AlaFile E-Notice

01-CV-2003-006630.00

Judge: PAT BALLARD

To: SOMERVILLE JOHN QUINCEY
jqs@somervillellc.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JOHN LAURIELLO VS CAREMARK RX LLC
01-CV-2003-006630.00

The following matter was FILED on 7/29/2016 12:38:22 PM

C004 CITY OF BIRMINGHAM RETIREMENT AND RELIEF SYSTEM

C002 FINNEY JAMES O. JR.

C003 JOHNSON SAM

FEE AND EXPENSE APPLICATION

[Filer: POWELL SCOTT ASHLEY]

Notice Date: 7/29/2016 12:38:22 PM

ANNE-MARIE ADAMS
CIRCUIT COURT CLERK
JEFFERSON COUNTY, ALABAMA
JEFFERSON COUNTY, ALABAMA
716 N. RICHARD ARRINGTON BLVD.
BIRMINGHAM, AL 35203

205-325-5355
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STATE OF ALABAMA
Unified Judicial System

Revised 3/5/08

01-JEFFERSON ☐ **District Court** ☑ **Circuit Court**

Case CV20

JOHN LAURIELLO VS CAREMARK RX LLC

CIVIL MOTION COVER SHEET

Name of Filing Party: C002 - FINNEY JAMES O. JR.
C003 - JOHNSON SAM
C004 - CITY OF BIRMINGHAM RETIREMENT AND RELIEF SYSTEM

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.

SCOTT A. POWELL ESQ.

2025 3RD AVENUE NORTH, SUITE 800
BIRMINGHAM, AL 35203

Attorney Bar No.: POW005

☐ Oral Arguments Requested

TYPE OF MOTION

Motions Requiring Fee

- ☐ Default Judgment ($50.00)
- ☐ Joinder in Other Party's Dispositive Motion (i.e. Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) ($50.00)
- ☐ Judgment on the Pleadings ($50.00)
- ☐ Motion to Dismiss, or in the Alternative Summary Judgment($50.00)
- ☐ Renewed Dispositive Motion(Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) ($50.00)
- ☐ Summary Judgment pursuant to Rule 56($50.00)
- ☐ Motion to Intervene ($297.00)
- ☑ Other _____

pursuant to Rule ($50.00)

_____

*Motion fees are enumerated in §12-19-71(a). Fees pursuant to Local Act are not included. Please contact the Clerk of the Court regarding applicable local fees.

☐ Local Court Costs $ 0.00

Motions Not Requiring Fee

- ☐ Add Party
- ☐ Amend
- ☐ Change of Venue/Transfer
- ☐ Compel
- ☐ Consolidation
- ☐ Continue
- ☐ Deposition
- ☐ Designate a Mediator
- ☐ Judgment as a Matter of Law (during Trial)
- ☐ Disburse Funds
- ☐ Extension of Time
- ☐ In Limine
- ☐ Joinder
- ☐ More Definite Statement
- ☐ Motion to Dismiss pursuant to Rule 12(b)
- ☐ New Trial
- ☐ Objection of Exemptions Claimed
- ☐ Pendente Lite
- ☐ Plaintiff's Motion to Dismiss
- ☐ Preliminary Injunction
- ☐ Protective Order
- ☐ Quash
- ☐ Release from Stay of Execution
- ☐ Sanctions
- ☐ Sever
- ☐ Special Practice in Alabama
- ☐ Stay
- ☐ Strike
- ☐ Supplement to Pending Motion
- ☐ Vacate or Modify
- ☐ Withdraw
- ☑ Other Fee and Expense Application

pursuant to Rule . (Subject to Filing Fee)

Check here if you have filed or are filing contemoraneously with this motion an Affidavit of Substantial Hardship or if you are filing on behalf of an agency or department of the State, county, or municipal government. (Pursuant to §6-5-1 Code of Alabama (1975), governmental entities are exempt from prepayment of filing fees) ☐

Date: 7/29/2016 12:37:22 PM

Signature of Attorney or Party: /s/ SCOTT A. POWELL ESQ.

*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.

**Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.

ELECTRONICALLY FILED
7/29/2016 12:37 PM
01-CV-2003-006630.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

CASE NO. CV-2003-006630-PJB

SAM JOHNSON and CITY OF BIRMINGHAM RETIREMENT AND RELIEF SYSTEM, for themselves, individually, and on behalf of a class of all others who are similarly situated,

Plaintiffs,

v.

CAREMARK Rx, L.L.C.; AMERICAN INTERNATIONAL GROUP, INC.; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; AIG TECHNICAL SERVICES, INC.; And AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,

Defendants.

CLASS COUNSEL'S FEE AND EXPENSE APPLICATION
AND
APPLICATION FOR SERVICE AWARDS TO PLAINTIFFS

TABLE OF CONTENTS

COME NOW the Plaintiffs, the Plaintiff Class, and Class Counsel,[1] and file this Class Counsel's Fee and Expense Application[2] and Application for Service Awards to Plaintiffs. They move the Court for an order awarding a 40% attorneys' fees, $2,585,932.71 in costs, and three service awards of $50,000 each to the plaintiffs. In support of this Application, the Plaintiffs, the Plaintiff Class, and Class Counsel state as follows:

I. INTRODUCTION

After litigating tirelessly for over 12 years, against long odds, and entirely at their own risk, Plaintiffs' class counsel have won an astonishing all-cash recovery of $310 million from Caremark and AIG on behalf of well over 20,000 defrauded investors. Plaintiffs' class counsel petition for a fee award of 40% of this sum, plus out-of-pocket expenses of $2,585,932.71. This is the rarest of victories. There has never before been a reported opinion about a fraud alleged to have been perpetrated upon a class.

As shown below, the most important factor of benefit achieved, or measure of success achieved, merits an award at the highest end of the acceptable range, i.e., at least at the 40% requested level. The difficulty of this litigation and the risks taken rank very high in setting the applicable percentage. Here, where a contingent-fee case has been vigorously litigated over

[1] For purposes of Class Counsel's Fee and Expense Application and as stated in the Stipulation and Agreement of Settlement dated May 27, 2016, Section 1.12, says: "'Class Counsel' means Hare, Wynn, Newell & Newton, LLP, Francis Law, LLC, as successor to James L. North and Associates, and Somerville, LLC. Solely for purposes of Section IX hereto, Class Counsel shall include Attorney for Former Intervenor [Lanny S. Vines]."

[2] Per express agreement, attorney Lanny S. Vines, one of Plaintiffs' counsel, i.e., for former intervenors, has waived any and all requests for reimbursement of his case expenses.

almost 13 years, with enormous and unusual risks to counsel, resulting in a $310M recovery, all factors justify an award at or near the highest end of the acceptable range of attorneys' fees percentages.

In class actions that result in the recovery of a common benefit fund, courts and scholars commonly note that the upper limit of an appropriate attorneys' fee award is 50% of the recovery.[3] If ever a class action recovery merited an award at the highest level of 50%, it would be this unique and arduous litigation. However, class counsel are not seeking the highest-possible award; instead, the request in this case is 40%. If 40% is not fair here, then 40% is never fair (yet, as shown below, awards of 40% and above are not rare). After over 12 years of hard-fought litigation against an army of first·rank defense lawyers, class counsel produced a result for MedPartners investors that has no precedent in the annals American jurisprudence. This Court is urged to look beyond so-called "benchmarks" of 25% to 30% to determine whether something truly exceptional has happened here - and, if so, to deviate upwards to 40% of the all-cash recovery.

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[3] Appropriate attorney fee percentages in class action common-fund cases generally range between 20% and 50% of the recovery. *Edelman & Combs v. Law*, 663 So. 2d 957, 960 (Ala. 1995) ("40%, or even 50%, may be justified"); *Reynolds v. First Alabama Bank, N.A.*, 471 So. 2d 1238, 1245 (Ala. 1985). "Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund...." 1 Alba Conte, Attorney Fee Awards § 2:8 (3d ed.) (May 2016 update); 5 William B. Rubenstein, Newberg on Class Actions § 15:83, p. 319 (5th ed. 2015) (electronic database updated June 2016) (same). See *Waters v. Cook's Pest Control, Inc.*, No. 2:07-CV-00394, 2012 WL 2923542, *18 (N.D. Ala. July 17, 2012) (Coogler, J.): "Neither Class Counsel nor the Court were able to locate instances of factually-similar litigation or similar recoveries in cases with comparable class sizes. However, an award of 35% of the Settlement Fund is well within the range of 20% to 50%, which has been generally established in this circuit. *Camden I*, 946 F.2d at 771." See also *Kemp v. Unum Life Insurance Company of America*, 2015 WL 8526689, *8 (E.D. La. 2015) ("50% as an upper limit"), and *Miller v. CEVA Logistics USA, Inc.*, 2015 WL 4730176, *8 (E.D. Cal. 2015) ("50% is the upper limit").

This has never been a typical class action. Many class actions settle shortly after the case is filed or certified, and usually for pennies on the dollar. But, not this case. This case was vigorously litigated for over 12 years, appealed thrice to the Supreme Court (with other attempted mandamus petitions), and ultimately settled for $310,000,000. To obtain this recovery, class counsel spent many years in heated litigation with two of the largest corporations in the world and their host of highly-ranked defense counsel. Both class certifications were hotly contested and both were appealed to the Alabama Supreme Court. The merits of the case developed into a battle of experts, a battle costing class counsel over $1.7M in expert witness fees alone. Over 50 depositions were taken on highly-complex, specialized issues. Nothing about this case was quick or easy.

The second, and ultimately-final, certification resulted in an appellate opinion of first impression. All the parties to this case conceded that they could not find a reported case or other legal authority in the English-speaking world that involved a fraud alleged to have been committed on a certified class. Literally every significant legal step in this long-running case had to be invented from scratch and then defended against the defendants' best attacks.

II. EVIDENTIARY SUBMISSIONS

The Plaintiffs, the Plaintiff Class, and Class Counsel specifically incorporate herein all of the exhibits contained in the contemporaneously-filed "Evidentiary Submissions in Support of The Plaintiff Class's Motion for Final Approval of Proposed Class Action Settlement and Class Counsel's Fee and Expense Application and Application for Service Awards to Plaintiffs." Undersigned invite the Court to pause here and read the first four exhibits: the Joint Affidavit of

Class Counsel (Powell, Francis, and Somerville); and the declarations of the three experts - Prof. Rubenstein, Judge Clemon, and Prof. Miller. Those documents detail - generally chronologically - the long history of this litigation and highlight some of more time-consuming and legally-difficult aspects of this unique case. Undersigned adopt those affidavits/declarations as the supporting statement of facts for this brief.

We will not burden the Court by repeating every statement from those affidavits/ declarations in the body of this brief. For example, Harvard Professor Rubenstein's scholarly and thorough examination of all of the relevant procedural facts and attorneys' fees factors runs 31 pages and 56 paragraphs, excluding attachments. Here are excerpts from Prof. Rubenstein's first two paragraphs, wherein he succinctly summarizes his major findings, conclusions, and opinions:

> 1. ... The Alabama Supreme Court directs its lower courts to utilize a percentage fee method in common fund cases and has noted that, while in "some cases, 20% may be reasonable, based upon the amount of the award and other factors," in "other cases 40%, or even 50%, may be justified." [*Edelman & Combs v. Law*, 663 So. 2d 957, 960 (Ala. 1995).] The Alabama Supreme Court has also enumerated a series of factors to guide lower courts in reviewing requested percentage awards. [*Peebles v. Miley*, 439 So. 2d 137, 140-41 (Ala. 1983) (listing 12 factors).] Employing these guidelines, it is my expert opinion that:
>
> ***Quantitatively, the 40% fee is consistent with awards courts approve in circumstances similar to those that exist in this case. Five independent facts support this conclusion***. *First*, as just noted, the Alabama Supreme Court has held that fees of 40-50% are justified in certain circumstances. *Second,* as described below, I maintain a database of over 1,000 class action fee awards. In 55 of the cases in my database (or about 5% of all the cases), courts have awarded counsel a fee of 40% or more of the common fund. Typically, fees of this magnitude are awarded in cases that proceed to trial, with the median award of fees and costs combined in such cases being 45%. *Third*, there are numerous reported federal and state cases awarding 40% or more to class counsel, many in circumstances far less compelling than those that exist in this case. *Fourth,* the 40% fee here comports with the market rate: empirical evidence demonstrates that contingent fee trial lawyers normally receive a fee of approximately 40% of the client's recovery in cases that proceed to trial and involve at least one appeal.

Fifth, in the underlying *MedPartners* matter, class counsel received a 33.33% fee for that more modest piece of litigation, providing evidence in the form of fees historically awarded by this Court in significant class suits. These five points demonstrate that courts award class counsel fees constituting 40% of the common fund in appropriate circumstances.

Qualitatively, the 40% fee is warranted by a series of more than a dozen factors that characterize the extraordinary risks Class Counsel took in pursuing this case and the remarkable results that they achieved for the class. Counsel took an extraordinary risk in undertaking this case: (1) the case did not follow on the heels of a government investigation or a well-publicized admission of wrong-doing but was litigated from scratch and without assistance by any entity beyond Class Counsel; (2) the case was not a cookie cutter case, re-filing pleadings from a past effort, but a completely novel one-off case: a "class action about a class action" with absolutely no precedent in the case law; (3) nothing Class Counsel learned in this case will be utilizable in future cases – it does not open a new line of business enabling counsel to spread its risks over future matters; (4) Class Counsel faced the real risk that the evidentiary trail would be stale given the historical facts underlying the case; (5) Class Counsel confronted the extremely high burden of securing class certification in a common law fraud case; (6) Class Counsel, a small local boutique firm and associated individual lawyers, litigated against some of the largest corporations in the world and (7) against some of the nation's premier law firms – all with the resources to outlast their efforts; (8) yet they did so without support from other firms, shouldering all of the risk themselves; and (9) given all of these risks, settlement in the case was unlikely and achieved only after they invested millions of dollars and 13 years of their practice into the class's claims in the case. Class Counsel secured extraordinary relief for the class: (10) the relief followed significant, contested, adversarial litigation against strong opposition, right up to the eve of trial – an outcome closer to a judgment than a settlement; (11) class members get significant monetary relief, roughly 5.5 times what they received in the initial MedPartners settlement; (12) 100% of the class is eligible for relief; (13) the claiming process is straightforward, web-based, and not unduly complex; (14) no monies will revert to the defendants, hence ensuring the full deterrent effect of the $310 million recovery; and (15) the relief compares favorably to results achieved in similar cases.

2. While the presence of these many positive factors is extremely impressive, and supports the 40% fee Class Counsel seek, this checklist approach runs the risk of masking how truly exceptional this case is. I have been an expert witness or consultant in about 50 fee-related matters in the past decade and I can recall only once before supporting a fee request of 40% or more. I do so here because this is likely the single most extraordinary class action that I have ever

> witnessed. Many class action cases today follow the headlines in the newspaper, with liability something of a given from the outset. It is exceedingly rare that a class action firm itself detects a legal concern that affects many individuals but which remains hidden, and then tackles it notwithstanding its intricacy, long odds, and sui generis nature. It is far less risky – but likely no less profitable – for a class action firm to be the umpteenth law firm with a few clients in a mega-case involving an oil spill or defective automobile. Yet such piling on produces less additional value for the clients. Class Counsel should be rewarded for investing enormous sums of money in this class's exceptionally risky suit as their work here exemplifies the legal system's core aspiration for class action attorneys: that they serve as private attorneys general. (emphasis added).

This case is truly exceptional, and class counsel exhibited exceptionally-high levels of fact-finding and legal scholarship. In Prof. Rubenstein's words: "[T]his is likely the single most extraordinary class action that I have ever witnessed.... It is exceedingly rare that a class action firm itself detects a legal concern that affects many individuals but which remains hidden, and then tackles it notwithstanding its intricacy, long odds, and sui generis nature.... Class Counsel should be rewarded for investing enormous sums of money in this class's exceptionally risky suit as their work here exemplifies the legal system's core aspiration for class action attorneys: that they serve as private attorneys general."

Professor Arthur Miller also found it noteworthy that: "Unlike most other cases in which a class action may result from public disclosures of fraud or an investigation of law enforcement or the Securities and Exchange Commission, this case stemmed from Class Counsel's discovery in unrelated litigation of the unlimited coverage that was provided by policies that had been issued by AIG. Therefore, there would be no case without the efforts of Class Counsel." Exhibit 2, ¶ 16.a.

III. THIS FEE IS TO BE AWARDED AS A PERCENTAGE OF THE RECOVERY

The U. S. Supreme Court, in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980), recognized that "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." The Supreme Court also holds that, when determining how much of a common fund an attorney is entitled, generally, "a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 903 n.16 (1984). See, generally, *Columbus Drywall & Insulation, Inc. v. Masco Corporation*, No. 1:04-cv-3066, 2012 WL 12540344, *1 (N.D. Ga. Oct. 26, 2012) (Julie E. Carnes, J.):

> When a representative party has created a "common fund" for the substantial benefit of a class, the court should award attorney fees based upon the benefit obtained. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Mills v. Electric Auto–Lite Co.*, 396 U.S. 375, 392–93 (1970). "[C]ourts ... have acknowledged the economic reality that in order to encourage 'private attorney general' class actions brought to enforce ... laws on behalf of persons with small individual losses, a financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid." *Mashburn v. National Healthcare, Inc.*, 684 F.Supp. 679, 687 (M.D. Ala. 1988) (Dubina, J.); see also *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 348–49 (N.D. Ga. 1993).[4]

The main case on common-fund attorneys' fee in Alabama is *Edelman & Combs vs Law*, 633 So. 2d 957 (Ala. 1995). The *Edelman* Court specifically held "that in a class action where

[4] *Columbus Drywall* has similarities to this case. At *3, Judge Carnes wrote: "The eight-year litigation of this case was protracted, complicated and highly contested at every juncture, involving extensive motion practice on summary judgment, class certification, multiple Daubert challenges, procedure for trial, evidentiary issues and other matters. The case settled only within 48 hours of trial. Further, as noted in the Court's separate order approving the settlement, it settled for a relatively high percentage of the potential recovery, as compared to other class action settlements. And, unlike some class settlements, the recovery here consists entirely of cash, rather than coupons or discounts on future purchases from the defendants."

the plaintiff class prevails and the lawyer's efforts result in a recovery of a fund, by way of settlement or trial, a reasonable attorney fee should be determined as a percentage of the amount agreed upon in settlement or recovered at trial." 633 So. 2d at 959. Thus, Alabama joins the majority of federal courts in holding that the attorneys' fees in a common-fund class action are set as a percentage of the recovery.[5] Hours are not the issue. See *Edelman*, at 960 (emphases added):

> Class actions are designed to provide a vehicle for redress where wrongful conduct has resulted in harm to a great number of people, but none has been hurt badly enough to justify pursuit of an individual claim. Where a recovery is made on behalf of a class, it is reasonable to award attorney fees on the basis of a percentage of the amount recovered. In some cases, 20% may be reasonable, based upon the amount of the award and other factors. In other cases 40%, or even 50%, may be justified. A trial court must carefully weigh the factors. For example, strict reliance on "the time consumed" factor in a common fund case could encourage and reward protracted litigation. *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 773 (11th Cir. 1991). It has been said that the "expended time" factor has limited significance in a common fund case:
>
> > "Professor Hornstein wrote in his article 'Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards,' 69 Harv.L.Rev. 658 (1956):
> >
> > > "'Where success is a condition precedent to compensation, "hours of time expended" is a nebulous, highly variable standard, of limited significance. One thousand plodding hours may be far less productive than one imaginative, brilliant hour. A surgeon who skillfully performs an appendectomy in seven minutes is entitled to no

[5] In so holding, the Alabama Supreme Court approvingly cited and extensively quoted the Third Circuit Task Force, 108 F.R.D. 237 (1985), which "recommended setting a percentage fee in cases like this one." *Edelman* at 959. The *Edelman* Court, at 959, n. 3, cited approvingly the Eleventh Circuit decision in *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 773 (11th Cir. 1991), which requires the percentage-of-recovery method of fee calculation where a common fund is recovered.

> smaller fee than one who takes an hour; many a patient would think he is entitled to more.'
>
> Id. at 660. Professor Hornstein's article was cited with approval by the United States Supreme Court in *Mills v. Electric Auto–Lite Co.,* 396 U.S. 375, 394 n. 18, 90 S.Ct. 616, 626 n. 18, 24 L.Ed.2d 593 (1970)."

Mashburn v. National Healthcare, Inc., supra, at 689.

IV. COURTS ARE TO CONSIDER THE 12 *PEEBLES* FACTORS AND OTHER FACTS

The Supreme Court held in *Edelman*, at 960, that the *Peebles v. Miley* factors were relevant for consideration by the Court in setting the percentage: "This Court has recognized the use of the *Peebles* factors in setting a percentage fee in common fund cases and has allowed percentages even higher than one-third in some cases." *Peebles v. Miley*, 439 So. 2d 137, 140-41 (Ala. 1983), which was neither a class action nor a common-fund case, adopted a series of factors for a court to consider in deciding the amount of a reasonable fee. *Peebles* was based upon the opinion of the old Fifth Circuit in *Johnson v Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974),[6] which in turn was based upon the Canons of Ethics of the American Bar Association (and that portion of the ABA Canon of Ethics was based, in turn, upon the first Code of Ethics of the State Bar of Alabama, written by former Alabama Governor and Federal Judge Thomas

[6] Followed by *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). The twelve "*Johnson* Factors" are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714, 717-19 (5th Cir. 1974).

Goode Jones). The *Peebles* factors, quoted in *Edelman*,[7] are:

(1) "the nature and value of the subject matter of the employment;"

(2) "the learning, skill, and labor requisite to its proper discharge;"

(3) "the time consumed;"

(4) "the professional experience and reputation of the attorney;"

(5) "the weight of his responsibilities;"

(6) "the measure of success achieved;"

(7) "the reasonable expenses incurred by the attorney;"

(8) "[w]hether the fee is fixed or contingent;"

(9) "[t]he nature and length of the professional relationship;"

(10) ""[t]he fee customarily charged in the locality for similar legal services;"

(11) "[t]he likelihood that a particular employment may preclude other employment;" and

(12) "[t]he time limitations imposed by the client or by the circumstances."

Each of these 12 factors will be discussed, seriatim, below.

Courts recognize that not every factor is relevant to every case. "Although not all of these [*Peebles* factors] criteria are applicable in every case, a trial court may consider those that are, along with other pertinent facts, in approving attorney fees...." *Edelman* ,at 960. See *Van Schaack v. AmSouth Bank*, 530 So. 2d 740, 749 (Ala. 1986): The *Peebles/Van Schaack* criteria are sometimes overlapping, and "not all the criteria will be applicable" in a particular case. "Indeed,

[7] See also *Union Fidelity Life Ins. Co. v. McCurdy*, 781 So. 2d 186, 192 (Ala. 2000), and *Van Schaack v. AmSouth Bank*, 530 So. 2d 740, 749 (Ala. 1986).

there would hardly ever be a case where the [determination] of attorney's fees brought into play every criterion." *Graddick v. First Farmers & Merchants National Bank of Troy*, 453 So. 2d 1305, 1311 (Ala. 1984). Also, "[t]he factors [e.g., *Johnson* factors, substantially the same as *Peebles*] are not applied formulaically, and the weight given to each factor may vary depending on the case." 2 McLaughlin on Class Actions § 6:24 (12th ed.) (database updated Dec. 2015).

Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768, 775 (11th Cir. 1991), identifies additional factors to consider, including the time required to reach the settlement, objections from the class to settlement terms or the fees requested, non-monetary benefits, the "economics involved in prosecuting a class action," and other factors "unique to a particular case." In addition, courts have recognized that awards of fair attorneys' fees from a common fund should serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and therefore to discourage future alleged misconduct of a similar nature. See *Hicks v. Morgan Stanley & Co.*, No. 01-10071, 2005 U.S. Dist. LEXIS 24890, at *27 (S.D. N.Y. Oct. 19, 2005) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding."). "Private attorneys should be encouraged to take the risks required to represent those who would not otherwise be protected from socially undesirable activities...." *Maley v. Del Global Techs. Corp*., 186 F. Supp. 2d 358, 374 (S.D. N.Y. 2002). See also In re *Visa Check/Mastermoney Antitrust Litig*., 297 F. Supp. 2d 503, 524 (E.D. N.Y. 2003), aff'd sub nom. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F. 3d 96 (2d Cir. 2005) ("There is ... commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest."), *In re Med. X-Ray Antitrust Litig.*, No. 93-5904, 1998 U.S. Dist. LEXIS 14888, at *23

(E.D. N.Y. Aug. 7, 1998) (awarding fee of 33.3% because it "furthers the public policy of encouraging private lawsuits"), and *Columbus Drywall & Insulation, Inc. v. Masco Corporation*, No. 1:04-cv-3066, 2012 WL 12540344, *7 (N.D. Ga. Oct. 26, 2012) (Julie E. Carnes, J.) (same).

V. THE *PEEBLES* FACTORS APPLIED TO THE CASE AT BAR

1. The nature and value of the subject matter of the employment

This factor does not weigh against the request for 40%. This was a unique and one-time case. No lawyer anywhere had any prior experience and expertise in this specific type of litigation (a class action about a class action; a fraud on a certified class). Thus, there was no cookie-cutter, go-by briefs or research that class counsel could borrow. When class counsel filed this case, they knew they were entering uncertain and unchartered waters where there was no guarantee of any recovery. They knew this case would involve novel, difficult, and complex legal questions and facts at every turn. And, it is highly unlikely that the research, work, and experience gained in this case can be used in future litigation because the facts and law of this case are singular. So, the value of employment in this case is just solely for this one-off case, which weighs on the side of awarding a higher fee.

2. The learning, skill, and labor requisite to its proper discharge

Judge Clemon's declaration, Exhibit 3, at ¶¶ 35-43, summarizes the experience of principal class counsel. The learning and skill of class counsel are of the highest order. Various measures of the extraordinary labor required of class counsel are scattered throughout this brief. Just as some small examples of the overall task, counsel successfully defended motions to

dismiss; secured class certification after drafting lengthy briefing and conducting five days of hearings; conducted extensive discovery; participated in over 50 depositions; defended multiple appeals to the Alabama Supreme Court; defended eight motions for summary judgment; successfully won partial summary judgment on behalf of the class; engaged in considerable pre-trial motion practice; and fully prepared this case for trial. See much more detail in Exhibit 4, Affidavit of Class Counsel in Support of the Class's Motion for Final Approval of Settlement and in Support of Class Counsel's Motion for Attorneys' Fees and Expenses.

As courts have recognized in many instances, the quality of work done by class counsel, and the efficacy and dedication with which it was performed, should be compensated. See, e.g., *Vizcaino v. Microsoft*, 290 F.3d 1043, 1048 (9th Cir. 2002); *In re Pacific Enters. Sec. Litig*., 47 F.3d 373, 379 (9th Cir. 1995); *In re Equity Funding Corp. Sec. Litig*., 438 F. Supp. 1303, 1337 (C.D. Cal. 1977); *J. N. Futia Co. v. Phelps Dodge Indus., Inc*., 1982 U.S. Dist. LEXIS 15261 (S.D. N.Y. Sept. 17, 1982). This case is no different.

Defendants are represented by some of the most skillful attorneys in the nation from some of its most prestigious law firms. Class Counsel fought vigorously with these counsel to overcome these complicated legal issues to design a settlement and notice program that rendered substantial benefits to all class members. The law recognizes that application of such skill for such purposes justifies an award to class counsel of a significant percentage of the common fund achieved on behalf of the Class. See *Vizcaino v. Microsoft*, 290 F.3d 1043, 1048 (9th Cir. 2002).

The three class counsel firms have extensive experience with class action litigation. Their level of skill is best measured by the results achieved for the class. See *Behrens v. Wometco Enters*., 118 F.R.D. 534, 547-48 (S.D. Fla.1988), aff'd, 899 F.2d 21 (11th Cir.1990) ("The

quality of work performed in a case that settles before trial is best measured by the benefit obtained."). Here, class counsel have created substantial benefits -- an immediate all-cash settlement fund of $310 million. The results achieved, standing alone, demonstrate the skills of class counsel, and weigh heavily in favor of the requested 40% fee award.

Aside from the benefits obtained for the class, this factor supports a 40% fee award because the issues involved in this case were so unique and complex. To prosecute the claims of the investor class against formidable defendants like CVS and AIG, represented by capable counsel with extensive resources, it was necessary that the class have equally-skilled lawyers with experience in complex commercial and class litigation. Were it not for class counsel's efforts, these MedPartners investors would not have been compensated for the alleged fraud-in-the-settlement that occurred in 1999. See *Columbus Drywall & Insulation, Inc. v. Masco Corporation*, No. 1:04-cv-3066, 2012 WL 12540344, *3 (N.D. Ga. Oct. 26, 2012) (Julie E. Carnes, J.): "Attorneys should be appropriately compensated for accepting complex and difficult cases. *Johnson*, 488 F.2d at 718; *Yates v. Mobile County Personnel Bd.*, 719 F.2d 1530, 1535 (11th Cir.1983)." Professor Arthur Miller stated that: "I find the procedural history of this class action to be remarkably extensive and complex, fraught with daunting obstacles for Class Counsel in trying to prosecute it. In my opinion the work of Class Counsel throughout this matter has been relentlessly energetic and of an extremely high quality." Exhibit 2, ¶ 17.

Throughout this long process, class counsel have fairly, adequately, and vigorously represented the interests of the class in the most efficient manner possible, dividing up responsibilities and avoiding duplication of effort. The Court is also in an excellent position to make its own assessment of the skills of class counsel, having conducted many hearings,

considered and ruled upon many motions on various subjects, and closely supervised this case throughout pretrial and summary judgment proceedings. See *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1210 (S.D. Fla. 2006) ("Class Counsel who have worked on this case are talented and experienced attorneys with excellent reputations in the legal community. I conclude this is a very strong factor in favor of the percentage sought. After seven years, I am very familiar with the quality and representation of Class Counsel."). Another "highly important" aspect of a court's evaluation of the skill required of the fee applicants is "[t]he trial judge's expertise gained from past experience as a lawyer and his observation from the bench of lawyers at work." *In re Enron Corp. Sec., Derivative & ERISA Litig*., 586 F.Supp.2d 732, 789 (S.D. Tex. 2008), quoting *Johnson*, 488 F.2d at 718.

Novel and complex issues were the norm in this case, not the exception. See, e.g., *Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992) (noting that plaintiff faced multi-faceted and complex legal questions). Many of the questions of law presented herein had never been tried in any court. The primary certification appeal in this case required the Alabama Supreme Court to decide an issue of first impression (e.g., individual class member reliance versus the so-called "entity theory." "Cases of first impression generally require more time and effort on the attorney's part." *Johnson*, *supra*, 488 F.2d at 717.

And, it is undisputed that, until the case was finally settled, defendants litigated this action aggressively and opposed the class at every step. See *Yates v. Mobile County Personnel Bd.*, 719 F.2d 1530, 1535 (11th Cir. 1983) (extremely complicated litigation requires thorough and detailed research of almost every question involved). In summary, this case presented many novel and difficult issues, both factual and legal, that presented tremendous challenges to class

counsel. The factual investigation alone was daunting. Mastery of the novel legal and factual issues involved in this case fully supports the 40% fee requested by class counsel.

Another consideration for assessing the quality of the services rendered is the quality of the opposing counsel in the case. See *Maley v. Del Global Techs. Corp*., 186 F. Supp. 2d 358, 373 (S.D. N.Y. 2002), *In re Sunbeam Sec. Litig*., 176 F. Supp. 2d 1323, 1334 (S.D. Fla. 2001), and *In re Warner Commc'ns Sec. Litig*., 618 F. Supp. 735, 749 (S.D. N.Y. 1985), aff'd, 798 F.2d 35 (2d Cir. 1986). Defendants are represented by highly-experienced counsel. The Class's success in the face of formidable legal opposition confirms the quality of its representation. See, e.g., *Schwartz v. TXU Corp*., No. 3:02-CV-2243-K, 2005 WL 3148350, *30 (N.D. Tex. Nov. 8, 2005) ("The ability of plaintiffs' counsel to obtain such a favorable settlement for the Class in the face of such formidable legal opposition confirms the superior quality of their representation."); *In re Global Crossing Sec. & ERISA Litig*., 225 F.R.D. 436, 467 (S.D. N.Y. 2004) ("'The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work.'"); and *Clark v. Cameron-Brown Co.,* 1981 WL 1637, *3-4 (M.D. N.C. Apr. 6, 1981) (awarding a 37% fee and noting that the fee was deserved in part because of the undesirability of the case "not only due to the risk of achieving no recovery for the burdensome amount of work involved, but also because of the reputation and pervasive influence of the defendants."). This factor further supports the requested percentage.

3. The time consumed

Because common-fund recoveries are judged purely on a percentage basis, this factor is either totally irrelevant or of minor importance. The first enumerated *Johnson* factor is "the time

and labor required." "While the *Johnson* factors must be [separately considered and] addressed, 'rarely are all the *Johnson* factors applicable; this is particularly so in a common fund case.'" *Di Giacomo v. Plains All American Pipeline*, 2001 WL 34633373, *9 (S.D. Fla. Dec. 19, 2001) (emphasis added). Indeed, this first *Johnson* factor is arguably relevant only to a lodestar cross-check analysis, and is not even an appropriate factor in determining a fair percentage fee. See *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1213-14 (S.D. Fla. 2006). Accordingly, to the extent this factor is even relevant, it is beyond question that this 13-year case has demanded substantial time and labor, including extensive briefing, protracted discovery, and arduous settlement negotiations. As quoted at *Caremark II*, 175 So. 3d at 602, Judge King's certification order found that: "These plaintiff attorneys have labored thousands of hours since 2003 seeking to represent and protect this proposed class, and have done so without remuneration for their time and monumental expenses incurred.... This civil action spanning into its tenth year is so complex and replete with filings, depositions and rulings, it is a virtual certainty that no lawyer and/or law firm would now invest the time and incur the expense to represent this class." The substantial amount of time and labor spent on this case was necessary, given the breadth and complexity of the allegations. The discovery battles alone were substantial. Beyond discovery, the motions to dismiss, the motions to deny certification, the summary judgment motions, and appeals at every opportunity, demanded extraordinary amounts of time and effort to save this case from defeat. All of these facts easily support a 40% fee award.

4. The professional experience and reputation of the attorney

See Judge Clemon's declaration, Exhibit 3, and the discussion in subsection (2), above.

At p. 14 of the certification order, Judge Tom King wrote: "Furthermore, the Court observed on the record during the Class Certification Hearing that the attorneys, both plaintiff and defense, are profoundly respected and professional. They are among the finest attorneys in the nation. The Court makes this statement because it is true. These lawyers involved in this case are among the best in the country in handling large complex litigation."

5. The weight of his responsibilities

"The weight of the responsibilities undertaken by Plaintiffs' counsel was very substantial. There were public documents reflecting the excess coverage for the 1998 case. So, to overcome the Defendants' dispositive motions, Plaintiffs' counsel had to make a showing of plausible and controvertible facts. That task was much easier said than done. Plaintiffs' counsel did just that." Judge Clemon's declaration, Exhibit 3, at ¶ 44.

The risks undertaken by class counsel were extreme in this literally unique case. In the context of analyzing class action fees, so factor often called "undesirable" means that counsel had to commit to enter unchartered legal waters. With CVS and AIG as defendants, counsel had no reason to expect a quick settlement. The estimated percentage chance of winning or losing was impossible to judge at the beginning of the case, primarily because there was sparse or zero case law regarding the important "merits" issues. This was by no means "copy-cat" litigation where the landmarks were clearly known in advance. New law was made in this case.

Thus, for purposes of choosing a fair attorneys' fee percentage, this case should be viewed as highly "risky," weighing on the side of a high fee percentage. Courts often elevate percentage fee awards due to the absence of prior or related litigation that could be of value to

class counsel in prosecuting the case. See *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 471 (2d Cir. 1974); *In re Gulf Oil/Cities Serv. Tender Offer Litig*., 142 F.R.D. 588, 597 (S.D. N.Y. 1992) ("[T]his is not a case where plaintiffs' counsel can be cast as jackals.... They did all the work on their own.").

By any reasonable view, this case was extremely risky. The issues were complex; the legal hurdles many and substantial; the opponents powerful and ably defended; and the time and expense demands daunting. Such circumstances justify a generous fee award. A court's consideration of this factor recognizes that counsel should be rewarded for taking on a case that is "undesirable" due to any number of things, including thorny factual circumstances, or complex, undecided legal questions. See *In re Sunbeam Sec. Litig*., 176 F. Supp. 2d 1323, 1336 (S.D. Fla. 2001).

This case was "undesirable" in another sense as well -- the factual risks of this case could not be fully ascertainable until extensive discovery had been completed because defendants were in possession of the relevant information. See *Di Giacomo v. Plains All American Pipeline*, 2001 WL 34633373, *12 (S.D. Fla. Dec. 19, 2001) (holding that an enhanced fee award is appropriate in cases that "carried risks that required investigation and ... discovery to uncover and analyze"). Even if class counsel felt confident about their assessment of fraud liability, they did not -- and could not -- appreciate the full financial ramifications of the tort until mountains of data were analyzed. (Toward the end, defendants still had experts ready to opinion that the economic loss to the class from the fraud-in-the-settlement was actually zero.) It could have been the case that a jury would believe that damages flowing from the fraud-in-the-settlement were insubstantial or non-existent, leaving class counsel and the class with only a Pyrrhic victory. "Undesirability" and

relevant risks must be evaluated from the standpoint of plaintiffs' counsel as of the time they commenced the suit, and not retroactively with the benefit of hindsight. See *Emery v. Hunt*, 132 F. Supp. 2d 803, 811 (D. S.D. 2001), rev'd on other grounds, 272 F.3d 1042 (8th Cir. 2001); *Cook v. McCarron*, 1997 WL 47448, *18 (N.D. Ill. Jan. 30, 1997), aff'd sub nom. *Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998).

As to the undesirability of the case, courts have observed that: "Cases may be deemed 'undesirable' when 'the defendant is a large corporation with substantial resources, financial and otherwise, for a vigorous defense; and the legal and factual issues presented risks to recovery absent settlement.'" *Burford v. Cargill, Inc.*, No. 05-0283, 2012 WL 5471985, *5 (W.D. La Nov. 8, 2012) (quoting *In re Heartland Payment Systems, Inc. Customer Data Security Breach Litig.*, 851 F.Supp.2d 1040, 1085 (S.D. Tex. 2012)). "Where class counsel is 'a relatively small group of attorneys with limited resources pitted against ... [a larger entity] with access to enormous legal resources,' the tenth factor weighs in favor of a substantial fee." *Id*. (quoting *In re Bayou Sorrel Class Action*, No. 04-1101, 2006 WL 3230771, *6 (W.D. La. 2006)). See *Columbus Drywall & Insulation, Inc. v. Masco Corporation*, No. 1:04-cv-3066, 2012 WL 12540344, *6 (N.D. Ga. Oct. 26, 2012) (Julie E. Carnes, J.):

> Undesirability of the Action
>
> This Court has recognized the risk and difficulty inherent in antitrust class actions, as well as the particular obstacles to recovery in this case. There are a limited number of firms that both possess the required skills and would undertake this representation, knowing that it would likely require expenditure of tens of thousands of hours (on a contingent basis) and the advancement of millions of dollars in out-of-pocket expenses. Class counsels' willingness to assume those risks should be reflected in the fee.

6 The measure of success achieved

This is the factor which many courts have consistently recognized as a major factor, if not the most important factor, to be considered in making a fee award. See, e.g, *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"), "Exceptional results are a relevant circumstance" in deciding a fee award in common fund cases. *Vizcaino v. Microsoft*, 290 F.3d 1043, 1048 (9th Cir. 2002).

In regard to "the amount involved and the results obtained," "[t]he United States Supreme Court and the Fifth Circuit have held that [this is] 'the most critical factor' in determining the reasonableness of a fee award…." *In re Enron Corp. Sec., Derivative & ERISA Litig*., 586 F.Supp.2d 732, 796-97 (S.D. Tex. 2008) (citing and quoting *Farrar v. Hobby*, 506 U.S. 103, 114 (1992), and *Hensely v. Eckerhart*, 461 U.S. at 436); *Migis v. Pearle Vision, Inc*., 135 F.3d 1041, 1047 (5th Cir. 1998). In this regard the success of the litigation is not only determined by the gross amount of the recovery but also by the number of individuals who benefit from the class settlement, the degree to which the settlement provides them with full compensation for their injuries, and the extent to which the settlement benefits the public at large. See, e.g., *In re Vioxx Products Liability Litigation*, 760 F.Supp.2d 640, 657-58 (E.D. La. 2010).; *Turner v. Murphy Oil, USA, Inc*., 472 F.Supp.2d 830, 866 (E.D. La. 2007); *In re Educational Testing Service Praxis Principle*, 447 F.Supp.2d 612, 632 (E.D. La. 2006). See also *In re Diet Drugs Prods. Liab. Litig*., 553 F.Supp.2d 442, 472-73 (E.D. Pa. 2008) ("the vast number of people who have benefitted from the Settlement Agreement and the level of participation among Class Members is a testament to the strength and efficacy of the Settlement Agreement").

It is well-established that one of the primary determinants of the quality of the work

performed is the result obtained. Class counsel have achieved a settlement of $310,000,000 -- a significant achievement in a case as fraught with peril as this one. After extensive investigation and discovery, class counsel were able to assess the strengths and weaknesses of their case, and have recovered by settlement a significant percentage of plaintiffs' best-case scenario of compensatory damages.

Instead of facing additional years of costly litigation, class members will now share in a substantial settlement fund. This class has already waited since 2003, when this case was filed - or, even longer, if one uses the 1999 date of the fraud. The settlement will provide immediate and significant cash benefits to the class. A trial would have been lengthy and expensive. A settlement providing an immediate cash benefit, and avoiding the cost and risk of continued litigation, is a positive result for the members of the class. See *Enterprise Energy Corp. v. Columbia Gas Transmission*, 137 F.R.D. 240, 246-247 (S.D. Ohio 1991) (noting that a cash settlement "provides immediate value to the Class and minimizes the costs which plaintiffs must otherwise incur in moving forward and potentially obtaining a successful result").

"The quality of representation is best measured by comparing the possible recovery to the amount actually received." 2 Joseph M. McLaughlin, McLaughlin on Class Actions § 6:24 (12th ed.) (database updated Dec. 2015). See also *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 55 (2d Cir. 2000) ("We agree with counsel that the quality of representation is best measured by results, and that such results may be calculated by comparing 'the extent of possible recovery with the amount of actual verdict or settlement.'"). An enhancement of the fee award is appropriate in cases of exceptional success. *Blum v. Stenson*, 465 U.S. 886, 901 (1984).

7. The reasonable expenses incurred by the attorney

Judge Clemon says that $3 million in total litigation expenses "seems very reasonable on its face, given 13 years of hard litigation against some of the major defense firms in the country." Exhibit 3, at ¶ 46. The subsection below, entitled, "Class Counsel Seek Reimbursement of Expenses," provides greater detail on this subject and factor # 7.

8. Whether the fee is fixed or contingent

In this case, class counsel prosecuted this action for over 12 years on an "at-risk" contingent-fee basis, meaning that counsel would be paid only if they achieved a successful result. Contingent risk obviously is an important factor in determining the fee award, and the recognition of that risk -- as well as the proper assessment of it -- is necessary to provide incentives to experienced counsel. In this case, class counsel assumed the risk of an unsuccessful result.

Class counsel have not received a dime of fees or expense reimbursement from any class member for the duration of this entire case. Class counsel undertook this litigation on a fully contingent-fee basis, with everything dependent upon a successful result. In view of the complexity involved in litigating this action, counsel faced a significant risk that they would never be paid for the thousands of hours of time expended or the millions of dollars of out-of-pocket expenses incurred. The risk of non-payment in complex cases such as this is very real. See *Ressler v. Jacobson*, 149 F.R.D. 651, 655 (M.D. Fla. 1992)

In determining the amount of the fee in a common-fund case, courts should focus on the amount of contingent risk involved and enhance the award accordingly. The district court in

Pinto v. Princess Cruise Lines, Ltd., 2007 WL 853431 (S.D. Fla. Feb. 16, 2007), spoke at length on this subject, offering the following observations that are equally applicable here:

> A determination of a fair fee for Class Counsel must include consideration of the contingent nature of the fee, the wholly contingent outlay of out-of-pocket sums by Class Counsel, and the fact that the risks of failure and nonpayment in a class action are extremely high. Cases recognize that attorneys' risk is "'perhaps the foremost' factor" in determining an appropriate fee award. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 54 (2d Cir. 2000) (citation omitted); accord *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981) ("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 result.")....
>
> Class Counsel have received no compensation during the course of this litigation and have also incurred significant expenses in litigating on behalf of the Class, none of which would have been recovered if the case had not been successfully concluded. From the time Class Counsel filed suit, there existed a real possibility that they would achieve no recovery for the Class and hence no compensation. Class Counsel's investment of time and expenses has always been at risk and wholly contingent on the result they achieved. Although Class Counsel have successfully concluded the litigation, this result was not foreseeable at the outset. The relevant risks must be evaluated from the standpoint of Plaintiffs' counsel as of the time they commenced the suit and not retroactively with the benefit of hindsight. The financial risks borne by Class Counsel fully support the appropriateness of the fee requested.

2007 WL 853431, *5. Accord *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1214-15, 1216-17 (S.D. Fla. 2006) ("A contingency fee arrangement often justifies an increase in the award of attorneys' fees.... As recognized in *Behrens*, without a contingent fee, '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.'").

Indeed, the fee jurisprudence has historically recognized that there is a cardinal difference between the economic value of services performed on a currently billed fee-for-service basis and compensation that is contingent on success. *Lindy Bros. Builders, Inc. v. Am. Radiator*, 487 F.2d

161, 168 (3d Cir. 1973) ("No one expects a lawyer … whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success"); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 735-36 (1987) (Blackmun, J., dissenting on other grounds) ("[L]awyers charge a premium when their entire fee is contingent on winning .... The premium added for contingency compensates for the risk of nonpayment if the suit does not succeed and for the delay in payment until the end of the litigation-factors not faced by a lawyer paid promptly as litigation progresses"). As the authoritative report by the Third Circuit Task Force on the award of counsel fees stated:

> It does not impugn the service that the plaintiffs' class action bar provides to note that the driving force in most cases is the opportunity to share in the plaintiffs' risk and ultimately in any reward they may receive. Like most prudent individuals, plaintiffs' counsel would not seek involvement in most class action cases ... unless the financial reward justified the risk that counsel undertakes. Because they have abilities that could be put to other uses, plaintiffs' counsel must find something in a class action that signals that it is financially attractive to be class counsel.
>
> It is plaintiffs' counsel who pay the expenses of the lawsuit, and who expect that they will lose much if not all of their out-of-pocket expenses if they are not ultimately successful in having a court certify a class and achieving either a settlement or a litigation victory. It is plaintiffs' counsel who work to obtain whatever recovery any member of the class who has not opted out of the litigation will receive. The fact that there will be no payment if there is no settlement or trial victory means that there is greater risk for plaintiffs' counsel in these class action cases than in cases in which an hourly rate or flat fee is guaranteed. The quid pro quo for the risk ... is some kind of risk premium if the case is successful.

Third Circuit Task Force Report on Selection of Class Counsel, 208 F.R.D. 340, 342-43 (2002).

Consistent with economic theory, the law uniformly recognizes that "[r]isk ... must be judged as it appeared to counsel at the outset of the case, when they committed their capital (human and otherwise)." *In re NASDAQ Market-Makers Antitrust Litig*., 187 F.R.D. 465, 488

(S.D. N.Y. 1998) (citing *Harman v. Lyphomed, Inc*., 945 F.2d 969, 976 (7th Cir. 1991)). Accord, e.g., *In re Enron Corp. Sec., Derivative & ERISA Litig*., 586 F.Supp.2d 732, 747 (S.D. Tex. 2008) ("risk must be assessed ex ante, from the outset of the case, not in hindsight.") (citing *In re Cardinal Health Inc. Sec. Litig*., 528 F.Supp.2d 752, 758 (S.D. Ohio 2007); *In re Diet Drugs Prods. Liab. Litig.*, 553 F.Supp.2d 442, 478 (E.D. Pa. 2008) (risk of non-payment must be evaluated as of "the inception of the action and not through the rosy lens of hindsight"); *In re Superior Beverage/Glass Container Consolidated Pretrial*, 133 F.R.D. 119, 127 (N.D. Ill. 1990) ("Risk must be assessed ex ante. Lawyers make decisions about whether to bring lawsuits on the basis of the risks and rewards they perceive at the beginning and must be compensated on the basis of the risks as they appeared at the beginning, not as the court perceives them at the end of the litigation").

The risk inherent in contingent fee representation such as this supports the requested fee. See *Goldberger v. Integrated Res., Inc*., 209 F.3d 43, 54 (2d Cir. 2000) (risk is "perhaps the foremost factor" in determining the appropriate fee); *Rader v. Thrasher*, 57 Cal. 2d 244, 253 (1962) (because a contingent fee case "involves a gamble on the result, [it] may properly provide for a larger compensation than would otherwise be reasonable"); *Salton Bay Marina, Inc. v. Imperial Irrigation Dist*., 172 Cal. App. 3d 914, 955 (1985) ("riskiness ... or contingent nature of the litigation is a relevant factor in determining a reasonable attorney fee award"). As the Court of Appeal explained in *Cazares v. Saenz*, 208 Cal. App. 3d 279, 288 (1989): "In addition to compensation for the legal services rendered, there is the raison d'etre for the contingent fee: the contingency. The lawyer on a contingent fee contract receives nothing unless the plaintiff obtains a recovery. Thus, in theory, a contingent fee in a case with a 50 percent chance of success

should be twice the amount of a noncontingent fee for the same case."

"Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, No. 01-11814, 2004 U.S. Dist. LEXIS 8608, at *11 (S.D. N.Y. May 14, 2004); see also *In re Am. Bank Note Holographics, Inc., Sec. Litig*., 127 F. Supp. 2d 418, 432-33 (S.D. N.Y. 2001) (concluding it is "appropriate to take this [contingent-fee] risk into account in determining the appropriate fee to award."). "The Court is well aware that there are numerous contingent cases such as this where plaintiff's counsel, after investing thousands of hours of time and effort, have received no compensation whatsoever. Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award. In evaluating [the contingent fee] factor the Court will not ignore the pecuniary loss suffered by plaintiff's counsel in other actions where counsel received little or no fee." *Ressler v. Jacobson,* 149 F.R.D. 651, 656-57 (M.D. Fla. 1992).

The risk of no recovery in complex cases of this type is real. There have been numerous class actions in which lead counsel expended thousands of hours and yet received no remuneration despite their diligence and expertise. See, e.g., *Steed Fin. LDC v. Nomura Sec. Int'l, Inc*., 148 F. App'x. 66 (2d Cir. 2005) (affirming summary judgment and dismissal of all plaintiffs' claims, including 10(b) and 20(a) claims); *AUSA Life Ins. Co. v. Ernst & Young*, 39 F. App'x 667 (2d Cir. 2002) (affirming district court's dismissal after a full bench trial and earlier appeal and remand); *Robbins v. Koger Props., Inc*., 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (appellate court overturned securities fraud class action jury verdict for plaintiffs

in case filed in 1973 and tried in 1988, on the basis of 1994 Supreme Court opinion); *Backman v. Polaroid Corp*., 910 F.2d 10 (1st Cir. 1990) (a case tried and argued in the First Circuit by Mr. Shapiro) (class won a substantial jury verdict and a motion for judgment n.o.v. was denied, but on appeal the judgment was reversed and the case dismissed, after 11 years of litigation); *Winkler v. NRD Mining, Ltd.*, 198 F.R.D. 355 (E.D. N.Y. 2000) (granting defendants' motion for judgment as a matter of law after jury verdict for plaintiffs), aff'd sub nom. *Winkler v. Wigley,* 242 F.3d 369 (2d Cir. 2000); *In re Clarent Corp. Sec. Litig.*, No. 01-03361 (N.D. Cal. Feb. 16, 2005) (defense verdict for Ernst & Young after four week trial); *In re Biogen Sec. Litig*., No. 94-12177 (D. Mass. May 6, 1998) (jury verdict for defendants in securities class action); *In re Health Mgmt., Inc. Sec. Litig.*, No. 96-889 (E.D. N.Y. Oct. 26, 1999) (jury verdict for auditor in securities class action case); *In re Walt Disney Co. Derivative Litig*., 907 A.2d 963 (Del. Ch. 2005) (defense verdict on all counts after nine years of litigation and a three month bench trial), aff'd, 906 A.2d 27 (Del. 2006). In undertaking this case in 2003, class counsel were aware of many hard-fought lawsuits where, because of the discovery of facts unknown when the case was commenced, or changes in the law during the pendency of the case, or a decision of a judge or jury following a trial on the merits, excellent professional efforts of members of the plaintiffs' bar produced no fee for counsel.[8]

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[8] See, e.*g., Phillips v. LCI Int'l, Inc.,* 190 F.3d 609 (4th Cir. 1999); *In re Comshare Inc. Sec. Litig.*, 183 F.3d 542 (6th Cir. 1999); *Levitin v. PaineWebber, Inc.*, 159 F.3d 698 (2d Cir. 1998); *Suna v. Bailey Corp*., 107 F.3d 64 (1st Cir. 1997); *Chill v. General Electric Corp.*, 101 F.3d 263 (2d Cir. 1996); *In re Syntex Corp. Secs. Litig.*, 95 F.3d 922 (9th Cir. 1996); *Gross v. Summa Four*, 93 F.3d 987 (1st Cir. 1996); *Glassman v. Computervision Corp.*, 90 F.3d 617 (1st Cir. 1996); *In re StacElecs. Sec. Litig*., 89 F.3d 1399 (9th Cir. 1996); *Epstein v. Washington Energy Co.*, 83 F.3d 1136 (9th Cir. 1996); *Lovelace v. Software Spectrum*, 78 F.3d 1015 (5th Cir. 1996); and *San Leandro Emergency Medical Group Profit Sharing Plan v. Philip Morris Cos*., 75 F.3d 801 (2d Cir. 1996).

Counsel's assumption of this contingency fee risk, and its extensive litigation in the face of these risks, strongly supports the reasonableness of the fee. See *Hill v. State St. Corp*., No. 09-12146-GAO, 2015 WL 127728, *18 (D. Mass. Jan. 8, 2015) (considering the contingency risk in awarding attorneys' fees where counsel "litigated the Action on a fully contingent basis and were exposed to the risk that they might obtain no compensation for their efforts on behalf of the class"); *In re Marsh ERISA Litig*., 265 F.R.D. 128, 148 (S.D. N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk."); *In re OCA, Inc. Sec. & Derivative Litig*., No. 05-2165, 2009 WL 512081, *22 (E.D. La. March 2, 2009) (Where counsel faced challenges in establishing scienter and loss causation and in proving liability and damages at trial, "the risk plaintiffs' counsel undertook in litigating this case on a contingency basis must be considered in its award of attorneys' fees, and thus an upward adjustment is warranted."); *Maley v. Del Global Techs. Corp*., 186 F. Supp. 2d 358, 372 (S.D. N.Y. 2002) ("Class counsel undertook a substantial risk of absolute non-payment in prosecuting this action, for which they should be adequately compensated.").

An award of attorneys' fees "should be structured as an incentive for lawyers to risk achieving the highest possible benefits for the greatest number of Class Members." *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1189 (S.D. Fla. 2006). The fees allowed in a case must also serve the function of covering situations where "attorneys have received no fees and litigated at substantial risk to themselves and in the best interest of the Class." *Id*. "This is not a situation where a class action is brought, soon settled, and Class Members receive an insignificant award and the lawyers get millions." *Allapattah*, at 1189. See *Columbus Drywall &*

Insulation, Inc. v. Masco Corporation, No. 1:04-cv-3066, 2012 WL 12540344, *5 (N.D. Ga. Oct. 26, 2012) (Julie E. Carnes, J.):

> Whether the Fee is Fixed or Contingent
>
> As already noted, class counsel prosecuted this case on an entirely contingent fee basis. In doing so, counsel assumed significant risk of investing tens of thousands of hours and millions of dollars in out-of-pocket expenses with no compensation. Even the "ordinary" antitrust class action (if there is such a thing) is always "uncertain in outcome." *In re Motorsports*, 112 F.Supp.2d at 1334. Particularly in the absence of any criminal indictments or pleas, this case has always involved a high degree of risk of nonpayment. This substantial contingency risk favors the requested fee. As another district court from this circuit observed:
>
> > A contingency fee arrangement often justifies an increase in the award of attorney's fees. This rule helps assure that the contingency fee arrangement endures. 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.
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> *Behrens v. Wometco Enters*., 118 F.R.D. 534, 548 (S.D. Fla.1988), aff'd, 899 F.2d 21 (11th Cir. 1990).

9. The nature and length of the professional relationship

Regarding this factor, the *Johnson* decision noted that "[a] lawyer in private practice may vary his fee for similar work in the light of the professional relationship of the client with his office." 488 F.2d at 719. However, this case was not one where an attorney might tend to discount his or her fees in anticipation of obtaining repeat business with an established client. There does not seem to be any likelihood that the named plaintiffs or class members were in a position to promise future business to these attorneys that would somehow offset the tens of thousands of hours and millions of dollars in expenses that class counsel invested in this case.

Thus, class counsels' compensation for these risks must come entirely from the settlement fund, rather than from future business from these clients. Again, this fraud-in-a-class-settlement case is a one-time event, unlikely ever to be repeated. See *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1189 (S.D. Fla. 2006) ("[A] higher fee may be warranted in class actions where counsel for the class had no prior relationship with the named plaintiffs ... [and where] the risk of representation was not diminished by a long and beneficial previous relationship.").

10. The fee customarily charged in the locality for similar legal services

A complex individual fraud case in Alabama would normally rate at least a 40% contingency fee. See ¶ 48 of Judge Clemon's affidavit, Exhibit 3:

> In the State of Alabama, over the last ten years, the usual contingency rate has escalated from 33% to 40%. This declaration is based on my personal experience, my law firm's practice, and interactions with plaintiff lawyers throughout the State. While attending the most recent annual convention of the Alabama Bar Association a few weeks ago, I re-affirmed the extant practice by talking with several lawyers from Huntsville to Mobile. As the presiding Judge in *Torbert et al v. Monsanto Corp*. (N.D. Ala. No. 01-cv-1407), I personally know that the lawyers in those cases received 40% of the $600 million global settlement. The case was less than three years old; and the legal services provided in that case pale in comparison to services provided in this case.

Bates v. Stewart, 99 So. 3d 837, 842 (Ala. 2012), notes that "the trial court entered an order denying Avery's motion and finding that a 40% attorney fee in the *Monsanto* litigation was reasonable pursuant to the 12 criteria this Court enumerated in *Pharmacia Corp. v. McGowan*, 915 So. 2d 549, 552-53 (Ala. 2004) (quoting *Van Schaack v. AmSouth Bank, N.A.*, 530 So. 2d 740, 749 (Ala.1988)).[9]

[9] The settlement in the underlying Pharmacia/Monsanto state litigation was $300 million, and the fee award was $120 million, or 40%. *Abernathy v. Monsanto Co.*, CV-01·832 (Circuit

As Judge Posner recognized in *Matter of Cont'l Illinois Sec. Litig*., 962 F.2d 566, 572 (7th Cir. 1992), courts should look to the marketplace to evaluate the reasonableness of a percentage fee:

> The judicial task might be simplified if the judge and the lawyers spent their efforts on finding out what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character. This was a contingent fee suit that yielded a recovery for the "clients" (the class members) of $45 million. The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client. Suppose a large investor had sued Continental for securities fraud and won $45 million. What would its lawyers have gotten pursuant to their contingent fee contract?

Accord *In re Synthroid Mktg. Litig*., 264 F.3d 712, 718 (7th Cir. 2001) (requiring that "common fund" percentage awards be determined by the market rate for contingency-fee agreements on a prospective basis at the outset of the case).

Other courts have reached similar conclusions about reliance upon the market price for legal services in these types of complex cases. For example, *in Pinto v. Princess Cruise Lines, Ltd.*, 2007 WL 853431, *6 (S.D. Fla. Feb. 16, 2007), the district court adopted Judge Posner's reasoning and concluded that "[i]n private litigation, attorneys regularly contract for contingent fees between 30% and 40% directly with their clients.... These percentages are the prevailing market rates throughout the United States for contingent representation." See also *Kirchoff v. Flynn*, 786 F.2d 320, 323 (7th Cir. 1986) (40% contractual award if case went to trial). The evidence in this case establishes that, in Alabama, and in the USA, the market price for services in this type of case for a single client would range between 40% - 50%. See ¶ 44 of Prof.

Court, Etowah County). Settled at the same time in a joint mediation presided over by Eric Green was a similar federal suit, where there was an identical recovery, $300 million, and an identical attorney fee award, $120 million, or 40%. *Tolbert v. Monsanto Company*, CA No. 01-C-1407-S.

Rubenstein's declaration:

> [T]he 40% fee sought here is supported by evidence of the rates charged in the private marketplace for similar services, namely empirical evidence on rates charged by contingent fee trial lawyers in non-class action cases. These data are helpful because, to consider the work counsel undertook here, it is necessary to look beyond the class action context since so few class suits proceed to trial. A better comparative group is trial lawyers in regular contingent fee cases, lawyers who more often take cases to trial. The general assumption about market rates for contingent fee lawyers is that most charge at least 33% and that the rates increase into the 40% range if a case goes to trial or on appeal. Those assumptions are largely borne out by the empirical data on contingent fee lawyers. The leading study on point shows that most contingent fee lawyers charge a flat 33% rate, but about a third of such lawyers charge variable rates ranging from 33%-50%. The key variables that pushed rates higher were the presence of a trial or an appeal; the presence of preparation for a trial and (several) appeals therefore contains not one but several factors supporting a 40% fee. A more recent study focusing on medical negligence cases – which are more likely than routine contingent cases to be contested through trial or appeal – showed that 50% of attorneys charged a flat 40% fee, and only 14% charged a flat 33%, with another 33% charging a variable rate. Another recent study of 42 patent cases showed that 10 had a fixed contingent rate, with the mean of those 10 contracts being 38.6%; the remaining 32 contracts tied rates to the litigation stage and "the average percentage upon filing was 28% and the average through appeal was 40.2%." Hence, the available empirical data on market rates for contingent fee trial lawyers support the conclusion that a 40% fee is warranted in a case involving both trial and an appeal(s).

Class litigation against powerful foes such as CVS and AIG presented enormous risks for class counsel. As the district court in *Allapattah* explained:

> This was an "all or nothing" case for the Plaintiffs. Class Counsel, having worked on this case since 1992, faced a potential catastrophic risk in the event the case was lost at trial or, thereafter, at each level of review. Given the length of this case, and the significant risks inherent in the litigation, I conclude that the most appropriate way to establish a bench mark is by reference to the market rate for a contingent fee in private commercial cases tried to judgment and reviewed on appeal.

Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1203 (S.D. Fla. 2006). Once again, the typical Alabama lawyer agreeing to accept and litigate – on a purely contingent basis -- an

untested claim like the fraud-in-a-class-action-settlement case would surely have charged a fee percentage of at least 40%. This fact weighs heavily in favor of approving the 40% fee request by Class Counsel.

In setting the percentage, "the most appropriate way is to establish a bench mark is by reference to the market rate for a contingent fee in private commercial cases tried to judgment and reviewed on appeal." *Allapattah Services, Inc. v. Exxon Corp*., 454 F.Supp.2d 1185, 1203 (S.D. Fla. July 6, 2006), citing *Camden I Condo. Assn., Inc. v. Dunkle*, 946 F.2d 768, 772 n. 5 (11th Cir. 1991), and *In re Synthroid Market'g Litig*., 264 F.3d 712, 718 (7th Cir. 2001). See also *City of Ozark v. Trawick*, 604 So. 2d 360, 364-365 (Ala. 1992) (awarding one-third of the common fund in a taxpayer class action); *State v. Brown*, 577 So. 2d 1256, 1260 (Ala. 1991) (noting an award of one-third "would be appropriate had a common fund been established"). In *Waters v. Cook's Pest Control, Inc*., No. 2:07-CV-00394-LSC, 2012 WL 2923542, *17 (N.D. Ala. July 17, 2012), Judge Coogler said: "The rates charged by Class Counsel are well within the customary fees charged for comparable service. Wiggins Childs Quinn & Pantazis, LLC, customarily enters into contingent fee agreements allowing for recovery of 33% in low risk cases with uncontested or moderately contested liability, and up to 49% in higher risk cases with difficult liability issues." The U. S. Supreme Court has recognized that an appropriate fee is intended to approximate what counsel would receive if they were bargaining for the services in the marketplace. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989). If this were a non-representative action, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 40% of the recovery.

As quoted above, one of Prof. Rubenstein's opinions is that a 40% fee in common-fund

class actions is not uncommon: "I maintain a database of over 1,000 class action fee awards. In 55 of the cases in my database (or about 5% of all the cases), courts have awarded counsel a fee of 40% or more of the common fund. Typically, fees of this magnitude are awarded in cases that proceed to trial, with the median award of fees and costs combined in such cases being 45%. Third, there are numerous reported federal and state cases awarding 40% or more to class counsel, many in circumstances far less compelling than those that exist in this case."

Undersigned counsel Bruce McKee was co-lead class counsel in Judge Hopkins's court in *Johns Manville v. Tennessee Valley Authority*, N.D. Ala. Case No. 2:99-CV-2294-VEH-HGD. In Document 256, filed on August 20, 2007, the Court gave final approval to a $18-million settlement and a 35% fee. That *TVA* case has some general similarities because it involved about 8 years of hard litigation against a tough opponent, and it involved unique, case-of-first-impression issues that went to the appellate court on more than one occasion. But, as hard as that case was, McKee says this case has been a magnitude of two or three times more complex.

Courts from other jurisdictions have commonly awarded fees of 35% or higher. For example, a 36% fee was approved in *In re U.S. Bancorp Litig*., 291 F.3d 1035, 1038 (8th Cir. 2002), a case where the court held that class counsel "obtained significant monetary relief on behalf of the class." The class action was filed because the defendant bank supplied confidential customer account information to unaffiliated third parties for marketing purposes. The Eighth Circuit relied heavily upon Judge Dubina's opinion in *Mashburn v. National Healthcare, Inc*., 684 F. Supp. 679 (M.D. Ala. 1988), in approving the 36% fee award. Accord, *In re Control Data Sec. Litig*., No. 3-85-1341 (D. Minn. Sept. 23, 1994) (awarding class counsel fees equal to 36.96% of the gross settlement fund); *In re Coordinated Pretrial Proceedings in Antibiotic*

Antitrust Actions, 410 F. Supp. 680 (D. Minn. 1975) (class counsel awarded 37% of a $45 million common fund).

Other courts have reached similar results. For example, in *In re Crazy Eddie Sec. Litig*., 824 F. Supp. 320 (E.D. N.Y. 1993), the Court concluded that, in light of the contingent nature of the case and the tenacity of the class counsel, the requested fee of $14.2 million, representing 33.8% of the proposed settlement fund of $42 million, was reasonable. The court noted that class counsel cited some 37 cases nationwide in which fees equaled or exceeded 33% of the common fund, some of similar magnitude to the *Crazy Eddie suit*. 824 F. Supp. at 326.

In *Adair v. Bristol Tech. Sys., Inc*., 1999 WL 1037878, at *3 (S.D. N.Y. Nov. 16, 1999), the district court awarded a one-third fee and noted that courts in that district had previously awarded fees exceeding 33% "on numerous occasions." The same Court, in *Greene v. Emersons Ltd.*, 1987 WL 11558 (S.D. N.Y. May 20, 1987), awarded fees and expenses representing 46.2% of the common fund. The *Greene* Court explained its award on grounds that apply to this case as well: "In the case at bar settlement was achieved virtually upon the courthouse steps. Before defendants ... were brought to a settling frame of mind, pre-trial procedures had to be completed. These included massive document discovery and inspections and the taking of depositions of fact witnesses and the rival expert witnesses The case settled only when counsel for the parties were in the process of completing preparation of a detailed pre-trial order." *Greene*, 1987 WL 11558, *2. Our case went even further because the parties were fully prepared to strike a jury on February 22, 2016.

In *In re Corel Corp. Inc. Sec. Litig*., 293 F. Supp. 2d 484, 496-97 (E.D. Pa. 2003), a one-third fee award was made because the case was "zealously litigated for over three years,

during which time plaintiffs' counsel briefed and argued numerous motions, including, inter alia, dismissal;" an appeal had been taken from the district court's ruling on certification issues; and "plaintiffs' counsel conducted intensive discovery including voluminous document review, numerous depositions, and consultation with experts." See also *Heckmann v. Ahmanson*, No. CA 000851, 13 Class Action Rep. 270 (Cal. Super. Ct. Los Angeles Co. Sep. 15, 1989) (awarding a 39.2% fee from a $60,800,000 settlement fund); *In re Combustion, Inc*., 968 F. Supp. 1116 (W.D. La. 1997) (awarding a 36% fee from a $127 million fund, plus 6% for costs); *In re Westinghouse Sec. Litig*., Nos. 91-354, 97-309 & 97-960 (W.D. Pa. Oct. 19, 1999) (awarding a 35.7% fee from a $67,250,000 settlement fund); *In re Relafen Antitrust Litig*., No. 01-12239 (D. Mass. April 9, 2004) (awarding 33.3% fee from a $175 million settlement fund).[10]

See *Pinto v. Princess Cruise Lines, Ltd*., 513 F. Supp. 2d 1334, 1341 (S.D. Fla. 2007):

> In private litigation, attorneys regularly contract for contingent fees between 30% and 40% directly with their clients. (See Engel Aff. [D.E. 937] ¶ 19). *Phemister v. Harcourt Brace Jovanovich, Inc*., 1984 WL 21981 (N.D. Ill. 1984) ("Contingent fee arrangements in non-class action damage lawsuits are the simple method of paying the attorney a percentage of what is recovered for the client. The more the recovery, the more the fee. The percentages agreed on vary, with one-third being particularly common."); *Kirchoff v. Flynn*, 786 F.2d 320, 323 (7th Cir. 1986) (observing that "40% is the customary fee in tort litigation" and noting, with approval, contract providing for one-third contingent fee if litigation settled prior to trial). These percentages are the prevailing market rates throughout the United States for contingent representation.

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[10] See also *Zinman v. Avemco Corp*., 1978 WL 5686 (E.D. Pa. Jan. 18, 1978) (**50%**); *In re Ampicillin Antitrust Litigation*, 526 F. Supp. 494 (D. D.C. 1981) (**45%**); *Aamco Automatic Transmission, Inc. v. Tayloe*, 82 F.R.D. 405 (E.D. Pa. 1979) (**43.87%**); *In re Ampicillin Antitrust Litig*., 526 F.Supp. 494 (D. D.C. 1981) (**40.4%**); *Howes v. Atkins,* 668 F.Supp. 1021, 1027 (E.D. Ky. 1987) (**40%**); *Valente v. Pepsico, Inc*., 1979 WL 1229 (D. Del. 1979) (**38.8%**); *Gaskill v. Gordon*, 942 F.Supp. 382 (N.D. Ill. 1996) (**38%**); *Van Gemert v. Boeing Co.*, 516 F.Supp. 412 (S.D. N.Y. 1981) (**36.5%**); and *In re Vitamins Antitrust Litig*., 2001 WL 34312839, *10 (D. D.C. July 16, 2001) (awarding **34%** of about a $360 million fund).

This is repeated, with approval, in *Ford v. Sprint Commc'ns Co. L.P.*, No. 3:12-CV-00270-SLC, 2012 WL 6562615, *3 (W.D. Wis. Dec. 14, 2012); *Faught v. Am. Home Shield Corp*., No. 2:07-CV-1928-RDP, 2010 WL 10959222, *2 (N.D. Ala. April 27, 2010) (Proctor, J.); and *Francisco v. Numismatic Guar. Corp. of Am*., No. 06-61677-CIV, 2008 WL 649124, *14 (S.D. Fla. Jan. 31, 2008).

11. The likelihood that a particular employment may preclude other employment

The three small law firms representing the class have devoted a large measure of their practice to this one case for over 12 years. Every hour spent on this case could have spent on hourly work or on other contingency-fee cases that most likely would have successfully terminated in a two-to-four-year range. This suit severely limited their ability over many years to take on other representation. The statement of the *Peebles* Factor 11, "the likelihood that a particular employment may preclude other employment," is a severe understatement in this case. See *Columbus Drywall & Insulation, Inc. v. Masco Corporation*, No. 1:04-cv-3066, 2012 WL 12540344, *4 (N.D. Ga. Oct. 26, 2012) (Julie E. Carnes, J.) (emphasis added):

> Preclusion of Other Employment
>
> *Johnson* held that a fee award should be higher if the attorney was precluded from accepting other employment because of the case at issue. *Johnson*, 488 F.2d at 718. Further, "[p]riority work that delays the lawyer's other legal work is entitled to some premium." *Id*. This case has required eight years of work, punctuated by extended periods requiring the undivided attention of multiple lawyer and staff members, including the period from late 2011 (when the Court set the July trial date) through mid-September 2012, when the parties executed comprehensive settlement papers. Class counsel have devoted tens of thousands of hours to this case that could have been used in the pursuit of other matters that would have paid a guaranteed return by the hour. This factor tends to favor the requested award.

12. The time limitations imposed by the client or by the circumstances

See subsection 11, just above.

VI. THE CIRCUMSTANCES OF THIS CASE FULLY SUPPORT A 40% FEE

To sum up on the *Peebles* factors, every factor weighs very heavily on the side of class counsel in this case being deserving of the highest possible attorneys' fees award. Everyone who has ever touched this case concedes that it is literally unique. Every legal issue was an issue of first impression. There was never any guarantee of a successful conclusion to this 13-year-old litigation. No one has identified a class action that has lasted longer or been defended harder than this one. If the maximum attorneys' fees award that could ever properly be awarded in a common-fund class action is 50%, then the 40% sought here is actually conservative, because no class action has ever been riskier or required higher legal skills than this one.

VII. TOTAL CLASS ACTION ATTORNEYS' FEES

Although Class Counsel, including Lanny S. Vines, per Section 1.12 and Section IX of the Stipulation and Agreement of Settlement,[11] have requested a total, overall 40% attorneys' fee, there is a separate agreement entitled "Lead Counsel Agreement of February 25, 2009" (Exhibit 10 to the Evidentiary Submissions) between Class Counsel (then called "Lauriello Counsel") and Lanny Vines, as counsel for the Intervenors (then called "McArthur Counsel"). Said Lead

[11] The Stipulation is Exhibit 1 to the May 28, 2016, Plaintiff Class's Motion for Preliminary Approval of Proposed Class Action Settlement, Doc 3269.

Counsel Agreement was filed with the Court and received court approval[12] and, thereafter, as a result of several appeals, this Lead Counsel Agreement is now law of the case. Paragraph 6 of the Lead Counsel Agreement of February 25, 2009, says, in full:

> With respect to any fee award in connection with any class action claims asserted in this litigation, the parties and their respective counsel agree that they will pose no objection to Lauriello Counsel petitioning the Court for an award of as much as 92.5% of the total class action settlement fee award or to McArthur Counsel petitioning the Court for an award of as much as 7.5% of the total class action settlement fee award. Lauriello Counsel agree that the contribution of McArthur Counsel is equal to or greater than the 7.5% referenced herein, and that the value will be enhanced by the presence and participation of McArthur Counsel; and McArthur Counsel agree that the contribution of Lauriello Counsel is equal to or greater than the 92.5% referenced herein. Lauriello Counsel and McArthur Counsel agree to expressly advance and support these positions to the Court in support of the settlement fee awards for respective counsel in this case. This fee distribution and the basis for it shall be included in any preliminary and final approval agreement submitted to the Court and in any class notice proposed as a result of any preliminary or final approval by the Court. Consistent herewith, Lauriello Counsel agree that they will not petition the Court, or otherwise seek, fees in excess of 92.5 % of the total fee awarded, and McArthur Counsel agree that they will not petition the Court. or otherwise seek, fees in excess of 7.5 % of the total fee awarded.

As a factual matter, the Plaintiffs, the Plaintiff Class, and Class Counsel, assert that Mr. Vines's advice and assistance is equal to or greater than 7.5% of the total fee. With one or two exceptions, when he had unavoidable court conflicts, Mr. Vines attended in person all of the many planning and strategy sessions; he prepared and presented his client, Virginia Hoffman, for deposition, as well as prepared for and gave his own deposition; he attended the Court mandated mediation in California conducted by Judge Layn Phillips; he prepared for and attended several

[12] The Lead Counsel Agreement was approved at pp. 20-21 of Judge Tom King's Order on Motion for Class Certification on August 15, 2012, which approval was discussed and affirmed by the Alabama Supreme Court at *CVS Caremark Corp. v. Lauriello*, 175 So. 3d 596, 612 (Ala. 2014) (as modified on denial of Rehearing Feb. 27, 2015).

days of class action hearings relating to Plaintiff's class certification motion; he attended focus groups and mocks trials and helped prepare for trial. Mr. Vines has extensive class action experience, including being Lead Counsel in the cases of *Princess Nobels, et al. v. Associates Corp. of North America, et al.*, U. S. District Court, Middle District of Alabama, CV-94-CL-699-N; *Elaine M. Jordan, et al. v. AVCO Financial Services, Inc., et al.*, U. S. District Court, Middle District of Alabama, CV-96-CL-1557-N; *Kenneth R. Christ, Jr., et al. v. Beneficial Corp, et al.*, U. S. District Court, Middle District of Florida, 2:98-CV-210-JES-SPC, among many others. These class actions required many years of diligent prosecution and several million dollars in case expenses involving consumer fraud class actions. The *Nobels* case referenced above was, at the time, the second largest consumer fraud class action in the history of the United States. His extensive experience with class actions and other complex litigation provided him with the ability to make many cogent comments and give valuable strategic guidance in the present class action.

Please note that this requested finding and award to Mr. Vines of 7.5% of the total attorneys' fee, which is consistent with Class Counsel's written agreement, does not affect or increase the total fee being paid by the class. Instead, Mr. Vines will simply receive 7.5% of whatever this Court sets as the fair and reasonable overall fee for all Class Counsel.

Lanny Vines also expressly supports the 92.5% of the total fee being requested by Lauriello Counsel (Hare, Wynn, Newell & Newton, LLP, Francis Law, LLC, as successor to James L. North and Associates, and Somerville, LLC).

VIII. CLASS COUNSEL SEEK REIMBURSEMENT OF EXPENSES

Plaintiffs' class counsel petition for reimbursement from the Settlement Fund of out-of-pocket litigation expenses of $2,585,932.71. See attachments to Exhibit 4, Joint Affidavit of Class Counsel Scott A. Powell, J. Timothy Francis, and John Q. Somerville.

The recovery of attorneys' fees ordinarily includes the recovery of out-of-pocket expenses of the sort that would normally be charged to a fee-paying client. 5 William B. Rubenstein, Newberg on Class Actions § 16:5, p. 459 (5th ed. 2015) (electronic database updated June 2016). "Class action courts have applied the 'reasonable expenses normally charged to a fee paying client' type formulation in awarding expenses from a common fund." *Id*. at p. 466. "The prevailing view is that expenses are awarded in addition to the fee percentage." 1 Alba Conte, Attorney Fee Awards § 2:19 (3d ed.) (May 2016 update).

The types of expenses covered and the degree of documentation required should generally be of the sorts normally expected in individual cases. "If counsel submit bills with the level of detail that paying clients find satisfactory, a federal court should not require more." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001).[13] See also *In re Global Crossing Sec. & ERISA Litig*., 225 F.R.D. 436, 468 (S.D. N.Y. 2004) (finding that plaintiffs' request for reimbursement of filing fees, expert fees, service of process, travel, legal research, as well as document production and review expenses, were "the type for which 'the paying, arms' length market' reimburses attorneys"); *In re Cardizem CD Antitrust Litig*., 218 F.R.D. 508, 535 (E.D. Mich. 2003), appeal dismissed, 391 F.3d 812 (6th Cir. 2004), cert. denied, 544 U.S. 1049 (2005)

[13] Repeated in many opinions, such as *Days Inns Worldwide, Inc. v. Rhee Inv'rs, Inc*., No. 15-CV-1131, 2015 WL 7272181, *4 (C.D. Ill. Nov. 16, 2015).

(holding that plaintiffs' counsel was entitled to reimbursement of all litigation related expenses, including expenses for document productions, experts, consultants, and travel).

"Under the common fund doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses. In determining whether the requested expenses are compensable, the Court has considered whether the particular costs are the type routinely billed by attorneys to paying clients in similar cases." *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc*., 234 F.R.D. 627, 634-35 (W.D. Ky. 2006) (securities case; $42 million settlement fund; $2.4 million in expenses approved) (internal quotations and citations omitted).[14]

In re Fidelity/Micron Sec. Litig., 167 F.3d 735, 737 (1st Cir. 1999) ("lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax"), quoted at *Allen v. Dairy Farmers of Am., Inc*., No. 5:09-CV-230, 2016 WL 3361544, *10 (D. Vt. June 14, 2016). See, generally, this discussion in *Columbus Drywall & Insulation, Inc. v. Masco Corporation*, No. 1:04-cv-3066, 2012 WL 12540344, *7-8 (N.D. Ga. Oct. 26, 2012) (Julie E. Carnes, J.):

> Reimbursement of Class Counsel Expenses.
>
> It is appropriate to reimburse the out-of-pocket expenses of counsel whose efforts created substantial benefit for the class. See, e.g., *Camden*, 946 F.2d at

[14] Repeated in cases such as *New York State Teachers' Ret. Sys. v. Gen. Motors Co.*, No. 14-11191, 2016 WL 2907968, *16 (E.D. Mich. May 19, 2016).

771; *In re Domestic Air Transp. Antitrust Litig*., 148 F.R.D. at 348.

> Here, class counsel seek reimbursement of expenses incurred in prosecuting this case in the total amount of $1,473,925.20, not including expenses already reimbursed through the manufacturer settlements. These unreimbursed expenditures include court and court reporter fees; legal research; document and database reproduction and analysis; expert witnesses; travel for meetings, mediations, and depositions; trial consultants; and other customary expenditures in a case like this. In particular, counsels' declarations explain that the complex task of analyzing and integrating multiple transaction databases produced (in varying states of usability) by five different manufacturers required a very large expenditure for expert economic and statistical analysis. This is due in part to the fact that Masco retained three separate testifying experts, each of whom produced reports purporting to rebut plaintiffs' proof of impact and damages and was scheduled to testify at trial.
>
> The Court is satisfied that these and other expenses were reasonable and necessary to prosecute the case and obtain the settlement. Further, the notices mailed to the class members advised that class counsel would apply for reimbursement of expenses of approximately $1.6 million, plus any additional costs incurred since the date of notice. As described in the notice, class counsel posted their detailed reimbursement request on the litigation website for review by the class members. No class member objected. This is more significant in this case than in many class actions because there are relatively few members in this class and quite a few are businesses with sufficient stakes in the settlement to warrant review of counsels' expense application through their own counsel.

See also *In re Media Vision Tech. Sec. Litig*., 913 F. Supp. 1362, 1366 (N.D. Cal. 1996), quoted at *In re Galena Biopharma, Inc. Sec. Litig*., No. 314CV00367SILEAD, 2016 WL 3457165, *12 (D. Or. June 24, 2016) ("It is well established that '[a]n attorney who has created a common fund has a right to reimbursement' of reasonable and relevant litigation expenses."); *Hill v. State St. Corp.*, No. 09-12146-GAO, 2015 WL 127728, *20 (D. Mass. Jan. 8, 2015) ("Lawyers who recover a common fund for a class are entitled to reimbursement of litigation expenses that were reasonably and necessarily incurred in connection with the litigation."); *Latorraca v. Centennial Techs., Inc.,* 834 F. Supp. 2d 25, 28 (D. Mass. 2011) ("In addition to attorneys' fees, lawyers who recover a common fund for a class are entitled to reimbursement of out-of-pocket expenses

incurred during litigation."); *In re Fidelity/Micron Sec. Litig*., 167 F.3d 735, 737 (1st Cir. 1999) ("[L]aw firms are not eleemosynary institutions, and lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax."); *In re Air Cargo Shipping Servs. Antitrust Litig*., No. 06-MD-1775 JG VVP, 2015 WL 5918273, *7 (E.D. N.Y. Oct. 9, 2015) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."); *In re "Agent Orange" Prod. Liab. Litig*., 611 F.Supp. 1296, 1314 (E.D. N.Y.1985), modified on other grounds, 818 F.2d 226 (2d Cir. 1987) ("Upon submission of adequate documentation, plaintiffs' attorneys are entitled to reimbursement of those reasonable and necessary out-of-pocket expenses incurred in the course of activities that benefitted the class."), quoted by *Waters v. Int'l Precious Metals Corp*., 190 F.3d 1291, 1298 (11th Cir. 1999), and *Waters v. Cook's Pest Control, Inc*., No. 2:07-CV-00394-LSC, 2012 WL 2923542, at *19 (N.D. Ala. July 17, 2012) (Coogler, J.).

Because the expenses were incurred over many years with no guarantee of recovery, class counsel had a strong incentive to keep them at a reasonable level, and did so. Each of the expenses on the attached ledgers and expense reports are the types of expenses that would be charged to an hourly, paying client or to an individual contingency-fee client in a non-class, individual case. No class member has objected to the request for reimbursement of expenses.

IX. THREE SERVICE AWARDS (OR INCENTIVE AWARDS) ARE REQUESTED

The Plaintiffs, the Plaintiff Class, and Class Counsel request the awarding of service awards (also commonly known as incentive awards) to the two current class representatives, Sam

Johnson and the City of Birmingham Retirement and Relief System, and to John lauriello, the original named plaintiff and former class representative. The request is for $50,000 each. See Exhibits 5, 6, and 7: the affidavits of Sam Johnson, James Love for the City, and John Lauriello.

"While the Eleventh Circuit has not expressly set forth guidelines for courts to use in determining incentive awards, there is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action. In fact, "[c]ourts routinely approve incentive awards[15] to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Allapattah Servs., Inc. v. Exxon Corp*., 454 F.Supp.2d 1185, 1218 (S.D. Fla. 2006)[16] (quoting *Ingram v. Coca–Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001)).[17] "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *In re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 276, 279 (S.D. Ohio 1997). "Incentive payments to named class representatives are fairly customary." *Faught v. Am. Home Shield Corp*., No. 2:07-CV-1928-RDP, 2010 WL 10959222, *6 (N.D. Ala. April 27, 2010) (Proctor, J.).

"At the conclusion of a class action, the class representatives are eligible for a special

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[15] A study on class action cases from 2006–2011 shows that courts provide incentive awards in 71.3% of all cases. 5 William B. Rubenstein, Newberg on Class Actions § 17:7, p. 524 (5th ed. 2015) (electronic database updated June 2016).

[16] The *Allapattah* Court used 1.5% of the $1,075,000,000 settlement fund, a total of $16 million, to make service awards of over $1.7 million for each of the nine named plaintiffs.

[17] The *Ingram* Court used 2.2% of the common fund as incentive awards to four named plaintiffs -- about $300,000 for each class representative -- in an employment discrimination class action that settled within 14 months of its inception.

payment in recognition of their service to the class. Most courts call that payment an 'incentive award,' though some courts label it a 'service award' or 'case contribution award.' The names capture the sense that the payments aim to compensate class representatives for their service to the class and simultaneously serve to incentivize them to perform this function." 5 William B. Rubenstein, Newberg on Class Actions § 17:3, p. 497 (5th ed. 2015) (electronic database updated June 2016). Service awards "work [1] to compensate class representatives for work done on behalf of the class, [2] to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, [3] to recognize their willingness to act as a private attorney general. Many courts have also noted a fourth rationale for incentive payments: that such payments do precisely what their name hopes they will — incentivize class members to step forward on behalf of the class. Courts regularly reference these four rationales behind incentive awards." *Id*. at p. 499.

"Most courts state that an incentive award to the class representatives is meant to compensate those entities for the service that they provided to the class. Generally, these services are the time and effort the class representatives invest in the case. Class representatives perform certain functions that arise in most cases, such as monitoring class counsel, being deposed by opposing counsel, keeping informed of the progress of the litigation, and serving as a client for purposes of approving any proposed settlement with the defendant." *Id.* at pp. 499-502.

"Courts often premise incentive awards on the risks that the class representatives undertook in stepping forward to represent the class. These risks are at least two-fold: in some circumstances, the class representative could be liable for the costs of the suit, while in other circumstances, a class representative might face retaliation. Where the risks are specific and

substantial, courts may increase the incentive award accordingly." *Id*. at pp. 504-05 (emphases added).

5 William B. Rubenstein, Newberg on Class Actions § 17:13 (5th ed. 2015) (electronic database updated June 2016), explains that most courts use essentially the same considerations, though the lists of factors are worded slightly differently. One commonly-used set of factors is the "five-factor test widely used in California...: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation; and 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." *Id.* at pp. 547-48 (emphases added).

Here, the claims of both representatives are modest in amount. Yet, on behalf of the class, and in effort to bring the defendants to justice, both representatives exposed themselves to potentially hundreds of thousands of dollars in assessments for court costs, had the Plaintiff Class not ultimately prevailed. *Lankhorst v. Independent Savings Plan Company,* No. 3:11–cv–390, 2015 WL 5724369 (M.D. Fla. Sept. 28, 2015), was a certified class action wherein the court granted summary judgment in favor of the defendant. The Court taxed about $8,000 of costs against the two class representatives. At *10, the Court explained that a class representative can agree that the costs of *prosecuting* the action (the plaintiff attorneys' expenses) will not be recoverable if the plaintiff does not recover, or will be spread among all class members if the plaintiffs do recover. However, the class representative cannot shirk his duty to be responsible for the prevailing *defendant's* court costs. At *11, the *Lankhorst* Court agreed *with Earley v.*

Superior Court of Los Angeles County, 95 Cal.Rptr.2d 57, 66 (Cal. Ct. App. 2000):

> ... it would be entirely appropriate to place the entire cost burden on the named representative plaintiff(s) who has (have) chosen to instigate the action rather than on the absent class members.... While imposition of the entire cost burden on the named plaintiffs may have a chilling effect on the willingness of plaintiffs to bring class action suits, this effect easily may be outweighed by the potential recovery. All potential litigants [i.e., the representative plaintiffs] must weigh costs of suit against likelihood of success and possible recovery before deciding to file suit. Those who choose to take the risks of litigation should be the ones who bear the cost when they are unsuccessful not those who did not make the choice.

Sykes v. Harris, No. 09 CIV. 8486 (DC), 2016 WL 3030156, *18 (S.D. N.Y. May 24, 2016), awarded four plaintiffs $30,000 each, finding that, "Lead Plaintiffs exposed themselves to liability for costs." See also *Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2011 WL 1230826, *36 (N.D. Cal. Apr. 1, 2011) ("Finally, Plaintiffs contend that they faced the possibility that, if RGIS prevailed in this case, they would be liable for some portion of its litigation costs under both Federal Rule of Civil Procedure 54(c) and California Labor Code § 218. The Court has considered Plaintiffs' arguments and finds that Plaintiffs have demonstrated that they faced potential risks as a result of pursuing this lawsuit against their employer. Thus, this factor also supports an incentive award.").

Court costs in Alabama include such items as witness fees, costs of any deposition introduced into evidence, travel expenses, and copying costs. 2 Ally Windsor Howell, Alabama Rules of Civil Procedure Annotated, Rule 54, § 54.6 (4th ed.) (database updated Dec. 2015). "Costs for both depositions used at trial and for those not used at trial are taxable and recoverable." 2 Ally Windsor Howell, Alabama Personal Injury and Torts § 14:31 (2014 ed.) (database updated Dec. 2015); *Ennis v. Kittle*, 770 So. 2d 1090, 1092 (Ala. Civ. App. 1999), cert. denied (Ala. 2000) (same). Thus, the huge financial risk, alone, is sufficient reason for a $50,000

service or incentive award to each class representative.

Mr. John Lauriello, the original sole named plaintiff who commenced this action, and former class representative, is also entitled to a significant service award. See 5 William B. Rubenstein, Newberg on Class Actions § 17:6, pp. 519-22 (5th ed. 2015) (electronic database updated June 2016) (emphasis added): "At the conclusion of a class action, the class representatives are eligible for incentive awards in recognition of their service to the class.... [B]ut the rationale — that a class member should be rewarded for her service to the class — can apply to a wider group of class members: ... Other class members who are neither class representatives nor named plaintiffs might be eligible for incentive awards if they meaningfully participated in the litigation and conferred a benefit on the class. Typically, such awards may be paid to class members who, for example, were deposed by the defendant." See *Smith v. Tower Loan of Mississippi, Inc*., 216 F.R.D. 338, 367-68 (S.D. Miss. 2003) (approving special payments totaling **$45,500** to Class Members other than the Class Representatives of the present action, given that those other plaintiffs "contributed to the settlement.").

"When class actions suits generate a substantial amount of press, the named plaintiffs and their families may be subjected to criticism and ridicule from their neighbors and from the media. Such negative publicity risks temporary or permanent damage to the class representative's reputation and livelihood. If incentive awards are not offered, individuals may not be willing to bring class action suits in the first place." Elisabeth M. Sperle, Here Today, Possibly Gone Tomorrow: An Examination of Incentive Awards and Conflicts of Interest in Class Action Litigation, 23 Geo. J. Legal Ethics 873, 881 (2010). In *Waters v. Cook's Pest Control, Inc*., No. 2:07-CV-00394-LSC, 2012 WL 2923542, *15 (N.D. Ala. July 17, 2012), Judge Coogler made a

service award to a plaintiff who said: "I have taken time away from both work and personal obligations, held myself up to public scrutiny and ridicule and forever associated my name and reputation with a cause I believed, but which has exposed me to potential risks and scorn in some quarters of the community."

Exhibit 7 is John Lauriello's affidavit. His experiences fit exactly the above-quoted concerns about "criticism and ridicule" and "public scrutiny and ridicule:"

> 9. Because of my lengthy experience in my commercial real estate practice, I am friends and acquaintances with many business leaders in the Birmingham area. I also represent or have represented many of them over the past 40 years. I have received numerous critical communications from many of them since the MedPartners litigation began blaming me for the culture of litigation in Birmingham and the fact that MedPartners/Caremark corporate headquarters moved from the Birmingham area. While there could be several potential reasons, several of my clients have retained other real estate professionals, or have chosen not to renew our business relationship, since my involvement in the MedPartners litigation began. There is no doubt in my mind that my involvement in the MedPartners litigation has cost me and my firm substantial business.
>
> 10. Moreover, in 2005, I was sued by other MedPartners shareholders contending that I had breached my duty as class representative in the original MedPartners Securities Litigation. They contended that I should have discovered that MedPartners had acquired unlimited insurance during the pendency of the case. They sought damages against me in the amount of hundreds of millions of dollars, claiming that I was an inadequate class representative, that I had breached fiduciary duties that I owed to them, that I had a conflict of interest, and that I had acted negligently and wantonly. The fact that I was sued caused me to again receive many negative communications from business associates over those accusations. Such accusations caused me to fear financial ruin and to suffer other mental distress.
>
> 11. Furthermore, most every time this litigation is mentioned in the press, my name is included. Thereafter, I have received many telephone calls, texts, and emails critical of my involvement.

But for John Lauriello's brave stance and willingness to risk these "slings and arrows," there likely never would have been a lawsuit. It is a fundamental fact that "without a named plaintiff there can be no class action." *In the Matter of Cont'l Illinois Sec. Litig*., 962 F.2d 566,

571 (7th Cir. 1992). This is particularly true where the class representative has "specialized knowledge of the subject, of the particular facts or of the background of the litigation which is beneficial to the class counsel in pursuing the litigation." *In re Southern Ohio Correctional Facility*, 175 F.R.D. 270 (S.D. Ohio 1997). John Lauriello's participation in the original 1998 action, and his intimate knowledge about the accounting fraud claims and about the 1999 settlement made him the perfect original plaintiff.

In determining whether to approve an incentive award, federal courts give great weight to the level of risk that the class representative may have incurred through its efforts on behalf of the class members. *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1220-21 (S.D. Fla. 2006). In particular, courts have taken note of the risks that are incurred by a class representative in an action against a large corporation, observing that incentive awards are "particularly appropriate ... where taking a high-profile role threatened to jeopardize class representatives' relationships with their suppliers." *In re Linerboard Antitrust Litigation*, 2004 WL 1221350, *18 (E.D. Pa. June 2, 2004).

"[W]here lawyers are rewarded for their risk and efforts on behalf of the class, but class representatives are not, there is little incentive for class representatives to serve as active client participants in the litigation, thus negating the 'adequate representation' safeguard of Rule 23 and transferring all decision-making responsibility to class counsel." *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1221-22 (S.D. Fla. 2006). Accordingly, federal courts have recognized that an incentive award can be appropriate to encourage or induce an individual to participate in the suit. *Matter of Cont'l Illinois Sec. Litig*., 962 F.2d 566, 571 (7th Cir. 1992). "[A] meaningful incentive is necessary to induce a company to put the target on its back for the

greater good of the class." *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001).

The request here is $50,000 for each of the three plaintiffs. The Court is not bound to award each plaintiff exactly the same amount. "While the size of incentive awards vary from case to case, they may also vary within one case. As discussed in a succeeding section, courts employ multifactor tests in reviewing proposed incentive awards; these factors focus the court on issues related to the class representatives' work on the case and the risks they encountered undertaking that work. Two class representatives within the same case might have undertaken different levels of work or encountered different levels of risk, hence justifying different levels of incentive awards." 5 William B. Rubenstein, Newberg on Class Actions § 17:8, p. 529 (5th ed. 2015) (electronic database updated June 2016). So, for example, a rational fact-finder might find that John Lauriello's service in commencing the action and his significant business risk should be valued at $50,000 or more, while the others somewhat less. The point is that it is the Court's decision and the Court is not required to make each award exactly the same amount.

An empirical study was published 10 years ago at Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303 (2006). "[T]he average total award was $128,803." *Id*. at 1308. The total requested here is $150,000, but this case lasted much longer than normal, was more complex than average, and required a high level of risk taking (e.g., the potential liability for costs). Incentive awards averaged "0.16 percent of the class recovery." *Id*. Our request is only one-tenth of that. That is, $50,000 is only 0.016% of $310M.

For all of the same reasons argued above about a 40% attorneys' fee, the service awards likewise ought to be on the high end of the range of what courts have deemed to be reasonable.

And, there surely can be no question but that service awards are deserved in this case, of all cases. "Service awards are common in class-action cases because they are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiff." *Marroquin Alas v. Champlain Valley Specialty of New York, Inc*., No. 515CV00441MADTWD, 2016 WL 3406111, *5 (N.D. N.Y. June 17, 2016).

There is a long history of federal court cases which authorize incentive awards for representative plaintiffs in class actions. See, e.g., *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 355 (S.D. N.Y. 2005). As examples, see:

Karic v. Major Auto. Companies, Inc., No. 09 CV 5708 (CLP), 2016 WL 1745037, at *7-8 (E.D. N.Y. April 27, 2016) (**$20,000 each** to of 7 plaintiffs);

Been v. O.K. Indus., Inc., No. CIV-02-285-RAW, 2011 WL 4478766, *12-13 (E.D. Okla. Aug. 16, 2011) (**$100,000 each** to of 5 plaintiffs);

Mentor v. Imperial Parking Sys., Inc., No. 05 CV 7993, 2010 WL 5129068, *1–2 (S.D. N.Y. Dec. 15, 2010) (granting **$40,000** and $15,000 service awards);

McCoy v. Health Net, Inc., 569 F.Supp.2d 448, 480 (D. N.J. 2008) (awarding **$60,000 to each** class representative);

Bradburn Parent Teacher Store v. 3M (Minnesota Mining and Manufacturing Company), 513 F.Supp.2d 322, 342 (E.D. Pa. 2007) (**$75,000**);

In re Elec. Carbon Products Antitrust Litigation, 447 F.Supp.2d 389 (D. N.J. 2006) ($300,000 total; **$50,000 to each** of 6 plaintiffs);

Bynum v. Dist. of Columbia, 412 F.Supp.2d 73, 81 (D. D.C. 2006) (awarding **$200,000** incentive fee to named plaintiffs for their contribution to the class);

In re Remeron End-Payor Antitrust Litig., No. 02-2007 (FSH), 2005 U.S. Dist. LEXIS 27011, at **93-95 (D. N.J. Sept. 13, 2005) (approving awards of **$30,000** to both of the named plaintiffs);

In re Linerboard Antitrust Litigation, 2004 WL 1221350, *19 (E.D. Pa. June 2, 2004) (approving

incentive awards of **$25,000 to each** of five named plaintiffs);

In re Graphite Electrodes Antitrust Litigation, MDL No. 1244 (E.D. Pa. Order of September 8, 2003) (**$80,000**);

In re Busiprone Antitrust Litigation, MDL No. 1413 (S.D. N.Y. Order of April 7, 2003) (**$25,000**);

In re Cendant Corp. Derivative Litig., 232 F. Supp. 2d 327, 344 (D. N.J. 2002) (approving award of **$25,000** to the lead plaintiff);

In re Cardizem CD Antitrust Litigation, MDL No. 1278 (S.D. Mich., Order of Nov. 26, 2002) (**$20,000**);

Brotherton v. Cleavland, 141 F.Supp.2d 907 (S.D. Ohio 2001) (**$50,000**);

In re Revco Securities Litigation, Nos. 851 & 89 CV 593, 1992 WL 118800 (N.D. Ohio May 6, 1992) (**$90,000**);

In re Dun & Bradstreet Credit Servs. Customer Litig., 130 F.R.D. 366, 374 (S.D. Ohio 1990) (awarding two class representatives **$55,000** each and three class representatives **$35,000** each);

and,

In First Jersey Securities, Inc., MDL No. 681 (E.D. Pa. 1989) (**$24,000**).

Judge Hopkins's *TVA* case, where she awarded a 35% fee, is discussed above. In that case, she awarded the class representative, Johns Manville, a service award of $270,000. *Johns Manville v. Tennessee Valley Authority*, N.D. Ala. Case No. 2:99-CV-2294-VEH-HGD, Document 256, filed on August 20, 2007, p. 12. Hare, Wynn and Somerville represented Wade Tucker as the plaintiff in the derivative action, on HealthSouth's behalf, against Richard Scrushy and others. In orders of September 10, 2007, and October 10, 2011, in cases CV-2002-005212 and CV-2009-902145, Judge Al Horn awarded Mr. Tucker a total of $90,000 in service awards. Another state court example is *Raider v. Sunderland*, C.A. No. 19357, 2006 Del. Ch. LEXIS 4, at *1 (Del. Ch. Jan. 5, 2006) (stating that incentive awards are justified both in Delaware and in

federal courts, awarding plaintiff an incentive award in the amount of **$42,400**, and noting that Delaware courts have previously approved individual incentive awards **as high as $65,000 and $95,000**). Wherefore, the Court is urged to approve the request for a service award of $50,000 each for the three plaintiffs. No one has objected to the request for service awards.

X. THE REQUESTED FEES, EXPENSES, AND SERVICE AWARDS ARE FAIR TO ALL CLASS MEMBERS, INCLUDING MINORS AND INCOMPETENTS, IF ANY

Paragraph 3 of the June 1, 2016, Order says: "Simultaneously with the Fairness Hearing, the Court will hold a hearing (the 'Pro Ami Hearing') at which the Court will receive evidence and examine whether the Settlement is fair and reasonable to and in the best interest of Minors and Incompetents, if any, who are Class Members." Class counsel believes that, by definition, no class member can be a minor. But, this Court is not being asked to decide that question. Instead, this Court is being asked to decide the hypothetical question of: If some class members might be minors, is this proposed settlement fair to minors? Similarly, this Court is being asked to decide the fairness question in regard to hypothetical incompetent class members. Class counsel understands the law to be that everyone is legally competent unless and until a court declares otherwise[18] - and, in such an order, the court would appoint a guardian or conservator. Thus,

[18] "[T]he law presumes every person to be sane." *Willis v. James*, 284 Ala. 673, 676, 227 So. 2d 573, 576 (1969); *Hester v. Hester*, 474 So. 2d 734, 736 (Ala. Civ. App. 1985). "There is a presumption of sanity under Alabama law." *Duncan v. Am. Home Assur. Co*., 747 F. Supp. 1418, 1420 (M.D. Ala. 1990). As to the legal processes for having someone declared to be incapacitated, or for having an incapacity terminated, see generally: Ala. Code §§ 26-2A-105 and 110; 1 Judith S. Crittenden and Charles P. Kindregan, Jr., Crittenden and Kindregan, Alabama Family Law § 14:3 (database updated Nov. 2015) (entitled, "Representation of incompetent adult party"); Hugh M. Lee, Alabama Elder Law § 8:50 (database updated Nov. 2015) (entitled, "Establishing the need for guardianship or conservatorship") ("all persons are presumed to have capacity").

class members with legally-declared incapacities necessarily have court-appointed agents who would have received the notices directed to the incapacitated class member.

Please see the "Pro Ami" section, at pp. 38-42 of The Plaintiff Class's Memorandum Brief in Support of The Plaintiffs Class's Motion for Final Approval Of Proposed Class Action Settlement. The legal citations about pro ami proceedings and guardians are not repeated here.

Just as in deciding the fairness of the overall $310-million settlement, in deciding whether the proposed 40% fee is fair to minor and incompetent class members, if any, all the same fee factors discussed above are applicable. Assume that class member "X" is a minor and class member "Y" is an adult. If a 40% fee is fair to the class as a whole, then, by definition, it is just as fair to X as it is to Y. In this case, there are no factual or legal distinctions that would separate the interests of X from those of Y. In other words, all class members are in the same boat in regard to fairness of the proposed 40% fee. The terms of this settlement do not discriminate for or against class members who may be underage or incapacitated in some manner. They are not being charged a higher or lower fee than competent, adult class members are paying. Therefore, once the Court determines that, for the class (as a whole), the proposed 40% fee is fair, adequate, and reasonable, then the fee is also, by logical necessity, just as fair, adequate, and reasonable to minor or incompetent class members, if any.

XI. RESPONSES TO THE THREE OBJECTORS

(1) SOBEL. Exhibit 11 is the one-page written objection from Steven M. Sobel mailed to Gilardi on July 21, 2016. Mr. Sobel failed to offer any evidence proving his membership in the class. However, more simply, the Plaintiffs, the Plaintiff Class, and Class Counsel urge the Court

to rule that the Sobel letter is not an "objection" at all, within the meaning of the class notice. Mr. Sobel does not object to $310M as being too small, or to the 40% fee, $3M of expenses, and $50,000 service awards as being too large. He just makes the general observation that many class members who did not file in 1999 will now find it difficult to locate records sufficient to support the filing a claim in 2016. This is not a "legal" objection to the terms or the settlement or to the requested fees, expenses, and service awards. This records-locating difficulty is just a fact of life, not a "legal" problem that the "law" can solve. Note that approximately 497 Form "B" claims have already been filed in 2016 by class members who did not file in 1999. The claims administrator says: "In Gilardi's experience, the inability to obtain documentation is a common complaint in securities litigation cases where several years have passed." Exhibit 8, Declaration of Ross Murray for Claims Administrator Gilardi & Co., ¶ 11.a.1. Some class members' inability to locate old records will, necessarily, always be a problem to some degree in every case that has been litigated over several years - but that "problem" is not a legal defect or a legal reason to reject a proposed class settlement.

(2) GEORGIA UROLOGY PHYSICIANS. Exhibit 12 is a written objection from 8 doctors at Georgia Urology, P.A., in Atlanta. It was timely mailed to Gilardi on the deadline date of July 22, 2016. This is a written-only objection (that is, no statement of intent to appear at the hearing). It is alleged that Georgia Urology, P.A., received around $5M worth of MedPartners stock in some kind of transaction in November 1996. That date is within the class period. None of the 8 doctors (or Georgia Urology) show up on the 1999 list of those who filed claims in 1999.

Failure to Prove Class Membership. A written-only (that is, no intent to appear at the hearing) objection was timely mailed on July 22, 2016, by attorney David I. Schoen. He says: "The objectors who we believe to be class members and on whose behalf am filing these written objections are: Dr. Barry M. Zisholtz, Dr. Mark Haber, Dr. Vahan Kassabian, Dr. Lawrence Goldstone, Ms. Margaret Philmon, Dr. Hal Scherz, Dr. Mark Kozin, and Dr. Neil Gladstone." Without conceding they are class members and without waiving any position that could be asserted on behalf of the Class, the Plaintiff Class has no objection to any of these doctors (or Georgia Urology, P.A.) filing claims with Gilardi & Co. prior to September 30, 2016, with the best supporting documents they can come up with. The Class, however, does not concede that any of these objectors have adequately shown, as of July 22, 2016, that they are members of the class. Thus, these doctors have no standing to object to the settlement.

The class notice provided these instructions: "Written objections must state: (1) the nature of the objection; (2) the grounds for such objection; (3) proof that the objector is a member of the Class and has not been excluded by the Court on its own motion; and (4) any documentation in support of such objection." (emphasis added). The Class asserts that no such proof or documentation was provided on July 22, 2016.

Page 3 of Mr. Schoen's letter says: "I also have enclosed the first page of an amendment to an **agreement between MedPartners and Georgia Urology** of November 15, 1996, which shows the **payment to Georgia Urology** (**and acquisition by Georgia Urology**) of in excess of $5 million in value of shares of MedPartners ('MPI') common stock. Georgia Urology distributed the shares among the objectors and others based on their internal formula and each acquired them during the relevant time period. All of the objectors listed herein, other than Dr.

Mark Kozin and Dr. Neil Gladstone acquired their shares of common stock as a function of their association with Georgia Urology, all at the same time and based on the same formula. Drs. Kozin and Gladstone ***believe*** they acquired the shares of common stock at issue within the relevant time frame for class membership." (emphases added).

Paragraph 4 of Dr. Zisholtz's declaration (the other two declarations, from Drs. Scherz and Haber, are identical) states that he does "not recall receiving any such notice." That makes perfectly good sense if Georgia Urology, P.A., acquired the stock from MedPartners (meaning that the aggrieved victim of any fraud is Georgia Urology, P.A., and not Dr. Zisholtz, individually). MedPartners would presumably have no idea about how and to whom Georgia Urology, P.A., intended to divide up and parcel out the shares. (And, even if MedPartners somehow knew, the party acquiring the stock from MedPartners was still Georgia Urology, P.A., and not any individual doctor).

MedPartners's May 15, 1997, Form 10-K/A is at https://www.sec.gov/Archives/edgar/data/1000736/0000950144-97-006024.txt. Page 22 of that SEC filing identifies a transaction with Georgia Urology, P.A., that closed on December 1, 1996. The purpose of the transaction is listed as "Management Conversion," whatever that is. As does the contract attached to Mr. Schoen's letter, the SEC filing identifies the parties to that transaction as MedPartners and Georgia Urology, P.A. - and no one else.

So, the only thing possibly proven by the July 22nd filing made by Mr. Schoen is that Georgia Urology, P.A., might be a class member - but, Georgia Urology, P.A., did not file an objection.

Consider two hypotheticals. (1) In July 1997, Richard Rowe buys 1000 shares of

MedPartners common stock. One week later, he gifts the stock to his friend, John Doe. In July 2016, Doe wants to file a claim in this settlement. Sorry, but Doe is not a class member. He did not purchase MedPartners stock within the class period. Doe was not a victim of any fraud and he has no legal damages. Rowe could file a valid claim, even though he no longer owns the stock. Rowe was the defrauded purchaser who purchased stock at a fraudulently-inflated value. (2) In July 1997, the Acme Corporation purchased 1000 shares of MedPartners common stock as an investment. John Doe was an Acme employee compensated on a commission basis. In October 1997, Acme was short of cash, and Doe agreed to accept the 1000 shares in MedPartners as his quarterly commission. Doe is not a class member and has no valid claim. He did not "purchase" MedPartners stock during the class period. Acme could file a claim in this case. The class definition includes Acme, but not Doe.

These doctors seem to be like the hypothetical John Doe. They did not purchase MedPartners stock or contract with MedPartners for the transfer of MedPartners stock directly to them. It appears that MedPartners contracted only with Georgia Urology, P.A., and transferred the stock only to Georgia Urology. P.A. What Georgia Urology, P.A., did with the shares afterwards is of no legal concern here. These doctors do not have standing as class members because they did not directly contract with MedPartners; instead, they acquired their stock (if any) from Georgia Urology, P.A. For the Court's information, this same entity, Georgia Urology, P.A., is still in existence. Its official website is at www.gaurology.com.

In fact, it is not even clear that Georgia Urology, P.A., ever actually received this block of MedPartners stock. It looks like Georgia Urology, P.A., claims that its founder and former president stole the stock for himself. See Roni B. Robbins, Georgia Urology Founder Disputes

Dismissal in Court, Atlanta Business Journal (Nov. 30, 1998), at www.bizjournals.com/atlanta/stories/1998/11/30/story6.html (emphasis added):

> Nearly 30 years after he founded Georgia Urology P.A., Dr. Arnold Rubenstein is now entrenched in a legal battle with the doctors who have since joined the practice.
>
> Lawsuits filed in federal and state court detail a dispute between Rubenstein and Riverdale-based Georgia Urology in which the practice claims he was fired for personally profiting from secret business deals....
>
> On July 13, the board of Georgia Urology passed a resolution to fire Rubenstein, its former president. The decision was based on claims that he breached his employment contract, committed fraud and acted inappropriately when he received money from services he rendered and deals he completed during the previous three years without the knowledge or approval of the medical group....
>
> Among the specific transactions cited in the suit, Georgia Urology accuses Rubenstein of: ... Accepting a development fee of $37,500 from MedPartners Inc. and MedPartners of Georgia Inc. for merging additional medical practices into Georgia Urology. The group contracts with MedPartners, a physicians practice management firm based in Birmingham, Ala.
>
> Georgia Urology P.A. was supposed to receive a payment for restructuring its agreement with MedPartners in which the two would conduct business with each other in the future. But the payment went to Georgia Urology Management Associates Inc. (GUMA), a company Rubenstein helped form and sold to MedPartners at the same time as the restructuring. He received a bonus of $500,000 from MedPartners when the restructuring deal closed.

Whatever the ultimate truth turns out to be, the July 22nd filing proves, at best, that Georgia Urology, P.A., might be a class member. As to the individual doctors filing the objection, the July 22nd filing actually affirmatively shows that they are ***not*** class members because they did not contract with MedPartners for the receipt of any of this stock. If a corporation had bought MedPartners stock in 1997, that corporation would be a class member, but the corporation's shareholders would not be class members because their economic loss was suffered just derivatively, just as a consequence of owning stock in a corporation that got cheated in a business deal. These individual doctors are in the same boat as a corporate shareholder - they

were injured (if at all) only derivatively.

Drs. Kozin and Gladstone are even further removed. They do not claim to have received any division of MedPartners stock from this 1996 "Management Conversion." Neither filed an affidavit explaining their alleged acquisition of MedPartners stock. Their lawyer just says: "Drs. Kozin and Gladstone ***believe*** they acquired the shares of common stock at issue within the relevant time frame for class membership." (emphases added). This unsworn "belief" is, obviously, not sufficient to establish their status as class members. They have no standing to object.

The Class seeks a ruling from the Court that none of these individual doctors have shown that are, or are likely to be, class members. However, the Class urges the Court to go forward and address, conditionally, the merits of the objections, and reject them.

Their Three Objections. First, they assert that a 20% fee is sufficient. They rely on "benchmark" or "general rule" rates of 20-25% for standard class actions. As shown above, and in the expert declarations, this case was anything but a "general rule" case.

Second, they object to the class definition not defining out the guilty fraudsters at MedPartners. This is similar to one of Clete Walker's objections, and will be addressed, below.

Lastly, they object to the short time frame for trying to find old records from 1997. This is similar to Mr. Sobel's lament, above. Recall that the claims period does not expire until September 30, 2016. Georgia Urology, P.A., should have plenty of time to prepare and file a claim by then, if it or some of its physicians are, in fact, class members.

(3) WALKER. Exhibit 13 is the "Objection to Proposed Class Settlement and Notice of Intent to Appear at Fairness Hearing" hand-filed in the clerk's office on Friday, June 22, 2016, by putative class member Clete Walker. Walker has not carried his burden to show that he is a class member. Thus, he has no standing to appear or to make objections. The class notice stated these requirements: "Written objections must state: (1) the nature of the objection; (2) the grounds for such objection; (3) proof that the objector is a member of the Class and has not been excluded by the Court on its own motion; and (4) any documentation in support of such objection. If a Class Member or Representative desires to appear and be heard at the Settlement Hearing, in addition to requirements (1)-(4), above, such Class Member also must state: (5) an intention to appear and be heard at the Settlement Hearing; and (6) the identities of witnesses, if any, the Class Member intends to call at the Settlement Hearing and a summary of their expected testimony."

No Standing to Object. "It is a well-settled rule that only class members have standing to challenge a class settlement." *Am. Med. Sec., Inc. v. Parker*, 279 Ga. 201, 203, 612 S.E.2d 261, 262 (2005), citing *Ex parte Anderson*, 807 So. 2d 505, 508 (Ala. 2000) ("Because they are no longer members of the class, they no longer have standing to object to the settlement the class wishes to enter."). "As Rule 23 confers the right to object upon class members, the Rule itself does not confer standing upon nonclass members. Courts regularly find that nonclass members have no standing to object to a proposed settlement or to the notice thereof." 4 William B. Rubenstein, Newberg on Class Actions § 13:22, pp. 354-57 (5th ed. 2014) (electronic database updated June 2016). See also *Association For Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 473–74 (S.D. Fla. 2002) ("Under Fed. R. Civ. P. 23(e), non-class members are not

permitted to assert objections to a class action settlement."); *In re CP Ships Ltd., Securities Litigation*, 2008 WL 2473684, *1 (M.D. Fla. 2008) ("[p]ursuant to the plain language of Rule 23 of the Federal Rules of Civil Procedure, only 'class members' may object to a proposed class action settlement" and hence finding nonclass member lacked standing to object); and *Feder v. Electronic Data Systems Corp*., 248 Fed. Appx. 579, 580 (5th Cir. 2007) ("But only class members have an interest in the settlement funds, and therefore only class members have standing to object to a settlement. Anyone else lacks the requisite proof of injury necessary to establish the 'irreducible minimum' of standing.").

The Class asks the Court to rule, primarily, that Clete Walker lacks standing. But, in an abundance of caution, the Class asks the Court to rule, *conditionally*, on the merits of Walker's objections, and to reject them. By analogy, Ala. R. Civ. P. 50(c)(1) requires trial courts to rule, conditionally, on alternative new trial motions: "If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed...." *Miller v. Ghirardelli Chocolate Co.*, No. 12-CV-04936-LB, 2015 WL 758094, *10 (N.D. Cal. Feb. 20, 2015), is an example where a class-action-settlement court held that the putative objectors had no standing, but also ruled, conditionally, on the merits of the objections:

> The court finds that, in fact, all three objectors have failed to establish their standing to challenge the settlement. Ms. Ference and Mr. Narkin have not complied with these procedures and so have not established that they are class members. ...
>
> The court therefore finds that all three objectors lack standing and strikes their objections.
>
> Even if the objectors had proven their membership in the class, the challenges they raise do not persuade the court that the settlement should not be approved as "fair, adequate, and reasonable." Their objections touch on three

topics....

Notice Time Period. Walker's primary complaint is the length of the 35-day period (which he incorrectly calculates) between the June 17 notice and the July 22 objection deadline. Note that the time period in the 1999 settlement was a shorter 30 days. See the July 6, 1999, Joint Affidavit of Neil L. Selinger and Steven E. Cauley in Support of the Proposed Settlement and Joint Petition for an Award of Attorneys' Fees and Reimbursement of Expenses (emphases added):

> 5. The favorable reaction of the members of the class supports the 'reasonableness of the Settlement and fee request. On May 24, 1999, individual notice was mailed to those members of the class who could be identified from the records supplied by MedPartners, and a summary notice was published in Investors Business Daily on June 1, 1999....
>
> 59. By Order dated May 3, 1999, the Court preliminarily approved the terms of the Settlement and directed that notice of the Settlement be mailed to each potential Settlement Class member identified on MedPartners' records and to each shareholder of record as of May 3, 1999, and that a summary notice of the proposed Settlement be published in Investors' Business Daily within 10 days of the mailing of the Class Notice. Individual notice was mailed on May 24, 1999, and the summary notice was published on June 1, 1999....
>
> 60. ... All objections were due by June 25, 1999. Not a single objection to the merits of the Settlement or the application for award of fees and expenses has been received as of this date.

Clete Walker should be estopped to complain about a 35-day notice period when he was a high-ranking officer at MedPartners at the time that MedPartners settled the original 1999 case with 30-days' notice.

Further, if Walker truly is a class member, his best opportunity was to have filed a claim in 1999, which he did not - and his objection offers no reason for why he did not file in 1999. He was an officer at MedPartners at the time, so he had to know about the 1998 lawsuits and the

1999 settlement. And, if he got a settlement notice in 2016, he would have received the certification notice in 2015. He could have started looking for his records in 2015 - and his objection offers no reason for why he did not start looking in 2015. A high-ranking officer at MedPartners during the class period (1996-98) should be able to show whether he purchased stock in his own company during the class period.

This Court has an obligation to define the class and set rules for the proving of class membership. The requirements and the time frames set by this Court in this case were eminently fair and reasonably. See generally this discussion in *In re Deepwater Horizon*, 739 F.3d 790, 809 (5th Cir.), cert. denied sub nom. *BP Expl. & Prod. Inc. v. Lake Eugenie Land & Dev., Inc*., 135 S. Ct. 754 (2014):

> The district court's instruction to provide proof of class membership was a legitimate exercise of its discretion under Rule 23(d)(1)(A) and Rule 23(d)(1)(C) to "issue orders that[ ] ... determine the course of proceedings" and "impose conditions ... on intervenors" in a class action. As the Supreme Court recognized in *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981), a district court presiding over a class action "has both the duty and the broad authority" to enter such orders to minimize "the potential for abuse" during such proceedings. Although a district court's discretion under Rule 23(d) is "not unlimited," the district court plainly acted within its discretion in finding that the BCA Objectors forfeited and waived their objections by disobeying the reasonable requirements of the Preliminary Approval Order. Moreover, in an unpublished case with equivalent facts, *Feder v. Electronic Data Systems Corp*., 248 Fed.Appx. 579, 580 (5th Cir. 2007), we dismissed an appeal from a district court's order on class certification and settlement approval based on the objector's failure to "prove his membership in the class" in accordance with the district court's reasonable documentation requirements. We see no meaningful difference between the present case and the facts of *Feder*. As we explained in *Feder*, "the right to object to settlement in a ... class action must rest on something more than the sort of bare assertions" now offered by the BCA Objectors.

Feder was a securities class action. Urbanik appealed the district court's decision to disregard his objections to a settlement. *Feder*, 248 F. App'x 579. "Urbanik submitted a written

objection to the settlement which included, among his objections, a statement that he purchased or otherwise acquired securities of EDS during the class period." *Id*. at 580. "Urbanik included no further information regarding EDS securities. The district court then held its fairness hearing to determine whether to approve the settlement. During the hearing, Urbanik's counsel stated that his client bought and sold shares of EDS stock in the requisite time frame." *Id*. at 581. Urbanik did not produce any other proof demonstrating that he was a member of the class. *Id.*

On appeal, the 5th Circuit found that Urbanik did not provide enough information providing that he was a member of the class. The court stated, "[a]side from Urbanik's unsupported claim of ownership in his objection letter, and the statements made by his attorney at the settlement hearing, Urbanik produced no evidence substantiating his membership in the class." *Id*.

> In this case, where the proof of claims period has closed and the settlement has been finally approved by the district court, the burden of proving class membership cannot be satisfied by the appellant's unsupported assertions of class membership. Urbanik did not submit a proof of claim form. Nor did he provide the documentary evidence required by the claim form to support his contention that he bought or sold EDS stocks during the class period. His objection did not include the required information as to the number or type of EDS securities that Urbanik alleges to have dealt in during the period. Allowing someone to object to settlement in a class action based on this sort of weak, unsubstantiated evidence would inject a great deal of unjustified uncertainty into the settlement process.

Feder, 248 F. App'x at 581 (emphasis added). Note that the district court had provided 38 days between the date of mailing notices and the deadline for filing objections. E.D. Tex., Case No. 6:03-cv-00126-LED, Document 310, pp. 12-13 (July 21, 2008).

A 30-day period is commonly held to comply with due process. (Note that the time

between notice and the objection deadline in the 1999 MedPartners settlement was 30 days.[19])

See 2 McLaughlin on Class Actions § 6:18 (12th ed.) (database updated Dec. 2015) (emphasis added):

> Courts have consistently held that **30 to 60 days** between the mailing (or other dissemination) of class notice and the last date to object or opt out, coupled with a few more weeks between the close of objections and the settlement hearing, affords class members an adequate opportunity to evaluate and, if desired, take action concerning a proposed settlement. [FN 1].
>
> FN 1. See *DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 940, 946–47 (10th Cir. 2005) (approving a **32-day** opt-out period); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (approving notice mailed **31 days** before the deadline for written objections and 45 days before the fairness hearing); *Miller v. Republic Nat. Life Ins.* Co., 559 F.2d 426, 430 (5th Cir. 1977) (in securities fraud class action case, a period of "almost **four weeks** between the mailing of the notices and the settlement hearing" was adequate time, particularly when only one class member objected to the timing and where such class member was a part of the case since its inception); *Marshall v. Holiday Magic, Inc*., 550 F.2d 1173, 1178 (9th Cir. 1977) (approving notice mailed **26 days** before the deadline for opting out of a settlement); *Grunin v. International House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975) (**19 days** notice was enough time to object, particularly when case had been ongoing for two years); *United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co.*, 447 F.2d 647, 652 (7th Cir. 1971) (in securities class action, adequate time was provided when notice was mailed on May 28 and fairness hearing was held on June 22 [25 days]); Air Lines Stewards & Stewardesses Ass'n Local 550 v. American Airlines, Inc., 455 F.2d 101, 108 (7th Cir. 1972) (in gender discrimination class action, class members were afforded a "reasonable time" of days [**12 days**] between sending of the notice and the hearing); ... *Mylan Pharmaceuticals, Inc. v. Warner Chilcott Public Ltd. Co.,* 2014 WL 631031, *5 (E.D. Pa. 2014) (approving **30-day** period to object or opt out from date on notice); *Woodard v. Andrus*, 272 F.R.D. 185, 204 (W.D. La. 2010) ("courts addressing opt-out periods in the class settlement context have typically held that between **30 and 60 days** from the time of mailing is appropriate"); *In re Sprint Corp. Securities Litigation*, 2004 WL 955859, *3 (D. Kan. 2004), aff'd, 429 F.3d 935 (10th Cir. 2005) (approving **32-day** interval "between the time the Notices

[19] See Joint Affidavit of Neil L. Selinger and Steven E. Cauley in Support of the Proposed Settlement and Joint Petition for an Award of Attorneys' Fees and Reimbursement of Expenses of June 30, 1999.

> were initially sent [to record holders and known beneficial holders] and the objection deadline); *In re BankAmerica Corp. Securities Litigation*, 210 F.R.D. 694, 708 (E.D. Mo. 2002) (in securities class action, "**three to four weeks** between the mailing of class notice and the last date to object, with an additional three weeks to prepare for the settlement hearing" sufficed); *Grice v. PNC Mortg. Corp. of America*, 1998 WL 350581, *8 (D. Md. 1998) (in consumer class action, approving **30-day** notice period prior to final settlement approval hearing).

See also *Etter v. Hibernia Corp*., 952 So. 2d 782, 791 (La. App. 4 Cir.), writ denied, 956 So. 2d 615 (La. 2007) (**30 days**), and *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182, 195 (N.D. Ill. 1981) (**30 days**).

If 30 to 60 days is standard, the lower end of scale is appropriate under the specific circumstances of this case. This case is unique in that there has never been a class action about a class action. This class already got a claims notice in 1999. Those who were interested enough could have gathered their then-fresh records in 1999 and filed a claim in 1999. Those who did, only have to file a name-and-address form today – they do not have to submit stock-trade records. Approximately 18,000 class members filed nearly $700M of claims in 1999.[20] Only those who elected to ignore the 1999 notices are the ones having trouble now in finding old records. Another distinction is that most class action settlements are done in one step, with certification and settlement done in one process, with just one class notice. Here, in May 2015, the class was noticed about certification and their opt out rights. So, the June 2016 settlement notice did not just come out of the blue. Moreover, even though the objection deadline was July 22, 2016, the claims period runs through September 30, 2016, so the people complaining about

[20] If plaintiffs' designated trial expert was correct, the total 1999 class damages were about $1B. This means that a large majority (near 70%) of shareholders, by value, filed claims in 1999. Only the minority, who did not, can even attempt to voice a complaint about not having enough time to locate old stock-trading records.

lack of time still have through September to locate records and file a claim (and, all these complainants are people who elected not to opt out in 2015 and to be bound by any judgment or settlement). Further, this is a class where the vast percentage of class members are known by name and address and were given individual mailed notice – that is, this is not a class where the primary methods of notice are publications, Internet, and word of mouth. So, in a case like this one, the minimal due process time frame of about 30 days fits perfectly – though a longer time period might be desirable in a different kind of class action case. The objectors' due process claims have no merit.

Judge Clemon, see Exhibit 3, refutes the objection regarding the 35-day notice period:

> 51. Assuming but not admitting or conceding that Mr. Walker has standing in this case (i.e., that he is a member of the certified class), it is my view that there is no factual or legal basis for his due process claim. The "notice" required by the due process clause of the Fourteenth Amendment to the Constitution, must be "reasonable under the circumstances." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950). The amount of time between the publication of class notice of a proposed settlement and the deadline for objections is subject to the trial court's discretion, so long as the due process clause is not offended. *United States v. Alabama*, 271 F.App'x 896, 900, 901 (11th Cir. 2008). The period between the notice and the deadline for objections is a factual determination to be made by a court on a case-by-case analysis. *Woodward v. Andrus*, No. CIV.A.03-2098, 2010 WL 1936154, at *5 (W.D. La. May 12, 2012). As Mr. Justice Frankfurter framed it: "due process cannot be imprisoned within the treacherous limits of any formula." *Joint Anti-Facist Refugee Commove. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).
>
> 52. The factual circumstances surrounding Plaintiffs' counsel June 17th notice to members establish that Mr. Walker's due process rights have not been violated. Mr. Walker obviously received the most recent notice to the class in sufficient time for his filing of objections. The June 17th notice was the second class notice he has received in the last two years; and between the two notices, he chose not to opt-out of the class. From the time that Mr. Walker was notified that the case had been certified, he knew that either at trial or following a settlement, he would be required to come forward with proof of his membership in the class. Finally, Mr. Walker still has more than two months within which to file his claim.

> 53. My opinion that Mr. Walker has not been denied due process is based on my own experience and training, my participation in legal conferences and seminars, and the published decisions of other trial judges and appellate courts. [FN 19]
>
> > FN 19. For example, in *AAL High Yield Bond Fund, et al. v. Ruttenberg, et al*, (N.D. Ala. No. 2:00-cv-1404-UWC) (Doc. 24), I approved the publication of class notice 34 days before the deadline for objections. In *Miller v. Republic Nat'l Life Ins. Co.,* 559 F.2d 436, 429, 430 (11th Cir. 1977), the Eleventh Circuit noted that "[t]here were almost four weeks between the mailing of the notice and the settlement hearing." A 19-day period was found to be sufficient notice in *Griffin v. International House of Pancakes*, 513 F.2d 114, 121 (8th Cir.1975); a 26-days' period was approved in *Marshall v. Holiday Magic, Inc*., 550 F.2d 1173, 1178 (9th Cir. 1977). A thirty days' period was approved in *Manguin v. Florida E. Coast Ry. Co.,* 318 F.Supp. 720, 733-34 (M.D. Fla. 1970), *aff'd*, 441 F.2d. 728 (5th Cir. 1971). *See also New England Health Care Employees Pension Fund*, 429 F.3d 935, 940, 946-947 (10th Cir. 2005) (approving a 32-day opt–out period).

Fee. In one conclusory sentence, Walker just alleges that a 40% fee is not fair. The preceding pages of this application and the expert declarations prove conclusively that 40% is a fair and reasonable fee. Walker, on July 22nd, offered no *evidence* of any kind in opposition to the 40% fee request. He identified no witness who will testify. Even if he had proven class membership, a conclusory statement that 40% is too much is not a valid objection - e.g., it is not substantiated or supported by anything.

Wrongdoers. Walker's final objection (see ¶ 5 on p. 3 of objection: "it permits those responsible for the wrongdoing at issue in the MedPartners Securities Litigation to receive settlement funds") is that the class definition could permit wrongdoers to recover. The Georgia Urology doctors

make a similar objection - see ¶ B on page 2 of Mr. Schoen's letter. The Plaintiff Class has a complete response to this objection. The responsible officers and directors who are apparently referred to by Walker and the Georgia Urology doctors were excluded from the 1999 class, so they are excluded here. If any of the D&O fraudsters from pre-1998 MedPartners try to make a claim, the Plaintiff Class intends to challenge that claim with the Court. Class counsel are monitoring with the claims administrator, and the Class will have one final opportunity to check names on the final payment sheet that Gilardi will present to the Court for final approval.

These persons (the "wrongdoing" officers and directors) were defined out of the 1999 class. See, e.g., ¶¶ 1.5, 1.6, and 1.23 of the Stipulation of Settlement of January 15, 1999. Defined out of the class are named persons such as Larry House, Richard Scrushy, et al., as well as categories of persons such as the "legal representatives" of MedPartners. In 1999, Judge Wynn's final order approved and adopted the 1999 stipulation of settlement, and the terms of that stipulation clearly exclude House, Scrushy, et al. The present class action is brought on behalf of the same 1999 class. In July 1999, when the alleged fraud-in-the-settlement was consummated, Scrushy, et al, were not members of that class, so they cannot be members of the present class (and, not being in the class in July 1999, they were not injured by the fraud and, thus, have no claim in 2016).

Credibility. Clete Walker's general credibility is suspect. His motivations for filing this objection are suspect. And, if he attempts to assert that he has at all relevant times been exercising due diligence to ascertain the details of his purchases, if any, of MedPartners stock, then the veracity of any such assertion would be suspect. The facts cited below are contained in Exhibit 14, as "Composite Exhibit of Items Relating to Clete Walker."

Clete Walker's LinkedIn page (in Exhibit 14) states that he was with MedPartners as its "Vice President for Corporate Strategies" from March 1994 until December 2002. So, Walker was there from its inception, throughout all of the fraud time period, and into MedPartners's morph into Caremark Rx.

In the summer of 2003, shortly before this lawsuit was filed, Clete Walker gave an interview. See Tom Bassing, Vitalmed Absorbs Doctors' Paperwork, Birmingham Business Journal (July 6, 2003), at www.bizjournals.com/birmingham/stories/2003/07/07/story1.html (in Exhibit 14). Quoting the article: "As MedPartners' vice president for corporate strategy in late 1997, Walker was assigned the task of evaluating the firm's underperforming assets - the various physician-practices that comprised that business unit, at the time the company's largest." So, by 1997, Walker knew that the PPM business was "under-performing," at a time when the company's public statements were to the contrary (i.e., fraudulent).

"MedPartners during the mid-1990s purchased as many rival physician-practice management firms as it could. That meant integrating different systems - from computers to divergent business practices- something that proved relentlessly vexing." *Id*. (emphasis added). A major fraud allegation against MedPartners in 1998 was that MedPartners was telling the public that these integrations were running smoothly, when, in fact, they were not. Walker is quoted as saying: "We grew way too fast through acquisitions without fully integrating them [and] [t]hat's one aspect of what went wrong..... [O]ur billing shop grew so fast we couldn't provide good billing services." *Id*. The article closes with this admission from Walker: "At Caremark, 'I kind of saw all the things we did wrong,' he says...."

Two MedPartners organizational charts in Exhibit 14 are dated November 7, 1997. (The CRX Bates number means they were produced by Caremark.) This is about two months before the

PhyCor deal fell through and the fraud at MedPartners came to light (and the flood of lawsuits began). On that date, Clete Walker was the number two man in the PPM Finance department. He was then the "Vice President of Finance Operations," not "Corporate Strategies." He reported directly to the CFO. Clete Walker's "Executive Profile" at Bloomberg/Businessweek is online at www. bloomberg.com/research/stocks/private/ person.asp?personId=62447754&privcapId= 43577362 (see Exhibit 14). It explains: "After a short stint with Coopers and Lybrand, he spent four years with a start-up transportation company in various roles including accounting, sales, and operations. Mr. Walker left his first start-up company to begin a nine-year career with another young company, MedPartners Inc. (now Caremark Rx, Inc.). At Caremark, Mr. Walker served as a Vice President of **Finance**, Vice President of **Financial Operations**, and Vice President of Corporate Strategy. Mr. Walker also handled **investor relations** and led the divestitures of certain portions of the physician practice management division as part of the company's overall restructuring strategy. After leaving Caremark in late 2002, he served as the Founding President at VitalMed Inc." (emphases added).

Exhibit 14 contains excerpts from Mac Crawford's March 14, 2000, deposition, in which Crawford testifies about Clete Walker's knowledge of a fraudulent practice at MedPartners called "flips." Flips were used to increase earnings. See, e.g., pages 147-48: flips are kind of like two sets of books and fraudulent bookings of transactions at false dates. Clete Walker told Mac Crawford that the accounting and acquisitions groups at MedPartners had kept a "score sheet" of these flips - thereby admitting that he (Walker) had known about them during the fraud period at MedPartners. At p. 154, Crawford said that, "Clete indicated that everybody [e.g., Hal Knight] knew about the

flips." At p. 149, Mac Crawford, as the new CEO at Caremark, testified that the "flips" and "score sheets" were "a major fraud committed by these people."

Exhibit 14 contains some of the arbitration testimony given by Ed Hardin regarding Clete Walker's knowledge of accounting fraud at MedPartners - e.g., by using reserves from transactions to create fake earnings. Hardin investigated the "Talbot write-off." He concluded that Talbot "was acquired for inappropriate reasons." "[T]he only reason it was acquired was to create reserves to make the company look more profitable than it was." Hardin said that Walker and Weeks were at the company when the Talbot acquisition was made. Hardin (page 3067, line 5) said that Walker admitted to him these improper motives for making the Talbot acquisition. Hardin said that he formed his opinion that this was an improper acquisition by also looking at a package prepared for the Board of Directors (which said the deal would "be accretive to earnings").

Clete Walker was one of the persons responsible for preparing those financial packages for the Board of Directors. Exhibit 14 contains excerpts from the January 13, 2000, deposition of Rebecca Tabor. At pages 78-79, Ms. Tabor testified that she "prepared the administrative section" of the Board package, but that the "finance section" was prepared by Clete Walker and Mark Weeks. Note that, when MedPartners/Caremark sued J. Johnston, et al., it claimed that a major part of the alleged fraud in the underlying case was fraudulent acquisitions used to create phony profits and fraud on the Board itself by its officers. Tabor testified that the finance section of the Board packages were prepared by Walker and Weeks. Thus, Walker appears to have been intimately knowledgeable about, and involved in, the accounting frauds at MedPartners while they were occurring and before they became public knowledge. This evidence establishes that Clete Walker, unlike almost anyone

else involved in the pre-1998 underlying fraud, was also still with the company when Crawford, Hardin, and others procured the unlimited-limits LMU but did not tell the public it was unlimited.

The relevance of all this is that is goes to the issue of proving membership in the class - e.g., for having standing to file an objection to the proposed settlement. Walker was a high-ranking officer at MedPartners during the time of the underlying fraud and at the time of the 1999 settlement in Judge Wynn's Court. This must mean that he was intimately knowledgeable about the 1998 litigations and the proposed 1999 global settlement. If he is a class member with a valid claim, why didn't he file a claim in 1999?

This evidence is also relevant to show that Walker was the number two man in PPM Finance, and even handled investor relations. What possible person should know better, and could know better, about his own stockholdings in MedPartners - and know how to go about retrieving information about stock transactions? Walker's claims that he has not had enough time to locate his stock records are simply not credible. He had to know about the case in 1999. If he got settlement notice in June 2016, then he also got certification notice in May 2015. He has, in effect, had over a year's notice to be getting records pulled together if he wanted to make a claim. Finally, this Court should look askance at the fact that the sole objector appearing at the hearing is a high-ranking former MedPartners officer who appears to have been knowledgeable about, or even involved in, the original underlying securities frauds going on inside MedPartners prior to 1998.

The Class is not asking this Court to rule that Clete Walker is not, or cannot be, a class member. If he is a class member and can retrieve sufficient stock-transaction information, he can file a claim prior to September 30, 2016. The Class does not care if Walker files a claim. If his claim is properly supported, presumably, he will get paid. The Class's position is simply that Walker, as of

July 22nd, did not show that he is a class member. Failing to do so by July 22nd means that Walker has no standing to object to the proposed settlement. He is still free to file a claim, up to September 30, 2016. The Class urges the Court to find that Walker has no standing to object because he failed to prove, by July 22nd, that he is a class member. The Court is urged to deny Walker's claims that the 35-day notice period was too short. However, the Class also urges the Court to go ahead and hear and consider Walker's objections and then to rule on them, conditionally (by conditionally denying them, as if they were deemed properly before the Court).

XII. CONCLUSION

Wherefore, the Plaintiffs,[21] the Plaintiff Class, and Class Counsel seek an order that grants this "Class Counsel's Fee and Expense Application and Application for Service Awards to Plaintiffs." They seek a separate order that grants the relief sought herein: (1) a common-fund, contingency-fee attorneys' fee award to class counsel in the total amount of 40% of the $310-million Settlement Fund, with 7.5% of that 40% awarded to Mr. Lanny Vines; (2) in addition to the fee, an award, to be paid from the Settlement Fund, to class counsel of expenses in the total amount $2,585,932.71, to reimburse them for their out-of-pocket case expenses which they advanced; and (3) service awards, to be paid from the Settlement Fund, in the amount of $50,000 each to Sam Johnson, the City of Birmingham Retirement and Relief System, and John Lauriello.

[21] Please note that the class representatives and John Lauriello all support the request for a 40% fee. See Exhibits 5-7. See also *Nat'l Treasury Employees Union v. United States,* 54 Fed. Cl. 791, 807 (2002): "The court concurs with class counsels' contention that the fact that the attorney fees provision has received such an infinitesimally small number of adverse comments from this large class underscores its reasonableness. In addition, the court has considered the fact that the class representatives strongly support class counsel's common fund fee request."

The Plaintiffs, the Plaintiff Class, and Class Counsel request a separate pro ami order which finds that the overall $310-million settlement and the relief sought in this "Class Counsel's Fee and Expense Application and Application for Service Awards to Plaintiffs" are fair and reasonable and in the best interest of class members, if any, who may be minors or incompetents.

And, the Plaintiffs, the Plaintiff Class, and Class Counsel request another separate order which responds to the three objections received or mailed by the deadline date of July 22, 2016. The Plaintiff Class urges a finding that none of the putative objectors have adequately shown themselves to be members of the class (or to have shown good cause as to why such evidence was not available or produced by July 22, 2016), meaning that they have no standing to appear or to object to the proposed settlement. Then, in the alternative, the Plaintiff Class asks the Court to rule, conditionally, on the merits of each objection, and to deny or reject them all.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 29th day of July, 2016, served a copy of the foregoing on counsel of record by notice of electronic mail on those who are registered participants in the electronic-filing system and upon counsel of record who are not participants in the electronic-filing system by placing a copy of same in the United States Mail, first class postage prepaid, and addressed, as follows:

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