UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: RAILWAY INDUSTRY EMPLOYEE NO-POACH ANTITRUST LITIGATION	)	Master Docket Misc. No. 18-798
	)	MDL No. 2850
This Document Relates to: ALL ACTIONS	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

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I. INTRODUCTION

Class Counsel have secured a $48.95 million settlement fund for the benefit of thousands of railway industry workers who, on average, will recover approximately $3,437 each, after deductions for the fees and costs requested herein. This excellent result ranks among the highest per capita recoveries ever achieved by employees asserting antitrust claims. Harvey Decl., Ex. A. Further, Class Members will receive this compensation in record time. *Id.* It has only been about 18 months since the Court appointed the undersigned as Interim Co-Lead Class Counsel.

For their successful efforts, Class Counsel respectfully request attorneys' fees of one-third of the common fund, reimbursement of $712,012.40 in litigation costs, and $105,000 for the settlement administrator. In addition, each of the five Class Representatives requests a service award of $15,000, in recognition of the critical role they played in obtaining this result for the Class.

II. BACKGROUND

A. The Litigation

In August 2018, the Judicial Panel on Multidistrict Litigation consolidated numerous cases alleging that the world's dominant rail equipment suppliers, Wabtec, Knorr, and Faiveley,[1] conspired to restrain competition and reduce compensation for their railway industry employees, and assigned those cases to this Court. Dkt. 1. At a hearing held on September 13, 2018, this Court appointed Dean Harvey of Lieff Cabraser Heimann & Bernstein, LLP and Roberta D. Liebenberg of Fine, Kaplan and Black, R.P.C. as Interim Co-Lead Class Counsel, *see* September

[1] "Faiveley" is used herein to refer to Faiveley Transport, S.A. and its wholly-owned subsidiary Faiveley Transport North America. Before it was acquired by Wabtec on November 30, 2016, Faiveley was the world's third-largest provider of rail equipment and services. CAC at ¶¶ 21-22.

21, 2018 Minute Order, and entered an Order enumerating Interim Co-Lead Class Counsel's responsibilities on November 6, 2018, *see* Dkt. 106.

In the ensuing months, the parties served and responded to discovery and held extensive discovery meet-and-confers. Harvey Decl. ¶ 2; Liebenberg Decl. ¶ 10. These meet-and-confers, which often occurred weekly or bi-weekly, included the negotiation of the Protective Order, ESI protocol, custodians, and key word search terms, as well as extensive back-and-forth relating to follow-up questions on the production of documents and data. Harvey Decl. ¶ 2; Liebenberg Decl. ¶ 10. As part of the meet-and-confer process, the parties exchanged over 250 formal letters and many more emails. Harvey Decl. ¶ 2; Liebenberg Decl. ¶ 10.

On a few occasions where the parties could not resolve their differences through these extensive meet-and-confers, they sought the assistance of the Court-appointed Special Master David White, which entailed the submission of briefs and telephonic argument. Dkt. 119. In the course of litigation, Defendants produced over 194,000 documents and extensive compensation data. Harvey Decl. ¶ 2; Liebenberg Decl. ¶ 12. Plaintiffs produced over 3,600 documents. Harvey Decl. ¶ 26; Liebenberg Decl. ¶ 12. Additionally, 19 third-parties produced over 10,400 documents. Harvey Decl. ¶ 2.

On November 27, 2018, Defendants moved to dismiss the Consolidated Class Action Complaint, arguing that Plaintiffs had failed to plead a *per se* violation of the Sherman Act and moved, in the alternative, to strike Plaintiffs' class action allegations. Dkt. 129. After the motion was fully briefed and argued, the Court rendered an Opinion and Order on June 20, 2019 holding that Plaintiffs had plausibly alleged a conspiracy and rejected Defendants' argument that the rule of reason, rather than *per se* review, applied to the alleged conspiracy. Dkts. 192, 193.

However, the Court granted the Motion to Strike Class Allegations, without prejudice to Plaintiffs amending their Complaint to address certain class definition issues. Dkt. 193.

On July 31, 2019, Plaintiffs filed the Consolidated Amended Complaint ("CAC"), narrowing the class definition from all employees to those employees "who worked in job families in which railway industry experience or skills were valuable." Dkt. 199 at ¶ 104. In response, on August 30, 2019, Wabtec once again moved to strike the class allegations. Dkt. 208, 209. Plaintiffs filed an opposition brief on September 30, 2019 (Dkts. 219, 220) and thereafter, Wabtec filed a Reply Memorandum in support of its Motion to Strike on October 15, 2019. Dkt. 227. The Court did not adjudicate the motion, instead denying it without prejudice while Plaintiffs and Wabtec pursued settlement negotiations. *See* December 3, 2019 Minute Order.

B. The Knorr Settlement

Interim Co-Lead Class Counsel and counsel for Knorr first discussed settlement in March 2019. Harvey Decl. ¶ 3. Through vigorous arm's length negotiations, and on the basis of substantial documentary evidence that had been produced, the parties agreed to the key terms of the settlement in a Memorandum of Understanding executed on August 13, 2019. *Id.* Because of the agreement in principle, Knorr did not file an Answer or other pleading in response to the CAC. *Id*. Plaintiffs and Knorr worked out the final terms of the Knorr Settlement over the next two months, executing it on October 16, 2019. *See* Dkt. 245-1 ("Knorr Settlement").

Pursuant to the Knorr Settlement, Knorr agreed to pay $12 million into a non-reversionary common fund and also to provide extensive cooperation to Plaintiffs' then-ongoing litigation against Wabtec, including: (1) providing a summary of relevant facts and answering reasonable follow-up questions; (2) making up to eight current employees available for interviews; (3) making up to five current employees available for depositions; (4) providing up to

five declarations from current employees; (5) providing declarations to authenticate documents; (6) producing at least three current employees at trial; (7) providing a list of job titles for its U.S. employees; and (8) providing the last known contact information for former employees. Knorr Settlement ¶ 54. As part of its cooperation, Knorr also made a human resources employee and detailed employee data available to aid Plaintiffs in determining the job titles that fit the class definition. Harvey Decl. ¶ 3.

To prepare that list, Plaintiffs performed a careful, expert-led review of 1,471 job titles for Knorr falling under 253 job families, and 1,746 job titles for Wabtec in 444 job families. Harvey Decl. ¶ 4; Liebenberg Decl. ¶ 17. Plaintiffs reviewed these job titles to remove categories of employees (1) explicitly excluded from the proposed Settlement Class (*e.g.*, senior executives, human resources, and legal personnel) and (2) lacking specific rail-industry value or skills (*e.g.*, administrative assistants, custodial staff). Harvey Decl. ¶ 4. For the remaining job families and job titles, the experts reviewed Knorr and Wabtec job descriptions and job postings where necessary to clarify the skills required, and were then able to identify additional job families for exclusion. *Id*.

C. The Wabtec Settlement

While Wabtec's Motion to Strike was pending, Wabtec and Plaintiffs began to pursue settlement negotiations in earnest. Harvey Decl. ¶ 5. Both parties recognized that they faced risks with respect to class certification, which served as an inducement to pursue settlement.

Indeed, the class certification issues were the subject of extensive discovery by the Plaintiffs. Through interrogatories, document requests, and third-party subpoenas, Plaintiffs obtained extensive information about Wabtec's employee job titles, descriptions, compensation structure, and the persons affected by the alleged no-poach agreements.

On August 20, 2019, Wabtec and the Plaintiffs advised the Court that they were discussing settlement and had selected former Third Circuit Judge Thomas J. Vanaskie to serve as their mediator. *See also* Dkt. 210, September 3, 2019.

Prior to the first mediation, which was held on November 21, 2019, the parties each submitted detailed mediation memoranda to Judge Vanaskie. Harvey Decl. ¶ 6. During the mediation, which lasted almost 6 hours, the parties provided Judge Vanaskie with additional information. *Id*.

On December 10, 2019, the parties held a second in-person mediation session with Judge Vanaskie. Harvey Decl. ¶ 6. Subsequent to that second mediation, the parties continued negotiations both through Judge Vanaskie and with each other directly, eventually leading to an agreement in principle on January 10, 2020. Harvey Decl. ¶ 6. A Memorandum of Understanding containing the central terms of the settlement was signed on January 21, 2020, and a long-form settlement agreement was finalized and executed on February 24, 2020. Dkt. 245-2 ("Wabtec Settlement").

Pursuant to the Wabtec Settlement, Wabtec agreed to pay $36.95 million into a non-reversionary common fund in exchange for a release of relevant claims.

D. Notice to the Class

On March 19, 2020, the Court granted Plaintiffs' motion for preliminary approval of the Knorr and Wabtec Settlements, and directed notice to the Class of the proposed settlements. Dkt. 262. On April 9, 2020, the Notice Administrator established the settlement website and provided direct e-mail and first class mail notice to all known class members. Harvey Decl. ¶ 8. The Notice Administrator also arranged for publication notice in *Progressive Railroading*, which is now underway in the May 2020 print edition and on the publication's website. *Id.* The various notices informed the Class that Class Counsel would seek one-third of the common fund

as attorneys' fees, reimbursement of approximately $715,000 in expenses Class Counsel already incurred and the costs of notice and settlement administration (approximately $105,000), and a service award of $15,000 for each of the five named plaintiffs. Harvey Decl. ¶ 8.

III. LEGAL STANDARD

A court may award reasonable attorneys' fees and reimbursement of costs from a class action settlement. Fed. R. Civ. P. 23(h); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."). The Third Circuit has explained that the "heart of this [doctrine] is a concern for fairness and unjust enrichment; the law will not reward those who reap the substantial benefits of litigation without participating in its costs." *Polonski v. Trump Taj Mahal Assocs.*, 137 F.3d 139, 145 (3d Cir. 1998).

To determine a reasonable fee, "the percentage-of-recovery method is favored in cases involving a common fund." *S.S. Body Armor I., Inc. v. Carter Ledyard & Milburn LLP*, 927 F.3d 763, 773 (3d Cir. 2019); *see also In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006); *Report of the Third Circuit Task Force re: Court Awarded Attorney Fees*, 108 F.R.D. 237, 255 (1986) ("recommend[ing] that in the traditional common-fund situation . . . the district court . . . should attempt to establish a percentage fee arrangement"). In determining whether a particular percentage fee award is reasonable, courts in this Circuit consider the seven factors set forth in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000):

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by counsel; and (7) the awards in similar cases.

S.S. Body Armor, 927 F.3d at 773 (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 301 (3d Cir. 2005)). In addition, courts consider "the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained." *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 496 (3d Cir. 2017). These factors "need not be applied in a formulaic way because each case is different, and in certain cases, one factor may outweigh the rest." *AT&T*, 455 F.3d at 166 (citation and quotation omitted).

Courts may confirm the reasonableness of the percentage requested through a lodestar cross-check. *Rite Aid*, 396 F.3d at 305. This "abridged lodestar analysis" is calculated "by multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services . . . ." *Id.* Unlike a lodestar calculation in a traditional statutory fee-shifting case, however, a lodestar cross-check of a percentage award "need entail neither mathematical precision nor bean-counting." *Id.* at 306. Instead, the Court "may rely on summaries submitted by the attorneys and need not review actual billing records." *Id.* at 307. The purpose of the cross-check is merely to confirm that the multiplier, or ratio, between the fees calculated through the lodestar method and percentage method is reasonable. *Id.* at 305-06. The district court "should explain how the application of a multiplier is justified by the facts of a particular case." *Id.* at 306 (quotation and citation omitted). Nevertheless, "the lodestar cross-check does not trump the primary reliance on the percentage of common fund method." *Id.* at 307. Multipliers "ranging from one to four are frequently awarded in common fund cases." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998) (quotation omitted, alteration in original).

IV. ARGUMENT

A. The Request for One-Third of the Settlement Fund as Attorneys' Fees Is Reasonable and Appropriate

All applicable factors weigh in favor of approving Class Counsel's request for one-third of the Settlement Fund in attorneys' fees. The reasonableness of this request is also confirmed by a lodestar cross-check.

1. The $48.95 Million Settlement Fund Benefits Thousands of Rail Industry Workers

The benefit provided to class members is usually the most important factor in analyzing the reasonableness of a request for attorneys' fees. *See, e.g., In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 515 (W.D. Pa. 2003) (counsel's efforts to bring a "complex matter to a successful and efficient conclusion are the best indicator of counsels' experience and ability"); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 149 (E.D. Pa. 2000) ("[t]he single clearest factor reflecting the quality of class counsels' services to the class are the results obtained") (alteration in original). Here, Class Counsel secured a Settlement Fund totaling $48.95 million for approximately 9,234 rail industry workers who are members of the Class. That is an average per capita net recovery of approximately $3,437, if the instant requests for fees, costs, and service awards are granted. Compared to other similar cases, this recovery is one of the largest. Harvey Decl., Ex. A. As a proportion of Class Member income over the Class period, this result is the second largest ever. *Id.* The only recovery that was larger, *Nitsch v. Dreamworks Animation SKG, Inc.*, involved evidence of direct compensation fixing that does not exist here, and further was resolved only after the Court granted class certification. 315 F.R.D. 270 (N.D. Cal. 2016).

Notably, Class Counsel also obtained significant non-monetary benefits for the Class in the Knorr Settlement. Class Counsel first negotiated and secured an icebreaker settlement with Knorr, which included valuable obligations to cooperate in the then-ongoing litigation against

Wabtec. Knorr Settlement ¶ 54. Pursuant to these obligations, Knorr assisted in refining the class definition and identifying the job titles and job families likely to have rail industry-specific skills and value. Harvey Decl. ¶ 3. Knorr's cooperation was invaluable in opposing Wabtec's Motion To Strike the class allegations from the CAC and, ultimately, in negotiating a substantial settlement with Wabtec. *Id.* These benefits also reflect the value of Class Counsel's services. *See, e.g., In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 278, 303 (E.D. Pa. 2012) (recognizing that settling defendant's "agreement to cooperate with Plaintiffs throughout the course of pre-trial proceedings and trial is valuable consideration in light of the risks in proceeding with this suit against the remaining Defendants"). Further, Interim Co-Lead Class Counsel was able to leverage the $12 million settlement with Knorr—including the cooperation obligations—to obtain more than three times the amount paid by Knorr from Wabtec, $36.95 million.

This excellent and expeditious result militates strongly in favor of approving Class Counsel's fee request.

2. Class Counsel Efficiently Navigated a Difficult and Complex Case to Quickly Obtain Relief for the Class

Class Counsel are experienced and skilled class action antitrust litigators, with specific expertise in no-poach antitrust litigation. Harvey Decl. ¶ 20. Class Counsel efficiently litigated this case, obtaining two substantial settlements after one round of motions to dismiss and substantial discovery—far earlier than other no-poach cases, where the parties also litigated class certification and summary judgment motions before settling. Class Counsel's efficiency not only guaranteed tangible and considerable benefits to the Class more quickly, but also helped conserve judicial resources. *See Kapolka v. Anchor Drilling Fluids USA, LLC*, No. 2:18-cv-01007-NR, 2019 WL 5394751, at *9 (W.D. Pa. Oct. 22, 2019) (counsel "should not be penalized

for settling the case early in the litigation" because "the early settlement of potentially costly litigation is commendable" and conserved "[c]onsiderable judicial time and resources").

The quality and experience of Defendants' counsel is also a relevant consideration. *See Lan v. Ludrof*, No. 1:06cv114-SJM, 2008 WL 763763, at *23 (W.D. Pa. Mar. 21, 2008) (counsel's achievement "all the more compelling" where "confronted with a formidable opposition"); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d at 515 (citing the "high quality of the Settling Defendants' legal representation"); *In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 496 (E.D. Pa. 2003) (noting that class counsel's success "in the face of formidable legal opposition further evidences the quality of their work"). Here, both the Knorr and Wabtec defendants were represented by top-notch litigators with substantial experience in antitrust class action defense. Mark Hamer, Knorr's lead counsel, is Global Chair of Baker McKenzie's Antitrust & Competition Practice Group and has over 25 years of litigation experience, including serving as defense counsel in numerous MDL antitrust class action proceedings and working in the U.S. Department of Justice's Antitrust Division. David Kiernan, lead counsel for Wabtec, is the Partner-in-Charge of Jones Day's Northern California region and head of litigation for its San Francisco office, and previously represented defendants in the watershed no-poach antitrust class action, *In re High-Tech Employee Antitrust Litigation*, No. 11-cv-2509-LHK (N.D. Cal.).

Further, this case raised important and complex questions of law, as reflected by the Court's 81-page Opinion on Defendants' motion to dismiss. *See* Dkt. 192. Plaintiffs also faced the challenge of producing sufficient evidence that all members of the proposed Class had their compensation suppressed by the alleged no-poach agreements. *Id.* at 76 n.15 (acknowledging that "[h]ere, plaintiffs' task is more difficult [than in other no-poach cases]"). Class Counsel rose to the challenge, vigorously pursued discovery, took advantage of Knorr's cooperation

obligations, and consulted with their experts on a painstaking analysis of Knorr's 1,471 job titles and Wabtec's 1,746 job titles to determine which had railway industry-specific skills consistent with the class definition. Harvey Decl. ¶ 4.

Class Counsel's skill and tenacity navigating this challenging case also weigh in favor of granting the requested fee.

3. Class Counsel Devoted Substantial Time and Resources to Obtain this Result

Class Counsel took this case on contingency: there was a substantial risk that their investment of time, personnel, and resources would not be rewarded if the motion to dismiss or motions to strike the class claims were granted. Courts in the Third Circuit have recognized that this is an important consideration in determining an appropriate fee award. *See, e.g.*, *In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 104 (E.D. Pa. 2013) ("[A]s a contingent fee case, counsel faced a risk of nonpayment in the event of an unsuccessful trial. . . . This factor supports approval of the requested fee."); *Kapolka*, 2019 WL 5394751, at *9 (representation "on a contingent basis . . . favors approving the fee award"); *In re Rent-Way Sec. Litig.*, 305 F. Supp. at 516 ("investment of time, personnel and resources" supports fee request); *In re Merck & Co., Inc. Vytorin Erisa Litig.*, No. 08-cv-285 (DMC), 2010 WL 547613, at *11 (D.N.J. Feb. 9, 2010) (holding that "[t]he risk of little to no recovery weighs in favor of an award of attorneys' fees").

Here, from the outset, Class Counsel embarked on a complex and potentially lengthy and expensive case knowing that they risked never being compensated for their work. In doing so, Class Counsel have invested over 12,000 hours of attorney time after the appointment of Interim Co-Lead Class Counsel, and over $712,000 in out-of-pocket expenses to compensate their consulting experts for reviewing, organizing, and analyzing Defendants' data and document productions and estimating class damages, and other out-of-pocket costs. Indeed, Class Counsel

reviewed over 194,000 documents produced by Defendants, and over 10,400 documents produced by 19 third-parties. Harvey Decl. ¶ 2; Liebenberg Decl. ¶ 12. Class Counsel's investment is even greater, as these numbers do not include the time and expense that Class Counsel will continue to devote to securing final approval and overseeing administration of the Settlements.

Finally, the $48.95 million settlement fund for the Class members is attributable to Class Counsel's efforts. Although the United States Department of Justice investigated Defendants' alleged anticompetitive conduct and entered into a consent decree with each of them, and although the DOJ's investigation provided support to the Class's claims, it did not result in any compensation for Defendants' employees. Further, the DOJ did not identify who among Defendants' employees were impacted by the alleged misconduct, nor did the DOJ estimate damages. Further, the DOJ did not obtain the relevant data or evidence necessary to investigate those questions or to support class certification. Those critical tasks fell fully on Class Counsel's shoulders. Thus, *Gunter* factors 5 and 6 support the requested fee award.

4. Class Counsel's Fee Request Is Consistent With Awards in Similar Cases

Class Counsel's request for one-third of the settlement fund is reasonable and consistent with fees regularly awarded by courts in class action litigation. *See, e.g.*, *Vista Healthplan, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1833, Dkt. 614 (E.D. Pa. Apr. 21, 2020) (approving one-third attorney fee request from $65.87 million antitrust settlement); *Seaman v. Duke Univ.*, No. 1:15-cv-462-CCE-JLW, 2019 WL 4674758 (M.D.N.C. Sept. 25, 2019) (approving one-third of $54.5 million settlement in no-poach antitrust case); *Hickton v. Enter. Rent-A-Car Co.*, No. 2:09-mc-00210, 2013 WL 12138607 (W.D. Pa. Aug. 28, 2013) (Conti, J.) (awarding one-third of $7.75 million common fund); *In re Flat Glass Antitrust Litig.*, MDL No. 1200, Dkt. No. 547 (W.D. Pa.

2003) (Order of May 28, 2003, awarding 33% of $53.7 million fund); *Byers v. PNC Fin. Servs. Grp., Inc.*, No. 07-cv-0123, Dkt. 25 (W.D. Pa. July 9, 2008) (35% of fee); *Battaline v. Advest, Inc.*, No. 06-cv-569, Dkt. 65 (W.D. Pa. Sept. 16, 2008) (33% fee); *In re Titanium Dioxide Antitrust Litig.*, No. 10-cv-00318(RDB), 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (one-third of $163.5 million settlement); *In re: Urethane Antitrust Litig.*, MDL No. 1616, 2016 WL 4060156, at *8 (D. Kan. July 29, 2016) (one-third of $835 million settlement); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1366 (S.D. Fla. 2011) (one-third of $410 million settlement fund); *In re Vitamins Antitrust Litig.*, MDL No. 1285, 2001 WL 34312839, at *9 (D.D.C. July 16, 2001) (over one-third of $365 million settlement); *First Impressions Salon, Inc., v. Nat'l Milk Producers Fed.*, No. 3:13-CV-00454-NJR (S.D. Ill. Apr. 27, 2020) (one third of $220 million settlement fund); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-md-1819-CW, Dkt. 1407 (N.D. Cal. Oct. 14, 2011) (one-third of $41.3 million fund). *See also Castro v. Sanofi Pasteur Inc.*, No. 11-7178 (JMV)(MAH), 2017 WL 4776626, at *9 (D.N.J. Oct. 23, 2017) (approving request for one-third of $61.5 million settlement and noting that "[t]he one-third fee is within the range of fees typically awarded within the Third Circuit through the percentage-of-recovery method").

Further, a one-third attorneys' fee is consistent with commonly negotiated contingency fees. *See, e.g.*, *Kapolka*, 2019 WL 5394751, at *10 ("In private contingency fee cases, 'plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery.'") (citation omitted); *Lan v. Ludrof*, No. 1:06cv114-SJM, 2008 WL 763763, at *25 (W.D. Pa. Mar. 21, 2008) ("contingency fees in the range of 33-40% are not uncommon"); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085 FSH, 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005) ("Attorneys regularly contract for contingent fees

between 30% and 40% with their clients in non-class, commercial litigation."); *Halley v. Honeywell*, 861 F.3d at 496.

The fact that the requested fee is in line with those commonly awarded in comparable cases supports approval of this fee request.

In sum, all pertinent factors considered by courts in this Circuit weigh in favor of Class Counsel's request for one-third of the common fund under the percentage-of-recovery method.

5. A Lodestar Cross-Check Confirms the Requested Percentage Is Reasonable

The reasonableness of Class Counsel's request for one-third of the $48.95 million common fund is confirmed by a lodestar cross-check.

To calculate the lodestar, Co-Lead Class Counsel reviewed detailed time records from all participating counsel to confirm that only time incurred and work performed which reasonably benefited the Class was considered. Harvey Decl. ¶ 11. With respect to work performed after the Court appointed Interim Co-Lead Class Counsel, they followed the Court's guidelines, *see* Dkt. 106, and credited only work authorized by Co-Lead Class Counsel, time records which were timely submitted and recorded contemporaneously, and with a sufficient description and breakdown of time to enable meaningful review and exclusion of block-billing entries that failed to reasonably specify the time spent on discrete, unrelated tasks. Harvey Decl. ¶ 12. Co-Lead Class Counsel also excluded time related to preparing this request for attorneys' fees. *Id.*

Based on their review, Co-Lead Class Counsel determined that, since the Court's Order appointing Interim Co-Lead Class Counsel, participating attorneys have worked approximately 12,073 hours, incurring a total lodestar of $6,940,874.55 prosecuting this litigation from September 13, 2018 through the end of March 2020. This sum was calculated using each attorneys' normal billing rates, which were consistent with reasonable market rates, and ranged

from $275-700 for associates and senior associates (at an average rate of approximately $525), and $500-1,100 for partners (at an average rate of approximately $750).[2] Harvey Decl. ¶ 15; *see In re Rite Aid*, 396 F.3d at 306 (cross-check should "approximate the fee structure of all the attorneys who worked on the matter"). A chart of each firm's time and the billing rates used for each attorney is attached as Exhibit B to the Harvey Declaration. Further, filed herewith are declarations from each of the law firms who submitted time records, explaining the work they performed and the time spent.[3]

This lodestar represents a multiplier of only approximately 2.35 when compared to the one-third fee request of $16,316,666.67.[4] This multiplier is at the low end of the range of multipliers regularly approved in common fund cases. *See In re Prudential Ins. Co.*, 148 F.3d at 341 (recognizing that "[m]ultiples ranging from one to four are frequently awarded in common fund cases") (quotation omitted, alteration in original); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005) ("the resulting multiplier need not fall within any pre-defined range, provided that the District Court's analysis justifies the award"). It is also below multipliers

[2] Class Counsel used current billing rates to calculate the lodestar. *See Lanni v. New Jersey*, 259 F.3d 146, 149-50 (3d Cir. 2001) ("When attorney's fees are awarded, the current market rate must be used. The current market rate is the rate at the time of the fee petition, not the rate at the time the services were performed.") (citations omitted). *Accord Berkoben v. Aetna Life Ins. Co.*, No. 2:12-cv-1677, 2014 WL 3565959, at *7 (W.D. Pa. July 18, 2014) (same); *Earley v. JMK Assoc.*, No. 18-760, 2020 WL 1875535, at *1-2 (E.D. Pa. April 15, 2020) (same).

[3] *See also* the Declarations of Daniel Walker, Kelly Iverson, Richard Donahoo, Joel Hurt, Robert Curtis, Adam Polk, Benjamin Carney, Joshua Grabar, Shana Scarlett, Jason Hartley, Robert Kaplan, Gregory Asciolla, W. Joseph Bruckner, Matthew Kupillas, David Spear, Linda Nussbaum, Alexandra Bernay, Hollis Salzman, A. Patricia Diulus-Myers, Samuel Strauss, and Christopher Micheletti.

[4] If the Court includes work performed prior to Interim Co-Lead Class Counsel's appointment—that is, from inception of the litigation to September 13, 2018—the multiplier is even lower. The total lodestar would then become $7,851,912.55 based on approximately 13,631.24 hours of work, for a multiplier of 2.08. Harvey Decl. ¶ 14.

approved in comparable complex class action litigation. *See, e.g.*, *Milliron v. T-Mobile USA, Inc.*, 423 F. App'x 131, 135 (3d Cir. 2011) (noting that "we have approved a multiplier of 2.99 in a relatively simple case"); *In re Cendant Corp. PRIDES Litig.*, 243 F. 3d 722, 742 (3d Cir. 2001) ("strongly suggest[ing]" that a multiple of 3 would be appropriate); *see also Duke*, 2019 WL 4674758, at *6 (in no-poach antitrust case, awarding $18.16 million in attorneys' fees with 2.89 multiplier); *Jackson v. Wells Fargo Bank*, 136 F. Supp. 3d 687, 718-19 (W.D. Pa. 2015) (approving 2.83 multiplier); *Kapolka*, 2019 WL 5394571, at *11-12 (approving 2.54 multiplier); *In re Rent-Way Secs. Litig.*, 305 F. Supp. 2d at 517 (approving 2.36 multiplier and stating that it was "well within the range typically approved by Federal Courts in this Circuit"); *Varacallo v. Mass. Mut. Lif. Ins. Co.*, 226 F.R.D. 207, 256 (D.N.J. 2005) (approving 2.83 multiplier to award $58.2 million in attorneys' fees); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (awarding $31.6 million in attorneys' fees at 6.96 multiplier); *see also In re Rite Aid Corp.*, 396 F.3d at 307 n.17 ("Consideration of multipliers used in comparable cases may be appropriate.").

Here, a multiplier of 2.35 is justified by the facts of this case, including "the risks of nonrecovery facing counsel," "incentiv[izing] counsel to undertake socially beneficial litigation," and "reward[ing] counsel for an extraordinary result." *In re Prudential Ins. Co.*, 148 F.3d at 340. *See also Jackson*, 136 F. Supp. 3d at 717 (2.83 multiplier "supported by the excellent result achieved for the class and the efficiency with which class counsel resolved the matter"); *Kapolka*, 2019 WL 5394751, at *12 (2.54 multiplier justified by "risk undertaken," "substantial attorney time and resources expended," the "positive result obtained," and "the public interests advanced" by the litigation); *Lan*, 2008 WL 763763, at *27 (3.04 multiplier "justified by the skill and efficiency demonstrated by Class Counsel"). Moreover, the actual multiplier will be even

lower, as this estimate does not include time after March 31, 2020 or the time Class Counsel will continue to devote to securing final approval and supervising administration of the settlements. The multiplier thus confirms the reasonableness of Class Counsel's request for one-third of the common fund.

B. Class Counsel's Reasonable Out-of-Pocket Costs Should Be Reimbursed

"Attorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund." *Bradburn Parent Teacher Store, Inc. v. 3M (Minnesota Mining & Mfg. Co.)*, 513 F. Supp. 2d 322, 335-36 (E.D. Pa. 2007); see also Fed. R. Civ. P. 23(h).

Class Counsel's reimbursable expenses total approximately $712,012.40, and the settlement administrator projects its total costs will amount to $105,000. Harvey Decl. ¶ 17, Ex. C. The largest expenses relate to Plaintiffs' consulting experts (approximately $550,000), mediation fees ($15,925), and settlement administration (approximately $105,000). *Id.* These expenses were necessary to prosecute and settle this litigation. As explained above, Plaintiffs' consulting experts played a pivotal role in analyzing Defendants' payroll records (including processing the records to convert them into a consistent format susceptible to econometric analysis), advising on the job titles to include in the class, and estimating class damages. The remaining costs concern necessary travel, postage, copy, and telephone fees, document production and storage, and legal research. *Id.* ¶ 18.[5] Such costs are routinely reimbursed from the common fund in class action litigation. *See Bradburn*, 513 F.Supp.2d at 336 (granting reimbursement of over $1 million in expenses); *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 2230314, at *32 (reimbursing similar expenses); *Duke*, 2019 WL 4674758, at *6-7.

[5] *See also supra* note 3.

C. The Class Representatives' Service Award Requests Are Reasonable

The five Class Representatives took on substantial reputational risks and contributed time and effort to support the Class's claims. In recognition of their contributions to the Class, each Class Representative respectfully requests a service award of $15,000 each, for a total of $75,000.

The purpose of service awards is to "compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) (citation and quotation omitted). Such awards are common in class actions resulting in a common fund because the Class Representatives "have conferred benefits on all other class members and they deserve to be compensated accordingly." *In re Linerboard Antitrust Litig.*, No. 98-cv-5055, 2004 WL 1221350, at *18 (E.D. Pa. June 2, 2004), amended, 2004 WL 1240775 (E.D. Pa. June 4, 2004); *see also Cullen*, 197 F.R.D. at 145 ("[C]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation."); *Kapolka*, 2019 WL 5394751, at *13 ("Courts have ample authority to award incentive or 'service' payments to particular class members where the individual provided a benefit to the class or incurred risks during the course of litigation.").

"Service awards for class representatives are routinely provided to encourage individuals to undertake the responsibilities and risks of representing the class and recognize the time and effort spent in the case." *Nitsch v. DreamWorks Animation SKG Inc.*, No. 14-cv-04062, 2017 WL 2423161, at *14 (N.D. Cal. June 5, 2017). Relevant factors in determining whether a service award is reasonable include "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and

effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation." *In re High-Tech Emp. Antitrust Litig.*, No. 11-cv-2509, 2015 WL 5158730, at *16 (N.D. Cal. Sept. 2, 2015).

The requested service awards of up to $15,000 for each Class Representative are reasonable and appropriate here for several reasons. First, the Class Representatives expended substantial time and effort in assisting Class Counsel with the prosecution of the Settlement Class's claims. Lara Decl. ¶ 8; Lonergan Decl. ¶ 8; Escalera Decl. ¶ 8; Brand Decl. ¶ 8; Baldassano Decl. ¶ 8. Specifically, each Class Representative collected evidence, responded to discovery requests, and reviewed draft interrogatory responses. *Id.* This process was more onerous and invasive than in a typical antitrust case—involving the imaging and searching of the Class Representatives' personal computers, email accounts, and social media accounts. *Id.* Collectively, the Class Representatives produced over 3,600 documents. Harvey Decl. ¶ 26. Additionally, each Class Representative assisted counsel's efforts to draft complaints, including the Consolidated Amended Complaint. *Id.* The Class Representatives' industry knowledge was particularly useful in revising the allegations and class definition in the amended complaint. The Class Representatives have no interests that conflict with those of the Settlement Class, have been actively involved in the litigation of this case, and have each reviewed and approved the proposed settlements. *Id.* "It is particularly appropriate to compensate named representative plaintiffs with incentive awards where they have actively assisted plaintiffs' counsel in their prosecution of the litigation for the benefit of a class." *Fleisher v. Fiber Composites, LLC*, No. 12-cv-1326, 2014 WL 866441, at *15 (E.D. Pa. Mar. 5, 2014); *see also* Annotated Manual for Complex Litigation § 21.62 n.971 (4th ed. 2019) (incentive awards may be "merited for time spent meeting with class members, monitoring cases, or responding to discovery.").

Second, the Class Representatives incurred the substantial risk of taking on visible leadership roles in this litigation against the largest and most prominent railway equipment manufacturers in the world. Mr. Baldassano has been contacted by colleagues and former colleagues who criticized his decision to sue the defendants. Baldassano Decl. ¶ 11. Mr. Escalera's contacts in the industry also learned of his role in this case, and he fears that other employers or clients may not want to work with him as a result. Escalera Decl. ¶ 12. Mr. Brand, Mr. Lara, and Ms. Lonergan share similar fears. Brand Decl. ¶ 11; Lara Decl. ¶ 11; Lonergan Decl. ¶ 11.

The risk incurred by current and former employees is well-recognized in the case law. As one court in this district recently explained, "[i]n employment litigation, the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers." *Kapolka*, 2019 WL 5394751, at *13; *see also Myers v. Jani-King of Philadelphia, Inc.*, No. 09-cv-1738, 2019 WL 4034736, at *10 (E.D. Pa. Aug. 26, 2019) (recognizing that employees "risk[] their employment reputation by participating in [a] class action."). Thus, "[i]t is common for courts to compensate class representatives for work done on behalf of the class, to make up for the reputational risk undertaken in bringing the action, and . . . to recognize their willingness to act as a private attorney general." *Duke*, 2019 WL 4674758, at *7 (citation and quotation marks omitted).

Third, the Class Representatives should be rewarded for their "public service of contributing to the enforcement" of the antitrust laws. *Sullivan*, 667 F.3d at 33 n.65 (citation and quotation marks omitted). Here, Defendants did not pay any fines to the DOJ. Thus, without the Class Representatives' willingness to take the risk of filing class action lawsuits, Defendants

would have paid nothing. As the Court in *High-Tech Employees* explained, the "Supreme Court has long recognized that class actions serve a valuable role in the enforcement of antitrust laws." *In re High-Tech Emp. Antitrust Litig.*, 289 F.R.D. 555, 563 (N.D. Cal. 2013) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979)); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972)). Solely because the Class Representatives came forward here at substantial personal risk, the Defendants paid a total of $48.95 million in settlements for the benefit of the Settlement Class.

Fourth, the requested service awards are substantially less than the amounts approved in many other no-poach, antitrust and other class action cases. For example, courts in other no-poach cases have approved service awards much higher than those proposed here. *See, e.g., Duke*, 2019 WL 4674758, at *7 ($125,000 award to a single plaintiff in a no-poach case); *High-Tech Emp.*, 2015 WL 5158730, at *17 ($100,000 service awards); *DreamWorks Animation*, 2017 WL 2423161, at *14-16 (awarding each of three class representatives $100,000 total for all settlements). Similarly, courts in this circuit and around the country have routinely awarded service awards higher than those proposed here. *In re Domestic Drywall Antitrust Litig.*, MDL No. 2437, 2018 WL 3439454, at *20 (E.D. Pa. July 17, 2018) (awarding incentive awards of $50,000 each to four class representatives); *Foster v. City of Pittsburgh*, No. 12-cv-1207, 2015 WL 11112431, at *3 (W.D. Pa. Nov. 18, 2015) (approving $20,000 service award for each class representative in employment discrimination claim); *Marchbanks Truck Serv. v. Comdata Network, Inc.*, No. 07-1078-JKG, 2014 WL 12738907, at *3-4 (E.D. Pa. July 14, 2014) (awarding $150,000 to one class representative and $75,000 each to two others); *Bradburn*, 513 F. Supp. 2d at 342 (awarding $75,000 to class representative); *In re Titanium Dioxide Antitrust Litig.*, No. 10-cv-00318 (RDB), 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) ($125,000

service award); *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194, 2010 WL 4877852, at *8, 25-28 (S.D.N.Y. Nov. 30, 2010) (awarding $125,000 each to multiple named plaintiffs). The requests here are comparatively modest because this case was resolved prior to depositions of the Class Representatives.

Finally, the less than 4.5:1 ratio between the requested service award and class members' average individual recovery of $3,347 is fair, reasonable, and lower than ratios approved by other courts, particularly in cases involving large settlements. *See Duke*, 2019 WL 4674758, at *7 ($125,000 service award 12.5 times greater than average class member recovery); *High-Tech*, 2015 WL 5158730, at *17-18 ($100,000 service awards 14-21 times greater than average class member recovery).

For all of these reasons, Class Counsel respectfully submits that the proposed service awards should be approved.

V. CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court grant this request for attorneys' fees, reimbursement of costs, and service awards.

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Respectfully submitted,

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