UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

In re POLYURETHANE FOAM ANTITRUST LITIGATION	MDL Docket No. 2196 Index No. 10-MD-2196 (JZ)
This document relates to: ALL DIRECT PURCHASER ACTIONS	

DIRECT PURCHASER PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR AN AWARD OF ATTORNEYS' FEES AND FOR REIMBURSEMENT OF EXPENSES

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I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Direct Purchaser Plaintiff class representatives ("Plaintiffs"), through Boies Schiller & Flexner, LLP and Quinn Emanuel Urquhart & Sullivan, LLP ("Interim Co-Lead Counsel"), as well as the Direct Purchaser Class Executive Committee,[1] respectfully move for an award of attorneys' fees and reimbursement of litigation expenses from the settlement with the Vitafoam defendants[2] ("Vitafoam Settlement").

Plaintiffs are direct purchasers of flexible polyurethane foam in the United States, and bring this action on their own behalf and on behalf of a class of similarly situated entities (the "Class").[3] Plaintiffs assert that Defendants, including Vitafoam, violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by engaging in an unlawful combination and conspiracy to fix, raise, maintain, and/or stabilize prices for flexible polyurethane foam products in the United States. Plaintiffs allege that this conduct resulted in direct purchasers of flexible polyurethane foam suffering damages in the form of overcharges for their flexible polyurethane foam purchases.

These cases, and the successes achieved to date, are the product of the initiative, investigation, and hard work of skilled counsel over the course of several years. As a result of Designated Counsel's efforts, Plaintiffs have entered into two settlement agreements that both

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[1] The Executive Committee consists of the following law firms: Bernstein Liebhard LLP; Grant & Eisenhofer P.A.; Hausfeld LLP; Pearson, Simon, Warshaw & Penny LLP; Robins, Kaplan, Miller, Ciresi LLP; Seeger Weiss LLP; Strange & Carpenter; and Weinstein Kitchenoff & Asher LLC. (Interim Co-Lead Counsel and the Executive Committee firms are collectively referred to herein as "Designated Counsel"),

[2] The "Vitafoam defendants" consist of Vitafoam, Inc. and Vitafoam Products Canada Limited.

[3] The Class is more fully defined in Plaintiffs' Consolidated Amended Complaint (Dkt. 46), at ¶¶ 141-152.

provide significant benefits to members of the proposed Settlement Classes (and members of any litigation class that may subsequently be certified by this Court): one with the Vitafoam defendants, which will confer a substantial monetary benefit—not less than $9 million, and as much as $15 million—to Class Members, and has provided significant cooperation that has enhanced, and will continue to enhance, Plaintiffs' ability to successfully prosecute this action against the non-settling Defendants; and one with the Domfoam Parties,[4] which has also resulted in important cooperation that will continue following any approval of the settlement (the "Domfoam Settlement).

Plaintiffs have moved for final approval of the proposed Vitafoam Settlement and the proposed Domfoam Settlement concurrently with this application.

Pursuant to the Court's order of November 29, 2012 (Dkt. 457), potential Class members were directly mailed Court-approved notice packets on January 31, 2013 ("Notice"), and the Court-approved summary notice was also published from March 4–11, 2013 in targeted trade journals and targeted publications (and the March 2013 editions of the same), and then broader business-oriented internet websites and networks from March 11–24, 2013. *See* Declaration of Stephen R. Neuwirth, dated April 22, 2013 ("Neuwirth Decl.") ¶¶ 15–17. The Notice discussed the settlement, and expressly notified potential Class members that Designated Counsel could seek up to 30% of the settlement fund in fees, plus additional amounts for reimbursement of expenses. Not a single class member has objected to the Vitafoam Settlement, regarding either the substantive settlement details or the fee and expense notification provisions.

[4] The "Domfoam Parties" are defined as Defendants Domfoam International Inc. ("Domfoam"), Valle Foam Industries (1995) Inc. ("Valle Foam"), and A-Z Sponge & Foam Products Ltd. (collectively, "Voluntary Dismissal Defendants"), and non-defendants Bruce Bradley, Dean Brayiannis, Michael Cappuccino, Peter Foti, Duke Greenstein, John Howard, Dale McNeill, James William Sproule, Robert Rochietti-Valle, Tony Vallecoccia, and Fred Zickmantel (collectively, "Individual Settling Parties"). (*See* Dkt. 343.)

In light of the substantial benefits Designated Counsel conferred on members of the proposed Class through their hard work, Plaintiffs and Designated Counsel respectfully request an award of 30% of the Vitafoam Settlement fund for attorneys' fees, as well as an additional $908,315.35 for reimbursement of expenses (excluding testifying experts' fees) to date.[5] This translates into 30% of the guaranteed $9 million that Vitafoam will pay to the fund, plus 30% of up to $6 million more that Vitafoam may pay into the fund under the terms of the Vitafoam Settlement, and an additional $908,315.35 on top of that sum. Even assuming the maximum possible fee award of $4.5 million (that is, 30 percent of $15 million), the total payment including expenses will be far less than the combined $25,192,450.05 in fees and $908,315.35 in expenses (excluding testifying expert fees) incurred to date by Designated Counsel in connection with this litigation. The total amount proposed to be paid to Designated Counsel remains well within the parameters established by courts in this Circuit.

II. BACKGROUND

A. Overview of the Litigation

This litigation commenced in the autumn of 2010, when several cases were filed in different federal courts following a series of raids by United States and Canadian authorities at the headquarters of various flexible polyurethane foam manufacturers. On December 1, 2010, the Judicial Panel on Multidistrict Litigation transferred and consolidated these cases in this Court for coordinated proceedings. Plaintiffs allege that Defendants, all manufacturers of flexible polyurethane foam,[6] unlawfully combined and conspired to raise and/or maintain prices of flexible polyurethane foam at supracompetitive levels. Plaintiffs allege that as a result of the

[5] Designated Counsel does not seek by this motion reimbursement for testifying expert fees that have been incurred to date.

[6] "Flexible polyurethane foam" includes slabstock foam, fabricated foam, molded foam, and polyurethane foam carpet underlay.

alleged collusion, direct purchasers of flexible polyurethane foam paid Defendants throughout the class period more for foam than they otherwise would have paid but for Defendants' illegal conduct.[7]

B. Designated Counsel's Vigorous Prosecution of the Case

Over the past two-and-a-half years, Designated Counsel has expended a significant amount of time and hard work pursuing Plaintiffs' claims against all Defendants.

1. Investigations and initial complaints

As discussed in more detail in the accompanying Neuwirth Declaration, this case has been prosecuted through the diligence, skill, and hard work of Designated Counsel, which has achieved substantial benefits for members of the proposed Class. Neuwirth Decl. ¶¶ 2–26. Although there is a governmental investigation into the facts underlying this case, there have been no U.S. indictments to date and, unlike many other antitrust class actions, Designated Counsel have not merely followed the government's lead, and themselves have led the way through the discovery thicket. *See id.* ¶ 3.

Before filing their initial lawsuits, Designated Counsel undertook substantial investigations, including extensive research into the flexible polyurethane foam industry; the flexible polyurethane foam trade associations, such as the Polyurethane Foam Association ("PFA") and Carpet Cushion Council ("CCC"); the economics that underpin the alleged conspiracy; public materials regarding the content and scope of the conspiracy; and the legal issues that pertain thereto. Neuwirth Decl. ¶ 3. Based on these investigations, in autumn of 2010, Interim Co-Lead Counsel and the Executive Committee members filed detailed original

[7] This lawsuit alleges injuries to *direct* flexible polyurethane foam purchasers only, that is, entities or individuals that bought flexible polyurethane foam directly from the defendant flexible polyurethane foam producers.

complaints outlining Defendants' unlawful conduct. *See, e.g.*, *Piazza's Carpet & Tile Shop, Inc. v. Hickory Springs Mfg. Co., et al.*, 5:10-cv-111 (W.D.N.C.); *Cambridge of California, Inc. v. Hickory Springs Mfg. Co. et al.*, 3:10-cv-01858 (N.D. Ohio). These initial complaints contained information and analysis that would not have come to light, at least not at that time, absent Designated Counsel's investigations.

Ever since, Plaintiffs' investigation of this matter has been ongoing. After the original actions were transferred and consolidated in this Court pursuant to the MDL Transfer Order (Dkt. 1), Designated Counsel conducted further analysis and, on February 24, 2011, filed the Consolidated Amended Complaint, or "CAC." The CAC contained 160 paragraphs and 51 pages of detailed information about the flexible polyurethane foam industry and Defendants' conspiracy. (*See* Dkt. 46.)

2. Case organization and management

Designated Counsel undertook considerable efforts from the outset of this litigation concerning the consolidation and administration of these actions. In addition to participating in proceedings before the Judicial Panel on Multidistrict Litigation, Designated Counsel engaged in negotiations with the Defendants (and, in some cases, also the Department of Justice) to develop proposed discovery protocols and schedules, as well as motion practice before this Court concerning a number of proposed case management orders. Orders resulting from these efforts included orders (and amendments thereto) regarding overall case management, the protection of confidential and highly confidential information, general discovery protocols, electronically-stored information ("ESI") protocols, and protocols regarding the production and content of the parties' transactional data. Neuwirth Decl. ¶¶ 5.

Throughout the litigation, Interim Co-Lead Counsel have sought to manage the administration and work division in the case in a systematic and efficient manner, coordinating work assignments through weekly conference calls between Interim Co-Lead Counsel and the Executive Committee, and working to avoid duplication of efforts or unnecessary work undertaken by any of the counsel for the Class, including Designated Counsel, in this case. Neuwirth Decl. ¶ 6.

Similarly, Interim Co-Lead Counsel have prudently managed expense outlays, including restricting in-person attendance by Designated Counsel at hearings to minimize the accrual of travel expenses (often considerable in nationwide price-fixing class actions); cost-effectively utilizing the assistance of expert consultants (also typically a considerable expense); and ensuring that the resources of Designated Counsel have been put to use in an efficient and effective manner that maximizes what each firm can contribute in a non-redundant way. Neuwirth Decl. ¶ 7.

3. Defendants' motions to dismiss and motions for reconsideration

Every Defendant filed a separate motion to dismiss the CAC and also joined in a "common issues" motion to dismiss. (Dkt. 89–92,95–97, 99–103, 109.) Over the next two-and-a-half weeks, Interim Co-Lead Counsel prepared oppositions to those motions by conducting extensive legal research and drafting, re-drafting, and revising briefing. Neuwirth Decl. ¶ 8. On May 2, 2011, Plaintiffs submitted their responses to the multiple motions to dismiss, (Dkt. 114-116), and then received Defendants' joint reply brief in support of the various motions on May 11, 2011. (Dkt. 138.) With all of the briefing in hand, Interim Co-Lead Counsel prepared for oral argument on the motions, which was held July 1, 2011. Co-Lead Counsel presented oral argument and also presented the Court (and defendants' counsel) with oral argument binders that

outlined the points presented. Following the hearing, the Court denied Defendants' motions on July 19, 2011. (Dkt. 191.)

Undeterred by the Court's order, Defendants individually and collectively moved for reconsideration on the motions to dismiss over the next several weeks. (Dkt. 195, 202–204, 214, 219.) Plaintiffs opposed each of these reconsideration motions, and Interim Co-Lead Counsel presented argument during telephonic conferences with the Court. The Court denied all such motions. (Dkt. 200, 243.)

4. The Vitafoam and Domfoam Settlements, and Defendants' standing-less attempts to prevent preliminary approval and notice to potential Class members

Designated Counsel engaged in discussions with counsel for Vitafoam and Domfoam from the early stages of the litigation, and settlement talks with each group of defendants culminated in the weeks and months following the Court's denial of Defendants' motions to dismiss. Designated Counsel engaged in extensive, arms-length and separate negotiations with Vitafoam and Domfoam, and ultimately reached favorable settlements with those defendants. To achieve the Vitafoam and Domfoam Settlements, Designated Counsel participated in fact-gathering sessions and informational meetings, as well as extensive negotiations that took place via telephone, through written correspondence, and in-person meetings in both Washington D.C. and New York. Neuwirth Decl. ¶ 10.

Plaintiffs moved for preliminary approval of the Vitafoam Settlement on October 27, 2011 (Dkt. 293) and the Domfoam Settlement on March 7, 2012 (Dkt. 343). Defendants, without standing to do so, objected to both motions, forcing Plaintiffs to commit significant resources and time to fighting for preliminary approval of settlements to which no party with actual standing objected. The Court preliminarily approved both settlements with instructions that Plaintiffs submit notice plans for Court approval. (*See* Dkt. 301, 352, 355.)

After weighing a number of potential plans, Plaintiffs did as the Court requested and moved for approval of a notice plan for both settlements on May 30, 2012. Neuwirth Decl. ¶ 14; (Dkt. 374). Once again, without standing, Defendants challenged Plaintiffs' proposed programs. They were ultimately unsuccessful, but only after requiring Plaintiffs to move to reconsider the Court's initial order on the plans. (Dkt. 377, 457.) Designated Counsel were thus again forced to expend significant resources to respond to Defendants' objections, including coordinating with Vitafoam and Domfoam for statements supporting the proposed plan. (*See* Dkt. 391 (Plaintiffs' reply concerning the notice program), 392 (Domfoam Parties' statement in support of same), 393 (Vitafoam Parties' statement in support of same).) All of this required dedication and perseverance from Designated Counsel.

5. Meet and confers and disputes concerning discovery

Designated Counsel have also expended considerable effort in addressing discovery issues with the numerous Defendants in this case. *See* Neuwirth Decl. ¶¶ 18–25. At the July 1, 2011 hearing on Defendants' motions to dismiss, and then again in the order on those motion, the Court ordered (*see* Dkt. 191) that the parties should proceed with discovery (including discovery of certain *Urethane* litigation documents), and Plaintiffs did so.

Since then, Designated Counsel have engaged in a series of extensive negotiations with Defendants—both individually and as a group—on a wide variety of matters related to discovery. First, Designated Counsel negotiated, on a global basis, the general scope of Defendants' responses to Plaintiffs' requests for production. Neuwirth Decl. ¶ 18. These negotiations occurred between May and October of 2011, and served as the baseline from which individual negotiations with each Defendant proceeded. *Id.* Following the global discussions, Designated Counsel then engaged in direct negotiations with each Defendant on the content and

specific scope of its respective production. *Id.* at ¶¶ 18–19. In some cases, a Defendant agreed to produce the same documents it produced to the Department of Justice as part of the ongoing criminal investigation, and Designated Counsel negotiated production agreements that ensured such productions were comprehensive and that Plaintiffs had the right to seek further documents if the DOJ production was inadequate in some fashion. *Id.*

Overall, the individual negotiations and meet and confers have spanned more than a year. Neuwirth Decl. ¶¶ 18–19. Throughout, Designated Counsel coordinated with other plaintiffs' counsel, including counsel for the Direct Action Plaintiffs and Indirect Purchaser Plaintiffs. Neuwirth Decl. ¶ 26.

As part of the meet and confer process, Designated Counsel drafted numerous follow-up memoranda and letters to Defendants, all in an effort to ensure that, to the extent possible, a streamlined discovery process was in place and that Plaintiffs received all of the discovery to which they are entitled. *See* Neuwirth Decl. ¶ 19. Such efforts were also intended to limit or resolve, to the extent possible, issues that needed Court input and/or resolution. *Id.* Where necessary, Designated Counsel drafted notices of discovery disputes to the Court and/or discovery motions, and pursued such disputes in writing and at telephonic and in-person hearings.

When appropriate, Designated Counsel engaged the services of experts to assist in developing discovery requests and interpreting information received from defendants in response.

6. Review of Defendants' voluminous document productions

To date, and as the direct result of Designated Counsel's efforts, Defendants have produced 9,877,166 pages of responsive materials in 162 separate productions, representing

2,224,185 total documents. Neuwirth Decl. ¶ 20. Defendants have also produced transactional data that encompasses millions of transactions. *Id.* It is no exaggeration to say that reviewing and analyzing these productions has been a monumental task. The alleged conspiracy spans more than a decade of collusive price increases, involves a multibillion dollar industry (and companies with billions of dollars in annual sales), relevant conspirators throughout the nation, and a putative class of thousands of direct purchasers. As the collective size of Defendants' productions indicates, Designated Counsel have had to spend a huge amount of time, money, and effort separating the wheat from the chaff and identifying the documents and data that prove liability, damages, and the bases for class certification. Designated Counsel have engaged the services of a third-party service provider to upload and maintain the documents and information received from Defendants on a platform that facilitates lawyer review and coding of the documents for analysis and other use.

7. Ongoing deposition discovery

In addition to document discovery, Designated Counsel have also spent a large amount of time preparing for and taking depositions. As of the date of this application, Designated Counsel have taken or participated in 11 depositions of Defendant witnesses. Neuwirth Decl. ¶¶ 23–24 . By the end of May, they will have taken an additional 21 Defendant depositions, and they plan to take many more throughout the summer and fall of this year. Neuwirth Decl. ¶ 24. These depositions have already yielded an extensive amount of useful liability and class certification evidence. Of the 11 depositions taken to date, 6 of the deponents have invoked the Fifth Amendment, and Designated Counsel expect that several more witnesses will do the same in the near future.

C. Notice of Proposed Settlements, Plan of Allocation, and Petition for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards

Consistent with the Class Action Fairness Act, 28 U.S.C.§ 1711 *et seq.*, counsel for Vitafoam sent notice of the proposed settlement to the appropriate State and Federal Officials on November 11, 15, and 21, 2011. Neuwirth Decl. ¶ 13. Those entities have not lodged any objections to the settlement. *Id.*[8]

By Order of the Court, the Garden City Group, which Designated Counsel retained to serve as the settlement claims administrator, directly mailed the Notice to approximately 35,041 unique addresses on January 31, 2013. Neuwirth Decl. ¶ 15. This Notice advised potential Class Members of the material terms of the proposed Vitafoam and Domfoam Settlements, including the intent of Designated Counsel to apply to the Court for an award on attorneys' fees and expenses. The notice further stated that Designated Counsel could seek up to 30% of the settlement fund, as well as expenses. *Id.* at ¶ 16.

The potential Class is composed of thousands of entities nationwide, many of which are sophisticated companies with their own in-house legal counsel. As of the date of this brief, no potential Class member has made any objection to the proposed settlement or to the notice of the anticipated fee and expense request. Neuwirth Decl. ¶ 16.

III. DESIGNATED COUNSEL SHOULD BE AWARDED THE REQUESTED FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

Designated Counsel to date have not received any fees for their work, while they have at the same time incurred significant out-of-pocket expenses.

[8] Counsel for the Domfoam Parties also complied with this statute by sending notice to the appropriate officials on March 14, 2012. Neuwirth Decl. ¶ 13. As with Vitafoam, no official has objected to the noticed settlement. *Id.*

Designated Counsel therefore request that the Court award to Designated Counsel 30% of the Settlement Fund for fees and an additional $908,315.35 for reimbursement of expenses (excluding testifying experts' fees). Depending on the final size of the Vitafoam Settlement Fund—which will be between $9 million and $15 million—the fee award will range from $2.7 million to $4.5 million. Any award in this range, when combined with the $908,315.35 in expense reimbursement, will represent far less than the combined $25,192,450.05 in fees and $908,315.35 in expenses (excluding testifying expert's fees) that Designated Counsel have incurred to date.

The proposed award would be well within the range approved by Courts in this and other districts. *See In re Scrap Metal Antitrust Litig.*, No. 1:02-cv-0844 (N.D. Ohio Mar. 24, 2005) (Neuwirth Decl., Ex. C) (awarding 30% fee plus expenses); *In re Cardizem CD Antitrust Litig.*, No. 99-md-1278 (Neuwirth Decl., Ex. D) (E.D. Mich. Nov. 25, 2002) (granting antitrust class action counsel 30% fee award plus expenses); *In re F&M Distribs. Inc. Sec. Litig.*, 95-CV-71778-DT, 1999 U.S. Dist. LEXIS 11090 (E.D. Mich. June 29, 1999) (awarding a 30% fee award plus expenses in common fund case).

Plaintiffs respectfully submit that the requested fees and expenses award is appropriate, given (a) the nature and extent of Designated Counsel's efforts in creating settlements beneficial to the Class in this hard-fought litigation, and (b) the risks Designated Counsel assumed in prosecuting this complex matter with no guarantee of recovery. Notably, no Class member has objected to the potential for this fee award or expense reimbursement.

A. Plaintiffs' Request for Attorneys' Fees Falls Within The Range of Approval

Courts have long recognized that a lawyer who recovers a "common fund" is entitled to a reasonable attorneys' fee from the fund as a whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472,

478 (1980); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993).[9] The rationale for such awards is that "persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched . . ." *Boeing*, 444 U.S. at 478; *see also Rosenbaum v. Macallister*, 64 F.3d 1439, 1444 (10th Cir. 1995); *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974); *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 921 (N.D. Ohio 2003).

"[T]he preferred method in common fund cases has been to award a reasonable percentage of the fund." *Bowling v. Pfizer,* 922 F. Supp. 1261, 1278–79 (S.D. Ohio 1996) (discussing the method's return to favor in the 1980s), *aff'd,* 102 F.3d 777 (6th Cir. 1996). This is because the lodestar method is cumbersome and often wasteful of the Court's resources, and disincentivizes counsel from achieving high, early results for the class, such as those present here. *See, e.g.*, *Rawlings*, 9 F.3d at 516 ("[T]he lodestar method has been criticized for being too time-consuming of scarce judicial resources."); *Sulzer*, 268 F. Supp. 2d at 923 (same); *In re Cardinal Health Inc. Sec. Litigations*, 528 F. Supp. 2d 752, 761 (S.D. Ohio 2007) ("The lodestar

[9] Interim Co-Lead Counsel also requests the Court's authorization to distribute the fees in a manner that, in the judgment of Interim Co-Lead Counsel, fairly compensates each firm for its contribution to the prosecution of Plaintiffs' claims. This is consistent with the Interim Co-Lead Counsel's duties under the Order re Interim Lead Counsel and Executive Committee (Dkt. 29) to "[c]oordinat[e] the activities of Plaintiffs' counsel and implement[] procedures to ensure that schedules are met and avoid[] unnecessary expenditures of time and funds," and to "[c]ollect[] time and expense reports on a periodic basis, endeavor[] to keep attorneys' fees reasonable, and choos[e] appropriate levels of staffing for the tasks required." *See also*, *e.g.*, *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533 n.15 (3d Cir. 2004) (affirming the District Court's decision to permit co-chairs of the Executive Committee to divide attorneys' fees according to their discretion, and declining to "deviate from the accepted practice of allowing counsel to apportion fees amongst themselves"); *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 1029, 1033 (S.D. Ohio 2001) (approving distribution of a "single fee from which the [Plaintiffs' Steering Committee] will allocate the attorneys' fees among the attorneys who provided a benefit to the Class"); *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 383 (S.D. Ohio 2006) ("Class Counsel shall allocate the award of attorneys' fees among counsel for the Class based on their good-faith assessment of the contribution of such counsel to the prosecution of this Action.").

method has been rightly criticized for generating avoidable hours, discouraging early settlement, and burdening district judges with the tedious task of auditing time records.").[10]

A "one-third recovery is a common percentage arrived at in private contingency fee cases." *In re Vitamins Antitrust Litig.*, 2001 WL 34312839 at *12 (D.D.C. July 16, 2001). In fact, attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation. *Id.* (quoting *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000)).

In this circuit, typically, the fee percentage awarded in a common fund case ranges from 20 to 50 percent of the fund. *See In re Rio Hair Naturalizer Products Liab. Litig.*, 1996 WL 780512 (E.D. Mich. Dec. 20, 1996) (observing that "more commonly, fee awards in common fund cases are calculated as a percentage of the fund created, typically ranging from 20 to 50 percent of the fund"); *In re Cincinnati Gas & Electric Co. Securities Litigation,* 643 F. Supp. 148, 150 (S.D. Ohio 1986) (noting the same). In antitrust common fund cases, fee awards in this district have commonly been 30 percent plus expenses. *In re Scrap Metal Antitrust Litig.*, No. 1:02-cv-0844 (March 24, 2005 N.D. Ohio) (Neuwirth Decl., Ex. C) (awarding 30% fee plus expenses); *In re Cardizem CD Antitrust Litig.*, No. 99-md-1278 (Neuwirth Decl., Ex. D) (November 25, 2002 E.D. Mich.) (awarding 30% of $110 million).

[10] *See also Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268 (D.C. Cir. 1993) ("First, attorneys are given incentive to spend as many hours as possible, billable to a firm's most expensive attorneys. Second, there is a strong incentive against early settlement since attorneys will earn more the longer a litigation lasts."); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 48–49 (2d Cir. 2000) (lodestar analysis "created an unanticipated disincentive to early settlements" and "was an inevitable waste of judicial resources"); *In re Cendant Corp. Litig.*, 264 F.3d 201, 256 (3d Cir. 2001) (lodestar approach creates "a risk that it will cause lawyers to work excessive hours, inflate their hourly rate, or decline beneficial settlement offers that are made early in litigation" and requires "an enormous investment of judicial time").

For a total award of fees and expenses, "Usually 50 percent of the fund is the upper limit of a reasonable fee award from a common fund, in order to assure that fees do not consume a disproportionate part of the recovery obtained for the class, though somewhat larger percentages are no unprecedented." Conte and Newberg, *Newberg on Class Actions*, §14:6, p. 550-51 (4th Ed. 2002). *See In re Scrap Metal Antitrust Litig.*, No. 1:02-cv-0844 (March 24, 2005 N.D. Ohio) (Neuwirth Decl., Ex. C); *Maley v. Del Global Technologies Corp.*, 186 F. Supp. 2d 358, 367-68 (S.D.N.Y. 2002) (awarding 33.3% of an $11.5 million settlement fund as fees, plus $200,371 in expenses, and noting that "courts in this Circuit have awarded fees ranging from 15% to 50% of the settlement fund"); *In re Vitamins Antitrust Litigation*, 2001 WL 34312839 *10 (D.D.C. 2001) (approving award of 34 percent of settlement fund as fees alone, before expenses, and noting that "while fee awards in common fund cases range from fifteen to forty-five percent, the normal range of fee recovery in antitrust suits is twenty to thirty percent of the common fund").

In determining what exact percentage fee is appropriate, "All the Sixth Circuit requires is that the award of attorneys' fees in common fund cases must be reasonable under the circumstances." *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 911 (S.D. Ohio 2001) (citing *Rawlings,* 9 F.3d at 516; and *Smillie v. Park Chemical Co.,* 710 F.2d 271, 275 (6th Cir. 1983)). Courts within the Sixth Circuit weigh six factors when making this analysis, including: (a) the value of the benefits rendered to the class; (b) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (c) whether the services were undertaken on a contingent fee basis; (d) the value of the services on an hourly basis; (e) the complexity of the litigation; and (f) the professional skill and standing of all counsel." *Telectronics*, 137 F. Supp. 2d at 1042. "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."

Bowling v. Pfizer, Inc., 922 F. Supp. 1261, 1280 (S.D. Ohio 1996) (citing *Rawlings,* 9 F.3d at 516). Nevertheless, "[t]here is no formula for weighing these factors. Rather, this Court must be mindful to the facts and circumstances of this specific case." *Godec v. Bayer Corp.*, 2013 WL 1089549 (N.D. Ohio Mar. 14, 2013).

As discussed below, Designated Counsel respectfully submit that the application of these factors to this case supports the fee request.

1. Designated Counsel secured significant benefits for the Class

The result achieved is a major factor to consider in making a fee award. *Hensley v. Eckhart*, 461 U.S. 424, 436 (1983) ("the most critical factor is the degree of success obtained"); *see also Behrens v. Wometco Enter., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained."); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 55 (2d Cir. 2000) ("the quality of representation is best measured by results").

The results achieved from the settlements and Designated Counsel's other efforts fully support the requested fee. The proposed $9-15 million Vitafoam Settlement, plus accrued interest, and Domfoam Settlement are substantial in both absolute terms and in light of the circumstances of this litigation. Specifically, the cash payment from Vitafoam is itself a considerable sum, but also indicates the further total damages the Class may collect. In addition, both Vitafoam and Domfoam have offered cooperation, as set forth in their respective settlements and as evidenced by the Domfoam Party declarations submitted concurrently with this fee application in support of Plaintiffs' motion for final approval of the Settlements. Although Vitafoam is under indictment by the Department of Justice and its witnesses have thus far asserted their Fifth Amendment rights, the Vitafoam corporate Defendants have rendered and

will continue to render considerable assistance in the prosecution of this class action. The Domfoam Parties have pled guilty or received clemency in Canada, have advised on the alleged conspiracy and submitted evidence in support of Plaintiffs' claims. Although the Domfoam Parties have not paid any amounts to the Class, the corporate entities declared bankruptcy in Canada and obtaining any settlement funds would have been, in Designated Counsel's informed and arms-length opinion, either impossible or impractical (in terms of money spent versus money obtained) to achieve.

Considering Vitafoam and the Domfoam Parties' relative size with respect to the remaining Defendants, the Vitafoam payments constitute a substantial recovery for the Class. Vitafoam has agreed to pay between $9-15 million even though its operations only constitute approximately 1% of the overall market. This implies a trial recovery for the class (before trebling) of between $900 million-$1.5 billion. Given the value of "icebreaker" settlements such as this—*i.e.*, early settlements in which a defendant agrees to provide substantial factual aid against its co-defendants—the cash amount achieved for the Class is excellent. *See In re Linerboard Antitrust Litig*., 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003) ("The Court also notes that this settlement has significant value as an "ice-breaker" settlement—it is the first settlement in the litigation—and should increase the likelihood of future settlements. An early settlement with one of many defendants can "break the ice" and bring other defendants to the point of serious negotiations."); *In re Corrugated Container Antitrust Litig*., 1981 WL 2093, at *19 (S.D. Tex. June 4, 1981) ("This settlement was advantageous to the class. It did not detract from the class's chances of prevailing for the entire range of damages; in fact, through discovery benefits and the streamlining of the class case against defendants, it enhanced them. It was the first one

negotiated and, in addition to the benefits already detailed, broke the ice and brought other defendants to the point of serious negotiations.").

And this is all the more so given that, because Vitafoam is participating in the DOJ amnesty program and cooperating with the government, Vitafoam is likely to be exempt from liability for treble damages.

With all of these facts in mind, the monetary payment, as well as Vitafoam's and Domfoam's valuable cooperation, will significantly benefit the class, and this factor thus weighs in favor of Designated Counsel's current request.

2. The value of Designated Counsel's services on an hourly basis in comparison to the settlement amount is extremely high

Designated Counsel have been litigating this case for over two-and-a-half years. Thousands of hours were—and continue to be—spent developing a case against Defendants, obtaining relevant and critical documents from Defendants and third parties, obtaining damages information, eliciting admissible testimony from witnesses, working with experts, and negotiating, documenting, and moving for approval of the settlements with Vitafoam and the Domfoam Parties. *See* Neuwirth Decl. ¶¶ 2–26. The significant investment of time required by this action necessarily precluded Designated Counsel's opportunity to work on other matters.

A lodestar cross-check confirms that to date, Designated Counsel have incurred fees of $25,192,450.05.

Accordingly, since there is no question that the considerable amount of time and effort Designated Counsel expended to date resulted in excellent early settlements and continuing value in the litigation for the Class, this factor weighs in favor of the requested fee award as well.

3. Designated Counsel's efforts significantly benefit society and thus merit a reward in order to maintain an incentive to others

The Supreme Court has repeatedly recognized the importance of private antitrust litigation as a necessary and desirable tool to assure the effective enforcement of the antitrust laws. *See*, *e.g.*, *Pillsbury Co., v. Conboy*, 459 U.S. 248, 262–63 (1983); *Reitner 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. Int'l 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). Fee awards similar to that requested here encourage and support meritorious class actions, and thereby promote private enforcement of, and compliance with, the antitrust laws. As the court noted in *Alpine Pharmacy v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973), "[i]n the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced…." Here, through their efforts to obtain redress for the wrongs committed by Defendants, Plaintiffs have substantially contributed to enforcement of this country's antitrust laws and have helped restore market efficiency in an important segment of the U.S. economy that yields such everyday and commonplace products as seat cushions, mattresses, packaging, and carpet underlay.

Additionally, this litigation, and the amount of money that Vitafoam will pay to the Class, sends a clear message that direct purchasers of flexible polyurethane foam will not tolerate collusive and conspiratorial behavior that unnecessarily and illegally raises the price they pay for flexible polyurethane foam. It is hoped that the settlements will deter flexible polyurethane foam manufacturers from engaging in similar unlawful conduct in the future. The end result of this hoped-for deterrence is increased competition.

Moreover, encouraging qualified counsel to bring highly risky but beneficial class actions like this one benefits society in general. *See*, *e.g.*, *In re M.D.C. Holdings Sec. Litig.*, Fed. Sec. L. Rep. (CCH) ¶ 95,474, 1990 U.S. Dist. LEXIS 15488, at *30-31 (S.D. Cal. Aug. 30, 1990) ("[W]ithout able lawyers handling these matters not only do some of them go unprosecuted, but…you don't get the highest recovery) (quoting *In re Pepsico Securities Litig.*, No. 82-Civ-8403 (S.D.N.Y. April 26, 1985)). Designated Counsel undertook, at a significant risk, this litigation.,. Payment of attorneys' fees in the requested amount adequately and fairly compensates Designated Counsel for the risk they undertook at the inception of the case and the benefit they have achieved for the class in these partial, early settlements.

4. Designated Counsel undertook their services on a contingent fee basis

Designated Counsel undertook this action on a wholly contingent basis, assuming significant risk with the possibility of no recovery whatsoever. In addition, Designated Counsel advanced significant expenses over the past 2 1/2 years that, absent a successful result, would not be reimbursed. All of this supports an award to Designated Counsel from the common fund. *See In re Sulzer Hip Prosthesis and Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d. 907, 936-38 (N.D. Ohio 2003).

5. The complexity of the litigation

It is no exaggeration to say that these consolidated actions represent multidistrict litigation at its most complex. As is evident from the summary of Designated Counsel's efforts provided in Section II.B., *supra*, this case has involved a large expenditure of time and effort against up to fourteen different Defendant groups. Designated Counsel's work has included, among other things, the investigation and filing of claims; briefing and arguing in opposition to extensive motions to dismiss and motions to reconsider the initial order on those motions;

negotiating, over a span of several months, preliminary discovery; negotiating the Vitafoam and Domfoam Settlements, together with the briefing and argument related to requests for settlement approval that the standing-less, non-settling Defendants challenged at every step; reviewing and analyzing millions of Defendant documents; and taking currently ongoing deposition discovery. Plaintiffs will also move in the near future for litigation class certification based, in part, on expert analyses of extremely detailed and extensive transactional data spanning more than a decade of purchases and sales.

As to the complexity of the case, "[a]n antitrust class action is arguably the most complex action to prosecute. … The legal and factual issues involved are always numerous and uncertain in outcome." *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004) (quoting *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)). This case presents no exception. Indeed, this litigation, involving price fixing and customer allocation by an international cartel of companies in the multivaried flexible polyurethane foam industry, could be viewed as even more complex than a typical price-fixing class action.

6. Designated Counsel have exhibited the utmost professional skill and standing

The benefit conferred on Class members here is the result of the skill and efficiency of Co-Lead Counsel and other Designated Counsel. Without these efforts, the entities that will benefit from this settlement may never have seen any recovery for what Plaintiffs allege was a nationwide price-fixing conspiracy causing significant overcharge damages to flexible polyurethane foam purchasers. Indeed, Designated Counsel obtained the Vitafoam and Domfoam Settlements well before any substantial amounts of discovery had been exchanged in the case, and the aid Vitafoam and the Domfoam Parties provided (and continue to provide) has

been a significant help to Plaintiff in pursuing their claims against the remaining non-settling Defendants.

Designated Counsel submit that they exhibit the highest levels of professional skill and standing in the antitrust field. For their part, the Defendants, including Vitafoam and the Domfoam Parties, have all been zealously represented by preeminent defense counsel from large, national law firms and with decades of experience litigating antitrust actions.

B. A Lodestar Cross-Check Demonstrates That The Requested Fee Is Reasonable

The reasonableness of the fees Designated Counsel request is further confirmed by a lodestar cross-check, *See Bowling,* 102 F.3d at 780 (6th Cir. 1996) (affirming district court's methodology which based the fee award on a percentage of the fund and then cross-checked the fee against class counsel's lodestar); *see also Connectivity Sys. Inc. v. Nat'l City Bank*, 2011 WL 292008 (S.D. Ohio Jan. 26, 2011) ("In this Circuit, the lodestar figure is used to confirm the reasonableness of the percentage of the fund award.").

Given the risks of contingent litigation, lodestar multipliers—*i.e.*, positive multipliers applied to the baseline lodestar amount—are frequently awarded in common fund cases. *See, e.g., Rawlings*, 9 F.3d at 517 (6th Cir. 1993) ("Counsel had requested a multiplier of 3.3 based upon the contingency risk undertaken and the quality of the work performed. Such factors are indeed the focus of a district court's analysis when determining whether to utilize a multiplier."); *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 922 (N.D. Ohio 2003) (multiplier may be used to account for the "costs and risks involved in the litigation," and applying multipliers as high as 19.8); *In re Oral Sodium Phosphate Solution-Based Products Liab. Action*, 2010 WL 5058454, at *4–5 (N.D. Ohio Dec. 6, 2010) (applying 2.0 multiplier).

Here, the cumulative lodestar value of Designated Counsel's time spent on the case is more than $25 million (through the end of March 2013). Neuwirth Decl. ¶ 27. Accordingly, the lodestar cross-check confirms the reasonableness of the requested fee.

C. The Request Is Also Reasonable In Light Of Expenses Incurred

To date, Designated Counsel have incurred $908.315.35 in expenses, excluding testifying experts' fees, that have not been reimbursed. These expenses were reasonable and necessary to the litigation of this case, and included, among other things, costs for document collection and management, electronic hosting for Defendants' document productions, travel, photocopying, overnight mail, process service fees, long distance telephone, electronic research, and contributions to the common expense litigation fund. Neuwirth Decl. ¶ 29.

"Under the common fund doctrine, 'class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses.'" *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 634-35 (W.D. Ky. 2006), *aff'd sub nom. Fidel v. Farley*, 534 F.3d 508 (6th Cir. 2008) (quoting *In re Cardizem CD Antitrust Litig.,* 218 F.R.D. 508, 535 (E.D. Mich. 2003)); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 389-98 (1970); *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 504 (E.D. Mich. 2008) ("Expense awards are customary when litigants have created a common settlement fund for the benefit of a class"). The appropriate analysis to apply in deciding whether expenses are compensable in a common fund case is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001) (expenses paid by private clients in

similar cases should be paid to class counsel from common fund); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'") (citation omitted); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients.") (citation omitted). The categories of expenses for which Designated Counsel seek reimbursement here are the type of expenses routinely charged to hourly-fee paying clients and it is respectfully submitted, therefore, that reimbursement is appropriate.

The expenses incurred in this litigation are described in further detail in the accompanying affidavit. Designated Counsel believe that the expenses were all reasonably incurred, are reasonable in amount, and should be reimbursed in full. *See In re Vitamin C Antitrust Litig.*, 2012 U.S. Dist. LEXIS 152275 (E.D.N.Y. 2012) (awarding fees and expenses together totaling 39% of $9.5 million settlement).

IV. CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Court should award 30 percent of the Vitafoam Settlement Fund to Designated Counsel, plus expenses of $908.315.35.

DATED: April 22, 2013

Respectfully Submitted,

/s/ William A. Isaacson
William A. Isaacson
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, NW
Washington, DC 20015
Phone: 202-237-5607
Fax: 202-237-6131

/s/ Stephen R. Neuwirth
Stephen R. Neuwirth
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Phone: 212-849-7165
Fax: 212-849-7100

Direct Purchaser (Class Action) Plaintiffs' Interim Lead Counsel

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2013, I served via the Court's Electronic Case Filing system, **DIRECT PURCHASER PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR AN AWARD OF ATTORNEYS' FEES AND FOR REIMBURSEMENT OF EXPENSES**, on all counsel of record.

/s/ Adam Wolfson