

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN

IN RE PRANDIN DIRECT
PURCHASER ANTITRUST
LITIGATION

C.A. No. 2:10-cv-12141-AC-DAS

Judge Avern Cohn

THIS DOCUMENT RELATES TO:
ALL ACTIONS

Magistrate Judge Donald A. Scheer

**PLAINTIFFS' UNOPPOSED MOTION FOR AN AWARD OF ATTORNEYS'
FEES, REIMBURSEMENT OF EXPENSES, AND PAYMENT OF
INCENTIVE AWARDS TO THE CLASS REPRESENTATIVES**

Plaintiffs American Sales Company, LLC and Rochester Drug Co-
Operative, Inc., by their counsel ("Class Counsel"), move for an order:

1. awarding attorneys' fees to Class Counsel of one-third of the settlement fund of \$19 million;
2. reimbursing Class Counsel for the costs and expenses incurred through October 31, 2014 (\$147,975.82); and
3. approving incentive awards to both of the Class Representatives in the amount of \$50,000 each.

In support of this motion, plaintiffs submit herewith a memorandum of law and a declaration of Co-Lead Class Counsel. A proposed order granting this motion will be incorporated into and submitted with Plaintiffs' motion for final approval of the settlement which is due December 16, 2014.

Dated: November 18, 2014

Respectfully submitted,

/s/Patrick E. Cafferty

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OF EXPENSES, AND PAYMENT OF INCENTIVE AWARDS TO THE
CLASS REPRESENTATIVES**

STATEMENT OF ISSUES PRESENTED

Whether Class Counsel should be awarded attorneys' fees in the amount of one-third of the common fund?

Plaintiffs' answer: Yes

Whether Class Counsel should be awarded reasonably incurred litigation costs and expenses, to be paid out of the common fund?

Plaintiffs' answer: Yes

Whether Plaintiffs American Sales Company, LLC and Rochester Drug Co-Operative, Inc. should be granted incentive awards of \$50,000 each, to be paid out of the common fund?

Plaintiffs' answer: Yes

CONTROLLING AND MOST APPROPRIATE AUTHORITIES

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Bowling v. Pfizer, Inc., 102 F.3d 777 (6th Cir. 1996)

In re Cardizem CD Antitrust Litig., 99-md-1278, Dkt. No. 49 (E.D. Mich. Nov. 26, 2002)

Lonardo v. Travelers Indem. Co., 706 F. Supp. 2d 766 (N.D. Ohio 2010)

Moulton v. United States Steel Corp., 581 F.3d 344 (6th Cir. 2009)

In re Packaged Ice Antitrust Litig., 2011 U.S. Dist. LEXIS 150427, at (E.D. Mich. Dec. 13, 2011)

In re Skelaxin Antitrust Litig., No. 12-cv-83, Dkt. No. 747 (E.D. Tenn. June 30, 2014)

In re Southeastern Milk Antitrust Litig., 2013 U.S. Dist. LEXIS 70167 (E.D. Tenn. May 17, 2013)

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Plaintiffs, by Class Counsel, respectfully submit this Memorandum in Support of Class Counsel's Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Awards for the Class Representatives.

I. INTRODUCTION

The Plaintiffs' claims against Novo Nordisk A/S and Novo Nordisk, Inc. (collectively "Novo" or "Defendants") have been settled for \$19 million in cash. This is an excellent settlement, achieved for the benefit of the Class over a period of four-and-a-half years of litigation, as a direct result of the skill, subject matter expertise, perseverance, and hard work of Class Counsel. The extensive efforts of Class Counsel are detailed in the Declaration of Co-Lead Counsel ("Co-Lead Counsel Dec.") submitted herewith. These efforts include researching and analyzing complex pharmaceutical and regulatory law and practices; investigating detailed factual issues, including review and analysis of over 300,000 pages of documents; researching and drafting multiple consolidated complaints and oppositions to Novo's motions to dismiss; and negotiating the terms of the settlement agreement with counsel for Novo.

Class Counsel now seeks an award of attorneys' fees, reimbursement of expenses, and incentive awards for Class Representatives. In compensation for its work and performance, Class Counsel seeks a fee of one-third of the settlement fund. A fee of one-third should be awarded.

First, a fee of one-third of the fund has been consistently approved in direct purchaser pharmaceutical antitrust actions such as this one, in this Circuit and elsewhere: in 17 such cases since 2003, a one-third fee has been approved.

Second, an award of a one-third fee is supported by the application of the factors for determining percentage-of-fund awards under the Sixth Circuit's precedent established in *Bowling v. Pfizer, Inc.*¹ *Third*, the request is consistent with fee awards in many substantially similar complex antitrust class actions in this Circuit.

Thus, Class Counsel respectfully request that the Court award an attorneys' fee of \$6,333,333.33, equal to one-third of the settlement proceeds. The nature and duration of the litigation, the complexity of the subject matter, and the exceptional result of Class Counsel's efforts in this litigation, all performed on a contingency basis, without any assurance of payment of any kind, all support the request. Class Counsel also request reimbursement of out-of-pocket expenses in the amount of \$147,975.82 and incentive awards of \$50,000 to each of the named Plaintiffs.²

II. FACTUAL BACKGROUND

On May 6, 2009, faced with the potential FDA approval of Caraco

¹ *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996).

² Direct Purchaser Class Plaintiffs are American Sales Company, LLC and Rochester Drug Co-Operative, Inc.

Pharmaceutical Laboratories, Inc.’s (“Caraco”) inexpensive generic repaglinide, Novo switched the “use code” narrative for the ’358 patent reference³ in the FDA’s “Orange Book.” Specifically, Novo filed a new use code narrative (U-968) that, Plaintiffs allege, expanded the description of the claim under the ’358 patent beyond the repaglinide-metformin combination claimed in the patent, and covered all approved uses of repaglinide, including two uses that were the subject of expired patents.⁴

In a patent infringement action,⁵ this Court held that generic manufacturer Caraco was entitled to a mandatory injunction requiring Novo to delist the new use code narrative and reinstate a former use code narrative. *Novo Nordisk A/S v. Caraco Pharm. Labs.*, 656 F. Supp. 2d 729 (E.D. Mich. 2009). Nevertheless, the use code remained in place while the injunction decision was appealed all the way to the Supreme Court. *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 182 L.Ed. 678 (2012). It was not removed until August 2012. *See Novo Nordisk A/S v. Caraco Pharm. Labs., Ltd.*, 688 F.3d 766 (Fed. Cir. 2012).⁶

³ U.S. Pat. No. 6,677,358 (“the ’358 patent”).

⁴ Co-Lead Counsel Dec. ¶ 2.

⁵ *Novo Nordisk A/S, et al. v. Caraco Pharmaceutical Laboratories, Inc.*, No. 2:05-cv-40188 (E.D. Mich.) (“the Caraco action”); Co-Lead Counsel Dec. ¶ 3.

⁶ Co-Lead Counsel Dec. ¶¶ 8, 10.

In this antitrust class action, first filed in May 28, 2010, Plaintiffs allege that Defendants unlawfully blocked FDA approval and market entry of bioequivalent, but less expensive, generic repaglinide that would have competed with Defendants' more expensive, branded Prandin.⁷ Plaintiffs initially asserted two monopolization claims: one based on submission of a baseless use code narrative to the FDA; and another premised on fraudulent procurement of the '358 patent.⁸ Defendants filed two separate motions to dismiss that were fully briefed but never resolved while appeals in the *Caraco* action were pending.⁹

On December 9, 2013, following the resolution of all of the appeals in the *Caraco* action, Plaintiffs filed their First Amended Consolidated Class Action Complaint ("FAC," Doc. No. 48).¹⁰ The FAC included a single claim for

⁷ Co-Lead Counsel Dec. ¶ 4.

⁸ This type of claim is called a "*Walker Process* claim" after *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965). Co-Lead Counsel Dec. ¶ 6.

⁹ Co-Lead Counsel Dec. ¶¶ 7, 13-14, 16. On January 19, 2011, the Court held that the '358 patent was invalid as obvious and that it was unenforceable due to inequitable conduct. *Novo Nordisk A/S v. Caraco Pharm. Labs.*, 775 F. Supp. 2d 985, 1025 (E.D. Mich. 2011). The Federal Circuit affirmed this Court's determination that the '358 patent was invalid as obvious, but reversed the determination that it was unenforceable due to inequitable conduct. *Novo Nordisk A/S v. Caraco Pharm. Labs., Ltd.*, 719 F.3d 1346 (Fed. Cir. 2013).

¹⁰ As result of the Federal Circuit's inequitable conduct ruling, Plaintiffs withdrew their *Walker Process* claim. Co-Lead Counsel Dec. ¶ 16.

monopolization based on the alleged submission of a baseless use code.¹¹

Defendants filed a motion to dismiss the FAC on January 15, 2014 (Doc. Nos. 50-51) and the motion was fully briefed (Doc. No. 52, 55). A hearing on the motion was scheduled for June 17, 2014.¹²

From the outset, Defendants heavily emphasized the regulatory issues that Caraco was facing, which, they maintained, broke the chain of causation between the alleged antitrust violations and Plaintiffs' alleged injury.¹³ Class Counsel investigated Caraco's circumstances through public sources, including public court dockets, SEC filings, FDA files (obtained through Freedom of Information Act requests and otherwise), press reports, and other sources.¹⁴ Class Counsel also served a subpoena on Caraco for confidential materials, resulting in the production of over 300,000 pages of documents, which Class Counsel thoroughly analyzed.¹⁵ While Class Counsel remain confident they could establish that Defendants' alleged use code manipulation violated the antitrust laws, there are serious issues concerning whether Caraco had the ability to obtain FDA approval to market

¹¹ Co-Lead Counsel Dec. ¶ 17.

¹² *Id.*

¹³ *Id.* ¶ 7.

¹⁴ *Id.* ¶ 20.

¹⁵ *Id.* ¶ 21.

generic Prandin sooner than it did, in July 2013. *See* Declaration of Caraco President GP Singh Sachdeva (Doc. No. 55-1).¹⁶

On the eve of oral argument on the motion to dismiss, the parties reached an agreement in principle to resolve the litigation and advised the Court. The Court granted preliminary approval to the proposed settlement on October 2, 2014 (Doc. No. 64).

III. ARGUMENT

A. Class Counsel's compensation derives from the benefits created by the litigation.

Courts have long recognized that a lawyer who recovers a “common fund” is entitled to a reasonable attorneys’ fee from the fund.¹⁷ The rationale for such awards is that it “avoid[s] the unjust enrichment of those who otherwise would be benefited by the fund without sharing in the expenses incurred by the successful litigant.”¹⁸

In decisions involving the computation of a common fund fee award, the Supreme Court consistently has held that it is appropriate for the fee to be

¹⁶ *Id.* ¶¶ 22-23.

¹⁷ *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Smillie v. Park Chemical Company*, 710 F.2d 271 (6th Cir. 1983); *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496 (E.D. Mich. 2000).

¹⁸ *Fournier v. PFS Investments, Inc.*, 997 F. Supp. 828, 830 (E.D. Mich. 1998).

determined on a percentage-of-the-fund basis.¹⁹ In a percentage fee award, the fee is measured by the benefit conferred upon the class.

The Supreme Court has observed that private antitrust litigation is necessary to assure the effective enforcement of the antitrust laws.²⁰ Fee awards similar to that requested here encourage the prosecution of meritorious class actions, and thereby promote compliance with the antitrust laws.

B. The “Percentage Method” is appropriate in this case and Class Counsel’s requested one-third fee is fair and reasonable.

Courts within the Sixth Circuit recognize the clear trend “toward adoption of a percentage of the fund method” in common fund cases.²¹ As Judge Cook explained in *F&M Distributors*:

¹⁹ See *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (“under the ‘common fund doctrine,’ . . . a reasonable fee is based on a percentage of the fund bestowed on the class”); see also *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 165-66 (1939); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 124-25 (1885); *Trustees v. Greenough*, 105 U.S. 527, 532 (1881).

²⁰ See, e.g., *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 331 (1979); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318-19 (1965).

²¹ *In re Southeastern Milk Antitrust Litig.*, 2013 U.S. Dist. LEXIS 70167, at *13 (E.D. Tenn. May 17, 2013) (quoting *Stanley v. United States Steel Co.*, 2009 U.S. Dist. LEXIS 114065, at **4-5 (E.D. Mich. Dec. 8, 2009)). See also *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532 (E.D. Mich. 2003) (Sixth Circuit courts have a “preference for the percentage-of-the-fund method in common fund cases.”).

[T]he Court concludes that the percentage-of-the-fund method should be applied for two reasons. First, the lodestar method is too cumbersome and time-consuming of the resources of the Court. Second, and more importantly, the “percentage of the fund” approach “more accurately reflects the result achieved.”²²

The percentage-of-the-fund method should be applied here.

Class Counsel requests that the percentage of the fund be awarded as attorneys’ fees be one-third. As Judge Cleland noted, in common fund cases, “the percentages awarded typically ranging from 20 to 50 percent of the common fund created.”²³ Class Counsel’s request falls in the middle of that range.

The one-third fee amount is standard in direct purchaser pharmaceutical antitrust cases. The table below summarizes 17 cases over the last 10+ years from circuits across the country, two of which were decided within the last six months, in which a one-third fee was awarded:

Direct Purchaser Generic Pharmaceutical Antitrust Cases One-Third Attorneys’ Fees Awarded		
Date	Case Name	Settlement Amount
9-16-14	<i>Mylan Pharmaceuticals, Inc. v. Warner Chilcott PLC</i> , E.D. Pa. 12-cv-3824, Doc. No. 665 (“ <i>Doryx</i> ”)	\$15M
6-30-14	<i>In re Skelaxin</i> , E.D. Tenn. 12-MD-2343, Doc. No. 747	\$73M

²² *In re F & M Distributors, Inc. Sec. Litig.*, 1999 U.S. Dist. LEXIS 11090, at *8. (E.D. Mich. June 29, 1999).

²³ *Wise v. Popoff*, 835 F. Supp. 977, 980 (E.D. Mich. 1993).

11-07-12	<i>In re Wellbutrin XL Antitrust Litig.</i> , E.D. Pa. 08-2431, Doc. No. 485	\$37.5M
05-31-12	<i>Rochester Drug Co-Operative, Inc., v. Braintree Laboratories, Inc.</i> , D. Del. 07-142-SLR, Doc. No. 243 (“Miralax”)	\$17.5M
01-12-12	<i>In re Metoprolol Succinate Antitrust Litig.</i> , D. Del. 06-52-MPT, Doc. No. 194 (“Toprol”)	\$20M
11-28-11	<i>In re DDAVP Direct Purchaser Antitrust Litig.</i> , S.D.N.Y. 05-2237, Doc. No. 113	\$20.25M
11-21-11	<i>In re Wellbutrin SR Antitrust Litig.</i> , E.D. Pa. 04-5525, Doc. No. 413	\$49M
08-11-11	<i>Meijer, Inc. v. Abbott Labs.</i> , N.D. Cal. 07-05985-CW, Doc. No. 514	\$52M
01-31-11	<i>In re Nifedipine Antitrust Litig.</i> , D.D.C. 03-mc-223-RJL, Doc. No. 333	\$35M
01-25-11	<i>In re Oxycontin Antitrust Litig.</i> , S.D.N.Y. 04-md-1603-SHS, Doc. No. 360	\$16M
04-23-09	<i>In re Tricor Direct Purchaser Litig.</i> , D. Del. 05-340-SLR, Doc. No. 543	\$250M
04-20-09	<i>Meijer, Inc. v. Barr Pharms., Inc.</i> , D.D.C. 05-2195, Doc. No. 210	\$22M
11-09-05	<i>In re Remeron Direct Purchaser Antitrust Litig.</i> , D.N.J. 03-0085, Doc. No. 185	\$75M
04-19-05	<i>In re Terazosin Hydrochloride Antitrust Litig.</i> , S.D. Fla. 99-MDL-1317, Doc. No. 1557	\$74M
09-28-04	<i>North Shore Hematology-Oncology Assoc., P.C. v. Bristol-Myers Squibb Co.</i> , D.D.C. 04-248-EGS, Doc. No.24	\$50M
04-09-04	<i>In re Relafen Antitrust Litig.</i> , D. Mass. 01-12239-WHY, Doc. No. 297	\$175M
04-11-03	<i>La. Wholesale Drug Co. v. Bristol-Myers Squibb Co.</i> , S.D.N.Y. 01-cv-7951, Doc. No. 22	\$220M

Within the Sixth Circuit, awards of one-third of a common fund are typical, particularly in the resolution of complex litigation. In June of this year, as noted above, in *In re Skelaxin*, a direct purchaser pharmaceutical antitrust case, Judge Collier awarded a one-third fee on a \$73 million settlement recovery. In *Southeastern Milk*, the court recently awarded a pair of fees, each one-third of settlements worth approximately \$150 million.²⁴ In making the second such award, the court noted that “attorneys’ fees requested represent one-third of the settlement fund. Although the total fee requested is a very large amount . . . the percentage requested is certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit.”²⁵ And, *Southeastern Milk* is only the latest in a line of authority from district courts in the Sixth Circuit that support fee awards of 30% or higher.²⁶ The one-third of the

²⁴ *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at **15-16; *In re Southeastern Milk Antitrust Litig.*, No. 08-md-01000, Dkt. No. 1897 (E.D. Tenn. July 7, 2012).

²⁵ *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at **15-16 (citation omitted); *Bessey v. Packerland Plainwell, Inc.*, 2007 WL 3173972, at *4 (W.D. Mich. Oct. 26, 2007) (approving an award of 33 percent, including costs and expenses, and noting that “[e]mpirical studies show that . . . fee awards in class actions average around one-third of the recovery”).

²⁶ See, e.g., *In re ProQuest Company Sec. Litig.*, No. 06-cv-10619, Final Order and Judgment ¶ 18, Doc. No. 114 (E.D. Mich. Mar. 30, 2009) (Cohn, J.) (counsel awarded 30% fee on \$20 million settlement); *In re Packaged Ice Antitrust Litig.*, 2011 U.S. Dist. LEXIS 150427, at **75-77 (E.D. Mich. Dec. 13, 2011) (“Importantly, the requested award of close to 30% appears to be a fairly well-

settlement fund fee requested by Class Counsel is within the accepted range of reasonable attorneys' fees recoverable in common fund cases.

1. Application of the Sixth Circuit's reasonableness factors supports Class Counsel's request for a one-third fee.

The Sixth Circuit has set forth the factors for determining the reasonableness of an attorneys' fee request:

- (1) the value of the benefit rendered to the plaintiff class;
- (2) the value of the services on an hourly basis;
- (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides.²⁷

Application of these factors confirms that the fee requested here is reasonable.

accepted ratio in cases of this type and generally in complex class actions.”); *In re Foundry Resins Antitrust Litig.*, No. 04-mdl-1638, Dkt. No. 247 (S.D. Ohio March 31, 2008) (awarding 33 1/3% of a \$14.1 million settlement). *See also Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 528 (E.D. Ky. 2010) (“Using the percentage approach, courts in this jurisdiction and beyond have regularly determined that 30% fee awards are reasonable.”); *Stanley v. United States Steel Co.*, 2009 U.S. Dist. LEXIS 114065, at **8-9 (E.D. Mich. Dec. 8, 2009) (“Class counsel seek a fee which is 30% of the total recovery. This is within the range of approved percentages.”); *In re Cardizem CD Antitrust Litig.*, 99-md-1278, Dkt. No. 49. (E.D. Mich. Nov. 26, 2002) (awarding a 30% fee on a \$100 million settlement); *F&M Distrib.*, 1999 U.S. Dist. LEXIS 11090, at *10 (“the excellent performance of the attorneys merits an award of thirty percent of the settlement fund”).

²⁷ *Moulton v. United States Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009) (quoting *Bowling*, 102 F.3d at 780 (these are commonly called the *Bowling* or *Ramey* factors)).

a. The value of the benefit rendered to the Class.

Courts within the Sixth Circuit consider the value of the result achieved a primary factor in making a fee award.²⁸ Here, the \$19 million recovery for the Class is outstanding in light of the risks and uncertainties in this case.

The settlement in this case provides a clear benefit to the Class: an immediate and certain payment to a limited national class of direct purchasers of \$19 million in cash less attorneys' fees, costs, and incentive awards to the Class Representatives, as may be awarded by the Court.

In determining a fee award, courts credit the role of counsel in creating the benefit.²⁹ Here, there would be no recovery but for the efforts of Class Counsel to research, develop, and zealously litigate claims.³⁰ Unlike in some antitrust cases, the commencement of this action did not follow a government lawsuit or

²⁸ See *Bowling v. Pfizer*, 922 F. Supp. 1261, 1280 (S.D. Ohio 1996) ("Most important among these factors are the value of the benefit rendered to the plaintiff class and the value of Counsel's services on an hourly basis."); *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 640 F. Supp. 697, 700 (S.D. Ohio 1986) (finding that the value of the benefit rendered is listed as the first factor because it is the most important one); see also *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("critical factor is the degree of success obtained").

²⁹ See *Connectivity Sys. Inc. v. Nat'l City Bank*, 2011 U.S. Dist. LEXIS 7829, at *36 (S.D. Ohio Jan. 25, 2011) ("Plaintiffs' Counsel identified and asserted claims concerning Defendant's alleged operations and, as a result, secured a substantial benefit for the Settlement Class.").

³⁰ See, e.g., Co-Lead Counsel Dec. ¶¶ 2-23.

investigation. There was no other governmental or private suit for antitrust damages for purchasers. This factor further supports the fee request.³¹

Court also consider the views of the class.³² Members of the Class are sophisticated businesses. Each Class member received direct notice of the settlement and requested fee. Each has made the informed choice to date not to object to the settlement generally, or to the fee request specifically. In similar previous cases, there have been no objections to fee requests and in fact class members have supported such requests.

Of course, an assessment of value conferred on the class must take into account the risk of no recovery.³³ Here, Class Counsel litigated this case without any guarantee of payment for over four-and-a-half years.

The \$19 million recovery is an outstanding result in light of the uncertainties in this case, and Class Counsel's fee should reflect both the risks and success.

³¹ See *In re AT&T Corp.*, 455 F.3d 160, 173 (3d Cir. 2006) (that "class counsel was not aided by the efforts of any governmental group, and the entire value of the benefits accruing to class members is properly attributable to the efforts of class counsel . . . strengthens the District Court's conclusion that the fee award was fair and reasonable.").

³² See, e.g., *Godec v. Bayer Corp.*, 2012 U.S. Dist. LEXIS 187040, at *8 (N.D. Ohio Mar. 14, 2012); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 795 (N.D. Ohio 2010) ("the paucity of objections suggests that the Settlement Class Members believe the Settlement Agreement is beneficial").

³³ See *Dick v. Sprint Communs. Co. L.P.*, 2014 U.S. Dist. LEXIS 11210, at *40 (W.D. Ky. Jan. 29, 2014).

b. The value of counsel's services on an hourly basis.

When applying the percentage method, courts will look at the hours expended by counsel, either as a factor in the fee analysis or as an independent cross-check.³⁴ Counsel's lodestar is determined by multiplying "the number of hours reasonably expended on the case by a reasonable hourly rate."³⁵ In a complex, multidistrict litigation, reasonable hourly rates may be determined with reference "to national markets, an area of specialization, or any other market [the court believes] is appropriate to fairly compensate attorneys in individual cases."³⁶

Class Counsel spent approximately 3,520.1 hours working on this case. This amounts to \$2,100,815.50 in attorney time. Class Counsel also invested

³⁴ See, e.g., *Bowling*, 102 F.3d at 780; *Smillie*, 710 F.2d at 275. Many courts do not require detailed time. For example, in *Rawlings*, the Sixth Circuit approved the district court's acceptance of class counsel's assurance concerning the total hours billed. *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 517 (6th Cir. 1993). As the court observed in *Southeastern Milk*, "[u]nlike the situation when the Court employs the lodestar method in full, 'the hours documented by counsel need not be exhaustively scrutinized by the district court' where a lodestar cross-check is used." 2013 U.S. Dist. LEXIS 70167, at *15 n.3 (quoting *In re WorldCom Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005)).

³⁵ *Barnes v. City of Cincinnati*, 401 F.3d 729, 745 (6th Cir. 2005).

³⁶ *McHugh v. Olympia Entm't, Inc.*, 37 Fed. Appx. 730, 740 (6th Cir. 2002) ("A court's choice not to apply local market rates for attorney fees is not an abuse of discretion."); see also *In re UnumProvident Corp. Derivative Litig.* 2010 U.S. Dist. LEXIS 4326, at *17 (E.D. Tenn. Jan. 20, 2010) (approving rates charged by out-of-town counsel where the case involved complex questions of law and defendants were represented by "large New York firms") (citing *Hadix v. Johnson*, 65 F.3d 532, 535 (6th Cir. 1995)).

\$147,975.82 in expenses. Class Counsel was prepared to risk more time and money had the litigation not settled.³⁷ This commitment precluded Class Counsel from doing other work. Thus, the fee requested by Class Counsel is reasonable in light of the quality and quantity of work performed, and the opportunities foregone as a result.

A one-third fee recovery in this matter would equate to a lodestar multiplier of approximately 3.01. This level of multiplier is within the range of what has been routinely accepted in complex matters such as this one.³⁸ Indeed, higher

³⁷ When attorneys' fees are awarded, the current market rate, not the rate at the time the services were performed, is to be used. *See UnumProvident Corp.* 2010 U.S. Dist. LEXIS 4326, at *17 (citing *Barnes*, 401 F. 3d at 745 (approving use of current rates to compensate for delay in payment)); *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 381 (S.D. Ohio 2006); *see also Lanni v. State of New Jersey*, 259 F.3d 146 (3d Cir. 2001) ("The current rate in 2008, rather than the historic rates of 2005, 2006 and 2007, must be used in the Third Circuit to reflect the delay in payment for services rendered in past years, measured by current market rates.") (citation omitted).

³⁸ *See, e.g., In re UnumProvident Corp. Securities Litig.*, No. 1:03-CV-0049, Dkt. No. 193 (E.D. Tenn., May 16, 2008) (Collier, J.) (fee awarded reflected 3.4 multiplier); *Bailey v. AK Steel Corp.*, 2008 U.S. Dist. LEXIS 18838, at *7 (S.D. Ohio Feb. 28, 2008) (awarding multiplier of 3.04, noting that "[c]ourts typically ... increas[e] the lodestar amount by a multiple of several times itself" and identifying a "normal range of between two and five"); *Manners v. American General Life Ins. Co.*, 1999 U.S. Dist. LEXIS 22880, at *31 (M.D. Tenn. Aug 11, 1999) (3.8 multiplier); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d. 752, 770 (S.D. Ohio 2007) (multiplier of 5.9).

multipliers have been accepted in complex pharmaceutical antitrust class actions.³⁹

c. The contingent nature of the fee.

A fair fee must also recognize the challenges of a contingent antitrust action, including the uncertain nature of the fee, the contingent outlay of out-of-pocket sums, and the fact that the risk of failure and nonpayment in an antitrust case is high. Accordingly, courts in this Circuit recognize that the risk of the litigation is an important factor to consider in awarding fees.⁴⁰

A contingency fee arrangement justifies an increase in the award of attorneys' fees. If this "bonus" methodology did not exist, few lawyers could risk the time, effort, and money to represent a class.⁴¹

³⁹ See, e.g., *Cardizem*, (approving 30% fee award that equates to lodestar multiplier of 3.7). See also *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340, Dkt. No. 543, at 9 (D. Del. Apr. 23, 2009) (approving one-third fee where lodestar multiplier was 3.93); *Meijer, Inc. v. 3M*, 2006 WL 2382718, at *24 (E.D. Pa. Aug. 14, 2006) (approving a percentage fee award that translated to a 4.77 multiplier in case that settled after one year); *In re Children's Ibuprofen Oral Suspension Antitrust Litig.*, No. 04-mc-00535-ESH, Dkt. No. 29 (D.D.C. Apr. 24, 2006) (multiplier of 2.33); *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27013, at **47-48 (D. N.J. Nov. 9, 2005) (multiplier of 1.86 is on the "low end of the spectrum").

⁴⁰ *Stanley*, 2009 U.S. Dist. LEXIS 114065, at *8 ("Numerous cases recognize that the contingent fee risk is an important factor in determining the fee award.").

⁴¹ *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988) ("the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer"); *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at *22 ("If counsel are not rewarded for this risk, few attorneys will undertake the representation of a class client given the

Courts assess this risk as of the commencement of the action.⁴² Even cases with strong liability facts can be unpredictable: the history of antitrust litigation is riddled with cases in which plaintiffs proved liability, but recovered no or small damages at trial or after appeal.⁴³ In antitrust cases, “[i]t is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced.”⁴⁴ When Class Counsel undertook this representation, they had no assurances of *any* fees: they only knew they would

investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.”) (internal quote omitted); *accord Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981) (“Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result.”).

⁴² See *Cardinal Health*, 528 F. Supp. 2d at 766 (“At the time that Lead Counsel undertook the prosecution of this action, it accepted the risk of investing substantial time and expenses without any assurance of being compensated.”) (emphasis added); *Dick v. Sprint*, 2014 U.S. Dist. LEXIS 11210, at *44 (“Class counsel spent considerable time on this case at the risk of receiving no compensation.”).

⁴³ E.g., *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974) (after two trips to the Court of Appeals for the Second Circuit and one to the Supreme Court, plaintiffs, the putative class, and their counsel recovered nothing); *United States Football League v. National Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) (“the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only \$1.00 in damages”), *aff’d*, 842 F.2d 1335 (2d Cir. 1988); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1166-67 (7th Cir. 1983) (antitrust judgment was remanded for new trial and damages).

⁴⁴ *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff’d*, 440 F.2d 1079 (2d Cir. 1971).

have to work many hours over an extended period for any possibility of payment.

Class Counsel alone bore the following risks: (a) that the matter would be dismissed on one of Novo's Rule 12(b)(6) motions; (b) that a class would not be certified; (c) that Plaintiffs would be unable to demonstrate that Novo's alleged use code manipulation violated the antitrust laws or that Novo fraudulently procured the '358 patent; (d) that Novo's appeal to the United States Court of Appeals for the Federal Circuit, and the subsequent appeal to the Supreme Court, would disrupt this Court's use code ruling and delay its implementation; and (e) that Caraco would not be ready and able to enter the market for repaglinide in 2009 or soon thereafter – an obstacle that ultimately generated great uncertainty.

Class Counsel expended substantial time and money on a difficult matter for contingent recovery. They are entitled now to be compensated for their risk.

d. Society's stake in the litigation.

Private antitrust prosecution fosters compliance with the antitrust laws, an important societal objective.⁴⁵ As the court explained in *Southeastern Milk*, “failing to fully compensate class counsel for the excellent work done and the various substantial risks taken would undermine society's interest in the private

⁴⁵ *Sonotone Corp.*, 442 U.S. at 344.

litigation of antitrust cases.”⁴⁶ Here, the challenge mounted by pharmaceutical purchasers and Class Counsel will deter antitrust misconduct and support competition, a benefit to all purchasers of prescription drugs and the consuming public. Society gains by incentivizing the kind of action taken by Class Counsel.

e. The complexity of the case.

Antitrust class actions are inherently, and arguably the most, complex class action cases to litigate. As the court noted in *In re Packaged Ice Antitrust Litig.*, “[t]his antitrust litigation, like all litigation of its species, promises to be extremely complex and time intensive and there is no question that if settlement fails, the Defendants will mount a strong defense.”⁴⁷

This case, like *Packaged Ice*, involved complex legal and factual issues, and

⁴⁶ 2013 U.S. Dist. LEXIS 70167, at *23 (citing *Pillsbury*, 459 U.S. at 262-63 (“This Court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws.”)). *See also Cardizem*, 218 F.R.D. at 534 (“Society also benefits from the prosecution and settlement of private antitrust litigation.”); *In re Folding Carton Antitrust Litig.*, 84 F.R.D. 245, 260 (N.D. Ill. 1979) (there is a “need in making fee awards to encourage attorneys to bring class actions to vindicate public policy (e.g., the antitrust laws) as well as the specific rights of private individuals.”).

⁴⁷ 2011 U.S. Dist. LEXIS 150427, at *76 (E.D. Mich. Dec. 13, 2011), *citing In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 639 (E.D. Pa. 2003). *See also Cardizem*, 218 F.R.D. at 533 (“Antitrust class actions are inherently complex . . . this extraordinarily complex case raised a multitude of difficult issues in the areas of antitrust law, patent law, and laws governing pharmaceutical drugs.”).

highly capable defense counsel. Not only were Class Counsel called upon to overcome the unusual Rule 12(b)(6) and class certification challenges, but also Novo signaled early on that one of its key defenses would be to challenge Plaintiffs' ability to demonstrate that, notwithstanding Novo's antitrust misconduct, Plaintiffs would not be able to prove antitrust injury because Caraco was not ready and able to come to market any earlier than it ultimately did.⁴⁸ Thus, Class Counsel were required to investigate the status of Caraco's manufacturing capabilities and its abilities to gain FDA approval for its generic drug application. Class Counsel assigned a group of attorneys to mine the public and private record for evidence of Caraco's being ready and willing to launch generic repaglinide, subpoenaing records from Caraco, and having attorneys review those records.⁴⁹ This complex investigation gave Class Counsel a deep understanding of its case, resulting in a favorable, timely settlement.

The complexity of the issues in the prosecution of this case, and the extensive work and coordination of Class Counsel, supports the one-third fee requested.⁵⁰

⁴⁸ Co-Lead Counsel Dec. ¶ 7.

⁴⁹ *Id.* ¶¶ 20-21.

⁵⁰ *See F&M*, 1999 U.S. Dist. LEXIS 11090, at *12 (approving fee award because attorneys had to "survive numerous motions to dismiss," "face[] vigorous

f. The skill, experience and reputation of counsel.

Class Counsel include some of the preeminent plaintiffs' antitrust firms in the country.⁵¹ Many lawyers in these firms have also specialized in class and non-class antitrust litigation in the pharmaceutical industry for well over a decade. Class Counsel demonstrated this expertise in the efficient prosecution of this action, including the beneficial settlement entered into with Novo. As one court observed, "[t]he quality of work performed in a case that settles before trial is best measured by the benefit obtained."⁵² Class Counsel obtained a substantial benefit for the Class.⁵³ That Class Counsel obtained this result despite the exceptional skill and vigorous advocacy of Novo's law firms further support the fee request.⁵⁴

opposition to their efforts to obtain class certification," and "manage complex discovery").

⁵¹ The background, experience, and accomplishments of Class Counsel are summarized in Co-Lead Counsel Dec. Exs. A -- H.

⁵² *Behrens*, 118 F.R.D. at 547-48.

⁵³ Co-Lead Counsel Dec. ¶¶ 27-31.

⁵⁴ See, e.g., *In re Delphi Corp. Securities, Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 504 (E.D. Mich. 2008) ("The ability of Co-Lead Counsel to negotiate a favorable settlement in the face of formidable legal opposition further evidences the reasonableness of the fee award requested."); *F&M*, 1999 U.S. Dist. LEXIS 11090, at *19 ("The skill and competence of the attorneys for the Plaintiffs was evident, especially when viewed on the basis of the results that they obtained in this case, while the excellent advocacy skills of the defense counsel . . . were equally evident").

C. Class Counsel's expenses are reasonable and were necessarily incurred to achieve the benefit obtained.

The expenses Class Counsel incurred in prosecuting this litigation are categorized in the Co-Lead Counsel Declaration.⁵⁵ Expenses typically billed to paying clients in similar cases are subject to reimbursement from the common fund in class cases.⁵⁶ The categories of expenses for which Class Counsel seek reimbursement here are the type of expenses routinely charged to hourly fee-paying clients and, therefore, should be reimbursed from the common fund.

D. Awards for Class Representatives are appropriate and reasonable.

Numerous courts have found it appropriate to specially reward named class representatives for the benefits they have conferred. As the court noted in

Lonardo v. Travelers Indem. Co.:

Courts within the Sixth Circuit ... recognize that, in common fund cases and where the settlement agreement provides for incentive awards, class representatives who have had extensive involvement in a class action litigation deserve compensation above and beyond amounts

⁵⁵ See Co-Lead Counsel Dec. Exs. A-H.

⁵⁶ See *Cardizem*, 218 F.R.D. at 535 ("Class Counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement, including expenses incurred in connection with document productions, consulting with experts and consultants, travel and other litigation-related expenses.").

to which they are entitled to by virtue of class membership alone.⁵⁷

The Court should approve awards in the amount of \$50,000 to each of the two Class Representatives. The Class Representatives diligently and completely fulfilled their obligations to the Class. First, they stepped forward to assert the Class's interests by filing suit, providing the additional public service of contributing to the enforcement of antitrust laws.⁵⁸ Without them, the Class would have nothing. Second, they monitored the litigation and related actions over four-and-a-half years, and advised and consulted on settlement negotiations.⁵⁹ All of these efforts required the Class Representatives to turn their attention away from their daily business of purchasing and selling pharmaceutical products. Third, the amounts requested are within the acceptable range of payments awarded by courts.⁶⁰ In the *Skelaxin Antitrust Action* recently concluded in another district

⁵⁷ 706 F. Supp. 2d, 766, 787 (N.D. Ohio 2010). See also *Hainey v. Parrott*, 2007 WL 3308027, at **5-6 (S.D. Ohio Nov. 6, 2007) (approving awards of \$50,000 each for class representatives out of a settlement fund of \$6 million); *In re Dun & Bradstreet Credit Services Customer Litig.*, 130 F.R.D. 366 (S.D. Ohio 1990) (two awards of \$55,000 and three awards of \$35,000); *In re Revco Sec. Litig.*, 1992 WL 118800 (N.D. Ohio May 6, 1992) (\$200,000 to the named plaintiff); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250-51 (S.D. Ohio 1991) (\$50,000 each to six named plaintiffs).

⁵⁸ Co-Lead Counsel Dec. ¶ 35.

⁵⁹ *Id.*

⁶⁰ Co-Lead Counsel Dec. ¶ 36.

court in this Circuit, Judge Collier awarded each of the class representatives and incentive award of \$50,000.⁶¹ In other direct purchaser pharmaceutical class actions, such awards are the norm,⁶² even in settlements of \$20 million or less.⁶³

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests the Court approve the fee request of one-third of the settlement fund, the expense reimbursement application of \$147,975.82, and a \$50,000 incentive award to each of the Class Representatives.

⁶¹ *In re Skelaxin Antitrust Litig.*, No. 12-cv-83, Dkt. No. 747 (E.D. Tenn. June 30, 2014), at 7.

⁶² *E.g.*, *In re Flonase Antitrust Litig.*, No. 08-cv-3149, ECF No. 496 (E.D. Pa. June 14, 2013) (\$50,000 to one class representative and \$40,000 to other class representative); *Wellbutrin XL*, No. 2: 08-cv-2431 (ECF No. 485) (\$50,000 to class representative); *Wellbutrin SR*, C.A. No. 04-5525 (ECF No. 413) (\$25,000 to each of two class representatives); *Miralax*, No. 07-142-SLR (ECF No. 243) (\$60,000 to each of the three class representatives); *Toprol*, No. 06-52-MPT (ECF No. 194) (\$50,000 to each of the three class representatives); *Tricor*, C.A. No. 05-340-SLR (ECF No. 543) (\$50,000 to each of the three class representatives).

⁶³ *See Miralax*, E.D. Pa. 07-142-SLR (ECF No. 243) (\$60,000 to each of the three Class Representatives in \$17.5 million settlement); *Toprol*, D. Del. 06-52 GMS-MPT (ECF No. 193) (\$50,000 each to three Class Representatives in \$20 million settlement); *Doryx*, E.D. Pa. 12-3824 (ECF No. 665) (\$50,000 each to three Class Representatives in \$15 million settlement).

Dated: November 18, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2014, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

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