ROBERTSON, FREILICH, BRUNO & COHEN, LLC
The Legal Center
One Riverfront Plaza
Newark, New Jersey 07102-5468
(973) 848-2100
Jeffrey A. Cohen

Additional Counsel Listed on Signature Page

Attorneys for Defendants Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE ROYAL DUTCH/SHELL TRANSPORT SECURITIES LITIGATION	)	**CIVIL ACTION NO. 04-374 (JAP)** **(Consolidated Cases)** **Hon. Joel A. Pisano** ***(Document electronically filed)***

DECLARATION OF RIVA KHOSHABA PARKER, ESQ.

RIVA KHOSHABA PARKER, ESQ. hereby certifies as follows:

1. I am associated with the law firm of Dewey & LeBoeuf LLP, counsel to Defendants Royal Dutch Shell Petroleum Company and The "Shell" Transport and Trading Company, plc (collectively "Shell") in these consolidated proceedings. I offer this declaration in support of the Proposed Findings of Fact and Conclusions of Law.

2. Attached hereto is a true and accurate copy of *In re Aetna Inc. Sec. Litig.*, MDL No. 1219, 2001 U.S. Dist. LEXIS 68 (E.D. Pa. Jan. 4, 2001).

3. Attached hereto is a true and accurate copy of *Campbell v. A-P-A Transp. Corp. (In re A-P-A Transp. Corp. Consol. Litig.)*, No. 02-3480, 2005 U. S. Dist. LEXIS 28122 (D.N.J. Nov. 15, 2005).

4. Attached hereto is a true and accurate copy of *In re Cell Pathways, Inc.*, No. 01-CV-1189, 2002 U.S. Dist. LEXIS 18359 (E.D. Pa. Sept. 23, 2002).

5. Attached hereto is a true and accurate copy of *Davis v. S. Bell Tel. & Tel. Co.*, No. 89-2839, 1993 U. S. Dist. LEXIS 20033 (S.D. Fla. Dec. 23, 1993).

6. Attached hereto is a true and accurate copy of *Desantis v. Snap-On Tools Co., LLP.,* No. 06-CV-2231, 2006 U.S. Dist. LEXIS 78362 (D.N.J. Oct. 27, 2006).

7. Attached hereto is a true and accurate copy of *In re Genta Sec. Litig.*, No. 042123 (JAG), 2008 WL 2229843 (D.N.J. May 28, 2008).

8. Attached hereto is a true and accurate copy of *Hughes v. InMotion Entm't*, No. 07-CV-1299, 2008 WL 3889725 (W.D. Pa. Aug. 18, 2008).

9. Attached hereto is a true and accurate copy of *Lenahan v. Sears, Roebuck & Co.*, No. 02-0045, 2006 U.S. Dist. LEXIS 60307 (D.N.J. July 10, 2006); *aff'd*, 2008 U.S. App. LEXIS 3798 (3d Cir. 2008).

10. Attached hereto is a true and accurate copy of *Meijer, Inc. v. 3M*, No. 04-5871, 2006 U.S. Dist. LEXIS 56744 (E.D. Pa. Aug. 14, 2006).

11. Attached hereto is a true and accurate copy of *In re NASDAQ*, MDL No. 1023, 2000 U.S. Dist. LEXIS 304 (S.D.N.Y. Jan. 12, 2000).

12. Attached hereto is a true and accurate copy of *Prudential-Bache Energy, Inc. P'ship Sec. Litig.*, No. MDL 888, 1994 U.S. Dist. LEXIS 6621 (E.D. La. May 18, 1994).

13. Attached hereto is a true and accurate copy of *In re Prison Realty Sec. Litig.*, No. 3:99-0458, 2001 U.S. Dist. LEXIS 21942 (M.D. Tenn. Feb. 9, 2001).

14. Attached hereto is a true and accurate copy of *Ravisent Tech.*, No. 00-CV-1014, 2005 U.S. Dist. LEXIS 6680 (E.D. Pa. Apr. 18, 2005).

15. Attached hereto is a true and accurate copy of *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085, 2005 U.S. Dist LEXIS 27013 (D.N.J. Nov. 9, 2005).

16. Attached hereto is a true and accurate copy of *Simon v. KPMG LLP*, No. 05-CV-3189, 2006 U.S. Dist. LEXIS 35943 (D.N.J. June 2, 2006).

17. Attached hereto is a true and accurate copy of *Swedish Hosp. Corp. v. Sullivan*, No. 89-1693, 1991 WL 319154 (D.D.C. Dec. 20, 1991).

18. Attached hereto is a true and accurate copy of *Texas v. Organon USA, Inc. (In re Remeron End-Payor Antitrust Litig.)*, No. 02-2007, 2005 U.S. Dist. LEXIS 27011 (D.N.J. Sept. 13, 2005).

19. Attached hereto is a true and accurate copy of *In re Vitamins Antitrust Litig.*, No. 99-197, 2000 U.S. Dist. LEXIS 8931 (D.D.C. Mar. 31, 2000).

20. Attached hereto is a true and accurate copy of *In re William Lyon Homes Shareholder Litig.*, C.A. No. 2015-N, 2007 WL 270428 (Del. Ch. Jan. 18, 2007).

21. Attached hereto is a true and accurate copy of *Wilson v. Airborne, Inc.*, No. 07-770-VAP, 2008 WL 3854963 (C.D. Cal. Aug. 13, 2008).

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: October 27, 2008
Washington, D.C. 20005

/s/ Riva Khoshaba Parker
Riva Khoshaba Parker

TAB 2

LEXSEE 2001 US DIST LEXIS 68

Caution
As of: Sep 25, 2008

IN RE AETNA INC. SECURITIES LITIGATION

CIVIL ACTION MDL NO. 1219 (All Cases)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2001 U.S. Dist. LEXIS 68*; *Fed. Sec. L. Rep. (CCH) P91,322

January 4, 2001, Decided
January 4, 2001, Filed

DISPOSITION: [*1] Class counsel recovered $ 1.5 million in reimbursed litigation costs and attorneys' fees constituting thirty percent of the settlement fund less costs.

CASE SUMMARY:

PROCEDURAL POSTURE: In securities fraud action on behalf of a certified class of purchasers of common stock, before the court was plaintiffs' motion for approval of settlement and plan of allocation, and plaintiffs' motion for approval of their application for attorneys' fees and reimbursement of expenses.

OVERVIEW: Plaintiffs brought a securities fraud action on behalf of a certified class of purchasers of the common stock of company during the time period from March 6, 1997, through September 29, 1997 (class period). Plaintiffs alleged that defendants, through a series of accounting and actuarial manipulations, caused company to falsify its publicly filed financial statements by reporting materially understated medical expenses and artificially inflated operating earnings throughout the class period. Plaintiffs asserted claims under Section 10(b), Section 20(a), and Section 20A(a) of the Securities and Exchange Act of 1934, *15 U.S.C.S. § 78j(b)*, 78(t)(a), and 78A(a), and *Rule 10b-5*, promulgated thereunder. Before the court was plaintiffs' motion for approval of settlement and plan of allocation, and plaintiffs' motion for approval of their application for attorneys' fees and reimbursement of expenses. The court concluded that the proposed settlement and plan of allocation was fair, adequate, and reasonable. Moreover, class counsel could recover $ 1.5 million in reimbursed litigation costs and attorneys' fees constituting 30 percent of the settlement fund less costs.

OUTCOME: The proposed settlement and plan of allocation was fair, adequate, and reasonable. Class counsel may recover $ 1.5 million in reimbursed litigation costs and attorneys' fees constituting thirty percent of the settlement fund less costs.

LexisNexis(R) Headnotes

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Class Members > General Overview
Civil Procedure > Class Actions > Compromises
[HN1] While the law generally favors settlement in complex or class action cases for its conservation of judicial resources, the court has an obligation to ensure that any settlement reached protects the interests of the class members. Before approving a settlement, the court must examine whether adequate notice was issued to class members. *Fed. R. Civ. P. 23(c)(2)*.

Civil Procedure > Settlements > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
[HN2] Both the constitutional mandate of due process and the Federal Rules of Civil Procedure require ade-

quate notice of a proposed settlement. In order to satisfy due process, notice to class members must be reasonably calculated under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.

Civil Procedure > Class Actions > Class Members > General Overview
Civil Procedure > Class Actions > Compromises
Civil Procedure > Class Actions > Prerequisites > General Overview

[HN3] *Fed. R. Civ. P. 23* contains two notice provisions. In *Rule 23(c)(2)* actions, class members must receive the best notice practicable under the circumstances, including individual notice to all shareholders who can be identified through reasonable effort. Notice must be given to all potential members of a *Rule 23(b)(3)* class informing them of the existence of the class action, the requirements for opting-out of the class and entering an appearance with the court, and the applicability of any final judgment to all members who do not opt-out of the class. *Rule 23(e)* requires all members of the class be notified of the terms of any proposed settlement. Notice pursuant to *Rule 23(e)* should summarize the litigation and settlement for the purpose of informing class members of the right and opportunity to inspect the settlement documents, pleadings, and other litigation papers.

Civil Procedure > Class Actions > Compromises
Civil Procedure > Class Actions > Judicial Discretion
Civil Procedure > Class Actions > Prerequisites > Adequacy of Representation

[HN4] A court may not approve a settlement in a class action case unless it concludes that the settlement is fair, adequate, and reasonable. Trial judges have a duty to protect absentees which is executed by the court's assuring the settlement represents adequate compensation for the release of the class claims. While the decision whether to approve a proposed settlement of a class action rests within the sound discretion of the district court, the court must state on the record its reasons for approving the settlement.

Civil Procedure > Class Actions > Compromises
Civil Procedure > Class Actions > Prerequisites > General Overview
Civil Procedure > Settlements > Settlement Agreements > General Overview

[HN5] Courts consider the following factors to assess the fairness of proposed settlements in class action cases: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness in light of all the attendant risks of litigation. Consideration of these factors requires reconciliation of two contrary principles.

Civil Procedure > Settlements > Settlement Agreements > General Overview
Evidence > Inferences & Presumptions > General Overview

[HN6] While the court is obligated to ensure that the proposed settlement is in the best interest of the class members by reference to the best possible outcome, it must also recognize that settlement typically represents a compromise and not hold counsel to an impossible standard. The proponents of the settlement bear the burden of establishing that these factors support settlement.

Civil Procedure > Class Actions > Prerequisites > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Procedure > Settlements > Settlement Agreements > General Overview

[HN7] The court must consider the possible risks of litigation to balance the likelihood of success and the potential damage award at trial against the benefits of an immediate settlement. If further litigation presents a realistic risk of dismissal on summary judgment or an exonerating verdict at trial, the plaintiffs have a strong interest to settle the case early. If, however, the plaintiffs have strong evidence of liability and would likely prevail at trial, early settlement might be less prudent. When considering this factor, the court should avoid conducting a mini-trial. Rather the court may give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action.

Securities Law > Liability > Securities Act of 1933 Actions > Civil Liability > Fraudulent Interstate Transactions > General Overview

[HN8] To prove scienter, plaintiffs have to show an intent to deceive or defraud, or a sufficiently reckless disregard of the truth demonstrating an extreme departure from the standards of ordinary care, and which presents a

danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.

Securities Law > Liability > Remedies > Actual Damages
Securities Law > Liability > Securities Act of 1933 Actions > Other Remedies & Rights

[HN9] In a Section 10(b) of the Securities and Exchange Act of 1934 action, the measure of actual damages is the out-of-pocket loss measured by the difference between the fair value of what the plaintiff received and the fair value of what would have been received had there been no fraudulent conduct.

Civil Procedure > Settlements > Settlement Agreements > General Overview

[HN10] In order to assess the reasonableness of a proposed settlement seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement. The primary touchstone of this inquiry is the economic valuation of the proposed settlement. In making this assessment, the evaluating court must recognize that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and guard against demanding too large a settlement based on the court's view of the merits of the litigation.

Civil Procedure > Class Actions > Compromises
Civil Procedure > Settlements > Settlement Agreements > General Overview

[HN11] In addition to examining the general settlement terms, the court must further determine the reasonableness of the plan of allocation. Approval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate. Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable.

Civil Procedure > Class Actions > Prerequisites > General Overview
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees

[HN12] Attorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund.

Civil Procedure > Class Actions > Class Counsel > Fees
Civil Procedure > Class Actions > Compromises
Civil Procedure > Class Actions > Judicial Discretion

[HN13] District courts approving class action settlements must thoroughly review fee petitions for fairness. Although the ultimate decision as to the proper amount of attorneys' fees rests in the sound discretion of the court, the court must set forth its reasoning clearly.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
Legal Ethics > Client Relations > Attorney Fees > Excessive Fees

[HN14] There are two methods for calculating attorneys' fees: the lodestar method and the percentage method. Under the lodestar method, the court multiplies the number of hours reasonably spent on the litigation by a reasonable hourly billing rate for such services in a given geographical area provided by a lawyer of comparable experience. The lodestar method has been criticized for potentially encouraging attorneys to delay settlement to maximize fees or undercompensating attorneys for the risk of undertaking complex or novel cases on a contingency basis. The method also places pressure on the judicial system by forcing the court to evaluate the propriety of thousands of billable hours. Due to these flaws, courts have increasingly used the percentage method.

Civil Procedure > Class Actions > Class Counsel > General Overview
Civil Procedure > Class Actions > Compromises
Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

[HN15] When determining the appropriate percentage recovery for Class counsel, the court must consider several factors: the percentage likely to have been negotiated between private parties in a similar case; percentages applied in other class actions; the complexity and duration of the litigation; the quality of class counsel; the size of the settlement fund and the number of persons benefitted; the client's views regarding the attorneys' performance; and the risk of nonpayment.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

[HN16] Under the lodestar method, the court first determines the lodestar figure by multiplying the number of hours worked by the normal hourly rates of counsel. The court may then multiply the lodestar calculation to reflect the risks of nonrecovery, to reward an extraordinary result, or to encourage counsel to undertake socially useful litigation.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

[HN17] Multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.

COUNSEL: For IN RE: AETNA, INC., SECURITIES LITIGATION, PLAINTIFF: DEBORAH R. GROSS, LAW OFFICES OF BERNARD M. GROSS, P.C., PHILADELPHIA, PA USA.

JUDGES: Padova, J.

OPINION BY: Padova

OPINION

MEMORANDUM

Padova, J.

January 4, 2001

Before the Court is Plaintiffs' Motion for Approval of Settlement and Plan of Allocation, and Plaintiffs' Motion for Approval of their Application for Attorneys' Fees and Reimbursement of Expenses. After a fairness hearing held on December 18, 2000, and for the reasons that follow, the Court grants both Motions.

I. BACKGROUND

Plaintiffs brought this securities fraud action on behalf of a certified class ("Class") of purchasers of the common stock of Aetna, Incorporated ("Aetna") during the time period from March 6, 1997, through 7:00 a.m. (Eastern standard time) on September 29, 1997 ("Class Period"). Plaintiffs alleged that Defendants Aetna, Richard Huber [1] ("Huber"), Leonard Abramson [2] ("Abramson"), and Ronald Compton [3] ("Compton"), through a series of accounting and actuarial manipulations, caused Aetna to [*2] falsify its publicly filed financial statements by reporting materially understated medical expenses and artificially inflated operating earnings throughout the Class Period. Plaintiffs asserted claims under Section 10(b), Section 20(a), and Section 20A(a) of the Securities and Exchange Act of 1934 ("Exchange Act"), *15 U.S.C.A. § 78j(b)*, 78(t)(a), and *78A(a) (West 1997)*, and *Rule 10b-5*, promulgated thereunder, *17 C.F.R. § 240.10b-5 (1999)*.

1 Huber was Aetna's Vice Chairman for Strategy and Finance and Chief Financial Officer during the Class Period, and Director, President and Chief Executive Officer as of June 1, 1997.

2 Abramson was dismissed from the suit by Order dated February 2, 1999. Abramson was a member of Aetna's Board of Directors and specifically a member of the Board's Finance Committee, and founder and principal officer of U.S. Healthcare ("USHC") at the time of the merger.

3 Compton was Aetna's Chairman of the Board, Chief Executive Officer, and President until June 1, 1997.

[*3] This case arises from the merger of Aetna with USHC on July 19, 1996. At the time of the merger, Defendants allegedly publicly stated that the merger would generate an annual increase of $ 300 million in operating income per year, a major portion of which would come from reduced HMO medical expenses. Defendants forecasted that such increases would be achieved within eighteen months of the merger, by January 1998. Plaintiffs allege that by October 1996, Defendants had learned that USHC's medical expense reserves were understated by $ 76 million. Plaintiffs claim that Defendants engaged in accounting and actuarial manipulations to artificially lower Aetna's reported medical expense reserve in violation of Generally Accepted Accounting Principles ("GAAP") allegedly to conceal this material shortfall and to create a false impression that medical costs were flat and in accordance with expectations throughout the Class Period. Additionally, to meet analysts' earnings expectations and further conceal the medical expense reserves shortfall, Aetna reclassified certain reserves as unnecessary and released $ 69 million of such reserves into operating earnings in the first two quarters of 1997. [*4] This release allegedly inflated Aetna's reported earnings.

Plaintiffs claim that Aetna's quarterly earnings announcements and other public statements included materially false claims that the integration of USHC and Aetna was rapid and successful and that medical costs were flat and under control. Plaintiffs assert that such statements were known to be materially false in that Aetna was encountering significant problems in integrating USHC's medical claims processing operations with Aetna. As a result of Defendants' conduct, Plaintiffs contend that public investors were mislead into believing that the USHC merger and operations integration was proceeding successfully, and that Aetna was meeting all of the expectations Defendants had represented to the market.

According to Plaintiffs, Aetna concealed the integration problems and inflated its reported earnings until September 29, 1997. On that date, Aetna announced that its third quarter earnings would be below analysts' consensus estimates and that it would increase its medical claims reserves because of the problems arising from the merger. Upon this announcement, the share price of Aetna common stock fell ten percent, from $ 90.50 [*5] to $ 81.00.

Plaintiffs also charged Defendants Compton, and Abramson individually with insider trading in violation of section 20(a) of the Exchange Act. Plaintiffs alleged that Abramson sold more than 1,350,000 shares and Compton sold more than 90,000 shares of Aetna common stock on the open market while in possession of material and adverse nonpublic information. To this end, Plaintiffs asserted two subclasses of Class members who purchased Aetna common stock contemporaneously with the sales and who were allegedly damaged by Abramson's and Compton's conduct.

A. *Procedural History*

In November 1997, class action complaints were filed against Defendants in the Eastern District of Pennsylvania and the District of Connecticut. On April 10, 1998, the Judicial Panel on Multidistrict Litigation consolidated and transferred the cases to this Court for pretrial proceedings pursuant to *28 U.S.C. § 1407*. The Court thereafter appointed lead and liaison counsel [4] and lead plaintiffs [5] pursuant to *15 U.S.C. § 78u-4*. Plaintiffs filed a Consolidated and Amended Class Action Complaint ("Amended Complaint") on June 15, 1998. Count [*6] One alleged violations of section 10(b) of the Exchange Act and *Rule 10b-5* against all Defendants. Count Two asserted liability as controlling persons of Compton, Huber, and Abramson for violations of section 10(b) and *Rule 10b-5*, pursuant to section 20(a) of the Exchange Act. Plaintiffs asserted Counts Three and Four against Abramson and Compton respectively for insider trading in violation of section 20(a) of the Exchange Act. Following extensive briefing and oral argument, on February 2, 1999, the Court granted Defendants Aetna, Compton, and Huber's Motion to Dismiss the Amended Complaint in part for failure to comply with the Private Securities Litigation Reform Act of 1995 ("PSLRA"), *15 U.S.C. § 78u-4(b)(1)*, holding that Plaintiffs' information and belief allegations did not comply with the heightened pleading requirements of the PSLRA. The Court further dismissed Abramson from the suit.

4 The Court's Order identified the Law Offices of Bernard M. Gross, P.C., Savett Frutkin Podell & Ryan, P.C., and Milberg Weiss Bershad Hynes & Lerach, LLP as lead counsel for Plaintiffs. The Court's Order further appointed Savett Frutkin Podell & Ryan, P.C. as liaison counsel.

[*7]

5 The Court appointed E. Herskowitz, M. Wolin, P. Goodman, M. Oring, S. Hoffman, R. Farrell, Khusal Mehta, the Rainbow Fund Inc., E. Silvert, T. Kelly, T.B. Cohen, C. Bennett, and W.C. and Sandra Bower as lead Plaintiffs to represent the interests of the class.

With the Court's leave, Plaintiffs filed a Second Consolidated and Amended Class Action Complaint ("Second Amended Complaint") on February 22, 1999. This complaint restated the allegations of the Amended Complaint, but listed the actual sources of information supporting those allegations and omitted claims against Abramson. Defendants Aetna, Huber and Compton again moved to dismiss. The Court denied Defendants' motions on March 24, 1999. On April 2, 1999, Defendants moved to certify the issue of the pleading requirements of the PSLRA for interlocutory appeal to the Third Circuit Court of Appeals and sought a stay of discovery pending appellate review. Defendants filed a Notice of Appeal with the Third Circuit on April 19, 1999, that Plaintiffs thereafter moved to dismiss. On May 5, 1999, the Third Circuit dismissed Defendants' appeal. [*8] The Court later denied Defendants' motion for certification of the appeal.

Defendants next sought an immediate stay of discovery and moved to dismiss the suit pursuant to *Federal Rule of Civil Procedure 60(b)* based on alleged misrepresentations to the Court. Following extensive and adversarial briefing and a hearing, the Court denied both motions finding no fraud had been committed.

On August 6, 1999, upon Plaintiffs' motion, the Court certified the following Class pursuant to *Federal Rule of Civil Procedure 23*:

> all persons who purchased the common stock of Aetna Inc. on the open market during the period from March 6, 1997 through and including 7:00 a.m. (EDT) on September 29, 1997 (the "Class Period"), and a subclass of persons who purchased on the open market Aetna common stock contemporaneously with the sales of such stock by Defendant Ronald Compton. [6]

6 Excluded from the Class are persons who requested exclusion by filing their names with the Court. Defendants, Aetna's officers and directors and their immediate family members, subsidiaries

and affiliates of the individual and corporate defendants and their officers and directors are also excluded from participating in the Class.

[*9] At the close of discovery, Defendants moved for summary judgment on Plaintiffs' claims. Plaintiffs responded with a motion requesting leave to file a Third Consolidated and Amended Class Action Complaint ("Third Amended Complaint"). The Third Amended Complaint expanded Plaintiffs' theory regarding the inflation of Aetna's earning reports to include manipulations of FAS 60 and Extended/Maturity insurance reserves. Plaintiffs alleged that Aetna failed to disclose the release of portions of the company's FAS 60 and Extended/Maternity insurance reserves into earnings that were reported on Aetna's first and second quarter 1997 financial statements. This release allegedly contributed to the overstatement of Aetna's earnings during those two quarters. Defendants vigorously contested the filing of the Third Amended Complaint. Following extensive briefing and a hearing, the Court permitted Plaintiffs to file a Third Amended Complaint and granted Defendant time to conduct additional discovery. During this second discovery period, disputes arose regarding Plaintiffs' expert in which Defendants sought to strike the expert report of F. Gerard Adams and prevent Plaintiffs from deposing certain [*10] witnesses.

Defendants refiled summary judgment motions following the second discovery period on May 31, 2000. These motions were ripe and pending before the Court and trial had been scheduled for November 20, 2000, when the parties reached a settlement. The parties had been participating in settlement discussions throughout the course of the litigation both on their own and before Magistrate Judge Charles B. Smith. [7] On September 26, 2000, Plaintiffs filed a Motion for Preliminary Approval of Settlement that the Court approved on October 5, 2000. On December 18, 2000, the Court held a hearing to ascertain the fairness of the settlement.

7 Early in the litigation, the Court referred the matter to Magistrate Judge Smith for settlement.

B. *Settlement Terms*

The Stipulation of Settlement ("Stipulation") outlines the details of the settlement. The settling Defendants paid into an escrow account $ 82.5 million on behalf of the Class ("Settlement Fund" or "Fund"). [8] Stipulation at 14. The Settlement [*11] Fund shall be applied to pay Plaintiffs' attorneys' fees and litigation costs in the amount approved by the Court, and costs related to the settlement and notice administration. The Fund then will be distributed to Class members who submit an approved Proof of Claim and Release form ("Authorized Claimant") according to an allocation plan ("Plan").

8 The Settlement Fund was fully funded as of December 15, 2000. Defendants deposited $ 4,125,000.00 in an escrow account five days after execution of the Stipulation of Settlement and added the remaining $ 78,375,000.00 on December 15, 2000. The Settlement Fund has been accumulating interest since the time of the first deposit. Plaintiffs project that the Fund will earn approximately $ 1.4 million in interest over an estimated distribution period of six months.

The Plan sets forth formulas for determining the recognized claim of an Authorized Claimant according to the date of purchase and/or sale of the Aetna common stock:

> (i) for each share of Aetna common stock [*12] purchased during the Class Period which an Authorized Claimant continued to hold as of 7:01 a.m. (EDT) on September 29, 1997, the Recognized Claim shall be equal to the "Estimated Inflation Per Share [9] " on the date of purchase; (ii) for each share of Aetna common stock purchased during the Class Period which an Authorized Claimant sold at a loss (i.e. sold for less than the purchase price paid) prior to 7:00 a.m. (EDT) on September 29, 1997, the Recognized Claim shall be equal to the lesser of: (a) the difference, if a loss, between the "Estimated Inflation Per Share" on the date of purchase and the "Estimated Inflation Per Share" on the date of sale, or (b) the difference, if a loss, between the purchase price paid (including commissions, etc.) and the proceeds received (excluding commissions, etc).

9 "Estimated Inflation Per Share" means (i) for each day in the Class Period between March 6, 1997 and September 22, 1997, eighteen percent of the closing price on that date; and (ii) for each day in the Class Period between September 23, 1997, and 7:01 a.m. (EDT) on September 29, 1997, ten percent of the closing price on that date, provided that for any purchase on September 29, 1997, the closing price will be the closing price on September 28, 1997. Stipulation at 6 P 15; Notice at 2 P 5.

[*13] Stipulation at 6; Settlement Hrg. P-1 Ex. A (Notice of Settlement of Class Action and Fairness Hearing ("Notice")) at *2 P 5*(a). Members of the Class who sold their shares of Aetna common stock at a price higher than the purchase price of such shares excluding fees and commissions have no recognized claim and accordingly will not share in the Settlement Fund. Stipulation at 7; Notice at 2 P 5(a). Each Authorized Claimant will receive an amount determined by multiplying the Recognized Claim by a fraction: "the numerator of which shall be the net Settlement Fund and the denominator of which shall be the total recognized claims of all Authorized Claimants." Notice P 5(b).

Upon Court approval of the settlement, Plaintiffs and Class members will release all claims arising from or in connection with their purchase or sale of Aetna common stock during the Class Period against Defendants and related parties. [10] The settlement permits Plaintiffs' counsel to seek attorneys' fees and litigation expenses to be paid from the Fund. Stipulation at 17-18. The Notice states Plaintiffs' intent to request attorneys' fees up to 33 1/3 percent of the Fund, and litigation [*14] costs of $ 1.5 million including interest. Notice at 1.

10 The release prohibits suit against "Defendants and . . . any of their former and present employees, directors, officers, accountants, agents, attorneys, insurers, investment bankers, representatives, affiliates, subsidiaries, and each of their heirs, executors, administrators, beneficiaries, predecessors, successors, [and] assigns." Stipulation at 18.

C. *Fairness Hearing*

On December 18, 2000, the Court held a hearing to determine the fairness of the proposed settlement. Plaintiffs' counsel outlined the settlement terms and plan of allocation, specifically addressing the amount of actual recovery of several different types of Class member claimants, and the present status and funding of the settlement fund and any accumulating interest. Counsel further discussed Plaintiffs' request for attorneys' fees and litigation costs. Significantly, counsel reported the receipt of no objections to the settlement. No objectors appeared during the hearing [*15] or requested to be heard.

II. MOTION FOR APPROVAL OF SETTLEMENT

[HN1] While the law generally favors settlement in complex or class action cases for its conservation of judicial resources, the court has an obligation to ensure that any settlement reached protects the interests of the class members. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liability Litig., 55 F.3d 768, 784 (3d Cir. 1995)*; *Fed. R. Civ. P. 23(e)*. Before approving a settlement, the court must examine whether adequate notice was issued to class members. *Fed. R. Civ. P. 23(c)(2)*; *In re Ikon Office Sol., Inc. Sec. Litig., 194 F.R.D. 166, 174 (E.D. Pa. 2000)*. Because the class in this action was certified by Order dated August 6, 1999, the Court need not determine whether to certify a settlement class. The court, however, must scrutinize the terms of the settlement to ensure that it is "fair, adequate, and reasonable." *In re General Motors, 55 F.3d at 785*.

A. *Adequacy of Notice*

[HN2] Both the constitutional mandate of due process and the Federal Rules of Civil Procedure require adequate notice of a proposed settlement. "In order to satisfy [*16] due process, notice to class members must be 'reasonably calculated under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." *Lachance v. Harrington, 965 F. Supp. 630, 636 (E.D. Pa. 1997)* (quoting *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950))*. [HN3] *Federal Rule of Civil Procedure 23* contains two notice provisions. *Fed. R. Civ. P. 23*. In *Rule 23(c)(2)* actions, class members must receive the "best notice practicable under the circumstances, including individual notice to all shareholders who can be identified through reasonable effort." *Fed. R. Civ. P. 23(c)(2)*. Notice must be given to all potential members of a *Rule 23(b)(3)* class informing them of the existence of the class action, the requirements for opting-out of the class and entering an appearance with the court, and the applicability of any final judgment to all members who do not opt-out of the class. *Id.*; *In re Prudential Ins. Co. of Am. Sales Practice Litig., 148 F.3d 283, 326 (3d Cir. 1998)*. *Rule 23(e)* requires all members of the [*17] class be notified of the terms of any proposed settlement. *Fed. R. Civ. P. 23(e)*; *In re Prudential, 148 F.3d at 326-27*. Notice pursuant to *Rule 23(e)* should summarize the litigation and settlement for the purpose of informing class members of the right and opportunity to inspect the settlement documents, pleadings, and other litigation papers. *In re Prudential, 148 F.3d at 327* (quoting 2 Newberg on Class Actions § 8.32 at 8-109).

The Court determines that the notice provided in this case met the requirements of due process and the Federal Rules of Civil Procedure. Pursuant to Order dated October 5, 2000, Plaintiffs mailed a copy of the Notice of Settlement of Class Action and Fairness Hearing ("Notice") to 22,092 individuals and companies identified by Aetna as shareholders and 29,710 individuals and companies identified as a result of the mailing of the Notice of Pendency who did not opt-out of the Class, and 1,365 nominees and brokers by U.S. first class mail on October 13, 2000. Settlement Hrg. P-1 RSM McGladrey Aff. PP

2, 4, Ex. B. A summary notice was also published in the national edition of the Wall Street Journal and on the Internet through [*18] the Business Wire on October 20, 2000. *Id. PP 5, 6*, Ex. C, D.

The Notice outlines in detail the settlement terms, including a verbatim statement of the Class, distribution Plan and release. The Notice further states the benefits of settlement from the perspective of each party and the maximum potential request for attorneys' fees and litigation costs. Rather than estimate the potential recovery if the action were to proceed to trial, the Notice lists the issues on which the parties disagree with respect to damages. The Notice informs the recipient of the date and venue of the settlement hearing held on December 18, 2000, and provides information on the right of Class members to appear and the procedures for filing objections to the settlement. The names and contact information of the relevant attorneys are included, as is information on filing a proof of claim and release form. The summary notice gave the essential terms of the settlement and notice of the upcoming fairness hearing, as well as information on how to obtain a copy of the full Notice. After reviewing the Notice and summary notice, the Court concludes that the substance of both was adequate to satisfy the concerns [*19] of due process and the Federal Rules. *See In re Prudential, 148 F.3d at 328*; *In re Ikon, 194 F.R.D. at 175* (approving notice that stated the settlement terms and plan of allocation, estimated potential recovery at trial, revealed maximum request for attorneys fees, and identified contact information of relevant attorneys and summary notice that summarized essential settlement terms and procedure for obtaining full notice); *Fed. R. Civ. P. 23(e)*.

B. *Fairness of Settlement*

[HN4] A court may not approve a settlement in a class action case unless it concludes that the settlement is "fair, adequate, and reasonable." *In re General Motors, 55 F.3d at 785*. Trial judges have a duty to protect absentees "which is executed by the court's assuring the settlement represents adequate compensation for the release of the class claims." *In re Prudential, 148 F.3d at 316* (quoting *In re General Motors, 55 F.3d at 805*). While the decision whether to approve a proposed settlement of a class action rests within the sound discretion of the district court, the court must state on the record its reasons for approving the [*20] settlement. *In re Prudential, 148 F.3d at 317*; *Eichenholtz v. Brennan, 52 F.3d 478, 488 (3d Cir. 1995)*.

[HN5] Courts consider the following factors to assess the fairness of proposed settlements in class action cases: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness in light of all the attendant risks of litigation. [11] *In re Prudential, 148 F.3d at 317* (quoting *Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)*(citations omitted)). Consideration of these factors requires reconciliation of two contrary principles. [HN6] While the court is obligated to ensure that the proposed settlement is in the best interest of the class members by reference to the best possible [*21] outcome, it must also recognize that settlement typically represents a compromise and not hold counsel to an impossible standard. *See In re Ikon, 194 F.R.D. at 179*. The proponents of the settlement bear the burden of establishing that these factors support settlement. *In re Ikon, 194 F.R.D. at 179* (citing *In re General Motors, 55 F.3d at 785*). Applying the above standard, the Court concludes that the proposed settlement in this case is fair, adequate and reasonable.

11 Because the proposed settlement here was reached after the class was certified by court order, the Court need not apply the heightened standard of scrutiny applicable to cases in which the parties simultaneously request approval of a settlement and certification of a settlement class. *See In re Prudential, 148 F.3d at 317* (citing *In re General Motors, 55 F.3d at 805*).

1. *Complexity and Duration of the Litigation*

This factor attempts to capture the likely [*22] costs of continued litigation in terms of both time and money. *In re General Motors, 55 F.3d at 812*. With respect to the duration of the litigation, the Court notes that this case has already been pending for over two years, having first been assigned in April 1998. Although the parties have already spent over two years litigating this case, the Court concludes that significant costs would still result in the absence of settlement. At the time the parties first proposed a settlement, trial was scheduled for November 20, 2000. Because the parties had amassed an extensive number of potential witnesses, trial would likely have lasted for several months. Given the extremely large sums of money sought by Plaintiffs and the vigorous advocacy by the parties, any outcome, whether by summary judgment or trial, would be subject to lengthy post-trial motions and appeal. *See In re Ikon, 194 F.R.D. at 179*. The risk of delay could have deleterious effects on any future recovery due to the time value of money.

Of equal importance is the likely complexity of proof in the case. *See id.* Plaintiffs' allegations center around the thorny issue of Aetna's accounting [*23]

practices. Extensive expert testimony would be required on the nature of Aetna's finances and accounting practices, the comparison of Aetna's practices with GAAP, and the effects of Aetna's practices on the stock price. *See id.*; Joint Decl. P 59. The complex nature of the evidence combined with the lengthy duration of the litigation weighs strongly in favor of settlement.

2. *Reaction of the Class*

This factor gauges the level of support for the settlement among the class members. *In re Prudential, 148 F.3d at 318*. While the number of members objecting to the settlement or choosing to opt-out of the class may be indicative of the strength of the opposition, the court must be cautious when inferring support from a small number of objectors especially in securities cases where members may be minor shareholders. *In re Ikon, 194 F.R.D. at 179* (citing *In re General Motors, 55 F.3d at 812*). In this case, the deadline for filing objections and entries of appearance to the proposed settlement was November 29, 2000. Notably, no objections or entries of appearance have been received to date.

3. *Stage of Proceedings and the Amount* [*24] *of Completed Discovery*

This factor captures the notion that courts should only approve settlements where the parties have an adequate appreciation of the merits of the case. *In re Ikon, 194 F.R.D. at 179* (citing *In re Prudential, 148 F.3d at 319*). Accordingly, the nature and depth of discovery is relevant to the propriety of the settlement. *194 F.R.D. at 180*.

In this case, discovery closed well before the proposed settlement was reached. Discovery was extensive as outlined in the Joint Declaration filed by lead counsel. *See* Joint. Decl. PP 38-65. Plaintiffs sifted through over 700,000 pages of documents, and conducted thirty-four depositions of Aetna personnel, Aetna's public auditors, and securities analysts. *Id. PP 45, 58*. The parties each retained several accounting and actuarial experts who developed substantial reports and analysis on liability and damages, and themselves produced voluminous documents. *Id. PP 59-67*. Specifically, Plaintiffs employed one expert to independently calculate Aetna's medical expense reserves for the period in dispute, another expert to calculate damages, and yet another to review Aetna's accounting practices. [*25] *Id. PP 60-62*. Defendants consulted two experts to analyze their accounting and actuarial practices and two experts to rebut Plaintiffs' damage calculations and provide alternate explanations for the decline in stock prices. *Id. P 64*. Defendants' expert testimony led Plaintiffs to seek an additional rebuttal expert whose report was subsequently hotly contested by Defendants. *Id.* at P 66. A majority of the experts were deposed by the opposing side. *Id. P 67*.

The Court concludes that both sides had a reasoned and substantiated opinion of the settlement value and likelihood of success of the case at the time of settlement. The parties reached settlement with the benefit of full investigation of Plaintiffs' claims and allegations. For example, discovery uncovered information that led Plaintiffs to file a Third Amended Complaint that added new allegations of manipulation of specific reserves. *Id. P 68*. That Defendants' summary judgment motions were ripe for decision at the time of the settlement further demonstrates that the parties had fully assessed the merits of the case prior to settlement. This factor, therefore weighs in favor of settlement.

4. *Risks of Maintaining* [*26] *the Class through Trial*

The value of a class action rests on certification of the class since the aggregation of claims and claimants enlarges the monetary value of the suit and facilitates proof on the merits through the pooling of litigation resources. *In re General Motors, 55 F.3d at 817*. The likelihood of obtaining and retaining certification of the class greatly impacts the range of recovery from the action. *Id.*

The Court granted Plaintiffs' Amended Motion for class certification on August 6, 1999, and ordered certification of the following class:

> (1) all persons who purchased the common stock of Aetna on the open market during the period from March 6, 1997 through and including 7:00 am (EDT) on September 29, 1997 (the "Class Period"), and (2) a subclass of persons who purchased on the open market Aetna common stock contemporaneously with the sales of such stock by Defendant Ronald Compton. Excluded from the Class are defendants, the officers and directors of Aetna, members of the immediate families of such officers and directors, subsidiaries and affiliates of the individual and corporate defendants, and their officers and directors (the "Class"). [*27]

In re Aetna Sec. Litig., 1999 U.S. Dist. LEXIS 12545, No. Civ. A. 1219, 1999 WL 624516, at *1 (E.D. Pa. Aug. 6, 1999). At the time of Plaintiffs' Motion, Defendants did not contest the "numerosity, commonality, or typicality requirements of *Rule 23(a) of the Federal Rules of Civil Procedure* nor the predominance and superiority requirements of *Rule 23(b)(3)*." *Id.* Rather, De-

fendant challenged the starting date of the Class Period. *Id.* This is notable in light of the otherwise contentious nature of the early stages of this litigation and the discovery Defendants had on the issue of class certification. *See* Joint Decl. P 35. While decertification is always a possibility given the conditional nature of all class action certifications, *In re Ikon, 194 F.R.D. at 181*, complete decertification would have been very unlikely given Defendants' failure to challenge the *Rule 23(b)* criteria, and the congruity of issues and legal theories of the class members. At most, the Court would have reconsidered the start date of the Class Period. Nonetheless, the risk of alteration of the starting date of the Class Period was eliminated by the settlement. This factor, therefore, weighs [*28] in favor of settlement. *See In re Ikon, 194 F.R.D. at 181*.

5. *Risks of Establishing Liability and Damages*

[HN7] The Court must further consider the possible risks of litigation to "balance the likelihood of success and the potential damage award . . . [at] trial against the benefits of an immediate settlement." *In re Prudential, 148 F.3d at 319*; *In re Ikon, 194 F.R.D. at 181*. If further litigation presents a realistic risk of dismissal on summary judgment or an exonerating verdict at trial, the plaintiffs have a strong interest to settle the case early. *In re Ikon, 194 F.R.D. at 181*. If, however, the plaintiffs have strong evidence of liability and would likely prevail at trial, early settlement might be less prudent. *Id.* When considering this factor, the court should avoid conducting a mini-trial. Rather the court may "give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action." *In re Ikon, 194 F.R.D. at 181* (citing *Lachance, 965 F. Supp. at 638*). [*29] Despite their vigorous advocacy of the merits of their claims throughout this litigation, Plaintiffs now identify issues that cast significant doubt on their ability to prevail at summary judgment or trial, or obtain damages. The Court agrees that Plaintiffs faced substantial risk at both the summary judgment and trial stage in proving the merits of their claims. The Court further concludes that Plaintiffs faced a substantial risk in establishing both the amount and causation of damages in this case.

The first consideration is the risk of establishing liability. The instant lawsuit involves allegations of violations of section 10(b) of the Exchange Act, and *Rule 10b-5* promulgated thereunder. To prevail, Plaintiffs must show that Defendants made misstatements or omissions of a material fact with scienter, that Plaintiffs relied on such statements, and that the reliance proximately caused injury. *See Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1417 (3d Cir. 1997).*

Plaintiffs would have had to overcome substantial difficulties in proving that Defendants acted with scienter. [HN8] To prove scienter, Plaintiffs would have had to show an intent to deceive or defraud, [*30] or a sufficiently reckless disregard of the truth demonstrating "an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *In re Advanta Corp Sec. Litig, 180 F.3d 525, 539 (3d Cir. 1999)* (citing *Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1045 (7th Cir. 1977))*. In addition to the inherent difficulties in establishing the requisite mental state, Defendants outlined a strong defense in their summary judgment motion based on reasonable reliance on the advice of outside accountants' estimation of the accuracy of Aetna's statement of the disputed reserves, and on internal status reports on the operations integration with USHC. *See* Defs' Summ. J. Mem. at 2-4, 42-43. While Plaintiff alleges that Aetna understated various reserves and thereby inflated its reported earnings during the first two quarters of 1997, Defendants presented evidence that KPMG LLP, working with Ernst and Young, independently recalculated these reserves and concluded that Aetna's reserves were fairly stated and in compliance [*31] with GAAP. Defendants also presented evidence that Aetna had informed shareholders of the risk of the integration in a proxy statement, and evidence indicating that Compton and Huber's public statements about the success of the integration were consistent with the internal monthly reports detailing the progress of the integration that were distributed to senior management.

Defendant Compton further submitted evidence that could have substantially undermined Plaintiffs' claims with respect to Count Three alleging insider trading. Compton claims that he sold only a small portion of his Aetna shareholding for diversification purposes in anticipation of his upcoming retirement. Compton presents evidence that he retained the majority of his Aetna shares and options, and sold shares only after Aetna publicly released its first quarter 1997 earnings information.

The next issue is risk of damages. [HN9] In a section 10(b) action, the measure of actual damages is the "out-of-pocket loss measured by the difference between the fair value of what the plaintiff received and the fair value of what . . . would have [been] received had there been no fraudulent conduct." *In re Ikon, 194 F.R.D. at 182* [*32] (citing *Lachance, 965 F. Supp. at 643*).

First, assuming a finding of liability, Plaintiffs would have faced significant hurdles in proving the speculative value of the stock had there been no fraud given Defendants' aggressive contest to Plaintiffs' damage estimates. On summary judgment, Defendants set forth the theory that Aetna's stock price unforeseeably

declined due to a general industry downturn. *See* Defs' Summ. J. Mem. at 53. Plaintiffs faced the potential difficulty of either establishing that the decline in stock price was not influenced by other factors outside of the alleged misstatements, or separating the fraud's effect on the stock price from that of outside factors. *See In re Ikon, 194 F.R.D. at 182-83*. Plaintiffs also would have had to successfully counter Defendants' evidence that no information about the allegedly manipulated adjustments to the FAS 60 or Extended/ Maternity reserves was publicly disseminated. Such evidence could preclude any damages claim based on those allegations since the information would not have been incorporated into the stock price absent public disclosure. Defendants further challenged Plaintiffs' ability [*33] to prove causation with respect to the integration statements.

Second, Plaintiffs' damages theories rested primarily on the testimony and reports of expert witnesses. Such experts would likely have been challenged on *Daubert* or other grounds. Plaintiffs, therefore, risked the rejection of its experts first by the Court pursuant to *Federal Rule of Evidence 104(a)*, or by the jury in assessing credibility.

Lastly, the parties differed widely in their damages estimation. Plaintiffs claimed enormous monetary damages of $ 830 million. Settlement Hrg. Tr. at 8. In addition to vigorously disputing any liability, Defendants strongly contested Plaintiffs' damages experts' calculation, claiming that full proof of all liability claims would only entitle Plaintiffs to recover at most $ 117 million. *Id. at 9*; Settlement Hrg. Ex. P-3. In light of the wide disparity in damage assessments, Plaintiffs risked the rejection of their expert damages witness by the jury, while Defendants risked entry of a massive damage award against them. The settlement avoids this uncertainty for both sides. *See In re Ikon, 194 F.R.D. at 183*.

For these reasons, the Court concludes that the [*34] risks of establishing liability and damages weigh strongly in favor of settlement.

6. *Defendants' Ability to Withstand Greater Judgment*

The Court lacks any evidence related to this factor. The factor therefore does not weigh in favor of settlement.

7. *Range of Reasonableness*

The last *Girsh* factors ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial. *In re Prudential, 148 F.3d at 322*. [HN10] In order to assess the reasonableness of a proposed settlement seeking monetary relief, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *Id*. (quoting Manual for Complex Litigation 2d § 30.44, at 252). "The primary touchstone of this inquiry is the economic valuation of the proposed settlement." *In re General Motors, 55 F.3d at 806*. In making this assessment, the evaluating court must recognize that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty [*35] and resolution and guard against demanding too large a settlement based on the court's view of the merits of the litigation. *Id.*

Considering the present value of money, the difficulties Plaintiffs would likely face in proving liability, the likelihood that the damages received would have been lower than Plaintiffs' maximum estimate, and the aggressive opposition to both liability and damages mounted by Defendants, the Court determines that this settlement falls within a reasonable range. Taking Plaintiffs' maximum estimate of recovery at trial if all issues were resolved in their favor, the gross settlement provides a recovery of approximately ten percent of the best possible recovery. This percentage is consistent with those approved in other securities fraud cases. *See In re Ikon, 194 F.R.D. at 183*. Furthermore, Defendants argued that the provable losses were substantially lower. Plaintiffs' experts calculated damages to be $ 830 million, while Defendants' experts asserted that Plaintiffs lost at most $ 117 million. The gross settlement provides the recovery of seventy percent of the losses estimated by Defendants. Additionally, the "hallmarks of a questionable [*36] settlement" are absent. Plaintiffs will receive a significant monetary settlement, and there is no suggestion of collusion between Defendants and Plaintiffs' counsel. To the contrary, this litigation has been aggressively pressed by both sides for nearly three years.

In summary, the Court determines that the majority of the *Girsh* factors weigh strongly in favor of settlement and concludes that the settlement is fair, reasonable and adequate.

C. *Fairness of Allocation Plan*

[HN11] In addition to examining the general settlement terms, the Court must further determine the reasonableness of the plan of allocation. *See In re Ikon, 194 F.R.D. at 184*. "Approval of a plan of allocation of a settlement fund in a class action is 'governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate.'" *In re Ikon, 194 F.R.D. at 194* (quoting *In re Computron Software, Inc., 6 F. Supp. 2d 313, 321 (D. N.J. 1998))*. Courts generally consider plans of allocation that reimburse class members based on the

type and extent of their injuries to be reasonable. [*37] *Id.*

Plaintiffs estimate the amount of the Fund that will be available to distribute to Class members to equal $ 57,900,000.00. [12] The Plan in this case acknowledges the differing losses suffered by Claimants depending on the dates on which they purchased and sold Aetna stock and the price at which they may have sold the shares. The Plan estimates different percentages of inflation of the stock price according to date. These estimates were derived from Plaintiffs' damages expert report. *See* Settlement Hrg. Tr. at 10; Nye Report at 20 P 42. Plaintiffs' expert calculated the estimated inflation percentage from the residual returns on Aetna stock, i.e., the difference between the actual returns on Aetna stock and the returns predicted based on the general market and industry returns. Nye Report at 20 P 41. Between March 6, 1997, and September 22, 1997, the estimated price inflation per share is eighteen percent of the stock's closing price on that date. Between September 23, 1997, and 7:01 a.m. on September 29, 1997, the estimated price inflation per share is ten percent. The price inflation for the latter period is lower than in the former period because [*38] on September 23, 1997, the price of Aetna's common stock dropped $ 9.06, a negative return of 8.8 percent. *Id.* at *13 P 26*. According to Plaintiffs' expert, the drop was caused by securities analysts' concerns that Aetna's third quarter earnings would fall short of expectations due to increases in the medical loss ratio, a slowdown in membership enrollment growth, or the failure to realize the cost savings and revenue enhancements from the merger. *Id. P 27*.

12 This amount is the gross Fund of $ 82,500,000.00 less litigation expenses ($ 1,500,000.00), attorneys' fees ($ 24,300,000.00) and estimated administration costs ($ 200,000.00), adding estimated interest ($ 1,400,000.00). *See* Settlement Hrg. Ex. P2.

The Recognized Claims of Class members are calculated by applying the estimated inflation per share for the time period during which the purchase or sale occurred to the purchase or sale price. For example the Recognized Claim for a Class member who purchased 1,000 shares [*39] on June 13, 1997 at $ 112 3/5 per share and sold those shares on September 24, 1997 at $ 92 5/8 is calculated by adding eighteen percent of the cost of the shares purchased on June 13, 1997 ($ 20,295.00) to ten percent of the amount obtained through the sale of the shares on September 24, 1997 ($ 9,262.50). This member's Recognized Claim would be $ 11,032.50. Assuming full participation by all Class members, the claimant would receive seven percent of the Recognized Claim or $ 648.38.

With respect to differentiation between claimants based on the price at sale, claimants who purchased shares at the start of the Class Period and sold those shares during the Class Period for a price higher than the initial purchase price have no Recognized Claim. *See* Settlement Hrg. Ex. P2. Having made a profit on their Aetna stock, such Class Members accordingly will receive no money from the settlement. Settlement Hrg. Tr. at 7. Claimants who suffered losses on their trades, however, will recover approximately seven percent of their Recognized Claims, assuming full participation by all Class members. *See* Settlement Hrg. Ex. P2.

The Court concludes that this plan of allocation is reasonable. [*40] The distinctions made are fair and accurately reflect the different risks and losses experienced by individuals who acquired Aetna stock at different times. It is reasonable to apply a different inflation percentage to shares bought or sold on or after September 23, 1997, since on that date the price of the stock partially adjusted to more accurately reflect Aetna's alleged financial condition. Similarly, it is fair that claimants who reaped a profit on their sales of Aetna stock during the Class Period receive no share of the settlement since they suffered no loss from any alleged misrepresentations.

III. MOTION FOR APPROVAL OF APPLICATION FOR ATTORNEYS' FEES AND COSTS

The Court now turns to Plaintiffs' Motion for Attorneys' Fees and Costs.

A. *Costs*

[HN12] Attorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund. *In re Ikon, 194 F.R.D. at 192* (quoting *Lachance, 965 F. Supp. at 651*.) Class counsel has requested reimbursement of litigation expenses in the amount of $ 1,693,915.33. Examining counsel's affidavits attesting to the unreimbursed expenses paid [*41] out, the Court concludes that the requested expenses are reasonable. The Court, however, will not award the full amount requested because the Notice sent to Class members states that Plaintiffs' counsel would apply only for costs in the amount of $ 1,500,000.00, plus interest. Settlement Hrg. Ex. P1 Ex. A at 1. Because of this representation made to Class members, the Court determines that any reimbursement of costs should be limited to $ 1,500,000.00, plus interest. [13]

13 Plaintiffs' counsel does not object to this reduced reimbursement. Settlement Hrg. Tr. at 16.

B. *Attorneys' Fees*

Class counsel have petitioned for an award of attorneys' fees of thirty percent of the Settlement Fund. [HN13] District courts approving class action settlements must thoroughly review fee petitions for fairness. *In re Prudential, 148 F.3d at 333*; *In re Ikon, 194 F.R.D. at 192*. Although the ultimate decision as to the proper amount of attorneys' fees rests in the sound discretion of the [*42] court, the court must set forth its reasoning clearly. *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 196 (3d Cir. 2000)*; *In re Ikon, 194 F.R.D. at 192-93*.

[HN14] There are two methods for calculating attorneys' fees: the lodestar method and the percentage method. *In re Ikon, 194 F.R.D. at 193*. Under the lodestar method, the court multiplies the number of hours reasonably spent on the litigation by a reasonable hourly billing rate for such services in a given geographical area provided by a lawyer of comparable experience. *Gunter, 223 F.3d at 199*. The lodestar method has been criticized for potentially encouraging attorneys to delay settlement to maximize fees or undercompensating attorneys for the risk of undertaking complex or novel cases on a contingency basis. *Id.* The method also places pressure on the judicial system by forcing the court to evaluate the propriety of thousands of billable hours. *Id.* Due to these flaws, courts have increasingly used the percentage method.

In light of these considerations and in accordance with the Third Circuit Court of Appeals' recommendation, the Court will utilize the percentage [*43] method, but cross-check the results against the lodestar award to ensure against an excessive fee award. *Gunter, 223 F.3d at 199*. The percentage will be based on the net settlement fund after deducting the costs of litigation. [14] *See In re Ikon, 194 F.R.D. at 193*. This approach increases the incentives for cautious expenditure and helps align the interests of the class more closely with those of counsel. *Id.* The gross Fund is $ 82.5 million. Subtracting the approved expenses of $ 1.5 million from the gross Fund leaves a net Fund of $ 81 million. Thirty percent of the net Fund is $ 24.3 million.

> 14 The Court will award counsel a percentage of the full recovery because their efforts "were a material factor in bringing about the entire settlement." *See In re Prudential, 148 F.3d at 336-38*; *In re Cendant Corp., 109 F. Supp. 2d 285, 299* (D. N.J. 2000.)

The Court will first address the question [HN15] whether thirty percent is an appropriate percentage [*44] recovery for Class counsel. Since this is a flexible and fact-driven determination, the Court must consider several factors: the percentage likely to have been negotiated between private parties in a similar case; percentages applied in other class actions; the complexity and duration of the litigation; the quality of class counsel; the size of the settlement fund and the number of persons benefitted; the client's views regarding the attorneys' performance; and the risk of nonpayment. *See Gunter, 223 F.3d at 197-199*; *In re Ikon, 194 F.R.D. at 193*. Upon a consideration of all of these factors, the Court concludes that thirty percent constitutes a reasonable award to Class counsel.

Despite the marginal weight of the first factor, *see In re Prudential, 148 F.3d at 340*, the Court concludes that an award of thirty percent is in line with what is routinely privately negotiated in contingency fee tort litigation. *See In re Ikon, 194 F.R.D. at 194*; Mem. in Supp. of Application for Att'y Fees ("Fees Mem.") at 19-20 (listing cases). Furthermore, awards of thirty percent are commonly awarded in other settlements of securities [*45] fraud cases. *See In re Ikon, 194 F.R.D. at 194*; Fees Mem. at 16-18.

The next factor, the complexity and duration of the litigation weighs strongly in favor of the requested fee award. The course of this litigation was prolonged, having been actively litigated for nearly three years, and involved complex issues. Counsel filed extensive briefing addressing the novel question of the pleading standards required under the PSLRA, and complicated issues of class certification and scienter. Counsel successfully defended two well-fought motions to dismiss. Following a condensed discovery period during which counsel conducted thirty-four depositions and analyzed hundreds of thousands of pages of documents, the parties filed extensive summary judgment briefs. At the time of settlement, the parties were preparing for a trial that was expected to last for several months. Extensive summary judgment briefing had been filed at the time of the settlement.

Similarly, the quality of representation by Plaintiffs' counsel weighs strongly in favor of counsel's fee request, as measured by "the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, [*46] the standing, experience, and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *See In re Ikon, 194 F.R.D. at 194* (quoting *Computron, 6 F. Supp. 2d at 323*.) The quality of the result and the difficulties faced as described earlier in reference to approval of the settlement certainly favor an award of thirty percent. Furthermore, Plaintiffs faced significant difficulties on top of the substantial risk inherent in any contingency fee action. The legal obstacles of establishing scienter, damages, and causation discussed in previous sections were present. The PSLRA presented additional procedural hurdles that Plaintiffs had to overcome. Plaintiffs worked without the benefit of an investigation of any regulatory agency. Most impor-

tantly, Defendants mounted an aggressive and vigorous defense throughout the course of this litigation. [15]

15 Given the aggressive defense and the difficulty of proving some of the essential elements of the claims, the Court concludes that the risk of nonpayment through either an award of summary judgment to Defendants or loss at trial was significant and real in this case.

[*47] Furthermore, Class counsel is of high caliber with extensive experience in similar class action litigation as evidenced by the attorney biographies filed with the Court. *See* Compendium Ex. 1, 2, 3. Defense counsel also have an excellent national reputation and have displayed great skill in defending this suit. Both sides consistently submitted documents of superb quality, and were very diligent in preparing filings in a timely manner under tight deadlines. Throughout the litigation, counsel willingly cooperated with each other to focus the disputes on salient issues, while still vigorously advocating their client's position. This Court has made special note of the efficiency and professionalism of counsel in completing discovery and resolving discovery disputes with little court intervention. *See* Settlement Hrg. Tr. at 3-4.

The size of the Settlement Fund and Class does not weigh against a percentage of thirty percent. While courts generally decrease the percentage awarded as the amount recovered increases, the settlement obtained in this case, $ 81 million net costs, is smaller than the large settlements for which courts decrease the percentage awarded. *See In re Ikon, 194 F.R.D. at 195-96.* [*48] Furthermore, the settlement benefitted a large class of shareholders. Additionally, the Class members' view of the attorneys' performance, inferred from the lack of objections to the fee petition, supports the fee award.

Checking the thirty percent against the lodestar further confirms the fairness and reasonability of the award. [HN16] Under the lodestar method, the court first determines the lodestar figure by multiplying the number of hours worked by the normal hourly rates of counsel. *In re Ikon, 194 F.R.D. at 195*. The court may then multiply the lodestar calculation to reflect the risks of nonrecovery, to reward an extraordinary result, or to encourage counsel to undertake socially useful litigation. *Id.* (citing *In re Prudential, 148 F.3d at 340-41*). Plaintiffs' counsel have filed under seal time records periodically throughout the course of the litigation, as well as submitted extensive affidavits detailing the hours spent on the case, a lodestar review, and firm and attorney biographies in support of the hourly billing rates for which they applied. The hours do not appear to be inflated. Examining these materials reveals a total lodestar amount [*49] of $ 6,882,924.94 for 22,209.34 hours expended at an average hourly rate of approximately $ 310.00. Although the hourly rates were appropriately calculated by reference to current rates, considering the various rates charged by counsel in this case and the average rate of counsel of comparable experience in the appropriate geographic area, the Court determines an average rate of $ 300.00 per hour to be acceptable. The total lodestar amount using a rate of $ 300 per hour is $ 6,662,802.00. The requested fee award of thirty percent represents a multiplier of 3.6. "[HN17] Multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *In re Prudential, 148 F.3d at 341* (quoting 3 Newberg § 14.03 at 14-5). Given the substantial risk of establishing liability and damages in this case, the large amounts of time and money expended, the outstanding quality of counsel, and the adequacy of the settlement reached, a multiplier of 3.6 is reasonable.

For these reasons, the Court determines that the requested percentage recovery is fair and reasonable. This Court sees no principled basis for reducing the requested award by some arbitrary [*50] amount. *See In re Ikon, 194 F.R.D. at 195*. Accordingly, the Court awards Class counsel $ 24,300,000.00, equaling thirty percent of the Settlement Fund less litigation costs.

IV. CONCLUSION

In summary, the Court concludes that the proposed settlement and plan of allocation is fair, adequate, and reasonable. Class counsel may recover $ 1.5 million in reimbursed litigation costs and attorneys' fees constituting thirty percent of the settlement fund less costs. An appropriate Order follows.

ORDER AND FINAL JUDGMENT - ENTERED JAN 5 2001

WHEREAS, the parties to the above-described class action litigation (the "Litigation") entered into a Stipulation of Settlement as of September 26, 2000 (the "Stipulation" or "Settlement"), which Stipulation and its Exhibits are hereby incorporated into and made a part of this Order:

WHEREAS, on October 5, 2000, the Court entered an Order that, (1) preliminarily approved the Settlement including the Plan of Allocation; (2) approved the forms of notice of the Settlement to members of the Class who did not previously request exclusion from the Class ("Class members"); (3) directed that appropriate notice [*51] of the Settlement be given to the Class; and (4) set a hearing date for final approval of the Settlement;

WHEREAS, notice of the Proposed Settlement and other matters was mailed to Class Members on October 13, 2000, and a summary notice of the Proposed Settlement was published in *The Wall Street Journal* on October 20, 2000 and on the Internet on October 20, 2000;

WHEREAS, on December 18, 2000, at 10:00 a.m., at the United States District Court, Eastern District of Pennsylvania, 601 Market Street, Philadelphia, PA, 19106, the Court held a hearing on, *inter alia,* whether the Settlement was fair, reasonable, adequate and in the best interests of the Class ("Settlement Hearing"); and

WHEREAS, based on the foregoing, having heard the statements of counsel at the Settlement Hearing, having considered all of the files, records, and proceedings in the Litigation, and being fully advised of the premises;

THE COURT HEREBY FINDS AND CONCLUDES that:

A. This Court has jurisdiction over the subject matter of the Litigation.

B. This Court affirms and makes final its Order and Memorandum entered August 9, 1999 certifying the Class Pursuant to *Rules 23(a)* and *23(b)* [*52] *of the Federal Rules of Civil Procedure*, finding that the Class members are so numerous that joinder is impracticable, that there are issues of law or fact common to the Class, that the claims of the named Plaintiffs ("Lead Plaintiffs") are typical of the claims of Class members, and that the Lead Plaintiffs and their counsel of record have fairly and adequately represented the interests of Class member in enforcing their rights in the Litigation, that questions of law or fact common to Class members predominate over questions affecting only individual members, and that a class action is a superior method of adjudicating this Litigation.

C. The form, content and method of dissemination of the notice given to the Class, including both published notice and individual notice to all Class members who could be identified through reasonable effort, were adequate and reasonable and constituted the best notice practicable under the circumstances.

D. The notice, as given, complied with the requirements of *Rule 23 of the Federal Rules of Civil Procedure*, satisfied the requirements of due process and constituted due and sufficient notice of the matters set forth therein.

E. The Settlement [*53] set forth in the Stipulation is fair, reasonable, adequate and in the best interests of the Class.

F. No Class Member filed any objections to the approval of the Settlement, the Plan of Allocation or the Application for fees and reimbursement of costs.

G. The Defendants, Lead Plaintiffs and the Class members, and all and each of them, are hereby bound by the terms of the Settlement set forth in the Stipulation.

H. The parties and their respective counsel at all times complied with the requirements of *Federal Rule of Civil Procedure 11*.

I. The provisions of the Stipulation, including definitions of the terms used therein, are hereby incorporated by reference as though fully set forth herein. The meaning of the terms used herein which are not defined herein shall have the meaning assigned to them in the Stipulation.

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. The Settlement set forth in the Stipulation is fair, reasonable, adequate and in the best interests of the Class, and it shall be consummated in accordance with the terms and provisions of the Stipulation. The Plan of Allocation is hereby approved.

2. Judgment shall be, and hereby is, entered dismissing [*54] the Litigation with prejudice, on the merits, and without costs (except as provided in the Stipulation) to any party as against any other.

3. From and after the Effective Date, each plaintiff and each Class member on behalf of themselves and their heirs, executors, administrators, beneficiaries, predecessors, successors, assigns and each of them and any of their former and present agents and representatives (the **"Releasing Class"**) are **BARRED AND PERMANENTLY ENJOINED** from instituting, maintaining, prosecuting or continuing to maintain or prosecute against the Defendants and each of them, and any of their former and present employees, directors, officers, accountants, agents, attorneys, insurers, investment bankers, representatives, affiliates, subsidiaries, and each of their heirs, executors, administrators, beneficiaries, predecessors successors, assigns and each of them (**"Released Defendant Group"**) of and from any and all manner of actions, causes of actions, suits, obligations, claims, debts, demands, agreements, promises, liabilities, controversies, costs, expenses, and attorneys fees whatsoever, whether in law or in equity and whether based on any federal law, [*55] state law, common law or foreign law right of action or otherwise, foreseen or unforeseen, matured or unmatured, known or unknown, accrued or not accrued which the Releasing Class, or any of them, ever had, now have, or can have, or shall or may hereafter have, either individually, or as a member of a Class against the Released Defendant Group, or any of them, for, based on, by reason of, or arising from or in connection with the purchase or sale of Aetna common stock during the Class Period ("the Released Claims"), except that nothing herein releases any claim arising out of the violation or breach of the Stipulation.

4. From and after the Effective Date, the Released Defendant Group is **BARRED AND PERMANENTLY ENJOINED** from prosecuting against any plaintiff, any Class member and plaintiffs' Counsel, and their successors, assigns, trustees, partners, administrators, attorneys, heirs and executors, predecessors, successors, past and present officers, directors, employees, agents, parents, subsidiaries, affiliates and assigns every and all asserted manner of actions, causes of actions, suits, obligations, claims, debts, demands, agreements, promises, liabilities, controversies, [*56] costs, expenses, and any attorneys fees whatsoever, whether in law or in equity, and whether based on, any federal law, state law, common law or foreign law right of action or otherwise, foreseen or unforeseen, matured or unmatured, known or unknown, accrued or not accrued, which the Released Defendant Group, or any of them ever had, now have, or can have, or shall or may hereafter have, either individually or collectively, against the Releasing Class and plaintiffs' counsel, or any of them, for, based on or by reason of, or arising from or in any way relating to the institution, prosecution or resolution of the litigation or to any affirmative defense or counterclaim that was asserted or that could have been asserted in the Litigation, except that nothing here releases any claim arising out of the violation or breach of the Stipulation.

5. From and after the Effective Date, the Plaintiffs and all Class members on behalf of themselves and their heirs, executors, administrators, beneficiaries, predecessors, successors, assigns and each of them are **BARRED AND PERMANENTLY ENJOINED** from instituting, maintaining, prosecuting or continuing to maintain or prosecute against the Lead [*57] Plaintiffs and plaintiffs' counsel, or any of them every and all asserted or potential, separate, joint, individual claims, class claims, or other claims, actions, rights, causes of action, demands, liabilities, losses and damages of every kind and nature, anticipated or unanticipated, direct or indirect, fixed or contingent, including attorneys' fees, known or unknown, under any federal, state, common or foreign law or any other law or regulation or at equity for, based upon or by reason of the institution, prosecution, or resolution of the Litigation or the Released Claims, except that nothing here releases any claim arising out of the violation or breach of the Stipulation.

6. The Stipulation and any and all Exhibits or documents referred to therein, or any terms or representations therein, or any action taken to carry out the Stipulation or the Settlement, may not be construed as or used as an admission by or against the Defendants of any fault, wrongdoing or liability whatsoever. Pursuant to the Federal Rules of Evidence, the Rules of Evidence of the various states and the Rules of Evidence followed by any quasi-judicial bodies, including regulatory and self-regulatory organizations, [*58] the fact of entering into or carrying out the Stipulation, the Exhibits thereto, and any negotiations and proceedings related thereto, shall not be construed as, offered into evidence as, or deemed to be evidence of, an admission or concession of liability by or an estoppel against any of the parties, a waiver of any applicable statute of limitations or repose, and shall not be offered or received into evidence, or considered, in any action or proceeding against any party to the Litigation in any judicial, quasi-judicial, administrative agency, regulatory or self-regulatory organization, or other tribunal, or proceeding for any purpose whatsoever, other than to enforce the provisions of the Stipulation or the provisions of any related agreement, release, or Exhibits thereto, or in the case of any subsequent action against the Defendants, Lead Plaintiffs, plaintiffs' counsel or Class members on any or all of the Released Claims, in order to support a defense of res judicata, collateral estoppel, accord and satisfaction, release or other theory of claim or issue preclusion or similar defense.

7. All persons whose names appear on Exhibit 1, which is attached and incorporated, who purport [*59] to have been members of the Class and who have duly and timely requested exclusion from the Class are excluded from the Class, not bound by this Order and Final Judgment, and may not under the circumstances make any claim or receive any benefit from the Settlement.

8. Plaintiffs' counsel are hereby awarded the sum of $ 24,300,000, which is 30% of the Settlement Fund, after deduction of their reimbursed costs, as reasonable attorneys' fees and the sum of$ 1,500,000 in reimbursement of their expert fees, costs, and expenses, both of which shall be paid from the Settlement Fund with interest at the same rate as earned by the Settlement Fund and shall be paid to Plaintiffs' Co-Lead Counsel for Plaintiffs' Co-Lead Counsel to allocate among plaintiffs' counsel based on Plaintiffs' Co-Lead Counsel's judgment as to the contribution made by plaintiffs' counsel to the litigation.

9. The Defendants and their counsel and agents shall have no responsibility or liability whatsoever with respect to and no person shall have any claim against the Defendants and their counsel and agents with respect to the investment or disbursement of the Settlement Fund by the Escrow Agent, or the determination, [*60] administration, calculation or payment of claims, or withholding of taxes, or any losses incurred in connection therewith, or with respect to any other matter relating to the processing of claims.

10. The Court hereby retains and reserves jurisdiction over (a) implementation of the Settlement and any distribution to Authorized Claimants under the terms and conditions of the Stipulation and pursuant to further orders of this Court; (b) disposition of the Settlement Fund

under the terms and conditions of the Stipulation and Notice; (c) the Litigation, until (i) the Effective Date contemplated by paragraph (A)6. of the Stipulation, which will occur on the date upon which this judgment is no longer subject to further appeal or review, and (ii) each and every act agreed to be performed by the parties shall have been performed pursuant to the terms and conditions of the Stipulation, including the exhibits annexed thereto: (d) the Litigation, for the purpose of implementing distribution to shareholders in accordance with the Notice; (e) any party herein which is a party to any stay proceeding pursuant to paragraph (K)2. of the Stipulation; (f) and all parties, for the purpose of enforcing [*61] and administering the Stipulation and this Settlement.

11. There is no just reason for delay in the entry of judgment pursuant to *Rule 54(b) of the Federal Rules of Civil Procedure*, and the Clerk is hereby directed to enter judgment in accordance with this Order and Final Judgment.

12. Certification under *Rule 54(b)* will not result in unnecessary appellate review, nor will review of the adjudicated claims moot any further developments in the Litigation. Even if appeals are subsequently filed, the nature of these claims are such that the appellate Court would not have to decide the same issue more than once. The reservation of jurisdiction by this Court pursuant to paragraph 10 shall not affect in any way the finality of this Order and Final Judgment.

13. Plaintiffs' Co-Lead Counsel are hereby granted leave to apply for reimbursement of costs which are incurred in connection with Notice of and administering the Settlement and distributing the Settlement proceeds to Class Members.

14. Upon good cause shown, plaintiffs' Co-Lead Counsel are granted leave to apply for counsel fees at the same time they apply for an order allowing distribution of the Net Settlement Fund to Class members.

[*62] Dated: 1/4, 2001

BY THE COURT

John R. Padova, U.S.D.J.

EXHIBIT 1

PERSONS WHO FILED REQUESTS FOR EXCLUSION

Alexander, Kathleen

Baptist Foundation of Texas by Mellon Trust

Brown, James L.

Chang, Carine S.

Clark, Robert for Delores Clark, Deceased

Clugston, Natalie L.

Cody, Debra P.

Collins William T. and E. Jane

Crawley, Peggy

DeCiantis Christopher G.

Douglas, Laura A.

Ehrmann, Marie C.

Ferrante, Daniel J.

Gay, Mary E.

Goltz, Otto and Margaret

Gornik, Raymond

Gray, Kerry C.

Halas, Cindy

Hebert, Paul B.

Holland, David B. & Dorothy B.

Holtzheimer, Helen A.

Huntleigh Securities Corp.

Kindred, Joan L. & James L., Deceased (joint account)

Krause, Mildred

Krolicki, Stanley & Antoinette

Kuckens, John H. & Loreen E. (joint account)

Kutshera, Kathryn B.

Leatherwood, Marie

Leon, Herman

Lewis, Irving and Ann R.

Liu, Min-Hwei

Lyster, Benton R.

Lyster, Dianne M. C/F Amy K. Lyster

Mandeville, Jean E.

Michaud, Michele S.

Miller, Marilyn J.

Moore, Ruth P.

Munley Jr., William J.

Noe, Evelyn L.

Norton Carter, Carol A.

Nystrom, Thomas L. and Marilyn M.

O'Banion, Lori

Orin, Michael

Pfeifer, Walter C.

Robertson, Donnie K.

Sanfilippo, Lena P.

Sayers, [*63] Virginia F., Virginia J. Slinkard & Bernard E. Sayers, II (joint account)

Schwarz Frank A.

Senger, Lois E.

Slota, Julie

Smiley, Clifton B.

Souza, Diane D.

Stadler, Donald F.

Stillmak, Mary L.

Stone, Laurel

Storo, Salvatore R.

Suhr, Beverly

Summerfelt, Eileen R.

Talifero, Etta Lee

Tate, Gordon E.

Taylor, Doug and David Tan

Wagner, Kenneth E.

Wiecek, Cheryl A.

Zabriskie, Mary P.

Zich, Robert A.

TAB 3

LEXSEE 2005 US DIST LEXIS 28122

Warning
As of: Sep 26, 2008

In re: A-P-A TRANSPORT CORP. CONSOLIDATED LITIGATION; BRIAN CAMPBELL, JOHN CRONIN, JR., ANDREW IMPERATORE, OMER MASSE, GARY PEGORARO, DEBORAH TETRO, and RICHARD YURCISIN, Plaintiffs, v. A-P-A TRANSPORT CORP., Defendant.

Civ. No. 02-3480 (WGB)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2005 U.S. Dist. LEXIS 28122

November 15, 2005, Decided
November 16, 2005, Filed

NOTICE: [*1] NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Summary judgment granted by, Summary judgment denied by *In re APA Transp. Corp. Consol. Litig., 2006 U.S. Dist. LEXIS 88437 (D.N.J., Dec. 7, 2006)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, seven nonunion former employees, brought an action on behalf of themselves and others similarly situated against defendant former employer, alleging violations of the Worker Adjustment and Retraining Notification (WARN) Act, *29 U.S.C.S. § 2101 et seq.* The employees sought to certify a class under *Fed. R. Civ. P. 23(b)(3)* and for an order appointing class representatives and class counsel and approving the form and manner of notice.

OVERVIEW: The employees claimed that they were terminated without cause and without proper notice under the WARN Act and that they did not receive required wages and benefits following termination. The court certified the class after finding that the requirements of *Rule 23* were met. At least 354 nonunion employees were terminated who had worked at facilities with 50 or more employees. Thus, they met the numerosity requirement of *Rule 23(a)(1)*. The employees asserted that the employer's common plan stemming from its decision to close the facilities raised five common issues under the WARN Act so as to satisfy commonality under *Rule 23(a)(2)*. Where the cause of action was premised on WARN Act liability on one set of operative facts, the terminations after plant closings, there were no conflicts of interest and all situations were identical to the rest of the class members to satisfy typicality under *Rule 23(a)(3)*. The fact that the named employees did not have personal knowledge of every class members' damages was no barrier to certification. Thus, the employees satisfied the four requirements of *Rule 23(a)*, and the court found that certification was appropriate under *Rule 23(b)(3)*.

OUTCOME: The court granted class certification, appointed class counsel, and appointed class representatives. The court approved an amended class notice.

LexisNexis(R) Headnotes

Labor & Employment Law > Worker Adjustment & Retraining Notification Act > Civil Actions
Labor & Employment Law > Worker Adjustment & Retraining Notification Act > Coverage & Definitions > General Overview
[HN1] The Worker Adjustment and Retraining Notification Act, *29 U.S.C.S. § 2101 et seq.*, bars employers with 100 or more employees from ordering a "plant closing" or a "mass lay-off" unless at least 60 days' advance written notice is provided to each employee who will be ter-

minated as a part of, or as a reasonably foreseeable consequence of, the plant closing or mass lay-off. *29 U.S.C.S. §§ 2101(a)(1)*, *2102(a)(2)*. Failure to provide the required notice renders the employer liable to each affected employee for 60 days' pay and benefits. *29 U.S.C.S. § 2104*. If the employer gives less than 60 days' notice, the employer is liable for pay and benefits for the number of days notice was not given. *29 U.S.C.S. § 2104*.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN2] On a motion for class certification, courts must not inquire into the merits of a suit. Courts may nevertheless probe behind the pleadings, in order to thoroughly examine the plaintiff's factual and legal allegations.

Civil Procedure > Class Actions > Prerequisites > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Initial Burden of Persuasion

[HN3] Plaintiffs bear the burden of showing that they can adequately represent the asserted class. In order to do so, the plaintiffs must satisfy the requirements of *Federal Rule of Civil Procedure 23*.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN4] Before obtaining certification, a class must meet the four requirements of *Fed. R. Civ. P. 23(a)*: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Fed. R. Civ. P. 23(a)*. If the plaintiffs satisfy these *Rule 23(a)* requirements, they must then show that the class is appropriate under *Rule 23(b)(1)*, *(2)* or *(3)*.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN5] A class must be so numerous that joinder of all members is impracticable. *Fed. R. Civ. P. 23(a)(1)*.

Civil Procedure > Class Actions > Prerequisites > General Overview
Evidence > Procedural Considerations > Burdens of Proof

[HN6] Conclusory or speculative allegations concerning the size of a prospective class do not satisfy the numerosity requirement.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN7] Generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, numerosity has been met.

Labor & Employment Law > Worker Adjustment & Retraining Notification Act > Coverage & Definitions > Employees

[HN8] Under the Worker Adjustment and Retraining Notification (WARN) Act, *29 U.S.C.S. § 2101 et seq.*, where those employees are terminated as the consequence of layoffs at facilities with 50 or more employees, employees at the smaller facilities may be included in the plaintiff class. The WARN Act does not limit "affected" employees to those included in the 50 or more employees used to define a "plant closing." Once that definition is satisfied, any employee may qualify as an "affected" employee, whether or not included in the group of employees used to define a "plant closing."

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN9] *Fed. R. Civ. P. 23(a)(2)* requires that there be questions of law or fact common to the class. *Fed. R. Civ. P. 23(a)(2)*. A plaintiff can meet the commonality requirement by showing the presence of a single common issue.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN10] *Fed. R. Civ. P. 23(a)(3)* requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class. *Fed. R. Civ. P. 23(a)(3)*. A court must ask whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented.

Civil Procedure > Class Actions > Prerequisites > General Overview
Labor & Employment Law > Worker Adjustment & Retraining Notification Act > Civil Actions

[HN11] For a class action, typicality is met where representatives allege only liability under the Worker Adjustment and Retraining Notification Act, *29 U.S.C.S. § 2101 et seq.*, based on one set of operative facts and liability for representatives will establish liability for benefit of the class.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN12] *Fed. R. Civ. P. 23(a)(4)* requires a representative plaintiff to show that he will fairly and adequately protect the interests of the class. The rule is designed to ensure that the absent class members' interests are fully pursued. A court must find that the representative plaintiff's counsel is qualified. In short, the plaintiffs' attorney must be qualified, experienced and generally able to conduct the proposed litigation, and the plaintiffs must not have interests antagonistic to those of the class. It is the defendants' burden to show the inadequacy of plaintiff's class representation. The named parties must also be free from conflicts of interest with the class they seek to represent.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN13] The fact that the named plaintiffs in a potential class action do not have personal knowledge of every class members' damages is no barrier to certification.

Civil Procedure > Class Actions

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN14] Under *Fed. R. Civ. P. 23(b)(3)*, provided a plaintiff has satisfied all four requirements of *Rule 23(a)*, an action may be maintained as a class action if the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Fed. R. Civ. P. 23(b)(3)*.

Civil Procedure > Class Actions

[HN15] In making a determination of class certification under *Fed. R. Civ. P. 23(b)(3)*, a court looks to the following factors: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action. *Fed. R. Civ. P. 23(b)(3)*.

Civil Procedure > Class Actions

[HN16] Under *Fed. R. Civ. P. 23(c)(2)(B)*, individual notice must be provided to all class members who can be identified through a reasonable effort. The notice must clearly and concisely state: the nature of the action, the definition of the class certified, the class claims, issues, or defenses, that a class member may entered an appearance through counsel if the member so desires, that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and. the binding effect of a class judgment on class members under *Rule 23(c)(3)*. *Fed. R. Civ. P. 23(c)(2)(B)*.

Civil Procedure > Class Actions

[HN17] Many courts have found individual mailings to potential members of a class action to an individual's last known address to be appropriate.

COUNSEL: Gail C. Lin, Esq., John C. Lankenau, Esq., LANKENAU & MILLER, LLP, New York, New York; Julie Hurwitz, Esq., Mark Fancher, Esq., THE NLG MAURICE AND JANE SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE, a non-profit law firm, Detroit, Michigan, Attorneys for Plaintiffs.

Keith R. McMurdy, Esq., GROTTA, GLASSMAN & HOFFMAN, P.A., Roseland, New Jersey, Attorneys for Defendant.

JUDGES: WILLIAM G. BASSLER, U.S.S.D.J.

OPINION BY: WILLIAM G. BASSLER

OPINION

BASSLER, SENIOR DISTRICT JUDGE:

Defendant A-P-A Transport Corp. ("APA") operated 24 trucking terminals in 10 states. APA employed both union and non-union workers at its facilities. On or about February 14, 2002, APA issued a notice to all APA employees that it would be closing all of its facilities on February 20, 2002.

Plaintiffs Brian Campbell, John Cronin, Jr., Andrew Imperatore, Omer Masse, Gary Pergoraro, Deborah Tetro, and Richard Yurcisin (collectively "Plaintiffs") filed suit against APA, alleging violations of the Worker Adjustment and Retraining Notification ("WARN") Act, *29 U.S.C. § 2901 et seq.*

Plaintiffs now move the Court to certify a plaintiff class consisting of Plaintiffs [*2] and other non-union former employees of APA that were terminated when APA closed its facilities. Plaintiffs also move the Court for an order appointing Mr. Cronin, Mr. Imperatore, Ms.

Tetro, and Mr. Yurcisin as class representatives; appointing Lankenau & Miller, LLP and the NLG Maurice and Jane L. Sugar Law Center for Economic and Social Justice (the "Sugar Law Center") as class counsel; and approving the form and manner of notice to the class. For the reasons set forth below, the Court **grants** all four of Plaintiffs' requests.

BACKGROUND

[1]

1 The following account of the facts accepts the allegations of Plaintiffs' Complaint in so far as a court must not inquire into the merits of a suit in order to determine whether it may proceed as a class action. *See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)*. The Court's inquiry, nonetheless, does "probe behind the pleadings," *General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*, in order to "thoroughly examine" Mulder's "factual and legal allegations." *Barnes v. Am. Tobacco Co., 161 F.3d 127, 140 (3d Cir. 1998)*.

[*3] Prior to February 20, 2002, APA owned and operated 24 trucking facilities in the Northeast and Midwest. APA employed both union and non-union employees. On February 14, 2002, however, APA issued a notice to its employees that it would be closing all of its facilities on February 20, 2002. Subsequently, APA terminated most of its union and non-union employees due to those closures.

Plaintiffs are seven non-union former employees of APA. Plaintiffs bring this action on behalf of themselves and on behalf of the other similarly situated non-union former employees of APA. Plaintiffs seek relief from alleged violations by the APA of the WARN Act.

[HN1] The WARN Act bars employers with 100 or more employees from ordering a "plant closing" or a "mass lay-off" unless at least 60 days' advance written notice is provided to each employee who will be terminated as a part of, or as a reasonably foreseeable consequence of, the plant closing or mass lay-off. *29 U.S.C. §§ 2101(a)(1)*, *2102(a)(2)*. Failure to provide the required notice renders the employer liable to each affected employee for 60 days' pay and benefits. *29 U.S.C. § 2104*. If the employer gives [*4] less than 60 days' notice, the employer is liable for pay and benefits for the number of days notice was not given. *Id.*

Plaintiffs allege in their Amended Complaint that prior to February 14, 2004, APA employed approximately 527 non-union employees and at all relevant times employed 100 or more employees. (Am. Compl. PP7,11.) Plaintiffs claim that they, as well as the other non-union plaintiffs, were terminated without cause and without proper notice. (*Id.* PP17,20-21.) APA did not pay Plaintiffs, and the other similarly situated non-union employees did not receive their wages and benefits for 60 days following their terminations. (*Id.* P23.)

Plaintiffs believe that they and the other similarly situated non-union employees constitute a class within the meaning of *Federal Rules of Civil Procedure 23(a)* and *(b)(3)*. (*Id.* P14.)

DISCUSSION

As noted above, [HN2] on a motion for class certification, courts must not inquire into the merits of a suit. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)*. Courts may nevertheless "probe behind the pleadings," *Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982),* [*5] in order to "thoroughly examine" the plaintiff's "factual and legal allegations." *Barnes v. Am. Tobacco Co., 161 F.3d 127, 140 (3d Cir. 1998)*.

[HN3] Plaintiffs bear the burden of showing that they can adequately represent the asserted class. *Davis v. Romney, 490 F.2d 1360, 1366 (3d Cir. 1974)*. In order to do so, Plaintiffs must satisfy the requirements of *Federal Rule of Civil Procedure 23*.

I. Class Certification Under *Federal Rule of Civil Procedure 23*

[HN4] Before obtaining certification, a class must meet the four requirements of *Rule 23(a)*: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Fed. R. Civ. P. 23(a)*; *In re LifeUSA Holding, Inc., 242 F.3d 136, 143 (3d Cir. 2001)*. If Plaintiffs satisfy these *Rule 23(a)* requirements, they must then show that the class is appropriate under *Rule 23(b)(1)*, *(2)* or *(3)*. Plaintiffs seek certification under 23(b)(3).

APA contends that Plaintiffs have not satisfied the *Rule 23(a)* requirements of numerosity or adequacy of representation, but [*6] does not dispute commonality or typicality.

A. *Rule 23(a)(1)* Numerosity

[HN5] A class must be "so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*. Plaintiffs seek to represent a class with the following definition:

> The Plaintiffs and the other non-union former employees of Defendant [APA] who were terminated without cause in connection with plant closings, as defined

> by the Worker Adjustment and Retraining Notification Act, *29 U.S.C. § 2101 et seq.* (the "WARN Act"), that were carried out by Defendant on or about February 14, 2002 as well as those other non-union former employees of Defendant who were terminated as the reasonable expected consequence of those plant closings.

(Pls.' Br. at 7.) The Court interprets Plaintiffs' definition of the proposed class to include all non-union workers formerly employed at any of the 24 trucking terminals nationwide.

APA contends that Plaintiffs merely speculate as to the number of aggrieved non-union employees. [HN6] Conclusory or speculative allegations concerning the size of a prospective class do not satisfy the numerosity requirement. [*7] *Stalling v. Califano, 86 F.R.D. 140, 142 (N.D. Ill. 1980)* (citing *Valentino v. Howlett, 528 F.2d 975 (7th Cir. 1976)*; *Tuma v. American Can Co., 367 F. Supp. 1178, 1188 (D.N.J. 1973)*. In their Amended Complaint, Plaintiffs allege that approximately 527 non-union employees were employed by APA. (Am. Compl. P7.) Plaintiffs support this allegation with a list of non-union employees showing that APA terminated a total of 527 non-union employees in 2002. (Lankenau Reply Decl., Ex. A.)

This is a substantial number of potential plaintiffs. Even without taking into consideration the further difficulty that the potential class members are based in numerous states, the sheer number alone is enough to make joinder impracticable. *See Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)* [HN7] ("generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, [numerosity] has been met").

Nonetheless, APA argues that Plaintiffs have not demonstrated that the putative class members worked at a facility with at least 50 full-time employees, as required by *29 U.S.C. § 2101(a)(2)* [*8] or *(3)*. APA seeks to limit the class to those non-union employees who were terminated from facilities that employed 50 or more full-time employees. This argument, however, goes to the merits of Plaintiffs' case by requiring the Court to prematurely determine which individuals qualify as "affected employees" under the WARN Act.

Even so, there is support for Plaintiffs' counter-argument that employees at facilities with less than 50 full-time employees may be protected by the WARN Act. [HN8] Where those employees are terminated as the consequence of layoffs at facilities with 50 or more employees, employees at the smaller facilities may be included in the plaintiff class. *See Amatuzio v. Gandalf Sys. Corp., 994 F. Supp. 253, 276 n.23 (D.N.J. 1998)* ("Neither does WARN limit 'affected' employees to those included in the fifty or more employees used to define a 'plant closing.' Once that definition is satisfied, any employee may qualify as an 'affected' employee, whether or not included in the group of employees used to define a 'plant closing.'"); *Kirkvold v. Dakota Pork Indus., Inc.,* No. 97-4166, slip op. at 6-7 (D.S.D. Dec. 15, 1997) (certifying a class that included [*9] affected employees from facilities with less than 50 full-time employees); *see also* Ethan Lipsig & Keith R. Fentonmiller, *A WARN Act Road Map,* 11 Lab. Law 273, 281 (1996).

In this case, Plaintiffs have submitted evidence that at least 354 non-union employees worked at facilities with 50 or more employees, excluding part-time employees. (Lankenau Reply Decl., P5 & Ex. B; *see also* Cronin Decl. P6; Imperatore Decl. P6; Tetro Decl. P6; Yurcisin Decl. P6.)

Plaintiffs have shown that at least 354 non-union former employees were terminated from facilities with 50 or more full-time employees. The Court therefore finds that the proposed class satisfies numerosity. For the purposes of this motion for class certification, the Court accepts that the remaining non-union former employees, who were terminated from facilities with less than 50 full-time employees, were terminated as a consequence of the layoffs at other facilities and should be included in the proposed class.

B. *Rule 23(a)(2)* Commonality

[HN9] *Rule 23(a)(2)* requires that "there [be] questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. A plaintiff [*10] can meet the commonality requirement by showing "the presence of a single common issue." *In re Prudential Ins. Co. of America Sales Practices Litig., 962 F. Supp. 450, 510 (D.N.J. 1997)* (citing 1 *Newberg* § 3.10, at 3-50 to 3-52).

Plaintiffs assert that APA's alleged "common plan stemming from Defendant's decision to close the Facilities" raises the following five common issues:

> (a) whether the Plaintiffs and the other proposed class members were protected by the WARN Act;
>
> (b) whether the Defendant discharged the Plaintiffs and the other proposed class members on February 14, 2002 or during the 90 days from January 2, 2002 through April 1, 2002;
>
> (c) whether the Plaintiffs and the other proposed class members were "affected employees";

> (d) whether the Defendant terminated the employment of the Plaintiffs and the other members of the proposed class without cause;
>
> (e) whether the Defendant terminated the employment of the Plaintiffs and the members of the proposed class without giving them at least 60 days' prior written notice as required by the WARN Act.

(Pls.' Br. at 11-12.) APA does not contest Plaintiffs' assertion that these [*11] five issues are common to the claims of all putative class members. The Court has no reason not to believe Plaintiffs' assertion. Because "common issues of law and fact are presented, . . . the WARN Act seems particularly amenable to class litigation." *Finnan v. L.F. Rothschild & Co., 726 F. Supp. 460, 465 (S.D.N.Y. 1989)*. Thus, Plaintiffs meet the commonality test.

C. *Rule 23(a)(3)* Typicality

[HN10] *Rule 23(a)(3)* requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Fed. R. Civ. P. 23(a)(3)*. The court must ask:

> whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented.

Baby Neal v. Casey, 43 F.3d 48, 57 (3d Cir. 1994).

Here, Plaintiffs assert a cause of action premised on WARN Act liability. Plaintiffs, as prospective representatives of the entire class, base their allegations on one set of operative facts--the February 20, 2002 terminations. Plaintiffs claim [*12] that neither they nor any other member of the class received proper written notice of the terminations or the 60 days' wages and benefits to which they were entitled as a result of the terminations. Plaintiffs declare that they have no conflicts of interest with the other prospective class members; in fact, Plaintiffs claim that their situations are identical to those of the other non-union employees. (Cronin Decl. PP9,11; Imperatore Decl. PP9,11; Tetro Decl. PP9,11; Yurcisin Decl. PP9,11.) Moreover, APA has not raised any objections to class certification based upon typicality. Under these circumstances, Plaintiffs meet the typicality requirement. *See Gomez v. American Garment Finishers Corp., 200 F.R.D. 579, 582 (W.D. Tex. 2000)* [HN11] (typicality met where representatives allege only WARN Act liability based on one set of operative facts and liability for representatives will establish liability for benefit of the class); *see also Grimmer v. Lord Day & Lord, 937 F. Supp. 255, 1996 WL 139649, at *8 (S.D.N.Y. 1996)* ("the WARN Act provisions lend themselves to class action because they provide for limited recovery").

D. *Rule 23(a)(4)* Fair and Adequate Representation

[*13] [HN12] *Rule 23(a)(4)* requires a representative plaintiff to show that he "will fairly and adequately protect the interests of the class." The rule is "designed to ensure that the absent class members' interests are fully pursued." *Samuel-Bassett v. Kia Motors Am., Inc., 212 F.R.D. 271, 279 (E.D. Pa. 2002)* (citing *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 312 (3d Cir. 1998))*. The Court must find that the representative plaintiff's counsel is qualified. *See Barnes v. Am. Tobacco, 161 F.3d 127, 141 (3d Cir. 1998)*. The named parties must also be free from conflicts of interest with the class they seek to represent. *Amchem Prods. v. Windsor, 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. The *Samuel-Bassett* court summarized the inquiry as follows:

> In short, the plaintiffs' attorney must be qualified, experienced and generally able to conduct the proposed litigation, and the plaintiffs must not have interests antagonistic to those of the class. It is the defendants' burden to show the inadequacy of plaintiff's class representation.

212 F.R.D. at 279 (internal citations omitted).

As stated [*14] above, the Court has no basis to believe that the proposed representatives of the class--Mr. Cronin, Mr. Imperatore, Ms. Tetro, and Mr. Yurcisin--have any conflicts of interests with other members of the putative class. Furthermore, the Court has reviewed the declaration by John C. Lankenau, Esq., dated November 21, 2003, in which he explains the suitability of Plaintiffs' co-counsel to represent the putative class. (*See* Lankenau Decl. PP15-27.) The Court finds Plaintiffs' co-counsel--Lankenau & Miller, LLP and the Sugar Law--to be qualified and able to prosecute this litigation on behalf of the class.

In objecting to Plaintiffs' adequacy of representation, APA contends that the proposed representatives of the class only have personal knowledge of the facts surrounding their own claims and thus cannot adequately represent the interests of the other prospective members

of the class. (Def.'s Opp. Br. at 5-7.) APA further argues that because the damages to each individual will vary and the prospective class representatives do not have actual knowledge of those damages, the class should not be certified. (*Id.*)

First, the Court notes that these are not conflicts of interest that [*15] weigh against the adequacy of representation by Plaintiffs. Second, [HN13] the fact that the named Plaintiffs do not have personal knowledge of every class members' damages is no barrier to certification. *See Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 372-73, 86 S. Ct. 845, 15 L. Ed. 2d 807 (1966)* (upholding appointment of plaintiff as class representative even though he was "uneducated generally and illiterate in economic matters"); 1 *Newberg on Class Actions* § 3:34 at 461 (4th ed. 2002) ("most courts have followed the *Surowitz* rationale in rejecting any challenge to adequacy for class actions under amended *Rule 23* based on ignorance of the facts or theories of liability"); *see also Nathan Gordon Trust v. Northgate Exploration, Ltd., 148 F.R.D. 105, 107 (S.D.N.Y. 1993)* ("it is familiar law that a class representative need not have personal knowledge of the evidence and the law involved in pursuing a litigation"). The Court sees no reason to deny certification solely because Plaintiffs are not familiar with every fact of the case.

E. Certification Under *Rule 23(b)(3)*

[HN14] Under *Rule 23(b)(3)*, provided a plaintiff has satisfied all four requirements of *Rule 23(a)*:

> an [*16] action may be maintained as a class action if . . . the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3). [HN15] In making this determination, the Court looks to the following factors:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3).

In this WARN Act litigation, all of the claims stem from the same set of operative facts. Plaintiffs proceed on one theory of liability: violation of the WARN Act for failure to give proper notice of the terminations [*17] that occurred on or about February 20, 2002. Because the claims are so similar, no individual member has an interest in controlling the prosecution. Plaintiffs are the only members of the pututative class to commence litigation regarding this matter, but four other WARN actions have been brought by unions on behalf of their members and consolidated with this action. This procedural history weighs in favor of certifying the proposed class. Finally, the pututative class seeks only monetary relief that should be easily computed by the parties.

In addition to these facts, the Court notes that APA has not raised any objections to class certification based on *Rule 23(b)(3)*. The Court therefore concludes that (b)(3) certification is appropriate for a class defined as follows:

> The Plaintiffs and the other non-union former employees of Defendant [APA] who were terminated without cause in connection with plant clsoings, as defined by the Worker Adjustment and Retraining Notification Act, *29 U.S.C. § 2101 et seq.* (the "WARN Act"), that were carried out by Defendant on or about February 14, 2002 as well as those other non-union former employees of Defendant who [*18] were terminated as the reasonable expected consequence of those plant closings.

II. Appointment of Class Counsel

Plaintiffs move to appoint its co-counsel as class counsel. APA raised no objection to this motion. As stated above, the Court finds Plaintiffs' co-counsel to be qualified and capable of prosecuting this action. Therefore, the Court appoints Lankenau & Miller, LLP and the Sugar Law Center as class counsel.

III. Appointment of Class Representatives

Of the seven named individuals, Plaintiffs request that Mr. Cronin, Mr. Imperatore, Ms. Tetro, and Mr. Yurcisin be appointed class representatives. APA has raised no objection to this motion, except to the extent

that APA claimed in its opposition to the motion for class certification that Plaintiffs could not adequately represent the interests of the class. The Court, however, has determined that Plaintiffs will fairly and adequately represent the interests of the class.

Furthermore, Plaintiffs' counsel represented in their moving brief that Mr. Cronin, Mr. Imperatore, Ms. Tetro, and Mr. Yurcisin "have been diligent and active in pursuing the class claim and have worked closely with counsel in initiating [*19] and prosecuting the action." (Pls.' Br. at 21.) These four individuals have submitted declarations in which they declare that they have no conflicts with other class members and that they will eagerly prosecute this action on behalf of the other non-union former employees. (Cronin Decl. PP10-11; Imperatore Decl. PP10-11; Tetro Decl. PP10-11; Yurcisin Decl. PP10-11.) Consequently, the Court appoints Mr. Cronin, Mr. Imperatore, Ms. Tetro, and Mr. Yurcisin as class counsel.

IV. Content and Manner of Giving Notice

Finally, Plaintiffs move this Court for an Order approving the form and manner of notice to the class. [HN16] Under *Federal Rule of Civil Procedure 23(c)(2)(B)*, individual notice must be provided to all class members who can be identified through a reasonable effort. The notice must clearly and concisely state:

> . the nature of the action,
>
> . the definition of the class certified,
>
> . the class claims, issues, or defenses,
>
> . that a class member may entered an appearance through counsel if the member so desires,
>
> . that the court will exclude from the class any member who requests exclusion, stating when and how members may elect [*20] to be excluded, and
>
> . the binding effect of a class judgment on class members under *Rule 23(c)(3)*.

Fed. R. Civ. P. 23(c)(2)(B).

Plaintiffs have submitted a proposed form of notice. (*See* Lankanau Decl., Ex. E.) APA has not objected to the substance of the notice. The Court has reviewed the proposed form of notice and finds that it meets all the formal requirements of *Rule 23(c)(2)(B)*. The second paragraph under the heading "The Class Claims," however, is unclear. Therefore, that paragraph should be amended to read:

> The Plaintiffs, all of whom are former employees of Defendant A-P-A Transport, were terminated from their jobs on or about February 14, 2002. The Plaintiffs claim that they and other former employees of A-P-A Transport were terminated without cause due to plant closings carried out on or about February 14, 2002. The Plaintiffs claim that under the WARN Act they were entitled to receive written notice 60 days in advance of their termination dates. Because they did not receive proper notice, they believe that under the WARN Act they are entitled to an award of 60 days' wages and benefits. Plaintiffs have brought [*21] this action on behalf of themselves and all other former employees who were terminated on or about February 14, 2002, as a result of the plant closings or as the reasonable expected consequence of those plant closings.

Once this paragraph has been revised, the Court will allow the mailing of the notice.

Plaintiffs propose that the notice be served, postage prepaid, "to each member of the proposed class at that person's last known address as shown in the Defendant's records." (Pls.' Br. at 21.) In the event that certain notices are returned as undeliverable due to an incorrect address, "Plaintiffs' counsel will undertake a search of a national database of addresses for a corrected address and will remail the notice to that address." (*Id.* at 23.)

[HN17] Many courts have found individual mailings to an individual's last known address to be appropriate. *See, e.g., White v. NFL, 41 F.3d 402, 408 (8th Cir. 1994)*; *Weinberger v. Kendrick, 698 F.2d 61, 71 (2d Cir. 1983)*; *Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 225 (D.N.J. 2005)*; *Steiner v. Equimark Corp., 96 F.R.D. 603, 614 (W.D. Pa. 1983)*; [*22] *Trist v. First Fed. Sav. & Loan Ass'n, 89 F.R.D. 1, 2 (E.D. Pa. 1980)*. APA has not objected to the proposed method of notice. Because Plaintiffs will attempt to cure any undelivered notices, the Court finds that it is appropriate for Plaintiffs to send the notices to the class members by first class mail.

Finally, Plaintiffs propose to provide class members with no less than 30 days from the date of the mailing to object to class certification. (Pls.' Br. at 23.) In order to provide sufficient time for class members to review the notice and contact an attorney, the Court requires that

Plaintiffs give class members 60 days from the date of the mailing to object to or be excluded from the class.

CONCLUSION

For the reasons set forth above, the Court grants Plaintiffs motion for class certification. The Court appoints Mr. Cronin, Mr. Imperatore, Ms. Tetro, and Mr. Yurcisin as the class representatives for the following class, pursuant to *Rules 23(a)* and *23(b)(3)* of the Federal Rules of Civil Procedure:

> The Plaintiffs and the other non-union former employees of APA who were terminated without cause in connection [*23] with plant closings, as defined by the Worker Adjustment and Retraining Notification Act, *29 U.S.C. § 2101 et seq.* (the "WARN Act"), that were carried out by APA on or about February 14, 2002, as well as those other non-union former employees of APA who were terminated as the reasonable expected consequence of those plant closings.

The Court appoints Lankenau & Miller, LLP and the Sugar Law Center as class counsel. Finally, the Court approves the form and manner of class notice, with one revision.

An appropriate Order follows.

Dated: November 15, 2005

WILLIAM G. BASSLER, U.S.S.D.J.

ORDER

This matter having come before the Court upon the motions of Plaintiffs BRIAN CAMPBELL, JOHN CRONIN, JR., ANDREW IMPERATORE, OMER MASSE, GARY PEGORARO, DEBORAH TETRO, and RICHARD YURCISIN (collectively "Plaintiffs") for class certification under *Federal Rule of Civil Procedure 23*, for appointment of class counsel, for appointment of class representatives, and for approval of the form and manner of class notice;

The Court having considered the submissions of the parties; and

The Court having decided the matter without [*24] oral argument pursuant to *Fed. R. Civ. P. 78*; and

For the reasons set forth in the Opinion issued this day; and

For good cause shown;

It is on this 15th day of November 2005 hereby ORDERED that the Court **GRANTS** certification of a class consisting of the Plaintiffs and the other non-union former employees of Defendant A-P-A TRANSPORT CORP. ("APA") who were terminated without cause in connection with plant closings, as defined by the Worker Adjustment and Retraining Notification Act, *29 U.S.C. § 2101 et seq.* (the "WARN Act"), that were carried out by APA on or about February 14, 2002, as well as those other non-union former employees of APA who were terminated as the reasonable expected consequence of those plant closings; and

IT IS FURTHER ORDERED that Lankenau & Miller, LLP and the NLG Maurice and Jane L. Sugar Law Center for Economic and Social Justice are appointed as class counsel; and

IT IS FURTHER ORDERED that Plaintiffs John Cronin, Jr., Andrew Imperatore, Deborah Tetro, and Richard Yurcisin are appointed class representatives; and

IT IS FURTHER ORDERED that Plaintiffs' proposed form of notice to class [*25] members, attached as Exhibit E to the Declaration of John C. Lankenau dated November 21, 2003,

> (1) shall be amended so that the second paragraph on the second page under the heading "The Class Claims," reads:
>
> > The Plaintiffs, all of whom are former employees of Defendant A-P-A Transport, were terminated from their jobs on or about February 14, 2002. The Plaintiffs claim that they and other former employees of A-P-A Transport were terminated without cause due to plant closings carried out on or about February 14, 2002. The Plaintiffs claim that under the WARN Act they were entitled to receive written notice 60 days in advance of their termination dates. Because they did not receive proper notice, they believe that under the WARN Act they are entitled to an award of 60 days' wages and benefits. Plaintiffs have brought this action on behalf of them-

> selves and all other former employees who were terminated on or about February 14, 2002, as a result of the plant closings or as the reasonable expected consequence of those plant closings.

(2) shall provide the class members with 60 days from the date of mailing to notify the class counsel of their intention to be excluded [*26] from the class; and

(3) shall be mailed, within 10 days of the entry of this Order, to each individual class member at that person's last known address as shown in APA's records; and

> (4) where the notice is returned as undeliverable due to an incorrect address, shall be re-mailed to the correct address as found by class counsel through a search of a national database of addresses; and

IT IS FURTHER ORDERED that Plaintiffs provide the Court, within 75 days after mailing the notice, with a list of (1) the names and addresses of the individuals to whom notice was sent; (2) the names and addresses of the individuals whose mail was returned as undeliverable, and the correct address to which the notice was re-mailed; and (3) the names and addresses of the individuals who have opted out of the class action.

WILLIAM G. BASSLER, U.S.S.D.J.

TAB 4

LEXSEE 2002 US DIST LEXIS 18359

In re Cell Pathways, Inc., Securities Litigation II; This Document Relates To: All Actions

Master File 01-CV-1189

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2002 U.S. Dist. LEXIS 18359*; *Fed. Sec. L. Rep. (CCH) P91,995

September 23, 2002, Decided
September 24, 2002, Filed

DISPOSITION: [*1] Petition for attorneys' fees and reimbursement of expenses granted.

COUNSEL: For G.K.P. TRADING LLC, ROBERT HALDEMAN, PLAINTIFFS: GARY E. CANTOR, SHERRIE R. SAVETT, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA USA.

For G.K.P. TRADING LLC, ROBERT HALDEMAN, PLAINTIFFS: FRED TAYLOR ISQUITH, WOLF, HALDERSTEIN, ADLER, FREEMAN & HERZ, NEW YORK, NY USA.

For G.K.P. TRADING LLC, ROBERT HALDEMAN, PLAINTIFFS: DAVID KESSLER, SCHIFFRIN & BARROWAY, LLP, BALA CYNWYD, PA USA.

For CELL PATHWAYS INC., ROBERT TOWARNICKI, RIFAT PAMUKCU, DEFENDANTS: MARC J. SONNENFELD, KAREN PIESLAK POHLMANN, MORGAN, LEWIS & BOCKIUS LLP, PHILADELPHIA, PA USA.

For CELL PATHWAYS INC., ROBERT TOWARNICKI, RIFAT PAMUKCU, DEFENDANTS: LAURIE B. SMILAN, WILSON SONSINI GOODRICH & ROSATI PC, CHARLES PAUL CHALMERS, LYLE ROBERTS, WILSON SONSINI GOODRICH & ROSATI PROF CORP, MCLEAN, VA USA.

JONATHAN I. ARNOLD, MOVANT, Pro se, CHICAGO, IL USA.

ANITA W. GARTEN, MOVANT, Pro se, HOUSTON, TX USA.

For SANFORD D. GOLDFINE, MICHAEL DENTON, JR., PAUL DIDION, RICHARD DARLINGTON, KENDALL . ELSOM, MOVANTS: DOUGLAS RISEN, BERGER & MONTAGUE, PHILA, PA USA.

For SANFORD D. GOLDFINE, MICHAEL DENTON, JR., WILLIAM LISS, [*2] LAURA LISS, JORDAN LISS, JASON LISS, SALVATORE SALIBELLO, MOVANTS: STUART L. BERMAN, SCHIFFRIN & BARROWAY, LLC., BALA CYNWYD, PA USA.

JUDGES: MARY A. McLAUGHLIN, J.

OPINION BY: MARY A. McLAUGHLIN

OPINION

MEMORANDUM AND ORDER

McLaughlin, J.

September 23, 2002

The plaintiffs have requested approval of a settlement of this securities class action and class counsel seeks approval of their petition for attorneys' fees and reimbursement of expenses. After a hearing held on September 6, 2002, the Court grants these requests and enters a final judgment and order of dismissal.

I. BACKGROUND

On March 13, 2001 a class action complaint was filed against Cell Pathways, Inc. ("the company" or "CPI") and its two principal officers, Robert Towarnicki and Rifat Pamukcu. The complaint sought damages for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. The suit was brought on behalf of purchasers of CPI securities who purchased between

October 27, 1999 and September 22, 2000, and alleged that the defendants made false and misleading statements concerning CPI's drug Aptosyn.

Subsequently ten additional complaints were filed. The Court consolidated all the cases [*3] on May 14, 2001. On July 27, 2001, the Court appointed Paul Didion, Sanford Goldfine, Michael Denton, and Richard Darlington as lead plaintiffs and approved the lead plaintiffs' selection of the law firms of Berger & Montague, P.C. and Schiffrin & Barroway, LLP as counsel for the class.

A consolidated class action complaint was filed on September 10, 2001. The consolidated complaint alleged generally that CPI and its two principal officers violated sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and *Rule 10b-5* promulgated thereunder, by making allegedly false and misleading statements regarding the clinical evidence of the safety and efficacy of the company's lead drug, Aptosyn, as a treatment for Familial Adenomatous Polyposis and the prospects for FDA approval of the company's new drug application seeking approval of Aptosyn.

The consolidated complaint also alleged that on September 22, 2000, after the close of trading that day, the company disclosed that the FDA had advised CPI that the pending Aptosyn new drug application was not approvable, and that the FDA would send the company a formal letter setting forth the reasons for that action. The consolidated complaint [*4] alleged that news of the FDA's refusal to approve the new drug application sent the price of the company's common stock tumbling nearly 70% on September 25, 2000.

With the Court's permission, the parties thereafter stipulated to defer the defendants' response to the consolidated complaint to allow the parties to engage in settlement discussions. On May 16, 2002, the parties entered into a stipulation and agreement of settlement and a separate supplemental agreement, which has been submitted for the Court's approval. Stipulation May 16, 2002, and Supplemental Agreement, May 16, 2002. The agreement provides that a cash payment of $ 2 million ($ 2,000,000.00) plus interest and 1,700,000 million shares of freely tradeable CPI common stock shall be issued by CPI to create a gross settlement fund. In exchange, all claims of the class against the defendant shall be extinguished.

Upon approval of the settlement and entry of an order approving distribution, the gross settlement fund, less the costs of notice and administration of the settlement and any fees and costs as may be awarded by the Court (the "net settlement fund"), shall be distributed to class members who timely submit [*5] valid proof of claim forms to the claims administrator. Each claimant's proportional share of the net settlement fund shall be calculated according to the type of security purchased and the time of the purchase. If the total recognized losses for all authorized claimants exceed the net settlement fund, each authorized claimant's share will be determined based upon the percentage that his, her, or its recognized loss bears to the total recognized losses for all authorized claimants.

Lead plaintiffs and the defendants made an application for an order approving the settlement. On June 6, 2002, the Court certified this action as a class action pursuant to *Fed. R. Civ. P. 23*. The Court also approved, as to form and content, the proposed Notice to the Class and scheduled a hearing on approval of the settlement.

The notice of the proposed settlement was distributed to the class through 34,277 directly mailed notices, as well as publication in the national edition of the Wall Street Journal and over the PR Newswire service. Affidavit of Edward J. Sincage, CPA Regarding Notice to the Class ("Sincage Aff."). After dissemination of the notice, class counsel received notice of 19 opt-outs, [*6] amounting to 59,383 shares. One objection was received from class members Jonathan I. Arnold and Anita W. Garten, two economists, who tried unsuccessfully to be named lead plaintiffs earlier in the case. Mr. Arnold and Ms. Garten objected only to the attorneys' fee petition. Notice of Intention to Appear, Object, and be Heard at the Settlement Hearing ("Obj"). Mr. Arnold and Ms. Garten also filed a pro se motion to intervene with respect to the fees and expenses requested by counsel.

On September 6, 2002, the Court held a hearing on the proposed settlement and the petition for attorneys' fees. Counsel for the class described the settlement and explained why the settlement and the attorneys' fee petition should be approved. Counsel for the defendant expressed the defendants' support for approval of the settlement. The Court granted the intervention petition of Mr. Arnold and Ms. Garten and heard from each of them as to their objections to the fee petition.

II. DISCUSSION

The Court decides the following five questions:

> A) whether there is a properly certified settlement class under *Federal Rule of Civil Procedure 23*;
>
> B) whether notice to the class regarding the [*7] settlement and attorneys' fees petition was adequate;
>
> C) whether the settlement itself and the plan of allocation are fair, adequate and reasonable;

D) whether the shares of CPI stock that are to be issued to the Class as part of the settlement are exempt from registration under *15 U.S.C. § 77c(a)(10)*; and

E) whether the attorneys' fee petition should be approved.

A. Certification of the Class

This action was certified as a class action for settlement purposes pursuant to *Fed. R. Civ. P. 23* on June 6, 2002. The class was defined to include all persons who purchased or otherwise acquired CPI common stock or the publicly-traded options on CPI common stock between October 27, 1999 and September 22, 2000, inclusive. Excluded from the class are the defendants, any entity in which they have a controlling interest or is a parent or subsidiary of or is controlled by CPI, and the officers, directors, employees, affiliates, legal representatives, heirs, predecessors, successors and assigns of the defendants.

In certifying this class, the Court found that the requirements of *Fed. R. Civ. P. Rules 23(a)* and *23(b)(3)* were satisfied. Nothing has occurred [*8] in the interim between the class certification and the present that has changed any of these factors or would otherwise warrant or require decertification. The class remains properly certified for the purposes of this settlement.

B. Notice

The due process requirements of *Fed. R. of Civ. Pro. 23* demand that, prior to final approval of a class action settlement, class members be given the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts. E.g., *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)*. A decision that notice is appropriate is required before any inquiry is made into the merits of the settlement itself. E.g., *In re Prudential, 148 F.3d 283, 326-27 (3d Cir. 1998)*.

In this case notice met the requirements of *Rule 23* and of due process. The notice disseminated, preapproved by this court, described the proposed settlement, its terms, and the nature of the claim filed on behalf of the class, as well as detailed instructions regarding class members' rights to object to or opt out of the settlement and their opportunity [*9] to be heard at the final fairness hearing.

The notice was printed in the national edition of the Wall Street Journal, and disseminated over a national newswire service. In addition to general publication, nearly 36,000 individual notice forms were sent to known class members. Because individual notices were sent to all identified class members, and because the notice was widely disseminated through widely read national business publications, the Court finds the notice in this case was the best practicable given the potential number of class members and thus meets due process requirements.

C. Approval of the Settlement

1. The Settlement as a Whole

In order for a settlement to be approved in a class action case, the proposed settlement must be "fair, reasonable, and adequate" and in the best interests of the class. In *Re General Motors, 55 F.3d 768, 785 (3d Cir. 1995)*.

In *Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975)*, the Third Circuit set forth the following specific factors a district court should consider in determining whether a settlement is fair, reasonable, and adequate: 1) the complexity, expense and likely duration of the litigation; [*10] 2) the reaction of the class to the settlement; 3) the stage of the proceedings and the amount of discovery completed; 4) risks of establishing liability; 5) risks of establishing damages; 6) the risks of maintaining the Class action through trial; 7) the ability of the defendants to withstand a greater judgment; 8) the range of reasonableness of the settlement fund in light of the best possible recovery; and 9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Id. at 157*.

a) The Ability of the Defendants to Withstand a Greater Judgment

This factor will be discussed first because this was the most important reason for class counsel's recommendation of the settlement. The Court concludes that it is highly uncertain whether the defendants would be able to pay any greater judgment than the settlement amount.

At the time of the settlement, CPI had no substantial cash assets and was going through its cash position at the rate of approximately $ 22 million per year. Over a nine-month period the company's financial statements showed a decline of $ 16.5 million in the company's cash, cash equivalents, [*11] and short-term investments. Id. at 10-11. Additionally, the FDA denial of approval for Aptosyn, the company's lead product in development, further jeopardized the company's financial health and stability.

The likelihood that CPI could withstand a higher judgment was also diminished by the lack of available insurance proceeds to pay the judgment. Though there was a potential $ 10 million in insurance proceeds to fund the settlement, the actual amount available is actually much lower. One of the insurance carriers providing half of the coverage, Reliance, was placed into rehabilitation and then into liquidation. The Pennsylvania Insurance Commissioner, appointed as the Reliance rehabilitator, has advised that the claims against Reliance exceed $ 9 billion and the likelihood that either the class or CPI could recover on that $ 5 million policy is very limited.

The other carrier, Hartford, has disclaimed coverage. Hartford has contended that the policy at issue had been exhausted by the settlement and defense of a prior case against CPI. Though Hartford eventually agreed to provide the funds which make up the cash portion of the settlement, it is unlikely that they would have agreed [*12] to pay a larger judgment without a full litigation of the insurance coverage issue which brings uncertainty and risk.

It is highly unlikely that CPI would have been able to pay, on its own or through insurance, any judgment significantly larger than this settlement. In fact, had the parties taken significantly more time, through protracted settlement negotiations or litigation, CPI may not have been able to pay a judgment equal to or even smaller than the settlement. CPI's' inability to withstand a greater judgment weighs strongly in favor of approving this settlement.

b) Complexity, Expense, and Likely Duration of Litigation

The claims advanced by the class involved numerous legal and financial issues, requiring extensive expert testimony, which would have added considerably to the expense and duration of the litigation. In addition, because the case settled at a relatively early stage in the proceedings, continued litigation would have greatly increased the expense and duration of this action.

c) Class Reaction

Not one class member has objected to the terms of the settlement. Although Mr. Arnold and Ms. Garten have expressed objection to the attorneys' fee petition, [*13] they do not object to the settlement itself. In addition, only 19 requests to opt out, totaling 59,383 shares, had been received as of the fairness hearing.

That 36,000 known class members have been identified and received direct notice of the proposed settlement, and thousands of other potential class members received notice through publication, and not one class member objects, is significant. As the Third Circuit noted in *Cendant Corp, 264 F.3d 201 (3d Cir. 2001)*, a vast disparity between the number of potential class members receiving notice of the settlement and the number of objectors creates a strong presumption in favor of approving the settlement. Here, the reaction of the class weighs in favor of approval.

d) Stage of Proceedings and Discovery Completed

The Court must also examine the stage of the proceedings and the discovery completed, in order to ensure that the parties and counsel have enough information available to them to form understanding of the case sufficient to enter into an appropriate settlement. *In re Prudential, 148 F.3d at 319*. In this case class counsel has investigated the claims thoroughly, both before and after [*14] filing, and are well situated to sufficiently determine the value of the claim and a proper settlement.

Prior to filing the complaint, class counsel conducted both a formal and informal investigation of the facts underlying the claims, including reviewing the company's public filings, annual reports, press releases and other public statements, as well as researching the applicable law regarding the case's claims and defenses. Joint Declaration of Sherrie R. Savett and David Kessler, August 29, 2002,("Savett/ Kessler Decl."), 20. Counsel also retained and worked closely with an expert in the areas of clinical trials, biostatistics, and FDA drug approval procedures. Id. 19-21.

After the filing of the consolidated complaint, counsel continued with their investigation and discovery. Counsel reviewed thousands of pages of internal documents produced by CPI regarding CPI's operations and dealings with the FDA as well as thousands of pages of new, publically available releases and articles regarding CPI. Counsel also conducted in-depth interviews of senior members of CPO's management, including Kathy Tsokas, CPI's director of regulatory affairs. Savett/ Kessler Decl. 9. Class counsel [*15] also kept abreast of the financial health and status of the defendant and continued to work with their biotechnology expert. Id.

Class counsel has given this case a thorough review. The discovery and other investigations that class counsel have undertaken render them sufficiently informed to make a decision about the propriety of settling and which terms of settlement to accept. The review class counsel has completed has also put them in a good position to investigate and confirm any representations made by the defendants during settlement and ensure that the settlement is fair and beneficial to the class. The stage of the proceedings and the amount of investigation and discovery undertaken by counsel weighs in favor of approving settlement.

e) Risks of Establishing Liability and Damages

To properly evaluate the risks of proving liability and damages, the court should balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of a quick settlement. *In re Prudential, 148 F.3d at 319*.

Class counsel has indicated that liability in this case would be more difficult to prove than in the typical securities [*16] case because of the difficulty in proving scienter, a prerequisite to a jury finding of liability. As class counsel explained at the hearing, scienter in a securities litigation case is usually proven by circumstantial evidence, such as a showing that the defendants engaged in insider trading. In this case, there was no insider trading, making it harder to prove that the defendants had the requisite scienter.

Another risk of continued litigation is that the plaintiffs would not be able to prove that the allegedly material facts about Aptosyn were not disclosed by the defendant and were not otherwise available in the market. Even if the material facts were not disclosed by the defendant, it is possible that the jury could find that the defendant has a valid "truth of the market" defense. Such a defense is available where a defendant's misrepresentation is irrelevant because accurate information was otherwise available to the general public. The defendants could put on a strong argument that this defense is applicable here because there was considerable discussion in the financial media about the risks associated with investing in companies like CPI.

If liability were proved, damages [*17] would likely be hotly disputed by the parties and their experts and would be based on highly complex valuation models. The real possibility that the jury could accept a defense expert's opinion on damages lends even more uncertainty and risk to the plaintiffs' ability to obtain a successful verdict.

By settling this case, class counsel has avoided these risks and uncertainties, guaranteeing that at least some benefit will flow to the class. Weighing the high level of risk and uncertainty in this case against the benefits of a quick settlement supports approval of this settlement.

f) Risks of Maintaining a Class Action Through Trial

The value of a class action depends largely on the certification of the class and the ability to sustain that class through trial. *In re General Motors, 55 F.3d at 817*. There are no factors to indicate a likelihood that this class could not have been maintained throughout trial. As with any class action, however, there is always some risk of decertification. Because the risk of decertification is present but no higher than any other class action, this factor neither supports nor undermines approval of this settlement.

g) The Reasonableness [*18] of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The reasonableness of a proposed settlement depends in part on a comparison of the present value of the damages the plaintiffs would likely recover if successful, discounted by the risks of not prevailing. *In re General Motors, 55 F.3d at 806*. This settlement is reasonable in light of the risks of litigation and the likelihood that, even if the class prevailed, that CPI would not be able to pay a large judgment.

Considering the additional risks of litigation and delay in this case, the settlement is reasonable despite the disparity between the settlement amount and the tens of millions of dollars of losses suffered by the class. Even if the class were to be awarded an amount of damages comparable to the losses, the likelihood that the class would ever collect the award is slim to none because of CPI's' financial situation. In light of these risks, the settlement is a reasonable compromise for the class, which weighs heavily in favor of the settlement's approval.

All but one of the Girsh factors weigh in favor of approval of the settlement, and the other, risk of [*19] maintaining the class through litigation, weighs neither for nor against approval. CPI's quickly deteriorating economic health in particular makes it in the best interest of the class for the parties to achieve a settlement rather than to proceed through a lengthy litigation process. Even had the class been able to prevail despite significant potential difficulties in proving their case, it is unlikely that they would ever recover a judgment significantly larger than as provided in the settlement. In light of these circumstances, this settlement is fair, reasonable, and adequate to protect the interests of the class.

2. The Plan of Allocation

The plan of allocation of settlement proceeds among class members must also be approved as part of the settlement. *F.R.C.P. 23*. The same standards apply as to the plan of allocation that apply to approval of the settlement as a whole; the plan of allocation must be fair, reasonable and adequate. *In re Cendant Corp. Litigation, 264 F.3d 201, 248 (3d Cir. 2001)*.

The proposed allocation would distribute the settlement proceeds to the class members based on the level of artificial inflation in the stock. The differences in [*20] allocation are made based on the type of security that was bought and/ or sold by the class member and the timing of any such transactions in an attempt to correlate

the portion of the settlement received to the likely damages each class member sustained.

To distinguish between the award given to class members based on these factors is reasonable. The factors used to allocate the funds, the timing of the purchase or sale or shares, as well as the type of shares involved, directly impact the risks and damages faced by various class members. Though each class member will not be allocated the same amount of the settlement proceeds as all other class members, the distribution is fair and equitable because each class member will receive a relative share based on factors directly related to their estimated losses. The plan of allocation is fair, reasonable, and adequate.

D. Exempted Securities

Counsel has requested that this Court determine whether or not the securities issued as part of this settlement will be exempt from registration and other requirements under *15 U.S.C. § 77c*. A security is exempt Under *15 U.S.C. § 77c(a)(10)* if it [*21] is:

> issued in exchange for one or more bona fide outstanding securities, claims, or property interests ... where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court ... of the United States ... authorized by law to grant such approval.

In this case, the CPI securities that are being issued to class members as part of the settlement are exempt under this section. The bona fide claims of the class against CPI will be extinguished upon approval of the settlement, in exchange for the securities at issue. The Court has held a hearing on the fairness of the settlement, including the securities portion. All class members to whom securities may issue had the right and opportunity to appear at the fairness hearing. Thus, upon final approval of the settlement by the Court, the conditions for exemption under *15 U.S.C. § 77c(a)(10)* will be met and the securities issued as part of this settlement are exempt from the provisions of *15 U.S.C. § 77c*.

[*22] E. Attorneys' Fee Petition

Class counsel in a class action who recovers a common fund for the benefit of persons other than himself or his client should receive an award of attorneys' fees that is fair and reasonable from the fund. *Boeing Co. v. VanGemert, 444 U.S. 472, 478, 100 S. Ct. 745, 749, 62 L. Ed. 2d 676 (1980)*. The attorneys in this case have petitioned the Court for an award based on a percentage of the common fund, which is the method generally favored in common fund cases. E.g., *In re General Motors, 55 F.3d at 821*, *In re Prudential, 148 F.3d at 333*. In deciding whether to approve the fee request, this Court must consider both the Attorneys' Fee petition and the Objection to the petition by Mr. Arnold and Ms. Garten.

1. Reasonableness of the Fee Requested

The Third Circuit has identified seven factors that should be considered in deciding whether a fee petition should be approved. *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 (3d Cir. 2000)*. These are: 1) the size of the fund created and the number of persons benefitted; 2) the presence or absence of substantial objections by members of [*23] the class to the settlement terms or fee request; 3) the skill and efficiency of the attorneys involved; 4) the complexity and the duration of the litigation; 5) the risk of nonpayment; 6) the amount of time devoted to the case by counsel; and 7) the awards in similar cases. These factors all weigh in favor of approving the attorneys' fee petition in this case.

a) The Size of the Fund and the Number of Persons Benefitted

The size of the fund and the number of persons benefitted is an important factor in setting attorneys' fees because attorneys should be rewarded for procuring a successful result for the class. E.g., *Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)*; *In re General Motors, 55 F.3d at 821*. Though the size of the fund is not large, counsel has procured a substantial amount of money and stock that will benefit thousands of class members.

The measure of counsel's success in this case also cannot be determined by considering only the final amount of the award itself; the amount of the settlement fund is a very good recovery in light of the difficulties of proving the plaintiffs' case and the precarious financial position of the defendants. [*24] Plaintiffs' counsel's success should be rewarded by an adequate fee award.

Additionally, the settlement fund procured by the attorneys will benefit a large number of people. Identified class members number at least 35,950, and there are likely more class members who received notice through publication. The number of persons benefitted and the size of the settlement both weigh in favor of approving their fee petition.

b) The Presence or Absence of Substantial Objections by the Members of the Class

The reaction of the class in this case also supports approval of the attorneys' fee petition. All class members who received notice, either individually or through publication were notified that the attorneys would request up to thirty percent as their fee award. Sincage Aff. Exh. A. Despite the large number of class members notified, only one objection was received and it related only to the fee petition. This reaction shows that the class views the settlement as a success, and, other than the objection by Mr. Arnold and Ms. Garten indicates that the class does not object to the thirty percent requested by the attorneys. This positive reaction supports approval of the fee petition.

[*25] c) The Skill and the Efficiency of the Attorneys Involved

The plaintiffs' counsel is highly skilled in the area of shareholder securities litigation. The attorneys involved have extensive experience in this area and have used their skill to efficiently resolve this matter. Most of the work on this case was done by skilled senior lawyers who had the most experience in and understanding of biotechnology securities litigation and could thus do the work more efficiently than less experienced attorneys. Transcript of Hearing on Settlement, September 6, 2002 ("Tr.") 50. The submissions made in this case were always thorough and of consistently high quality, showing a high level of skill and effort by counsel. Additionally counsel have always carried themselves in a professional manner and have represented their clients effectively before the Court.

Counsel has also shown a high level of awareness of the need for efficiency in handling this case. Six months prior to filing the initial complaint in this case, counsel researched and prepared the case so as to put forth the strongest complaint possible from the beginning. Tr. 9, 27. As counsel for both plaintiffs and defendants noted [*26] at the settlement hearing, shortly after their appointment as lead counsel by the Court, class counsel began negotiations with the defendants an attempt to reach a prompt settlement without extensive litigation and fees. Id. at 25, 28. A tentative agreement was reached within seven months and, the plaintiffs' counsel had provided this Court with a settlement agreement within eleven months of their appointment. Savett/ Kessler Decl. 14. Both the high level of skill and experience of counsel and their efficient handling of this case support approval of their fee petition.

d) The Complexity and Duration of the Litigation and the Risk of Nonpayment

The complexity and difficulty of this case support approval of the attorneys' fee petition. This is a biotechnology securities litigation case involving several complex issues of fact and law that plaintiffs' counsel was able to effectively address because of their experience and research. As discussed in Part III, there were several difficult liability and damage issues present in this litigation, as well as the added complexity of CPI's insurance problems.

The complexity and difficulty of the case and CPI's precarious financial [*27] situation directly correlated to a high risk of nonpayment. As already discussed, not only there was a high risk that no or few damages would be awarded, it was also likely that even had damages been awarded they would not have been collectable. Both the class and the attorneys faced a high risk of nonpayment despite putting forth best efforts.

Though the duration of the litigation was relatively quick for a class action case involving such complex and intricate issues, the reason for the quick result appears to be plaintiffs' counsel's hard work. Additionally, even though the settlement itself was reached promptly, it is important to note that plaintiffs' counsel has been working on this case for about two years. Tr. at 9. Much of this time involved intensive work by the attorneys: at least six months of extensive research in preparation for writing the complaint; followed by five months of discovery and fact-finding; seven months of aggressive settlement negotiations; and three months of confirmatory discovery. Id. at 9-11; Savett/ Kessler Decl. 14.

Though counsel acted in the best interest of the class by reaching a quick settlement, the case has been neither easy nor short. [*28] The complexity of the case, the risk of non-payment, and the duration of the litigation also support approval of the fee petition.

e) The Amount of Time Devoted to the Case

Counsel has invested a significant amount of time into preparing and prosecuting this case. A total of over 2,600 hours was spent by plaintiffs' counsel. Savett/ Kessler Decl. 40. This amount justifies an award of the size counsel has requested. Counsel has provided hourly rates for purposes of cross checking the percentage award against what the fee would be if billed hourly (the "lodestar"). This Court finds the hourly rates offered to be reasonable in light of counsel's experience and skill and the nature of this case.

Using the hourly rates provided by counsel, the thirty percent award is equal to approximately 1.2 times the lodestar. The amount of time counsel spent on this matter supports granting the fee requested in the fee petition.

f) Comparing the Awards in Similar Cases

The thirty percent counsel has requested is well within the range approved in other class action fee awards where a percentage of the common fund was

awarded. In In re General Motors, the Third Circuit cites data from [*29] a District Court, noting that fee awards have ranged from nineteen to forty-five percent of the fund in common fund cases. *55 F.3d at 774*. The request in this case is not even at the top of this range.

In fact, thirty percent is very close to other fee awards that have been made by courts in this District. In In re Ikon, Judge Katz approved a thirty percent award in a class action securities case where the percentage fee was approximately 2.46 times the lodestar. *194 F.R.D. 166, 195*. In In re Rite Aid, Judge Dalzell approved an award of twenty five percent and cited data from one study that indicates the average attorney's fees percentage in a common fund case is 31.71% and the median was about 33.3%. *146 F. Supp. 2d 706, 735 (2001)*. A thirty percent fee is very comparable to awards in similar cases, providing further support for approval of the fee petition.

2. The Objection by Mr. Arnold and Ms. Garten

Mr. Arnold and Ms. Garten have objected to the fee petition and have requested that they be allowed limited discovery into the attorneys' handling of and the attorneys' time spent in the case. Obj. 1-4; Tr. 32-33. This Court finds [*30] that the objections raised by Mr. Arnold and Ms. Garten do not diminish the overall reasonableness of the fee. Additionally, the discovery requested is not warranted by the facts of this case and is therefore denied.

Mr. Arnold and Ms. Garten object to the fee award because they believe that the settlement is worth less than counsel has asserted and because they feel that a thirty percent award is excessive. Tr. 29. Mr. Arnold and Ms. Garten argue that the settlement is worth less than reported because the actual value of the settlement is reduced because the settlement is paid to shareholders by the company in which they hold shares. Mr. Arnold and Ms. Garten argue that this dilutes the value of any CPI stock already held by the class, thus reducing the actual value of the settlement, particularly to those class members who have other CPI stock holdings. Id. at 35-36.

As both Mr. Arnold and defense counsel noted at the hearing, this dilution argument applies equally regardless of whether a settlement is issued in cash or in securities. Id. at 39, 45. Thus if Mr. Arnold and Ms. Garten's objections were heeded, it would call into question any and all settlements between a [*31] class of shareholders and the company in which they hold shares. This would undermine the efficacy and utility of class action securities litigation overall. Additionally, the effect of dilution depends upon the number of shares each class member has apart from the settlement, how long they have held the shares, when they purchased the shares, and other outside factors unrelated to this case or this settlement.

In determining whether a percentage-based fee is appropriate, courts in this Circuit consider only the actual value of the securities and/ or cash settlement, not the potential net value to each class member based on dilution or other factors unrelated to the litigation. This is what is contemplated by Section 21D(a)(6) of the Exchange Act, which requires that attorneys get paid based on a reasonable percentage of what gets paid out to class members, not the net value of the settlement. *15 U.S.C. § 78u-4(a)(6)*. Thus Mr. Arnold and Ms. Garten's objection as to the actual value of the settlement does not change the Court's decision that the factors to consider regarding an attorneys' fee petition weigh in favor of approval of the petition.

Mr. Arnold [*32] and Ms. Garten also raised the concern that class counsel's work does not warrant the thirty percent award that they have requested. Mr. Arnold in particular noted that he did not feel that counsel had demonstrated that they were entitled to the thirty percent because, he argued, the case and the result achieved did not require high quality legal work. Tr. 30. The Court disagrees and concludes that the thirty percent award is not an overcompensation of class counsel.

Contrary to Mr. Arnold's assertions at the hearing, there is no evidence that this settlement was easily reached or reached without hard work and skill on the part of class counsel. As defense counsel explained at the hearing, both the high quality of the complaint and the experience and reputation of class counsel were very influential factors in persuading Hartford to fund this settlement. Tr. 44. As noted in the evaluation in Part V. A. of the Gunter factors for fee approval, class counsel has invested considerable time and energy into this case. Counsel has used their skill and expertise to procure a result that is favorable to their clients and a benefit to the class, and has done so efficiently despite very [*33] complex issues of law and fact. A thirty percent award is appropriate in such a case.

Limited discovery, as requested by Mr. Arnold and Ms. Garten, would not be necessary or appropriate in this case. There is no evidence or reason to believe that class counsel has handled this case other than appropriately. Class counsel has provided a list of time spent on this case by all attorneys and paralegals as well as counsel's hourly rates. Counsel has also provided a detailed explanation of their approach to this case. See generally Savett/ Kessler Decl. All of this information is available both to the Court and to the objectors, and has been available since before the hearing. The discovery sought is inappropriate in this case because it would place a burden on class counsel that is unnecessary in light of the

information already available and the absence of any indication at all of impropriety.

3. Costs Requested

Counsel for the class has also requested reimbursement of fees and expenses totaling $ 62,037.12. No class members have objected to this expense request. These expenses are reasonable expenses necessary to this case and, as such, are approved.

FINAL JUDGMENT AND [*34] **ORDER OF DISMISSAL**

On the 6th day of September, 2002, a hearing having been held before this Court to determine: (1) whether the terms and conditions of the Stipulation and Agreement of Settlement and a separate Supplemental Agreement, both dated as of May 16, 2002 (collectively, the "Stipulation"), including the issuance of 1.7 million shares of Cell Pathways, Inc. ("CPI") common stock (the "Settlement Stock") pursuant to the Stipulation, are fair, reasonable and adequate and in the best interest of the Class, the Class Members and each individual Class Member who receives Settlement Cash or Settlement Stock (defined in the Stipulation) pursuant to the Settlement in settlement of all claims asserted by the Class and the Class Members against defendants CPI, Robert Towarnicki and Rifat Pamukcu (the "Defendants") in the Consolidated Class Action Complaint (the "Consolidated Complaint") now pending in this Court under the above caption, including the release of the Defendants and the Released Persons, and should be approved; (2) whether the shares of Settlement Stock are exempted securities pursuant to Section 3(a)(10) of the Securities Act of 1933, *15 U.S.C. § 77c* [*35] *(a)(10)*; (3) whether judgment should be entered dismissing the Consolidated Complaint on the merits and with prejudice in favor of the Defendants and as against Lead Plaintiffs and all persons or entities who are members of the Class herein who have not timely and validly excluded themselves from the Class; (4) whether to approve the Plan of Allocation as a fair and reasonable method to allocate the Settlement proceeds among the Class Members and each individual Class Member who receives Settlement Cash or Settlement Stock pursuant to the Settlement; and (5) whether and in what amount to award counsel for Lead Plaintiffs and the Class fees and reimbursement of expenses. The Court having considered all matters submitted to it at the hearing and otherwise pursuant to *Rule 23, Fed. R. Civ. P.*, the Private Securities Litigation Reform Act of 1995, *15 U.S.C. § 78u-4, et seq.* (the "PSLRA") and Section 3(a)(10) of the Securities Act of 1933; and it appears that a notice of the hearing substantially in the form approved by the Court was mailed to all Class Members who purchased Cell Pathways, Inc. common stock ("CPI Stock") or related options on CPI Stock during the [*36] period from October 27, 1999 through and including September 22, 2000 (the "Class Period"), and that a summary notice of the hearing substantially in the form approved by the Court was published in the national edition of The Wall Street Journal and disseminated through the PR Newswire pursuant to the specifications of the Court; and the Court having considered and determined the fairness and reasonableness of the award of attorneys' fees and expenses requested; and all capitalized terms used herein having the meanings as set forth and defined in the Stipulation.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Court has jurisdiction over the subject matter of the Action, the Lead Plaintiffs, all Class Members, the Defendants, and the Released Persons.

2. The Notice of Class Action Certification, Proposed Settlement of Class Action and Hearing Thereon and of other matters set forth therein given to the Class pursuant to the Hearing Order was the best notice practicable under the circumstances, including individual notice to all Class Members who could be identified through a reasonable effort, as well as valid, due and sufficient notice to all persons entitled thereto, and [*37] complied fully with the requirements of *Fed. R. Civ. P. 23*, the Constitution of the United States, the PSLRA, Section 3(a)(10) of the Securities Act of 1933, and for any other applicable law.

3. The Settlement for purposes of Section 3(a)(10) of The Securities Act of 1933 is approved as fair, reasonable and adequate and in the best interest of the Class, the Class Members and each individual Class Member who receives Settlement Stock or Settlement Cash pursuant to the Settlement, and the Parties are directed to consummate the Stipulation in accordance with its terms and provisions.

4. The shares of Settlement Stock are issued in exchange for bona fide outstanding claims; all parties to whom it is proposed to issue such shares have had the right to appear at the hearing on the fairness of the Settlement; and the shares of Settlement Stock are exempted securities pursuant to Section 3(a)(10) of the Securities Act of 1933, *15 U.S.C. § 77c(a)(10)*.

5. The Consolidated Complaint is hereby dismissed with prejudice and without costs, except as to any fees and costs provided in the Stipulation, as against any and all of the Defendants.

6. "Released Claims" collectively [*38] means any and all claims, demands, rights, liabilities or causes of action, in law or in equity, known or unknown, accrued or unaccrued, fixed or contingent, direct, individual or representative, of every nature and description whatso-

ever, whether based on federal, state, local, statutory or common law or any other law, rule or regulation that have been asserted or that could have been asserted by any Class Member (or such Class Member's "affiliates" or "associates" or other entities "controlled" by them, as defined in SEC Rule 12b-2) against the Released Persons (as defined below) or any one of them, arising out of or relating in any way to any of the alleged acts, omissions, misrepresentations, facts, events, matters, transactions, or occurrences referred to or that could have been asserted in the Consolidated Complaint, or in any of the complaints filed in any of the actions consolidated with this Action, including without limitation any of CPI's financial statements publicly disclosed before or during the Class Period. Released claims also means any and all claims arising out of, relating to, or in connection with the settlement or resolution of the litigation, other than claims [*39] to enforce the settlement or any of its terms.

7. "Released Persons" means all of the Defendants and each of their respective past or present subsidiaries, parents, successors and predecessors, officers, directors, shareholders, agents, employees, attorneys, insurers, advisors, investment advisors, auditors, accountants, affiliates (as defined by SEC Rule 12b-2), associates (as defined by SEC Rule 12b-2) and any person, firm, trust, corporation, officer, director or other individual or entity in which any Defendant has a controlling interest or which is related to or affiliated with any of the Defendants, and the legal representatives, heirs, successors in interest or assigns of the Defendants.

8. Lead Plaintiffs and each Class Member (and such Class Member's "affiliates" or "associates" or other entities "controlled" by them, as defined in SEC Rule 12b-2), except those who timely and validly exclude themselves from the Class, shall hereby be deemed to have, and by operation of the Judgment shall have, fully, finally and forever released, relinquished and discharged all Released Claims against the Released Persons and shall be enjoined forever from prosecuting the Released Claims, [*40] whether or not any of the Class Members executes and delivers the Proof of Claim or the release contained therein. The Released Claims are hereby compromised, settled, released, discharged and dismissed as against the Released Persons on the merits and with prejudice by virtue of the proceedings herein and this Final Judgment and Order of Dismissal.

9. Lead Plaintiffs, all Class Members (and such Class Member's "affiliates" or "associates" or other entities "controlled" by them, as defined in SEC Rule 12b-2) and anyone claiming through or on behalf of any of them, are barred and enjoined forever from commencing, instituting, prosecuting or continuing to prosecute any action or other proceeding in any court of law or equity, arbitration tribunal, administrative forum, or other forum of any kind, asserting against any of the Released Persons, and each of them, any of the Released Claims.

10. Each of the Released Persons shall be deemed to have, and by operation of this Final Judgment and Order of Dismissal shall have, fully, finally and forever released, relinquished and discharged, and be barred from and enjoined from prosecuting the Released Claims, including Unknown Claims against [*41] Lead Plaintiffs, the Class Members, Plaintiffs' Co-Lead Counsel and all other Plaintiffs' Counsel; *provided, however,* that nothing in this Final Judgment and Order of Dismissal shall bar any action or release any claim to enforce the terms of the Stipulation or this Final Judgment and Order of Dismissal.

11. All actions and claims for contribution are permanently barred, enjoined and finally discharged: (i) as provided by Section 21D(f)(7)(A) of the PSLRA, *15 U.S.C. § 78u-4(f)(7)(A)*, and *(ii)* as may be provided by applicable federal or state statutes or common law.

12. Neither this Final Judgment and Order of Dismissal, the Stipulation, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

(a) offered or received against the Defendants as evidence of or construed as or deemed to be evidence of any presumption, concession, or admission by any of the Defendants of the truth of any fact alleged by Lead Plaintiffs (or Plaintiffs' Counsel) or the validity of any claim that had been or could have been asserted in the Action or in any litigation, [*42] or the infirmity of any defense that has been or could have been asserted in the Action or in any litigation, or of any liability, negligence, fault, or wrongdoing of Defendants;

(b) offered or received against the Defendants as evidence of a presumption, concession or admission of any fault, misrepresentation or omission with respect to any statement or written document approved or made by any Defendant, or against the Lead Plaintiffs and the Class as evidence of any infirmity in the claims of Lead Plaintiffs and the Class;

(c) offered or received against the Defendants as evidence of a presumption, concession or admission of any liability, negligence, fault or wrongdoing, or in any way referred to for any other reason as against any of the Parties to the Stipulation, in any other civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Stipulation; provided, however, that Defendants may refer to the Stipulation to effectuate the liability protection granted them thereunder;

(d) construed against the Defendants or the Lead Plaintiffs and the Class as an admission or concession that the consideration [*43] to be given hereunder represents the amount which could be or would have been recovered after trial; or

(e) construed as or received in evidence as an admission, concession or presumption against Lead Plaintiffs or the Class or any of them that any of their claims are without merit or that damages recoverable under the Consolidated Complaint would not have exceeded the Settlement Fund.

13. The Plan of Allocation is approved as fair, reasonable and adequate, and Plaintiffs' Co-Lead Counsel and the Claims Administrator are directed to administer the Stipulation in accordance with its terms and provisions.

14. The Court finds that all Parties and their counsel have complied with each requirement of the Private Securities Litigation Reform Act and *Rule 11 of the Federal Rules of Civil Procedure* as to all proceedings herein.

15. Plaintiffs' Counsel are hereby awarded 30% of the Settlement Fund as and for their attorneys' fees, which sum the Court finds to be fair and reasonable, and which percentage shall be payable from both the Settlement Stock and the Settlement Cash in the Settlement Fund. Plaintiffs' Counsel are also hereby awarded $ 62,037.12 in reimbursement of expenses [*44] (not including any settlement administration or distribution expenses to be incurred) from the cash portion of the Settlement Fund, together with interest from the date the Settlement Fund was funded to the date of payment at the same net rate that the Settlement Fund earns. The above amounts shall be paid to Plaintiffs' Co-Lead Counsel, pursuant to the terms of the Stipulation, from the Settlement Fund. The award of attorneys' fees shall be allocated among Plaintiffs' Counsel in a fashion which, in the opinion and sole discretion of Co-Lead Counsel, fairly compensates Plaintiffs' Counsel for their respective contributions in the prosecution of the Action.

16. Exclusive jurisdiction is hereby retained over the Parties and the Class Members for all matters relating to this Action, including the administration, interpretation, effectuation or enforcement of the Stipulation and this Final Judgment and Order of Dismissal, the distribution of the Settlement Fund to the Class Members, and any application for fees and expenses incurred in connection with administering and distributing the Settlement Fund to the Class Members.

17. No Authorized Claimant shall have any claim against Plaintiffs' [*45] Co-Lead Counsel, the Claims Administrator or other agent designated by Plaintiffs' Co-Lead Counsel based on the distributions made substantially in accordance with the Settlement and Plan of Allocation as approved by the Court and further orders of the Court. No Authorized Claimant shall have any claim against Defendants, Defendants' Counsel or any of the Released Persons with respect to the investment or distribution of the Net Settlement Fund, the determination, administration, calculation or payment of claims, or any losses incurred in connection therewith, the Plan of Allocation, or the giving of notice to Class Members.

18. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation.

19. Pursuant to *Rule 54(b) of the Fed. R. Civ. P.*, there is no just reason for delay in the entry of this Final Judgment and Order of Dismissal, and the Clerk of Court is expressly directed to enter the Judgment of dismissal in accordance with this Order.

Dated: September 23, 2002

BY THE COURT:

MARY A. McLAUGHLIN, J.

ATTACHMENT

CELL PATHWAYS, INC. SECURITIES LITIGATION II REQUESTS FOR EXCLUSION

[*46] 1 Joanne Donlevy

306 Crossroads Drive

Warwick, PA 18974

2 Orland Russell and
Marian B. Russell, Trustees

The Russell Family Trust

P. O. Box 1927

Sequim, WA 98382

3 James P. Selbert, Sr.
355 Lackawanna Street

P. O. Box 1003

Reading, PA 19603

4 Dennis J. W. O'Donnell
Malvern Retreat House

P. O. Box 315

Malvern, PA 19355

5 Amigos De Jesus, Inc.
Malvern Retreat House
P. O. Box 315
Malvern, PA 19355

6 John W. Ferrara
25 Country Club Lane
Marlton, NJ 08053

7 Anne Ferrara
25 Country Club Lane
Marlton, NJ 08053

8 Michael A. Ferrara, III
25 Country Club Lane
Marlton, NJ 08053

9 Mary E. Ferrara
25 Country Club Lane
Marlton, NJ 08053

10 Jennie E. Ferrara
25 Country Club Lane
Marlton, NJ 08053

11 Penny C. Ferrara
25 Country Club Lane
Marlton, NJ 08053

12 Michael A. Ferrara, Jr.
25 Country Club Lane
Marlton, NJ 08053

13 Ronald J. Selzer and
Marie A. Selzer
276 Brownsburg Road
Newtown, PA 18940

14 Stephanie L. Hughes
P. O. Box1292
Lithonia, GA 30058

15 Scott Scher
Scott Scher Sep IRA
2900 Vinson Lane
Plano, [*47] TX 75093

16 Randall D. Cooper
2905 Vinson Lane
Plano, TX 75093

17 Joe. J. Roessner and
Nani Lopez Roessner
6123 Broad Branch Road, NW
Washington, D.C. 20015

18 Robert W. Murphy, Rollover IRA
4837 Hampton Lake Drive
Marietta, GA 30068

19 Steven W. Wentz
5825 Toppingham Street
Plano, TX 75093

TAB 5

4 of 9 DOCUMENTS

Caution
As of: Sep 26, 2008

LINDA DAVIS, et al., Plaintiffs, v. SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, a Georgia corporation, Defendant.

Case No. 89-2839-CIV-NESBITT

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

1993 U.S. Dist. LEXIS 20033*; *1993-2 Trade Cas. (CCH) P70,480

December 23, 1993, Decided
December 23, 1993, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff customers sought class action certification in an action filed against defendant telephone company seeking monetary damages and injunctive relief for violation of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, Florida Civil Remedies for Criminal Practice Act, *Fla. Stat. Ann. §§ 772.101-772.104*, restitution, and breach of duty of good faith and fair dealing, for deceptive statements regarding inside wire maintenance service.

OVERVIEW: The customers alleged that the telephone company (company) deceived them regarding its offer of inside wire maintenance (IWMS), leading customers to believe that the company was the only company capable of offering such service. The customers sought class action certification. The court granted the motion and held that *Fed. R. Civ. P. 23*'s typicality requirement was met because all of the class representatives bought IWMS from the company, paid monopolistic prices at some time, and thus suffered the same type of injury as absent class members. The named plaintiffs were adequate to serve as class representatives because the company charged all of the class members the same, allegedly monopolistic prices, and thus injured all of the class members in the same way. The company's conduct was directed at the class as a whole. Injunctive relief and damages were both recoverable and did not prevent class certification. The issues common to the class predominated in number and complexity over the issues requiring individual proof, and the advantage of collective proof outweighed any manageability problems related to individual proof of reliance and damages.

OUTCOME: The court granted the customer's motion for class action certification.

LexisNexis(R) Headnotes

Civil Procedure > Class Actions > Appellate Review
Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > General Overview
[HN1] When reviewing a motion for class action certification, a district court is obliged to concentrate on the facts at the core of the dispute to determine whether the dispute involves issues common to the class as a whole. The court, however, is prohibited from ruling on the merits of the dispute. Rather, the court must defer to the allegations of the plaintiff's complaint and determine whether those allegations warrant the adjudication of the plaintiff's claims on a class wide basis. The decision whether to order class certification falls within the court's discretion.

Civil Procedure > Parties > Joinder > General Overview
Civil Procedure > Class Actions > Class Members > General Overview

Civil Procedure > Class Actions > Prerequisites > Numerosity

[HN2] In order to obtain class certification, plaintiffs must demonstrate that the action satisfies the requirements set out in *Fed. R. Civ. P. 23(a)*. The rule provides that one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN3] In order to obtain class certification, plaintiffs must demonstrate that the action satisfies the requirements of either *Fed. R. Civ. P. 23(b)(1)*, *23(b)(2)*, or *23(b)(3)*.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Class Members > General Overview
Civil Procedure > Class Actions > Prerequisites > General Overview

[HN4] *Fed. R. Civ. P. 23(b)(2)* and *23(b)(3)* provide that: An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against the class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Civil Procedure > Class Actions > Prerequisites > Adequacy of Representation
Civil Procedure > Class Actions > Prerequisites > Typicality

[HN5] *Fed. R. Civ. P. 23(a)(3)* and *23(a)(4)* set out the typicality and adequacy standards applicable to federal class actions. Under *Fed. R. Civ. P. 23(a)(3)*, the claims of the class representatives must be typical of the claims of the class, while, under *Fed. R. Civ. P. 23(a)(4)*, the class representatives must be in a position to fairly and adequately represent the class.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > Typicality

[HN6] In order to satisfy *Fed. R. Civ. P. 23(a)(3)*'s typicality requirement, the party seeking class certification must demonstrate that the interests of the class representatives do not conflict with those of the class and that the claims of the class representatives are based on the same legal or remedial theory as those of the class as a whole. Moreover, when the party seeking certification alleges that the same unlawful conduct was directed at or affected both the class representatives and the class itself, the typicality requirement is usually met irrespective of varying fact patterns which underlie the individual claims.

Civil Procedure > Class Actions > Prerequisites > Typicality

[HN7] Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, where a class representative's claims are based on injuries caused by conduct affecting the class as whole, the class representative's claim satisfies *Fed. R. Civ. P. 23*'s typicality requirement.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > General Overview

[HN8] *Fed. R. Civ. P. 23(b)(2)* governs certification of classes in cases involving requests for declaratory or injunctive relief. The rule imposes two requirements on certification of such classes: 1) the party opposing the class must have acted or refused to act on grounds generally applicable to the class and 2) final injunctive or declaratory relief must be appropriate as to the class as a whole.

Civil Procedure > Class Actions > Certification

[HN9] Nothing in the language of *Fed. R. Civ. P. 23* precludes certification of both an injunctive class and a damages class in the same action.

Contracts Law > Consideration > Enforcement of Promises > General Overview
Torts > Business Torts > Fraud & Misrepresentation > General Overview
[HN10] The elements of common law fraud include: 1) a false statement of material fact; 2) known by the defendant to be false at the time it was made; 3) made for the purpose of inducing the plaintiff to act in reliance thereon; 4) which actually induced the plaintiff to undertake some act in detrimental reliance thereon; and 5) which caused damage to the plaintiff as a result of that reliance.

Contracts Law > Consideration > Enforcement of Promises > General Overview
Torts > Business Torts > Fraud & Misrepresentation > General Overview
[HN11] Reliance is presumed where the misrepresentation at issue arises from material omissions. To prove reliance, a plaintiff need only prove that he or she was exposed to the misrepresentation at issue and undertook some action to his or her detriment on the basis of that misrepresentation.

Antitrust & Trade Law > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview
Criminal Law & Procedure > Scienter > General Intent
[HN12] In order to sustain a claim under *Fla. Stat. Ann. § 772.103(1)*, a plaintiff must demonstrate that the defendant: 1) received proceeds derived directly or indirectly; 2) with criminal intent; 3) pursuant to a pattern of criminal activity; 4) to use or invest in establishing or operating a RICO "enterprise."

Antitrust & Trade Law > Consumer Protection > Home Solicitation
Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Causes of Action > General Overview
Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview
[HN13] *Fla. Stat. Ann. § 817.061(1)* provides that it is unlawful for any person, company, corporation, agency, association, partnership, institution, or charitable entity to solicit payment of money by means of a statement or invoice, or any writing that would reasonably be interpreted as a statement or invoice, for goods not yet ordered or services not yet performed and not yet ordered, unless there appears on the face of the statement or invoice or writing in 30 point boldface type the following warning: "This is a solicitation for the order of goods or services, and you are under no obligation to make payment unless you accept the offer contained herein."

JUDGES: [*1] NESBITT

OPINION BY: LENORE C. NESBITT

OPINION

ORDER

This cause comes before the Court upon Plaintiffs' Motion For Class Certification.

BACKGROUND

Plaintiffs, customers of Defendant Southern Bell Telephone & Telegraph Company ("Southern Bell"), initiated this action seeking monetary damages and injunctive relief for violations of the antitrust laws, Florida Civil Remedies for Criminal Practice Act ("Florida RICO"), restitution, breach of duty of good faith and fair dealing, and other statutory violations under Florida law. [1] The only federal claims presented are for monopolization and attempted monopolization in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2*. The Court has supplemental jurisdiction over the remaining claims.

1 Plaintiffs seek treble damages for violations of *§ 2* of the Sherman Act and Florida Antitrust Act of 1980, *Fla. Stat. § 542.19* (1987), treble damages for violations of the Florida RICO laws, and treble damages for violations of *Fla. Stat. § 817.061*.

This suit arises out [*2] of the terms upon which Southern Bell furnished inside wire maintenance service ("IWMS") to its residential and simple business customers in the State of Florida since 1983. IWMS covers the telephone wire within a customer's home or office which connects the telephone jack to the telephone company's outside plant. It also covers the telephone jacks, but not the customer's telephone equipment.

Plaintiffs's filed their original Complaint on December 21, 1989, and followed with their First Amended Complaint on February 2, 1990. The First Amended Complaint alleges the following facts. Prior to 1983, Southern Bell maintained all the inside wiring for residential and simple business customers. IWMS was part of, or was "bundled with," basic telephone provided by Southern Bell pursuant to a monopoly franchise from the State of Florida and regulated by the Florida Public Ser-

vice Commission ("PSC"). [2] In 1982, the PSC ordered that IWMS be separated, or "unbundled," from basic telephone service in order to promote competition in the IWMS market.

2 IWMS is used in both interstate and intrastate communication and is regulated concurrently by both the State and the federal government.

[*3] In June of 1983, Southern Bell offered IWMS to its customers as a separate service for the first time. Southern Bell made the offer through a "negative option" contract announced in a billing insert. Plaintiffs allege that the insert contained untrue, deceptive, or misleading statements and omissions; specifically, that it failed to inform customers that it was a contract offer and implied that repairing inside wire was a difficult task that could not be undertaken by the customer. Pursuant to the terms of the negative option contract, customers were to continue to receive IWMS from Southern Bell unless they affirmatively requested otherwise, and were charged $ .55 per month for the service. The new $ .55 charge for the IWMS was included in the charge for local telephone service.

From February to June of 1987, Southern Bell sent two or more billing inserts to its customers, including a ballot check-off which provided that Southern Bell would continue to provide IWMS if the customer so requested. These inserts allegedly contained the same types of misrepresentations and omissions as the 1983 insert.

In March 1988, Southern Bell sent its customers another billing insert containing [*4] a second negative option contract for IWMS which increased the cost of service from $ .55 per month to $ 1.00 per month. Customers would accept the new "offer" if they did not act. The billing insert contained defects similar to those contained in prior inserts. Another negative option contract mailed to customers in the late Spring of 1989 raised the charge for IWMS to $ 1.50 per month.

Plaintiffs allege that by this conduct, Southern Bell willfully acquired or maintained, or attempted to acquire or maintain, monopoly power in the IWMS markets, which enables it to realize unlawful monopoly profits. The First Amended Complaint alleges that Plaintiffs represent a class consisting of all residential and simple business consumers in the State of Florida who paid for Southern Bell's optional IWMS between the time service became optional and the date of class certification.

On February 16, 1990, Southern Bell filed a Motion To Dismiss, Or In The Alternative, Motion For Summary Judgment. In an Order dated February 4, 1991, the Court granted the motion in part and deferred ruling on other aspects of the motion. The Order immunized Southern Bell from all antitrust liability through December [*5] 31, 1986 pursuant to the state action doctrine.

Plaintiffs filed the instant motion for class certification on March 22, 1990. The motion requests certification of a class consisting of all *current* residential and simple business consumers in the State of Florida who have paid for Southern Bell's IWMS between the time service became optional and the date of class certification.

STANDARDS GOVERNING CLASS CERTIFICATION

Prior to examining Plaintiffs' motion for class certification, it is necessary to review the principles governing disposition of a class certification motion. [HN1] When reviewing such a motion, a district court is obliged to concentrate on the facts at the core of the dispute to determine whether the dispute involves issues common to the class as a whole. *Sollenbarger v. Mountain States Tel. & Tel. Co., 121 F.R.D. 417 (D.N.M. 1988)*. The court, however, is prohibited from ruling on the merits of the dispute. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 2152, 40 L. Ed. 2d 732 (1974)* ("We find nothing in either the language or history of *Rule 23* that gives a court [*6] any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule. . . "). Rather, the court must defer to the allegations of the plaintiff's complaint and determine whether those allegations warrant the adjudication of the plaintiff's claims on a class wide basis. *Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 102 S. Ct. 2364, 2372, 72 L. Ed. 2d 740 (1982)*. The decision whether to order class certification falls within the court's discretion. *Sollenbarger, 121 F.R.D. at 422*.

[HN2] In order to obtain class certification, Plaintiffs must demonstrate that the action satisfies the requirements set out in *Rule 23(a)*. The rule provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of [*7] the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[HN3] Plaintiffs must also demonstrate that the action satisfies the requirements of *either Rule 23(b)(1)*, *Rule*

23(b)(2), or *Rule 23(b)(3)*. Plaintiffs assert that the action satisfies [HN4] *Rule 23(b)(2)* and *23(b)(3)*. Those rules provide that:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning [*8] the controversy already commenced by or against the class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The Court will analyze the propriety of class certification with respect to each of Plaintiffs' causes of action.

ANTITRUST CAUSES OF ACTION

The First Amended Complaint asserts the following four causes of action pursuant to the antitrust laws: 1) monopolization and leveraging of monopoly power in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2* (Count I); 2) attempt to monopolize in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2* (Count II); 3) monopolization and leveraging of monopoly power in violation of the Florida Antitrust Act of 1980, *Fla. Stat. Ann. § 542.19* (Count III); and 4) attempt to monopolize in violation of the Florida Antitrust Act of 1980, *Fla. Stat. Ann. § 542.19* (Count IV). Both the Florida Legislature and the Florida courts have made clear that the Florida Antitrust Act was modelled on the Sherman Act and is to be interpreted with [*9] the precedents construing the Sherman Act. *See Fla. Stat. Ann. § 542.32* (1987) ("It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to the comparable antitrust statutes . . . "); *see also, Day v. Le-Jo Enterprises, Inc., 521 So.2d 175 (Fla. 3rd Dist. Ct. App. 1988)*.

Southern Bell raises the following objections to class certification with respect to these claims; 1) Plaintiffs' lack antitrust standing; 2) the claims of the named Plaintiffs are not typical of those of the alleged class as a whole under *Rule 23(a)(3)*; 3) the named Plaintiffs do not qualify as adequate class representatives under *Rule 23(a)(4)*; 4) Southern Bell did not act on grounds generally applicable to the class within the meaning of *Rule 23(b)(2)*; 5) individual questions predominate over questions common to the class under *Rule 23(b)(3)*; and 6) a class action is not superior to other available for the fair and adjudication of the controversy because of the need for certification of numerous subclasses and because of the many manageability problems associated with [*10] individual proof of injury and damages. The Court considers each of these objections separately.

1) Antitrust Standing

In its Order of February 4, 1991 disposing of Southern Bell's motion to dismiss or, alternatively, for summary judgment, the Court considered the issue whether Plaintiffs possess antitrust standing. *See Davis, 755 F. Supp. at 1534-1537*. The Court explained that, for purposes of that motion, it was limited to a review of the allegations of the Complaint. *Id.* at 1534. As the Court is not permitted to assess the merits of Plaintiffs' causes of action in connection with the instant motion, the Court is similarly limited here.

In its February 4, 1991 Order, the Court held that the allegations of the Complaint were sufficient to withstand the motion to dismiss, but that Southern Bell would not be precluded form renewing its objection in a subsequent motion for summary judgment. The Court adopts that holding for purposes of the instant motion, and will revisit the issue of standing in connection with Southern Bell's Motion For Summary Judgment.

2) Typicality/Adequacy

[HN5] *Rule 23(a)(3)* and *23(a)(4)* set out the typicality [*11] and adequacy standards applicable to federal class actions. Under *Rule 23(a)(3)*, the claims of the class representatives must be typical of the claims of the class, while, under *Rule 23(a)(4)*, the class representatives must be in a position to fairly and adequately represent the class. A number of courts have noted that the two standards tend to merge because the class representatives' claims' must be typical of those if the representatives are to be adequate. *See, e.g., Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 102 S. Ct. 2364, 2370 n.13, 72 L. Ed. 2d 740 (1982)*; *Sollenbarger, 121 F.R.D. at 423*. The

Court, however, will analyze the two requirements separately.

[HN6] In order to satisfy's *Rule 23(a)(3)*'s typicality requirement, the party seeking class certification must demonstrate that the interests of the class representatives do not conflict with those of the class and that the claims of the class representatives are based on the same "legal or remedial" theory as those of the class as a whole. *Gonzales v. Cassidy, 474 F.2d 67, 71 n.7* (5th Cir. 1973; *Pottinger v. City of Miami, 720 F. Supp. 955, 959 (S.D. Fla. 1989)*. [*12] Moreover, when the party seeking certification alleges that the same unlawful conduct was directed at or affected both the class representatives and the class itself, the typicality requirement is usually met irrespective of varying fact patterns which underlie the individual claims. Herbert Newberg, 1 Newberg On Class Actions § 3.13 (1992) ("Newberg").

Southern Bell appears to concede that the claims of class representatives are based on the same legal theories as those of the class as a whole, but contends that, because the class representatives commenced and terminated their subscriptions to IWMS over different periods, their interests conflict both with one another and with those of the absent class members. In particular, Southern Bell contends that short-term purchasers may be satisfied with minimal recovery or a class-wide settlement arrangement which would dissatisfy long-term purchasers. In the nearly fours years over which this litigation has proceeded, the Court has received no evidence of any such conflict between the class representatives and thus has no reason to believe that such a conflict will materialize in the future. Moreover, the Court retains two tools with which [*13] to cure any conflict that does arise. First, the Court can subdivide the class in order to eliminate the conflict. Second, the Court can scrutinize any settlement to ensure that the settlement adequately protects the interests of all class members.

Southern Bell also objects to the adequacy of the named Plaintiffs as class representatives. It is well established that two factors govern whether a named plaintiff must satisfy two criteria in order to adequately represent a class: 1) the plaintiff's interests must not be in conflict with those of the other class members; and 2) the plaintiff must be able to ensure vigorous representation of the class. *See, e.g., Falcon, 457 U.S. at 157 n.13*; Newberg at § 3.22.

Southern Bell raises two objections to the adequacy of the named Plaintiffs as class representatives. First, Southern Bell contends that the individual named Plaintiffs differ markedly from the absent class members because all of the named Plaintiffs concede that they never read the allegedly deceptive billing inserts and therefore could not have been deceived by them. Second, Southern Bell contends that depositions [*14] of the named Plaintiffs reveal that they lack adequate knowledge of the facts underlying the litigation and the costs associated with the litigation.

Southern Bell's first objection is really a typicality objection. *See* Newberg at § 3.22 at 127 ("The typicality test examines the relationship of facts and issues between the representative and the class."). According to a leading authority on class actions:

> [HN7] Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff.

Newberg at § 3.13 at 76. Thus, where a class representative's claims are based on injuries caused by conduct affecting the class as whole, the class representative's claim satisfies *Rule 23*'s typicality requirement.

In the present case, Plaintiffs contend that Southern Bell's 1987, 1988, and 1989 solicitations for IWMS misled customers into believing that they needed [*15] IWMS and that Southern Bell was the only company capable of providing the service. As a result, Plaintiffs contend that any potential competitor must engage in "corrective advertising"--advertising designed to overcome the effect of Southern Bell's misleading solicitations and to inform customers that other companies can provide the service. The need for corrective advertising deters potential competitors from entering the market for IWMS for three reasons. First, corrective advertising is expensive. Second, a company that engages in corrective advertising cannot ensure that it will capture all of the business diverted away from Southern Bell by the advertising. Rather, *other* competitors will capture much of that business. Finally, those competitors offering repair on a case by case basis, rather than through a service plan, cannot recoup the costs of corrective advertising within an acceptable period of time due to the low rate at which inside wires fail. The need for corrective advertising thus acts as a market entry barrier that prevents potential competitors from entering the market for IWMS. As a consequence, Southern Bell is able to charge monopoly prices for the service.

[*16] It is undisputed that *all* of the class representatives purchased IWMS from Southern Bell prior to the present date. Thus, *all* of the class representatives paid

monopolistic prices for IWMS at some time and therefore suffered exactly the same type of injury as the absent class members. The fact that class representatives never read those solicitations is irrelevant. [3] *See Kennedy v. Tallant, 710 F.2d 711, 717 (11th Cir. 1983)* (investor served as adequate class representative in securities fraud case investor admitted never reading fraudulent prospectuses)

3 The fact that some of the class members received oral, rather than written solicitations, creates no impediment to class certification. In *Kirkpatrick v. J.C. Bradford and Co., 827 F.2d 718, 724 (11th Cir. 1987)*, the Eleventh Circuit held that the fact that some class members in a securities fraud case received fraudulent information via oral misrepresentations, while others received the information via written misrepresentations was irrelevant, absent some evidence of material variance between the oral and written representations. The Court finds no such evidence here.

[*17] Southern Bell's second objection to the adequacy of the named Plaintiffs as class representatives also lacks merit. Southern Bell contends that the named Plaintiffs lack sufficient knowledge of the facts underlying the case and of the costs associated with the case to serve as adequate class representatives. This objection is meritless. The depositions of the named Plaintiffs reveal that they are well aware of facts underlying this action and have at least some understanding of the applicable law. *See, e.g.,* Deposition of Linda Martens at pp. 31-33, 43-44, Exhibit H to Plaintiffs Reply. Moreover, at least one of the Plaintiffs has indicated that she is aware of the costs associated with the action. *Id.* at 45. The Court has no reason to believe that the other named Plaintiffs are not similarly informed. Finally, the vigor with which Plaintiffs have prosecuted this action is unquestionable. The voluminous court file is a testament to this vigor. The Court concludes that the named Plaintiffs are adequate to serve as class representatives. [4]

4 Southern Bell objects to the adequacy of named Plaintiff Genevieve Williams ("Williams") on the ground that telephone service at her residence is in her husband's name and that she is therefore not a Southern Bell customer. Her deposition makes its clear, however, that she resides with her husband, uses the phone serviced through Southern Bell in his name, and, most importantly, pays the telephone bills out of her own checking account. Deposition of Genevieve Williams at 7-8, 34, Exhibit J to Plaintiffs' Reply. Because Williams pays for the telephone service in her husband's name, she, not her husband, suffered any injury associated with Southern Bell's alleged monopoly of IWMS. She therefore qualifies as an adequate class representative.

[*18] 4) Certification Under *Rule 23(b)(2)*

[HN8] *Rule 23(b)(2)* governs certification of classes in cases involving requests for declaratory or injunctive relief. The rule imposes two requirements on certification of such classes: 1) the party opposing the class must have acted or refused to act on grounds generally applicable to the class and 2) final injunctive or declaratory relief must be appropriate as to the class as a whole. *Fed.R.Civ.Pro. 23(b)(2)*. According to Southern Bell, the class alleged by Plaintiffs fails to satisfy either of these requirements.

Southern Bell contends that the class fails to satisfy the first requirement on the ground that Southern Bell altered the provision and billing of IWMS on an individual, not a class basis. Southern Bell concludes that it has not acted on grounds generally applicable to the class. This contention lacks merit. Southern Bell ignores the fact that it charged *all* of the class members the same, allegedly monopolistic prices and thus injured all of the class members in the same way. Moreover, Southern Bell acquired the ability to charge monopoly prices by directing its 1987, 1988, and 1989 solicitations at *all* of its residential and [*19] simple business customers in each of those years. Thus, the conduct at the heart of the case, and which any injunction would address, was directed at the class as a whole.

Southern Bell nevertheless contends that final injunctive relief is not appropriate because the essential relief requested is monetary, not injunctive. [HN9] Nothing in the language of *Rule 23* precludes certification of both an injunctive class and a damages class in the same action. In fact, where injunctive relief and damages are both important components of the relief requested, court have regularly certified an injunctive class under *Rule 23(b)(2)* and a damages class under *Rule 23(b)(3)* in the same action. *See, e.g., Waldrip v. Motorola, Inc., 85 F.R.D. 349 (N.D. Ga. 1980)*; *Marshall v. Elec. Hose & Rubber Co., 68 F.R.D. 287 (D.Del. 1975)*; *see also,* Newberg at § 4.14 at 51. As noted, Plaintiffs allege that Southern Bell employed deceptive marketing practices to create a barrier to entry into the IWMS market and that Plaintiffs therefore paid monopolistic prices for the service. If these allegations are correct, Plaintiffs are entitled to damages [*20] for the excessive prices they paid and injunction preventing Southern Bell from using the same techniques to acquire a future monopoly. Both aspects of the relief requested are therefore important. The fact that Plaintiffs have requested both damages and injunctive relief does not prevent certification of a class under *Rule 23(b)(2)*.

5) Certification Under *Rule 23(b)(3)*

Plaintiffs also seek certification under *Rule 23(b)(3)*. As noted above, that rule authorizes class certification when the party seeking certification can demonstrate that the action in question satisfies all of the requirements of *Rule 23(a)* and that: 1) questions of law or fact common to the class predominate over any questions affecting individual class members; and 2) a class action is superior to other available methods for the fair and efficient adjudication of the action. *Fed.R.Civ.Pro. 23(b)(3)*. Southern Bell contends that the instant case fails to meet either of these two criteria.

With regard to the first criterion, Southern Bell notes that Plaintiffs must prove three elements in order to prevail on their antitrust claims: 1) the existence of a violation of the antitrust laws; 2) direct injury to each individual [*21] Plaintiff caused by the violation; and 3) individual damages associated with the injury. *See State of Ala. v. Blue Bird Body Co., 573 F.2d 309, 317 (5th Cir. 1978)*. Southern Bell concedes that whether it violated the antitrust laws is an issue common to the class as a whole, but contends that the issues of injury and damages require individual proof. Southern Bell concludes that individual issues predominate.

Southern Bell's argument misconceives the nature of this case. The issues of antitrust violation, injury, and damages all turn on class-wide proof. In particular, if Plaintiffs demonstrate that Southern Bell's use of marketing techniques enabled it to charge monopolistic prices for IWMS, then Plaintiffs will have demonstrated that Southern Bell violated the antitrust laws *and* that anyone who purchased IWMS from Southern Bell during the period over which Southern Bell charged such prices was injured. If Plaintiffs make such a proof, then an individual plaintiff need only prove that he or she purchased IWMS during some portion of the period of the violation in order to show injury.

Calculation of damages then becomes mechanical. *See Smith v. MCI Telecommunications Corp., 124 F.R.D. 665, 678 (D.Kan. 1989)*. [*22] At any given time during the period at issue, Southern Bell charged all residential and simple business consumers the same rate for IWMS. Thus, once the fact-finder determines the amount of the overcharge per line per month for each month during this period--a factual issue requiring class wide proof--the fact-finder can then calculate an individual plaintiff's damages by computing the sum of the overcharges for each month in which the plaintiff proves that he or she purchased service. Thus, the only issues requiring individual proof concern whether, and over what time period, each individual plaintiff purchased service. [5]

5 Resolution of these issues need not burden the Court's docket. Once the fact finder has determined that Southern Bell charged IWMS consumers monopolistic prices and has computed the overcharge per month per line, the Court could, for example, appoint a special master to devise guidelines to reduce the number of contested individual claims.

The complexity of these issues pales in comparison with [*23] the complexity of the issues related to proof of antitrust violation. As noted, Plaintiffs assert claims for monopolization, monopoly leveraging, and attempted monopolization. In order to prove that Southern Bell monopolized that market, Plaintiffs must prove that: 1) Southern Bell possessed monopoly power in the relevant market; and 2) Southern Bell did not acquire that power simply through superior product, business acumen, or accident, but rather through willful and improper conduct. *United States v. Grinnell, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*.

Proof of the first prong requires definition and proof of the relevant market and proof of monopoly power. *Id.* Both of these issues require presentation of substantial economic evidence. Proof of the second prong requires proof that the monopolizer undertook a course of action the consequences of which were to destroy competition in the relevant market. *Id.* In the present case, Plaintiffs contend that Southern Bell's use of misleading marketing techniques constitute the improper conduct. Plaintiffs will have to prove that those techniques mislead [*24] IWMS consumers, that the misunderstanding created the need for corrective advertising, and that corrective advertising operated as a market entry barrier that excluded, and continues to exclude, potential competitors from the IWMS market. Proof each of these links will require presentation of substantial and complex evidence. [6]

6 Plaintiffs also contend that Southern Bell violated *section 2* of the Sherman Act and *section 542.19 of the Florida Statutes* through "monopoly leveraging". Monopoly leveraging is the use of monopoly power in one market to acquire monopoly power in another market. *See Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 611, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*. In this case, Plaintiffs contend that Southern Bell used its monopoly over the provision of basic telephone services, and unique access to consumers of those services, to monopolize the market for IWMS. Proof of monopoly leveraging will turn on, among other things, Plaintiffs ability to prove that Southern Bell's billing inserts mislead consumers and will thus be quite similar to proof of monopolization. The Court therefore chooses not

to analyze monopoly leveraging and reaches the same conclusion regarding certification of both the monopoly leveraging and monopolization claims.

[*25] Proof of attempted monopolization will be similarly complex. To prove attempt, Plaintiffs must prove that Southern Bell possessed a specific intent to monopolize the relevant market and had a dangerous probability of success. *Palmer v. BRG of Ga., Inc., 874 F.2d 1417, 1439 n.33 (11th Cir. 1989)*. Proof of the relevant market will be the same for attempted monopolization as for monopolization. Proof of specific intent can be inferred from Southern Bell's anticompetitive conduct. *Id.* Thus, Plaintiff's proof will undoubtedly focus on Southern Bell's marketing techniques and their effect and will likely be substantially similar to their proof of willful and improper conduct under the monopolization counts.

Finally, in order to prove "dangerous probability of success" Plaintiffs must prove that: 1) Southern Bell has sufficient power to create a reasonable likelihood that it could achieve a monopoly; and 2) an overt act in furtherance of the attempt. *McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1505 (11th Cir. 1988)*. Their proof on these issues will focus on the causal link between Southern Bell's marketing techniques [*26] and the need for corrective advertising and on the effect of the need for corrective advertising on the market for IWMS. Again, this proof will require presentation of substantial and complex evidence.

The foregoing indicates that the issues common to the class predominate in both number and complexity over the issues requiring individual proof. Southern Bell also contends, however, that a class action is not the best available vehicle for resolution of the instant controversy for the following reasons: 1) proper certification requires certification of numerous sub-classes; 2) class action treatment will require numerous minitrials on the issues of injury and damages; and 3) it not possible to accurately determine the membership of the class, making effective notice to the class impossible. None of these contentions warrants denial of class certification.

According to Southern Bell, the Court must certify numerous separate sub-classes that will render management of the action extraordinarily difficult. For instance, Southern Bell asserts that the Court must certify separate sub-classes corresponding to the sets of IWMS purchasers who received Southern Bell's various solicitations. [*27] Thus, one subclass would include all those current subscribers who received the 1987, 1988, and 1989 solicitations, while another subclass would contain only those who received the 1988 and 1989 solicitations. Southern Bell also asserts that must certify separate language-based sub-classes--one consisting of Spanish speakers, the other consisting of English speakers.

The need for these sub-classes arises from the conflicts alleged to exist between them. As noted above, for example, Southern Bell contends that short term subscribers may be satisfied with a judgment smaller than one that would satisfy longer term subscribers. The Court, however, must approve any settlement and can reject any settlement that fails to adequately protect the interests of all class members. Moreover, if irreconcilable conflicts between sub-groups within the class materialize before settlement or trial, the Court can then subdivide the class. In the absence of any evidence of an *actual* conflict between subgroups, the Court need not subdivide the class. Purely speculative conflicts are not sufficient to preclude certification under *Rule 23(b)(3)*. [7]

7 The Court notes that, in *Sollenbarger,* the United States District Court of New Mexico certified a class nearly identical to the one in the present case on substantially similar facts. *121 F.R.D. at 417*. The noted that it retained the power to either decertify or subdivide the class in the event that intra-class conflicts warranted such action. *Id.* The court never exercised either option.

[*28] The Court has already addressed Southern Bell's prediction of numerous, time consuming minitrials on the issues of injury and damages. The Court is confident that it can overcome any manageability problems attendant to individual proof on the issues. As noted, the Court might, for instance, appoint a special master to devise guidelines designed to reduce the number of contested individual claims.

Southern Bell's notice argument is also insufficient to preclude class certification. The class alleged by Plaintiffs includes all *current* subscribers to IWMS. n8 As Southern Bell bills each of these customers for the service each month, the company must have some mechanism for identifying these customers. The same mechanism can be used to generate a list of class members to whom notice of the instant action must be sent.

n8 The fact that the class alleged in the Complaint and in Plaintiffs' motion for class certification in no way precludes certification of the latter class. *See, e.g.,* 1 Newberg at 2.03; *see also, Fed.R.Civ.Pro. 23(c)(1), 23(c)(4)*.

Finally, Southern Bell has failed to demonstrate that a feasible alternative to a class action exists. Every individual plaintiff [*29] who filed an antitrust claim in a separate action would have to prove antitrust violation, in addition to individual injury and damages. The use of the class action vehicle simply permits aggregate proof of

antitrust violation and those class-wide issues related injury and damages. Use of the vehicle will thus conserve judicial resources and will eliminate the risk of inconsistent adjudications on the issues common to the class. The class action vehicle will thus simplify, not complicate, resolution of the instant controversy.

FLORIDA RICO CLAIMS

In Counts V through VIII of the First Amended Complaint, Plaintiffs allege four seperate violations of Florida's Civil Remedies for Criminal Practices Act ("Florida RICO"), *Fla. Stat. Ann. §§ 772.101-772.104*. According to Plaintiffs, the violations are based on underlying violations of Florida's misleading advertising laws. Plaintiffs contend that Southern Bell violated those laws by disseminating the bill inserts at issue.

Southern Bell asserts the following four objections to class certification with respect to Plaintiffs' Florida RICO claims: 1) Plaintiffs could not obtain class certification in Florida court with respect to these claims; [*30] 2) Plaintiffs fail to satisfy the adequacy and typicality requirements of *Rule 23(a)(3)* and *23(a)(4)*; 3) certification under *Rule 23(b)(2)* is not appropriate because Plaintiffs' preferred relief is monetary, not injunctive; 4) certification under *Rule 23(b)(3)* is not appropriate because individual questions predominate over questions common to the class.

Southern Bell's first argument is completely meritless. Whether Florida procedural law would prohibit certification of a class with respect to Plaintiffs' Florida RICO claims is irrelevant. This Court, like all other federal district courts, applies federal procedural law. *See Erie Railroad v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)*.

Southern Bell's second and third arguments are nearly identical to the arguments made in connection with Plaintiffs' antitrust claims. On the basis of the reasons set out in the section dealing with those claims, the Court finds that the named Plaintiffs are adequate class representatives within the meaning of *Rule 23(a)(3)*, that their claims are typical of those of the class within the meaning of *Rule 23(a)(4)*, and that [*31] the fact that Plaintiffs seek both injunctive and monetary relief does not preclude certification under *Rule 23(b)(2)*.

Southern Bell's final argument requires more extended analysis. As noted, Plaintiffs's Florida RICO claims are based upon claims that Florida's misleading advertising laws, specifically sections 817.06, 817.40, and 817.41 of the Florida Statutes. Southern Bell contends that, in order to sustain a claim for misleading advertising in Florida, a plaintiff must satisfy all of the [HN10] elements of common law fraud. Those elements include: 1) a false statement of material fact; 2) known by the defendant to be false at the time it was made; 3) made for the purpose of inducing the plaintiff to act in reliance thereon; 4) which actually induced the plaintiff to undertake some act in detrimental reliance thereon; and 5) which caused damage to the plaintiff as a result of that reliance. *Vance v. Indian Hammock Hunt & Riding Club, Ltd., 403 So.2d 1367 (Fla. 4th Dist. Ct. App. 1981)*. Southern Bell concedes that the first three elements are common to the class and can be proved on a class-wide basis, but contends that the final two elements-reliance and [*32] damages--must be proven individually. Given the vast number of individuals included in the class, Southern Bell concludes that these individual issues would predominate over those issues common to the class.

Plaintiffs assert two basic responses. First, Plaintiffs contend that reliance and damages are not part of the elements of a criminal violation of Florida's misleading advertising laws. Since Florida RICO was designed to provide a civil remedy for *criminal* violations, Plaintiffs conclude that they need not establish reliance and damages in order to sustain a claim under that statute. Second, Plaintiffs contend that, even if they must establish those elements, the questions common to the class predominate.

The Court need not address Plaintiffs's first contention. Even if Plaintiffs must prove reliance and damages, questions common to the class predominate over individual questions. Proof of reliance should be a simple matter in most cases since, as Plaintiffs note, [HN11] reliance is presumed where the misrepresentation at issue arises from material omissions. [9] *See, Shores v. Sklar, 647 F.2d 462 (5th Cir. 1981)*. Moreover, in order to prove reliance, [*33] a plaintiff need only prove that he or she was exposed to the misrepresentation at issue and undertook some action to his or her detriment on the basis of that misrepresentation. Regular payment for IWMS satisfies the latter condition.

9 Plaintiffs contend, among other things, that Southern Bell's bill inserts were misleading because they failed to make clear that purchase of IWMS was optional.

The issues common to the class are more numerous and require more extensive proof. [HN12] In order to sustain a claim under *section 772.103(1)*, for instance, a plaintiff must demonstrate that the defendant: 1) received proceeds derived directly or indirectly; 2) with criminal intent; 3) pursuant to a pattern of criminal activity; 4) to use or invest in establishing or operating a RICO "enterprise". *Fla. Stat. Ann. § 772.103(1)*. Proof on each of these issues will require extensive presentation of evidence.

In order to prove a pattern of criminal activity, for example, Plaintiffs must prove that Southern Bell engaged in at least two [*34] incidents of criminal activity that had the same or similar intents, results, accomplices, victims or methods of commission. *See Fla. Stat. Ann. § 772.102(4)*. The latest incident must fall within no more than five years of at least one other incident. *Id.* Plaintiffs allege that Southern Bell's various sales solicitations of IWMS constitute these incidents. In order to prove that these solicitations were *criminal,* Southern Bell must prove that they violated Florida's misleading advertising statutes. Thus, as to at least two of these solicitations, Plaintiffs must prove at a minimum that: 1) the solicitation in question contained misrepresentations concerning IWMS; 2) Southern Bell made the misrepresentations knowingly; and 3) Southern Bell made the misrepresentations in order to induce customers to initiate or continue IWMS. Plaintiffs also assert claims under *sections 772.102(2)* and *(3)*. Proof of these claims will necessitate presentation of evidence on a number of complex issues, including, for example, whether Southern Bell engaged in a "conspiracy" prohibited by Florida RICO.

All of the issues concerning Southern Bell's conduct are common to the class. Given the number [*35] and complexity of these issues, and the comparative simplicity of the reliance and damages issues, the Court concludes that questions common to the class predominate over questions requiring individual proof. *See Eisenberg v. Gagnon, 766 F.2d 770, 786 (3rd Cir. 1985)* ("The presence of individual questions as to the reliance of each investor does not mean that the common questions of fact do not predominate . . . as required by *Rule 23(b)(3)* . . . "). Moreover, the only alternative to a class action is a multiplicity of individual suits. In each of these suits, an individual plaintiff would have to present evidence on all of the common *and* individual questions. A class action will at least permit collective proof on the common questions. As the common questions are substantial, the gains to be had from collective proof on these issues far outweigh any manageability problems related to the need for individual proof of reliance and damages. Certification under *Rule 23(b)(3)* is therefore appropriate.

SOLICITATION

In Count IX of the First Amended Complaint, Plaintiffs assert that the materials Southern Bell used to market IWMS violated *sections 817.061(1)* [*36] *of the Florida Statutes.* [HN13] That section provides that:

> It is unlawful for any person, company, corporation, agency, association, partnership, institution, or charitable entity to solicit payment of money by means of a statement or invoice, or any writing that would reasonably be interpreted as a statement or invoice, for goods not yet ordered or services not yet performed and not yet ordered, unless there appears on the face of the statement or invoice or writing in 30 point boldface type the following warning:
>
> > "This is a solicitation for the order of goods or services, and you are under no obligation to make payment unless you accept the offer contained herein."

Fla. Stat. Ann. § 817.061(2). *Section 817.061(2)* creates a right of action for any person damaged by noncompliance with its terms. *Id.* at *§ 817.061(2)*. The injured party may recover three times the sum improperly solicited. *Id.*

Southern Bell asserts the following three objections to class certification with respect to this claim: 1) the named Plaintiffs are not adequate class representatives and their claims are not typical of the class; 2) certification is not appropriate under *Rule 23(b)(2)* because the [*37] essential relief requested is monetary, not injunctive; and 3) certification is not appropriate under *Rule 23(b)(3)* because individual questions concerning injury and damages predominate over questions common to the class. The Court has already addressed Southern Bell's first and second objections and declines to deny class certification on the basis of those objections for the reasons stated above.

Southern Bell's third objection is also familiar. Once again, the Court finds that the common issues predominate over those requiring individual proof. Southern Bell concedes that the issue whether its solicitations complied with *section 817.061* is common to the class as a whole. The company contends, however, that the issues of injury and damages, which require individual proof, predominate.

The measure of damages specified in *section 817.061* is quite simple. A prevailing plaintiff is entitled to an amount equal to three times the sum solicited. *Fla. Stat. Ann. § 817.061(2)*. Individual damage calculations can thus be performed mechanically once the fact finder has determined the amounts solicited in each of Southern Bell's solicitations.

Proof of injury should also be simple. In order [*38] to prove injury, a plaintiff need only prove receipt of the solicitation and detrimental reliance on it. *Section*

817.061 penalizes omission of the required warning from a written solicitation. As noted above, reliance is generally presumed where required information is omitted. *See, e.g., Sklar, 647 F.2d at 476.*

As proof of injury and damages involves so little, the need for individual proof on these issues will create few manageability problems. The benefit afforded by class certification--collective adjudication on the issue of noncompliance--outweighs the burden that these manageability problems will create. The Court therefore finds that class certification is appropriate under *Rule 23(b)(3)*.

MONEY HAD AND RECEIVED

In Count X of the First Amended Complaint, Plaintiffs assert a claim for "money had and received". Under this cause of action, a plaintiff may obtain the restitution of monies held by the defendant where "equity and good conscience" compel such restitution. *See Moore Handley, Inc. v. Major Realty Corp., 340 So.2d 1238, 1239 (Fla. 4th Dist. Ct. App. 1976)*. Plaintiffs contend that Southern Bell's sales [*39] contracts contained misrepresentations that mislead customers into believing that, unless they subscribed to IWMS, the company would cancel the remainder of their phone service. Plaintiffs conclude that Southern Bell derived its revenue from IWMS unfairly and that equity demands restitution of the funds to the members of the class.

Southern Bell raises the following two objections to certification of a class with respect to this claim: 1) the named Plaintiffs are not adequate class representatives and their claims are not typical of the class; and 2) certification under *Rule 23(b)(3)* is not appropriate because individual issues concerning the voluntariness of the purchases and the damages suffered predominate over questions common to the class. For the reasons set forth above, the Court rejects both of the these arguments. The Court finds that a class action is the best vehicle available to resolve this controversy and that certification is appropriate under *Rule 23(b)(3)*.

VOID AND VOIDABLE CONTRACTS

In Count XI of the First Amended Complaint, Plaintiffs assert a cause of action for restitution of monies paid under void or voidable contracts. Southern Bell raises the following three [*40] objections to certification with respect to this count: 1) the named Plaintiffs are not adequate class representatives and their claims are not typical of the class; 2) certification is not appropriate under *Rule 23(b)(2)* because the essential relief sought is monetary, not injunctive; and 3) certification is not appropriate under *Rule 23(b)(3)* because questions concerning whether individual customers reached a "meeting of the minds" with Southern Bell and the amount of individual damages suffered predominate over questions common to the class. The Court rejects each of these objections for the reasons set forth in the preceding sections.

BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

In Count XII of the First Amended Complaint, Plaintiffs assert that the manner in which Southern Bell marketed IWMS violated Florida's implied good faith and fair dealing. Southern Bell responds that Florida does not provide that such a duty can override express contract terms and that Count XII fails to state a claim upon which relief can be granted.

Southern Bell's objection clearly goes to the merits of Plaintiffs' claim, not to its suitability for class treatment. The Court will address Southern [*41] Bell's objections to the merits of the claim in a separate order.

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that Plaintiffs' motion for class certification is GRANTED. The Court hereby certifies classes pursuant to *Rule 23(b)(2)* and *Rule 23(b)(3)*, respectively. The *Rule 23(b)(2)* class shall consist of all residential and simple business consumers in the State of Florida who: 1) paid for Southern Bell's IWMS between December 31, 1986 and the entry date of this Order; 2) currently subscribe to Southern Bell's IWMS; and 3) seek injunctive relief based on the claims asserted Counts I through IX in the First Amended Complaint. The *Rule 23(b)(3)* class shall consist of all residential and simple business consumers in the State of Florida who: 1) paid for Southern Bell's IWMS between December 31, 1986 and the entry date of this Order; 2) currently subscribe to Southern Bell's IWMS; and 3) seek monetary damages based on the claims asserted in all twelve counts in the First Amended Complaint.

Southern Bell shall promptly mail a notice of the action in a form to be approved by the Court to each potential class member. Each notice shall comply in all respects with the requirements [*42] of *Rule 23(c)(2)* and shall at a minimum: 1) specify the nature of this action; 2) list the counts included in the First Amended Complaint; 3) specify that the Court will exclude the member from the class if the member so requests by a date not less than ten days after the date upon which the notice was received; 4) specify that the judgment rendered in this action, whether favorable or not, will bind all members who do not request exclusion; and 5) specify that any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

In addition, Plaintiffs shall publish notice in a form to be approved by the Court complying with the preceding requirements in a newspaper of general circulation in this district each day for a period of seven (7) days. Pub-

lication shall commence no later than January 17, 1994. The parties shall submit to the Court a proposed form of notice by January 10, 1994 for both the mailing and publication notices.

Initially, Southern Bell shall bear the costs of mailing notices to potential class members and Plaintiffs shall bear the costs of notice by publication. At the conclusion of this litigation, the Court will determine [*43] the proper assessment and allocation of the costs incurred by the parties in mailing and publishing the notices.

DONE and ORDERED, in chambers, Miami, Florida, this *23rd* day of December 1993.

LENORE C. NESBITT

UNITED STATES DISTRICT JUDGE

TAB 6

LEXSEE 2006 US DIST LEXIS 78362

Analysis
As of: Sep 22, 2008

RONALD DESANTIS, MATT SETSER, SHAWN DICKMYER, WILLIAM BRADLEY FREEMAN, SCOTT FACTOR, SCOTT INGENTO, AARON REEVES, ANTHONY HOBBY, DWIGHT LANKART, RICHARD FORTUNA, and PAUL VLADYKA, on behalf of themselves and all others similarly situated, Plaintiffs, v. SNAP-ON TOOLS COMPANY, LLC, SNAP-ON CREDIT, LLC, and SNAP-ON INCORPORATED, Defendants.

Civil Action No. 06-cv-2231 (DMC)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2006 U.S. Dist. LEXIS 78362

October 27, 2006, Decided

NOTICE: [*1] NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Request denied by, Request granted *Desantis v. Snap-On Tools Co., LLC, 2007 U.S. Dist. LEXIS 958 (D.N.J., Jan. 5, 2007)*

PRIOR HISTORY: *Marron v. Snap-On Tools, Co., 2006 U.S. Dist. LEXIS 523 (D.N.J., Jan. 9, 2006)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff former franchisees filed suit against defendants, former franchisor and others, alleging that due to certain deceptive business practices, their franchises were caused to fail. Before the court was the application of class plaintiffs, pursuant to *Fed. R. Civ. P. 23(e)*, for final approval of the settlement agreement with defendants.

OVERVIEW: The settlement agreement provided for both monetary and non-monetary benefits to the class. Approximately $ 61.6 million in former franchisee debt would be discharged and forgiven by defendants as a result of the settlement agreement. The court first found that the requirements of *Rule 23(a)* for class certification were satisfied. The court reasoned in part that plaintiffs' claims arose from a common nucleus of operative facts, namely, defendants' alleged deceptive business practices. Next, the court found that the innovative hybrid settlement not only compensated class plaintiffs for past injuries but also provided non-monetary relief in the form of changes to the franchisor's internal business that would benefit current and prospective franchisees in the future. The court also found that if fully litigated, this case would likely be very expensive because defendants had and would continue to vigorously contest the class action. Finally, the court found that the risks of litigation were great because plaintiffs' claims involved complex and contested questions of law. At trial, this case could easily become a battle of the experts, lessening plaintiffs' likelihood of success.

OUTCOME: The court approved the settlement agreement and class counsel's application for attorneys' fees and expenses.

LexisNexis(R) Headnotes

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN1] To certify a class, *Fed. R. Civ. P. 23(a)* requires that there be numerosity, commonality, typicality and adequacy of representation. *Fed. R. Civ. P. 23(a)*.

Civil Procedure > Class Actions > Prerequisites > Maintainability

[HN2] In a case where money damages predominate, class certification is appropriate where common questions predominate and class resolution is the superior method for the fair and efficient adjudication of the controversy.

Civil Procedure > Class Actions > Compromises
Civil Procedure > Class Actions > Prerequisites > Maintainability
[HN3] The same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes, and thus these variations in state laws are irrelevant to certification of a settlement class.

Civil Procedure > Class Actions > Compromises
[HN4] *Fed. R. Civ. P. 23(e)*, provides that a class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs. *Fed. R. Civ. P. 23(e)*. In determining whether to approve a class action settlement pursuant to *Rule 23(e)*, the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members.

Civil Procedure > Class Actions > Compromises
[HN5] Before giving final approval to a proposed class action settlement, the court must determine that the settlement is fair, adequate, and reasonable. The United States Court of Appeals for the Third Circuit identified nine factors, so-called "Girsh factors," that a district court should consider when making this determination: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. These factors are a guide and the absence of one or more does not automatically render the settlement unfair. Rather, the court must look at all the circumstances of the case and determine whether the settlement is within the range of reasonableness.

Civil Procedure > Class Actions > Compromises
[HN6] In the context of determining whether a settlement if fair, adequate, and reasonable, in addition to the Girsh factors, district courts should also consider other relevant and appropriate factors.

Civil Procedure > Class Actions > Compromises
[HN7] In the context of determining whether a settlement if fair, adequate, and reasonable, district courts may consider the maturity of the underlying substantive issues, as measured by the experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the sentiment for individual class or subclass members and the results achieved - or likely to be achieved - for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

Civil Procedure > Class Actions > Compromises
[HN8] The first Girsh factor, the complexity, expense and likely duration of the litigation, requires the court to evaluate whether the number of objectors, in proportion to the total class, indicates that the reaction of the class to the settlement is favorable.

Civil Procedure > Class Actions > Compromises
[HN9] The second Girsh factor, the reaction of the class to the settlement, requires the Court to evaluate whether the number of objectors, in proportion to the total class, indicates that the reaction of the class to the settlement is favorable.

Civil Procedure > Class Actions > Compromises
[HN10] Pursuant to the third Girsh factor, the court must consider the degree of case development that class counsel have accomplished prior to settlement, including the type and amount of discovery already undertaken. In considering this factor, the court may consider not only discovery in the instant action but also discovery taken in related or companion proceedings. Review of the amount of discovery completed in the case informs the court of whether counsel had an adequate appreciation of the merits of the case before negotiating.

Civil Procedure > Class Actions > Compromises
[HN11] In the context of determining whether a settlement if fair, adequate, and reasonable, the court must consider the rewards that might have been gained if the case was litigated balanced against the benefits of immediate settlement.

Civil Procedure > Class Actions > Decertification
[HN12] Pursuant to *Fed. R. Civ. P. 23*, a court may decertify a class during litigation if it proves to be unmanageable.

Civil Procedure > Class Actions > Decertification
[HN13] If defendants have a unique defense against a class that will play a significant role at trial then decertification may be necessary.

Civil Procedure > Class Actions > Compromises
[HN14] To evaluate whether a settlement agreement is fair to plaintiffs, the court must evaluate whether defendants could withstand a judgment much greater than the amount of the settlement.

Civil Procedure > Class Actions > Compromises
[HN15] To assess the reasonableness of a settlement agreement, a court must compare the value of the proposed settlement against the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing.

Civil Procedure > Class Actions > Compromises
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > General Overview
[HN16] In approving attorneys fees in a class action settlement, the court must evaluate what class counsel actually did and how it benefitted the class. The United States Court of Appeals for the Third Circuit recently repeated the standard for approving attorneys fees in a class action settlement: afford a presumption of reasonableness to fee requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel, yet this presumption is rebuttable when a district court finds the fee to be prima facie excessive. Still, this presumption does not alleviate the court's burden of acting as the class members' fiduciary because the Third Circuit has cautioned against affording the presumption too much weight at the expense of the court's duty to act as a fiduciary guarding the rights of absent class members.

Civil Procedure > Class Actions > Compromises
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > General Overview
[HN17] In reviewing an attorneys' fees award in a class action settlement, a district court should consider the Gunter factors, the Prudential factors, and any other factors that are useful and relevant with respect to the particular facts of the case. The Gunter factors and Prudential factors are substantially similar to the factors provided by Girsh. The factors listed in Gunter include: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. Similarly, the factors listed in Prudential include: size of the fee award, fee percentages in other class actions, quality of class counsel, fee percentage that would have been negotiated between private parties, and size of the expected recovery under the proposed settlement.

Civil Procedure > Class Actions > Compromises
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > General Overview
[HN18] Many courts, including several in the United States Court of Appeals for the Third Circuit, have considered 25% to be the benchmark figure for attorney fee awards in class action lawsuits, with adjustments up or down for significant case-specific factors.

COUNSEL: For Jeff Uhle, Movant: RICHARD A. GANTNER, NEE, BEACHAM, & GANTNER, HILLSBOROUGH, NJ.

For RONALD DESANTIS, MATT SETSER, SHAWN DICKMYER, WILLIAM BRADLEY FREEMAN, SCOTT FACTOR, SCOTT INGENITO, AARON REEVES, ANTHONY HOBBY, DWIGHT LANKART, RICHARD FORTUNA, PAUL VLADYKA, Plaintiffs: DONNA DUBETH GARDINER, EDWARD BRUCE DEUTSCH, RONALD J. RICCIO, MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, MORRISTOWN, NJ; GERALD ALLEN MARKS, JUSTIN M. KLEIN, MARKS & KLEIN, LLP, RED BANK, NJ.

For SNAP-ON TOOLS COMPANY, LLC, SNAP-ON CREDIT, LLC, SNAP-ON INCORPORATED, Defen-

dants: GAGE ANDRETTA, DANIEL D. BARNES, WOLFF & SAMSON, PC, WEST ORANGE, NJ.

JUDGES: DENNIS M. CAVANAUGH, U.S.D.J.

OPINION BY: DENNIS M. CAVANAUGH

OPINION

DENNIS M. CAVANAUGH, U.S.D.J.:

This matter comes before the Court upon the application of Class Plaintiffs Ronald Desantis, Matt Setser, Shawn Dickmyer, William Bradley Freeman, Scott Factor, Scott Ingento, Aaron Reeves, Anthony Hobby, Dwight Lankart, Richard Fortuna, and Paul Vladyka ("Class Plaintiffs"), pursuant to *Fed. R. Civ P. 23(e)*, for Final Approval of the Settlement Agreement with Defendants Snap-on Tools Company, [*2] LLC, Snap-on Credit, LLC, and Snap-on Incorporated (Snap-on Inc."). A hearing on the application for Final Approval was held by this Court on August 28, 2006. Also before this Court is Class Counsel's application for approval of attorneys' fees and reimbursement of expenses. For the reasons set forth below, the Court approves the Settlement Agreement and Class Counsel's application for attorneys' fees and expenses.

I. BACKGROUND

A. Procedural History

1. The Hochberg Action

On September 25, 2003, Class Counsel, on behalf of Plaintiffs Michael Marron, Jeffrey Goldwasser, Aaron Reeves, and Anthony Hobby, filed a Class Action Complaint against Defendants Snap-on Tools Company, LLC ("Tools") and Snap-on Credit, LLC ("Credit"). Civil Case No. 03-cv-04563 (FSH)(PS) ("Hochberg Action"). Judge Hochberg granted Tools' Motion to Compel Arbitration on or about July 1, 2004. Judge Hochberg determined that the arbitrators were to determine whether class actions in arbitration should be permitted. Tools filed a Notice of Appeal of Judge Hochberg's Order with the United States Circuit Court of Appeals for the Third Circuit. On or about August 23, 2005, this appeal was [*3] dismissed by the Third Circuit.

Due to an error of service, Credit was not properly served with a Complaint and a separate action had to be filed against Credit. Therefore, Judge Hochberg's July 1, 2004 Order did not apply to Credit. On July 7, 2004, Credit filed a Motion to Dismiss the Complaint against it. On September 29, 2004, Judge Hochberg granted Credit's Motion, without prejudice. Thereafter, on October 13, 2004, Class Counsel filed a new action with Credit being named as the sole defendant. Judge Hochberg granted Class Counsel's Motion to Compel Arbitration. This decision was also appealed to the Third Circuit by Credit and was also dismissed. The parties consented to consolidate the Credit Action and the Hochberg Action in the American Arbitration Association ("AAA").

2. Proceedings Before the AAA

The AAA refused Tools' request for a single arbitrator. Tools and Credit sought review of this decision from Judge Hochberg. On May 4, 2005, Credit agreed to the jurisdiction of the AAA and agreed to fully participate in the six pending arbitrations.

Each of the six arbitrations involved discovery, briefing and conferences between the parties and arbitrators. Both the Hobby [*4] and Fortuna arbitrations resulted in the arbitrators finding that the contested clause in the Franchise Agreement does not preclude class actions. Both of these decisions were contested by Defendants before Judge Hochberg. The Van Curen arbitration was resolved through a settlement. The Reeves, Lankart and Vladyka arbitrations were all stayed pending settlement discussions.

3. Florida State Court Class Action

On or about December 6, 2004, Class Counsel, on behalf of Plaintiffs Ronald DeSantis, Shawn Dickmyer, Scott Factor, William Bradley Freeman, Scott Ingenito, and Matt Setser, filed a Class Action Complaint in Florida state court, Sixth Judicial Circuit, Pinellas County, Case No. 04-008709CI against Defendants. On September 14, 2005, the Florida court granted Tools' Motion to Compel Arbitration. After unsuccessful motions for reconsideration and interlocutory appeal, Tools' request to stay the arbitrations was denied by the AAA on December 13, 2004. The AAA also denied Defendants' request for a single arbitrator. In or about early May 2006, the parties filed motions and cross-motions in all but two of the pending arbitrations seeking, *inter alia,* preliminary injunctive [*5] relief by Plaintiff and dismissing the class actions by Respondents. Detailed case management schedules have been implemented by the arbitrators with extensive briefs and hearings scheduled throughout the summer of 2006.

4. The Instant Action

Class Plaintiffs, on behalf of themselves and all others similarly situated, filed a Complaint against Defendants on May 17, 2006. Plaintiffs are eleven former franchisees of Defendant Snap-on Tools, some of whom were also borrowers from Snap-on Credit. Defendants allege that certain of the Class Plaintiffs owe monies to

either Snap-on Tools or Snap-on Credit. (Comp. P 1-11.) In the Complaint, Class Plaintiffs allege that due to certain deceptive business practices, their franchises were caused to fail. More specifically, the Complaint alleges that Defendants targeted unsophisticated persons to become franchisees for Snap-on Inc. Additionally, the Complaint alleges that franchisees are contractually required to make minimum weekly purchases of product from Snap-on Tools. The Complaint further alleges that these products can only be re-sold by franchisees to a limited number of end-users. The Complaint seeks, *inter alia,* injunctive relief [*6] and monetary damages.

This Court issued an Order on May 16, 2006, preliminarily approving the settlement and providing for class notice. [1] Pursuant to that Order, the class action administrator, LECG, LLC, distributed 2,938 Notices of Pendency and Class Action and Proposed Settlement ("the Notice") via first class mail to Former Franchisees and 3,180 Notices to Current Franchisees. A Fairness Hearing for final approval of the Settlement Agreement was held on August 28, 2006. [2]

1 That Order was amended several times during June and July, with a Fourth Amended Order signed by the Court on July 18, 2006.

2 An error in mailing occurred and this Court allowed an additional 60 days for objections to be filed. No such objections were filed.

B. Settlement Agreement

The Settlement Agreement provides for both monetary and non-monetary benefits to the Class. Pursuant to the Settlement Agreement, the Class is defined as "all persons in the United States who were or are currently franchisees." (Settlement [*7] Agreement ("SA"), P 2.4). "Franchisees" are defined as:

> all individuals or entities in the United States who, from January 1, 1998 through April 18, 2006, operated one or more franchises, independent dealerships, and/or conversion franchisees, but does not include trial franchisees or employees of independent contractors of Franchisees. "Former Franchisee" is a Franchisee who has sent in notice to terminate or has been sent a letter of termination or has otherwise terminated by April 18, 2006 and has checked in prior to May 30, 2006.

(SA P 2.17). The monetary and non-monetary benefits vary depending on franchisee status.

1. Benefits of Settlement to Former Franchisees

Approximately $ 61.6 million [3] in Former Franchisee debt will be discharged and forgiven by Defendants as a result of the settlement agreement. Also, letters will be sent to all credit reporting agencies to correct any negative credit reports stemming from debt allegedly owed to Defendants by Former Franchisees. Finally, Former Franchisees who responded to the Notice were eligible for either one of two optional cash payments. Option A provided responding Former Franchisees with a cash payment of [*8] $ 1,000 and a Release. Option B provides for a cash payment of up to $ 20,000 to each Former Franchisee per each franchise operated. The estimated total cash payments to the class is $ 25 million.

3 Originally, the estimated debt forgiveness was $ 75 million. However, this figure was the result of an accounting error and accurate amount of debt forgiveness pursuant to the Settlement Agreement will be $ 61.6 million. (Rabenhurst Declaration, P 2, 3).

2. Benefits of Settlement to Current and Prospective Franchisees

Current and Prospective Franchisees will receive benefits from the settlement which include a possible qualification for an additional amount of money as a credit to their Snap-on Tools statement for each franchise based on the average weekly paid sales. Defendants have also agreed to make a number of modifications to the Snap-on Tools franchise distribution model and business practices, designed to benefit both Current and Prospective Franchisees. These include, *inter alia,* a reduction of [*9] the required investment for initial inventory, offers of financing to qualified franchisees who have been on credit hold for five of the last ten weeks prior to the date of the final approval of the Settlement Agreement, a technology credit, making reasonably available improved initial training for new franchisees, and improvement of recruitment training practices. The following valuations have been provided for these changes: $ 4,522,847 for the reduction cost on initial inventory, $ 3,816,000 for the technology credit, and $ 27,600,000 for the improved training. Additionally the estimated cost of design and implementation of changes is $ 4 million. These figures, combined with the estimated cash payments to class members equals benefits valued at over $ 64 million.

3. Benefit to Representative Plaintiffs

Representative Plaintiffs will be paid no more than $ 50,000 as compensation and consideration for the time they have spent working with Class Counsel on this matter and the sacrifices they have made as a result. Specifically, Representative Plaintiffs acted as private attorneys

general, working with Class Counsel and helping to bring the Settlement to fruition. Defendants [*10] have also agreed to pay former franchisees who retained counsel on or before April 18, 2006 an Incentive Award of not more than $ 15,000. The final amount of the Incentive Award is to be determined by the Court, and therefore does not diminish any of the other benefits provided to any Class Member.

4. Retention of Jurisdiction

The Settlement Agreement also provides that this Court will retain jurisdiction over implementation and enforcement of all terms of the Agreement. Furthermore, all parties have agreed to submit to the jurisdiction of the Court for purposes of implementing and enforcing the Settlement.

II. APPROVAL OF THE SETTLEMENT AGREEMENT

A. Satisfaction of Rule 23 Criteria for Class Certification

The Court must certify the Class of Franchisees pursuant to the requirements of *Federal Rule of Civil Procedure 23(a)* and *(b)*. See *Amchem Prods. v. Windsor, 521 U.S. 621-22, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. In determining whether certification is appropriate, this Court may take the Settlement Agreement into consideration. See *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 308 (3d Cir. 1998)* [*11] cert denied, *525 U.S. 1114, 119 S. Ct. 890, 142 L. Ed. 2d 789 (1999)*.

1. *Rule 23(a)* Requirements

[HN1] To certify a class, *Rule 23(a)* requires that there be numerosity, commonality, typicality and adequacy of representation. *Fed. R. Civ. P. 23(a)*. Here, the numerosity requirement is met because the Class has well over 5,000 members. Joinder of this many Plaintiffs is clearly not feasible. See *Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)*. Commonality exists because there are common questions of law and fact. *Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)*. Plaintiffs' claims arise from a common nucleus of operative facts, namely, Defendants' alleged deceptive business practices. Furthermore, there is commonality among the questions of law raised because the same legal and equitable claims are asserted by Plaintiffs and Class Members against Defendants. The typicality requirement is also met here because the interests of the Class and the Lead Plaintiffs are "aligned." *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 531 (3d Cir. 2004)*. Specifically, the claims of the Plaintiffs [*12] and of the Class arise from the same alleged deceptive business practices and therefore their interests are properly aligned. Finally, there is adequacy of representation because the Class Plaintiffs' and Class Members' interests are aligned, as stated immediately above; and also, because there has been a strong showing that Class Counsel are qualified to handle this type of complex litigation. For these reasons, the requirements of *23(a)* for class certification are satisfied in this case.

2. *Rule 23(b)* Requirements

[HN2] In a case where money damages predominate, class certification is appropriate where common questions predominate and class resolution is the superior method for the fair and efficient adjudication of the controversy. As discussed above, common questions of fact and law predominate in this case. Furthermore, for purposes of *Rule 23(b)*, these "questions of law or fact common to members of the Class predominate over any questions affecting only individual members." *Fed. R. Civ. P. 23(b)(3)*. Specifically, each Class Member's claims depend upon resolution of the same factual and legal questions regarding the Defendants' alleged deceptive [*13] business practices. See *Warfarin, 391 F.3d at 528*; *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig., 418 F.3d 277, 309 (3d Cir. 2005)* (cases where Third Circuit found the predominance requirement satisfied because the claims arose from Defendants' same fraudulent scheme).

Even though the laws of various states differ as to the claims raised by this nationwide class of Franchisees, this Court still finds that there is *Rule 23(b)* predominance. The Third Circuit has noted that [HN3] "the same concerns with regards to case manageability that arise with litigation Classes are not present with Settlement Classes, and thus these variations [in state laws] are irrelevant to certification of a settlement class." *Warfarin, 391 F.3d at 529*. Furthermore, the same common issues regarding Defendants' business practices still lie at the core of Class Members' claims.

Finally, it is clear that approving the settlement is a superior method of resolving these claims. Approving this Settlement Agreement is a more efficient and less risky means of addressing Class Members' grievances.

Based on the foregoing, the proposed Settlement Class is certified pursuant to *Rule 23(b)(3)*.

[*14] B. Satisfaction of *Rule 23(e)* Standard

[HN4] *Federal Rule of Civil Procedure 23(e)*, provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs." *Fed. R. Civ. P. 23(e)*. In determining

whether to approve a class action settlement pursuant to *Rule 23(e)*, "'the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members'" *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 785 (3d Cir.1995)* (quoting *Grunin v. Int'l House of Pancakes, 513 F.2d 114, 123 (8th Cir.)*, cert. denied, *423 U.S. 864, 96 S. Ct. 124, 46 L. Ed. 2d 93 (1975)* (citation omitted)).

[HN5] Before giving final approval to a proposed class action settlement, the Court must determine that the settlement is "fair, adequate, and reasonable." *Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 588 (3d Cir. 1999)*; *Walsh v. Great Atl. & Pac. Tea Co., 726 F.2d 956, 965 (3d Cir.1983)*. [*15] In Girsh v. Jepson, the Third Circuit identified nine factors, so-called "Girsh factors," that a district court should consider when making this determination:

> (1) the complexity, expense and likely duration of the litigation;
>
> (2) the reaction of the class to the settlement;
>
> (3) the stage of the proceedings and the amount of discovery completed;
>
> (4) the risks of establishing liability;
>
> (5) the risks of establishing damages;
>
> (6) the risks of maintaining the class action through the trial;
>
> (7) the ability of the defendants to withstand a greater judgment;
>
> (8) the range of reasonableness of the settlement fund in light of the best possible recovery;
>
> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

521 F.2d 153, 157 (3d Cir.1975). "These factors are a guide and the absence of one or more does not automatically render the settlement unfair." *In re American Family Enterprises, 256 B.R. 377, 418 (D.N.J. 2000)*. Rather, the court must look at all the circumstances of the case and determine whether the settlement is within the range of reasonableness under [*16] Girsh. *In re Orthopedic Bone Screw Prod. Liab. Litig., 176 F.R.D. 158, 184 (E.D.Pa.1997)*.

Since Girsh was decided there has been a "sea-change in the nature of class actions." *Prudential, 148 F.3d at 323*. Thus, [HN6] district courts should also consider other relevant and appropriate factors. [4] See also *In re AT&T Corp. Secs. Litig., 455 F.3d 160 (3d Cir. 2006)*. In sum, the Court's assessment of whether the settlement is fair, adequate and reasonable is guided by the Girsh factors, but the Court is in no way limited to considering only those enumerated factors and is free to consider other relevant circumstances and facts involved in this settlement.

> 4 The Prudential court suggested that [HN7] district courts may consider "the maturity of the underlying substantive issues, as measured by the experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the sentiment for individual class or subclass members and the results achieved - or likely to be achieved - for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable." *148 F.3d at 323*.

[*17] **B. Application Of Girsh Factors To This Case**

The Court has considered the proposed settlement in keeping with the *Girsh* factors and finds that the balance of factors weigh in favor of approval. Particularly, this Court is very satisfied that this innovative hybrid settlement not only compensates Class Plaintiffs for past injuries but also provides non-monetary relief in the form of changes to Snap-on's internal business that will benefit Current and Prospective Franchisees in the future.

1. Complexity, Expense and Likely Duration of Litigation

[HN8] This factor is concerned with assessing the "probable costs, in both time and money, of continued litigation." *In re Cendant Corp. Litig., 264 F.3d 201, 234 (3d Cir. 2001)*. While this case was only filed in early 2006, as recounted in the procedural history above, it is part of a complex series of cases and therefore has a long detailed history. This case is the culmination of eleven separate class action arbitrations. The various litigations required an analysis of a wide range of legal and factual

issues, including franchise law, arbitration law, public injunction law, and corporate law.

If fully litigated, [*18] this case would likely be very expensive because Defendants have and would continue to vigorously contest the class action. Extended discovery, expert reports and motion practice would make this litigation costly for all parties. To the contrary, the settlement was only reached after extensive arms-length negotiations between the parties, and thereby avoids years of contentious litigation.

This Court is satisfied that the first Girsh factor weighs heavily in favor of approving the Settlement.

2. Reaction of Class to Settlement

[HN9] This factor requires the Court to evaluate whether the number of objectors, in proportion to the total class, indicates that the reaction of the class to the settlement is favorable. Here, as of August 21, 2006, there were only four objectors, equal to less than 0.07% of the total class. Notably, as of August 21, 2006, the percentage of opt-outs is only 3.9%. The Third Circuit has repeatedly recognized that low numbers of objectors and opt-outs is probative on the issue of whether a settlement is fair, adequate and reasonable. *Warfarin, 391 F.3d at 536*. This Court is persuaded that the few number of objectors and opt-outs weighs heavily [*19] in favor of approving the Settlement.

Additionally, the lack of merit of the objectors' arguments also weighs in favor of approving the Settlement. As is discussed in more detail below, the objectors' arguments are not persuasive and do not provide sufficient grounds for this Court to find that the Girsh factors do not weigh in favor of approving the settlement. In light of the very few objectors to the Settlement Agreement and the weak nature of the objectors' claims, this Court is satisfied that the second Girsh factor weighs heavily in favor of approving the Settlement.

3. Stage of Proceedings and Amount of Discovery Completed

[HN10] Pursuant to the third *Girsh* factor, the Court must consider the "degree of case development that Class Counsel have accomplished prior to Settlement," including the type and amount of discovery already undertaken. *GMC Pick-Up Truck, 55 F.3d at 813*. See also *Prudential, 148 F.3d at 319*. In considering this factor, this Court may consider not only discovery in the instant action but also discovery taken in "related or companion proceedings." *GMC Pick-Up Truck, 55 F.3d at 813*. Review of the amount of [*20] discovery completed in the case informs the Court of "whether counsel had an adequate appreciation of the merits of the case before negotiating." *Id*. See also *AT&T, 455 F.3d at 167* (noting extent of discovery).

In this case, the evidence shows that Class Counsel were well-apprised of the merits of the case before and during negotiation. Specifically, Class Counsel engaged in pre-filing investigative work starting in May 2003. Class Counsel performed extensive research to vigorously challenge an arbitration clause and a clause allegedly precluding class actions. Furthermore, Plaintiffs utilized the work of two experts on the channel stuffing and revenue recognition claims. Depositions were conducted on these issues by both sides.

Based on the foregoing, this Court is persuaded that the third Girsh factor weighs in favor of approving the Settlement Agreement.

4. Risks of Establishing Liability and Damages

[HN11] The Court must consider the rewards that might have been gained if the case was litigated balanced against the benefits of immediate settlement. See *GMC Pick-Up Truck, 55 F.3d at 814*; *Prudential, 148 F.3d at 319*. Litigation [*21] poses many risks for Franchisees. To prevail at trial, Franchisees would have to attain Class certification as well prove liability and damages. Plaintiffs would have to expend time and money to make these showings, without any guarantee of success.

In this case, the risks of litigation are great because Plaintiffs' claims involve complex and contested questions of law. Furthermore, prevailing on these claims would require expert testimony from each side. Thus, at trial, this case could easily become a battle of the experts, lessening Plaintiffs' likelihood of success. Defendants' submissions have made it clear to this Court that they intend to contest the issue of liability as well as the legal basis of Plaintiffs' claims. For these reasons, Plaintiffs face many obstacles in attaining a successful result at trial and these Girsh factors weigh in favor of approving the Settlement Agreement.

5. Risks of Maintaining the Class Action Through Trial

While this Court approves certification of the settlement class, the Court must consider whether there is a risk that the class could not be maintained during trial. [HN12] Pursuant to *Federal Rule of Civil Procedure Rule 23* [*22] , a court may decertify a class during litigation if it proves to be unmanageable. See *Prudential, 148 F.3d at 321*. Here, not only do Plaintiffs have to attain certification and avoid decertification during litigation, they must also effectively rebut Defendants' argument that a clause in the franchise agreement prohibits class actions. While this issue has been decided in favor of some of the Class Plaintiffs through arbitration, there are still other arbitrations pending on this same issue.

Therefore, great risks are posed in even getting this class certified for purposes of litigation.

Additionally, the Third Circuit has recently reiterated that [HN13] if Defendants have a unique defense against a Class that "will play a significant role at trial" then decertification may be necessary. *Beck v. Maximus, Inc., 457 F.3d 291, 300 (3d Cir. 2006)*. In this case, Defendants are not only likely to continue to contest class certification but will also argue that the different choice-of-law issues involved in the state law claims render the class action unmanageable.

Bearing these risks and obstacles in mind, and having determined that certification of the settlement [*23] class is appropriate, this factor weighs in favor of approving the Settlement Agreement.

6. Ability of Defendants to Withstand a Greater Judgment

[HN14] To evaluate whether the Settlement Agreement is fair to Plaintiffs, the Court must evaluate whether Defendants could withstand a judgment much greater than the amount of the settlement. See *Cendant, 264 F.3d at 240*; *Prudential, 148 F.3d at 321-22*; *GMC Pick-Up Truck, 55 F.3d at 818*. This factor does not weigh in favor of approving the Settlement Agreement because there have been no claims by either party that the solvency of Snap-on Inc. would be threatened by an award to Plaintiffs. However, as noted above, approval of a settlement may still be appropriate even if all the factors do not weigh in favor of approval.

7. Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and in Light of all the Attendant Risks of Litigation

[HN15] To assess the reasonableness of the Settlement Agreement, this Court must compare the value of the proposed settlement against "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted [*24] for the risk of not prevailing." *GMC Pick-Up Truck, 55 F.3d at 806*. Based on their discovery, investigation and evaluation of the facts and law relating to all matters alleged in the pleadings, Plaintiffs and Defendants have agreed to a settlement that will provide substantial monetary and non-monetary benefits to Class Plaintiffs. Plaintiffs and Defendants agree and clearly document that the Settlement Agreement offers Class Members value in excess of $ 125 million. Furthermore, the hybrid nature of this settlement, providing both monetary and non-monetary benefits, effectively compensates Plaintiffs for their claimed injuries and makes changes to benefit Current and Prospective Franchisees. Due to the complex nature of this litigation, the parties would have faced great risk and uncertainty should the suit have proceeded to trial, with no guarantee of recovery. Even if it is possible that Plaintiffs could have won more substantial money damages at trial, it is unclear that they would have obtained the desired modifications to the Snap-on business model. Weighing the risks of recovery against the satisfactory results Class Members receive with settlement, it is clear [*25] that these factors weigh in favor of approving the Settlement Agreement.

In sum, the Court finds that the Settlement is fair, adequate, reasonable and proper, and is in the best interests of the Class. Accordingly, the Court approves the Settlement.

III. APPROVAL OF FEE AWARD

[HN16] In approving attorneys fees in a class action settlement, this Court must evaluate "what class counsel actually did and how it benefitted the class." *Prudential, 148 F.3d at 342*. The Third Circuit recently repeated the standard for approving attorneys fees in a class action settlement: "afford a presumption of reasonableness to fee requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel," yet this presumption is rebuttable "when a district court finds the fee to be prima facie excessive." *Cendant, 264 F.3d at 220*. Still, this presumption does not alleviate this Court's burden of acting as the Class Members' fiduciary because the Third Circuit has "caution[ed] against affording the presumption too much weight at the expense of the court's duty to act as 'a fiduciary guarding the rights of absent class [*26] members.'" *AT&T, 455 F.3d at 175* (citing *Cendant 264 F.3d at 231*).

Here, Class counsel's attorneys fees are calculated by using a percentage of recovery method, applying a certain percentage to the settlement fund. See *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 243 F.3d 722, 732 n.10 (3d Cir. 2001)*. Class Counsel seek approval of their requests for fees in the amount of $ 13 million, the equivalent of 10.4% of the settlement. Also, Class Counsel seeks reimbursement of expenses in the amount of $ 166,485.26 for McElroy, Deutsch, Mulvaney & Carpenter, LLP and $ 200,688.49 for Marks & Klein, LLP. Defendant does not oppose Class Counsels' motion.

Class Counsel submit that the settlement agreement will confer a benefit on the class in excess of $ 125 million. The Settlement Agreement also provides for debt forgiveness estimated to be the equivalent of $ 61.6 million. Finally, the Settlement Agreement requires the Defendants to make modifications and enhancements to its current business practices that will benefit the Class

Members. Class Counsel estimate the value of these modifications to be approximately $ 60 million.

The Third Circuit's recent decision [*27] of In re AT&T Corporation Securities Litigation states that[HN17] "[i]n reviewing an attorneys' fees award in a class action settlement, a district court should consider the Gunter factors, the Prudential factors, and any other factors that are useful and relevant with respect to the particular facts of the case." *455 F.3d at 166*. The Gunter factors and Prudential factors are substantially similar to the factors provided by Girsh. [5] To avoid redundancy, this Court incorporates by reference its above discussion of the Girsh factors and the reasons given for approval of the settlement. Additionally, there are further reasons why the attorneys fees are reasonable in this matter and should be approved.

> 5 The factors listed in Gunter include: "(1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases." *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195, n.1*. Similarly, the factors listed in Prudential include: size of the fee award, fee percentages in other class actions, quality of class counsel, fee percentage that would have been negotiated between private parties, and size of the expected recovery under the proposed settlement. *Prudential, 148 F.3d at 339*.

[*28] First, the 6,118 class members will share in a recovery of approximately $ 125 million. This is an impressive ratio for the size of the fund and the number of persons benefitted. Additionally, there is an absence of substantial objections to the requested attorneys' fees. The fact that there were so few objectors to the amount of attorneys fees indicates that there is a positive reaction amongst the class to the requested fees. Furthermore, these qualified and experienced attorneys spent a large amount of time preparing this case, arbitrating it and in negotiating a settlement, all with the risk of a very contentious litigation looming without any guaranteed successful result. Importantly, Class Counsel in this case achieved a very favorable and creative settlement that properly benefits all members of the class.

This fee award is in no way greater than the fees awarded in similar cases. Specifically, the fee application seeks only 10.4% of the settlement amount, a figure well below the norm. See *Cendant Prides Litig., 243 F.3d at 736* (fee awards range from nineteen to forty-five percent); *In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109 (D.N.J. 2002)* [*29] (noting fee awards between one-third and one-half of the settlement); *In re Safety Components, Inc. Sec. Litig., 166 F. Supp. 2d 72, 101 (D.N.J. 2001)* (noting recent fee awards ranging between 27.5% and 33.8%). In fact, [HN18] "[m]any courts, including several in the Third Circuit, have considered 25% to be the 'benchmark' figure for attorney fee awards in class action lawsuits, with adjustments up or down for significant case-specific factors." *Varacallo v. Massachusetts Mut. Life Ins. Co., 226 F.R.D. 207, 249 (D.N.J. 2005)* (quoting *In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 262 (D.Del.2002)*. Additionally, the attorneys' fees are to be paid separate from the payments to the class and in no way diminish the payments made to the class.

Finally, this Court is satisfied that awarding the requested attorneys fees is appropriate because this Court retains jurisdiction and is therefore available to Class members for final resolution of any dispute or objection that may arise.

Here, the percentage of recovery Class Counsel seeks falls well below the norm. This fact, when considered in combination with the other factors recounted [*30] above, satisfies the Court of the reasonableness of the fees. As such, the Court does not deem a lodestar cross-checking to be necessary.

At this time there is a dispute among Class Counsel as to the proper allocation of the attorneys fees to be paid by Defendants. This Court needs the benefit of an evidentiary hearing and oral argument on this issue to decide the proper delineation of fees between McElroy, Deutsch, Mulvaney & Carpenter, LLP and Marks & Klein, LLP. This Court approves the requested attorneys' fees, holding that they should be held in escrow until this Court conducts an evidentiary hearing to determine proper allocation of the fees.

IV. OBJECTORS' ARGUMENTS

As stated above, the arguments set forth by the notably small number of objectors are not persuasive. Only one objector, Jeff Uhle ("Uhle"), appeared at the August 28, 2006 hearing for Class Action Settlement approval. The objectors generally attack the class certification as well as the adequacy, fairness and reasonableness of this settlement. As discussed fully above, this Court disagrees with these arguments because the Court finds that certification is appropriate pursuant to *Federal Rule of Civil Procedure 23(a)* [*31] and *(b)*; and also that the Settlement Agreement is adequate, fair and reasonable. Listed below are the additional objections raised by Uhle and his fellow objectors as well as the reasons why these

objections are without merit. Uhle also raised a host of other meritless objections that the Court does not find persuasive. The Court, acting in its fiduciary capacity to protect Class Members' interests, does not deem it necessary to summarize and dismiss each of these objections because they do not raise any questions as to whether the Settlement Agreement is fair, reasonable and adequate or whether the attorneys fees are unreasonable.

A. Value of Settlement is Misrepresented

Objector Uhle argues that the value of the settlement is misrepresented because there is insufficient information on the payments to be made to Class Members and no evidence that the forgiveness-of-debt equals $ 61.6 million. First, amounts paid to Class Members pursuant to Option B will be determined under a disclosed formula, utilizing factors designed to ensure intra-class fairness. Second, the parties submitted a sworn verification as to the amount of the debt forgiveness. The value of the settlement [*32] to Franchisees has been carefully documented and explained and the Court is unpersuaded by the argument that the settlement's value has been misrepresented.

B. Lack of Information on Internal Business Changes

There is also an objection to the lack of information concerning the internal business changes Defendant will undertake pursuant to the Settlement Agreement. The business changes agreed upon through settlement have been characterized as the most significant in Snap-on's history. They specifically address the alleged deceptive practices that Plaintiffs complained of. The declarations submitted by the parties evidence that Snap-on has seriously studied this matter and made a commitment to these changes. Additionally, this Court retains jurisdiction over this matter and can thereby resolve any disputes regarding the promised internal business modifications.

Objector Uhle complains that some of the deceptive business practices raised in the complaint are not addressed in the settlement agreement. This is a meritless objection, disregarding the fact that this settlement is the product of negotiation - an attempt by both parties to reach a fair agreement, thereby avoiding the [*33] risks of litigation.

This Court is satisfied that the parties have submitted clear and strong evidence of the internal business changes to be effected by Defendant and that Class Members also had sufficient information to decide whether the settlement was favorable to them.

C. Release is Too Broad

The objectors argue that the release of Class Members' claims against Defendant is too broad. To the contrary, the release of claims in this case is consistent with Third Circuit precedent as to what claims may be released pursuant to a settlement agreement. See *In re Prudential Ins. Co. of Am. Sales Practice Litig., 261 F.3d 355, 366-67 (3d Cir. 2001)*. Additionally, adequate notice was given to Class Members to object to the Settlement or opt out of the release of claims. Again, a notably small number of individuals chose to opt out. This Court is unpersuaded that the settlement is not reasonable, fair or adequate based on this objection.

D. Conflict of Interest of Class Counsel

Uhle argues that Class Counsel have a conflict of interest because the Settlement Agreement improperly restricts Class Counsels' practice of law and the Marks firm has been limited [*34] from representing potential clients against Snap-on. Specifically, Uhle points to language in the Settlement Agreement which states that Class Counsel had "no present intention of representing any persons who are not Class Members with respect to defendants." This is not an agreement but mere attempt by one negotiating party to achieve finality through the settlement. The Settlement Agreement does not restrict Class Counsel's right to represent any future clients and therefore does not create any impermissible conflict of interest.

E. Incentive Fees Paid to Lead Plaintiffs are Disproportionate

This Court finds that the incentive awards to representative Plaintiffs are not disproportionate but fairly, adequately and reasonably compensate them for their time and efforts. Such incentive awards are common and long-established. See *In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, No. Civ. 03-0085 (FSH), 2005 WL 3008808, at * 18 (D.N.J. Nov. 9, 2005)*. Additionally, these incentive awards will not diminish any of the other benefits provided to any Class Member. The Court finds that they are not disproportionate and not grounds for finding that the settlement is not [*35] fair, adequate or reasonable.

V. CONCLUSION

For the reasons expressed above, Plaintiff's Motion for Final Approval of the Settlement Agreement is **granted.** The Settlement Agreement is hereby **approved.** An appropriate Order accompanies this Opinion.

s/ DENNIS M. CAVANAUGH, U.S.D.J.

Date: October 27, 2006

ORDER

This matter comes before the Court upon the application of Class Plaintiffs Ronald Desantis, Matt Setser, Shawn Dickmyer, William Bradley Freeman, Scott Factor, Scott Ingento, Aaron Reeves, Anthony Hobby, Dwight Lankart, Richard Fortuna, and Paul Vladyka ("Class Plaintiffs"), pursuant to *Fed. R. Civ P. 23(e)*, for Final Approval of the Settlement Agreement with Defendants Snap-on Tools Company, LLC, Snap-on Credit, LLC, and Snap-on Incorporated and upon application by counsel for Class Plaintiffs for approval of fees and costs; and the Court having considered the papers submitted by Plaintiffs in support thereof as well as the objections thereto; and oral argument having been heard on August 28, 2006, and the Court having been satisfied that the proposed settlement is fair, adequate, reasonable, and in the [*36] best interests of the class and the shareholders and that the award of attorneys' fees is reasonable; and for the reasons stated in the Court's Opinion issued on this day;

IT IS on this 27 day of October, 2006;

ORDERED that Plaintiffs' motion for final approval of settlement is **granted,** and the Settlement Agreement is approved; and it is further

ORDERED that a Fee Award in accord with the terms of the Settlement Agreement in the amount of $ 13,000,000 is hereby approved; and it is further

ORDERED that the fees shall be held in escrow; and it is further

ORDERED that Defendants will pay the firm of McElroy, Deutsch, Mulvaney & Carpenter, LLP ("MDMC") and the firm of Marks & Klein, LLP ("MK") for reimbursement of all costs and expenses that this Court finds reasonable estimated at $ 166,485.26 for MDMC and $ 200,688.49 for MK; and it is further

ORDERED that an evidentiary hearing will be held in order to determine how the fees should be allocated between MDMC and MK and also to determine the proper amount for reimbursement of costs and expenses.

s/ DENNIS M. CAVANAUGH, U.S.D.J.

Date: October 27, 2006

TAB 7

United States District Court,D. New Jersey.
In re GENTA SECURITIES LITIGATION.
Civil Action No. 04-2123 (JAG).

May 28, 2008.

Shalov, Stone, Bonner & Rocco, LLP, by: Patrick Louis Rocco, Esq., Morristown, NJ, Milberg, Weiss, Bershad & Schulman, Esqs., by: Neil Fraser, Esq., New York, NY, for Plaintiffs.
Fox Rothschild, LLP, by: Jack L. Kolpen, Esq., Lawrenceville, NJ, Davis, Polk & Wardwell, by: Elliot Moskowitz, Esq., Amelia T.R. Starr, Esq., New York, NY, for Defendants.

OPINION

GREENAWAY, JR., District Judge.
***1** This matter comes before this Court on the Motion for Final Approval of the Settlement (Docket Entry No. 137) and the Motion By Plaintiffs' Counsel [FN1] for Award of Attorneys' Fees and Reimbursement of Expenses (Docket Entry No. 138) by Lead Plaintiffs Bal Harbor Financial LLC, William Nasser, Jr., David Smith, Brian R. Nickerson, and Ralph LeMar (collectively, "Lead Plaintiffs"). A Fairness Hearing was held on March 3, 2008 to determine (1) whether, under FED. R. CIV. P. 23(a) and (b), this action satisfies the applicable prerequisites for class action treatment; (2) whether the proposed settlement (the "Settlement"), as set forth in the Stipulation and Agreement of Settlement (the "Stipulation"), is fair, reasonable, and adequate, and should be finally approved by this Court; (3) whether an Order and Final Judgment should be entered, dismissing the Complaint with prejudice, and releasing the Released Parties from any liability for the Settled Claims [FN2]; (4) whether the proposed plan of allocation of the Settlement proceeds ("Plan of Allocation") is fair and reasonable and should be approved by this Court; (5) whether the application for an award of attorneys' fees and reimbursement of expenses should be approved; and (6) such other matters as this Court may deem appropriate.

FN1. The term "Plaintiffs' Counsel" is used herein as defined in the Stipulation. (Stipulation and Agreement of Settlement ("Stip.") 8.)

FN2. The terms "Released Parties" and "Settled Claims" are used herein as defined in the Stipulation. (Stip.8-9.)

For the reasons set forth in this Opinion, this Court shall grant final approval of the Settlement, the Plan of Allocation, and the application for an award of attorneys' fees and reimbursement of expenses. This Court, however, shall limit the incentive award granted to Lead Plaintiff William Nasser, Jr. to $5250, which reflects reimbursement of expenses, and not $55,281.

I. *APPROVAL OF SETTLEMENT*

Rule 23(e) of the Federal Rules of Civil Procedure requires courts to approve any settlement of claims, issues or defenses that would bind class members. Rule 23(e) provides in relevant part:

> The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval.... The court must direct notice in a reasonable manner to all class members who would be bound by the proposal. If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.... Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Rule 23 requires courts to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir.1995) (hereinafter referred to as *"GM"*).

Under Rule 23(e), the district court acts as a fiduciary guarding the rights of absent class members, and must determine whether the proffered settlement is "fair, reasonable, and adequate." *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir.2001) (citing *GM,* 55 F.3d at 785). The "decision of whether to approve a proposed settlement of a class action [or the like] is left to the sound discretion of the district court."*Girsh,* 521 F.2d at 156.

***2** The Third Circuit "has adopted a nine-factor test to help district courts structure their final decisions to approve settlements as fair, reasonable, and adequate as required by Rule 23." *GM,* 55 F.3d at 785 (citing *Girsh v. Jepson,* 521 F.2d 153, 157 (3d Cir.1975)). These factors, coined by courts as the "*Girsh* factors," include "(1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation."*Id.*"The proponents of the settlement bear the burden of proving that these factors weigh in favor of approval." *Id.* at 785-86.

However, "[t]he *Girsh* factors do not provide an exhaustive list of factors to be considered when reviewing a proposed settlement."*In re AT & T Corp.*, 455 F.3d 160, 165 (3d Cir.2006). Other factors this Court may consider include:

> the maturity of the underlying substantive issues, as measured by the experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved-or likely to be achieved-for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

Id.

A proposed settlement is entitled to a presumption of fairness when "(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir.2004) (citing *In re Cendant,* 264 F.3d at 232 n. 18).

This Court finds that the Settlement merits a presumption of fairness. Lead Plaintiffs attest that the Settlement was reached as a result of arm's length negotiations with experienced securities class action counsel. (Declaration of Neil Fraser in Support of Plaintiff's Motion for Final Approval of Settlement and the Approval of Plaintiff's Lead Counsel for an Award of Attorneys' Fees and Reimbursement of Expenses ("Fraser Decl.") ¶ 70.) The motion to dismiss resolved many of the issues raised in the Amended Complaint, leaving Lead Plaintiffs and Defendants (collectively, the "Parties") with a solid understanding of the strengths and weaknesses of their respective positions.(*Id.*) Moreover, only eight objections to the Settlement have been filed, a small percentage compared to the hundreds of potential members of the Settlement Class.[FN3]

> FN3. The term "Settlement Class" is used herein as the term "Class" is defined in the Stipulation. (Stip.5.)

***3** After applying the *Girsh* factors to the instant case, this Court concludes that final approval of the Settlement is appropriate.

A. *Complexity, Expense and Likely Duration*

This action involves complex legal and factual issues, and pursuing them would be costly and expensive. (*Id.* ¶ 78.)Motion practice and/or trial would be lengthy and would require considerable attorney time. In addition, even after the litigation before this Court had concluded, the appellate process would have required additional time and expenses. (*Id.*) This

Court finds that continued litigation of this action would have been complex, expensive, and lengthy.

B. *Reaction of the Class to the Settlement*

Counsel for Defendants has not filed any objection to the Settlement, although eight objections by individual shareholders have been brought to this Court's attention. When weighed against the 68,500 Notices sent out to potential members of the Settlement Class, it is beyond dispute that the Settlement Class' reaction is favorable. The substance of each objection is discussed seriatim.

1. *Summary of Objections*

a. *Elias Chotas*

Elias Chotas' ("Chotas") letter, dated February 11, 2008, states that he received a bulk mailing from the Claims Administrator, inferred by this Court to be the Notice, on February 4, 2008. As a result, Chotas asserts that he was unable to return the Proof of Claim by the February 2, 2008 due date expressly stated in the Notice. In a separate letter dated February 11, 2008, Chotas enclosed a copy of the Proof of Claim form that he returned, which is dated February 6, 2008, and which he alleges was postmarked and sent on February 11, 2008.

Chotas requests that this Court deny the attorneys' fees request, and "take appropriate disciplinary action" if it is determined that the mailing was delayed in order to benefit some Settlement Class members over others. Chotas also requests that his Proof of Claim be deemed timely submitted.

b. *Richard Dodge, Jr.*

In his letter dated February 8, 2008, Richard Dodge, Jr. ("Dodge") stated that the Notice mailed by the Claims Administrator was postmarked February 1, 2008, and that he received the Notice on February 7, 2008. This made it impossible for him to comply with its instructions to return the Proof of Claim by February 2, 2008. Dodge states that the Claim Administrator [FN4] was negligent in its responsibility to distribute the Notice, and requests in general terms that corrective action be taken to remedy this error.

FN4. The term "Claim Administrator" is used herein as defined in the Stipulation. (Stip.5.)

c. *Theodore A. Bechtold, Esq.*

Theodore A. Bechtold, Esq. ("Bechtold") wrote a letter, dated January 28, 2008, objecting to the Settlement on behalf of himself "and all absent Class members." He states that he will provide a list of Settlement Class members for whom he is authorized to speak once the list is finalized; however, no such list ever materialized. Bechtold also states in the letter that "[a]mong other things I object to the Lead plaintiffs used by the law firm of Milberg Weiss, the notice provided Class members, the limited disclosure Milberg Weiss provided regarding several partners business relationship with those behind GENTA and the obvious race to settle the case after the firm was indicted."

d. *Donald P. Alexander, Esq.*

***4** Donald P. Alexander, Esq. ("Alexander") states in his letter, dated February 11, 2008, that he did not receive timely class notice. He explains that the Notice sent to him, in his capacity as executor of an estate, was postmarked February 1, 2008, and that he received the Notice on February 5, 2008, after the February 2, 2008 deadline for returning the Proof of Claim had passed. On February 6, 2008, Alexander notified Plaintiffs' Lead Counsel [FN5] of his untimely receipt of Notice.

FN5. The term "Plaintiffs' Lead Counsel" is used herein as defined in the Stipulation. (Stip.8.)

e. *Joseph T. Caravello*

Joseph Caravello complains in a letter dated January 12, 2008 that he will recover less than what he actually lost if the terms of the Settlement are effectuated. He explains that, under the terms of the Settlement, the Settlement Class may recover 16.9 cents and 0.0245 shares of Genta common stock for each damaged share of Genta stock they own. Under this formula, Joseph Caravello states, he will recover a few hundred dollars. However, Joseph Caravello claims that he lost over $32,000 due to purchases of

Genta common stock during the Class Period, and stands to lose thousands more when he sells the remaining shares he holds.

f. *Lisa B. Caravello*

In a separate letter akin to that sent by Joseph Caravello, dated January 13, 2008, Lisa Caravello states that she will recover less than what she actually lost if the terms of the Settlement are effectuated. Specifically, Lisa Caravello states that she may recover fifty dollars under the Settlement, but has lost thousands of dollars due to purchases of Genta common stock during the Class Period.

g. *David and Nancy Pudelsky*

David and Nancy Pudelsky (the "Pudelskys") object to the dates incorporated into the Class Period.[FN6]In a letter dated January 26, 2008, they contend that they lost a considerable amount of money on Genta stock that they purchased prior to December 14, 2000, and which was sold after May 3, 2004.

> FN6. The term "Class Period" is used herein as defined in the Stipulation. (Stip.6.)

h. *Geoff Gordon*[FN7]

> FN7. Although Geoff Gordon's letter was addressed to this Court, this Court did not receive the letter until it was submitted by Plaintiffs' Lead Counsel at the Fairness Hearing.

In a letter dated February 26, 2008, Geoff Gordon ("Gordon") states that the Settlement will be "unfairly distributed" because individuals who qualify as members of the Settlement Class may have taken certain actions that allowed them to gain a profit from Genta common stock acquired or sold during the Class Period. To defend his assertion, Gordon offers the following hypothetical in his letter:

> One has by all intents, and filing literally by forms asked only, held shares in Genta from Dec[ember] 2000 and held them all through the [C]lass [P]eriod ending in 2004. Well in the literal sense of the intent of the filing, they are entitled to a loss of $9 buy or so against $5 sell or so ..[.] or about $4 a share.... However, if along the way that same person wrote covered Calls against their $9 shares all the way down to the $5 "sell" at the end of the Class period ... they in fact were very much in the profit net column, or at least square. Same would be true if they bought Put protection or locked in gains with a Short off-set box position. Yet these off-set profit positions that reasonably would occur during the [C]lass [P]eriod were not asked to be accounted.

2. *Analysis of Objections*

***5** The objections raised by the objecting shareholders noted above are meritless.

Bechtold's objections should not be taken into consideration because he submitted no information identifying any potential members of the Settlement Class on whose behalf he was speaking. Indeed, Bechtold admitted at the Fairness Hearing that he has no standing to raise objections against the Settlement. (Fairness Hr'g T27:3-13.) Consequently, this Court shall not take into account Bechtold's objections.

The Pudelskys' objection lacks merit. The Amended Complaint states that the materially false and misleading statements allegedly made by Defendants caused damage to Genta stock during the Class Period. (Am.Compl.¶¶ 29-36, 41-43.) To allow potential Settlement Class members to recover for losses incurred from a decline in Genta stock prices outside of the Class Period would fly in the face of the injury alleged in the Amended Complaint. Furthermore, the Class Period described in the Settlement represents a reasonable compromise since the Class Period named in the Amended Complaint may not have been maintained throughout the litigation of this action. Had the litigation continued, Defendants likely would have attacked Lead Plaintiffs on the length of the Class Period set forth in the Settlement. (T9:3-8.)

The arguments raised by Joseph and Lisa Caravello in their objections are also flawed. Lead Plaintiffs stated that "Genta is a company that, by its own admission, has not turned a profit."(Fairness Hr'g T9:11-12.) It may have been difficult to extract an agreement from Genta to pay more than what is provided for in the Settlement. (Fairness Hr'g T9:20-25; T10:1.) If Lead Plaintiffs had sought a larger

monetary award, moreover, Defendants could have "start[ed] spending insurance money" that Lead Plaintiffs were already seeking, thereby resulting in "more of a diminution in the recovery rather than a larger recovery."(Fairness Hr'g T10:2-7.)

Furthermore, the Settlement is not intended to compensate each and every aggrieved individual fully for his loss, but instead represents a reasonable amount of relief for the Settlement Class, given the risks inherent in further litigation. The Notice expressly states that it is unlikely that the members of the Settlement Class will receive payment satisfying all losses incurred from their recognized claims. (Notice, attached as Ex. A-1 to Lead Pl. Stipulation, at 9.) In addition, each individual receiving the Notice has the right to exclude himself from the Settlement and retain any right he may have to sue Defendants on his own. (*Id.* at 10.)

Gordon's objection is unfounded. There is no evidence in the record to show that members of the Settlement Class may enjoy a windfall under the terms of this Settlement. Plaintiffs' Lead Counsel addressed Gordon's concerns in an email correspondence which explains that the Claims Administrator can identify and rectify any problems with the distribution of the Settlement. (T12:14-25.) Gordon offers only a hypothetical, and no concrete evidence, claiming that potential members of the Settlement Class *may* receive funds from the Settlement despite never having incurred a loss from Genta common stock, call options on Genta common stock, or put options on Genta common stock. Without more, this Court cannot conclude that any potential members of the Settlement Class will be unjustly enriched by the Settlement.

***6** Last, Lead Plaintiffs have explained quite effectively the aberration in the service of Notice to Chotas, Dodge, and Alexander. Plaintiffs' Lead Counsel states that the Notice was properly disseminated by the Claims Administrator. This Court's Order dated November 5, 2007 (the "November 5 Order") provides that the Notice and Proof of Claim must be mailed by first class mail, postage prepaid, within thirty days. The Notice was distributed to potential Class Members on November 27, 2007. (Aff. of Jose C. Fraga, attached as Ex. H to Fraser Decl., at ¶¶ 4-5.)

To explain Dodge's late receipt of the Notice, Lead Plaintiffs state that Notice was timely mailed to him, and that it was later returned as undeliverable on January 22, 2008. (Fraser Decl. ¶ 99.) All such undeliverable mailings were sent through a national change of address database, and then re-mailed to the updated address. (*Id.*) Plaintiffs' Lead Counsel contacted Dodge and directed him to attach an explanatory note to the Proof of Claim before submitting it to the Claims Administrator. (*Id.*)

Plaintiffs' Lead Counsel contacted Chotas as well. Chotas learned from Plaintiff's Lead Counsel that he likely received the Notice after the February 2, 2008 deadline due to the failure of a Nominee [FN8] to dispatch the Notice, as required by the November 5 Order. (*Id.* ¶ 101.)Chotas was also advised to submit his Proof of Claim together with an explanatory note.(*Id.*)

> FN8. Nominee purchasers are described within the Notice as individuals and entities such as brokerage firms who purchased Genta common stock and call options on Genta common stock or who sold (wrote) put options on Genta common stock during the Class Period (as defined in the Stipulation) as record owners, but not as beneficial owners. (Stip. Ex. A-1 at 26.) The November 5 Order requires Nominee purchasers to, within seven days of their receipt of the Notice, either forward copies of the Notice and Proof of Claim to their beneficial owners or provide the Claims Administrator with lists of the names and addresses of the beneficial owners to which the Claims Administrator will promptly send the Notice and Proof of Claim.

Alexander's objection was not included on the docket list; nevertheless, his February 11, 2008 letter (received in chambers on February 14, 2008) indicates that he notified Plaintiffs' Lead Counsel of his untimely receipt of Notice. At the Fairness Hearing, Plaintiffs' Lead Counsel attested to this Court that Alexander was given the same information that Chotas and Dodge were told. (Fairness Hr'g T30:14-25; T31:1-4.)

C. *Stage of the Proceeding and the Amount of Discovery Completed*

This action had developed sufficiently to allow the Parties to discern the strengths and weaknesses of their respective positions. This case was initiated on May 4, 2004. The Parties did not reach a settlement until after the case had progressed through the filing and resolution of a motion to dismiss, the production of certain documents, and several mediation sessions. (Fraser Decl. ¶ 102.)

Lead Plaintiffs attest that the impending discovery would have been extremely expensive and time-consuming to complete. (Fairness Hr'g T7:6-15; T16:21-25; T17:1-2.) The cost of collecting the data alone would have cost Defendants approximately six or seven million dollars. (Fairness Hr'g T20:20-24.) The scientific data would have been difficult to decipher, and the contract attorneys needed to review the documents would have been expensive and difficult to find. (*Id.*)

This is not to say that the Parties have not engaged in discovery sufficient to discern the relative strength of their arguments. Significant document discovery had already been undertaken and produced. (Fairness Hr'g T7:16-19.) Although discovery has been halted since January 23, 2006, the Parties' obligation to respond to document requests and subpoenas related to the mediation continued. (Order dated Jan. 23, 2006.)

D. *Risks of Establishing Liability and Damages*

***7** *Girsh* factors four and five require this Court to consider the risks involved in establishing liability against Defendants, as well as the amount of damages due. The Settlement terms do not include any admission of liability by Defendants. (*Id.* ¶¶ 104-05.)Defendants have denied, and continue to deny, each and every allegation made by Lead Plaintiffs, including whether their conduct caused the decrease in Genta stock prices. Defendants also contest any claims which seek to hold them liable for any wrongdoing. (*Id.* ¶¶ 104-07.)Also, Defendants certainly would have attacked the materiality of the statements made by Genta that Plaintiffs rely on here. (Fairness Hr'g T18:5-9.) In addition, competing expert testimony likely would have created sufficient uncertainty regarding the exact amount of damages that could be recovered.(*Id.* ¶ 109.)Defendants also would have attacked the length of the Class Period set forth in the Settlement. (Fairness Hr'g T6:1-7.) Last, if the litigation had proceeded, Defendants would have sought to confirm a Class Period markedly shorter than that provided for in the Settlement. (*Id.*)

E. *Risks of Maintaining the Class Action Through Trial*

The sixth *Girsh* factor requires consideration of the risks implicit in maintaining the class action status of the case throughout trial. Lead Plaintiffs profess that they have become "conversant" with the strengths and weaknesses of this case, and thus have fairly evaluated the risks associated with continued litigation. (*Id.* ¶¶ 110-12.)They note that this Court, after considering Defendants' arguments, may not have certified the Settlement Class, and that, even if the Settlement Class was certified, this Court could order de-certification at any point during the litigation. The existence of this risk encouraged Settlement of this action. (*Id.*)

Lead Plaintiffs also assert that Defendants likely would have attacked the appropriateness of the proposed class representatives during the class certification stage of the litigation. (Fairness Hr'g T5:20-25.) In particular, Lead Plaintiffs attest that the "typicality" prong of the class certification analysis would have been a focal point of Defendants' argument. (*Id.*) The definition of the Settlement Class, consequently, may have taken a form distinct from that provided for in the Settlement.

F. *Ability of the Defendants to Withstand Greater Judgment, Range of Reasonableness In Light of the Best Possible Recovery, and Range of Reasonableness in Light of the Attendant Risks of Litigation*

The final three *Girsh* factors take into account Defendants' ability to withstand a greater judgment, the reasonableness of the settlement in light of the best possible recovery available, and the reasonableness of the settlement in light of the attendant risks of litigation. As stated above, the Settlement comprises a reasonable resolution of the action, after taking into account the inherent risks at stake in securities litigation. The Settlement was negotiated at arm's length by experienced class counsel, and Genta does not "really have any resources that they would have been willing to give

up other than what [Lead Plaintiffs] have already been able to obtain."(Fairness Hr'g T9:24-25; T10:1.)

G. *Summary*

***8** After considering the aforementioned *Girsh* factors, this Court concludes that the Settlement is fair and reasonable, and merits final approval by this Court.

II. *APPROVAL OF PLAN OF ALLOCATION*

Lead Plaintiffs also ask this Court to grant final approval of the Plan of Allocation, as set forth in the Notice. In the November 5 Order, this Court, after examining the Plan of Allocation against the *Girsh* factors, determined that approval of the Plan of Allocation was warranted. (November 5 Order at 3-4.) No objection to the Plan of Allocation has been filed with this Court. This Court shall accordingly approve of the Plan of Allocation, for the reasons set forth in the November 5 Order.

III. *APPROVAL OF APPLICATION FOR ATTORNEYS' FEES*

Lead Plaintiffs request approval of its proposed attorneys' fees award, which includes $4.5 million in cash and 500,000 shares of Genta common stock for Plaintiffs' Counsel, as well as a request for reimbursement of expenses."Attorney's fees are typically assessed through [use of] the percentage-of-the-fund method or through the lodestar method."*In re AT & T Corp.*, 455 F.3d at 164. "The amount of a fee award ... is within the district court's discretion so long as it employs correct standards and procedures and makes findings of fact not clearly erroneous."*In re AT & T Corp.*, 455 F.3d at 163-64 (quoting *Pub. Interest Research Group of N.J., Inc. v. Windall*, 51 F.3d 1179, 1184 (3d Cir.1995)). District courts must clearly set forth their reasoning for fee awards so that, if appealed, the Court of Appeals will have a sufficient basis to review for abuse of discretion. *Id.* at 164.

"The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir.2005) (quoting *In re Prudential Ins. Co. of Am.*, 148 F.3d 283, 333 (3d Cir.1998)). The Third Circuit has recommended that district courts cross-check the reasonableness of the result yielded under the percentage-of-recovery method by also applying the lodestar method. *In re AT & T Corp.*, 455 F.3d at 164. However, "[t]he lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method."*Id.* This Court shall analyze the reasonableness of the attorneys' fees requested under both methods.[FN9]

> FN9. It is important to note that "[b]oth of these approaches have been subject to significant criticism.... [because] each leaves the court to make a fee determination with little concrete guidance.... Courts are dependent upon counsel for information about the quality and quantity of the attorneys' work, and must make their judgments of the appropriate lodestar multiple or percentage of recovery after the fact and on the basis of imperfect information."*In re Cendant Corp.*, 404 F.3d at 188.

A. *The Percentage-Of-Recovery Method*

Seven factors are considered when determining the propriety of an attorneys' fees award:

> (1) the size of the fund created and the number of persons benefitted; the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

***9** *Id.* at 165.Much like the *Girsh* factors, these factors do not constitute an exhaustive list. *Id.* The Third Circuit has noted three additional factors that may also be considered when analyzing the propriety of an attorneys' fees award, namely (1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations; (2) the percentage fee that

would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any "innovative" terms of settlement. *Id.* (citing *In re Prudential,* 148 F.3d at 338-40). Although the analysis of the aforementioned seven factors may somewhat overlap with the factors considered under the *Girsh* test to examine the appropriateness of the Settlement, this Court will nonetheless discuss each factor in turn.

1. *Size of the fund and number of persons benefitted*

"As a general rule, as the size of a fund increases, the appropriate percentage to be awarded to counsel decreases." *In re Cendant Corp. Sec. Litig.,* 232 F.Supp.2d 327, 337 (D.N.J.2002). This rule is based on the premise that, "in many instances[,] the increase in recovery is merely a factor of the size of the class and has no direct relationship to the efforts of counsel."*Id.* (quoting *In re Prudential,* 148 F.3d at 339). However, "there is no rule that a district court must apply a declining percentage reduction in every settlement involving a sizable fund. Put simply, the declining percentage concept does not trump the fact-intensive *Prudential/Gunter* [seven-factor] analysis." *In re Rite Aid,* 396 F.3d at 303. Indeed, the Third Circuit cautions against "overly formulaic" approaches to calculating the reasonableness of an award for attorneys' fees. *Id.* Parenthetically, the Third Circuit has noted that other courts have criticized the decreasing percentage principle. *Id.* at 303 n. 12.

Counsel for Plaintiffs note that the Settlement provides for a substantial recovery-$18 million in cash, plus interest, and two million shares of Genta common stock. (Memorandum of Law in Support of Plaintiffs' Lead Counsel's Application for an Award of Attorneys' Fees and Reimbursement of Expenses from the Settlement Fund ("Attorneys' Fees Br.") 5.) While not constituting a "very large settlement," the Settlement is no doubt considerable in size. *See In re Cendant Corp. PRIDES Litig.,* 243 F.3d 722, 737 n. 19 (3d Cir.2001) (recognizing $100,000,000 as the marker of a very large settlement). Furthermore, the Settlement Class may comprise hundreds of individuals that may have purchased or acquired Genta's publicly traded common stock. (November 5 Order at 5.) These considerations weigh in favor of approving the attorneys' fees award.

2. *Presence or absence of substantial objections*

Of the hundreds of potential members of the Settlement Class, only eight submitted objections, and of these eight, only one objected to the attorneys' fees award. However, as explained *supra* in Section I, B of this Opinion, Chotas' objection to the untimely distribution of the Notice does not warrant denial of the request for attorneys' fees because Chotas' late receipt of the Notice was an anomaly due to the failure of a Nominee to timely distribute the Notice as required by the November 5 Order. The lack of meritorious objections in this action favors awarding the requested attorneys' fees.

3. *Skill and efficiency of attorneys involved*

***10** The third factor, the skill and efficiency of the attorneys, weighs in favor of granting the attorneys' fees award. The attorneys involved in this action are experienced in, and adept at, handling securities litigation. (Fraser Decl. ¶¶ 128-29.) Given the "stated goal in percentage fee-award cases of ensuring that competent counsel continue to be willing to undertake risky, complex, and novel litigation," the attorneys' expertise in securities litigation favors approving the requested award for attorneys' fees. *Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190, 198 (3d Cir.2000).

4. *Complexity and duration of litigation*

As explained *supra* in Section I, A of this Opinion, the instant action involves complex legal and factual issues, and would have been costly and expensive, if litigated further. *See Smith v. Dominion Bridge Corp.,* No. 96-7580, 2007 WL 1101272, at *4 (E.D.Pa. Apr.11, 2007) ("There is no doubt that the issues in this case are complex in that the alleged misrepresentations relate to securities fraud which would have required a significant amount of expert testimony and would involve educating a jury about financial accounting and federal securities law."). Even if Lead Plaintiffs were successful on the merits, they would have faced challenges proving the amount of damages owed to the Settlement Class. (*Id.*) The complexity of the issues involved in this case support approval of the attorneys' fees award.

5. *Risk of nonpayment*

Plaintiffs' Counsel litigated this action on a contingent fee basis, and thus faced considerable risk that they would not receive payment for their work. (Fraser Decl. ¶ 134.) The contingent fee agreement further substantiates the propriety of the attorneys' fees award. *See* *In re Datatec Sys., Inc. Sec. Litig.*, No. 04-525, 2007 WL 4225828, at *7 (D.N.J. Nov.28, 2007); *In re Lucent Tech., Inc. Sec. Litig.*, 327 F.Supp.2d 426, 438 (D.N.J.2004).

6. *Amount of time devoted to case by counsel for Lead Plaintiffs*

Plaintiffs' Counsel have devoted over 2850 hours to this case, and expect to devote more time going forward when administering the Settlement. (Fraser Decl. ¶ 132.) This fact, together with the attendant risk that Plaintiffs' Counsel may not have otherwise received compensation, favors approving the fee request.

7. *Awards in similar cases*

It is not uncommon for attorneys to receive twenty-five percent of the settlement funds. *See* *In re Rite Aid Corp. Sec. Litig.*, 362 F.Supp.2d 587, 590 (E.D.Pa.2005); *In re Rent-Way Sec. Litig.*, 305 F.Supp.2d 491, 514 (W.D.Pa.2003). Moreover, attorneys have received both cash and stock awards as part of their attorneys' fees award. *See* *In re Cell Pathways, Inc. Sec. Litig. II*, No. 01-1189, 2002 WL 31528573, at *15 (E.D.Pa. Sept.23, 2002) (awarding plaintiffs' counsel thirty percent of the settlement fund, including both the settlement cash and the settlement stock). The attorneys' fees requested in this action do not depart from those requested in other similar class actions.

B. *The Lodestar Method*

***11** "The lodestar method multiplies the number of hours class counsel worked on a case by a reasonable hourly billing rate for such services, based on the given geographical area, the nature of the services provided, and the experience of the attorneys." *In re Rite Aid Corp.*, 396 F.3d at 305. "The multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *Id.* at 305-06.To perform the cross-check, district courts must divide the proposed fee award by the lodestar calculation, which will yield a lodestar multiplier. *In re AT & T Corp.*, 455 F.3d at 164.

To calculate the lodestar amount, this Court reviewed the billing summaries provided by Plaintiffs' Counsel. (Fraser Decl. Ex. A-F.) After adding together the hours of work performed by Plaintiffs' Counsel, and multiplying this total by the average hourly rate charged, this Court calculated a lodestar of $1,016,673.0225 for all attorneys participating in the case, and $257,092.9525 for all professional support staff, yielding a total lodestar amount of $1,273,765.975.[FN10]

> FN10. Plaintiffs' Lead Counsel states that the lodestar amount is $1,200,611.88. (Memorandum of Law In Support Of Plaintiffs' Lead Counsel's Application For An Award Of Attorneys' Fees And Reimbursement Of Expenses From The Settlement Fund ("Attorneys' Fees Br.") 18; Fraser Decl. ¶ 137.)

To compute the lodestar multiplier, this Court must divide the requested attorneys' fees award by the lodestar amount. According to Plaintiffs' Lead Counsel, only the cash award of $4,500,000 should be divided by the lodestar amount. However, this calculation does not take into account the 500,000 shares of Genta common stock requested by Plaintiffs' Counsel. Plaintiffs' Lead Counsel states that the lodestar multiplier does not factor in the value of the Settlement Shares because their value will not be known until they are issued. (Fraser Decl. ¶ 138 n. 16.) However, the failure to include any estimate of the Settlement Shares' value underestimates the true size of the attorneys' fees award.

Plaintiffs' Lead Counsel states that "Genta common stock was recently trading at $0.48 per share."(*Id.*) Using this indicator, the Settlement Shares would be valued at $240,000. When combined with the $4,500,000 cash award, the total value of the attorneys' fees award amounts to $4,740,000. This total, when divided by the $1,273,765.975 lodestar amount calculated by this Court, yields a lodestar multiplier of 3.72.[FN11]This lodestar multiplier falls within the range approved for reasonable attorneys'

fees awards. *See* *In re Prudential,* 148 F.3d at 341 (stating that "multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied").

FN11. Plaintiffs' Lead Counsel contends that the lodestar multiplier is 3.75. (Attorneys' Fees Br. 18-19; Fraser Decl. ¶ 139.)

In sum, both the percentage-of-the-fund method and the lodestar method support approval of the attorneys' fees award requested by Plaintiffs' Counsel. An attorneys' fees award amounting to twenty-five percent of the Settlement Fund shall be approved.

IV. *REIMBURSEMENT OF EXPENSES TO PLAINTIFFS' COUNSEL*

Plaintiffs' Counsel also request reimbursement of expenses incurred as part of this action, totaling $130,195.29. The Third Circuit has approved of reimbursing expenses, in addition to awarding attorneys' fees. *See In re AT & T Corp.,* 455 F.3d at 169 (upholding district court's order supporting reimbursement of expenses totaling over $5 million). This Court finds that the expenses set forth in Exhibits B through F of the Fraser Declaration, which encompass costs for legal research, meals, photocopying, experts, and mail postage, are in fact reasonable and appropriate, and thus shall be reimbursed to Plaintiffs' Counsel.

V. *REIMBURSEMENT OF EXPENSES TO LEAD PLAINTIFF*

***12** Last, Lead Plaintiffs ask this Court to award $55,281 [FN12] to Lead Plaintiff William Nasser, Jr. ("Nasser") as reimbursement for costs and expenses incurred from his service as a class representative for this case. The Private Securities Litigation Reform Act (the "PSLRA") states that a class representative shall "not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)."15 U.S.C. § 78u-4(a)(2)(A)(vi). Paragraph (4) provides that

FN12. Lead Plaintiffs originally stated that Nasser incurred $66,531 in costs and expenses for work performed in relation to this action. This total was amended at the Fairness Hearing, after this Court pointed out an error in Lead Plaintiffs' calculations.

> [t]he share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class.
> 15 U.S.C. § 78u-4(a)(4).

Plaintiffs' Counsel state that Nasser incurred costs and expenses totaling $55,281 for performing duties related to this action, including reviewing drafts of complaints, retrieving and reviewing brokerage records, participating in telephone conferences, and traveling to and attending meetings. (Decl. of William Nasser, Jr., attached as Ex. G to Fraser Decl., at ¶¶ 2-4.) Plaintiff incurred $1671 in travel expenses, $231.05 in fax and photocopy expenses, and $3,347.95 in telephone costs. (*Id.* at ¶¶ 3-4.)The remaining costs are based on 222.36 hours spent performing the aforementioned tasks, multiplied by Nasser's discounted billing rate of $225 per hour.[FN13]

FN13. Nasser's discounted billing rate was computed based on the rate he charges for standard litigation support for his work as a certified public accountant at an accounting and litigation firm, for which he is the managing partner and owner.

This Court accepts Nasser's assertion that he incurred $5250 in costs from travel expenses, fax and photocopy expenses, and telephone charges. However, Nasser has not submitted any evidence showing that he lost wages or business opportunities due to the time he spent working on the instant litigation. Although Nasser estimated that he spent 222.36 hours performing duties related to this action, and established his discounted billing rate as $225 per hour, Nasser has failed to show that his contributions to this action foreclosed him from obtaining business opportunities or earning wages. *See* *Dominion Bridge Corp.,* 2007 WL 1101272, at

*12 (denying class representative's request for incentive award because the "class representative failed to provide this court with any evidence of actual expenses incurred, lost wages, lost vacation time, or lost business opportunities"); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, Nos. 02-1484, 02-3176, 02-7854, 02-10021, 2007 WL 313474, at *25 (S.D.N.Y. Feb.1, 2007) ("Although Manton claims to have spent time during her work day performing her duties as lead plaintiff, she nevertheless fails to claim any actual expenses incurred, or wages or business opportunities she lost, as a result of acting as lead plaintiff. Under the PLRSA, it is simply not enough ... to assert that she took time out of her work day and that her time is conservatively valued at $500 per hour.")

***13** After calculating the aforementioned expenses, this Court finds that Nasser should be granted an incentive award of $5250 for costs and expenses incurred during the litigation of this action.

VI. *CONCLUSION*

For the reasons set forth above, Lead Plaintiff's Motion for Final Approval of the Settlement shall be granted. This Court approves both the Settlement and the Plan of Allocation.

However, the Motion By Plaintiffs' Counsel for Award of Attorneys' Fees and Reimbursement of Expenses shall be granted, in part, and denied, in part. This Court approves the proposed attorneys' fees award entitling Plaintiffs' Counsel to $4.5 million in cash and 500,000 shares of Genta common stock, as well as $130,195.29 for reimbursement of expenses. However, this Court shall only grant an incentive award of $5250 to Nasser.

D.N.J.,2008.
In re Genta Securities Litigation
Slip Copy, 2008 WL 2229843 (D.N.J.), 70 Fed.R.Serv.3d 931

END OF DOCUMENT

TAB 8

United States District Court,W.D. Pennsylvania.
Lauren HUGHES individually and on behalf of all others similarly situated, Plaintiff(s),
v.
InMOTION ENTERTAINMENT, Does 1 Through 10, Inclusive, Defendants.
No. 07cv1299.

Aug. 18, 2008.

Gary F. Lynch, Carlson Lynch Ltd., New Castle, PA, R. Bruce Carlson, Carlson Lynch, Sewickley, PA, for Plaintiff(s).
Judith F. Olson, Schnader Harrison Segal & Lewis LLP, Pittsburgh, PA, Michael L. Duncan, Akerman Senterfitt, Jacksonville, FL, for Defendants.

MEMORANDUM OPINION

ARTHUR J. SCHWAB, District Judge.

I. Introduction.

***1** On May 7, 2008, this Court entered an Order (doc. no. 28) granting preliminary approval to the parties' Joint Motion for Preliminary Approval of Class Action Settlement (doc. no. 26), subject to the agreed to notices being published and sent to the class, opportunity for putative class members to opt out and to object to the settlement, and the final approval of the Court following a fairness hearing at which the Court would determine whether the settlement was fair, reasonable and adequate viz a viz the absent class members. Before the Court is the Notice of Rescission of Settlement and Motion of Defendant InMotion Entertainment to Vacate Preliminary Approval Order and to Dismiss Action (doc. no. 29), filed on July 9, 2008. After careful consideration of said motion to vacate, plaintiff's response thereto, and the memoranda of law in support and in opposition thereto, the Court will deny defendant's motion to vacate for the reasons set forth below.

II. Background.

1. The Complaint.

Plaintiff Lauren Hughes filed, in her own right and on behalf of a putative class, a complaint alleging that InMotion Entertainment and its employees willfully violated the Fair and Accurate Credit Transaction Act ("FACTA"), codified as relevant to this action at 15 U.S.C. § 1681c(g), and "failed to protect Plaintiff and others similarly situated against identity theft and credit card and debit card fraud by continuing to print more than the last five digits of the card number and/or the expiration date on receipts provided to debit card and credit card cardholders transacting business with Defendants."Complaint, ¶ 3. The Complaint seeks "on behalf of herself and the class, statutory damages, punitive damages, costs and attorneys fees, all of which are expressly made available by statute ...." Complaint, ¶ 5. Plaintiff alleges that although Defendant had actual knowledge of FACTA's truncation requirements, including the requirement that credit and debit card expiration dates be truncated on receipts presented to consumers at the point of sale, and that defendant was provided with notice of these obligations by trade associations such as Visa, Complaint, ¶ 21-22, it failed to comply with FACTA from 2005 through 2008 and, on "September 14, 2007, after the effective date of the statute, Defendant, at its location at Pittsburgh International Airport, Pittsburgh, Pennsylvania, provided Plaintiff with an electronically printed receipt on which Defendant printed the expiration date of Plaintiff's credit or debit card." Complaint, ¶ 55.

The Complaint also avers that "Defendants, at the point of a sale or transaction with members of the class, provided, either: a) through use of a machine that was first put into use on or after January 1, 2005, at any time after such date; or b) through any machine at any time after December 4, 2006, each member of the class with one or more electronically printed receipts on each of which Defendants printed, for each respective class member, more than the last five digits of such member's credit card or debit card number and/or printed the expiration date of such member's credit or debit card."Complaint, ¶ 56. The Complaint sets forth allegations as to why the case is appropriate for class action pursuant to Fed.R.Civ.P. 23. Complaint, ¶ ¶ 36-48, 56-65.

***2** The parties were directed to participate in this Court's Alternative Dispute Resolution Program, (doc. no. 2), and selected a highly skilled and respected attorney, Mark R. Hornak, to act as mediator. (doc. no. 20). Following "arms-length negotiations facilitated by experienced complex litigation lawyer/mediator Mark Hornak, the Parties" reached a proposed settlement of the putative class action culminating with a Class Action Settlement Agreement ("Settlement Agreement" or "Settlement"), that was attached to their Joint Motion for Preliminary Approval of Class Action (doc. no. 26), as Exhibit 1. Between the parties, the Agreement was fully executed, subject, of course, to this Court's obligation to review any proposed class action settlement for reasonableness, adequacy and fairness to the absent class members under Fed.R.Civ.P. 23(e).

2. The Settlement Agreement/ Joint Motion for Court Approval.

The detailed and comprehensive Agreement defined (at section IV. 1.13) the settling class as follows:

> All consumers cardholders who received electronically printed receipts from InMotion at the point of sale or transaction, in a retail credit card or debit card transaction occurring between December 4, 2006, and October 1, 2007, and wherein the receipt displayed (1) more than the last five digits of the consumer cardholder's credit card or debit card number, and/or (2) the expiration date of the consumer cardholder's credit card or debit card.

Agreement, Exhibit 1 to Joint Motion (doc. no. 26-2 at p. 5 of 41).

The settlement set forth the consideration to each qualifying class member as a free rental of one DVD valued at up to $5.00 retail, at any InMotion store or kiosk, and 100 DVDs or CDs to be donated to a charity selected by InMotion (subject to Class Counsel's approval), and the consideration for defendant to enter into the Agreement was that all members of the putative class would release any and all known and unknown claims. *Id.* at §§ 2.1.1 and 1.27

3. Court Order Granting Preliminary Approval.

The Court's Order Granting Preliminary Approval of Proposed Class Action Settlement, Directing the Dissemination of Notice and Scheduling a Final Settlement Hearing (doc. no. 28) stated, in most relevant part:

> The Court has considered the Class Action Settlement Agreement and its exhibits, the joint motion of the Settling Parties for an order preliminarily approving a class action settlement, directing the issuance of notice and setting a final settlement hearing, and all other papers filed in this action. The matter having been submitted and good cause appearing therefore:
>
> The Court finds as follows:
>
> 1. All defined terms contained herein shall have the same meanings as set forth in the Class Action Settlement Agreement executed by the Settling Parties and filed with this Court (the "Settlement Agreement");
>
> 2. The Class Representative and the InMotion Releasees, through their counsel of record in the Litigation, have reached an agreement to settle all claims in the Litigation;
>
> ***3** 3. The Court preliminarily concludes that, for the purposes of approving this settlement only and for no other purpose and with no other effect on the Litigation, should the proposed Settlement Agreement not ultimately be approved or should the Effective Date not occur, the proposed Settlement Class likely meets the requirements for certification under Rule 23 of the Federal Rules of Civil Procedure: ...;
>
> 4. The moving parties also have presented to the Court for review a Class Action Settlement Agreement. The Settlement Agreement proposes a Settlement that is within the range of reasonableness and meets the requirements for preliminary approval; and
>
> 5. The moving parties have presented to the Court for review a plan to provide notice to the proposed Settlement Class of the terms of the

settlement and the various options the Settlement Class has, including, among other things, the option for Settlement Class Members to opt-out of the class action; the option to be represented by counsel of their choosing and to object to the proposed settlement; and/or the option to become a Participating Claimant. The notice will be published consistent with the Settlement Agreement....

Good cause appearing therefore, IT IS HEREBY ORDERED that:

1. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Class Action Settlement Agreement is preliminarily approved;

2. The Notice of Proposed Settlement and Conditionally Certified Class Action setting forth the rights of Settlement Class Members to opt in and or out of the settlement and/or to become a Participating Claimant shall be given consistent with the terms of the Settlement Agreement beginning on May 19, 2008.

3. A hearing shall be held before this Court on July 16, 2008 at 8:00 am to consider whether the settlement should be given final approval by the Court:

(a) Written objections by Class Members to the proposed settlement will be considered if received by Class Counsel on or before the Notice Response Deadline;

(b) At the Settlement Hearing, Class Members may be heard orally in support of or, if they have timely submitted written objections, in opposition to the settlement;

(c) Class Counsel and counsel for the InMotion Releasees should be prepared at the hearing to respond to objections filed by Class Members and to provide other information as appropriate, bearing on whether or not the settlement should be approved; and

4. In the event that the Effective Date occurs, all Settlement Class Members will be deemed to have forever released and discharged the Released Claims. In the event that the Effective Date does not occur for any reason whatsoever, the Settlement Agreement shall be deemed null and void and shall have no effect whatsoever.

Order of Court dated May 7, 2008 (doc. no. 28).

4. InMotion's Motion to Vacate.

Defendant's motion to vacate asserts that plaintiff has been deprived of standing, and this Court no longer has subject matter jurisdiction to consider the "proposed" settlement, on the grounds that Congress had amended the life out of plaintiff's class action suit for willful violation of the truncation requirements of FACTA, 15 U.S.C. 1681n, by its clarifying amendment of June 3, 2008, which states in pertinent part:

***4** (d) Clarification of willful noncompliance

For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and June 3, 2008, but otherwise complied with the requirements of section 1681c(g) of this title for such receipt *shall not be in willful noncompliance with section 1681c(g)) of this title by reason of printing such expiration date on the receipt.*

15 U.S.C. § 1681n, as amended by the Credit and Debit Card Receipt Clarification Act of 2007, Pub.L. 110-241, § 3(a), June 3, 2008, 122 Stat. 1566 (emphasis added).

InMotion's argument for the judicial dissolution of its Agreement with plaintiffs is summarized as follows:

The Preliminary Approval Order must be vacated, and this action must be dismissed, because the named plaintiff no longer has standing. Because the named plaintiff lacks standing to bring any claim, for herself or on behalf of the alleged class, so the Court lacks subject matter jurisdiction. The settlement agreement between the parties and the Court's preliminary approval of it do not alter that the Court now lacks subject matter jurisdiction by virtue of the Clarification Act. The settlement agreement cannot be approved as a matter of law.

Motion to Vacate (doc. no. 29), ¶ 5.

5. Fairness Hearing.

On July 23, 2008, the Court convened the fairness hearing as scheduled, but after discussion with counsel, rescheduled the hearing for September 30, 2008, and directed additional briefing on the motion to vacate the settlement. See Minute Entry (doc. no. 33). On July 23, 2008, the Court issued an Amended Preliminary Approval Order (Amending Dkt. # 28) stating as follows:

> In consideration of the Plaintiff's Status Report (Dkt.# 32) and the report of counsel for the Parties at the hearing held on Wednesday, July 16, 2008, the Order Granting Preliminary Approval Of Proposed Class Action Settlement ("Preliminary Approval Order") (Dkt.# 28) is hereby amended as follows:
>
> (A) Defendant shall fully comply and continue to comply with the notice requirements as set forth in the Preliminary Approval Order (Dkt.# 28) so that the Notice of Proposed Settlement and Conditionally Certified Class Action setting forth the rights of Settlement Class Members to opt in and/or out of the settlement and/or to become a Participating Claimant shall be given consistent with the terms of the Settlement Agreement, and shall begin to do so no later than July 23, 2008.
>
> (B) The hearing to consider whether the settlement should be given final approval by the Court shall be held before this Court on September 30,2008, at 8:00 a.m. At this hearing any written objections by Settlement Class Members to the proposed settlement will be considered if received by Class Counsel on or before the Notice Response Deadline. At the Settlement Hearing, Settlement Class Members may be heard orally in support of or, if they have timely submitted written objections, in opposition to the settlement. Class Counsel and counsel for the InMotion Releasees should be prepared at the hearing to respond to objections filed by Settlement Class Members and to provide other information as appropriate, bearing on whether or not the settlement should be approved. In the event that the Settlement Agreement is approved by the Court and the Effective Date occurs, all Settlement Class Members will be deemed to have forever released and discharged the Released Claims. In the event that the Settlement Agreement is not approved by the Court or the Effective Date does not occur for any reason whatsoever, the Settlement Agreement shall be deemed null and void and shall have no effect whatsoever.
>
> ***5** (C) Except as expressly amended by this Order, the Preliminary Approval Order (Dkt.# 28) otherwise remains in full force and effect.

Amended Order (doc. no. 35).

Following supplemental briefing, this matter is now ripe for determination.

III. Legal Analysis.

Defendant's standing-subject matter jurisdiction argument barely mentions the Settlement Agreement entered by the parties *prior to* passage of the Credit and Debit Card Receipt Clarification Act of 2007, Pub.L. 110-241, § 3(a), June 3, 2008, 122 Stat. 1566, amending the truncation cause of action under FACTA. However, the Settlement Agreement is the Court's starting point.

A. Validity and Enforceblity of Settlement Agreement.

It is a long-standing principle that a voluntary settlement agreement may be binding upon the parties, irrespective of whether it was made in the presence of the Court. *Green v. Lewis & Co.*, 436 F.2d 389, 390 (3d Cir.1970); see also *D.R. by M.R. v. East Brunswick Bd. of Educ.*, 109 F.3d 896, 901 (3d Cir.1997) (holding that a settlement agreement is binding despite the fact that it resulted from mediation instead of litigation). Moreover, a settlement agreement does not even need to be reduced to writing to be enforceable, so long as its material terms have been mutually agreed upon. See *Main Line Theatres, Inc. v. Paramount*, 298 F.2d 801, 804 (3d. Cir.1962); see also *Good v. The Pennsylvania Railroad Co.*, 384 F.2d 989, 990 (3d Cir.1967) (holding that a settlement agreement, entered into by duly authorized counsel, was "valid and binding despite the absence of any writing or

formality").

Settlement agreements are interpreted as binding contracts and are governed by the ordinary principles of contract law. *In re Cendant Corp. Litig.*, 233 F.3d 188, 193 (3d Cir.2000). There is a strong judicial policy in favor of the voluntary settlement of lawsuits. See *Pennwalt Corp. v. Plough*, 676 F.2d 77, 79-80 (3d. Cir.1982) (holding that voluntary settlement agreements are "specifically enforceable and broadly interpreted"). As recently expressed by a colleague in the United States District Court of New Jersey:

> The [United States Court of Appeals for the] Third Circuit recognizes a strong public policy favoring settlements of disputes, the finality of judgments and the termination of litigation. See *American Iron & Steel Institute v. Environmental Protection Agency*, 560 F.2d 589 (3d Cir.1977); *Pennwalt Corp. v. Plough, Inc.*, 676 F.2d 77, 80 (3d Cir.1982)..."Voluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustments of matters in dispute, as for the most wholesome of reasons they certainly should." *Pennwalt*, 676 F.2d at 80....

In re Nazi Era Cases Against German Defendants Litig., 236 F.R.D. 231, 241-42 (D.N.J.2006) (numerous additional citations omitted). See also *Standard Steel, LLC v. Buckeye Energy, Inc.*, 2005 WL 2403636 *2 (W.D.Pa.2005) (Conti, J.) ("Settlement agreements are encouraged as a matter of public policy because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by courts."), citing *D.R. by M.R.*, 109 F.3d at 901.

***6** The strong public policy and high judicial favor for negotiated settlements of litigation is particularly keen "in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."*In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. ("In re GMC")*, 55 F.3d 768, 784 (3d Cir.1995).

In light of the foregoing principles, there is no doubt that the parties, plaintiff Hughes and InMotion, through capable and experienced counsel, and with the assistance of a well-respected and experienced mediator appointed pursuant to this Court's mandatory ADR program, negotiated in good faith and at arm's length a through and comprehensive written settlement agreement that not only set forth the *material* terms of the Agreement, but also the details of the parties' performance and expectations, and the legal consequences of the Agreement. The Agreement is a binding and enforceable agreement under general principles of contract interpretation.

Thus, the Agreement is binding on both plaintiff and InMotion unless there is something in the Credit and Debit Card Receipt Clarification Act amending 15 U.S.C. § 1681c(g) or inherent in the non-finality of class action settlements pending a district court's Rule 23 review and approval that deprives this court of jurisdiction, as defendant claims, or otherwise permits or compels a court to disregard a binding and enforceable settlement agreement between the parties. After careful consideration of defendant's motion to vacate, the Credit and Debit Card Receipt Clarification Act, and this Court's obligations under Fed.R.Civ.P. 23, and mindful of the strong public policy and judicial preference for settlements, this Court finds no reason permitting, let alone compelling, a district court to disregard a valid, binding contract to settle the litigation.[FN1]

> FN1. The Court is aware that a well-respected colleague on the United States District Court for the Western District of Pennsylvania has recently rendered a contrary decision. *Ehrheart v. Verizon Wireless,* Civil Action No. 07-1165 (W.D.Pa.) (Ambrose, C.J.). See Opinion and Order dated June 13, 2008 (doc. no. 38) and Order dated July 25, 2008 denying motion for reconsideration (doc. no. 50).

B. The Credit and Debit Card Receipt Clarification Act.

The Credit and Debit Card Receipt Clarification Act set forth Congress's findings and purpose in amending the truncation cause of action under FACTA, including that technical violations regarding the truncation of expiration dates did not cause actual harm to customers where the credit or debit number was truncated as required by FACTA, and that, despite "repeatedly being denied class certification [but not, however, in district courts within the Third

Circuit which have routinely approved settlements in similar class action lawsuits], the continued appealing and filing of these lawsuits represents a significant burden on the hundreds of companies that have been sued and could well raise prices to consumers without corresponding consumer protection benefit."*Id* . at § 2(a)(5-7). By amending FACTA to provide that persons who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and June 3, 2008, but otherwise complied with the requirements of section 1681c(g), "shall not be in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt," Congress plainly eliminated the private cause of action based *solely* on failing to truncate the expiration date.

***7** Congress also provided that the "amendment made by subsection (a) shall apply to any action, *other than an action which has become final,* that is brought for a violation of 605(g) of the Fair Credit Reporting Act to which such amendment applies without regard to whether such action is brought before or after the date of the enactment of this Act."*Id.* at § 3((b) (emphasis added).

Thus, had this clarifying amendment been enacted prior to the execution of the settlement agreement, the Court would no doubt have seen a motion to dismiss the complaint for failure to state a claim or for want of jurisdiction, and most likely would have granted such motion, at least to the extent that any plaintiff's claims may have been based *solely* on the failure to truncate the expiration dates and not also on failure to truncate the credit and debit card numbers in accordance with FACTA. (The Court notes that plaintiff's Complaint includes claims that defendant issued receipts which did not truncate credit and debit card numbers, and the settling class is defined to include such potential class members.)

However, the Agreement unambiguously provides that defendant denies all wrongdoing and all of plaintiff's claims and contentions but that, in order to avoid protracted and expensive litigation, and taking into account the uncertainty and risks inherent in any litigation, InMotion determined it to be in its best interests to settle the case. Class Action Settlement Agreement, Exhibit 1 to Joint Motion (doc. no. 26-2) at Sec. III. Similarly, plaintiff agreed to release any and all claims known and unknown, and agreed that the settlement was not an admission that InMotion had violated FACTA. *Id.* at §§ 2.9.5 and 2.9.6.

Pursuant to the plain and unambiguous language of the Agreement and this Court's Order Approving Preliminary Settlement, the settlement and judgment based on the settlement cannot possibly be interpreted as a judicial determination or an admission by defendant that it had been "in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt," and the Agreement is not predicated on such a determination or admission. To the contrary, the settlement was based on a mutual exchange of consideration following good faith, arm's length negotiations by sophisticated counsel, and the Agreement can *in no way* be deemed to be in violation of the Credit and Debit Card Receipt Clarification Act of 2007 or its amendment to 15 U.S.C. § 1681c(g) of FACTA.

Congress said nothing about whether parties to a litigation could mutually agree to settle litigation, and it is well recognized that changes in the law after settlement do not provide grounds for rescission of an otherwise binding settlement agreement. See *Coltec Indus., Inc. v. Hobgood,* 280 F.3d 262 (3d Cir.2002) (stipulation for settlement precluded corporation from contesting its underlying liability under Coal Industry Retiree Health Benefit Act, even though intervening Supreme Court decision found Act unconstitutional).

***8** The Credit and Debit Card Receipt Clarification Act of 2007 is a clarifying amendment which merely eliminates a cause of action based solely on a person's failure to truncate expiration dates from credit and debit card receipts, and which does not purport to limit parties' ability to negotiate binding settlement agreements or judicial authority to enforce such settlements of FACTA claims made before the effective date of the amendments. The Court finds that the Credit and Debit Card Receipt Clarification Act of 2007 offers no impediment to enforcement of the Agreement.

C. Fed.R.Civ.P. 23(e)-District Court's Obligation to Absentee Class Members.

Rule 23(e) currently provides:

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b) (3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Fed.R.Civ.P. 23(e).

As the language of Rule 23(e) indicates, and as the commentary to the 2003 Amendments to Rule 23(3) explain, this subdivision was "amended to strengthen the process of reviewing proposed class-action settlements. Settlement may be a desirable means of resolving a class action. But court review and approval are *essential to assure adequate representation of class members who have not participated in shaping the settlement."*(emphasis added). Indeed, the district court's obligations to protect absent class members and to ensure the fairness and adequacy of the settlement to those absentee class plaintiffs has been designated a "fiduciary" duty by the United States Court of Appeals for the Third Circuit. *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir.2001), citing *In re GMC*, 55 F.3d at 784-85 (with judicial supervision of class actions, "there remains an overarching concern-that absentees' interests are being resolved and quite possibly bound by the operation of res judicata even though most of the plaintiffs are not the real parties to the suit.... [T]he *court plays the important role of protector of the absentees' interests, in a sort of fiduciary capacity,* by approving appropriate representative plaintiffs and class counsel."(emphasis added)); *In re Community Bank of Northern Virginia*, 418 F.3d 277, 318 (3d Cir.2005) ("We have gone so far as to deem the district judge a 'fiduciary' of the class." *In re Cendant Corp. Litig.*, 264 F.3d at 231.

***9** In the related derivative action in the Cendant Corporation litigation, the Court of Appeals for the Third Circuit made clear that the "fiduciary obligation" of a district court reviewing proposed class action settlements runs to the absent class members, not to the defendant corporation which is represented in the class action. In the derivative action, *In re Cendant Corp. Litig.*, 264 F.3d 286 (3d Cir.2001), the Court of Appeals stated as follows:

> We believe that the District Court correctly identified the applicable law-under Fed.R.Civ.P. 23(e), courts must determine whether the settlement is fair, reasonable, and adequate *to the class.*The *fiduciary duty to the class* exists because the very nature of the class action device prevents many who have claims from directly participating in the litigation process. See *In re GM Trucks*, 55 F.3d at 805 ("Rule 23(e) imposes on the trial judge the duty of protecting absentees."); see also 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 1.46, at 11-105 to 11-106 (3d ed. 1992) ("The court must be assured that the settlement secures an adequate advantage for the class in return for the surrender of litigation rights against the defendants."). Deutch has not persuaded us that the court's fiduciary duty under Rule 23(e) should be extended to include defendant corporations even if they may be controlled by individuals who have conflicts of interest.

In re Cendant Corp. Litig., 264 F.3d at 296 (emphasis added).

From the foregoing, it is certain that this Court's obligation to review and finally determine whether the settlement is fair and reasonable extends only to the absent class members, to whom the district court

owes a fiduciary duty, not to the parties to the settlement negotiations and agreement. The Agreement was fully, fairly and finally executed by the parties and approved by the Court, with the caveat that the Court would determine whether it passed muster in terms of fairness, adequacy and reasonableness to the class members who did not participate in the negotiations and drafting of the Agreement. Absent a determination that the Agreement did not pass muster from the perspective of absent class members, which will be determined at the fairness hearing with reference to the non-exhaustive nine *Girsh* factors, *Girsh v. Jepson,* 521 F.2d 153 (3d Cir.1975), the only contingency left open in the Agreement, it was and is binding on the parties. If the Court would vacate its previous Order and effectively rescind the Agreement, absent class members would have no recovery given the inevitable motion to dismiss that would follow judicial rescission of the Agreement. Therefore, the Court has no hesitancy in affirming the Agreement as being in the best interests of the class, subject to the fairness hearing and determination of reasonableness and adequacy of the settlement to the class.

Viewed in this light, and mindful that if the Court would vacate its previous Order and effectively rescind the Agreement, absent class members would have no recovery given the inevitable motion to dismiss that would follow judicial rescission of the Agreement, the Court has no hesitancy in affirming the Agreement as being in the best interests of the class, and therefore in granting plaintiff's Motion for Final Approval.

D. Standing and Jurisdiction.

1. Framing the Issue.

***10** Defendant argues that plaintiff has no standing to pursue the claims that Congress has now eliminated as a FACTA cause of action for suits commenced before and after its effective date. Plaintiff counters that defendant confuses jurisdiction and standing with the merits, and that the amendment merely provides a defense on the merits, without depriving the Court of jurisdiction. Both arguments are somewhat off target. The real question in this case is whether Congress's amendment to FACTA moots plaintiff's case, which is not entirely a "merits" question and which does have jurisprudential aspects to it.

Thus, the issue is not whether plaintiff has "standing" to bring the FACTA claim before this Court; clearly he had standing at the commencement of the suit, which (as seen below) is the point at which a plaintiff's standing is assessed. Subsequent changes do not divest the Court of jurisdiction over claims brought by a party who possessed the requisite personal stake in the outcome at the outset. See e.g., *Felice v. Sever,* 985 F.2d 1221, 1225 (3d Cir.1993) (rejecting defendant's argument that the district court lost subject matter jurisdiction when it dismissed his civil rights claim and plaintiff abandoned his claim for breach of the duty of fair representation under federal law, stating: "The fact that the federal claims that were the basis for the removal were unsuccessful or were dropped during subsequent proceedings does not deprive the district court of jurisdiction, unless the federal claims were 'insubstantial on their face.' "), quoting *Hagans v. Lavine,* 415 U.S. 528, 542 n. 10, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Herero People's Reparations Corp. v. Deutsche Bank, A.G.,* 370 F.3d 1192, 1195 (D.C.Cir.2004) (after removal, plaintiff sought to disclaim reliance on federal Alien Tort Act, but "a plaintiff's change in legal theory cannot defeat jurisdiction if a federal question appeared on the face of the complaint."). Even where all federal claims are dismissed before trial, the district court retains jurisdiction to hear remaining state law claims, although in the exercise of discretion, it should usually decline to exercise its jurisdiction to hear such claims absent extraordinary circumstances. See e.g., *Hedges v. Musco,* 204 F.3d 109, 123 (3d Cir.2000) (where the "claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so.") (internal quotation marks and citation omitted); *Shaffer v. Board of Sch. Directors of Albert Gallatin Area Sch. Dist.,* 730 F.2d 910, 912 (3d Cir.1984) ("We have held that pendent jurisdiction should be declined where the federal claims are no longer viable, absent 'extraordinary circumstances.' ") (citation omitted).

2. Justiciability Generally.

Federal courts are courts of limited, not general

jurisdiction. See *Mansfield, C. & L.M. Ry. Co. v. Swan,* 111 U.S. 379, 383, 4 S.Ct. 510, 28 L.Ed. 462 (1884).Article III of the Constitution restricts the "judicial power" of the United States to the resolution of "cases" and "controversies." *Arizonans for Official English v. Arizona,* 520 U.S. 43, 64, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 471, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). The case and controversy restriction requires that "a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit." *Arizonans for Official English,* 520 U.S. at 64.

***11** Standing has both constitutional and prudential components, both of which must be satisfied before a litigant may seek redress in the federal courts. *Id.; Wheeler v. Travelers Ins. Co.,* 22 F.3d 534, 537 (3d Cir.1994). This Article III restriction requires at the outset that the party invoking federal jurisdiction have standing-the "personal interest that must exist *at the commencement of the litigation."* *Friends of Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (emphasis added; internal quotation marks omitted). But it is not enough that the requisite interest exist at the outset of the lawsuit-to "qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English,* 520 U.S. at 67.

As the United States Court of Appeals for the Third Circuit explained in *Federal Kemper Ins. Co. v. Rauscher,* 807 F.2d 345, 350 (3d Cir.1986):

> The judicial authority of the federal courts is defined, in part, by the Article III, § 2 requirement that each case before the courts must involve a "case" or "controversy." This constitutional phrase has been judicially interpreted many times resulting in the development of the related doctrines of justiciability. These include, among other things, the concepts of mootness, political question-and most important to us in this case-standing to litigate. Underlying all of these doctrines is the concern that the exercise of judicial authority must be properly limited in a democratic society. *Allen v. Wright,* 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

(parallel citations omitted).

" 'All of the doctrines that cluster about Article III-not only standing but mootness, ripeness, political question, and the like-relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen,* 468 U.S. at 750, quoting *Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-1179 (D.C.Cir.1982) (Bork, J., concurring). The question of standing "bears close affinity" to the question of mootness, as both involve the consideration of whether an Article III case or controversy exists. *Ruocchio v. United Transp. Union, Local 60,* 181 F.3d 376, 385 n. 11 (3d Cir.1999), citing *Warth,* 422 U.S. at 498-99. "Mootness has been described as 'the doctrine of standing set in a time frame. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' " *Arizonans for Official English,* 520 U.S. at 68, n. 22.[FN2]

> FN2. See also *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (explaining that "mootness [is] the 'doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' "), quoting Henry Monaghan, *Constitutional Adjudication: The Who and When,* 82 Yale L.J. 1363, 1384 (1973); *Daimler Chrysler Corp. v. Cuno,* 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does.") (citations omitted); *Johnson v. Board of Regents of University of Georgia,* 263 F.3d 1234 (11th Cir.2001) ("A party's standing to sue is generally measured at the time the complaint is filed; the effect of subsequent events generally is analyzed under mootness

> standards."); Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure, ("Wright & Miller"), Jurisdiction & Related Matters, vol. 13, § 3531 (2d ed.) (standing "focuses ... on the nature of the injuries that justify the risks of judicial decision. Ripeness and mootness focus more on the questions whether the injury has yet become mature, or has vanished into the past.... Both ripeness and mootness, indeed, could be seen as providing time-bound perspectives on the injury inquiry of standing.").

As the United States Court of Appeals for the Third Circuit explained in *Bass v. Butler,* 238 Fed.Appx. 773, 775-76 (3d Cir.2007):

> ***12** Standing inquires whether "someone is the proper party to bring a lawsuit at the beginning of the case." *Artway v. Attorney Gen. of N.J.,* 81 F.3d 1235, 1246 (3d Cir.1996)."The three elements necessary to establish the irreducible constitutional minimum of standing are: (1) the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there is a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Taliaferro v. Darby Twp. Zoning Bd.,* 458 F.3d 181, 188 (3d Cir.2006) (citing *United States v. Hays,* 515 U.S. 737, 742-43, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995)).
>
> Mootness has been described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence (mootness)." *Rosetti v. Shalala,* 12 F.3d 1216, 1224 n. 19 (3d Cir.1993) (citation omitted)."A central question in determining mootness is whether a change in the circumstances since the beginning of the litigation precludes any occasion for meaningful relief." *Surrick v. Killion,* 449 F.3d 520, 526 (3d Cir.2006) (citation omitted).

See also *Danvers Motor Co., Inc. v. Ford Motor Co.,* 432 F.3d 286 (3d Cir.2005).

3. Standing.

Generally, standing doctrine is "employed to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct the litigant advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself."Wright & Miller, vol. 13, § 3531 (2d ed.). Standing is a jurisdictional requirement, *Storino v. Borough of Point Pleasant Beach,* 322 F.3d 293, 295 (3d Cir.2003), and is a "threshold question in every federal case." *Wheeler,* 22 F.3d at 537, quoting *Warth,* 422 U.S. at 498.

As the Court of Appeals for the Third Circuit explained, the "standing requirement implicit in Article III is not merely a troublesome hurdle to be overcome if possible so as to reach the merits of a lawsuit, but an integral part of the governmental charter established by the Constitution.... If plaintiffs do not possess Article III standing, both the District Court and this Court lack subject matter jurisdiction to address the merits of plaintiffs' case." *ACLU-NJ v. Township of Wall,* 246 F.3d 258, 261 (3d Cir.2001), quoting *Valley Forge Christian College,* 454 U.S. at 476 (additional citations and internal quotation marks omitted)."Plaintiffs bear the burden of proving standing." *Storino v. Borough of Point Pleasant Beach,* 322 F.3d 293, 296 (3d Cir.2003). The concepts employed in the standing analysis, whether constitutional or prudential are, of course, "not susceptible of precise definition" and "cannot be defined so as to make application of the ... standing requirement a mechanical exercise." *Allen,* 468 U.S. at 751.

***13** A "legally and judicially cognizable" injury-in-fact must be "distinct and palpable," not "abstract or conjectural or hypothetical." *Raines v. Byrd,* 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). While it is difficult to reduce injury-in-fact to a simple formula, economic injury is one of its paradigmatic forms. See *San Diego County Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1130 (9th Cir.1996) ("Economic injury is clearly a sufficient basis for standing."). However, "[i]njury-in-fact is not Mount Everest." *Danvers Motor Co.,* 432 F.3d at 294, citing *Bowman v. Wilson,* 672 F.2d 1145, 1151 (3d Cir.1982) ("The contours of the injury-in-fact requirement, while not precisely defined, are very

generous," requiring only that claimant allege "some specific, 'identifiable trifle' of injury").

4. Mootness.

In a sense, a mootness inquiry asks whether a claimant's standing continues throughout the litigation. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack,* 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). See also *Donovan ex. rel. Donovan v. Punxsutawney Area School Bd.,* 336 F.3d 211, 216 (3d Cir.2003) (citation omitted) (same). Mootness doctrine "encompasses the circumstances that destroy the justiciability of a suit previously suitable for determination. It is not enough that the initial requirements of standing and ripeness have been satisfied; the suit must remain alive throughout the course of litigation, to the moment of final appellate disposition.... Perhaps as a consequence of adversary litigiousness and crowded dockets, a startling number of cases can be found dealing with the problems of mootness that arise as events overtake the pace of decision. These problems often require a highly individualistic, and usually intuitive, appraisal of the facts of each case. The central question nonetheless is constant-whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties."Wright & Miller, vol. 13, § 3533. "Some of the easiest mootness principles apply to cases in which the plaintiff abandons the quest for relief, or obtains relief by settlement....*Id.*"Settlement moots an action, although of course jurisdiction remains to enter a consent judgment. As with other questions arising out of settlements, mootness questions should be answered according to the intent of the parties and more general contract principles. Acts that reflect composition of the underlying dispute can moot an action even without a formal settlement agreement."*Id.* at § 3353.2.

"The concept of mootness encompasses both constitutional principles under Article III, and jurisprudential policy considerations. With regard to the latter, it is entirely proper for a court to focus on its present ability to provide any meaningful remedy in light of changed circumstances relating to the case." *Kirby v. U.S. Government, Dept. of Hous. & Urban Dev.,* 745 F.2d 204, 208 (3d Cir.1984). The main question in determining mootness "is whether a change in circumstances since the beginning of the litigation precludes any occasion for meaningful relief." *Old Bridge Owners Coop. Corp. v. Tsp. of Old Bridge,* 246 F.3d 310, 314 (3d Cir.2001).

***14** "The United States Supreme Court sets a high threshold for judging a case moot. An appeal is moot in the constitutional sense only if events have taken place that make it "impossible for the court to grant any effectual relief whatever." *Church of Scientology of Cal. v. United States,* 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (citation omitted). An appeal is not moot "merely because a court cannot restore the parties to the status quo ante [the state in which it was before]. Rather, when a court can fashion some form of meaningful relief, even if it only partially redresses the grievances of the prevailing party, the appeal is not moot." *In re Continental Airlines,* 91 F.3d 553, 558 (3d Cir.1996) (en banc) ("Continental I") (citations and quotation marks omitted)." *United Artists Theatre Co. v. Walton,* 315 F.3d 217, 226 (3d Cir.2003). If "developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be dismissed as moot.' " *County of Morris v. Nationalist Movement,* 273 F.3d 527, 533 (3d Cir.2001), quoting *Blanciak v. Allegheny Ludlum Corp.,* 77 F.3d 690, 698-99 (3d Cir.1996)).

The FACTA amendment certainly has not eliminated plaintiff's personal stake in the outcome of the litigation, nor does it purport to prevent a court from being able to provide relief in the form of a judgment pursuant to a legally enforceable settlement. It is the settlement that has made the merits and resolution of plaintiff's legal claims moot, if anything, and the settlement preceded the Credit and Debit Card Receipt Clarification Act of 2007. Assuming the Court finds the settlement fair, adequate and reasonable to absent class members, the Court can grant complete relief in this case, judgment on the Agreement. Thus, the FACTA amendment does not deprive plaintiffs of standing to enforce the settlement, does not render the settlement moot, and does not divest this Court of jurisdiction.

IV. Conclusion.

For the foregoing reasons, defendant's motion to vacate will be denied. An appropriate Order will follow.

W.D.Pa.,2008.
Hughes v. InMotion Entertainment
Slip Copy, 2008 WL 3889725 (W.D.Pa.)

END OF DOCUMENT

TAB 9

SHAWN LENAHAN and JOSEPH KAPCSOS, et al., Plaintiffs, v. SEARS, ROEBUCK and Co., Defendants.

Civ. No. 02-0045

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2006 U.S. Dist. LEXIS 60307

July 10, 2006, Decided

NOTICE: [*1] NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Affirmed by *Lenahan v. Sears, Roebuck and Co., 2008 U.S. App. LEXIS 3798 (3d Cir. N.J., Feb. 21, 2008)*

COUNSEL: For SHAWN LENAHAN, JOSEPH KAPCSOS, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs: GABRIEL H. HALPERN, WILLIAM J. PINILIS, PINILIS HALPERN, LLP, MORRISTOWN, NJ.

For SEARS, ROEBUCK AND CO., Defendant: KEVIN RICHARD GARDNER, CONNELL, FOLEY LLP, ROSELAND, NJ.

JUDGES: Stanley R. Chesler, U.S.D.J.

OPINION BY: Stanley R. Chesler

OPINION

CHESLER, U.S. District Court Judge

THIS MATTER comes before the Court upon the motion of Plaintiffs, Shawn Lenahan, Joseph Kapcsos, Carlos DeSoto and Mike Banta, individually and on behalf of the classes they represent and on behalf of all In-Home Service Technicians similarly situated (collectively "Plaintiffs") for an Order Certifying the Settlement Classes, Granting Incentive Awards to the named Plaintiffs, and Granting Final Approval of the Stipulation and Settlement Agreement entered into between Plaintiffs and Sears. For the reasons set forth below, this Court will **GRANT** Plaintiffs' Motions.

I. GENERAL BACKGROUND

Sears is a retailer of apparel, home and automotive products and services. In addition, Sears operates a Product Repair Services Division ("PRS") which is responsible for [*2] the service and repair of its appliances such as lawnmowers, dishwashers and air conditioners. Within the PRS Division, is an In-Home Service Group which is responsible for product repair in customers' homes. In November, 2001, Sears implemented the Home Dispatch Program ("HDP") for service technicians, replacing their former "call first" procedure. The implementation of the HDP was the motivation for Plaintiffs' filing of the instant lawsuit.

A. The "Call First" Procedure

Under the "call first" procedure, Sears provided service technicians with a Sears-owned van to use for their personal commute to and from work. If a technician chose to use the Sears van, Sears paid for all expenses associated with the vehicle including gas, maintenance and insurance.

Under the "call first" procedure technicians would report to their respective units in the morning at a scheduled time. Most technicians commuted from home to the unit in their Sears-owned van; others used their own cars or public transportation. Technicians were not paid for their commute time to the unit regardless of their method of transportation. Payable time began once the technicians arrived at their unit and punched [*3] in on their Hand Held Terminals ("HHT").

At their unit, technicians would call customers on his/her schedule and set expected arrival times for each service call. In addition, when necessary, the technician would restock his van with parts, dispose of garbage and hazardous waste, submit cash payments received from the prior day's customers, and exchange uniforms. From there, the technician would depart to his first call, typically arriving between 9:30 a.m. - 10:00 a.m. At the end of the day, the technician drove directly home from his/her last call and would "punch out" on the HHT [1].

1 During March and April of 2003, the HHT was replaced with a new laptop computer called the SST.

B. The Home Dispatch Program

The "call first" program was discontinued on November 14, 2001 when Sears initiated its Home Dispatch Program ("HDP"). The HDP allowed technicians to go directly from their homes to their first call of the day. Those who participated in the HDP would continue to use Sears' van for commuting [*4] purposes, but would now commute directly from their homes to the first customer in the morning, and directly home from the last customer in the evening. Those who chose not to participate in the HDP would commute to and from their home to their assigned unit, or another location where the van was kept. The policies and instructions for the HDP were set out in an In-Home Technician Process Manual [2] ("Manual"). (Sears Ex. A.) This Manual and its provisions apply to all technicians nationwide. (Sears Ex. B.)

2 The Manual is now called the In-Home SST Technician Manual.

Technicians participating in the HDP received their daily customer call assignments on their SSTs. These assignments were transmitted overnight electronically from Sears' mainframe computer to the technicians' SSTs at their homes. In the morning, technicians would log onto their SST to view the location of their first service call for the day. The process of logging onto the SST and viewing customer call assignments has been measured by Sears to [*5] take between 40 and 79 seconds depending on the model of SST and the type of connection to Sears' mainframe.

If an overnight transmission of assignments is not completed, the technician must perform a "manual upload/download" to receive the assignments. This process has been measured to take approximately 22 seconds. If the manual upload/download is not successful, the technician must trouble shoot the problem and/or call the Sears SST help desk, or a manager for assistance in receiving the day's assignments. Sears instructs technicians that if this happens, and the technician is required to spend some time trouble shooting and seeking help, the technician is to fill out and submit a payroll correction form to be compensated for this time. (Sears Ex. A § 2.2.)

Once the technician has received the day's assignments, he is instructed to turn off the SST and place it in its power cradle in the Sears' owned van. Technicians then use the van to drive from their home to the first customer of the day, and to continue throughout the day on their customer call routes. They record call details and communicate with managers on their SSTs. At the end of the day, technicians participating in [*6] the HDP prepare the necessary paperwork, drive home in the Sears van, remove the SST from the van, and plug it into electrical and telephone outlets in their home to receive the overnight transmission of the next day's assignments.

Commuting time for participating technicians is unpaid, both at the beginning and end of the day, unless it exceeds "normal commute time" which was set at 35 minutes for all districts. Customer service calls were now scheduled by customer care network associates rather than the technicians themselves, and replacements for truck stock parts were shipped to the technician's home. Under the HDP, technicians are compensated for all morning and evening commute time in excess of 35 minutes, as well as all time spent repairing appliances, traveling between customer calls and performing other work-related activities during the work day.

C. Plaintiffs' Claims

Plaintiffs Shawn Lenahan and Joseph Kapcsos, former and current Sears technicians respectively, brought this purported class action alleging that Sears' HDP violates the Fair Labor Standards Act ("FLSA"), *29 U.S.C. § 201, et seq.* and the Wage and Hour Law of the State of [*7] New Jersey, *N.J.S.A., 34:11-56a et seq.* The settlement before this Court has its genesis in three additional pending class action lawsuits brought by Sears' technicians: (1) Desoto, et al. v. Sears, Roebuck and Co., No. RG03-096692 (Alameda County, California Superior Court); (2) Caiarelli, et al. v. Sears Roebuck and Co., No. GD 03-001735 (Court of Common Pleas for Allegheny County, Pennsylvania); and (3) Winter, et al. v. Sears Roebuck and Co., No. 05-2-33313-8MCH (Superior Court of King County, Washington). Each case asserts essentially the same claims, namely that the HDP violates federal and/or state wage and hours laws by: (1) failing to compensate technicians for the morning and evening commute; (2) requiring or permitting the technicians to perform uncompensated "off the clock" work and (3) failing to pay for all work performed in excess of forty hours in a work week at the applicable overtime rate.

D. Procedural History

The Complaint in this matter was filed on January 2, 2002. After approximately 18 months of discovery, Plaintiffs filed a motion for partial summary judgment on June 27, 2003. (Docket Item # 48.) On the same day, Defendants also [*8] filed a motion for summary judgment. (Docket Item # 50.)

Settlement discussions began in the Fall of 2003. (Schneider-King Decl. P 40.) The parties attended settlement conferences with Magistrate Judge Tonianne Bongiovanni on September 18, October 10, and November 18, 2003. (Id. P 41.) No settlement was reached at that time.

On or about December 30, 2003 this case was referred to mediation by an Order of Magistrate Judge Bongiovanni and the case was stayed. The parties attended mediation sessions before the Honorable Nicholas H. Politan (ret.) on January 22, 2004 and March 1, 2004. The parties notified the Court on March 30, 2004 that, despite good faith efforts, no settlement had been reached. On April 13, 2004, Magistrate Judge Bongiovanni issued a Stipulation and Order reinstating the pending motions. (Docket Item # 72.) On May 13 and May 24, 2004, the parties in *Lenahan* attended settlement conferences with this Court, and again, were unable to reach a settlement. (Schneider-King Decl. P 44.)

On September 17, 2004, Plaintiffs filed a motion for equitable tolling of the statute of limitations. (Docket Item # 74.) On January 13, 2005, the parties in both the *Lenahan* [*9] and *DeSoto* actions attended another mediation session with the Honorable Nicholas Politan in an attempt to find a nationwide resolution of all wage and hour claims against Sears. (Schneider-King Decl. P 46.) Over the course of the next several months the parties engaged in significant negotiations via telephonic conferences and additional conversations with Judge Politan. (Id. P 53.) On May 16, 2005, during a telephonic status conference, the parties informed the Court that they had reached a tentative settlement. That same day, the Court issued an Order withdrawing all of the parties' pending motions. (Docket Item # 87.)

On or about October 19, 2005, the parties submitted a joint motion for preliminary approval of their settlement and a joint motion to certify the class. (Docket Item # 92.) On November 2, 2005, the *Winters* and *Caiarelli* plaintiffs filed a motion to intervene for the purpose of opposing the proposed class settlement, and to continue the preliminary approval hearing. (Docket Items # 95, 97.)

E. Preliminary Approval of the Settlement

The *Lenahan* and *DeSoto* Plaintiffs and Sears negotiated a Stipulation and Settlement Agreement ("Settlement"), [*10] individually and on behalf of the classes they represent and on behalf of all others similarly situated, which settles and compromises all claims asserted with respect to the operation of the HDP. The settlement includes all claims in the *Lenahan, DeSoto, Caiarelli* and *Winter* lawsuits, and all claims nationwide arising from or related to these suits. (Stipulation and Settlement Agreement, Sears Ex. C.)

This Court held a preliminary approval hearing on November 10, 2005, at which time the Court granted preliminary approval to the parties' nationwide settlement. [3] The Court also provisionally certified three classes for settlement purposes:

> . Class One (State Law Class for California, New Jersey, Pennsylvania and Washington State Law Claims): All persons who were, are or will be employed by Sears and have or will have participated in the HDP as technicians in the States of New Jersey, California, Pennsylvania and Washington ("Class One") during the period from the commencement of the HDP through the date of the Preliminary Approval Order.
>
> . Class Two (State Law Class for Other State Law Claims): All persons who were, are or will be employed by Sears and [*11] have or will have participated in the HDP as technicians in the following states ("Class Two"), during the period from the commencement of the HDP through the date of the Preliminary Approval Order: Alaska, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Vermont, Virginia, West Virginia, Wisconsin and Wyoming.
>
> . Class Three (FLSA claims): All persons who are not members of Class One or Class Two and who were, are or who will be employed by Sears and have or will have participated in the HDP as technicians during the period November 10, 2002 through November 10, 2005 or whose employment terminated but who

filed a consent to join in *Lenahan et al. v. Sears, Roebuck and Co.*

Additionally, the Court appointed the *Lenahan* and *DeSoto* Plaintiffs as Class Representatives and the *Lenahan* and *DeSoto* Plaintiffs' attorneys as Class Counsel. Class Representatives were granted leave to, and [*12] have subsequently filed, an Amended Class and Collective Action Complaint in *Lenahan* asserting both federal and state wage and hour claims on behalf of a nationwide class of Sears' technicians.

3 The Court preliminarily approved the settlement by an Order dated November 10, 2005. Subsequently, the Court issued a Consent Order amending the preliminary approval dated December 22, 2005. (Docket Item # 110.)

The Amended Complaint encompasses all claims by the *Lenahan, DeSoto, Caiarelli,* and *Winters* lawsuits and seeks certification of Settlement Classes of present and former Sears technicians nationwide asserting (a) claims under the FLSA as a "collective action" pursuant to *29 U.S.C. § 216(b)* and *(b)* claims under the applicable wage and hour laws of the various states pursuant to this Court's supplemental jurisdiction under *28 U.S.C. § 1367(a)*.

F. The Proposed Settlement

Under the Proposed Settlement, Sears is required to pay fifteen million [*13] dollars ("Gross Settlement Amount"). (Sears Ex. C at 8.) Class counsel will seek no more than thirty percent of the Gross Settlement Amount for attorneys fees plus costs incurred in connection with the instant litigation. The costs and fees will include all attorneys' fees and costs incurred by counsel for the *Caiarelli* and *Winter* Plaintiffs. (Id.) An incentive award of $ 2,500.00 will be paid to each of the four named Plaintiffs in the *Lenahan* and *DeSoto* actions, as well as all named Plaintiffs in the *Caiarelli* and *Winter* actions, except those who opted out of the settlement.

The Net Settlement Amount will be distributed to Settlement Class members based upon their number of compensable workweeks as calculated by the Settlement Administrator. Each week for class members in Class One will be weighted at 1.5 compensable work week under the formula. Work weeks for members of Class Two and Three will be weighted at 1.0 compensable workweek.

After calculation of individual class member workweeks, the total number of compensable workweeks will be calculated by adding together the individual class member workweeks ("Total Class Members Workweeks"). The dollars [*14] payable for compensable workweeks will be calculated by dividing the Total Class Members Workweeks into the Net Settlement Amount. Dollars payable for compensable workweeks will then be multiplied by the number of individual class member workweeks worked by each settlement class member (the "Claim Share").

Additionally, Sears will distribute to all incumbent technicians an election form on which each technician will choose whether or not he or she agrees to participate in the HDP on the terms and conditions specified on the form. Sears will also notify all technicians in writing that: (1) the only activities technicians are to perform under the HDP prior to starting their route and compensable workday, are to log onto the SST and determine the location of the first customer call of the day, place unopened boxes of truck stock replenishment parts in the van, as necessary, and to place the SST in the service van and commute to the first customer of the day; (2) the only activities technicians are to perform under the HDP after ending their route and compensable workday are to commute home, remove the SST from the service van and plug it into the telephone and power lines at home, and [*15] replenish unopened service parts if it is more convenient to do so at night; and (3) technicians are to submit solar time keeping correction forms to be compensated for time spent prior to starting their route or after ending their route in the performance of other activities directed by Sears under the HDP. (Sears' Ex. C., 16.)

G. Notice to Class Members

On January 13, 2006, the court-approved Settlement Administrator mailed notice to the 16,252 members of the settlement class, based upon a list provided by Sears. The notice informed Class members of the terms of the Settlement, the plan of distribution of the settlement proceeds and that Plaintiffs' counsel would apply for an award of attorneys' fees of up to 30% of the Settlement Fund along with reimbursement of costs and expenses. The notice provided that any opt outs, objections, or claims had to be filed by March 16, 2006.

As of April 6, 2006, the Settlement Administrator had received 190 opt-outs and six objections to the settlement. On March 22, 2006, a brief stating objections to the Proposed Settlement was filed with the Court by four objectors, Dean Winter, Vern Sailand, Tehron Harmison and Bernaldo Mora, four [*16] of the *Winter* plaintiffs ("*Winter* objectors"). One member of the *Cairelli* class [4] submitted objections to the Proposed Settlement ("Pennsylvania objector"). The Court also received an objection to the Proposed Settlement from James S. Reist, a current Sears Technician from Wisconsin. As of April 6, 2006,

the Settlement Administrator had received 7,576 claim forms.

> 4 The Brief containing objections to the Proposed Settlement was filed by a Sears technician in Pennsylvania who would otherwise be a member of the class sought to be certified in the *Caiarelli* case.

Winter objectors argue that Class notice was misleading and failed to satisfy due process. (Winter Br. 26.) The notice described all four pending class actions and then stated that, "Plaintiffs and Sears engaged in settlement discussions . . . [and have] reached an agreement to settle the claims raised by Plaintiffs for a settlement fund of $ 15 million. . . ." (Dale Cert., Ex. 1.) The *Winter* objectors contend that because the [*17] terms "Plaintiffs" and "parties" are never defined, the notice implies that these terms include plaintiffs and parties from all four lawsuits.

Objectors also contend that the subsequent paragraph referencing opinions of "Class counsel" on the strengths and weaknesses of the case is likewise misleading. (Winter Br. 26.) Objectors contend that a class member from Washington of Pennsylvania may misinterpret the notice as stating that counsel for all four actions endorse the settlement.

To satisfy due process, notice must be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re Cendant Corp. Sec. Litig., 109 F. Supp. 2d. 235, 254 (D.N.J. 2000)*. This standard is met if the notice informs class members concerning: (1) the nature of the litigation; (2) the general terms of the settlement; (3) where complete information can be located; and (4) the time and place of the fairness hearing and that objectors may be heard. *Id.* Here, the Class notice complied with each of these requirements. (Dale Cert., Ex. 1.)

The Class notice adequately informs class [*18] members of the claims encompassed by the Proposed Settlement and lists all four pending actions which are included. Likewise, the notice provides class members with information about the settlement, the rights and benefits of the respective classes, where to obtain more information, and details on the final fairness hearing. (Id.) Objectors' contention that notice was misleading does not convince this Court that the Class notice violated due process. In fact, the introduction paragraph of the Class notice specifically states that "[a] settlement has been reached between plaintiffs and Sears, Roebuck and Co. in *Lenahan, et al. v. Sears, Roebuck and Co.,* pending in the United States District Court, District of New Jersey. . . ." (Id.) Although objectors contend that later, the notice is unclear regarding who, in fact, negotiated the settlement, the Court finds the introductory paragraph clear and the Class notice to be adequate.

II. DISCUSSION

A. Class Certification

This Court preliminarily certified this Class for settlement purposes in the Preliminary Approval Order. *Rule 23 of the Federal Rules of Civil Procedure* allows this Court to certify a class [*19] for settlement purposes only. *In re Prudential Ins. Co. of Am. Sales Practices Litig. ("Prudential I"), 962 F. Supp. 450, 508 (D.N.J. 1997)*. A settlement class is "a device whereby the court postpones the formal certification procedure until the parties have successfully negotiated a settlement, thus allowing a defendant to explore settlement without conceding any of its arguments against certification." *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig., 55 F.3d 768, 786 (3d Cir. 1995)* ("General Motors"). When certifying a settlement class, courts must follow the general requirements of *Rule 23* and, therefore, "a settlement class must satisfy the *Rule 23(a)* requirements of numerosity, commonality, typicality, and adequacy of representation and the *Rule 23(b)* requirements." *Prudential I, 962 F. Supp. at 508*. Additionally, where, as here, a settlement class is sought to be certified under *Rule 23(b)(3)*, the class must satisfy the Rule's superiority and predominance requirements.

This Court provisionally certified three classes for settlement purposes in its Preliminary Approval Order. This Court [*20] must find that Classes One and Two [5] meet the requirements of *Rule 23(a)* and *(b)* and that class certification remains appropriate.

> 5 Class Three raises only FLSA claims and has been conditionally certified as a collective action pursuant to *29 U.S.C. § 216(b)*. In the Preliminary Approval Order, this Court determined that all technicians were "similarly situated," with respect to the nationwide implementation of Sears' HDP, within the meaning of *§ 216(b)*. No objection has been filed for decertification or challenging that finding.

1. Rule 23 Class Certification Requirements Are Satisfied [6]

i. Numerosity

Rule 23(a)(1) provides that a class action may be maintained only if "the class is so numerous that joinder of all members is impracticable." The numerosity requirement of *Rule 23(b)(1)* does not require joinder to be impossible. "To meet the numerosity requirement, class representatives must demonstrate only that 'common

sense' suggests that it would be difficult or inconvenient [*21] to join all class members." *Prudential I, 962 F. Supp. at 510* (citing *Lerch v. Citizens First Bancorp, Inc., 144 F.R.D. 247, 250 (D.N.J. 1992))*.

> 6 The Court received no objections to the requirements of *Rule 23* as to numerosity, commonality, typicality, adequacy of representation, predominance or superiority.

When dealing with a class that numbers in the hundreds, joinder will most often be impracticable. See Newberg on Class Actions (4th Ed. 2002) § 305 (class of 40 or more raises presumption that numerosity requirement met). Here, the proposed classes each contain more than 4,000 members who were employed by Sears during the appropriate liability period. *Rule 23(a)(1)* is therefore satisfied.

ii. Commonality and Predominance

Rule 23(a)(2) requires there be "questions of law or fact common to the class." *Rule 23(b)(3)* requires that these common issues of law or fact "predominate over any questions affecting only individual members." The predominance requirement of [*22] *Rule 23(b)(3)* is a more exacting standard and, therefore, incorporates the *Rule 23(a)* commonality analysis. See *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 528 (3d. Cir. 2004)*. Accordingly, the two factors are commonly considered together. See Id; see also *In re LifeUSA Holding, Inc., 242 F.3d 136, 144 (3d. Cir. 2001)*; *Prudential I, 962 F. Supp. at 510*.

The commonality requirement of *Rule 23(a)(2)* is satisfied if there is at least one question of fact or law common to the class. See *In re Baby Neal, 43 F.3d 48, 56 (3d Cir. 1994)*. Here, the commonality requirement is met because the federal and state claims asserted with respect to Sears' nationwide HDP present common operative facts and common questions of law, namely: (1) whether Sears failed to compensate technicians for time spent in their morning and evening commutes to the first customer of the day and back home from the last customer of the day, respectively, for which they should have been paid; and (2) whether Sears required technicians to perform uncompensated incidental activities at home and elsewhere for which they should have been paid. (Am. [*23] Class Action Compl. PP 25-34.)

For the class to be certified under *Rule 23(b)(3)*, which the parties are seeking here, this Court must also find that these common questions predominate over individual issues. "To evaluate predominance, the Court must determine whether the efficiencies gained by class resolution of the common issues are outweighed by individual issues presented for adjudication." *Prudential I, 962 F. Supp. at 510-11*. At the core of this settlement is the nature of Sears' HDP and what it specifically requires of individual Sears Technicians. Each class member shares a similar legal question: whether the alleged failure to pay for all hours worked by Technicians under the HDP violated the applicable state wage and hour laws. The common questions shared by class members predominate over any factual variations regarding individual technicians claims, such as the length of their commute or hourly wage. These individual issues affect only the technician's potential damages, but not the nature or legal basis of class claims. See *Prudential I, 962 F. Supp. at 517* ("Individual damages issues do not defeat an otherwise valid class certification [*24] attempt"); *Baby Neal, 43 F.3d at 57* (same).

Similarly, variations between the wage and hour laws of different states are not sufficient to defeat predominance for a settlement class. See *Warfarin, 391 F.3d at 529-30*; *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions) ("Prudential II"), 148 F.3d 283, 313-315 (3d Cir. 1998)*. Certification of litigation classes with claims arising under the laws of several states requires a court to determine whether such state law variations render class action litigation unmanageable. See *In re Sch. Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986)*. These concerns of case manageability, however, are not present in the context of a class being certified for settlement purposes only. See *Warfarin, 391 F.3d at 529* ("when dealing with variations in state laws, the same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes"); *Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. Here, the class is not being certified for litigation purposes, thus, as in *Prudential,* [*25] predominance is not defeated by variations in the laws of the fifty states.

iii. Typicality

Rule 23 also requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *FED. R. CIV. PRO. 23(a)(3)*. "Typicality lies where there is a strong similarity of legal theories or where the claims of the class representatives and class members arise from the same alleged course of conduct by the defendant." *Prudential I, 962 F. Supp. at 518* (citations omitted.) Thus, even where there may be factual differences between the claims of the class representatives and other class members, it does not rule out a finding of typicality. *In re Lucent Technologies, Inc., Sec. Litig., 307 F. Supp. 2d 633, 640 (D.N.J. 2004)* (citing *Prudential II, 148 F.3d at 310*). Here, the same allegedly unlawful conduct affected both the named Plaintiffs and the putative class members, namely Sears' HDP. Both the named Plaintiffs and the class members have alleged that Sears' failure to compensate Technicians for

work at home and travel time violated the applicable state and federal wage and hour laws. Accordingly, [*26] this Court finds the typicality requirement of *Rule 23(a)(3)* is also satisfied.

iv. Adequacy of Representation

Rule 23(a)(4) requires that the "representative parties fairly and adequately represent the interests of the class." *F.R.C.P. 23(a)(4)*. To determine whether a class is adequately represented, courts look to two factors: "(1) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (2) the plaintiff must not have interests antagonistic to those of the class." *Prudential I, 962 F. Supp. at 519*. Those standards are met here.

Named Plaintiffs and their counsel have prosecuted this action vigorously on behalf of the class. Plaintiffs' counsel are experienced in this area and have prosecuted a number of class action lawsuits in the employment and overtime wage context. (Schneider-King Decl., P 70, 91.) Furthermore, under the proposed settlement, all class members who submit timely claims, including the named Plaintiffs, will receive a pro-rata portion of the settlement fund based on the number of weeks they worked as Technicians during the relevant time frame. As such, there is no conflict of interest [*27] in the settlement allocations [7]. Accordingly, the Court is satisfied that the *Rule 23(a)(4)* requirement of adequate representation is met.

> 7 In addition, each named Plaintiff will receive a $ 2,500 incentive award. These awards, however, constitute a small fraction of the total $ 15,000,000 settlement fund. Additionally, after adequate notice and an opportunity to object, no class members objected to the incentive payments to the named Plaintiffs.

v. Superiority

Rule 23(b)(3) requires that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy." The Rule provides the Court with four non-exclusive factors to aid in this determination: (1) the interest of members of the class in individually controlling the litigation of separate claims; (2) the extent to which litigation concerning the current controversy had already been commenced by members of the class; (3) the desirability of concentrating claims in a given forum; and (4) difficulties in [*28] management of the litigation if pursued as a class action. *FED. R. CIV. PRO. 23(b)(3)(A)-(D)*.

Here, the Court finds a settlement class action to be the superior method for litigation of these claims. The size and scope of this class weighs in favor of class certification. "As the case becomes larger and more geographically dispersed, the traditional alternatives of joinder, consolidation, and intervention will be impracticable." *Prudential I, 962 F. Supp. at 523* (citing 1 Newberg § 4.33, at 4-136 to 4-137). This settlement class involves Sears Technicians nationwide, and, therefore, traditional methods of joinder and consolidation are impracticable. Additionally, in this case, the amount of recovery that each class member will receive is relatively modest, leaving individual class members with minimal incentive and little ability to litigate their claims against Sears independently. The alternative to class action litigation is for individual Technicians to bring multiple, individual lawsuits for their small amount of damages. This alternative would be uneconomical for potential individual plaintiffs as litigation costs could dwarf any potential recovery. Here, a [*29] class action would facilitate the spreading of litigation costs among Plaintiffs. See *Prudential II, 148 F.3d at 315-16.*

In the context of a settlement class action, concerns regarding litigation management and the desirability of concentrating the litigation in a particular forum are insignificant. See *Amchem, 521 U.S. at 620* (stating that when confronted with a settlement-only class certification, a district court need not be concerned with issues of manageability if the case went to trial, because the point of the settlement is that there will be no trial.) Additionally, the Court finds that New Jersey is the proper forum for this settlement. The claims of the *Lenahan* Plaintiffs have been vigorously litigated and have advanced through discovery and motion practice. Considering these factors and the difficulty individual Technicians would suffer if forced to bring these claims individually, the Court finds that "the class action is not only the superior method for adjudicating this controversy, it affords the vast majority of class members the only practical avenue of redress." *Prudential I, 962 F. Supp. at 522*. This Court, [*30] therefore, finds this class action settlement represents a superior means to resolving the claims in this case.

Thus, this Court grants final class certification to Classes One and Two under *Rules 23(a)* and *(b)(3)*. All persons who satisfy the Class definition, except those who properly requested exclusion from the Class in accordance with the Preliminary Approval Order, are members of the Class and are bound by the terms of the Settlement, and the Final Judgment.

B. Fair Labor Standards Act ("FLSA") Collective Action Standard

Class Three raises only FLSA claims and has been conditionally certified as a collective action pursuant to *29 U.S.C. § 216(b)*. *Section 216(b)* of the FLSA, states that "an action . . . may be maintained [under the FLSA] .

. . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." *29 U.S.C. § 216(b) (1982)*

Unlike the class action requirements under *Rule 23*, *§ 216(b)* requires class members to "opt-in" by affirmatively indicating their consent to be part of the class. See *Sperling v. Hoffman-La Roche, Inc., 862 F.2d 439, 444 (3d Cir. 1988)*. [*31] *Section 216(b)* mandates that "[n]o employee shall be a party plaintiff to any such action [under the FLSA] unless he gives consent in writing to become such a party and such consent is filed in the court in which such action is brought." *29 U.S.C. § 216(b)*.

Under *§ 216(b)*, there are two threshold requirements for an action to proceed as a collective action: (1) class members must be "similarly situated" and (2) all members must affirmatively consent to join the action. Id. In the Preliminary Approval Order, this Court determined that all Sears Technicians nationwide are "similarly situated" with respect to the nationwide implementation of Sears' HDP. (Preliminary Approval Order, at 5.)

The FLSA does not define "similarly situated" and neither the Third Circuit nor the Supreme Court have expounded a test for making such a determination. In the absence of such guidance, district courts have established a two-tier test to determine who are "similarly situated' employees under *§ 216(b)*. See *Morisky v. Public Serv. Elec. & Gas Co., 111 F. Supp. 2d 493, 497 (D.N.J. 2000)*; *Moeck v. Gray Supply Corp., 2006 U.S. Dist. LEXIS 511, 2006 WL 42368, * 4 (D.N.J. 2006)*; *Bayles v. American Med. Response of Colorado, Inc., 950 F. Supp. 1053, 1066-67 (D.Colo. 1997)*. [*32] The Court first makes a determination during the "notice stage" - the stage when the Court decides whether to provide notice to potential class members. *Morisky, 111 F. Supp. 2d at 497*. The determination at this stage involves a lenient standard and generally results in "conditional certification" of a class. Id. Such conditional certification requires "nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan." *Sperling, 862 F.2d at 4407*.

Later, after discovery is largely complete and the case is ready for trial the court will make a second determination. *Morisky, 111 F. Supp. 2d at 497*. At this stage the court will have more information on which to base its decision and, therefore, will employ a stricter standard. Id. If, under the more stringent standard, the court determines that plaintiffs are similarly situated, the case will proceed as a collective action. *Id.*

The posture of this case has been somewhat different. At the time this Court conditionally certified the class, the parties had already engaged in significant amounts of discovery [*33] and litigation. As such, the Court was presented with more than simply "substantial allegations," when it determined plaintiffs were similarly situated. Consents have been received from 630 class members. (Schneider-King Decl. P 22.) Putative class members are all present or former Sears Technicians asserting claims under Sears' nationwide HDP. No objection to the Court's conditional certification of this collective action has been filed challenging the Courts determination that these class members are similarly situated. Accordingly, the Court finds that these 630 plaintiffs remain similarly situated and this action can proceed as a collective action under *§ 216(b)*.

C. Fairness of the Class Action Settlement

Any settlement of a class action must receive court approval pursuant to *Federal Rule of Civil Procedure 23(e)*. In approving a class action settlement, the district court must find the settlement to be "fair, reasonable and adequate." *General Motors, 55 F.3d at 785*. Moreover, in cases such as this one, where settlement negotiations preceded class certification and settlement approval is sought simultaneously with class certification, this Court must [*34] be even "more scrupulous than usual" in its examination of the fairness of the settlement. *Id. at 805*; see *Warfarin, 391 F.3d at 534*. "This heightened standard is intended to ensure that class counsel has engaged in sustained advocacy throughout the course of the proceedings, particularly in settlement negotiations, and has protected the interests of all class members." *Warfarin, 391 F.3d at 534*.

This Proposed Settlement is, however, entitled to an initial presumption that it is fair because "(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *Warfarin, 391 F.3d at 535* (quoting *In re Cendant Corp. Litig., 264 F.3d 201, 232 n.18 (3d Cir. 2001)*). In Warfarin, the Third Circuit held that despite the fact that the case involved a settlement-only class, the district court had properly applied the presumption of fairness after having found that all four factors were met. Id.

To aid in this Court's determination of fairness with [*35] regard to the Proposed Settlement, the Third Circuit in *Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)*, established nine factors for consideration ("the Girsh factors"). These factors are:

> (1) The complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of estab-

> lishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (6) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in the light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh v. Jepson, 521 F.2d 153, 156-57. "This nine-factor test requires this Court to conduct both a 'substantive inquiry into the terms of the settlement relative to the likely rewards of litigation' and a 'procedural inquiry into the negotiation process.'" *Prudential I, 962 F. Supp. at 534* (quoting *General Motors, 55 F.3d at 796*.) [*36]

Settlement of class action litigation has long been favored and encouraged. See *General Motors, 55 F.3d at 784* ("the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation"); *In re School Asbestos Litigation, 921 F.2d 1330, 1333* (same); *Warfarin, 391 F.3d at 535* ("there is an overriding public interest in settling class action litigation, and it should therefore be encouraged").

For the reasons discussed below, after carefully weighing the *Girsh* factors, considering the objections, and mindful of the heightened standard of review in place for a settlement-only class, the Court determines that the Proposed Settlement is indeed fair, reasonable, and adequate and should be approved.

1. Complexity, Expense and Likely Duration of the Litigation

This factor is "intended to capture 'the probable costs, in both time and money, of continued litigation.'" *General Motors, 55 F.3d at 811*. The Court must balance the Proposed Settlement against the time and expense of achieving a potentially more favorable result through [*37] further litigation. Where the complexity, expense and likely duration of litigation are significant, the Court will view this factor as weighing in favor of settlement. *Prudential I, 962 F. Supp. at 536*.

Prior to settlement, the parties in this case expended significant amounts of money and time on the litigation of these claims. The *Lenahan* action has been pending for over four years and, during that time, has gone through extensive discovery [8]. The parties have engaged in discovery motion practice and both sides have reviewed over 18,000 documents produced during discovery. Approximately twenty five depositions have been taken, including a deposition of Defendants' expert witness. (Schneider-King Decl. P 15.) The parties also engaged in substantial motion practice. Still pending before the Court are two fully briefed motions for summary judgment and Plaintiffs' fully briefed motion for equitable tolling. If the pending motions for summary judgment did not resolve this case, a lengthy and expensive trial would likely have followed.

> 8 Similar efforts have been expended in the *DeSoto* action, which has been pending in California state court since May of 2003. (Schneider-King Decl. P 23.)

[*38] Given the nationwide impact of this litigation, Sears would likely appeal any result reached on liability or damages further prolonging litigation and increasing Plaintiffs' risk of receiving no recovery. Therefore, even if Plaintiffs were ultimately victorious, the additional delay would not only delay payment, but the additional litigation expense would further reduce any actual recovery. The Proposed Settlement, however, provides substantial and immediate benefits for the Classes, undiminished by further expenses and without the risk and uncertainty of continued litigation. Therefore, this factor weighs in favor of approving the Proposed Settlement.

2. The Reaction of the Class to the Settlement

This factor instructs the Court to look to the reaction of the class to the settlement in determining whether to grant final approval. See *In re Cendant Corp. Litig., 264 F.3d 201, 231-32 (3d Cir. 2001)*. Here, the response of the Class to the Proposed Settlement also supports final approval. Of the 16,252 Technicians to whom notices of the settlement were sent, only 190 class members opted out of the settlement [9]. Additionally, only six objections to the [*39] Proposed Settlement were filed with the Court. This correlates to exclusions amounting to approximately 1.2% of the Class, and objections by less than 0.01% of the Class. In contrast, over 7,500 Class members responded affirmatively by filing claims for payment.

> 9 Of the 190 class members who opted out, 150 were part of a mass opt out by the *Caiarelli* Plaintiffs and putative *Caiarelli* class members.

Overall, the reaction of the Class to the Proposed Settlement has been largely positive. Such acceptance of the Proposed Settlement is persuasive evidence of the fairness and adequacy of the Proposed Settlement. See *Prudential II, 148 F.3d 283, 318* (affirming conclusion that class reaction was favorable where 19,000 policyholders out of 8 million opted out and 300 objected).

Objector Winter argues that the reaction of the class does not support the proposed settlement. (Winter Br.

21.) Winter argues that the absence of any significant number of objections or exclusions is a result of the [*40] inadequate notice sent to class members. As discussed in Part I, § F of this Opinion, the Court finds the notice sent to potential class members to be adequate. Thus, given the sufficient notice that has been provided to class members, and the relatively small amount of exclusions and objections, this factor weights in favor of the Proposed Settlement.

3. The Stage of Proceedings and Amount of Discovery Completed

This factor requires the Court to examine the level of case development that transpired prior to settlement. The aim of this factor, therefore, is to ensure that class counsel has an "adequate appreciation of the merits of the case before negotiating" a settlement. *Prudential II, 148 F.3d at 319* (quoting *General Motors, 55 F.3d at 813*).

Prior to reaching a settlement in this case, the parties engaged in vigorous litigation for over four years. Also, as discussed above, discovery in this case spanned more than a year, is complete, and has been extensive. This discovery included significant document production, numerous interrogatories, requests for admissions, and third party subpoenas. (Schneider-King Decl. PP 6-11.) Plaintiffs [*41] have taken over thirty depositions and reviewed over 20,000 pages of documents. In addition to the discovery conducted here Plaintiffs' counsel also engaged in significant discovery in the prosecution of the *DeSoto* matter. (Schneider-King Decl. P 26.) In both matters, the parties litigated highly contested discovery motions, as well as motions for summary judgment in the *Lenahan* matter, and the class certification motion in the *DeSoto* action.

Moreover, the parties have gone through several separate rounds of mediation and settlement negotiations before the Court. Settlement discussions were held before this Court as well as before Magistrate Judge Bongiovanni. The parties attended mediation on three separate occasions with retired District Judge Nicholas H. Politan. These mediation and negotiation processes were rigorous and gave the parties ample opportunity to assess the relative strengths and weaknesses of their claims. Given the vast amount of discovery obtained, the numerous mediation and negotiation efforts, and the volume of motion practice, the Court is satisfied that class counsel adequately appreciated the merits of the case before negotiating a settlement.

[*42] **4. The Risks of Establishing Liability and Damages**

The fourth and fifth *Girsh* factors consider the risk of establishing liability at trial in order to balance the parties' relative likelihood of success against the immediate benefits derived from a settlement. *Prudential II, 148 F.3d at 319*. Additionally, these factors "attempt[] to measure the expected value of litigating the action rather than settling it at the current time." *In re Cendant, 264 F.3d at 239*. To the extent that establishing damages is contingent upon liability, many of the same risks will be present in each analysis.

Here, Plaintiffs face the initial hurdle of proving Sears' liability under both FLSA and state wage and hour laws. This is a significant risk in light of the defenses available to Sears, and the fact that generally, normal commuting time is not compensable, even in states with more protective stage wage and hour laws. (Report of Richard T. Seymour, Expert for Plaintiffs, In Support of The Grant of Final Approval To the Proposed Settlement ("Seymour Report") PP 53-69.)

Proving that the Technicians' drive times were compensable would be a complex and fact-intensive [*43] challenge for Plaintiffs. One defense Sears asserts is that the HDP program was completely voluntary. Plaintiffs' expert asserts that a thorough review of State wage and hour laws and FLSA reveals no significant difference in the compensability of commuting time when employees voluntarily drive an employer's vehicle. (Seymour Report, P 41(j).) Plaintiffs deny that the Technicians use of the Sears van was voluntary. There exists a significant dispute over whether the program was in fact voluntary, and whether the Technicians taking the van home with them at night committed employees to more than *de minimis* work. Plaintiffs must also refute the defense that the activities they claim are compensable are merely "preliminary" activities and, therefore, non-compensable under the Portal-to-Portal Act, the FLSA, and under state laws following the FLSA.

The general rule, that commuting time is not compensable, can, however, be overcome in certain situations. Some of these circumstances include showing that: (a) the employer controlled the employee's movements and activities during the commute; (b) the employer required the employee to pick up supplies, or to drop by a customer's location, [*44] to give rides to other employees or to perform other functions that could not otherwise be performed during an official workday; (c) the employee's work day actually began before the commute, making the 'commute', in actuality, a move from one work location to another. (Seymour Report, PP 62-64.) Each of these factual distinctions is vigorously disputed in the parties respective motions for summary judgment. The ultimate outcome of the case is dependent on the determination of a fact-finder on these disputed factual issues. Consequently, this presents significant litigation risks for both sides.

In addition to defenses to liability, Plaintiffs would have to overcome any defenses regarding damages that Defendants would assert. Weighing these factors against the immediate and certain settlement presented to this Court, this Court concludes that the Proposed Settlement is the superior course of action.

5. The Risk of Maintaining the Class Action Through Trial

"[T]he prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor measures the likelihood of obtaining and keeping a class certification [*45] if the action were to proceed at trial." *Warfarin, 391 F.3d at 537*. As previously stated, this Court's decision to certify this class is for settlement purposes only.

If, however, this Court were to certify this Class for litigation purposes, there is a significant risk of decertification at a later stage in the litigation because of the number and variety of individual questions as to the voluntariness of taking the vehicles home, performance of, and timing of, off-the-clock work, and similar questions. (Seymour Report P 68.) This risk of potential decertification does not pose a problem in a settlement class. *Warfarin, 391 F.3d at 537*. Therefore, this factor weighs neither in favor, nor against settlement.

6. The Ability of the Defendants to Withstand a Greater Judgment

This factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *In re Cendant, 264 F.3d at 240*. The parties do not contend that Defendants could not withstand a larger judgment. Likewise, there has been no evidence presented to this Court regarding Sears' ability to pay [10]. Thus, [*46] this factor does not favor nor disfavor the Proposed Settlement. See *Warfarin, 391 F.3d at 538*.

> 10 *Winter* objectors argue that Sears can withstand a greater judgment than the Proposed Settlement fund. (Winter Br. 22.) The *Winter* objectors, however, do not come forward with any evidence of Sears financial viability or the relative impact the Proposed Settlement will have on Sears.

7. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

The last two *Girsh* factors ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial. These factors examine "whether the settlement represents a good value for a weak case or a poor value for a strong case." *Warfarin, 391 F.3d at 538*.

Under the Proposed Settlement, Sears will pay $ 15 million into a Settlement Fund to be used to compensate class members pursuant [*47] to a claims procedure. The payment to members of Class One is weighted in recognition of the favorable wage and hour laws in their states and the pending *DeSoto, Caiarelli,* and *Winter* legal actions brought under those laws. Based upon the level of participation in the settlement by class members, the average payout per claimant in Class One is over $ 1,606 [11]. (RG2 Decl., at Ex. G.) Additionally, currently employed Technicians nationwide will be able to elect whether to participate in the HDP and will have their duties under the HDP clearly defined. In light of the attendant risks of litigation discussed more fully above, and the risks involved in continuing this nationwide class action, the settlement is within the range of reasonableness.

> 11 The average recovery for Class Two members is over $ 1,208 and the average recovery for Class Three members is nearly $ 868. (RG2 Decl., at Ex. G.)

Plaintiffs concede that recovery would have been far greater had they succeeded on the merits of their claims. The [*48] *Winter* objectors aptly note that early estimates of nationwide exposure were estimated at $ 104 million with exposure in Washington alone estimated at $ 3.5 million. (Winter Br. 11-12.) However, [i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair." *Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 628 (9th Cir. 1982)* ("there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery"). Given the magnitude of the risks in litigation, the Proposed Settlement represents a fair and adequate recovery. As discussed above, this litigation involves difficult legal and factual questions regarding Sears liability under the FLSA and state wage and hour laws. Thus, the settlement fund represents a good value for a case where numerous critical legal issues have not been determined and are therefore uncertain. This factor, therefore, weighs in favor of settlement.

Given this Court's analysis, the Court concludes that the nine-factor test utilized [*49] by the Third Circuit is satisfied. The Proposed Settlement is fair, adequate, and reasonable under *Federal Rule of Civil Procedure 23(e)*.

D. Objections to the Settlement

1. Objections of the *Winter* Plaintiffs

The *Winter* objectors contend that the Proposed Settlement is not fair, reasonable and adequate under the Third Circuit's nine-factor analysis. The *Winter* objectors argue that the parties have not demonstrated any substantial risk of establishing liability under Washington state law. (Winter Br. 13.) The *Winter* objectors assert that Washington state wage and hour law does not contain an equivalent to either the federal Portal-to-Portal Act, or the Employee Commuting Flexibility Act of 1996 ("ECFA"), both of which limited compensability of employee travel time. (Id.) Thus, the objectors conclude that, under Washington law, the time spent by Sears Technicians commuting between their homes and customers' residences is compensable [12] and the Proposed Settlement is, therefore, unreasonable because it provides only a fraction of the recovery possible. The parties have recognized that the law of certain states is more favorable to Plaintiffs' claims [*50] and/or damages calculations. As such, Class One, as comprised of Class members from such states, receive an additional 50% recovery under the Proposed Settlement. *Winter* objectors contend that this surplus recovery is not sufficient to compensate Washington state class members in consideration of their greater chance of recovery under Washington state law.

12 The *Caiarelli* objectors make similar contentions, arguing that Pennsylvania law likewise does not contain an equivalent to the Portal-to-Portal Act or the ECFA and that Technicians "drive time" is therefore compensable under Pennsylvania state law. (Caiarelli Br. 5.)

In support of their contention, the *Winter* objectors rely on two Washington state trial court orders granting summary judgment on the drive time issue, and the Washington Department of Labor and Industries ("DL&I") interpretation of state law. (Winter Br. 4.) *Winter* objectors rely first on an order in Stevens v. Brink's Home Security, Inc. [13], granting plaintiffs' motion [*51] for summary judgment on the drive time issue. The court stated that with respect to the time plaintiffs spent driving, in company issued trucks, from their homes to the first job of the day and from the last job back to their homes constitutes "work time." (Winter Ex. 3 at 21.) In making its determination, the court relied on the definition of "employ" contained in the Washington Minimum Wage Act. (Id.) The trial court issued a similar ruling in Crow v. Transportation, Inc. [14] granting summary judgment on behalf of the plaintiff class of paratransit van drivers who were dispatched directly from their homes in company vans. (Winter Ex. 9.)

13 No. 02-2-32464-9 SEA (King County Superior Court, Sept. 13, 2005).

14 No. 03-2-35135-1 SEA (King County Superior Court, Dec. 15, 2005).

Winter objectors also point to the Washington DL&I interpretations of state law which state that, "[t]ime spent driving from home to the job sit, from job site to job site, and from job site to home is considered work [*52] time when a vehicle is supplied by an employer for the mutual benefit of the employer and the worker to facilitate progress of the work." (Winter Ex. 11.)

Currently, there is only one reported Washington appellate case dealing with the issue of travel time. *Anderson v. State of Washington, 63 P.3d 134, 115 Wn. App. 452 (Wash. App.), rev. denied, 75 P.3d 968, 149 Wn.2d 1036 (Wash. 2003)*. In Anderson, a group of correction officers sought compensation for time spent on a state ferry taking them to work at McNeil Island Corrections Center. The court found that employees were able to engage in personal activities during the ferry passage and that the time spent on the ferry was, in effect, normal commuting time. The Washington Supreme Court has not ruled on the compensability of travel time.

Based upon what the *Winter* objectors consider to be favorable differences in Washington state law, they argue that the Proposed Settlement does not adequately compensate Washington state class members. The objectors contend that the parties have not demonstrated a risk of establishing liability under Washington law and, therefore, as to Washington Plaintiffs, the Proposed Settlement is not [*53] fair, reasonable and adequate under *Girsh*. This Court disagrees.

Winter objectors appear to overstate the favorable status of Washington state law and give short shrift to any risks of continued litigation of their claims. Objectors point only to two, unpublished orders granting summary judgment on the drive time issue, non-binding DL&I guidelines, and one Washington Appellate Court decision. The Washington State Supreme Court has made no ruling on the issue of the compensability of general commuting time and this Court is unprepared to make a prediction as to how it would so rule. While the *Winter* objectors would like this Court to predict that it is so likely that the Washington State Supreme Court would rule in their favor that the Proposed Settlement is unfair, the record before this Court demonstrates quite the contrary.

It is generally recognized that mere commuting time is not compensable, even in states like California and Washington with generally more protective state labor laws. See *Anderson, 63 P.3d 134* (travel time to and from work generally non-compensable under Washington state law). The summary judgment orders relied on by objectors do [*54] not advance their position. In Brinks, the courts determination that plaintiffs' "drive time" was

compensable seemed largely based on the perceived harshness of Brink's policies. The court based its decision, in part, on its finding that "Brink's places significant restrictions on the technicians' activities and uses of the trucks during this 'drive time.'" (Winter Ex. 3.) During this litigation, Sears has contended that the HDP was voluntary and contained minimal restrictions on the Technicians' use of the vehicles during the commute periods. Such factual distinctions greatly affect the relative strength of Washington claims and are overlooked by the *Winter* objectors.

There is little about Washington state law at this time that enables this Court to conclude that the Washington Class claims are so much stronger than the rest of the Class sufficient to justify even the modest bump in recovery that they receive under the Proposed Settlement. Under current Washington law, similar to that of other state laws included in the Proposed Settlement, there is no statutory or regulatory provision or controlling case law precedent establishing the Technicians' rights to be paid for their [*55] commute time under the HDP. Therefore, there is no less risk for Washington plaintiffs in establishing Sears' liability under Washington state law, than there exists for the rest of the Class. Moreover, the *Winter* objectors minimize the risks of continued litigation. The Proposed Settlement before this Court was negotiated by parties who litigated these claims for over four years and were fully informed of the relative strengths and weaknesses of their claims. Additionally, to the extent *Winter* objectors find the Proposed Settlement to be unacceptable in light of their expectations, they had the option to opt-out of the Class and pursue their claims in Washington State Court individually.

2. Pennsylvania Objectors

Pennsylvania objectors make contentions similar to those of the *Winter* objectors. The objectors argue that the Proposed Settlement provides Pennsylvania class members with inadequate compensation in light of the reduced level of risk faced by putative class members under Pennsylvania law. (Pennsylvania Br. 3.) Pennsylvania objectors base their contention largely on three facts: (1) that Pennsylvania, like Washington, has not adopted an analog to the Portal-to-Portal [*56] Act, (2) that under Pennsylvania's Wage Payment and Collection Law [15] ("WPCL") Technicians can recover wages for all work performed and broadly defines "wages", and (3) that Pennsylvania's Minimum Wage Act ("MWA") provides for the recovery of straight time and overtime wages earned but not paid.

15 In the Pennsylvania case, the trial court dismissed the WPCL claims on preliminary objections, holding that the Pennsylvania plaintiffs did not establish a contractual right to compensation since they were at-will employees and not employed pursuant to a contract of employment.

The Court is not persuaded that claims under Pennsylvania law are so significantly stronger than the class claims that, as to them, the Proposed Settlement is inadequate and unfair. Pennsylvania class members face substantial risk in seeking relief under Pennsylvania law. As recounted by Plaintiffs' expert, regulations implementing Pennsylvania's wage and hour law contain two express limitations on compensable travel time: (1) only travel [*57] time that is "part of the duties of the employee" is compensable, and (2) only travel time "during normal working hours" is compensable. (Seymour Report P 109.) A court may interpret the regulations to mean that some travel time is not compensable, that the mere fact the employee is traveling is not enough to make it part of their normal duties, and that the fact that the employee is traveling at a certain time is not enough to make that time part of "normal working hours." (Id.)

The Court is satisfied that neither the *Winter* nor the Pennsylvania objectors have provided a sufficient basis for this Court to refrain from approving the settlement.

III. CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

Also before the Court is Plaintiffs' request for an award of attorneys' fees amounting to 30% of the Settlement Fund, and reimbursement of costs and expenses in connection with the final resolution of this litigation in the amount of $ 281,759.11. Plaintiffs' request is unopposed and, for the reasons stated below, the Court will grant the application for attorneys' fees and expenses.

A. Attorneys' Fees

The Third Circuit has established two methods [*58] for evaluating the award of attorneys' fees: (1) the lodestar approach, and (2) the percentage of the recovery approach. *General Motors, 55 F.3d at 820-21*; *Prudential II, 148 F.3d at 333*. The Third Circuit has emphasized that "[t]he percentage of recovery method is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005)* (quoting *Prudential II, 148 F.3d at 333*). This Court finds that the percentage of fund method is the proper method for compensating Plaintiffs' counsel in this common fund case.

In *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 (3d Cir. 2000)*, the Third Circuit set forth with specificity the factors that a court should consider in

evaluating such requested attorneys' fees. The Gunter factors include:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested [*59] by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Gunter, 223 F.3d at 195 n.1. In Gunter, the Circuit also instructed that a District Court should "cross-check the percentage award at which [it] arrive[s] against the 'lodestar' award method, which is normally employed in statutory fee-award cases." *Id.*

1. The Size and Nature of the Fund Created and the Number of Class Members Benefitted by the Settlement

The Class here is comprised of approximately 16,000 persons who will share in a cash settlement fund of $ 15 million, less attorneys' fees, expenses and incentive awards as granted by this Court. The settlement amount is significant, especially in view of the risks and obstacles to recovery presented in this case.

2. The Absence of Objections

Following preliminary approval of the Settlement, more than 16,000 notices of the Proposed Settlement and the fee and expense request were mailed to potential Class members at their last known address. [*60] (Cert. Of Claims Administrator Kathy Y. Dales ("Dales Cert."), P 5.) Class Counsel received no objections from the Class on the issue of the proposed fee [16]. (Id.) As discussed above, only 6 Class members objected to the Proposed Settlement as a whole. The lack of significant objections from the Class supports the reasonableness of the fee request. See *Reinhart v. Lucent Techs., Inc. (In re Lucent Techs., Inc. Sec. Litig.) 327 F. Supp. 2d 426, 431 (D.N.J. 2004)*; *Stoetzner v. United States Steel Corp., 897 F.2d 115, 119 (3d Cir. 1990)* (where 20 members of a 281 person class objected, the court found the response of the class as a whole "strongly favors [the] settlement").

> 16 As discussed above, six Class members have objected to the Proposed Settlement generally.

3. The Skill and Efficiency of Plaintiffs' Counsel

The skill and efficiency of the attorneys involved is "measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience [*61] and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 194 (E.D.Pa. 2000)*. Here, Plaintiffs' counsel includes attorneys with significant employment law and class action experience. Class Counsel, as well as counsel for Sears, also includes firms with extensive experience in employment and labor law. The settlement entered with Defendant is a reflection of Class Counsel's skill and experience. See *In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 261 (D. Del.2002)* (class counsel "showed their effectiveness through the favorable cash settlement they were able to obtain").

4. Complexity and Duration of the Litigation

As discussed above, this case involved many complex factual and legal issues. Plaintiffs' counsel have litigated this case for over four years. This included deposing numerous Sears' employees concerning the HDP, reviewing approximately 28,000 pages of documents, briefing a motion for summary judgment, answering written discovery and propounding written discovery, engaging [*62] in discovery disputes, conducting research of complex state wage and hour laws and the FLSA, and engaging in multiple rounds of mediation.

Settlement negotiations in this case were also complex. The parties needed to craft a settlement that would take into account substantive and procedural differences in the wage and hour laws of each of the fifty states. (Joint Decl. PP 15, 17.) The Court is familiar with the long and arduous settlement process that led to the present Proposed Settlement. The complexity of the issues involved in the prosecution of this litigation support the requested fee.

5. The Risk of Nonpayment

The risk of nonpayment in complex cases such as this one is "very real and is heightened when Plaintiffs' Counsel press to achieve the very best result for their clients." *In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109, 134*. Sears had numerous defenses in this litigation which posed substantial risks to findings of liability and damages. (Joint Decl. P 76.) These defenses included: the alleged voluntary nature of HDP; factual issues surrounding what it requires of Technicians and how much time Technicians spent performing tasks under HDP; the general recognition [*63] that normal commuting time is not compensable; and the *de minimis* doctrine, under which Sears could significantly reduce damages. (Id.)

Plaintiffs' expert, Richard Seymour, analyzed the fairness of the Proposed Settlement and stated that, "[t[his is not a case that presented a prospect of certain victory for plaintiffs . . . In my judgment, plaintiffs faced a substantial risk of losing this case on the merits." (Seymour Dec. P 55.)

Similarly, at the time of the Proposed Settlement, cross motions for summary judgment were pending in *Lenahan,* and the parties in *DeSoto* were likely to bring similar motions. (Joint Decl. P 89.) In light of the defenses and arguments asserted by Defendants, Plaintiffs faced a risk of this Court ruling against them on their motions. Even if Plaintiffs were successful on their motions, Plaintiffs still faced significant risks at trial. Accordingly, the risk of non-payment weighs in favor of approving the fee request.

6. The Time Devoted to this Case by Plaintiffs' Counsel

Class Counsel has expended nearly 12,695.74 hours working on this case since the inception of the litigation four years ago. Additionally, as discussed above, Class [*64] Counsel has spent substantial amounts of time reviewing voluminous discovery materials, briefing substantive motions before the Court, and has spent tremendous efforts at negotiating and arriving at the Proposed Settlement. The amount of time and effort Class Counsel spent on this litigation supports the fee request.

7. Awards in Similar Cases

The seventh and final *Gunter* factor involves a comparison of the fee request with attorneys' fees awarded in similar cases. Attorneys' fees of 30 percent are common in this Circuit. See *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir. 1995)* (review of 289 settlements demonstrates "average attorney's fee percentage [of] 31.71%" with a median value that "turns out to be one-third"); *General Motors, 55 F.3d at 822*.

Likewise, attorneys' fees of approximately 30 percent of the common fund are also regularly awarded in labor and employment class actions. See *In re Safety Components, Inc. Sec. Litig., 166 F Supp. 2d 72, 102 (D.N.J. 2001)* (granting award of 33 1/3 % in common fund case and citing to ten cases from this Circuit holding the same); see also *Erie County Retirees Assoc. v. County of Erie, Pennsylvania, 192 F. Supp. 2d 369, 382-83 (W.D. Pa. 2002)* [*65] (38% of common fund was awarded in ADEA case). The percentage requested in the Application for Attorneys' Fees in this matter appears to be reasonable when compared to fee awards in other cases.

8. Lodestar Cross-Check

The Third Circuit has suggested it is sensible for a court to use a second method to cross-check its initial fee calculation. See *In re Rite Aid, 396 F.3d at 300*. However, the "lodestar cross-check does not trump the primary reliance on the percentage of common fund method." *Id.*; see *Cendant, 264 F.3d at 285* ("The lodestar cross-check, however, is very time consuming. Thus, while the Court should in the first instance test the presumption, if challenged, by the *Gunter* factors, it may, if necessary, utilize the lodestar cross-check."). To apply the lodestar method, the Court must examine the number of hours Class Counsel worked and the rate for these lawyers' services, and multiply the number of hours worked by the hourly rate. The Court can also multiply the hourly rate by a lodestar multiplier to reflect the risks of nonpayment facing counsel. *Prudential II, 148 F.3d at 340-41*.

Here, according to their submissions, [*66] Class Counsel spent 12,695.74 hours on the litigation, and had an average mixed hourly rate of $ 353.63. (Joint Br. App. Ex. 1.) This results in a lodestar of approximately $ 4,489,580.20. See *In Re Cendant Corporation Prides Litig., 243 F.3d 722 (3d Cir. 2001)*. Given the fee Class Counsel has requested, the multiplier under the *Cendant Prides* formula is 1 [17].

17 Class Counsel has requested 30% of the Settlement Fund. This amounts to approximately $ 4,500,000. Calculating the lodestar multiplier: 12,695.74 hours x $ 353.63 = $ 4,489,580.20. $ 4,500,000 divided by $ 4,489,580.20 = 1.002.

In Cendant Prides, the Third Circuit ruled that a multiplier of 3 was an appropriate ceiling. *243 F.3d at 742*. In Prudential, the Third Circuit noted, based on a review of common fund cases, "[m]ultipliers ranging from one to four are frequently awarded in common fund cases, when the lodestar method is applied." *Prudential II, 148 F.3d at 341*. Accordingly, the Court [*67] concludes that the requested fee of 30 percent is reasonable when measured by the lodestar cross-check.

B. Counsel's Costs and Expenses

In addition to their request for attorneys' fees, Class Counsel seeks reimbursement of costs and expenses in the amount of $ 281,759.11. In common fund cases, counsel is "entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case." *In re Cendant Corp., Derivative Action Litig., 232 F. Supp. 2d 327, 343*. Upon review of the affidavits submitted in support of this request, the Court finds the requested amount to be fair and reasonable. Class Counsel's expenses reflect costs reasonably incurred in computerized legal research services, travel costs, experts' and media-

tors' fees and copying costs. (App. Exs. 2-7.) Additionally, throughout this litigation, Plaintiffs' counsel has advanced the cost of all expenses necessary to prosecution of this case. (Joint Decl. P 85-87.) Courts in this Circuit have found these types of expenses to be reasonable. See *Oh v. AT & T Corp., 225 F.R.D. 142, 154 (D.N.J. 2004)* (finding expenses such as "(1) travel and lodging, (2) local meetings [*68] and transportation, (3) depositions, (4) photocopies, (5) messengers and express service, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, court and witness fees, (9) overtime and temp work, (10) postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund pro hac vice." to be reasonable). This Court is satisfied that the instant request for expenses is reasonable and will, therefore, grant Class Counsel's request for costs and expenses.

C. Defendants' Request for Prospective Relief

In addition to the injunctive relief requiring Sears to alter its HDP, section B.7 of the Proposed Settlement sets forth that Sears would request, and Plaintiffs would not oppose, a determination by this Court that Sears' HDP is compliant with federal wage and hour laws. In accordance with this provision of the agreement, the proposed Final Order approving the settlement includes the following language:

> 12. This Court, having been fully briefed on the material facts . . . finds and determines. . . as follows:
>
> (a) The participation by In-Home Service Technicians in Sear's HDP . . . is subject to an agreement on the part of the employer and employee [*69] within the meaning of *Section 4(a)* of the Portal to Portal Act of 1947 . . . .
>
> (b) The In-Home Service Technicians, who participate in the HDP, use their Sears provided service van for commuting . . . within the meaning of the ECFA. This commute . . . is time spent traveling to and from the actual place of performance of the principal activity for which the Technician is employed to perform . . . within the meaning of *Section 4(a)(1)* of the Portal to Portal Act, . . . and is therefore non-compensable. Likewise, the Technicians' commute constitutes non-compensable ordinary travel between home and work, as well as "preliminary" and/or "postliminary" activity within the meaning of the Portal to Portal Act.
>
> (c) The activities In-Home Service Technicians are instructed to perform pursuant to the HDP prior to the start of their route and the commencement of their compensable work day or after the end of their route . . . are activities which are incidental to the use of a Company provided vehicle for commuting within the meaning of the ECFA, and are not part of the Technicians' principal activities within the meaning of *Section 4(a)(2)* of the Portal to Portal Act. . . and, therefore, [*70] are not compensable. These incidental activities are also non-compensable "preliminary" and/or "postliminary" activities within the meaning of the Portal to Portal Act.

(Proposed Form of Order, P 12 (a)-(c) ("Order").) In essence, Section B.7 of the Proposed Settlement, and the accompanying portion of the proposed Final Order, asks this Court for an imprimatur of legality on Sears' HDP under federal wage and hour laws.

Sears contends that this Court has been sufficiently briefed, via the pending summary judgment motions, on the issue of Sears' HDP and its compliance with federal wage and hour laws. This Court disagrees. The HDP has changed since the filing of this lawsuit and is altered in significant ways by the terms of the Proposed Settlement. The implementation of the Proposed Settlement, and these changes, will be nationwide and affect Sears' HDP program in every state. The briefing before this Court, however, was limited to the facts and circumstances of the *Lenahan* Plaintiffs and the HDP as it existed at that time. Importantly, the program that Defendants ask this Court to declare compliant has yet to be put into practice.

Furthermore, Defendants' request appears [*71] to offend the well-settled prohibition on advisory opinions. The power given to federal courts under Article III of the Constitution is not absolute. At the core of Article III's limitation on federal judicial power is the ban on advisory opinions. E. Chemerinsky, FEDERAL JURISDICTION at 47 (Little Brown, 1994). The ban on advisory opinions is the oldest and most consistent justiciability doctrine. In order for a case to be justiciable, and not an advisory opinion, an action must present "(1) a legal controversy that is real and not hypothetical, (2) a legal controversy that affects an individual in a concrete manner so as to provide the factual predicate for reasoned adjudication, and (3) a legal controversy so as to sharpen the issues for judicial resolution." *Rhone-Poulenc Surfactants and Specialties, L.P. v. C.I.R., 249 F.3d 175, 182 (3d Cir. 2001)*. These requirements assure that cases pre-

sented to the court are concrete legal disputes between genuine adversaries.

The declaration Defendants request is speculative, and not the subject of a live dispute. There has been no true adversarial process regarding this declaration because the Plaintiff class, although not [*72] endorsing the declaration, has agreed not to oppose it. Defendants ask this Court, in a vacuum, to make a declaration with regard to a program that has yet to be implemented. At the final approval hearing, statements by counsel implicitly acknowledged the advisory nature of this request. In response to the Court's reservations about the language of the order, counsel stated that, "what we're asking is in the full disposition of this case, recognizing that part of what is necessary for putting this matter to rest is some guidance for Sears as to how it can perform its program in the future." (Tr. 16:6-10.) The Court does not have the authority to render such guidance and will not make a determination of legality on a program that has not yet been implemented. Therefore, in light of the prohibition on advisory opinions discussed above, the declaration Defendants seek is not available from this Court.

IV. CONCLUSION

For the foregoing reasons, this Court will, (a) GRANT Plaintiffs' motion for final approval of the Proposed Settlement, and (b) GRANT the motion of Class Counsel for attorneys' fees of 30 % of the Settlement Fund (minus the $ 300,00 hold back pursuant to the Settlement [*73] Agreement) and $ 281,759.11 in costs and expenses. An appropriate form of order will follow.

s/ Stanley R. Chesler, U.S.D.J.

PROPOSED FINAL ORDER APPROVING SETTLEMENT AGREEMENT AND JUDGMENT DISMISSING ACTION WITH PREJUDICE

This matter comes before the Court on the motion of Class Representatives, by Class Counsel Kaplan Fox & Kilsheimer LLP, Schneider & Wallace, Goldstein, Demchak, Baller, Borgen & Dardarian and Van Bourg, Weinberg, Roger & Rosenfeld, and by Defendant, Sears Roebuck and Co., by their counsel Vedder, Price, Kaufman & Kammholz, P.C. for an order and judgment (1) finally approving the Settlement Agreement dated October 19, 2005 and preliminarily approved by Order dated November 10, 2005 ("Preliminary Approval Order"); (2) finally certifying the Settlement Classes provided for in the settlement; and (3) dismissing with prejudice all claims and actions in *Lenahan et al. v. Sears, Roebuck and Co.,* Case No. 02-00045/MLC (D.N.J.); and (4) enjoining all Settlement Classes Members who participate in the settlement from bringing or continuing any action related to their dismissed claims. After reviewing the Agreement and other related materials submitted by the parties, [*74] including the cross motions for summary judgment and briefs in support in *Lenahan,* and having considered any and all objections raised to the settlement at a final approval hearing held on May 12, 2006 and otherwise being fully informed in the premises, the Court hereby enters the following Final Order and Judgment:

1. This Court has jurisdiction over the subject matter of these actions and over all parties to these actions pursuant to *28 U.S.C. § 1331*, *29 U.S.C. § 216(b)* and *28 U.S.C. § 1367(a)*, including all members of the Settlement Classes, preliminarily certified for settlement purposes only, by the Preliminary Approval Order, and as defined as:

> Class One: All persons who were, are or will be employed by Sears and have or will have participated in the HDP as Technicians in the States of New Jersey, California, Pennsylvania and Washington ("Class One") during the period from the commencement of the HDP through the date of the Preliminary Approval Order.
>
> Class Two: All persons who were, are or will be employed by Sears and have or will have participated in the HDP as Technicians in the [*75] following states during the period from the commencement of the HDP through the date of the Preliminary Approval Order: Alaska, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Vermont, Virginia, West Virginia, Wisconsin and Wyoming.
>
> Class Three: All persons who are not members of Class One or Class Two and who were, are or will be employed by Sears and have or will have participated in the HDP as Technicians during the period November 10, 2002 through November 10, 2005 or whose employment terminated but who filed a consent to join in *Lenahan et al. v. Sears, Roebuck and Co.*

2. The Court finds that the Settlement Classes One and Two, as defined above, satisfy the requirements of

Fed. R. Civ. P. Rule 23(a): (1) the members of the Classes are sufficiently numerous; (2) there are common questions of law and fact in this attempt to recover unpaid wages and overtime pay and other damages arising from the [*76] operation of Sears' HDP; (3) all Class members, including the Class Representatives, seek recovery under the same legal theory for precisely the same course of conduct; and (4) the Class Representatives adequately represent absentee class members in that Class Counsel are experienced wage and hour class action counsel and the Class Representatives' interests are not antagonistic to the interests of the Settlement Classes. The Court finds that the Settlement Classes One and Two, as defined above, are maintainable under *Rule 23(b)(3)* because there is an overriding factual issue common to all class members, namely the operation of the HDP program with respect to all class members. The Court finds that the Settlement Class Three satisfies the requirements to be maintainable as a collective action under *29 U.S.C. § 216(b)* in that all technicians are "similarly situated" with respect to the nationwide implementation of Sears' HDP, and no objection has been filed for "decertification" or challenging this finding.

3. The Notice given to the members of the Settlement Classes adequately informed the class members of the terms of the Settlement Agreement, the process available [*77] to them to obtain monetary relief, their right to opt out of the monetary provisions and pursue their own remedies, of the fact that they will be bound by the settlement if they do not opt out and their opportunity to file written objections and to appear and be heard at the final approval hearing regarding the approval of the Settlement Agreement. The Court finds that the Notice provided satisfied the requirements of *Fed. R. Civ. P. 23(e)(1)(B)*.

4. The Court hereby approves the Settlement Agreement and finds that the settlement is fair, reasonable and adequate to all members of the Settlement Classes. The Court finds that extensive investigation, research and litigation has been conducted such that counsel for the parties are able to evaluate their respective risks of further litigation, including the additional risks, costs and delay associated with the further prosecution of this action. The Court further finds that the Settlement Agreement has been reached as the result of intensive, arms-length negotiations, including mediation with an experienced former Judge of this District.

5. Class Counsel shall be awarded the amount of $ 4,781,759.11 minus the $ 300,000 holdback from [*78] the distribution of attorneys' fees and costs provided for in Section B.5.g. of the Settlement Agreement for fair and reasonable attorneys' fees and expenses incurred in the prosecution of this litigation, such award to be paid from the Gross Settlement Amount in full compromise and satisfaction of all attorneys' fees, expenses incurred by Class Counsel as specified in the Settlement Agreement.

6. The Settlement Administrator, RG 2 Claims Administration LLC, shall be awarded the amount of $ 123,711.55 for fair and reasonable fees and expenses incurred to date in the administration of the settlement, plus any additional fees and expenses incurred subsequent to the entry of this Order and as may be awarded by the Court, such award to be paid as specified in the Settlement Agreement.

7. Incentive awards are approved for the following Class Representatives who performed substantial services for the benefit of the Settlement Classes, in the following amounts:

Name	Amount
Shawn Lenahan	$ 2,500
Joseph Kapcsos	$ 2,500
Carlos DeSoto	$ 2,500
Mike Banta	$ 2,500
Dean Winter	$ 2,500
Vern Sailand	$ 2,500
Bernaldo Mora	$ 2,500
Tehron Harmison	$ 2,500

Such [*79] awards are to be paid from the Gross Settlement Amount as specified in the Settlement Agreement.

8. The Court approves a Hold Back Amount of $ 1,000,000, pursuant to Section B.5.f. of the Settlement Agreement, to be set aside from the Gross Settlement Amount for payments made by Sears (a) to the Settlement Administrator for any fees and costs incurred after

the date of entry of this Order and (b) in connection with claims made and/or settled after the date of entry of this Order. Sears shall file within thirty (30) days of the second anniversary of this Order a report with the Court and Class Counsel regarding the disposition of the Hold Back Amount.

9. The Court finds and determines that the payments to be made to the members of the Settlement Classes, as provided in the Settlement Agreement and specified by the Settlement Administrator, are fair, reasonable and adequate and gives final approval to and orders that those payments be made to the members of the Settlement Classes who submitted valid claims in accordance with the Settlement Agreement.

10. This Court, pursuant to the Settlement Agreement, orders Sears to distribute to all incumbent In-Home Service Technicians, within [*80] thirty (30) days of the entry of the Order, an HDP Participation Election form, a copy of which is attached as Exhibit A, on which each Technician shall designate whether he or she chooses to participate in the HDP on the terms and conditions specified on the election form.

11. Pursuant to the Parties' Settlement Agreement, this Court also orders Sears to apprise all In-Home Service Technicians in writing that (i) the only activities Technicians are to perform under the HDP, as in effect as of the date of this Order, prior to starting the route and beginning the compensable workday are to log on to the SST to determine the location of the first customer call of the day, place unopened boxes of truck stock replenishment parts in the Sears provided van, as necessary, and place the SST in the service van and commute to the first customer call; (ii) the only activities Technicians are to perform under the HDP after ending the route and compensable work day are to commute home, remove the SST from the service van and plug it into the telephone and power lines at home and place unopened boxes of truck stock replenishment parts in the service van if more convenient than doing so in the morning; [*81] and (iii) Technicians are to submit solar time keeping correction forms to be compensated for time spent prior to starting the route or after ending the route in the performance of any other activities directed by Sears under the HDP. Nothing in this Order shall be deemed or act as a restriction on Sears' right to change the terms and conditions of the HDP in the future.

13. This Court hereby dismisses all claims and actions in *Lenahan* and the claims of all "Participating Settlement Classes Members" (i.e. all Settlement Class One and Two Members who have not opted out of the Settlement and all Settlement Class Three Members who have filed consents to join) relating to the operation of Sears' HDP which were asserted in *Lenahan* or which could have been asserted based on or arising out of any acts, facts, transactions, occurrences, representations or omissions alleged in the Amended Class Action Complaint in *Lenahan* on the merits and with prejudice and without costs to any of the parties as against any other settling party, except as provided in the Settlement Agreement.

14. All persons who are Participating Settlement Classes Members are hereby barred and permanently enjoined [*82] from prosecuting, commencing or continuing any claims, causes of action, damages and liabilities of any kind, nature and character whosever in law, equity or otherwise, known or unknown, suspected or unsuspected, that now exist, may exist or heretofore existed, against Sears Holdings Corporation and its consolidated subsidiaries, including without limitation, Sears, Roebuck and Co. and Kmart Holding Corporation, and their present and former successors, predecessors, assigns, affiliates, parent companies, subsidiaries, shareholders, officers, directors, agents, insurers, attorneys and employees arising out of, related to, connected with, or based in whole or in part to any acts, facts, transactions, occurrences, representations or omissions alleged in the Amended Class Action Complaint in *Lenahan.*

15. The Court retains jurisdiction over this action and the parties to administer, supervise, interpret and enforce the Settlement Agreement and this Order.

Plaintiffs' Motions (docket #s 121, 133) are Granted.

Dated: July 10, 2006

Stanley R. Chesler

UNITED STATES DISTRICT JUDGE

EXHIBIT A

Home Dispatch Program Participation Election Form

46204-HOF-Home [*83] Dispatch, Rev 0, 07-05

The Home Dispatch Program ("HDP") is voluntary. You are to indicate whether or not you choose to participate in the HDP by initialing one of the options below.

I choose to participate in the HDP.

In choosing to participate in the HDP, I understand and agree that:

. **I will use the Sears provided service van for my personal commute to and from work. Sears will pay for the fuel and maintenance of the service van for the travel associated with the personal commute to and from work.**

. If I cannot park the service van at my home, I may request my District General Manager to approve an alternative location, close to my home and convenient to my commute, where I would like to park the service van.

. My compensation will begin upon arrival at the first customer's home (or unit in the event of a meeting, etc.) and will end when work is completed at the last customer's home.

. I will be paid for any commute time at either end of the workday that exceeds the normal commute time, which is 35 minutes. For example, if the commute to the first customer location is 45 minutes, I will be paid for ten minutes. [*84] **Similarly, if the commute from the last customer location to my home (at the end of my workday) is 45 minutes, I will be paid for ten minutes.**

. I will receive "truck stock" replenishment parts, via UPS, or other shipment, to my home and I am to place them unopened in the van as necessary and when convenient.

. I will use the SST to transfer information via phone line from home.

I choose not to participate in the HDP.

In choosing not to participate in the HDP, I understand and agree that

. I do not wish to use the service van for my personal commute. My manager will provide me with the parking location prior to my choosing not to use the service van for my personal commute. The parking location of the van will generally be aligned with my primary work area at the time I make my decision whether or not to participate in the HDP. I know the parking location is subject to change based on business needs and security of the vehicle.

. I will be responsible for my commute to and from the parking location on my own time and in my own vehicle or using public transportation.

. My compensation will begin upon arrival at [*85] **the service van parking location at the beginning of the day and will end upon arrival at the parking location at the end of the day.**

. I will receive "truck stock" replenishment parts at the parking location or I will be required to stop at a service location during the course of the workday.

. I will use the SST to transfer information via phone line from home.

I understand the above options and that my choice is voluntary. I have initialed next to the option of my choice.

Associate Name (Print)

Associate Signature

Manager Signature

Date

Sears Product Services District

LEXSEE 2008 US APP LEXIS 3798

Analysis
As of: Sep 22, 2008

SHAWN LENAHAN; JOSEPH KAPCSOS, On Behalf of Themselves and All Others Similarly Situated; v. SEARS, ROEBUCK AND CO.; DEAN WINTER; VERN SAILAND; BERNALDO MORA; TEHRON HARMISON, Appellants

No. 06-3837

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

266 Fed. Appx. 114*; *2008 U.S. App. LEXIS 3798

January 14, 2008, Submitted Under Third Circuit LAR 34.1(a)
February 21, 2008, Opinion Filed

NOTICE: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [**1]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY. (D.C. Civil No. 02-cv-00045). District Judge: The Honorable Stanley R. Chesler.

Lenahan v. Sears, Roebuck & Co., 2006 U.S. Dist. LEXIS 60307 (D.N.J., July 10, 2006)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff service technicians filed suit against defendant employer for the alleged failure to pay wages in connection with the employer's home dispatch program (HDP) in violation of the Fair Labor Standards Act, *29 U.S.C.S. § 201 et seq.* Appellants, putative class members, appealed from a decision of the United States District Court for the District of New Jersey, which gave final approval to the settlement.

OVERVIEW: As a result of implementing the HDP, between January 2002 and October 2005, four putative class actions were filed against the employer in federal and state courts on behalf of technicians claiming that the drive time before the day's first job and after the day's last job was not merely commute time, but compensable work time. Under the proposed settlement, the employer agreed to pay $ 15 million dollars to settle all claims nationwide. According to appellants, Washington class members' strong claims under Washington law were unfairly discounted by being settled together with relatively weaker claims, under federal and state law, that were subject to defenses under the Portal to Portal Act of 1947 and the Employee Commuting Flexibility Act of 1996. The instant court found that absent a finding that the employer exercised significant control, Washington class members did not appear to have strong claims under Washington law. Next, the instant court found that the district court properly considered the Girsh factors and found the settlement to be fair, reasonable and adequate.

OUTCOME: The decision was affirmed.

LexisNexis(R) Headnotes

Civil Procedure > Class Actions > Certification
Civil Procedure > Settlements > Settlement Agreements > General Overview
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN1] An appellate court reviews the decision of the district court to certify a class and approve a settlement under an abuse of discretion standard. An appellate court

may find an abuse of discretion where the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.

Civil Procedure > Class Actions > Compromises
Civil Procedure > Settlements > Settlement Agreements > General Overview

[HN2] Certification of a settlement class is only appropriate if the class meets the requirements of *Fed. R. Civ. P. 23*. Under *Rule 23(a)*, class representatives and class counsel must fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)*. *Rule 23(b)(3)* requires that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Fed. R. Civ. P. 23(b)(3)*.

Civil Procedure > Class Actions > Compromises
Civil Procedure > Settlements > Settlement Agreements > General Overview

[HN3] The fairness of a settlement is determined by consideration of the nine Girsh factors. The nine factors include: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

COUNSEL: For SHAWN LENAHAN; JOSEPH KAPCSOS, On Behalf of Themselves and All Others Similarly Situated, Plantiffs - Appellees: David A. Borgen, Esq., Goldstein, Demchak, Baller, Borgen & Dardarian, Oakland, CA; Gabriel H. Halpern, Esq., Pinilis Halpern, Morristown, NJ; Joseph E. Jaramillo, Esq., Goldstein, Demchak, Baller, Borgen & Dardarian, Oakland, CA; Laurence D. King, Esq., Kaplan, Fox & Kilsheimer, San Francisco, CA; William J. Pinilis, Esq., Pinilis Halpern, Morristown, NJ.

For DEAN WINTER, VERN SAILAND, BERNALDO MORA, TEHRON HARMISON, Plantiffs - Appellants: Adam J. Berger, Esq., Schroeter, Goldmark & Bender, Seattle, WA; Martin Garfinkel, Esq., Schroeter, Goldmark & Bender, Seattle, WA; James Katz, Esq., Spear Wilderman, Cherry Hill, NJ.

For SEARS ROEBUCK & CO, Defendant - Appellee: Thomas G. Abram, Esq., Vedder, Price, Kaufman & Kammholz, Chicago, IL.

JUDGES: Before: BARRY, CHAGARES and ROTH, Circuit Judges.

OPINION BY: BARRY

OPINION

[*115] BARRY, Circuit Judge

This appeal concerns the settlement of a nationwide class action filed on behalf of field service technicians [**2] against their employer, Sears Roebuck & Co. ("Sears"), for the alleged failure to pay wages in connection with Sears' home dispatch program ("HDP"). Following a hearing, the District Court gave final approval to the settlement on July 24, 2006. Appellants (the "*Winter* Objectors") are putative class members who claim that the District Court erred in certifying the settlement class and finding that the settlement is fair, reasonable and adequate. We will affirm.

I.

Because we write only for the parties, familiarity with the facts is presumed, and we include only those facts that are relevant to our analysis.

Sears implemented the HDP in November 2001 to increase the amount of time that technicians spend at customers' homes servicing Sears appliances. Under the HDP, rather than beginning and ending their work days at a dispatch center, technicians drove their Sears van (which they kept at home) from home to the first job of the day, and from the last job of the day to home. They were not paid for their drive time before the first job or after the last job unless the drive exceeded 35 minutes. [*116] Nor were they paid for the time it took them to log onto a computer in the morning to receive [**3] their daily assignments, load boxes of replacement parts into their van, or complete other minor tasks. According to Sears, participation in the HDP was voluntary.

As a result of implementing the HDP, between January 2002 and October 2005, four putative class actions were filed against Sears in federal and state courts on behalf of technicians claiming that the drive time before the day's first job and after the day's last job was not merely commute time, but compensable work time. They also claimed that the activities performed at home were substantial work-related tasks that required compensation. The four actions were: (1) *Lenahan v. Sears, Roebuck & Co.*, No. 02- 00045, filed on January 2, 2002 in the District Court for the District of New Jersey (assert-

ing class claims on behalf of New Jersey technicians under New Jersey's state wage and hour law and collective claims on behalf of technicians nationwide under the Fair Labor Standards Act, *29 U.S.C. § 201, et seq.* ("FLSA")); (2) *Caiarelli v. Sears, Roebuck & Co.*, No. GD 03-001735, filed on January 4, 2003 in Pennsylvania state court (asserting class claims on behalf of Pennsylvania technicians under Pennsylvania's wage and hour [**4] law); (3) *DeSoto v. Sears Roebuck & Co.*, No. RG 03-096692, filed on May 15, 2003 in California state court (asserting class claims on behalf of California technicians under California's wage and hour law); and (4) *Winter v. Sears, Roebuck & Co.*, No. 05- 2-33313-8 MCH, filed on October 7, 2005 in Washington state court (asserting class claims on behalf of Washington technicians under Washington's wage and hour law).

In January 2005, following more than a year of settlement negotiations, Sears reached an agreement in principle with plaintiffs' counsel in two of the pending actions, *Lenahan* and *DeSoto*, for a nationwide settlement. Over the next several months, a settlement agreement was negotiated, and a final draft was executed on October 19, 2005. Under the proposed settlement, Sears agreed to pay $ 15 million dollars to settle all claims nationwide. Plaintiffs' counsel in *Lenahan* and *Desoto* agreed to share the role of class counsel and, pursuant to the terms of the proposed settlement, filed an amended complaint alleging violations of the FLSA and the wage and hour laws of those states that have such laws. Class members were divided into three subclasses. Class One consisted of technicians [**5] from New Jersey, Pennsylvania, California and Washington. Class Two consisted of technicians from other states that had an applicable wage and hour law. Class Three included technicians from states that had no applicable wage and hour law. Technicians from Class One received 150% of the recovery of technicians in Classes Two and Three, owing to the relative strength of their claims and the existence of pending litigation in those states.

The District Court preliminarily approved the settlement on November 10, 2005. Notice of the proposed settlement was mailed to 16,252 class members on January 13, 2006. 7,632 class members filed claims seeking payment under the settlement. 190 class members, 150 of whom were *Caiarelli* plaintiffs, opted out. Only six class members filed objections to the proposed settlement, four of whom were the *Winter* Objectors, the named plaintiffs in the *Winter* action.

On May 12, 2006, the District Court held a hearing to consider the objections and determine whether to grant final approval to the settlement. At the hearing, the *Winter* Objectors argued that the claims of Washington class members were stronger [*117] than those of other class members owing to unique characteristics [**6] of Washington law. Therefore, they claimed, class certification was not proper and the settlement was not fair as to Washington class members. The District Court disagreed, finding that there was "little about Washington state law at this time that enables this Court to conclude that the Washington Class claims are so much stronger than the rest of the Class sufficient to justify even the modest bump in recovery that they receive under the Proposed Settlement." (JA 43.) On July 24, 2006, the District Court certified the class and granted final approval to the settlement. The *Winter* Objectors filed a timely notice of appeal, claiming that the District Court erred in (1) certifying the class, and (2) finding that the settlement was fair, reasonable and adequate with respect to Washington class members.

II.

We have jurisdiction pursuant to *28 U.S.C. § 1291*. [HN1] "We review the decision of the District Court to certify the class and approve the settlement under an abuse of discretion standard." *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 527 (3d Cir. 2004)*. "An appellate court may find an abuse of discretion where the 'district court's decision rests upon a clearly erroneous finding [**7] of fact, an errant conclusion of law or an improper application of law to fact.'" *In re Prudential Ins. Co. America Sales Practice Litig., 148 F.3d 283, 299 (3d Cir. 1998)* (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 783 (3d Cir. 1995))*.

III.

A. The Relative Strength Of Washington Law

The thrust of the *Winter* Objectors' argument is that Washington class members' claims are stronger than those of other class members because Washington law is more favorable than federal law and other states' law. They claim that although Washington wage and hour law generally follows the FLSA, Washington has not adopted the Portal to Portal Act of 1947, *29 U.S.C. § 251, et seq.*, or the Employee Commuting Flexibility Act of 1996, Pub. L. 104-188, § 2102, 110 Stat. 1755, 1928 (1996) ("ECFA"), both of which provide Sears with strong defenses. According to the *Winter* Objectors, Washington class members' strong claims under Washington law were unfairly discounted by being settled together with relatively weaker claims, under federal and state law, that are subject to defenses under the Portal to Portal Act and the ECFA. Citing two unpublished Washington state [**8] trial court decisions, *Stevens v. Brink's Home Sec., Inc.*, No. 02-2- 32464-9 (King County Super. Ct. Sept. 13, 2005), and *Crow v. Northwest Transp., Inc.*, No 03-2-35135-1 (King County Super. Ct. Dec. 15, 2005), and an administrative guideline informally promulgated by Washington's Department of Labor and Industries

("DLI"), they argue that Washington law would likely permit recovery here, while states following the Portal to Portal Act and the ECFA would not.

The District Court rejected this argument, observing that the Washington Supreme Court had not ruled on the compensability of travel time under these circumstances, and that the only relevant published decision, *Anderson v. State of Washington, 115 Wn. App. 452, 63 P.3d 134 (Wash. Ct. App. 2003)*, suggested that Washington followed the general rule that commute time is not compensable. The District Court distinguished *Brink's* and *Crow* on the ground that, in those cases, the Washington trial court explicitly found [*118] that the home dispatch program placed significant restrictions on the drivers during drive time, whereas "[d]uring this litigation, Sears has contended that the HDP was voluntary and contained minimal restrictions on the Technicians' use [**9] of the vehicles during the commute periods." (JA 43.) Finally, the District Court found that, because the DLI guideline was informally promulgated, it was non-binding and thus entitled to little deference.

We agree with the District Court that *Brink's* and *Crow* appear to be driven, at least in part, by the explicit finding that the employer exercised significant control over the employee during drive time. While this appeal was pending, the Washington Supreme Court affirmed the trial court's ruling in *Brink's*. *See Stevens v. Brink's Home Sec., Inc., 162 Wn.2d 42, 169 P.3d 473 (Wash. 2007)*. Tellingly, the court's "on duty" analysis focused almost exclusively on the extent to which the employer exercised control over the employee during drive time. *See id. at 476* ("[W]e must evaluate the extent to which Brink's restricts Technicians' personal activities and controls Technicians' time to determine whether Technicians are 'on duty'...."); *id.* ("Unlike ordinary commuters who regularly run errands during their commutes and carry additional passengers, Brink's policy prohibits Technicians from engaging in personal activities while driving the Brink's trucks."); *id.* ("In addition to the restrictions on Technicians' [**10] drive time, Technicians remain 'on duty' during the drive. Supervisors may redirect Technicians under the HDP while en route to and from their homes to assist with other jobs or answer service calls.").

The District Court found that there was a legitimate dispute concerning the extent of Sears' control during drive time, and we cannot say that this finding was clearly erroneous. The *Winter* Objectors argue that there is little evidence that Sears did not exercise control during drive time. However, even assuming that that is true, there also is little evidence that Sears *did* exercise control. That is, based on our review of the record, it would have been difficult for the District Court to find -- as the *Brink's* and *Crow* courts found -- that Sears placed significant restrictions on drivers during drive time. Absent a finding that Sears exercised significant control, Washington class members do not appear to have strong claims under Washington law. [1]

> 1 We also agree with the District Court that the DLI guideline was non-binding and entitled to little deference. Moreover, the Washington Supreme Court's analysis in *Brink's*, which focused extensively on employer control (and did not even [**11] acknowledge the guideline), casts doubt on the extent to which the guideline accurately reflects Washington law.

Washington class members were included in Class One and therefore, for purposes of analyzing the relative strength of their claims, the proper comparison is with other members of Class One. California class members were also included in Class One. Washington law and California law appear to be similar, as both focus on the element of employer control during drive time. *Compare Brink's, 169 P.3d at 476* ("[W]e must evaluate the extent to which Brink's restricts Technicians' personal activities and controls Technicians' time to determine whether Technicians are 'on duty'....") *with Morillion v. Royal Packing Co., 22 Cal. 4th 575, 94 Cal. Rptr. 2d 3, 995 P.2d 139, 146 (Cal. 2000)* ("The level of the employer's control over its employees [while traveling to work], rather than the mere fact that the employer requires the employees' activity, is determinative."). Accordingly, even if Washington law is somewhat favorable relative to other [*119] states' law, it does not appear to be more favorable than California law, and we take comfort in the fact that class members from both states are treated identically under the settlement. [**12] [2]

> 2 There is no reason to believe (and the *Winter* Objectors do not allege) that the settlement is unfair as to California class members, as plaintiffs' counsel in *DeSoto* serves as class counsel and was involved in the arm's length negotiation of the settlement. Assuming the settlement is fair as to California class members, the obvious implication is that it also must be fair as to Washington class members, given that both states have similar laws, class members from those states press the same claims, and class members from those states are compensated identically under the settlement.

We agree with the District Court that Washington class members' claims are not significantly stronger than those of other class members. Even assuming their claims are slightly stronger than the claims of some non-Washington class members, this factor is adequately taken into account by their inclusion in Class One, where they receive a 50% premium.

B. The District Court's Decision To Certify The Class.

[HN2] Certification of a settlement class is only appropriate if the class meets the requirements of *Federal Rule of Civil Procedure 23*. Under *Rule 23(a)*, class representatives and class counsel must "fairly [**13] and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)*. *Rule 23(b)(3)* requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Fed. R. Civ. P. 23(b)(3)*. The *Winter* Objectors argue that, because Washington class members' claims are stronger than those of other class members, the settlement class fails to meet those requirements and therefore the class should not have been certified.

In light of our finding that Washington class members's claims are not stronger than those of other class members, these claims necessarily fail. Even assuming that Washington class members' claims are slightly stronger than some non-Washington class members' claims, their inclusion in Class One, where they received a 50% premium, allays any concerns about the class' ability to satisfy the requirements of *Rule 23*.

C. The District Court's Finding That The Settlement Is Fair, Reasonable and Adequate.

[HN3] The fairness of the settlement is determined by consideration of the nine factors articulated [**14] in *Girsh v. Jepson, 521 F.2d 153, 156-57 (3d Cir. 1975)*. [3] The District Court properly considered each of those factors and found the settlement to be fair, reasonable and adequate. The *Winter* Objectors argue that the District Court erred in its *Girsh* analysis. Although we could address each factor separately, we need not do so because at bottom the *Winter* Objectors' criticisms concerning the District Court's analysis [*120] are premised on their belief that Washington class members' claims are stronger than those of other class members. Given our finding to the contrary, their argument concerning the fairness of the settlement necessarily fails. And again, even assuming that Washington class members' claims are slightly stronger than some non-Washington class members' claims, the 50% premium adequately compensates them for any such advantage.

3 The nine factors include: "(1) the complexity, expense and likely duration of the litigation"; "(2) the reaction of the class to the settlement"; "(3) the stage of the proceedings and the amount of discovery completed"; "(4) the risks of establishing liability"; "(5) the risks of establishing damages"; "(6) the risks of maintaining the class action [**15] through the trial"; "(7) the ability of the defendants to withstand a greater judgment"; "(8) the range of reasonableness of the settlement fund in light of the best possible recovery"; and "(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Girsh, 521 F.2d at 157*.

IV.

In light of the foregoing, we hold that the District Court did not abuse its discretion in certifying the settlement class and finding the settlement to be fair, reasonable and adequate as to Washington class members. Accordingly, we will affirm.

TAB 10

LEXSEE 2006 US DIST LEXIS 56744

Analysis
As of: Sep 26, 2008

MEIJER, INC. & MEIJER DISTRIBUTION, INC., on behalf of themselves and all others similarly situated v. 3M (MINNESOTA MINING AND MANUFACTURING COMPANY)

CIVIL ACTION NO. 04-5871

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2006 U.S. Dist. LEXIS 56744*; *2006-2 Trade Cas. (CCH) P75,397

August 14, 2006, Decided
August 15, 2006, Filed; August 15, 2006, Entered

PRIOR HISTORY: *Meijer, Inc. v. 3M, 2005 U.S. Dist. LEXIS 13995 (E.D. Pa., July 13, 2005)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a class of purchasers of certain transparent and invisible tape, brought a class action antitrust lawsuit against defendant tape manufacturer. The parties reached a settlement, which the court preliminarily approved. Before the court was a motion brought pursuant to *Fed. R. Civ. P. 23* for final approval of settlement and class counsel's motion for attorneys' fees, expenses, and an incentive award.

OVERVIEW: This class action suit alleged that the tape manufacturer unlawfully maintained monopoly power through its bundled rebate programs and its exclusive dealing arrangements with various retailers. After considerable discovery and mediation, the parties reached a settlement totalling approximately $27 million. The court first determined that the settlement class satisfied the requirements of *Fed. R. Civ. P. 23(a)* and *(b)(3)*. Among other factors, the court noted that the class satisfied the numerosity requirement because it consisted of at least 143 members, from at least 35 different states. Moreover, the class members met the commonality requirement because they shared numerous common questions of law and fact. As to the settlement, the court found that, because it resulted from arm's-length negotiations after a year of litigation and discovery, it had the presumption of fairness. Applying the nine Girsh factors established by the United States Court of Appeals for the Third Circuit, the court found that only the manufacturer's ability to withstand greater judgment did not favor the proposed settlement and concluded that it was outweighed by the other factors favoring settlement.

OUTCOME: The court approved the final certification of the class for settlement purposes and approved the settlement agreement and distribution plan. The court further approved class counsel's requested reimbursement of expenses in the amount of $ 390,452, award of attorneys' fees in the amount of $ 7.5 million, and an incentive award for the class representative in the amount of $ 25,000.

LexisNexis(R) Headnotes

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Compromises
[HN1] Class actions created for the purpose of settlement are recognized under the general scheme of *Fed. R. Civ. P. 23*, provided that the class meets the certification requirements under the rule. The class may not be finally certified for settlement purposes unless it fully satisfies the requirements laid out in *Fed. R. Civ. P. 23(a)* and *(b)*. In the settlement context, the requirements of *Fed. R. Civ. P. 23(a)* and *(b)* call for heightened judicial scrutiny.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN2] The United States Court of Appeals for the Third Circuit has summarized the legal standard for class certification as follows: To be certified, a class must satisfy the four threshold requirements of *Fed. R. Civ. P. 23(a)*: (1) numerosity (a class so large that joinder of all members is impracticable); (2) commonality (questions of law or fact common to the class); (3) typicality (named parties' claims or defenses are typical of the class); and (4) adequacy of representation (representatives will fairly and adequately protect the interests of the class). In addition to the threshold requirements of *Rule 23(a)*, parties seeking class certification must show that the action is maintainable under *Rule 23(b)(1)*, *(2)*, or *(3)*. *Rule 23(b)(3)* provides for so-called "opt-out" class action suits. Under *Rule 23(b)(3)*, two additional requirements must be met in order for a class to be certified: (1) common questions must predominate over any questions affecting only individual members (the predominance requirement), and (2) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy (the superiority requirement).

Civil Procedure > Class Actions > Prerequisites > Numerosity

[HN3] When determining whether a proposed class is sufficiently large such that joinder of all members of the class is impractical, the United States Court of Appeals for the Third Circuit has noted that no minimum number of plaintiffs is required, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of *Fed. R. Civ. P. 23(a)* has been met. In addition to evaluating the absolute size of the proposed class, courts may consider other characteristics of the class when assessing numerosity, such as the geographic dispersion of class members.

Civil Procedure > Class Actions > Prerequisites > Commonality

[HN4] The commonality requirement for class action suits will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class. Because the requirement may be satisfied by a single common issue, it is easily met.

Civil Procedure > Class Actions > Prerequisites > Commonality

Civil Procedure > Class Actions > Prerequisites > Typicality

[HN5] The concepts of commonality and typicality in class action suits are broadly defined and tend to merge. A plaintiff's claim is typical if it arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory. The named plaintiffs' claims need only be sufficiently similar to those of the class such that the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented.

Civil Procedure > Class Actions > Prerequisites > Adequacy of Representation

[HN6] The adequacy of a class representative is dependent on satisfying two factors: 1) that the plaintiffs' attorney is competent to conduct a class action; and 2) that the class representatives do not have interests antagonistic to the interests of the class. The second factor that must be considered when evaluating adequacy serves to uncover conflicts of interest between named parties and the class they seek to represent. For this factor to be satisfied, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members. Consequently, the adequacy of representation requirement is not satisfied where the named representative's interest in maximizing its own recovery provides a strong incentive to minimize the recovery of other class members.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN7] *Fed. R. Civ. P. 23(b)(3)* requires that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. *Fed. R. Civ. P. 23(b)(3)*. The *Rule 23(b)(3)* predominance inquiry tests whether the class is sufficiently cohesive to warrant adjudication by representation and mandates that it is far more demanding than the *Rule 23(a)(2)* commonality requirement. The difficulty of demonstrating sufficient class cohesion naturally varies depending on the nature of the claim, but predominance is a test readily met in certain cases alleging violations of the antitrust laws.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN8] The superiority requirement of *Fed. R. Civ. P. 23(b)(3)* asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication. The considerations relevant to this determination are (A) the interest of members of the class in individually control-

ling the prosecution and defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum. *Fed. R. Civ. P. 23(b)(3)*.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Compromises
[HN9] The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court. While the law generally favors settlement in complex or class action cases for its conservation of judicial resources, the court has an obligation to ensure that any settlement reached protects the interests of the class members. Consequently, prior to approving a settlement, the court must determine whether the notice provided to class members was adequate. The court must also scrutinize the terms of the settlement to ensure that it is fair, adequate, and reasonable. Cases where the parties simultaneously seek certification and settlement approval require courts to be even more scrupulous than usual when they examine the fairness of the proposed settlement.

Civil Procedure > Class Actions > Notices
[HN10] The due process demands of the *Fifth Amendment* and the Federal Rules of Civil Procedure require adequate notice to class members of a proposed class action settlement. In the class action context, the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class. The due process requirements of the *Fifth Amendment* are satisfied by the combination of reasonable notice, the opportunity to be heard and the opportunity to withdraw from the class. The notice must be reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Civil Procedure > Class Actions > Notices
[HN11] In a settlement class maintained under *Fed. R. Civ. P. 23(b)(3)*, class notice must meet the requirements of both *Fed. R. Civ. P. 23(c)(2)* and *23(e)*. *Rule 23(c)(2)* provides that class members must receive the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. *Fed. R. Civ. P. 23(c)(2)(B)*. *Rule 23(c)(2)* also requires that the notice indicate an opportunity to opt out, that the judgment will bind all class members who do not opt out, and that any member who does not opt out may appear through counsel.

Civil Procedure > Class Actions > Notices
[HN12] In addition to the requirements of *Fed. R. Civ. P. 23(c)(2)*, *Fed. R. Civ. P. 23(e)* requires that notice of a proposed settlement of a class action lawsuit must inform class members: (1) of the nature of the pending litigation; (2) of the settlement's general terms; (3) that complete information is available from the court files; and (4) that any class member may appear and be heard at the Fairness Hearing. The court should consider both the mode of dissemination and its content to assess whether notice was sufficient. Although the notice need not be unduly specific, the notice document must describe, in detail, the nature of the proposed settlement, the circumstances justifying it, and the consequences of accepting and opting out of it.

Civil Procedure > Class Actions > Notices
[HN13] In the usual situation, first-class mail and publication in the press fully satisfy the notice requirements of both *Fed. R. Civ. P. 23* and the due process clause.

Civil Procedure > Class Actions > Compromises
[HN14] *Fed. R. Civ. P. 23(e)* requires that the court must approve any settlement of a class action and states that the court may only approve a settlement after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. *Fed. R. Civ. P. 23(e)(1)*. The United States Court of Appeals for the Third Circuit has determined that a court should accord a presumption of fairness to settlements if the court finds that (1) the negotiations occurred at arms length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.

Civil Procedure > Class Actions > Compromises
[HN15] The United States Court of Appeals for the Third Circuit developed a nine-factor test in Girsh v. Jepson (the "Girsh factors") which provides the analytic structure for determining whether a class action settlement is fair, reasonable, and adequate under *Fed. R. Civ. P. 23(e)*. The nine factors are (1) The complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action

through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation. The Girsh factors do not provide an exhaustive list of factors to be considered when reviewing a proposed settlement.

Civil Procedure > Class Actions > Compromises

[HN16] The first Girsh factor established by the United States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement, i.e., the complexity, expense, and likely duration of the litigation, captures the probable costs, in both time and money, of continued litigation.

Civil Procedure > Class Actions > Compromises

[HN17] The second Girsh factor established by the United States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement, i.e., the reaction of the class to the settlement, attempts to gauge whether members of the class support the settlement.

Civil Procedure > Class Actions > Compromises

[HN18] This third Girsh factor established by the United States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement, i.e., the stage of the proceedings and the amount of discovery completed, enables the court to determine whether counsel had an adequate appreciation of the merits of the case before negotiating.

Civil Procedure > Class Actions > Compromises

[HN19] The fourth Girsh factor established by the United States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement, i.e., the risks of establishing liability, enables the court to examine what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them. When considering this factor, the court should avoid conducting a mini-trial. Rather the court may give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action.

Antitrust & Trade Law > Sherman Act > Claims

[HN20] In order to succeed on a claim that a defendant violated *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, the plaintiff must establish that the defendant possessed monopoly power in the relevant market and that it willfully acquired or maintained that power as distinguished from achieving growth or development as a consequence of a superior product, business acumen, or historic accident.

Civil Procedure > Class Actions > Compromises

[HN21] Like the fourth Girsh factor established by the United States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement, the fifth Girsh factor, i.e., the risks of establishing damages, attempts to measure the expected value of litigating the action rather than settling it at the current time. In making this inquiry, the court considers the potential damage award if the case were taken to trial against the benefits of immediate settlement.

Civil Procedure > Class Actions > Compromises

[HN22] The sixth Girsh factor established by the United States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement, i.e., the risks of maintaining the class action through the trial, allows the court to weigh the possibility that, if a class were certified for trial in this case, it would be decertified prior to trial. *Fed. R. Civ. P. 23(a)* provides that a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable, and proceeding to trial would always entail the risk, even if slight, of decertification. There will always be a risk or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement.

Civil Procedure > Class Actions > Compromises

[HN23] The seventh Girsh factor established by the United States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement, i.e., the ability of the defendants to withstand a greater judgment is concerned with whether the defendants could withstand a judgment for an amount significantly greater than the settlement.

Civil Procedure > Class Actions > Compromises

[HN24] The eighth and ninth Girsh factors established by the United States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial. In making this assessment, the court compares the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing with the amount

of the proposed settlement. The damages estimates should generate a range of reasonableness (based on size of the proposed award and the uncertainty inherent in these estimates) within which a district court approving (or rejecting) a settlement will not be set aside. The primary touchstone of this inquiry is the economic valuation of the proposed settlement. In making this assessment, the evaluating court must recognize that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and guard against demanding too large a settlement based on the court's own view of the merits of the litigation.

Civil Procedure > Class Actions > Compromises

[HN25] In addition to analyzing the terms of a class action settlement agreement, the court must also examine the fairness of the proposed distribution plan. Approval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable, and adequate. Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable.

Civil Procedure > Class Actions > Class Counsel > Fees

[HN26] In class action cases, attorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund.

Civil Procedure > Class Actions > Class Counsel > Fees

[HN27] District courts approving class action settlements must thoroughly review fee petitions for fairness. Although the ultimate decision as to the proper amount of attorneys' fees rests in the sound discretion of the court, the court must set forth its reasoning clearly. Thorough review of fee arrangements is critical in the context of a class action settlement because of the danger that the lawyers might urge a class settlement at a low figure or on a less-than optimal basis in exchange for red-carpet treatment for fees, and because the parties to the action might lack sufficient incentive to object to the arrangement. Courts must be especially vigilant in searching for the possibility of collusion in pre-certification settlements.

Civil Procedure > Class Actions > Class Counsel > Fees

[HN28] Courts typically use one of two methods for assessing attorneys' fees, either the percentage of recovery method or the lodestar method. The percentage of recovery method is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure. The United States Court of Appeals for the Third Circuit also recommends use of the lodestar method to cross-check the percentage fee award, in order to verify that the fee award is not excessive.

Civil Procedure > Class Actions > Class Counsel > Fees

[HN29] When a district court uses the percentage of recovery method for assessing attorneys' fees, it first calculates the percentage of the total recovery that the proposal would allocate to attorneys fees by dividing the amount of the requested fee by the total amount paid out by the defendant; it then inquires whether that percentage is appropriate based on the circumstances of the case. The percentage will be based on the net settlement fund after deducting the costs of litigation.

Civil Procedure > Class Actions > Class Counsel > Fees

[HN30] In Gunter v. Ridgewood Energy Corp., the United States Court of Appeals for the Third Circuit directed the district courts to consider the following seven factors ("Gunter factors") when determining whether a percentage of recovery fee award is reasonable: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or the fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Civil Procedure > Class Actions > Class Counsel > Fees

[HN31] The list of seven factors created by the United States Court of Appeals for the Third Circuit in Gunter v. Ridgewood Energy Corp. (the "Gunter factors"), for assessing the reasonableness of a percentage of recovery fee award was not intended to be exhaustive. In the case, In re Prudential, the court noted three other factors (the "Prudential factors") that may be relevant and important to consider: (1) the value of benefits accruing to class members attributable to the efforts of class counsel as

opposed to the efforts of other groups, such as government agencies conducting investigations; (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any innovative terms of the settlement. Therefore, in reviewing an attorneys' fees award in a class action settlement, a district court should consider the Gunter factors, the Prudential factors, and any other factors that are useful and relevant with respect to the particular facts of the case. While the district courts should engage in robust assessments of the fee award reasonableness factors when evaluating a fee request, these factors need not be applied in a formulaic way because each case is different, and in certain cases, one factor may outweigh the rest.

Civil Procedure > Class Actions > Class Counsel > Fees

[HN32] When a class is comprised of sophisticated business entities that can be expected to oppose any request for attorney fees they find unreasonable, the lack of objections indicates the appropriateness of the fee request.

Civil Procedure > Class Actions > Class Counsel > Fees

[HN33] The skill and efficiency of plaintiffs' counsel in a class action case is measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience, and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case, and the performance and quality of opposing counsel.

Civil Procedure > Class Actions > Class Counsel > Fees

[HN34] While counsel should not be penalized for prosecuting a case in an efficient manner, a court reviewing a percentage of recovery fee award may nonetheless consider the amount of time devoted to a case by counsel as disfavoring the requested fee.

Civil Procedure > Class Actions > Class Counsel > Fees

[HN35] The United States Court of Appeals for the Third Circuit has suggested that, in addition to reviewing fee award reasonableness factors, it is sensible for district courts to cross-check the percentage fee award against the lodestar method. The lodestar is calculated by multiplying the number of hours worked by the normal hourly rates of counsel. The court may then multiply the lodestar calculation to reflect the risks of nonrecovery, to reward an extraordinary result, or to encourage counsel to undertake socially useful litigation. The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award. Moreover, the lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records. The resulting multiplier need not fall within any pre-defined range, provided that the district court's analysis justifies the award. It is appropriate for the court to consider the multipliers utilized in comparable cases. The Third Circuit has recognized that multipliers ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.

Civil Procedure > Class Actions > Class Members > Named Members

[HN36] Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation. It is particularly appropriate to compensate named representative plaintiffs with incentive awards when they have actively assisted plaintiffs' counsel in their prosecution of the litigation for the benefit of the class.

COUNSEL: [*1] For MEIJER, INC., MEIJER DISTRIBUTION, INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Plaintiff: BRENT W. LANDAU, DANIEL A. SMALL, COHEN, MILSTEIN, HAUSFELD & TOLL, PLLC, WASHINGTON, DC;DAVID P. GERMAINE, JOSEPH M. VANEK, VANEK VICKERS & MASINI PC, CHICAGO, IL, US; IRA NEIL RICHARDS, KATHRYN C. HARR, TRUJILLO RODRIGUEZ & RICHARDS LLC, PHILADELPHIA, PA; THOMAS A. VICKERS, DAAR & VANEK PC, CHICAGO, IL.

For 3M COMPANY, formerly known as MINNESOTA MINING AND MANUFACTURING COMPANY, Defendant: BRENT N. RUSHFORTH, DAVID T. SMUTNY,KATHERINE E. WOOD, KIT A. PIERSON, PAUL ALEXANDER, HELLER, EHRMAN, LLP, WASHINGTON, DC; DAVID W. ENGSTROM, ELEANOR MORRIS ILLOWAY, JOHN G. HARKINS, JR., HARKINS CUNNINGHAM, PHILADELPHIA, PA.

JUDGES: Padova, J.

OPINION BY: Padova

OPINION

MEMORANDUM

Padova, J.

August 14, 2006

Plaintiffs, Meijer, Inc. and Meijer Distribution, Inc. (collectively "Meijer"), have brought this class action antitrust lawsuit against Defendant 3M for damages arising out of 3M's allegedly anti-competitive conduct. Plaintiffs have reached a settlement with 3M, which the Court has preliminarily approved. Presently before the Court are Plaintiffs' Motion for Final Approval of [*2] Settlement (Docket No. 96) and Plaintiffs' Counsel's Motion for Attorneys' Fees, Expenses, and Incentive Award (Docket No. 97). After a Final Approval Hearing held on August 8, 2006, and for the reasons that follow, the Court grants both Motions.

I. BACKGROUND

Meijer brings this action against 3M on behalf of itself and other members of a proposed class, which includes persons and entities who purchased invisible or transparent tape directly from 3M at any time from October 2, 1998 to February 10, 2006 and also purchased, for resale under their own label, "private label" invisible or transparent tape from 3M at any time from October 2, 1988 to February 10, 2006. Meijer alleges one count of monopolization in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*, claiming that 3M unlawfully maintained monopoly power in the transparent tape market through its bundled rebate programs [1] and through exclusive dealing arrangements with various retailers. (Compl. P 27.) Meijer further claims that "3M has used its unlawful monopoly power . . . to harm Plaintiffs and the other Class members in their business or property by increasing, maintaining, or stabilizing [*3] the prices they paid for invisible and transparent tape above competitive levels." (Id. P 34.) Meijer seeks relief for these overcharges. (Id. P 4.)

1 In short, 3M's bundled rebate programs provided purchasers with significant discounts on 3M's products. The availability and size of the rebates, however, were dependent upon purchasers buying 3M products from multiple product lines. See *LePage's, Inc. v. 3M,324 F.3d 141, 154-55 (3d Cir. 2003)*.

A. Litigation History

The conduct of 3M that forms the basis of this class action lawsuit was the subject of a prior lawsuit before the Court, LePage's Inc. v. 3M, Civ. A. No. 97-3983 (E.D. Pa.). In that suit, LePage's, Inc., a competing supplier of transparent tape, sued 3M alleging, *inter alia,* unlawful maintenance of monopoly power in violation of *Section 2* of the Sherman Act. The jury found in favor of LePage's. See *Le Page's Inc. v. 3M, 2000 U.S. Dist. LEXIS 3087, Civ. A. No. 97-3983, 2000 WL 280350 (E.D. Pa. Mar. 14, 2000)*, aff'd [*4] , *324 F.3d 141 (3d Cir. 2003)* (en banc), cert. denied, *542 U.S. 953, 124 S. Ct. 2932, 159 L. Ed. 2d 835 (2004)*. Thereafter, Bradburn Parent/Teacher Store, Inc. brought a class action lawsuit against 3M on the basis of the conduct litigated in LePage's. *Bradburn Parent/Teacher Stores, Inc. v. 3M, 2004 U.S. Dist. LEXIS 16193, Civ. A. No. 02-7676 (E.D. Pa.)*. Bradburn, who originally had sought to represent a class which included Meijer, was ultimately granted certification of a modified class that excluded purchasers of private label tape, such as Meijer. *Bradburn Parent/Teacher Stores, Inc. v. 3M, 2004 U.S. Dist. LEXIS 16193, Civ. A. No. 02-7676, 2004 WL 1842987 (E.D. Pa. Aug. 18, 2004)*. Having been excluded from the class in Bradburn, Meijer attempted to intervene in that lawsuit as an additional class representative. In denying Meijer's Motion to Intervene, this Court noted that "there is nothing which would prevent Meijer from filing its own individual or class-action lawsuit against [3M] and presenting its claims in that forum." *Bradburn Parent/Teacher Store, Inc. v. 3M, 2004 U.S. Dist. LEXIS 25246, Civ. A. No. 02-7676, 2004 WL 2900810, at *6 (E.D. Pa. Dec. 10, 2004)*.

Accordingly, on December 16, 2004, Meijer filed a Complaint [*5] against 3M. On February 10, 2005, 3M moved to dismiss the Complaint on the grounds that it was barred by the statute of limitations and failed to allege an antitrust injury. Meijer filed its opposition to that Motion on March 11, 2005. On July 13,2005, this Court denied 3M's Motion to Dismiss, but left open the question of whether and to what extent the statute of limitations should be tolled. See *Meijer, Inc. v. 3M, 2005 U.S. Dist. LEXIS 13995, Civ. A. No. 04-5871, 2005 WL 1660188, at *4 n.2 (E.D. Pa. July 13, 2005)*.

While 3M's Motion to Dismiss was pending, this Court entered a Protective Order negotiated by counsel for 3M and for Meijer, which allowed Meijer to begin receiving documents from the Lepage's and Bradburn cases as well as documents responsive to its own discovery requests. (Daniel A. Small Decl. P 18.) Separately, individual lawsuits were filed against 3M by Publix Supermarkets, Inc. ("Publix"), a former member of the Bradburn class, and by Kmart Corporation ("Kmart"), a member of the proposed Meijer Class. (Id. P 19.) On May 26, 2005, 3M moved for coordination of pretrial discovery among the four pending actions. Meijer responded on June 13, 2005, agreeing [*6] that such coor-

dination was appropriate and suggesting modifications to 3M's proposed order. On July 20, 2005, the Court issued an Order coordinating pretrial discovery. Thereafter, Meijer participated in the merits discovery that was ongoing in Bradburn and, in collaboration with Publix and Kmart, established an online database to facilitate the compilation and review of documents and depositions. (Id. PP 22, 24.) On August 2, 2005, 3M filed its Answer to Meijer's Complaint with affirmative defenses.

On September 6, 2005, Meijer moved for class certification under *Federal Rule of Civil Procedure 23(a)* and *(b)(3)*; this Motion was supported by an expert affidavit from an economist, Professor Keith Leffler ("Leffler Declaration"). 3M filed its opposition to this Motion on October 26, 2005. Meanwhile, this Court, following a status hearing on September 26, 2005, suggested that the parties in the coordinated actions attempt to reach a settlement through mediation. (Id. P 31.) The parties selected as a mediator Jonathan B. Marks, and the mediation occurred on November 8 and 9, 2005. (Id. PP 32-33.) Negotiations continued in the days [*7] immediately following the mediation, and ultimately resulted in a Memorandum of Understanding ("MOU"), dated November 21, 2005, that resolved the Meijer, Publix, and Kmart actions. (Id. PP 36-37.) Pursuant to the MOU, 3M agreed to pay a total of $ 30 million to settle the three separate lawsuits. (Id. P 38.) Meijer, Publix, and Kmart then allocated that lump sum among the three actions in proportion to the relevant purchases of 3M tape represented in each action; under this allocation plan, all three parties settled their claims for the same percentage of their respective purchases. (Id.)

Subsequent to the execution of the MOU, counsel for Meijer and 3M spent approximately three months negotiating the details of their formal Settlement Agreement, which the parties signed on February 10, 2006. (Id. PP 39, 41.) On February 13, 2006, Meijer moved for preliminary approval of the proposed Settlement; on February 15, 2006, Bradburn moved to intervene for the purpose of opposing preliminary approval of Meijer's proposed Settlement and Settlement Class. Both Meijer and 3M opposed Bradburn's Motion and, on March 9, 2006, the Court denied Bradburn permission to intervene. [*8] On March 28, 2006, the Court issued an Order preliminarily approving the Settlement. That Order also preliminarily certified the Settlement Class for settlement purposes, appointed Class Counsel, [2] and approved Meijer as Class Representative. Additionally, the Order authorized the dissemination of Notice to the Settlement Class, scheduled a hearing for final approval of the proposed Settlement ("the Final Approval Hearing"), and set June 6, 2006 as the deadline for objections to the Settlement, requests for exclusion from the Settlement Class, or for filing a Notice of Appearance at the Final Approval Hearing. Pursuant to the March 28th Order, Notice of the Settlement was disseminated through publication and first-class mail, and also was posted on a dedicated website. (Id. P 52.) On May 23, 2006, Meijer filed the instant Motions for Final Approval of Settlement and for Attorneys' Fees, Expenses and Incentive Award. The Motions were supported by a Declaration from Class Counsel attorney Daniel A. Small ("Small Declaration") and a second Declaration from Professor Keith Leffler ("Leffler Declaration II").

2 The Court appointed the following as Class Counsel: Daniel A. Small and Brent W. Landau of Cohen, Milstein, Hausfield & Toll, P.L.L.C. ("CMHT"); and Joseph M. Vanek of Vanek, Vickers & Masini, P.C. ("VVM," previously "Daar & Vanek, P.C.").

[*9] B. The Settlement Agreement

1. The Settlement Class

The Settlement Class, which was preliminarily certified by the Court, is defined as:

> all persons and entities that purchased invisible or transparent tape directly from 3M Company, or any subsidiary or affiliate thereof, in the United States at any time during the period from October 2, 1998 to February 10, 2006 and also purchased for resale under the class member's own label, any "private label" invisible or transparent tape from 3M or any of 3M's competitors from October 2, 1988 to February 10, 2006; but excluding 3M Company, its subsidiaries, affiliates, officers, directors, and employees and excluding those persons or entities that timely and validly request exclusion from the Settlement Class.

2. Terms of the Settlement Agreement

The Settlement Agreement provides for a cash payment of $ 28,889,128 to the Settlement Class; this amount was deposited in an interest-bearing escrow account on April 5, 2006. (Id. P 42.) The Settlement Amount is approximately 2% of the total amount paid to 3M by members of the Settlement Class for invisible and transparent tape for home or office use during [*10] the Class Period. (Id. P 43.) The Settlement Amount was

subject to reduction and reversion to 3M as members of the Settlement Class requested exclusion. 3M had the right to terminate the Settlement if requests for exclusion exceeded 27.5%. The Distribution Plan calls for the Settlement Amount to be allocated among Class Members in proportion to their relevant purchases of 3M tape. All costs of administering the Settlement and of providing Notice to Members of the Settlement Class are to be paid out of the Settlement Fund. The Agreement authorizes Class Counsel to withdraw up to a total of $ 25,000 from the Settlement Fund for the costs of administering the Settlement and providing Notice to Members of the Settlement Class.

The Settlement Agreement requires that Members of the Settlement Class release and discharge 3M from any and all claims asserted, or which could have been asserted, in the litigation. The release includes all claims and potential claims concerning any 3M discount, rebate, offer, promotion, or other sales program or practice (including programs alleged to involve the bundling of products or volume or growth rebates), relating in any way to the sale, promotion, [*11] or distribution of invisible or transparent tape for home or office use, in effect from January 1, 1993 to the Settlement Agreement Date of February 10, 2006. The release specifically excludes claims relating to product defect, personal injury, or breach of contract.

The Settlement Agreement permitted Plaintiffs' Counsel [3] to apply to the Court during the Final Approval Hearing for an award of attorneys' fees and a reimbursement of litigation and settlement expenses incurred on behalf of the Settlement Class. The Settlement Agreement also allows Meijer, as Class Representative, to seek an incentive award for its services to the Settlement Class. The attorneys' fees, expenses, and incentive award are to be paid from the Settlement Fund prior to the Fund's distribution to the Class.

3 The term "Plaintiffs' Counsel" refers collectively to Class Counsel, as identified above, and the firm Trujillo, Rodriguez, and Richards, L.L.C. ("TRR"), which has served as local counsel for Plaintiffs.

C. Final Approval Hearing

[*12] On August 8, 2006, the Court held a Final Approval Hearing to address the Motions for Final Approval of Settlement and for Attorneys' Fees, Expenses and Incentive Award. In preparation for the Hearing, Meijer filed, on August 1, 2006, additional Memoranda in support of these Motions as well as a second Declaration by Attorney Small ("Small Declaration II") and an Affidavit from Thomas R. Glenn, Senior Vice President and Chief Operating Officer of Complete Claims Solutions, Inc. ("CCS"), the firm hired to act as Settlement Administrator. These submissions provided the Court with the following updated information regarding the Settlement Class and Fund: approximately sixty-eight [4] identified Class Members had responded to the Notice which had been mailed to them and were therefore eligible to receive allocation from the Settlement Fund (Thomas R. Glenn Aff. P 13), no objections or Notices of Appearance had been filed, and only one Settlement Class Member - Costco Wholesale Corporation ("Costco") - had requested exclusion from the Class. (Id. P 15.) After factoring in accrued interest and the appropriate reversion to 3M to account for Costco's exclusion, the Settlement Fund totaled [*13] $ 27,783,836.97 as of August 1, 2006. (Mem. in Further Support of Pls.' Mot. for Final Approval of Settlement at 5 n.6.). Meijer's submissions also indicated that Plaintiffs' Counsel would request an award of $ 7.5 million in attorneys' fees and a reimbursement of $ 390,452.46 in expenses, and that Meijer would request an incentive award of $ 25,000. The Court confirmed these facts at the Hearing and then considered the final certification of the Settlement Class, the final approval of the proposed Settlement, and the final approval of the requested attorneys' fees, expenses, and incentive award.

4 Sixty-eight refers to the number of clearly non-duplicative responses that CCS had received from identified Class Members as of August 1, 2006. CCS received a total of seventy-two responses from identified Class Members, but four were identified as potentially duplicative. (Glenn Aff. P 13.) CCS also received thirty requests for inclusion in the Settlement Class from entities believing that they may be Class Members; of those requests, two entities were identified as additional Class Members, sent Notice, and given the opportunity to respond and become eligible to receive allocation from the Settlement Fund. (Id. P 14.) As of the Final Approval Hearing on August 8, 2006, no response from those entities had been received; their responses, however, did not need to be postmarked until August 7, 2006 (Id.), and thus may have been validly outstanding at the time of the Hearing. For greater detail regarding the Notice Plan, see infra Section III. A.

[*14] II. FINAL CLASS CERTIFICATION

"The Third Circuit has declared that [HN1] class actions created for the purpose of settlement are recognized under the general scheme of *Federal Rule of Civil Procedure 23*, provided that the class meets the certification requirements under the Rule." *Pozzi v. Smith, 952 F. Supp. 218, 221 (E.D. Pa. 1997)* (citing*In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,*

55 F.3d 768, 792-97 (3d Cir. 1995)). The Settlement Class was preliminarily certified on March 28, 2006; the Class, however, may not be finally certified for settlement purposes unless it fully satisfies the requirements laid out in *Federal Rule of Civil Procedure 23(a)* and *(b)*. See *In re Cmty. Bank of N. Va., 418 F.3d 277, 299 (3d Cir. 2005)* (noting that "the ultimate inquiry into the fairness of the settlement under *Fed. R. Civ. P. 23(e)* does not relieve the court of its responsibility to evaluate *Rule 23(a)* and *(b)* considerations"). In the settlement context, the requirements of *Rule 23(a)* and *(b)* call for [*15] heightened judicial scrutiny. See, e.g., *In re General Motors, 55 F.3d at 784*; *Amchem Prods.,Inc. v. Windsor, 521 U.S. 591, 621, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (stating that the full satisfaction of *Fed. R. Civ. P. 23(a)* and *(b)* criteria as a prerequisite to certification is even more important when the case is to be settled without trial). [HN2] The United States Court of Appeals for the Third Circuit ("Third Circuit") has summarized the legal standard for class certification as follows:

> To be certified, a class must satisfy the four threshold requirements of *Federal Rule of Civil Procedure 23(a)*: (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical . . . of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class"). In addition to the threshold requirements of *Rule 23(a)*, parties seeking class certification must show that the action [*16] is maintainable under *Rule 23(b)(1)*, *(2)*, or *(3)*. *Rule 23(b)(3)* . . . provides for so-called "opt-out" class actions [sic] suits. Under *Rule 23(b)(3)*, two additional requirements must be met in order for a class to be certified: (1) common questions must "predominate over any questions affecting only individual members" (the "predominance requirement"), and (2) class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy" (the "superiority requirement").

In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 527 (3d Cir. 2004)(internal citations omitted).

For the reasons given below, the Court finds that the proposed Settlement Class satisfies the requirements of *Rule 23(a)* and *(b)(3)*, and thus the Court certifies the Class for settlement purposes.

A. *Rule 23(a)* Factors

1. Numerosity

[HN3] When determining whether a proposed class is sufficiently large such that joinder of all members of the class is impractical, the Third Circuit has noted that "[n]o minimum number of plaintiffs is required . . ., but generally if the named plaintiff demonstrates that the potential number of plaintiffs [*17] exceeds forty, the first prong of *Rule 23(a)* has been met." *Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)* (citing 5 James Wm. Moore et al., *Moore's Federal Practice § 23.22[3][a]* (Matthew Bender 3d ed. 1999)). In addition to evaluating the absolute size of the proposed class, courts may consider other characteristics of the class when assessing numerosity, such as the geographic dispersion of class members. 5 *Moore's Federal Practice § 23.22[1][d]* (Matthew Bender 3d ed. 2006); see also *In re Corel Corp. Inc. Sec. Litig., 206 F.R.D. 533, 540 (E.D. Pa. 2002)* (noting that plaintiffs' argument that "joinder is impracticable due to the geographic dispersion of class members" supports a finding of numerosity). Here, information supplied from 3M's sales records indicates that the Settlement Class consists of at least 143 Members, who are headquartered in at least 35 different states. (Thomas R. Glenn Aff. P 5; Leffler Decl. Table 1.) Accordingly, the Court finds that the Settlement Class satisfies the numerosity requirement of *Rule 23(a)*.

2. Commonality

[HN4] "The [*18] commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class. Because the requirement may be satisfied by a single common issue, it is easily met. . . ." *Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)* (citations omitted). The Court notes that the "numerous common questions of law and fact" that this Court found to be present in Bradburn are also present in this case. See *Bradburn, 2004 U.S. Dist. LEXIS 16193, 2004 WL 1842987, at *3*. Namely, all members of the Settlement Class must establish: the proper definition of the relevant product and geographic market; whether 3M has monopoly power in the relevant market; whether 3M acquired monopoly power through anti-competitive activity; and whether 3M's anti-competitive conduct caused tape prices to be artificially inflated. As Meijer shares multiple questions

of law and fact with the proposed Class, the Court finds that *Rule 23(a)*'s commonality requirement is satisfied.

3. Typicality

[HN5] The concepts of commonality and typicality are broadly defined and tend to merge." *Baby Neal, 43 F.3d at 56*. "'[A] plaintiff's [*19] claim is typical if it arises from the same event or course of conduct that gives rise to the claims of other Class members and is based on the same legal theory.'" *T.B. v. School Dist. of Phila., 1997 U.S. Dist. LEXIS 19300, Civ. A. No. 97-5453, 1997 WL 786448, at *4 (E.D. Pa. Dec. 1, 1997)* (quoting *Paskel v. Heckler, 99 F.R.D. 80, 83 (E.D. Pa. 1983))* (alteration in original). The named plaintiffs' claims need only be sufficiently similar to those of the class such that "the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented." *Georgine v. Amchem Prods., Inc., 83 F.3d 610, 631 (3d Cir. 1996)*, aff'd subnom. *Amchem Prods., 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689*. Here, Meijer's claims are typical of the claims of the members of the proposed Class. Both Meijer and all Settlement Class Members allegedly have been injured by the same anti-competitive conduct of 3M, and purportedly suffered overcharges as a result. Accordingly, the Court finds that the typicality requirement is satisfied.

4. Adequacy of representation

[HN6] The adequacy of the class representative [*20] is dependant on satisfying two factors: 1) that the plaintiffs' attorney is competent to conduct a class action; and 2) that the class representatives do not have interests antagonistic to the interests of the class." *In Re Linerboard Antitrust Litig., 203 F.R.D. 197, 207 (E.D. Pa. 2001)*(citations omitted). With respect to the first factor, Class Counsel have submitted firm resumes (Small Decl. PP 62-64, Exs. 8, 9A, 10A) which attest to their extensive experience in antitrust and other class action litigation and their successful prosecution of such cases in courts throughout the country. The Court, therefore, finds that Class Counsel is competent to conduct this class action.

he second factor that must be considered when evaluating adequacy "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., 521 U.S. at 625*. For this factor to be satisfied, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the Class members." *E. Tex. Motor FreightSys. Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977)* (quoting [*21] *Schlesinger v. Reservists Comm. to Stopthe War,418 U.S. 208, 216, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974))*; see also *Georgine, 83 F.3d at 630* (finding class representative inadequate because the proposed settlement made "important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others"). Consequently, the adequacy of representation requirement is not satisfied where "the named representative's interest in maximizing its own recovery provides a strong incentive to minimize the recovery of other class members." *Yeager's Fuel, Inc. v. Pa. Power & Light Co.,162 F.R.D. 471, 478 (E.D. Pa. 1995)*.

Meijer is capable of providing adequate representation for the absent Class Members. Meijer, as a purchaser of both brand and private label tape from 3M, has the same interest in this antitrust claim as the absent Class Members do: namely, to challenge and obtain damages for 3M's anti-competitive conduct. The potential concern regarding the adequacy of Meijer's representation is Meijer's decision to seek these damages under an "overcharge" theory as opposed to an alternate [*22] "lost profits" theory. See *Bradburn Parent/Teacher Store, Inc. V. 3M, 2004 U.S. Dist. LEXIS 3347, Civ. A. No. 02-7676, 2004 WL 414047, at *4 (E.D. Pa. Mar. 1, 2004). Rule 23(a)(4)*, however, asks the Court to examine the interests of the class representative, not its litigation decisions. Meijer's decision to pursue the common interest of the proposed Class through one theory of recovery as opposed to another does not compromise the adequacy of Meijer's representation unless the record demonstrates that such a decision will work to the detriment of absent Class Members. See *Bradburn, 2004 U.S. Dist. LEXIS 16193, 2004 WL 1842987, at *6* (rejecting the argument that "the mere risk that the theory [of damages] proposed by Plaintiff will be less well received than a competing theory which could be put forward by other potential class members is sufficient for the Court to find the existence of an imminent and apparent potential conflict").

While the lost profits theory is a means of pursuing damages available to the Settlement Class, Meijer's decision to pursue an overcharge theory is not antagonistic to the interests of the Class. Meijer has submitted a declaration from Keith Leffler, Ph.D., an Associate Professor [*23] at the University of Washington, which indicates that it is highly likely that every Class Member's overcharge remedy is larger than its lost profits remedy and, even if a Class Member has a larger lost profits claim, the burden and difficulty of proving such a claim would overwhelm its additional value. (Leffler Decl. P 6.) The Court also finds it significant that, in the years since the LePage's verdict, no potential member of the proposed

Meijer Class pursued a lost profits claim and Kmart, the one such entity to file an individual action, chose to pursue an overcharge remedy rather than a lost profits remedy. Complaint at P 4, Kmart Corp. v. 3M Co., Civ. A. No. 05-3842 (E.D. Pa. July 25, 2005). Thus, since Class Counsel is competent to conduct a class action, and since Meijer does not have interests in this action that are antagonistic to the interests of the Members of the proposed Settlement Class, the Court finds that Meijer satisfies the adequacy of representation requirement.

B. *Rule 23(b)(3)* Factors

1. Predominance

[HN7] *Rule 23(b)(3)* requires that "the questions of law or fact common to the members of the class predominate over any questions affecting [*24] only individual members." *Fed. R. Civ.P. 23(b)(3)*. "The *Rule 23(b)(3)* predominance inquiry tests whether the class is sufficiently cohesive to warrant adjudication by representation, and mandates that it is far more demanding than the *Rule 23(a)(2)* commonality requirement." *In re Life USA Holding Inc., 242 F.3d 136, 144 (3d Cir. 2001)* (citing *Amchem, 521 U.S. at 623-24*). The difficulty of demonstrating sufficient class cohesion naturally varies depending on the nature of the claim, but "'[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws.'" *In re Warfarin, 391 F.3d at 528* (quoting *Amchem, 521 U.S. at 625*).

The Court finds that common questions of law and fact predominate in this case. The substance of this antitrust claim derives from the anti-competitive conduct of 3M and "does not depend on the conduct of individual class members." Id.The success of the claim hinges on matters of common, class-wide proof; the evidence that proves the violation as to one Class Member proves it as to all Class Members. See *In re Linerboard, 203 F.R.D. at 220* [*25] (finding predominance requirement satisfied where "[p]laintiffs have shown that they plan to prove common impact by introducing generalized evidence which will not vary among individual class members."). "Finally, the fact that plaintiffs allege purely an economic injury . . . and not any physical injury, further supports a finding of commonality and predominance because there are little or no individual proof problems in this case otherwise commonly associated with physical injury claims." *In re Warfarin, 391 F.3d at 529*. Accordingly, the Court finds that *Rule 23(b)(3)*'s predominance requirement is met.

2. Superiority

[HN8] "The superiority requirement [of *Rule 23(b)(3)*] 'asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication.'" *In re Warfarin, 391 F.3d at 533-34* (quoting *In re Prudential Ins. Co. of Am. Sales Practice Litig., 148 F.3d 283, 316 (3d Cir. 1998))*. The considerations relevant to this determination are:

> (A) the interest of members of the class in individually controlling the prosecution and defense [*26] of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum . . . . [5]

Fed. R. Civ. P. 23(b)(3).

> 5 There is also a fourth consideration: "(D) the difficulties likely to be encountered in the management of a class action." *Fed. R. Civ. P. 23(b)(3)(D)*. The Court, however, need not consider this final factor in the context of a settlement-only class certification. See *Amchem, 521 U.S. at 620* ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see *Fed. Rule Civ. Proc. 23(b)(3)(D)*, for the proposal is that there be no trial.").

Here, a class action is superior [*27] to other methods of adjudication. There appears to be little interest on behalf of the Members of the proposed Class in litigating their claims individually. Roughly half of the Members of the proposed the Class have under $ 1 million in total tape purchases from 3M (Leffler Decl. Table 1), and the potential recovery of these Class Members would be just a fraction of that amount - a sum easily subsumed by the various fees and expenses of a complex antitrust suit against a large corporate defendant such as 3M. See *In re Warfarin, 391 F.3d at 534*; see also *Orloff v. Syndicated Office Sys., Inc., 2004 U.S. Dist. LEXIS 7151, Civ. A. No. 00-5355, 2004 WL 870691, at *5 (E.D. Pa. Apr. 22, 2004)* (finding a class action to be the superior method of adjudication, "because it "provides an efficient alternative to individual claims, and because individual Class members are unlikely to bring individual actions given the likelihood that their litigation expenses would exceed any potential recovery"). The presence of some larger

purchasers in the proposed Class who potentially could support an individual suit does not militate against the superiority of the class action, given the presence [*28] and number of smaller claimants. See *Bradburn, 2004 U.S. Dist. LEXIS 16193, 2004 WL 1842987, at *18* (finding the superiority requirement to be satisfied even though the "class may include members who have purchased a sufficiently large quantity of tape from 3M to justify the commencement of an individual suit" because "the class also contains many members whose potential damage awards would be dwarfed by their potential litigation expenses."). If these larger purchasers preferred to litigate separately, they could have opted out of the proposed Settlement. The fact that, of the potential members of the proposed MeijerClass, only Kmart chose to bring an individual action speaks both to the lack of interest of the Members of the proposed Class in litigating separately and to the lack of "litigation concerning the controversy already commenced by or against members of the class." *Fed. R. Civ. P. 23(b)(3)*; see also *In re Warfarin, 391 F.3d at 534* ("[T]here were a relatively small number of individual lawsuits pending against [the defendant] in this matter, which indicated . . . that there was a lack of interest in individual prosecution [*29] of claims."). Lastly, the consolidation of these claims before the Court is appropriate given the Court's experience and familiarity with the previous litigation, LePage's, that arose from the conduct of 3M at issue here. Accordingly, the Court finds that a class action is the superior method of adjudication in this case, as required by *Rule 23(b)(3)*.

Thus, the Court concludes that the proposed Settlement Class satisfies all of the relevant requirements of *Rule 23(a)* and *(b)* and, therefore, approves final certification of the Class for the purposes of settlement.

III. MOTION FOR FINAL APPROVAL OF SETTLEMENT

[HN9] "The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh v. Jepson, 521 F.2d 153, 156 (3d Cir. 1975)*. "While the law generally favors settlement in complex or class action cases for its conservation of judicial resources, the court has an obligation to ensure that any settlement reached protects the interests of the class members." *In re Aetna Inc. Sec. Litig., 2001 U.S. Dist. LEXIS 68, MDL No. 1219, 2001 WL 20928, at *4 (E.D. Pa. Jan. 4, 2001)* (citing *In re General Motors, 55 F.3d at 784*). [*30] Consequently, prior to approving a settlement, the Court must determine whether the notice provided to class members was adequate. *Id.* (citations omitted). The Court must also "scrutinize the terms of the settlement to ensure that it is 'fair, adequate and reasonable.'" *Id.* (quoting *In re General Motors, 55 F.3d at 785*). "[C]ases such as this, where the parties simultaneously seek certification and settlement approval, require 'courts to be even more scrupulous than usual' when they examine the fairness of the proposed settlement." *In re Prudential, 148 F.3d at 317* (quoting *In re General Motors, 55 F.3d at 805*).

A. Adequacy of Notice

[HN10] The due process demands of the *Fifth Amendment* and the Federal Rules of Civil Procedure require adequate notice to class members of a proposed settlement. *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *5*. "In the class action context, the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class. [*31] " *In re Prudential, 148 F.3d at 306* (citing *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)*). The due process requirements of the *Fifth Amendment* are satisfied by the "combination of reasonable notice, the opportunity to be heard and the opportunity to withdraw from the class." Id. The notice must be "'reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Lachance v. Harrington, 965 F. Supp. 630, 636 (E.D. Pa.1997)* (quoting *Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)*).

[HN11] Moreover, "in a settlement class maintained under *Rule 23(b)(3)*, class notice must meet the requirements of both *Federal Rules of Civil Procedure 23(c)(2)* and *23(e)*." *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig., 226 F.R.D. 498, 517 (E.D. Pa. 2005)* (citing *Carlough v. Amchem Prods., Inc., 158 F.R.D. 314, 324-25 (E.D. Pa. 1993)*). [*32] *Rule 23(c)(2)* provides that class members must receive the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Fed. R. Civ. P. 23(c)(2)(B)*. *Rule 23(c)(2)* also requires that "the notice indicate an opportunity to opt out, that the judgment will bind all class members who do not opt out and that any member who does not opt out may appear through counsel." *In re Diet Drugs, 226 F.R.D. at 517* (citing *Fed. R. Civ. P. 23(c)(2)*).

[HN12] In addition to the requirements of *Rule 23(c)(2)*, *Rule 23(e)* "requires that notice of a proposed settlement must inform class members: (1) of the nature of the pending litigation; (2) of the settlement's general terms; (3) that complete information is available from the court files; and (4) that any class member may appear and be heard at the Fairness Hearing." *Id. at 517-18* (ci-

tation omitted). The court should consider both "the mode of dissemination and its content to assess whether notice was sufficient." *Id.* Although the "notice need not be unduly specific [*33] . . . the notice document must describe, in detail, the nature of the proposed settlement, the circumstances justifying it, and the consequences of accepting and opting out of it." *Id. at 518* (citing *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig., 369 F.3d 293, 308-10 (3d Cir. 2004)*).

The Court finds that the Notice provided in this case satisfies the requirements of due process and the Federal Rules of Civil Procedure. Pursuant to the Settlement Agreement and the Court's Preliminary Approval Order, Meijer hired CCS as Settlement Administrator to oversee the dissemination of Notice to the Class. (Small Decl. II P 3.) Potential Members of the Settlement Class were identified by Meijer and 3M through the examination of 3M's sales data as well as the list of entities compiled in the Bradburn litigation. (Small Decl. P 52.) Between May 1 and May 5, 2006, CCS sent Notice by first-class mail to the 143 entities identified as those believed to be Members of the Settlement Class. (Small Decl. P 52; Glenn Aff. P 5.) This Notice was accompanied by a preprinted Proof of Claim form, which provided the total invoice amount [*34] paid to 3M by the Settlement Class Member for invisible transparent tape for home or office use, less any applicable volume rebates, from 1999 through 2004. (Small Decl. P 53.) An attachment to the preprinted form listed this information on a year-by-year and SKU-by-SKU basis. (Id.) Settlement Class Members were given the opportunity either to agree with the total purchase amount stated on the Proof of Claim form, or to disagree and provide supporting documentation for a different amount. (Id.) On or about April 27, 2006, CCS sent Summary Notice by first-class mail to over 3000 other entities identified by 3M as having purchased invisible or transparent tape directly from 3M, based on the list used in the Bradburn litigation. (Small Decl. P 52; Glenn Aff. P 4.) Each entity receiving Summary Notice also received a Claim Form Request, with which it could request a Proof of Claim Form if it believed it was a Member of the Settlement Class. (Small Decl. P 54.) Additionally, an abbreviated Summary Notice was published on May 11, 2006, in DSN Retailing Today, Supermarket News, and Office Products International. (Glenn Aff. P 6.) Lastly, Notice was posted on a dedicated [*35] website, www.TransparentTapeDirectPurchaserSettlement.com; this website has been active since May 1, 2006. (Small Decl. P 52; Glenn Aff. P 12.) The Court finds that these efforts to disseminate notice were the best practicable. See *Zimmer Paper Prods., Inc. v. Berger & Montague, 758 F.2d 86, 90 (3d Cir. 1985)*(noting that [HN13] "in the usual situation first-class mail and publication in press fully satisfy the notice requirements of both *Fed. R. Civ. P. 23* and the due process clause").

The Court also finds the content of the Notice and the Summary Notices to be adequate under the due process clause and *Rules 23*. The Notice describes the nature and background of this action and defines the Class, Class claims, and consequences of Class Membership. (Glenn Aff. Ex. 2.) It summarizes the terms of the Settlement, including information relating to the size of the Settlement Fund; the release provisions of the Settlement; and the attorneys' fees, expenses, and incentive award for which Meijer may apply. (Id.) The Notice also describes the proposed Distribution Plan and details how to submit a proper and timely Proof of Claim form, advising [*36] Class Members that, if they fail to submit a proper Proof of Claim form by the specified deadline, they may be barred from any recovery though still bound by the final disposition of the litigation. (Id. at 3-4.) The Notice alerts Class Members to their right to request exclusion from the Class, and details the procedure for and consequences of doing so. (Id. at 3.) The Notice informs Class Members of the time and date of the Final Approval Hearing, advising them of the nature and purpose of the Hearing, of their rights to object to the Settlement and appear at the Hearing, and of the procedure for asserting those rights. (Id. at 4.) The Notice includes the contact information of the relevant attorneys and of the Settlement Administrator, and also directs Class Members to the dedicated website, where copies of the Notice, the Settlement Agreement, and other documents pertaining to the case may be found. (Id.) The Summary Notices provide the essential information regarding the Class, the litigation, the terms of the Settlement, and the Final Approval Hearing. (Glenn Aff. Exs. 1,4.) The Summary Notices inform potential Class Members of their rights with regard to the [*37] Settlement and provide information on how copies of the full Notice and Settlement Agreement may be obtained. (Id.) The Summary Notice distributed by mail also explicitly distinguishes the proposed Meijer Class from the Bradburn Class and details both the procedure for submitting the Claim Form Request and the consequences of failing to submit a Proof of Claim form. (Glenn Aff. Ex.1.) After reviewing the Notice and Summary Notices, the Court concludes that their substance, like the method of their dissemination, is sufficient to satisfy the concerns of due process and *Rule 23*. See *In re Prudential, 148 F.3d at 328*; *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *5* (citing *In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 175 (E.D. Pa. 2000)*).

B. Presumption of Fairness

[HN14] *Rule 23(e) of the Federal Rules of Civil Procedure* requires that the Court must approve any set-

tlement of a class action and states that the Court may only approve a settlement "after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(1)* [*38] . The Third Circuit has determined that a court should accord a presumption of fairness to settlements if the court finds that: "(1) the negotiations occurred at arms length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Cendant Corp. Litig., 264 F.3d 201, 232 n.18 (3d Cir. 2001)* (citing *In re General Motors, 55 F.3d at 785*).

The Settlement in this case is entitled to a presumption of fairness. The Settlement Agreement resulted from arm's-length negotiations that occurred both during the Court-suggested mediation and in the months following. (Small Decl. PP 36, 40.) Prior to the mediation, the parties exchanged detailed mediation statements so that discussions could be founded on the attorneys' full understanding of the strengths and weaknesses of their cases. (Id. PP 34-35.) The Settlement was reached after a year of litigation and discovery, during which the parties also had access to the LePage's trial record and the Court's ruling on collateral estoppel in Bradburn. See *Bradburn Parent/Teacher Store, Inc. v. 3M, 2005 U.S. Dist. LEXIS 11375, Civ A. No. 02-7676,2005 WL 1388929* [*39] *(E.D. Pa. June 9, 2005)*. [6] (Id. PP 18, 26.) Meijer engaged in coordinated discovery with the parties in the Bradburn, Publix, and Kmart actions, which entailed the compilation and review of hundreds of thousands of pages of documents and participation in multiple depositions. (Id. PP 18-25, 28.) As already discussed, Class Counsel has extensive experience litigating antitrust class actions such as the one at hand. Lastly, no Class Members filed objections to the Settlement. Accordingly, the Court will apply a presumption of fairness in analyzing the Settlement.

> 6 Based on the outcome of the LePage's litigation, the Court held that collateral estoppel applied to establish the following facts upon the trial of the Bradburn action:
>
> > 1. For the time period from June 11, 1993 [to] October 13, 1999, the relevant market in this matter is the market for invisible and transparent tape for home and office use in the United States;
> >
> > 2. For some period of time between June 11, 1993 and October 13, 1999, 3M possessed monopoly power in the relevant market, including the power to control prices and exclude competition in the relevant market;
> >
> > 3. For some period of time between June 11, 1993 and October 13, 1999, 3M willfully maintained such monopoly power by predatory or exclusionary conduct; and
> >
> > 4. For some period of time between June 11, 1993 and October 13, 1999, 3M's predatory or exclusionary conduct harmed competition.
>
> *Bradburn, 2005 U.S. Dist. LEXIS 11375, 2005 WL 1388929, at *7.*

[*40] C. The *Girsh* Factors

[HN15] The Third Circuit developed a nine-factor test in Girsh, "which provides the analytic structure for determining whether a class action settlement is fair, reasonable, and adequate under *Rule 23(e)*." *In re Cendant, 264 F.3d at 231* (citation omitted). The nine factors are:

> (1) The complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation.

Id. at 232 (citing *Girsh, 521 F.2d at 157*). Upon consideration of these factors, the Court finds that the proposed Settlement is fair, reasonable, and adequate. [7]

> 7 As the Third Circuit has recently noted, "The Girsh factors do not provide an exhaustive list of factors to be considered when reviewing a proposed settlement." *In re AT&T Corp. Sec. Litig.,455 F.3d 160, 2006 WL 2021033, at *3 (3d Cir. 2006)*. In In re Prudential, for instance, the Third Circuit enumerated a list of additional con-

siderations which may be relevant to a court's assessment of the fairness of a class action settlement. *148 F.3d at 323*. After thorough review of the proposed Settlement in this case, the Court has found that all considerations relevant to its assessment of the Settlement's fairness are fully covered by the Court's analysis of the adequacy of the Notice, the nine Girsh factors, and the fairness of the Distribution Plan.

[*41]

1. Complexity, expense, and likely duration of the litigation

[HN16] "This factor captures 'the probable costs, in both time and money, of continued litigation.'" *Id. at 323* (citing *In re General Motors, 55 F.3d at 812*). An antitrust class action, such as this one, is "arguably the most complex action to prosecute" as "[t]he legal and factual issues involved are always numerous and uncertain in outcome." *In re Linerboard Antitrust Litig., 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003)* (citations and internal quotation marks omitted).

In the absence of settlement, significant costs in terms of both time and money likely would result from the continued litigation of this case. At the time when the MOU and the subsequent Settlement Agreement were reached, the issue of class certification was still pending, and other legal issues, including the potential tolling of the statute of limitations and the proper preclusive effect of the LePage's verdict, were going to be disputed. The parties had begun coordinated discovery at that point, but substantial merits discovery remained. In addition to discovery costs, continued litigation potentially [*42] would have entailed various dispositive motions, the procurement and submission of additional expert reports, and a substantial trial. Whatever the disposition of the case, litigation likely would have continued for some time thereafter through post-trial motions and appeal. See *In re Ikon, 194 F.R.D. at 179* ("[T]he extremely large sums of money at issue almost guarantee that any outcome, whether by summary judgment or trial, would be appealed."). The time and resources saved by the avoidance of these costs would benefit all parties. See *In re Warfarin, 391 F.3d at 536* ("[I]t was inevitable that post-trial motions and appeals would not only further prolong the litigation but also reduce the value of recovery to the class."); *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928,at *6* (noting that "[t]he risk of delay could have deleterious effects on any future recovery due to the time value of money"). Thus the Court finds that the complexity, expense, and likely duration of the litigation favor settlement. See *In re Prudential, 148 F.3d at 318* ("[T]he trial of this class action would be a long, arduous process requiring great expenditures [*43] of time and money on behalf of both the parties and the court. The prospect of such a massive undertaking clearly counsels in favor of settlement.").

2. The reaction of the class

[HN17] This factor "attempts to gauge whether members of the class support the settlement." Id. As stated above, Notice of this Settlement was disseminated thoroughly by means of publication and first-class mail, and informed potential Class Members of their rights to object to the Settlement and to request exclusion from the Class. The deadline for filing objections and requesting exclusion was June 6, 2006. As of the Final Approval Hearing on August 8, 2006, no objections and only one request for exclusion had been filed. (Glenn Aff. P 15.) This total absence of objections, coupled with such a low opt-out rate, argues in favor of the proposed Settlement. See, e.g., *In re PNC Fin. Servs. Group, Inc., 440 F. Supp. 2d 421, 2006 U.S. Dist. LEXIS 47618, Civ. A. No. 02-271, 2006 WL 1984660, at *9 (W.D. Pa. July 13, 2006)*("Here, no class member objected to the proposed settlement. Similarly, only five opt outs were received after the mailing of over 73,000 copies of the notice and the publication of the summary notice. Under [*44] these circumstances an inference of strong class support is properly drawn."); *Marino v. UDR, 2006 U.S. Dist. LEXIS 39680, Civ. A. No. 05-2268, 2006 WL 1687026, at *3 (E.D. Pa. June 14, 2006)* ("The fact that there are no opt-outs and no objections favors the proposed settlement.") (citing *Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 118-119 (3d Cir. 1990)*); *Perry v. Fleet Boston Fin. Corp., 229 F.R.D. 105, 115 (E.D. Pa. 2005)* (holding that, when only 70 out of 90,000 potential class members opted out and "not a single class member objected to the proposed settlement . . . [s]uch a response (or lack thereof) weighs greatly in favor of approving the settlement") (citing cases). The lack of objections and low opt-out rate are particularly notable in this case as "these are sophisticated businesses with, in some cases, large potential claims, and they could be expected to object to a settlement they perceived as unfair or inadequate." *In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 254-55 (D. Del. 2002)*, aff'd, *391 F.3d 516 (3d Cir. 2004)*.

Additionally, as of August 1, 2006, approximately sixty-eight Settlement Class Members [*45] had submitted Proof of Claim forms qualifying them to participate in the proposed Settlement. (Glenn Aff. P 13). These claimants amount to nearly half of the 143 entities to whom Notice originally was mailed and over 60% of the tape purchases by Settlement Class Members from 3M

during the relevant period. (Id.) This response further indicates the fairness of the proposed Settlement. See *In re Auto. Refinishing Paint Antitrust Litig., MDL No. 1426, 2004 U.S. Dist. LEXIS 29161, at *15 (E.D. Pa. Sept. 27, 2004)* ("The fact that there have been no objectors to the Settlement, that the claims filed represent a significant majority of the sales at issue, and that claims have been filed by major companies with significant resources . . . supports approval of the settlement."); *Stoner v. CBA Info. Servs., 352 F. Supp. 2d 549, 552 (E.D. Pa. 2005)* ("Over 16% of 11,980 class members notified have submitted claim forms seeking to participate in the settlement. Only 18 members have chosen to opt out and only five have filed . . . objections to the proposed settlement. This relatively high response rate indicates a more than favorable class reaction.") (footnote [*46] and citations omitted). Accordingly, the Court finds that the reaction of the Class in this case strongly favors approval of the Settlement.

3. Stage of proceedings and amount of discovery completed

[HN18] This factor enables the Court to "'determine whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *In re Cendant, 264 F.3d at 235* (quoting *In re General Motors, 55 F.3d at 813*). In this case, a substantial amount of discovery had been performed before the Settlement was reached: Class Counsel had compiled and undertaken review of hundreds of thousands of pages of discovery documents and depositions, had reviewed the discovery and trial record from the LePage's litigation, had participated in coordinated discovery in the Bradburn litigation, and had consulted extensively with an economic expert. Moreover, prior to reaching the Settlement, the parties had engaged in mediation, including the exchange of mediation statements regarding the merits of their respective positions in order to inform and facilitate their negotiations. The Court concludes, therefore, that the parties had "an adequate appreciation [*47] of the merits" of this case at the time they negotiated the Settlement. *In re Cendant, 264 F.3d at 235* (citation omitted).

4. Risks of establishing liability

[HN19] This factor enables the Court to examine "'what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them.'" *In re Cendant, 264 F.3d at 237* (quoting *In re General Motors,55 F.3d at 814*). "When considering this factor, the court should avoid conducting a mini-trial. Rather the court may 'give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action.'" *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *9* (quoting *In re Ikon, 194 F.R.D. at 181*).

[HN20] In order to succeed on its claim that 3M violated *§ 2* of the Sherman Act, Meijer "must establish that [3M] possessed monopoly power in the [relevant] market and that it willfully acquired or maintained that power as distinguished from achieving growth or development as a consequence [*48] of a superior product, business acumen, or historic accident." *In re Warfarin, 391 F.3d at 529 n.11* (citing *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*). Meijer's risks of establishing liability in this case are diminished by the LePage's verdict and the collateral estoppel ruling in Bradburn. Meijer, however, faced numerous challenges in establishing 3M's liability in this case. For instance, the rebates offered by 3M after 1999 [8] may not have been anti-competitive and the verdict in favor of LePage's does not mean that purchasers of tape from 3M were necessarily injured as well, since many of them may have benefitted from the challenged rebates. The Court concludes that, given these challenges, this factor favors settlement.

8 The collateral estoppel ruling in Bradburn only covers the Class Period up until October 13, 1999. *Bradburn, 2005 U.S. Dist. LEXIS 11375, 2005 WL 1388929, at *7.*

5. Risks of establishing damages

[HN21] "Like [*49] the fourth factor, 'this inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time.'" *In re Cendant, 264 F.3d at 238-39* (quoting *In re General Motors, 55 F.3d at 816*). In making this inquiry, the Court considers the "potential damage award if the case were taken to trial against the benefits of immediate settlement." *In re Warfarin, 212 F.R.D. at 256* (citing*In re Prudential, 148 F.3d at 319*). Meijer had not completed a final damages calculation prior to reaching the Settlement Agreement with 3M against which the Settlement Amount may be compared. The Settlement Class, however, would face significant risks in establishing damages at trial. For instance, to the extent that some Class Members may have benefitted from the challenged rebates, they would have had to prove that a period of recoupment followed the discontinuation of the rebates.

See generally *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-89, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Some evidence, however, suggests that such a recoupment period never occurred and that, even if [*50] such recoupment were established, the resulting damages period potentially would have been fairly short. (Leffler Decl. II PP 4, 8-13.) Additionally, the parties' efforts to dispute damages at trial undoubtedly would result in a "'battle of the experts,' with each side presenting its figures to the jury and with no guarantee whom the jury would believe." *In re Cendant, 264 F.3d at 239*. For these reasons, the Court concludes that the risks of establishing damages weigh in favor of settlement in this case.

6. Risks of maintaining class action status through trial

[HN22] This factor allows the Court to weigh the possibility that, if a class were certified for trial in this case, it would be decertified prior to trial. *Federal Rule of Civil Procedure 23(a)* provides that "a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable, and proceeding to trial would always entail the risk, even if slight, of decertification." *In re Cendant, 264 F.3d at 239* (citation and internal quotations omitted). The Settlement here was reached before the Court had ruled [*51] on class certification, a motion which 3M had contested. Thus, there was the risk that such certification would not be granted in the first place, along with the ever-present risk that the class, if certified, would have been decertified later in the litigation. Accordingly, the Court finds that this factor favors settlement. See *In re Prudential, 148 F.3d at 321* ("There will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement.")

7. Ability of defendants to withstand greater judgment

[HN23] This factor "is concerned with whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." *In re Cendant, 264 F.3d at 240*. The Court notes that 3M, with 2005 annual net sales of $ 21.2 billion (3M 2005 Annual Report), likely can withstand a judgment significantly greater than the Settlement Amount. Even so, this determination in itself does not carry much weight in evaluating the fairness of the Settlement. See *Perry, 229 F.R.D. at 116* ("Fleet could certainly withstand a much larger judgment as it has [*52] considerable assets. While that fact weighs against approving the settlement, this factor's importance is lessened by the obstacles the class would face in establishing liability and damages."). Accordingly, the Court finds that this factor disfavors settlement, albeit very slightly.

8 & 9. Range of reasonableness (in light of best possible recovery and risks of litigation)

[HN24] The eight and ninth Girsh factors "ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *11* (citing *In re Prudential, 148 F.3d at 322*). In making this assessment, the Court compares "'the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing'" with "'the amount of the proposed settlement.'" *In re General Motors, 55 F.3d at 806* (quoting MCL 2d § 30.44). The damages estimates should "generate a range of reasonableness (based on size of the proposed award and the uncertainty inherent in these estimates) within which a district court approving (or [*53] rejecting) a settlement will not be set aside." Id. (citation omitted). "The primary touchstone of this inquiry is the economic valuation of the proposed settlement." *Id.* "In making this assessment, the evaluating court must recognize that "settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and guard against demanding too large a settlement based on the court's own view of the merits of the litigation." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *11* (citing *In re General Motors, 55 F.3d at 806*).

Pursuant to the Settlement Agreement, Settlement Class Members will receive immediate monetary relief in accordance with their relevant purchases of 3M tape, without undertaking the risks, costs, and delays of further litigation. The Settlement Fund equals approximately 2% of the amount paid to 3M by Members of the Settlement Class for invisible and transparent tape for home or office use during the period from October 2, 1998 to February 10, 2006. Kmart - the one potential member of the proposed Meijer Class that brought an individual suit against 3M - and Publix both settled their [*54] claims against 3M for that percentage of their relevant purchases. This percentage also falls "within a range of settlements reached in other antitrust class actions" in this District. *In re Auto. Refinishing Paint Antitrust Litig., 2004 U.S. Dist. LEXIS 29161, MDL No. 1426, 2004 WL 1068807, at *2* (preliminarily approving a settlement

which represented approximately 2% of sales during the class period); see also *In re Linerboard Antitrust Litig., 321 F. Supp. 2d 619, 627 (E.D. Pa. 2004)* (approving a settlement that represents 1.62% of sales from class period); *In re Plastic Tableware Antitrust Litig., 1995 U.S. Dist. LEXIS 17014, Civ. A. No. 94-3564, 1995 WL 678663, at *1 (E.D. Pa. Nov. 13, 1995)* (3.5% of sales); *Fisher Bros. v. Mueller Brass Co., 630 F. Supp. 493, 499 (E.D. Pa. 1985)* (0.2% of sales); *Axelrod v. Saks & Co., 77 F.R.D. 441, 1981 WL 2031, at *1 (E.D. Pa. Feb. 23, 1981)* (3.7% of sales)). Moreover, there is no indication that this Settlement Amount has been reached inappropriately, or should otherwise be considered suspect; both parties have demonstrated willingness and ability to litigate this action, have engaged in mediation [*55] at the Court's suggestion, and have reached an agreement that provides Class Members with monetary relief that is immediate, significant, and in line with other comparable settlements. See *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *11* ("Additionally, the hallmarks of a questionable settlement are absent. Plaintiffs will receive a significant monetary settlement, and there is no suggestion of collusion between Defendants and Plaintiffs' counsel.") (internal quotation marks omitted). Accordingly, the Court finds that the Settlement represents a reasonable compromise in light of both the best possible recovery and the risks of litigation.

Thus, of the nine *Girsh* factors, the Court finds that only one - Defendant's ability to withstand greater judgment - does not favor the proposed Settlement. This one factor is outweighed by the other Girsh factors favoring the Settlement. The Court, therefore, concludes that the Settlement Agreement is fair, adequate, and reasonable.

D. Fairness of the Distribution Plan

[HN25] In addition to analyzing the terms of the Settlement Agreement, the Court must also examine the fairness of the proposed Distribution Plan. "'Approval of a plan of [*56] allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate.'" *In re Ikon, 194 F.R.D. at 184* (quoting *In re Computron Software Inc., 6 F. Supp. 2d 313, 321 (D.N.J. 1998)*). "Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *12* (citing *In re Ikon, 194 F.R.D. at 184*).

The proposed Distribution Plan allocates the Settlement Fund among Class Members who submit proof of their claims in proportion to each claimant's relevant, direct purchases from 3M. As detailed above, each Class Member may submit a preprinted Proof of Claim form which specifies that particular Member's purchase amount. When submitting this form, the Class Member can either agree with the total purchase amount stated in the form or disagree and provide supporting documentation for a different amount. These Proof of Claim forms must have been postmarked by July 11, 2006, for those Class Members [*57] who received them initially by mail, and by August 7, 2006, for those who received their forms in response to a Claim Form Request. Once the Settlement Administrator has received and reviewed all of the forms and has calculated each Class Member's recovery, Plaintiffs will return to the Court to seek approval for the distribution of the Settlement Fund. The Court finds that the amount of a Class Member's relevant, direct purchases provides a reasonable measure of the relative injury which each Class Member has suffered, and that the submission procedure for the Proof of Claim forms affords each Class Member an opportunity to attest to the extent of its own injury and, in turn, deserved allocation. Thus, the Distribution Plan correlates to the damages that each participating Class Member actually suffered, and the Court finds this Plan to be fair, reasonable and adequate.

In sum, the Court finds that the content and dissemination of Notice in this case satisfies the requirements of due process and the Federal Rules of Civil Procedure, and also finds that the Settlement Agreement is fair, adequate and reasonable in light of all relevant considerations. The Court therefore grants final [*58] approval to the Settlement. The Court further finds that the proposed Distribution Plan is fair, reasonable and adequate, and approves the Plan.

IV. MOTION FOR ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARD

Plaintiffs' Counsel have asked the Court to award attorneys' fees amounting to the smaller of $ 7.5 million or one-third of the amount remaining in the Settlement Fund after refunding any reversion to 3M. As mentioned above, one Settlement Class Member, Costco, has requested exclusion. After appropriate reversion to 3M, the Settlement Amount totals $ 27,783,836.97. As $ 7.5 million is less than one-third of the Settlement Amount after reversion, Plaintiffs' Counsel seeks $ 7.5 million in attorneys' fees. Plaintiffs' Counsel has also requested reimbursement of litigation expenses in the amount of $ 390,452.46. Meijer has requested an incentive award of $ 25,000 as compensation for the services it provided as Class Representative. All three requests are to be paid from the Settlement Fund prior to the distribution of the Fund to eligible Members of the Settlement Class.

A. Expenses

[HN26] "Attorneys who create a common fund for the benefit of a class are entitled to reimbursement [*59] of reasonable litigation expenses from the fund." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *13* (citing *In re Ikon, 194 F.R.D. at 192*). Plaintiffs' Counsel have requested reimbursement of litigation expenses incurred from the beginning of this litigation through August 1, 2006, totaling $ 390,452.46. (Small Decl. PP 70-75; Small Decl. II PP 14-20.) These expenses were incurred in connection with the prosecution and settlement of the litigation, and include costs related to the following: travel; computerized legal research; copying; postage; telephone and fax; transcripts; retention of a mediator; the document database; expert services; and claims administration. [9] (Id.) The Court notes that the total amount of these expenses is below the maximum amount of $ 450,000 provided for in the Notice that was mailed to the Settlement Class, and that no objections have been filed in response to this request for reimbursement. Accordingly, the Court finds that the litigation expenses enumerated by Plaintiffs' Counsel are reasonable and grants Plaintiffs' Counsel's request for reimbursement. [10] See, e.g.,*In re Remeron End-Payor Antitrust Litig., Civ. A. No. 02-2007, 2005 U.S. Dist. LEXIS 27011,* [*60] *at *92 (D.N.J. Sept. 13, 2005)* (approving reimbursement of expenses which "reflect costs expended for purposes of prosecuting this litigation, including substantial fees for experts; substantial costs associated with creating and maintaining an electronic document database; travel and lodging expenses; copying costs; and the costs of deposition transcripts").

9 Pursuant to the Settlement Agreement and the Court's Preliminary Approval Order, the Settlement Administrator was paid $ 25,000 from the Settlement Fund on April 28, 2006 in partial payment of the costs of giving Notice to the Settlement Class; this amount is not included in Plaintiffs' Counsel's request for reimbursement. (Small Decl. P 74.)

10 The Court notes that Plaintiffs' Counsel expects to incur approximately $ 20,000 in additional claims administration costs prior to the distribution of the Settlement Fund. (Small Decl. II P 21.) These future expenses are not included in the present request, but Plaintiffs' Counsel will seek reimbursement for them in Plaintiffs' Counsel's anticipated motion with respect to distribution of the Settlement Fund.

[*61] B. Attorneys' Fees

[HN27] "District courts approving class action settlements must thoroughly review fee petitions for fairness. Although the ultimate decision as to the proper amount of attorneys' fees rests in the sound discretion of the court, the court must set forth its reasoning clearly." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *13* (citations omitted). Thorough review of fee arrangements is critical in the context of a class action settlement because of "'the danger . . . that the lawyers might urge a class settlement at a low figure or on a less-than optimal basis in exchange for red-carpet treatment for fees,'" *In re General Motors, 55 F.3d at 820* (quoting *Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991)*), and because the parties to the action might lack sufficient incentive to object to the arrangement. *In re AT&T Corp. Sec. Litig., 455 F.3d 160, 2006 WL 2021033, at *6 (3d Cir. 2006)*. "[C]ourts must be especially vigilant in searching for the possibility of collusion in pre-certification settlements" such as the one at hand. *In re General Motors, 55 F.3d at 820.* [*62]

[HN28] Courts typically use one of two methods for assessing attorneys' fees, either the percentage of recovery method or the lodestar method. *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005)*. The Court will utilize the percentage of recovery method in this case as it is "generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" Id. (quoting *In re Prudential, 148 F.3d at 333*). The Court, however, will use the lodestar method " to 'cross-check' the percentage fee award," as the Third Circuit recommends, in order to verify that the fee award is not excessive. *Id. at 305* (citing *In re Prudential, 148 F.3d at 333*).

[HN29] When a district court uses the percentage of recovery method, it "first calculates the percentage of the total recovery that the proposal would allocate to attorneys fees by dividing the amount of the requested fee by the total amount paid out by the defendant; it then inquires whether that percentage is appropriate based on the circumstances of the case." *In re Cendant, 264 F.3d at 256.* [*63] "The percentage will be based on the net settlement fund after deducting the costs of litigation." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *14* (citing*In re Ikon, 194 F.R.D. at 193*). The net Settlement Fund in this case, as of August 1, 2006, is $ 27,393,384.51. Consequently, the requested fee of $ 7.5 million would result in a percentage of recovery of 27.4%.

[HN30] In *Gunter v. Ridgewood Energy Corp.,223 F.3d 190 (3d Cir. 2000)*, the Third Circuit directed the district courts to consider the following seven factors when determining whether a percentage of recovery fee award is reasonable:

(1) the size of the fund created and the number of persons benefitted;

> (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or the fees requested by counsel;
>
> (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment;
>
> (6) the amount of time devoted to the case by plaintiffs' counsel; and
>
> (7) the awards in similar cases.

Id. at 195 n.1; see also *In re Rite Aid, 396 F.3d at 301*. [*64] "Since this is a flexible and fact-driven determination," *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *14*, district courts are not limited to the Gunter factors in their analysis of the fee request's reasonableness. As the Third Circuit recently noted:

> [HN31] This list [of Gunter factors] was not intended to be exhaustive. . . . In Prudential, we noted three other factors that may be relevant and important to consider: (1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations; (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any 'innovative' terms of the settlement. . . . In reviewing an attorneys' fees award in a class action settlement, a district court should consider the Gunter factors, the Prudential factors, and any other factors that are useful and relevant with respect to the particular facts of the case.

*In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *4* (citing *In re Prudential, 148 F.3d at 338-340*). [*65] While the district courts should "engage in robust assessments of the fee award reasonableness factors when evaluating a fee request," *In re Rite Aid, 396 F.3d at 302*, these factors "'need not be applied in a formulaic way' because each case is different, 'and in certain cases, one factor may outweigh the rest.'" *In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *4* (quoting*In re Rite Aid, 396 F.3d at 301*); see also *In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 736 (3d Cir. 2001)* ("[A] district court may not rely on a formulaic application of the appropriate range in awarding fees but must consider the relevant circumstances of the particular case.").

Having thoroughly reviewed the facts of this case in light of the *Gunter* and *Prudential* factors [11] and having applied the lodestar cross-check to this analysis, the Court concludes that Plaintiffs' Counsel's request for $ 7.5 million in attorneys' fees is reasonable.

> 11 The Court has determined that, in this case, all considerations relevant to its analysis of the fee award's reasonableness are covered fully by the Gunter and Prudential factors listed above.

[*66]

1. Size of fund created and number of persons benefitted

Pursuant to the Settlement Agreement, the Settlement Class will obtain an immediate cash benefit of $ 27,783,836.97, less attorneys' fees, expenses, and incentive award payments as awarded by the Court. As of August 1, 2006, approximately sixty-eight Class Members had filed Proof of Claim forms and so were in a position to recover from the Settlement Fund, without having to go through the time, expense, and risk of continued litigation. (Glenn Aff. P 13.) While the number of claimants which stand to be benefitted in this Settlement is fairly small, these claimants comprise nearly half of the 143 Settlement Class Members to whom individual Notice was originally mailed and they account for over 60% of the tape purchases by those Class Members from 3M during the relevant period. (Id.) As discussed above, the Settlement Fund was calculated to provide Class Members with a recovery amounting to approximately 2% of what they paid to 3M for invisible and transparent tape for home or office use during the period from October 2, 1998 to February 10, 2006, a recovery that compares favorably with other class action antitrust [*67] settlements. Thus, although the number of entities positioned to recover a share of the Settlement Fund is fairly small, both the percentage of relevant purchases which those entities represent as well as the substantial and comparatively favorable size of the Fund obtained by Plaintiffs' Counsel weigh in favor of the requested fees.

2. Presence or absence of substantial objections by members of the class

There have been no objections either to the Settlement Agreement or to the requested attorneys' fees. As

detailed above, Notice and Summary Notices were disseminated by mail and publication to potential Class Members. The Notice clearly disclosed Plaintiffs' Counsel's intention to request the lesser of $ 7.5 million or one-third of the Settlement Fund in fees to be paid from the Settlement Fund, and also detailed the procedure by which any Class Member could object to that request. The absence of objections to the requested attorneys' fees in this case is particularly notable given the sophisticated nature of the absent Class Members. See *In re Remeron Direct Purchaser Antitrust Litig., Civ. A. No. 03-0085, 2005 U.S. Dist. LEXIS 27013, at *35 n.1* [*68] *(D.N.J. Nov. 9, 2005)* ([HN32] "When a class is comprised of sophisticated business entities that can be expected to oppose any request for attorney fees they find unreasonable, the lack of objections 'indicates the appropriateness of the [fee] request.'" (alteration in original) (quoting *Cimarron Pipeline Constr., Inc. v. Nat'l Council on Comp. Ins., 1993 U.S. Dist. LEXIS 19969, Civ. A. Nos. 89-822, 89-1186, 1993 WL 355466, at *1-2 (W.D. Ok. June 8, 1993)*)); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp., 2005 U.S. Dist. LEXIS 9705, Civ. A. No. 03-4578, 2005 WL 1213926, at *10 (E.D. Pa. May 19, 2005)*(finding that this factor weighs in favor of approval because, "[a]lthough the Settlement Class in this case is relatively small and consists of sophisticated businesses, not one member of the Settlement Class objected to the requested fee"). The Court finds that this total absence of objections to the requested fees weighs in favor of approval. [12] See *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, MDL No. 1261, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004)* ("The absence of objections supports approval of the Fee Petition."); *In re Rent-Way Secs. Litig., 305 F. Supp. 2d 491, 515 (W.D. Pa. 2003)* [*69] ("[T]he absence of substantial objections by other class members to the fee application supports the reasonableness of Lead Counsels' request."); *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *15* ("[T]he Class members' view of the attorneys' performance, inferred from the lack of objections to the fee petition, supports the fee award.").

12 The import of this absence of objections, while significant, should not be overstated. As the Third Circuit has noted, "[c]lass members may have little incentive to oppose a fee request, since any reduction will only result in a minor increase in their share of the settlement." *In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *6.*

3. Skill and efficiency of the attorneys involved

[HN33] The skill and efficiency of Plaintiffs' Counsel is "measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted [*70] the case and the performance and quality of opposing counsel." *In re Ikon, 194 F.R.D. at 194* (citation omitted). As discussed above, Plaintiffs' Counsel are highly experienced in complex antitrust class action litigation (Small Decl. PP 62-64, Exs. 8-10) and have obtained a significant settlement for the Class despite the complexity and challenges of this case. Defense Counsel are also very experienced in complex class action antitrust litigation and have defended this suit skillfully. Accordingly, the Court finds that this factor favors approval of the requested fees.

4. Complexity and duration of the litigation

As discussed above, Plaintiffs' Counsel had been litigating this action for roughly one year when the Settlement Agreement was reached. While a duration of one year is not especially long, during that time Plaintiffs' Counsel engaged in extensive coordinated discovery, participated in multiple depositions as well as expert consultations, briefed and argued 3M's Motion to Dismiss, briefed Meijer's Motion for class certification, prepared for and participated in the mediation, and negotiated the terms of the Settlement Agreement. Antitrust class [*71] actions such as this one are "arguably the most complex action[s] to prosecute." *In re Linerboard, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *10* (quotation omitted). While the LePage's decision and the collateral estoppel ruling in Bradburn favored the Plaintiffs in this action, Plaintiffs' Counsel nonetheless faced complex challenges in establishing liability and damages in this case, as discussed above. Accordingly, the Court finds that this factor weighs in favor of the reasonableness of the requested fees.

5. Risk of nonpayment

Plaintiffs' Counsel's compensation for their services in this case was wholly contingent on the success of the litigation. (Small Decl. P 61.) Given the risks of establishing liability and damages discussed above, as well as the possibility that this case could not be maintained as a class action through trial, the possibility of non-payment has been present throughout this litigation. Accordingly, the Court finds that this factor weighs in favor of the requested fees.

6. Amount of time devoted to the case by Plaintiffs' counsel

Plaintiffs' Counsel devoted slightly over 4,500 hours of work on this litigation from the [*72] inception of the claims through August 1, 2006. (Small Decl. II P 12.) This is a relatively small amount of time for a settlement class action of this size. See, e.g., Stuart J. Logan, Dr. Jack Moshman & Beverly C. Moore, Jr., Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 167-234 (2003) (surveying, *inter alia*, class action cases that resulted in a recovery of $ 20-30 million and indicating that, of the 23 such cases which reported total hours awarded toward attorneys' fees, only one reported a total of less than 6,000 hours). [HN34] While "[t]he Court recognizes that Plaintiffs' counsel should not be penalized for prosecuting this case in an efficient manner," the Court nonetheless "may consider the amount of time devoted to a case by counsel as disfavoring the requested fee." *Stop & Shop, 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, at *12*. Consequently, the Court finds that the amount of time devoted to this case by Plaintiffs' Counsel weighs against the requested fees.

7. Awards in similar cases

This factor requires the Court to compare the percentage of recovery requested as a fee in this case against the percentage of recovery awarded as a [*73] fee in other common fund cases in which the percentage of recovery method, rather than the lodestar method, was used. *In re Cendant Corp. PRIDES Litig., 243 F.3d at 737*. As stated above, Plaintiffs' Counsel's request for attorneys' fees in this case produces a 27.4% percentage of recovery.

The Court finds that this percentage of recovery falls within a reasonable range of awards in similar cases. "In the normal range of common fund recoveries in securities and antitrust suits, common fee awards fall in the 20 to 33 per cent range." 4 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 14:6 (4th ed. 2006). In In re Rite Aid, the Third Circuit noted three studies which found that fee awards ranging between 25-33% of the common fund were not unusual. *In re Rite Aid,396 F.3d at 303* ("[O]ne study of securities class action settlements over $ 10 million . . . found an average percentage fee recovery of 31%; a second study by the Federal Judicial Center of all class actions resolved or settled over a four-year period . . . found a median percentage recovery range of 27-30%; and a third study of class action settlements between $ 100 million [*74] and $ 200 million . . . found recoveries in the 25-30% range were 'fairly standard.'") (citation omitted). In 2003, the Class Action Reporter published a survey of fee awards in common fund class actions. See Logan et al., supra. This survey included 65 cases that fell within the $ 20-30 million recovery range; these cases averaged a percentage of recovery of 25.8%. [13] Id. at 174.

13 This survey calculated percentage of recovery by lumping the awards of attorneys' fees and expenses and dividing that sum by the aggregate class recovery, which differs from the methodology employed by the Court. For the sake of comparison, applying this survey's method of calculation to the present case would render a percentage of recovery for Plaintiffs' Counsel of 28.4%.

In addition to considering the survey data, the Court notes that attorneys' fee awards ranging between 20-33% of common funds comparably sized to the present Settlement Fund have been approved by judges within the Third Circuit on numerous [*75] occasions. See, e.g., *In re Ravisent Technologies, Inc. Sec. Litig., 2005 U.S. Dist. LEXIS 6680, Civ. A. No. 00-1014, 2005 WL 906361, at *11 (E.D. Pa. Apr. 18, 2005)* (noting that "courts within th[e Third Circuit] have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses."); *In re Rent-Way, 305 F. Supp. 2d at 519* (approving attorneys' fees award of 25% of a $ 25 million settlement fund); *In re Warfarin, 212 F.R.D. at 262-63* (approving 22.5% of $ 44.5 million settlement); *Lazy Oil Co. v. Witco Corp., 95 F. Supp. 2d 290, 322-23 (W.D. Pa. 1997)* (approving 28% of an $ 18.9 million settlement fund). Accordingly, the Court finds that Plaintiffs' Counsel's request does not substantially deviate from the percentage of recovery awarded as fees in similar common fund cases, and that this factor favors the requested fees. The Court concludes that, of the seven *Gunter* factors, only one - the amount of time devoted to the case by Plaintiffs' Counsel - disfavors the requested award of attorneys' fees in this case. This one factor is outweighed by the other Gunter considerations that favor the requested award. Accordingly, [*76] the Court finds that, under the Gunter analysis, the percentage of recovery requested as attorneys' fees in this case is reasonable.

8. The Prudential factors

The Court's assessment of Plaintiffs' Counsel's request for attorneys' fees in light of the three Prudential factors is consistent with the Court's finding of reasonableness under the Gunter factors. The first Prudential factor is intended to measure whether "the entire value of

the benefits accruing to class members is properly attributable to the efforts of class counsel," *In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *11*, or if some of those benefits are more properly attributed "to the efforts of other groups, such as government agencies conducting investigations." *455 F.3d 160, [WL] at *4* (citing *In re Prudential, 148 F.3d at 338*). While Plaintiffs' Counsel were not aided in their prosecution of this case by a government investigation, Plaintiffs' Counsel did have the benefit of prior litigation which assigned liability to 3M for the same sort of anti-competitive conduct that has been alleged here. Compare *Stop & Shop, 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, at *12* ("[T]his action was [*77] riskier than many other antitrust class actions because there was no prior government investigation, or prior finding of civil or criminal liability based on antitrust violations, in this case."). The Court finds that this factor is neutral with respect to the reasonableness of the requested attorneys' fees.

As for the second *Prudential* factor, the Court finds that the 27.4% percentage of recovery requested in this case is comparable to the likely "percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained." *In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *4* (citing *In re Prudential, 148 F.3d at 340*). See *In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, at *46* ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation."); see also *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *14* ("[A]n award of thirty percent is in line with what is routinely privately negotiated in contingency fee tort litigation."); *In re Ikon, 194 F.R.D. at 194* ("[I]n private [*78] contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."). With respect to the third Prudential factor, the Settlement here contains no particularly "innovative" terms to argue in favor of the requested award of attorneys' fees. *In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *4* (citing *In re Prudential, 148 F.3d at 339*). In sum, the Court finds that the Prudential factors are largely neutral with respect to Plaintiffs' Counsel's request, and thus that they do not alter the Court's conclusion of reasonableness under the Gunter factors. Accordingly, the Court finds that the percentage of recovery requested by Plaintiffs' Counsel for attorneys' fees in this case is reasonable.

9. Lodestar cross-check

[HN35] The Third Circuit has suggested that, in addition to reviewing the fee award reasonableness factors, "it is 'sensible' for district courts to 'cross-check' the percentage fee award against the 'lodestar' method." *In re Rite Aid, 396 F.3d at 305* (citing *In re Prudential, 148 F.3d at 333*). The lodestar [*79] is calculated by "multiplying the number of hours worked by the normal hourly rates of counsel. The court may then multiply the lodestar calculation to reflect the risks of nonrecovery, to reward an extraordinary result, or to encourage counsel to undertake socially useful litigation." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *15* (citing *In re Ikon, 194 F.R.D. at 195*). "The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award." *In re Rite Aid, 396 F.3d at 306*. The cross-check, however, "does not trump the primary reliance on the percentage of common fund method." *Id. at 307*. Moreover, "[t]he lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records. . . . [T]he resulting multiplier need not fall within any pre-defined range, provided that the District Court's analysis justifies the award."*Id. at 306-07* [*80] (footnotes and citations omitted). It is appropriate for the court to consider the multipliers utilized in comparable cases. *Id. at 307 n.17*.

The total lodestar amount submitted to the Court by the three firms comprising Plaintiffs' Counsel in this case is $ 1,572,775.50 for 4,508.55 hours of attorney and paralegal time. [14] (Small Decl. II P 12.) The lodestar amount covers work done from the inception of the claims in this action through August 1, 2006, and is calculated at each firm's current rates, which are based on the prevailing rates for cases of this type in the community in which the attorneys practice. (Small Decl. P 67; Small Decl. II PP 9-11.) The hours worked were recorded contemporaneously in the books and records that the firms maintained in the ordinary course of business; they do not include any work done in connection with Plaintiffs' Counsel's application for fees. (Id.) The lodestar amount, taken against the requested fee award of $ 7.5 million, results in a lodestar multiplier of 4.77.

14 The breakdown amidst the three firms is as follows: CMHT, indicating a lodestar of $ 944,551 for 2,885.05 hours (resulting in an hourly rate of $ 327.40); VVM, indicating a lodestar of $ 436,199 for 1,133.60 hours (hourly rate of $ 384.79); and TRR, indicating a lodestar of $ 192,025.50 for 489.90 hours (hourly rate of $ 391.97). (Small Decl. P 69, Small Decl. II P 12.)

[*81] The Third Circuit has recognized that multipliers "'ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'" *In re Cendant PRIDES,243 F.3d at 742* (quoting*In re Prudential, 148 F.3d at 341*). While a 4.77 multiplier is slightly above average, it is not far outside the range of normal awards. See *In re Linerboard, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *16* (noting that "during 2001-2003, the average multiplier approved in common fund class actions was 4.35") (citing Logan, et al., supra, at 167). Moreover, the lack of objections by this Class of sophisticated parties to Plaintiffs' Counsel's request for fees supports the resulting multiplier. See *Stop & Shop, 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, at *18* (noting that "the high lodestar multiplier (15.6) which results from the Court's award of attorneys' fees in this case is neutralized . . . by the extraordinary support Plaintiffs have shown for counsels' request for fees. Not one member of the Settlement Class, which is made up of approximately 90 sophisticated businesses, objected"). Accordingly, the Court finds that, given the facts of this case, the [*82] requested lodestar multiplier of 4.77 is acceptable and does not call for a reduction in Plaintiffs' Counsel's requested attorneys' fees award.

Having thoroughly reviewed Plaintiffs' Counsel's request for attorneys' fees, the Court concludes that the percentage of recovery requested by Plaintiffs' Counsel is reasonable, and that the lodestar cross-check is consistent with a finding of reasonableness. Accordingly, the Court approves Plaintiffs' Counsel's request for $ 7.5 million in attorneys' fees to be paid from the Settlement Fund.

C. Incentive Award to Representative Plaintiffs

Meijer has asked the Court to approve an incentive award in the amount of $ 25,000 to be paid from the Settlement Fund, because Meijer allegedly has spent a significant amount of its own time and expense litigating this case for the absent members of the Settlement Class. [HN36] "'Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.'" *Cullen v. Whitman Med. Corp., 197 F.R.D. 136, 145 (E.D. Pa. 2000)* (quoting *In re S. Ohio Corr. Facility, 175 F.R.D. 270, 272 (S.D. Ohio 1997))*. [*83] It is particularly appropriate to compensate named representative plaintiffs with incentive awards when they have actively assisted plaintiffs' counsel in their prosecution of the litigation for the benefit of the class. See *Tenuto v. Transworld Sys., Inc., 2002 U.S. Dist. LEXIS 1764, Civ. A. No. 99-4228, 2002 WL 188569, at *5 (E.D. Pa. Jan. 31, 2002)*; see also *In re Linerboard, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *18* ("Like the attorneys in this case, the class representatives have conferred benefits on all other class members and they deserve to be compensated accordingly.") (citing In re Plastic Tableware Antitrust Litig., Civ. A. No. 94-3564, 2002 WL 188569 (E.D. Pa. Dec. 4, 1998)).

Meijer has worked closely with Plaintiffs' Counsel throughout the investigation, prosecution and settlement of the claims in this litigation. (Mem. in Supp. of Pls.' Counsel's Mot. for Attys' Fees, Expenses, and Incentive Award at 21.) Furthermore, the Notice advised Class Members that Meijer would apply for an incentive award in this amount and there were no objections to the award. See *In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, at *50*. Lastly, [*84] the incentive award requested in this case is similar to the awards approved in comparable complex class actions in this District. See *id. at *52* (approving a total incentive award of $ 60,000 to two named plaintiffs); *In re Linerboard, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *19* (approving incentive awards of $ 25,000 to each of five named plaintiffs); *In re Residential Doors Antitrust Litig., 1998 U.S. Dist. LEXIS 4292, MDL No. 1039, 1998 WL 151804, at *11 (E.D. Pa. Apr. 2, 1998)* (approving $ 10,000 incentive awards to each of four named plaintiffs). Accordingly, the Court approves the requested incentive award.

V. CONCLUSION

For the foregoing reasons, the Court concludes that the Settlement Class meets the certification requirements of *Federal Rule of Civil Procedure 23* and approves the Class's final certification for settlement purposes. The Court also concludes that the Settlement Agreement and Distribution Plan are fair, adequate and reasonable, and approves them. The Court further concludes that Plaintiffs' Counsel's requested reimbursement of expenses in the amount of $ 390,452.46 and requested award of attorneys' fees in the amount of $ [*85] 7.5 million are fair and reasonable, and approves them. Lastly, the Court approves Meijer's request to be paid an incentive award in the amount of $ 25,000. An appropriate Order follows.

FINAL APPROVAL ORDER AND JUDGMENT

WHEREAS Plaintiffs Meijer, Inc. and Meijer Distribution, Inc., on behalf of themselves and each Settlement Class Member (as defined herein), by and through their counsel of record, have asserted claims for damages and injunctive relief against 3M Company, alleging violations of federal antitrust law;

WHEREAS the Plaintiffs and 3M Company, desiring to resolve any and all disputes in this action, executed a Settlement Agreement dated as of February 10, 2006, which was filed with the Court on February 13, 2006;

WHEREAS the Settlement Agreement does not constitute, and shall not be construed as or deemed to be evidence of, an admission of any fault, wrongdoing or liability by 3M Company or by any other person or entity;

WHEREAS 3M Company and each of the Plaintiffs have agreed to entry of this Final Approval Order and Judgment (hereinafter, the "Order");

WHEREAS Plaintiffs, on behalf of themselves and each Settlement Class Member, have agreed to the release [*86] of claims specified in the Settlement Agreement;

WHEREAS, on March 28, 2006, this Court granted preliminary approval to the Settlement Agreement and directed that Notice be given to the Settlement Class as defined in the Settlement Agreement;

WHEREAS, pursuant to the Preliminary Approval Order, Notice of the Settlement was given to members of the Settlement Class, in accordance with *Federal Rules of Civil Procedure 23(c)(2)* and *23(e)* and the requirements of due process, and Settlement Class Members were afforded the opportunity to exclude themselves from the Settlement Class or to object or otherwise comment on the Settlement;

WHEREAS an opportunity to be heard was given to all persons requesting to be heard in accordance with this Court's orders; the Court has reviewed and considered the terms of the Settlement Agreement, the submissions of the parties in support thereof, and the comments received in response to the Notice; and after holding a hearing on August 8, 2006, at which all interested parties were given an opportunity to be heard; and

WHEREAS there is no just reason for delay;

NOW, THEREFORE, [*87] before the taking of any testimony, without trial or adjudication of any issue of fact or law herein, without any admission of liability or wrongdoing by 3M Company, and upon the consent of the Settling Parties,

IT IS HEREBY ORDERED, AD JUDGED AND DECREED:

I.

JURISDICTION

1.1. The Court has jurisdiction over the subject matter of this action and the parties hereto. The Plaintiffs brought this action asserting a claim under *Section 2* of the Sherman Act, *15 U.S.C. § 2*. Jurisdiction lies in this Court pursuant to *28 U.S.C. §§ 1331* and *1337*. Venue is proper in the Eastern District of Pennsylvania.

II.

DEFINITIONS

As used in this Final Approval Order and Judgment, the following definitions shall apply:

2.1. "3M" or "Defendant" means 3M Company and all of its predecessors, successors and past and present affiliates, subsidiaries, directors, officers, employees and agents.

2.2. "Class Counsel" means the law firms of Cohen, Milstein, Hausfeld & Toll, P.L.L.C. and Daar & Vanek, P.C.

2.3. "Effective Date" means the first date by which all of the events and conditions specified [*88] in paragraph 8.1 of the Settlement Agreement have been met and have occurred.

2.4. "Invisible or transparent tape" means invisible or transparent tape sold within the United States for home and office use, including such products as Scotch (R) tm Magica" [cent] tape, Scotch (R) tm transparent tape, Highlanda" [cent] tapes and other invisible or transparent tapes for home and office use, but not including such products as packaging tapes, sealing tapes or masking tapes.

2.5. "Judgment" refers to this Final Approval Order and Judgment.

2.6. "Litigation" means the action pending in this Court titled Meijer, Inc., and Meijer Distribution, Inc. v. 3M Company, f/k/a Minnesota Mining and Manufacturing Company, Civil Action No. 04-5871 (JP).

2.7. "Notice" means, collectively, the communications by which the Settlement Class was notified of the existence and terms of the Settlement.

2.8. "Notice Plan" means the plan approved in the Preliminary Approval Order for notifying the Settlement Class of the Settlement.

2.9. "Plaintiffs" or "Class Representatives" means Meijer, Inc. and Meijer Distribution, Inc. and each of their parents, subsidiaries, affiliates, assignees, predecessors, [*89] successors, officers, directors, employees, agents, and attorneys.

2.10. "Plaintiffs' Counsel" means the law firms of Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Daar & Vanek, P.C. and Trujillo Rodriguez & Richards, LLC.

2.11. "Released Claims" means the release and discharge of 3M and each of its parents, subsidiaries, divisions, affiliates, assignors, assignees, predecessors, successors, officers, directors, employees, agents and attorneys, from any and all claims asserted, or which could have been asserted, in the Litigation and any and all claims and potential claims, demands, rights, liabilities and causes of action which have arisen or could arise hereafter, whether known or unknown, whether asserted or that could have been or could hereafter be asserted by any member of the Settlement Class or any parent, affiliate or subsidiary of any of such member against 3M and any of its subsidiaries, affiliates, directors, officers, employees and/or agents, concerning or relating in any way to or arising in any way from any 3M discount, rebate, offer, promotion or other sales program or practice (including without limitation, programs claimed to involve the bundling of products or volume [*90] or growth rebates) concerning, including or relating in any way to the sale, promotion or distribution of invisible or transparent tape for home or office use in effect from January 1, 1993 to February 10, 2006, including without limitation claims arising under any federal and/or state antitrust laws, unfair competition laws, consumer protection laws or deceptive trade practices acts or any similar statutory or common law provisions, but excluding from this release claims relating to any alleged product defect, personal injury or breach of contract. With the exception of claims relating to any alleged product defect, personal injury or breach of contract, this release is a "general release" as that term is used in *Section 1542* of the Civil Code of the State of California and all members of the Settlement Class that have not opted out will expressly waive any rights under that statute or any similar law of any state or territory of the United States or any principle of common law that is similar, comparable, or equivalent to *Section 1542 of the California Civil Code.*

2.12. "Settlement" means the settlement contemplated by the terms, conditions and provisions set forth in this Settlement [*91] Agreement.

2.13. "Settlement Agreement" means the Settlement Agreement dated as of February 10, 2006 by and among Plaintiffs Meijer, Inc. and Meijer Distribution, Inc., on behalf of themselves and each Settlement Class Member, and Defendant 3M Company, including all exhibits thereto.

2.14. "Settlement Agreement Date" means February 10, 2006, the date as of which the Settling Parties entered into the Settlement Agreement.

2.15. "Settlement Class" means all persons and entities that purchased invisible or transparent tape directly from 3M, or any subsidiary or affiliate thereof, in the United States at any time during the period from October 2, 1998 to February 10, 2006 and also purchased for resale under the class member's own label, any "private label" invisible or transparent tape from 3M or any of 3M's competitors at any time from October 2, 1988 to February 10, 2006; but excluding 3M Company, its subsidiaries, affiliates, officers, directors, and employees and excluding those persons or entities that timely and validly request exclusion from the Settlement Class.

2.16. "Settlement Class Member" means any person or entity, including but not limited to each individual representative [*92] plaintiff, that satisfies all of the requirements for inclusion in the Settlement Class as set forth in paragraph 2.15, and that does not validly request exclusion therefrom.

2.17. "Settlement Consideration" means the amount paid by 3M to or on behalf of the Settlement Class in exchange for the settlement and release of all Released Claims, as defined in paragraph 2.11 herein.

2.18. "Settling Parties" means, collectively, each of the Plaintiffs, on behalf of themselves and each Settlement Class Member, and 3M.

III.

FINAL APPROVAL OF SETTLEMENT

3.1. In its Order Preliminarily Approving Settlement, the Court certified the following Settlement Class, for the purpose of this Settlement only:

> all persons and entities that purchased invisible or transparent tape directly from 3M, or any subsidiary or affiliate thereof, in the United States at any time during the period from October 2, 1998 to February 10, 2006 and also purchased for resale under the class member's own label, any "private label" invisible or transparent tape from 3M or any of 3M's competitors at any time from October 2, 1988 to February 10, 2006; but excluding 3M Company, its subsidiaries, [*93] affiliates, officers, directors, and employees and excluding those persons or entities that timely and validly request exclusion from the Settlement Class.

3.2. Attached hereto as Exhibit 1 is the list of persons and entities that timely excluded themselves from

the Settlement Class and for which this Final Approval Order and Judgment has no force or effect.

3.3. The terms of the Settlement Agreement are adjudged to be fair, reasonable and adequate and in the best interests of Plaintiffs and the Settlement Class as a whole, and satisfy the requirements of *Federal Rule of Civil Procedure 23(c)(2)* and *23(e)* and due process.

3.4. The Court finds that the Notice and the Notice Plan constituted the best notice practicable under the circumstances and constituted due and sufficient notice and that all Settlement Class Members were afforded the opportunity to exclude themselves from participation in this action.

3.5. The terms of the Settlement Agreement are hereby approved, and the Settling Parties are directed to implement the Settlement in accordance with its terms.

3.6. The Distribution Plan is adjudged [*94] to be fair, reasonable and adequate and is hereby approved and Class Counsel are directed to proceed with the Distribution Plan.

3.7. No part of the Settlement Consideration provided by 3M pursuant to the Settlement Agreement shall constitute, nor shall it be construed or treated as constituting, a payment in lieu of treble damages, fines, penalties, forfeitures or punitive recoveries under any state or federal laws, rules or regulations, or any other applicable statute or provision.

IV.

DISMISSAL OF ACTION AND RELEASES OF CLAIMS

4.1. This Litigation is dismissed with prejudice and, except as provided in paragraph 5.1 of this Order, without costs. The Plaintiffs and all Settlement Class Members are barred from further prosecution of the Released Claims.

4.2. The Court hereby finds that the Released Claims which the Plaintiffs and the Settlement Class Members, on behalf of themselves and, with respect to individuals or individually owned businesses, on behalf of each of their heirs, predecessors, successors, representatives or assigns, and, with respect to corporate entities, on behalf of each of their parents, subsidiaries, affiliates, assignees, predecessors, [*95] successors, officers, directors, employees and agents, shall fully and forever release, relinquish and discharge, by operation of this Final Approval Order and Judgment are as defined in paragraph 2.11 of this Order, i.e.,

> the release and discharge of 3M and each of its parents, subsidiaries, divisions, affiliates, assignors, assignees, predecessors, successors, officers, directors, employees, agents and attorneys from any and all claims asserted, or which could have been asserted, in the Litigation and any and all claims and potential claims, demands, rights, liabilities and causes of action which have arisen or could arise hereafter, whether known or unknown, whether asserted or that could have been or could hereafter be asserted by any member of the Settlement Class or any parent, affiliate or subsidiary of any of such member against 3M and any of its subsidiaries, affiliates, directors, officers, employees and/or agents, concerning or relating in any way to or arising in any way from any 3M discount, rebate, offer, promotion or other sales program or practice (including without limitation, programs claimed to involve the bundling of products or volume or growth rebates) [*96] concerning, including or relating in any way to the sale, promotion or distribution of invisible or transparent tape for home or office use in effect from January 1, 1993 to February 10, 2006, including without limitation claims arising under any federal and/or state antitrust laws, unfair competition laws, consumer protection laws or deceptive trade practices acts or any similar statutory or common law provisions,but excluding from this release claims relating to any alleged product defect, personal injury or breach of contract. With the exception of claims relating to any alleged product defect, personal injury or breach of contract, this release is a "general release" as that term is used in *Section 1542* of the Civil Code of the State of California and all members of the Settlement Class that have not opted out will expressly waive any rights under that statute or any similar law of any state or territory of the United States or any principle of common law that is similar, comparable, or equivalent to *Section 1542 of the California Civil Code.*

4.3. Upon the Effective Date, each Settlement Class Member, on behalf of themselves and, with respect to individuals or individually [*97] owned businesses, on

behalf of each of their heirs, predecessors, successors, representatives or assigns, and, with respect to corporate entities, on behalf of each of their parents, subsidiaries, affiliates, assignees, predecessors, successors, officers, directors, employees and agents, shall have, shall be deemed to have and by operation of this Judgment shall have fully, finally and forever released, relinquished and discharged 3M and its attorneys from any and all Released Claims and shall be deemed to have covenanted and agreed not to sue 3M or its attorneys with respect to the Released Claims.

4.4. The following injunction is hereby entered: All members of the Settlement Class are permanently enjoined from filing, commencing, initiating, asserting, continuing to prosecute, intervening in, participating in or maintaining in any jurisdiction any action or claim based in whole or in part on any Released Claims, except for proceedings in this action, if any, that are necessary to consummate or enforce the Settlement Agreement or the terms of this Order.

4.5. Upon the Effective Date, 3M shall be deemed to have, and by operation of the Final Judgment shall have fully, finally and [*98] forever released, relinquished and discharged each and all of the Plaintiffs and Plaintiffs' Counsel from all claims arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement or resolution of the Litigation, other than claims for breach of the Settlement Agreement.

V.

FEES AND EXPENSES AND PLAINTIFF INCENTIVE AWARD

5.1. The Court approves the award of $ 7.5 million plus interest that may have accrued on that sum deposited in escrow to pay Plaintiffs' Counsel's attorneys fees plus $ 390,452.46 to reimburse Plaintiffs' Counsel for payment of costs and expenses reasonably incurred in prosecuting and settling this action. The award shall be apportioned among Plaintiffs' Counsel by Cohen, Milstein, Hausfeld & Toll, P.L.L.C., subject to review by this Court upon request of any Plaintiffs' Counsel.

5.2. The Court approves the award of $ 25,000.00 as an incentive award for Plaintiffs Meijer, Inc. and Meijer Distribution, Inc.

VI.

FINALITY OF JUDGMENT

6.1. The Court finds that this Final Approval Order and Judgment adjudicates all the claims, rights and liabilities of the parties to the Settlement Agreement [*99] and is final and shall be immediately appealable. Neither this Order nor the Settlement Agreement shall constitute any evidence or admission of liability by 3M, nor shall either document or any other document relating to the Settlement be offered in evidence or used for any other purpose in this or any other matter or proceeding except as may be necessary to consummate or enforce the Settlement Agreement or the terms of this Order or if offered by 3M in responding to any action purporting to assert Released Claims.

VII.

RETENTION OF JURISDICTION

7.1. Without affecting the finality of this Order, the Court retains jurisdiction for the purposes of enforcing the terms of the injunction set forth in paragraph 4.4 of this Order and enabling any of the Settling Parties to apply to this Court at any time for such further orders and directions as may be necessary and appropriate for the construction or carrying out of the Settlement Agreement and this Final Approval Order and Judgment, for the modification of any of the provisions of this Final Approval Order and Judgment, and for the enforcement of compliance herewith.

So Ordered.

Dated this 14th day of August, [*100] 2006.

/s/ John R. Padova

EXHIBIT 1

Persons and Entities That Timely Excluded Themselves from the Settlement Class

[15]

15 The United States submitted a letter stating that, under federal law, it "cannot be represented by private counsel in a class action lawsuit" and that "[a]s a result, the United States Attorney General does not agree to the inclusion of the federal government as a class member in this Rule 23 litigation."

Costco Wholesale Corporation