

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

<hr/>	:	MASTER FILE NO. 99-MD-1278
IN RE CARDIZEM CD	:	
ANTITRUST LITIGATION	:	MDL NO. 1278
<hr/>	:	
	:	HON. NANCY G. EDMUNDS
This document relates to:	:	
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<i>Louisiana Wholesale, 99-CV-73259</i>	:	
	:	
<i>Duane Reade, 99-CV-73870</i>	:	
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**CLASS COUNSEL'S JOINT PETITION FOR ATTORNEYS' FEES,  
REIMBURSEMENT OF EXPENSES AND INCENTIVE AWARDS  
FOR NAMED PLAINTIFFS AND MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT THEREOF**

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All counsel for the Sherman Act Class Plaintiffs ("Plaintiffs") and the Class<sup>1</sup> in the above-captioned cases, including Co-Lead Counsel and Members of the Executive and Discovery Committees ("Class Counsel"), hereby submit this Joint Petition for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards for the Named

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<sup>1</sup> The Class consists of all persons (or assignees of such persons) who at any time during the period July 9, 1998 through June 23, 1999 directly purchased Cardizem CD from Hoechst Marion Roussel, Inc. [now known as Aventis Pharmaceuticals, Inc.] ("Aventis"); and who also, after the first generic version of Cardizem CD entered the market on June 23, 1999, either: (1) purchased one or more generic versions of Cardizem CD, or (2) obtained increased discounts for their direct purchases of Cardizem CD (the "Class"). Excluded from the Class are Defendants Aventis and Andrx Pharmaceuticals, Inc. ("Andrx") and their officers, directors, management and employees, subsidiaries or affiliates. Also excluded are those entities who have already opted out of the Class on or before the opt-out deadline of January 25, 2002 ordered by the Court, including plaintiffs in the actions CVS Meridian, Inc. v. Hoechst Marion Roussel, Inc., Case No. 99-CV-75036 and Kroger Co. v. Hoechst Marion Roussel, Inc., Case No. 99-CV-73735 in MDL No. 1278.

Plaintiffs and Memorandum of Points and Authorities in Support Thereof and would respectfully show the Court as follows:

## I. INTRODUCTION

Class members' claims against Defendants in this consolidated action have been settled for \$110,000,000 in cash, plus interest since July 1, 2002 (as of October 31, 2002, \$539,116.96 of interest has accrued) (the "Settlement Fund"). Plaintiffs' expert economist has estimated that this amount represents more than 200% of the total amount the Class was overcharged during the period the illegal agreement between Aventis and Andrx was in effect (September 24, 1997 through June 9, 1999), and more than 95% of the overcharge accrued through August 13, 2002, the date the Plaintiffs and Defendants signed the proposed Settlement Agreement. Co-Lead Counsel Affidavit ("Co-Lead Aff.") ¶ 87, attached hereto as Exhibit "A". To recover such a substantial percentage of the estimated overcharges to the Class in a settlement of this magnitude is an extraordinary result.

This outstanding settlement for the Class was achieved by the skill, perseverance and hard work of Class Counsel. The extensive efforts of Class Counsel in achieving this excellent result are detailed below and in the attached affidavit of Co-Lead Counsel, Exhibit "A" hereto, and the individual firm affidavits of Class Counsel, attached as Exhibit "B" hereto. These efforts over nearly 4 years included obtaining a key legal ruling on the existence of a *per se* violation of the Sherman Act and an exhaustive factual investigation and discovery effort, including review and analysis of over a million pages of documents; responding to Defendants' voluminous discovery requests to Plaintiffs, and taking and defending depositions. Class Counsel were also active in researching and

drafting necessary motions (including the motion for class certification and opposition to Defendants' motions to dismiss), appearing and arguing at hearings, working with experts concerning class certification, damages and causation issues, and successfully mediating and then negotiating the terms of this settlement over a three-month period with counsel for the Defendants.

As detailed in Co-Lead Counsel's Affidavit, Class Counsel's efforts were not only successful, but were highly organized and efficient in addressing a number of complex issues raised by this case, including highly technical Federal Drug Administration ("FDA") regulatory issues, patent, manufacturing and financial issues. See Co-Lead Aff. at ¶¶ 48-51. This also included addressing potential causation issues raised in a public statement made by the Federal Trade Commission ("FTC") that the agreement between Aventis and Andrx did not delay the entry of any generic version of Cardizem CD. Id. at ¶ 46.

To date, Class Counsel's successful efforts have been without compensation of any kind. Class Counsel have expended more than 27,000 hours over nearly a four-year period, the compensation for which has been wholly contingent upon the result achieved. As detailed below, the percentage-of-the-fund method is the proper method of compensating Class Counsel. The exceptional result of Class Counsel's efforts in this complex litigation supports an attorneys' fee award of 30% of the Settlement Fund. This percentage is one that has been approved by this Court and other courts in the Sixth Circuit, is justified by relevant factors identified by this Circuit, and is in line with the fees that Class Counsel could have obtained at arm's-length in the open market. Accordingly, for the reasons set forth below, Class Counsel respectfully request that the

Court award fees equal to 30% of the settlement (\$33,000,000), plus 30% of all interest that has accrued prior to payment of the fees.

The size of the instant settlement does not militate in favor of a lower percentage award. As discussed below, several cases (authored by preeminent jurists) have rejected the notion of reducing the fee percentage for large, “megafund” recoveries (typically over \$100 million) as: (1) not providing proper economic incentives to class counsel; (2) not advancing the policies underlying class action cases generally; (3) not reflecting the extremely risky nature of contingency class action work; and (4) not necessarily reflecting the types of contingency fee arrangements that can be negotiated in the private context. Also, given the complex nature of this lawsuit, the result achieved, and the fact that this matter was defended with extreme vigor, a 30% award is particularly reasonable.

Class Counsel also request reimbursement of \$970,411.26 in out-of-pocket expenses incurred in connection with this litigation and incentive awards of \$20,000 for each of the two named Plaintiffs, Louisiana Wholesale Drug Company, Inc. and Duane Reade, Inc.

For the reasons set forth below and in the accompanying Co-Lead Counsel Affidavit, Class Counsel respectfully submit that the attorneys’ fees and expenses for which reimbursement is sought are fair and reasonable under applicable legal standards and should be awarded by the Court.

## **II. HISTORY OF THE LITIGATION**

Class Counsel filed class action suits on behalf of Plaintiffs and the Class on November 18, 1998 and February 22, 1999, and immediately began vigorously prosecuting Plaintiffs’ and the Class’ claims. See Co-Lead Aff. at ¶ 5. These suits were

consolidated in this Court by the Judicial Panel on Multidistrict Litigation on June 11, 1999. Id. at ¶ 19.

The Plaintiffs' consolidated actions (the "Class Actions") arise out of an agreement Aventis entered into with Andrx on or about September 24, 1997, pursuant to which Aventis agreed to pay Andrx, *inter alia*, \$10 million per quarter in return for Andrx's agreement not to manufacture and sell its generic version of Cardizem CD. Id. at ¶ 2. Plaintiffs have alleged that this illegal agreement kept less expensive generic versions of Cardizem CD off the market, thereby forcing direct purchasers to pay artificially inflated prices for Cardizem CD and its AB-rated generic equivalents. Id. at ¶ 7.

On December 10, 1999, Class Counsel moved for certification of the Sherman Act Class. Id. at ¶ 31. After a period of class-related discovery, including expert depositions (and motion practice relating thereto), and briefing on Plaintiffs' motion, the Court conducted an evidentiary hearing and oral argument on class certification. On March 14, 2001, the Court granted Class Counsel's motion allowing the litigation to proceed on a classwide basis and certifying a class consisting of all persons (or assignees of such persons) who at any time during the period July 9, 1998 through June 23, 1999 ("Class Period") directly purchased Cardizem CD from HMRI [now Aventis]; and who also, after the first generic version of Cardizem CD entered the market on June 23, 1999, either: (1) purchased one or more generic versions of Cardizem CD; or (2) obtained increased discounts for their direct purchases of Cardizem CD (the "Sherman Act Class")

or “Class”).<sup>2</sup> Order No. 24 at 3, 59. Notice of the class certification decision was sent to Class members on or about December 11, 2001, pursuant to a notice program approved by the Court. Co-Lead Aff. at ¶ 40.

On March 28, 2001, Defendants filed a petition with the Sixth Circuit Court of Appeals for permission to appeal the Court’s class certification ruling pursuant to Fed. R. Civ. P. 23(f). Id. at ¶ 41. On June 18, 2001, the Court of Appeals denied Defendants’ petition. Id.

On December 10, 1999, Class Counsel also filed a motion for partial summary judgment asking the Court to rule that the Defendants’ agreement was a *per se* violation of the antitrust laws. Id. at ¶ 27. On February 8, 2000, Class Counsel argued the merits of the motion and on June 6, 2000, the Court granted it, holding that the Defendants’ agreement “constitutes a restraint of trade that has long been held illegal *per se* under established Supreme Court precedent.” Order No. 13 at 1. A successful summary judgment for the plaintiff on the existence of an antitrust violation is relatively rare and represents a landmark victory for the Class in this case.

On June 20, 2000, Defendants asked for permission to immediately appeal this decision to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b). Co-Lead Aff. at ¶ 29. Defendants’ request was granted, and on December 12, 2000, the Sixth Circuit agreed to hear Defendants’ appeal. Id. The appeal has been fully briefed and

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<sup>2</sup> Excluded from the Class are all Defendants in this lawsuit, and their officers, directors, management and employees, subsidiaries or affiliates. Id. Also excluded are those direct purchasers who have already opted out of the Class on or before the opt-out deadline of January 25, 2002 ordered by the Court, including those who brought their own separate actions against the Defendants, which are currently being coordinated with the Class’s case before the United States District Court for the Eastern District of Michigan.

argued, and the parties are currently awaiting decision by the Sixth Circuit Court of Appeals. Id.

On or about December 10, 1999, Defendants also moved to dismiss the consolidated complaint filed by the Plaintiffs. Id. at ¶ 26. After substantial briefing and oral argument on these motions, the Court denied Defendants' motions to dismiss on May 11, 2000. Order No. 12 at 4.

In addition to this significant motion practice, Class Counsel also conducted a coordinated and efficient discovery effort that included the filing of numerous motions to compel, the review of over a million pages of documents and conducting over 25 depositions of witnesses. Co-Lead Aff. at ¶¶ 42-73. Class Counsel were able to streamline and focus their discovery efforts, as well as all other litigation efforts, through standing weekly conference calls in which tasks were assigned and reviewed, and through discovery agendas where the internal discovery committee was required to justify the need for each piece of discovery before pursuing it. Id. at ¶¶ 21-22.

After lengthy negotiations (including a protracted mediation with a highly experienced mediator approved by the Court<sup>3</sup>) and following substantial discovery,

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<sup>3</sup> Professor Eric Green acted as the mediator in the negotiation and settlement of this case. He has mediated numerous other significant antitrust matters.

The mediation itself encompassed, among other things, two rounds of extensive briefing concerning the merits of the lawsuit, an initial "plaintiffs only" mediation session involving all the plaintiff groups in the cases consolidated before this Court, an initial "defendants only" session, a three-day "all parties" session in New York City, and several follow-up sessions in person and telephonically. This process lasted approximately 6 months. The three-day session was effectively a mini-trial, in which Class Counsel took the lead in presenting the case and in responding to Defendants' presentation. The follow-up sessions among Class Counsel, Defendants and Professor Green were hard fought, often contentious, negotiations regarding the terms of the initial Memorandum of Understanding and the Settlement Agreement.

investigation and substantive briefing on the legal issues, on or about August 13, 2002, Class Counsel entered into a final settlement agreement and side letter with Defendants (the “Settlement Agreement”). Subject to final approval by the Court, the Settlement Agreement will settle all claims that were or could have been asserted in the Class Actions against Defendants and related entities and persons relating to the drug Cardizem CD and/or its AB-rated equivalents arising out of or concerning the facts and circumstances giving rise to the allegations (including without limitation the agreement between HMRI [now Aventis] and Andrx, dated September 24, 1997) in the Class Actions or in any other complaint filed in any action consolidated or coordinated with MDL No. 1278, in exchange for payment of \$110 million in cash. See Sett. Agmt. at ¶ 12. The Settlement Agreement also provides “most favored nation” protection against a settlement with any other direct private purchaser on better monetary terms for a comparable release than the settlement with the Class. Sett. Agmt. at ¶ 7. If Defendants were to enter into such a settlement, additional payments on behalf of the Class would be required to make up the difference. Id.<sup>4</sup>

This settlement is an exceptional result for the Class. Class counsel respectfully request that their applications for fees, reimbursement of expenses and incentive awards to the named Plaintiffs be approved.

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<sup>4</sup> Following the terms of the Settlement Agreement, the Mediator has examined the terms of the settlement between Aventis and the individual direct purchaser plaintiffs and determined that their settlements do not require payment of additional money to the Class under the “most favored nation” clause contained in the Settlement Agreement.

### III. THE COURT SHOULD APPROVE THE JOINT FEE PETITION

#### A. Class Counsel are Entitled to Compensation Based Upon the Benefits Created by the Litigation.

Courts have long recognized that a lawyer who recovers a “common fund” is entitled to a reasonable attorneys’ fee from the fund as a whole. Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980). The rationale for such awards is that “persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched . . . .” Id. at 478; Rosenbaum v. Macallister, 64 F.3d 1439, 1444 (10<sup>th</sup> Cir. 1995); Fournier v. PFS Investments, Inc., 997 F. Supp. 828, 830 (E.D. Mich. 1998).

The Supreme Court has repeatedly recognized the importance of private antitrust litigation as a necessary and desirable tool to assure the effective enforcement of the antitrust laws. See, e.g., Pillsbury Co. v. Conboy, 459 U.S. 248, 262-63 (1983); Reitner v. Sonotone Corp., 442 U.S. 330, 331 (1979); Hawaii v. Standard Oil Co., 405 U.S. 251, 266 (1972); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968); Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318-19 (1965). Fee awards similar to that requested here, encourage and support meritorious class actions, and thereby promote private enforcement of, and compliance with, the antitrust laws. As noted by the Second Circuit in Alpine Pharmacy v. Chas. Pfizer & Co., Inc., 481 F.2d 1045, 1050 (2d Cir.), cert. denied, 414 U.S. 1092 (1973), “[i]n the absence of adequate attorneys’ fee awards, many antitrust actions would not be commenced . . . .”

Fee awards which recognize the success reflected by the recoveries are in the “best interests” of current and future class members:

It unquestionably is true that without able lawyers handling these matters not only do some of them go unprosecuted, but the big difference in my experience is in the amount obtained and you don't get the highest recovery and when you are paying at the low end of the scale of fee recovery in contingent actions, it seems to me that I as the protector of the class, can fairly say, and honestly say, that I believe it is in the class' best interests – of this class and of future classes yet unknown – to pay this kind of money for these kinds of benefits.

In re Pepsico Sec. Litig., No. 82-Civ-8403 (S.D.N.Y. April 26, 1985), Transcript of April 26, 1985 at 17-18, cited in Herbert B. Newberg, Attorney Fee Awards § 1.04, at 6 (1986), and quoted with approval in In re M.D.C. Holdings Sec. Litig., 1990 U.S. Dist. LEXIS 15488, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,474 at 97,492 (S.D. Cal. 1990), attached hereto as Exhibit "C".

As these courts and others have repeatedly recognized, attorney fee awards that fully reward excellent results encourage the successful prosecution of meritorious cases.

**B. The Percentage-of-the-Fund Method is the Appropriate Method For Calculating Attorneys' Fees in this Case.**

The Supreme Court consistently has held in decisions involving the computation of a common fund fee award that it is appropriate for the fee to be determined on a percentage-of-the-fund basis. See Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984) ("under the 'common fund doctrine,' . . . a reasonable fee [is] based on a percentage of the fund bestowed on the class"); see also Trustees v. Greenbough, 105 U.S. 527, 532 (1882); Central R.R. & Banking Co. v. Pettus, 113 U.S. 116, 124-25 (1885); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 165-66 (1939). In a percentage fee award, the fee is measured by the benefit conferred upon the class.

Although the Sixth Circuit has left it to the trial court's discretion as to whether it will apply the lodestar or percentage-of-the-fund method to awards of attorneys' fees, see

Rawlings v. Prudential-Bache Properties, Inc., 9 F.3d 513, 516 (6<sup>th</sup> Cir. 1993), courts within the Sixth Circuit have indicated their preference for the percentage-of-the-fund method. See, e.g., In re F&M Distributors, Inc. Sec. Litig., Case No. 95-CV-71778-DT, 1999 U.S. Dist. LEXIS 11090, [1999 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶90,621 (E.D. Mich. June 29, 1999) (choosing percentage-of-the-fund as the better method for determining attorneys' fees in a securities class action), attached hereto as Exhibit "D". See also In re Rio Hair Naturalizer Products Liability Litig., MDL No. 1055, 1996 U.S. Dist. LEXIS 20440 (E.D. Mich. Dec. 20, 1996) ("more commonly, fee awards in common fund cases are calculated as a percentage of the fund created, typically ranging from 20 to 50 percent of the fund"), attached hereto as Exhibit "E"; Fournier, 997 F. Supp. at 830. As Judge Julian A. Cook, Jr. held in F&M Distributors:

[T]he Court concludes that the percentage-of-the-fund method should be applied for two reasons. First the lodestar method is too cumbersome and time-consuming of the resources of the Court. See Rawlings, 9 F.3d at 516-17. Second, and more importantly, the "percentage of the fund" approach "more accurately reflects the result achieved." Id. at 516.

1999 U.S. Dist. LEXIS 11090, Exhibit "D".

The use of the percentage method in this Circuit is consistent with decisions nationwide awarding fees in common fund cases on this same basis. As the Third Circuit Task Force recently concluded, "[m]ost courts use the percentage of the fund method." Third Circuit Task Force on the Selection of Class Counsel, Final Report at 103 (Jan. 2002), attached hereto as Exhibit "F". See also In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295, 305 (1<sup>st</sup> Cir. 1995) ("[c]ontrary to popular belief, it is the lodestar method, not the [percentage] method, that breaks from precedent"); Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 50 (2d Cir. 2000)

(approved the use of percentage method); In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir.), cert. denied, 516 U.S. 824 (1995) (“In common fund cases, a district judge can award attorneys’ fees as a percentage of the fund recovered,” and in prior cases “fee awards have ranged from nineteen percent to forty-five percent of the settlement fund”); In re Continental Illinois Sec. Litig., 962 F.2d 566, 572 (7<sup>th</sup> Cir. 1992) (fee award should not be based on “individual hours,” but rather on the percentage that counsel “would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client”); Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9<sup>th</sup> Cir. 1990) (“a reasonable fee under the common fund doctrine is calculated as a percentage of the recovery”); Gottlieb v. Barry, 43 F.3d 474, 484 (10<sup>th</sup> Cir. 1994) (fee award should be calculated using the percentage method; “use of the lodestar in common fund cases is ‘out of fashion’”); Camden I Condominium Assoc., Inc. v. Dunkle, 946 F.2d 768, 774 (11<sup>th</sup> Cir. 1991) (“Henceforth in this circuit, attorneys’ fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class”); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (“percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases”). In fact, the Third Circuit Task Force on the Selection of Class Counsel recently found that the percentage-of-the-fund method is the superior method for determining a reasonable fee for class counsel. Third Circuit Task Force on the Selection of Lead Counsel, Final Report at 19, Exhibit “F”.

For these reasons, as the Court recognized at the preliminary approval hearing on September 24, 2002, the percentage-of-the-fund method should be applied here.<sup>5</sup>

**C. The Requested 30% Fee is Fair and Reasonable.**

As stated in Rio Hair Naturalizer, fee awards in common fund cases “typically range from 20 to 50 percent of the fund.” 1996 U.S. Dist. LEXIS 20440, at \*50, Exhibit “E”. Judge Cook in F&M Distributors authorized an award of 30% of the gross settlement fund after reviewing fee awards in similar cases citing, among others: Rebenstock v. Deloitte, No. 94-CV-71331 (E.D. Mich. Nov. 13, 1996) (fee equal to 33 1/3%); Rebenstock v. Fruehauf, No. 92-CV-77050 (E.D. Mich. Aug. 17, 1995) (fee equal to 33 1/3% of recovery); In re Michigan Nat’l Corp. Sec. and ERISA Litig., No. 95-CV-70647 (E.D. Mich. Dec. 7, 1998) (fee equal to 30% of recovery).

National Economic Research Associates, an economics consulting firm, conducted surveys in 1995 and 1996 of fee awards in securities class actions. Using data from 433 class actions, the study reports the following: “Regardless of case size, fees average approximately 32 percent of the settlement.” Denise N. Martin, et al., *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?* at 12-13 (NERA Nov. 1996) (hereinafter “*Recent Trends IV*”), attached hereto as Exhibit “G”. Another study released in 1996 focused on all types of class actions in four federal district courts: the Southern District of Florida, the Northern District of California, the Eastern District of Pennsylvania, and the Northern District of Illinois. The Federal Judicial Center Study reported findings very similar to the NERA study: “Median rates

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<sup>5</sup> The Court held at the preliminary approval hearing that it “will entertain a fee application based on a percentage so long as it’s supported by a cross check lodestar summary presentation.” Transcript of September 24, 2002 hearing at 51, lines 8-10.

ranged from 27% to 30%. Most fee awards in the study were between 20% and 40% of the gross monetary settlement." Thomas E. Willging, Laurel L. Hooper, and Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* at 69 (Federal Judicial Center 1996), attached hereto as Exhibit "H".

The 30% of the settlement fund requested by Class Counsel here is well within the accepted range of reasonable attorneys' fees recoverable in common fund cases.

**1. The Requested 30% Fee Reflects the Market Rate in Other Complex, Contingent Litigation.**

The percentage method of awarding fees in class actions is consistent with, and is intended to mirror, practice in the private marketplace where attorneys negotiate percentage fee arrangements with their clients. In re Synthroid Marketing Litig., 264 F.3d 712, 718 (7<sup>th</sup> Cir. 2001) (Easterbrook, F.). Consequently, in setting a percentage fee, courts should look to the private marketplace:

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.

In re RJR Nabisco Sec. Litig., 1992 U.S. Dist. LEXIS 12702, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,984, at 94,268 (S.D.N.Y. 1992), attached hereto as Exhibit "T". This approach has been mandated by numerous courts. For example, in In re Continental Illinois Sec. Litig., 962 F.2d 566 (7<sup>th</sup> Cir. 1992), Judge Richard Posner reversed a district court's reduction of a requested fee percentage, holding:

It is apparent what the district judge's mistake was. He thought he knew the value of the class lawyers' legal services better than the market.

\* \* \*

The object in awarding a reasonable attorney's fee, as we have been at pains to stress, is to give the lawyer what he would have gotten in the way

of a fee in an arms' length negotiation, had one been feasible. In other words the object is to stimulate the market where a direct market determination is unfeasible.

Id. at 568, 572. Recently, Judge Easterbrook held in In re Synthroid Marketing Litig., 264 F.3d 712 (7<sup>th</sup> Cir. 2001), that "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." Id. at 718.

In determining the market price for such services, evidence of fee arrangements in comparable litigation should be examined. See Continental Illinois Sec. Litig., 962 F.2d at 573 (the judge must try to simulate the market "by obtaining evidence about the terms of retention in similar suits, suits that differ only because, since they are not class actions, the market fixes the terms"); Synthroid Marketing Litig., 264 F.3d at 719 (court should evaluate fee contracts and other data from similar cases where fees were privately negotiated).

Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation. See, e.g., Phemister v. Harcourt Brace Jovanovich, Inc., 1984 U.S. Dist. LEXIS 23595, 1984-82 Trade Cas. (CCH) ¶66,234, at 66,995 (N.D. Ill. 1984) ("Contingent fee arrangements in non-class action damage lawsuits are the simple method of paying the attorney a percentage of what is recovered for the client. The more the recovery, the more the fee. The percentages agreed on vary, with one-third being particularly common."), attached hereto as Exhibit "J"; Kirchoff v. Flynn, 786 F.2d 320, 323 (7<sup>th</sup> Cir. 1986) (observing that "40% is the customary fee in tort litigation" and noting, with approval, contract providing for one-third contingent fee if litigation settled prior to trial).

These percentages cited by the courts are confirmed by those set forth in executed contingency fee contracts in similar complex litigation. For example, several members of Class Counsel executed (and currently have in place) private contingency fee contracts in

similar, complex antitrust class actions. Contracts with these non-class plaintiffs, which were entered into at arm's-length, provide for contingency fees of between 33.3% and 50% of the recovery, depending on the stage of litigation reached. See affidavits of members of Class Counsel, attached collectively hereto as Exhibit "K". Additionally, Stephen D. Susman, a partner at Susman Godfrey, LLP – a well-known firm specializing in complex commercial litigation nationally – confirms that his firm regularly enters into fee agreements in antitrust cases at contingent fee rates of between 33.33% and 45%. See Affidavit of Stephen Susman, attached hereto as Exhibit "L". Moreover, the named Plaintiffs here have indicated that they would have been willing to enter into a contingency fee contract with Class Counsel for payment of 33.3% of their recovery for representing them in their individual prosecution of this litigation. See affidavits of Louisiana Wholesale Drug Company, Inc. and Duane Reade, Inc., attached hereto as Exhibits "M" and "N", respectively. Class Counsel's requested 30% fee is well within the prevailing market rate throughout the United States for contingent representation in complex litigation cases such as this one.<sup>6</sup>

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<sup>6</sup> While some courts have not adopted the Seventh Circuit's market-based approach, Class Counsel's fee request is reasonable even under alternative approaches. For example, in Vizcaino v. Microsoft Corp., 290 F.3d 1043 (9<sup>th</sup> Cir. 2002), the Ninth Circuit held that courts must look at the totality of the circumstances in deciding the appropriate percentage to apply in each case. The factors identified by the court included many of the same factors relevant under Sixth Circuit law, including: (1) the results achieved for the class; (2) the risk undertaken by class counsel; (3) the contingent nature of the case; and (4) the expense and effort required to litigate the case. Id. at 1048-50. Although it criticized the Seventh Circuit's approach, the Ninth Circuit credited class counsel's evidence that the 30% fee agreement between class counsel and the named plaintiff "reflected the standard contingency fee for similar cases." Id. at 1049. As noted above, Plaintiffs here have proffered similar evidence. After considering these factors, as well as the "lawyers' reasonable expectations, which are based on the circumstances of the case and the range of fee awards out of common funds of similar size", Id. at 1050, the Ninth Circuit approved the district court's award of 28% of a \$96.855 million settlement fund.

**2. A Declining Percentage Based Upon the Size of Recovery is Not Appropriate.**

A few courts have indicated that as settlement funds grow larger than some arbitrary number, such as \$100 million – sometimes referred to as “megafunds”, a lower percentage should be applied to the settlement fund in awarding attorneys’ fees. See, e.g., In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465 (S.D.N.Y. 1998) (approved the application of declining percentages to “megafund” cases over \$100 million and awarded 14% of \$1 billion settlement in attorneys’ fees). Applying such a declining percentage, however, is directly contrary both to the Class’ interest in obtaining the maximum recovery possible, and to what Class Counsel would have received on the open market. As Judge Easterbrook recognized in Synthroid Marketing Litig., “[p]rivate parties would never contract for such an arrangement, because it would eliminate counsel’s incentive to press for more [money]”. 264 F.3d at 718. In further explaining the economic irrationality of declining percentage fee structures and overruling the district court’s application of a declining fee structure, Judge Easterbrook stated:

The district judge defined megafunds as settlements of \$75 million and up. Fees in “megafund” cases should be capped at 10% of the recovery, the judge held, although she recognized that fees of 30% and more are common and proper in smaller cases. This means that counsel for the consumer class could have received \$22 million in fees had they settled for \$74 million but were limited to \$8.2 million in fees because they obtained an extra \$14 million for their clients (the consumer fund, recall, is \$88 million). Why there should be such a notch is a mystery. Markets would not tolerate that effect. . . .

Id.

Judge Kaplan similarly criticized the declining percentage approach in In re Auction Houses Antitrust Litig., 197 F.R.D. 71 (S.D.N.Y. 2000):

By adjusting downward the percentage of the recovery awarded to counsel as plaintiffs' recovery increases . . . this method may give rise to an attorney incentive problem by creating declining marginal returns to effort for counsel. If counsel's opportunity costs begin to exceed the economic benefit to counsel of continuing to litigate, counsel may be more likely to settle the case and exit the litigation rather than prolonging the litigation and pushing for a higher recovery for the class, even if the added effort would be in plaintiffs' best interest. Again, this method can create an incentive to settle quickly and cheaply, when the returns to effort are highest, rather than investing additional time and maximizing plaintiffs' recovery.

Id. at 80.

The court in In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 197 (E.D. Pa. 2000), likewise rejected the declining percentage concept, holding that “[s]uch an approach also fails to appreciate the immense risks undertaken by attorneys in prosecuting complex cases in which there is a great risk of no recovery. Nor does it give sufficient weight to the fact that ‘large attorneys’ fees serve to motive capable counsel to undertake these actions.’”

Moreover, courts from various jurisdictions confirm that even in cases with large recoveries, attorneys' fees ranging from 25%-30% are regularly awarded. See, e.g., In re Ikon, 194 F.R.D. at 166 (awarding 30% of a \$111 million); In re Sumitomo Copper Litig., 74 F. Supp. 2d 393 (S.D.N.Y. 1999) (awarding 27.5% of \$116 million); Kurzweil v. Philip Morris Companies, Inc., No. 94-2373 (MBM), 94 Civ. 2546 (MBM), 1999 U.S. Dist. LEXIS 18378 (S.D.N.Y. Nov. 30, 1999) (awarding 30% of \$123.8 million), attached hereto as Exhibit “O”; In re Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D. Tex. 1999) (acknowledging declining percentage concept, but nevertheless awarding 25% of \$190 million); In re Combustion Inc., 968 F. Supp. 1116 (W.D. La. 1997)

(awarding maximum reserve of 36% fee from \$127 million); In re Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, MDL 997, 2000 U.S. Dist. LEXIS 1734 (N.D. Ill. Feb. 10, 2000) (awarding 25% of \$700 million), attached hereto as Exhibit “P”, In re Aetna Inc. Securities Litig., MDL No. 1219, 2001 U.S. Dist. LEXIS 68 (E.D. Pa. 2001) (awarding 30% of \$81 million), attached hereto as Exhibit “Q”; In re Rite Aid Corp. Sec. Litig., 146 F. Supp. 2d 706 (E.D. Pa. 2001) (awarding 25% of \$193 million); In re Prudential Sec. Inc., Ltd. Partnership Litig., 912 F. Supp. 97 (S.D.N.Y. 1996) (awarding 27% of \$110 million).

Class Counsel respectfully submit that application of a declining percentage here would neither be fair nor in accord with what Class Counsel would have been able to negotiate in the open market. No downward adjustment of the percentage based upon the size of the recovery should be applied here.

**D. Application of the Sixth Circuit’s Reasonableness Factors Supports Class Counsel’s Request for a 30% Fee.**

The Sixth Circuit has set forth various factors that should be evaluated when determining the reasonableness of an attorney fee request: (1) whether the services were undertaken on a contingent fee basis; (2) the complexity of the litigation; (3) the professional skill and standing of counsel involved on both sides; (4) the value of the benefit rendered to the class; (5) the value of the services on an hourly basis; and (6) society’s stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others. Smillie v. Park Chem. Co., 710 F.2d 271, 274 (6<sup>th</sup> Cir. 1983). An application of these factors to this case confirms that the fee requested is well within the reasonable range.

## 1. The Contingent Nature of the Fee.

A determination of a fair fee must include consideration of the sometimes undesirable characteristics of a contingent antitrust action, including the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high. Numerous cases recognize that attorneys' risk is "perhaps the foremost factor" in determining an appropriate fee award. Goldberger, 209 F.3d at 54 (citation omitted); accord Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981) ("Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result."). In Behrens v. Wometco Enterprises, Inc. 118 F.R.D. 534, 548 (S.D. Fla. 1988), aff'd, 899 F.2d 21 (11th Cir. 1990), the Court noted that:

Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer....

A contingency fee arrangement often justifies an increase in the award of attorneys' fees. This rule helps assure that the contingency fee arrangement endures. If this "bonus" methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.

Id. (citations omitted) at 548. As Judge Nimmons explained in Ressler v. Jabobson:

The Court is well aware that there are numerous contingent cases such as this where plaintiff's counsel, after investing thousands of hours of time and effort, have received no compensation whatsoever. Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award . . . . In evaluating [the contingent fee] factor the Court will not ignore the pecuniary loss suffered by plaintiff's counsel in other actions where counsel received little or no fee.

149 F.R.D. 651, 656-57 (M.D. Fla. 1992) (citations omitted).<sup>7</sup>

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<sup>7</sup> The Fourth Circuit made a similar observation in McKittrick v. Gardner, 378 F.2d 872, 875 (4th Cir. 1967):

Success before a jury in complex litigation is highly unpredictable. As one court observed in another antitrust class action: "It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced." West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir. 1971).

The history of antitrust litigation is replete with cases in which plaintiffs succeeded at trial on liability, but recovered no damages or very small damages at trial or after appeal. See, e.g., United States Football League v. National Football League, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) ("the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only \$1.00 in damages"), aff'd, 842 F.2d 1335 (2d Cir. 1988); MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1166-67 (7th Cir. 1983) (antitrust judgment was remanded for new trial and damages). Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), vacated on other grounds, 417 U.S. 156 (1974), illustrates the risks faced by Class Counsel. Eisen was brought as an antitrust class action. After two trips to the Second Circuit and one to the Supreme Court, plaintiffs and the putative class and their counsel recovered nothing.

This case is no exception to the rule. When Class Counsel undertook the representation of named Plaintiffs and the Class, there were no assurances that any fees would be received. Class Counsel were aware that they would likely have to expend tens

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The effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services. Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.

of thousands of hours and hundreds of thousands of dollars in prosecuting this case over an extended period of time before having even a possibility of recovering a fee. In doing so, Class Counsel deferred engaging in more traditional work that would have otherwise paid by the hour and not required large outlays of cash for expenses. Class Counsel alone bore the risk of the case being dismissed in the pretrial stage, of not prevailing at trial if the case progressed that far, or even possibly losing on appeal.

For example, although Class Counsel obtained a ruling from the Court establishing that the HMRI/Andrx Agreement is a *per se* violation of the Sherman Act, Plaintiffs still bear the risk of prevailing on causation and damages in order to succeed on their cause of action under Section 4 of the Clayton Act, 5 U.S.C. § 15. (Of course, there was no assurance that Class Counsel would succeed in obtaining the *per se* ruling from the Court when Class Counsel brought the case.)<sup>8</sup> Moreover, there is no assurance that the *per se* ruling, which was appealed by the Defendants and is currently pending before the Sixth Circuit Court of Appeals, will be upheld on appeal. The risk involved in succeeding at trial and on appeal on liability, causation and damages, along with the enormous financial risks and outlays borne by Class Counsel to date in this contingency matter, all support the fee requested.

To date, Class Counsel have received no compensation during the course of this four-year litigation, yet have spent over 27,000 of hours in vigorously prosecuting this case and incurred approximately \$1,080,231.74 in expenses. See Co-Lead Aff., Exhibit “A” for a full description of the work performed and financial burdens carried.

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<sup>8</sup> Nor was there any assurance that Plaintiffs’ class certification motion would succeed.

## 2. The Complexity of the Case.

Antitrust class actions are inherently complex and arguably the most complex class action to prosecute because the legal and factual issues are always complicated and uncertain in outcome. This antitrust action is no different. In fact, in addition to the legal issues involved in overcoming Defendants' motions to dismiss and successfully obtaining class certification and a partial summary judgment ruling on *per se* liability at the onset of the case, this case involves some highly technical and complex issues that are not present in all antitrust cases. As detailed in the attached Co-Lead Counsel Affidavit, Plaintiffs spent thousands of hours analyzing and consulting with experts concerning: (1) regulatory issues arising out of the Hatch-Waxman Act; (2) patent law issues relevant to the Aventis/Andrx patent litigation underlying the illegal agreement; (3) the intricacies of the pharmaceutical industry from a sales and marketing perspective; (4) the scientific and production processes involved with inventing and commercializing branded and generic pharmaceutical products; and (5) the FDA regulations applicable to reviewing and approving pharmaceutical products and new manufacturing facilities/processes. Co-Lead Aff. at ¶¶ 32-35, 70-72.

Such analysis was necessary in light of the many causation defenses asserted by Andrx in support of its argument that it would not have come to market but for its unlawful agreement with Aventis. These defenses include: (a) Andrx's management and board of directors had no intention of entering the market with its original formulation of its generic Cardizem CD (i.e., Andrx's generic Cardizem CD product having a not-less-than 55% dissolution profile at the 18-hour mark) while the patent litigation with Aventis was ongoing; (b) Andrx had insufficient funds to develop and manufacture its reformulated generic Cardizem CD product (i.e., Andrx's generic Cardizem CD product

having a not-less-than 65% dissolution profile at the 18-hour mark), but needed the money it was paid by Aventis in connection with the unlawful agreement to perform this work; (c) Andrx did not have sufficient funds to properly market any version of its generic Cardizem CD product during the time period Plaintiffs alleged it could have come to market; (d) Andrx did not possess sufficient equipment to produce its generic Cardizem CD product in adequate commercial quantities during the time period Plaintiffs alleged it could have come to market; (e) Andrx did not possess sufficient facilities to produce its generic Cardizem CD product in adequate commercial quantities during the time period Plaintiffs alleged it could have come to market; (f) Andrx did not have sufficient numbers of trained and qualified employees to manufacture its generic Cardizem CD product in adequate commercial quantities during the time period Plaintiffs alleged it could have come to market; and (g) Andrx did not have the scientific and manufacturing know-how to make any version of its generic Cardizem CD product with sufficient consistency to meet the FDA's required standards for launching its generic Cardizem CD product during the time period Plaintiffs alleged it could have come to market.

Class Counsel were obliged to fully understand every aspect of Andrx's business and manufacturing operations and the applicable FDA regulations in order to demonstrate that Andrx's causation defenses are meritless. Through internal analysis of the voluminous documentary record, and depositions Class Counsel took based on their analysis, Class Counsel were able to gather significant evidence indicating that Andrx possessed sufficient finances, equipment, facilities, employees, and scientific know-how

to develop, manufacture and market its generic Cardizem CD product in the “but for” world. Co-Lead Aff. at ¶¶ 49-51.

As described above and in the Co-Lead Counsel Affidavit (Exhibit “A” hereto), the complexity of the issues involved in Class Counsel’s prosecution of this litigation supports the 30% fee requested.

### **3. The Skill, Experience and Reputation of Counsel.**

Class Counsel include some of the preeminent antitrust firms in the country with decades of experience in prosecuting and trying complex actions.<sup>9</sup> Several of these firms have also been actively engaged in antitrust litigation (class and non-class) in the pharmaceutical industry for the past ten years. This experience and skill were demonstrated by Class Counsel’s efficient and effective prosecution of this action, including the beneficial settlement entered into with Defendants.

Notably, from the beginning of this action, Class Counsel vigorously prosecuted the Class’ claims. This effort resulted in a partial summary judgment reflecting early in this case that the HMRI/Andrx Agreement was a *per se* violation of the Sherman Act. This ruling on partial summary judgment on behalf of Plaintiffs was a watershed event in the litigation, although by itself did not guarantee a monetary recovery. In order to prevail under section 4 of the Clayton Act, 15 U.S.C. § 15, which provides private plaintiffs with a cause of action for violations of the antitrust laws, plaintiffs must still prove causation and damages. That Class Counsel were able to achieve a \$110 million

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<sup>9</sup> The background, experience, accomplishments and qualifications of Class Counsel are summarized in the firm resumes and biographies attached to their individual affidavits collectively submitted herewith as Exhibit “B”.

settlement despite the FTC's statement in their settlement with Defendants that the Agreement did not delay generic entry is another testament to the skill and experience demonstrated by Class Counsel. Plaintiffs' counsel in very few antitrust class actions have been able to obtain such results for the Class. Moreover, Class Counsel obtained this result despite the skill and vigorous advocacy demonstrated by Defendants' counsel in this litigation.<sup>10</sup>

Another illustration of Class Counsel's skill and experience is the integral, leading role Class Counsel were able to take in deposing many of the critical defense witnesses in this case, and in presenting the plaintiffs' case to the Defendants at the mediation regarding the issues affecting all plaintiffs in the coordinated actions, in particular the causation issues.

Other examples of the skill and experience Class Counsel brought to bear on this case (including surviving Defendants' motions to dismiss and certifying the Class), as set forth in the attached Co-Lead Counsel Affidavit, further support the requested percentage fee award.

#### **4. The Excellent Result Achieved on Behalf of the Class.**

The result achieved is a major factor to consider in making a fee award. Hensley v. Eckerhart, 461 U.S. 424, 436 (1983) ("critical factor is the degree of success obtained"); see also Behrens, 118 F.R.D. at 547-48 ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained."); Goldberger, 209

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<sup>10</sup> Defendants fought Plaintiffs' efforts at every step of this litigation. Plaintiffs were forced to file or defend against over 20 motions. Similarly, Plaintiffs were forced to defend on appeal each favorable ruling they were able to accomplish before the Court, including their *per se* partial summary judgment ruling, class certification and denial of Defendants' motions to dismiss.

F.3d at 55 ("the quality of representation is best measured by results"). The results achieved in this case fully support the requested fee. The \$110 million in cash and \$539,116.96 in accrued interest as of October 31, 2002, is approximately 200% of the amount overcharged during the period the alleged unlawful agreement was in effect and 95% of the amount overcharged through the date the Settlement Agreement was signed (August 13, 2002). This result far exceeds the results achieved in most antitrust actions. See, e.g., Jack Faucett Associates, Inc., v. American Tel. & Tel. Co., 1985 WL 5199 (D.D.C. 1985) (settlement of an antitrust class action that created a fund that was approximately 50% of the potential recovery was "well above the range which many courts have approved as fair, reasonable and adequate." ), attached hereto as Exhibit "R"; In re First DataBank Antitrust Litig., 205 F.R.D. 408, 411 (D.D.C. 2002) ("This Court has previously recognized the appropriateness of approving class settlements involving recoveries for far less than the whole of estimated single damages suffered"); In re Warfarin Sodium Antitrust Litig., 2002 U.S. Dist. LEXIS 16375 (D. Del. Aug. 30, 2002) (found that settlement amount of \$44.5 million, which represented approximately 33% of the best possible recovery, was "a very reasonable settlement when compared with recovery percentages in other class actions."), attached hereto as Exhibit "S".

Not only is the settlement large in an absolute sense, it is also quite substantial in relation to any potential damages recovery. It is indeed unusual for a settlement of this magnitude to recover such a substantial percentage of the estimated overcharge to the Class. As discussed above, the settlement figure in this case is more than twice the total overcharge damages suffered during the 11-month period the unlawful agreement was in effect and close to 100% of total overcharge damages suffered by the Class through the

period the Settlement Agreement was signed.

This is an extraordinary recovery when compared, for example, to two recent large antitrust class action settlements, namely In re Brand Name Prescription Drugs Antitrust Litig., 2000 U.S. Dist. LEXIS 1734 and In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465 (S.D.N.Y. 1998). In the former, while the settlement ultimately approved was for \$697 million, 2000 U.S. Dist. LEXIS 1734, the plaintiffs' experts had estimated damages to be almost nine times that amount, or \$6 billion. See In re Brand Name Prescription Drugs Antitrust Litig., 1996 WL 167347, at \*4 (N.D. Ill. Apr. 4, 1996), attached hereto as Exhibit "T". Further, in NASDAQ, which settled for slightly over \$1 billion, plaintiffs had estimated damages to range from 2.5 to 3 times that amount. 187 F.R.D. at 477. When viewed in this context, Plaintiffs' recovery here is clearly an outstanding result.

For the reasons detailed in the Sherman Act Class Plaintiffs' Memorandum in Support of Motion for Final Approval of Settlement, the \$110 million recovery is an exceptional result in light of all the risks and uncertainties in this case.

**5. The Value of Class Counsel's Services on an Hourly Basis.**

Class Counsel have been litigating this case for nearly four years. Thousands of hours were spent obtaining admissible testimony from witnesses, obtaining a partial summary judgment establishing that Defendants' agreement is a *per se* violation of the antitrust laws, attending and arguing at over two dozen hearings, obtaining class certification, successfully defending against Defendants' motions to dismiss, developing a case against Defendants, obtaining relevant and critical documents from Defendants and third parties, obtaining damages information, working with experts and negotiating and documenting the settlement with Defendants. See Co-Lead Affidavit, Exhibit "A".

The significant investment of time required by this action necessarily precluded Class Counsel's opportunity to work on other matters.

There is no question that the considerable amount of time and effort expended by Class Counsel resulted in an excellent settlement for the Class.

As the Court requested at the hearing on preliminary approval, Class Counsel have prepared individual firm affidavits setting forth the hours expended in this case on pleadings, discovery, mediation/settlement, experts, court appearances and case management, as well as their out-of-pocket expenses. See individual firm affidavits attached hereto as Exhibit "B". In total, Class Counsel expended \$9,001,654.25 in attorney time and \$1,080,231.74 in expenses in prosecuting this case, see Co-Lead Aff. at ¶ 87, and was (and is) prepared to put at risk considerable more time and money had the litigation not settled.

A 30% fee recovery in this matter would equate to a lodestar multiplier of approximately 3.7. Similar multipliers have been routinely accepted as fair and reasonable in complex matters such as this one that last a period of several years. See, e.g., Weiss v. Mercedes-Benz of N. Am. Inc., 899 F. Supp. 1297, 1304 (D.N.J. 1995), aff'd, 66 F.3d 314 (3d Cir. 1995) (awarding a multiplier of 9.3); Rabin v. Concord Assets Group, Inc., 19914 U.S. Dist. LEXIS 18273, [1991-92 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,471 (S.D.N.Y. 1991) ("In recent years, multipliers of between 3 and 4.5 have become common"; applied a 4.4 multiplier), attached hereto as Exhibit "U"; Maley v. Del Global Tech. Corp., 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (awarding a multiplier of 4.65, "well within the range awarded by courts in this Circuit and courts throughout the country"); In re Aetna, Inc. Sec. Litig., 2001 U.S. Dist. LEXIS 68 (E.D. Pa. Jan. 4, 2001) (awarding a 3.6 multiplier); In re RJR Nabisco, Inc., Sec. Litig., [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,984 (S.D.N.Y. 1992) (awarding a percentage-based fee representing 6 times lodestar), Exhibit "T". Similar multipliers have been applied in cases with large settlement funds. See, e.g., Behrens, 118 F.R.D. at 549 (multipliers in large,

complicated class actions range from 2.26 to 4.5); In re Rite Aid Corp. Sec. Litig., 146 F. Supp. 2d 706 (awarding 25% of \$193 million and noting that the lodestar would range anywhere from a 4.5 to 8.5 multiplier); Van Vranken v. Arco, 901 F. Supp. 294 (N.D. Cal. 1995) (3.6 multiplier on \$76 million settlement); Vizcaino, 290 F.3d 1043 (3.65 multiplier on \$96.885 million settlement).<sup>11</sup>

The percentage of fees requested by Class Counsel are reasonable in light of the risk and the quality and quantity of work expended by Class Counsel over the past four years.

#### **6. Society's Stake in Rewarding Attorneys Who Produce Such Benefits.**

As discussed in Section III.A. above, the Supreme Court has repeatedly noted that the prosecution of private antitrust actions is integral in helping ensure compliance with the antitrust laws. See, e.g., Pillsbury Co. v. Conboy, 459 U.S. at 262-63; Reitner v. Sonotone Corp., 442 U.S. at 331; Hawaii v. Standard Oil Co., 405 U.S. at 266; Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. at 139; Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. at 318-19. Here, Class Counsel sought to enforce the antitrust laws and prevent a brand-name drug manufacturer from colluding with a generic competitor to block cheaper generic versions of the brand-name drug from coming to market.

In recent years, the pharmaceutical industry has drawn a significant amount of attention (and criticism) due to the increasing prices of prescription drugs. This case has

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<sup>11</sup> The Third Circuit Task Force found that “[g]iven the substantial problems with the lodestar approach generally, the Task Force is highly skeptical about the use of the lodestar even as a cross-check when awarding a percentage of the common fund. . . . We also emphasize that even if a lodestar cross-check is to be conducted, it is only a “cross-check” and not a full-blown lodestar inquiry.” Third Circuit Task Force on the Selection of Class Counsel, Final Report at 104-105 (Jan. 2002), Exhibit “F”.

helped highlight and focus the public debate on this issue, and has helped put prescription drug pricing and marketing tactics at the forefront of media, Congressional scrutiny, and judicial scrutiny.

Additionally, this litigation, and the amount of money that the Defendants will pay to the Class, send a clear message that purchasers of pharmaceutical products will not tolerate collusive behavior that unnecessarily and illegally raises the prices of pharmaceutical products. It is hoped that the payment of \$110 million will deter pharmaceutical companies from engaging in similar types of unlawful conduct in the future. The end result of this hoped-for deterrence is increased competition - something which benefits all purchasers of pharmaceutical products.

Moreover, encouraging qualified counsel to bring highly risky but beneficial class actions like the one here benefits society. See, e.g., In re M.D.C. Holdings Sec. Litig., [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 97,492 (“without able lawyers handling these matters not only do some of them go unprosecuted, but . . . you don’t get the highest recovery). Class Counsel undertook, at a significant risk, this litigation involving some very complex causation issues relating to the patent laws, drug manufacturing and the Hatch-Waxman Amendments. Payment of attorneys’ fees in the requested amount adequately and fairly compensates Class Counsel for the risk they undertook at the inception of the case and the benefit they have achieved for the Class in settling this litigation for \$110 million.

Class Counsel should be compensated such that they will have an incentive to pursue additional cases similar to this one.

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

Substantial out-of-pocket expenses have been incurred in prosecuting this litigation. Class Counsel's expenses are categorized in Co-Lead Counsel's affidavit, attached hereto as Exhibit "A".

It is well-settled that plaintiffs who have created a common fund for the benefit of a class are entitled to be reimbursed for their out-of-pocket expenses reasonably incurred in creating the fund. See, e.g., Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 389-98 (1970), cert. denied, 434 U.S. 922(1977); Gottlieb, 150 F.R.D. at 185 ("An award of expenses is warranted to class counsel under the common fund doctrine."). The appropriate analysis to apply in deciding whether expenses are compensable in a common fund case is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. Synthroid Marketing Litig., 264 F.3d at 722 (expenses paid by private clients in similar cases should be paid); Harris v. Marhoefer, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'") (citation omitted); Mitland Raleigh-Durham v. Myers, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients.") (citation omitted). The categories of expenses for which Class Counsel seek reimbursement here are the type of expenses routinely charged to hourly fee-paying clients and, therefore, should be reimbursed out of the common fund.

A large component of these expenses consists of fees paid to experts and consultants who were instrumental in, among other things, helping Plaintiffs certify the Class and in obtaining this favorable settlement for the Class. These expert expenses are reasonable and were necessarily incurred in obtaining this result for the Class.

Other expenses include the costs of computerized research. These are the actual charges for computerized factual and legal research services such as LEXIS, Westlaw and NEXIS. It is standard practice for attorneys to use LEXIS and Westlaw to assist them in researching legal issues. Indeed, courts recognize that these tools create efficiencies in litigation and, ultimately, save clients money. In approving expenses for computerized research, the court in Gottlieb v. Wiles, 150 F.R.D. 174, 186 (D. Colo. 1993), rev'd on other grounds sub nom., Gottlieb v. Barry, 43 F.3d 474 (10th Cir. 1994), underscored the time-saving attributes of computerized research as a reason reimbursement should be encouraged. The court also noted that hourly fee-paying clients reimburse counsel for such computerized legal research. Id.

In addition, Class Counsel were required to travel in connection with this litigation for depositions, hearings and meetings with potential witnesses and consultants, and thus incurred considerable costs for meals and lodging. The expenses in this category are reasonable in amount and are properly charged against the fund created. See In re McDonnell Douglas Equip. Leasing Sec. Litig., 842 F. Supp. 733, 746 (S.D.N.Y. 1994); Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 741 F. Supp. 84, 86 (S.D.N.Y. 1990).

Other expenses for which Class Counsel are seeking reimbursement (i.e., copying costs, postage, secretarial overtime) are also customarily charged to paying clients. See Brown v. Pro Football, Inc., 839 F. Supp. 905, 916 (D.D.C. 1993) (citing Missouri v. Jenkins, 491 U.S. 274, 286 (1989), for the proposition that “[p]laintiffs’ out-of-pocket costs for telephone, telecopier, air and local couriers, postage, photocopying, Westlaw research, secretarial overtime, and counsels’ travel expenses are routinely billed to fee-paying clients, and thus are all compensable as part of a reasonable attorneys’ fee”).<sup>12</sup>

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<sup>12</sup> In the affidavits of Class Counsel, collectively Exhibit “B” hereto, Co-Lead Counsel list “contribution to the litigation fund” as an expense. Class Counsel made individual contributions to this fund, which was in turn used to pay such reasonable expenses as expert fees, scanning and copying costs for Defendants’ document

The expenses incurred in this litigation are described in detail in the accompanying affidavits. Class Counsel believe that the expenses were all reasonably incurred, are reasonable in amount and should be reimbursed in full.

**V. INCENTIVE AWARDS FOR THE NAMED PLAINTIFFS ARE APPROPRIATE AND REASONABLE**

Class Counsel request the Court to approve incentive awards in the amount of \$20,000 each for the two named Plaintiffs, Louisiana Wholesale Drug Company, Inc. (“Louisiana Wholesale”) and Duane Reade, Inc. The Notice to the Class advised Class members that Class Counsel would apply for incentive awards for the named Plaintiffs. To date, no objections to such awards have been received.

The named Plaintiffs diligently and completely fulfilled their obligations as representatives for the Class. They stepped forward and pursued the Class’ interests by filing suit on behalf of the members of the Class and undertaking the responsibilities attendant upon serving as a named plaintiff, including being deposed and responding to document requests and interrogatories. The named Plaintiffs also participated in the settlement negotiations, including attendance by Louisiana Wholesale at a three-day mediation.

In instituting this litigation, the named Plaintiffs have acted as private attorneys general seeking a remedy for what appeared to be a public wrong, in effect providing private enforcement of the law. It is well recognized that private class action suits are a primary weapon in the enforcement of the laws for the protection of the public. See, e.g., P.D.Q. Inc. of Miami v. Nissan Motor Corp. in USA, 61 F.R.D. 372, 380 (S.D. Fla. 1973)

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productions, filing fees and court reporting fees. The contributions for which Class Counsel seek reimbursement have been used in payment for such expenses.

(private civil suits are an important tool in enforcing the antitrust laws); Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970) (the effectiveness of the securities laws depends in large measure on the application of the class action device).

Numerous courts have found it appropriate to specially reward named class plaintiffs for the benefits they have conferred. See In re Dun & Bradstreet Credit Services Customer Litig., 130 F.R.D. 366 (S.D. Ohio 1990) (two incentive awards of \$55,000 and three incentive awards of \$35,000); REVCO Sec. Litig., Arsam Co. v. Salomon Bros., Inc., 1992 U.S. Dist. LEXIS 7852 (N.D. Ohio 1992), [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,956 (N.D. Ohio 1992) (\$200,000 to the named plaintiff), attached hereto as Exhibit "V"; Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250-51 (S.D. Ohio 1991) (\$50,000 each to 6 named plaintiffs); Bogosnian v. Gulf Oil Corp., 621 F. Supp. 27 (E.D. Pa. 1985) (incentive awards of \$20,000 to each of two named plaintiffs).

For these reasons, Class Counsel submit that the requested incentive awards for the two named Plaintiffs are both appropriate and reasonable in amount.

## VI. CONCLUSION

Without any guarantee of success, Class Counsel pursued this litigation at their own risk and expense for almost four years. For the reasons set forth above, Class Counsel respectfully request the Court to approve the fee and expense application and enter an order awarding Class Counsel a fee of \$33,000,000 (30% of the settlement) plus 30% accrued interest (\$539,116.96), and \$1,080,231.74 in out-of-pocket expenses. Class Counsel also request that the two named Plaintiffs be awarded \$20,000 each for their participation in the prosecution of this action.

A proposed form of Order will be submitted to the Court by Class Counsel.

Dated: November 4, 2002

Respectfully submitted,

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