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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION

This Document Relates to:

ALL ACTIONS EXCEPT

Jenkins v. Nat'l Collegiate Athletic Ass'n
Case No. 4:14-cv-02758-CW

Case No. 4:14-md-02541-CW

NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

DATE: Nov. 17, 2017
TIME: 9:00 a.m.
DEPT: Courtroom 2, 4th Floor
JUDGE: Hon. Claudia Wilken

COMPLAINT FILED: Mar. 5, 2014

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on November 17, 2017, at 9:00 a.m., in the courtroom of the Honorable Claudia Wilken of the United States District Court of the Northern District of California, located at 1301 Clay Street, Courtroom 2 – 4th Floor, Oakland, CA 94612, plaintiffs will and hereby do move the Court for an order:

1. Awarding plaintiffs' counsel $41,732,889 in attorneys' fees;

2. Approving reimbursement of $3,184,274.38 in expenses and costs incurred by plaintiffs' counsel; and

3. Approving an incentive award of $20,000 for each of the four class representatives.

This motion is based on this notice of motion and motion, the accompanying memorandum of points and authorities, the declarations in support of the motion, argument by counsel at the hearing before this Court, any papers filed in reply, such oral and documentary evidence as may be presented at the hearing of this motion, and all papers and records on file in this matter.

STATEMENT OF ISSUES

1) Plaintiffs' counsel have dedicated over $11.5 million in attorney and professional time to this matter over more than a three-year period. Counsel now seek an attorneys' fee award in the amount of $41,732,889, which represents 20% of the settlements and a multiplier of 3.62 on their lodestar. Should this Court exercise its discretion to approve the fee request as fair and reasonable when plaintiffs' counsel obtained an exceptional result that will provide injured class members with approximately 66% of their losses before fees and expenses are deducted?

2) Plaintiffs' counsel have advanced $3,184,274.38 in out-of-pocket expenses in this litigation, mainly attributable to the costs of experts. Should the Court approve reimbursement of this amount as fair and reasonable?

3) Should the court grant a $20,000 incentive award to each of the four class representatives for their work in helping attain an exceptional settlement for class members?

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I. INTRODUCTION

Guided by Dr. Rascher's damages probit regression model, class counsel negotiated a settlement of $208,664,445. The probit model predicted which schools would have adopted full cost of attendance in 2009-2010 had the NCAA's rules prohibiting such payments not been adopted, and damages were estimated therefrom.[1] For eligible class members attending schools which the probit model predicted would have paid Cost of Attendance ("COA"), the estimated damages are approximately $210 million to $220 million.[2] Since the settlement was reached, many additional schools are now paying or have stated an intent to pay COA. Eligible class members from these additional COA-paying schools will also receive payment from the settlement fund.[3] The average recovery for class members who played their sports for four years and are entitled to an award under the settlement is approximately $6,000 (net of the fees and expenses requested here).

Class counsel committed to the Court at the preliminary approval hearing that we would not seek more than a 25% fee award—the Ninth Circuit's benchmark (attaching to it a presumption of reasonableness). Class counsel is honoring its commitment to the Court—and indeed is seeking even less, including costs and expenses. Class counsel respectfully requests that the Court award attorneys' fees of $41,732,889, which is 20% of the proposed settlement, well below the 25% benchmark.

Even though a higher fee award here (such as the Ninth Circuit's 25% benchmark) would be reasonable when compared to other large, complex antitrust cases in this district and elsewhere, class counsel request a more modest award of 20%. A 20% fee award is well within the range of

[1] *See* ECF No. 560-4 (Expert Declaration of Daniel A. Rascher in Support of Motion for Preliminary Approval of Damages Classes).

[2] *Id.*

[3] The number of class members eligible to receive payment has grown significantly since the settlement was reached. The settlement agreement benefitted class members by including a clause allowing for even more class members to become eligible to receive settlement payments after the parties reached an agreement in principle in December 2016 and executed their settlement agreement on February 3, 2017, if their school adopted or stated an intent to adopt COA any time up to June 1, 2017. *See* ECF No. 560-1 at Exhibit A to the Settlement Agreement, para. B.2. As Dr. Rascher opined at class certification, the market was still unwinding from the longstanding GIA cap and had yet to reach "equilibrium." After the parties reached settlement, dozens of schools adopted or declared their intent to adopt COA. So, many more student-athlete class members have become eligible to get paid from the settlement fund after the parties agreed to settlement and the Court granted preliminary approval. Counting all of the many additional class members who will now receive payment, the settlement fund now represents approximately 66% of total single damages—a tremendous result in comparison to most large antitrust settlements.

reasonableness, and could even be considered a below-market request, given the excellent result achieved for the classes, the risks plaintiffs' counsel faced of not receiving any compensation in pursuing this matter, the millions of dollars in out-of-pocket expenses they incurred, and the efficiency with which they litigated the case.

The Court well knows how hard fought this case has been. Not only are these defendants sophisticated entities, represented by some of the most experienced antitrust defense counsel in the United States, policy and institutional considerations—both within and across dozens of schools and conferences—required counsel to overcome varied interests and substantive road blocks to successfully settle the damages part of the case. In the face of these formidable challenges, plaintiffs' counsel achieved an extraordinary settlement on behalf of the classes, with class members who are entitled to damages under the settlement receiving approximately 66% of their damages before fees and expenses are deducted.

Class counsel also request reimbursement of $3,184,274.38 in expenses, the vast majority of which are expert fees. The total percentage of the fund for fees and costs is approximately 21.5%. And plaintiffs request $20,000 for each class representative as incentive awards.

II. THE WORK UNDERTAKEN BY PLAINTIFFS' COUNSEL

Plaintiffs' counsel have devoted enormous resources to prosecuting this case against vigorous opposition provided by the NCAA and conference defendants (and the defense lawyers they hired from some of the largest and best law firms in the country). As shown below, the road to a $208 million settlement required an enormous commitment from plaintiffs' counsel.

A. Pre-filing investigation and work-up

Lead counsel Hagens Berman ("HB") and Pearson, Simon & Warshaw ("PSW") began investigating this case several years before filing a complaint.[4] In performing the investigation, the firms conducted extensive due diligence, including:

- Conducting informational interviews with current and former student athletes, and conferring with student-athletes' rights organizations;

[4] ECF No. 50-2 ¶ 7; ECF No. 50-4 ¶ 4.

- Retaining the services of experienced consultants to perform a substantial economic analysis of the relevant market;
- Researching the relationships between the NCAA and its conferences, and making the strategic decision to include the conferences as defendants (with the concomitant increase in resources necessary to prosecute against multiple defendants);
- Analyzing the diverse types of remedies to frame the requested relief in the case;
- Researching the positions of the NCAA and conferences on issues of competitive balance and amateurism;
- Reviewing public statements, interviews, and quotes from defendants and their executives dating as far back as 2003; and
- Researching the NCAA's IRS Form 990 filings and other sources that provided important information regarding the revenues and finances of the NCAA and the conferences.[5]

The hard work of HB and PSW culminated in the drafting and filing of the *Alston* complaint,[6] which was the first-filed complaint in this MDL.

B. Successful efforts before the JMPL to coordinate this case

After HB and PSW filed the *Alston* complaint, other law firms filed complaints across the country.[7] Class counsel filed a motion to transfer actions to the Northern District of California with the JPML.[8] PSW attended and argued the motion to transfer before the JPML.[9] On June 13, 2014, the JPML granted the motion to transfer the cases to this Court.[10]

C. Opposing defendants' motion to dismiss

Plaintiffs' Consolidated Amended Complaint was immediately met with a motion to dismiss. Defendants' primary arguments were that this Court's decision in *O'Bannon* was fatal to plaintiffs' case here and there was a debilitating intra-class conflict.[11] But class counsel forcefully opposed the

[5] *See generally* ECF No. 50-2 ¶¶ 6-21; ECF No. 50-4 ¶¶ 4-14.

[6] *Alston v. Nat'l Collegiate Athletic Ass'n et al.*, No. 4:14-cv-01011-CW (N.D. Cal.).

[7] ECF No. 50-2 ¶ 42; ECF No. 50-4 ¶ 15.

[8] ECF No. 50-2 ¶ 42; ECF No. 50-4 ¶ 15.

[9] ECF No. 50-4 ¶ 16.

[10] ECF No. 50-2 ¶ 43; ECF No. 50-4 ¶ 16.

[11] ECF No. 89 at 2 ("Plaintiffs cannot allege any plausible theory that can reconcile the relief they seek in this case with the decision and injunction in *O'Bannon* . . . .").

motion by emphasizing the major differences between this case and *O'Bannon* and showing the legally deficient argument concerning the purported conflict.[12] This Court denied the motion.[13]

D. Written discovery and document production

Class counsel then began the written discovery and document production process. For three years, the two firms took the lead in responding to defendants' interrogatories and requests for production of documents, both by working with plaintiffs to acquire information requested by defendants and by drafting the discovery responses.[14] Discovery responses included, for example, a 45-page set of responses to defendants' contention interrogatories directed at critical issues in the case (e.g., less restrictive alternatives).[15]

Plaintiffs' counsel have also propounded extensive document requests on defendants and third parties. These requests yielded significant document productions of more than 550,000 documents and more than 2.8 ***million*** pages of documents.[16] And plaintiffs received productions from various NCAA member institutions throughout the litigation.[17] Reviewing these massive document productions was a major effort.[18] Lead counsel coordinated a complex and thorough review process with eleven attorneys, spanning two-and-a-half years and amounting to about 5,000 attorney hours.[19]

And plaintiffs issued subpoenas to ***three hundred and thirty-seven*** NCAA member institutions in order to obtain critical NCAA member scholarship data. This effort cannot be understated, given the importance of detailed school and player-specific data required for plaintiffs' econometric damages model.[20] One of defendants' primary attacks against class certification was the varying nature of the data and that a school-by-school, or even a player-by-player, analysis was required.

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[12] ECF No. 94 at 3 ("Moreover, Plaintiffs' but-for world (one without the challenged restraint) is different than the *O'Bannon* world.").

[13] ECF No. 131.

[14] Declaration of Steve W. Berman (filed concurrently herewith) ("Berman Decl.") ¶ 2; Declaration of Bruce L. Simon (filed concurrently herewith) ("Simon Decl.") ¶ 20.

[15] Simon Decl. ¶ 20.

[16] Berman Decl. ¶ 3; Simon Decl. ¶ 22.

[17] Simon Decl. ¶ 22.

[18] Berman Decl. ¶ 3; Simon Decl. ¶ 22.

[19] Berman Decl. ¶ 4.

[20] Berman Decl. ¶ 5; Simon Decl. ¶ 12; Declaration of Elizabeth C. Pritzker (filed concurrently herewith) ("Pritzker Decl.") ¶ 15.

Given this attack, it was critical for plaintiffs to acquire comprehensive data from hundreds of schools, organize and digest the information, and coordinate with plaintiffs' experts to help create workable economic models in the case. And given that these schools were third parties—and not defendants—getting timely responses to meet court deadlines (such as class certification) was a significant challenge and required a major investment of dedicated resources.

Elizabeth Pritzker and her firm assisted lead counsel with the ongoing and important efforts to collect comprehensive data from hundreds of schools.[21] This third-party subpoena project required a sustained effort by plaintiffs' counsel, which consisted in part of:

- Creating and managing a database to track third-party subpoenas issued to all 337 schools, including information regarding dates of service, deadlines for responding, timing and status of productions received, and plaintiffs' requests for missing, updated, or additional information;
- Meeting and conferring with counsel and staff from these NCAA member schools regarding information sought by the subpoenas, timing of responses, requested format for responsive document productions (electronic vs. hard copy), issues related to production costs and expenses, as well as the nature, form, and timing of any notifications to students under the Family Educational Rights and Privacy Act; and
- Drafting and collecting from NCAA members schools customized business records affidavits authenticating records and data produced in response to the subpoenas.[22]

When discovery disputes arose during this case, HB and PSW were intimately involved in resolving them.[23] For example, the two firms were actively involved in the lengthy meet-and-confer process with conference defendants to obtain their financials and media contracts.[24] Plaintiffs were successful, resulting in the production of financial statements, television contracts, and sponsorship contracts, all of which were asked about at depositions of conference defendant witnesses.[25] And when meet-and-confer talks broke down, HB and PSW litigated the discovery issues before Judge

[21] Berman Decl. ¶ 5; Simon Decl. ¶ 12; Pritzker Decl. ¶ 15.
[22] Pritzker Decl. ¶ 15.
[23] Berman Decl. ¶ 6; Simon Decl. ¶ 23.
[24] Berman Decl. ¶ 7; Simon Decl. ¶ 23.
[25] Berman Decl. ¶ 7; Simon Decl. ¶ 23.

Cousins. For example, PSW argued motions to compel regarding (1) Notre Dame's commercial contracts (including its television contract with NBC) and (2) the Pac-12's eSports documents.[26]

E. Depositions

As in most complex antitrust cases, this case involved a large number of depositions. Plaintiffs took more than 50 depositions.[27] HB and PSW lawyers have deposed numerous high-profile figures in the world of college sports, including, but not limited to, Mark Emmert (President of the NCAA); Mary Willingham (the whistleblower who helped to reveal an academic fraud scandal at the University of North Carolina at Chapel Hill); Mike Slive (former Commissioner of the Southeastern Conference); John Swofford (Commissioner of the Atlantic Coast Conference); Michael Aresco (Commissioner of the American Athletic Conference); Harvey Perlman (former Chancellor of the University of Nebraska); Jim Delany (Big Ten Conference Commissioner); Karl Benson (Sun Belt Conference Commissioner); and Larry Scott (Pac-12 Conference Commissioner).[28]

To maximize class recovery and minimize costs, plaintiffs' counsel used a lean team to take depositions and execute all other projects.[29] One comparison is that defendants routinely staffed the defense of depositions with numerous lawyers (often, numerous senior lawyers).[30] For example, at the deposition of former NCAA executive Greg Shaheen, the deposing attorney was a PSW associate, appearing alone for plaintiffs. But on the defense side, ***five*** lawyers appeared in person.[31] The NCAA was represented in person by a partner and an associate from one of its law firms (Schiff Hardin LLP), an associate from one of its other law firms (Skadden, Arps, Slate, Meagher & Flom LLP), and an in-house counsel from the NCAA, while the Southeastern Conference was represented in person by a partner from one of its law firms.[32] This efficiency was typical for plaintiffs' counsel.

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[26] Simon Decl. ¶ 24.

[27] Berman Decl. ¶ 8; Simon Decl. ¶ 14.

[28] Berman Decl. ¶ 9; Simon Decl. ¶ 15.

[29] Berman Decl. ¶ 10; Simon Decl. ¶ 17.

[30] Berman Decl. ¶ 10; Simon Decl. ¶ 17.

[31] Simon Decl. ¶ 18.

[32] Simon Decl. ¶ 18. NCAA counsel's approach to staffing is perhaps best evidenced by the fact that the NCAA is currently represented by ***four different law firms*** in this case.

F. Motion for class certification under Rule 23(b)(3)

HB and PSW spearheaded the filing of a motion for class certification under Rule 23(b)(3).[33] The two firms—along with the Pritzker Levine firm—put enormous time and energy into acquiring the NCAA member school scholarship data.[34] Armed with this critical data, the firms worked closely with Dr. Rascher to assist him in constructing his damages modeling of the but-for world.[35] In addition, HB and PSW performed significant legal research on class certification issues and wrote extensive briefs covering class-wide impact and damages as well as defendants' offset defense.[36]

Although plaintiffs were confident in the merits of their class certification arguments, defendants vigorously opposed their motion.[37] Relying in part on this Court having declined to certify a damages class in *O'Bannon*, defendants argued that plaintiffs could not establish either impact or damages on a class-wide basis.[38] But class counsel undermined defendants' arguments, in part during HB's deposition of defendants' expert economist on damages class certification. In response to more than a dozen school witness declarations submitted by defendants in opposition to class certification, HB took sample depositions of five different university officials, again proceeding along the most efficient track. These witnesses confirmed that schools track, audit, and maintain detailed financial records in the ordinary course of business and provided corroborative support for plaintiffs' class certification position.[39] Working together with Dr. Rascher, class counsel filed a strong reply brief[40] and a strong rebuttal report from Dr. Rascher.

G. Settlement

Settlement in this case was very challenging. Defendants forced plaintiffs to overcome numerous hurdles. For example, at virtually every step along the way, plaintiffs were forced to deal with defendants' argument that the *O'Bannon* decision somehow foreclosed plaintiffs' case. And

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[33] ECF No. 362.
[34] Berman Decl. ¶ 5; Simon Decl. ¶ 12; Pritzker Decl. ¶ 15.
[35] Berman Decl. ¶ 5; Simon Decl. ¶ 12.
[36] Berman Decl. ¶ 11; Simon Decl. ¶ 12.
[37] *See* ECF No. 494.
[38] ECF No. 494 at 14-21.
[39] Berman Decl. ¶ 12; ECF No. 509-2 at 1.
[40] ECF No. 509-2.

even setting aside the *O'Bannon* case, defendants claimed the difficulty endemic in individual data issues could not be overcome.

Steve Berman and Bruce Simon were personally involved in the hard-fought settlement discussions that persisted intermittently over several years.[41] During these negotiations, the parties confronted many difficult and time-consuming issues.[42] The negotiations have been arm's-length at all times and broke down on several different occasions before the parties were finally able to reach a settlement.[43] Berman and Simon attended multiple in-person mediation sessions with Professor Eric Green and participated in telephone calls with him as well.[44] Eventually, the settlement established a fund of $208,664,445—nearly single damages according to Dr. Rascher's model at the time of settlement.[45]

Plaintiffs and their experts engaged in extensive modeling of damages and a deep dive into the arcane classification systems and nomenclature used in college athletics. As a result, counsel was able to value the case with confidence. This extraordinary result is the product of a thorough assessment and evaluation of the strengths and weaknesses of plaintiffs' case.[46]

H. Providing notice to class members

HB has led and continues to lead the settlement and claims administration process by selecting Gilardi & Co. LLC ("Gilardi"), a company associated with Kurtzman Carson Consultants, after a thorough and competitive bid process involving multiple bids from four different companies over a period of over two weeks.[47] HB has spent many lawyer hours and resources working with the class administrator Gilardi and communicating with class members regarding the settlement, including working with Gilardi, defendants, and plaintiffs' own experts to establish a website that allows class members to see expected payout amounts, specific to each class member. Through these communi-

[41] Berman Decl. ¶ 13; Simon Decl. ¶ 25.
[42] Berman Decl. ¶ 14; Simon Decl. ¶ 25.
[43] Berman Decl. ¶ 14; Simon Decl. ¶ 25.
[44] Berman Decl. ¶ 13; Simon Decl. ¶ 25.
[45] Berman Decl. ¶ 15; Simon Decl. ¶ 28.
[46] Berman Decl. ¶ 15; Simon Decl. ¶ 29.
[47] Berman Decl. ¶ 16.

cations, class members have been very active, connected and interested.[48] HB anticipates about twenty hours weekly working with Gilardi and class members until settlement distribution is completed, which is estimated to be in February 2018.[49]

III. ARGUMENT

Plaintiffs' counsel request 20% of the common fund ($41,732,889) in attorneys' fees. This Court "has discretion to award fees either as a percentage of the common fund established or pursuant to the lodestar method."[50] But the Ninth Circuit has explained that "the primary basis of the fee award remains the percentage method," although "the lodestar may provide a useful perspective on the reasonableness of a given percentage award."[51] So the "lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement."[52] For that reason, "[m]any courts and commentators have recognized that the percentage of the available fund analysis is the preferred approach in common-fund fee requests because it more closely aligns the interests of plaintiffs' counsel and the class, i.e., class counsel directly benefit from increasing the size of the class fund and working in the most efficient manner."[53]

As shown below, a 20% fee is reasonable. It is well below the 25% benchmark and is fully justified by the exceptional settlement obtained by plaintiffs' counsel. Class members who are eligible for payments under the settlement will receive 66% of their losses (approximately 50% after fees and expenses are deducted), which is a much higher rate of recovery than in most antitrust cases, in which fees of 25% or more are common. And a lodestar cross-check confirms that a 20% fee is reasonable, because the 3.62 multiplier is well within the normal range of multipliers in complex cases.

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[48] Berman Decl. ¶ 17.

[49] Berman Decl. ¶ 18.

[50] *Keller v. Elec. Arts, Inc.*, 2015 U.S. Dist. LEXIS 114387, at *11 (N.D. Cal. Aug. 18, 2015).

[51] *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) ("*Vizcaino II*") (footnote omitted).

[52] *Id.* at 1050 n.5.

[53] *Aichele v. City of L.A.*, 2015 U.S. Dist. LEXIS 120225, at *15 (C.D. Cal. Sept. 9, 2015).

Plaintiffs' counsel also request reimbursement of $3,184,274.38 in expenses incurred in this litigation from its inception through August 31, 2017, the vast majority of which are fees paid to experts. Finally, plaintiffs and class counsel request that the four class representatives be granted a service award of $20,000 each for their work in making the settlement possible.

A. The requested fee of twenty percent of the settlement is fair and reasonable (and even below market) under the percentage-of-the-recovery method.

When considering a request for attorneys' fees under the percentage-of-recovery method, the Ninth Circuit has "established a 25 percent 'benchmark' in percentage-of-the-fund cases that can be 'adjusted upward or downward to account for any unusual circumstances involved in [the] case.'"[54] The Ninth Circuit has instructed that although the benchmark of 25 percent "is not per se valid, it is a helpful 'starting point.'"[55] Courts consider the following factors to determine whether to apply either an upward or downward adjustment from that benchmark: (1) the results obtained by counsel; (2) the risks and complexity of issues in the case; (3) whether the attorneys' fees were entirely contingent upon success and whether counsel risked time and effort and advanced costs with no guarantee of compensation; (4) whether awards in similar cases justify the requested fee; and (5) whether the class was notified of the requested fees and had an opportunity to inform the Court of any concerns they have with the request.[56] Each of these factors supports the request for fees of 20 percent.

1. The 25% benchmark award is presumptively reasonable, reflecting a market based fee.

Plaintiffs' counsel seek fees that are $10.4 million under the 25% benchmark. "While the benchmark is not per se valid," the Ninth Circuit has recognized that requesting "the 25% benchmark award only" shows the reasonableness of a fee request.[57] As a court in this District recognized, "in

[54] *Fischel v. Equitable Life Assur. Soc'y of the United States*, 307 F.3d 997, 1006 (9th Cir. 2002) (citation omitted). *See also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ("we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar").

[55] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 955 (9th Cir. 2015) (citation omitted).

[56] *See, e.g.*, *Keller*, 2015 U.S. Dist. LEXIS 114387, at *12-13.

[57] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 955. *See also Keller v. NCAA*, 2015 U.S. Dist. LEXIS 166546, at *28-29 (N.D. Cal. Dec. 10, 2015) ("A fee award of 30 percent is within the usual range of fee awards that Ninth Circuit courts award in common fund cases.") (citations and internal quotation marks omitted).

most common fund cases, the award exceeds the [25%] benchmark."[58] And this Court has referred to the "the many cases in this circuit that have granted fee awards of 30% or more."[59]

Empirical evidence supports the 20% fee request. A study of attorneys' fees, known as the EMG Study,[60] looked at awards in 458 class actions between 2009 and 2013, finding that 21% was the midpoint for fees where the recovery exceeded $100 million. The largest recoveries, over $100 million, had mean and median fee percentages ranging from 16.6% to 25.5%, depending on the year.[61] Twenty-one percent is the mid-point of that range and below the average award of 22.3% for the highest recoveries (above $67.5 million).[62] The report finds that "[o]n average, fees were 27% of gross recovery during the 2009-2013 period, which is higher than the average fee percentage of 23% that we reported in our analyses of the 1993-2008 period."[63] And of the 53 settlements in this District, the mean and median awards were 26% and 25%, respectively, matching the mean and median percentages found more broadly in the 144 settlements surveyed in the Ninth Circuit.[64] Further, of the 19 antitrust settlements between 2009 and 2013, with a mean recovery of $501.09 million and a median recovery of $37.3 million, the mean and median fee percentages were 27% and 30%.

2. All relevant circumstances confirm a 20% fee award is reasonable.

a. A 20% fee is justified by the exceptional results achieved.

"The most important factor is the results achieved for the class." [65] Here, the results are exceptional because counsel's efforts created a $208,664,445 fund for the class (nearly 100% single damages at time of settlement and 66% of single damages currently). Far lesser results (with 20%

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[58] *De Mira v. Heartland Empl. Serv.*, 2014 U.S. Dist. LEXIS 33685, at *2 (N.D. Cal. Mar. 13, 2014) (quoting *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008)).

[59] *Vedachalam v. Tata Consultancy Servs., Ltd.*, 2013 U.S. Dist. LEXIS 100796, at *4 (N.D. Cal. July 18, 2013) (awarding 30% fee). This Court cited *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, at *18 n.12 (C.D. Cal. June 10, 2005), in which the court noted that more than 200 federal cases awarded fees higher than 30% as of 2005.

[60] Berman Decl., Ex. C (Eisenberg, Miller & Germano, *Attorneys' Fees in Class Actions: 2009-2013*) ("EMG Study") at 8.

[61] *Id.*

[62] *Id.* at 9.

[63] *Id.* at 8.

[64] *Id.* at 11, 12.

[65] *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. LEXIS 102408, at *63 (N.D. Cal. Aug. 3, 2016).

recovery of damages or less) have justified upward departures from the 25% benchmark.[66] The results achieved are even more substantial when considering the actual recovery amounts. The average recovery for a class member who was eligible to receive payment for four years is approximately $6,000, after accounting for the fees and expenses class counsel requests. Importantly, class counsel also negotiated an allocation and payment method whereby, at the time of disbursement, each non-opt-out class member who is entitled to payment will receive payment directly in the mail, without needing to make any showing or do anything further. Plaintiffs' counsel achieved these exceptional raw-dollar, percentage, and per capita results despite facing off against some of the best, and most well-resourced, defense lawyers in the country.[67]

b. A 20% fee is justified by the significant risk borne by plaintiffs' counsel and the complexity of issues in this case.

Plaintiffs' counsel faced real risks in pursuing this case, not the least of which was being initially dismissed on the pleadings as a matter of law based on *O'Bannon*. "The risk that further litigation might result in [p]laintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees."[68] And although numerous antitrust cases have been brought over the years against the NCAA, seldom if ever has there been a significant monetary award. An "antitrust class action is arguably the most complex action to prosecute. The

[66] *See, e.g.*, *id.* at *65 (holding that 20% antitrust recovery in a megafund case warranted "a modest increase over the Ninth Circuit benchmark"); *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046 ("a total award of approximately 9% of the possible damages . . . weighs in favor of granting the requested 28% fee"). In *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13627, at *28-29 (C.D. Cal. June 10, 2005), the court cited numerous examples, stating that the "the Settlement Fund, as a percentage of recovery, is greater than recoveries obtained in other cases where courts have awarded attorneys' fees of one-third of a common fund. *See, e.g.*, *Medical X-Ray*, 1998 U.S. Dist. LEXIS 14888, 1998 WL 661515, at *7-8 (court increased 25% benchmark to 33.3% where counsel recovered 17% of damages); *Crazy Eddie*, 824 F. Supp. at 326 (court increased 25% benchmark to 33.8% where counsel recovered 10% of damages); *In re General Instr. Sec. Litig.*, 209 F. Supp. 2d 423, 431, 434 (E.D. Pa. 2001) (one-third fee awarded from $48 million settlement fund that was 11% of the plaintiffs' estimated damages); *In re Corel Corp., Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 489-90, 498 (E.D. Pa. 2003) (one-third fee awarded from settlement fund that comprised about 15% of damages); *Cullen*, 197 F.R.D. at 148 (one-third awarded in fees from settlement of class consisting of defrauded vocational students that was 17% of the tuition the class members paid)."

[67] *See De Mira*, 2014 U.S. Dist. LEXIS 33685, at *5-6 (justifying 28% fee award in part because "Defendant was represented by an experienced and well-resourced defense firm. Had Class Counsel failed to vigorously prosecute this case, it is unlikely that this settlement could have been achieved").

[68] *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046-47; *accord In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (holding fees justified "because of the complexity of the issues and the risks").

legal and factual issues involved are always numerous and uncertain in outcome."[69] And it bears noting that the EMG Study looked at average fee awards based on risk, according to the type of litigation. The average fee award for ***low-medium risk*** antitrust cases between 2009 and 2013 was ***24.91%***. This data looking at the risk dimension in antitrust cases reinforces the reasonableness of counsel's 20% fee request.

Just one example of unique complexity in this case was the challenge in obtaining, digesting, and utilizing the data necessary to model impact and damages in this case. Plaintiffs needed to obtain tens of thousands of records from hundreds of different schools. Each school maintained its own data and frequently had different systems and formats for data. Plaintiffs' counsel not only had to identify and get the right data but also had to work with their experts to understand (for their model and class certification arguments) the various financial aid packages and sources of grants.

Along with the data endeavor, counsel had to analyze and understand eligibility rules and definitions, and apply all of this in the context of an NCAA manual the size of a telephone book. These were all very specific factors unique to college athletics that were necessary to develop a reliable working model to both identify class members and calculate damages, as well as present compelling certification arguments.

c. A 20% fee is justified by the contingent nature of the representation and the efforts and costs expended by plaintiffs' counsel.

The 20% fee request is also reasonable in light of the contingent nature of class counsel's representation; they would only get paid if the classes recovered and only out of the class recovery at that. "Courts have long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis with an ***enhanced fee*** to compensate them for the risk that they might be paid nothing at all for their work."[70] "This mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them ***a***

[69] *In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 U.S. Dist. LEXIS 175515, at *45 (N.D. Cal. Dec. 19, 2016) (internal citation, quotation marks, and ellipses omitted).

[70] *Ching v. Siemens Indus.*, 2014 U.S. Dist. LEXIS 89002, at *25 (N.D. Cal. June 27, 2014) (emphasis added).

premium over their normal hourly rates for winning contingency cases."[71] And "[c]ontingent fees that may ***far exceed*** the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose."[72]

In short, contingent fees are good for clients and the public alike. In exchange for increased predictability, decreased bean counting, and unlimited protection against downside risks—including the risk of a zero dollar recovery—a client agrees to pay its attorneys an enhanced fee if and only if the client recovers. And because contingent fees are almost always determined as a percentage of the client's recovery, such fees are necessarily aligned with and proportional to the results achieved for that client—in short, the client only pays for what it gets.[73] Lest contingent fees disappear altogether, the law must recognize both sides of the bargain—namely, a significant upside fee for successful contingent representations. If it instead becomes that lawyers must not only bear all of the downside risk but must also do so only for the prospect of being paid what they would have been paid by the hour, the law will discourage sophisticated counsel from pursuing risky representations on behalf of non-wealthy clients.[74]

Here, counsel for the classes have spent more than three years investigating and litigating this case, without receiving any compensation to do so. Such burdens are significant, even for law firms of the stature of plaintiffs' counsel. For instance, the fact that no money was coming in did not relieve class counsel from having to pay the salaries of the associates and staff working on this case, or from having to cover non-reimbursable overhead expenses like rent. Class counsel floated these

[71] *Vizcaino II*, 290 F.3d at 1051 (emphasis added).

[72] *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) (emphasis added).

[73] *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 887 (1987) ("[E]ven uninformed clients can align their attorney's interests with their own by compensating them through a percentage-of-recovery fee formula.").

[74] *See Vizcaino II*, 290 F.3d at 1051 ("In common fund cases, 'attorneys whose compensation depends on their winning the case must make up in compensation in the cases they win for the lack of compensation in the cases they lose.'" (citation omitted)).

expenses while assuming the risk that there might never be ***any*** repayment.[75] They also advanced over $3,184,274.38 in expenses, interest-free, prosecuting this action, including all expert fees and expenses, which are a substantial but necessary burden in any antitrust action. "This substantial outlay, when there is a risk that none of it will be recovered, further supports the award of the requested fees."[76] So a 20% award would reasonably compensate plaintiffs' counsel for carrying the financial burdens of this risky case.[77]

d. A 20% fee accords with fee awards in analogous cases.

An award of 20% of the common fund is consistent with, and within the range of, fee awards out of common funds of comparable size—which is not surprising since the benchmark is 25%. Of course, because "the percentage may be adjusted to account for any unusual circumstances,"[78] it is possible to cite many examples of percentage-of-the-fund awards falling on either side of that benchmark. But "[p]ercentage awards of between 20% and 30% are common"[79] and "in most common fund cases, the award exceeds th[e] benchmark."[80]

In fact, of the three common funds of nearly equivalent size cited by the Ninth Circuit in *Vizcaino II*,[81] ***all three cases awarded fees at or above the 25 percent benchmark***, and ***two of the three awards*** resulted in multipliers exceeding the 3.62 multiplier requested here:

Case	Fund	Fee (%)	Fee ($)	Multiplier
In re Rite Aid Corp. Secs. Litig., 146 F. Supp. 2d 706 (E.D. Pa. 2001)	$193M	25.0%	$48M	4.5-8.5
In re Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D. Tex. 1999)	$190M	25.0%	$47M	1.4
In re Merry-Go-Round Enters., 244 B.R. 327 (Bankr. D. Md. 2000)	$185M	40.0%	$71M	19.6

[75] *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376-77 (9th Cir. 1993) ("Class counsel, however, have the case on a contingency. Moreover, it is a double contingency; first, they must prevail on the class claims, and then they must find some way to collect what they win.").

[76] *In re Omnivision Techs.*, 559 F. Supp. 2d at 1047.

[77] *See Torrisi*, 8 F.3d at 1377 ("The 25% contingent fee rewarded class counsel not only for the hours they had in the case to the date of the settlement, but for carrying the financial burden of the case, effectively prosecuting it and, by reason of their expert handling of the case, achieving a just settlement for the class.").

[78] *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997).

[79] *De Mira*, 2014 U.S. Dist. LEXIS 33685, at *3.

[80] *Id.* at *2 (alteration in original) (citation and internal quotation marks omitted).

[81] 290 F.3d at 1052 (upholding 28% fee on $97 million settlement fund).

Indeed, "federal district courts across the country have, in the class action settlement context, routinely awarded class counsel fees in excess of the 25% 'benchmark,' even in so-called 'mega-fund' cases."[82]

While *Vizcaino II* alone demonstrates that both the requested fee and resultant multiplier is well within the reasonable range, additional market information further shows that a 20% award is reasonable and within the range of fee awards from analogous cases. As discussed above, the EMG Study reports that the highest decile of recoveries in the study, above $67.5 million, averaged a 22.3% fee award.[83] The largest recoveries in the study, above $100 million, had mean and median fee percentages that ranged from 16.6% to 25.5%, depending on the year.[84] Across all settlements in the study, "[o]n average, fees were 27% of gross recovery during the 2009-2013 period, which is higher than the average fee percentage of 23% that we reported in our analyses of the 1993-2008 period."[85] And of the 53 settlements in the Northern District of California, the mean and median

[82] *Allapattah Servs. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1210 (S.D. Fla. 2006) (31.33% fee on $1.075 billion settlement fund); *accord In re Urethane Antitrust Litig.*, 2016 U.S. Dist. LEXIS 99839, at *82 (D. Kan. July 29, 2016) (awarding 33.33% fee on $835 million settlement, noting that "Counsel's expert has identified 34 megafund cases with settlements of at least $100 million in which the court awarded fees of 30 percent or higher"). *See also, e.g.*, *In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 U.S. Dist. LEXIS 175515, at *6 (awarding 25% fee on $124.5 million settlement fund); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. LEXIS 102408, at *55-56 (27.5% fee on $576.75 million settlement fund); *In re Polyurethane Foam Antitrust Litig.*, 2015 U.S. Dist. LEXIS 23482 (N.D. Ohio Feb. 26, 2015) (awarding 30% fee on $147.8 million settlement fund); *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 170 (D. Mass. 2014) (28% fee on $325 million settlement fund); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 U.S. Dist. LEXIS 49885, at *72 (N.D. Cal. Apr. 1, 2013) (28.6% fee on $571 million settlement fund); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1366 (S.D. Fla. 2011) (33.3% fee on $510 million settlement fund); *In re Comverse Tech., Inc.*, 2010 U.S. Dist. LEXIS 63342 (E.D.N.Y. June 23, 2010) (25% fee on $225 million settlement fund); *In re Rite Aid Corp. Secs. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (25% fee on $126 million settlement fund, resulting in multiplier of 6.96); *In re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXIS 10532 (E.D. Pa. June 2, 2004) (30% fee on $202.5 million settlement fund); *In re Buspirone Antitrust Litig.*, 2003 U.S. Dist. LEXIS 26538 (S.D.N.Y. Apr. 11, 2003) (33.3% fee of a $220 million dollar fund); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067 (D.D.C. July 13, 2001) (34.6% fee on $365 million settlement fund); *In re Ikon Office Sols.*, 194 F.R.D. 166, 170 (E.D. Pa. 2000) (30% fee on $111 million settlement fund); *In re Brand Name Prescription Drugs Antitrust Litig.*, 2000 U.S. Dist. LEXIS 1734 (N.D. Ill. Feb. 9, 2000) (25% fee on $696 million settlement fund); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 395 (S.D.N.Y. 1999) (27.5% fee on $116 million settlement fund).

[83] See EMG Study at 9-10.

[84] *See id.* at 8.

[85] *Id.*

percentages awarded were 26% and 25% respectively, and of the 144 settlements in the Ninth Circuit, the mean and median percentages awarded were also 26% and 25% respectively.[86] The study further reports that 19 antitrust settlements between 2009-2013 had a mean recovery of $501.09 million and a median recovery of $37.3 million, with mean and median percentages awarded of 27% and 30% respectively.[87] In addition, the study reports that "the fee-to-recovery ratio tends to be lower in cases with very large recoveries."[88] Conversely, the study at the same time reports that "higher multipliers are associated with higher recoveries."[89] Here, again, the fact that the average award in mega-fund cases across all subject matters and all locales in 2011 was greater than the 20% fee requested here confirms, like *Vizcaino II* does, that a 20% fee on a recovery of this size is reasonable and well inside the range of fee awards in comparable common fund cases.

e. A 20% fee does not award windfall profits to counsel even if the settlement were deemed a megafund.

In reiterating that any fee award must be reasonable, the Ninth Circuit has remarked that "for example, where awarding 25% of a 'megafund' would yield windfall profits for class counsel in light of the hours spent on the case, courts should adjust the bench-mark percentage or employ the lodestar method instead."[90] As an initial matter, counsel do not seek the benchmark 25% fee, notwithstanding the cases and studies cited in the previous section that would support such a request. And the 20% fee is reasonable. This is not a mass tort or fraud case in which mere disclosure of a government investigation all but guarantees the creation of a megafund, notwithstanding what counsel does or does not do; instead, this case went from zero recovery to megafund ***solely*** because of counsel's efforts and expenditures of expert fees and other expenses.[91] Relatedly, the size of the common fund

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[86] *Id*. at 11, 12.

[87] *Id.* at 13; *see also In re Auto. Refinishing Paint Antitrust Litig.*, 2008 U.S. Dist. LEXIS 569, at *16 (E.D. Pa. Jan. 3, 2008) ("We have previously noted that is not unusual in antitrust class actions for the attorneys to receive awards for fees in the 30% range.").

[88] EMG Study at 8.

[89] *Id.* at 27.

[90] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 942 (citation omitted).

[91] *Accord, e.g.*, *In re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXIS 10532, at *51 ("the highly favorable settlement was attributable to the petitioners' skill and it is inappropriate to penalize them for their success"); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067, at *68 ("This Court agrees that it is not fair to penalize counsel for obtaining fine results for their clients.").

obtained in this case is not "merely a factor of the size of the class."[92] A megafund was created in this case despite the size of the classes, not because of it. And above-benchmark fees frequently are awarded where megafunds must be shared by hundreds of thousands, if not millions, of class members.[93] Here, there are approximately 45,000 class members.

So while applying the so-called "increase-decrease" principle may be appropriate in certain cases,[94] it is tenuous here, where the size of the fund is not merely a factor of the size of the classes but is instead directly related to the efforts of plaintiffs' counsel, who achieved exceptional, megafund results for a relatively discrete set of class members. In so doing, they obtained incidental benefits for the public, expended huge amounts of time and money, and faced considerable risks of non-recovery (and thus non-payment) in pursuing this complex antitrust case against well-financed, top-notch counsel. The 20% fee request is below the market contingency rate, below the Ninth Circuit benchmark rate, and below rates awarded in other megafund cases, and results in a multiplier within the range of multipliers that the Ninth Circuit has deemed reasonable. The 20% fee request is eminently reasonable and justified based on all the circumstances of this case. To nonetheless apply the increase-decrease principle and reduce an otherwise reasonable fee simply because this is a

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[92] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 943.

[93] *See In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 U.S. Dist. LEXIS 175515, at *36 ($124.5 million settlement for "millions of class members"); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. LEXIS 102408, at *1 ($576.75 million settlement for millions of class members); *In re Polyurethane Foam Antitrust Litig.*, 2015 U.S. Dist. LEXIS 23482, at *8 ($147.8 million settlement for "more than 48,000" class members); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 U.S. Dist. LEXIS 49885, at *58 ($571 million settlement fund for "235,808 claimants"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1366 ($510 million settlement for "approximately 13 million" class members); *In re Comverse Tech., Inc.*, 2010 U.S. Dist. LEXIS 63342, at *5 ($225 million settlement fund for "more than 204,000 potential class members"); *In re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXIS 10532, at *18 ($202.5 million settlement for "approximately 80,000 companies"); *In re Ikon Office Sols.*, 194 F.R.D. at 170 ($111 million settlement for more than 200,000 class members); *but see In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067 ($365 million settlement fund for 4,000 class members).

[94] Many courts are not so sure. As Judge Katz put it in oft-quoted language: "The court will not reduce the requested award simply for the sake of doing so when every other factor ordinarily considered weighs in favor of approving class counsel's request of thirty percent. . . . It is difficult to discern any consistent principle in reducing large awards other than an inchoate feeling that it is simply inappropriate to award attorneys' fees above some unspecified dollar amount, even if all of the other factors ordinarily considered relevant in determining the percentage would support a higher percentage. Such an approach also fails to appreciate the immense risks undertaken by attorneys in prosecuting complex cases in which there is a great risk of no recovery." *In re Ikon Office Sols.*, 194 F.R.D. at 196-97 (citations omitted).

"megafund" case would be unreasonable.

B. Using lodestar as a cross-check further supports the requested fees.

As the Ninth Circuit has explained, "a crosscheck using the lodestar method can confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate."[95] Here, counsel for plaintiffs have invested $11,515,749.30 in attorneys' and para-professionals' time in this case, and request a 3.62 multiplier, which is well within the range of multipliers awarded in similar cases.

A court may give an upwards adjustment to a lodestar (through a positive multiplier) to reflect "reasonableness" factors, including: (1) the amount involved and the results obtained, (2) the time and labor required, (3) the novelty and difficulty of the questions involved, (4) the skill requisite to perform the legal service properly, (5) the preclusion of other employment by the attorney due to acceptance of the case, (6) the customary fee, (7) the experience, reputation, and ability of the attorneys, and (8) awards in similar cases.[96] These are referred to as *Kerr* "reasonableness" factors after the Ninth Circuit's opinion in *Kerr v. Screen Extras Guild, Inc.*[97] "Foremost among these considerations, however, is the benefit obtained for the class."[98]

1. Plaintiffs' counsel achieved an exceptional result for the classes.

The first factor, the amount involved and the results for the classes, strongly supports the 20% fee request and the 3.62 multiplier. At the time of settlement, the parties agreed to a fund equaling nearly 100% of single damages according to Dr. Rascher's model.[99] And after settlement, as more class members became eligible to receive payment from the $208 million fund (because their schools agreed to start paying COA), the recovery for all of those eligible class members now stands

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[95] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 949 (internal quotation marks and citation omitted).

[96] *Id.* at 941-42. The Supreme Court has since called into question the relevance of two of the original *Kerr* factors: the contingent nature of the fee and the "desirability" of the case. *See Resurrection Bay Conserv. All. v. City of Seward*, 640 F.3d 1087, 1095 n.5 (9th Cir. 2011). Other factors such as "time limitations imposed by the client or the circumstances" and "the nature and length of the professional relationship with the client" do not readily apply here.

[97] 526 F.2d 67, 70 (9th Cir. 1975).

[98] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 942.

[99] *See* ECF No. 560-4.

at 66% of their single damages.[100] If the Court grants class counsel's fee and expense request, class members will receive approximately 50% of their damages, a result almost never achieved in large, complex antitrust cases.[101]

2. Plaintiffs' counsel expended significant resources on behalf of the classes.

Plaintiffs' counsel collectively devoted $11,515,749.30 in attorneys' and para-professionals' time in litigating this matter. They have also spent $3,184,274.38 in expenses in this litigation. This commitment of time, personnel, and money to the classes supports the requested award.

3. This case presented difficult questions, requiring extraordinary skill by plaintiffs' counsel.

The third and fourth *Kerr* factors—the difficulty of the questions presented by the litigation and the skill required to perform the legal services properly—both support the requested award. Plaintiffs' counsel first had to overcome defendants' argument that *O'Bannon* precluded their claim, and then had to present the motion for certification of damage classes so as to overcome this Court's order in *O'Bannon* declining to certify a damages class. And plaintiffs' counsel confronted the difficulties in establishing which schools would have provided COA (and which would not have) in the *but-for* world. In working with an economist to provide a workable, reliable economic model to support these arguments, counsel had to identify, acquire, and understand vast amounts of data, not only to ensure the workability of a reliable antitrust impact and damages model, but also to show the Court an administratively feasible method to identify class members and calculate damages specific to each school and student. And of course, plaintiffs faced the risk of proving liability before even getting a damages award. Counsel performed extensive work in discovery building the liability case to establish that defendants violated the antitrust laws by capping the GIA.

Defendants vigorously opposed plaintiffs at every turn, including on class certification and the merits (with such opposition continuing in the injunctive relief case). Settlement was not reached

[100] This smaller percentage recovery is a function of math—as the number of class members eligible to recover damages from the $209 million goes up, the average *pro rata* recovery goes down. There are few reported cases with sixty-six percent settlement recovery in large antitrust cases.

[101] *See, e.g.*, *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. LEXIS 102408, at *65 (holding that 20% antitrust recovery in a megafund case warranted "a modest increase over the Ninth Circuit benchmark"); *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046 ("a total award of approximately 9% of the possible damages . . . weighs in favor of granting the requested 28% fee").

until class certification had been fully briefed. These issues have required advocacy and skill beyond routine litigation, especially in light of the strength of counsel hired by the multiple defendants in this action.

4. The market rate of antitrust lawyers with the experience of plaintiffs' counsel supports the request.

The hourly rates of plaintiffs' counsel are in line with market rates in this District. The most senior HB attorney on the case, Steve Berman, bills at an hourly rate of $950. Other partners at HB have hourly rates ranging between $578 and $760. Associates at HB billed at hourly rates ranging from $295 to $630.[102] The most senior PSW attorneys on the case—Clifford Pearson and Bruce Simon—billed at hourly rates between $835 and $1,035 over the course of this matter. Another PSW partner billed at between $715 and $870 per hour, while PSW "of counsel" lawyers billed at between $450 and $900 per hour. And PSW associates billed at hourly rates ranging from $350 to $900. Staff and law clerks at PSW billed at hourly rates ranging from between $175 to $225.[103] The two partners at Pritzker Levine who worked on this matter—Elizabeth Pritzker and Jonathan Levine—have an hourly rate of $695 each. The associates and "of counsel" attorney who worked on this matter for Pritzker Levine have hourly rates ranging from $495 to $625.[104]

All of these rates are well within the range of $200 to $1,080 charged by attorneys in California in 2015, as shown by a reputable survey of billing rates.[105]

5. Plaintiffs' counsel by-passed other cases due to their commitment to this case.

Plaintiffs' counsel have dedicated a core team of individuals to the litigation of this action. The consequence of dedicating a team of experienced antitrust attorneys has meant that many of these professionals could not work on other cases. The choice of plaintiffs' counsel to commit a significant number of attorneys almost exclusively to this litigation, forgoing other cases and other projects, further supports the request for fees.

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[102] *See* Berman Decl., Ex. A (setting forth HB hourly rates).
[103] *See* Simon Decl., Ex. B (setting forth PSW hourly rates).
[104] *See* Pritzker Decl., Ex. 2 (setting forth Pritzker Levine hourly rates).
[105] Berman Decl., Ex. D (2015 NLJ Billing Survey). *See also* Pritzker Decl. ¶ 23.

6. The requested fee is reasonable when compared to fees in similar litigation.

The sixth and eighth *Kerr* factors—the customary fee and awards in similar cases—both support the fee request. A 3.62 multiplier for a fee award of 20% is reasonable in light of awards in other cases. In *Vizcaino II*, the Ninth Circuit affirmed a fee award based on a 3.65 multiplier.[106] This is nearly the exact multiplier counsel ask for here. And in another case, the Ninth Circuit affirmed a 6.85 multiplier, holding that it "falls well within the range of multipliers that courts have allowed."[107] Similarly here, a 3.62 multiplier is reasonable, particularly given the difficult nature of this litigation and the fact that the fund equals approximately 66% of class members' damages.

The requested 3.62 multiplier is well within the range of awards in other cases. In *In re Linerboard Antitrust Litigation*,[108] the district court explained that "during 2001-2003, the average multiplier approved in common fund class actions was 4.35 and during 30 year period from 1973-2003, [the] average multiplier approved in common fund class actions was 3.89." So the 3.62 multiplier requested by plaintiffs' counsel in this matter is below the midrange of multipliers awarded in other cases—and almost none of these other cases, if any, approach the success of the results here. Indeed, multipliers of 4.0 and above are frequently applied in granting fee awards from common funds.[109]

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[106] 290 F.3d at 1050-51; *id*. at 1052-54 (noting district court cases in the Ninth Circuit approving multipliers as high as 6.2, and citing only 3 of 24 decisions with approved multipliers below 1.4).

[107] *Steiner v. Am. Broad. Co.*, 248 F. App'x 780, 783 (9th Cir. 2007). *See also Buccellato v. AT&T Operations, Inc.*, 2011 U.S. Dist. LEXIS 85699, at *4 (N.D. Cal. June 30, 2011) ("The resulting multiplier of 4.3 is reasonable in light of the time and labor required, the difficulty of the issues involved, the requisite legal skill and experience necessary, the excellent and quick results obtained for the Class, the contingent nature of the fee and risk of no payment, and the range of fees that are customary.").

[108] 2004 U.S. Dist. LEXIS 10532, at *50 (E.D. Pa. June 2, 2004) (citing Stuart J. Logan, et al., *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Reports 167 (2003)).

[109] *See, e.g., In re Credit Default Swaps Antitrust Litig.*, 2016 U.S. Dist. LEXIS 54587, at *54 (S.D.N.Y. Apr. 25, 2016) (lodestar multiplier "of just over 6"); *Gutierrez v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist. LEXIS 67298, at *25 (N.D. Cal. May 21, 2015) (awarding $18.5 million in fees, noting that "this order allows a multiplier of 5.5 mainly on account of the fine results achieved on behalf of the class, the risk of non-payment they accepted, the superior quality of their efforts, and the delay in payment"); *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 448 (E.D.N.Y. 2014) (multiplier of "about 3.41"); *Athale v. Sinotech Energy Ltd.*, 2013 U.S. Dist. LEXIS 199696 (S.D.N.Y. Sept. 4, 2013) (20% fee award with 5.65 multiplier); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers"); *In re Enron Corp. Secs., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 741 (S.D. Tex. 2008) (multiplier of 5.2); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319 (S.D.N.Y. 2005) (4.0 multiplier); *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 998-99 (D. Minn. 2005) (25% fee with 4.7 multiplier); *In re*

7. The reputation, ability, and efficiency of plaintiffs' counsel supports the requested fee.

The three firms requesting attorneys' fees in this matter are among the most well-respected class action litigation firms in the country, as this Court has witnessed in numerous cases.[110] And the efficiency with which plaintiffs' counsel achieved such exceptional results is laudable because it benefits the classes. For example, by working efficiently and keeping a tight hold on the lodestar rein, class counsel is less inclined to seek a benchmark award of 25 percent (or more), resulting in more money to class members. So class counsel's efficiency should be considered favorably in evaluating the reasonableness of the fee request.[111]

Plaintiffs' counsel have focused on the most efficient path to results, not devoting resources to "nice to have" belt-and-suspender litigation.[112] These actions reduced their lodestar, resulting in a higher multiplier when cross-checking counsel's percentage-of-the-fund award. But that's a good thing.[113] Strategic and efficient lawyering not only encourages "the just, speedy, and inexpensive determination of every action and proceeding"[114] but also directly correlates with obtaining superb results. Meet and confers with fewer lawyers tend to be more productive; oral arguments tend to go

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Rite Aid Corp. Secs. Litig., 362 F. Supp. 2d at 587 (25% fee with 6.96 multiplier); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 134-35 (D.N.J. 2002) (28% fee with 4.3 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (33.3% fee, resulting in "modest multiplier of 4.65"); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) ("The percentage fee award in this case represents a multiplier of approximately 3.97 times Class Counsel's lodestar of $36,191,751. A multiplier of 3.97 is not unreasonable in this type of case."); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (5.5 multiplier); *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297 (D.N.J. 1995) (9.3 multiplier), *aff'd*, 66 F.3d 314 (3d Cir. 1995); *Rabin v. Concord Assets Grp., Inc.*, 1991 U.S. Dist. LEXIS 18273, at *4 (S.D.N.Y. Dec. 19, 1991) (awarding 4.4 multiplier and explaining that "multipliers of between 3 and 4.5 have been common") (internal quotation marks and citation omitted).

[110] *See* firm resumes at Berman Decl., Ex. E; Simon Decl., Ex. A; Pritzker Decl., Ex. 1.

[111] *See Vizcaino II*, 290 F.3d at 1050 n.5 ("The lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee.").

[112] *See* Berman Decl. ¶ 10; Simon Decl. ¶ 17 n.2.

[113] *See In re Xcel Energy, Inc.*, 364 F. Supp. 2d at 996 ("But for the cooperation and efficiency of counsel, the lodestar of plaintiffs' counsel would have been substantially more and would have required this court to devote significant judicial resources to its management of the case. Instead, counsel moved the case along expeditiously, and the court determines that the time and labor spent to be reasonable and fully supportive of the 25% attorney fee.").

[114] Fed. R. Civ. P. 1.

better when the person who wrote the motion also argues the motion; and depositions are more effective when the person taking the deposition drafted the questions for the deposition.

Although modification of a fee award based on a lodestar cross-check may serve some utility in cases at the fringes, routine recourse to it threatens to swallow the benefits that the percentage-of-the-fund method provides, for "if a court sometimes employs a lodestar cross-check, then self-interested entrepreneurial lawyers will conduct their affairs accordingly."[115] In sum, in order to maximize the class recovery, promote optimal deterrence, incentivize efficient, speedy, and inexpensive dispute resolution, and conserve judicial resources, this Court should award attorneys' fees in an amount of 20% of the fund recovered for the classes.

C. Class counsel's expenses are reasonable and were necessarily incurred.

Class counsel seek reimbursement of $3,184,274.38 in expenses necessarily incurred in the prosecution of this action. All expenses that are typically billed by attorneys to paying clients in the marketplace are compensable.[116] With this motion, plaintiffs provide an accounting of the expenses incurred by class counsel.[117] The primary expense in this case is for experts. Several additional categories account for the remainder, including filing fees, travel expenses, costs of court and deposition transcripts, and computer research expenses. All of these costs were necessarily and reasonably incurred to achieve this $208 million dollar recovery, and they reflect market rates for the various categories of expenses incurred. And plaintiffs' counsel advanced these necessary expenses, interest-free, without assurance that they would even be recouped. The request of plaintiffs' counsel for reimbursement of expenses is reasonable.[118]

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[115] Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 145-46 (2006). *See also* Sandra R. McCandless et al., Tort Trial & Ins. Practice Section of the Am. Bar Ass'n, *Report on Contingent Fees in Class Action Litigation*, 25 Rev. Litig. 459, 471 (2006) ("The lodestar cross-check reintroduces the problems of the lodestar method. If the attorneys in the previous example know that their fee, when calculated as a percentage, will be 'crosschecked' by the lodestar, they have every financial incentive to put as many hours into the file as possible. They may do unnecessary work or delay settlement to make sure that the multiplier needed to get to their percentage fee does not appear to be out of line.").

[116] *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

[117] *See* Berman Decl., Ex. B; Simon Decl., Ex. C; Pritzker Decl., Ex. 3.

[118] *See Vedachalam*, 2013 U.S. Dist. LEXIS 100796, at *9-10 ("Plaintiffs' Counsel have incurred unreimbursed costs prosecuting this case on behalf of the Class . . . . Plaintiffs' Counsel put forward

D. Service awards should be granted to the class representatives.

Plaintiffs request that the Court approve service awards in the amount of $20,000 each for each class representative, to be deducted from the settlement funds. Service awards for class representatives are provided to encourage them to undertake the responsibilities and risks of representing the classes and to recognize the time and effort spent in the case. Incentive awards "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general."[119] Here, the class representatives spent a significant amount of time assisting in the litigation of this case, in preparing for and having their depositions taken, in searching for and producing documents that spanned many years, and in conferring with counsel throughout the litigation.[120] Awards of $20,000 each are consistent with service awards in other cases.[121]

IV. CONCLUSION

Plaintiffs and class counsel respectfully submit that their requests for fees, expenses, and service awards are reasonable and should be granted.

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these out-of-pocket costs without assurance that they would be repaid. These litigation expenses were necessary to secure the resolution of this litigation.").

[119] *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009); *see also Just Film, Inc. v. Merch. Servs., Inc.*, 2013 U.S. Dist. LEXIS 186623, at *4-5 (N.D. Cal. Dec. 11, 2013) (explaining that incentive awards "may be made to class representatives based on '(1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulty encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation and; (5) the personal benefit (of lack thereof) enjoyed by the class representative as a result of the litigation.'" (citation omitted)).

[120] *See* Berman Decl. ¶¶ 22-25; Simon Decl. ¶¶ 47-48; Pritzker Decl. ¶¶ 26-30.

[121] *See Dandan Pan v. Qualcomm Inc.*, 2017 U.S. Dist. LEXIS 120150, at *42 (S.D. Cal. July 31, 2017) ("[A] $50,000.000-per-Class-Representative award is reasonable. In particular, there is no doubt that in the present case the Class Representatives have helped secure substantial relief for the class . . . ."); *Syed v. M-I, L.L.C.*, 2017 U.S. Dist. LEXIS 118064, at *26-27 (E.D. Cal. July 27, 2017) (awarding $15,000 and $20,000 to two class representatives); *In re High-Tech Empl. Antitrust Litig.*, 2015 U.S. Dist. LEXIS 118052, at *62 (N.D. Cal. Sept. 2, 2015) (authorizing $80,000 and $120,000 service awards in case with $415 million settlement fund, in addition to $20,000 award to each for prior settlement); *Godshall v. Franklin Mint Co.*, 2004 U.S. Dist. LEXIS 23976, at *21 (E.D. Pa. Dec. 1, 2004) (granting incentive award of $20,000 to each plaintiff); *In re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXISIS 10532, at *56-58 (awarding $ 25,000 for each of five class representatives and collecting cases in which awards of $24,000 or more were authorized); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (authorizing $50,000 incentive award in case with settlement fund of $76,723,213.26).

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Respectfully Submitted,

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