declarations from individual Plaintiffs' firms.[1]

[1] The Petition is supported with the lodestar and expense information for nine firms: Baker & Hostetler LLP/Howrey LLP; Boies Schiller & Flexner LLP; Brewer & Terry P.C.; Cohen Milstein Sellers & Toll, PLLC; Fine, Kaplan, & Black R.P.C.; Freed Kanner London & Millen, LLC; Hausfeld LLP; Jessee & Jessee; and Whitfield Bryson & Mason LLP.

I. THE REQUESTED AWARD OF FEES IS FAIR AND REASONABLE

A. An Award of Fees Based on a Percentage of the Common Fund Created by the Settlement Is Appropriate

Class Counsel created a benefit for the Settlement Class and are entitled to recover reasonable attorneys' fees. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."); *Stanley v. U.S. Steel Co.*, 2009 U.S. Dist. LEXIS 114065, at *4 (E.D. Mich. Dec. 8, 2009) ("[W]here counsel's efforts create a substantial common fund for the benefit of [ ] a class, they are entitled to payment from the fund based on a percentage of that fund.").

This award is particularly appropriate here, where Defendants' conduct could not practicably have been challenged without the commitment of significant time and resources by Plaintiffs and Class Counsel. (*See* 9/7/10 Order, Dkt No. 934 (As this Court recognized: "This litigation is complex, its prosecution costly, and the [class] members with smaller damages claims likely have fewer resources with which to fund individual litigation.")) Defendants vigorously defended – and non-settling Defendants continue to defend – the case and had great resources at their disposal, requiring Class Counsel to devote immense amounts of time and resources on a contingency basis and at a significant risk.

In awarding fees paid out of a common fund, the Sixth Circuit "trend[s] towards adoption of a percentage of the fund method in cases," *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *4 (quoting *Rawlings v. Prudential-Bach Props. Inc.*, 9 F.3d 513, 515 (6th Cir. 1993)),[2] although

[2] The percentage of the fund method prevents "inequity by assessing attorneys' fees against the entire fund," and "decreases the burden imposed on the [c]ourt by eliminating a full-blown, detailed and time consuming lodestar analysis." *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *4-5; *In re Cardinal Health Sec. Litig.*, 528 F. Supp. 2d 752, 762 (S.D. Ohio 2007) ("[T]he [c]ourt [is] spared from the costly task of scrutinizing counsel's billable hours"). The percentage of the

the Court has the discretion to apply either the percentage of the fund or lodestar method[s] in determining the appropriate amount of the award, *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *3-4; *In re Sulzer Ortho. Inc.*, 398 F.3d 778, 780 (6th Cir. 2005) ("[I]t is within the district court's discretion to determine the appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before it") (quoting *Rawlings*, 9 F.3d at 516-17). When courts employ the percentage of the fund method, the lodestar may still be useful to cross-check the reasonableness of the percentage. *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *9-10 (citing Manual for Complex Litig. (Third) § 14.121, n.504 (1995)); *Cardinal Health*, 528 F. Supp. 2d at 767 (performing a lodestar cross-check). Under either method, the fees requested here are appropriate. Plaintiffs accordingly seek fees based on a percentage of the common fund, with a lodestar cross-check.

B. Application of the Sixth Circuit's Test for Reasonableness Strongly Supports the Requested Award

Plaintiffs' requested fee of 33.3% of the settlement fund falls well within the 20-50% range of fees awarded in the Sixth Circuit on a percentage basis in complex common fund cases. *See Worthington v. CDW Corp.*, 2006 U.S. Dist. LEXIS 32100, at *22 (S.D. Ohio May 22, 2006) ("[C]ounsel's requested percentage of 38 and one-third of the total gross settlement is solidly within the typical 20 to 50 percent range."); *Rotuna*, 2010 U.S. Dist. LEXIS 58912, at *23 ("one-third of the total award[] is . . . reasonable"); *Bessey v. Packerland Plainwell, Inc.*, 2007 WL 3173972, at *4 (W.D. Mich. Oct. 26, 2007) (approving award of approximately 33% and noting that "[e]mpirical studies show that . . . fee awards in class actions average around one-third of the

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fund method is also advantageous because it "establish[es] reasonable expectations on the part of class counsel as to their expected recovery and encourag[es] early settlement before substantial fees and expenses have accumulated." *Rotuna v. West Customer Mgm't Group, LLC*, 2010 U.S. Dist. LEXIS 58912, at *20 (N.D. Ohio June 15, 2010). In addition, the percentage of the fund approach "more accurately reflects the results achieved." *Rawlings*, 9 F.3d at 516.

recovery") (internal quotations omitted); *In re Sulzer Ortho., Inc*., 398 F.3d at 779, 782 (affirming award of "thirty-two per cent of the settlement fund"); *Kogan v. AIMCO Fox Chase, L.P*., 193 F.R.D. 496, 505 (E.D. Mich. 2000) (awarding approximately 31%); *In re Cardizem CD Antitrust Litig*., Case No. 99-md-1278 (E.D. Mich. Nov. 26, 2002) (unreported, Edmunds, J.) (awarding 30% of settlement to counsel for "Sherman Act Plaintiffs")[3]; *In re F&M Distrib., Inc. Sec. Litig*., 1999 U.S. Dist. LEXIS 11090, at *10 (E.D. Mich. June 29, 1999) ("the excellent performance of the attorneys merits an award of thirty percent of the settlement fund"); *In re Foundry Resins Antitrust Litig*., Case No. 2:04-md-1638 (S.D. Ohio Mar. 31, 2008) (unreported, Frost, J.) (awarding approximately 30%).[4]

Plaintiffs' requested fee is fair and reasonable compensation for Class Counsel's efforts in light of the following factors considered by the Sixth Circuit: (1) "the value of the benefit rendered to the plaintiff class"; (2) "the value of the services on an hourly basis"; (3) "the complexity of the litigation"; (4) "whether the services were undertaken on a contingent fee basis"; (5) "the professional skill and standing of counsel involved on both sides"; and (6) "society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others." *Bowling v. Pfizer, Inc*., 102 F.3d 777, 780 (6th Cir. 1996); *see also Kogan*, 193 F.R.D. at 503 (laying out factors).

1. Class Counsel Secured a Valuable Benefit for the Class

A recovery of $145,000,000 from three Defendants is a significant success and of substantial benefit to the class. This settlement is likely the largest settlement of any antitrust case litigated in this District. Each class member will be eligible to receive proportional shares

[3] This unreported decision (hereafter "*Cardizem* (unreported)") is attached hereto as Exhibit A.

[4] This unreported decision is attached hereto as Exhibit B.

of the settlement based on the volume of milk within the class, estimated to be, on average, $13,000 per class member. (2/14/12 Order, at Ex. A ¶ 15, Dkt No. 1782-1.) In addition, $145,000,000 is approximately one-third of the total damages calculated by Plaintiffs' expert as of August 2011. (*See, e.g.*, Supp. Rpt. of Rausser, 9.) It is unquestionable that this monetary recovery is of substantial benefit to the class. *See Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 339 (W.D. Pa. 1997) ("[C]ourts have determined that a settlement can be approved even if the benefits amount to a small percentage of the recovery sought . . . . '[T]here is no reason . . . why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.'") (quoting *Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974)).

In addition, the settlement with SMA and Baird includes valuable and significant structural changes to the manner in which SMA is operated and managed, the way in which milk is marketed in the Southeast, and how SMA interacts with Southeast dairy farmers. (SMA/Baird Settlement Agmt, Dkt No. 1678-1.) First, SMA will undergo a broad annual audit of its activities conducted by an independent auditor, the results of which shall be made available to SMA's Board of Directors and the managers of SMA's member cooperatives. (*Id.*, ¶ 7.3.) Second, SMA will use its best efforts to increase Class I utilization percentages in Federal Orders 5 and 7 by reducing milk supply commitments to certain manufacturing plants within those Orders. SMA estimates that this change alone may generate value to Southeast dairy farmers of approximately $0.10 to $0.12/cwt of milk – which could amount to millions of dollars per year of benefits to members of the class. (*Id.*, ¶ 7.4.) Third, SMA and Baird also will maintain, for at least three years, a production incentive program for the dairy farmer members of SMA's cooperatives in Orders 5 and 7 designed to increase prices paid to these farmers for the purpose

of increasing their local production of milk. (*Id*., ¶ 7.5.) Fourth, SMA will change the procedures for the election of its board of directors, implement term limits for most directors, and disclose potential and actual conflicts of interest. (*Id*., ¶ 7.6.) Fifth, SMA will no longer handle, pool or otherwise be involved with milk marketed by DMS for independent farmers. (*Id*., ¶ 7.8.) Sixth, SMA and Baird will terminate without cause the management agreement between SMA's member cooperatives and VFC Management, LLC (Baird's management company), and a competitive bidding process will be implemented for the selection of SMA's General Manager. (*Id*., ¶ 7.6.) Seventh, SMA and Baird will establish a Dispute Resolution Committee consisting of three independent parties authorized to hear and resolve complaints and disputes over SMA and Baird's compliance with certain provisions of the Settlement Agreement. (*Id*., ¶ 7.7.) This important structural relief, which would not have been undertaken absent this litigation, will provide significant long-term economic benefits to all Southeast dairy farmers in addition to the $145,000,000 cash payments. Achieving this substantial benefit for thousands of dairy farmers similarly supports Class Counsel's fee request here. *See In re Visa Check/ Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) (considering the injunctive relief awarded in determining an appropriate fee award).

2. Class Counsel Expended Significant Time and Labor

Final approval of the settlements with Dean, SMA, and Baird will represent a benefit obtained from over 113,000 hours of legal work. (Abrams Decl., ¶ 3.) This matter involves very complex issues, which where vigorously litigated by all nine Defendants. Unquestionably, Class Counsel's efforts in this case have been extensive. Class Counsel began prosecuting this case over four years ago, after a one-year investigation of the dairy industry in the Southeast. The formidable defense began shortly after the complaints were filed, when Class Counsel (and

separate counsel prior to consolidation) responded to numerous motions to dismiss. (Abrams Decl., ¶ 4.)

During discovery, Class Counsel reviewed, analyzed, and organized for use over 5,000,000 pages of documents produced by Defendants, in addition to the over 95,000 pages produced by third parties. (Abrams Decl., ¶ 5.) Obtaining these documents from Defendants and third parties required hundreds of hours of Class Counsel's time participating in meet and confer sessions and exchanging dozens of letters, in an effort to resolve discovery issues without Court intervention. (Abrams Decl., ¶ 5.) While disputes were sometimes resolved informally, the parties were often unable to reach agreement, forcing Plaintiffs to file seventeen motions to compel and other discovery motions. (Abrams Decl., ¶ 6.) Many of these motions were subject to another round of briefing after both sides moved to reconsider or appeal Magistrate Judge Inman's decisions, and sometimes decisions of this Court. (Abrams Decl., ¶ 6.) In addition, Named Plaintiffs produced over ten thousand pages of documents, (Abrams Decl., ¶ 5), and opposed several discovery motions filed by Defendants. (Abrams Decl., ¶ 6.) Class Counsel and Plaintiffs also produced hundreds of pages of interrogatory responses. (Abrams Decl., ¶ 5.)

During discovery, Class Counsel took 80 depositions of fact witnesses, and defended or otherwise attended 30 depositions taken by Defendants. (Abrams Decl., ¶ 5.) Plaintiffs also conducted extensive expert discovery. In the class certification phase of the case, Class Counsel consulted extensively with John Beyer, Plaintiffs' expert, and deposed Defendant's class expert, Catherine Morrison-Paul. (Abrams Decl., ¶ 7.) Towards the end of discovery and throughout trial preparation, Class Counsel frequently consulted with its two experts, Frank Scott and Gordon Rausser. (Abrams Decl., ¶ 7.) In addition, Class Counsel deposed Defendants' five experts (Kalt, Elzinga, Peterson, Ortego, and Herbein). (Abrams Decl., ¶ 7.) Class Counsel also

filed three *Daubert* motions to exclude Defendants' experts, and opposed Defendants' five motions to exclude Professors Scott and Rausser. (Abrams Decl., ¶ 7.)

Class Counsel filed extensive briefs and evidence in support of class certification and responded to Defendants' six motions for summary judgment and voluminous statements of fact.[5] (Abrams Decl., ¶ 7.) Class Counsel also performed significant work in oppositions to Defendants' Rule 23(f) Petition for Leave to Appeal as well as several motions to decertify the class. (Abrams Decl., ¶ 7.)

Class Counsel's ability to prosecute this case was further complicated by the robust protection afforded by the Protective Order. (Abrams Decl., ¶ 8.) Defendants designated significant parts of their document productions and almost all deposition transcripts as "Confidential" or "Highly Confidential." (Abrams Decl., ¶ 8.) These designations prohibited Class Counsel from filing many of its briefs and supporting evidence on the public record. (Abrams Decl., ¶ 8.) Plaintiffs filed multiple motions requesting the Court modify the Protective Order, and were also required to follow the sealing procedures put in place by the Court. (Abrams Decl., ¶ 8.) Accordingly, for many of Plaintiffs' filings, Class Counsel would: (1) file a brief and exhibits under seal, which required multiple hard copies and a CD hand delivered to the Court; (2) confer with Defendants and third parties about the materials contained in the briefs to determine whether information must remain sealed; (3) file a redacted version of the brief and exhibits, redacting all purported "Confidential" and "Highly Confidential" information; and (4) draft responses to Defendants' objections to unsealing the information.

[5]Although the Court granted in part summary judgment on Counts 2-4, it should be noted that Defendants understood that Plaintiffs' claims remained essentially unaltered as the case proceeded to trial. (Exhibit C, 7/18/11 NE Milk Hearing Tr., 61 ("MR. FRIEDMAN: [In the Southeast case], [m]otions for Summary Judgment briefed, argued, decided. Three counts were dismissed . . . but two counts survived. And those two counts . . . frankly, are sufficiently large enough to encompass everything that the plaintiffs in Tennessee were complaining about."))

(Abrams Decl., ¶ 8.) Complying with this procedure required a significant amount of time and resources by Class Counsel. (Abrams Decl., ¶ 8.)

As trial approached, Class Counsel prepared pretrial submissions including over 1,000 exhibits and hundreds of deposition designations, and identified dozens of potential witnesses. (Abrams Decl., ¶ 9.) Class Counsel filed 18 motions in limine, and opposed Defendants' 57 motions in limine. (Abrams Decl., ¶ 9.) Plaintiffs and Class Counsel were prepared to commence the 6-7 week trial when the trial was postponed in August 2011. (Abrams Decl., ¶ 9.) In a very real sense, settlements with Dean, SMA, and Baird did not occur until the parties were on the Courthouse steps.

Finally, Class Counsel participated in many mediation sessions over the past four years. (Abrams Decl., ¶ 10.) Each of these sessions required preparation of materials for the mediator's consideration and took the time of Class Counsel's most senior lawyers. (Abrams Decl., ¶ 10.) Class Counsel also participated in countless settlement meetings and discussions with Dean, SMA, and Baird to secure the settlements.

In total, Class Counsel spent over 113,000 hours prosecuting this case.

Courts in the Sixth Circuit recognize the lodestar method as a check of the reasonableness of the fee calculated as a percentage of the fund. *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *9-10. The great amount of time spent by Class Counsel to achieve these settlements makes clear that the fee requested is supported by the amount of work contributed to the recovery. A lodestar calculation requires the court to multiply the number of hours counsel reasonably expended on the case by their reasonable hourly rate. *See Isabel v. City of Memphis*, 404 F.3d 404, 415 (6th Cir. 2005). The Sixth Circuit also typically adds on to that number to account for the risk in handling the case on a contingency basis. *Id.; see also Stanley*, 2009 U.S. Dist. LEXIS 114065,

at *9. Here, Class Counsel expended over 113,000 hours over the course of the litigation. (Abrams Decl., ¶ 3.) Simply multiplying historical rates charged by counsel (with no multiplier) results in a lodestar of $46,702,830. (Abrams Decl., ¶ 3.)

Class Counsel seeks one-third of the settlement amount recovered, ensuring that most of the settlement goes to the dairy farmer class members for whom the benefit was recovered. This amount - $48,333,333 – is equal to a minimal lodestar multiplier of only 1.03, well within the range permitted in this Circuit. *See In re Cardinal Health*, 528 F. Supp. 2d at 767 (noting that "[m]ost courts agree that the typical lodestar multiplier in a large . . . class action[] ranges from is 1.3 to 4.5"); *Worthington*, at *19 (range of 1.5 to 5 is appropriate lodestar multiplier); *Cardizem* (unreported) (approving 30% fee award that equates to lodestar multiplier of 3.7). Notably, in *Cardinal Health*, counsel and their staff worked 51,970 hours at a "reasonable average hourly billing rate of approximately $353.63" for a total lodestar of $18,378,122.75. 528 F. Supp. 2d at 767. The court approved a $108,000,000 fee award – 18% of the settlement, but almost *six times* the counsel's lodestar. *Id.* at 768. The court reasoned that it was "not uncomfortable with deviating from the normal range of lodestar multipliers . . . . [g]iven the outstanding settlement in this case and the noticeable skill of counsel." *Id.*

3. The Complexity of the Litigation Supports the Requested Award

Antitrust class actions are "arguably the most complex action[s] to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome." *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003) (quoting *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)); *see also In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 533 (E.D. Mich. 2003) (observing that "[a]ntitrust class actions are inherently complex"); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96,

122 (2d Cir. 2005) (affirming district court's [fee award] because, *inter alia*, "antitrust cases, by their nature, are highly complex"); *In re Shopping Carts Antitrust Litig.*, 1983 WL 1950, at *7 (S.D.N.Y. Nov. 18, 1983) ("antitrust price fixing actions are generally complex, expensive and lengthy").

In addition to antitrust issues, this case required Class Counsel to become well-versed in the "inner workings of the dairy industry [which] are complicated in the extreme." (12/8/10 Order, Dkt No. 1186.) Class Counsel consulted extensively with Named Plaintiffs, industry and economic experts, and other witnesses to master the complex concepts at issue in this case. The Court repeatedly acknowledged the complexity of this case: "This is an incredibly complex case, involving arcane issues far beyond the understanding of the average juror." (12/8/10 Order, Dkt No. 1193; *see also* 1/6/09 Tr., at 13, Dkt No. 214 ("THE COURT: I don't think in the years I practiced law I was ever involved in a case that is quite this complicated"); 8/17/10 Order, at 23, Dkt No. 934 ("This litigation is complex."))

The litigation began with six different dockets, all of which were consolidated into one MDL. (Abrams Decl., ¶ 4.) Defendants were located in several different states, requiring substantial coordination and negotiation with defense counsel on scheduling matters – including the dates and locations of over 100 depositions. (Abrams Decl., ¶ 5.) As described in part I.B.2, *supra*, millions of pages of documents were reviewed, over 100 depositions taken or defended, scores of briefs filed – including multiple motions to dismiss, class certification, summary judgment, and *Daubert* motions – and nine different expert opinions provided. (Abrams Decl., ¶¶ 4-7.)

The *Cardizem* court's reasoning for awarding a 30% fee to the Sherman Act plaintiffs is instructive. In that case, the court explained:

> The complexity of this case cannot be overstated. Antitrust class actions are inherently complex. The complexity of this antitrust case was enhanced by additional, highly technical, causation-related issues; i.e., regulatory issues . . . . Despite its complexity, Class Counsel was able to efficiently and effectively prosecute and settle this matter.

Cardizem (unreported), at 20-21. The extensive amount of work and coordination by Class Counsel supports the award here. *F&M*, 1999 U.S. Dist. LEXIS 11090, at *12 (approving fee award because attorneys had to "survive numerous motions to dismiss," "face[] vigorous opposition to their efforts to obtain class certification," and "manage complex discovery").

4. The Contingent Nature of the Fee and the Financial Risk Carried by Class Counsel

Courts in this Circuit recognize that the risk of the litigation is an important factor to consider when awarding fees. *Stanley*, 2009 U.S. Dist. LEXIS, at *8 ("Numerous cases recognize that the contingent fee risk is an important factor in determining the fee award."). Class Counsel undertook this case on a contingency basis with the expectation that a successful result would be rewarded with a fee to reflect the risk of non-payment. "Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of the result." *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981), *overruled on other grounds by Int'l Woodworkers of Am. v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986). "If this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing." *Behrens v. Wometco Enter., Inc*., 118 F.R.D. 534, 548 (S.D. Fla. 1988).

An antitrust case of this complexity and magnitude, in which the defendants have significant resources, experienced counsel, and a track record of litigating rather than settling, posed very significant risks for Plaintiffs. Even though Plaintiffs successfully navigated

Defendants' pretrial challenges over the course of four years (including motions to dismiss, class certification, and summary judgment), and if they succeed in establishing liability at trial, they risk recovering minimal – or no – damages. *See, e.g., United States Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) (finding liability, but awarding nominal damages). Even if Plaintiffs establish liability and damages at trial, they are still at risk of having the judgment overturned after years of appeal.

This case is no exception to the rule. Here, Class Counsel have invested tens of thousands of hours and advanced many millions of dollars, despite the very real risk of recovering nothing for their efforts. Class Counsel alone have borne the risk of the case being dismissed or of not prevailing at trial. Class Counsel have received no compensation over the course of five years, but have spent over 113,000 hours prosecuting this case, and incurred over $7,000,000 in out-of-pocket-expenses. (Abrams Decl., ¶ 3.) This risk carried by Class Counsel supports the requested fee award. *Kogan*, 193 F.R.D. at 504 (factor weighed in favor of fee where "[p]laintiffs' counsel undertook this action on a contingency fee basis and made significant cash outlays to finance it"); *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *8 (awarding fees because, *inter alia*, "class counsel worked for over four years without payment, risking recovery of nothing in the event they were to generate no benefit for the class").

5. Skill and Experience of Class Counsel

Class Counsel – and defense counsel – have extensive experience in complex litigation, antitrust litigation, and class actions. (Abrams Decl., ¶ 3.) The Settlements were reached only after vigorous prosecution of the case and significant arms-length negotiations with highly-competent and experienced opposing counsel. A recovery of $145,000,000 plus substantial and valuable structural relief is a significant success and of enormous benefit to class members, and speaks volumes to Class Counsel's competence, experience, and diligence in obtaining the

Settlements. As the Court previously observed, "Class Counsel in this case are experienced in antitrust and class action litigation . . . and they have to date aggressively and vigorously prosecuted this case." (9/7/10 Order, Dkt No. 934.) Class Counsel have been confronted with highly skilled attorneys and have achieved an excellent result for the class in the face of such challenges. *F&M*, 1999 U.S. Dist. LEXIS 11090, at *19 ("The skill and competence of the attorneys for the plaintiffs was evident, especially when viewed on the basis of the results that they obtained in this case, while the excellent advocacy skills of the defense counsel . . . were equally evident").

6. Society Has an Important Stake in this Lawsuit

It is well-established that there is a "need in making fee awards to encourage attorneys to bring class actions to vindicate public policy (e.g., the antitrust laws) as well as the specific rights of private individuals." *In re Folding Carton Antitrust Litig*., 84 F.R.D. 245, 260 (N.D. Ill. 1979). Courts in the Sixth Circuit weigh "society's stake in rewarding attorneys who [win favorable outcomes] in order to maintain an incentive to others . . . . Society's stake in rewarding attorneys who can produce such benefits in complex litigation such as in the case at bar counsels in favor of a generous fee . . . . Society also benefits from the prosecution and settlement of private antitrust litigation." *In re Cardizem*, 218 F.R.D. at 534 (quoting *F&M*, 1999 U.S. Dist. LEXIS 11090, at *18).

Further, the Supreme Court has recognized the need for private litigation to enforce the antitrust laws. *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("This Court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws."). Here, the significant recovery Class Counsel achieved makes clear to the dairy industry, and to other businesses, that

collusion will not be tolerated. Society as a whole stands to benefit from the work of Class Counsel.

Fee awards in cases like this incentivize attorneys to act as private attorneys' general to enforce compliance with the antitrust laws and secure relief for injured parties (particularly injured parties challenging anticompetitive conduct by defendants with far greater resources). Awards of attorneys' fees allow and ensure the zealous enforcement of class members' legal rights. *Kogan*, at 504 (approving 31% fee because "the amount . . . is substantial and therefore, would create an incentive for other attorneys to take on similar cases").

C. The Court Should Authorize Lead Counsel to Determine Allocations to Specific Firms

Class Counsel have collaborated on this litigation under the supervision of Lead Counsel appointed by the Court in this case in accordance with the Court's Case Management Order. (Abrams Decl., ¶ 3.) Courts generally approve joint fee applications which request a single aggregate fee award with allocations to specific firms determined by lead counsel. *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *17-18 (E.D. Pa. June 2, 2004) (approving joint fee petition with specific allocations to be determined by liaison counsel); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 357 (N.D. Ga. 1993) ("Ideally, allocation is a private matter to be handled among class counsel."). Class Counsel has directed this case from its inception and are "better able to describe the weight and merit of each [counsel's] contribution." *Linerboard*, 2004 WL 1221350, at *18. Allowing lead counsel to allocate the fee award "relieves the Court of the difficult task of assessing counsels' relative contributions." *Id.* (internal quotations omitted).

Plaintiffs request the Court approve the aggregate amount of the fee award, and allow Lead Counsel to allocate the fee among the firms representing Plaintiffs, in Lead Counsel's good

faith judgment, and consistent with the authority delegated to Lead Counsel by the Case Management Order. The Court would, of course, retain jurisdiction for any disputes that cannot be resolved by counsel over the allocation of the award. *See In re Automotive Refinishing Paint Antitrust Litigation*, 2008 WL 63269, at *8 (E.D. Pa. Jan. 3, 2008) (holding lead counsel shall allocate the fees, but the court will retain jurisdiction to address any disputes).

II. THE EXPENSES REQUESTED ARE REASONABLE

Plaintiffs request reimbursement of costs incurred in litigating this case and obtaining the settlements through February 29, 2011, in the amount of $7,408,920.39. (Abrams Decl., ¶ 3.) It is well-settled that plaintiffs 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. *F&M*, 1999 U.S. Dist. LEXIS 11090, at *20 ("Expense awards are customary when litigants have created a common settlement fund for the benefit of a class."). The touchstone for reimbursing expenses is whether they are of the type typically billed to paying clients in the similar cases. *Cardizem* (unreported), at 22.

Here, a large percentage of Class Counsel's out-of-pocket expenses consist of fees paid to experts who were pivotal in helping Plaintiffs to certify the class, defend against summary judgment, prepare for trial, and obtain these settlements. (Abrams Decl., ¶¶ 13-14.) In addition, Class Counsel have had to travel across the country for depositions, hearings, and meetings with witnesses, experts and class representatives. (Abrams Decl., ¶¶ 13-14.) Other expenses include the cost of payments to court reporters for depositions, computerized research, copying costs, and delivery. (*Id*., ¶¶ 13-14.) These are the types of expenses customarily charged to paying clients. Class Counsel's expenses, detailed in the attached declarations, are reasonable and should be reimbursed in full. *Cardizem* (unreported) at 22 ("The Court finds that the categories of expenses for which Class Counsel seek reimbursement are the type routinely charged to their

hourly fee-paying clients and thus should be reimbursed out of the Settlement Fund.").

III. THE COURT SHOULD APPROVE THE REQUESTED INCENTIVE AWARD TO CLASS REPRESENTATIVES

Plaintiffs request that the Court approve incentive awards for the fifteen class representatives, in the amount of $10,000 each, or $150,000 total.[6] The Notice to the Settlement Class advised class members that Class Counsel would apply for incentive awards for the class representatives. (*See* 2/14/11 Order, Ex. A, ¶ 20, Dkt No. 1782-1.)

"Incentive awards are fairly typical in class action cases. Such awards are discretionary and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (citations omitted). The common fund theory allows courts to award additional compensation to the class representatives for their efforts including investigation, document production, and deposition appearances. *Hainey v. Parrott*, 2007 WL 3308027, at *5-6 (S.D. Ohio Nov. 6, 2007) (approving incentive awards of $50,000 each for class representatives out of a settlement fund of $6 million); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 787 (N.D. Ohio 2010) ("Courts within the Sixth Circuit . . . recognize that, in common fund cases and where the settlement agreement provides for incentive awards, class representatives who have had extensive involvement in a class action litigation deserve compensation above and beyond amounts to which they are entitled to by virtue of class membership alone.").

Throughout this litigation, the class representatives have communicated closely with

[6] The class representatives are: Sweetwater Valley Farm, Inc., Barbara & Victor Arwood, Jeffrey Bender, Randel Davis, Farrar & Farrar Dairy, Inc., Fred Jaques, John Moore, D.L. Robey Farms, Robert Stoots, Virgil Willie, Thomas Watson, James & Eva Baisley, Stephen Cornett, William Frazier & Branson McCain, and Jerry Holmes.

Class Counsel, provided documents and information essential to the litigation of this case, submitted to depositions, and assisted with the preparation of this case for settlement and trial. (Abrams Decl., ¶ 15.) The amounts requested by Plaintiffs are reasonable in light of other incentive awards approved by courts in this Circuit. *See Hainey*, 2007 WL 3308027, at *5 (approving $50,000 incentive awards); *Cardizem* (unreported) at 23 (approving $20,000 incentive awards); *Worthington*, 2006 U.S. Dist. LEXIS 32100, at *24 (approving $10,000 incentive awards); *F&M*, 1999 U.S. Dist. LEXIS 11090, at *20-21 (approving $7500 incentive awards).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grants its motion and award $48,333,333 in attorneys' fees, reimburse $7,408,920.39 in expenses, and award $150,000 in incentive awards for the class representatives.

Dated: April 2, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 2nd day of April, 2012, a true and correct copy of ***Plaintiffs'Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards for Class Representatives*** was served by operation of the electronic filing system of the U.S. District Court for the Eastern District of Tennessee upon all counsel who have consented to receive notice of filings in the matters styled *In re Southeastern Milk Antitrust Litigation*, MDL No. 1899.

/s/ Robert G. Abrams
Robert G. Abrams

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CARDIZEM CD ANTITRUST LITIGATION,

Master File No. 99-md-1278
MDL No. 1278

THIS DOCUMENT RELATES TO:

Honorable Nancy G. Edmunds

Louisiana Wholesale, 99-73259

Duane Reade, 99-73870

ORDER NO. 49

MEMORANDUM OPINION GRANTING SHERMAN ACT CLASS PLAINTIFFS' MOTIONS FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION, AND SHERMAN ACT CLASS COUNSEL'S JOINT PETITION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR NAMED PLAINTIFFS

This matter came before the Court on November 20, 2002 on Sherman Act Class Plaintiffs' motions for (1) final approval of settlement; (2) approval of plan of allocation; and (3) Class Counsel's joint petition for attorneys' fees, reimbursement of expenses and incentive awards for named Plaintiffs. The Court preliminarily approved the Settlement on September 24, 2002. On November 20, 2002, a fairness hearing was conducted. For the reasons stated below, this Court GRANTS Sherman Act Class Plaintiffs' motions.

I. Background

Class Counsel filed class action suits on behalf of Plaintiffs and the Class on November 18, 1998 and February 22, 1999. These suits were consolidated in this Court by the Judicial Panel on Multidistrict Litigation on June 11, 1999. The Plaintiffs'

consolidated actions (the "Class Actions") arise out of Defendants' September 1997 Agreement, pursuant to which Aventis agreed to pay Andrx, *inter alia*, $10 million per quarter in return for Andrx's agreement not to manufacture and sell its generic version of Cardizem CD. Plaintiffs have alleged that this Agreement kept less expensive generic versions of Cardizem CD off the market, thereby forcing direct purchasers to pay artificially inflated prices for Cardizem CD and its AB-rated generic equivalents.

On December 10, 1999, Class Counsel moved for certification of the Sherman Act Class. After a period of class-related discovery, including expert depositions (and motion practice relating thereto), and briefing on Plaintiffs' motion, the Court conducted an evidentiary hearing and oral argument on class certification. On March 14, 2001, the Court granted Class Counsel's motion allowing the litigation to proceed on a classwide basis and certified a class consisting of:

> all persons (or assignees of such persons) who at any time during the period July 9, 1998 through June 23, 1999 ("Class Period") directly purchased Cardizem CD from HMRI [now Aventis]; and who also, after the first generic version of Cardizem CD entered the market on June 23, 1999, either: (1) purchased one or more generic versions of Cardizem CD; or (2) obtained increased discounts for their direct purchases of Cardizem CD [the "Sherman Act Class" or "Class"].

See Order No. 24 at 3, 59. Excluded from the Class are all Defendants in this lawsuit, and their officers, directors, management and employees, subsidiaries or affiliates. *See id.* Also excluded are those direct purchasers who have already opted out of the Class on or before the opt-out deadline of January 25, 2002 ordered by the Court, including those who brought their own separate actions against Defendants, which are currently being coordinated with the Class's case before this Court. Notice of the class certification decision was sent to Class members on or about December 11, 2001, pursuant to a notice

program approved by the Court. On March 28, 2001, Defendants filed a petition with the Sixth Circuit Court of Appeals for permission to appeal the Court's class certification ruling pursuant to Fed. R. Civ. P. 23(f). On June 18, 2001, the Court of Appeals denied Defendants' petition.

On December 10, 1999, Class Counsel also filed a motion for partial summary judgment asking the Court to rule that the Defendants' September 1997 Agreement was a *per se* violation of the antitrust laws. On February 8, 2000, Class Counsel argued the merits of the motion, and on June 6, 2000, the Court granted it, holding that the Defendants' agreement "constitutes a restraint of trade that has long been held illegal *per se* under established Supreme Court precedent." Order No. 13 at 1. On June 20, 2000, Defendants asked for permission to immediately appeal this decision to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b). Defendants' request was granted, and on December 12, 2000, the Sixth Circuit agreed to hear Defendants' appeal. The appeal has been fully briefed and argued, and the parties are currently awaiting decision by the Sixth Circuit.

In December 1999, Defendants also moved to dismiss the consolidated complaint filed by the Plaintiffs. After substantial briefing and oral argument on these motions, the Court denied Defendants' motions to dismiss on May 11, 2000. *See* Order No. 12 at 4.

In addition to this significant motion practice, Class Counsel also conducted a coordinated and efficient discovery effort that included the filing of numerous motions to compel, the review of over a million pages of documents and conducting over 25 depositions of witnesses.

After lengthy negotiations, including a protracted mediation with Professor Eric Green, a highly experienced mediator approved by the Court, and following substantial discovery, investigation and substantive briefing on the legal issues, Class Counsel entered into a final settlement agreement and side letter with Defendants on August 13, 2002 (the "Settlement Agreement").

II. Analysis

A. Final Approval of Settlement

Sherman Act Class Plaintiffs come before this Court seeking final approval, pursuant to Fed. R. Civ. P. 23(e) of the proposed settlement of this antitrust class action as embodied in the Settlement Agreement dated August 13, 2002 ("Settlement"). The Settlement provides for a cash payment of $110 million, plus interest (the "Settlement Fund") to the class certified by this Court on November 26, 2001. The Settlement comes after almost four years of vigorous litigation, including months of mediation under the aegis of the nationally recognized mediator, Professor Eric D. Green, in an extraordinarily complex case raising a multitude of difficult issues in the areas of antitrust law, patent law, and laws governing pharmaceutical drugs.

This Court preliminarily approved the proposed Settlement on September 24, 2002. It also approved the form and manner of notice for dissemination to the Class. Pursuant to the approved notice, all entities identified as potential Class members from Defendants' sales database were advised of their rights under the Settlement, including their right to exclude themselves from the Class, to object to any or all terms of the Settlement, the Plan of Allocation, the award of attorneys' fees and costs, and incentive awards to the named

Plaintiffs. Copies of the Notice of Proposed Class Settlement and Hearing Regarding Settlement (the "Notice") were disseminated by first class mail to Class members, and a Summary Notice was published in two trade publications well known to entities within the pharmaceutical industry: the Pink Sheet and the Chain Drug Review. The Summary Notice notified potential Class members of, *inter alia*, the proposed settlement and instructed them where to obtain a more detailed Class Notice. The deadline for submitting objections was November 13, 2002. No Class members objected in writing or at the fairness hearing held on November 20, 2002.

1. Standards for Court Approval of Settlement

Fed. R. Civ. P. 23(e) provides that "[a] class action shall not be dismissed or compromised without approval of the court . . . ." In deciding whether to approve a proposed class action settlement, the Court must determine, after the fairness hearing, whether the settlement is "fair, adequate, and reasonable, as well as consistent with the public interest." *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990). The Court's determination requires consideration of "whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." Manual for Complex Litigation (Third) § 30.42 (1995).

Other relevant factors considered by the Court include: (1) the likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement; (2) the risks, expense, and delay of further litigation; (3) the judgment of experienced counsel who have competently evaluated the strength of their proofs; (4) the amount of discovery completed and the character of the evidence uncovered; (5) whether the

settlement is fair to the unnamed class members; (6) whether the settlement is consistent with the public interest; (7) objections raised by class members; and (8) whether the settlement is the product of arm's length negotiations as opposed to collusive bargaining. *See Granada Investments, Inc. v. DWG* Corp., 962 F.2d 1203, 1205 (6th Cir. 1992); Williams *v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983); *Kogan v. AIMCO Fox Chase*, L.P., 193 F.R.D. 496, 501-02 (E.D. Mich. 2000); *Steiner v. Fruehauf Corp.*, 121 F.R.D. 304, 305-06 (E.D. Mich. 1988).

2. Evaluation of the Settlement Under Applicable Standards

Considering the above, this Court finds that the proposed Settlement is fair, adequate, and reasonable. Accordingly, Plaintiffs' motion is GRANTED, and the Settlement is APPROVED for the following reasons.

a. The Benefits of the Settlement Weigh in Favor of Approval

Pursuant to the proposed Settlement, the Class will obtain an immediate and certain benefit of $110 million in cash, plus interest ($539,116.96 as of October 31, 2002). The Sherman Act Class Plaintiffs' expert economist has estimated that this amount represents more than 200% of the total amount the Class was overcharged during the period the Defendants' September 1997 Agreement was in effect (September 24, 1997 through June 9, 1999), and more than 95% of overcharge damages accrued through August 13, 2002, the date the Sherman Act Class Plaintiffs and Defendants signed the proposed Settlement Agreement.[1] The recovery to the Class under the negotiated Settlement is well beyond the

[1]The Settlement Agreement also provides "most favored nation" protection against a settlement with any other direct private purchaser on better monetary terms for a comparable release than the Settlement with the Class. If Defendants were to enter into such a settlement, additional payments on behalf of the Class would be required to make

percentage of claimed damages found by other courts to be satisfactory. *See In re Warfarin Sodium Antitrust Litig.*, ___ F. Supp.2d ___, ___, 2002 WL 2007850, *26 (D. Del. Aug. 30, 2002) (observing that "[t]he settlement amount of $44.5 million represents more than 33% of the maximum possible recovery," and finding that this is "a very reasonable settlement when compared with recovery percentages in other class actions."). In light of the above, this Court finds that the benefits the Settlement confers on the Class weigh in favor of approval.

b. The Risks, Expenses, and Delay of Continued Litigation Favor Approval

As part of the approval process, the Court also evaluates the proposed Settlement's fairness and adequacy "by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." *Williams*, 720 F.2d at 922. Settlements should represent "a compromise which has been reached after the risks, expense and delay of further litigation have been assessed." *Id.* Accordingly, this Court examines the risks, expense, and delay Plaintiffs would face if they continued to prosecute this complex litigation through trial and appeal and weighs those factors against the amount of recovery provided to the Class in the proposed Settlement.

The prospect of a trial necessarily involves the risk that Plaintiffs would obtain little or no recovery. Experience proves that, no matter how confident trial counsel may be, they cannot predict with 100% accuracy a jury's favorable verdict. Moreover, Plaintiffs', while

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up the difference. *See* Settlement Agreement ¶ 7. The mediator, Eric Green, has already determined that the Individual Sherman Act Plaintiffs' settlement with Defendant Aventis does not trigger Aventis' obligation to make additional payments to the Class under this "most favored nation" clause.

emphasizing the strengths of their case, candidly admit there were hurdles that would have to be overcome for successful prosecution at trial and on appeal.

First, there is the risk that the Sixth Circuit might reverse this Court's ruling that Defendants' September 1997 Agreement was a *per se* violation of the Sherman Act. This issue is pending on appeal, and, if reversed, would add significantly to the risks Plaintiffs would face at trial. For example, Plaintiffs would have to prove their case under a more difficult "quick look" or "rule of reason" analysis. They would also have to rebut Defendants' pro-competitive justifications for the Agreement and define a relevant market.

Second, Plaintiffs faced risks regarding the causation element of their claims. The FTC, in its "Analysis to Aid Public Comment" accompanying the announcement of its settlement with Defendants, stated that, based on its investigation, it did not believe that the Defendants' September 1997 Agreement delayed the entry of Andrx's generic Cardizem CD product onto the market. Sherman Act Class counsel disagree with this statement and observe that it has no precedential value. Nonetheless, they acknowledge that it highlights one of the primary risks Plaintiffs would face absent the Settlement. During the course of this litigation, Defendants have vigorously challenged Plaintiffs' claims with multi-faceted and complex causation arguments; i.e., that, regardless of the September 1997 Agreement, Andrx had no intention of coming to market while its patent litigation with Aventis (formerly HMRI) was pending, and furthermore, Andrx could not have come to market any earlier due to various financial and technical reasons. Class Counsel contend that they developed persuasive evidence to refute these defenses (and thus obtained a favorable settlement) but cannot dismiss the fact that there is no way to assure that they would have succeeded on their claims if they had proceeded to trial.

If the jury came to the conclusion that the Defendants' September 1997 Agreement did not delay Andrx (or any other generic company) from entering the market, then the Class would recover nothing – even if the Court's ruling that the Agreement was a *per se* violation of Section 1 of the Sherman Act is upheld on appeal. To recover monetary damages under Section 4 of the Clayton Act, the Class must not only establish that Defendants' September 1997 Agreement was illegal but also that it caused the Class economic harm. Here, the economic harm claimed by the Class is overcharges incurred because of the alleged delay in generic entry caused by the Defendants' September 1997 Agreement. Accordingly, a jury's determination that the Agreement did not delay generic entry would result in no recovery for the Class. Plaintiffs would also likely face additional defenses at trial; i.e., that Class members, especially wholesalers, did not suffer any economic injury as a result of the Agreement ("bypass" argument raised by Defendants in the class certification context). The possibility that a jury could agree with Defendants at trial on any of these issues presents a risk to be weighed against the amount and form of relief offered in the settlement.

Continued prosecution through trial and appeal would also create substantial additional expense and delay. Although significant discovery has already taken place (Class counsel contends that it has already reviewed approximately one million documents and taken numerous depositions), substantial additional effort and expense would be required to prepare this matter for trial. This would include: (1) completion of fact and expert discovery; (2) preparing witnesses, experts and exhibits; and (3) completing pre-trial motion practice, including possible motions for summary judgment.

In light of the above, this Court finds that the certain and immediate benefits to the Class represented by the Settlement outweigh the possibility of obtaining a better result at trial, particularly when factoring in the additional expense and long delay inherent in prosecuting this complex litigation through trial and appeal.

c. The Judgment of Experienced Counsel and the Amount and Character of Discovery Weigh in Favor of Approval

In approving a proposed Settlement, the Court also considers the opinion of experienced counsel as to the merits of the settlement. As the Sixth Circuit observed, "[t]he court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs. Significantly, however, the deference afforded counsel should correspond to the amount of discovery completed and the character of the evidence uncovered." *Williams*, 720 F.2d at 922-23 (internal citations omitted).

This Court finds that counsel for the Sherman Act Class, who have extensive experience in antitrust and other complex class action litigation, negotiated the proposed settlement at arm's length, after extensive discovery and independent analysis of all relevant matters, and thus it defers to Class Counsel's conclusion that the proposed Settlement is fair, adequate, and reasonable. At the time the parties entered into the Settlement Agreement, fact discovery relevant to the Sherman Act Class Plaintiffs' action had almost been completed. Class Counsel's Affidavits reveal that they had (1) thoroughly investigated the claims against Defendants; (2) retained and worked with expert witnesses in evaluating aggregate damages to the Class and Defendants' highly technical production-related causation defenses; and (3) sufficiently developed the facts concerning

Defendants' liability and damages to make a highly informed decision regarding the proposed Settlement. All of this weighs in favor of the Court's approval of the Settlement.

d. The Fact that the Settlement Is the Product of Arm's Length Negotiations as Opposed to Collusive Bargaining and Consideration of the Fairness of the Settlement to the Unnamed Members of the Class Also Favor Approval

This Settlement comes after almost four years of vigorous litigation and is the product of arm's length settlement negotiations between Class Counsel and Defendants that lasted several months. These negotiations and the ultimate Settlement Agreement were closely monitored by Professor Eric D. Green, an experienced and respected mediator. He opines in his Mediation Report to the Court that "this settlement was the result of hard-fought and difficult negotiations. All counsel did an excellent job in the litigation and the mediation, and in my opinion the process was such as would lead to a fair and reasonable settlement." Eric Green 11/18/02 Mediation Report at 4.

As to the Settlement's fairness to unnamed members of the Class, Plaintiffs' expert economist estimates that the $110 million Settlement (plus interest) is more than enough to cover all of the Class's overcharge damages. Moreover, pursuant to the proposed Plan of Allocation, the Settlement Fund is to be distributed *pro rata* to all Class members based on their proportion of the Class's aggregate damages. The fact that the two named Plaintiffs are to receive an incentive award in the amount of $20,000 does not render the Settlement unfair to unnamed members of the Class. In light of the above, this Court finds that the Settlement was negotiated at arm's length and would be fair to the unnamed Class members. Accordingly, these factors also weigh in favor of approval.

e. The Settlement's Consistency with Public Interest Favors Approval

There is a strong public interest in private antitrust litigation. *See e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983). Likewise, there is a strong public interest in encouraging settlement of complex litigation and class action suits because they are "notoriously difficult and unpredictable" and settlement conserves judicial resources. *See Granda*, 962 F.2d at 1205 (internal quotes and citation omitted). *Accord, In re Warfarin Sodium Antitrust Litig.*, ___ F.Supp.2d at ___, 2002 WL 2007850 at *21; *Steiner*, 121 F.R.D. at 305. Settlement of this antitrust action serves the public interest by ensuring effective enforcement of the antitrust laws and deterrence of anti-competitive conduct in the marketplace. *See Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965). This is particularly important in the pharmaceutical industry where the potential harm to society caused by agreements to prevent or delay entry of cheaper generic products has recently received considerable attention.

f. The Lack of Class Member Objections Weighs Heavily in Favor of Approval

Notice of the Settlement included a description of the Class, the procedural status of the litigation, description of the Class members' rights under Fed. R. Civ. P. 23(b)(3), the significant terms of the Settlement, a general description of the proposed plan of allocation of the settlement proceeds, and a description of the process of court approval. Notice was mailed to each Class member at its last known address (for whom such address was known). The Summary Notice was also published in two industry publications, and the Settlement Agreement and Notices were posted on the websites of Co-Lead Counsel. No Class member objected to the terms of the Settlement in writing or at the fairness hearing

held on November 20, 2002. The Court finds that the positive Class response to the proposed Settlement weighs heavily in support of its approval. *See Kogan*, 193 F.R.D. at 502.

3. Conclusion

Having considered the above factors, this Court finds that the proposed Settlement merits FINAL APPROVAL. For the reasons stated on the record at the November 20, 2002 fairness hearing, this Court's approval is without prejudice to the Individual Sherman Act Plaintiffs' right to assert arguments against application of the release language contained in the Settlement Agreement to the claims asserted in their separate, on-going litigation.[2] Defendant Andrx's arguments regarding the legal effect of that release language present affirmative defenses that are properly considered in the context of that separate, on-going litigation. *See Abbott Labs. v. CVS Pharmacy, Inc.*, 290 F.3d 854 (7th Cir. 2002).

B. Approval of Allocation Plan

Sherman Act Class Plaintiffs also seek approval of their Plan of Allocation which allocates the settlement funds, net of Court-approved attorneys' fees, incentive awards, and expenses ("Net Settlement Fund"), in proportion to the overcharge damages incurred by each Class member due to Defendants' alleged anti-competitive conduct. For the following reasons, this Court GRANTS Plaintiffs' motion and APPROVES Plaintiffs' Plan of Allocation.

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[2]As clarified at the November 20, 2002 fairness hearing, Individual Sherman Act Plaintiffs have no objection to this Court's approval of the proposed Settlement in this action.

First, no Class member has objected to the Plan. Second, it provides a fair and reasonable method of calculating Class member overcharge damages based on each Class member's actual purchases of generic Cardizem CD and/or any increased discounts on Cardizem CD that the Class members actually received, in conformance with Plaintiffs' experts' damage calculation methodology; and also provides a fair and reasonable method for determining each Class member's *pro rata* share of the Net Settlement Fund.

Third, the Plan adequately describes: (1) the method of calculating each Class member's overcharge damages and *pro rata* share of the Net Settlement Fund; (2) the contents and method of disseminating a Claims Notice form; (3) the manner in which claims will be initially reviewed and processed; (4) the method of notifying Class members of the amount that each Class member will receive from the Net Settlement Fund ("Notice of Class Member Distribution Amount"); and (5) the process for handling and resolving challenged claims. It also includes deadlines for completing tasks related to distributing each Class member's *pro rata* share of the Net Settlement Fund: (1) preparation and dissemination of the Claims Notice form; (2) receipt by the Settlement Administrator of completed Claims Notice forms and supporting documentation; (3) curing deficiencies in any Claims Notice form or supporting documentation submitted by Class members; (4) disseminating the Notice of Class Member Distribution Amount; and (5) challenging and resolving disputes over the Settlement Administrator's determination of each Class member's distribution amount.

Accordingly, Plaintiffs' Plan of Allocation is approved with one minor amendment. Consistent with Paragraph 23 of the parties' Settlement Agreement, the term "alleged" (or, where appropriate, "allegedly") shall be inserted in the Plan at page 2 (before references

to "the illegal Agreement," "the illegal behavior" and "the collusive period"), page 3 (before reference to "the anti-competitive Agreement"), page 4 (before reference to "delay[ed] generic entry [and] delayed competition"), and page 9 n.5 (before reference to "the collusive conduct").

C. Approval of Requested Attorneys' Fees, Expenses and Incentive Awards

Class Counsel also filed a Joint Petition for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards for Named Plaintiffs. Specifically, Class Counsel request a fee in the amount of 30% of the Settlement Fund plus interest, for a total of $33,161,734.80 through October 31, 2002, plus 30% of additional interest as accrued. Counsel for the Sherman Act Class also request reimbursement of $1,089,371.73 in out-of-pocket expenses incurred in the representation of the Sherman Act Class. Finally, Class Counsel request an incentive award of $20,000 each to the named Plaintiffs, Louisiana Wholesale Drug Company, Inc. and Duane Reade, Inc., for their participation as representatives of the Sherman Act Class. For the reasons set forth below, this Court GRANTS Class Counsel's requests.

1. Attorneys' Fees

The Class members' claims against Defendants in this consolidated action have been settled for $110 million in cash, plus interest since July 1, 2002 (as of October 31, 2002, $539,116.96 of interest has accrued). As discussed above, this represents an excellent settlement for the Class and reflects the outstanding effort on the part of highly experienced, skilled, and hard working Class Counsel. As Class Counsel's affidavits show, their efforts were not only successful, but were highly organized and efficient in addressing

numerous complex issues raised in this litigation, including highly technical Federal Drug Administration ("FDA") regulatory issues, patent, manufacturing, financial and related causation issues. To date, Class Counsel have been without compensation of any kind. They have expended more than 27,000 hours over a four-year period, with compensation wholly contingent on the result achieved.

This Court finds that the percentage-of-the-fund method is the proper method for compensating Class Counsel, and that an attorneys' fee award of 30% of the Settlement Fund is reasonable under the circumstances presented here. Courts in the Sixth Circuit have approved similar percentage awards, and consideration of factors identified by the Sixth Circuit justify such an award.

The Settlement Fund is a "common fund", and the courts have long recognized that a lawyer who recovers such a fund is entitled to a reasonable attorneys' fee from the fund as a whole. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "In a common fund case, the 'fees are not assessed against the unsuccessful litigant (fee shifting), but rather are taken from the fund or damage recovery (fee spreading), thereby avoiding the unjust enrichment of those who otherwise would be benefited by the fund without sharing in the expenses incurred by the successful litigant.'" *Fournier v. PFS Investments, Inc.*, 997 F. Supp. 828, 830 (E.D. Mich. 1998) (quoting *Court Awarded Attorneys Fees*, Report of the Third Circuit Task Force, 108 F.R.D. 237, 250 (1985)). "The common fund exception to the American Rule is grounded in the equitable powers of the courts under the doctrines of *quantum meruit* and unjust enrichment. It applies where a common fund has been created by the efforts of plaintiffs' attorney and rests on the principle that persons who

obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." Manual for Complex Litigation (Third) § 24.121 (1995) (internal quotes and footnotes omitted).

The Sixth Circuit leaves it to the Court's discretion as to whether it will apply the lodestar or percentage-of-the-fund method to awards of attorneys fees, requiring "only that awards of attorney's fees by federal courts in common fund cases be reasonable under the circumstances." *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). It noted, however, that the recent trend has been towards application of a percentage-of-the-fund method in common fund cases. *See id.* Courts within the Sixth Circuit have likewise indicated their preference for the percentage-of-the-fund method. *See, e.g., In re F & M Distributors, Inc. Sec. Litig.*, Case No. 95-CV-71778-DT, 1999 U.S. Dist. LEXIS 11090, [1999 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 90,621 (E.D. Mich. June 29, 1999) (choosing percentage-of-the-fund as the better method for determining attorneys' fees in a securities class action); *In re Rio Hair Naturalizer Products Liability Litig.*, MDL No. 1055, 1996 U.S. Dist. LEXIS 20440 (E.D. Mich. Dec. 20, 1996) (observing that "more commonly, fee awards in common fund cases are calculated as a percentage of the fund created, typically ranging from 20 to 50 percent of the fund"); *Fournier*, 997 F. Supp. at 832-33 (choosing percentage-of-the-fund method in class action securities litigation). This Court agrees with Judge Cook's observations in *F & M Distributors* that (1) "the lodestar method is too cumbersome and time-consuming of the resources of the Court"; and (2) "more importantly, the 'percentage of the fund' approach more accurately reflects the result achieved." 1999 U.S. Dist. LEXIS 11090 at *8 (internal quotes and

citations omitted). This Court's decision to apply the percentage-of-the-fund method is consistent with the majority trend, and, more importantly, is reasonable under the circumstances presented here.

As the Third Circuit Task Force recently concluded, "[m]ost courts use the percentage of the fund method." *Third Circuit Task Force on the Selection of Class Counsel*, Final Report of the Third Circuit Task Force at 103 (January 2002). The Task Force concluded that "[a] percentage fee, tailored to the realities of the particular case, remains superior to any other means of determining a reasonable fee for class counsel." *Id.* at 19. It explained why the lodestar method is inferior to the percentage fee approach:

> The lodestar remains difficult and burdensome to apply, and it positively encourages counsel to run up the bill, expending hours that are of no benefit to the class. Moreover, use of the lodestar may result in undercompensation of talented attorneys. Experienced practitioners know that a highly qualified and dedicated attorney may do more for a class in an hour than another attorney could do in ten. The lodestar can end up prejudicing lawyers who are more efficient with a less expenditure of time.

Id. at 104. These observations apply here. The percentage fee method is preferred so as not to undercompensate extremely talented and efficient Class Counsel.

This Court also finds that the requested 30% fee is fair and reasonable and is justified by the excellent performance of Class Counsel in obtaining an extraordinary result for the Class in this complex litigation. This is within the ordinary range of between 20-30% typically awarded in common fund cases. *See F & M Distributors*, 1999 U.S. Dist. LEXIS 11090 at *8-10 (awarding 30% of the gross settlement fund after reviewing other awards in the Sixth Circuit and finding 30% award consistent with the trend). It is also within the range of fee awards in settlements with common funds of comparable size to the $110

million Settlement Fund at issue here. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.4 (9th Cir.) (upholding a 28% fee award of a $96.885 million settlement fund, and observing that its survey of percentage fee awards "from 34 common fund settlements of $50-200 million from 1996-2001," show a majority clustered in the 20-30% range), *cert. denied*, ___ S. Ct. ___, 2002 WL 1968819, 71 U.S.L.W. 3154 (U.S. Nov. 12, 2002).

A lower percentage is not required simply because the Settlement obtained on behalf of the Class is large. As recently observed by the District Court for the Southern District of New York, blind adherence to a declining percentage-of-fund method under these circumstances "can create an incentive to settle quickly and cheaply when the returns to effort are highest," and can create an undesirable situation where counsel is inadequately rewarded for "investing additional time and maximizing plaintiffs' recovery." *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 80 (S.D. N.Y. 2000).

This Court determines the reasonableness of the percentage requested by Class Counsel by examining factors identified by the Sixth Circuit. These include: "(1) the value of the benefit rendered to the plaintiff class . . .; (2) the value of services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides." *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996) (internal quotes and citations omitted). *Accord, Smillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983).

Considering the above factors, this Court finds that Class Counsel's requested fee award is reasonable under the circumstances. First, as discussed above, the result Class Counsel obtained on behalf of the Class is extraordinary. Second, there is no question that Class Counsel spent thousands of hours litigating this complex case over the past four years. Their work at all times has been of the highest quality. The Court is also mindful that the significant amount of time spent on this action precluded Class Counsel from working on other matters. Moreover, the fact that the 30% fee recovery in this case would equate to a lodestar multiplier of approximately 3.7 does not render it unreasonable. Similar multipliers have been accepted as fair and reasonable in complex matters with large settlement funds such as this. *See Vizcaino*, 290 F.3d at 1051 (examining cases and determining that a 3.65 multiplier on a $96.885 million settlement was appropriate and within the range applied in large common fund cases).

The third through sixth factors also support the requested attorneys' fee. Class Counsel undertook representation of the Class on a contingent fee basis and thus bore the risk of recovery (detailed above) and the outlay of large out-of-pocket expenses for almost four years. The complexity of this case cannot be overstated. Antitrust class actions are inherently complex. The complexity of this antitrust case was enhanced by additional, highly technical, causation-related issues; i.e., regulatory issues arising out of the Hatch-Waxman Act; patent law issues relevant to the Aventis/Andrx patent litigation underlying the Defendants' September 1997 Agreement; the intricacies of the pharmaceutical industry from a sales and marketing perspective; the scientific and production processes involved with inventing and commercializing branded and generic pharmaceutical products; and the FDA regulations applicable to reviewing and approving pharmaceutical products and new

manufacturing facilities/processes. Despite its complexity, Class Counsel was able to efficiently and effectively prosecute and settle this matter. A review of Class Counsel's affidavits, submitted in support of the petition, reveals that they were able to streamline and focus their discovery and litigation efforts through standing weekly conference calls in which tasks were assigned and reviewed and through discovery agendas where the internal discovery committee was required to justify the need for each piece of discovery before pursuing it.

Furthermore, 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. The Court is appreciative of the professionalism, skill, and competency displayed by counsel for both sides throughout this litigation. Professor Eric Green, the mediator in this matter, likewise observed that the skill and professionalism of counsel for the Defendants and the Plaintiff Class during the mediation was of the highest caliber.

Finally, this Court considers society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others. As already noted, Class Counsel obtained an excellent settlement for the Class in a complex and hard-fought case. "Society's stake in rewarding attorneys who can produce such benefits in complex litigation such as in the case at bar counsels in favor of a generous fee. . . ." *F & M Distributors*, 1999 U.S. Dist. LEXIS 11090 at *18. Society also benefits from the prosecution and settlement of private antitrust litigation. *See e.g., Pillsbury Co.*, 459 U.S. at 262-63; *Minnesota Mining & Mfg. Co.*, 381 U.S. at 318. Class Counsel brought this private antitrust action seeking to enforce the antitrust laws and alleging that a brand-name drug

manufacturer had colluded with a generic competitor to block cheaper generic versions of the brand-name drug from coming to market. This case has helped put prescription drug pricing and marketing tactics at the forefront of media, Congressional scrutiny, and judicial scrutiny. Encouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this case benefits society.

Taking into consideration the above factors and also observing that there are no objections to the requested fee, this Court awards counsel for the Sherman Act Class 30% of the Settlement Fund plus interest, for a total of $33,161,734.80 through October 31, 2002, plus 30% of additional interest as accrued.

2. Reimbursement of Expenses

In addition to their petition for attorneys' fees, Class Counsel seek reimbursement of $1,089,371.73 in out-of-pocket expenses incurred in the representation of the Sherman Act Class. Upon review of the numerous affidavits submitted by Class Counsel in support of this request, the Court finds this amount to be fair and reasonable. "Expense awards are customary when litigants have created a common settlement fund for the benefit of a class." *F & M Distributors*, 1999 U.S. Dist. LEXIS 11090 at *19. In determining whether the requested expenses are compensable in this common fund, the Court has considered whether the particular costs are of the type typically billed by attorneys to paying clients in similar cases. *See In re Synthroid Marketing Litig.*, 264 F.3d 712, 722 (7th Cir. 2001). The Court finds that the categories of expenses for which Class Counsel seek reimbursement are the type routinely charged to their hourly fee-paying clients and thus should be reimbursed out of the Settlement Fund. Likewise, considering the detailed affidavits

submitted in support of the request for reimbursement, this Court is persuaded the these expenses are reasonable.

3. Incentive Awards to Named Plaintiffs

Finally, Class Counsel request the Court to approve incentive awards in the amount of $20,000 each for the two named Plaintiffs, Louisiana Wholesale Drug Company, Inc. and Duane Reade, Inc. The Court GRANTS Class Counsel's request. Such awards are also common in class actions such as this. *See F & M Distributors*, 1999 U.S. Dist. LEXIS 11090 at *20. The Notice to the Class advised that Class Counsel would apply for these incentive awards, and no objections were received. Moreover, the Court finds these incentive awards to be reasonable and justified in light of the discovery, mediation, settlement, and other litigation burdens placed on Louisiana Wholesale and Duane Reade, Inc.

III. Conclusion

For the foregoing reasons, this Court GRANTS Sherman Act Class Plaintiffs' motions for (1) final approval of settlement; (2) approval of plan of allocation; and (3) Class Counsel's joint petition for attorneys' fees, reimbursement of expenses and incentive awards for named Plaintiffs.

Nancy G. Edmunds
U.S. District Judge

Dated: 26 NOV 2002

CERTIFICATE OF SERVICE

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Deputy Court Clerk

26 NOV 2002

Date

Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: FOUNDRY RESINS ANTITRUST LITIGATION	Case No. 2:04-md-1638 Master Docket No. 2:04-cv-415 **CLASS ACTION**
This Document Relates To: **ALL CASES EXCEPT Caterpillar Inc. v. Ashland Inc., et al., Court File No. 2:04-cv-01165-GLF-MRA**	Judge Gregory L. Frost Magistrate Judge Mark R. Abel

ORDER

This matter is before the Court for consideration of the February 15, 2008 Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Payment of Incentive Awards to Class Representatives (Doc. # 242) and the March 25, 2008 Plaintiffs' Notice of Filing Supplemental Time and Expense Information in Support of Motion for an Award of Attorneys' Fees, Reimbursement of Expenses and Payment of Incentive Awards to Class Representatives (Doc. # 244). Upon consideration, the Court **GRANTS** the motion as supplemented.

It is therefore hereby ORDERED, ADJUDGED, and DECREED as follows:

(1) The Court awards Plaintiffs' Counsel attorneys' fees in the amount of 33⅓% of the Ashland Settlement Fund ($7,900,000.00) and 33⅓% of the HAI Settlement Fund ($6,256,421.00 after reduction pursuant to the applicable "most favored nation" provision), for a total fee of $4,718,807.00, plus accrued interest.

(2) The Court authorizes Co-Lead Counsel to distribute such fees to Plaintiffs' Counsel in a manner which, in the opinion of Co-Lead Counsel, fairly compensates each Plaintiffs'

Counsel firm in view of its contribution to the prosecution of Plaintiffs' claims. The Court retains jurisdiction over any disputes among Plaintiffs' Counsel concerning the allocation of such awarded attorneys' fees.

(3) In addition to the attorneys' fees awarded by the Court, the Court approves a payment of unreimbursed litigation expenses in the amount of $891,185.20 from the Ashland and HAI Settlement Funds to Plaintiffs' Counsel.

(4) The Court approves incentive awards of $5,000 each to Plaintiffs State Line Foundries, Kore Mart, Lancaster Foundry Supply, Kulp Foundry, AmeriCast Technologies, and Tri-Cast Limited from the Ashland and HAI Settlement Funds for their service as Class Representatives.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE

Exhibit C

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

ALICE H. ALLEN, ET AL)

VS) CASE NO: 5:09-CV-230

DAIRY FARMERS OF AMERICA, INC,)
DAIRY MARKETING SERVICES,
LLC, DEAN FOODS COMPANY AND)
HP HOOD,LLC
_____) FINAL FAIRNESS HEARING

BEFORE: HONORABLE CHRISTINA REISS
CHIEF JUDGE

APPEARANCES: KIT A. PIERSON, ESQUIRE
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(APPEARANCES CONTINUED:)

DATE: July 18, 2011

TRANSCRIBED BY: Anne Marie Henry, RPR
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posture of the case because clearly it makes, it makes a big difference. And I will preface what I'm about to say, I'll say it once so I don't have to keep repeating it. Judge Grear in Tennessee has made a substantial number of rulings and moved the case forward. And we disagree with many of his rulings, but they are the rulings of the Court. And they put us in the posture we found ourselves last week.

So the hurdles that the plaintiffs in Tennessee passed, that have not been even crossed yet by the plaintiffs here, include class certification. And in Tennessee we petitioned for interlocutory appeal. The Sixth Circuit turned it down so they survived that. There are two pending motions to decertify the class. The Court hasn't ruled on those yet. [Motions for Summary Judgment briefed, argued, decided. Three counts were dismissed, from my perspective that was great, but two counts survived. And those two counts, conspiracy in restraint of trade under Section 1 and conspiracy to monopolize in violation of Section 2, frankly, are sufficiently large to encompass everything that the plaintiffs in Tennessee were complaining about.]

There were 70, don't blanch, but 70 motions in limine that were filed. The Court held argument on those over the course of two days and delivered oral rulings on many of them. So we knew -- the, the written rulings were