UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

IN RE: CAST IRON SOIL PIPE AND FITTINGS ANTITRUST LITIGATION	**No. 1:14-md-2508-HSM-CHS**
THIS DOCUMENT RELATES TO: Direct Purchaser Class Action	

DIRECT PURCHASER PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, FOR REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR THE NAMED PLAINTIFFS

Pursuant to Rule 23(e) and (h) of the Federal Rules of Civil Procedure, direct purchaser plaintiffs A&S Liquidating Inc., Hi Line Supply Co. Ltd., and Red River Supply, Inc. ("Direct Purchaser Plaintiffs"), on behalf of themselves and all others similarly situated, by and through the undersigned Settlement Class and Liaison Counsel, respectfully move this Court for an Order:

1. Awarding attorneys' fees of one-third of the Settlement Fund;

2. Approving the reimbursement of expenses, as stated in the accompanying Memorandum of Law in Support and the Joint Declaration of Solomon B. Cera, Robert N. Kaplan and Kit A. Pierson in Support of Direct Purchaser Plaintiffs' (1) Motion for Final Approval of Settlement and Plan of Distribution and (s) Motion for an Award of Attorneys' Fees, for Reimbursement of Expenses, and Incentive Awards for the Named Plaintiffs;

3. Authorizing Settlement Class Counsel to pay the costs of the notice and claims administration being handled by RG/2 Claims Administration, LLC from the Settlement Fund in accordance with the provisions of the Settlement Agreement up to a maximum amount of $150,000; and

4. Awarding $50,000 to each of A&S Liquidating Inc., Hi Line Supply Co. Ltd., and Red River Supply, Inc. as incentive awards;

This motion is based on the accompanying Memorandum of Law in Support and the Joint Declaration of Solomon B. Cera, Robert N. Kaplan and Kit A. Pierson in Support of Direct

Purchaser Plaintiffs' (1) Motion for Final Approval of Settlement and Plan of Distribution and (2) Motion for an Award of Attorneys' Fees, for Reimbursement of Expenses, and Incentive Awards for the Named Plaintiffs (Doc. 492-3), which was submitted in connection with Direct Purchaser Plaintiffs' Motion for Final Approval of Settlement and Plan of Distribution (Doc. 492).

WHEREFORE, Direct Purchaser Plaintiffs respectfully request that this Court grant this Motion for an Award of Attorneys' Fees, for Reimbursement of Expenses, and Incentive Awards for the Named Plaintiffs.

Dated: April 21, 2017

Respectfully submitted,

/s/ Scott N. Brown, Jr.
Scott N. Brown, Jr., BPR No. 1212
Joseph R. White, BPR No.13459
Joseph A. Jackson, II, BPR No. 30203
SPEARS, MOORE, REBMAN & WILLIAMS, P.C.
801 Broad Street, Sixth Floor, P.O. Box 1749
Chattanooga, Tenn. 37401-1749
Tel: (423) 756-7000

Liaison Counsel

/s/ Solomon B. Cera
Solomon B. Cera
CERA LLP
595 Market Street - Suite 2300
San Francisco, Calif. 94105-2835
Tel: (415) 777-2230

C. Andrew Dirksen
CERA LLP
800 Boylston St., 16th Floor
Boston, Mass. 02199
Tel: (857) 453-6555

/s/ Robert N. Kaplan
Robert N. Kaplan
Richard J. Kilsheimer
Gregory K. Arenson
Matthew P. McCahill
Jason A. Uris
KAPLAN FOX & KILSHEIMER LLP
850 Third Avenue, 14th Floor
New York, New York 10022
Tel: (212) 687-1980

/s/ Kit A. Pierson
Kit A. Pierson
Robert A. Braun
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, NW, Suite 500 East
Washington, DC 20005
Tel: (202) 408-4600

Christopher J. Cormier
COHEN MILSTEIN SELLERS & TOLL PLLC
5290 Denver Tech Center Parkway, Suite 150
Greenwood Village, Colorado 80111
Tel: (720) 630-2092
ccormier@cohenmilstein.com

Settlement Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2017, I caused true and correct copies of the foregoing to be served electronically. Notice of this filing will be sent by operation of the Court's CM/ECF system to all parties shown on the electronic filing receipt.

/s/ Matthew P. McCahill
Matthew P. McCahill

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

IN RE: CAST IRON SOIL PIPE AND FITTINGS ANTITRUST LITIGATION **THIS DOCUMENT RELATES TO:** **Direct Purchaser Class Action**	**No. 1:14-md-2508-HSM-CHS**

DIRECT PURCHASER PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, FOR REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR THE NAMED PLAINTIFFS

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

Counsel for the certified settlement class of direct purchasers in the above-captioned case ("Settlement Class Counsel") respectfully submit this brief in support of Direct Purchaser Plaintiffs' ("DPPs'") motion for an award of attorneys' fees, reimbursement of out-of-pocket expenses, and incentive awards for Settlement Class representatives A&S Liquidating, Inc., Hi Line Supply Company, Ltd., and Red River Supply, Inc. (collectively, the "Named Plaintiffs").

I. INTRODUCTION

The claims of the certified settlement class of direct purchasers ("Settlement Class Members") against McWane, Inc. (and its unincorporated divisions Tyler Pipe Company and AB&I Foundry) (collectively, "McWane"), Charlotte Pipe and Foundry Company and Randolph Holding Company, LLC (collectively, "Charlotte Pipe"), and the Cast Iron Soil Pipe Institute ("CISPI," who along with McWane and Charlotte Pipe, are referred to here as "Defendants") have been settled for $30 million in cash (the "Settlement Fund"), which has been paid into escrow. Settlement Class Counsel respectfully submit that the Settlement achieved in this case is an excellent example of effective private enforcement at the heart of the federal antitrust laws, and merits an award of attorneys' fees and reimbursement of expenses.

The recovery obtained for Settlement Class Members is the result of the skill, perseverance and hard work of Settlement Class Counsel and the other law firms involved in prosecuting this case for the benefit of the Settlement Class. The efforts undertaken by Settlement Class Counsel are detailed in the accompanying Joint Declaration of Solomon B. Cera, Robert N. Kaplan and Kit A. Pierson in Support of Direct Purchaser Plaintiffs' (1) Motion for Final Approval of Settlement and (2) Motion for an Award of Attorneys' Fees, for Reimbursement of Expenses, and Incentive Awards for the Named Plaintiffs (the "Jt. Decl.").

Those efforts included: an exhaustive pre-filing investigation of potential direct purchaser claims against Defendants; development, review and analysis of a massive discovery record, which included roughly one million pages of documents produced by Defendants and numerous non-parties, and nearly 30 depositions of witnesses from Defendants and non-parties; research and drafting of a comprehensive amended complaint upheld by this Court; engaging in time-consuming discovery negotiations with Defendants and non-parties; working with experts on class certification; marshalling the discovery record for DPPs' class certification papers, which in addition to a detailed expert report also relied on dozens of deposition transcripts and hundreds of Defendants' documents; making a dozen appearances before the Court for various motion hearings and status conferences; and successfully mediating before two well-known mediators and then negotiating the terms of the Settlement Agreement. (Jt. Decl. ¶¶ 1-52).

To date, Settlement Class Counsel's efforts have been without compensation of any kind. Settlement Class Counsel and their co-counsel have expended over 27,000 hours over the last four years investigating and litigating this case, the compensation for which has been wholly contingent on the result achieved. (Jt. Decl. ¶¶ 53-54). At this time, Settlement Class Counsel requests an award of attorneys' fees and reimbursement of expenses to be paid out of the common fund generated through their efforts.

II. FACTUAL BACKGROUND

Cast iron soil pipe ("CISP") is manufactured predominantly from cast iron and primarily used in residential, commercial, industrial and government buildings for sanitary and storm drain, waste, and vent-piping applications. *See* Consolidated Amended Class Action Complaint (here, the "CAC," Doc. 124). CISP is a versatile product and can be installed above or below flooring as well as underground, and CISP's noise-reduction, strength and resistance, and non-

combustibility make it more effective in many applications than plastic or polymer pipes, which are not functional substitutes for CISP. *Id.* State, municipal and local codes often require the use of CISP rather than plastic piping for certain types of construction. *Id.* The most frequent direct purchasers of CISP are plumbing wholesalers and distributors. *Id.* Defendants McWane, Inc. (and its divisions Tyler Pipe and AB&I Foundry) and Charlotte Pipe and Foundry Company collectively control over 85% of the CISP market, and are the only members of their trade association, co-defendant CISPI.

III. HISTORY OF THE LITIGATION

In 2013, Settlement Class Counsel began a months-long investigation into potential antitrust violations in the CISP market, including witness interviews, extensive factual and economic research into the CISP market, and thorough analysis of possible causes of action. (Jt. Decl. ¶ 1). Settlement Class Counsel filed the first complaints on behalf of their clients in the Northern District of California on October 2, 2013. *Id*. Other direct purchasers filed similar actions in other federal districts, causing a motion before the Judicial Panel on Multidistrict Litigation, which in February 2014 transferred the related CISP antitrust cases to this district for coordinated or consolidated pretrial proceedings. *Id*. Following Chief Judge Varner's March 2014 order reassigning this case to this Court, this Court and then-Magistrate Judge Carter held an initial case management conference, and on May 20, 2014, the Court appointed the undersigned law firms as Interim Co-Lead and Interim Liaison Counsel for the Proposed Direct Purchaser Class. (Jt. Decl. ¶¶ 2-3).[1]

[1] The Court appointed the same law firms as Settlement Class Counsel in its Preliminary Approval Order, and this brief therefore uses the term "Settlement Class Counsel."

In the months following the Court's initial case management conference, and concurrently with their preparation of a consolidated amended complaint that was soon to be filed by the Direct Purchaser Plaintiffs ("DPPs") on behalf of themselves and all other similarly-situated entities, Settlement Class Counsel engaged in significant motion practice, namely: (1) opposing Defendants' request that DPPs' forthcoming consolidated amended complaint include a "fact sheet" specifying from which Defendant(s) the named plaintiffs had bought CISP; and (2) moving for the Court's oversight of Defendants' communications with members of the proposed direct purchaser class, to the extent those communications related to this litigation, which, following oral argument, resulted in a Court-ordered moratorium on such communications until DPPs filed their amended complaint, along with a direction that any such communications thereafter include a copy of DPPs' amended complaint. (Jt. Decl. ¶ 5).

While engaging in that adversarial motion practice, Settlement Class Counsel simultaneously: (1) negotiated with defense counsel stipulations governing the confidentiality and use of discovery materials and the scope of expert and electronic discovery, none of which required the Court's intervention; (2) compiled and served initial disclosures pursuant to Fed. R. Civ. P. 26(a); (3) participated in the discovery planning conference required by Fed. R. Civ. P. 26(f); and (4) drafted and served Defendants with document requests and targeted interrogatories. (Jt. Decl. ¶ 6).

DPPs' CAC was filed on August 11, 2014, and it alleged a conspiracy starting as early as January 1, 2006, through December 31, 2013. (Jt. Decl. ¶ 7). The CAC alleged that Defendants: (1) violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to unreasonably restrain trade by agreeing to fix, raise, maintain and stabilize the price of CISP in the United States; and (2) violated Section 7 of the Clayton Act, 15 U.S.C. § 18, by acquiring and destroying the CISP

assets of Star Pipe, a seller of imported CISP, which substantially lessened competition and caused severe anticompetitive effects in the CISP market.[2] *Id*. On October 10, 2014, Defendants moved to dismiss the CAC for failure to state a claim. *Id*. Settlement Class Counsel opposed Defendants' dismissal motions and defended the CAC at oral argument on December 19, 2014. *Id*. The Court denied Defendants' motions to dismiss the CAC on June 24, 2015. *Id*. Defendants answered on July 22, 2015, largely denying the CAC's allegations. *Id*.

On January 27, 2016, McWane moved to compel arbitration of claims asserted against it by the Named Plaintiffs, and to further exclude from the proposed direct purchaser class any purchasers of CISP from McWane's Tyler division. (Jt. Decl. ¶ 10). Settlement Class Counsel vigorously opposed McWane's motions on various grounds, including waiver. *Id*. at ¶ 11. DPPs also contended that, even if successful, McWane's arbitration motions would have only a limited effect, because all class members that bought directly from either Charlotte Pipe or McWane's AB&I division would continue to have claims against all Defendants under principles of joint-and-several liability. *Id*.

In addition, to ensure that the proposed direct purchaser class would be adequately represented should McWane win its arbitration motions, Settlement Class Counsel filed motions to intervene two Charlotte Pipe purchasers as additional class representatives. *Id*. at ¶ 12. The Court heard oral argument on the parties' arbitration and intervention motions in May 2016, but before deciding those two motions and at the parties' request, stayed all proceedings so that the parties could try and reach a settlement. *Id*.

---

[2] DPPs' Section 7 claim was originally asserted against both Charlotte Pipe and McWane, but DPPs discontinued their Section 7 claim against McWane at the motion to dismiss stage. *See* June 24, 2015 Order, Doc. 247, at PageID#: 2948.

DPPs moved for class certification on March 4, 2016. *Id*. at ¶ 13. DPPs' opening class certification papers – supported by over 100 exhibits, including excerpts from 11 Defendant depositions and scores of documents produced by Defendants and non-parties [Doc. 452-2] – were the result of the substantial time, effort and expense that Settlement Class Counsel devoted to developing, analyzing and marshalling the massive discovery record. *Id*. Settlement Class Counsel also spent many months prior to class certification working with expert economists, primarily Dr. Russell Lamb, who prepared an exhaustive expert report in support of DPPs' class certification motion [Doc. 452-1], and later sat for a deposition defended by Settlement Class Counsel. Defendants had not responded to DPPs' class certification motion by the time the parties reached an agreement in principle to settle in September 2016. *Id*. at ¶ 14.

Shortly after the CAC was filed, the Court appointed retired U.S. District Judge Robert L. Echols as a mediator, and convened a status conference on September 3, 2014, where the parties, the Court and Judge Echols discussed the potential mediation of the parties' dispute. *Id*. at ¶ 51. On July 12, 2016, the parties participated in a Court-ordered mediation with Judge Echols, and while some progress was made, that mediation did not resolve the parties' dispute. *Id.*

On August 29, 2016, the parties mediated before former U.S. District Judge Layn R. Phillips, a respected mediator of disputes of this nature. *Id*. at ¶ 52. After the mediation, the parties continued negotiations with the assistance of Judge Phillips. *Id*. On September 27, 2016, the parties reached an agreement in principle to settle DPPs' claims, and negotiated the final terms of the agreement in the subsequent weeks. *Id*. Following additional negotiations regarding the specific terms of the settlement agreement, Settlement Class Counsel and counsel for Defendants signed the Settlement Agreement with an execution date of October 19, 2016. *Id*. Settlement

Class Counsel prepared, briefed and argued DPPs' motion for preliminary approval of the Settlement Agreement, which the Court approved on November 29, 2016. *Id*. at ¶ 56.

IV. ARGUMENT

A. The Attorneys' Fees and Reimbursement of Expenses Requested Are Fair and Reasonable

District courts may award reasonable attorneys' fees and expenses from the settlement of a class action under Federal Rules of Civil Procedure 23(h) and 54(d)(2). To assess the reasonableness of a fee application in a class action, courts in the Sixth Circuit first determine the appropriate method of calculating the attorneys' fees by applying either the "percentage-of-the-fund" method (where the court determines a percentage of the settlement to award to class counsel) or the "lodestar" method (where the court multiplies the number of hours reasonably spent on the case by a reasonable hourly rate). *See Gashco v. Global Fitness Holdings, LLC*, 822 F.3d 269, 279-80 (6th Cir. 2016). To confirm the reasonableness of the fee award, courts then analyze and weigh the six factors described in *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188 (6th Cir. 1974).

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

The diligent efforts of Settlement Class Counsel have resulted in a common fund of $30 million (the "Settlement Fund"). "[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole," *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980), and in class actions, courts "must ensure 'that counsel is fairly compensated for the amount of work done as well as for the results achieved.'" *In re Southeastern Milk*, No. 2:07-cv-208 2013 U.S. Dist. LEXIS 70167, at * 11 (E.D. Tenn. May 17, 2013) (quoting *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513,

516 (6th Cir. 1993)). When calculating attorneys' fees "under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).

While district courts have the discretion to choose either the percentage of the fund method or the lodestar method, *see Gashco*, 822 F.3d at 280, "the trend in the Sixth Circuit is 'toward adoption of a percentage of the fund method' in common fund cases." *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at *13 (quoting *Stanley v. U.S. Steel Co.*, 2009 U.S. Dist. LEXIS 114065, at **4-5 (E.D. Mich. Dec. 8, 2009)). This trend mirrors the practice in most other circuits, as "the vast majority of courts of appeal now permit or direct district courts to use the percentage-fee in common fund cases." MANUAL FOR COMPLEX LITIGATION (FOURTH), § 14.121.

The "percentage-of-the-fund" method is preferable to the "lodestar" method, particularly in class action cases, because "[i]n practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation," and "creates inherent incentive to prolong the litigation." *Id.* Settlement Class Counsel respectfully submit that the "percentage-of-the-fund" method should apply here, making the primary question before this Court the appropriate percentage of the Settlement Fund to be awarded as attorneys' fees.

C. Settlement Class Counsel's Requested Fee of One-Third of the Settlement Fund is Fair and Reasonable, and Within the Range of Fees Routinely Awarded in the Sixth Circuit

Settlement Class Counsel request one-third (or 33 1/3%) of the $30 million of the Settlement Fund as attorneys' fees,[3] a percentage routinely awarded in complex, common fund

[3] This percentage should be applied to the Settlement Fund before deducting unreimbursed out-of-pocket expenses, incentive awards to the Named Plaintiffs, and the costs of notice and settlement administration. *See, e.g.*, *In re Packaged Ice Antitrust Litig.*, 2011 U.S. Dist. LEXIS 150427, at

class actions in this district and throughout the Sixth Circuit. *See, e.g.*, *In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 2:12-cv-83, 2014 U.S. Dist. LEXIS 91661, at *5 (E.D. Tenn. June 30, 2014) (finding that "the requested counsel fee of one third is fair and reasonable and fully justified . . . [and] within the range of fees ordinarily awarded"); *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at **15-16 (awarding fees representing "one-third of the settlement fund," finding that "the percentage requested is certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit."). The results achieved by Settlement Class Counsel support an award of one-third of the Settlement Fund.

1. Consideration of the Sixth Circuit's *Ramey* Factors Supports the Reasonableness of the Requested Fee

After selecting a method for awarding attorneys' fees, courts in the Sixth Circuit consider the six *Ramey* factors to assess the reasonableness of the percentage sought: (1) the value of the benefit rendered to the plaintiff class; (2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (3) whether the services were undertaken on a contingent fee basis; (4) the value of the services on an hourly basis; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides. *See Ramey*, 508 F.2d at 1196. Application of the *Ramey* factors here confirms that the one-third fee requested by Settlement Class Counsel is reasonable.

i. The Unique Value of the Benefit Obtained for Settlement Class Members

A primary consideration in awarding attorneys' fees is the result class counsel has obtained for the class. *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 503 (E.D.

*71 (E.D. Mich. Dec. 13, 2011) ("The fee percentage is applied to the settlement fund before the separate award of litigation costs and expenses are deducted from the fund.")

Mich. 2008). There are at least two reasons why the $30 million recovery for Settlement Class Members is an excellent result that supports awarding a one-third fee to Settlement Class Counsel.

First, while DPPs believe that their claims have substantial merit and could be proven at trial, the Settlement eliminates the risk that the Settlement Class might recover nothing if the litigation were to proceed to class certification, summary judgment, and trial. An assessment of the value of the result achieved by Settlement Class Counsel must consider the risk of non-recovery after trial. *See Dick v. Sprint Commc'ns. Co. L.P.*, 297 F.R.D. 283, 299 (W.D. Ky. 2014).

Second, the Settlement will provide the largest possible monetary recovery to every entity that makes up the Settlement Class. Like most other direct-purchaser antitrust settlements, the amount of a Settlement Class Member's recovery from the Settlement Fund in this case will be determined by that entity's share of the total CISP purchases made by Settlement Class Members during the Settlement Class Period; the greater the amount of CISP purchased, the larger the recovery from the Settlement Fund. *See* Direct Purchaser Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement and Plan of Distribution, at pp. 15-17.

Importantly, this Settlement offers Settlement Class Members benefits beyond those obtained in many other antitrust class action settlements. By excluding from the definition of the Settlement Class the "Known Opt-Outs" – whose purchases collectively account for over 60% of all CISP sold by Defendants during the Class Period – the agreement negotiated by Settlement Class Counsel ensures that these excluded entities cannot participate in the distribution of the net Settlement proceeds, and thus their purchases will not dilute the *pro rata* recoveries of Settlement Class Members (especially small- and medium-sized entities). *Cf. In re Polyurethane Foam Antitrust Litig.*, 135 F. Supp. 3d 679, 687-688 (N.D. Ohio 2015) (rejecting effort by large opt-out

purchaser to rejoin direct purchaser class, holding that because settlement "funds will be distributed on a pro rata basis. . . [the large purchaser's] opt-in would reduce class member claim payouts . . . This diminution in claim value prejudices the Class.").

The Settlement's benefits are clear: an immediate and certain payment of $30 million in cash, less whatever the Court may award as attorneys' fees, expenses, and incentive payments to the Named Plaintiffs, divided *pro rata* among eligible purchases (roughly 40% of class period purchases). If Settlement Class Counsel had not investigated and litigated their antitrust claims, Settlement Class Members would not have recovered anything. This factor favors approval of Settlement Class Counsel's requested one-third fee.

ii. Society's Stake in the Litigation

The Supreme Court has long recognized the importance of private antitrust litigation as a necessary and desirable tool to assure the effective enforcement of the antitrust laws. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("This court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws."). Fee awards like that requested here encourage and support meritorious class actions, which promote private enforcement of, and compliance with, the antitrust laws. As the court explained in *Southeastern Milk*, "[f]ailing to fully compensate class counsel for the excellent work done and the various substantial risks taken would undermine society's interest in the private litigation of antitrust cases. Society's interests are clearly furthered by the private prosecution of civil cases which further important public policy goals, such as vigorous competition by marketplace competitors." 2013 U.S. Dist. LEXIS 70167, at *23 (citing *Pillsbury*, 459 U.S. at 262-63).

This case sends a message that direct purchasers of CISP will not tolerate alleged collusive behavior that illegally raises the prices of products they buy from Defendants. The result of this deterrent effect is increased competition; a benefit to all purchasers of CISP. Settlement Class Members will only recover here through the work of lawyers pursuing this litigation entirely on a contingent-fee basis. Society gains by compensating Settlement Class Counsel for the result achieved here, which will incentivize them and lawyers like them to pursue cases like this in the future. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) ("[I]t is especially important to provide appropriate incentives to attorneys pursuing antitrust actions because public policy relies on private sector enforcement of the antitrust laws.").

The result obtained by Settlement Class Counsel's efforts in this case exemplifies the importance of private enforcement of the antitrust laws. While the Federal Trade Commission's investigation into Charlotte Pipe's 2010 acquisition of Star Pipe resulted in a fine and a consent decree in April 2013, neither penalty imposed on Charlotte Pipe directly benefitted direct purchasers of CISP, and the FTC closed its separate, nonpublic investigation into the standard-setting practices of both McWane and Charlotte Pipe without taking any action. [Doc. 161-1]. Moreover, the FTC's focus in those investigations was far narrower than the conduct uncovered during Settlement Class Counsel's pre-filing investigation, later alleged in the CAC, and ultimately developed during discovery. *See Polyurethane Foam*, 135 F. Supp. 3d at 690 (awarding fee and noting that "Class Counsel's efforts are also notable" because parallel criminal investigations "produced results far more limited than the Direct Purchaser case.") From the outset, Settlement Class Counsel has focused on a wide range of alleged anticompetitive conduct, including price-fixing and market allocation, neither of which were at issue in the FTC's inquiries. As the case progressed into document and deposition discovery, Settlement Class Counsel developed a factual

record sufficient to prosecute treble-damages claims that could only be pursued in a civil action. Public policy supports awarding Settlement Class Counsel a one-third fee for their efforts investigating, litigating and remedying the claims of Settlement Class Members.

iii. The Contingent Nature of the Fee

The determination of a reasonable fee must include consideration of the contingent nature of any class counsel's fee, the equally contingent outlay of over $2 million in unreimbursed out-of-pocket costs and expenses, and the fact that the risks of failure in a class action are notoriously high. Many courts "consider the risk of non-recovery [as] the most important factor in fee determination," with *Ramey*'s contingency-fee factor standing "as a proxy for the risk that attorneys will not recover compensation for the work they put into a case." *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 766 (S.D. Ohio 2007).

Since 2013, Settlement Class Counsel have investigated and litigated this case on a fully contingent-fee basis, risking non-payment for the value of their time and reimbursement of out-of-pocket costs and expenses if they were unsuccessful. (Jt. Decl. ¶ 1). Settlement Class Counsel faced numerous risks from the inception of the litigation, including that: (a) the case would be dismissed at the pleadings stage; (b) the proposed direct purchaser class would not be certified; (c) that McWane would prevail in its attempts to force a significant portion of the case into arbitration; (d) that DPPs' claims would not survive summary judgment; and (e) that a jury would issue a defense verdict. *Id*. at ¶ 54.

Settlement Class Counsel nonetheless assumed those risks, and litigated the case to a multimillion-dollar recovery for Settlement Class Members. The excellent result supports the requested fee of one-third of the Settlement Fund. *See Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at *22 ("If counsel are not rewarded for this risk, few attorneys will undertake the

representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.") (internal quote omitted).

iv. The Value of Settlement Class Counsel's Services on an Hourly Basis

As noted above and as detailed in the Joint Declaration, Settlement Class Counsel devoted extensive time and effort to secure this uniquely beneficial Settlement. To date, Settlement Class Counsel and their co-counsel[4] have spent 27,265 hours prosecuting this case, which would be valued at $12,846,973.90 if paid on an hourly basis (the "lodestar").[5] (Jt. Decl. ¶59). The fee requested here is $10,000,000 which is one-third of the $30 million Settlement Fund – substantially less than counsel's lodestar. *Id*. at ¶ 58.

Some Sixth Circuit courts apply a lodestar "cross-check" on the reasonableness of a requested fee calculated as a percentage of a common fund. *See, e.g.*, *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at *20 ("Using the lodestar method as a cross-check on the

[4] Paragraph 59 of the Joint Declaration identifies these law firms, their attorney time expended and out-of-pocket expenses incurred. Settlement Class Counsel will distribute any fee awarded among these other firms in a manner which, in the judgment of Settlement Class Counsel, fairly compensates each firm for its contributions to the prosecution of the direct purchaser class's claims. "Courts routinely permit counsel to divide common benefit fees among themselves," *In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d 985, 1006-07 (N.D. Ohio 2016) (also noting that in *Bowling v. Pfizer*, 102 F.3d 777, 781 (6th Cir. 1996), "the Sixth Circuit . . . suggested it would adopt the approach" of other circuits "declining to 'deviate from the accepted practice of allowing counsel to apportion fees amongst themselves'").

[5] The lodestar amount reflects the hourly rates charged by these firms when the work was performed in their respective local markets, which, as several courts have recognized, appropriately compensates attorneys litigating complex, multidistrict class actions against defendants represented by large regional or national law firms. *See, e.g.*, *In re UnumProvident Corp. Derivative Litig.*, No. 1:02-cv-386, 2010 U.S. Dist. LEXIS 4326, at *17 (E.D. Tenn. Jan. 20, 2010) (approving current hourly rates charged by out-of-town counsel where the case involved complex questions of law and defendants were represented by "large New York firms") (citing *Hadix v. Johnson*, 65 F.3d 532, 535 (6th Cir. 1995)).

reasonableness of the requested [one-third] fee likewise supports the award of fees requested.")[6]. The significant time Settlement Class Counsel and their co-counsel have expended confirms that the one-third fee requested is well "aligned with the amount of work the attorneys contributed" to the recovery, and does not, in any way, constitute a "windfall." *Cardinal*, 528 F. Supp. 2d at 764.

A lodestar "cross-check" supports the requested fee and shows that it is reasonable. Here, the fee requested represents a negative 0.78 "multiplier" of the lodestar, meaning that the requested one-third fee compensates Settlement Class Counsel for only 78% of the market value of the legal services rendered to Settlement Class Members. (Jt. Decl. ¶ 61). A negative lodestar "multiplier" is eminently reasonable in the Sixth Circuit, where courts regularly grant fee awards reflecting a significant positive multiplier of class counsel's lodestar in antitrust and other complex class actions. *See, e.g., Skelaxin*, 2014 U.S. Dist. LEXIS 91661, at *7 (awarding one-third fee equating to lodestar "multiplier" of "between 2.1 and 2.5"); *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at *20 (requested fee of 33 1/3% of common fund "represents a lodestar multiplier of 1.90, clearly within, but in the bottom half of, the range of typical lodestar multipliers").

Indeed, Sixth Circuit courts have recognized that negative lodestar multipliers, such as the one here, are plainly reasonable. *See, e.g., Walls v. J.P. Morgan Chase Bank, N.A.*, C.A. No. 3:11-cv-673-DJH, 2016 WL 6078297, at *6 (W.D Ky. Oct. 14, 2016) (finding that the lodestar cross-check resulting in a .83 multiplier "indicates that the fee award sought by Class Counsel is reasonable."); *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *3 (awarding 30% fee when lodestar cross-check revealed negative lodestar multiplier). Moreover, when a lodestar cross-check shows a negative multiplier, courts often grant attorneys' fees of at least one-third of a total settlement

[6] Because a lodestar "cross-check" is optional, the Court need not engage in a detailed review of counsel's time records. *Cardinal*, 528 F. Supp. 2d at 767.

recovery. *See, e.g.*, *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 163 n.5 (S.D.N.Y. 2011) (approving 33% fee with 0.89 multiplier); *City of Providence v. Aeropostale, Inc.*, 11-cv-7132, 2014 U.S. Dist. LEXIS 64517, at *36 (S.D.N.Y. May 9, 2014) (approving 33% fee with .70 multiplier, noting that the negative multiplier afforded additional evidence that the fee request was reasonable). A negative lodestar multiplier supports the requested fee here.

v. The Complexity of the Case

The complexity and novelty of the factual and legal issues presented, and the settlement negotiations necessary to resolve those issues, are factors to be considered when approving a fee request in class action cases. *See, e.g.*, *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 939 (N.D. Ohio 2003). Antitrust class actions are "arguably the most complex class action cases to prosecute. The legal and factual issues are always complicated and highly uncertain in outcome." *Packaged Ice*, 2011 U.S. Dist. LEXIS 150427, at *76 (quoting *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 639 (E.D. Pa. 2003)). The complex legal, factual and economic issues of this case support Settlement Class Counsel's fee request.

Settlement Class Counsel have been tackling complex factual and legal issues since they began investigating the CISP market in 2013. (Jt. Decl. ¶ 1). Counsel's pre-filing investigation involved extensive efforts identifying and investigating potential antitrust claims, including a rarely-alleged cause of action under Section 7 of the Clayton Act stemming from Charlotte Pipe's acquisition and destruction of Star Pipe's CISP assets. *Id*. at ¶¶ 1, 7. As the case progressed, in addition to the "inherently complex" issues present in every antitrust class action, *see In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 533 (E.D. Mich. 2003), McWane's belated arbitration motions required Settlement Class Counsel to research, brief and argue complicated, unsettled legal issues. *Id*. at ¶¶ 10-12.

As is evident from DPPs' opening class certification papers, discovery revealed the complexity of the CISP market, including among other things: Defendants' multi-component pricing mechanisms [Doc. 452, at PageID #: 8350-51]; the role played in the alleged conspiracy by highly-technical product standards created by CISPI and its only two members, McWane and Charlotte Pipe [*Id.*, at PageID #: 8351]; and the mechanics of Defendants' multi-faceted alleged conspiracy to maintain their duopoly, including price-fixing and collusive elimination of the competitive threats posed by CISP importers [*Id.*, at PageID #: 8351-57]. Class certification required complex economic analysis, and Settlement Class Counsel worked closely with their expert and his staff throughout discovery to help develop his expert report and testimony demonstrating that DPPs' claims were capable of proof at trial through evidence common to the class. [*Id.*, at PageID #: 8363-69]; (Jt. Decl. ¶ 14).

The same complex factual, economic and legal issues encountered by Settlement Class Counsel in litigating the case were implicated in mediating before Judges Echols and Phillips, and ultimately negotiating the terms of the Settlement Agreement with the Defendants.

vi. The Skill, Experience and Reputation of Settlement Class Counsel and their Adversaries

Settlement Class Counsel include three of the preeminent antitrust firms in the country, with decades of experience in prosecuting complex actions on both a class and non-class basis. They demonstrated this experience and skill in the effective prosecution of the Action from start to finish. That Settlement Class Counsel obtained a multimillion-dollar recovery for Settlement Class Members despite the skill and vigorous advocacy of Defendants' experienced lawyers further supports the fee request. *See, e.g., In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 504 (E.D. Mich. 2008) ("The ability of Co-Lead Counsel to negotiate a favorable settlement in the face of formidable legal opposition further evidences the reasonableness of the

fee award requested."); *In re F&M Distribs., Inc. Sec. Litig.*, Case No. 95-cv-71778, 1999 U.S. Dist. LEXIS 11090, at *19 (E.D. Mich. June 29, 1999) ("The skill and competence of the attorneys for the plaintiffs was evident, especially when viewed on the basis of the results that they obtained in this case, while the excellent advocacy skills of the defense counsel . . . were equally evident").

D. Settlement Class Counsel's Unreimbursed, Out-Of-Pocket Expenses Are Reasonable and Were Necessarily Incurred to Obtain this Beneficial Settlement

"Expense awards are customary when litigants have created a common settlement fund for the benefit of a class." *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at *32 (internal citation omitted). "Under the common fund doctrine, class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement, including expenses incurred in connection with document productions, consulting with experts and consultants, travel and other litigation-related expenses." *Cardizem*, 218 F.R.D. at 535.

Unreimbursed, out-of-pocket expenses incurred throughout the course of the litigation by Settlement Class Counsel and the other law firms involved in the direct purchaser case are $2,043,701.02, *see* Jt. Decl., ¶ 59; however, Settlement Class Counsel request reimbursement of $2,000,000.00 in expenses. These unreimbursed expenses, specified in the Joint Declaration and in the declarations of co-counsel submitted in support of this request, were reasonably and necessarily incurred, and are directly related to their prosecution and resolution of this Action. *Id*.

The expenses include costs for: copying, court fees, postage and shipping, phone charges, legal research, travel, document production and review, court reporters, mediation fees, and contributions to a common expense litigation fund used, in part, to pay for expert witness services. Most of counsel's unreimbursed expenses were the fees paid to experts and consultants who were

instrumental in helping Settlement Class Counsel prepare their class certification papers, and whose analysis informed Settlement Class Counsel's mediations before Judges Echols and Phillips and settlement negotiations with Defendants. These categories of expenses are of a type typically billed by counsel to paying clients in similar cases. *See, e.g.*, *Skelaxin*, 2014 U.S. Dist. LEXIS 91661, at *11; *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at *31. Settlement Class Counsel therefore respectfully request reimbursement of the litigation expenses that have been incurred in prosecuting and resolving this Action, which are detailed in the Joint Declaration accompanying this brief. Jt. Decl. ¶ 59.

E. Incentive Awards of $50,000 for Each of the Named Plaintiffs Are Appropriate and Reasonable

Settlement Class Counsel also respectfully request that the Court award $50,000 to each of the three Named Plaintiffs, companies that have actively served as representatives of the proposed direct purchaser class since this litigation began nearly four years ago. (Jt. Decl. ¶ 64). "Courts within the Sixth Circuit . . . recognize that, in common fund cases . . . class representatives who have had extensive involvement in a class action litigation deserve compensation above and beyond amounts to which they are entitled by virtue of class membership alone." *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 787 (N.D. Ohio 2010). Here, the Named Plaintiffs – A&S Liquidating, Hi Line Supply and Red River Supply – were extensively involved in this case and devoted substantial time and energy to their duties as representatives of the direct purchaser class, including working with counsel to understand how the CISP market worked, collecting relevant documents in response to Defendants' document requests, responding to Defendants' interrogatories (including contention interrogatories), and sitting for depositions. (Jt. Decl. ¶ 64).

Recognizing the unique burdens imposed on named plaintiffs in complex antitrust class actions, "[d]istrict courts in this Circuit routinely grant incentive awards to representative plaintiffs

in antitrust matters, when the representative plaintiff actively participates in the litigation." *Polyurethane Foam*, 135 F. Supp. 3d, at 694 (collecting cases). Courts in this district are no exception, having granted incentive payments, including awards in the amounts requested here, to class representatives in antitrust class actions. *See, e.g.*, *Skelaxin*, 2014 U.S. Dist. LEXIS 91661, at *11 - *12 (awarding $50,000 to each of the five named plaintiffs who "diligently and completely fulfilled their obligations to the Class" when 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 sitting for depositions . . . and responding to document requests and interrogatories"); *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at *33 - *34 (awarding a total of $160,000 in incentive awards to class representatives). Incentive awards are especially meaningful for small- to mid-sized purchasers like the Named Plaintiffs, whose leadership and work as representative plaintiffs helped to obtain a common fund, the *pro rata* distribution of which will compensate many Settlement Class Members in amounts that will substantially exceed those paid to the Named Plaintiffs. For these reasons, Settlement Class Counsel submit that the requested incentive awards for the Named Plaintiffs are both appropriate and reasonable, and should be granted by the Court.

V. CONCLUSION

For the reasons stated above, and in the accompanying Joint Declaration, Settlement Class Counsel respectfully request that the Court grant their motion for attorneys' fees, reimbursement of out-of-pocket expenses, and incentive awards for the Named Plaintiffs.

Dated: April 21, 2017 Respectfully submitted,

/s/ Scott N. Brown
Scott N. Brown, Jr., BPR No. 1212
Joseph R. White, BPR No. 13459
Joseph Alan Jackson, II, BPR No. 30203
SPEARS, MOORE, REBMAN & WILLIAMS, P.C.
801 Broad Street, Sixth Floor
P.O. Box 1749
Chattanooga, Tennessee 37401-1749
Tel: (423) 756-7000
snb@smrw.com
jrw@smrw.com
jaj@smrw.com

Liaison Counsel

/s/ Robert N. Kaplan
Robert N. Kaplan
Richard J. Kilsheimer
Gregory K. Arenson
Matthew P. McCahill
Jason A. Uris
KAPLAN FOX & KILSHEIMER LLP
850 Third Avenue, 14th Floor
New York, New York 10022
Tel: (212) 687-1980
rkaplan@kaplanfox.com
rkilsheimer@kaplanfox.com
garenson@kaplanfox.com
mmccahill@kaplanfox.com
juris@kaplanfox.com

Settlement Class Counsel

/s/ Solomon B. Cera
Solomon B. Cera
CERA LLP
595 Market Street, Suite 2300
San Francisco, California 94105-2835
Tel: (415) 777-2230
scera@cerallp.com

C. Andrew Dirksen
CERA LLP
800 Boylston Street, 16th Floor
Boston, Massachusetts 02199
Tel: (857) 453-6555
cdirksen@cerallp.com

Settlement Class Counsel

/s/ Kit A. Pierson
Kit A. Pierson
Robert A. Braun
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, NW
Suite 500, East Tower
Washington, D.C. 20005
Tel: (202) 408-4600
kpierson@cohenmilstein.com
rbraun@cohenmilstein.com

Christopher J. Cormier
COHEN MILSTEIN SELLERS & TOLL PLLC
5290 Denver Tech Center Parkway, Suite 150
Greenwood Village, Colorado 80111
Tel: (720) 630-2092
ccormier@cohenmilstein.com

Settlement Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt on this 21st day of April, 2017.

/s/ Matthew P. McCahill

Matthew P. McCahill