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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

In re AFTERMARKET AUTOMOTIVE LIGHTING PRODUCTS ANTITRUST LITIGATION

No. 2:09-ml-02007-GW(PJWx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY DIRECT PURCHASER PLAINTIFFS FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT FOR COSTS AND EXPENSES

DATE: May 5, 2014
TIME: 8:30 a.m.
CTRM: 10
JUDGE: Hon. George H. Wu

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I. STATEMENT OF ISSUES TO BE DECIDED

Co-Lead Counsel for the Class ("Class Counsel")[1] submit this motion for an award of attorneys' fees and reimbursement of litigation expenses. Plaintiffs[2] seek a fee of 33% of the $25,000,000 settlement fund created by the proposed settlement with Defendants TYC Brother Industrial Co. Ltd. and Genera Corp. (collectively "TYC"). This percentage award is amply supported by the result achieved thus far, as well as confirmed by a lodestar cross-check. Plaintiffs' counsel have collectively rendered approximately 13,211 hours of professional services between November 1, 2011 and January 31, 2014, and approximately 28,630 hours of professional services since inception of this litigation in 2008.[3] In addition to the aforementioned fees, plaintiffs also seek reimbursement of $1,403,112.08 in expenses incurred to prosecute this case since its inception and which were not reimbursed from prior settlements. The circumstances surrounding the outstanding settlement here satisfy the elements set forth in myriad cases for the fee requested.

Plaintiffs also request the Court to award service awards to each of the two representative plaintiffs in the amount of $15,000 each.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

After more than five years of extensive, hard-fought litigation, Class Counsel secured a settlement fund of $25,000,000 made up of $23,000,000 in cash and $2,000,000 in product credit from the last remaining defendants, TYC and Genera. The product credits are "near-cash equivalents" because they entitle the holder to

[1] As used herein, the term "Class Counsel" refers to the following law firms: Co-Lead Counsel Robbins Geller Rudman & Dowd LLP; Stueve Siegel Hanson LLP; Hausfeld LLP; and Labaton Sucharow LLP and all other firms that have been assisting them in the prosecution of this litigation.

[2] Plaintiffs are Motoring Parts International, Inc. ("MPI") and Sioux Plating Co., Inc. ("Sioux Plating").

[3] Plaintiffs' prior fee and expense application (in connection with the settlements with Depo Auto Parts Industrial Co., Ltd. ("Depo"), Maxzone Vehicle Lighting Corp. ("Maxzone") and Sabry Lee, Inc. ("Sabry Lee") was for the period from inception of the litigation in 2008 through October 31, 2011.

1 redeem them on product purchases from Genera – in effect reducing the cash that the
2 holder otherwise has to pay for product. Moreover, the credits are transferable, so that
3 a class member who no longer buys aftermarket auto lights can sell any credit
4 received to anyone who does buy from Genera. The cash component shall be paid in
5 three installments over three years. The first installment of $11,500,000 was
6 deposited on December 30, 2013 into an escrow fund on behalf of the Class. The
7 second installment of $6,900,000 will be deposited on or before December 31, 2014.
8 The final installment of $4,600,000 will be paid on or before December 31, 2015.
9 Each of these future payments will be secured by a letter of credit drawn on a US
10 bank. The entirety of the product credits will be distributed along with the distribution
11 of the first cash installment if the settlement is approved by the Court.

12 The $25,000,000 settlement fund is an outstanding result for the class. It is far
13 above the MFN minimum set in the Depo/Maxzone settlement, which delivered
14 approximately 4.6% of the Class's sales back to the victims of the price fixing
15 conspiracy. The TYC settlement, if approved, is 12.6% of the relevant sales.
16 Moreover, in light of Genera's limited financial viability and TYC's location abroad,
17 the achieved settlement is particularly excellent. Memorandum in Support of
18 Plaintiffs' Motion for Preliminary Approval of the Proposed Settlement with
19 Defendants TYC and Genera ("Prelim. Mem.") (Dkt. No. 811); Declaration of Jason
20 Hartley in support thereof, Dkt. No. 811(2) ("Prelim. Mem. Hartley Decl.") and
21 Declaration of Jennifer Keough in support thereof, Dkt. No. 811(3). The settlement
22 reflects the skill, expertise, and hard work of Class Counsel who refused to accept
23 TYC's consistent protests that it was unable to pay a settlement of this size. In
24 accordance with well-established precedent, Class Counsel seek an award of
25 attorneys' fees and reimbursement of costs and expenses.

26 The Class faced hurdles in establishing liability and damages in this action.
27 Unlike in many antitrust class actions, Class Counsel did not have the benefit of
28 criminal guilty pleas or any pending criminal prosecution by federal or state

governmental authorities when they filed this action on behalf of their clients. Even after a governmental investigation was announced – many months after the filing of the Class complaints – the leniency applicant, TYC refused to provide meaningful or timely cooperation, as demonstrated by this Court's August 26, 2013 Ruling on Plaintiffs' Motion for Order That TYC Forfeited Any Claim to the Benefits of Limited Civil Liability Under the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA"), Dkt. No. 702. Instead, TYC fought tooth-and-nail at every turn, bringing the parties to within days of trial before settling. TYC was defended throughout the litigation by highly experienced and skilled counsel from the law firm of Morgan, Lewis, and Bockius, LLP, which objected vigorously to class certification and litigated many other pre-trial motions. Moreover, TYC Brother Industrial Co. Ltd., the last defendant with any meaningful assets, is based in Taiwan, making enforcement of any judgment more difficult. Accordingly, the recovery obtained in these circumstances will provide a valuable benefit to the Class and justifies the award of a 33% fee to Class Counsel.

From its inception, this action was fraught with risk. Class Counsel faced the challenge of proving a price-fixing cartel that operated at both the manufacturer and distributor levels. It included Taiwanese and Hong Kong parents conspiring with other Taiwanese entities who in turn implemented a conspiracy among their distributor subsidiaries located in the United States.[4] This conspiracy lasted for at least seven and one-half years and encompassed numerous Aftermarket Automotive Lighting Products ("AALPs") sold in the United States, and its territories and possessions. There is the further impediment that some of these AALPs were

[4] The Defendants initially were four sets of Taiwanese or Hong Kong companies and their United States subsidiaries: (a) TYC Brother Industrial Co. Ltd. ("TYC") and its subsidiary Genera Corporation ("Genera"); (b) Depo Auto Parts Industrial Co. Ltd. ("DAP") and its subsidiary Maxzone Vehicle Lighting Corp. ("Maxzone"); (c) Eagle Eyes; and (d) Sabry Lee U.S.A. Inc. and Sabry Lee International Ltd. (collectively "Sabry Lee"), which was also partially owned by Eagle Eyes Industrial Co. Ltd. Plaintiffs previously settled with DAP, Maxzone, Sabry Lee, Eagle Eyes and E-Lite.

excluded from the Class definition because they were priced at low levels by three of the defendant groups (including TYC) to punish Sabry Lee, the United States distributor for Eagle Eyes, for withdrawing from the conspiracy. Plaintiffs prepared for trial twice (the first trial date being postponed by the Court) and were only two and a half weeks from their second trial date when the case settled. Moreover, the risks of litigation would have continued well beyond trial. Post-trial motions and appeals of any substantial verdict were a virtual certainty.

In light of these many risks, the substantial effort and preparation for trial, and in light of the outstanding result obtained for the Class, this Court should approve attorneys' fees equal to 33% of the value of the settlement fund. Plaintiffs also seek reimbursement of costs and expenses in the sum of $1,403,112.08.

III. BACKGROUND OF ACTION

This Court is well aware of the facts of this case. Nonetheless, for the Court's convenience, Plaintiffs briefly recount the salient facts here. The first class actions, which were ultimately centralized before this Court, were filed in late 2008. *In re Aftermarket Automotive Lighting Prods. Antitrust Litig.*, 598 F. Supp. 2d 1366 (J.P.M.L. 2009). The original complaints alleged a conspiracy commencing in 2004 among Depo, Maxzone, TYC, Genera, and Eagle Eyes; the second consolidated amended complaint added substantial evidentiary allegations relating to the conspiracy, extended the class period, added the Sabry Lee entities as defendants, and excluded from the class definition the products priced low in an attempt to force Sabry Lee from the market. Dkt. No. 162.

In September of 2010, Plaintiffs filed a motion for class certification supported by extensive record evidence obtained through discovery and by the declaration of their expert, Dr. Russell Lamb. (Dkt. No. 195). The Court granted Plaintiffs' Motion and certified the Class on July 25, 2011. *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, 276 F.R.D. 364 (C.D. Cal. 2011).

1 Plaintiffs agreed to proposed settlements in 2011 with Depo/Maxzone and
2 Sabry Lee, in which those defendants agreed to pay $25,000,000 and $450,000
3 respectively, to the Class, as well as to provide continued cooperation to the Plaintiffs
4 in the prosecution of their claims against the remaining Defendants. The Court
5 granted final approval of the Depo/Maxzone and Sabry Lee Settlements on February
6 23, 2012. There were no objections.
7 Plaintiffs conducted extensive discovery. In total, 47 depositions were taken,
8 including 19 in Taiwan during four separate trips; 6 separate sets of interrogatories
9 were served; 33 separate sets of document demands were served; and Defendants
10 collectively produced over 1.4 million pages of documents, many of which required
11 translation and all of which were coded into a document management database for
12 review. Declaration of Jason S. Hartley In Support of Plaintiffs' Motion for Fees and
13 Expenses Re Settlement With TYC Brother Industrial Co. Ltd and Genera Corp.
14 ("Hartley Decl.") ¶ 4.
15 Plaintiffs briefed numerous motions prior to settling with TYC, many of which
16 required supplemental briefing. *Id.* at ¶ 5. They succeeded in limiting Defendants'
17 repeated attempts to delay the case through motions to stay and motions for
18 continuances; they prevailed on motions seeking production of materials provided in
19 the parallel government action; and they prevailed on their extensively-briefed motion
20 for class certification, which was the subject of an evidentiary hearing. *Id.* Plaintiffs
21 also successfully opposed TYC's request for limited liability and damages under
22 ACPERA. *Id.* at ¶ 6.
23 Before TYC agreed – on the eve of trial - to settle the case, Plaintiffs were also
24 forced to engage in enormous effort preparing this international price fixing case for
25 trial. Plaintiffs prepared and opposed several motions *in limine*, reviewed thousands
26 of pages of deposition transcripts to designate for trial, reviewed and objected to
27 TYC's own deposition designations, interviewed and prepared witnesses for trial,
28 prepared direct and cross examinations of witnesses, prepared opening statement,

prepared a comprehensive exhibit list for trial and objected to certain exhibits offered by TYC, researched evidentiary objections to same, prepared and objected to dozens of jury instructions, negotiated translations of foreign language documents for use at trial, and analyzed TYC's revised trial expert report in preparation of cross examination. *See generally* Hartley Decl. ¶ 6-7; Declaration of Jay L. Himes in Support of Plaintiffs' Motion for Attorneys Fees and Expenses ("Himes Decl.") ¶ 6; Declaration of Michael P. Lehmann In Support of Motion for An Award of Attorneys' Fees and Expenses ("Lehmann Decl.") ¶ ¶ 7-8, Declaration of Bonny E. Sweeney In Support of Plaintiffs' Motion For Award of Attorneys' Fees and Expenses ("Sweeney Decl.") ¶ 10.

IV. SETTLEMENT TERMS

Although settlement was broached by Plaintiffs in August, 2009, settlement discussions between the parties did not begin until March 2011. Settlement negotiations between Plaintiffs and TYC continued through November 2013. For virtually that entire period, the spread between the settlement numbers offered by Plaintiffs and TYC was considerable. Prelim. Mem. Hartley Decl. ¶ 2. There were several offers and counteroffers exchanged between the parties before their first mediation session in front of a neutral.

The parties engaged in several in-person, mediated efforts at settlement. They participated in a JAMS mediation in Los Angeles before the Hon. Gary L. Taylor (Ret.) on December 12, 2012. That mediation was very short-lived as TYC claimed it was not in a financial condition to pay a settlement amount that Plaintiffs found satisfactory.

A second mediated settlement session did not take place for another nine months. On August 20, 2013, the parties participated in the first of two settlement conferences before Magistrate Judge Suzanne H. Segal. At the first settlement conference, TYC continued to claim it lacked the resources to pay the settlement

1 amount required. Plaintiffs suggested alternative and creative means of funding a
2 settlement. TYC requested time to evaluate funding alternatives and the parties
3 ultimately appeared before Magistrate Judge Segal a second time on October 2, 2013.
4 Again, however, TYC claimed it could not fund an adequate settlement.
5 Finally, Plaintiffs and TYC conducted a mediation on November 15, 2013 with
6 Antonio Piazza in San Francisco. At that mediation, the parties reached an agreement
7 in principle. The terms of the agreement were memorialized in a "Term Sheet" that
8 was signed by the parties, and were later finalized as the proposed settlement that is
9 the subject of Plaintiffs' preliminary approval motion. Prelim. Mem. Hartley Decl.
10 Ex. A. If approved, this TYC settlement with the last remaining defendants would
11 end this litigation.
12 The settlement agreement with TYC requires it to pay a total of $25,000,000.
13 The TYC settlement amount accounts for approximately 12.6% of its relevant sales
14 during the entire Class Period, which is more than twice the MFN of the Depo
15 settlement and much higher than settlements obtained in numerous other antitrust
16 price-fixing cases. *See, e.g.*, *In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619,
17 627 (E.D. Pa. 2004) (recovery represented 1.62% of sales); *Fisher Bros. v. Phelps*
18 *Dodge Industries, Inc.*, 604 F.Supp. 446, 451 (E.D. Pa. 1985) (2.4% of sales); *Fisher*
19 *Bros. v. Mueller Brass Co.*, 630 F.Supp. 493, 499 (E.D. Pa. 1985) (recoveries equal to
20 0.1%, 0.2%, 0.3%, 0.65%, 0.88%, and 2.4% of defendants' total sales); *In re Rubber*
21 *Chemicals Antitrust Litig.*, 232 F.R.D. 346 (N.D. Cal. 2005) (characterizing a
22 settlement representing 4% of the defendants' sales as an "excellent recovery");
23 "Order" (Nov. 1, 2006) in *In Re Dynamic Random Access Memory (DRAM) Antitrust*
24 *Litig.*, No. M-02-1486 PJH (N.D. Cal.) (approving settlements of 10.53% to 13.96%
25 of sales); *In re Automotive Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004
26 WL 1068807 at *2 (E.D. Pa. May 11, 2004) ("*Auto Paint*") (recovery represented
27 approximately 2% of sales); *In re Plastic Tableware Antitrust Litig.*, Case No. 94-CV-
28 3564, 1995 WL 723175, at *1 (E.D. Pa. Oct. 25, 1995) (granting final approval to

1 settlement where recovery was 3.5% of sales); *In re Shopping Carts Antitrust Litig.*,
2 1983 WL 1950, at *9 (S.D.N.Y. Nov. 18, 1983) (3% of sales).

3 **V. THE STANDARDS GOVERNING THE AWARD OF ATTORNEYS' FEES IN COMMON FUND CASES**

4
5 **A. Plaintiffs' Counsel Are Entitled to a Fee from the Common Fund They Created**

6 It is well-settled that an attorney who maintains a suit that results in the creation
7 of a fund or benefit in which others have a common interest is entitled to obtain
8 reasonable fees from that common fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472,
9 478, 100 S. Ct. 745, 749, 62 L. Ed. 2d 676, 681 (1980) ("a litigant or a lawyer who
10 recovers a common fund for the benefit of persons other than himself or his client is
11 entitled to a reasonable attorney's fee from the fund as a whole"). The Ninth Circuit
12 has specifically found that "those who benefit from the creation of the fund should
13 share the wealth with the lawyers whose skill and effort helped create it." *In re Wash.*
14 *Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("*WPPSS*").

15 The Supreme Court has further emphasized that "the purposes of the antitrust
16 laws are best served by insuring that the private action will be an ever-present threat to
17 deter anyone contemplating business behavior in violation of the antitrust laws."
18 *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139, *88 S.Ct.
19 1981, 20 L.Ed.2d 982 (1968). *See also Reiter v. Sonotone Corp.*, 442 U.S. 330, 344,
20 99 S.Ct. 2326, 60 L.Ed.2d 931(1979) ("These private suits provide a significant
21 supplement to the limited resources available to the Department of Justice for
22 enforcing the antitrust laws and deterring violations."). As noted in *Reiter v. Sonotone*
23 *Corp.*, 442 U.S. 330, 344 (1979), "Congress created the treble-damages remedy of §4
24 precisely for the purpose of encouraging private challenges to antitrust violations.
25 These private suits provide a significant supplement to the limited resources available
26 to the Department of Justice for enforcing the antitrust laws and deterring violations."
27 *Id*.
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B. The Ninth Circuit Supports Awarding Attorneys' Fees Using the Percentage Approach

Courts in the Ninth Circuit regularly award fees as a percentage of the-recovery in common fund cases.[5] *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). The percentage-of-the-fund method is generally recognized as the superior method of calculating attorneys' fees in common fund class action settlements, like this one, because "the percentage-of-the-fund method aligns the interests of class counsel and the class, rather than rewarding attorneys for hours spent on cases, as the lodestar method does." *In re Brooktree Secs. Litig.*, 915 F. Supp. 193, 196 (S.D. Cal. 1996). *See also Glass v. UBS Financial Services*, No. 07-15278, 2009 U.S. App. LEXIS 2581, at *10 (N.D. Cal. 2007) (objector's "contention that the district court erred in using common fund principles in assessing the award of attorneys' fees [using the percentage-of-the-fund method] is inconsistent with Ninth Circuit jurisprudence, which permits the application of common fund principles where – as in the present case – the class of beneficiaries is identifiable and the benefits can be traced in order to allocate the fees to the class.").

Under the percentage-of-the-fund approach, the district court awards a percentage of the fund created by the attorneys' efforts as their reasonable attorneys' fee. *Blum*, 465 U.S. at 900 n.16. Many courts have awarded fees in the range sought here. *See, e.g., In re Vitamins Antitrust Litig.,* MISC. 99-197(TFH), 2001 WL 34312839 at *11 (D.D.C. July 16, 2001) (33% fee awarded); *In re Heritage Bond Litig.,* 2005 WL 1594403 at *20 (33.3% fee awarded) (*citing In re Gen. Instrument Sec. Litig.,* 209 F. Supp. 2d 423, 432-33 (E.D. Pa. 2001) (approving a fee award of one-third); *In re Pub. Serv. Co. of New Mexico,* 91-0536M, 1992 WL 278452 at *8 (S.D. Cal. July 28, 1992) (fee award of one third); *Cicero v. DirecTV, Inc.*, EDCV 07-

[5] The other method of awarding fees, through the lodestar approach, is typically used in "employment, civil rights and other injunctive relief class actions . . . because there is no way to gauge the net value of the settlement or any percentage thereof." *Hanlon*, 150 F.3d at 1029.

1182, 2010 WL 2991486 at *6 (C.D. Cal. July 27, 2010) (approving 30% fee request); "Amended Order" (Dec. 27, 2011) (Dkt. No. 4436) in *In re TFT-LCD (Flat Panel) Antitrust Litig*., No. 3:07-md-1827 SI (N.D. Cal.) ("*LCD*")(awarding 30% fee to direct purchaser class counsel) (attached as Exhibit 1); ; *In re Static Random Access (SRAM) Antitrust Litig*., 4:07-md-1817 (N.D. Cal.) (*SRAM II*) (awarding 33.3% fee to indirect purchaser class counsel)(attached as Exhibit 2).

VI. THE REQUESTED FEE IS REASONABLE UNDER THE PERCENTAGE-OF-RECOVERY METHOD

While the ultimate determination of the proper amount of attorneys' fees rests within the sound discretion of the district court, the guiding principle in this Circuit is that a fee award should be "reasonable under the circumstances." *Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012). The Ninth Circuit has identified a number of factors that are relevant to the district court's determination, including: (1) the result achieved, (2) the risk of continued litigation, (3) the financial burden of contingent representation, and (4) customary fees awarded in similar cases. *See Vizcaino*, 290 F.3d at 1048-50. *See also In re TFT-LCD (Flat Panel) Antitrust Litig*., M 07-1827 SI, 2013 WL 1365900 at *7 (N.D. Cal. Apr. 3, 2013) (*citing Vizcaino* and enumerating these factors in support of upward adjustment from benchmark). As demonstrated below, application of these factors confirms the reasonableness of a 33% fee.

1. The Results Achieved Were Meaningful.

The Supreme Court has said that in an award of attorney's fees the "most critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S.Ct. 1933 (1983). "Exceptional results are a relevant circumstance." *Vizcaino,* 290 F.3d at 1048 (*citing Torrisi v. Tucson Elec. Power Co*., 8 F.3d 1370, 1377 (9th Cir.1993); *Six (6) Mexican Workers*, 904 F.2d at 1311; *In re Prudential Ins. Co. Sales Practices Litig*., 148 F.3d 283, 339 (3d Cir.1998)); *see also In re Heritage*

1 *Bond Litig.*, 2005 WL 1594403 at *19 (noting exceptional settlement result as a factor
2 in favor of 33.5% attorney fee award and collecting similar cases).

3 This settlement represents approximately 12.6% of TYC'S relevant sales during
4 the class period, a substantial sum. Class Counsel insisted, in the face of documentary
5 evidence and TYC's desperate arguments that it was on the brink of insolvency, that
6 TYC could pay the settlement amount demanded. The result is more than twice what
7 the Class agreed would be a minimum acceptable settlement with TYC when the
8 Class adopted the Depo settlement and its MFN provision without a single objection.
9 By all accounts, the result of this settlement for the class is remarkable.

10 **2. The Risk of Litigation Was Significant.**

11 The risk factor also supports the requested fee percentage. In accepting this
12 case, Plaintiffs' Counsel committed to a long and arduous fight against sophisticated
13 Defendants with experienced counsel. Antitrust class actions such as this one are
14 inherently complex, and such complexity adds to the risk of confusion if this case
15 were to be tried in front of a jury. In addition, Plaintiffs' Counsel had to face the
16 possibility of confusion caused by language barriers when evidence and testimony
17 regarding the foreign Defendants would be utilized. Throughout this case, Plaintiffs'
18 Counsel faced dedicated opposition on nearly every point, and were preparing for trial
19 when this settlement was achieved. Moreover, TYC claimed throughout the entire
20 settlement negotiation that its financial condition was perilous, and sought to back up
21 those claims with documentary evidence and explanations by an independent
22 accountant. Had litigation continued to a trial and judgment for Plaintiffs, they would
23 have been faced with the uncertainty of enforcing a judgment against TYC in a
24 foreign country where recognition of this Court's judgment could be uncertain. Even
25 if Plaintiffs were successful in enforcing a judgment against TYC in Taiwan, there
26 was reason to believe that there would be funds insufficient to pay a judgment larger
27 than the settlement achieved. *See Torrisi*, 8 F.3d at 1376 (defendant's weak financial
28 condition was predominate factor in assessing the settlement).

Although Plaintiffs' Counsel were confident in Plaintiffs' case, the ultimate outcome of a trial is always an uncertain proposition. Plaintiffs' Counsel assumed the risk that they would not be paid and that they would lose all costs and time invested if this case was unsuccessful. Despite these real and substantial risks, meaningful monetary relief was secured for the Class. Thus, the risk accepted by Plaintiffs' Counsel supports the requested fee award. *See In re Pac. Enterprises Sec. Litig.,* 47 F.3d 373, 379 (9th Cir. 1995) (approving fee award in excess of benchmark "because of the complexity of the issues and the risks" involved); *Vizcaino*, 290 F.3d at 1048 (*citing Pacific. Enterprises* and noting that "Risk is a relevant circumstance.")

The above facts reflect the risk undertaken by Class Counsel and weigh heavily in favor of approval of the 33% requested fee.

3. The Contingent Nature of the Fee and the Financial Burden Carried by the Plaintiffs Justifies the Request.

The contingent nature of counsel's representation also supports the requested fee. Plaintiffs' Counsel took on this case and the out-of-pocket costs prosecuting it, with the understanding that they would be compensated only if they succeeded. Courts have recognized the need to reward Plaintiffs' Counsel who accept a case on a contingent fee basis because of the risk of non-payment that they face:

> It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. See Richard Posner, Economic Analysis of Law §21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.

WPPS., 19 F.3d 1291, 1299, 1300-01 (9th Cir. 1994). The Court should not overlook the real risks that Plaintiffs' Counsel incur by accepting contingent fee cases, such as this one. Large-scale antitrust actions are, by their very nature, complicated and time-consuming. Any law firm undertaking a case such as this must inevitably must be

prepared to make a tremendous investment of time, energy, and resources. Even after the Depo settlement, this case involved significant costs and time requirements far and above the ordinary action, including additional travel to Taiwan, extensive review of complex documents which often required translation, preparation of expert merits reports, witness preparation, lengthy exhibit selection, deposition transcript designations and myriad other tasks in preparation for trial, Plaintiffs' Counsel were prepared to make and did make this investment with the very real possibility of an unsuccessful outcome and no fee of any kind. The demands and risks of this type of litigation overwhelm the resources – and deter participation – of many traditional plaintiffs' firms.

Plaintiffs' Counsel prosecuted this complex and difficult case for five years, up until the eve of trial, before achieving this settlement. The fact that significant financial burden was carried for such a long period supports the reasonableness of the requested fee percentage. *See Vizcaino,* 290 F.3d at 1050 ("These burdens [years of litigation, significant financial expense, foregoing other work] are relevant circumstances….") (*citing Six (6) Mexican Workers*, 904 F.2d at 1311; *Torrisi v. Tucson Elec. Power Co*., 8 F.3d 1370, 1377 (9th Cir.1993), *Bebchick v. Wash. Metro. Area Transit Comm'n*, 805 F.2d 396, 408 (D.C.Cir.1986)); *see also Lopez v. Youngblood,* CV-F-07-0474 DLB, 2011 WL 10483569 (E.D. Cal. Sept. 2, 2011) (noting that "Class Counsel's efforts were extensive and involved all that occurs in a case that is litigated up to the eve of trial" in approving upward departure from benchmark fee).

4. The Skill Required and Quality of Work Justifies the Request.

This case involved significant and complex analysis of antitrust law, economics, and foreign documents and testimony. As described above this case also involved navigating significant risk while engaging in a vigorously contested and litigated action against experienced opposing counsel. In addition, Plaintiffs' Counsel initiated

1 this case prior to any government investigation, further evidencing the skill and
2 quality of work in this matter. *See, e.g., In re Vitamins Antitrust Litig.,* 2001 WL
3 34312839 at *11 ("[C]ounsel completed a substantial portion of their investigation
4 prior to the implementation of any government investigation into the alleged price-
5 fixing conspiracy. This factor also weighs in favor of the proposed [33%] fee.")
6 Achieving settlement involved difficult and extensive negotiations, including
7 four mediation sessions before three different neutrals. This was a hard-fought
8 settlement that was negotiated at arms-length over the course of several months, while
9 simultaneously preparing for trial. The difficulty of achieving such a settlement
10 against experienced and motivated opposing counsel is substantial. *See, e.g., In re*
11 *Heritage Bond Litig.,* 2005 WL 1594403 at *20 ("[t]he Court also notes that the
12 quality of opposing counsel is important in evaluating the quality of Plaintiff's
13 counsel's work… There is also no dispute that the plaintiffs in this litigation were
14 opposed by highly skilled and respected counsel with well-deserved local and
15 nationwide reputations for vigorous advocacy in the defense of their clients.")
16 Plaintiffs' Counsel are experienced antitrust and class action attorneys. They
17 not only obtained class certification and a ground-breaking ruling denying TYC the
18 benefits of ACPERA, but also prepared the case for trial twice. Such qualifications
19 should also be taken into account when evaluating an appropriate fee award. *See id.*
20 ("The experience of Class Counsel also justifies the [33.3%] fee award requested.")
21 (*citing In re Gen. Instrument Sec. Litig.,* 209 F. Supp. 2d at 432-33 (approving a fee
22 award of one-third based in part on the experience of counsel); *In re Pub. Serv. Co. of*
23 *New Mexic,* 1992 WL 278452 at *8 (finding that the experience of counsel in complex
24 litigation cases favored a one-third fee award); *see also In re Vitamins Antitrust Litig.,*
25 2001 WL 34312839 at *11 ("[T]he attorneys involved are among some of the most
26 highly skilled in the country with extensive experience in similar class action
27 litigation…The experience, skill and professionalism of counsel and the performance
28 and quality of opposing counsel all weigh in favor of the requested [33%] fee.")

1 Therefore, the skill required and quality of work in the present case weighs in favor of
2 the requested fee award.

3 **5. Awards Made in Similar Cases.**

4 The Ninth Circuit has also found it appropriate to "to examine lawyers'
5 reasonable expectations, which are based on the circumstances of the case and the
6 range of fee awards out of common funds of comparable size" in assessing a fee
7 request. *Vizcaino*, 290 F.3d at 1050. The requested 33% amount clearly meets these
8 criteria. Many courts have found that amounts in this range are typically granted:

9 > The Ninth Circuit has held that 25% of the gross settlement amount is
10 > the benchmark for attorneys' fees awarded under the percentage method, with 20 to 30% as the usual range in common fund cases where the
11 > recovery is between $50 and 200 million. *Vizcaino*, 290 F.3d at 1047. Other case law surveys suggest that 50% is the upper limit, with 30-50%
12 > commonly being awarded in cases in which the common fund is
13 > relatively small. *See* Rubenstein, Conte and Newberg, NEWBERG ON CLASS ACTIONS at § 14:6.

14 *Cicero v. DirecTV, Inc.*, EDCV 07-1182, 2010 WL 2991486 at *6 (C.D. Cal. July 27,
15 2010) (approving 30% fee request). Courts in complex antitrust class actions such as
16 this one have routinely awarded fees of 30-35%. *See Nichols v. SmithKline Beecham*
17 *Corp.*, 2005 WL 950616 (approving 30% of fund and considering *Buspirone Antitrust*
18 *Litig.*, Civ.A.No. 01-MD-1410 (S.D.N.Y. Apr. 11, 2003) (awarding 33.3% of a $220
19 million dollar fund); *LCD* (awarding 30% of a $405 million fund); *SRAM II*
20 (awarding 33% of a $41.3 million fund); *In re Cardizem CD Antitrust Litig.*,
21 Civ.A.No. 99-MD-1278 (E.D.Mich. Nov. 26, 2002) (awarding 30% of a $110 million
22 fund); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839 at *10 (awarding about 34%
23 of an approximately $360 million fund)); *see also In re Activision Sec. Litig.,* 723
24 F.Supp. 1373 (N.D. Cal. 1989) (noting that Ninth Circuit had initially endorsed
25 benchmark of 25% in *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272
26 (9th Cir. 1989) but "as documented by the lengthy list of cases below, this court finds
27 that in most recent cases the benchmark is closer to 30%").
28

Moreover, here the entire fund, less costs and fees, will be distributed to the Class on a pro-rata basis. There is no possibility for any "unclaimed" funds and no provision for any refund of any portion of this settlement fund to TYC. Accordingly, Plaintiffs' Counsel's request for a 33% fee is clearly in line with fee awards in similar class action cases.

VII. THE REQUESTED FEE IS REASONABLE UNDER THE LODESTAR CROSS-CHECK

The Ninth Circuit has held that the lodestar method "provides a check on the reasonableness of the percentage award. Where such investment is minimal, as in the case of an early settlement, the lodestar calculation may convince a court that a lower percentage is reasonable. Similarly, the lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted." *Vizcaino*, 290 F.3d at 1050. Given the protracted litigation here, along with the fact that the 33% fee is still less than Plaintiffs' Counsel's total lodestar, the requested fee percentage is appropriate.

The lodestar method, as set forth in the seminal cases *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) ("*Lindy I*"), and *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) ("*Lindy II*"), is a two-step process. *See Lindy I*, 487 F.2d at 167-68. The first step requires ascertaining the "lodestar" figure by multiplying the number of hours reasonably worked by the current hourly rate of counsel. *Id.* at 167. In the second step of the analysis, a court adjusts the lodestar to take into account, among other things, the risk of non-payment, the result achieved, the quality of representation, the complexity and magnitude of the litigation, and public policy considerations. *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 583 (3d Cir. 1984). To account for the foregoing factors the court then applies an appropriate multiplier to the lodestar number.

1 The lodestar for the services performed by Class' Counsel in this case results in
2 a negative lodestar multiplier in this case. During the time period since the Depo
3 settlement (November 1, 2011), Class Counsel expended a total of 13,211 hours for a
4 partial lodestar of $7,516,488.70. Hartley Decl. ¶ 3 ; Sweeney Decl., ¶¶ 4-7 ; Himes
5 Decl., ¶ 7 ; Lehmann Decl., ¶ 9 . Class Counsel expended a total of approximately
6 28,630.18 hours litigating this case from inception to January 31, 2014, for a total
7 lodestar of $15,557,844.17. Id. The requested fee, when added to the prior fee
8 awards in this litigation, is 2% less than that lodestar. A negative lodestar multiplier
9 supports the reasonableness of the percentage fee request. *Schiller v. David's Bridal,*
10 *Inc.*, Case No. 1:10-cv-00616, 2012 U.S. Dist. LEXIS 80776, at *62-63 (E.D. Cal.
11 2012). The lodestar cross-check confirms that the 33% fee requested by Plaintiff's
12 counsel is reasonable.
13 Finally, Class Counsel agree to defer receipt of their entire fee award over
14 installments, in the same manner that the class will receive the proceeds of the
15 settlement, if approved. This was the approach utilized in the LCD case by Judge
16 Illston when there were settlement installments paid over time. See "Corrected Order
17 Granting Direct Purchaser Class Plaintiffs' Motion for Attorneys' Fees,
18 Reimbursement of Expenses and Incentive Awards," *In re TFT_LCD (Flat Panel)*
19 *Antitrust Litigation*, 3:07-md-1827-SI (Dkt. No. 7504) (attached as Exhibit 3).
20 Class counsel fees shall be applied to each of the installments at the time they are
21 paid by TYC to the Class instead of entirely from the first installment. Thus, when
22 class is awarded the first installment of $13.5 million in cash and product credit, Class
23 Counsel shall receive 33% of only that amount in fees. When the class receives the
24 second installment of $6.9 million, Class Counsel shall receive 33% of only that
25 amount as their fee. And when the Class receives the final installment of $4.6 million,
26 Class Counsel shall receive 33% of only that amount as the balance of their fee.
27
28

VIII. THE EXPENSES ARE REASONABLE AND SHOULD BE REIMBURSED

Class Counsel also respectfully request that they be reimbursed for the litigation costs and expenses in the amount of $1,403,112.08. See Sweeney Decl., ¶¶ 12-25; Himes Decl., ¶¶ 12-55; Hartley Decl. , ¶¶ 8-22; Lehmann Decl., ¶¶ 12-38Under the common fund doctrine, Class Counsel are entitled to reimbursement of all reasonable out-of-pocket expenses and costs incurred in prosecution of the claims and in obtaining a settlement. *Vincent v. Hughes Air West*, 557 F.2d 759, 769 (9th Cir. 1977) ("the doctrine is designed to spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone and the 'stranger' beneficiaries do not receive their benefits at no cost to themselves").

It is common and appropriate for Class Counsel to be reimbursed out of the common fund for all reasonable litigation expenses, including expenses for document production, travel, deposition expenses, expenses for experts and consultants, expenses for delivery of documents and the. *See* H. Newberg, Attorney Fee Awards §2.19 at 69 (1986); *Mills*, 396 U.S. at 391-92; *Omnivision*, 559 F. Supp. 2d at 1048; *see also In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996) ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement."). Expenses are compensable in a common fund case if the particular expense is of the type typically billed by attorneys to paying clients in the marketplace.[6] The categories of expenses for which Class Counsel seek payment here are of the type routinely charged to paying clients and, therefore, should be awarded.

As explained in the accompanying declarations of Co-Lead Counsel, Class Counsel are seeking reimbursement of expenses that were incurred in prosecuting the

[6] *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (expenses normally charged to a fee-paying client approved).

1 case and which were not reimbursed from prior settlements. Sweeney Decl., ¶¶ 12-
2 25; Himes Decl., ¶¶ 12-55; Hartley Decl. , ¶¶ 8-22; Lehmann Decl., ¶¶ 12-38.
3 In accordance with the March 5, 2012 Order entered by this Court in connection
4 with the Depo/Maxzone and Sabry Lee settlements, and as they did with the Eagle
5 Eyes settlement, Class Counsel have provided, together with their declarations in
6 support of each firm's expense application, evidence of the incurrence of each
7 expense and its payment. These declarations demonstrate that each expense was
8 necessarily incurred on behalf of the Class, was reasonable in amount, and was paid
9 by the firm requesting reimbursement.
10 Accordingly, it is respectfully requested that the out-of-pocket expenses of
11 Class Counsel of $1,403,112.08 be reimbursed in full from the first installment
12 payment.
13 **IX. THE REQUESTED SERVICE AWARDS ARE REASONABLE**
14 "Because a named plaintiff is an essential ingredient of any class action, an
15 incentive award is appropriate if it is necessary to induce an individual to
16 participate in the suit." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).
17 Sioux Plating and MPI deserve the requested $15,000 incentive awards, for
18 without their willingness to step forward and assist in the investigation and filing
19 of the consolidated class action complaint, this settlement would not have been
20 possible. They previously produced documents in the case and submitted to full-
21 day depositions. Moreover, they were prepared both to attend the entire trial on
22 behalf of the class and to testify at trial. Thus their hard work and commitment
23 during the duration of this long litigation was directly responsible for the benefits
24 of this settlement made available to over 700 class members.
25 Service awards help to mitigate, to some extent, the disincentives that
26 antitrust victims may have to serve as a class representative, and are, therefore, an
27 integral part of class action procedure. Recognizing this, Courts regularly approve
28 awards in the amounts sought. *See, e.g., Woo v. Home Loan Group, L.P.*, No. 07-

CV-202, 2008 WL 3925854, at *6 (S.D. Cal. Aug. 25, 2008) ("The Court further approves a payment to the Class Representative . . . as an enhancement in the amount of $7,500 for the initiation of this action, services performed, and the risks undertaken . . ."); *Fulford v. Logitech, Inc.*, No. 08-cv-02041, 2010 WL 807448, at *3 n.1 (March 5, 2010) (collecting cases awarding service payments ranging from $5,000 to $40,000); *In re Sorbates Direct Purchaser Antitrust Litig.,* 2002 WL 31655191, at *3 (N.D. Cal. Nov. 15, 2002) (approving $7,500 service awards).

The Ninth Circuit has identified three factors that a Court should consider in approving a service award: "[1] the actions the plaintiff has taken to protect the interests of the class, [2] the degree to which the class has benefitted from those actions, and [3] the amount of time and effort the plaintiff expended in pursuing the litigation." *Staton,* 327 F.3d at 976 (citing and quoting factors from *Cook,* 142 F.3d at 1016). The first two factors clearly support the requested award, as the Class Representatives' efforts have resulted in a $25,000,000 Settlement Fund from TYC. The third factor also supports the award as the Class Representatives have made a significant investment of time and effort in this matter, particularly since the Depo settlement, including:

- meeting with Class Counsel to discuss the factual allegations and legal theories and assisting in the preparation of the complaint;
- preparing with counsel for their testimony at trial;
- allocating employee time to attend every day of trial;
- providing input and guidance during the negotiation and settlement process, including reviewing and approving the settlement agreement on behalf of the Class; and
- keeping themselves and other plaintiffs informed about the progress of the litigation.

In Class Counsel's opinion, each Class Representative has acted in the very best interest of the class at all times, and each is deserving of the $15,000 service awards requested on their behalf.

X. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court enter an order and judgment awarding 33% of the value of the settlement fund as attorneys' fees and reimbursement of $1,403,112.08 for the expenses incurred to prosecute this case and $15,000 to each Class Representative, Motoring Parts International and Sioux Plating.

Dated: February 14, 2014

Respectfully submitted,

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