UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: BEAZER HOMES USA, INC. ERISA LITIGATION	Civil Action No. 1:07-CV-00952-RWS

PLAINTIFFS' MOTION
FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT
OF EXPENSES, AND CASE CONTRIBUTION AWARDS

1. Keller Rohrback LLP, Barroway Topaz Kessler Meltzer & Check LLP, and Liaison Counsel Holzer Holzer & Fistel, LLC (collectively, "Class Counsel"), as well as Settlement Class Representatives Patrick Denning and Lorene De Stefano through their Counsel, in compliance with the Court's Order Granting Preliminary Approval of Class Action Settlement, Preliminarily Certifying a Class for Settlement Purposes, Approving Form and Manner of Class Notice, Setting Date for Hearing on Final Approval of Settlement, as well as with Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, request that the Court enter an Order:

a. Awarding Class Counsel attorneys' fees in the amount of 27.5% of the Settlement Fund recovered for the benefit of the Class;

b. Reimbursing Class Counsel $95,522.93 in expenses advanced by them to the Class as reasonable and necessary expenses of litigation; and

c. Awarding Settlement Class Representatives Patrick Denning and Lorene De Stefano $5,000 each in recognition of the time and effort they have invested as Class Representatives for the benefit of the Class.

2. Through the efforts of Class Counsel and the Class Representatives, Plaintiffs achieved an excellent result for the Class that includes a $5.5 million cash payment to the Beazer Homes USA, Inc. 401(k) Plan (the "Plan") for the benefit of its participants and beneficiaries.

3. Each of these requests is fully supported by the record and controlling Eleventh Circuit authority regarding compensation of counsel and class representatives in class action cases of this type and magnitude.

4. The grounds for granting this motion are more fully set out in Plaintiffs' supporting brief, which is filed herewith. In summary, the requested fee award is fair and reasonable based upon each of the 12 factors set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974): "(1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and the length of the professional relationship with the client; [and] (12) awards in similar cases." *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 772 n.3 (11th Cir. 1991). The reasonableness of the fee award is further confirmed considering (1) "the time required to reach a settlement," (2) "whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel," (3) "any non-monetary benefits conferred upon the class by the settlement," and (4) "the economics involved in prosecuting a class action." *Id.* at 775.

5. In addition, the expenses for which Class Counsel seek reimbursement from the common fund created by the Settlement were reasonably incurred for the benefit of the Class in prosecuting the Class's claims and in obtaining the Settlement, including expenses incurred in connection with experts and consultants, travel, and other litigation-related expenses. Furthermore, the Class Representatives should be awarded compensation for the time and effort they have invested for the benefit of the Class, including providing information to Class Counsel, reviewing and approving pleadings, assisting with discovery, and participating in settlement discussions.

WHEREFORE, Plaintiffs respectfully request that this Court award Class Counsel attorneys' fees, reimburse Class Counsel for expenses, and award the Class Representatives compensation in the amounts requested.

A proposed Order is filed herewith.

DATED this November 5, 2010.

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LOCAL RULE 7.1(D) CERTIFICATION

Counsel for Plaintiffs hereby certifies that the text of this document has been prepared with Times New Roman 14 point, one of the fonts and point selections approved by the Court in Local Rule 5.1(C).

/s/ Sarah H. Kimberly
Sarah H. Kimberly

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all known counsel of record.

/s/ Sarah H. Kimberly
Sarah H. Kimberly

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: BEAZER HOMES USA, INC. ERISA LITIGATION	Civil Action No. 1:07-CV-00952-RWS

ORDER GRANTING PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CASE CONTRIBUTION AWARDS

On November 14, 2010, the Court heard Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Award of Case Contribution Awards to Class Representatives ("Motion"). Having heard argument and having fully considered the pleadings and evidence submitted, the Court hereby FINDS:

1. The Settlement Class has been given proper and adequate notice of the Motion, such notice having been carried out in accordance with the Court's Order Granting Preliminary Approval of Class Action Settlement, Preliminarily Certifying a Class for Settlement Purposes, Approving Form and Manner of Class Notice, Setting Date for Hearing on Final Approval of Settlement.

2. Based on the entire record, including the evidence presented in support of the Motion, and specifically including the Declaration of Sarah H. Kimberly in Support of (1) Class Counsel's Motion for Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Award of Case Contribution Awards to Class Representatives, and (2) Plaintiffs' Motion for Final Approval of Class

Action Settlement, Certification of Settlement Class, and Approval of the Plan Of Allocation, Class Counsel's requested fee award is reasonable when evaluated in light of each of the 12 factors set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974): "(1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and the length of the professional relationship with the client; [and] (12) awards in similar cases." *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 772 n.3 (11th Cir. 1991). The reasonableness of the fee award is further confirmed considering (1) "the time required to reach a settlement," (2) "whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel," (3) "any non-monetary benefits conferred upon the class by the settlement," and (4) "the economics involved in prosecuting a class action." *Id.* at 775. All of these factors support the fee award requested here.

3. The expenses for which Class Counsel seek reimbursement from the common fund created by the Settlement were reasonably incurred for the benefit of the Class in prosecuting the Class' claims and in obtaining the Settlement,

including expenses incurred in connection with experts and consultants, travel and other litigation-related expenses.

4. Class Representatives should be awarded compensation for the time and effort they have invested for the benefit of the Class, including providing information to Class Counsel, reviewing and approving pleadings, assisting with discovery, and participating in settlement discussions.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Class Counsel's Motion is granted.

2. Class Counsel are awarded as attorneys' fees in this case in the amount of _____% of the cash Settlement Fund.

3. Class Counsel are further awarded $_____________ for reimbursement of their expenses, to be paid out of the Settlement Fund.

4. Class Representatives Patrick Denning and Lorene De Stefano are each awarded $__________ as compensation for their substantial contribution to the litigation on behalf of the Class.

SO ORDERED, this _________ day of _____________________, 2010.

____
HON. RICHARD W. STORY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: BEAZER HOMES USA, INC. ERISA LITIGATION	Civil Action No. 1:07-CV-00952-RWS

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND CASE CONTRIBUTION AWARDS

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I. INTRODUCTION

Following over three years of hard-fought litigation in this complex and difficult case, the parties reached a settlement that includes a payment of $5,500,000 in cash to the Beazer Homes USA, Inc. 401(k) Plan (the "Plan") for the benefit of the Plan's participants and beneficiaries who are members of the Settlement Class.[1] This result was achieved through the diligent efforts of Class Counsel, as well as the Named Plaintiffs.[2] Accordingly, Class Counsel respectfully request that:

- Class Counsel be paid a contingent fee of $1,512,500, which represents 27.5% of the gross Settlement amount;
- Class Counsel be reimbursed out-of-pocket litigation expenses totaling $95,522.93; and
- Named Plaintiffs be awarded a Case Contribution Award of $5,000 each for their services to the Class.

The award of attorneys' fees is compensation for Class Counsel's efforts in bringing this Action to a favorable conclusion and for undertaking the considerable

[1] Capitalized terms that are not otherwise defined herein have the meaning given them in the Stipulation and Agreement of Settlement (the "Stipulation"), attached as Exhibit A to the Declaration of Edward W. Ciolko in Support of (1) Plaintiffs' Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, and Approval of the Plan of Allocation and (2) Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Case Contribution Awards ("Ciolko Declaration" or "Ciolko Dec.").

[2] Class Counsel refers to Keller Rohrback L.L.P. and Barroway Topaz Kessler Meltzer & Check LLP. Patrick Denning and Lorene De Stefano are the Named Plaintiffs.

risks associated with prosecuting this Action with no guarantee of receiving any compensation at all. Lawsuits of this type brought under the Employee Retirement Income Security Act of 1974 ("ERISA") face significant risks, as they involve complex and still evolving law. As detailed below, the risks included the very real possibility that, despite their best efforts, the Class would have received less monetary damages than the Settlement Amount or even nothing at all if this case proceeded through trial.

The approved form of Class Notice was mailed to 6,120 Class Members on August 30, 2010, and to date, Class Counsel have received no objections to their application for a fee award.[3] Furthermore, it is noteworthy that Class Counsel is seeking a fee award of 27.5% of the Settlement, which is less than the 30% stated in the Notice. *See* Class Notice at 3, attached as Exhibit 1 to A.B. Data Affidavit.[4]

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[3] The deadline for objecting to the Stipulation expired on October 8, 2010. Class Counsel did receive an email from Laura Skowron on November 4, 2010, who sought to have certain documents considered for the Final Fairness Hearing. *See* Ciolko Dec., Exhibit H. Upon review of the email, however, Class Counsel have made a determination that the documents attached by Ms. Skowron are unrelated to the Action. Rather, the documents concern a dispute over a Separation and Release Agreement between Ms. Skowron and Beazer Homes. Because Ms. Skowron's email does not concern this Settlement or application for attorneys' fees, Class Counsel do not view the email as an objection.

[4] The "A.B. Data Affidavit" refers to the affidavit of Anya Verkhovskaya, Senior Executive Vice President and Chief Operating Officer of A.B. Data, Ltd.'s Class Action Administration Division ("A.B. Data"), which is attached to the Ciolko Declaration as Exhibit G.

As demonstrated below, the record in this case and the case law in the Eleventh Circuit fully support the requested fees, expenses, and Case Contribution Awards. Accordingly, Class Counsel respectfully request that their motion be granted.

II. BACKGROUND

Because the concurrently-filed Motion and Memorandum of Points and Authorities in Support of Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, and Approval of the Plan of Allocation ("Final Approval Memorandum"), the Declaration of Sarah H. Kimberly in Support of (1) Class Counsel's Motion for Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Award of Case Contribution Awards to Class Representatives, and (2) Plaintiffs' Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, and Approval of the Plan of Allocation ("Kimberly Declaration" or "Kimberly Dec."), the Declaration Of Michael I. Fistel, Jr. in Support of Motion for Award of Attorneys' Fees, Reimbursement of Expenses and Case Contribution Awards, as well as the Ciolko Declaration filed herewith contain detailed discussions of this litigation's progress, risks, and ultimate success, Plaintiffs ask the Court to consider these documents in connection with this request for fees, expenses, and Case Contribution Awards, and Plaintiffs incorporate by reference those documents herein.

III. CLASS COUNSEL'S INVESTMENT OF TIME AND MONEY IN THE CASE

As of November 2, 2010, Class Counsel has devoted almost 2,400 hours to this case, representing a lodestar of $1,038,785 at their hourly rates, and has incurred $95,522.93 in out-of-pocket expenses. Kimberly Dec. ¶¶ 3, 7, 13, 45. Class Counsel will continue to incur additional attorney hours in connection with final approval of the Settlement, responding to inquiries from Class members, interacting with the Settlement Administrator, and generally overseeing implementation of the Settlement. *Id.* ¶ 11. Based on past experience, responding to inquiries from Class Members will require dedication of significant resources. In fact, since Notice has been disseminated to the Class, Class Counsel has responded to dozens of emails and phone calls from Class Members. *See* Ciolko Dec. ¶ 25.

IV. AWARD OF ATTORNEYS' FEES AND EXPENSES

Class Counsel request an award of attorneys' fees of 27.5% of the $5.5 million Settlement: $1,512,500. This method of calculating the fee award, based on a percentage-of-the-fund, is both straightforward and fair under the circumstances of the case. Moreover, cross-checking this fee request against the lodestar fee calculation validates its reasonableness, as explained below.

Significant time and effort were devoted to this case. Class Counsel's efforts were extensive, carefully coordinated, and efficient. Defendants, who were

represented by prominent firms—Troutman Sanders LLP and Cravath Swaine & Moore LLP—devoted at least as many resources to pretrial efforts. Together, these firms put Class Counsel through their paces at every stage of the case.

A. The Legal Standard Governing Awards of Attorneys' Fees.

It is well established that "a lawyer who recovers a common fund for the benefit of persons other than . . . his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Id.* As the Eleventh Circuit has explained, under the "common benefit" doctrine, when litigation confers substantial benefits on members of a class, courts are authorized to award attorneys' fees to class counsel to spread the cost proportionally among class members. *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991) (*Camden I*). The amount of fees requested by counsel "is subject to court approval." *Id.*

B. A Reasonable Percentage of the Fund Recovered is the Appropriate Method for Awarding Class Counsel's Attorneys' Fees in this Common Fund Settlement.

In the Eleventh Circuit, the law is clear that where a settlement provides for the creation of a common fund, "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit

of the class." *Id.* at 774. A percentage-based fee award accomplishes several objectives:

> First, it is consistent with the private market place where contingent fee attorneys are regularly compensated on a percentage of recovery method. Second, it provides a strong incentive to plaintiffs' counsel to obtain the maximum possible recovery in the shortest time possible under the circumstances. Finally, the percentage approach reduces the burden of the Court to review and calculate individual attorney hours and rates and expedites getting the appropriate relief to class members.

Garst v. Franklin Life Ins. Co., No. 97-0074, 1999 U.S. Dist. LEXIS 22666, at *83-84 (N.D. Ala. June 28, 1999) (citations omitted). Each of these objectives is applicable here.

C. The 27.5% Fee Requested by Class Counsel is Within the Range Considered Reasonable and Fair in the Eleventh Circuit.

Class Counsel's fee request of 27.5% of the Settlement, plus any Court-approved reasonable expenses, falls squarely within the range approved by courts within the Eleventh Circuit. Although there is no set rule governing what constitutes a reasonable fee, the Eleventh Circuit has noted that "[t]he majority of common fund fee awards fall between 20% to 30% of the fund." *Camden I*, 946 F.2d at 774. Indeed, many courts within the Eleventh Circuit award fees within or above this range. *See*, *e.g.*, *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295-98 (11th Cir. 1999) (upholding award of 33.3%); *Eslava v. Gulf Tel. Co., Inc.*, No. 04-0297, 2007 WL 4105977, at *2 (S.D. Ala. Nov. 16, 2007) (awarding

30%); *Sands Point Partners, L.P. v. Pediatrix Med. Grp., Inc.*, No. 99-6181, 2002 WL 34343944, at *3 (S.D. Fla. May 3, 2002) (awarding 30%); *Lowell v. Am. Cyanamid Co.*, No. 97-581, 2001 WL 929754, at *4 (S.D. Ala. June 15, 2001) (awarding one-third); *Lopez v. Checkers Drive-In Rests, Inc.*, No. 94-282, 1996 U.S. Dist. LEXIS 22668, at *8-9 (M.D. Fla. Nov. 22, 1996) (awarding 30%); *Ressler v. Jacobson*, 149 F.R.D. 651, 655-56 (M.D. Fla. Dec. 15, 1992) (awarding 30%); *Sanders v. Robinson Humphrey/Am. Express, Inc.*, Nos. 85-172, 1990 WL 105894, at *5 (N.D. Ga. May 23, 1990) (awarding 30%).

Moreover, the 27.5% fee sought by Class Counsel is in line with fee awards that have been approved in other similar ERISA breach of fiduciary duty class actions. *See*, *e.g.*, *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146-47 (S.D.N.Y. 2010) (awarding 33.33%); *In re Xerox Corp. ERISA Litig*., No. 02-1138, slip op. at 2-3 (D. Conn. Apr. 14, 2009) (awarding 30%); Order and Final Judgment at 6, *Spivey v. Southern Co*., No. 04-1912 (N.D. Ga. Aug. 14, 2007) (awarding 27.5%); Order of Final Judgment at 5, *In re Mirant Corp. ERISA Litig*., No. 03-1027 (N.D. Ga. Nov. 16, 2006) (awarding 27.5%); *In re CMS Energy ERISA Litig.*, No. 02-72834, 2006 WL 2109499, at *3 (E.D. Mich. June 27, 2006) (awarding 28.5%); Order Granting Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Costs and Expenses, and for Named Plaintiffs'

Compensation at 2, *In re Household Int'l ERISA Litig.*, No. 02-7921 (N.D. Ill. Nov. 22, 2004) (awarding 30%).

D. The Requested Percentage Award is Fair and Reasonable under *Camden I*.

To determine what constitutes a reasonable percentage award, the Eleventh Circuit recommended in *Camden I* that district courts consider several factors, including the "*Johnson* factors" first articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989). *Camden I*, 946 F.2d at 775. The *Johnson* factors include:

> (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and the length of the professional relationship with the client; [and] (12) awards in similar cases.

Id. at 772 n.3 (citing *Johnson*, 488 F.2d at 717-19).

The Eleventh Circuit also recognized four additional factors that may prove useful in evaluating percentage awards: (1) "the time required to reach a settlement," (2) "whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel," (3) "any

non-monetary benefits conferred upon the class by the settlement," and (4) "the economics involved in prosecuting a class action." *Camden I*, 946 F.2d at 775. All of these factors support the fee award requested here.

1. *Johnson* Factor One – The Time and Labor Required

Class Counsel has dedicated substantial efforts to litigating this case since the first complaint was filed over three years ago. As discussed in the Kimberly Declaration, the litigation has been hard fought, entailing substantial and time-consuming preliminary discovery, motions practice, and extensive mediation and negotiations. Class Counsel devoted almost 2,400 attorney and professional hours to the successful prosecution of the case, and advanced expenses in the amount of $95,522.93 over the three-year course of the case. Kimberly Dec. ¶ 6; *see Pinto v. Princess Cruise Lines, Ltd*, 513 F. Supp. 2d 1334, 1343 (S.D. Fla. 2007) (finding fee request reasonable where counsel had "expended over 3,300 hours" in litigating case); *Garst*, 1999 U.S. Dist. LEXIS 22666, at *88 (finding fee request reasonable where counsel had expended thousands of hours on a contingency basis).

For example, following extensive additional investigation and review of documents produced in informal discovery and available from public sources, Plaintiffs filed their Consolidated Amended Complaint ("Complaint") on June 27, 2008, which served as the operative complaint throughout the litigation. Kimberly

Dec. ¶ 14. The Complaint was a detailed pleading that identified the Plan's fiduciaries, the scope of their respective duties, and how the Plan was operated and administered. *Id.* It also detailed the alleged breaches of fiduciary duty and the underlying bases for the alleged imprudence of Beazer stock. *Id.*

On October 10, 2008, Defendants moved to dismiss the Complaint. *Id.* ¶ 15. Defendants argued, *inter alia*, that Plaintiffs had failed to allege facts from which it could be concluded that any of the Defendants had breached their fiduciary duties by causing the Plan to invest in Company stock, and in addition challenged the legal bases of the claims against them on numerous grounds. *Id.* Class Counsel filed a thorough and extensive opposition to the motion, which was a substantial undertaking, requiring the work of multiple attorneys to analyze and refute the arguments proffered by Defendants. *Id.*

After discussing the possibility of settlement, the parties met for a formal mediation session with an experienced mediator, Jonathan Marks, on September 30, 2009, in Atlanta, Georgia. *Id.* ¶ 16. In preparation for the mediation, Plaintiffs drafted an extensive and detailed mediation statement that was both provided to the mediator and exchanged with Defendants. *Id.* The mediation statement analyzed Plaintiffs' settlement position and included details of Plaintiffs' legal and factual allegations, the procedural posture of the case, the Plan, other lawsuits and investigations, Plaintiffs' damages estimates, and the insurance available to satisfy

a judgment or settlement. *Id.* In response to further questions from the mediator, Plaintiffs submitted additional information related to their damages calculations that also included estimated losses based on different breach dates. *Id.*

This first mediation session was unsuccessful, and the parties determined to wait until the Court ruled on Defendants' motion to dismiss before discussing settlement further. *Id.* ¶ 17. On April 2, 2010, the Court issued its order granting in part and denying in part Defendants' motion to dismiss. *Id.* The Court dismissed the prudence and monitoring claims (Counts I and II) and all claims against the Compensation Committee Defendants, and allowed Plaintiffs' remaining claims—the disclosure (Count III), communications (Count IV), and co-fiduciary (Count V) claims—to continue. *Id.*

After the Court's ruling, the parties scheduled a second day of mediation with Mr. Marks for May 26, 2010, in Washington, D.C. *Id.* ¶ 18. In preparation for this second meeting, Class Counsel prepared a supplemental mediation statement that analyzed the effect, if any, of the Court's order granting in part and denying in part Defendants' motion to dismiss. The supplemental statement also further discussed Defendants' liability and the weaknesses of some of their defenses. *Id.*

This second day of mediation was successful, and the Parties then engaged in extensive negotiations regarding the terms and conditions of the Settlement.

Id. ¶ 19. On July 19, 2010, the parties filed the Stipulation with Plaintiffs' papers in support of their motion for preliminary approval of the Settlement. *Id.*

All told, as the above summary demonstrates, Class Counsel were dedicated to this case and diligently pursued the Class's claims against Defendants throughout litigation and mediation, notwithstanding the substantial risks of non-payment presented in this case. These efforts were the necessary groundwork for the Settlement obtained in this case. Thus, the first *Johnson* factor—the time and labor required—clearly supports the requested fee award in this case.

2. *Johnson* Factor Two – The Novelty and Difficulty of the Questions Involved

There were numerous novel and difficult issues of law in this case. As several courts have noted, there is a high degree of complexity in ERISA class actions of this type. *See*, *e.g.*, *In re Ikon Office Solutions, Inc. Sec. Litig.*, 209 F.R.D. 94, 104-07 (E.D. Pa. 2002) (noting the complexity and duration of litigation of similar breach of fiduciary duty claims, as well as the expense of litigation and risks of establishing liability and damages); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 228 F.R.D. 541, 565-66 (S.D. Tex. 2005) (same); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (finding that "[f]iduciary status, the scope of fiduciary responsibility, the appropriate fiduciary response to the Plans' concentration in company stock and [Global Crossing's] business practices would be issues for proof, and numerous legal issues concerning

fiduciary liability in connection with company stock in 401(k) plans remain unresolved"). Like the aforementioned cases, this case was highly complex and involved difficult questions of law and fact.

In several important respects, this case presented the unique problems, including:

- **Complex and novel legal theories.** ERISA is a highly-specialized and complex area of the law, and the type of claims brought here—involving alleged breaches of duty by the Plan's fiduciaries—are especially so. The law is developing, there are significant conflicts between the approaches adopted by different trial and appellate courts, and more law was developed in this area after this case was filed. The length of the parties' briefs on the dismissal motion alone bears witness to the complexity and evolving nature of ERISA jurisprudence. Class Counsel believe the claims in this case are solidly grounded in ERISA law but are cognizant of the fact that the issues are complex.

- **Difficulty of establishing liability and losses.** A finding of liability would require careful presentation and analysis of lengthy and detailed Plan documents, complex corporate financial and accounting matters, and sophisticated judgments about the investment decisions and communications Defendants had made, or not made, as much as five years ago. Furthermore, with the dismissal of the prudence and monitoring claims, the difficulty of establishing liability and losses greatly increased. In addition, Plaintiffs faced the risk that the finder of fact would accept Defendants' damage assessments, which could have resulted in a limited recovery even if liability were established.

- **Risk of an unforeseen change in the law.** ERISA jurisprudence presents an ever-changing legal landscape, and there is a constant risk that the law will change before judgment. While many recent decisions have upheld claims similar to those asserted here, others have not, and there was no assurance a change in the law would not have affected, or negated, the claims in this lawsuit. The possibility that the law might materially and adversely change during the course

of the litigation meant that Plaintiffs needed to structure their arguments and proofs to present multiple avenues to recovery. The necessity of avoiding an approach that placed all of Plaintiffs' "eggs in one basket" greatly magnified the complexity of Plaintiffs' task.

- **Vigorous defense.** Defendants were all represented by attorneys with many years of litigation and trial experience who had significant resources to present their defenses through dismissal motions, and the anticipated summary judgment, trial, post-trial motions and appeals.

- **Risk of appeal.** Even if Plaintiffs won at trial, it was virtually certain that trial would have been followed by post-trial motions as well as an appeal to the Eleventh Circuit and the possibility of petition for a writ of certiorari. Given the quickly-evolving legal and political landscape, appeal posed a significant risk.

- **Decision tree.** Applying a standard "decision tree" analysis to this case only underscores its magnitude and complexity. Defendants asserted numerous factual and legal defenses to this suit, some of which were successful at the pleadings stage of the litigation. If this case were to proceed through summary judgment and trial, Defendants would continue to assert arguments, any one of which, if successful, could result either in a judgment in Defendants' favor, or a very small recovery for the Class. The innumerable forks-in-the-road leading to liability and damage findings all had to be considered by Class Counsel and factored into their overall litigation strategy. The possibility of a loss at any of these forks in the road—from the motion to dismiss, through summary judgment, trial, and appeal—had to be factored into Plaintiffs' analysis, and consequently bears on the Court's evaluation of the Settlement.

Kimberly Dec. ¶ 21.

The complexity and uncertainty in the law, combined with the vigorous defense at every stage of the case, presented novel and difficult questions which were successfully navigated by Class Counsel. Thus, the second *Johnson* factor supports the fee award requested here.

3. *Johnson* Factor Three – The Skill Requisite to Perform the Legal Service Properly

As noted above, this was a highly complex case that presented difficult factual, procedural and legal issues in its own right. Class Counsel demonstrated skill and acumen throughout the litigation as reflected in the substantial recovery they obtained for the Class. *See Johnson*, 488 F.2d at 718 (explaining that the trial judge may gauge this factor by observing "the attorney's work product, his preparation, and general ability before the court"). Importantly, the case required a high degree of ERISA class action expertise, which Keller Rohrback LLP and Barroway Topaz Kessler Meltzer & Check ("BTKMC") clearly possess. *See* Section IV.D.8, *infra*; *see also* Kimberly Dec. ¶ 23. Moreover, Liaison Counsel, Holzer Holzer & Fistel LLC, provided important assistance in the advancement of this action. *Id.* Together, these firms provided the Class with the experience and expertise that successful prosecution of the case demanded.

The quality of opposing counsel is also an important factor in evaluating the quality of work done by Class counsel. *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1334 (S.D. Fla. 2001); *Ressler*, 149 F.R.D. at 654. As noted above, Defendants were represented by prominent law firms with reputations for vigorous advocacy in the defense of complex civil actions such as this. The ability for Class Counsel to obtain a favorable settlement for the Class in the face of formidable legal opposition confirms the quality of Class Counsel's representation. Class

Counsel effectively utilized their expertise to represent the interests of the Class in obtaining the exceptional recovery. Thus, the third *Johnson* factor supports the fee award requested.

4. *Johnson* Factor Four – The Preclusion of Other Employment by the Attorneys Due to Acceptance of the Case

This factor requires consideration of whether "once the employment is undertaken the attorney is not free to use the time spent on the client's behalf for other purposes." *Johnson*, 488 F.2d at 718. As reflected by the sheer number of hours devoted by the attorneys and paralegals involved in litigating this case, a substantial amount of their time was devoted to this case at the preclusion of other work. Kimberly Dec. ¶ 25. Thus, the fourth *Johnson* factor supports the fee award requested.

5. *Johnson* Factors Five and Six – The Customary Fee and Whether the Fee is Fixed or Contingent

Because the contingent nature of the requested fees affects the analysis of the customary fee, Plaintiffs address factors five and six together. Class Counsel accepted this matter on a wholly contingent basis, in large part because virtually no individual Class member possesses a sufficiently large stake in the litigation to justify paying an attorney on an hourly basis. Thus, "[a] determination of a fair fee for Class Counsel must include consideration of the contingent nature of the fee, the wholly contingent outlay of out-of-pocket sums by Class Counsel, and the fact

that the risks of failure and nonpayment in a class action are extremely high." *Pinto*, 513 F. Supp. 2d at 1339; *see also Blum v. Stenson*, 465 U.S. 886, 902 (1984) (Brennan, J., concurring) ("[T]he risk of not prevailing, and therefore the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee.").

Furthermore, "[i]n private litigation, attorneys regularly contract for contingent fees between 30% and 40% directly with their clients." *Pinto*, 513 F. Supp. 2d at 1341 (noting that "[t]hese percentages are the prevailing market rates throughout the United States for contingent representation"). Accordingly, the 27.5% fee requested by Class Counsel is not only within the range of percentage awards made in complex cases in this Circuit and courts nationwide, but is also within the range that is customary for contingent fees. Thus, the fifth and sixth *Johnson* factors support the fee award requested here.

6. *Johnson* Factor Seven – Time Limitations Imposed by the Client or the Circumstances

The motions practice in this case required Class Counsel to satisfy numerous filing deadlines. *See Johnson*, 488 F.2d at 718 (noting that "[p]riority work that delays the lawyer's other legal work is entitled to some premium"). Moreover, had the litigation continued, Plaintiffs would have been subject to discovery deadlines as well as dispositive motion and trial deadlines.

7. *Johnson* Factor Eight – The Amount Involved and the Results Obtained

Before this lawsuit, Class members had received no compensation for Defendants' alleged fiduciary breaches. Through the efforts of Class Counsel, the Class can now benefit from the $5.5 million Settlement, which represents an excellent recovery for the Class. This result was accomplished in a complex, difficult case, which was aggressively defended, and in the face of the very real risk that the Class would fail to recover anything at all.

In assessing the value of the benefit, it makes sense to consider the recovery the Class might have obtained if liability had been established at trial. As discussed in detail in the Final Approval Memo at 15-17, Plaintiffs calculated losses based on the return the Plan would have obtained had the Plan fiduciaries divested the Plan's holding of Beazer stock at the beginning of the Class Period and invested the proceeds in one of three alternative Plan investment options. *See also* Kimberly Dec. ¶ 27.

If the alternative investments suggested by Plaintiffs were accepted and Plaintiffs were able to prove liability on the first day of the Class Period (July 28, 2005), the maximum amount that Plaintiffs could have recovered in this case (not discounting for risk) ranges from approximately $31.6 million to $36.8 million. However, Plaintiffs anticipate that Defendants would not only argue for a different measure of damages but would also argue that *if* there was a breach at all, the

breach occurred much later than July 28, 2005. The use of a different method of calculating damages and/or a later breach date would result in a smaller recovery, given the continuous decline in the value of Beazer stock over the course of much of the Class Period. And, of course, if Plaintiffs did not prevail at trial, the Class would recover nothing. Thus the range of possible damages in this case is zero to approximately $36.8, and the Settlement represents a recovery of between 15% and over 100% of Plaintiffs' estimated losses. Kimberly Dec. ¶ 28. Consequently, the $5.5 million Settlement is an excellent result when compared to the amount of potential damages involved.

Moreover, even if the maximum potential recovery is used as the benchmark by which to judge the result achieved in this case, the Settlement provides a larger percentage of recovery than often is recouped in class actions. *See*, *e.g.*, Richard M. Phillips & Gilbert C. Miller, *The Private Securities Litigation Reform Act of 1995: Rebalancing Litigation Risks and Rewards for Class Action Plaintiffs, Defendants and Lawyers*, 51 Bus. Law. 1009, 1029 & n.131 (1996) (noting that typical recoveries are within range of 7-11% of claimed losses); Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 Stan. L. Rev. 1487, 1500 & n.50 (1996) (explaining that settlements average twelve percent of claimed losses). Thus, the eighth *Johnson* factor also supports the fee award.

8. *Johnson* Factor Nine – The Experience, Reputation and Ability of the Attorneys

This Settlement was achieved by Class Counsel, who have decades of experience in prosecuting and trying complex actions, including complex ERISA breach of fiduciary duty class actions such as this one. Keller Rohrback has been and continues to be a pioneer in this area of the law, and has served or is serving as Lead or Co-Lead Counsel in numerous leading ERISA breach of fiduciary class actions, including, among many others, *In re Enron Corp. Sec., Derivative & ERISA Litig.*, No. 01-3913 (S.D. Tex.); *In re WorldCom, Inc. ERISA Litig.*, No. 02-4816 (S.D.N.Y.); *In re HealthSouth ERISA Litig.*, No. 03-1700 (N.D. Ala.); *In re Global Crossing, Ltd. ERISA Litig.*, No. 02-7453 (S.D. Tex.); *In re Xerox Corp. ERISA Litig.*, No. 02-1138 (D. Conn.); and *In re Goodyear ERISA Litig.*, No. 03-02182 (N.D. Ohio). *See* Kimberly Dec. ¶ 30.

Further, Keller Rohrback serves or has served as lead or co-lead counsel in several ERISA class actions involving the mortgage industry and credit markets, including cases against Merrill Lynch & Co., Inc.; Countrywide Financial Corp.; Washington Mutual, Inc.; Fremont General Corp.; Wachovia Corp.; IndyMac Bank, F.S.B.; and The Colonial BancGroup, Inc. *Id.* Keller Rohrback's extensive experience litigating this particular type of ERISA claim involving this particular industry allowed it to effectively and efficiently pursue its clients' interests in this case. *Id.* ¶ 31.

Keller Rohrback attorneys have litigated these and other ERISA class actions from start to finish, and have obtained favorable rulings on motions to dismiss, class certification, and numerous other issues. Keller Rohrback has recovered close to $1 billion for employees and retirees in ERISA class action cases. *Id.* ¶ 32. As testament to their skill, experience, and reputation in this area of law, Keller Rohrback attorneys frequently are asked to present at national ERISA seminars, including those organized by the American Bar Association, Glassers, and various insurance organizations. *Id.*

BTKMC also possesses substantial relevant experience.[5] BTKMC's experience includes not only litigation of company stock actions in general, but, more specifically, representing pension plans and their participants sponsored by banks, lenders, and other financial institutions regarding allegations based on, *inter alia*, unsound and/or excessively risky banking and lending practices which led in part to the collapse of the U.S. housing market and failure or near failure of many of those institutions. *See, e.g*. *In re National City Corp. et al.*, No. 08-00144 (N.D. Ohio). BTKMC also has the rare benefit of having tried a similar company stock action to verdict (upon information and belief, one of only four to ever go through trial). Thus, they are in a unique position to truly evaluate the wisdom of settling the claims prior to a risk-fraught trial. BTKMC has been named Lead or Co-Lead

[5] *See* firm resume of BTKMC attached to the Ciolko Dec. as Exhibit I.

Counsel in numerous breach of fiduciary class actions across the nation, including, among many others, *In re Advanta Corp. ERISA Litig.*, No. 09-04974 (E.D. Pa.); *In re R.H. Donnelley ERISA Litig.*, No. 09-07571 (N.D. Ill.); *Hanna v. YRC Worldwide, Inc. et al.,* No. 09-02593 (D. Kan.); *Dann v. Lincoln National Corp.,* No. 08-5740 (E.D.P.A.); and *In re BellSouth Corp. ERISA Litig.*, No. 02-2440 (N.D. Ga.) (co-lead with Keller Rohrback).[6]

BTKMC's ERISA department, under Mr. Joseph Meltzer, Chair of BTKMC's ERISA department, and Mr. Ciolko's guidance, has prosecuted numerous ERISA cases, with courts rendering favorable opinions in a number of decisions denying defendants' motions to dismiss and/or for summary judgment.[7] In addition to its extensive litigation experience, the firm has also successfully

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[6]Other actions in which BTKMC was appointed Lead or Co-Lead Counsel include *In re: SLM Corp. ERISA Litig.,* No. 08-4334 (S.D.N.Y.); *Dresslar v. Wellpoint, Inc.,* No. 08-00679 (S.D. Ind.); *Grosick v. National City Corp.*, No. 08-00144 (N.D. Ohio); *In re Lear ERISA Litig*., No. 06-11735 (E.D. Mich.); *In re Honeywell ERISA Litig.*, No. 03-1214 (D.N.J.); *Wilson v. Federal Home Loan Mortgage Corp.*, MDL No. 1584, No. 04-2632 (S.D.N.Y.).

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[7] *See*, *e.g.*, *In re YRC Worldwide, Inc. ERISA Litig.,* No. 09-2593 (D. Kan. Oct. 29, 2010); *Dann v. Lincoln Nat'l Corp.*, No. 08-5740, 2010 WL 1644276 (E.D. Pa. Apr. 20, 2010); *In re Hartford Fin. Svc. Grp. Inc. ERISA Litig.*, No. 08-01708, 2010 WL 135186 (D. Conn. Jan. 13, 2010); *In re Merck & Co., Inc. Vytorin ERISA Litig.*, No. 08-1974, 2009 WL 2834792 (D.N.J. Sept. 1, 2009); *Board of Trustees of the AFTRA Retirement Fund v. JPMorgan Chase Bank, N.A.*, No. 09-00686 (S.D.N.Y. May 28, 2009); *Brieger v. Tellabs, Inc.*, 473 F. Supp. 2d 878 (N.D. Ill. 2007); *In re Lear ERISA Litig.*, No. 06-11735 (E.D. Mich. Apr. 10, 2006).

engaged in extensive, intricate and intense settlement negotiations, including court-ordered mediations.

Furthermore, Liaison Counsel also has extensive relevant experience with complex litigation and provided important assistance in this case at the direction of Keller Rohrback and BTKMC.

This was by all accounts a difficult and demanding case that presented many risks as noted above. As the results achieved under these circumstances establish, Class Counsel demonstrated a high degree of ability, skill and diligence throughout the litigation. *Id.* ¶ 34. Thus, the ninth *Johnson* factor supports the fee award requested by Class Counsel in this case.

9. *Johnson* Factor Ten – The "Undesirability" of the Case

This factor is similar to factor two, which concerns the novelty and difficulty of the questions presented. The stakes in this case were enormous. By taking this case, Class Counsel took on significant risk of non-payment, the significant burden of advancing litigation expenses, and the significant "opportunity cost" of having to turn down other potentially lucrative cases. *Id.* ¶ 35. These risks strongly motivated Class Counsel to perform work of the highest quality and in appropriate quantity, in order to fulfill Class Counsel's commitment to their clients and to decrease the chances of a disastrous loss. The complexity and uncertainty in the law, combined with intensity of the defense, reflects the fact that the case had some

undesirable characteristics. This was not a typical "cookie-cutter" case, in part because it presented many unique demands, as the law governing ERISA company stock cases was uncertain. *See*, *e.g.*, *Sunbeam*, 176 F. Supp. 2d at 1336 (noting that counsel should be rewarded for taking on a case to which other law firms are adverse and explaining that "[s]uch aversion could be due to any number of things, including social opprobrium surrounding the parties, thorny factual circumstances, or the possible financial outcome of a case"). Hence, this factor also weighs in favor of the requested fee award.

10. *Johnson* Factor Eleven – The Nature and Length of the Professional Relationship with the Client

Class Counsel's professional relationship with Plaintiffs began during the investigation phase of this case. Throughout the litigation, Class Counsel regularly communicated with Plaintiffs to seek input and update Plaintiffs on the progress of the Action. As Interim Co-Lead Counsel, Class Counsel also represented the putative class of thousands. Indeed, notice was issued to over 6,200 current and former participants in the Plan. Because of the sheer number of putative Class members involved, management of interactions with the Class was more challenging than in a typical direct action suit. However, in order to manage its relationship with the class, Class Counsel created and maintained a website describing the status of the litigation, which was regularly updated with case-relevant information, filings, and Court rulings. Kimberly Dec. ¶ 36. Class

Counsel also spoke frequently with members of the Class who phoned and wrote to discuss the litigation. *Id.* Thus, to the extent this factor is applicable here, it weighs in favor of the requested fee award due to the nature of Class representation.

11. *Johnson* Factor Twelve – Awards in Similar Cases

"The reasonableness of a fee may also be considered in the light of awards made in similar litigation within and without the court's circuit." *Johnson*, 488 F.2d at 719. As discussed *supra* in Section IV.C, Class Counsel's requested award of 27.5% of the Settlement compares favorably to fee awards in class action cases in this Circuit. *See e.g.*, *Camden I*, 946 F.2d at 774-75 (noting a benchmark range of between 20-30% of the common fund). Moreover, the requested 27.5% award is in line with fee awards in similar breach of fiduciary duty ERISA class action cases, and ERISA class actions generally. *See* Section IV.C., *supra*. Under the circumstances of this case, where Class Counsel faced substantial risks and expended tremendous effort over more than three years with the possibility of not recovering anything, a recovery at 27.5% is both reasonable and appropriate. Accordingly, the twelfth *Johnson* factor supports the requested fee award in this case.

12. Additional Factors under *Camden I*

As stated above, in addition to the *Johnson* factors, the Eleventh Circuit identified other factors that a court may also consider in approving a fee request. *See Camden I*, 946 F.2d at 775. Each of these additional factors supports the requested fee award as well.

a. The time required to reach settlement

As noted in Section IV.D.1, *supra*, substantial time was required to resolve this case. Indeed, settlement efforts began shortly after the Court issued its order on Defendants' motion to dismiss and continued for several months. During this time, Class Counsel dedicated considerable hours to the case and advanced significant costs on litigation-related expenses on a wholly contingent basis. Thus, this factor strongly favors the requested fee in this case. *See*, *e.g.*, *Ressler*, 149 F.R.D. at 656 (noting that counsel had shown particular deliberation and care in maintaining settlement deliberations over nine- to ten-month period).

b. Whether there are any substantial objections by Class members or other parties to the settlement terms or the fees requested by counsel

Notice was issued to the Class by direct mail on August 30, 2010, per the Court's Preliminary Approval Order. In addition to describing the terms of the Settlement in detail, the Class Notice specifically stated that Class Counsel would apply for fees of up to 30% of the Settlement Fund. Kimberly Dec. ¶ 37. Class

members were informed that they could object to such an application. *Id.* To date, Class Counsel have no objections. *Id.* The lack of objections is itself important evidence that the requested fee is fair. *See Ressler*, 149 F.R.D. at 656 (noting that the lack of objections is "strong evidence of the propriety and acceptability" of the fee request).

c. Any non-monetary benefits conferred upon the class by the settlement

When assessing non-monetary benefits conferred on a class, courts frequently consider the broad public benefits of a case. *See*, *e.g.*, *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 534 (E.D. Mich. 2003) (explaining that "[e]ncouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this case benefits society"); *Ressler*, 149 F.R.D. at 657 ("Attorneys who bring class actions are acting as 'private attorneys general'. . . . Accordingly, public policy favors the granting of counsel fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions.").

The public benefits are particularly relevant here given the importance of protecting employees' retirement savings through the vigorous enforcement of ERISA's fiduciary standards on the one hand, and the tremendous investment required to undertake cases of this sort on the other. Thus, this consideration supports the fee request in this case.

d. The economics involved in prosecuting a class action

As discussed above, with respect to the contingent nature of this case, Class Counsel performed work over more than three years, dedicating substantial resources to this litigation, both in terms of hours and expenses that were advanced for the benefit of the Class with no guarantee that there would be any recovery in the case. Thus, this case was both an expensive and risky undertaking. Accordingly, the "economics" of the case provide further support for the requested fee award. *See Ressler*, 149 F.R.D. at 656 (noting that "[t]his factor also implicates the *Johnson* contingent fee factor" and the significant authority recognizing "that the attorney's contingent fee risk is an important factor in determining the fee award" (citations omitted)).

Therefore, taking into account all of the applicable Eleventh Circuit factors and applying them in light of the excellent result obtained, Class Counsel respectfully submit that the requested 27.5% fee in this case is reasonable and appropriate.

E. The Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee.

As stated above, the Eleventh Circuit has held that "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Camden I*, 946 F.2d at 774. Nonetheless, Class Counsel provide the following lodestar information for the Court as

background, and as further support for their requested fee award under the first *Johnson* factor. *See, e.g., Waters*, 190 F.3d at 1298 ("[W]hile we have decided in this circuit that a lodestar calculation is not proper in common fund cases, we may refer to that figure for comparison.").

The lodestar is derived by multiplying the attorney and professional hours devoted to a case by the timekeepers' individual billing rates, and then applying a risk multiplier. In order to determine the appropriate multiplier, courts typically take into account, *inter alia*, the risk undertaken by class counsel, the result achieved, the quality of representation, and the complexity and magnitude of the litigation. *See, e.g., In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 1029, 1041 (S.D. Ohio 2001). Studies have shown that the average multiplier applied in class action lawsuits is approximately four. *See generally In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 938 n.45 (N.D. Ohio 2003) (citing a 2003 study of fee awards in 1,120 cases to conclude that "the courts' effective multipliers averaged . . . 3.89 across all 1,120 cases"); Stuart J. Logan, Beverly C. Moore, Jr. & Jack Moshman, *Attorney Fee Awards In Common Fund Class Actions*, 24 CLASS ACTION REP. 167, 197 (2003) (finding that in 134 cases where fees were awarded in 2001 through 2003, the average multiplier was

4.35). Here, Class Counsel's total lodestar is $1,038,785.[8] Thus, a 27.5% fee award based on the $5.5 million Settlement would result in a multiplier of 1.46, which is substantially below the multiplier typically awarded in class action cases. Accordingly, Class Counsel's lodestar and the resultant multiplier further demonstrate that the requested fee award of 27.5% is both fair and reasonable.

V. REQUEST FOR REIMBURSEMENT OF EXPENSES

Reimbursement of reasonable costs and expenses to counsel who create a common fund is both necessary and routine. As one commentator has written:

> [A]n attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved. The equitable principle that all reasonable expenses incurred in the creation of a fund for the benefit of a class are reimbursable proportionately by those who accept benefits from the fund authorizes reimbursement of full reasonable litigation expenses as costs of the suit . . . .

1 Alba Conte, ATTORNEY FEE AWARDS § 2.19 (3d ed. 2006) (citing *Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527, 533 (1881)). The expenses that may be reimbursed from the common fund are not limited to those taxed in a judgment against an opponent, but instead, encompass "all reasonable expenses." *Id*. District courts in the Eleventh Circuit have concurred that plaintiff's counsel should be reimbursed for expenses reasonably incurred to obtain settlement. *See*, *e.g.*,

[8] Class Counsel's lodestar does not include any of the work related to this Fee Petition or the significant additional time that Class Counsel expects to expend on the administration of the Settlement.

Ressler, 149 F.R.D. at 657; *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 549 (S.D. Fla. 1988).

Class Counsel have advanced or incurred $95,522.93 in expenses to date, and a breakdown of these unreimbursed expenses by category is contained in the Kimberly Declaration. Kimberly Dec. ¶ 45. Because these expenses were advanced with no guarantee of recovery, Class Counsel had a strong incentive to keep them to a reasonable level and did so. *Id.* ¶ 44. In light of the nature of this complex litigation, which required, *inter alia*, the use of database software, experts, and mediation sessions with a highly capable and respected mediator, the expenses incurred by Class Counsel were both reasonable and reasonably related to the interests of the Plaintiffs and the Class. Hence, Class Counsel respectfully request that they be fully reimbursed for their out-of-pocket expenses in this case.

VI. REQUEST FOR CLASS REPRESENTATIVE CASE CONTRIBUTION AWARD

At the conclusion of a successful class action case, it is common for courts, exercising their discretion, to award special compensation to the class representatives in recognition of the time and effort they have invested for the benefit of the class. Courts may grant incentive awards as a class action expense to particular members of the class and routinely do so “to compensate named plaintiffs for the services they provided and the risks they incurred during the

course of the class action litigation." *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001).

Here, Class Representatives Patrick Denning and Lorene De Stefano significantly contributed to the litigation and consulted with Class Counsel throughout the litigation including during settlement negotiations. Kimberly Dec. ¶ 46. Their initiative, time, and effort were essential to the successful prosecution of the case and resulted in a significant recovery for the Class. *Id.* Moreover, their willingness to step forward and endure the litigation process should be appropriately rewarded. *Id.* Accordingly, Class Counsel ask that the Class Representatives be recognized with a case contribution award of $5,000 each. This award is within the range typically awarded under similar circumstances. *See, e.g., Rankin v. Rots*, No. 02-CV-71045 (E.D. Mich. June 27, 2006) (awarding $10,000 to each class representative); *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 467 (E.D. Pa. 2008) (granting plaintiffs' case contribution awards of $15,000 and $7,500); *In re Household Int'l, Inc. ERISA Litig.,* No. 02-CV-7921 (N.D. Ill. Nov. 22, 2004) (awarding $10,000 to each class representative).

VII. CONCLUSION

The attorneys' fees requested by Class Counsel will reasonably compensate Class Counsel for the risks undertaken and the time and resources they committed over several years in order to obtain the excellent result achieved in this case.

Thus, Class Counsel respectfully request that the Court (1) award attorneys' fees in the amount of 27.5% of the Settlement achieved for the benefit of the Class; (2) order reimbursement of $95,522.93 in expenses advanced by Class Counsel as reasonable and necessary expenses of litigation; and (3) award $5,000 each to the Class Representatives, Patrick Denning and Lorene De Stefano, in recognition of the time and effort they invested for the benefit of the Class in this case.

A proposed form of Order is lodged herewith.

DATED this November 5, 2010.

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LOCAL RULE 7.1(D) CERTIFICATION

Counsel for Plaintiffs hereby certifies that the text of this document has been prepared with Times New Roman 14 point, one of the fonts and point selections approved by the Court in Local Rule 5.1(C).

/s/ Sarah H. Kimberly
Sarah H. Kimberly

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all known counsel of record.

/s/ Sarah H. Kimberly
Sarah H. Kimberly