UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: COMMODITY EXCHANGE, INC., GOLD FUTURES AND OPTIONS TRADING LITIGATION *This Document Relates To All Actions*	Case No. 14-MD-2548 (VEC) 14-MC-2548 (VEC) Hon. Valerie E. Caproni

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, LITIGATION EXPENSES, AND INCENTIVE AWARDS

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William B. Rubenstein, *Newberg on Class Actions*, § 15:80 (5th ed. 2021) 20, 21, 23

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Herbert M. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DePaul L. Rev. 267 (1998) 10

John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997, 2010 (2015)......................... 9

PRELIMINARY STATEMENT

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Co-Lead Counsel respectfully move for an award of attorneys' fees and payment of litigation expenses from the common fund.[1] This case has its roots in Co-Lead Counsel's investigative efforts, working with industry and economic consultants, in early November 2013. The case likely would not exist without the investments and hard work of counsel, their consultants, and Plaintiffs alike.

Co-Lead Counsel did not just get the case off the ground, we vigorously litigated the case for over seven years. Indeed, the complexity of this case cannot be understated, as aptly demonstrated both by the case's length and the amount we have had to invest in out-of-pocket expenses. As a result of the hard work and skill of Co-Lead Counsel, and our strategic choice to settle at key points in the case—at the dismissal stage, prior to depositions, and the final one after the factual record was set—the Settlement Class is in line for substantial monetary recoveries. As the Second Circuit has explained:

> [O]ne whose labors produce a favorable result deserves adequate recompense. Such a notion is particularly applicable in the area of the antitrust class action, which depends heavily on the notion of the private attorney general as the vindicator of the public policy. In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation.

Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc., 481 F.2d 1045, 1050 (2d Cir. 1973).

We respectfully submit that our $16,640,000 request plus interest—bringing our total fees to 29.5% of the case recoveries—is fair and reasonable. This request is supported by this Circuit's standards for evaluating fee applications and by fee awards used in other complex antitrust litigation with comparable recoveries.

[1] All capitalized terms not otherwise defined herein have the meanings set forth in the Stipulations and the Joint Declarations.

Our fee request is also strongly supported by the lodestar "cross-check." As before we have calculated our investment in the case pursuant to a very conservative methodology that uses, for example, discounted rates and is limited only to Co-Lead Counsel's work. Even our request is granted our total fee awards would still only represent a "multiplier" of just 0.945 compared to our total lodestar as calculated using a very conservative set of rate rules. Meaning, we are still getting *less* than our fee investment, even as measured at below-market rates.

We also respectfully request that $2,091,999.60 in additional litigation expenses be reimbursed, plus interest. As before, almost all of these expenses arise out of the work of our non-testifying expert consultants.

Finally, the contributions of certain Plaintiffs warrant reasonable incentive awards. Each expended considerable time and resources in fulfilling their duties as proposed class representatives, without any guarantee of recovery. Without their involvement, this litigation would not have occurred, and important public policies would have gone unenforced.

STATEMENT OF FACTS

All of our work contributed to the Third Settlement Agreement. However, we will try to be brief with respect to the work already discussed in our first fee application, ECF No. 565, and our first joint declaration, ECF. No. 569 (the "2021 Joint Decl."). Details for the period after November 2020 are in the accompanying second joint declaration (the "2022 Joint Decl.").

Co-Lead Counsel's work at the pleading stage is described more fully in the 2021 Joint Declaration, Section I.A. Our investigation began in 2013, even before the government investigations or reports had been made public. Throughout 2014 and into 2017, the complaint was filed and amended, and the parties briefed, held oral argument, and filed supplemental authority papers on Defendants' motions to dismiss. Co-Lead Counsel and our non-testifying

expert consultants also worked in this time period to successfully amend the pleading to bring the early-year claims back into the case after being dismissed by the Court's first order.

Co-Lead Counsel's written discovery work is described more fully in the 2021 Joint Declaration, Section I.B, and the 2022 Joint Declaration, Section I.C. Throughout the discovery process, there have been delays and multiple battles with Defendants over even the simplest of tasks. Even focusing just on the period prior to November 2020, negotiations over discovery issues required over 400 formal discovery communications between the parties, as well as countless informal conversations and e-mail communications, and numerous discovery motions. Defendants alone produced over 15 million pages of documents and 8,000 audio files.

Understanding such a large effort required massive investments in time and resources, and these efforts continued after November 2020. For example, Co-Lead Counsel expended significant time trying to work with Defendants and CME in order to identify Defendants' trades in CME's data. Co-Lead Counsel continued to review documents, including in connection with deposition preparations. And Co-Lead Counsel even served new discovery, such as Requests for Admission and Interrogatories.

Co-Lead Counsel's work during deposition discovery is described more fully in the 2022 Joint Declaration, Sections I.A and I.B. Co-Lead Counsel took 26 Defendant and third-party witnesses. Even the scheduling of these depositions took sustained effort—one deposition was first noticed in October 2020 but after a series of interventions, requests, objections, and extensions, did not take place until April 2021. The Rule 30(b)(6) notices were even more fraught with conflict. One did not occur until the last day of fact discovery. Co-Lead Counsel were also responsible for the overall preparation and defending of the depositions of class

representatives. This process included additional document-review processes, as well as conferring with each witness numerous times to go over anticipated lines of inquiries.

Co-Lead Counsel's work with our consultants and experts is described more fully in the 2021 Joint Declaration, Sections I.C and III.B, and in the 2022 Joint Declaration, Sections I.D and I.E. The operative Third Amended Complaint includes 180 paragraphs regarding statistical analyses. Both through correspondence and then motion practice, Defendants waged a series of "discovery" battles over their disagreement with the pleading-stage analysis. This continued past November 2020, as we had to again defend the accuracy of the complaint and produce materials, and also had to confer and then brief a dispute regarding whether the non-testifying expert consultants should be deposed.

Co-Lead Counsel also worked with non-testifying expert consultants during the discovery process—most particularly, regarding the data produced by Defendants and the CME. Over 600 million data records, many with over 100 fields of information about each record, were gathered and analyzed. The work on gathering and understanding these records also continued past November 2020.

While the Third Settlement Agreement was reached before expert reports were due, Co-Lead Counsel, Plaintiffs' non-testifying expert consultants, and Plaintiffs' potential testifying expert were all also working hard towards that eventual deadline. The groundwork was laid in earlier data-gathering efforts, but over time the projects became more and more also about turning the data into potential models, theories, and case strategies. All this preparation for expert discovery included extensive consideration of the ways the data could potentially be used to assist in showing conspiratorial conduct, measuring its impact, and translating that into a class-wide damages model. Trying to turn all the data we had into a workable and persuasive

model was, of course, a monumental undertaking. Complicating matters, we were also trying to line the data up across multiple sources—CME data, Defendants' data, audio recordings, and trading records could each give a view of the events of even just one day.

ARGUMENT

I. CO-LEAD COUNSEL'S FEE REQUEST IS FAIR AND REASONABLE

"Attorneys whose work created a common fund for the benefit of a group of plaintiffs may receive reasonable attorneys' fees from the fund." *See In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *16 (S.D.N.Y. Apr. 26, 2016) ("*CDS*"). Awarding reasonable attorneys' fees from the common fund recognizes and compensates Co-Lead Counsel's efforts in bringing and prosecuting this case, and advances the purpose of the antitrust laws, which rely on private actions like this one to further important public-policy goals. Without "adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation." *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2011 WL 2909162, at *6 (E.D.N.Y. July 15, 2011).

Ultimately, "market rates" are the "ideal proxy" for an attorney's compensation. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). The percentage method provides "appropriate financial incentives" necessary "to attract well-qualified plaintiffs' counsel who are able to take a case to trial," while also "directly align[ing] interests of the class and its counsel" by providing "a powerful incentive for the efficient prosecution and early resolution of litigation." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355, 359 (S.D.N.Y. 2005).

A. The Fee Request is Reasonable Under the *Goldberger* Factors

1. Co-lead Counsel invested substantial time and resources

Over 119,000 hours by Co-Lead Counsel's attorneys and professional support staff, and over $10 million in expenses, have been invested in connection with the case. Such investments

were required because of the complexity of the case, and its length—it was almost four years from the start of our investigation to when Defendants filed their first answers, and fact discovery did not end until over seven years after the start of our investigation. *See In re Aetna Inc. Sec. Litig.*, 2001 WL 20928, at *14, *16 (E.D. Pa. Jan. 4, 2001) (awarding 30 percent of settlement fund where "the course of this litigation was prolonged, having been actively litigated for nearly three years, and involved complex issues"). As in the Statement of Facts above and in the Joint Declarations, every step in that abnormally long history required constant interaction between attorneys and industry and other non-testifying expert consultants. Beyond the value created for the Settlement Class by way of the settlements, all this work both gave counsel sufficient knowledge to assess what the case was worth. All our work also confirms the requested fee comes nowhere close to creating a "windfall" situation.

2. The case is incredibly complex

"[C]lass actions have a well-deserved reputation as being most complex," *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998), with antitrust cases being among the most "complex, protracted, and bitterly fought," *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 669 (S.D.N.Y. 2015). In cases that require more expertise, a larger percentage of the fund should be awarded to the lawyers who can competently prosecute the case. *See In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 379 (S.D.N.Y. 2013) ("The upshot is that the magnitude and complexity of the litigation also weigh in favor of a significant award.").

As confirmed by Professor Charles Silver, the many millions of out-of-pocket expenses incurred to gather, process, understand, and analyze the massive amounts of data in this case speaks to the case's complexity. *See* ECF No. 568 ("Silver Decl.") ¶¶ 66-71. More generally, all the same facts discussed above also demonstrate that this case was a prime example of a complex and risky case. Not only did the case go on for many years, but the conspiracy at issue

now goes back over 17 years into the past, and the market for gold-related investments span not just hundreds of billions of dollars, but many different instrument types. Defendants argued, and would have kept arguing, these and other facts complicate—in their view, defeat—the alleged motive, means, and effectiveness of the conspiracy. And as detailed in the Joint Declarations, every issue, large and small, turned into a dragged-out battle.

For all these reasons, a fee award that accounts for the prosecution of litigation that was "extraordinary in both complexity and scope" is appropriate. *In re Holocaust Victim Assets Litig.*, 2007 WL 805768, at *46 (E.D.N.Y. Mar. 15, 2007). *See also NASDAQ*, 187 F.R.D. at 477 ("There can be no doubt that this class action would be enormously expensive to continue, extraordinarily complex to try, and ultimately uncertain of result.").

3. The case involved substantial risk

The Second Circuit has "historically labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement." *Goldberger*, 209 F.3d at 54. Co-Lead Counsel took this case on a fully contingent basis. *See* 2022 Joint Decl. ¶ 84. "Counsel should be rewarded for undertaking [those risks] and for achieving substantial value for the class." *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 441 (E.D.N.Y. 2014).

At the outset of our investigation, Co-Lead Counsel had little to go on but the review of the publicly available data—and by the dismissal stage Defendants were touting letters received about the closing of investigations against them. *See* Apr. 20, 2016 Tr. at 15:13-16:2. Co-Lead Counsel thus were investing resources into this case both before the government was known to be acting and were investing even more heavily well after the government's own resources were directed elsewhere. This not only demonstrates the increased risk of this case, but also the importance of the role of private attorneys general to the nation's antitrust laws. *See* Section

I.A.6 below; Silver Decl. ¶¶ 72-76 ("Private law firms . . . can supplement and even take the place of public enforcers because they use the dollars they take in to maintain their capacities."); *Payment Card*, 991 F. Supp. 2d at 441 (finding fact plaintiffs "did not piggyback on previous government action" to weigh in favor of fee award).

More generally, as expounded upon in Sections I.D.1.b and I.D.1c of the concurrently filed motion for final approval to the Third Settlement Agreement, one need look no further than the Court's first two substantive rulings to appreciate the riskiness of this case: the Court determined that Plaintiffs "clear the plausibility standard, *albeit barely*." *In re Commodity Exch., Inc.*, 213 F. Supp. 3d 631, 659-60 (S.D.N.Y. 2016) (emphasis added). Other parts of the Court's orders identified many of the risks in trying to move from "barely" stating a plausible claim to a large jury award.

For instance, the Court presaged the "battle of the experts" by warning Plaintiffs about "lies, damn lies, and statistics." *Id.* at 641. Years later, the possibility the pleading stage would be revisited based on a threatened Rule 11 motion was still out there. *E.g.* ECF No. 557. In its dismissal ruling, the Court also allowed the complaint to survive because at least "some" Plaintiffs had standing, though the Court had "grave doubts" about the scope of the case. *In re Commodity Exch., Inc.*, 213 F. Supp. 3d at 659. As time passed, the risks of the standing issue also grew. *See, e.g.*, *Schwab Short-Term Bond Market Fund v. Lloyds Banking Group plc*, 22 F.4th 103, 114 (2d Cir. 2021) (limiting standing in the LIBOR benchmarking context).

The Court also, among other things, pointed out the lack of government enforcement activity, downplayed the relevance of the structure of the Fixing itself, rejected many of Plaintiffs' statistical analyses, left the door open to renewed timeliness challenges, and found the "chat" evidence Plaintiffs proffered unpersuasive. *In re Commodity Exch., Inc.*, 213 F. Supp. 3d

at 661-62, 664, 676; *In re Commodity Exch., Inc.*, 328 F. Supp. 3d 217, 222-23, 225-26 (S.D.N.Y. 2018). Finally, we note that Defendants also intended to have the Court consider "the extraterritoriality of Plaintiffs' claims." *See* ECF No. 570 at 5 n.4. If anything, Plaintiffs' risk heightened during the history of this case here, too, with court decisions such as *Prime International Trading Ltd v. BP PLC*, 937 F.3d 94, 103 (2d Cir. 2019), which found that the presumption against extraterritorially had "not been displaced" even with respect to "serious claims premised on manipulation, fraud, and deceit."

4. Co-Lead Counsel provided high-quality representation

"[T]he quality of representation . . . may be measured in large part by the results that counsel achieved for the classes." *Payment Card*, 991 F. Supp. 2d at 441. As a general matter, Co-Lead Counsel are among the most experienced and skilled antitrust and class action litigators in the country. Each firm has led several prior mega-fund cases involving the financial markets and have tried class action cases, and the attorneys running the case are highly qualified litigators. *See* ECF No. 566 Ex. C & ECF No. 567 Ex. D (sample firm and attorney resumes).

This factor is also met because of the fact that Co-Lead Counsel obtained $152 million for the benefit of the Settlement Class. A study has found that the median full-case antitrust recovery is 19% of single damages.[2] Thus, Co-Lead Counsel would have had to survive until trial and then establish a recoverable single-damages figure of $800 million before the case recovery Co-Lead Counsel managed to secure by settlements would be behind the median recovery rate. Given the many risks standing between Plaintiffs and such a huge jury verdict, recovering $152 million while facing aggressive, well-funded Defendants represented by top-flight counsel is not just a testament to the merits of the Settlements, but also the skill with which

[2] *See* John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997, 2010 (2015).

Co-Lead Counsel have prosecuted this case. *See Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *22 (S.D.N.Y. Sept. 9, 2015) ("The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work."); *NASDAQ*, 187 F.R.D. at 489 (approving fee award where defense counsel included "the nation's biggest and best defense firms operating on a seemingly unlimited budget over a period of four years").

5. *The effective percentage being requested is at or below the applicable norms*

Again, "market rates" are the "ideal proxy" for an attorney's compensation. *Goldberger*, 209 F.3d at 50. Years of study "shows that claimants typically agree to pay contingent fees in the range extending from 33 percent to 40 percent, even when sophisticated clients hire lawyers to handle complex commercial lawsuits with the potential to generate enormous recoveries." Silver Decl. ¶ 35.[3] Co-Lead Counsel's request—to be paid 29.5% of the case recoveries—is below the "proxy" of what a privately negotiated contingency fee would have likely provided for in a case of this size, complexity, and risk. Though it risks deviating from the "ideal proxy" of privately negotiated agreements, courts of course do often also want to often know what other courts are doing. Courts recognize that large, complex antitrust cases present considerable risk and require extensive work. As a result, courts often award fees at or even above the percentage requested here, even in cases with as large or even larger recoveries than Plaintiffs' here.[4]

[3] *See also* Silver Decl. ¶¶ 20-24 (33% in large pharmaceutical cases), 47 ("broad agreement that in most types of plaintiff representations contingent fees range from 30 percent to 40 percent of the recovery," with higher percentages in cases where "costs and risks" are great), 50-52 (survey of patent cases), 53-58 (survey of other large complex actions), 59 (named plaintiffs), 83 (in Second Circuit, out of 116 cases median fee percentage of 30%); Herbert M. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DePaul L. Rev. 267, 286 (1998) (reporting the results of a survey of Wisconsin lawyers, which found that "[o]f the cases with a [fee calculated as a] fixed percentage [of the recovery], a contingency fee of 33% was by far the most common, accounting for 92% of those cases").

[4] *See, e.g.*, *In re Urethane Antitrust Litig.*, 2016 WL 4060156, at *8 (D. Kan. July 29, 2016) (awarding 33.33% of $835 million settlement); *In re CRT Antitrust Litig.*, 2016 WL

6. Public policy supports approval of the fee request

Public policy also strongly supports the requested fee award. Without private counsel taking on the risk of this lawsuit, and having the skill and resources to use consultants and other sources to uncover and then pursue the claims vigorously, the Settlement Class would have recovered nothing, and important public interests would not have been vindicated. *See CDS*, 2016 WL 2731524, at *18 ("It is important to encourage top-tier litigators to pursue challenging antitrust cases . . . . Our antitrust laws address issues that go to the heart of our economy.").

Again, at the outset of our investigation, Co-Lead Counsel had little to go on but the review of the publicly available data—and by the dismissal stage Defendants were touting letters received about the closing of investigations against them. *See* Apr. 20, 2016 Tr. at 15:13-16:2. Co-Lead Counsel's efforts—which including probing the Fixing rules, the way the Fixing was actually carried out, and even analyzing many hours of audio files—are the only way allegedly injured investors will receive any compensation. This case is thus a prime example of why

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183285, at *2-*3 (N.D. Cal. Jan. 14, 2016) (awarding 30% of $127.5 million settlement); *Klein v. Bain Capital Partners, LLC*, No. 1:07-cv-12388, Dkt. No. 1095 (D. Mass. Feb. 2, 2015) (awarding 33% of $590.5 million antitrust settlement); *In re Polyurethane Foam Antitrust Litig.*, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015) (awarding 30% of $147.8 million settlement); *Standard Iron Works v. Arcelormittal, et al.*, No. 1:08-cv-05214, Dkt. No. 539, at 5 (N.D. Ill. Oct. 22, 2014) (awarding 33% of $164 million settlement); *In re Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at *6 (E.D. Tenn. May 17, 2013) (awarding one-third of $158 million settlement fund); *In re TFT-LCD (Flat Panel) Antitrust Litig*., 2013 WL 1365900, at *20 (N.D. Cal. Apr. 3, 2013) (awarding 28.6% of $1.08 billion settlement); *In re Checking Acct. Overdraft Litig*., 830 F. Supp. 2d 1330, 1358 (S.D. Fla. 2011) (awarding 30% of $410 million settlement); *In re Initial Pub. Offering Sec. Litig*., 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33.3% of $510 million settlement); *Allapattah Servs., Inc. v. Exxon Corp*., 454 F. Supp. 2d 1185, 1241 (S.D. Fla. 2006) (awarding 31.33% of $1.06 billion settlement); *In re Linerboard Antitrust Litig., 2004 WL 1221350*, at *19 (E.D. Pa. June 2, 2004) (awarding 30% of $202 million settlement fund); *In re Oxford Health Plans, Inc. Sec. Litig.*, 2003 U.S. Dist. LEXIS 26795, at *13-*14 (S.D.N.Y. June 12, 2003) (awarding 28% of $300 million settlement); *In re Vitamins Antitrust Litig*., 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (awarding 34.06% of $365 million settlement).

public policy favors enforcement of the antitrust laws through suits by private attorneys general.[5] Awarding a reasonable percentage of the common fund properly motivates zealous enforcement of the antitrust laws and incentivizes skilled counsel to bring meritorious cases even where, at the outset, the prospect of any recovery is uncertain. *Cf. WorldCom*, 388 F. Supp. 2d at 359 ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."). Accordingly, public policy supports Co-Lead Counsel's requested fee.

B. The Fee Request is Reasonable Under the Lodestar Cross-Check

"[W]here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50. The cross-check in this case strongly support Co-Lead Counsel's fee request, both because it confirms Co-Lead Counsel are in no way receiving a "windfall" and because it confirms that the complexity and risk factors discussed above are strongly in favor of our application.

Courts recognize providing fee awards beyond standard hourly rates is necessary to incentivize attorneys to take cases despite the risks inherent in contingency-fee arrangements. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974) ("No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success."), *abrogated on other grounds by Goldberger*, 209 F.3d 43. *See also In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (appropriate to take this contingent fee risk "into account in determining the appropriate fee to award"); Silver Decl.

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[5] *See F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013) (noting the "fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws"); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) (emphasizing "the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws").

¶ 94. A large survey has found that the mean multiplier for fees in the Second Circuit was 1.93, while the mean multiplier for awards for antitrust cases was 1.61. Silver Decl. ¶ 93. But courts often award even higher multipliers where the facts—particularly, the risks—support it. *See Mary Jennifer Perks v. TD Bank, N.A.*, No. 18-cv-11176, Dkt. No. 127 at 6 n.3 (S.D.N.Y. May 9, 2022) (Caproni, J.) ("A 2.97 multiplier is broadly within the normal range of attorneys' fees in class action settlements.") (citing favorably *Sewell v. Bovis Lend Lease, Inc.*, 2012 WL 1320124, at *13 (S.D.N.Y. Apr. 16, 2012) ("Courts commonly award lodestar multipliers between two and six.")).[6]

Here, Co-Lead Counsel's attorneys and professional support staff collectively spent over 119,000 hours on this matter. Co-Lead Counsel turned this into a fees-equivalent using a very conservative methodology that included, for instance, certain rate discounts, freezes, and growth caps, as described in our prior fee submissions. This all means the "rates" being used are far below market. *See generally* Silver Decl. ¶¶ 90-92 (discussing datapoints as to hourly rates, finding rates used here to be "clearly reasonable"). We also calculate the lodestar based entirely on Co-Lead Counsel's work.[7] Using this conservative methodology, Co-Lead Counsel had invested the equivalent of $47,424,337 in attorney and staff hours through March 2022. *See* 2022 Joint Decl. Section III.A.

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[6] *See also, e.g.*, *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Asare v. Change Group of N.Y., Inc.*, 2013 WL 6144764, at *19 (S.D.N.Y. Nov. 18, 2013) ("Typically, courts use multipliers of 2 to 6 times the lodestar."); *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *13 (S.D.N.Y. May 9, 2014) (noting that "lodestar multiples of over 4 are awarded by this Court"); *CDS*, 2016 WL 2731524 at *17 (awarding fees equivalent to a lodestar "multiple of just over 6"); *In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, at *27 (S.D.N.Y. Nov. 26, 2002) ("Here, the resulting multiplier of 2.09 is at the lower end of the range of multipliers awarded by courts within the Second Circuit.").

[7] No commitments have been made, but we may provide a portion of any fee award to certain firms who provided assistance at the request of Co-Lead Counsel.

If our current fee request is granted, the "multiplier" for all of our case fee awards compared to all of our lodestar would be only 0.945. In other words, Co-Lead Counsel are asking for *less* than our lodestar, even when calculated using very conservative methodologies. This is, clearly, not a windfall situation. In connection with our original fee request, which had a multiplier of 0.71, Prof. Silver noted that "judges presiding over antitrust cases with mega-fund settlements . . . have often awarded multipliers far larger." Silver Decl. ¶¶ 95. Indeed, Prof. Silver said the 0.71 multiplier "by ordinary standards is minuscule," *id.* ¶ 88, and "nearly unheard of in settlements of this magnitude," *id.* ¶ 93. We submit these same points apply to the similarly sized 0.945 multiplier in this application.

And, again, these calculations are made on an incredibly conservative basis. Our actual rates have gone up significantly in the past eight years, creating an increasing gap as compared to those used for the above calculations. If calculations were run using our rates used with clients paying by the hour, using our rates contemporaneous for the work performed, we approximate our lodestar calculation would show a "multiplier" of 0.86. And if we instead used our *current* rates projected backwards for all the work in the case—which courts allow to compensate for the delay in payment[8]—we approximate the calculation would show a "multiplier" 0.57.

C. The Fee Request is Below That Negotiated for by Co-Lead Counsel's Clients

As discussed in Section I.A above, the "ideal proxy" for a reasonable fee, *Goldberger*, 209 F.3d at 50, are market rates. Another fact supporting Co-Lead Counsel's request, then, is that the 29.5% full-case fee would be below the terms negotiated for by our own sophisticated clients. None of the retention agreements entered into by Co-Lead Counsel limit our fees to a

[8] *See, e.g.*, *Reiter v. MTA Ne w York City Transit Auth.*, 457 F.3d 224, 232 (2d Cir. 2006) (lodestar should be calculated using "current rather than historic hourly rates"); *Murray v. Weinberger*, 741 F.2d 1423, 1433 (D.C. Cir. 1984) (using current market rates to calculate the lodestar figure "may counterblance the delay in payment"); *E.F. ex rel. N.R. v. New York City Dep't of Educ.*, 2012 WL 5462602, at *2 (S.D.N.Y. Nov. 8, 2012) (same).

lower percent of the recoveries, with many instead allowing a 33 request. *See* 2022 Joint Decl. III.A. Fees negotiated specific to a case can be seen as "the best indication of the actual market value of counsel's services." *In re Comverse Tech., Inc. Sec. Litig.*, 2010 WL 2653354, at *4 (E.D.N.Y. June 24, 2010) (negotiated fee "is the best indication of the actual market value of counsel's services"); *see also CDS*, 2016 WL 2731524, at *17 (citing approvingly privately negotiated fee schedule even where court would otherwise have found the requested award to be "generous" given the lodestar multiplier was over 6).

D. Our Case Fees Should Be Viewed On a Holistic Basis

In our discussion above, we discuss the percentage of our fee as being [full case fees / full case recoveries], and our lodestar multiplier as being [full case fees / full case lodestar]. This is because "courts typically base fee awards in subsequent settlements on all work performed in the case," recognizing that "the total work performed by counsel from inception of the case makes each settlement possible." *In re Capacitors Antitrust Litig.*, 2018 WL 4790575, at *6 (N.D. Cal. Sep. 21, 2018). *See Lobatz v. U.S. West Cellular of California*, 222 F.3d 1142 (9th Cir. 2000) (rejecting argument that lodestar should have been limited to hours spent following approval of earlier settlement); *In re Automotive Parts Antitrust Litig.*, 2020 WL 5653257, at *3 n.5 (E.D. Mich. Sep. 23, 2020) (reviewing "total fees" against the "overall lodestar"; "it would be impractical to compartmentalize and isolate" work done for one settlement versus another).[9]

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[9] *See also In re Mun. Deriv. Antitrust Litig.*, 2016 WL 11543257, at *1 (S.D.N.Y. July 8, 2016) (awarding fees across multiple settlements; underlying submissions had shown overall recoveries and overall lodestar); *Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd.*, 2015 WL 6964973, at *1, *3, *7 (E.D.N.Y. Nov. 10, 2015) (performing cross-check using cumulative lodestar from case inception through mid-August 2015 in evaluating interim fee request relating to eleven settlements that received preliminary approval from October 2013 through April 2015); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2015 WL 5918273, at *1, *6 (E.D.N.Y. Oct. 9, 2015) (performing cross-check using cumulative lodestar that ran through and even past multiple settlements); *see generally In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002, Dkt. No. 1570 at 1, n.1 & Dkt. No. 1537-1 at 2, 5, 19-20 (E.D. Pa. Nov. 20,

That is, we submit that taking a holistic view of the case is the fairest way to determine whether our fee request would result in a reasonable fee and appropriate incentives, or if instead our fee request would result in a "windfall."[10] This is because the Third Settlement Agreement could not exist without the earlier work. This is also because policy favors paying attorneys *more* than their standard rates in order to incentivize the taking on the risk inherent in any contingency-fee case. So a prior fee award does not necessarily "true up" the accounts the way a client paying an invoice on an hourly-fee engagement does. The holistic view also accords with the fact that the risks to us or class members did not disappear in November 2020 merely because we filed our first fee motion then.

Finally, the holistic approach is preferable because of the arbitrary results that an alternative piecemeal approach could yield. Under a deal-by-deal approach, two attorneys who did the same work, for the same number of years, achieving the same results, could end up being paid differently based on the fluke of the timing of their respective fee requests, or based on which attorney was more strategic in where to cut off and begin the calculations. This is not only illogical, it would encourage wasteful gamesmanship and thus create disputes over where the lines should be drawn. And none of those differences or fights would benefit class members. In short, a piecemeal approach to the calculations would undermine the very public policy goals fee awards are designed to achieve. *See In re Southeastern Milk Antitrust Litig.*, 2013 WL

2017) (approving cross-check using cumulative lodestar from inception through June 2017 for December 2016 settlement and noting that "[i]n calculating a lodestar award to evaluate a settlement . . . courts may include the time spent by counsel performing tasks that are not directly related to the settlement").

[10] This is identical to the approach used in the first fee application, in that we did not seek to divide between "Deutsche Bank" work or fees versus "HSBC" work or fees. *See* ECF No. 565 at 18. *See also generally In re Wells Fargo Collateral Protection Ins. Litig.*, 2019 WL 6219875, at *6 (C.D. Cal. Nov. 4, 2019) (citing Justice Kagan and Justice O'Connor in support of "holistic" approach to fees where court seeks to do "rough justice").

2155387, at *6 (E.D. Tenn. May 17, 2013) (rejecting objection that it constituted "double billing" to assess fees on a full-case basis; settlement-by-settlement calculations would be "flawed from a policy perspective" because they would distort incentives of attorneys and would "effectively eliminate consideration of the risk taken by counsel").

Even though we submit a holistic approach should govern whether our fee request is reasonable or a windfall, in fact even calculations based on a piecemeal approach support our current application. Our initial fee award of $28,200,000 was submitted as against $39,722,235 in (discounted) lodestar associated with work performed prior to November 10, 2020. *See* 2021 Joint Decl. ¶ 144. Thus, even if we were only entitled to recover our (discounted) hourly fees for pre-2020 work—which is not the law[11]—we would still have $11,522,235 in unpaid "bills" from the earlier part of the case. Combined with the later work which was not previously submitted at all, again even using our discounted historical rates, we currently have a combined uncompensated-for-work in this case of $19,224,337 ($11,522,235 in uncompensated lodestar from the earlier period plus $7,702,102 in new work). Even in this view, the lodestar multiplier for this application using the discounted rate structure would still only be 0.87 ($16,640,000 fee request / $19,224,337 uncompensated lodestar = 0.8656), which again shows we are getting less than our investment.[12]

E. <u>The Request is Reasonable Despite Departing From the Fee Schedule Envisioned in our 2014 Leadership Application</u>

Co-Lead Counsel's 2014 leadership application states that we "envision[ed]" being paid pursuant to the sliding-scale fee approach in *Payment Card*, 991 F. Supp. at 445. The current fee

[11] As discussed above, class counsel are routinely granted awards *above* even their *current market* rates, including without limitation to compensate for the taking on of risk.

[12] Our fee request is reasonable even if viewed (improperly, we submit) solely in light of the work performed after November 2020, including because of the changing risk profile of the case even as we continued to be called upon to make investments during the complex deposition phase of the case, heading into the even-more-complex expert phase.

application, if granted, would result in a full-case fees of $44,840,000, which is $6,640,000 (17.4%) higher than the $38,200,000 full-case fees under the *Payment Card* scale. However, we respectfully submit that the reasonableness of our fee request should be judged by the facts as they actually exist today, not what they were predicted to be in 2014.[13]

Courts recognize that on appropriate facts fee awards can depart from leadership-stage representations, where the circumstances warrant. *See In re Optical Disk Drive Products Antitrust Litigation*, 959 F.3d 922, 933-34 (9th Cir. 2020) (district court is not "bound" to counsel's leadership "bid"; remanding for consideration of whether to "adjust fees upward" from leadership bid);[14] *In re Cedant Corp. PRIDES Litig.*, 243 F.3d 722, 736 n.18 (3d Cir. 2001) (reversing fee award that overly relied on leadership application scale; "though the result of a bidding process may be of use to a district court in awarding fees at the end of the case, it cannot supplant post-settlement analysis to determine a reasonable fee"); *Raftery v. Mercury Fin. Co.*, 1997 WL 529553, at *2 (N.D. Ill. Aug. 15, 1997) (while encouraging competitive-but-realistic bids, acknowledging that court "is in a position to adjust the fee at the end of the case should it appear that the agreed fee is no longer reasonable").

The many twists, turns, and extensions of this case are summarized in our Joint Declarations, and include among other things: how our pleading-stage statistical work turned

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[13] Though we took our representations seriously and had every intention of sticking to the scale, that our application expressly refers only what we "envision[ed]" eventually requesting as a fee award supports our current request for an award that would take us above that scale. That is, we recognized even in 2014 that future twists could justify different results.

[14] On remand in *Optical Disk*, the district court acknowledged that "at a general level" problems of incorrect budgeting and unfavorable court rulings "arise in litigation all the time." *In re Optical Disk Drive Products Antitrust Litig.*, 2021 WL 3502506, at *6 (N.D. Cal., July 2, 2021). But "the *cumulative* effect of the factors [counsel] faced took this litigation beyond what actually was, or reasonably could have been, contemplated at the time of the bid[.]" *Id.* at *7 (emphasis in original). The district court awarded a premium of 20% on top of the "bid" as "reasonable compensation for the extra hours the firm expended[.]" *Id.* The district court's order is currently on appeal.

into years-long satellite litigation over our privileges and discovery obligations; the number of conferrals required on issues great and small; the painstaking process of obtaining and then analyzing over 8,000 audio files; the extreme effort required to get, assemble, understand, and start to use over 600 million transactional entries; the need to continually adjust in response to COVID, internally, in our deposition arrangements with Defendants, and with witnesses; and the need to address (including internally with our experts) continually developing law, foreign and domestic, involving everything from foreign privacy restrictions to the demands that would placed on the data at the certification stage.

The cumulative effect of these and other factors took this case far beyond what was reasonably contemplated in 2014, such that the policy goals behind fee awards warrant an award above the previously proposed scale. That the case's twists and turns took it outside our expectations is confirmed by our leadership application itself. The 2014 leadership application projected a total fee and expense budget of $23.85 million to $30.35 million to get the case *through trial*. Between our out-of-pocket expenses and lodestar, even at discounted rates the total cost was over $57 million in time and treasure just to get *through fact discovery.* It likely would have cost many millions *more* to litigate the case for another two or three years to get through expert discovery, class certification, summary judgment, and trial.

That this case was unexpectedly complex is also confirmed by looking at just our out-of-pocket expenses. Professor Silver confirms that the amount of out-of-pocket expenses incurred is a powerful sign of a case's complexity. *See* Silver Decl. ¶¶ 66, 71. This is in part because counsel have strong incentives to avoid going out-of-pocket wherever possible. *Id*. ¶ 71. Our total out-of-pocket expenses here were over $10 million, overwhelmingly driven by the non-testifying expert consultant expenses. Though there was no single line-item in our 2014 forecast

for all consultant work, the line-item for expert reports and expert depositions estimated that our total *fees and expenses* of only $3 million to $5 million.

Finally, while in 2014 we saw merit to the philosophy behind the sliding-scale approach, Professor Silver notes that the "ideal proxy" of the private marketplace goes the other way: the private market sees fees flatten out *or rise* as recoveries increase. Silver Decl. ¶ 44. And while the sliding-scale approach once had momentum, it is now recognized to have "its own problems." William B. Rubenstein, Newberg on Class Actions § 15:80 (5th ed. 2021). Such problems include that devotion to a set sliding scale ignores that "some high fund cases involve significant risks, require enormous investments of money and time, and may appropriately trigger a healthy percentage award." *Id.* Given that a "scale" could result in under-incentivizing attorneys in particularly risky and resource-intensive cases, Newberg suggests courts simply re-look to the lodestar "multiplier" analysis as the "best measuring stick for determining when [a] 'windfall' occurs," rather than resort to the cruder method of following a table of diminishing marginal returns. *Id.* § 15:81.

In fact the "problem" identified by Newberg is that which arose in this very case: this turned out to be very high-risk, very high-resource affair. And it only became more difficult and more expensive—not easier and cheaper—to get each successive recovery. Put simply, while Co-Lead Counsel of course would have preferred to invested less, and in the abstract all plaintiffs hope to recover more, it would distort incentives in future cases to further reduce a fee award that *already* does not even cover our discounted hourly investments. *See In re Initial Public Offering Secs. Litig.*, 671 F. Supp. 2d 467, 510, 515 (S.D.N.Y. 2009) (even though settlement results were "in general, [] disappointing," awarding $195 million in fees representing 43% of the recoveries because the award was already less than the attorneys' lodestar and

"applying a further reduction will serve only to further penalize counsel and chill other class actions").

F. The Reaction of the Class

Co-Lead Counsel will update the Court on the reaction of the class in our reply papers.

II. CO-LEAD COUNSEL'S REQUEST FOR AN AWARD OF THEIR LITIGATION EXPENSES IS REASONABLE

"Counsel are entitled to be reimbursed for the reasonable expenses advanced in class litigation." *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 469 (S.D.N.Y. 2004); *see also In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."). The Notice informed members of the Settlement Class that Co-Lead Counsel would move for an award of litigation costs of up to $3,500,000. We respectfully request an expense award of at least $2,091,999.60, plus interest thereon.[15] To confirm, these amounts a) were not part of our initial expense request, b) do not include amounts incurred by firms other than Co-Lead Counsel, and c) do not include amounts associated with electronic research. *See* 2022 Joint Decl. Section II.B.

For the reasons discussed above, "substantial expenses were necessary in this complex antitrust case." *Meredith*, 87 F. Supp. 3d at 671. As before the great bulk of the expenses are for experts and consultants, whose work is detailed in the 2022 Joint Declaration Sections I.C and I.D. *See In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 1:13-cv-07789-LGS, Dkt. No. 1115, at 3 (Aug. 16, 2018) (reimbursing over $17 million in expenses incurred from experts and consultants); *CDS*, 2016 WL 2731524, at *18 (reimbursing over $10 million in expenses

[15] We say here "at least" because we reserve the right to modify our request or make additional requests, such as to cover expenses that have not accrued yet. We expect such additions, if any, to be minimal. *See generally* ECF No. 623-6 at 10 (class members on notice that Co-Lead Counsel could request expenses incurred even after the Fairness Hearing).

incurred even pre-certification of the class, and noting that "[m]ost of these expenses were incurred in connection with retention of experts" and that this "expert work was essential to the litigation and invaluable to the Class"). Aside from the consulting and similar fees, the balance of the requested expenses are composed of industry-standard charges such as document imaging and copying, travel expenses, and other litigation support services. These expenses are again being submitted on a "at cost" basis, without any markup or profit component to our firms. These expenses have been reviewed by Co-Lead Counsel and were found to be reasonable.

In sum, there is thus "no reason to depart from the common practice in this circuit of granting expense requests." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003) (granting $18.7 million where bulk of expenses were "experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses").

III. NAMED PLAINTIFFS' REQUESTS FOR INCENTIVE AWARDS ARE REASONABLE

"[S]ervice awards are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiff." *Sanz v. Johny Utah 51 LLC*, 2015 WL 1808935, at *1 (S.D.N.Y. Apr. 20, 2015). Incentive awards also compensate for and recognize contributions to the advancement of important policy goals and class-wide benefits. *See Spann v. AOL Time Warner Inc.*, 2005 WL 1330937, at *9 (S.D.N.Y. June 7, 2005) ("an incentive award may be given to compensate named plaintiffs for efforts expended for the benefit of the lawsuit"); *see also Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) (affirming incentive awards in an antitrust case and noting they "reward the public service of contributing to the enforcement" of laws). Discretionary incentive awards are routinely made in

class actions, including antitrust matters. *See* Newberg on Class Actions §§ 17:1, 17:3 (5th ed. 2018) ("Empirical evidence shows that incentive awards are now paid in most class suits"); *Melito v. Experian Mktg. Sols.*, 923 F.3d 85, 96 (2d Cir. 2019) (affirming propriety of incentive awards approved by this Court).

Here, the requested awards would appropriately recognize that named Plaintiffs committed a significant amount of time to the case, stood up to a powerful group of Wall Street banks with no guarantee of any recovery in a case that spanned more than eight years, and played a crucial role in vindicating the private enforcement of our antitrust laws—in this instance, before the government took any action and long after the government walked away. *See In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *18 (E.D. Pa. June 2, 2004) (noting that incentive payments are "particularly appropriate" in cases where "there was no preceding governmental action alleging a conspiracy").

Co-Lead Counsel seek different award amounts for twenty-seven named plaintiffs, depending on their level of participation in the litigation. *See* 2022 Joint Decl., Section III.C. We seek the largest award, of $7,500, for those who represented the class including through depositions; a lesser amount of $3,000 for each of the class representatives who participated in formal discovery but were not deposed; and the smallest amount of $1,500 for the three class representatives who were not subject to formal discovery but who contributed to the litigation in other ways. Courts recognize the propriety of scaling awards based on their level of participation,[16] but also recognize the propriety of awarding anyone who took risks by

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[16] *See Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *24 (S.D.N.Y. Sept. 9, 2015) (approving an award of $25,000 for a named plaintiff who communicated regularly with counsel, reviewed court filings, traveled to attend mediations, and sat for a deposition; approving smaller awards of $5,000 each for two other class members whose contributions were lesser but "still meaningful"); *Dornberger v. Metropolitan Life Ins. Co.*, 203 F.R.D. 118, 124-25 (S.D.N.Y.

participating in the litigation in any capacity. *See, e.g.*, *Espenscheid v. DirecSat USA, LLC*, 688 F.3d 872, 876 (7th Cir. 2012) ("[A] class action plaintiff assumes a risk; should the suit fail, he may find himself liable for the defendant's costs or even, if the suit is held to have been frivolous, for the defendant's attorneys' fees."). While Co-Lead Counsel knew their claims were well-grounded, Defendants certainly made noises about a Rule 11 motion. *See* ECF No. 557.

The amounts sought here are in line with or less than awards made in other cases, including by this Court. *See Mary Jennifer Perks*, Dkt. No. 127 at 10 ("The $7,500 awards sought are within the range awarded in this Circuit[.]")[17] And the aggregate award here, $126,000, is smaller than many aggregate awards in similar cases, and represents only 0.08% of the total recovery of $152 million. *See Laydon v. Mizubo Bank, Ltd.*, No. 12-cv-3419, Dkt. No. 724, at 2 (S.D.N.Y. Nov. 10, 2016) (granting awards totaling $580,000); *Alaska Elec. Pension Fund v. Bank of Am. Co.*, 2018 WL 6250657, at *4 (S.D.N.Y. Nov. 29, 2018) (granting awards totaling $500,000); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2015 WL 5918273, at *5-*6

2001) (approving incentive awards of $1,500 for eight named plaintiffs who represented subclasses, provided documents, and regularly communicated with counsel, and approving an incentive award of $10,000 for a named plaintiff who was also deposed and contributed to the settlement).

[17] *See also, e.g.*, *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2015 WL 5918273, at *5-6 (E.D.N.Y. Oct. 9, 2015) ($90,000 award to each of six class representatives); *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *11 (E.D.N.Y. 2012) ($50,000 award to both class representatives); *In re Domestic Drywall Antitrust Litig.*, 2018 WL 3439454, at *20 (E.D. Pa. July 17, 2018) ($50,000 award given to each of four representatives "in line with other cases"); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150-51 (S.D.N.Y. 2010) (granting "modest case contribution awards of $15,000 each"); *In re Lithium Ion Batteries Antitrust Litig.*, 853 F. App'x 56, 57-58 (9th Cir. 2021) ($10,000 awards to twenty-one individual named plaintiffs and $25,000 service awards for two governmental entity class representatives); *Godson v. Eltman, Eltman, & Cooper, P.C.*, 328 F.R.D. 35, 60 (W.D.N.Y. 2018) ($10,000 service award); *Kindle v. Dejana*, 308 F. Supp. 3d 698, 717-18 (E.D.N.Y. 2018) (approving an incentive award of $10,000 and collecting cases approving the same); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 357-58 (N.D. Ga. 1993) (approving service awards of $2,500-$5,000 for each of forty-two class representatives).

(granting awards totaling $540,000, noting only 0.06% of total recovery raises "no serious concern that the payments will dwarf the average monetary recovery per class member").

CONCLUSION

For the foregoing reasons, Co-Lead Counsel respectfully requests that the Court approve Co-Lead Counsel's application for the payment of attorneys' fees and expenses in the amounts set forth above, plus interest thereon. Plaintiffs also respectfully request that the Court approve the application for incentive awards. Co-Lead Counsel will submit proposed orders in connection with our reply papers.

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Respectfully submitted,

/s/ Michael C. Dell'Angelo

Merrill G. Davidoff
Martin I. Twersky
Michael C. Dell'Angelo
Candice J. Enders
Zachary D. Caplan
BERGER MONTAGUE PC
1818 Market Street
Philadelphia, Pennsylvania 19103
Telephone: (215) 875-3000
Fax: (215) 875-4604
mdavidoff@bm.net
mtwersky@bm.net
mdellangelo@bm.net
cenders@bm.net
zcaplan@bm.net

/s/ Daniel L. Brockett

Daniel L. Brockett
Sami H. Rashid
Alexee Deep Conroy
Christopher M. Seck
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
Telephone: (212) 849-7000
Fax: (212) 849-7100
danbrockett@quinnemanuel.com
samirashid@quinnemanuel.com
alexeeconroy@quinnemanuel.com
christopherseck@quinnemanuel.com

Jeremy D. Andersen
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017
Telephone: (213) 443-3000
Fax: (213) 443-3100
jeremyandersen@quinnemanuel.com

Counsel for Gold Plaintiffs and Interim Co-Lead Counsel for the Proposed Gold Class