UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Thrift Development Corporation, Plaintiff, v. American International Group, Inc.; Chartis, Inc., and American Home Assurance Co., Defendants.	**Civil Action No. 8:12-cv-00861-BHH**

MEMORANDUM IN SUPPORT OF PLAINTIFF'S PETITION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES AND SERVICE AWARD

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I. INTRODUCTION

Class Counsel in the above-captioned case[1] hereby moves this Court for an award of attorneys' fees and expenses in the amount of six hundred and fifty-one thousand dollars ($651,000), having achieved the class action settlement that has been submitted for the Court's approval, as well as a service award of $5,000 for the named plaintiff, Thrift Development Corporation ("Plaintiff" or "Thrift"), to compensate it for its efforts and commitment on behalf of the Class. As set forth herein, the requested amounts are fair, reasonable, and justified under applicable law and given the circumstances of this case, including the significant challenges and risks that Class Counsel assumed in pursuing this difficult case, the significant time and resources that Class Counsel has devoted, and the substantial benefits those efforts generated for the Class and other employers.

Class Counsel's outlay of time and resources in this case has been considerable, with a combined lodestar of $2,039,230.50, as well as out-of-pocket expenses of $382,518.27. *See* Declaration of James C. Bradley ("Bradley Decl."), filed herewith, ¶¶ 13, 19; Declaration of Michael P. Thornton ("Thornton Decl."), filed herewith, ¶¶ 14, 18; Declaration of Roger N. Heller ("Heller Decl."), filed herewith, ¶¶ 16, 22, Exs. A, B. Given the resources Class Counsel have expended and the strong result achieved for the Class, the amount of attorneys' fees and expenses requested, $651,000, is absolutely reasonable. Likewise, the $5,000 service award requested for Thrift is in-line with the amounts awarded in other similar cases and is well justified given Thrift's substantial commitment on behalf of the Class here.

[1] Class Counsel are Richardson, Patrick, Westbrook & Brickman, LLC, Thornton Law Firm LLP, and Lieff Cabraser Heimann & Bernstein LLP.

II. BACKGROUND OF CLASS COUNSEL'S EFFORTS IN THIS LITIGATION AND THE SETTLEMENT.

Plaintiff filed the class action complaint in this case on March 26, 2012, alleging that Defendants and their affiliated entities failed to timely and properly revise unit statistical reports to reflect third-party recoveries received by Defendants and their affiliates in connection with workers' compensation claims in South Carolina, resulting in the application of incorrect ex-mods to the calculation of workers' compensation insurance premiums paid by employers. *See* ECF No. 1. Defendants filed a motion to dismiss for failure to state a claim on May 23, 2012, which the Court denied on September 21, 2012. *See* ECF Nos. 13, 45.

Before filing the compliant, Class Counsel conducted an extensive investigation regarding the issues in this case, including reviewing and analyzing Defendants' insurance contracts and applicable state regulations, governing rules promulgated by the National Council on Compensation Insurance ("NCCI"), and insureds' billing histories. In addition, following the filing of the complaint, Class Counsel conducted extensive ongoing factual investigation and legal research regarding the issues in the case. Furthermore, in August 2013, due at least in part to this case, NCCI, which serves as the workers' compensation data collection and ratings bureau for South Carolina, placed AIG into its Data Quality Remediation Program in order to, among other things, identify and correct instances in which Defendants had failed to timely and properly revise unit statistical reports to reflect third-party recoveries. This remediation program has generated benefits far beyond the scope of the Class in this case, resulting in premium refunds for employers across the country.

Between 2012 and 2014, the parties engaged in extensive discovery, including fact discovery, expert discovery, and third-party discovery. Class Counsel's discovery efforts included (1) reviewing nearly 90,000 documents (consisting of over 800,000 pages) produced by

Defendants, NCCI, and the South Carolina Second Injury Fund ("SCSIF"); (2) analyzing voluminous data regarding third-party recoveries and unit statistical information; and (3) deposing 12 senior AIG employees, 2 senior personnel at the SCSIF, and one senior personnel at NCCI. In addition, Class Counsel litigated several motions to compel. *See* ECF Nos. 55, 79, 210. Class Counsel also worked extensively with their experts on both liability and class damages issues and took the deposition of Defendants' designated expert. Moreover, Class Counsel had to devote considerable time and energy to analyze and understand, among other complex subjects, NCCI's extensive rules regarding the reporting of third-party recoveries and their impact on employers' ex-mods and had to apply these rules to a voluminous amount of data they extracted from Defendants' unit statistical reporting and insureds' premium information. Class Counsel gained sufficient expertise regarding these and other complex issues only through their hard work in reviewing large quantities of documents and data, all while litigating against one of the largest insurers in the world, which was of course represented by experienced and sophisticated counsel.

In early 2014, Plaintiff filed a motion for class certification, and Defendants filed a motion for summary judgment and a motion to exclude one of Plaintiff's experts. *See* ECF Nos. 130, 159, 174. These motions presented significant challenges, and Class Counsel was required to spend significant time researching, analyzing, and briefing the issues raised by these motions, as well as strategizing and preparing for argument.

Prior to the Court ruling on the pending motions for class certification, summary judgment, and the exclusion of Plaintiff's expert, and with counsel for both sides being well-educated about the strengths and risks of their respective litigation positions, the parties settled the case. The settlement was the result of arm's-length and hard fought negotiations. On July 14,

2014, the parties engaged in a full-day mediation session with experienced and well-respected mediator David M. Brodsky of Brodsky ADR LLC. While the parties did not reach an agreement during this session, the parties continued to negotiate a potential resolution through Mr. Brodsky, and were ultimately able, with the assistance of Mr. Brodsky, to reach an agreement in principle regarding the terms of a class-wide settlement. After an agreement in principle was reached on the merits, the parties, with the assistance of Mr. Brodsky, reached an agreement in principle regarding Class Counsel's request for attorneys' fees and expenses. Thereafter, the parties worked extensively on memorializing their agreement in a final written settlement agreement and on preparing the class notice, plan of allocation, and other exhibits to the settlement. Throughout the process, negotiations were arms-length and hard-fought. In fact, as the record reflects, AIG vigorously litigated this case from the very beginning, raising several dispositive issues that could have derailed this case considerably or entirely. Ongoing litigation would have been time-consuming and would have presented many litigation risks.

Pursuant to the Settlement Agreement, Defendants will pay up to a total of $2,325,000 ("Total Monetary Value"). This amount includes refunds worth an estimated $900,000, which Defendants will provide to Class Members through their remediation program with NCCI, and additional funds ($1,4500,000 less any Court-awarded attorneys' fees, costs, service award, and administrative costs) from which Class Members who submit valid claims will be sent refunds. The amount of each claimant's refund is based on the claimant's alleged premium overpayments as calculated by the parties' Calculation Advisor using the pertinent recovery and premium information from Defendants and NCCI and as set forth in detail in the parties' Plan of Allocation. (Settlement Agreement, ¶¶ III.C-D; Ex. C (Plan of Allocation)). The Total Monetary Value of $2,325,000 represents approximately 50% of the premium overpayments by the

Settlement Class—a strong result, particularly considering the significant risks and delays of continued and protracted litigation.

Consistent with well-established legal principles, Class Counsel respectfully seek a reasonable fee for their efforts in producing this result for the class. The hours and expenses incurred by Class Counsel to date demonstrate the extent of their efforts and contributions on behalf of the class. As of September 25, 2015, Class Counsel's combined lodestar is more than $2,039,230.50, and Class Counsel have incurred $382,518.27 in reasonable out-of-pocket expenses. *See* Bradley Decl. at ¶¶ 13, 19; Thornton Decl. at ¶¶ 14, 18; Heller Decl. at ¶¶ 16, 22, Exs. A, B. For the reasons set forth below, Class Counsel respectfully request that the Court award Class Counsel a total of $651,000 in attorneys' fees and costs. Such amount is appropriate under applicable law and well-justified under the circumstances of this case.

In addition, Class Counsel respectfully request that the Court grant a service award of $5,000 to Plaintiff Thrift to compensate it for its significant efforts and commitment on behalf of the Class.

III. ARGUMENT

A. The Attorneys' Fees and Expenses Requested Are Reasonable and Well-Justified.

1. Class Counsel are Entitled to a Reasonable Fee Having Achieved the Settlement for the Class.

Where a lawyer "recovers a common fund for the benefit of persons other than himself or his client[, the lawyer] is entitled to a reasonable attorneys' fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). In such cases, an award of attorneys' fees is within the discretion of this Court. *See Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) ("It is well established that the allowance of attorneys' fees 'is within the judicial discretion of the trial judge, who has close and intimate knowledge of the efforts expended and

the value of the services rendered.'") (citations omitted); *see also Savani v. URS Prof'l Solutions LLC*, C/A No. 1:06-cv-02805-JMC, 2014 WL 172503, at *1 (D.S.C. Jan. 15, 2014); *Alexander S. v. Boyd*, 113 F.3d 1373, 1390 (4th Cir. 1997); *Colonial Williamsburg Found. v. Kittinger Co.*, 38 F.3d 133, 138 (4th Cir. 1994).

The two generally accepted methods for determining attorney's fees in settlements of class actions are the lodestar method and the percentage-of-the-fund method. As discussed below, the requested fee here is reasonable and appropriate under either approach.

2. The Requested Fee is Reasonable Under the Lodestar Approach.

Under the lodestar method, the court first calculates counsel's lodestar by "multiplying the number of hours expended by a reasonable hourly rate." *In re MI Windows & Doors Inc. Products Liab. Litig.*, 2015 WL 4487734, at *1 (D.S.C. July 23, 2015). Counsel's raw lodestar may then be adjusted based on consideration of certain factors, such as the benefit achieved for the class and the complexity of the case. *Id.* at *5. The complete list of factors that courts in this Circuit consider in applying the lodestar approach, as set forth in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 n.28 (4th Cir. 1978), is as follows: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases. *Barber*, 577 F.2d at 226 n.28; *MI Windows & Doors*, 2015 WL 4487734, at *2.

"Although courts should consider all of the *Barber* factors, they need not be strictly applied in every case inasmuch as all of the factors are not always applicable." *MI Windows & Doors*, 2015 WL 4487734, at *2 (citing *EEOC v. Serv. News, Co.*, 898 F.2d 958, 965 (4th Cir.1990)).

a. Class Counsel's Hourly Rates are Reasonable.

In determining reasonable hourly billing rates, courts in this Circuit look to "'prevailing market rates in the relevant community.'" *MI Windows & Doors*, 2015 WL 4487734, at *3 (citing *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 175 (4th Cir.1994); *Blum v. Stenson*, 465 U.S. 886, 895 (1984)). Moreover, when a case spans multiple years, it is appropriate to award fees based on the attorneys' current rates rather than historical rates in order to account for the effect of delay in payment that would otherwise dilute the award because of inflation and foregone interest. *Daly v. Hill*, 790 F.2d 1071, 1081 (4th Cir.1986); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994); *Alexander S. ex rel. Bowers v. Boyd*, 929 F.Supp. 925, 937-38 (D.S.C. 1995).

Class Counsel's hourly billing rates, submitted with this motion, are consistent with prevailing market rates in the legal community, are the regular rates that Class Counsel charge their clients in non-contingency litigation, and have been approved by numerous federal and state courts in other cases. *See* Bradley Decl. at ¶ 15; Heller Decl. at ¶¶ 20-21. Class Counsel's billing rates are reasonable.

b. The Fee Requested Here Represents a Significant Negative Multiplier on Class Counsel's Lodestar.

Consideration of the relevant *Barber* factors confirms that the fee requested by Class Counsel here is absolutely reasonable. Class Counsel's total lodestar to date in this case is more than $2,039,230.50. *See* Bradley Decl. at ¶ 13; Thornton Decl. at ¶ 14; Heller Decl. at ¶ 16, Ex.

A. Once Class Counsel's reasonable out-of-pocket expenses ($382,518.27) are subtracted from the total amount of fees and expenses requested, the attorneys' fee portion of what Class Counsel is requesting is just $268,481.73, which represents a significant "negative multiplier" of 0.13 on Class Counsel's time. Under the circumstances here, a positive multiplier on Class Counsel's lodestar could easily be justified. The much smaller amount (representing a negative multiplier) that Class Counsel actually seeks is absolutely reasonable under the circumstances of this case.

c. Time and labor required.

The accompanying declarations of Class Counsel set forth the number of hours that Class Counsel have worked in this litigation. As set forth therein, Class Counsel and their staffs have devoted a total of over 4000 hours to this litigation and have a total unadjusted lodestar to date of approximately $2,039,230.50. *See* Bradley Decl. at ¶ 13; Thornton Decl. at ¶ 14; Heller Decl. at ¶ 16, Ex. A.

Class Counsel's time expended in this case is reasonable. In order to be in a position to vigorously pursue this matter and evaluate and negotiate the Settlement, Class Counsel were required to spend substantial time on various tasks, including but not limited to:

- Conducting an extensive investigation and legal research regarding the issues in this case before filing the complaint, including reviewing and analyzing Defendants' insurance contracts and applicable state regulations, governing rules promulgated by NCCI, and insureds' billing histories. Class Counsel worked closely with its expert consultants on this phase of the litigation.

- Following the filing of the complaint, Class Counsel conducted extensive ongoing factual investigation and legal research regarding the issues in the case. Again, Class Counsel worked closely with its expert consultants on these issues.

- Engaging in extensive discovery practice, including fact discovery, expert discovery, and third-party discovery. Class Counsel's discovery efforts included propounding and responding to written discovery, pursuing subpoenas *duces tecum* against NCCI and the SCSIF, taking fifteen depositions of fact witnesses and defending Plaintiff's deposition, reviewing nearly 90,000 documents (consisting of over 800,000 pages) produced by Defendants, NCCI, and the SCSIF, and analyzing voluminous data regarding third-party recoveries and unit statistical information. The depositions taken

by Class Counsel were particularly time consuming as they involved many industry and defendant-specific business practices and implicated complicated rules and regulations, with which Class Counsel had to gain expertise. Among other things, Class Counsel had to devote considerable time to analyze and understand NCCI's complex rules regarding the reporting of third-party recoveries and their impact on employers' ex-mods, and Class Counsel had to apply these rules to a substantial amount of data from Defendants' unit statistical reporting and insureds' premium information.

- Engaging in extensive motions practice, including successfully defeating Defendants' motion to dismiss, prosecuting several complicated motions to compel and a motion for class certification, and contending with Defendants' motion for summary judgment and motion to exclude one of Plaintiff's experts. *See* ECF Nos. 13, 45, 55, 79, 130, 159, 174, 210.

- Working extensively with their experts and consultants on both liability and class damages issues and taking the deposition of Defendants' designated expert.

- Class Counsel devoted substantial work to preparing for and attending the mediation; negotiating the settlement; preparing the settlement agreement, form of notice, claim form and other settlement papers; and preparing settlement approval papers

- Following the Court's preliminary approval of the Settlement, Class Counsel have spent considerable time overseeing the implementation of the notice program, settlement website, and claims process, working closely with the Administrator in that regard.[2]

In sum, as reflected in their submitted lodestar, Class Counsel here were unquestionably committed to meeting the demands of a complex litigation so that the interests of the Class were protected and vigorously advanced. Even though their outlay of time and resources has been very considerable, Class Counsel have agreed that they would only seek a fee representing a small fraction of their lodestar in the case.

d. Novelty and difficulty of the questions involved.

This case involved numerous complex factual issues, requiring Class Counsel to become intimately familiar with complex regulations and rules regarding the reporting of third-party

[2] Should the Court grant final approval of the Settlement, Class Counsel will continue to devote considerable resources to overseeing the implementation of the Settlement and claims process. Such time, which is not included in the lodestar information submitted in support of this motion, further justifies the fee requested.

recoveries and the effect of such reporting on ex-mods and premiums. Class Counsel had to devote considerable time and energy to analyze and understand the complex regulations and rules at issue and apply them to a substantial amount of data from Defendants' unit statistical reporting and insureds' premium information. Class Counsel gained expertise regarding these and other complex issues only through their hard work in reviewing large quantities of documents and data, including over 800,000 pages of documents, all the while litigating against one of the largest workers' compensation insurers in the world. This case involved complex and novel legal issues as well, including the applicability of the filed-rate doctrine and the statute of limitations to the factual scenario at issue here, just to name a couple.

The issues in this case were truly novel. Indeed, Plaintiff is not aware of any prior cases that were filed regarding the issues addressed in this case.

e. The skill that is required to perform the legal services properly.

The prosecution of any complex class action requires unique legal skills and abilities that are to be considered when determining a reasonable fee. *See Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987) ("prosecution and management of a complex national class action requires unique legal skills and abilities"); *Temp. Servs., Inc. v. Am. Int'l Grp., Inc.*, No. 3:08-CV-00271-JFA, 2012 WL 4061537, at *8 (D.S.C. Sept. 14, 2012) (the complexity of the issues involved and skill and effort displayed by class counsel are additional factors used in determining the proper fee under the percentage-of-the-fund approach). The result achieved here would not have been possible but for the hard work and skill demonstrated by Class Counsel in prosecuting and resolving this matter. Throughout, Defendants were represented by highly skilled and experienced counsel, underscoring the skill required of and displayed by Class Counsel. *See Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05CV00187, 2007 WL 119157, at

*2 (M.D.N.C. Jan. 10, 2007) ("Additional skill is required when the opponent is a sophisticated corporation with sophisticated counsel."); *see also In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 635-36 (D. Colo. 1976) (defense counsel's reputation considered in determining fee award as their stature reflects challenges faced by plaintiffs' attorneys).

f. The attorneys' opportunity costs in pressing the litigation.

Class Counsel has already devoted more than 4000 hours to the investigation, prosecution, and settlement of this case and has advanced $ $382,518.27 in reasonable out-of-pocket expenses. *See* Bradley Decl. at ¶¶ 13, 19; Thornton Decl. at ¶¶ 14, 18; Heller Decl. at ¶¶ 16, 22, Exs. A, B. The considerable time and resources that Class Counsel spent here could otherwise have been spent on other potentially fee-generating work, underscoring the opportunity costs involved in Class Counsel's work and dedication here and further supporting the reasonableness of the fee requested.

g. The contingent nature of the matter/the attorneys' expectations at the outset of the litigation.

"In complex and multi-year class action cases, the risks of litigation are immense and the risk of receiving little or no recovery is a major factor in awarding attorney's fees." *Savani v. URS Prof'l Solutions LLC*, C/A No. 1:06-cv-02805-JMC, 2014 WL 172503, at *5 (D.S.C. Jan. 15, 2014) (citing *Phillips v. Crown Cent. Petroleum Corp.*, 426 F. Supp. 1156, 1170 (D. Md. 1977)). Class Counsel prosecuted this matter on a purely contingent basis, agreeing to advance all necessary expenses and agreeing that they would only receive a fee if there was a recovery. Class Counsel's outlay of resources has been significant. *See* Bradley Decl. at ¶¶ 13, 19; Thornton Decl. at ¶¶ 14, 18; Heller Decl. at ¶¶ 16, 22, Exs. A, B. Class Counsel expended these resources despite the very real risk that they may never be compensated at all. Indeed, the risk assumed was magnified in this case given the formidable defenses and challenges that they faced

in prosecuting this action. Class Counsel not only worked with no ongoing payments and with the risk of taking no payment at all, but Class Counsel could have lost their entire investment in out-of-pocket expenses, an amount that now totals $382,518.27. *See* Bradley Decl. at ¶ 19; Thornton Decl. at ¶ 18; Heller Decl. at ¶ 22, Ex. B.

h. The amount in controversy and the amount obtained.

Based on their extensive investigation and discovery efforts, working closely with their experts and consultants, Class Counsel estimated the premium overpayments by the Class in this case to be approximately $4.3 million. As stated above, Defendants will pay up to a Total Monetary Value of $2,325,000 pursuant to the Settlement, which represents over 50% of the premium overpayments. This is a strong result for the Class, particularly given the risks and challenges of ongoing litigation. Moreover, the claims process provided for in the Settlement Agreement is well-designed to make claim submission for Tier 2, 3, and 4 Class Members convenient and straightforward, and the plan of allocation is well-designed to provide substantial relief to these Class Members in amounts appropriately tied to their alleged damages. Notably, the average recovery for Class Members in this case is expected to be in the thousands of dollars.

i. The experience, reputation and ability of counsel.

As stated above, the lawyers and firms that make up Class Counsel are all highly reputable with extensive experience litigating and settling complex class actions and other complex cases. *See* Bradley Decl. at ¶ 4; Thornton Decl. at ¶ 3; Heller Decl. at ¶¶ 2-3. Few law firms have the experience and the resources to pursue such litigation and Class Counsel handled this litigation with expertise and professionalism. Class Counsel's skill and extensive experience were very important to achieving the strong result for the Class in this matter.

3. The Requested Fee is Reasonable Under the Percentage-of-the-Fund Approach.

Class Counsel here request a total fee and cost award of $651,000. After Class Counsel's reasonable out-of-pocket litigation costs ($382,518.27) are subtracted, the total fee sought is just $268,481.73, which represents less than 12% of the Total Monetary Value of the Settlement. Such an award is very reasonable and justified here.

Under the percentage-of-the-fund method, courts analyze certain factors in determining the appropriate percentage fee to award, including: (1) the results obtained for the class; (2) the quality, skill, and efficiency of the attorneys involved; (3) the risk of nonpayment; (4) the reaction of the class; and (5) public policy. *Kirven v. Cent. States Health & Life Co. of Omaha*, No. CA 3:11-2149-MBS, 2015 WL 1314086, at *11 (D.S.C. Mar. 23, 2015). Consideration of those factors here strongly supports the reasonableness of the fee requested.

a. The Results Obtained for the Class.

The results obtained for the class are generally considered to be the most important factor in determining the appropriate fee award in a common fund case. *See Hensley v. Eckerhart*, 461 U.S. 424, 435-36 (1983); *Nigh v. Koons Buick Pontiac GMC, Inc.*, 478 F.3d 183, 190 (4th Cir. 2007); Federal Judicial Center, *Manual for Complex Litigation*, § 27.71, p. 336 (4th ed. 2004) (the "fundamental focus is on the result actually achieved for class members"). As stated above, the $2,325,000 Total Monetary Value of the Settlement represents over 50% of the estimated premium overpayments by the Class of 323 employees. Tier 1 Class Members will get full refunds through the remediation program, totaling approximately $900,000. Assuming the Court awards the full amounts of attorneys' fees and costs ($651,000) and plaintiff service award ($5,000), and with administrative costs expected to be approximately $43,000, there will be an additional $726,000 in funds available for refunds to Tier 2, 3, 4 Class Members. On average,

even after the payment of fees and costs, Class Members' refunds will be in the thousands of dollars. This is a strong result for the Class Members, particularly given the risks and challenges of ongoing litigation. Moreover, the claims process provided for in the Settlement Agreement is well-designed to make claim submission for Tier 2, 3, and 4 Class Members convenient and straightforward, and the plan of allocation is well-designed to provide substantial relief to these Class Members in amounts appropriately tied to their alleged damages. The Settlement Agreement also provides Settlement Class Members with another significant benefit that they could not receive if they proceeded to trial—prompt relief. Proceeding to trial could add years to the resolution of this action given the legal and factual issues raised and likelihood of appeals. Without Class Counsel's efforts here, it is quite possible, if not likely, that the Class would not have obtained any relief whatsoever. The strong results achieved here strongly support the requested fee.

b. The Quality, Skill, and Efficiency of the Attorneys Involved.

The prosecution and management of any complex class action requires unique legal skills and abilities that are to be considered when determining a reasonable fee. *Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987) ("prosecution and management of a complex national class action requires unique legal skills and abilities"); *Temp. Servs., Inc. v. Am. Int'l Grp., Inc.*, No. 3:08-CV-00271-JFA, 2012 WL 4061537, at *8 (D.S.C. Sept. 14, 2012) (the complexity of the issues involved and skill and effort displayed by class counsel are additional factors used in determining the proper fee under the percentage-of-the-fund approach).

The lawyers and firms that make up Class Counsel are all highly reputable with extensive experience litigating and settling complex class actions and other complex cases. *See* Bradley Decl. at ¶ 4; Thornton Decl. at ¶ 3; Heller Decl. at ¶¶ 2-3. Likewise, Defendants were represented by highly skilled and experienced counsel, which further highlights the skill required

of Class Counsel in prosecuting this case to a successful result. *See Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05CV00187, 2007 WL 119157, at *2 (M.D.N.C. Jan. 10, 2007) ("Additional skill is required when the opponent is a sophisticated corporation with sophisticated counsel."); *see also In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 635-36 (D. Colo. 1976) (defense counsel's reputation considered in determining fee award as their stature reflects challenges faced by plaintiffs' attorneys). Class Counsel's skill and relevant experience were very important to achieving the strong result for the Class in this matter. As explained above, Class Counsel conducted an extensive investigation regarding the issues in this case both before and after filing suit, engaged in substantial motions practice (including multiple dispositive motions), and engaged in extensive fact, expert, and third-party discovery. Moreover, Class Counsel engaged in hard-fought, arm's-length negotiations with experienced and sophisticated opposing counsel to reach the settlement in this case. The skill required of, and demonstrated by, Class Counsel here further supports the reasonableness of the fee requested.

c. The Risk of Nonpayment

"In complex and multi-year class action cases, the risks of litigation are immense and the risk of receiving little or no recovery is a major factor in awarding attorney's fees." *Savani v. URS Prof'l Solutions LLC*, C/A No. 1:06-cv-02805-JMC, 2014 WL 172503, at *5 (D.S.C. Jan. 15, 2014) (citing *Phillips v. Crown Cent. Petroleum Corp.*, 426 F. Supp. 1156, 1170 (D. Md. 1977)). Class Counsel prosecuted this matter on a purely contingent basis, agreeing to advance all necessary expenses and agreeing that they would only receive a fee if there was a recovery. Class Counsel's outlay of resources has been significant. Class Counsel have devoted more than 4000 hours to investigating, litigating, and resolving this case, for a total combined lodestar of $2,039,230.50. *See* Bradley Decl. at ¶ 13; Thornton Decl. at ¶ 14; Heller Decl. at ¶ 16, Ex. A. Moreover, Class Counsel have incurred $382,518.27 in unreimbursed out-of-pocket litigation

expenses. *See* Bradley Decl. at ¶ 19; Thornton Decl. at ¶ 18; Heller Decl. at ¶ 22, Ex. B. Class Counsel expended these resources despite the very real risk that they may never be compensated at all. Indeed, the risk assumed was magnified in this case given the formidable defenses and challenges that they faced in prosecuting this action.

Both liability and damages were disputed in this case, and Defendants vigorously litigated the case from the very beginning. For example, Defendant's motion to dismiss and motion for summary judgment raised various defenses, including the filed-rate doctrine and the statute of limitations, which could have considerably derailed the case or eliminated it entirely. The risk assumed by Class Counsel in prosecuting this case on a contingency basis militates strongly in favor of awarding the requested fee.

d. The Reaction of the Class

The deadline for Class Members to opt-out or submit objections to the Settlement or Class Counsel's fee and expense request is October 26, 2015. While there is still approximately one month to go until the deadline, the reaction of the Class thus far has been very positive. As of September 28, 2015, not a single objection to Class Counsel's fee and expense request (the amount of which was specifically identified in the notice sent directly to the Class Members) has been submitted, and none of the Class Members has opted-out of the Class. *See* Declaration of Kenneth Jue (ECF No. 231-2) ¶¶ 7-8. Class Counsel will provide a further update to the Court in advance of the Fairness Hearing, but the initial positive reaction of the Class further supports the reasonableness of the fee requested.

e. Public Policy

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. *See, e.g., In re Wash. Pub. Power*

Supply Sys. Sec. Litig., 19 F.3d 1291, 1299 (9th Cir. 1994) ("Contingent fees that may far exceed the market value of the services if rendered on a noncontingent 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."); *Temp. Servs., Inc. v. Am. Int'l Grp., Inc.*, No. 3:08-CV-00271-JFA, 2012 WL 4061537, at *9 (D.S.C. Sept. 14, 2012) ("Courts across the country recognize that the risk of receiving no recovery is a major factor in awarding attorneys' fees").

Here, Class Counsel do not seek any enhanced fee even though one would be justified. Rather, Class Counsel request a fee representing only a fraction of their lodestar and less than 12% of the Total Monetary Value of the Settlement. Public policy strongly supports the reasonableness of the fee requested here.

4. Class Counsel's Reasonable Litigation Expenses are Recoverable.

Under well-settled law, Class Counsel are entitled to reimbursement of the expenses they reasonably incurred investigating and prosecuting this matter. *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 468 (D. Md. 2014) ("It is well-established that [class counsel] are also entitled to recover reasonable litigation-related expenses as part of their overall award."); *Smith v. Krispy Kreme Doughnut Corp.*, No. 1:05CV00187, 2007 WL 119157, at *3 (M.D.N.C. Jan. 10, 2007) ("An attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved."); 1 Alba Conte, Attorney Fee Awards § 2:08, at 50-51 (3d ed. 2004) ("The prevailing view is that expenses are awarded in addition to the fee percentage").

To date, Class Counsel have incurred a total of $382,518.27 in out-of-pocket litigation expenses. *See* Bradley Decl. at ¶ 19; Thornton Decl. at ¶ 18; Heller Decl. at ¶ 22, Ex. B. This

amount includes costs for filing fees, deposition transcripts, service of process, witness fees, consulting and expert services, reference materials and research, postage charges, and document handling costs such as copying, scanning and facsimile transmissions. *See id*. The total fee and expense award that Class Counsel seek (*i.e.*, $651,000) *includes* reimbursement of these expenses.

The expenses for which Class Counsel seek reimbursement were reasonably necessary for the continued prosecution and resolution of this litigation and were incurred by Class Counsel for the benefit of the Class with no guarantee that they would be reimbursed. They are reasonable in amount, and the Court should approve their reimbursement as part of the overall award.

B. **The Requested Class Representative Service Award is Reasonable.**

"Incentive or service awards reward representative plaintiffs' work in support of the class, as well as their promotion of the public interest." *Deem v. Ames True Temper, Inc.*, No. 6:10-CV-01339, 2013 WL 2285972, at *6 (S.D.W. Va. May 23, 2013). "The purpose of such awards is to encourage socially beneficial litigation by compensating named plaintiffs for their expenses on travel and other incidental costs, as well as their personal time spent advancing the litigation on behalf of the class and for any personal risk undertaken." *Id.* "Courts around the country … routinely approve" such awards. *Id*.

The requested service award of $5,000 here is reasonable and justified. In addition to lending its name to this case, and thus subjecting itself to public attention, Thrift was actively engaged in the litigation. Among other things, Thrift gathered documents, reviewed correspondence, pleadings, and discovery requests and responses, stayed updated about the litigation, had its representative's deposition taken, and reviewed and approved the proposed Settlement. *See* Decl. of Gary Thrift at ¶¶ 3-4. Thrift's commitment in this case is notable given

the relatively modest size of its personal financial stake in this matter. Moreover, the $5000 award requested here is well within the range of service awards that courts have granted in similar circumstances. *See, e.g.*, *In re MI Windows & Doors Inc. Products Liab. Litig.*, No. 2:12-MN-00001-DCN, 2015 WL 4487734, at *6 (D.S.C. July 23, 2015) (approving $5,000 service award as "modest" and "well within the range of service awards approved by other courts"); *Muhammad v. Nat'l City Mortgage, Inc.*, No. CIV.A. 2:07-0423, 2008 WL 5377783, at *9-10 (S.D.W. Va. Dec. 19, 2008) (approving $5,000 service award).

IV. CONCLUSION

For the reasons set forth herein, Class Counsel respectfully request that this Court: (a) award Class Counsel reasonable attorneys' fees and expenses in a total amount of $651,000; and (b) award Plaintiff Thrift a service award in the amount of $5,000.

Respectfully Submitted,

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September 28, 2015

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2015, a true and correct copy of the foregoing was sent to the following counsel of record by electronic mail through ECF filing in accordance with the Federal Rules of Civil Procedure and the local rules of the United States District Court for the District of South Carolina:

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