

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY (NEWARK)**

Stephen Giercyk, Ajay Das and James and Emma Imes, on behalf of themselves and all other similarly situated,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
National Union fire Insurance Company of Pittsburgh, PA, d/b/a National Union Fire Insurance Company, a division of American International Group, Inc. (AIG), Healthextras, Inc., Healthextras Benefits Administrators, Inc., Catamaran Health Solutions, LLC f/k/a Catalyst Health Solutions, Inc., Healthextras Insurance Agency, Inc., American International Group, Inc., d/b/a Group Insurance Trust, for the account of Healthextras, Alliant Insurance Services, Inc., f/k/a Driver Alliant Insurance Services, Inc., Alliant Services Houston, Inc., f/k/a JLT Services Corporation, and Alliant Insurance, Services Houston, LLC, f/k/a Capital Risk, LLC and f/k/a Jardine Lloyd Thompson, LLC and Virginia Surety Company, Inc.	:	Civil Action No: 2:13-cv-6272-FSH-MAH
	:	
Defendants.	:	CLASS ACTION

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED
MOTION FOR APPROVAL OF ATTORNEYS' FEES AND CASE
CONTRIBUTION FEES AND REIMBURSEMENT OF COSTS AND EXPENSES**

TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION	1
CASE HISTORY	2
ARGUMENT	3
I. CLASS COUNSEL’S UNOPPOSED REQUEST FOR ATTORNEYS’ FEES IS REASONABLE AND AUTHORIZED BY THE SETTLEMENT AGREEMENT	3
A. Application of the Percentage-of-the-Fund Method is Proper When Awarding Attorneys’ Fees in a Common Fund Case	4
B. Class Counsel is Entitled to a Fee of One-Third of the Settlement Fund	6
1. One-Third of the Settlement Fund is Reasonable	7
2. No Lodestar Analysis is Required	8
C. Other Factors to Determine the Reasonableness of Fees Support the Requested Fee Award	10
1. Whether the Fee Was Fixed or Contingent.....	11
2. The Time and Labor Required, the Size of the Fund Created, the Number of Persons Benefitting from the Settlement, the Novelty and Difficulty of the Questions Involved, and the Skill, Experience, Reputation and Ability of Counsel Required to Perform the Service Properly.....	13
3. The Current Absence of Objections to the Attorneys’ Fees Favors Approval.....	16
4. The Requested Attorneys’ Fees Are Reasonable When Compared to Awards in Similar Cases and What Would Have Been Contracted in a Private Contingency Matter	17
II. PLAINTIFFS’ COUNSEL SHOULD BE AWARDED REIMBURSEMENT OF LITIGATION COSTS AND EXPENSES.....	18
III. THE CASE CONTRIBUTION FEES REQUESTED FOR CLASS REPRESENTATIVES ARE REASONABLE	19
CONCLUSION.....	23
CERTIFICATE OF SERVICE	25

TABLE OF AUTHORITIES

	<u>PAGE</u>
Cases	
<i>Bodnar v. Bank of Am., N.A.</i> , No. 14-3224, 2016 WL 4582084 (E.D. Pa. Aug. 4, 2016)	8, 9
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472 (1980).....	5, 6
<i>Bredbenner v. Liberty Travel, Inc.</i> , No. 09-905, 2011 WL 1344745 (D.N.J. Apr. 8, 2011).....	21
<i>Cabrales v. Cnty. of Los Angeles</i> , 935 F.2d 1050 (9th Cir. 1991)	14
<i>Carroll v. Stettler</i> , No. 10-2262, 2011 WL 5008361 (E.D. Pa. Oct. 19, 2011)	21
<i>Central R.R. & Banking Co. v. Pettus</i> , 113 U.S. 116 (1885).....	6
<i>Chakejian v. Equifax Info. Servs., LLC</i> , 275 F.R.D. 201, 219 (E.D. Pa. 2011).....	12, 21
<i>Chaudhri v. Osram Sylvania Inc.</i> , No. 2:11-cv-05504 (D.N.J.) [D.E. # 100] (Jan. 9, 2015)	8
<i>Cullen v. Whitman Medical Corp.</i> , 197 F.R.D. 136 (E.D. Pa. 2000).....	21
<i>Fanning v. Acromed Corp.</i> , No. 1014, 2000 WL 1622741 (E.D. Pa. Oct. 23, 2000).....	17
<i>Feiertag v. DDP Holdings, LLC</i> , No. 14-CV-2643, 2016 WL 4721208 (S.D. Ohio Sept. 9, 2016)	9
<i>Fickinger v. C.I. Planing Corp.</i> , 646 F. Supp. 622 (E.D. Pa. 1986)	5
<i>Gierliner v. Gleason</i> , 160 F.3d 858 (2d Cir. 1998).....	14
<i>Godshall v. The Franklin Mint Co.</i> , No. 01-cv-6539, 2004 U.S. Dist. LEXIS 23976 (E.D. Pa. Dec. 1, 2004).....	22
<i>Goldberger v. Integrated Res., Inc.</i> , 209 F.3d 43 (2d Cir. 2000).....	9
<i>Gunter v. Ridgewood Energy Corp.</i> , 223 F.3d 190 (3rd Cir. 2000)	10, 14, 15
<i>Hall v. AT&T Mobility LLC</i> , No. 07-5325 JLL, 2010 WL 4053547 (D.N.J. Oct. 13, 2010).....	7, 15, 16

Hall v. Best Buy Co., Inc.,
274 F.R.D. 154 (E.D. Pa. 2011)..... 21

Hall v. Cole,
412 U.S. 1 (1973)..... 6

Haught v. Summit Res., LLC,
No. 1:15-CV-0069, 2016 WL 1301011 (M.D. Pa. Apr. 4, 2016)..... 22

Hensley v. Eckerhart,
461 U.S. 424 (1983)..... 10

In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.,
263 F.R.D. 226 (E.D. Pa. 2009)..... 21, 22

In re AT&T Corp.,
455 F.3d 160 (3d. Cir. 2006)..... *passim*

In re Certainteed Fiber Cement Siding Litig.,
303 F.R.D. 199 (E.D. Pa. 2014)..... 19

In re Checking Account Overdraft Litig.,
830 F. Supp. 2d 1330 (S.D. Fla. 2011) 9

In re Datatec Systems, Inc. Sec. Litig.,
No. 04-525, 2007 WL 4225828 (D.N.J. Nov. 28, 2007) 11, 16

In re First Fid. Bancorporation Sec. Litig.,
750 F. Supp. 160 (D.N.J. 1990) 5

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.,
55 F.3d 768 (3d Cir. 1995)..... 4, 7

In re Genta Sec. Litig.,
No. 04-2123, 2008 WL 2229843 (D.N.J. May 28, 2008)..... 16

In re Ikon Office Solutions, Inc. Sec. Litig.,
194 F.R.D. 166 (E.D. Pa. 2000) 5, 11, 17

In re Ins. Brokerage Antitrust Litig.,
No. 04-5184, 2007 WL 1652303 (D.N.J. June 5, 2007) 9

In re Janney Montgomery Scott LLC Fin. Consultant Litig.,
No. 06-3202, 2009 WL 2137224 (E.D. Pa. Jul. 16, 2009) 11

In re OSB Antitrust Litig.,
Master File No. 06-826, 2008 U.S. Dist. LEXIS 125173 (E.D. Pa. Dec. 9, 2008) 16

In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,
148 F. Supp. 450 (D.N.J. 1997) 7

In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Action Litig.,
962 F.3d 283 (3d Cir. 1998)..... 4, 8,

In re Prudential-Bache Income Partnerships Sec. Litig.,
No. 888, 1994 WL 202394 (E.D. La. May 18, 1994)..... 12

In re Remeron Direct Purchaser Antitrust Litig.,
 No. 03-0085, 2005 WL 3008808 (D.N.J. Nov. 9, 2005) 17, 18

In re Rite Aid Corp. Sec. Litig.,
 146 F. Supp. 2d 706 (E.D. Pa. 2001) 9

In re Rite Aid Corp. Sec. Litig.,
 396 F.3d 294 (3rd Cir. 2005) 4, 8, 16

In re Safety Components, Inc. Securities Litig.,
 166 F. Supp. 2d 72 (D.N.J. 2001) 15

In re Suprema Specialties, Inc. Sec. Litig.,
 No. 02-168, 2008 WL 906254 (D.N.J. March 31, 2008) 9

In re Warfarin Sodium Antitrust Litig.,
 391 F.3d 516 (3d Cir. 2004)..... 7

In re WorldCom, Inc. Sec. Litig.,
 388 F. Supp. 2d 319 (S.D.N.Y. 2005)..... 5

Johnson v. Ga. Highway Express, Inc.,
 488 F.2d 714 (5th Cir. 1974) 10

Lachance v. Harrington,
 965 F. Supp. 630 (E.D. Pa. 1997) 5

Lindy Bros. Builders of Phila. v. Am. Radiator & Standard Sanitary Corp.,
 540 F.2d 102 (3d Cir. 1976)..... 12

Maley v. Del Global Tech. Corp.,
 186 F. Supp. 2d 358 (S.D.N.Y. 2002)..... 4

McGee v. Continental Tire N. Am., Inc.,
 Civ. No. 06-6234, 2009 WL 539893 (D.N.J. Mar. 4, 2009)..... 21

Mehling v. New York Life Ins. Co.,
 248 F.R.D. 455 (E.D. Pa. 2008)..... 15

Mills v. Electric Auto-Lite Co.,
 396 U.S. 375 (1970)..... 6, 18

Oh v. AT&T Corp.,
 225 F.R.D. 142 (D.N.J. 2004)..... 11, 18

Petruzzo v. Nat. Union Fire Ins. Co. of Pitt.,
 No. 5:12-113 (May 22, 2015) 13

Phemister v. Harcourt Brace Jovanovich, Inc.,
 No. 77 C 39, 1984 WL 21981 (N.D. Ill. Sept. 14, 1984)..... 17

Public Interest Research Grp. v. Windall,
 51 F.3d 1179 (3d Cir. 1995)..... 10

Ricoh Corp, v. Pitney Bowes, Inc.,
 Civ. No. 02-56-39, 2007 WL 1852553 (D.N.J. June 26, 2007)..... 19

Savoie v. Merchs. Bank,
166 F.3d 456 (2d Cir. 1999)..... 9

Sema v. Automall 46 Inc.,
894 A.2d 77 (N.J. Sup. Ct. App. Div. 2005)..... 18

Sullivan v. DB Invest., Inc.,
667 F.3d 273 (3d Cir. 2011)..... 3, 4, 15

Swedish Hosp. Corp. v. Shalala,
1 F.3d 1261 (D.C. Cir. 1993)..... 4

Ursic v. Bethlehem Mines,
719 F.2d 670 (3d Cir. 1983)..... 3

Williams v. First Gov't Mortgage & Inv. Corp.,
225 F.3d 738 (D.C. Cir. 2000)..... 14

RULES

Fed. R. Civ. P. 23(h) 3, 23

OTHER AUTHORITIES

Federal Practice & Procedure § 1803.1 16

Plaintiffs Mario Petruzzo, Jeffery & Kimberly Bush, James & Emma Imes, Arie Waiserman, Christine Hine, Ralph Williams, Sharen Smith, Robert & Maria Watson, Manette Dubuisson, Alice Lacks, Jayantilal Patel, Virginia Riker, Paul & Deborah Johnson, Kenneth Graham, Rita Campbell, Larry & Linda Lake, Stephen Giercyk, Ajay Das, Danny & Tracy Walker, Dagmar Durcik, and Thomas & Kim Broome (collectively, “Class Representatives”)¹ hereby submit this Memorandum of Law in support of their Unopposed Motion for Attorneys’ Fees, Case Contribution Fees and Litigation Costs and Expenses pursuant to the Court’s Order granting Preliminary Approval [D.E. # 268] (“PA Order”) and Federal Rules of Civil Procedure 23(b)(3) and (e).

INTRODUCTION

Court-appointed Class Counsel Golomb & Honik, Hemmings & Stevens, P.L.L.C and the Aughtman Law Firm, LLC (collectively, “Class Counsel”), on behalf of the Class, the Class Representatives and all Plaintiffs’ counsel, respectfully move this Court for an award of attorneys’ fees of \$5 million, reimbursement of the \$379,550.26 in out-of-pocket litigation costs and expenses that Plaintiffs’ counsel incurred in successfully prosecuting the claims in this action, and Case Contribution Fees for the Class Representatives in the total amount of \$74,000.

The attorneys’ fees sought amount to one-third of the Settlement Fund in this matter. *See* Declaration of Kenneth Grunfeld in Support of Plaintiffs’ Motion for Approval of Attorneys’ Fees and Case Contribution Fees, and Reimbursement of Costs and Expenses (“Grunfeld Dec.”), Exhibit A, at ¶ 5. Since even before the Complaint was filed, Class Counsel has been working

¹ The Plaintiffs are class representatives in seventeen (17) related cases and include twenty-eight (28) individuals and twenty-one (21) distinct accounts. *See* Exhibit 1 to the Preliminary Approval Brief, at D.E. # 262-1.

diligently on this case, devoting extensive resources to this action, *id.* at ¶ 10, and in light of the results achieved, the requested fee is fair and reasonable.

Class Counsel has spent a total of \$379,550.26 in reimbursable litigation-related costs and expenses in this case. *See id.* at ¶ 5. This amount includes Class Counsel's total out-of-pocket expenses, including, *inter alia*, shipping costs, case fees, legal research and e-discovery platform expenses, telephone costs, deposition costs, and travel expenses. *Id.* at ¶ 41. For the same, Class Counsel requests the Court order that this amount be approved as part of the class-wide settlement in this matter.

Finally, Class Counsel seeks Case Contribution Fees on behalf of the 28 Class Representative individuals and their 21 distinct accounts in the amount of \$4,000.00 for each HealthExtras Settlement Class Representative and \$2,000 for each Stonebridge Settlement Class Representative, with a total of \$74,000 to be paid in Case Contribution Fees in accordance with the Settlement Agreement. *Id.* at ¶¶ 45-6.

Class Counsel's efforts to date have been without compensation of any kind, and the fee has been wholly contingent upon the result achieved. *Id.* at ¶ 30. For the reasons set forth below, Class Counsel respectfully submits that the requested attorneys' fees and Case Contribution Fees, and the cost and expense reimbursements, are fair and reasonable under the applicable legal standards, and, in light of the contingency risk undertaken and the result achieved, should be awarded by the Court.

CASE HISTORY

A full recitation of the history of the case is set forth in Plaintiffs' previous pleadings and the declarations. *See* Plaintiffs' Motion and Memorandum of Law for Preliminary Approval of Settlement, Conditional Certification of the Settlement Class, and Approval of Notice Plan ("PA Brief"), at D.E. # 262, pp. 2-5 (Litigation History) and p. 9 (Settlement Negotiations); *see also*

Joint Declaration in Support of Plaintiffs’ and Class Counsel’s Unopposed Motion for Preliminary Approval of Class Settlement and Certification of Settlement Class (“PA Declaration”), at D.E. # 262-2. Detail of the case as it relates to the request set forth in this motion, including the efforts of counsel for the Plaintiffs and the Class Representatives, and the costs and expenses incurred as a result of the litigation, are set forth herein and within the attached declaration at ¶¶ 9-28.

ARGUMENT

I. CLASS COUNSEL’S UNOPPOSED REQUEST FOR ATTORNEYS’ FEES IS REASONABLE AND AUTHORIZED BY THE SETTLEMENT AGREEMENT

At the conclusion of a successful class action, class counsel may apply to a court for an award of attorneys’ fees. *See* Fed. R. Civ. P. 23(h). The amount of an attorneys’ fee award “is within the district court’s discretion so long as it employs correct standards and procedures and makes finding of fact not clearly erroneous[.]” *Sullivan v. DB Invest., Inc.*, 667 F.3d 273, 329 (3d Cir. 2011) (*en banc*) (internal quotations and citation omitted); *see also Ursic v. Bethlehem Mines*, 719 F.2d 670, 675 (3d Cir. 1983) (“the district court has discretion in determining the amount of a fee award ... in view of [its] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters”).

As indicated in the Court-approved Notice disseminated to the Settlement Classes, and consistent with standard class action practice and procedure, Class Counsel requests attorneys’ fees in the amount of \$5 million, to be paid from the \$15 million Class Settlement Fund. *See* Settlement Agreement [D.E. # 262-2], at ¶ 6.2. Not only do the Defendants agree not to oppose this amount, but Class Counsel’s requested attorneys’ fees fall within the acceptable range of fees routinely approved by this Court and within this Circuit.

A. Application of the Percentage-of-the-Fund Method is Proper When Awarding Attorneys' Fees in a Common Fund Case

“Attorneys’ fees requests are generally assessed under one of two methods: the percentage-of-recovery (‘POR’) approach or the lodestar scheme.” *Sullivan*, 667 F.3d at 330. The POR approach is appropriate in cases involving a common settlement fund, *i.e.*, when a settlement contemplates one fund from which class member payments and attorneys’ fees will be paid. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995).

In consumer class actions with settlement funds like this one, courts in this Circuit prefer to award fees as a percentage of the fund. *See, e.g., Sullivan*, 667 F.3d at 330 (stating that percentage of recovery method “is generally favored in common fund cases because it allows courts to award fees from the fund ‘in a manner that rewards counsel for success and penalizes it for failure’”); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) (same); *In re Prudential Ins. Co. of Am. Sales Practices Litig. Actions*, 148 F.3d 283, 333 (3rd Cir. 1998) (same), *cert. denied*, 525 U.S. 1114 (1999); *In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006) (indicating that percentage-of-recovery method has long been used by Third Circuit in common-fund cases).²

The percentage of the fund method, rather than the lodestar method, is favored, because lodestar looks only at the value of the time counsel spent working on the case. The percentage method provides “appropriate financial incentives” necessary to “attract well-qualified plaintiffs’

² Other circuits have approved and favor the percentage method in common fund cases as well. *See, e.g., Maley v. Del Global Tech. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002), (“[T]here is a strong consensus – both in this Circuit and across the country – in favor of awarding attorneys’ fees in common fund cases as a percentage of the recovery.”); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (“[W]e join the Third Circuit Task Force and the Eleventh Circuit, among others, in concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases.”).

counsel who are able to take a case to trial,” and “directly aligns the interests of the class and its counsel.” *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355, 359 (S.D.N.Y. 2005). Further, the common fund method “prevent[s] . . . inequity by assessing attorney’s fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 192 (E.D. Pa. 2000) (“[T]here is no doubt that attorneys may properly be given a portion of the settlement fund in recognition of the benefit they have bestowed on class members.”); *Fickinger v. C.I. Planing Corp.*, 646 F. Supp. 622, 632 (E.D. Pa. 1986) (awarding attorneys’ fees from a common fund avoids “the unjust enrichment of those who otherwise would be benefitted by the fund without sharing in the expenses incurred by the successful litigant”).

Additional reasons exist to apply the percentage-of-the-fund method. First, it incentivizes attorneys to create the largest common fund out of which payments to the class can be made, so counsel’s interests are aligned with the interests of the Class. *Lachance v. Harrington*, 965 F. Supp. 630, 647 (E.D. Pa. 1997) (“under the POR method, the more the attorney succeeds in recovering money for the client, and the fewer legal hours expended to reach that result, the higher dollar amount of fees the lawyer earns.”). Second, it is consistent with market practices, because it mimics the compensation system used by clients to compensate their attorneys. *In re Ikon*, 194 F.R.D. at 194. Third, the percentage method promotes early case resolution, which is favored. *See In re First Fid. Bancorporation Sec. Litig.*, 750 F. Supp. 160, 162 (D.N.J.1990) (compared to the percentage of recovery method, the lodestar method “penalizes rather than rewards counsel for an early resolution and distribution to class members”). Fourth, the percentage method preserves judicial resources because courts do not

need to spend time scrutinizing counsel's billing entries. *Id.* ("Requiring the court to calculate the number of hours devoted by counsel and evaluate the services rendered is unrealistically burdensome and time-consuming."); *see also infra* section II(B)(1).

B. Class Counsel is Entitled to a Fee of One-Third of the Settlement Fund

The United States Supreme Court has recognized the principle that "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 attorneys' fee from the fund as a whole." *Boeing*, 444 U.S. at 478; *see also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393 (1970); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 123 (1885). Thus, an award of attorneys' fees is appropriate where plaintiff's successful litigation confers substantial benefit on members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread costs proportionately among them. *Hall v. Cole*, 412 U.S. 1, 5 (1973).

Here, Class Counsel is entitled to reasonable attorneys' fees to compensate them for their work in recovering real dollars for the Class. The Settlement Agreement preliminarily approved by the Court provides that:

Class Counsel intends to submit a Fee and Expense Application, seeking an award based on the value of the Settlement and the work performed in an amount not to exceed five million dollars (\$5,000,000), plus costs and expenses. Defendants shall not oppose Class Counsel's Fee and Expense Application up to this amount.

Settlement Agreement [D.E. # 262-2], at ¶ 6.2. In addition, the Court-approved Notice of Proposed Settlement of Class Action Lawsuit and Fairness Hearing ("Long-Form Notice") that was provided to Class Members stated the following:

18. How will the lawyers be paid?

Class Counsel intends to submit a Fee and Expense Application, seeking an award based on the value of the Settlement and the

work performed in an amount not to exceed five million dollars (\$5,000,000), plus expenses. Defendants have agreed not oppose Class Counsel's Attorneys' Fee and Expense application up to this amount.

Long-Form Notice, [D.E. # 262-2], at 18.

The Parties and their counsel did not discuss the provisions regarding attorneys' fees until after the Parties had already agreed upon the terms of the Settlement in principle, had executed the Memorandum of Understanding, and substantive elements of the Settlement Agreement had been negotiated, further minimizing the risk of a conflict between the interests of the attorneys and those of the Class. Grunfeld Dec. at ¶ 29; *see also In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 542-43 (D.N.J. 1997) (finding the attorney fees negotiations to be proper where parties "did not negotiate attorneys' fees until after they had agreed on the appropriate relief"); *In re Gen. Motors Corp.*, 55 F.3d at 803 ("recogniz[ing] the potential for attorney-class conflicts" where terms of settlement and fees are negotiated simultaneously).

1. One-Third of the Settlement Fund is Reasonable

In terms of the percentage sought, there is no standardized rule regarding what percentage of the common fund should be awarded as attorneys' fees. *See In re Ikon*, 194 F.R.D. at 194 ("Percentages awarded have varied considerably, but most fees appear to fall in the range of nineteen to forty-five percent."). However, courts in New Jersey and within the Third Circuit routinely award one-third of the fund for attorneys' fees in class action settlements similar to this one. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004) (finding an approximately 33% fee award of a \$44.5 million settlement fund to be reasonable when compared with recovery percentages in other class actions); *Hall v. AT&T Mobility LLC*, No. 07-5325, 2010 WL 4053547, at *22 (D.N.J. Oct. 13, 2010) (multiple factors, including "the fact that

several courts in similar matters have awarded fees in this amount” warranted approval of 33 1/3% fee).

In *Chaudhri v. Osram Sylvania Inc.*, Your Honor recently granted plaintiff counsel’s fee and cost requests of one-third of a \$30 million settlement fund in a consumer class action case involving falsely marketed automobile headlights. See Final Approval Order and Judgment, No. 2:11-cv-05504 (D.N.J.) [D.E. # 100] (Jan. 9, 2015). In that matter, Plaintiff’s counsel retained Professor Brian T. Fitzpatrick, an expert on attorney fee applications in class action litigations, who opined that “the most common percentages awarded by all federal courts . . . were 25%, 30% and 33%, with nearly two-thirds of awards between 25% and 35%.” *Id.* at [D.E. # 88-4] (“Fitzpatrick Decl.”) at ¶ 14; see also *id.* at ¶ 16 (“where the percentage-of-the-fund method was used, nearly fifty percent of awards [are] between 30% and 35%”). Plaintiff’s counsel in *Chaudhri* also retained as an expert James E. Cecchi, Esq., a well-known New Jersey class action attorney, who stated that “[c]ourts in the Third Circuit generally award fees in the neighborhood of 30-33 1/3% of the amount of the common fund.” *Id.* (“Cecchi Dec.”) at ¶ 38g. Accordingly and as set forth herein, Class Counsel’s request is reasonable and well within the range approved by courts in similar litigations.

2. No Lodestar Analysis is Required

In cases involving settlement funds utilizing a percentage-of-the-fund method to compute requested attorney fees, no court within the Third Circuit mandates the use of a detailed lodestar analysis to cross check the percentage-of-the-fund method. While the use of lodestar has been deemed “sensible,” courts in this Circuit are not required to consider lodestar analysis in making attorney fee determinations. See *In re Rite Aid*, 396 F.3d at 305 (citing *In re Prudential*, 148 F.3d at 333; *Bodnar v. Bank of Am., N.A.*, No. 14-3224, 2016 WL 4582084, at *5 (E.D. Pa. Aug.

4, 2016)) *see also In re AT&T*, 455 F.3d at 164 (lodestar analysis does not displace a district court’s primary reliance on the percentage-of-the-fund method); *In re Suprema Specialties, Inc. Sec. Litig.*, No. 02-168, 2008 WL 906254, at *8 (D.N.J. March 31, 2008).³

In fact, not mandating a lodestar cross check preserves judicial resources because it relieves the court of the “cumbersome, enervating, and often surrealistic process” of evaluating fee petitions. *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 736 n.44 (E.D. Pa. 2001) (noting that opting against performing a cross check “conserves scarce judicial time”); *see also Savoie v. Merchs. Bank*, 166 F.3d 456, 461 n.4 (2d Cir. 1999); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 48-49 (2d Cir. 2000) (the “primary source of dissatisfaction [with the lodestar method] was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits”).

Plaintiffs’ counsel does not believe that the burden of scrutinizing time entries in this case of lawyers from the seventeen different Plaintiffs’ law firms that were involved over the last five years of litigation is required, nor is it a good use of judicial resources.⁴ As set forth in the attached declaration, the undersigned Class Counsel is confident that the lawyers representing the Plaintiffs here have spent far more than \$5 million in lodestar time litigating this case. *Id.* at

³ Other circuits have also held a lodestar cross check is not required. *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1363 (S.D. Fla. 2011) (“courts in this Circuit regularly award fees based on a percentage of the recovery, without discussing lodestar at all”); *Feiertag v. DDP Holdings, LLC*, No. 14-CV-2643, 2016 WL 4721208, at *7 (S.D. Ohio Sept. 9, 2016) (“Performing a cross-check of the attorney-fee request using Class Counsel’s lodestar is optional[.]”).

⁴ If the Court disagrees and requires that such an analysis be undertaken, Plaintiffs’ counsel reserves its right to do, preferably before the Final Approval hearing set for April 20, 2017. *See e.g., In re Rite Aid*, 396 F.3d at 306-07 (“cross-check calculation need entail neither mathematical precision nor bean-counting. . . . [C]ourts may rely on summaries submitted by the attorneys and need not review actual billing records.”); *In re Ins. Brokerage Antitrust Litig.*, No. 04-5184, 2007 WL 1652303, at *9 (D.N.J. June 5, 2007) (“court may rely on summaries submitted by the attorneys, and is not required to scrutinize every billing record.”), *aff’d*, 579 F.3d 241 (3d Cir. 2009).

¶¶ 32-34. Creating a detailed lodestar analysis here, and performing a review of such an analysis, would be very time-consuming and extensive process, especially given the fact that it would most certainly result in a significant negative lodestar multiplier. *Id.* Accordingly, Class Counsel does not include a detailed lodestar analysis from all Plaintiffs' counsel, nor need it do so, given the obvious and extensive amount of work performed in these cases across the country.

C. Other Factors to Determine the Reasonableness of Fees Support the Requested Fee Award

Other factors established to determine the reasonableness of fee awards under the percentage of recovery method similarly support Plaintiffs' requested fee award. These factors include: (1) the size of the fund created and number of persons benefitting from the settlement; (2) the presence/absence of substantial objections to the fee; (3) the skill of plaintiffs' counsel; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the litigation; and (7) awards in similar cases. *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195, n.1 (3rd Cir. 2000). The Third Circuit has also suggested three other factors that may be relevant to a court's inquiry: (1) "the value of benefits accruing to class members attributable to the efforts of counsel as opposed to the efforts of other groups, such as government agencies conducting investigations;" (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any "innovative terms of settlement." *In re AT&T*, 455 F.3d at 165 (citation omitted); *Public Interest Research Grp. v. Windall*, 51 F.3d 1179, 1185 n.8 (3d Cir. 1995) (discussing the "Johnson factors" set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-18 (5th Cir. 1974), and cited in *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983)).

These factors “need not be applied in a formulaic way, and their weight may vary on a case-by-case basis.” *In re Janney Montgomery Scott LLC Fin. Consultant Litig.*, No. 06-3202, 2009 WL 2137224 at *14 (E.D. Pa. Jul. 16, 2009) (citing *Oh v. AT&T Corp.*, 225 F.R.D. 142, 146 (D.N.J. 2004)); *In re AT&T Corp.*, 455 F.3d at 165-6; *In re Datatec Systems, Inc. Sec. Litig.*, No. 04-525, 2007 WL 4225828, at *6 (D.N.J. Nov. 28, 2007). “[W]hat is important is that the district court evaluates what class counsel actually did and how it benefitted the class.” *Prudential*, 148 F.2d at 342; *Hensley*, 461 U.S. at 436 (the “most critical factor is the degree of success obtained”). Indeed, as another court has stated:

The most significant factor in this case is the quality of representation, as measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.

In re Ikon, 194 F.R.D. at 194 (internal citations and quotations omitted); Thus, *Gunter/Prudential* factors are not exhaustive, a district court should consider [those] factors ..., and any other factors that are useful and relevant with respect to the particular facts of the case.”). *In re AT&T Corp.*, 455 F.3d at 166.

As discussed *infra*, if this Court elects to consider these factors here, they also clearly support the reasonableness of Class Counsel’s fee request.

1. Whether the Fee Was Fixed or Contingent

Class Counsel undertook this action on an entirely contingent fee basis, and in doing so assumed a substantial risk that counsel would have to devote a significant amount of time and incur expenses in prosecuting this action without any assurance of being compensated for their efforts. *See* Grunfeld Dec. at ¶ 30. In effect, Class Counsel has advanced their legal services to

the Settlement Class since that time. *See Lindy Bros. Builders of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 116-17 (3d Cir. 1976).

Further, taking on these complex, multi-state cases served to preclude counsel from other employment due to time and budget restrictions based on the acceptance of these cases. *See Grunfeld Dec.* at ¶ 30. Class Counsel are three small, plaintiffs' side law firms with busy practices. *Id.* at ¶ 35. Class Counsel (and all additional counsel) were required to forego other opportunities to properly prosecute these cases. *See id.* at ¶¶ 30, 35-6. Briefing and discovery in this case was significant, which meant that the firms involved on behalf of the Plaintiffs expended a great deal of time and effort on this matter at the expense of other potentially lucrative matters. *Id.* at ¶¶ 15-18.

Courts have consistently recognized that the risk of receiving no recovery is a factor in considering an award of attorneys' fees. *See Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 219 (E.D. Pa. 2011) (risk at trial and contingency basis "indicates that substantial attorney's fees should be awarded"). Further,

Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review is unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

In re Prudential-Bache Income Partnerships Sec. Litig., No. 888, 1994 WL 202394, at *6 (E.D. La. May 18, 1994).

Here, Class Counsel expended significant time and costs to prosecute this case. *See Grunfeld Dec.* at ¶¶ 15, 30, 35. Meanwhile, Class Counsel aggressively advanced this case despite substantial risk of non-payment and even given the uncertainty created by the North

Carolina dismissal order in *Petruzzo v. Nat. Union Fire Ins. Co. of Pitt*, No. 5:12-113 (May 22, 2015) (at D.E. # 181) and the New Jersey dismissal order (at D.E. # 237). *See* Grunfeld Dec. at ¶ 14. Despite the risks and difficulties presented throughout this litigation, Class Counsel forged a significant resolution that provides substantial relief to the Class. Accordingly, Class Counsel undertook a significant risk of non-payment, which now favors approval of the requested fee.

2. The Time and Labor Required, the Size of the Fund Created, the Number of Persons Benefitting from the Settlement, the Novelty and Difficulty of the Questions Involved, and the Skill, Experience, Reputation and Ability of Counsel Required to Perform the Service Properly

Throughout the five-year history of this case, the Parties engaged in significant and highly-contested adversarial litigation. The prosecution of the many complex and unique issues in this litigation required the participation of highly skilled and dedicated attorneys.

As discussed thoroughly in the attached declaration, Class Counsel undertook a number of important tasks associated with this litigation, requiring a significant amount of Class Counsel's time and labor to develop the legal theories and arguments presented in the pleadings and crafted through discovery. Grunfeld Dec. at ¶¶ 31-33. These tasks include: initial investigation of the case; researching complex issues of law, client vetting and meetings; drafting numerous class action complaints in a number of states; conducting substantial discovery resulting in hundreds of written discovery requests, a huge volume of documents (and other media) produced and 17 depositions conducted; opposing various motions filed by Defendants; preparing for and participating in numerous hearings and oral argument before multiple courts; crafting appellate appeals, and; negotiating the settlement and drafting the settlement papers. *Id.*⁵

⁵ Moreover, Class Counsel's work is not yet done. Class Counsel will be required to, among other things: (1) continue to monitor the claims administration process and communicate with the administrator, including overseeing the claim review process, (2) respond to Class Member inquiries now and for years to come; (3) prepare for and attend the Final Approval Hearing;

After months of analysis, Class Counsel ascertained information regarding over 1.3 million Class Members' accounts, including identities, addresses, time in and the amount spent on the plans. Discovery of this information formed the basis for direct notification of Class Members, and will result in substantial payment to such Members that file claims from the \$15 million Settlement Amount negotiated by Class Counsel. *Id.* at ¶ 28.⁶ In light of this case's robust litigation, discovery, and motions practice history, this factor supports Class Counsel's fee request.⁷

"The complexity and duration of the litigation is the first factor a district court can and should consider in awarding fees." *Gunter*, 223 F.3d at 197. As set forth throughout this brief and in the accompanying declaration, the complexity of this case grew as the years progressed, requiring Class Counsel to adroitly navigate issues involving Multi-District Litigation and case coordination, bankrupt parties and the Trustee, Article III standing and due process issues, and a multitude of states' consumer protection laws. *See Grunfeld Dec.* at ¶¶ 15-18, 31.

The skill required of Class Counsel to accomplish this excellent Settlement warrants the requested fee. The "single clearest factor reflecting the quality of Class Counsels' services to the Class are the results obtained." *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 96

(5) continue to oversee the claims administration process; (6) monitor distribution of benefits to the Class; (7) and potentially handle any post-judgment appeals. *Grunfeld Dec.* at ¶ 34.

⁶ Information about the Class and the claims filed will be set forth in greater detail in Plaintiffs' forthcoming Final Approval brief and the Class Action Administrator's Declaration in support thereof.

⁷ Class Counsel should be compensated even in the instances that they were not entirely successful. Plaintiffs ultimately prevailed, and "losing is part of winning." *Cabrales v. Cnty. of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991). A plaintiffs' fee award "does not depend on her success at interim stages of the litigation, but rather depends on the ultimate outcome of the litigation." *Gierliner v. Gleason*, 160 F.3d 858, 880 (2d Cir. 1998). Here, even Plaintiffs' unsuccessful attempt to consolidate cases before the MDL Panel and certain Rule 12 orders should not impact the Court's decision on its fee requests. *See Williams v. First Gov't Mortgage & Inv. Corp.*, 225 F.3d 738, 746-47 (D.C. Cir. 2000)

(D.N.J. 2001). Related factors include “the difficulties faced, the speed and efficiency of the recovery, the standing, experience, and expertise of counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.” *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 465 (E.D. Pa. 2008). *Gunter* factors are considered to ensure “that competent counsel continue to undertake risky, complex and novel litigation” for the benefit of large numbers of Class Members who might otherwise lack reasonable access to justice. *Gunter*, 223 F.3d at 198. Here, Class Counsel obtained very substantial monetary relief for consumers holding over 1.3 million insurance policies. Grunfeld Dec. at ¶ 28. The Settlement, the terms of which have been carefully set forth before the Court, provides an outstanding result for the Class because the plans have been cancelled and the Settlement provides real and substantial monetary benefits to Class Members. *Id.* at ¶¶ 26-28. The results achieved by Class Counsel were especially impressive given Defendants’ vigorous contestation of the merits and class certification, which threatened the all-out dismissal of Plaintiffs’ action and no relief for the Class. *Id.* at #14.

Class Counsel have unique legal skills and abilities, as well as experience litigating consumer class actions and actions against these Defendants. *Id.* at ¶¶ 35-36. Those unique skills were called upon in order to litigate and successfully settle a complex class action. *Sullivan*, 667 F.3d at 303. Without Class Counsel’s skill, the Class would have received no benefits at all. Grunfeld Dec. at ¶ 28.⁸ In addition, “[t]he quality of opposing counsel is also important in evaluating the quality of plaintiffs’ counsel’s work.” *Hall v. AT&T Mobility LLC*, No. 07-5325 JLL, 2010 WL 4053547, at *19 (D.N.J. Oct. 13, 2010); Federal Practice &

⁸ In that no other group, such as other class action attorneys or a government agency like the CFPB or any states’ Department of Insurance, has ever attempted to recover funds for this Class, the value of the benefits accruing to the Class is entirely attributable to the efforts of Class Counsel.

Procedure § 1803.1; *In re OSB Antitrust Litig.*, Master File No. 06-826, 2008 U.S. Dist. LEXIS 125173, at *13-14 (E.D. Pa. Dec. 9, 2008) (in assessing quality of representation, courts also look to “the performance and quality of opposing counsel”) (internal quotations and citation omitted). Also, Class Counsel was opposed in this litigation by highly experienced class action defense counsel at some of the nation’s most elite law firms. *See* Grunfeld Dec. at ¶ 37. There is little doubt that Defendants’ law firms possess the resources, reputation, and experience to vigorously and effectively advocate for the Defendants’ interests were this matter to be litigated further. *Id.* Despite Defendants’ staunch resistance, Class Counsel’s efforts resulted in a fair and reasonable, if not exceptional, Settlement for the Class.

3. The Current Absence of Objections to the Attorneys’ Fees Favors Approval

The absence or minimal number of objections to a fee request is significant evidence that the request is fair and reasonable. *See, e.g., In re Rite Aid*, 396 F.3d at 305; *In re AT&T Corp.*, 455 F.3d at 170 (awarding fee despite eight objections); *In re Datatec*, 2007 WL 4225828 at *7 (no objections weigh “strongly in favor” of approval); *In re Genta Sec. Litig.*, No. 04-2123, 2008 WL 2229843, at *9 (D.N.J. May 28, 2008) (awarding fees despite one objection).

To date, there have been no objections to the Settlement or Fees and Costs Request and only four Class Members have filed valid requests to be excluded. By comparison, over 1.3 million Class Members’ accounts were notified of the Settlement and are eligible to receive a payment from the Settlement Amount. *See* Grunfeld Dec. at ¶ 28. The lack of objections to the Settlement, including the proposed fees and costs awards, weighs strongly in favor of approval its approval.

4. The Requested Attorneys' Fees Are Reasonable When Compared to Awards in Similar Cases and What Would Have Been Contracted in a Private Contingency Matter

Attorney fee awards in similar consumer class action cases have resulted in similar awards. *See supra* section II(B).

Additionally, the requested attorneys' fee here is entirely consistent with the private marketplace where attorneys negotiate contingency fee agreements. Courts in this circuit and others have reasoned that the percentage-of-the-fund method of awarding attorneys' fees in class actions should approximate the fee which would be negotiated if the lawyer were offering his or her services in the private marketplace. *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085, 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005) (“[a]ttorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation”); *see also Fanning v. Acromed Corp.*, No. 1014, 2000 WL 1622741, at *7 (E.D. Pa. Oct. 23, 2000) (noting that plaintiffs' counsel in private contingency fee cases regularly negotiate agreements providing for thirty to forty percent of any recovery); *Phemister v. Harcourt Brace Jovanovich, Inc.*, No. 77 C 39, 1984 WL 21981, at *15 (N.D. Ill. Sept. 14, 1984) (“[t]he percentages agreed on [in contingent fee arrangements in non-class action damage lawsuits] vary, with one-third being particularly common”). If this case was not class action litigation, the customary contingency fee would range from 30% to 40% of the recovery. *See In re Ikon*, 194 F.R.D. at 194 (“[I]n private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery.”) In fact, clients of Class Counsel routinely agree to contingency fee arrangements of one-third or more, plus costs and expenses. *See Grunfeld Dec.* at ¶ 30.

II. PLAINTIFFS' COUNSEL SHOULD BE AWARDED REIMBURSEMENT OF LITIGATION COSTS AND EXPENSES

Class Counsel requests reimbursement for a total of \$379,550.26 in certain litigation costs and expenses, which has essentially been advanced to the Class. *Id.* at ¶ 39; *see Mills*, 396 U.S. at 391-92; *Oh*, 225 F.R.D. at 154 (“[c]ounsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case.”). Indeed, reimbursement for costs expended by counsel in prosecuting the action is “routinely permitted.” *In re Remeron*, 2005 WL 3008808, at *17.

The costs and expenses are sought directly out of the Settlement Amount and are to be considered separately from the request for attorney fees:

Class Counsel intends to submit a Fee and Expense Application, seeking an award based on the value of the Settlement and the work performed in an amount not to exceed five million dollars (\$5,000,000), plus costs and expenses. Defendants shall not oppose Class Counsel’s Fee and Expense Application up to this amount.”).

See Settlement Agreement, at ¶¶1.4, 6.2. Further, the amount sought corresponds to certain actual out-of-pocket costs and expenses that all of the Plaintiffs’ law firms necessarily incurred and paid in connection with the prosecution of this litigation and the Settlement. *See* Grunfeld Dec. at ¶¶ 39-40. These costs have been carefully reviewed, audited and categorized by Class Counsel. *Id.* at ¶ 40.

The costs and expenses sought are compensable in a class action. *See* Fed. R. Civ. P. 23(h) (permitting award of “nontaxable costs that are authorized by law or by the parties’ agreement”). In addition to being compensable under Rule 23, these costs are also compensable under the consumer protection statutes alleged in the Further Amended Complaint. *See* Further Amended Complaint [D.E. # 266] at counts five and six (September 27, 2016); *Sema v. Automall 46 Inc.*, 894 A.2d 77, 81 (N.J. Sup. Ct. App. Div. 2005).

The categories of expenses for which Class Counsel seek reimbursement here are the type of expenses routinely charged to paying clients in the marketplace and, therefore, the full requested amount should be reimbursed. *See* Grunfeld Dec. at ¶ 41. These expenses include but are not limited to: shipping costs, case fees,⁹ legal research expenses,¹⁰ telephone costs, deposition costs, database management and travel expenditures. *Id.* These expenses are reasonable and justified. *See, e.g., In re Certaineed Fiber Cement Siding Litig.*, 303 F.R.D. 199 (E.D. Pa. 2014) (approving \$304,996.65 in costs that included similar categories as those requested here); *Oh*, 225 F.R.D. at 154.

III. THE CASE CONTRIBUTION FEES REQUESTED FOR CLASS REPRESENTATIVES ARE REASONABLE

The following twenty-eight (28) individuals, representing twenty-one (21) accounts, have been preliminarily approved as Class Representatives:

HealthExtras Settlement Class Representatives

1. Stephen Giercyk,
2. Ajay Das,
3. Rita Campbell,
4. Mario Petruzzo,
5. Ralph Williams,
6. Manette DuBuisson,
7. Jayantilal Patel,
8. Virginia Riker,
9. Jeffrey and Kimberly Bush,
10. Arie Waiserman,
11. Robert and Maria Watson,
12. Larry and Linda Lake,
13. Christine Hine,
14. Dagmar Durcik, and
15. Thomas and Kim Broome.

⁹ The *case fees* category includes filing fees, expert charges, bankruptcy counsel fees, service of process, mediation/arbitration fees and record collection fees, all paid for by counsel for the Plaintiffs.

¹⁰ *Ricoh Corp. v. Pitney Bowes, Inc.*, Civ. No. 02-56-39, 2007 WL 1852553, at *4 (D.N.J. June 26, 2007) (allowing computer research expenses to be reimbursed).

Stonebridge Settlement Class Representatives

1. Alice Lacks,
2. Kenneth Graham,
3. Sharen Smith,
4. Danny and Tracy Walker,¹¹
5. James and Emma Imes, and
6. Deborah and Paul Johnson.

See PA Order [D.E. # 268], at ¶ 5. On their behalf, Class Counsel seeks Case Contribution Fees in the amount of \$4,000.00 for each HealthExtras Settlement Class Representative and \$2,000 for each Stonebridge Settlement Class Representative, for a total of \$74,000 to be paid in accordance with the Settlement Agreement. *Id.* at ¶¶ 1.25, 6.1. Pursuant to the Settlement Agreement, the Case Contribution Fees are on a per account basis as opposed to per Class Representative, such that joint account holders split a single Case Contribution Fee and are essentially considered a single Class Representative. *See* Settlement Agreement [D.E. # 262-2], at ¶ 6.1. Defendants have agreed not oppose a request for Case Contribution Fees totaling up to \$85,000, though they actually total only \$74,000. *Id.* All Case Contribution Fees ordered shall be paid by the Settlement Administrator to Class Counsel out of the Settlement Amount. *Id.* The approved notice plan informed Class Members about this. *See* Long Form Notice, [D.E. # 262-2], at section 6.

It is routine to give service awards to class representatives because of their additional efforts in zealously prosecuting the case. “The purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation” and “to reward the public service of contributing to the enforcement of

¹¹ Mr. and Mrs. Walker are now divorced and had separate policies.

mandatory laws.” *Bredbenner v. Liberty Travel, Inc.*, No. 09-905, 2011 WL 1344745, at *22 (D.N.J. Apr. 8, 2011) (internal citations and quotations omitted).

Service awards for Class Representatives promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits. “Courts use the following factors to evaluate the appropriateness of awards: (1) the financial, reputational, and personal risks to the plaintiff; (2) the degree to which the plaintiff was involved in discovery and other litigation responsibilities; (3) the length of litigation; and (4) the degree to which the named plaintiff benefitted as a class member.” *Carroll v. Stettler*, No. 10-2262, 2011 WL 5008361 at *9 (E.D. Pa. Oct. 19, 2011) (citing *Chakejian*, 275 F.R.D. at 220, and *Hall v. Best Buy Co., Inc.*, 274 F.R.D. 154, 173 (E.D. Pa. 2011)).

The proposed Case Contribution Fees for each of the Class Representatives in recognition of their services to the Class is modest under the circumstances, and well in line with awards approved by federal courts in New Jersey and elsewhere. *See* Grunfeld Dec. at ¶ 47.¹²

Here, the Class Representatives came forward to prosecute this litigation for the benefit of the Class as a whole. These Class Representatives sought successfully to remedy a widespread wrong and have conferred valuable benefits upon their fellow Class Members. They provided a valuable service to the Class by: providing information and input in connection with

¹² *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000) (“[C]ourts routinely approve incentive awards to compensate named plaintiffs for services they provided and the risks they incurred during the course of the class action litigation.”); *McGee v. Continental Tire N. Am., Inc.*, Civ. No. 06-6234, 2009 WL 539893, at *18 (D.N.J. Mar. 4, 2009) (“Incentive awards are not uncommon in class action litigation and particularly where ... a common fund has been created for the benefit of the entire class.”) (internal citations and quotations omitted); *In re American Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 263 F.R.D. 226, 245 (E.D. Pa. 2009) (awarding 10 representative plaintiffs incentive payments in the amounts of \$10,500 each and 2 representative plaintiffs \$5,000 each, for a total of \$115,000, finding those amounts to be “reasonable compensation considering the extent of the named plaintiffs’ involvement and the sacrifice of their anonymity”).

the drafting of the original Complaint; overseeing the prosecution of the litigation; consulting with counsel; providing documents and information that were produced under Rule 26(f), and; offering advice and direction at critical junctures, including the Settlement of the litigation. *Id.* These individuals underwent extensive document discovery and many of them were further subjected to lengthy depositions during which Defendants aggressively questioned Plaintiffs about their personal health and financial histories. *Id.* In an effort to represent the class, the Class Representatives were required to put their name on the pleadings, bringing to bear an element of potential reputational harm. *Id.* However, the Class Representatives willingly took this on in order to correct problems that they believed negatively impacted the entire Class as well as themselves. Each Class representative committed time and effort to this case, and bore the risks involved in prosecuting it. *Id.*

The amounts of the Case Contribution Fees sought here, both individually and collectively, fall well within the range approved in other cases. The Case Contribution Fees collectively represent less than one-half of 1% of the Settlement Fund and to date, no one has objected to the Case Contribution Fees. *Id.* Individually, the Case Contribution Fees modestly reflect the efforts of the individuals serving as Class Representatives in this successful class action. *Id.* at ¶¶ 47-4. Accordingly, the Case Contribution Fees requested here are reasonable. *See, e.g., Haught v. Summit Res., LLC*, No. 1:15-CV-0069, 2016 WL 1301011, at *7 (M.D. Pa. Apr. 4, 2016) (approving \$15,000 for class representatives, noting that service awards typically range “from \$1,000 to \$50,000” each); *In re Am. Investors*, 263 F.R.D. at 245 (approving awards between \$5,000 and \$10,000 to each class representative); *Godshall v. The Franklin Mint Co.*, No. 01-cv-6539, 2004 U.S. Dist. LEXIS 23976, at *20-21 (E.D. Pa. Dec. 1, 2004) (approving award of \$20,000 each to each class representative).

Upon consideration of Class Counsel's request for Case Contribution Fees for the 28 Class Representatives in this litigation, and with the acknowledgement of their efforts to come forward and act as Class Representatives in this case, Class Counsel requests that the Case Contribution Fees requested be approved by the Court.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant Plaintiffs' Unopposed Motion and enter an Order: (i) approving attorneys' fees in the amount of \$5 million, one-third of the Settlement Fund; (ii) reimbursing \$379,550.26 in out-of-pocket costs and expenses that Class Counsel incurred in successfully prosecuting the claims in this action, and (iii) awarding Case Contribution Fees to the 28 Class Representatives in this case in the amount of \$74,000.00 in total.

Dated: March 10, 2017

Respectfully submitted by Counsel,

/s/ Kenneth J. Grunfeld

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CERTIFICATE OF SERVICE

I, Kenneth J. Grunfeld, Esquire, hereby certify that on this 10th day of March, 2017, a copy of the foregoing Plaintiff's Unopposed Motion for Approval of Attorneys' Fees and Case Contribution Fees and Reimbursement of Costs and Expenses was filed and served upon all counsel via operation of the Court's CM/ECF system.

/s/ Kenneth J. Grunfeld
Kenneth J. Grunfeld, Esquire