

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA**

PAUL SMITH and ALFIE CARTER, each on)
behalf of himself and all others similarly)
situated including all participants and)
beneficiaries in the Krispy Kreme Doughnut)
Corporation Retirement Savings Plan or the)
Krispy Kreme Profit Sharing Stock Ownership)
Plan,)

No. 1:05CV00187

Plaintiffs,)

v.)

KRISPY KREME DOUGHNUT)
CORPORATION, RANDY J. CASSTEVENS,)
KEN HUDSON, SHERRY LUPER, FRANK)
MURPHY, PAM PETRO-OTT, MICHAEL C.)
PHALEN, SHERRY POLONSKY, JEFF)
THIELEN, SCOTT A. LIVENGOOD, and)
JOHN N. (JACK) MCALEER,)

Defendants.)

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION
FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT
OF LITIGATION COSTS AND EXPENSES, AND FOR CASE
CONTRIBUTION AWARDS TO THE NAMED PLAINTIFFS**

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Plaintiffs have reached a settlement with Defendants that calls for a cash payment to the Class of \$4.75 million and structural changes (conservatively valued at \$3.82 million) to the ERISA plans at issue. By separate motions, Plaintiffs have asked the Court to grant final approval to that Settlement and to approve a Plan of Allocation of the net Settlement proceeds.

In this motion, Plaintiffs (1) request payment of attorneys' fees from the cash portion of the common fund created for the benefit of the Class, (2) request reimbursement of litigation expenses incurred for the benefit of the Class, and (3) request that the named plaintiffs – Mr. Smith and Mr. Carter – each receive \$15,000 as a case contribution award.

As discussed below in detail, each of these requests is fully supported by the record and is fully consistent with controlling Fourth Circuit authority. Each of these requests has been tacitly approved by the *entire Class* (no objections have been filed), by an *independent fiduciary* retained by the Defendants to protect the interests of the ERISA Plans, and by the *Department of Labor*, which is charged with policing the settlement of ERISA claims and assisting the development of the law in this complex area. Plaintiffs submit that there is a compelling basis for the Court to approve these requests.

I. ATTORNEYS' FEES

It is the Court's duty to award a reasonable fee to Class Counsel. In a common fund case such as this, a reasonable fee is normally a percentage of the Class recovery. *DeLoach v. Philip Morris Cos.*, No. 00-1235, 2003 WL 23094907, at *3 (M.D.N.C. 2003) (citing with approval *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 215 (D. Me. 2003); *In re Microstrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d 778, 787 (E.D. Va. 2001); *In re Vitamins Antitrust Litig.*, MDL No. 1285, 2001 WL 34312839, at *3 (D.D.C. July 16, 2001)). Here, for the reasons stated below, a fair and reasonable fee would be 26% of the cash portion of the common fund recovered for the Class.

A. Work Performed By Class Counsel

Class Counsel have worked diligently, over the course of almost two years, to investigate, file, prosecute, and obtain a favorable recovery for the Class. In summary, these efforts included:

- Paul Smith retained Class Counsel in early 2005, which led to the preparation of the initial Complaint in this Action. Considerable investigation was required to understand the two related ERISA plans that held Krispy Kreme stock for current and former Krispy Kreme employees, to identify the proper defendants, to research legal issues specific to this jurisdiction, and to confirm Mr. Smith's fact-specific allegations. The Complaint was filed on March 3, 2005. *Declaration of T. David Copley In Support of Fairness Hearing* ("Copley Decl.") ¶ 6.
- Class Counsel gathered and reviewed all publicly available information concerning the financial and managerial issues at Krispy Kreme during the Class period with a focus on the suitability of Krispy Kreme stock for inclusion and retention in the subject retirement plans. Class Counsel also investigated the structure and operation of the Plans and information provided by plan participants. *Id.* ¶¶ 8-11.
- Shortly after filing the original Complaint, Class Counsel were also retained by Alfie Carter, which led to the filing of the Amended Complaint on July 1, 2005. *Id.* ¶ 7.
- Defendants retained distinguished counsel, who are well known to Class Counsel through other cases similar to this one. Defendants are represented by four prominent law firms: Proskauer Rose LLP, Gibson, Dunn & Crutcher LLP, Kilpatrick Stockton, L.L.P., and Tuggle Duggins & Meschan, P.A. *Id.* ¶ 37.

- Early in the litigation Class Counsel requested, and Defendants agreed to provide, certain preliminary information necessary to evaluate liability issues and the quantum of potential damages. Defendants provided information concerning the two ERISA plans at issue and transaction data showing some of the Plans' purchases and sales of Krispy Kreme stock during the Class Period. *Id.* ¶ 10.
- Early in the case, Class Counsel also retained a confidential consultant to evaluate the prudence of the Defendants in acquiring and holding Krispy Kreme stock during the Class Period. This confidential report allowed Class Counsel to assess the merits of the case even before the beginning of formal discovery. *Id.* ¶ 11.
- Based on the experience of their respective counsel, both Plaintiffs and Defendants grasped the strengths and weaknesses of this case. The Defendants expressed willingness to consider an early mediation of the case, and Class Counsel agreed that an early mediation might be useful. *Id.* ¶ 24.
- The parties jointly agreed on Jonathan Marks as a mediator. Class Counsel met with Mr. Marks privately, telephonically, in advance of the mediation, and we are informed that defense counsel did the same. Class Counsel sent Mr. Marks three pre-mediation statements addressing in detail the factual and legal issues presented, and responding to the factual and legal assertions we anticipated Defendants would raise. *Id.* ¶ 25.
- Mediation was originally scheduled for August 31, 2005, but Hurricane Katrina made that impossible. The mediation was rescheduled for November 1, 2005, in Bethesda, Maryland. Class Counsel attended the full-day session, as did counsel for

Defendants and Defendants' insurer. Both sides bargained hard, and the case did not settle. *Id.* ¶¶ 26-27.

- On December 15, 2005, Defendants filed two motions dismiss the Amended Complaint. *Id.* ¶ 12.
- On February 7, 2006, Class Counsel filed a single comprehensive response to the motions, consisting of a 40 page memorandum of law and two declarations authenticating more than 1000 pages of attached exhibits. *Id.* ¶¶ 12-15.
- Class Counsel supplemented its response to the motions to dismiss by submitting supplemental authority on March 2, 2006, March 27, 2006, April 5, 2006 and April 20, 2006. *Id.* ¶¶ 16, 19, 21, and 23.
- Throughout the motion to dismiss briefing, the parties continued discussions concerning the merits of the litigation and potential resolution. Spirited negotiations continued until a Terms Sheet was finally agreed upon and executed on May 12, 2006. *Id.* ¶¶ 24-28.
- After the Terms Sheet was signed, Class Counsel began negotiating with Defendants concerning the language of the formal Settlement Agreement. This became a difficult and protracted process because of the vigorous advocacy of both Class Counsel and Defense counsel. The final Settlement Agreement was not agreed upon and executed until August 15, 2006. *Id.* ¶¶ 29-30.
- Class Counsel retained distinguished economist Krishna Ramaswamy to evaluate the economic value of the structural relief envisioned in the Settlement Agreement. Class Counsel provided Professor Ramaswamy with relevant Plan documents and data to assist his analysis. *Id.* ¶ 31.

- Shortly after the Settlement Agreement was signed, Class Counsel submitted a motion for Preliminary Approval of the settlement, preliminary certification of a settlement class, approval of the form and method of class notice, and setting a date for a final fairness hearing. *Id.* ¶ 32. On September 27, 2006, the Court granted preliminary approval to the settlement, approved the proposed class notice, and set a date for the Fairness Hearing. *Id.* ¶ 33.
- On or before September 29, 2006, Class Counsel posted the Class Notice on its website, activated a toll-free phone number to receive phone inquiries from Class members, and mailed the Court-approved notice to each member of the Class using the most-recent address information previously provided by Defendants and the Plans administrator. Since that time, Class Counsel has responded to approximately 25 direct inquiries from Class Members. Class Counsel has monitored the number of mailed notices returned for incorrect addresses and instructed the third-party mailing service to take all reasonable steps to locate updated address information and promptly re-mail class notice to the corrected addresses. *Id.* ¶¶ 34, 55-57. *See also Affidavit of Mailing* signed by Jenny Teston (“*Teston Affidavit*”).
- Class Counsel has spent considerable time providing information to the Department of Labor and the independent fiduciary retained by Defendants, to assist these objective parties understand the Settlement and evaluate its fairness and adequacy.
- Providing these legal services for the benefit of the Class has required Class Counsel to devote at least¹ 1089 hours of attorney time and 772 hours of paralegal time. *Id.*

¹ These figures are current through October 31, 2006. They do not include any of the time Class Counsel has spent preparing this fee application, finalizing the motion for final approval of the Settlement, preparing for the November 20, 2006 Fairness Hearing, or any of the post-approval work that will be required to ensure that the Settlement is fully effectuated pursuant to the exact terms of the Settlement Agreement and the Court-approved

¶47. Class Counsel certify that this time and effort has been reasonably and necessarily incurred in the prosecution of this case. *Id.* ¶¶ 45-49.

B. Attorneys' Fees Should Be Set as a Percentage of the Common Fund Recovery

It is well-established, in this Circuit and elsewhere, that attorneys whose efforts result in a “common fund” may, and should be, compensated by awarding them a percentage of the recovery. *DeLoach v. Philip Morris Cos.*, No. 00-1235, 2003 WL 23094907, at *3 (M.D.N.C. 2003); *In Re Microstrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d 778, 786-87 (E.D. Va. 2001). *See also Manual for Complex Litigation* § 14.121 (4th ed. 2004) (“the vast majority of courts of appeals . . . permit or direct district courts to use the percentage-fee method in common-fund case.”). Supreme Court cases on this point date back to at least 1881:

Since the decision in [*Internal Improvement Fund*] *Trustees v. Greenough*, 105 U.S. 527 [] (1882) [sic] and *Central [R.R.] & Banking Co. v. Pettus*, 113 U.S. 116 [] (1885), this court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole. *See, Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 [] (1970); *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161 [] (1939); *cf. Hall v. Cole*, 412 U.S. 1 [] (1973). . . . 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.

Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).²

In this Circuit, the percentage-of-recovery approach is not only permitted, it is the preferred approach to determining attorneys’ fees. *See Goldenberg v. Marriott PLP Corp.*, 33 F.

Plan of Allocation. We estimate that these additional services will require an additional 100 hours of attorney time and 200 hours of paralegal time. *Copley Decl.* ¶ 49.

² The common fund doctrine is based on the notion that all “those who have benefited from litigation should share its costs.” *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 252 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989). *See also, In re Synthroid Mktg. Litig.* (“*Synthroid II*”), 325 F.3d 974, 977 (7th Cir. 2003) (each class member “must bear their portion of the legal expense”). In this case, Plaintiffs, acting on behalf of the Plan and the Class, undertook litigation that, upon the Court’s approval of the Settlement, will result in a significant benefit for all Class members. A common fund fee award is therefore appropriate in this case.

Supp. 2d 434, 438 (D. Md. 1998) (noting endorsement of percentage-of-recovery method by several courts in the Fourth Circuit). Percentage-of-recovery fees are firmly based in the real-world marketplace for legal services: contingent fees are commonly – indeed almost universally – established as a percentage of the amount recovered. Percentage-of-recovery fees also have the salutary effect of conserving judicial resources. Percentage fees are simple to calculate, are not subject to manipulation, and do not require the Court to “second-guess” each and every decision made by counsel in the course of a complex case. *Strang v. JHM Mortgage Sec. Ltd. P’ship*, 890 F. Supp. 499, 503 (E.D. Va. 1995) (“the percentage method is more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases”).

The percentage-of-recovery method is particularly appropriate where, as here, the settlement confers a substantial benefit on members of a class. *Boeing Co.*, 444 U.S. at 479. *See also Teague v. Bakker*, 213 F. Supp. 2d 571, 584 (W.D.N.C. 2002) (“an award of attorneys’ fees from a common fund depends on whether the attorneys’ specific services benefited the fund – whether they tended to create, increase, protect or preserve the fund”). Clearly, the percentage method is the gold standard in cases where a common fund exists. Accordingly, Class Counsel seeks a percentage of the cash portion of the total Class recovery.

C. An Attorneys’ Fee Equal to 26% of the Cash Recovery is Reasonable

To determine the reasonableness of the fee award sought by Class Counsel in this action, this Court may elect to apply all or some of the factors that the Fifth Circuit announced in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), which were adopted by Fourth Circuit adopted in *Barber v. Kimbrell’s Inc.*, 577 F.2d 216, 226 (4th Cir. 1978). The Fourth Circuit’s approved list of factors that should be considered in “common fund” fee award determinations are:

- (1) time and labor expended;
- (2) novelty and difficulty of the questions raised;
- (3) skill required to properly perform the legal services;
- (4) attorney's opportunity costs in pressing the litigation;
- (5) customary fee for like work;
- (6) attorney's expectation at the outset of litigation;
- (7) time limitations imposed by the client or circumstances;
- (8) amount in controversy and results obtained;
- (9) experience, reputation and ability of the attorney;
- (10) undesirability of the case within the legal community in which the suit arose;
- (11) nature and length of the professional relationship between the attorney and client; and
- (12) fee awards in similar cases.

In re Microstrategy, Inc. Sec. Litig., 172 F. Supp. 2d 778, 786 (E.D. Va. 2001) (citing *Barber*, 577 F.2d at 226, with only minor variations).

We address each of these factors in turn:

1. Time and Labor Expended

As described above, Class Counsel effectively and efficiently litigated this action from its inception. Defendants and their counsel bitterly contested not only liability but damages. One indication of the deeply-held differences between the parties is the fact that almost one year transpired from the initial date the parties set for mediation (August 31, 2005) to the final execution of the Settlement Agreement (August 15, 2006). This delay was occasioned by the vast differences between the parties and the many technical issues that were negotiated, and finally resolved, in the Settlement.

Thus far, Class Counsel has devoted at least 1089 hours of attorney time and 772 hours of paralegal time to the vindication of the Class's interests. *Id.* ¶¶ 46-47. We estimate that up to an additional 300 hours of professional time may be required if this Court grants final approval to the Settlement, in order to see this case through to a full and final conclusion. *Id.* ¶ 49. Class Counsel have devoted considerable time and labor on this case for the benefit of the Class, and it is fair and reasonable for Class Counsel to be compensated for that effort.

2. Novelty and difficulty of the questions raised

ERISA law is a highly complex and quickly-evolving area of the law, as evidenced by the *four* notices of supplemental authority submitted by Class Counsel within a *seven-week* period earlier this year. Class Counsel are experienced in these cases, and used their extensive knowledge to prosecute this case as efficiently as possible. Even so, the complexity of the legal landscape required Class Counsel to keep up with dozens of cases being litigated across the Country, to synthesize those developments for the benefit of the Class in this case, and to take appropriate timely action.

3. Skill required to properly perform the legal services

Closely related to the preceding factor, large-scale ERISA class action litigation requires a high degree of skill and experience. The law is complex and quickly-evolving. To obtain an extraordinary result on behalf of a class, a very high level of skill is required.

The skill required by Class Counsel is reflected in the quality of opposing counsel. Here, Defendants were represented by exceptionally knowledgeable and zealous counsel; it required a great deal of skill to withstand their defense of the claims asserted.

4. Attorney's opportunity costs in pressing the litigation

While there were many times when the demands of this litigation precluded other paying work, it would be difficult if not impossible to quantify such forgone opportunities.

5. Customary Fee for like work

When plaintiffs' counsel accept a case on contingency, it is customary to charge as fees one-third (33.3%) of any amount recovered for the client. This analogy lacks power, however, because in high-stakes class action litigation, both the risks and potential benefits of litigation are accentuated. It is not clear that a normal contingent fee represents a fee for "like work." Here, a more useful comparison might be "fee award in similar cases," which is addressed below as *Barber* factor number 12.

6. Attorney's expectation at outset of litigation

At the outset of this litigation, Class Counsel expected that Defendants would present a vigorous defense. At that time, Krispy Kreme was in the midst of a blizzard of bad press, the company was facing an uncertain future, and numerous lawsuits and Government investigations were under way. Class Counsel knew from experience that companies under such pressure often dig in and fight for their lives. Class Counsel fully expected to litigate this case to final judgment on the merits, and possibly on appeal. Counsel were prepared to see this case through, even if it took several years, the expenditure of large outlays, and the consumption of a large part of our practice. Counsel expected to be rewarded for their efforts (if successful) in the form of a significant percentage of the common fund obtained for the benefit of the Class. *Copley Decl.* ¶¶ 40-43.

7. Time limitations imposed by the client or circumstances

At various times, the time demands of this case required Class Counsel to delay other important work on paying cases. The time demands of this case did not create a major hardship, but "priority work that delays the lawyer's other work is entitled to some premium." *Johnson*, 488 F.2d at 718.

8. Amount in controversy and results obtained

Class Counsel prepared some preliminary damage models and calculations are the outset of the case. Through the mediation process, Plaintiffs refined and corrected their damages models based on new information provided by Defendants. Ultimately, Plaintiffs' decision to settle was based, in part, on a damages model indicating that the Plans suffered a loss in the conservative range of \$11.7 to \$12.2 million. *Copley Decl.* ¶ 3. Thus, it is accurate to characterize the amount in controversy as between \$11.7 to \$12.2 million (exclusive of attorneys fees Defendants might become liable to pay under ERISA's fee-shifting provision).

The proposed settlement results in a \$4.75 million cash common fund for the Class and also creates additional economic value for the Class, conservatively valued at \$3.82 million in the accompanying report of Professor Krishna Ramaswamy, the Edward Hopkinson Professor of Finance at the Wharton School. *Id.* ¶ 31. Defendants' cash payment of \$4.75 million, added to the \$3.83 million in economic value directly flowing from the structural relief obtained for the Class through the Settlement, creates a total settlement value of at least \$8.57 million, which amounts to recovery of between 70-73% of the conservative loss estimate for the Class as a whole. The proposed settlement, considered as a percentage of the conservatively-estimated potential recovery, represents a highly favorable recovery for the Plans and the Class. This excellent result reflects the skill and zealous advocacy that Class Counsel provided for the benefit of the entire Class.

9. Experience, reputation and ability of the attorney

Class Counsel are very experienced in successfully handling class actions, and specifically class actions in relation to ERISA 401(k) plans. Keller Rohrback L.L.P. pioneered this area of the law with the seminal case *In re IKON Office Solutions, Inc. Securities Litig.*, 86 F. Supp. 2d 481 (E.D. Pa. 2000). It has served or is serving as Lead for the classes in numerous

ERISA fraud cases, including, among many others: *In re WorldCom, Inc. ERISA Litig.*, No. 02-4816 (S.D.N.Y.); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, No. 01-3913 (S.D. Tex.); *In re Williams Cos. ERISA Litig.*, No. 02-153 (N.D. Okla.); *In re Dynegy, Inc. ERISA Litig.*, No. 02-3076 (S.D. Tex.); *In re Global Crossing, Ltd. ERISA Litig.*, No. 02-7453 (S.D. Tex.) (served as Chair of Lead Counsel Committee); *In re Household Int'l ERISA Litig.*, No. 02-7921 (N.D. Ill.); *In re CMS Energy ERISA Litig.*, No. 02-72834, 2006 WL 2109499 (E.D. Mich.); *In re Delphi ERISA Litig.*, No. 05-70882 (E.D. Mich.); *In re Visteon Litig.*, No. 05-71205 (E.D. Mich.); *Reinhart v. Lucent Technologies Inc.*, No. 01-3491 (D.N.J.); *In re Xerox Corp. ERISA Litig.*, No. 02-1138 (D. Conn.); and *In re Goodyear ERISA Litig.*, No. 03-02182 (N.D. Ohio).

Keller Rohrback L.L.P. has recovered more than \$525 million for employees and retirees in ERISA class action cases. As further testament to Keller Rohrback's skill and experience in this area of law, its attorneys are frequently asked to present at national ERISA seminars, including those organized by the American Bar Association, Glassers, and insurance organizations. The firm's Complex Litigation Group also has extensive insurance, white collar, accounting, and securities law litigation experience, and the ability, developed through its active class action practice to manage document intensive cases, and utilize the latest electronic discovery applications in doing so. A copy of the Keller Rohrback L.L.P. firm resume describing the firm's ERISA and general class action experience is attached to the *Copley Decl.* as Exhibit E for the Court's review. As the Court is certainly aware, Lewis & Roberts P.L.L.C. is among the most distinguished firms in the Western District. Lewis & Roberts made many valuable contributions to the ultimate success of this litigation, for which they should be fairly compensated. A copy of the Lewis & Roberts firm resume describing the firm's ERISA and

general class action experience is attached to the *Copley Decl.* as Exhibit F for the Court's review.

10. Undesirability of the case within the legal community in which the suit arose

Despite the widespread coverage of Krispy Kreme in the popular and financial press in early 2005, no other law firms or claimants stepped forward to seek recovery on behalf of the Krispy Kreme ERISA plans. This lack of interest reflects that fact that this case was relatively undesirable among the plaintiffs' bar. Frankly, the Krispy Kreme ERISA plans for which Plaintiffs sought relief are relatively small ERISA plans with small asset bases and small numbers of participants. Thus, this case was much less attractive, and much riskier, than similar claims against bigger plans. Only a legal team with significant experience in ERISA class action litigation could manage this case in a cost-effective and comprehensive way. This case was not unattractive because of any moral approbation, but it was economically and logistically unattractive to any but the most experienced and specialized counsel.

11. Nature and length of the professional relationship between the attorney and client

Class Counsel did not have professional relationships with either Named Plaintiff prior to this litigation. Both Named Plaintiffs contacted Class Counsel for their specific expertise in this type of litigation.

12. Fee Awards in similar cases

In similar cases, courts commonly award percentage fees of 25% or more. *See In re ADC Telecomms., Inc. ERISA Litig.*, No. 03-2989 (D. Minn. Oct. 16, 2006) (awarding fee of 30% of \$3.25 million settlement); *In re Westar Energy, Inc., ERISA Litig.*, No. 03-4032 (D. Kan. July 27, 2006) (awarding fee of 30% of \$9.25 million settlement); *In re HealthSouth Corp. ERISA Litig.*, No. 03-1700, 2006 WL 2109484 (N.D. Ala. June 28, 2006) (awarding fee of 25% of

\$28.875 million settlement); *In re CMS Energy ERISA Litig.*, No. 02-72834, 2006 WL 2109499 (E.D. Mich. June 27, 2006) (awarding fee of 28.5% of \$28 million settlement); *Beam v. HSBC Bank USA*, No. 02-0682 (W.D.N.Y. Nov. 21, 2005) (awarding fee of 25% of \$9.35 million settlement); *Falk v. Amerada Hess Corp.*, No. 03-2491 (D.N.J. Nov. 2, 2005) (awarding fee of 25% of \$2.25 million settlement); *Russell v. Conseco Services, LLC*, No. 02-1639 (S.D. Ind. Oct. 14, 2005) (awarding fee of 25% of \$9.975 million settlement); *Furstenau v. AT&T Corp.*, No. 02-5409 (D.N.J. Oct. 14, 2005) (awarding fee of 29% of \$29 million settlement); *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 844 (N.D. Cal. 2005) (awarding fee of 25% of \$18.2 million settlement); *Fescina v. CVS Corp.*, No. 04-12309 (D. Mass. Sept. 7, 2005) (awarding fee of 27.5% of \$3 million settlement); *In re Royal Dutch/Shell Transport ERISA Litig.*, No. 04-1398 (D.N.J. Aug. 29, 2005) (awarding fee of 25% of \$90 million settlement); *In re Honeywell ERISA Litig.*, No. 03-1214 (D.N.J. July 20, 2005) (awarding fee of 25% of \$14 million settlement); *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 1002 (D. Minn. 2005) (awarding fee of 25% of \$8 million settlement); *In re Household Int'l, Inc. ERISA Litig.*, No. 02-7921 (N.D. Ill. Nov. 22, 2004) (awarding fee of 30% of \$46.5 million settlement); *Blyler v. Agee*, No. 97-00332 (D. Idaho Aug. 25, 2004) (awarding fee of 30% of \$21 million settlement); *In re Harnischfeger Indus., Inc., Sec. Litig.*, 212 F.R.D. 400 (E.D. Wis. 2002) (awarding fee of 30% of \$10.150 million settlement); *Moensch v. Robertson*, No. 92-4829, 1996 U.S. Dist. LEXIS 21898 (D.N.J. Nov. 1, 1996) (awarding fee of 35% of \$700,000 settlement). Class Counsel's request for 26% of the cash recovered for the Class is perfectly reasonable under this standard.

D. The Fairness And Reasonableness Of A 26% Percentage Fee is Confirmed By A “Cross-Check” Against Lodestar

As noted above, Fourth Circuit precedent calls for attorneys fees in common fund cases to be set as a percentage of the gross recovery. Applying the 12 *Barber* factors, it is clear that a fee constituting 26% of the cash recovery is completely reasonable under the facts and circumstances of this case. The Court could properly end its analysis at this point, and simply award attorneys fees as a percentage of the gross cash recovery (at 26%, or whatever percentage the Court deems proper). We invite the Court to do so.

We recognize, however, that the Court may choose to “cross-check” the results of a percentage-fee award against the attorneys’ “lodestar.” “Lodestar” – an alternative method of determining attorneys fees used in other settings -- 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. *Florin v. Nationsbank of Ga.*, 34 F.3d 560, 562 (7th Cir. 1994). If the two approaches lead to the same range of fee awards, the court might have greater confidence in the overall fairness of the fee determination.

Using lodestar as a cross-check, the facts show:

- Class Counsel has devoted at least 1089 hours of attorney time and 772 hours of paralegal time. *Copley Decl.* ¶ 46. On a straight-time basis (i.e., assuming that Class Counsel were charging standard hourly rates and had reasonable assurance of timely payment), this time has a market value of \$703,384.74. *Id.* ¶¶ 47-48.
- Class Counsel estimate that up to an additional 300 hours of professional time (100 hours of attorney time and 200 hours of paralegal time) may be required to complete diligent representation of the Class. *Id.* ¶ 49. On a straight-time basis this future time has a market value of approximately \$80,000. *Id.* ¶ 49.

Thus, the 26% fee award requested here (\$1,235,000), constitutes a multiplier of approximately 1.6 over the lodestar (which totals \$783,384.74). This is an exceptionally modest risk multiplier. If the fee in this case were governed by lodestar, any fee award would include a multiplier of at least 1.6 to reflect the contingent nature of the attorneys' payment. *Florin*, 34 F.3d at 565 ("a risk multiplier is not merely available in a common fund case but mandated, if the court finds that counsel 'had no source of compensation for their services'") (quoting *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992)); *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").

Indeed, a comprehensive study showed that for the years 2001 to 2003, covering 134 cases, the average risk multiplier was 4.35. Stuart J. Logan, Jack Moshman & Beverly C. Moore, *Attorney Fee Awards In Common Fund Class Actions*, 24 CLASS ACTION REPORTS 167, 197 (2003). If Class Counsel were being compensated on a lodestar basis rather than a percentage-of-recovery basis, a reasonable multiplier of 4 (or even more), would be justified, rendering a total fee in excess of \$3 million. Here, Class Counsel has agreed to cap its fee request at 26% of the gross cash recovery, which is less than half the fee suggested by a lodestar analysis. This confirms that the 26% fee is not only fair and reasonable; it is a bargain for the Class.

E. No Objections

Class Counsel's request for a 26% fee has been reviewed by more than 1000 Class members, by a sophisticated independent fiduciary, and by experts at the Department of Labor. No objections have been lodged. The lack of objection is tacit agreement that Counsel's request for payment is fair and reasonable.

II. REIMBURSEMENT OF EXPENSES

Reimbursement of reasonable costs and expenses to counsel who create a common fund is both necessary and routine. *In re Synthroid Mktg. Litig.*, (“*Synthroid I*”), 264 F.3d 712, 722 (7th Cir. 2001); *Strang v. JHM Mortgage Secs. Ltd. Partnership*, 890 F. Supp 499, 503 (E.D. Va. 1995); 1 Alba Conte, *Attorney Fee Awards* § 2:08, at 50-51 (3d ed. 2004) (“The prevailing view is that expenses are awarded in addition to the fee percentage”). 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.

Conte, *supra.*, § 2:19, at 73-74, citing *Internal Improvement Fund Trustees v. Greenough*, 105 U.S. 527 (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.*

Class Counsel have advanced or incurred more than \$87,433.32 in expenses to date.³ Because these expenses were advanced with no guarantee of recovery, Class Counsel had a strong incentive to keep them to a reasonable level. Class Counsel has provided the Court with a detailed summary of the expenses advanced. *Copley Decl.* ¶ 50. The lion’s share of these costs – about \$38,000 – was spent on an expert consultant and an expert witnesses, who helped with

³ This figure excludes the expense of issuing class notice, which the Court has already Ordered to be paid from the Settlement Fund. Findings and Order Preliminarily Certifying a Class for Settlement Purposes, Preliminarily Approving Proposed Settlement, Approving Form and Dissemination of Class Notice, and to Set Hearing on Final Approval ¶ 8, dated September 27, 2006.

analysis of the facts underlying the Complaint and valuation of the structural relief obtained as part of the Settlement.

The other expenses advanced by Counsel were also reasonable and necessary, including photocopying/duplication of electronic media (approximately \$3,580), travel (approximately \$14,600), Lexis/Westlaw charges (approximately \$10,000), paying the mediator (approximately \$14,800), and lesser amounts for postage, telephone, service of process, and other routine costs of litigation. *Id.*

In light of the nature of this litigation, 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.

Class Counsel's request for expense reimbursement has been reviewed by more than 1000 Class members, by a sophisticated independent fiduciary, and by experts at the Department of Labor. No objections have been lodged. The lack of objection is tacit agreement that Counsel's request for payment of expenses in any amount up to \$110,000 is fair and reasonable.⁴ Class Counsel's request for reimbursement of actual expenses incurred to date totaling \$87,433.32 should be approved.⁵

III. NAMED PLAINTIFF CASE CONTRIBUTION AWARDS

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, which often includes providing

⁴ The Class Notice advised the Class that Class Counsel would seek no more than \$110,000 for reimbursement of expenses.

⁵ Should material additional expenses be incurred by Class Counsel during the claims process, Class Counsel shall file a subsequent application for reimbursement with the Court. In no case, would additional expenses bring the total above the noticed amount.

information to counsel, reviewing and approving pleadings, assisting with discovery, preparing for and/or attending a deposition, and participating in settlement discussions. Such awards to class representatives generally are paid out of the common fund recovery, and that is what Plaintiffs suggest here.

Such awards are the norm in class action common fund cases. “Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.” *In re S. Ohio Corr. Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997) (adding that incentive awards are “not uncommon in class action litigation and particularly where, as here, a common fund has been created for the benefit of the entire class”). *See also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (affirming grant of incentive awards in securities class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (approving \$25,000 incentive award in an ERISA class action); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (granting incentive awards to class representatives for contributing to case); *Linney v. Cellular Alaska P’ship*, No. 96-3008, 1997 WL 450064, at *7 (N.D. Cal. July 18, 1997) (awarding class representative \$25,000 and noting that incentive fees “serve much the same function as attorneys’ fees do in the class action context: they provide the economic incentive necessary to ensure that meritorious actions are prosecuted”); *Spicer v. Chi. Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1234 (N.D. Ill. 1993) (\$20,000 awarded to class representatives); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250-51 (S.D. Ohio 1991) (finding class representatives entitled to incentive awards in the amount of \$50,000 each).

Here, the Named Plaintiffs were directly involved in the prosecution of the case, and consulted throughout with Plaintiffs’ Counsel to advance the interests of the Class. Their

initiative, time and effort were essential to the successful prosecution of the case and resulted in a significant recovery for the Class. Their efforts should each be recognized by an incentive award of \$15,000 each.

Class Counsel's request that the named plaintiffs receive case contribution awards of \$15,000 each has been reviewed by more than 1000 Class members, by a sophisticated independent fiduciary, and by experts at the Department of Labor. No objections have been lodged. The lack of objection is tacit agreement that this request is fair and reasonable.

IV. CONCLUSION

For all the reasons given above and in the supporting documentation submitted herewith, Plaintiffs respectfully request that the Court:

(1) Award Class Counsel attorneys fees in the amount of \$1,235,000 (which represents 26% of the cash recovery obtained by the Class), to be paid from the common fund established for the Class;

(2) Award Class Counsel \$87,433.32 as reimbursement of expenses actually and reasonably incurred for the benefit of the Class, to be paid from the common fund established for the Class;

(3) Award each named plaintiff -- Mr. Paul Smith and Mr. Alfie Carter -- \$15,000 as a case contribution award, to be paid from the common fund established for the Class.

Respectfully submitted this 6th day of November, 2006.

/s/ T. David Copley

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U.S.D.C., M.D.N.C.
Case No. 1:05 CV 00187 (WGB)

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