**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

| In Re: LIQUID ALUMINUM SULFATE ANTITRUST LITIGATION | Civil Action No. 16-md-2687 (MCA) (JAD) |
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**BRIEF IN SUPPORT OF DIRECT PURCHASER CLASS PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENTS WITH SOUHERN IONICS, USALCO AND AMERICAN SECURITIES AND DPP LEAD COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND PAYMENT OF CASE CONTRIBUTION AWARDS TO THE DIRECT PURCHASER CLASS PLAINTIFFS**

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## TABLE OF CONTENTS

Table Of Authorities ........................................ iii

Preliminary Statement ........................................ 1

Factual Background ........................................ 4

A. Summary of the Alleged Claims and Procedural History ........................................ 4

B. Settlement Negotiations and the Settlements ........................................ 5

Legal Argument

I. Notice To The Class Satisfied The Requirements Of Rule 23 And Due Process ........................................ 6

II. The Court Should Affirm Its Certification Of The Direct Purchaser Settlement Class. 7

III. The Settlements Are Fair, Reasonable And Adequate, And Should Be Granted Final Approval ........................................ 8

A. The Settlements are Fair, Reasonable and Adequate ........................................ 9

1) The Settlements Occurred After Good Faith, Arm's-Length Negotiations Conducted By Well-Informed And Experienced Counsel ........................................ 10

2) The Relief Provided To The Class Is Adequate ........................................ 12

IV. The Plan Of Distribution Should Be Approved ........................................ 12

V. The Requested Attorneys' Fees And Expenses Are Reasonable And Should Be Approved ........................................ 13

A. The Common Fund Doctrine Applies to the Settlements ........................................ 14

B. Plaintiffs' Counsel's Fees Should Be Based on a Percentage of the Common Fund ........................................ 14

1. The Size of the Fund Created and Number of Persons Benefited ........................................ 16

2. The Absence of Objections to the Fee Request to Date ........................................ 16

3. The Skill and Efficiency of the Attorneys Involved ........................................ 17

4. The Complexity and Duration of the Litigation .................................... 17

5. The Risk of Nonpayment ........................................................................ 18

6. The Amount of Time Devoted to the Case By Plaintiffs' Counsel ....... 19

7. Awards in Similar Cases ........................................................................ 20

8. Benefits Attributable to Others Including Government Agencies ......... 21

9. The Percentage Fee that Would Have Been Negotiated Had the Case Been Subject to a Private Contingent Fee Agreement ............ 22

10. Innovative Terms of Settlements ........................................................... 22

VI. Plaintiffs' Counsel Should Be Reimbursed For Their Out-Of-Pocket Expenses .......... 22

VII. The Court Should Approve Case Contribution Awards To The Direct Purchaser Class Plaintiffs ......................................................... 23

VIII. Conclusion ........................................................................................................... 25

## TABLE OF AUTHORITIES

**Cases**

*Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp. LP*,
592 F.3d 991 (9th Cir. 2010) .......... 19
*Anixter v. Home-Stake Prod. Co.,* 77 F.3d 1215 (10th Cir. 1996).......... 19
*Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).......... 14
*Bredbenner v. Liberty Travel, Inc.*, 2011 WL 1344745 (D.N.J. Apr. 8, 2011) .......... 10
Castro v. Sanofi Pasteur Inc., 2017 WL 4776626 (D.N.J. Oct. 23, 2017).......... 13, 20
*Dartell v. Tibet Pharmaceuticals, Inc.* 2017 WL 2815073 (D.N.J. June 29, 2017) .......... 21
*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).......... 6
*Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975).......... 9
*Glaberson v. Comcast Corp.*, 2014 WL 7008539 (E.D. Pa. Dec. 12, 2014) .......... 11
*Gunter v. Ridgewood Energy Corp*, 223 F.3d 190 (3d Cir. 2000).......... 15
*Hall v. AT&T Mobility LLC*, 2010 WL 4053547 (D.N.J. Oct. 13, 2010) .......... 17, 21
*Henderson v. Volvo Cars of N. Am., LLC*, 2013 WL 1192479 (D.N.J. Mar. 22, 2013) .......... 15
*Hensley v. Eckerhart*, 461 U.S. 424 (1983) .......... 16
*In re Aetna UCR Litig.*, 2013 WL 4697994 (D.N.J. Aug. 30, 2013) .......... 10
*In re Apple Comput. Sec. Litig.*, 1991 WL 238298 (N.D. Cal. Sept. 6, 1991) .......... 19
*In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109 (D.N.J. 2002) .......... 6, 16
*In re AT&T Corp. Sec. Litig.*, 455 F.3d 160 (3d Cir. 2006).......... 14, 15, 19
*In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722 (3d Cir. 2001) .......... 17
*In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484 (E.D. Pa. 2003) .......... 17
*In re Flonase Antitrust Litig.*, 291 F.R.D. 93 (E.D. Pa. 2013).......... 18
*In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*,
55 F.3d 768 (3d Cir. 1995).......... 14
*In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166 (E.D. Pa. 2000) .......... 20, 22
*In re Insurance Brokerage Antitrust Litigation*, 297 F.R.D. 136 (D.N.J. 2013) .......... 21
*In re Insurance Brokerage Antitrust Litigation*, 579 F.3d 241 (3d Cir. 2009) .......... 20
*In re Linerboard Antitrust Litig.*, 292 F.Supp.2d 631 (E.D. Pa. 2003).......... 12, 17, 24
*In re Merck & Co., Inc. Vytorin ERISA Litig.*, 2010 WL 547613 (D.N.J. Feb. 9, 2010) ...... passim
*In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465 (S.D.N.Y. 1998) .......... 11, 12
*In re New Jersey Tax Sales Certificate Antitrust Litigation*,
2016 WL 5844319 (D.N.J. October 3, 2016) .......... 20
*In re Pet Food Prods. Lib. Litig.*, 629 F.3d 333 (3d Cir. 2010).......... 8
*In re Philips/Magnavox TV Litig.*, 2012 WL 1677244 (D.N.J. May 14, 2012).......... 10
*In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) .. 6
*In re Prudential Insurance Company America Sales Practice Litigation*,
148 F.3d 283 (3d Cir. 1998).......... 9, 15
*In re Remeron Direct Purchaser Antitrust Litigation*, 2005 WL 3008808 (D.N.J. Nov. 9, 2005)22
*In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491 (W.D. Pa. 2003) .......... 18
*In re Residential Doors Antitrust Litig*., 1998 WL 151804 (E.D. Pa. Apr. 2, 1998).......... 24
*In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294 (3d Cir. 2005).......... 20
*In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72 (D.N.J. 2001) .......... 22
*In re Schering-Plough Corp. Enhance ERISA Litigation*, 2012 WL 1964451 (D.N.J. May, 31, 2012). .......... 23
*La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*,

2009 WL 4730185 (D.N.J. Dec. 4, 2009) ... 21
*MCI Commc'ns. Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983) ... 19
*Milliron v. T-Mobile USA, Inc.*, 2009 WL 3345762 (D.N.J. Sept. 14, 2009) ... 21
*Muse v. Dymacol, Inc.*, 2003 WL 22794698 (E.D. Pa. Nov. 7, 2003) ... 18
*Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd.*,
2014 WL 12778314 (E.D. Pa. Sept. 15, 2014) ... 13
*Polanski v. Trump Taj Mahal Assocs.*, 137 F. 3d 139 (3d Cir. 1998) ... 14
*Robbins v. Koger Props., Inc.,* 116 F.3d 1441 (11th Cir. 1997) ... 19
*Schuler v. The Medicines Co.*, 2016 WL 3457218 (D.N.J. June 24, 2016) ... 21
*Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011) ... 9, 14, 19
*United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) ... 8
*Varacallo v. Mass Mut. Life Ins. Co.*, 226 F.R.D. 207 (D.N.J. 2005) ... 11, 19

**Other Authorities**

Fed.R.Civ.P. 23, Advisory Committee Notes, 2018 Amendments, Subdivision (e)(2) ... 10

**Rules**

Fed.R.Civ.P. 23 ... 6, 7, 9, 12

## PRELIMINARY STATEMENT

Pursuant to Fed.R.Civ.P. 23(e), Interim DPP Lead Counsel respectfully submits this Brief in support of Direct Purchaser Class Plaintiffs'[1] motion for final approval of the proposed, partial settlements of the above-captioned class action ("Action") reached with defendants Southern Ionics Incorporated ("SII"), USALCO, LLC ("USALCO"), and American Securities, LLC ("American Securities").

The SII settlement provides that SII pay $6.5 million in a lump sum. The USALCO settlement provides that USALCO pay a total of $6.1 million, payable $3 million as an initial payment, $2 million one year after the initial payment, and the balance of $1.1 million payable two years after the initial payment. The American Securities settlement provides that American Securities pay a $13 million in a lump sum. These proposed settlements are proportional to other settlements in this matter that have been negotiated with other settling defendants, based upon their relative market share.

All three settlements are substantial and represent the result of three years of difficult hard-fought litigation. Like the other settlements in this case, the negotiation of these settlements were time-consuming, hard fought and, at time, contentious. It involved not only numerous in-person meetings but extensive mediations sessions with experienced mediators, former District Judge Faith Hochberg in the case of the SII and USALCO settlements and David Geronamus in the case of the American Securities settlement. Direct Purchaser Class Plaintiffs and their

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[1] Direct Purchaser Class Plaintiffs are Central Arkansas Water; City of Charlotte, North Carolina; City and County of Denver, Colorado, acting by and through its board of Water Commissioners; Flambeau River Papers, LLC; City of Greensboro, North Carolina; Mobile Area Water and Sewer System; City of Rochester, Minnesota; City of Sacramento, California; SUEZ Water Environmental Services Inc.; SUEZ Water New Jersey Inc.; SUEZ Water Princeton Meadows Inc.; SUEZ Water New York Inc.; SUEZ Water Pennsylvania Inc.; City of Texarkana, Arkansas and City of Texarkana, Texas, d/b/a Texarkana Water Utilities, and City of Shreveport, Louisiana.

Interim DPP Lead Counsel believe that the settlements are an excellent result for the Direct Purchaser Settlement Class and appropriately balance their objective of securing the highest possible recovery for the Direct Purchaser Settlement Class, while accounting for normal litigation risks.

Interim DPP Lead Counsel also submits this Brief in support of its request for attorneys' fees, expenses and Case Contribution Awards. Interim DPP Lead Counsel, on behalf of all lawyers and their law firms that have performed authorized common benefit work in this Action (collectively, "Plaintiffs' Counsel"), is seeking a fee award of 33.33% of the settlement proceeds available to the Direct Purchaser Settlement Class, plus out-of-pocket expenses that have not been previously reimbursed. Among their efforts, Plaintiffs' Counsel have conducted a far-reaching, and ongoing, investigation into the Direct Purchaser Settlement Class's claims, drafted a detailed amended complaint, briefed multiple motions to dismiss, and reviewed millions of pages of documents produced by Defendants. The settlements are a direct result of these efforts. Accordingly, Interim DPP Lead Counsel submit that the present fee request is fair and reasonable when considered under the applicable legal standards, Plaintiffs' Counsel's extensive litigation efforts, and the results achieved for the Direct Purchase Settlement Class. Interim DPP Lead Counsel also submits that the expenses requested are reasonable in amount and were essential to the successful prosecution of the Action.

Further supporting the settlements and request for fees and expenses, is the reaction of the Direct Purchaser Settlement Class to date. Following the Court's preliminary approval of the SII and USALCO Settlements on April 24, 2019 and the American Securities Settlement on May 13, 2019, notice of the settlements was disseminated to members of the Direct Purchaser Settlement Class, providing them the opportunity to object to the settlement or to request exclusion from the Direct Purchaser Settlement Class. Although the Court-ordered deadline to

object to the settlements and submit a request for exclusion is September 12, 2019, not one objection to any aspect of the settlements has been received and only three class members in addition to the Direct Action Plaintiffs have sought exclusion.

For all of the reasons discussed herein, it is respectfully submitted that the settlements are not only fair, reasonable, and adequate, but also a highly favorable result for the Direct Purchaser Settlement Class, and should be approved by the Court. Likewise, Interim DPP Lead Counsel's request for attorneys' fees, reimbursement of expenses and Case Contribution Awards also merits approval.

## FACTUAL BACKGROUND

### A. Summary of the Alleged Claims and Procedural History

Direct Purchaser Class Plaintiffs allege that Defendants participated in a conspiracy in the liquid aluminum sulfate ("Alum") market by not competing for each other's historical business, allocating customers and fixing the price of Alum sold in the United States from January 1, 1997 through at least February 28, 2011. Specifically, Direct Purchaser Class Plaintiffs allege that Defendants engaged in this conspiracy by, *inter alia*, (1) participating in secret communications, discussions, and meetings to exchange confidential and competitively sensitive information regarding each other's Alum business; (2) agreeing to "stay away" from each other's "historical" customers by not pursuing those customers; (3) tracking bid and pricing histories to identify the "historical" customers of each co-conspirator; (4) submitting intentionally losing or "throw away" bids to each other's "historic" customers; (5) discussing and agreeing to set a price floor to be quoted to a customer by an intended winner to determine the amount of the intended loser's intentionally losing or "throw away" bid; (6) where a co-conspirator could not withdraw its inadvertently winning bid, bidding to lose one of its own customers to compensate for the loss of that "historical" customer; (7) instructing new employees on determining whether and how to bid on Alum business so as to comport with the agreement to not compete; and (8) selling Alum to customers at artificially inflated prices in the United States.

The foregoing claims against Defendants have been vigorously prosecuted for more than three years – commencing with the filing of the initial action in October 2015. In December 2016, many of the Defendants moved to dismiss the operative complaint in the Action – the Consolidated Amended Complaint (Docket Entry 220) (the "Complaint"). Following extensive

briefing by the parties, the Court, by Opinion and Order dated July 20, 2017, denied Defendants' motions to dismiss in their entirety. Docket Entries 405, 406.

Since the Court's denial of Defendants' motions to dismiss, the parties have been actively engaged in discovery, with Defendants producing more than 13 million pages of documents for Direct Purchaser Class Plaintiffs' review.

**B. Settlement Negotiations and the Settlements**

The settlements are the product of extensive arm's-length negotiations, including numerous in-person meetings, formal mediation and a Court-led settlement conference. Following protracted and hard-fought negotiations, the Parties finalized the terms of their respective agreements to settle the Action with SII, USALCO and American Securities. The USALCO settlement agreement was signed on February 25, 2019. The SII settlement agreement was signed on March 21, 2019. The American Securities settlement agreement was signed on April 15, 2019. Preliminary approval for the SII and USALSO settlements was granted on April 24, 2019 (Docket Entry 1282), and for the American Securities settlement on May 13, 2019 (Docket Entry 1293). On June 7, 2019, the Court set a schedule for dissemination of notice and for opting out or objecting to the settlements. (Docket Entry 1313)

The SII settlement provides that SII pay $6.5 million in a lump sum. The USALCO settlement provides that USALCO pay a total of $6.1 million, payable $3 million as an initial payment, $2 million in one year, and the balance of $1.1 million payable in two years. The American Securities settlement provides that American Securities pay $13 million in a lump sum. These proposed settlements are proportional to other settlements in this matter that have been negotiated with other settling defendants, based upon each defendant's relative market share.

## LEGAL ARGUMENT

### I. NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

On June 24, 2019, in accordance with the Court's June 7, 2019 Order, the Court-authorized Settlement Administrator, Angeion Group, LLC ("Angeion"), caused the approved Notice and Claim Form to be mailed, by First Class mail, to all Direct Purchaser Settlement Class Members readily and reasonably identified by or previously identified by settling defendants, identified or previously identified by Non-Settling Defendants or identified by Interim DPP Lead Counsel. Declaration of Andy Morrison ("Morrison Dec.), ¶ 5-7. In addition, Angeion caused the Summary Notice to be published in the August 2019 edition of *The Municipal*, which had a hard copy distribution date of July 18, 2019. Morrison Dec., ¶ 12.[2]

This notice program, which combines an individual, mailed notice to all Direct Purchaser Settlement Class Members who can be reasonably identified along with a summary publication notice meets the requirements of Fed.R.Civ.P. 23, which calls for "the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 326-27 (3d Cir. 1998). As noted below, this notice program also satisfies the requirements of due process. *See In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 119 (D.N.J. 2002) ("In order to satisfy due process, notice to class members must be reasonably calculated under all circumstances, to

[2] Angeion also established a website (www.LiquidAluminumDirectSettlement.com) and settlement-specific toll-free hotline to provide members of the Direct Purchaser Settlement Class with information about the settlements and the applicable deadlines, as well as access to downloadable copies of the Notice, Claim Form and Settlement Agreements. *Id.*, ¶¶ 13-18.

apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").[3]

Here, the Direct Purchaser Settlement Class has been given notice of the proposed settlements, and their rights in connection therewith, as well as the method and dates by which they may: (i) object to the settlement, Plan of Distribution and/or Interim DPP Lead Counsel's request for attorneys' fees and expenses, (ii) request exclusion from the Direct Purchaser Settlement Class, and (iii) submit a claim in order to be eligible to participate in the Settlement and receive a payment from the Net Settlement Fund. Additionally, the Direct Purchaser Settlement Class has been advised of the date of the Fairness Hearing at which they will have an opportunity to be heard with respect to any objection raised. Accordingly, the Court-approved notice program for the Settlement provided the best practicable notice of the settlements, consistent with the requirements of Rule 23(c)(2)(B) and due process, to members of the Direct Purchaser Settlement Class.

## II. THE COURT SHOULD AFFIRM ITS CERTIFICATION OF THE DIRECT PURCHASER SETTLEMENT CLASS

In presenting the settlements to the Court for preliminary approval, Direct Purchaser Class Plaintiffs requested the Court's certification of the Direct Purchaser Settlement Class for settlement purposes so that notice of the proposed settlements, Fairness Hearing and rights of Direct Purchaser Settlement Class Members – to request exclusion, object to the settlements or submit a claim in order to be eligible to receive a payment from the Net Settlement Fund – could be issued. In its Orders dated April 24, 2019 (Docket Entry 1282) and May 13, 2019 (Docket Entry 1293), the Court provisionally certified the Direct Purchaser Settlement Class (*i.e.*, all persons or entities that purchased Alum in the United States directly from a Defendant from

[3] Unless otherwise noted, all emphasis in quotations is added, and internal quotation marks, citations and footnotes are omitted.

January 1, 1997 through February 28, 2011[4]) solely for the purpose of effectuating the settlements. By the same Orders, the Court appointed, solely for purposes of effectuating the settlements, Direct Purchaser Class Plaintiffs as class representatives and Interim DPP Lead Counsel as class counsel for the Direct Purchaser Settlement Class.[5]

Nothing has changed since those Orders to alter the propriety of the Court's certification. Accordingly, for all the reasons stated in Direct Purchaser Class Plaintiffs' briefs supporting preliminary approval of the settlements (Docket Entries 1250-1; 1273-1), incorporated herein by reference, Direct Purchaser Class Plaintiffs respectfully request that the Court re-affirm its certification of the Direct Purchaser Settlement Class, as well as its appointment of class representatives and class counsel, for purposes of carrying out the Settlement.

## III. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE, AND SHOULD BE GRANTED FINAL APPROVAL

"[S]ettlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts . . . and preventing lawsuits." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 401 (1977) (alteration in original). In complex class action lawsuits such as this, the policy of favoring voluntary resolution through settlement is particularly strong. *See In re Pet Food Prods. Lib. Litig.*, 629 F.3d 333, 351 (3d Cir. 2010) (finding "overriding public interest in settling class action litigation"). The Third Circuit applies this "strong presumption in favor of voluntary settlement agreements," which is "especially

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[4] Excluded from the Direct Purchaser Settlement Class are (1) Defendants and their respective parents, subsidiaries, and affiliates, and (2) any Direct Purchaser Settlement Class Members who timely and validly elect to be excluded from the Direct Purchaser Settlement Class.

[5] *See* Docket Entries 1282, ¶¶3-5; 1293, ¶¶ 3-5. Moreover, if the settlement is terminated or not approved by the Court, the provisional certification of the Direct Purchaser Settlement Class (along with the appointment of Direct Purchaser Class Plaintiffs as class representatives and Interim DPP Lead Counsel as class counsel) will be vacated. *Id*.

strong in class actions and other complex cases . . . because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by federal courts." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (alteration in original).

**A. The Settlements are Fair, Reasonable and Adequate**

Approval of a settlement requires that the Court find that the settlement is "fair reasonable and adequate after considering whether:

> (A) The class representatives and class counsel have adequately represented the class;
>
> (B) The proposal was negotiated at arm's length;
>
> (C) The relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3)
>
> (D) the proposal treats class members equitably relative to each other."

Fed.R.Civ.P. 23(e)(2).

These factors are a blend of the factors formerly considered under *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) and *In re Prudential Insurance Company America Sales Practice Litigation*, 148 F.3d 283, 323-24 (3d Cir. 1998). They are intended to focus the parties' and the Court's attention on a shorter list of factors relating to the propriety of a proposed class settlement. As stated by the Advisory Committee:

> A lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of these factors—perhaps many—may not be relevant to a

> particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).
>
> This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision on whether to approve the proposal.

Fed.R.Civ.P. 23, Advisory Committee Notes, 2018 Amendments, Subdivision (e)(2)

**1) The Settlements Occurred After Good Faith, Arm's-Length Negotiations Conducted By Well-Informed And Experienced Counsel**

The settlements are the result of extensive arm's-length negotiations undertaken in good faith by counsel for the Parties. As noted above, the Parties' negotiations involved numerous in person meetings and formal mediation. *See In re Aetna UCR Litig.*, 2013 WL 4697994, at *11 (D.N.J. Aug. 30, 2013) ("Sessions with a respected and experienced mediator, gave counsel on both sides ample opportunity to adequately assess the strengths of their respective positions and facilitated serious and informed negotiations."). The participation of a mediator in this case is further assurance that the settlement is the result of arm's-length negotiations. *See Bredbenner v. Liberty Travel, Inc.*, 2011 WL 1344745, at *10 (D.N.J. Apr. 8, 2011) ("Participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties.").

Throughout every stage of their negotiations, the Parties weighed the strengths and weaknesses of the Direct Purchaser Class Plaintiffs' claims and SII, USALCO and American Securities' defenses, including consideration of, among other issues, liability, causation and damages. In addition, the settlements followed an extensive investigation as well as substantial discovery and motion practice, just as with the GEO, Chemtrade and Kemira settlements. *See In re Philips/Magnavox TV Litig.*, 2012 WL 1677244, at *11 (D.N.J. May 14, 2012) ("Where this

negotiation process follows meaningful discovery, the maturity and correctness of the settlement become all the more apparent."). When the settlements were reached, Direct Purchaser Class Plaintiffs and Interim DPP Lead Counsel were well-informed regarding their case against SII, USALCO and American Securities and the likelihood of recovery from these Defendants, just as they were with respect to the GEO, Chemtrade and Kemira settlements. As a result, Direct Purchaser Class Plaintiffs and Interim DPP Lead Counsel had an adequate basis for assessing the strengths of the Direct Purchaser Settlement Class's claims and the risks of continued litigation against when they entered into the SII, USALCO and American Securities settlements.

Moreover, Interim DPP Lead Counsel, a firm with extensive experience in prosecuting complex antitrust class actions in this District and around the country, believes that the settlements are in the best interests of the Direct Purchaser Settlement Class. Counsel's judgment is entitled to considerable weight. *See Varacallo v. Mass Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("Class Counsel's approval of the Settlement also weighs in favor of the Settlement's fairness."); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (Courts have consistently given "'great weight' . . . to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation."). The settlements are also fully supported by the Direct Purchaser Class Plaintiffs.

The fact that the settlements are the product of protracted, arm's-length negotiations between experienced and well-informed counsel demonstrates that the process by which the settlements were reached was fair and not the product of collusion. *See, e.g., Glaberson v. Comcast Corp.*, 2014 WL 7008539, at *4 (E.D. Pa. Dec. 12, 2014) (a settlement is presumed to be fair "when the negotiations were at arm's length, there was sufficient discovery, and the

proponents of the settlement are experienced in similar litigation"). The process culminating in the present settlements strongly supports the Court's granting of preliminary approval.

#### 2) <u>The Relief Provided To The Class Is Adequate</u>

Under amended Rule 23(e), the Court must also consider whether the relief to the class is adequate, taking into account "the costs, risks, and delay of trial and appeal." Fed.R.Civ.P. 23(e)(2)(C)(i).

As is explained above, SII will pay $6.5 million, USALCO will pay $6.1 million and American Securities will pay $13 million, substantial sums by any measure. This case has already been litigated for more than three years and will require additional years of time and expense, including completing discovery, briefing on class certification and a potential Rule 23(f) appeal, motions for summary judgment, and trial. Even then, it is virtually certain that appeals would be taken from any verdict. These are the same considerations that led to the GEO, Chemtrade and Kemira settlements.

Direct Purchaser Class Plaintiffs believe their case is strong but acknowledge, as with any complex class action such as this Action, there are identifiable risks here. *See, e.g., In re Linerboard Antitrust Litig.*, 292 F.Supp.2d 631 (E.D. Pa. 2003) ("An antitrust class action is arguably the most complex action to prosecute."); *In re NASDAQ*, 187 F.R.D. at 475-76 ("The history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal.").

## IV. <u>THE PLAN OF DISTRIBUTION SHOULD BE APPROVED</u>

Plans of distributions, like settlement agreements, are to be approved it treats class members equitably relative to each other. Fed.R.Civ.P. 23(e)(2)(D).

The proposed Plan of Distribution ("Plan") submitted herewith describes the distribution of the Net Settlement Fund (*i.e.*, the settlement proceeds available to the Direct Purchaser

Settlement Class less the costs of settlement administration and notice and Court-approved attorneys' fees and expenses) to those Direct Purchaser Settlement Class Members that submit valid claims. The Plan will allocate the Net Settlement Fund based on each Claimant's *pro rata* share of the total eligible Alum purchases (*i.e.*, Alum purchases in the United States directly from a Defendant from January 1, 1997 through February 28, 2011) claimed in connection with the settlements. In other words, the Net Settlement Fund will be allocated on a *pro rata* basis based on the total dollar value of each Claimant's eligible Alum purchase(s) in proportion to the total dollar value of all valid claims submitted.

Furthermore, the Plan treats all Direct Purchaser Settlement Class Members equally and ensures that each Claimant will receive a share of the Net Settlement Fund based on their eligible purchases. This type of allocation methodology has been approved in similar antitrust cases.[6] For these reasons, the Plan is fair and reasonable and warrants the Court's approval.

## V. THE REQUESTED ATTORNEYS' FEES AND EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

In connection with the settlements, Interim DPP Lead Counsel, on behalf of Plaintiffs' Counsel, requests an award of attorneys' fees in the amount of 33.33% of the settlement proceeds made available to the Direct Purchaser Settlement Class, reimbursement of litigation expenses and case contribution awards for the named class representatives in the amount of $10,000. Plaintiffs' Counsel have conferred a substantial benefit upon the Direct Purchaser Settlement Class and should be appropriately compensated.

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[6] *See, e.g.*, *Castro v. Sanofi Pasteur Inc.*, 2017 WL 4776626, at *2, 7 (D.N.J. Oct. 23, 2017) (approving proposed plan of distribution which determined *pro rata* shares of settlement fund based on class members' purchases of Menactra); *Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd.*, 2014 WL 12778314, at *5 (E.D. Pa. Sept. 15, 2014); Final Judgment, *In re Skelaxin Antitrust Litig.*, No. 12-cv-83 (E.D. Tenn. Sept. 24, 2014), DE No. 800 at ¶9 (same).

### A. The Common Fund Doctrine Applies to the Settlements

Courts have long held that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 820 n.39 (3d Cir. 1995). The Third Circuit has noted that at the "heart of this [doctrine] is a concern for fairness and unjust enrichment; the law will not reward those who reap the substantial benefits of litigation without participating in its costs." *Polanski v. Trump Taj Mahal Assocs.*, 137 F. 3d 139, 145 (3d Cir. 1998). Here, Plaintiffs' Counsel successfully negotiated a settlements of the Action with SII for $6.5 million, with USALCO for $6.1 million and American Securities for a total of $13 million, which represent a "common fund." Plaintiffs' Counsel are therefore entitled to a share of that fund to properly compensate them for bringing, prosecuting and settling the claims against SII, USALCO and American Securities.

### B. Plaintiffs' Counsel's Fees Should Be Based on a Percentage of the Common Fund

An award of attorneys' fees and the method used to determine that award are "within the discretion of the court." *In re Merck & Co., Inc. Vytorin ERISA Litig.*, 2010 WL 547613, at *6 (D.N.J. Feb. 9, 2010). The Third Circuit has consistently ruled, however, that in common fund cases such as this one, the percentage-of-recovery method is the preferred approach in calculating an award of fees. *See Sullivan,* 667 F.3d at 330 (the percentage of recovery method "is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure"); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006); *Henderson v. Volvo Cars of N. Am., LLC*, 2013

WL 1192479, at *14 (D.N.J. Mar. 22, 2013) ("The percentage-of-recovery method is preferred in common fund cases. . . .").[7]

The Third Circuit has identified the following factors for courts to consider when evaluating the reasonableness of a fee request under the percentage-of-recovery method:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

*Gunter v. Ridgewood Energy Corp*, 223 F.3d 190, 195 n.1 (3d Cir. 2000). This Circuit has also suggested three other factors that may be relevant to the Court's inquiry:

> (8) the value of benefits attributable to the efforts of class counsel to the efforts of other groups, such as government agencies conducting investigations; (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (10) any innovative terms of settlement.

*Merck ERISA*, 2010 WL 547613, at *6; *Prudential*, 148 F.3d at 338-40. "The fee award reasonableness factors need not be applied in a formulaic way because each case is different, and in certain cases, one factor may outweigh the rest." *AT&T*, 455 F.3d at 166.

In addition, the Third Circuit recommends that the Court "use the lodestar method to cross-check the reasonableness of a percentage-of-recovery fee award." *AT&T*, 455 F.3d at 164. *See also Merck ERISA*, 2010 WL 547613, at *12 (applying lodestar cross-check). However, "[t]he lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method." *AT&T*, 455 F.3d at 164.

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[7] Additionally, the Supreme Court has consistently held that the percentage-of-recovery approach is an appropriate methodology for awarding plaintiffs' counsel's fees in a common fund case. *See, e.g.*, *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class").

Consideration of these factors demonstrates that Interim DPP Lead Counsel's request for 33.33% of the settlement proceeds is reasonable and should be approved.

### 1. The Size of the Fund Created and Number of Persons Benefited

The result achieved is one of the primary factors to be considered in assessing the propriety of an attorneys' fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *AremisSoft Corp.*, 210 F.R.D. at 132 ("the single clearest factor reflecting the quality of class counsels' services to the class are the results obtained"). Here, through their substantial efforts, Plaintiffs' Counsel have created a common fund of at least $25.6 million for the benefit of thousands of Direct Purchaser Settlement Class Members.[8] This factor strongly favors approval of the fee request.

### 2. The Absence of Objections to the Fee Request to Date

As set forth above, the Notice advises Direct Purchaser Settlement Class Members that Interim DPP Lead Counsel will be seeking an award of attorneys' fees up to 33.33% of the total consideration made available to the Direct Purchaser Settlement Class, reimbursement of expenses and Case Contribution Awards to Direct Purchaser Class Plaintiffs. The Notice also advises Direct Purchaser Settlement Class Members that they can object to these requests and provides instructions on how to do so. No objections to Interim DPP Lead Counsel's fee and expense request have been received to date. Because the objection deadline is April 2, 2019, any objections received after this submission will be address by Interim DPP Lead Counsel in its reply brief.

[8] Per the Morrison Declaration, Angeion mailed the Notice to 10,043 Direct Purchaser Settlement Class Members. Morrison Dec., ¶10. These individuals and entities will need to submit a valid claim in order to be eligible to receive a payment from the Net Settlement Fund.

### 3. The Skill and Efficiency of the Attorneys Involved

An analysis of the skill and efficiency of the attorneys involved also supports the fee request. Plaintiffs' Counsel are highly experienced in litigating complex class actions and antitrust cases. Through their efforts, Plaintiffs' Counsel were able to defeat Defendants' motions to dismiss and, through protracted, hard-fought and creative negotiations, successfully obtain a highly favorable recovery from SII, USALCO, and American Securities. "The result achieved is the clearest reflection of petitioners' skill and expertise." *Linerboard*, 2004 WL 1221350, at *5.

The quality of opposing counsel is also relevant in assessing the quality of counsel's work. *Hall v. AT&T Mobility LLC*, 2010 WL 4053547, at *19 (D.N.J. Oct. 13, 2010). In this Action, Southern Ionics was represented by Porzio, Bromberg & Newman, USALCO was represented by Whiteford, Taylor & Preston, and American Securities was represented by Arnold & Porter Kaye Scholer, all prominent law firms who zealously represented the interests of their clients. The ability of Plaintiffs' Counsel to obtain favorable settlements for the Direct Purchaser Settlement Class "in the face of formidable legal opposition further evidences the quality of their work." *In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 496 (E.D. Pa. 2003).

### 4. The Complexity and Duration of the Litigation

"[C]omplex and/or novel issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case by class counsel" are the "factors which increase the complexity of class litigation." *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 741 (3d Cir. 2001). Moreover, "antitrust class action is arguably the most complex action to prosecute. . . . The legal and factual issues involved are always numerous and uncertain in outcome". *Linerboard*, 2004 WL 1221350, at *10. This case was no exception.

Although Plaintiffs' Counsel have already engaged in substantial motion practice and extensive discovery, this Action could continue for additional years if it were to go to trial. *See Muse v. Dymacol, Inc.*, 2003 WL 22794698, at *2 (E.D. Pa. Nov. 7, 2003) ("[s]ettlement . . . will avoid delay in realizing benefit for the affected class members, and will avoid unnecessary litigation costs"). A settlement now – even if only with two sets of Defendants – weighs in favor of finding the fee request reasonable. *See Merck ERISA*, 2010 WL 547613, at *10 ("inherently complex suit" that was "ongoing for more than two years" warranted 33⅓% fee award).

**5. The Risk of Nonpayment**

Courts in the Third Circuit have consistently recognized that the attorneys' contingent fee risk is an important factor in determining a fee award. *See In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 516 (W.D. Pa. 2003) (finding "investment of time, personnel and resources" supported awarding requested fee). *See, e.g.*, *In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 104 (E.D. Pa. 2013) ("as a contingent fee case, counsel faced a risk of nonpayment in the event of an unsuccessful trial. Throughout this lengthy litigation, class counsel have not received any payment. This factor supports approve of the requested fee."); *Merck ERISA*, 2010 WL 547613, at *11 (finding "[t]he risk of little to no recovery weighs in favor of an award of attorneys' fees" where counsel accepted the action on a contingent-fee basis).

Plaintiffs' Counsel have prosecuted this Action on a wholly contingent basis and continue to shoulder all the risks (and costs) of litigation. From the outset, Plaintiffs' Counsel understood that they were embarking on a complex, expensive and potentially lengthy litigation, which could require (and has) the investment of millions of dollars and many thousands of hours of attorney time, with no guarantee of ever being compensated for the investment of such time and resources. In undertaking this risk, Plaintiffs' Counsel were obligated to, and did, ensure that

sufficient resources were dedicated to prosecuting this Action. Indeed, there have been many class actions in which plaintiffs' counsel took on the risk of pursuing claims on a contingent basis, expended millions of dollars in time and expenses, and received nothing for their efforts.[9] Thus, the contingency risk here was very significant and fully supports the requested fee.

### 6. The Amount of Time Devoted to the Case By Plaintiffs' Counsel

Through February 28, 2019, Plaintiffs' Counsel have expended more than 51,000 hours litigating this case. (Docket Entry 1247-2, ¶¶40-44) As a court in this District observed, "[o]ver the course of years, it is reasonable that so much time would have been spent on these complex cases, particularly given the excellent counsel of Defendants and their contested nature." *Varacallo*, 226 F.R.D. at 253. Such is the case here.

As noted previously, the Third Circuit recommends that district courts use counsel's lodestar as a "cross-check" to determine whether the fee that would be awarded under the percentage-of-recovery method is reasonable. *See Sullivan*, 667 F.3d at 330; *AT&T*, 455 F.3d at 164.[10] In applying the lodestar cross-check, however, the Third Circuit has emphasized that the calculation is "not a full-blown lodestar inquiry" and need not entail "mathematical precision" or

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[9] *See, e.g., Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991 (9th Cir. 2010) (Ninth Circuit affirmed district court's dismissal on summary judgment, and plaintiffs received no damages); *Robbins v. Koger Props., Inc.,* 116 F.3d 1441 (11th Cir. 1997) (reversing $81 million jury verdict after nineteen-day trial and dismissing case with prejudice); *Anixter v. Home-Stake Prod. Co.,* 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation); *In re Apple Comput. Sec. Litig*., 1991 WL 238298 (N.D. Cal. Sept. 6, 1991) ($100 million jury verdict vacated on post-trial motions); *MCI Commc'ns. Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983) (antitrust judgment remanded for new trial and damages).

[10] Under the lodestar method, a court multiplies the number of hours each timekeeper spent on the case by their hourly rate, then adjusts that lodestar figure by applying a multiplier to reflect such factors as the risk and contingency nature of the litigation, the result obtained and the quality of the attorneys' work. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (multiplier is intended to "account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work").

"bean counting." *AT&T*, 455 F.3d at 169, n.6. Further, "the district court may rely on summaries submitted by the attorneys and need not review actual billing records." *Rite Aid*, 396 F.3d at 306-307. Here, Plaintiffs' Counsel have devoted over 52,000 hours to the prosecution of the Direct Purchaser Settlement Class's claims against Defendants, resulting in a total lodestar of $30,875,419.65. Cecchi Dec., ¶35,38.[11] Thus, the requested fee award results in the application of a slightly negative multiplier, which underscores the reasonableness of counsel's requested fee. *See, e.g., Castro* 2017 WL 4776626, at *9 ("Because the lodestar cross-check results in a negative multiplier, it provides strong evidence that the requested fee is reasonable."); *In re New Jersey Tax Sales Certificate Antitrust Litigation*, 2016 WL 5844319, at *11 (D.N.J. October 3, 2016) ("This negative multiplier confirms the reasonableness of the requested fee award." citing *In re Insurance Brokerage Antitrust Litigation*, 579 F.3d 241, 284-85 (3d Cir. 2009)).

#### 7. Awards in Similar Cases

Interim DPP Lead Counsel's request for 33.33% of the settlement proceeds available to the Direct Purchaser Settlement Class is reasonable under the percentage-of-recovery method and is consistent with fees awarded by courts in this Circuit. While there is no general rule, the Third Circuit has observed that fee awards generally range from 19% to 45% of the settlement fund. *See, e.g., Castro*, 2017 WL 4776626, at *9 ("The one-third fee is within the range of fees typically awarded within the Third Circuit through the percentage-of-recovery method; the Circuit has observed that fee awards generally ranged from 19% to 45% of the settlement fund. . . . Thus, the requested fee in this matter [of one-third of the settlement fund] is within the normal range."); *In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("Percentages awarded have varied considerably, but most fees appear to fall in the range of

[11] This time may be used to support future requests for attorneys' fees commensurate with additional settlements and/or judgments that may be obtained in the Action.

nineteen to forty-five percent."); *cf. La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, 2009 WL 4730185, at *8 (D.N.J. Dec. 4, 2009) (noting that "[c]ourts within the Third Circuit often award fees of 25% to 33⅓% of the recovery").

Moreover, ample precedent exists in this District for granting fees to counsel that are equal to the fees requested herein. *E.g.*, *Dartell v. Tibet Pharmaceuticals, Inc.* 2017 WL 2815073, at *11 (D.N.J. June 29, 2017) ("A one-third fee is consistent with fee awards in non-class cases.") *Schuler v. The Medicines Co.*, 2016 WL 3457218, at *9-10 (D.N.J. June 24, 2016) (approving 33% fee); *In re Insurance Brokerage Antitrust Litigation*, 297 F.R.D. 136, 155 (D.N.J. 2013) ("[33%] has regularly been found acceptable in common fund settlements in this District."); *Merck Vytorin*, 2010 WL 547613, at *9-12 (approving fee of 33⅓% of settlement); *Milliron v. T-Mobile USA, Inc.*, 2009 WL 3345762, at *13 (D.N.J. Sept. 14, 2009) ("The Court is aware that 33 1/3% is a standard figure for recovery in a consumer class action of the contingent-fee variety").

#### 8. Benefits Attributable to Others Including Government Agencies

This factor contemplates whether Plaintiffs' Counsel benefited from "the efforts of other groups, such as government agencies conducting investigations." *AT&T*, 455 F.3d at 165. Here, the Department of Justice ("DOJ") did conduct an investigation into the alleged anticompetitive conduct alleged in the Action and as a result, GEO entered into a plea agreement with the DOJ, agreeing to a $5 million fine. Cecchi Dec., ¶11. While this investigation provided support for the Direct Purchaser Class Plaintiffs' claims, the result obtained for the Direct Purchaser Settlement Class by the present Settlements is directly attributable to the efforts of Plaintiffs' Counsel.

### 9. The Percentage Fee that Would Have Been Negotiated Had the Case Been Subject to a Private Contingent Fee Agreement

The 33.33% fee request reflects commonly negotiated fees in the private marketplace. *See Merck ERISA*, 2010 WL 547613, at *12; *In re Remeron Direct Purchaser Antitrust Litigation*, 2005 WL 3008808, at*16 (D.N.J. Nov. 9, 2005) ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation."); *Ikon*, 194 F.R.D. at 194 ("[I]n private contingency fee cases . . . plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery"). Accordingly, the fee request is reasonable.

### 10. Innovative Terms of Settlements

The Direct Purchaser Settlement Class is guaranteed a monetary recovery of $25.7 million, $6.2 million from SII, $6.5 million from USALCO, payable in three installments, and $13 million from American Securities. In sum, the 33.33% fee requested here is supported by the *Gunter* and *Prudential* factors, consistent with fees awarded in this Circuit and warrants the Court's approval.

## VI. PLAINTIFFS' COUNSEL SHOULD BE REIMBURSED FOR THEIR OUT-OF-POCKET EXPENSES

In addition to its request for attorneys' fees, Interim DPP Lead Counsel also requests reimbursement of certain of Plaintiffs' Counsel's out-of-pocket expenses, in the amount of $19,548.31. *See In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001) (finding counsel to be "entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action"). The $19,548.31 requested by Interim DPP Lead Counsel at this time includes expenses that incurred since the Kemira and Chemtrade settlements were approved. *See* Cecchi Dec., ¶ 35.

The expenses requested for reimbursement are of the type "routinely billed by attorneys to paying clients in similar cases" and should therefore be reimbursed from the settlement proceeds. *In re Schering-Plough Corp. Enhance ERISA Litigation*, 2012 WL 1964451, at *8 (D.N.J. May, 31, 2012). Accordingly, at this time, Interim DPP Lead Counsel respectfully requests reimbursement of Plaintiffs' Counsel's expenses in the amount of $1,429,450.19.

## VII. THE COURT SHOULD APPROVE CASE CONTRIBUTION AWARDS TO THE DIRECT PURCHASER CLASS PLAINTIFFS

Interim DPP Lead Counsel requests that the Court award $10,000 to each of the Direct Purchaser Class Plaintiffs[12] (an aggregate of $110,000) for their work, to date, representing the Direct Purchaser Settlement Class in the Action. Cecchi Dec., ¶39.[13] Each of the Direct Purchaser Class Plaintiffs has been committed to pursuing the Direct Purchaser Settlement Class's claims since they became involved in the litigation. Specifically, Direct Purchaser Class Plaintiffs provided information necessary for filing the Complaint, and has undergone significant efforts to produce their own documents in response to Defendants' document requests. *Id*. The awards requested here are well deserved.

In the Third Circuit, service awards may be paid to class representatives to reward efforts that benefit the class. *See Beneli v. BCA Financial Services, Inc.*, 324 F.R.D. 89, 111 (D.N.J. 2018) ("The purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the

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[12] For purposes of this request, Direct Purchaser Class Plaintiffs SUEZ Water Environmental Services Inc.; SUEZ Water New Jersey Inc.; SUEZ Water Princeton Meadows Inc.; SUEZ Water New York Inc.; and SUEZ Water Pennsylvania Inc. are being treated as one plaintiff.

[13] As the Action is ongoing, Interim DPP Lead Counsel may request additional Case Contribution Awards for the Direct Purchaser Class Plaintiffs in connection with future settlements.

public service of contributing to the enforcement of mandatory laws." quoting *Sullivan*, 667 F.3d at 333, n. 65). Indeed, numerous courts have awarded named class plaintiffs for the benefits they have conferred on the class, and the amount requested here in consistent with typical awards. *See, e.g.*, *Linerboard*, 2004 WL 1221350, at *19 (approving award of $25,000 for each class representative); *In re Residential Doors Antitrust Litig*., 1998 WL 151804, at *9 (E.D. Pa. Apr. 2, 1998) (approving $10,000 award to each representatives). The requested awards to Direct Purchaser Class Plaintiffs are reasonable and justified based on their involvement in the Action and should be granted.

## VIII. CONCLUSION

For the foregoing reasons, Direct Purchaser Class Plaintiffs and Interim DPP Lead Counsel respectfully request that the Court: (1) grant final approval of the Settlement; (2) affirm certification of the Direct Purchaser Settlement Class for purposes of effectuating the Settlement and appointment of Direct Purchaser Class Plaintiffs as class representatives and Interim DPP Lead Counsel as class counsel; (3) approve the proposed Plan of Distribution submitted herewith; and (4) award attorneys' fees in the amount of 33.33% of the settlement proceeds, reimbursement of Plaintiffs' Counsel's expenses in the amount of up to $19,548.31 and Case Contribution Awards to Direct Purchaser Class Plaintiffs in the aggregate amount of $11,000.[14]

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO, P.C.
*Interim DPP Lead Counsel and*
*Chair of the Direct Purchaser Plaintiffs'*
*Steering Committee*

By: /s/ James E. Cecchi
JAMES E. CECCHI

Dated: August 29, 2019

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[14] Proposed orders will be submitted with Interim DPP Lead Counsel's reply submission on or before September 18, 2019, after the deadline for objecting and requesting exclusion from the Direct Purchaser Settlement Class has passed.