

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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IN RE: DELPHI CORPORATION : MDL No. 1725

SECURITIES, DERIVATIVE & "ERISA" : Master Case No. 05-md-1725

LITIGATION : Hon. Gerald E. Rosen

:

: This Document Relates to:

: *In re Delphi Corp. ERISA Litigation,*

: Nos. 05-CV-70882, 05-70940,

: 05-71030, 05-71200, 05-71249,

: 05-71291, 05-71339, 05-71396,

: 05-71397, 05-71398, 05-71437,

: 05-71508, 05-71620, 05-71897,

: 05-72198

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LEAD ERISA COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES

Lead Counsel and Court-appointed Named Plaintiffs Greg Bartell, Kimberly Chase-Orr, Neal C. Folck, Thomas Kessler, Don McEvoy and Irene Polito (the "Named Plaintiffs") through their Counsel, in compliance with the Court's Order granting final approval of the settlement and plan of allocation, *see* Amended Opinion and Order (Dkt. No. 318; Jan. 11, 2008) (the "Final Approval Order"), and with Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, request that the Court enter an Order:

1. Awarding Lead Counsel attorneys' fees of \$4,576,554.87 (20% of the Gross Settlement Fund excluding Taxes and accounting fees), to be allocated by Lead Counsel as set forth in Section IV of Plaintiffs' Memorandum in Support of Lead Counsel's Motion for Award of Attorneys' Fees and Expenses; and

2. Reimbursing Lead Counsel \$750,000 as reserved in the Final Approval Order, toward their costs and expenses advanced in prosecuting this litigation, to be allocated by Lead

Counsel as set forth in Section IV of Plaintiffs' Memorandum in Support of Lead Counsel's Motion for Award of Attorneys' Fees and Expenses.

Through the efforts of Lead Counsel and the Named Plaintiffs, Plaintiffs achieved an excellent result for the Class that includes a \$22.5 million payment benefiting participants in the Delphi Savings-Stock Purchase Program for Salaried Employees, the Delphi Personal Savings Plan for Hourly-Rate Employees, the ASEC Manufacturing Savings Plan, and the Delphi Mechatronic Systems Savings-Stock Purchase Program (collectively the "Plans").

Each of these requests is fully supported by the record, the Final Approval Order, and controlling Sixth Circuit authority regarding compensation of counsel in class action cases of this type and magnitude.

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: (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) the fact that the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides. In addition, the expenses for which Class Counsel seek reimbursement from the Gross Settlement 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 legal research, discovery, travel and other litigation-related expenses.

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

proposed Order is filed herewith.

RESPECTFULLY SUBMITTED this 16th day of September, 2009.

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Liaison Counsel for Plaintiffs

litigation; and (6) the professional skill and standing of counsel involved on both sides. *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 779 (6th Cir. 1996).

2. The expenses for which Lead 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 legal research, discovery, travel and other litigation-related expenses.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Lead Counsel's Motion is granted.

2. Lead Counsel is awarded as attorneys' fees in this case of \$4,576,554.87 (20% of the Gross Settlement Fund, excluding Taxes and accounting fees). Lead Counsel shall allocate a portion of the awarded fees to Liaison Counsel and other Plaintiffs' Counsel on the basis set forth in the Memorandum in Support of Lead Counsel's Motion for Award of Attorneys' Fees and Expenses.

3. Lead Counsel is further awarded \$750,000.00 for reimbursement of their expenses, to be paid out of the Gross Settlement Fund. Lead Counsel shall allocate a portion of this award to those costs incurred by Liaison Counsel and other Plaintiff's Counsel on the basis set forth in the Memorandum in Support of Lead Counsel's Motion for Award of Attorneys' Fees and Expenses.

IT IS SO ORDERED, ADJUDGED AND DECREED.

DATED this ____ day of _____, 2009.

Hon. Gerald R. Rosen
United States District Judge

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**UNITED STATES DISTRICT COURT
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**MEMORANDUM IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AWARD OF
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STATEMENT OF CONTROLLING OR MOST APPROPRIATE AUTHORITY

Pursuant to E.D. Mich. LR 7.1(c)(2), Plaintiffs identify the following controlling or most appropriate authority for the relief sought:

1. *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513 (6th Cir. 1993);
2. *Bowling v. Pfizer, Inc.*, 102 F.3d 777 (6th Cir. 1996);
3. *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508 (E.D. Mich. 2003); and
4. Amended Opinion and Order Regarding Lead Plaintiffs' Motions for (1) Final Approval of Settlements, (2) Settlement Class Certification, (3) Final Approval of Plans of Allocation, and (4) Award of Attorneys' Fees; and Delphi Trust I Interim Counsel's Motion for Attorneys' Fees, Slip. Op. Jan. 11, 2008 (Dkt. No. 318) (the "Final Approval Order").

STATEMENT OF ISSUE PRESENTED

Pursuant to E.D. Mich. LR 7.1(c)(2), Plaintiffs identify the following as the major issue presented:

In light of the Court's prior reservation on January 11, 2008 (Dkt. No. 318) of 20% of the Gross ERISA Settlement Fund for attorneys' fees, and \$750,000 for costs, whether the Court should grant ERISA Lead Counsel's Motion for Award of Attorneys' Fees and Expenses for:

(1) an attorneys' fee award of \$4,576,554.87 (20% of the Gross Settlement Fund excluding Taxes and accounting fees); and

(2) a cost award of \$750,000 to reimburse counsel for a portion of the expenses advanced in prosecuting this action.

INTRODUCTION

Through the efforts of Lead Counsel Keller Rohrback, L.L.P., Liaison Counsel Morgan & Meyers, and the Court-appointed Named Plaintiffs, Plaintiffs achieved an excellent settlement for the Class that includes a \$22.5 million payment benefiting participants in the Delphi Savings-Stock Purchase Program for Salaried Employees, the Delphi Personal Savings Plan for Hourly-Rate Employees, the ASEC Manufacturing Savings Plan, and the Delphi Mechatronic Systems Savings-Stock Purchase Program (collectively the “Plans”).¹ This Court previously recognized the litigation results, time and efforts of Lead Counsel in its Amended Opinion and Order (Dkt. No. 318; Jan. 11, 2008) (“Final Approval Order”) when it ordered a reserve of 20% of the Gross ERISA Settlement Fund for an award of fees to the Lead Counsel and a reserve of \$750,000 for costs and expenses.

In light of the successful results achieved in this hard-fought class action, and as recognized in the Final Approval Order, Plaintiffs respectfully request that:

- Lead Counsel be awarded attorneys’ fees of \$4,576,554.87 (20% of the Gross Settlement Fund, excluding Taxes and accounting fees), to be allocated by Lead Counsel as set forth in Section IV, *infra*; and
- Lead Counsel be reimbursed \$750,000 from the reserve toward their costs and expenses advanced in prosecuting this litigation, to be allocated by Lead Counsel as set forth in Section IV, *infra*.

¹ Capitalized terms that are not otherwise defined herein have the meaning given them in the Stipulation and Agreement of Settlement with Certain Defendants – ERISA Actions, and in the Amendment to Stipulation and Agreement of Settlement with Certain Defendants – ERISA Actions (collectively, “Settlement Stipulation”) (Dkt Nos. 228 & 260), previously filed in connection with Plaintiffs’ Settlement approval papers.

For the reasons set forth herein, the requested fee award is reasonable in light of the substantial work Lead Counsel have done in prosecuting this litigation, and in view of the additional time that Lead Counsel will spend issuing the revised Legal Notice to Class Members, implementing the Plan of Allocation, overseeing distribution of the Settlement Fund, and responding to Class Members' inquiries.

In short, the fee request, as well as the request for reimbursement of expenses, is supported by the record and controlling Sixth Circuit authority regarding compensation of counsel in cases of this type and magnitude. Accordingly, Lead Counsel respectfully submit that the request for attorneys' fees and reimbursement of expenses should be granted.

I. CASE HISTORY

The Named Plaintiffs and the Settling Defendants² executed the initial Settlement Stipulation on August 31, 2007, and later an Amended Settlement Stipulation on October 31, 2007. Under the terms of the initial Settlement, the Settling Defendants agreed to pay \$22.5 million in cash to be paid from available insurance policies, and an "Allowed Equity Interest" in the Delphi Corporation Chapter 11 case in the face amount of \$24.5 million. Under the Settlement Stipulation, the Allowed Equity Interest was entitled, upon the consummation of Delphi's bankruptcy Plan of Reorganization, to receive the same distribution under the Delphi bankruptcy Plan of Reorganization as would a general unsecured claim of the same face amount.

The Court granted preliminary approval of the Settlement on September 5, 2007, and conducted a final fairness hearing on November 13, 2007.

² The Settling Defendants include all defendants besides State Street Bank & Trust Co: Delphi Corporation, ASEC Manufacturing General Partnership, Delphi Mechatronic Systems, Inc., the Delphi Corporation Board of Directors Executive Committee and its members, the Investment Policy Committee and its members, J.T. Battenberg III, Robert Brust, Alan S. Dawes, Susan A. McLaughlin and John D. Opie. Settlement Stipulation at 2.

On January 11, 2008, the Court granted final approval of the Settlement and Plan of Allocation, and ordered creation of a reserve of 20% of the Gross ERISA Settlement Fund for a potential award of attorneys' fees to ERISA Co-Lead Counsel. Final Approval Order; Slip. Op. at 47. The Court also ordered creation of a reserve of \$750,000 to cover the costs and expenses of ERISA Co-Lead Counsel. *Id.* Under the Final Approval Order, these reserves were to be set aside "pending resolution of all claims in the ERISA action and the filing by ERISA Co-Lead Counsel of a formal application for fees and expenses." *Id.* at 52.

Following the 2007 Settlement, Named Plaintiffs also vigorously pursued their case against State Street Bank & Trust Co. Litigation against State Street in 2007 and 2008 included a settlement conference with the Court, written document discovery propounded to both State Street, and third parties, fact and expert depositions, and summary judgment briefing. In March of 2009, the Court denied Plaintiffs' claims against State Street. (Dkt. No. 433.)

In addition, since the Court granted final approval of the Settlement in January of 2008, Lead Counsel has carefully monitored the Delphi bankruptcy proceedings to monitor the Settlement Class' Allowed Equity Interest in the Delphi Chapter 11 bankruptcy case provided for in the Amended Settlement Stipulation. A condition to finality of the Settlement was final approval in Delphi's Chapter 11 bankruptcy case. The Official Committee of Unsecured Creditors in Delphi's bankruptcy indicated that it would not support approval of the Settlement except as part of the confirmation of Delphi's Plan of Reorganization, and the bankruptcy court indicated agreement with this position. As a result, the bankruptcy court's consideration of the Settlement occurred as part of the Plan of Reorganization confirmation process that occurred between December, 2007 and January, 2008. This necessitated Lead Counsel's close monitoring of the confirmation process, including the review of voluminous papers filed in the bankruptcy

court with respect to the Plan of Reorganization, and attendance at multiple days of confirmation-related hearings.

Ultimately, the bankruptcy court approved the Settlement as part of its confirmation of Delphi's Plan of Reorganization on January 25, 2008. This approval was subject to the consummation of the Plan of Reorganization, however, Delphi's bankruptcy Plan of Reorganization as confirmed in January, 2008, was never consummated due to intervening developments in the bankruptcy case and the continued deteriorating conditions in the overall economy and the automotive industry generally since that time. In light of the circumstances involving Delphi's bankruptcy, in particular, the delay and uncertainty surrounding Delphi's emergence from bankruptcy and the greatly reduced prospects for a material recovery by unsecured creditors in the Delphi bankruptcy, Lead Counsel and Delphi negotiated a modification to the Settlement that would de-couple the Effective Date of the Settlement from consummation of the Plan of Reorganization, and would eliminate the requirement that the Allowed Equity Interest receive the same treatment as unsecured claims in the Delphi bankruptcy.³ This Modification was approved by the Bankruptcy Court on July 24, 2009, and Named Plaintiffs are concurrently moving this Court for an Order Preliminarily Approving Settlement Modification, Forms and Method of Notice, With Respect Thereto, and for Judgment Modification Under Fed. R. Civ. P. 60 (the "Settlement Modification Motion").

On May 28, 2009, Lead ERISA Counsel participated in a status conference in which developments in the Delphi bankruptcy proceedings, and the anticipated Settlement Modification were discussed. The parties informed the Court that the process of documenting the proposed Modification was on-going, and that the proposed modification would be presented to the Court

³ On July 24, 2009, the Bankruptcy Court confirmed Delphi's modified Plan of Reorganization, under which the Allowed Equity Interest will receive no distribution.

as promptly as possible. The Court indicated that Lead Counsel's fee petition should be submitted in conjunction with the motion for approval of the Settlement Modification. Since May 28, 2009, the parties have worked diligently on negotiating the proposed Modification, and are now presenting the proposed Modification to the Court for preliminary approval.

II. REQUEST FOR ATTORNEYS' FEES

As a result of the prior final approval process, the May 28, 2009 status conference, and the Settlement Modification Motion, the Court is well informed of the details of the Settlement. In relevant part, the Settlement, as modified by the proposed Settlement Modification, will result in a Gross Settlement Fund of \$22.5 million in cash plus interest.⁴

Lead Counsel's efforts in this case have been intensive, carefully coordinated, and efficient. Defendants are represented by highly skilled counsel at the law firms of Shearman & Sterling LLP, Baker Botts L.L.P., O'Melveny & Myers LLP, and McDermott, Will & Emery, as well as by local counsel. Through their experienced counsel, Defendants have vigorously defended this action, and have devoted extensive resources. As a result of Defendants' quality representation, Plaintiffs were required to exercise diligence and to commit significant time and resources to ensure the successful prosecution of this action.

A. Lead Counsel Are Entitled to a Reasonable Percentage of the Common Fund

It is well established that "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). "The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are

⁴ Pursuant to the Settlement Stipulation, \$22.5 million was deposited in a Qualified Settlement Fund on September 20, 2007. Since that time, \$617,185.36 has been earned in interest and a total of \$234,411.00 has been paid out for Taxes and accounting fees, and \$69,348.27 for class notice expenses.

unjustly enriched at the successful litigant's expense." *Id.* The district court typically has discretion to determine the appropriate method for calculating attorney's fees. *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993).

Trial courts within the Sixth Circuit may choose either a percentage of the fund calculation, or a lodestar/multiplier approach, with a "trend towards adoption of a percentage of the fund method in [common fund] cases." *Id.* at 515-517. *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532 (E.D. Mich. 2003) ("[C]ourts in the Sixth Circuit have indicated their preference for the percentage-of-the-fund method in common fund cases."). In *Cardizem*, the district court observed that:

The lodestar method should arguably be avoided in situations where such a common fund exists because it does not adequately acknowledge (1) the result achieved or (2) the special skill of the attorney(s) in obtaining that result. Courts and commentators have been skeptical of applying the formula in common fund cases . . . Many courts have strayed from using lodestar in common fund cases and moved towards the percentage of the fund method which allows for a more accurate approximation of a reasonable award for fees.

Cardizem, 218 F.R.D. at 532 (internal quotes and citations omitted). Because the courts in the Sixth Circuit have expressed a preference for the "percentage-of-the-fund" method in common fund cases, and because the Court has previously reserved funds based on a percentage of the gross recovery, Lead Counsel request a fee based on this method. The overriding requirement is that the award "be reasonable under the circumstances." *Rawlings*, 9 F.3d at 516; *see also Bowling v. Pfizer, Inc.*, 102 F.3d 777, 779 (6th Cir. 1996).

B. The 20 Percent Fee Requested by Lead Counsel is Within the Range Considered Reasonable and Fair in the Sixth Circuit

In the Final Approval Order, the Court established a reserve of 20% of the Gross ERISA Settlement Fund for a potential future award of attorneys' fees, and a reserve of \$750,000 for

costs and expenses.⁵ Lead Counsel's request for the full value of these reserves is well within, and even below, the range of percentage fee awards generally approved by district courts in the Sixth Circuit. *Sherrill v. Federal-Mogul Corp. Ret. Programs Comm.*, No. 04-72949, 2007 U.S. Dist. LEXIS 51054 (E.D. Mich. July 13, 2007) (awarding 28% of settlement fund for attorneys' fees to Lead Counsel on ERISA fiduciary breach claims involving imprudent investment in employer company stock in the company's 401(k) plan); *In re Visteon Corp. ERISA Litig.*, No. 05-71205 2007 U.S. Dist. LEXIS 96023 (E.D. Mich. Mar. 9, 2007) (awarding 28% of \$7.6 million settlement fund); *In re CMS Energy ERISA Litig.*, No. 02-72834, 2006 U.S. Dist. LEXIS 55836 (E.D. Mich. June 27, 2006) (awarding 28.5% of settlement fund for attorneys' fees to Lead Counsel on ERISA fiduciary breach claims); *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496 (E.D. Mich. 2000) (awarding 31% of settlement fund for attorney fees to Lead Counsel on claims resulting from improper sale of property); *In re F&M Distribs., Inc. Sec. Litig.*, No. 95-71778, 1999 U.S. Dist. LEXIS 11090, at *8-9 (E.D. Mich. June 29, 1999) (awarding 30% of the settlement fund); *In re Rio Hair Naturalizer Prods. Liab. Litig.*, No. MDL-1055, 1996 U.S. Dist. LEXIS 20440, at *56 (E.D. Mich. Dec. 20, 1996) (acceptable range of fee awards typically ranges from 20% to 50% of the common fund).

Lead Counsel faced substantial risks in this complex litigation, and pursued all potential avenues to secure a favorable outcome in the face of a vigorous defense that created numerous legal obstacles. These efforts yielded an excellent recovery for the Class. Accordingly, Lead

⁵ Lead Counsel initially requested a reserve of 25% of the Gross Settlement Fund for a potential award of attorneys' fees and costs, and the Class Notice that was mailed and published to class members on September 28, 2007 stated the same 25% request. See ERISA Named Plaintiffs' Memorandum in Support of Motion for Final Approval of ERISA Class Action Settlement, for Certification of Settlement Class, for Reserve from Gross Settlement Fund for Potential Award of Attorneys' Fees and Expenses, and for Case Contribution Awards ("Final Approval Mem.") (Dkt. No. 266), and Exhibit 1 to the Memorandum in Support of ERISA Named Plaintiffs' Motion for Order Preliminarily Approving Settlement, Certifying Settlement Class, Approving Forms and Methods of Service and Setting a Fairness Hearing ("Prelim. Approval Mem.") (Dkt. No. 228).

Counsel respectfully submit that the requested 20% fee award in this case is well-justified, reasonable under the circumstances, and consistent with the Court's Final Approval Order.

C. The Requested 20 Percent Fee Award is Fair and Reasonable under the Sixth Circuit *Bowling* Factors

Courts in the Sixth Circuit evaluate the reasonableness of a requested attorney fee award using six factors: (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides. *Bowling*, 102 F.3d at 780; *Smillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983). Each of these factors supports the fee award here.

1. Factor One - The Value of the Benefit Rendered to the Class.

Before this lawsuit, Class members had suffered losses in their retirement savings accounts, and had no remedy for Defendants' alleged fiduciary breaches. Now, the efforts of Lead Counsel have resulted in a \$22.5 million cash recovery for the Class. This result was accomplished in a complex case involving a bankrupt entity, 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 is necessary to consider the likelihood of Plaintiffs' success on the merits and the recovery the Class might have obtained if liability had been established at trial. Named Plaintiffs are optimistic about their ultimate legal success in this matter. *See* Final Approval Mem. at 10. (Dkt. No. 266; *See* n. 4.) However, while Named Plaintiffs believe strongly that the evidence developed thus far supports the allegations of the Settling Defendants' fiduciary status under all Plans and their failure to protect the Plans and serve participants' best interests, Defendants have a different view and have forcefully defended

their actions. *Id.* at 11; *see also* Declaration of Lynn L. Sarko in Support of Lead ERISA Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Expenses ("Sarko Decl.") ¶¶ 3, 5. While confident of their ultimate success on the merits as to the Settling Defendants, Named Plaintiffs cannot be certain how the case would be decided once all evidence is presented, particularly in this complex and rapidly developing area of law.

Furthermore, while the proposed Settlement amount is fixed under the Settlement Modification (\$22.5 million plus interest), the amount Plaintiffs could recover if successful, discounted for risk, is not. First, the bankruptcy of Delphi and the impaired financial health of the other auto industry Defendants raise serious questions about the realistic probability of any financial recovery for Plaintiffs outside of insurance proceeds; continued litigation would have resulted in further erosion of the available insurance coverage as the policy limits would have been consumed by continuing defense costs. Second, there is a significant risk that the dollar amount of any potential recovery at trial could have been reduced because the parties vigorously disputed the appropriate measure of losses in this case. Thus, the measure of losses could have resulted in a smaller recovery than the recovery achieved by this Settlement—even if liability were established on all counts of Complaint. At bottom, the case law is sparse on the proper measure of damages in ERISA cases, which presented risks going forward in this case.

Weighing the strengths of Plaintiffs' claims against the risks of litigating those claims to a verdict at trial warrants the conclusion that Class interests are better served if the litigation is resolved with certainty, rather than being pursued. Thus, the first *Bowling* factor supports the fee award sought here.

2. Factor Two - The Value of the Services on an Hourly Basis.

In assessing the second *Bowling* factor, courts typically consider the hours and expense incurred by counsel, and, thus, counsel's investment of time and resources in the case. *New Eng. Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 634 (W.D. Ky. 2006). This case required Lead Counsel to actively pursue this case for the better part of four years. During this time, Lead Counsel received no compensation for its time and advanced virtually all the litigation costs of the plaintiff class. Indeed, Lead Counsel devoted more than 8,700 attorney and professional hours to the successful prosecution of the case, and advanced expenses in the amount of \$842,606.91 over the four years of litigation. Sarko Decl. at ¶¶ 75, 82-83.

In addition, pursuant to the Order Establishing Interim Leadership Structure (Master File No. 05-70882, Dkt. No. 50), which authorized Lead Counsel to coordinate and supervise the prosecution of all plaintiffs' claims, Lead Counsel assigned specific tasks to other firms and monitored the work of the other firms. The total hours incurred by these firms that contributed to the successful result in this case was 2,714 attorney and professional hours, and \$27,867.54 in expenses. Sarko Decl. ¶¶ 76, 83. A breakdown of the work performed and expenses incurred by other counsel at Lead Counsel's direction is set forth at ¶¶ 77, 83 of the Sarko Decl.

The reasonableness of Lead Counsel's hourly rates in similar cases has been recently adjudged by other courts in the Sixth Circuit, who found that Lead Counsel's requested fee awards of 28.5% and 25%, respectively, of settlement values were reasonable in view of the value of Lead Counsel's services on an hourly basis. *See In re CMS Energy ERISA Litig.*, 2006 U.S. Dist. LEXIS 55836; *In re The Goodyear Tire & Rubber Company ERISA Litig.*, No. 03-02182, (N.D. Ohio Oct. 22, 2008).

To assist with its evaluation of the value of the services provided by Lead Counsel and firms that performed tasks at Lead Counsel's direction, we provide the following summary of noteworthy aspects of this litigation.

a. Lead Counsel Filed a Consolidated and Amended Complaint and Litigated the Motion to Dismiss.

Following the October 21, 2005, consolidation of all ERISA cases, the Plaintiffs filed a Consolidated Amended Complaint on March 3, 2006, which included new information and detailed allegations regarding Defendants' alleged breaches of fiduciary duty. Sarko Decl. ¶ 25. From March through May 2006, all Defendants moved to dismiss the Consolidated Amended Complaint. The motions were extensively briefed and the parties filed numerous supplemental briefs regarding the many decisions in similar cases that were rendered during the time that the motion to dismiss was pending. *Id.* ¶¶ 28-35. The August 2007 Settlement was reached prior to the Court issuing any ruling on the Defendants' Motion to Dismiss.

b. Lead Counsel Conducted a Significant Amount of Discovery.

Lead Counsel invested significant time and resources on discovery, as detailed in the accompanying Declaration of Lynn L. Sarko. The following is a summary overview of the discovery in which Plaintiffs engaged:

- Lead Counsel served several sets of formal and informal requests for information on defendants, including interrogatories and requests for production of documents;
- Lead Counsel reviewed and produced discovery from the Named Plaintiffs, and reviewed extensive additional information from public sources regarding Delphi's finance and operations, and the Plans;

- Lead Counsel submitted Freedom of Information Act requests to the United States Department of Justice, the United States Department of Labor, and the United States Securities & Exchange Commission, and obtained and reviewed extensive materials produced in response to the requests;
- Lead Counsel obtained and reviewed hundreds of thousands of pages of documents produced by Delphi, the Individual Defendants, State Street, and third-parties, including insurance coverage policies; and
- Lead Counsel established an electronic document depository to review and analyze all documents.

Sarko Decl. ¶¶ 36-45.

c. Lead Counsel Engaged in Extensive Mediation and Settlement Negotiations.

The parties litigated for almost two years before entering into the Settlement Agreement. The Settlement was reached after vigorous motion practice and arm's-length negotiations, including a multi-day mediation conducted by the Court-Appointed Master for Settlement Negotiations, the Honorable Layn R. Phillips. Lead Counsel participated in a multi-party mediation in New York City on July 23, 24, the evening of July 29, and July 30, 2007. Prior to the mediation, Lead Counsel and the Settling Defendants submitted a substantial amount of material to the mediator, including mediation statements that included a thorough analysis of the claims, damages, and insurance coverage issues. Finally, on July 30, 2007, the settling parties reached an agreement in principle on the amount of the settlement and its essential terms. The parties continued hard-fought negotiations thereafter regarding the remaining Settlement terms,

leading to the execution of the Settlement Stipulation on August 31, 2007.⁶ Sarko Decl. ¶¶ 49-54. Thereafter, Lead Counsel was required to devote substantial time to the monitoring of the Delphi bankruptcy proceedings, as well as to the negotiation and documentation of the Modification to the Settlement Stipulation executed on July 10, 2009.

d. Lead Counsel Engaged in Substantial Settlement Administration.

Following the Court's preliminary approval of the Settlement, Lead Counsel then turned its efforts to setting the stage to ensure proper administration of the Settlement upon it becoming final. Lead Counsel coordinated efforts with the Plans' administrators and record keepers to obtain complete Plan data. Lead Counsel also retained and monitored a Settlement Administrator to perform the duties set out in the Settlement Stipulation, including issuing Class Notice. In addition, Lead Counsel moved the Court to send an additional Notice mailing to a group of 3,129 late-identified Class Members, and extend the objection deadline for those receiving later notice. *See* Final Approval Mem. at 2-4 (regarding compliance with notice requirements); Sarko Decl. ¶¶ 65-66.

Additionally, as set forth in greater detail in Section I, *supra*, Lead Counsel has spent considerable time since approval of the Settlement monitoring the Delphi bankruptcy, and Plan of Reorganization.

e. Lead Counsel's Lodestar Supports Their 20 Percent Fee Request.

While the trend in the Sixth Circuit is to use the percentage-of-fund approach over the lodestar approach in common fund cases, it is not unusual for courts in the Sixth Circuit to check a percentage fee request against counsel's lodestar. This enables the court to determine the amount of the "lodestar multiplier" that the percentage recovery would provide. *See, e.g., In re*

⁶ The Settlement Stipulation was amended October 31, 2007.

Cardizem, 218 F.R.D. at 533. It is well established that where counsel assumes the risk of non-payment, any lodestar calculation should include a “multiplier” that reflects this risk, the result achieved, the quality of representation, and the complexity and magnitude of the litigation. *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 1029, 1041 (S.D. Ohio 2001) (citing 3 HERBERT B. NEWBERG & ALBA CONTE, ON CLASS ACTIONS § 12.55 (3d ed. 1992); *Rawlings*, 9 F.3d at 516). Accordingly, courts within the Sixth Circuit routinely approve percentage-of-fund fee awards that equate to substantial multipliers. *See, e.g., Manners v. Am. Gen. Life Ins. Co.*, No. 98-266, 1999 U.S. Dist. LEXIS 22880, at * 93 (M.D. Tenn. Aug. 11, 1999) (awarding multiplier of 3.8 and observing that “[t]his multiplier is well within the range of multipliers for similar litigations, which have ranged from 1-4 and have reached as high as 10.”).

Over the four years the case has been pending, the total lodestar of Lead Counsel and other counsel who performed tasks at Lead Counsel’s direction is \$4,865,411.62 (\$3,821,807.37 for Lead Counsel, and \$1,043,604.25 for other counsel who performed tasks at Lead Counsel’s direction). The Court’s 20% reserve for an attorneys’ fee award to Lead Counsel (\$22.5 million, plus interest, excluding Taxes and accounting fees), amounts to \$4,576,554.87 (20% of \$22,882,774.00).⁷ Thus, the 20% fee requested by Lead Counsel would equate to a lodestar multiplier of just under 1, or a non-multiplier. In light of the risks of the case, and a review of lodestar multipliers approved in other actions, a significantly higher lodestar multiplier would be appropriate here.

In addition, Lead Counsel expects to dedicate additional hours to this litigation in connection with administration of the Settlement. Sarko Decl. ¶ 85. Consequently, the total

⁷ This calculation reflects the initial Gross Settlement Fund balance of \$22.5 million, plus interest earned of \$617,185.36, excluding Taxes and accounting fees paid of \$234,411.00, which equals \$22,882,774.00.

hours that will be expended by Lead Counsel in this case will be greater than the lodestar referenced herein, and, thus, the final multiplier will be correspondingly smaller. Hence, for the reasons detailed above, the second *Bowling* factor supports the fee award sought by Lead Counsel in this case.

3. Factor Three - Whether the Services Were Undertaken on a Contingent Fee Basis.

Lead Counsel accepted this matter on a wholly contingent basis and they have received no compensation to date. As recognized by Judge Posner, “[t]he lawyers for the class receive no fee if the suit fails.” *In re Cont’l Ill. Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992). Counsel should be properly compensated for this risk, or else “systematic undercompensation” will undermine the viability of class action litigation. *Id.* Accordingly, courts uniformly hold that when recovery is contingent, a higher fee should be awarded than when counsel undertake no risk of non-payment. *E.g.*, *Blum v. Stenson*, 465 U.S. 886, 902 (1984) (Brennan, J., concurring) (“the 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.”); *c.f.* *In re Cardizem*, 218 F.R.D. at 533 (noting that counsel “undertook representation of the Class on a contingent fee basis, thus bearing the risk of recovery inherent in litigation, and expended millions of dollars in attorney time and expenses in their prosecution of [the] litigation over the past five years.”).

Here, Lead Counsel took on a complex case involving an esoteric and rapidly developing area of law, and carried the risk for four years. Accordingly, this factor also supports the fee award sought by Lead Counsel.

4. Factor Four - Society's Stake in Rewarding Attorneys Who Produce Such Benefits in Order to Maintain an Incentive to Others.

As discussed above, the Settlement provides valuable benefits to the Class that would not have been obtained without Lead Counsel's efforts. As the court noted in *In re F&M Distribs.*, 1999 U.S. Dist. LEXIS 11090, at *18, "[s]ociety's stake in rewarding attorneys who can produce such benefits . . . counsels in favor of a generous fee. . . ." Moreover, "[e]ncouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this case benefits society." *In re Cardizem*, 218 F.R.D. at 534. This is particularly true 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. Absent the courage of these named Plaintiffs and Lead Counsel's capable guidance, the class participants would have likely recovered nothing. Thus, this factor counsels in favor of the fee award requested by Lead Counsel in this case.

5. Factor Five - The Complexity of the Litigation.

Several courts have noted the high degree of complexity of ERISA class actions of this type. *See, e.g., In re Ikon Office Solutions, Inc. Sec. Litig.*, 209 F.R.D. 94, 104 (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). This case was highly complex and required litigation in multiple forums, including the Bankruptcy Court.

The complexity and uncertainty in the law, combined with the discovery efforts undertaken and the vigorous defense, presented complicated factual, legal, and procedural issues all of which were successfully navigated by Lead Counsel. *See, e.g., Kogan*, 193 F.R.D. at 504 (finding that complexity factor weighed in favor of 33% fee where class action was "very

complex,” due to controlling law, substantial discovery, extensive motions practice, and the need for numerous experts). Thus, the fifth *Bowling* factor supports the fee award requested here.

6. Factor Six - The Professional Skill and Standing of Counsel Involved on Both Sides.

Lead Counsel are highly experienced in complex ERISA and class action matters. Keller Rohrback L.L.P. has been and continues to be a pioneer in this area of law, and has served or is serving as Lead Counsel for classes in numerous leading ERISA breach of fiduciary class actions, including *In re WorldCom, Inc. ERISA Litigation*, *In re Enron Corp. Securities and ERISA Litigation*, *In re Global Crossing, Ltd. ERISA Litigation*, *In re HealthSouth ERISA Litigation*, *In re Visteon Litigation*, *In re Household ERISA Litigation*, *Reinhart v. Lucent Technologies Inc.*, *In re Williams Co. ERISA Litigation*, *In re CMS Energy ERISA Litigation*, *In re Goodyear ERISA Litigation*, and *In re Ford Motor Company ERISA Litigation*, which is also pending in the United States District Court for the Eastern District of Michigan. Lead Counsel also brought to this case its skill and resources in electronic document management and financial and forensic accounting analysis, as well as its skill monitoring the proceedings of the Delphi bankruptcy case. Sarko Decl. ¶¶ 8, 9. Furthermore, Liaison Counsel Jeffrey T. Meyers also has extensive relevant experience with complex litigation and provided important assistance in this case at the direction of Keller Rohrback. Sarko Decl. ¶ 10.

Lead Counsel demonstrated a high degree of skill and diligence in the preparation of this class action. Sarko Decl. ¶¶ 8-75. This case presented many risks, and was ably and vigorously defended by lawyers from high quality defense firms, and despite these challenges, Lead Counsel achieved an excellent result. *See Id.* ¶¶ 67-69. The prosecution of this case, thus, required a high degree of skill and dedication to bring the case to a successful close. Thus, this final *Bowling* factor supports the fee award requested by Lead Counsel as well.

III. REQUEST FOR REIMBURSEMENT OF EXPENSES

It is well established in the Sixth Circuit that “[e]xpense awards are customary when litigants have created a common settlement fund for the benefit of a class.” *F&M Distributions*, 1999 U.S. Dist. LEXIS 11090, at *20. “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...experts and consultants, travel and other litigation-related expenses.” *In re Cardizem*, 218 F.R.D. at 535; *see, e.g.*, 1 ALBA CONTE, ATTORNEY FEE AWARDS, § 2.19 (3d ed. 2004) (noting “[t]he 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.”) (citing *Trustees v. Greenough*, 105 U.S. 527, 533 (1881)).

Here, Lead Counsel and those firms which performed work approved by Lead Counsel have advanced or incurred \$870,474.45 in expenses to date. A breakdown of these unreimbursed expenses is contained in the supporting declaration submitted by Lead Counsel. *See Sarko Decl.* ¶¶ 82-83. In light of the complex nature of this litigation, which required significant travel, computerized legal research, retention of highly qualified expert witnesses, and several mediation sessions with a highly capable and respected mediator, the expenses incurred were both reasonable and reasonably related to the interests of the Named Plaintiffs and the Class. Hence, Lead Counsel respectfully requests that the entire reserve of \$750,000 for costs be awarded.

IV. ALLOCATION OF ATTORNEYS' FEE AWARD AND EXPENSES BY LEAD COUNSEL

With the Court's approval, Lead Counsel intends to allocate fees and expense awards to Lead Counsel, Liaison Counsel and the other Plaintiffs' Counsel who performed work at the direction of Lead Counsel which Lead Counsel determines in its discretion to have directly contributed to the result obtained in the Settlement, taking into consideration each firm's contribution to the prosecution of this matter, including the respective lodestar and cost advance amounts for the firms who performed work approved by Lead Counsel in this matter, as set forth in the Sarko Declaration.

V. CONCLUSION

The attorneys' fees requested by Lead Counsel will reasonably compensate them, and those firms who performed work approved by Lead Counsel for the risks assumed by Lead Counsel in this litigation, and the time and resources committed over several years in order to obtain the excellent result achieved in this case. This request is also consistent with the Court's January 11, 2008, Final Approval Order. Thus, Lead Counsel respectfully request that the Court award: (1) attorneys' fees in the amount of 20% of the cash Gross ERISA Settlement Fund (\$4,576,554.87); and (2) reimbursement of \$750,000 in expenses, as reasonable and necessary expenses of litigation.

A proposed Order is lodged herewith.

RESPECTFULLY SUBMITTED this 16th day of September, 2009.

KELLER ROHRBACK L.L.P.

By: /s/Lynn Lincoln Sarko _____

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