UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

OSHONYA SPENCER, CHARLES STRICKLAND, and DOUGLAS McDUFFIE on behalf of themselves and all others similarly situated,	:	
Plaintiffs,	:	NO. 3:05cv1681 (JCH)
V.	:	
THE HARTFORD FINANCIAL SERVICES GROUP, INC., et al	:	
Defendants.	:	AUGUST 16, 2010

CLASS COUNSEL'S MEMORANDUM IN SUPPORT OF APPLICATION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

SILVER GOLUB & TEITELL LLP
David S. Golub
Jonathan M. Levine
184 Atlantic Street
P.O. Box 389
Stamford, Connecticut 06904
Tel. (203) 325-4491
Fax (203) 325-3769

BERGER & MONTAGUE, P.C.
Peter R. Kahana
Steven L. Bloch
1622 Locust Street
Philadelphia, PA 19103
Tel. (215) 875-3000
Fax (215) 875-4604

ZUCKERMAN SPAEDER LLP
Carl S. Kravitz
Ellen D. Marcus
Caroline E. Reynolds
1800 M Street, N.W.
Washington, DC 20036
Tel. (202) 778-1800
Fax (202) 822-8106

RISK LAW FIRM
Richard B. Risk, Jr.
3417 East 76th Street
Tulsa, OK 74136
Tel. (918) 404-8025
Fax (918) 494-5819

Attorneys for the Named Plaintiffs and Class Counsel

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I. Introduction

After nearly five years of hard-fought litigation – encompassing over 250 docket entries in this Court and the Court of Appeals – class counsel in this case have succeeded in obtaining certification of a nationwide RICO and fraud class of 22,000 claimants and a settlement of $72,500,000 on behalf of the class.

By this settlement, class counsel have produced a common fund from which every individual who settled a personal injury or worker's compensation claim with a structured settlement from defendants since 1997 (other than those working with their own broker) will obtain monetary relief. The $72.5 million equates to a reimbursement of 4.5% of the premiums used for the annuities that funded the structured settlements – a recovery *greater* than the 4% sought in plaintiffs' original Complaint – and to an outstanding 30% recovery of plaintiffs' alleged losses under their broader 15% theory.[1] And, unlike class actions in which class members receive no meaningful benefit, each class member in this case (on average) will receive thousands of dollars in settlement monies.

This outstanding result could not have been obtained without counsel willing to assume the enormous financial risks of pursuing a possible class action on behalf of the three named plaintiffs, whose individual claims – like those of the other class members – could not possibly have warranted the legal time and litigation expenses necessary to prosecute this action. To obtain this recovery, the four law firms representing plaintiffs in this action risked thousands of hours of legal time (the overwhelming majority of which was invested prior to class certification being granted) and hundreds of thousands of dollars in litigation expense. They did so in a case with highly uncertain prospects at

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[1] *See* Ellen M. Ryan, Laura E. Simmons, *Securities Class Action Settlements, 2009 Review and Analysis*, at 5 (Cornerstone Research, Inc. 2010) (attached to Declaration of David S. Golub dated August 16, 2010 ["Golub Dec."] as Exhibit D) (in securities class actions settling for between $50 and $124 million in 2009, the median settlement as a percentage of actual investor losses is 3.9%).

the outset, involving well-financed corporate defendants with a reputation for tenacious litigation and against defense counsel (from one regional and three national law firms) who asserted, repeatedly, that class certification could never be approved (and, if approved, would never be upheld); that no viable legal theory of liability existed; and that no damages could be ever established.

The settlement was reached by dint of class counsel's dogged efforts (with the assistance of the Court) to force defendants and third parties to cooperate with discovery; through class counsel's development of a factual basis for liability, supported by legal theories of how the elements of RICO and common-law fraud could be satisfied, on the facts of this case, in the class action context; and by the development of expert evidence on the calculation of damages. Every aspect of discovery was resisted by defendants, and every element necessary to obtain a recovery for the class was vigorously contested by defendants' counsel.

Class counsel have now applied for an award of attorneys' fees pursuant to the "common fund" doctrine, which authorizes this Court to allocate the fees and costs of this litigation among the nearly 22,000 class members. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). Class counsel respectfully seek a percentage award of 30% of the settlement fund – a percentage award fully in accord with awards in similar cases of this magnitude in this District:

> *see In re Priceline.com Sec. Litig.*, No. 3:00-CV-1884 (AVC), 2007 WL 2115592 (D. Conn. Jul. 20, 2007) (Covello, J.) (awarding 30% of $80 million settlement);

as well as in other Districts in this Circuit:

> *see In re Bisys Sec. Litig.*, No. 04 Civ. 3840 (JSR), 2007 WL 2049726 (S.D.N.Y. Jul. 16, 2007) (Rakoff, J.) (awarding 30% of $65.87 million settlement); *In re Buspirone Antitrust Litig.*, No. MDL 1413, 01-CV-7951 (JGK) (S.D.N.Y. Apr. 17, 2003) (Koeltl, J.) (awarding 33⅓% of $300 million settlement); *Kurzweil v. Philip Morris Cos., Inc.*, No. 94 Civ. 2373 (MBM), 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999) (Mukasey, J.)

(awarding 30% of $123 million settlement); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320 (E.D.N.Y. 1993) (Nickerson, J.) (awarding 34% of $42 million settlement); *In re Wedtech Sec. Litig.,* MDL No. 735 (LBS) (S.D.N.Y. Jul. 30, 1992) (Sand, J.) (awarding 39.2% of $53 million); *see also In re Initial Public Offering Sec. Litig.*, 671 F. Supp. 2d 467 (S.D.N.Y. 2009) (Scheindlin, J.) (awarding 33⅓% of $586 million settlement);

and in Districts across the country:

see Allapattah Servs. v. Exxon Corp., 454 F. Supp. 2d 1185 (S.D. Fla. 2006) (awarding 31⅓% of $65.87 million settlement); *Nicholas v. SmithKlein Beecham Corp.*, No. Civ.A.00-6222, 2005 WL 950616 (E.D. Pa. Apr. 22, 2005) (awarding 30% of $65 million settlement); *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350 (E.D. Pa. June 2, 2004) (awarding 30% of $202 million settlement); *In re Relafen Antitrust Litig.*, No. 01-12239 (WGY) (D. Mass. Apr. 9, 2004) (awarding 33⅓% of $175 million settlement); *In re Automotive Refinishing Paint Antitrust Litig.*, MDL No. 1426 (E.D. Pa. 2004) (awarding 32% of $66.75 million settlement); *In re Managed Care Litig. v. Aetna, Inc.*, No. MDL 1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003) (awarding 35.5% of $310 million settlement); *In re Monosodium Glutamate Antitrust Litig.,* MDL No. 1328, 2003 WL 297276 (D. Minn. Feb. 6, 2003) (awarding 30% of $81.4 million); *In re Cardizem CD Antitrust Litig*, No. MDL 1278 (NGE), (E.D. Mich. Nov. 26, 2002) (awarding 30% of $110 million settlement); *In re Vesta Ins. Group, Inc. Sec. Litig.*, No. 98-1407 (N.D. Ala. Dec. 10, 2001) (awarding 34.1% of $61 million); *In re Vitamins Antitrust Litig.*, No. 99-197, 2001 WL 34312839 (D.D.C. Jul. 16, 2001) (awarding 34% of $360 million settlement); *In re Prison Realty Sec. Litig.*, No. 3:99-0458 (M.D. Tenn. Feb. 9, 2001) (awarding 30% of $111 million settlement); *In re Aetna Securities Litig.*, No. Civ. A. MDL 1219, 2001 WL 20928 (E.D. Pa. Jan. 4, 2001) (awarding 30% of $82.5 million settlement); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166 (E.D. Pa. 2000) (awarding 30% of $111 million settlement); *In re Informix Corp. Sec. Litig.*, No. 9701289 (N.D. Cal. Nov. 23, 1999) (awarding 30% of $137 million settlement); *In re Westinghouse Sec. Litig.*, Nos. 91-354, 97-309, 97-960 (W.D. Pa. Oct. 19, 1999) (awarding 35.7% of $67.25 million); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403 (S.D. Tex. 1999) (awarding 30% of $123 million settlement); *In re Commercial Explosives Antitrust Litig.*, MDL No. 1093 (D. Utah Dec. 29, 1998) (awarding 30% of $77 million settlement); *In re Combustion, Inc.*, 978 F. Supp. 673 (W.D. La. 1997) (awarding 36% of $127 million settlement); *In re Airline Ticket Commission Antitrust Litig.*, 953 F. Supp. 280 (D. Minn. 1997) (awarding 33⅓ of $86.892 million); *Gaskill v. Gordan*, 942 F. Supp. 382 (N.D. Ill 1996) (awarding 38% of $43.69 million); *In re National Health Laboratories Sec. Litig.,* No. 99-1949 (S.D. Cal. Aug. 15, 1995) (awarding 30% of $64 million); *In re Melridge, Inc. Sec. Litig.*, No. 87-1426 (D. Or. Mar. 19, 1992) (awarding 37.1% of $54 million settlement).

Class counsel further seek reimbursement of their litigation expenses totaling $823,467.35 incurred in the successful prosecution of this action.

The three named plaintiffs, each of whom entered into a 33⅓% contingency fee agreement with counsel on their individual claims, support class counsel's Application.[2] No other members of the class – who were specifically apprised in the Notice of this settlement that class counsel might seek a fee of up to 33⅓% – have given notice of any objection.

II. Plaintiffs' Counsel Are Entitled to the Reasonable Fee Requested in Counsel's Application.

A. The Legal Standards Governing an Award of Attorneys' Fees in this Action.

1. The "Common Fund" Doctrine Authorizes the Court to Exercise its Equitable Powers to Allocate the Costs of This Litigation Among All of the Class Members.

Pursuant to the "common fund" doctrine, "a lawyer who recovers a common fund for the benefit of persons other than ... his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing* at 478; *Goldberger* at 47.

The doctrine was first established by the United States Supreme Court more than a century ago in *Trustees v. Greenough*, 105 U.S. 527, 532-53 (1881), and rests on the equitable principle that "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing* at 478. The common-fund doctrine derives from the court's equity powers, *id.*,[3] and enables courts to "prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefits by the suit." *Id.*; *Goldberger* at 47 (common fund doctrine "prevents unjust enrichment of those benefitting from a lawsuit without

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[2] *See* Declarations submitted by each of the Named Plaintiffs in support of Motion for Order Authorizing Incentive Awards for Class Representatives filed this day.

[3] "The district court's power to award attorneys' fees through an application of the common fund doctrine is derived from its traditional power to do equity." *In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Fire Litigation*, 982 F.2d 603, 607 n 5 (1st Cir. 1992).

contributing to its cost"); *Catullo v. Metzner*, 834 F.2d 1075,1083 (1st Cir. 1987) (doctrine "prevent[s] the unjust enrichment of persons who benefit from a lawsuit without shouldering its costs").

In addition to ensuring that the costs of a class litigation are fairly borne by all class members who benefit from a recovery, awards of attorneys' fees from a common fund serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future misconduct of a similar nature. *See Maley v. Del Global Techs, Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y, 2002).

Moreover, where – as here – class claims under civil RICO are successfully pursued, counsel in such actions serve as "private attorneys general" and help to promote the important public policy of enforcing RICO in cases where the government lacks resources to proceed. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (civil RICO "bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate"). Percentage awards in such cases provide incentive to counsel to perform this important role. *Alpine Pharmacy v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir. 1973).

2. The Percentage-of-Recovery Method Is the Preferred Basis for a Common Fund Award and Should be Utilized in This Case.

Attorneys' fee awards in common fund cases have, historically, been based on one of two methodologies: the percentage-of-recovery method or the lodestar method. *See Goldberger* at 47; *Savoie v. Merchants Bank*, 166 F.3d 456, 460 (2d Cir. 1999). It is now well-established that the percentage-of-recovery method is the preferred method for determining a common fund award in a class action and should be utilized in this case.

"The trend in this Circuit is toward the percentage method." *Wal-Mart Stores. Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 122 (2d Cir. 2005), *cert. den., sub nom. Leonardo's Pizza by the Slice Inc. v.*

Wal-Mart Stores Inc., 544 U.S. 1044 (2005); *accord In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05 cv 10240 (CM), 2007 WL 2230177, at **15-16 ("The trend of district courts within this Circuit [is] to utilize the percentage of recovery approach ... in common fund cases") & 16 n.3 (collecting cases) (S.D.N.Y. July 27, 2007); *In re Global Crossing Sec. Litig.*, 225 F.R.D. 436, 469 (S.D.N.Y. 2004) ("The great weight of authority supports basing common-fund awards on a percentage of the gross recovery").[4]

Support for the "percentage of recovery" methodology is widespread outside the Second Circuit, as well. One of the nation's foremost scholars in the field of class actions and attorneys' fees, Professor Charles Silver of the University of Texas School of Law, has expressly cited the broad consensus that the percentage method is far superior to the lodestar method:

> The consensus that the contingent percentage approach creates a closer harmony of interests between class counsel and absent plaintiffs than the lodestar method is strikingly broad. It includes leading academics, researchers at the RAND Institute for Civil Justice, and many judges, including those who contributed to the Manual for Complex Litigation, the Report of the Federal Courts Study Committee, and the report of the Third Circuit Task Force.

Charles Silver, "Due Process and the Lodestar Method: You Can't Get There From Here," 74 Tul. L. Rev. 1809, 1819-20 (2000) (footnotes omitted); *see also* Report of the Third Circuit Task Force, Court

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[4] A*ccord In re Comverse Tech. Inc. Sec. Litig.*, No. 06 cv 1825 (NGG), 2010 WL 2653354, at *2 (E.D.N.Y. June 24, 2010) (noting "the trend in the Circuit [for] the percentage method"); *Maley* at 370 ("the trend within this Circuit is to use the percentage of recovery method to calculate fee awards to class counsel"); *In re American Bank Note Holographics, Inc.*, 127 F. Supp.2d 418, 431 (S.D.N.Y. 2001) (same); *In re Nasdaq Market Makers Antitrust Litig.*, 187 F.R.D. 465, 485 (S.D.N.Y. 1998) (citing "strong support for the percentage approach from district courts in this Circuit"); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 397 (S.D.N.Y. 1999) ("groundswell of support for mandating a percentage-of-the-fund approach"); *Slomovics v. All for a Dollar, Inc.*, 906 F. Supp. 146, 150 (E.D.N.Y. 1995) ("it is proper to compensate counsel based on a percentage of the common settlement fund"); *In re Crazy Eddie* at 325 ("since at least the late 1980's, the trend within this Circuit has been toward the percentage of recovery method"); *In re Fine Host Corp. Sec. Litig.*, MDL No. 1241 (JCH), 2000 WL 33116538, at **1-2 (D. Conn. Nov. 8, 2000) (Hall, J.) (citing *In re Crazy Eddie* and applying the percentage method); *In re Priceline.com* at *5 (applying percentage method and awarding 30% of $80 million settlement).

Awarded Attorney Fees, 108 F.R.D. 237, 254-59 (Oct. 8, 1985) (recognizing the many shortfalls of lodestar method and unequivocally recommending use of percentage method in common fund cases).

The applicability of the percentage of recovery method in common fund cases was noted by the Supreme Court in *Blum v. Stenson*, 465 U.S. 886 (1984),[5] and use of the percentage-of-the-fund method in common fund cases has now been approved by every Court of Appeals that has addressed the issue.[6] The Third Circuit, which had been a leading proponent of the lodestar method, *see Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973), now takes the position that the percentage method is the "favored" and "proper" method for determining common fund awards. *In re Rite Aid Corp. Sec. Litig.* 396 F.3d 294, 300, 305 (3d Cir. 2005). At least two other circuits – the District of Columbia and the Eleventh Circuits – require use of the percentage method in common fund cases.[7]

Congress has also has expressed its preference for the percentage method of recovery in class action litigation. Thus, the Private Securities Litigation Reform Act provides that a fee award should

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[5] In *Blum*, the Supreme Court differentiated between the methodology for calculating a fee under a fee-shifting statute (the lodestar method), and determining a fee award in a common fund case, noting that "under the common fund doctrine, ... *a reasonable fee is based on the percentage of the fund bestowed on the class*." *Id.* at 900 n. 16 (emphasis added).

[6] The First, Third, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuit Courts of Appeals have all adopted the percentage method for use in common fund cases. *See In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995) (approving percentage method, and observing that "contrary to popular belief, it is the lodestar method, not the [percentage] method, that breaks from precedent"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tanks Prod. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 564-65 (7th Cir. 1004); *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370,1376-77 (9th Cir. 1993); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Camden I Condominium Association v. Dunkle,* 946 F.2d 768, 774 (11th Cir. 1991) *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1268 (D.C. Cir. 1993).

[7] *See Swedish Hospital Corp.* at 1268; *Camden I* at 774; *see also Gottlieb* at 487, in which the Tenth Circuit held that use of the lodestar/multiplier methodology in a common fund case was an "abuse of discretion."

constitute "a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. § 78u-4(a)(6).

Indeed, there are a number of persuasive reasons supporting use of the percentage of recovery method over the lodestar method. Under the lodestar method, the district court is required to "scrutinize[] the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate" and then may adjust the total by an appropriate multiplier, based on such subjective factors as complexity of the litigation, quality of the representation, difficulty of the case, and counsel's risk of non-recovery. *Goldberger* at 47.

Courts have repeatedly recognized that the lodestar method is cumbersome and inefficient, and requires unwarranted and inefficient use of judicial resources. *Id.* at 49 (comparing lodestar analysis to "resurrect[ing] the ghost of Ebenezer Scrooge"); *In re Global Crossing* at 466 (percentage approach preferable to "cumbersome, enervating, and often surrealistic process of evaluating fee petitions under the lodestar/multiplier approach"); *In re Lloyd's American Trust Fund Litigation*, No. 96 Civ.1262 (RWS), 2002 WL 31663577 at *25 (S.D.N.Y. Nov. 26, 2002) (lodestar approach "wasteful and burdensome – to both counsel and courts"); *In re Nasdaq Market Makers* at 485 (describing lodestar calculations as "largely judgmental and time-wasting computations of lodestars and multipliers [which] no matter how conscientious, often seem to take on the character of so much Mumbo Jumbo").

Courts have also recognized that the lodestar method creates a disincentive for early settlements and thus gives rise to a potential tension between the interests of the class and its counsel:

> [T]he "lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits."

Wal-Mart at 122 (citation omitted).

The percentage of recovery method not only avoids "an unanticipated disincentive to early settlements" created by the lodestar method, but has also been found to be "simpler" and more efficient. *Goldberger* at 47. The percentage-of-recovery method allows the court to set "some percentage of the recovery as a fee" by considering the "same 'less objective' factors that are used to determine the multiplier for the lodestar." *Id.* No detailed analysis of lodestar hours or rates is required; rather, the court need only perform a more general "lodestar cross-check," based on its familiarity with the case, that the percentage fee falls within the range of a reasonable lodestar award to make sure that the percentage does not represent an undue windfall for counsel. *Id.* at 50.

As one district court has explained,

> The percentage method directly aligns the interests of the Class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system. The percentage approach is also the most efficient means of rewarding the work of class action attorneys, and avoids the wasteful and burdensome process — to both counsel and the courts - of preparing and evaluating fee petitions, which the Third Circuit Task Force described as "cumbersome, enervating and often surrealistic."

In re Lloyd's at *25; *accord Wal-Mart* at 122.

For all these reasons, the percentage method is the preferred methodology for determining counsel fees in a common fund case and should be utilized in this case.

B. The 30% Percentage Award Requested by Class Counsel Is Supported by Fees Awarded in Cases of Similar Magnitude and Is Consistent with Contingency Fee Agreements Negotiated in the Private Marketplace.

The notice of the settlement provided to class members advised them that class counsel would seek a fee award of up to one-third of the recovery obtained for the class. Although the Named Plaintiffs would support a 33⅓% fee request and although no class member has, to date, expressed any objection to a fee award of that percentage, class counsel have determined, after reviewing awards in

other similar cases and authorities, that it is appropriate for them to seek a 30% percentage fee award. Class counsel have made this determination based on the following considerations:

1. A 30% percentage fee award is consistent with 30% percentage fees awarded in cases of similar magnitude in this District, in this Circuit and throughout the country and is at the lower end of the range of awards in cases of similar magnitude;

2. A 30% contingency fee is at or below the percentage amount routinely agreed to in arms-length contingency fee agreements in the private marketplace for complex commercial tort cases with significant risk;

3. A lodestar cross-check confirms that a 30% percentage fee is well within the range of a reasonable fee and will not produce an undue windfall.

1. A 30% Percentage Fee Award is Consistent with – and at the Lower End of the Range of – Awards in Cases of Similar Magnitude.

In connection with this fee application, class counsel have surveyed percentage fee awards in this District, in this Circuit and across the country in cases of similar magnitude to determine – and confirm – that the 30% percentage fee they seek in this case is reasonable when compared with percentage fee awards in cases of similar magnitude. This review firmly demonstrates that percentage fees of 30% of the settlement have consistently been awarded in comparable cases and that, overall, 30% is at the lower end of the range of percentage fee awards in cases of similar magnitude.

In this District, this Circuit and across the country, percentage fees of 30% or more were awarded in the following cases with settlements of magnitude similar to (or greater than) this case:

Second Circuit	**Case**	**Award / Settlement**
D. Conn.	*In re Priceline.com Sec. Litig.*, No. 3:00-CV-1884 (AVC), 2007 WL 2115592 (D. Conn. Jul. 20, 2007) (Covello, J.)	30% of $80 million

S.D.N.Y.	*In re Bisys Sec. Litig.*, No. 04 Civ. 3840 (JSR), 2007 WL 2049726 (S.D.N.Y. Jul. 16, 2007) (Rakoff, J.)	30% of $65.87 million
S.D.N.Y.	*Kurzweil v. Philip Morris Cos. Inc.*, No. 94 Civ. 2373 (MBM), 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999) (Mukasey, J.)	30% of $123 million
S.D.N.Y.	*In re Buspirone Antitrust Litig.*, MDL No. 1413 (JGK) (S.D.N.Y. Apr. 17, 2003) (Koeltl, J.)	33⅓% of $300 million
S.D.N.Y.	*In re Wedtech Sec. Litig.* MDL No. 735 (S.D.N.Y. Jul. 30, 1992)	39.2% of $53 million
S.D.N.Y.	*In re Initial Public Offering Sec. Litig.* 671 F. Supp. 2d 467 (S.D.N.Y. 2009) (Scheindlin, J.)	33⅓% of $586 million
E.D.N.Y.	*In re Crazy Eddie Sec. Litig.* 824 F. Supp. 320 (E.D.N.Y. 1993) (Nickerson, J.)	34% of $42 million
Other Circuits		
S.D. Fla.	*Allapattah Servs. v. Exxon Corp.* 454 F. Supp. 2d 1185 (S.D. Fla. 2006)	31⅓% of $65.87 million
E.D. Pa.	*Nicholas v. SmithKlein Beecham Corp.*, No. Civ.A.00-6222, 2005 WL 950616 (E.D. Pa. Apr. 22, 2005)	30% of $65 million
E.D. Pa.	*In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 WL 1221350 (E.D. Pa. June 2, 2004)	30% of $202 million
D. Mass.	*In re Relafen Antitrust Litig.* No. 01-12239 (WGY) (D. Mass. Apr. 9, 2004)	33⅓% of $175 million
E.D. Pa.	*In re Automotive Refinishing Paint Antitrust Litig.*, MDL No. 1426, (E.D. Pa. 2004)	32% of $66.75 million
S.D. Fla.	*In re Managed Care Litig. v. Aetna, Inc.*, MDL No. 1334, 2003 WL 22850070 (S.D. Fla. Oct. 24, 2003)	35.5% of $310 million
D. Minn.	*In re Monosodium Glutamate Antitrust Litig.* MDL No. 1328, 2003 WL 297276 (D. Minn. Feb. 6, 2003)	30% of $81.4 million
E.D. Mich.	*In re Cardizem CD Antitrust Litig.* MDL No. 1278 (NGE), (E.D. Mich. Nov. 26, 2002)	30% of $110 million
N.D. Ala.	*In re Vesta Ins. Group, Inc. Sec. Litig.* No. 98-1407 (N.D. Ala. Dec. 10, 2001)	34.1% of $61 million

D. D.C.	*In re Vitamins Antitrust Litig.*, No. 99-197, 2001 WL 34312839 (D.D.C. Jul. 16, 2001)	34% of $360 million
M.D. Tenn.	*In re Prison Realty Sec. Litig.* No. 3:99-0458 (M.D. Tenn. Feb. 9, 2001)	30% of $111 million
E.D. Pa.	*In re Aetna Securities Litig.*, MDL No. 1219, 2001 WL 20928 (E.D. Pa. Jan. 4, 2001)	30% of $82.5 million
E.D. Pa.	*In re Ikon Office Solutions, Inc., Sec. Litig.* 194 F.R.D. 166 (E.D. Pa. 2000)	30% of $111 million
N.D. Cal.	*In re Informix Corp. Sec. Litig.* No. 9701289 (N.D. Cal. Nov. 23, 1999)	30% of $137 million
W.D. Pa.	*In re Westinghouse Sec. Litig.*, Nos. 91-354, 97-309, 97-960 (W.D. Pa. Oct. 19, 1999)	35.7% of $67.25 million
S.D. Tex.	*In re Lease Oil Antitrust Litig.* 186 F.R.D. 403 (S.D. Tex. 1999)	30% of $123 million
D. Utah	*In re Commercial Explosives Antitrust Litig.* MDL No. 1093 (D. Utah Dec. 29, 1998)	30% of $77 million
W.D. La.	*In re Combustion, Inc.* 978 F. Supp. 673 (W.D. La. 1997)	36% of $127 million
D. Minn.	*In re Airline Ticket Commission Antitrust Litig.* 953 F. Supp. 280 (D. Minn. 1997)	33.3% of $86.892 million
N.D. Ill.	*Gaskill v. Gordan* 942 F. Supp. 382 (N.D. Ill 1996)	38% of $43.69 million
S.D. Cal.	*In re National Health Laboratories Sec. Litig.* No. 99-1949 (S.D. Cal. Aug. 15, 1995)	30% of $64 million
D. Or.	*In re Melridge, Inc. Sec. Litig.* No. 87-1426 (D. Or. Mar. 19, 1992)	37.1% of $54 million[8]

[8] *See also Taft v. Ackermans*, No. 02 Civ. 7951 (PKL), 2007 WL 414493 (S.D.N.Y. Jan. 31, 2007) (Leisure, J.) (awarding 30% of $15.175 million); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588 (S.D.N.Y. 1992) (Mukasey, J.) (awarding 30% of $34 million); *McLeod USA Inc. Sec. Litig.*, No. C02-001 MWB, 2007 WL 81956 (N.D. Iowa Jan. 8, 2007) (awarding 30% of $30 million); *LaGrasta v. Wachovia Capital Markets, LLC*, No. 2:01-CV-251-FTM-29-DNF, 2006 WL 4824480 (M.D. Fla. Nov. 6, 2006) (awarding 30% of $30 million).

In addition to the fee awards of 30% or more in the cases listed above, many cases (generally of smaller magnitude) award 33⅓% to counsel as a standard in common fund cases.[9] Moreover, there are a number of additional cases of magnitude similar to this case in which percentage fees slightly under 30% have been awarded. *See e.g., In re Deutsche Telekom AG Sec. Litig.*, No. 00 Civ. 9475 (NRB) (S.D.N.Y. June, 7, 2005) (awarding 28% of $120 million settlement) (Buchwald, J.); *In re Oxford Health Plans, Inc. Sec. Litig.*, No. MDL 1222 (CLB), 2003 U.S. Dist. Lexis 26795 (S.D.N.Y. June 12, 2003) (Brieant, J.) (awarding 28% of $300 million settlement); *In re Sumitomo Copper* at 400 (Pollack, J.) (awarding 27.5% of $116 million settlement); *In re Prudential Securities Ltd. Partnership Litig.*, 912 F. Supp. 97 (S.D.N.Y. 1996) (Pollack, J.) (awarding 27% of $110 million settlement); *Dusek v. Mattel, Inc.*, CV 99-10864-MRP(C.D. Cal. Sep. 29, 2003) (awarding 27% of $122 million settlement);

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[9] *See, e.g., In re Marsh ERISA Litig.*, 265 F.R.D. 128 (S.D.N.Y. 2010) (awarding 33⅓% of $11.665 million); *Faican v. Rapid Park Holding Corp.*, No. 10CV1118 (JG), 2010 WL 2679903 (E.D.N.Y. Jul. 1, 2010) (awarding 33⅓% of $0.533 million); *In re Publication Paper Antitrust Litig.*, MDL No. 1631 (SRU), 2009 WL 2351724, at *1 (D. Conn. Jul. 30, 2009) (Underhill, J.); *Strougo v. Bassini*, 258 F. Supp. 2d 254 (S.D.N.Y. 2003) (awarding 33⅓% of $1.5 million); *RMED Int'l Inc. v. Sloan's Supermarkets, Inc.*, No. 94 Civ. 5587 (PKL), 2003 WL 21136726 (S.D.N.Y. May 15, 2003) (awarding 33⅓% of $0.975 million); *Maley* at 374 (awarding 33⅓% of $11.5 million); *In re Blech Sec. Litig.*, No. 94 Civ. 7696 (RWS), 2002 WL 31720381 (S.D.N.Y. Dec. 4, 2002) (awarding 33⅓% of $3 million); *Newman v. Caribiner Int'l Inc.*, No. 99 Civ. 2271 (S.D.N.Y. Oct. 19, 2001) (awarding 33⅓% of $15 million); *In re APAC Teleservices, Inc. Sec. Litig.*, No. 97 Civ. 9145 (S.D.N.Y. Dec. 10, 2001) (awarding 33⅓% of $21 million); *Klein v. PDG Remediation, Inc.*, No. 95 Civ. 4954 (DAB), 1999 WL 38179 (S.D.N.Y. Jan. 28, 1999) (awarding 33% of $0.5 million); *Adair v. Bristol Technology Systems, Inc.*, No. 97 Civ. 5874 (RWS), 1999 WL 1037878 (S.D.N.Y. Nov. 16, 1999) (awarding 33% of $0.975 million); *Becher v. Long Island Lighting Co.* 64 F. Supp. 2d 174 (E.D.N.Y. 1999) (awarding 33⅓% of $7.75 million); *Maywalt v. Parker & Parsley Petroleum Co.*, 963 F. Supp. 310 (S.D.N.Y. 1997) (awarding 33.4% of $8.25 million); *Cohen v. Apache Corp.*, No. 89 Civ. 0076, 1993 WL 126560 (S.D.N.Y. Apr. 21, 1993) (awarding 33⅓% of $6.75 million); *In re Allstar Ins. Sec. Litig.*, No. 88 Civ. 9282 (PKL), 1991 WL 352491 (S.D.N.Y. Nov. 20, 1991) (awarding 33⅓% of $2.46 million); *Greene v. Emersons, Ltd.*, No. 76 Civ. 2178 (CSH), 1987 WL 11558 (S.D.N.Y. May 20, 1987) (awarding 46.2% of $1.175 million).

See also In re Ravisent Technologies, Inc., Sec. Litig., No. Civ.A.00-CV-1014, 2005 WL 906361 (E.D. Pa. Apr. 18, 2005) (awarding 33⅓% of $7 million); *In re Corel Corp. Inc., Sec. Litig.*, 293 F. Supp. 2d 484 (E.D. Pa. 2003) (awarding 33⅓% of $7 million); *In re Engineering Animation Sec. Litig.*, 203 F.R.D. 417 (S.D. Iowa 2001) (awarding 33⅓% of $7.5 million); *Faircloth v. Certified Finance, Inc.*, No. Civ. A.99-3097, 2001 WL 527489 (E.D. La. May 16, 2001) (awarding 35% of $1.6 million); *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72 (D. N.J. 2001) (awarding 33⅓% of $4.5 million); *In re Unisys Corp. Sec. Litig.*, No. 99-5333, 2001 WL 1563721 (E.D. Pa. Dec. 6, 2001) (awarding 33% of $5.75 million); *In re Neoware Systems, Inc. Sec. Litig.*, No. Civ.A.98-CV-2582, 2000 WL 1100871 (E.D. Pa. Jul. 27, 2000) (awarding 33⅓% of $1.06 million); *In re Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal. 1989) (awarding 32.8% of settlement and noting "that in class action common fund cases the better practice is to set a percentage fee and that, absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%); *Muehler v. Land O' Lakes, Inc.*, 617 F. Supp. 1370 (D. Minn. 1985) (awarding 35.5% of $1.55 million).

In re Telectronics Pacing Systems, Inc., 137 F. Supp. 2d 1029 (S.D. Ohio 2001) (awarding 27.09% of $62.4 million settlement); *see also In re Comverse Tech.* at *6 (awarding 25% on $225 million settlement); *In re RJR Nabisco, Inc. Sec. Litig.*, MDL No. 818, 1992 WL 210138, at * 7 (S.D.N.Y. Aug. 24, 1992) (Mukasey, J.) (awarding 25% of $72.5 million settlement).

What all of these case demonstrate is that the consistent range for common fund percentage fee awards in cases of magnitude equal or greater than this case is approximately 27% - 35%, and that an award of 30% is in the lower to middle end of the range.

Class counsel do not contend that 30% – or any other percentage – is an automatic "benchmark" for a common fund award. Class counsel are aware that in *Goldberger*, the Second Circuit rejected the concept of a "benchmark" and ruled that each award must be decided on the basis of the circumstances of the case, *Goldberger* at 51, and, in particular, should reflect the level of risk associated with prosecuting each particular class action. *Id.* at 54 ("risk of success" is "'perhaps the foremost' factor to be considered" in determining award of fees). Thus, in cases where there is little risk of non-recovery – not this case – a lower percentage award is sometimes awarded. In *Goldberger*, for example, the Second Circuit ruled that the case (a securities fraud case arising out of the notorious Michael Milken-Drexel Burnham fraud prosecution) had "almost certain prospects of a large recovery from solvent defendants," benefitted from extensive investigation and legal work performed by federal authorities during civil and criminal actions, and raised no difficult legal issues. *Id.* at 53-54. Under such circumstances, the court ruled that the district court had not abused its discretion in refusing to award a percentage fee or in refusing to enhance the lodestar. *Id.* at 57. Similarly, in *In re Fine Host*, this Court found that there was little risk of non-recovery (the defendant in a securities fraud case had

not even moved to dismiss the plaintiff's 10b-5 action), and awarded only a 17.5% percentage fee in a case. 2000 WL 33116538 at *5.[10]

As discussed below, class counsel faced enormous risk of non-recovery of their time and litigation expenses on every front in this case: as to liability, as to class certification, and as to proof of damages. Unlike in a significant number of securities or antitrust class actions where a private action is brought only after a governmental enforcement action or criminal prosecution has identified the wrongdoing that establishes the right of relief, there was no prior governmental investigation or prosecution in this case that either identified a potential civil claim or reduced, in any fashion, class counsel's burden to establish plaintiffs' causes of action and prosecute their claims. *See, e.g., Gulf Oil* at 597 ("this is not a case where class counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill"); *Priceline.com* at * 5 (noting, with respect to risk of litigation that "the plaintiffs developed their own theory of liability and damages, as there was not a government prosecution in this case"); *contrast Goldberger*, at 53-54 (reduced fee justified by limited risk of non-recovery since "counsel benefitted from the spadework done by federal authorities during the criminal and civil actions brought against Drexel and Milken," and "[t]here was no groundbreaking issue which loomed significant in this case").

Rather, plaintiffs' claims are the product of counsel's hard investigatory work and creativity. They are based on the premise that settling claimants were defrauded of the full economic value of the

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[10] Different considerations may apply to the determination of attorneys' fees in "megafund" situations, commonly defined as class action settlements in excess of $100 million, *see Wal-Mart* at 123, in order to avoid extraordinarily large awards where the value obtained in the case is more a function of the size of the class than the efforts of counsel. *See, e.g., In re Rite Aid* at 302-03 (recognizing basis for declining percentage of recovery in megafund cases "is the belief that in many instances the increase [in recovery] is merely a factor of the size of the class and has no relationship to the efforts of counsel," but rejecting automatic application of declining percentage or other "overly formulaic approaches" in larger settlement cases); *accord In re Synthroid Marketing Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (criticizing declining scales in "megafund" cases as leading to economically irrational results that markets would not tolerate).

structured portion of their settlements by The Hartford's systematic practice of funding structured settlements with annuities issued by its own life insurance company and in the process retaining 15% of the economic value of the structures for itself. Plaintiffs contend that, as a result of these practices, The Hartford did not pay claimants the full amount of their settlements.

Defendants vigorously disputed plaintiffs' theory of recovery, asserting that – whether the amount of the settlement devoted to the structure was characterized as the "cost" of purchasing the resulting annuity or the "value" of the structured portion of the settlement – the streams of payments the settling claimants received were exactly what they bargained for. The Hartford further contended that its pricing of annuities used to fund structures for class members was no different than the pricing methodology used by other life insurance companies and was identical to Hartford Life's pricing of structured settlement annuities that it sold to unaffiliated insurance companies. As this Court recognized, it was unknown whether a jury would ultimately side with defendants' interpretation.

Class certification – without which this case had virtually no value[11] – was also hotly disputed. The releases associated with each annuity contained integration clauses which The Hartford argued precluded proof of a common class-wide representation outside the confines of those releases. Similarly, The Hartford argued that individualized issues of reliance precluded certification of a fraud class (and even of the RICO class after the Supreme Court eliminated reliance as an element of that cause of action). Defendants asserted throughout this litigation that plaintiffs would be unable to

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[11] At the time this action was commenced, plaintiffs' theory of liability was that defendants had wrongfully underpaid 4% of the cost or value of structured settlements. Named Plaintiff Spencer's structured settlement had a purported cost of $52,000, and her actual loss under the 4% theory was $2,080; plaintiff Strickland's structured settlement was $50,071, and his actual loss under this theory was $2,003; and plaintiff McDuffie's structured settlement was $36,768, and his actual loss under this theory was $1,471.

It would, obviously, have been wholly infeasible for any of the Named Plaintiffs to retain counsel on an hourly rate (or agree to pay the likely litigation expenses necessary) to recover these sums. Indeed, no ethical attorney would (or could) have recommended that any of the named plaintiffs enter into an hourly rate representation. The only practical way this case could have a value substantial enough to warrant the time and expense that would likely be required was if it could be pursued on a class basis.

obtain certification of a national class on any of their legal theories and – even after the Second Circuit denied review of this Court's certification Order – repeatedly asserted that either this Court would, on subsequent motion, decertify the class or that its certification Order would be reversed on appeal.

Finally, according to defendants, proof of class damages was very problematic because defendants had made the payments that each claimant had bargained for and each claimant had received the same structure he or she would have received if it had been funded with a like annuity purchased on the open market.

As the cases cited in the text above make clear, where counsel assumes substantial risk and obtains an excellent result for the class, a percentage award of 30% or more is appropriate.

Courts have referred to several studies that confirm that a percentage fee in the range of 30% of the settlement is customary in this kind of litigation. A study undertaken by National Economic Research Associates, an economic consulting firm, surveyed 656 shareholder class actions and determined that "regardless of size, fees average 32 percent of the settlement." *See In re Linerboard,* at *14, *citing* to Dunbar, et al, "Recent Trends IV, What Explains Filings and Settlements in Shareholder and Class Actions (NERA, 1996) at 12-13. The Third Circuit has noted that the Dunbar study demonstrates that for "class action settlements over $10 million ... the average percentage fee recovery [was] 31%." *In re Rite Aid* at 303. A second study by the Federal Judicial Center involving class actions resolved or settled over a two year period in four selected federal districts found a median percentage fee award range of 27-30%. *Id.* And a third study has demonstrated that even in cases with settlements between $100 and $200 million – where the percentage awarded would be expected to be lower – fee awards in the 25-30% range are "fairly standard." *Id.*; *accord In re Rite-Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (surveying fee awards in similar cases, including

review of 289 class action settlements that demonstrates "average attorneys' fees percentage [of] 31.71% [with a] median [value that] turns out to be one-third"); *In re Linerboard* at *13 (30% fee award on $202 million settlement comparable to recent fee awards in recent cases); *see In re Activision* at 1377 (surveying class action fee awards, including "many [class action cases] from the Southern and Eastern Districts of New York" and concluding "nearly all common fund awards range around 30%").

The studies cited by the Third Circuit in *In re Rite-Aid* were summarized in a Declaration submitted to the district court in that case by Professor John C. Coffee, Jr. of Columbia University Law School, one of the country's leading authorities on class action litigation. In his Declaration, Professor Coffee also referenced another study of 1,280 securities class action cases that similarly found that the average fee awarded to class counsel in securities class actions amounted to 32% of the settlement fund. In his Declaration, Professor Coffee concluded that "30% seems to be the operative fee ... in commercial class actions."[12]

2. A 30% Percentage Fee Reflects What Would Customarily Be Negotiated in the Private Marketplace.

The 30% percentage fee requested by class counsel is appropriate because it fairly reflects what would customarily be negotiated in the private marketplace in a complex commercial tort case with significant risk of non-recovery.

"When deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Marketing* at 718. The goal of the fee setting process is to "determine what the lawyer would receive if he were selling his services in the

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[12] Declaration of John C. Coffee, Jr. dated April 2, 2001, ¶ 27, submitted in *In re Rite-Aid*, 269 F. Supp. 2d 603 (E.D. Pa. 2003) (copy attached [without attachments] to Golub Dec. as Exhibit F).

market rather than being paid by Court Order." *In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 568 (7th Cir.1992) (Posner, J.).

Thus, this Court should look to the private market when assessing the reasonableness of a percentage fee request. As Judge Mukasey has noted,

> What should govern [fee] awards is not the essentially whimsical view of a judge, or even a panel of judges, as to how much is enough in a particular case, but what the market pays in similar cases.

In re RJR Nabisco at * 7; *accord Goldberger* at 52 ("we agree that ... market rates, where available, are the ideal proxy for [attorneys'] compensation").

In applying the percentage of recovery method, courts seek to tailor fee awards to replicate the marketplace conditions that influence attorneys' fees in contingent fee commercial tort cases. The percentage approach "is uniquely the formula that mimics the compensation system actually used by individual clients to compensate their attorneys," *In re Sumitomo* at 397; and thus "can serve as a proxy for the market in setting counsel fees." *In re American Bank Note* at 432; *In re Lloyd's* at 26 ("the percentage approach most closely approximates the manner in which private litigants compensate their attorneys in the marketplace contingency fee model").

As the Court of Appeals for the Third Circuit has noted,

> The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund "in a manner that rewards counsel for success and penalizes it for failure."

In re Rite Aid at 300, *quoting In re Prudential Ins. Co.*, 148 F.3d 283, 333 (3d Cir. 1998).

This consideration is particularly salient here, since the benefits obtained for each of the nearly 22,000 class members would not have been possible absent the willingness of class counsel to assume this representation on a contingent fee basis. This litigation was initiated by three individual plaintiffs,

each of whom had entered into a small structured settlement with defendants. None of the named plaintiffs would ever have been able to pursue and maintain this action had he or she been required to pay experienced litigation counsel on an hourly basis or pay the hundreds of thousands of dollars in litigation expenses counsel have incurred. Each of the named plaintiffs entered into a fee agreement with class counsel that provided for representation on a contingent fee basis.

While some of the class members have larger structured settlements than the named plaintiffs, it would have made no sense for any class member to compensate counsel on an hourly basis for the thousands of hours and hundreds of thousands of dollars of expenses necessary to litigate this case. All of the class members benefitted greatly from counsel's willingness to prosecute the case on a percentage of recovery basis.

The percentage method of recovery was essential to enable the class members to benefit from this action, without expense, and to attract experienced counsel by offering an opportunity for sufficient compensation to warrant the risk that no fee would be earned. Courts have recognized that "in order to attract well-qualified class counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives." *In re WorldCom. Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005).

As one court has stated in this regard:

> [It is] imperative that the filing of such contingent lawsuits not be chilled by the imposition of fee awards which fail to adequately compensate counsel for the risks of pursuing such litigation and the benefits which would not otherwise have been achieved but for their persistent and diligent efforts. Private attorneys should be encouraged to take the risks required to represent those who would not otherwise be protected from socially undesirable activities....

Maley at 374; *accord Goldberger* at 51 (noting the "commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest"). Counsel

in this case, who assumed the risk of recovering no fee for thousands of hours of legal time and no recovery of hundreds of thousands of dollars of litigation expenses, are entitled to a percentage of recovery award not only to reward them for the risk they assumed, but as an incentive to counsel in future cases to assume a similar risk.

In approving the percentage fee awards in the cases listed above, courts have consistently recognized that a fee in the range of 30% is appropriate because that percentage reflects the going rate in the private marketplace for complex contingency fee litigation. "An award of thirty percent is in line with what is routinely privately negotiated in contingency fee tort litigation." *In re Aetna* at * 14; *In re Linerboard* at *15 (30% is at or below market rate for commercial class action litigation); *In re U.S. Bioscience Securities Litig.*, 1994 WL 485935, at *15 (E.D. Pa. 1994) (noting Special Master recommendation that 30% is appropriate market rate for contingent fee complex litigation).

Indeed, not surprisingly, the three Named Plaintiffs each engaged counsel on a contingent fee basis, agreeing to pay a contingent fee of 33⅓% of any recovery on their individual claims.

3. The Lodestar Cross-Check Supports the Requested Fee.

Class counsel have expended over 11,900 hours of legal and paralegal time in their prosecution of this case, with a resulting lodestar of over $5.881 million dollars. [*See* Golub Dec. at ¶¶ 68-71]. The requested fee would support a lodestar multiplier of 3.70, well within the customary range of a reasonable lodestar multiplier. *See e.g., In re EVCI* at *17 (noting that "lodestar multipliers of nearly 5 have been deemed 'common' by courts in the Southern District of New York); *Maley* at 369 (awarding fee equal to 4.65 multiplier was "well within the range awarded by courts in this Circuit and courts throughout the country"); *In re Linerboard* at *16 *citing*, Stuart J. Logan, *et al*, *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Rep. 167 (2003) ("the average multiplier approved in

common fund class actions from 2001-2003 was 4.35 and during the 30 year period from 1973-2003, the average multiplier approved in common fund class actions was 3.89").

B. The Requested Fee Is Fair and Reasonable as a Percentage of the Fund Created for the Benefit of Class Members.

The Second Circuit has set forth six factors that should be considered in determining the reasonableness of the fee in common fund class action cases:

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

Goldberger at 50. Consideration of the relevant *Goldberger* factors clearly supports an award of a fee of 30% of the settlement fund to class counsel in this case.

1. The Significant Time and Labor Expended by Class Counsel

The first factor set forth in *Goldberger* for determining an appropriate fee is "the time and labor expended by counsel." *Id.* Class counsel have expended in excess of 11,900 hours of time to pursue this case. The time and labor required to successfully prosecute this litigation and achieve an outstanding settlement for the settlement class fully justifies the requested fee. This case has been vigorously litigated from its commencement. The Hartford – a large company with virtually unlimited funds at its disposal to mount a defense – was represented during the course of this litigation by highly experienced and capable counsel from one regional and three national law firms who mounted a vigorous defense at every step of the litigation.

Class counsel recognized from the outset that a successful prosecution of plaintiffs' claims necessitated a team approach. Plaintiffs were originally represented by the law firms of Silver Golub & Teitell, LLP of Stamford, Connecticut, Berger & Montague, P.C. of Philadelphia, Pennsylvania, and

the Risk Law Firm of Tulsa, Oklahoma, and were joined in 2006 by the District of Columbia law firm of Zuckerman Spaeder LLP. Plaintiffs' four law firms worked on various aspects of the prosecution and coordinated their efforts and strategy with regular team conferences. Over the course of nearly five years of litigation, sixty-seven attorneys and paralegals from the four firms participated in the prosecution of this action.

The successful litigation of this matter involved:

• extensive pre-filing investigation into The Hartford and its subsidiaries' claims settlement practices, including their relationship with cooperating broker entities;

• drafting comprehensive fact-specific pleadings, including a 42-page Complaint, a 23-page RICO Case Statement, and a 75-page Amended Complaint.

• litigating defendants' Motion to Dismiss which challenged every legal theory in plaintiffs' Amended Complaint, entailed voluminous briefing – including research into the law in six separate jurisdictions – and extensive oral argument before the Court. As a result of class counsel's efforts, defendants' Rule 12(b) challenges were denied in their entirety.

• preparation of a 41-page Second Amended Complaint based on claims which were unknown to plaintiffs and their counsel at the outset of the litigation but were ascertained only as a result of discovery undertaken in this action. Plaintiff's proposed Second Amended Complaint also entailed extensive litigation and was only allowed significant briefing by the parties as well as more than two hours of oral argument before the Court.

• complex class certification proceedings, including early engagement of expert assistance to develop an appropriate protocol to identify a representative sample of the more than 22,000 potential class members' claim files in order to permit the parties to make statistically meaningful assessments of the nature of the representations made to potential class members about the cost and value of their respective settlements with The Hartford. As detailed in Golub Dec. at 7-8, the development and implementation of this protocol entailed analysis of over 96,000 pages of claims files, the analysis of a stratified statistical sample of claim files and the development of an expert statistical methodology to extrapolate from that analysis to determine the size and characteristics of various sub-classes of the potential plaintiff class. The successful development and implementation of this protocol was ultimately instrumental in enabling plaintiffs to obtain class certification in this action, and resulted in the outstanding settlement on behalf of the class beneficiaries.

• extensive document and deposition discovery, including review and analysis of over 540,000 pages of discovery produced by defendants and third party brokers, and depositions across the country.

• significant discovery motions practice, including repeated motions to compel defendants to cooperate in depositions, opposition to defendants' efforts to stay all proceedings, motions for protective order, and for expedited discovery orders in support of dozens of fact depositions of key executives of The Hartford responsible for the development of defendants' program for the settlement of claims through sales of Hartford Life annuity policies as well as third party brokers who participated in the Broker Assistance Program which supported The Hartford's annuity sales practice.

• extensive litigation of plaintiff's Motion for Class Certification, involving voluminous submissions in support of the Motion, including review of the laws of 51 separate jurisdictions concerning the four causes of action as to which plaintiffs sought class certification, 800 pages of appendices to plaintiffs' memoranda in support of the Motion, and three separate sur-reply notices of additional relevant authority.

• Preparation of pleadings in opposition to defendants' Rule 23(f) petition for interlocutory appeal of this Court's class certification Order, successfully prevailing over defendants' appellate counsel, the former Solicitor General of the United States.

• development of a class-wide damages analysis based on the statistical sampe of claim files developed by plaintiffs' expert on issues of class certification.

• extensive merits and damages expert discovery, including production of substantial expert reports, and rebuttal reports and depositions of multiple experts.

• complex settlement negotiations, including two days of mediation with an extremely able and experienced mediator and involving submission of voluminous mediation statements and exhibits

• protracted negotiation of the (36-page) Settlement Agreement and its exhibits, including, *inter alia*, a plan of allocation of the settlement, mail and publication notice, and a complex escrow agreement covering settlement funds and extensive dealings with the Claims Administrator and escrow bank to effectuate the procedures contemplated by the parties' Settlement Agreement.

• extensive dealings with the professional Claims Administrator to develop policies and procedures for class administration after the Court's Order granting class certification, including for issuance of mail and publication notice, development of an informational settlement website, responding to questions from class members, weekly tracking of class member responses to the initial notice of class eligibility.[13]

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[13] The legal work on this litigation, moreover, will not end with the Court's approval of the settlement. Plaintiffs' co-counsel have, to date, responded to hundreds of inquiries from class members concerning both the Order certifying the class and the proposed settlement. Counsel reasonably anticipate that they will be required to expend considerable additional time after approval of the settlement in responding to continuing inquiries from class members and overseeing the claims administration process.

The 3.70 multiplier on the more than $5.881 million of time falls well within the range of multipliers found reasonable for cross-check purposes by courts in common fund cases, *see* cases collected at pp. 35-36. & 36 n. 17, *infra*, and is fully justified here given the effort required, the significant risks faced and overcome and the outstanding results achieved on behalf of the class beneficiaries.

2. The Magnitude, Complexity and Risks of the Litigation

The second and third *Goldberger* factors are the magnitude, complexity, and risk of the litigation. *Goldberger* at 50. These considerations clearly support the fee requested in this case.

The Second Circuit has long recognized "the risk of success as 'perhaps the foremost' factor to be considered in determining [a reasonable award of attorneys' fees]." *Id.* at 54. The risk is measured as of the commencement of the case, *id.* at 55, rather than with the benefit of hindsight after prosecution of the case proves successful.

The settlement achieved in this matter is an outstanding one precisely because the risks of litigation here were so substantial. Plaintiffs faced significant risk that they would be unable to prevail on any theory of liability; that they would be unable to obtain or sustain class certification; and that, even if they prevailed on class certification and established liability, they would be unable to prove significant damages for class members.

Risk that plaintiffs would not prevail: Plaintiffs faced substantial factual and legal arguments that they could not prevail on their asserted causes of action including The Hartford's contentions that:

- plaintiffs' claims for breach of contract should fail because each claimant received the promised stream of payments described in each release and, thus, received the benefit of his or her bargain;

- plaintiffs claims for fraud should fail because defendants either had no statutory or common law obligation to disclose its annuity pricing methodology, or because its representations concerning

the "cost" or "value" of the structured portion of the settlement accurately reflected the premium price, or because plaintiffs would be unable to establish the requisite fraudulent intent;

• plaintiffs claims for unjust enrichment should fail because they were barred by the terms of the parties' express contractual undertakings or because plaintiffs would be unable to demonstrate that defendants were unjustly enriched by the annuity pricing scheme;

• plaintiffs' RICO cause of action would fail because plaintiffs could not establish the predicate wire or mail fraud if the representations as to the "cost" or "value" of the settlements were not fraudulent, or because plaintiffs would be unable to establish an enterprise based on an "association in fact" between The Hartford and the independent brokers sufficient to give rise to RICO statutory liability.

Indeed, well into this litigation, both in its Class Certification Order and at oral argument on plaintiffs' Motion for Preliminary Approval of the Settlement, this Court observed that the outcome at trial was uncertain:

> Ultimately, defendants may prevail on the merits by demonstrating that the representations were not fraudulent. They may also succeed in limiting the definition of those damaged (on summary judgment or at trial) to those who fall into one subclass or the other - for example, those whose representations specified as "value"' as opposed to "cost".... Of course, a jury may ultimately decide that plaintiffs received what they bargained for and thus suffered no injury. Or they may decide that the 'value' plaintiffs suffered an injury but the 'cost' plaintiffs did not.

Spencer v. The Hartford Financial Services Group, Inc., 256 F.R.D. 284, 297-98 (D.Conn. 2009).

As the Court stated at the hearing on preliminary approval of the settlement:

> ...I will note that the Hartford has from the beginning clearly and vigorously asserted their view that they did nothing wrong. That they gave to each of the settling plaintiffs a product which is what it would have cost that settling plaintiff if they had gone out to buy it from the Travelers or some other annuity company. ....
>
> ... I[t] strikes me that the jury could have said at the end of the day they got what they asked for. They wanted an annuity. This is what the annuity cost and they got it. These are different companies. They aren't the same and I think you could have walked away with nothing.

[Tr., June 7, 2010 at 25-28].

Risk that the class would not be certified: There were also significant risks at the outset of this litigation that plaintiffs' claims would not be certified or that a provisional certification might be subject to reversal either at the trial level or on appeal. These risks included a finding that, since the representations of cost and value made to the settling claimants were not necessarily identical across the class, a court would find that individualized issues concerning the nature of those representations predominated over any common issues such that class certification was inappropriate. In particular, defendants vociferously asserted both in this Court and in the Court of Appeals that individualized questions concerning the extent and reasonableness of any particular claimant's reliance on the representations made in the claim settlement documents precluded certification of a class on any of the legal theories asserted in plaintiffs' Second Amended Complaint, going so far as to submit more than 2,000 claim file documents in the appendix to its Memorandum in Opposition to plaintiffs' Motion for Class Certification in an effort to demonstrate the assertedly individualized nature of any claimant's reliance on defendants' representations in this case.[14] Although class counsel believed that their views were correct and that the class should be certified, defendants' arguments presented real risks in the context of the litigation.

There were also substantial risks that, even if a court found that common *factual* questions predominated, variations among the laws of the 51 jurisdictions in which the putative class members reside either precluded class certification entirely or rendered it inadvisable on plaintiffs' state law claims. Thus, with respect to the one state law class claim (fraud) which this Court did certify, defendants contended that differences in state law concerning the requisite burden of proof, the need to

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[14] Indeed, during the early stages of this litigation, the Second Circuit rendered two high-profile decisions the The Hartford asserted made class certification in this case problematic. *See In re Initial Public Offerings Securities Litigation*, 471 F.3d 24 (2d Cir. 2006); *McLaughlin v. American Tobacco Company*, 522 F.3d 215 (2d Cir. 2008).

demonstrate justifiable and/or reasonable reliance, the availability of punitive damages, the relevant statute of limitations or the applicability of the economic loss doctrine precluded certification of a nation-wide class. Similar risks existed at the outset of the litigation that plaintiffs would be unable to make the requisite showing for certification of the other state law claims which this Court, in fact, did not certify.

Risk that plaintiffs would be unable to prove damages: Plaintiffs also faced the risk that they would be unable to prove substantial damages. Defendants vigorously disputed plaintiffs' claims of damages in this action, asserting, among other things, that (a) claimants received their "bargained for" stream of payments, (b) the value of the structures that claimants received as part of their settlements was equal to or greater than the value of comparable investments in the market, particularly accounting for the tax-free nature of those annuity payments and the guaranteed returns offered by an annuity; and (c) any damages model developed by plaintiffs could not account for subjective considerations that would affect the value of the settlement for each individual claimant. Defendants also vigorously attacked the actuarial assumptions in plaintiffs' expert reports and disclosed two experts to support that attack. At trial, the damage assessments of plaintiffs' and defendants' experts would have varied substantially and, in the end, this crucial element at trial would likely have reduced to a "battle of experts." The reaction of a jury to such expert testimony is highly unpredictable and, as this Court recognized, there was substantial risk that plaintiffs would be unable to prevail on the issue of damages or that a jury would award minimal damages.[15]

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[15] Although risk is assessed from the outset of the litigation, it is also worth noting that events that occurred during the course of the litigation also created some risk that any verdict against The Hartford could not be collected. During the national economic crisis in the fall of 2008, and after The Hartford revealed substantial investment exposure in both Lehman Brothers and American International Group, and sustained a third quarter loss of $2.6 billion, the company's stock price fell dramatically. At the time, there was substantial concern in the investment community that The Hartford did not have sufficient capital to sustain its losses and might be required to seek bankruptcy protection.

As the Second Circuit has observed, the contingent nature of counsel's representation is an important factor in determining a reasonable award of attorneys' fees:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

Detroit v. Grinnell Corp., 495 F.2d 448,470 (2d Cir. 1974) (citation omitted); see *In re American Bank Note* at 433 ("[I]t [is] appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award.") (citation omitted); *In re Warner Comm. Sec. Litig.*, 618 F. Supp. 735, 747 (S.D.N.Y. 1985) ("Numerous cases have recognized that the attorneys' contingent fee risk is an important factor in determining the fee award."), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

Class counsel undertook this large, complex action on a wholly contingent fee basis, knowing that it would require them to risk a tremendous amount of time and expense to prosecute the action appropriately. Counsel's enormous contingency risk cannot be seriously disputed. Class counsel litigated plaintiffs' claims for almost five years and, in the absence of a fair, reasonable and adequate settlement that properly furthered the interests of the class, were prepared to begin a full trial of this matter in September of this year, even if it meant risking the loss of their enormous investment of attorney time and substantial out-of-pocket expenses. As a matter of economic reality, given the size of each individual class member's claim, absent counsel willing to assume that contingency risk, class members would not have received the benefits obtained by this settlement.

In *Goldberger*, the Second Circuit noted that "[r]isk falls along a spectrum, and should be accounted for accordingly." *Id.* at 54. Taking into account the significant litigation and contingency risks in this case, the attorneys' fees requested by class counsel are justified.

3. The Quality of Representation and the Result Achieved

The result achieved and the quality of the services provided are also important factors to be considered in determining the amount of reasonable attorneys' fees. *Id.* at 50; *see Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained").

In this case, the quality of the representation of class counsel is best evidenced by the extraordinary recovery obtained for the class – a $72.5 million all cash settlement fund. This settlement is an exceptional result for the members of the Settlement Class, each of whom stands to recover, on average, thousands of dollars in additional compensation arising out of their structured settlements with The Hartford.

The gross settlement payment represents 4.5% of each dollar of premium used to purchase the annuities funding the Class Members' structured settlements. The 4.5% recovery exceeds the 4% sought in the plaintiffs' initial complaint and represents a highly favorable 30% recoupment of plaintiffs' actual loss on class counsel's expanded 15% theory.

Indeed, as this Court commented at the hearing on preliminary approval of the settlement:

> In terms of the agreement itself, I make no final judgment here today but the court's initial assessment is that it is a very favorable outcome for the plaintiffs. In effect, the plaintiffs' initial theory was that they were harmed in the amount of four percent of the total annuity .. And only subsequently after some discovery ... plaintiffs enlarge[d] their claim to be a 15 percent claim of annuity as their measure of damages. The recovery now in the settlement is in excess of the original theory of the claim at four and a half percent of the total annuity premium.
>
> It is almost a third ... of the larger ... theory of the case by the plaintiffs as to which there were substantial litigation risks.

[Tr., June 7, 2010, at 25].

A 2009 study of trends in securities class action settlements has shown that in settlements of between $50 and $124 million, the median settlement as a percentage of investor losses is 3.9%, substantially lower than the percentage of loss recovered for plaintiffs in this case.[16] Indeed, even after deduction of the attorneys' fees requested in this application, each class member will still receive a net benefit from the settlement equal to 21% of their maximum actual losses – more than five times the 2009 median. Moreover, at plaintiff's counsel's insistence, *all* net settlement funds will go to class members. None of the settlement funds is subject to any reversion to the defendants.

In evaluating the quality of the representation provided by class counsel, it is important to note that, throughout this litigation, The Hartford demonstrated that it was willing to invest substantial resources to defend against plaintiff's claims, hiring some of the premier law firms in this country. In addition to retaining the law firm of Wiggin & Dana which has represented The Hartford for years and has significant expertise in insurance law matters, The Hartford was also represented in this litigation by experienced and skilled lawyers from three national law firms – Morrison & Foerster LLP, WilmerHale and Baker Botts LLP – with well-deserved reputations for vigorous advocacy in the defense of complex civil cases. Defendants were so tenacious in their determination to defeat class certification in this case that they hired the former Solicitor General of the United States to pursue its attempt to obtain interlocutory Rule 23(f) review by the Second Circuit of this Court's Order granting class certification of plaintiff's RICO and fraud claims. The ability of class counsel to obtain this outstanding settlement in the face of such formidable legal opposition confirms the quality of counsel's representation. *See Taft v. Ackermans*, No. 02 Civ. 7951 (PKL), 2007 WL 414493, at *11 (S.D.N.Y.

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[16] *See* Ryan, *Securities Class Action Settlements, 2009 Review and Analysis* (Golub Dec., Ex. D) at 5; *see also* Stephanie Plancich, Ph.D., Svetlana Starykh, *2008 Trends in Securities Class Actions*, at 14 (NERA. 2008) (Golub Dec., Ex. E) (median ratio of settlement to investor losses of cases settled in 2008 was 2.7%, and ranged between 2.2% and 3.2% between 2002 and 2008).

Jan. 31, 2007) (in determining appropriateness of fee, courts consider backgrounds of the lawyers involved in the suit); *In re KeySpan Corp. Sec. Litig.*, No. CV 2001-5852 (ARR), 2005 WL 3093399, at *11 (E.D.N.Y. Sep. 30, 2005) ("quality of opposing counsel is also important in evaluating the quality of Class Counsel's work").

4. The Relation of the Requested Fee to the Settlement

The fifth *Goldberger* factor – the relation of the requested fee to the Settlement – also supports the fee requested in this case. As noted above, the requested fee is fully consistent with fee awards in comparable cases within the Second Circuit (and nationally), in light of the unique circumstances of this case, the intense efforts of class counsel and the extraordinary result obtained on behalf of the plaintiff class beneficiaries.

The requested fee is also fully consistent with fees "likely to have been negotiated between private parties in a similar case." *In re Aetna* at *14. As one court has noted:

> What the market would pay is significant because, as the Seventh Circuit has explained, the goal of the fee setting process is to "determine what the lawyer would receive if he were selling his services in the market rather than being paid by Court Order." [*quoting In re Continental Ill. Sec. Litig.* at 568].

In re Linerboard at *15; *accord In re Synthroid Marketing* at 718 ("[W]hen deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time."); *In re Continental Ill.* at 572 ("The object ... is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation."); *In re RJR Nabisco* at *7 ("What should govern such [fee] awards is not the essentially whimsical view of a judge, or even a panel of judges, as to how much is enough in a particular case, but what the market pays in similar cases.").

Private plaintiffs in Connecticut and nationwide in contingent personal injury cases and commercial cases arising out of personal injury claims routinely pay fees of 1/3 or more of the total settlement. Indeed, the 30 percent award requested is less than the 1/3 fee to which each of the named plaintiffs in this action originally agreed with class counsel. *In re Aetna* at *14 (30% is in line with "what is routinely privately negotiated in contingency fee tort litigation").

5. Public Policy Considerations

The sixth *Goldberger* factor, public policy considerations, also supports the requested fee in this case. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device").

In prosecuting the civil RICO claims (and their ancillary state law causes of action) in this case, class counsel functioned as "private attorneys general," providing a supplemental enforcement mechanism to the governmental regulatory and prosecutorial function. *Rotella v. Wood*, 528 U.S. 549, 557 (2000) ("The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity."); *Agency Holding Corp.* at 151 (civil RICO "bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate"); *Sedima v. Imrex Co.*, 473 U.S. 479, 493 (1985) (describing the "private attorney general provision" in civil RICO as "designed to fill prosecutorial gaps").

As the Second Circuit has explained in the analogous context of antitrust actions, awarding appropriate attorneys fees is important to create the necessary incentive for the "private attorney

general" where enforcement of statutory protections or vindication of public policy depends on such "private attorney general" litigation:

> [F]ew would dispute the basic proposition that one whose labors produce a favorable result deserves adequate recompense. Such a notion is particularly applicable in the area of antitrust class action, which depends heavily on the notion of the private attorney general as the vindicator of the public policy. In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation.

Alpine Pharmacy at 1050 (citations omitted); *Allapattah* at 1217 ("[c]ounsel has risked millions of dollars in unreimbursed attorneys' time and additional millions in out-of-pocket costs. Unless that risk is compensated with a commensurate reward, few firms, no matter how large or well financed, will have any incentive to represent the small stake holders in class actions against corporate America, no matter how worthy the cause or wrongful the defendant's conduct").

D. A "Cross-Check" of Class Counsel's Lodestar Demonstrates the Reasonableness of the Requested Award.

Under *Goldberger*, a district court applying the percentage of recovery method is "encourage[d]" to "cross-check" the reasonableness of the fee calculated as a percentage of the common fund by comparing that fee to that which counsel would be entitled under the lodestar method. *Goldberger* at 50. This cross-check serves to ensure that counsel is not receiving a "windfall" from a percentage award without having put in legal time to warrant the award. Where the lodestar is "used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Id.* The court need not review actual time records, but may rely on summaries, as the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case. *Id.*

The award of attorneys' fees is vested in the sound discretion of the district court and will only be reviewed for abuse of discretion. *Id.* at 47-48. Abuse of discretion review of a district court's fee

determination is especially deferential since "the district court, which is intimately familiar with the nuances of the case, is in a far better position to make [such] decisions than is an appellate court, which must work from a cold record. *Id.*

The lodestar cross-check is exactly what it says: it is a cross-check to assure that the fees awarded pursuant to the percentage of recovery method are within a reasonable range, but is not itself either the method for calculating reasonable fees, nor a rigid parameter for an award of fees. As the Third Circuit has noted:

> ... we reiterate that the percentage of common fund approach is the proper method of awarding attorneys' fees. The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. ... Furthermore, the resulting multiplier need not fall within any pre-defined range, provided that the DistrictCourt's analysis justifies the award. Lodestar multipliers are relevant to the abuse of discretion analysis. But the lodestar cross-check does not trump the primary reliance on the percentage of common fund method.

In re Rite Aid at 306-07.

Where counsel have undertaken a difficult matter on contingency and have secured a favorable result for the class, the normal multiplier is 4-5 times the lodestar. *In re EVCI* at * 17 ("lodestar multipliers of nearly 5 have been deemed 'common' by courts in the Southern District of New York"); *Maley* at 369 (4.65 multiplier was "well within the range awarded by courts in this Circuit and courts throughout the country"); *In re Nasdaq Market-Makers* at 489 ("multipliers of between 3 and 4.5 have become common"); *In re Linerboard* at *14, *quoting* Logan, *et al*, *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Rep. 167 (2003) ("the average multiplier approved in common

fund class actions from 2001-2003 was 4.35 and during the 30 year period from 1973-2003, the average multiplier approved in common fund class actions was 3.89").[17]

Class counsel have, together, devoted over 11,900 hours to plaintiffs' claims, as follows:

Silver Golub & Teitell LLP

David S. Golub, Esq.	– 1,343.34 hours
Jonathan M. Levine, Esq.	– 1,106.99 hours
Others	– 330.99 hours

Berger & Montague

Peter R. Kahana, Esq.	– 1,137.00 hours
Steven L. Bloch, Esq.	– 2,133.50 hours
Others	– 1,471.05 hours

Zuckerman Spaeder LLP

Carl S. Kravitz, Esq.	– 961.30 hours
Ellen D. Marcus, Esq.	– 622.90 hours
Caroline E. Reynolds, Esq.	– 1,225.20 hours
Others	– 709.60 hours

Risk Law Firm

Richard B. Risk, Jr.	– 599.10 hours.

[Golub Dec. at ¶ 68].

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[17] *See also In re Interpublic Secs.*, 2004 WL 2397190, at *12 (S.D.N.Y. Oct. 26, 2004) (approving fee award representing multiplier of 3.96); *Deutsche Telekom*, 00 Civ. 9475 (awarding a multiplier of approximately 3.96 in a $120 million settlement); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 197 (S.D.N.Y. 1997) (approving multiplier of 5.5); *In re Buspirone Patent*, 01-MD-1410, 2003 U.S. Dist. LEXIS 26538, at *11 (S.D.N.Y. Apr. 11, 2003) (awarding multiplier of 8.46 in settlement for $220 million); *Newman*, 99 Civ. 2271 (percentage fee award of 33⅓% representing multiplier of 7.7); *In re Charter Comm. Inc. Sec. Litig.*, 2005 WL 4045741, at * 18 (E.D. Mo. June 30, 2005) (multiplier of 5.61 "falls within the range of multipliers found reasonable for cross-check purposes by courts in other similar actions, and is fully justified here given the effort required, the hurdles faced and overcome, and the results achieved"); *In re Rite Aid*, 2005 WL 697461 at *2-3 (E.D. Pa. Mar. 24, 2005) (approving multiplier of 6.96); *In re Xcel Energy, Inc. Sec. Derivative & ERISA Litig.* 364 F. Supp. 2d 980 (D. Minn. 2005) (approving multiplier of 4.7); *In re Cendant Corp. Prides Litig.*, 51 F. Supp.2d 537 (D.N.J. 1999), *vacated and remanded*, 243 F.3d 722 (3d Cir. 2001), *on remand*, No. 98-2819 (D. N.J. June 11, 2002) (approving multiplier of 5.28); *DiGiacomo v. Plains All Am. Pipeline*, 2001 WL 3463337, at *10 (S.D. Tex. Dec. 18, 2001) (approving multiplier of 5.3).

The current[18] hourly rates for the attorneys principally responsible for the prosecution of this litigation are, as follows:

Silver Golub & Teitell LLP

David S. Golub, Esq.	– $600/hr.
Jonathan M. Levine, Esq.	– $525/hr.

Berger & Montague

Peter R. Kahana, Esq.	– $650/hr
Steven L. Bloch, Esq.	– $525/hr

Zuckerman Spaeder LLP

Carl S. Kravitz, Esq.	– $ 750/hr
Ellen D. Marcus, Esq.	– $525/hr
Caroline E. Reynolds, Esq.	– $435/hr.[19]

These hourly rates are consistent with hourly rates of local and out-of-state class counsel in other class action cases in this District, reviewed and approved in lodestar cross-checks by Judges Covello, Arterton and Droney. *See* Golub Dec. at ¶ 70, citing to fee applications in *Priceline.com*, No. 3:00-CV-1884 (AVC); *Norflet v. John Hancock Life Ins. Co.*, No. 3:04cv1099 (JBA); *Staehr v. The Hartford Financial Services Group, Inc., et al*, No. 3:04 cv 1740 (CFD).

At these current hourly fees, the hours devoted by the sixty-seven attorneys and paralegals[20] who participated in the prosecution of this action result in a lodestar, before multiplier enhancement, of over $5.881 million. *See* Golub Dec. at ¶ 71.

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[18] It is appropriate to utilize current billing rates in calculating the lodestar to make up for the delay in payment over the years the case has been pending. *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) (same)

[19] The hours spent by the supporting lawyers and paralegals (and the rates at which their time is billed by their respective law firms) is set forth in Golub Dec. at ¶ 68 and in the Bloch and Kravitz Declarations.

[20] The reimbursement of paralegal and litigation support expenses is expressly authorized by applicable case law. *Jenkins* at 285-87.

The hours expended by counsel are reasonable in view of the work performed to prosecute this case, which was vigorously defended by The Hartford. In addition to the normal time demands of hotly-disputed complex litigation, successful prosecution of this case required counsel and their supporting legal and paralegal staff to expend significant amounts of time developing an appropriate protocol to identify a representative sample of the nearly 22,000 potential class members that would support a statistical model of the class as a whole sufficient to support plaintiff's motion for class certification and to sustain a damages analysis. Development and implementation of that protocol, including detailed analysis of the almost 100,000 pages of claims files yielded by the statistical sampling process, – consumed well in excess of 1,000 hours of legal time. Class counsel's successful development of the agreed-upon sampling protocol – as a result of which defendants did not disclose their own expert on class certification issues (which, itself, obviated considerable additional investment of attorney time by class counsel) – and the development of the damages model based on the statistical sample of claim files was, ultimately, decisive in enabling plaintiff's to obtain class certification and achieve the outstanding settlement on behalf of the class.

Class counsel's requested fee percentage results in a lodestar multiplier of 3.70, which is well within the acceptable range. *See In re Nasdaq* at 489 ("[i]n recent years, multipliers of between 3 and 4.5 have become common).

E. The Reaction of the Settlement Class Supports the Requested Fee

Finally, "[t]he reaction by members of the Class is entitled to great weight by the Court" and confirms the reasonableness of the requested fee. *Maley* at 374. Each of the class representatives has advised class counsel that he or she consents to counsel's request for an award of attorneys' fees.[21] The

[21] *See* Declarations of Oshonya Spencer, Charles Strickland and Douglas McDuffie submitted with Motion for Order Authorizing Incentive Award for Class Representatives filed this day.

notice sent to the class expressly advised class members that class counsel would seek an award of attorneys' fees of up to 33⅓% of the common fund, and that any class member could object to the fee application. Counsel are unaware of any member of the class who, to date, has objected to that request.

III. Class Counsel Are Entitled to Reimbursement of the Litigation Expenses Incurred in the Prosecution of This Action.

The law is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class. "Courts routinely grant the expense requests of class counsel." *In re Gilat Satellite Networks. Ltd.*, No. 02 Civ. 1510 (CPS), 2007 WL 2743675, at * 19 (S.D.N.Y. Sept. 18, 2007) ; *American Bank Note* at 433; *Taft* at *11. "[G]ranting requests for expenses is consonant with the public policy underlying fee awards in common fund cases." *In re KeySpan* at *11. "Since counsel in a class action will necessarily incur substantial costs and expenses over the course of many years and will presumably have aid the expenses by the time a fee request is considered by the Court, providing for reimbursement of costs and expenses is a component of affording adequate compensation to counsel in order to encourage attorneys to pursue common fund cases. *Id.*

Class counsel have incurred an aggregate of $823,467.35 in expenses to date in prosecuting this litigation. *See* Golub Dec. at ¶ 74. Counsel request that the Court approve reimbursement from the common fund of these expenses.

IV. Conclusion

This litigation was very risky, complicated factually and legally, and hotly contested by a major corporation with abundant resources, represented by premier law firms who tenaciously advocated for their clients. Class counsel worked extremely hard, took significant risk in terms of their time and expenses advanced, and obtained an excellent result. The percentage fee requested is well within the range of reasonableness, and supported by recent awards in this District, throughout the Second Circuit and across the country.

Accordingly, Class counsel respectfully request that the Court award attorneys' fees in the amount of $21.75 million, representing 30% of the settlement fund, and reimbursement of counsel's legal expenses in the amount of $823,467.35.[22]

[22] Class counsel, who have worked collectively on this matter and stand in a common relationship to the class, have agreed upon the allocation of any attorneys' fee award among themselves, as permitted by District precedent, obviating any decision as to allocation by the Court. *Norflet v. John Hancock Life Insurance Company*, 658 F. Supp.2d 350, 353 (D. Conn. 2009) (Arterton, J.)

Dated: August 16, 2010

Respectfully submitted,

/s/

DAVID S. GOLUB ct 00145
JONATHAN M. LEVINE ct07584
SILVER GOLUB & TEITELL LLP
184 ATLANTIC STREET
P.O. BOX 389
STAMFORD, CT 06904
Tel: 203 325-4491
Fac. 203 325-3869
Email: dgolub@sgtlaw.com

PETER R. KAHANA phv0784
STEVEN L. BLOCH phv0786
BERGER & MONTAGUE, P.C.
1622 LOCUST STREET
PHILADELPHIA, PA 19103
Tel. (215) 875-3000
Fac. (215) 875-4604

CARL S. KRAVITZ phv01826
CAROLINE E. REYNOLDS phv01825
ZUCKERMAN SPAEDER LLP-DC
1800 M STREET, N.W.
WASHINGTON, DC 20036
Tel. (202) 822-8100
Fac. (202) 822-8106

RICHARD B. RISK, JR. phv0785
RISK LAW FIRM
3417 EAST 76TH STREET
TULSA, OK 74136
Tel. 918 494 8025

Attorneys for the Named Plaintiffs and Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2010, Class Counsel's Memorandum in Support of Application for Award of Attorneys' Fees and Reimbursement of Litigation Expenses was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/

DAVID S. GOLUB ct 00145
SILVER GOLUB & TEITELL LLP
184 ATLANTIC STREET
P.O. BOX 389
STAMFORD, CONNECTICUT 06904
Tel. (203) 325-4491
Fac. (203) 325-3769
dgolub@sgtlaw.com