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 CLASS ACTIONS	

MEMORANDUM OF LAW IN SUPPORT OF
DIRECT PURCHASER CLASS PLAINTIFFS' 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 Class representatives ("Plaintiffs"), through Boies Schiller & Flexner, LLP and Quinn Emanuel Urquhart & Sullivan, LLP ("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 Leggett & Platt, Incorporated (the "L&P Settlement") and the settlement with Carpenter Co., E. R. Carpenter, L.P., and Carpenter Holdings, Inc. (the "Carpenter Settlement"). These settlements are the product of the initiative, investigation, and hard work of skilled counsel over the course of more than four years. They provide significant benefits to members of the proposed Settlement Classes (which overlap with the certified Direct Purchaser Class): cash payments totaling $147.8 million ($108 million from Carpenter, and $39.8 million from L&P), and important trial cooperation that will enhance Plaintiffs' ability to prosecute this action against non-settling Defendants.[2]

Class counsel have achieved extraordinary results for the class in a case with only limited government activity. These highly valuable settlements were achieved only after counsel spent years and expended millions of dollars in expenses, working doggedly to build a compelling factual and expert record in support of class certification, winning certification in the District Court and also defeating Defendants' related *Daubert* motions; and after class counsel brought their experience and insight to bear in lengthy arms' length settlement negotiations. Even before

[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. (Co-Lead Counsel and the Executive Committee firms are collectively referred to herein as "Designated Counsel").

[2] Plaintiffs have moved for final approval of the proposed L&P and Carpenter Settlements concurrently with this application.

filing preliminary approval papers, class counsel also defeated Defendants' Rule 23(f) petition to the Sixth Circuit, earning a unanimous written opinion from the three-judge panel. Moreover, class counsel respectfully submit that their work to date has created a very credible trial threat reflected in the value of the settlements. This is certainly not a case where class counsel have simply "piggy-backed" on a government investigation or the work of others.

In light of the substantial benefits Designated Counsel conferred on members of the proposed Settlement Classes, Plaintiffs and Designated Counsel respectfully request an award of 30% of the L&P Settlement and Carpenter Settlement Funds for attorneys' fees, as well as an additional $8,133,855.80 for reimbursement of expenses to date. The requested attorneys fees, even when added to the $3,101,267.63 million in fees previously awarded in connection with the Vitafoam settlement, are still substantially below plaintiffs' counsel's total lodestar to date of $52,274,968.55 million). The total amount proposed to be paid to Designated Counsel remains well within the parameters established by courts in this Circuit.

II. BACKGROUND

A. Designated Counsel's Vigorous Prosecution of the Case.

Over the past four years, Designated Counsel has expended significant time and effort pursuing Plaintiffs' claims against all Defendants. As set forth in Direct Purchaser Plaintiffs' Memorandum of Law in Support of Their Motion for an Award of Attorneys' Fees and for Reimbursement of Expenses ("Prior Fee Application") (Dkt. 539-1), Designated Counsel undertook significant investigation prior to filing their initial complaints and Consolidated Amended Complaint, expended significant effort opposing Defendants' motions to dismiss and motions for reconsideration, organizing and managing the case, negotiating the Vitafoam and Domfoam Settlements and opposing Defendants' efforts to prevent approval of these settlements

and distribution of notice to the Settlement Classes. As set forth below, since the time of the Prior Fee Application, Designated Counsel have continued to expend significant time litigating Plaintiffs' claims, while being cognizant of the need to work efficiently, avoid duplication, and prudently manage expenses.

1. Meet and confers and disputes concerning discovery.

Designated Counsel have continued to expend considerable effort in addressing discovery issues with the numerous Defendants in this case on a Defendant-by-Defendant basis. These individual negotiations and meet and confers—which spurred several different motions to compel and hearings with the Court—spanned several years and have even continued into the current post-fact discovery period. Neuwirth Decl. ¶¶ 5-6. Throughout, Designated Counsel coordinated with other plaintiffs' counsel, including counsel for the Direct Action Plaintiffs and Indirect Purchaser Plaintiffs. Neuwirth Decl. ¶ 7.

2. Review of Defendants' voluminous document productions.

Designated Counsel have continued to review and analyze documents and data produced by Defendants. As the direct result of Designated Counsel's efforts, Defendants and third parties have produced 5.4 million pages of responsive materials in 219 separate productions, representing 2.4 million total documents. Neuwirth Decl. ¶ 15. 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. 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, summary judgment, and claims at trial.

3. Deposition discovery.

In addition to document discovery, Designated Counsel also spent a substantial amount of time preparing for, taking, and attending the more than 200 fact and expert depositions in these consolidated actions, approximately 100 of which were of Defendants and third parties. Neuwirth Decl. ¶¶ 16. These depositions yielded an extensive amount of useful liability and class certification evidence, which Plaintiffs extensively cited in their class certification and more recent summary judgment briefing.

4. Class certification.

Toward the end of fact discovery, Plaintiffs moved for litigation class certification. Their opening brief was 45 pages and included 91 numbered exhibits and a collection of declarations and deposition transcripts, along with the expert reports of Dr. Jeffrey Leitzinger and Dr. Matthew Gordon. In all, Plaintiffs' opening submission totaled over 1500 pages. Dkt. 584. Defendants opposed with their own brief and exhibits totaling 1716 pages, including the expert reports of Drs. Janusz Ordover and Michelle Burtis. Dkt. 682. Plaintiffs' reply again was an extremely voluminous submission and included the rebuttal expert reports of Dr. Leitzinger, Dr. Abba Krieger, and Dr. Matthew Gordon. Dkt. 744. Following this reply, Defendants submitted even more materials that required Plaintiffs' attention, reply, and, in some cases, briefing.

Ultimately, the Court held oral argument on Plaintiffs' class certification motion on January 15, 2014, at which time Plaintiffs presented their case for certification in response to multiple detailed questions from the Court. This Court granted class certification. Dkt. 1102, 1115. On numerous occasions, Defendants subsequently attempted to negate this Court's certification order and/or to delay the case because of it, and Plaintiffs have expended significant time and resources opposing Defendants' efforts. Dkt. 1169, 1384, 1415.

5. Summary judgment briefing.

On August 25, 2014, all of the then-non-settling Defendants, which included Carpenter and L&P, filed separate motions for summary judgment and collective *Daubert* motions against all of Plaintiffs' merits experts. Dkt. 1321-1329. Plaintiffs responded to these motions on September 25, 2014, submitting with their briefs a voluminous set of exhibits demonstrating why summary judgment is not warranted. Dkt. 1343. Defendants replied and the parties are currently scheduled to argue the motions before the Court on January 15, 2015. In all, the summary judgment briefing was an enormous task, yielding 140 pages of briefing from Plaintiffs, 276 pages from Defendants, and hundreds of exhibits.

6. Trial preparation.

Trial is now scheduled to being on March 31, 2015. Designated Counsel is engaged in substantial preparations for trial and will continue to prepare through the time trial begins.

B. 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 L&P sent notice of the proposed settlement to the appropriate State and Federal Officials on November 13, 2014. Dkt. 1413. Carpenter sent notice of the proposed settlement to the appropriate State and Federal Officials on November 22 and 24, 2014. Dkt. 1427. To date, those entities have not lodged any objections to the settlement. *Id.*

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 48,624 unique addresses on November 24, 2014. Neuwirth Decl. ¶ 39. This Notice advised potential Class Members of the material terms of the proposed L&P and Carpenter 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.* ¶ 40.

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. ¶ 2.

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

To date, Designated Counsel have received $3,101,267.63 in fees and $908,315.35 in expenses, (Dkt. 598), the combined total of which represents only a small portion of what Designated Counsel have incurred in prosecuting this case. Given this, Designated Counsel respectfully request that the Court award to them 30% of each of the L&P and Carpenter Settlement Funds for fees and an additional $8,113,855.80 for reimbursement of expenses. This will result in an award of $52,453,855.80, total, which is less than total amount of fees and expenses Designated Counsel has 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) (awarding 30% fee plus expenses); *In re Southeastern Milk Antitrust Litig.*, No. 2:08-MD-1000, 2013 WL 2155387 (E.D. Tenn. May 17, 2013) (awarding antitrust counsel 33% fee plus expenses from $158.6 million settlement); *In re Cardizem CD Antitrust Litig.*, No. 99-md-1278 (E.D. Mich. Nov. 25, 2002) (granting antitrust class action counsel 30% fee award plus expenses); *In re F&M Distribs. Inc. Sec. Litig.*, 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).[3] 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).

"[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 efficient results. *Rawlings*, 9 F.3d at 516 ("[T]he lodestar

[3] As with the Vitafoam Settlement, Co-Lead Counsel also requests the Court's authorization to distribute the fees in a manner that, in the judgment of Co-Lead Counsel, fairly compensates each firm for its contribution to the prosecution of Plaintiffs' claims. This is consistent with the Co-Lead Counsel's duties (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." Dkt. 598 at 4 (granting the same request in connection with the Vitafoam settlement).

method has been criticized for being too time-consuming of scarce judicial resources."). A one-third recovery is a common percentage arrived at in private contingency fee cases. Dkt. 598 at 3 (awarding 30% of Vitafoam Settlement Fund to Designated Counsel); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839 at *12 (D.D.C. July 16, 2001).

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.*, MDL 1055, 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) (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 (N.D. Ohio Mar. 24, 2005) (Neuwirth Decl., Ex. C); *In re Cardizem CD Antitrust Litig.*, No. 99-md-1278 (Neuwirth Decl., Ex. D) (E.D. Mich. Nov. 26, 2002).

For a total award of fees and expenses, "[u]sually 50 per cent 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 not unprecedented." *Newberg on Class Actions*, §14:6; *see also In re Scrap Metal Antitrust Litig.*, No. 1:02-cv-0844 (March 24, 2005 N.D. Ohio); *Maley v. Del Global Technologies Corp.*, 186 F. Supp. 2d 358, 367–68, 370 (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"); *Vitamins*, 2001 WL 34312839 at *10 (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, "[a]ll 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). Courts within the Sixth Circuit weigh six factors when making this analysis: "(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." *In re Telectronics Pacing System, Inc.*, 137 F. Supp. 2d 1029, 1042 (S.D. Ohio 2001). "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*, 922 F. Supp. at 1280. 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 at *2 (N.D. Ohio Mar. 14, 2013).

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"); *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 collective proposed $147.8 million collection, plus accrued

interest, is substantial in both absolute terms and in light of the circumstances of this litigation. Specifically, the cash payment is not just a considerable sum (which it is), but also an indication of the further total damages the Class may collect, whether in settlement or at trial. In addition, both L&P and Carpenter have offered cooperation at trial, as set forth in their respective settlements submitted concurrently with this fee application in support of Plaintiffs' motion for final approval of the Settlements. This cooperation will help Plaintiffs introduce evidence at trial that will be critical in prosecuting the remainder of the case against the non-settling Defendants.

Moreover, considering L&P and Carpenter's size relative to the remaining Defendants, the payments constitute a substantial recovery for the Class. L&P and Carpenter collectively constitute approximately 38% of the overall market. Based on the current known opt outs from the Direct Purchaser Class, Plaintiffs expect to seek between $815-867 million at trial, before trebling. The L&P and Carpenter Settlements thus represent a substantial portion of Plaintiffs' proposed trial damages.

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 four 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, briefing large motions (including, among other things, class certification and summary judgment), and negotiating, documenting, and moving for approval of the previous Vitafoam and Domfoam Settlements and the current L&P and Carpenter Settlements. Neuwirth Decl. ¶¶ 9-40.

A lodestar cross-check confirms that to date, Designated Counsel have incurred fees of $52,274,968.55. Because there is no question that the considerable amount of time and effort

Designated Counsel expended to date resulted in excellent positioning for trial and continuing value in the litigation for the Class, this factor weighs in favor of the requested fee award.

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. *Pillsbury Co., v. Conboy*, 459 U.S. 248, 262–63 (1983); *Reitner v. Sonotone Corp.*, 442 U.S. 330, 344 (1979); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 265–66 (1972); *Minnesota Min. & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317–18 (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. Here, through their efforts, Plaintiffs have substantially contributed to enforcement of the 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 mattresses, packaging, and carpet underlay.

Additionally, this litigation, and the amount of money that L&P and Carpenter will pay to the Class, sends a clear message that direct purchasers of flexible polyurethane foam will not tolerate collusive and conspiratorial behavior. The settlements will hopefully lead to increased competition because they will deter foam manufacturers from similar future misconduct.

Moreover, encouraging qualified counsel to bring highly risky but beneficial class actions like this one benefits society in general. *In re M.D.C. Holdings Sec. Litig.*, 1990 WL 454747 at *10 (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"). Payment of attorneys' fees in the requested amount fairly compensates Designated Counsel for the significant risk they undertook and the benefits they have achieved for the class.

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 four years that, absent a successful result, would not be reimbursed. All of this supports an award to Designated Counsel from the common fund. *In re Sulzer Hip Prosthesis and Knee Replacement Liability Litig.*, 268 F. Supp. 2d 907, 936–38 (N.D. Ohio 2003).

5. The complexity of the litigation supports the application.

It is no exaggeration to say that this case represents 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. Moreover, "[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) (quotations omitted). As the Court is aware, this case presents no exception.

6. Designated Counsel have exhibited professional skill.

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

B. Designated Counsel Has Not "Piggybacked" On A Government Investigation.

This is not a case where Plaintiffs and Designated Counsel have "piggybacked" off a government investigation. The government's ongoing investigation has proceeded slowly over the past four years. Because of this, Plaintiffs have developed their case against Defendants largely on their own and without government aid or pressure. This fact warrants a higher attorneys' fee, given the heightened risk Designated Counsel faced without the aid that an active governmental investigation or set of indictments brings. *In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 104-05 (E.D. Pa. 2013) (awarding proposed fee because, *inter alia*, "class counsel was not assisted by a government investigation."); *Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 219 (E.D. Pa. 2011) ("All of the benefits obtained for class members are due to the efforts of class counsel; there were no government agencies or other groups conducting investigations and contributing to this settlement."); *see also Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 464 (D. Md. 2014) ("the risk undertaken by class counsel is evaluated by, among other things, the presence of government action preceding the suit").

C. 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. *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); *Connectivity Sys. Inc. v. Nat'l City Bank*, 2:08-CV-1119, 2011 WL 292008 at *13 (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"). Here, the cumulative lodestar value of Designated Counsel's time spent on the case is more than $52 million (through the end of November 2014), which is more than the amount of fees sought by Designated Counsel.

Neuwirth Decl. ¶ 41. Indeed, the current requested fee award and the fees previously awarded to Designated Counsel following the Vitafoam and Domfoam settlements is over $2 million less than the cumulative lodestar value of Designated Counsel's time on this case. Accordingly, the lodestar cross-check confirms the reasonableness of the requested fee.

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

To date, Designated Counsel have incurred $8,133,855.80 in expenses, excluding expenses that have already been reimbursed. These expenses were reasonable and necessary to the litigation of this case, and included, among other things, costs for experts, 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. ¶¶ 42-43.

"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 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). The categories of expenses for which Designated Counsel seek reimbursement here are the type of expenses routinely charged to hourly-fee paying clients and are described in further detail in the accompanying Neuwirth Declaration. Designated Counsel believe that the expenses were all reasonably incurred, and should be reimbursed in full.

IV. CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Court should award 30 percent of each of the L&P Settlement Fund and Carpenter Settlement Fund to Designated Counsel, plus expenses of $8,113,855.80.

DATED: December 23, 2014

Respectfully Submitted,

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Co-Lead Counsel for the Direct Purchaser Class Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2014, I served via the Court's Electronic Case Filing system, MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER CLASS PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND FOR REIMBURSEMENT OF EXPENSES, on all counsel of record.

/s/ Adam Wolfson

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 CLASS ACTIONS	

DECLARATION OF STEPHEN R. NEUWIRTH IN SUPPORT OF DIRECT PURCHASER (CLASS) PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND FOR REIMBURSEMENT OF EXPENSES

I, Stephen R. Neuwirth, declare as follows:

1. I am a member of the bar of the State of New York and a partner in the firm of Quinn Emanuel Urquhart & Sullivan, LLP, co-lead class counsel for Direct Purchaser Class Plaintiffs ("Plaintiffs"). I make this declaration based on my personal knowledge. I submit this declaration in support of Plaintiffs' Motion for an Award of Attorneys' Fees and for Reimbursement of Expenses (the "Motion").

2. Plaintiffs' Motion seeks compensation for Co-Lead Counsel and the Direct Purchaser Class Executive Committee[1] (collectively, "Designated Counsel") from the proceeds of the settlement between Plaintiffs and Leggett & Platt, Incorporated (the "L&P Settlement") and the settlement between Plaintiffs and Carpenter Co., E. R. Carpenter, L.P., and Carpenter Holdings, Inc. (the "Carpenter Settlement"). Designated Counsel seek compensation for time expended and expenses advanced investigating and prosecuting the claims in this action for more

[1] Co-Lead Counsel for the Plaintiffs are Boies Schiller & Flexner, LLP and Quinn Emanuel Urquhart & Sullivan, LLP. 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.

than four years. In my view, Designated Counsel has committed substantial resources and achieved substantial benefits for members of the class, which include, among other things:

- Independent investigations into antitrust violations in the flexible polyurethane foam industry, resulting in the filing of the Consolidated Amended Complaint in this case;
- Extensive briefing, oral argument, and victory over *twelve* separate motions to dismiss Defendants submitted;
- Management of a discovery process—including review and analysis of over 5.4 million pages of documents to date and depositions of numerous third parties, experts, and employees and former employees of the Defendants—that has resulted in substantial evidence supporting Plaintiffs' claims;
- Extensive negotiations and numerous meet-and-confers during the discovery process, as well as motion practice concerning the same, and continued negotiations and meet-and-confers over discovery issues following the official close of fact discovery, but required by late-produced discovery from third parties and certain Defendants;
- Negotiating and securing, and obtaining preliminary and final approval by the Court of, the Vitafoam and Domfoam settlements – settlements that provided significant monetary and non-monetary benefits to the Class;
- Briefing, arguing for, and ultimately obtaining certification of the Direct Purchaser Class despite vigorous opposition by the Defendants;
- Responding to combined and individual summary judgment motions totaling 200 pages from all then-non-settling Defendants, including *Daubert* challenges against each of Plaintiffs' expert and marshalling extensive record evidence in support of same;

- Negotiating and securing, and then obtaining preliminary approval by the Court of two separate settlements on behalf of Plaintiffs with L&P and Carpenter – settlements that will provide significant monetary benefits to the Class, as well as significant cooperation at trial in this litigation, and to which I have been advised that no Plaintiff has objected as of the date of this declaration.

Designated Counsel's Investigation and Prosecution of this Case.

3. Designated Counsel have expended a significant amount of time and resources in investigating and prosecuting this case over the past four years. Designated Counsel's investigation into the factual and legal underpinnings of this case began in 2010. Their efforts included research into the flexible polyurethane foam industry, its economics, the companies involved in the manufacture and sale of flexible polyurethane foam, and relevant trade associations, as well as all related legal issues.

4. Shortly after filing their respective putative class actions, Designated Counsel participated in briefing and in-person appearances related to these consolidated actions before the Judicial Panel on Multidistrict Litigation ("JPML") in 2010. The JPML proceedings addressed the appropriateness of consolidating these actions in a multidistrict litigation and where the consolidated action should be venued.

5. Following this case's transfer to the Northern District of Ohio, Designated Counsel negotiated with Defendants and, on certain issues, also representatives of the Department of Justice, concerning a number of proposed case management orders, including orders (and amendments thereto) regarding the overall case management, protection of confidential and highly confidential information, general discovery protocols, electronically-stored information ("ESI") protocols, and protocols regarding the production of the parties' transactional data. (*See, e.g.*, Dkts. 65 (proposed scheduling order), 345 (amended joint scheduling order), 347 (dispute concerning scheduling order), and 408 (proposed amended joint scheduling order).) The negotiations surrounding each of these protocols took months and

involved numerous meet-and-confers, written letters and email, and other communications with Defendants. The protocols also spanned numerous complex issues involving the appropriate extent of discovery in a complex set of antitrust actions such as this, the realities of ESI productions in modern litigation, and the availability of highly probative transactional data. Throughout these negotiations, Defendants' counsel zealously advocated their clients' positions.

6. Designated Counsel continued to engage in such negotiations with Defendants' counsel throughout fact discovery and even after the close of fact discovery due to certain third parties and Defendants' late production of documents and testimony.

Designated Counsel's Management of this Case.

7. Co-Lead Counsel have managed this case through the help of the Executive Committee, which includes eight firms in addition to Co-Lead Counsel. Designated Counsel implemented such a structure in order to efficiently distribute work to attorneys with extensive experience in antitrust matters and who are familiar with the case, and to administer and supervise that work at minimal cost. Management of this case has involved regular communications and oversight from Co-Lead Counsel, and Co-Lead Counsel coordinates their efforts by holding conference calls and other meetings among the Designated Counsel group, and by coordinating with the Direct Action Plaintiffs and the Indirect Purchaser Plaintiffs.

8. Co-Lead Counsel have worked to minimize expenses incurred in prosecuting this case. Attorney attendance at hearings is generally restricted to Co-Lead Counsel and one or two Executive Committee members in order to minimize airfare and hotel bills. Co-Lead Counsel solicited bids for vendors of services to support document review and other case tasks, and selected competent vendors that were the low-cost bidders. The most significant expenses to date have been associated with Dr. Jeffrey Leitzinger and his team, who are the economic experts Plaintiffs retained both to provide consulting services and to provide opinions and testimony and rebuttals in support of Plaintiffs' motion for class certification and oppositions to summary judgment.

Designated Counsel's Victory over Defendants' Motions to Dismiss.

9. After Plaintiffs filed their Consolidated Amended Complaint on February 28, 2011, Defendants filed *twelve* separate motions to dismiss, as well as a joint "common issues" memorandum of law. (Dkt. 89–92, 95–97, 99–103, 109.) Every Defendant filed a motion to dismiss. Designated Counsel researched, drafted, revised, and finalized oppositions to Defendants' motions—an undertaking that required a large number of concurrent tasks and significant attorney time. (*See* Dkt. 114, 115.) Co-Lead Counsel, assisted by certain members of the Executive Committee, then prepared for oral argument on the motions and traveled to Toledo to present their positions to the Court. Following oral argument, on July 19, 2011, the Court generally denied all of Defendants' motions to dismiss with respect to Plaintiffs' claims. (Dkt. 191.)

10. After the Court issued its order denying the motions to dismiss, a number of Defendants sought reconsideration. (Dkt. 195, 202–204, 214, 219.) Designated Counsel prepared and submitted oppositions to these motions, and Co-Lead Counsel participated in telephonic conferences with the Court concerning the subject matter of these motions. (Dkt. 226, 227.) The Court denied Defendants' motions on July 27, 2011 and September 15, 2011. (Dkt. 200, 243.) Simultaneously with these motions, Co-Lead Counsel also responded to and defeated Defendant FXI's attempt to seek an interlocutory appeal from the Sixth Circuit.

Designated Counsel's Management of Discovery.

11. The complexity of Plaintiffs' claims, the temporal scope of the alleged conspiracy, and the sheer number of parties involved has necessitated lengthy discovery proceedings in this litigation. Beginning in early 2011, Designated Counsel drafted a number of requests for production. Following service of each set of discovery requests, Designated Counsel negotiated the general scope of Defendants' responses between May and October 2011, a process that involved numerous meet and confers, teleconferences, and written emails and letters. These negotiations served as a reference point from which negotiations with individual Defendants then proceeded. The subsequent, individual negotiations with each Defendant

concerned the specific content and scope of their respective productions, and took from a few months to more than a year, depending on the Defendant. And, even then, later discovery from those same Defendants often required that Designated Counsel negotiate still more discovery issues with them to ensure adequate and complete production.

12. Plaintiffs' individual negotiations and meet and confers with Defendants—which spurred several different motions to compel and hearings with the Court—spanned several years and have even continued into the current post-fact discovery period. I understand from the Designated Counsel members who conducted these meet and confers that they were heavily negotiated and often involved substantial opposition from Defendants that required multiple meet and confers and letters to resolve.

13. One notable, repeated dispute that occurred during the discovery process was Defendants' insistence that Plaintiffs produce substantial "downstream" discovery. (*See* Dkt. 418-1 (joint submission on dispute concerning "downstream" discovery, among other disputes), 420 (order on "downstream" discovery), 452 (Defendants' second brief on "downstream" discovery), 454 (Plaintiffs' second brief on "downstream" discovery), and 458 (order denying Defendants' requested discovery).) Designated Counsel expended significant resources on the collection, review, and production of Plaintiffs' documents responsive to Defendants' document requests. Later in the case, after Defendants obtained the right to serve subpoenas on absent Class members who manufactured some foam, Plaintiffs participated in that discovery to ensure fair treatment and adherence to the scope of the Court's permission for such discovery.

14. In addition to "downstream" discovery, Plaintiffs also responded to and addressed Defendants' discovery requests of them. These included substantial sets of requests for production and interrogatories, the latter of which included contention interrogatories for which Plaintiffs produced lists of thousands of the documents on which they intend to rely at trial to prove their case. Defendants sought to compel even more granular answers than Plaintiffs' detailed responses, but failed after the parties briefed and argued the issue to the Court.

15. To date, and as the direct result of Designated Counsel's efforts, I understand that Defendants and third parties have produced 5.4 million pages of responsive materials in 219 separate productions, representing 2.4 million total documents. Defendants have also produced several iterations of their transactional data—including supplemental productions required by Plaintiffs' follow up questions and analyses—that encompasses millions of transactions for over a decade's worth of annual sales. Designated Counsel reviewed these documents and this data and have used it to advance Plaintiffs' claims throughout this case.

16. In the Spring of 2013, and consistent with agreements reached earlier with Defendants, Designated Counsel began taking depositions of Defendants' witnesses. In addition to extensive substantive preparation for these depositions, Designated Counsel had to negotiate the schedules for these depositions and, when necessary, seek intervention from the Court to resolve scheduling disputes. In all, Designated Counsel attended over 200 depositions, prepared for and took over 100 depositions of Defendant and third party witnesses, and participated in Defendants' many depositions of various plaintiff witnesses.

17. Designated Counsel's efforts have yielded a substantial amount of evidence to advance Plaintiffs' claims, including evidence relevant to liability, damages, class certification, expert testimony, and Plaintiffs' oppositions to Defendants' various motions for summary judgment, *Daubert* exclusion, and other substantive issues.

18. In addition to fact discovery, Designated Counsel have also engaged in substantial expert discovery, both during the class certification process (further discussion on that below), and during the merits phase following class certification briefing. During expert discovery, Defendants submitted expert reports from nearly a dozen different purported expert witnesses, all of whose reports Designated Counsel analyzed and then addressed in depositions and in securing rebuttal reports from Plaintiffs' experts. Expert discovery required flights and depositions all over the country and substantial time, effort, and expense.

19. Finally, as the above indicates, although there is a governmental investigation into the facts underlying this case, there has only been one U.S. indictment to date and, unlike many

other antitrust class actions of which I am aware, Designated Counsel have not built their case by relying on government indictments or evidence produced as part of such indictments. Instead, Designated Counsel have relied almost entirely on the discovery, admissions, testimony, and evidence that they have been able to collect without any governmental aid or pressure on Defendants.

The Vitafoam and Domfoam Settlements.

20. Designated Counsel's separate negotiations with the Vitafoam defendants and the Domfoam Parties culminated in mid and late 2011. Designated Counsel participated in a number of fact-gathering sessions and informational meetings as part of their evaluation of the terms and conditions of any potential settlements. Designated Counsel also engaged in separate negotiations with Vitafoam's counsel at Freshfields Bruckhaus Deringer, and with Domfoam's counsel at Skadden, Arps, Slate, Meagher & Flom. Following months of negotiation for each settlement, Designated Counsel, the Vitafoam defendants, and the Domfoam Parties reached their respective settlements.

21. Designated Counsel 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 the Vitafoam Settlement on January 23, 2012 and the Domfoam Settlement on March 26, 2012. (Dkt. 323, 355.)

22. Following the Court's preliminary approval of the Vitafoam and Domfoam Settlements, Designated Counsel crafted a notice program for both settlements. This process included selecting a claims administrator, working with the claims administrator and its expert on notice to draft the proposed notices and analyze the most effective methods of distributing the notices, reviewing vendor proposals, and coordinating with the interim class representatives concerning all of the aforementioned activities. Designated Counsel also drafted motion papers for the notice plan and coordinated with the proposed claims administrator for a declaration

explaining how they would proceed with the notice plan. Designated Counsel eventually finalized the program and supporting papers in May 2012 and moved for approval of the program on May 30, 2012. Following Plaintiffs' submission of the motion, the non-settling Defendants once again filed oppositions and attempted to hold up the notice process. After extensive motion practice on this issue—during which Designated Counsel once again drafted opposition papers, arranged for statements of support to be submitted by the Vitafoam and Domfoam Parties, and moved for reconsideration after the Magistrate Judge's initial refusal to approve the proposed plan—the Court approved Designated Counsel's programs, with limited revisions to the draft notices, on November 29, 2012.

23. The Court held a final approval hearing for the Vitafoam and Domfoam settlements on May 7, 2013. The Court approved the settlements on June 20, 2013. (Dkt. 597).

Designated Counsel's Success in Certifying the Direct Purchaser Class.

24. Toward the end of fact discovery, Designated Counsel achieved significant benefit for Plaintiffs by obtaining certification of the Direct Purchaser Class.

25. Designated Counsel did so by first submitting their motion for class certification, which included 45 pages of argument and over 90 exhibits, for a total of over 1500 pages. Defendants' Counsel responded with over 1700 pages of briefing and exhibits, and Designated Counsel replied.

26. Designated Counsel's opening brief included the expert report of Dr. Jeffrey Leitzinger, which provided an economic and statistical analysis of common impact to the Plaintiffs stemming from Defendants' collusion. Designated Counsel's reply brief included rebuttal expert reports from Dr. Abba Krieger and Dr. Leitzinger. As the Court is aware from prior briefing on this subject, Dr. Krieger rebutted Defendants' claims that Dr. Leitzinger's statistical analysis did not comport with statistical theory and practice, while Dr. Leitzinger rebutted specific criticisms of his opening expert report. Designated Counsel spent substantial effort in identifying and preparing Plaintiffs' experts, and in responding to and refuting the claims Defendants' experts made in opposition to class certification.

27. Designated Counsel also spent substantial time and resources preparing for oral arguments concerning class certification, which were held on January 15, 2014 and involved nearly a day of testimony, questions, and argument from all sides.

28. Ultimately, the Court granted the Plaintiffs' motion for class certification. (Dkt. 1102, 1115).

29. Designated Counsel has continued to defend the Court's class certification Order against Defendants' myriad attempts to discredit the Order either in this Court or at various appellate courts.

30. Specifically, Defendants petitioned the Sixth Circuit pursuant to Rule 23(f) for an interlocutory appeal of the Court's class certification Order. Meanwhile, Defendants also sought to stay this action pending the result of their petition. Following briefing (and, in the case of the stay request, brief argument to the Court), Defendants failed in both efforts, although they did convince the Court to temporarily stay class notice. (See Dkt. 1169 & 1384.) Once the Sixth Circuit denied the Rule 23(f) petition, Defendants then attempted to stay class notice once again because they planned to petition the Supreme Court for a writ of certiorari. Following briefing, Defendants failed in that argument, but then made the same argument once again to the Sixth Circuit. Plaintiffs responded and, once again, Defendants failed to stay this case. More recently, Defendants filed their promised petition for a writ of certiorari and the parties are in the process of briefing that request now. (Dkt. 1415.)

Summary Judgment Briefing.

31. Another area of substantial effort and expense is found in Designated Counsel's opposition to Defendants' myriad summary judgment and *Daubert* motions.

32. On August 25, 2014, all of the then-non-settling Defendants filed separate motions for summary judgment and collective *Daubert* motions against all of Plaintiffs' merits experts. (Dkt. 1321-1329.) These motions were collectively 200 pages long and included numerous exhibits, deposition transcripts, and citations to expert reports. Plaintiffs responded to

these motions on September 25, 2014, submitting with their briefs a voluminous set of exhibits demonstrating why summary judgment is not warranted. (Dkt. 1343.)

33. I attest that the summary judgment briefing process was an enormous task, requiring many hours of effort by Co-Lead Counsel and certain of the Executive Committee members and yielding 140 pages of briefing from Plaintiffs, along with literally thousands of pages of exhibits. For their part, Defendants submitted 276 pages of briefing and over 520 exhibits (also constituting many thousands of pages). And, as the Court is aware, the process is not yet done. Designated Counsel is currently preparing for oral argument on the issues Defendants raise in their summary judgment and *Daubert* motions, the hearing for which is scheduled January 15, 2015.

The Carpenter and Leggett & Platt Settlements.

34. While in the midst of overall case management, fact and expert discovery, and summary judgment briefing, Co-Lead Counsel continued to meet with certain Defendants to discuss settlement of this case. As a result of these efforts, Plaintiffs have entered into two new settlement agreements: the Carpenter Settlement and the L&P Settlement. The settlements will provide significant benefits to members of the proposed Settlement Classes (which entirely overlap with the certified Direct Purchaser Class): a substantial monetary benefit of $147.8 million and important cooperation that will enhance Plaintiffs' ability to successfully prosecute this action at trial against the non-settling Defendants.

35. The L&P Settlement is the product of Designated Counsels' extensive negotiations with Leggett & Platt, which occurred across multiple meetings and after two separate mediations. Co-Lead Counsel participated in fact-gathering and informational meetings, and conducted negotiations through written correspondence and via telephone or in person in New York, New York; West Palm, Florida; and Chicago, Illinois.

36. The L&P Settlement requires Leggett & Platt to pay Plaintiffs $39.8 million. The settlement also provides a "most favored nations" clause that sets a floor for future settlements and helps to maximize Plaintiffs' recoveries.

37. After extensive settlement discussions involving direct communications between counsel and then a mediation located in Boston, Massachusetts, Plaintiffs and Carpenter reached the Carpenter Settlement. The Carpenter Settlement requires the Carpenter entities to pay $108 million to the Plaintiffs. The settlement also requires Carpenter to provide witnesses to testify at trial regarding the admission of various Carpenter documents, which is again a significant benefit for Plaintiffs.

38. The Court preliminarily approved the settlement between Plaintiffs and L&P on November 6, 2014. (Dkt. 1391.) On November 10, 2014, the Court allowed, by agreement of the parties, for combined notices of both the Carpenter and L&P settlements so that the Court could conduct a final approval hearing for both settlements on February 3, 2015. (Dkt. 1397.)

39. Pursuant to the Court's Order of November 17, 2014 (Dkt. 1411), Co-Lead Counsel directed the claims administrator, Garden City Group, to directly mail Court-approved notice packets to potential Class members on November 24, 2014 ("Notice"). Garden City Group did so and the Court-approved summary notice was also published at Co-Lead Counsel's direction in targeted trade journals and targeted publications starting on December 8, 2014 (and the remaining December and January 2015 editions of the same), as well as in broader business-oriented internet websites and networks. I understand from Garden City Group that these publications will carry the Notice through at least January 9, 2015.

40. Designated Counsel crafted the Notice and has coordinated and will continue to coordinate its delivery through at least January 9, 2015. The Notice further stated that Designated Counsel could seek up to 30% of the settlement fund, as well as expenses.

Designated Counsel's Lodestar.

41. I understand, based on monthly reports prepared by Designated Counsel and assembled and tabulated by GCG, the total reported lodestar of Designated Counsel through the end of November 2014 is $52,274,968.55.

Designated Counsel's Expenses.

42. Designated Counsel have incurred a number of expenses in pursuing this litigation. These expenses have included costs for, among other things, experts, document collection and management, hosting of Defendants' and Plaintiffs' ESI, travel, mail, service of process, electronic legal research, long-distance telephone calls, and contributions to the common expense litigation fund.

43. I understand, based on monthly reports prepared by Designated Counsel and assembled and tabulated by GCG, that the total amount of expenses incurred by Designated Counsel (excluding expenses the Court has already awarded out of the Vitafoam Settlement) through the end of November 2014 is $8,113,855.50.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed December 23, 2014, at New York City, New York.

/s/ Stephen R. Neuwirth
Stephen R. Neuwirth