

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

KIM CARTER, ASHLEY GENNOCK,  
KENNETH HARRISON, JENNA  
KASKORKIS, and DANIEL STYSLINGER,  
individually and on behalf of all others similarly  
situated,

Plaintiffs,

v.

GENERAL NUTRITION CENTERS, INC., a  
Delaware Corporation, GENERAL HOLDINGS,  
INC., a Delaware Corporation,

Defendants.

Case No: 2:16-cv-00633-MRH

**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFFS' MOTION FOR ATTORNEYS'  
FEES AND EXPENSES, AND FOR  
REPRESENTATIVE PLAINTIFFS'  
SERVICE PAYMENTS**

Filed Electronically

**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. SUMMARY OF THE LITIGATION AND SETTLEMENT NEGOTIATIONS .....	2
A. Class Counsel Conducted Extensive Factual and Legal Investigation and Diligently Litigated this Matter.....	2
B. Class Counsel Engaged in Extensive Arms’-Length Settlement Discussions and Negotiated All Aspects of the Settlement .....	4
C. Preliminary Approval and Supervision of Class Notice .....	5
D. The Settlement Benefits Achieved By Class Counsel .....	6
1. Monetary Benefits to the Class .....	6
2. Injunctive Relief.....	7
3. Class Release .....	8
III. THE REQUESTED ATTORNEYS’ FEES AND EXPENSES ARE FAIR AND REASONABLE .....	8
A. Class Counsel’s Fee Request Should Be Evaluated Under the Percentage-of-Recovery Method .....	9
B. The Requested Fee Is Fair and Reasonable Under the Third Circuit’s <i>Gunter/Prudential</i> Factors .....	9
1. The Settlement Fund is Substantial and Confers a Benefit Upon Approximately 3.6 Million Class Members.....	10
2. The Lack of Opposition to Class Counsel’s Fee Request Weighs in Favor of Approval .....	12
3. The Excellent Result Achieved Demonstrates That Class Counsel Litigated this Matter With Skill, and Efficiency.....	12
4. The Complexity and Duration of the Litigation .....	14
5. Class Counsel Undertook Significant Risk of Nonpayment.....	14
6. Class Counsel Devoted Significant Time Prosecuting this Litigation.....	15
7. Class Counsel’s Fee and Expense Request of 25% of the Settlement Fund is in Line With Awards in Similar Cases.....	17

8.	The Settlement Benefits Are Attributable Solely to the Efforts of Class Counsel .....	18
9.	The Percentage Fee Approximates the Fee that Would Have Been Negotiated in the Private Market .....	18
10.	Innovative Terms of the Settlement.....	18
C.	The Lodestar Cross-Check Confirms the Reasonableness of Class Counsel’s Fee Request.....	19
D.	Class Counsel Are Entitled to Reimbursement of Reasonable Expenses.....	22
IV.	THE REQUESTED SERVICE PAYMENTS ARE REASONABLE.....	23
V.	CONCLUSION.....	24

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>Cases</b>	
<i>Abrams v. Lightolier, Inc.</i> , 50 F.3d 1204 (3d Cir. 1995) .....	22
<i>Alexander v. Washington Mut. Inc.</i> , No. CIV.A. 07-4426, 2012 WL 6021103 (E.D. Pa. Dec. 4, 2012).....	21
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472 (1980).....	9
<i>Brown v. Progressions Behavioral Health Servs., Inc.</i> , No. CV 16-6054, 2017 WL 2986300 (E.D. Pa. July 13, 2017).....	23
<i>Bryan v. Pittsburgh Plate Glass Co.</i> , 494 F.2d 799 (3d Cir. 1974).....	14
<i>Cullen v. Whitman Med. Corp.</i> , 197 F.R.D. 136 (E.D. Pa. 2000).....	23
<i>First State Orthopaedics v. Concentra, Inc.</i> , 534 F.Supp.2d 500 (E.D. Pa. 2007).....	17
<i>Fleisher v. Fiber Comp., LLC</i> , No. CIV.A. 12-1326, 2014 WL 866441 (E.D. Pa. March 5, 2014).....	23
<i>Frederick v. Range Resources-Appalachia, LLC</i> , No. 08-288, 2011 WL 1045665 (W.D. Pa. Mar. 17, 2011) .....	17
<i>Gattinella v. Kors</i> , No. 14-cv-5731, 2016 WL 690877 (S.D.N.Y. Feb. 9, 2016).....	11
<i>Gunter v. Ridgewood Energy Corp.</i> , 223 F.3d 190 (3d Cir. 2000).....	9, 10, 12, 15
<i>Hall v. Best Buy Co.</i> , 274 F.R.D. 154 (E.D. Pa. 2011).....	9
<i>Halley v. Honeywell Int’l, Inc.</i> , 861 F.3d 481 (3d Cir. 2017).....	17
<i>Harshbarger v. Penn Mut. Life Ins. Co.</i> , No. CV 12-6172, 2017 WL 6525783 (E.D. Pa. Dec. 20, 2017).....	18, 19
<i>Haught v. Summit Res., LLC</i> , No. 1:15-CV-0069, 2016 WL 1301011 (M.D. Pa. April 4, 2016).....	24
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983) .....	10
<i>Huffman v. Prudential Ins. Co. of Am.</i> , No. 2:10-CV-05135, 2019 WL 1499475 (E.D. Pa. Apr. 5, 2019) .....	17
<i>In re Aetna Inc. Securities Litig.</i> , No. CIV.A. MDL 1219, 2001 WL 20928 (E.D. Pa. Jan. 4, 2001).....	22
<i>In re Am. Inv’rs Life Ins. Co. Annuity Mktg. &amp; Sales Practices Litig.</i> , 263 F.R.D. 226 (E.D.Pa. 2009).....	22, 24

<i>In re Am. Investors Life Ins. Co. Annuity Marketing and Sales Practices Litig.</i> , MDL 1712, 2009 WL 4912164 (E.D. Pa. Dec. 18, 2009).....	12
<i>In re Cendant Corp. Litig.</i> , 264 F.3d 201 (3d Cir. 2001) .....	12, 19
<i>In re Cendant Corp. PRIDES Litig.</i> , 243 F.3d 722 (3d Cir. 2001).....	8
<i>In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.</i> , 269 F.R.D. 468 (E.D. Pa. 2010).....	14
<i>In re CertainTeed Fiber Cement Siding Litig.</i> , 303 F.R.D. 199, 225 (E.D. Pa. 2014) .....	23
<i>In re Cigna-Am. Specialty Health Admin. Fee Litig.</i> , No. 2:16-cv-03967-NIQA, 2019 WL 4082946 (E.D. Pa. Aug. 29, 2019) .....	10, 17, 18, 20
<i>In re Diet Drugs</i> , 582 F.3d 524 (3d Cir. 2009).....	passim
<i>In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.</i> , 55 F.3d 768 (3d Cir. 1995).....	14, 17
<i>In re Ikon Office Sols., Inc. Sec. Litig.</i> , 194 F.R.D. 166 (E.D. Pa. 2000) .....	13, 18, 20
<i>In re Ins. Brokerage Antitrust Litig.</i> , 282 F.R.D. 92 (D.N.J. 2012).....	23
<i>In re Merck &amp; Co., Inc. Vytorin Erisa Litig.</i> , No. CIV. A. 08-CV-285DMC, 2010 WL 547613 (D.N.J. Feb. 9, 2010) .....	17, 18, 21
<i>In re Processed Egg Prods. Antitrust Litig.</i> , 284 F.R.D. 249 (E.D. Pa. 2012).....	14
<i>In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions</i> , 148 F.3d 283 (3d Cir. 1998).....	9, 21
<i>In re Rite Aid Corp. Sec. Litig.</i> , 396 F.3d 294 (3d Cir. 2005).....	10, 19
<i>In re Safety Components, Inc. Sec. Litig.</i> , 166 F. Supp. 2d 72 .....	21, 22
<i>In re Schering-Plough Corp. Enhance ERISA Litig.</i> , No. 08-1432 (DMC) (JAC), 2012 WL 1964451 (D.N.J. May 31, 2012).....	15, 20
<i>In re Viropharma Inc. Sec. Litig.</i> , No. 12-2714, 2016 WL 312108 (E.D. Pa. Jan. 25, 2016).....	10, 13, 14, 20
<i>Krimes v. JPMorgan Chase Bank, NA.</i> , No. 15-5087, 2017 WL 2262998 (E.D. Pa. May 24, 2017) .....	20
<i>Lazy Oil Co. v. Witco Corp.</i> , 95 F.Supp.2d 290 (W.D. Pa. 1997) .....	17
<i>Martin v. Foster Wheeler Energy Corp.</i> , No. 3:06-cv-0878, 2008 WL 906472 (M.D. Pa. March 31, 2008).....	22
<i>McDonough v. Toys “R” Us, Inc.</i> , 80 F.Supp.3d 626 (E.D. Pa. 2015) .....	17

*Mckenna v. City of Phila.*, 582 F.3d 447, 455 (3d Cir. 2009)..... 19

*Mo. v. Jenkins by Agyei*, 491 U.S. 274, 283-84 (1989) ..... 20

*Moore v. GMAC Mortg.*, No. 07-4296, 2014 WL 125318188 (E.D. Pa. Sept. 19, 2014) ..... 21

*Myers v. Jani-King of Philadelphia, Inc.*, No. CV 09-1738,  
 2019 WL 4034736 (E.D. Pa. Aug. 26, 2019) ..... 15

*Russell v. Kohl's Dep't Stores, Inc.*, No. EDCV151143RGKSPX,  
 2016 WL 6694958 (C.D. Cal. Apr. 11, 2016) ..... 11

*Sullivan v. DB Invs. Inc.*, 667 F.3d 273 (3d Cir. 2011)..... 8

*Wallace v. Powell*, 288 F.R.D. 347. 374 (M.D. Pa. 2012)..... 15, 17, 18

**Rules**

Fed. R. Civ. P. 23(h) ..... 8

**Statutes**

16 C.F.R. §§ 233.1 ..... 7

Cal. Bus. & Prof. Code § 17501 ..... 7

## I. INTRODUCTION

After over three years of zealous advocacy of this class action, thorough factual and legal investigation, substantial exchanges of information among the Parties,<sup>1</sup> two full-day mediation sessions before a neutral and experienced mediator, as well as months of arms'-length discussions and negotiations between the Parties both before and after mediation, Class Counsel achieved an excellent Settlement on behalf of Plaintiffs and the Settlement Class (the "Class"). Given the risks that the Class faced in every phase of this litigation—which, absent a settlement, would have involved a lengthy trial and likely appeals—the Settlement represents an outstanding result. The Settlement generates a \$6,000,000 Settlement Fund and provides Settlement Class Members ("Class Members") with significant monetary and non-monetary relief while fully resolving all claims at issue in this Action.

Class Counsel now request that the Court award \$1,500,000 in attorneys' fees and expenses as contingent compensation for their efforts. The fee requested, \$1,452,542.96 (after \$47,457.04 in expenses are deducted) equates to 24.21% of the Settlement Fund and represents a 1.38 multiplier of Class Counsel reasonable lodestar of \$1,053,927.50, and is well within the range of what courts in the Third Circuit have found to be reasonable.

In addition, the five Representative Plaintiffs seek a Service Payment of \$5,000 each in recognition of their services as class representatives in this case (for a total of \$25,000). Without these individuals' investment of time, and their courage to step forward and vindicate the Class' rights against a large institution, the Class would not have obtained the substantial relief offered

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<sup>1</sup> Unless otherwise specified herein, all capitalized words and phrases shall have the same meaning as in the Definitions section (Section II) of the Settlement Agreement and Release of Claims ("Settlement Agreement," "Settlement," or "SA") filed in this Action. ECF No. 78-1 Ex. A.

by the Settlement.

Class Counsel submit that the requested fee award is amply justified in light of the significant Settlement benefits obtained on behalf of Plaintiffs and the Class despite the numerous risks and obstacles presented in this litigation, the significant work Class Counsel have invested and will continue to invest in this case, and the caliber of Class Counsel's work in the face of formidable opposition. Further, given the time and effort the Representative Plaintiffs devoted to this litigation on behalf of the Class, Class Counsel submit that the requested Service Payments are reasonable.

For the reasons set forth below, and the accompanying Declarations of Robert R. Ahdoot ("Ahdoot Decl."), Jeffrey R. Krinsk ("Krinsk Decl."), Gary F. Lynch ("Lynch Decl."), Reuben D. Nathan ("Nathan Decl."), and Nick Suciu III ("Suciu Decl."), Plaintiffs respectfully request that their motion be granted.<sup>2</sup>

## **II. SUMMARY OF THE LITIGATION AND SETTLEMENT NEGOTIATIONS**

### **A. Class Counsel Conducted Extensive Factual and Legal Investigation and Diligently Litigated this Matter**

In this Action, Plaintiffs claim that GNC falsely advertised discounts on their website, GNC.com. *See generally*, Amended Class Action Complaint ("FAC") (ECF No. 62), and Ahdoot Decl. ¶¶ 17-21. Plaintiffs alleged that GNC's pricing practices are wrongful and that the action should be certified pursuant to FRCP Rule 23.

The proposed Settlement seeks to redress the claims of three separate class actions; the instant case, as well as two cases pending in the United States District Court for the Southern

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<sup>2</sup> In accordance with this Court's Order Granting Preliminary Approval of Class Action Settlement (ECF No. 87 ¶14(d)), Plaintiffs will move for final approval of the Settlement by no later than December 13, 2019.



District of California: the first filed *Kaskorkis v. General Nutrition Centers, Inc. and General Holdings, Inc.*, No. 3:16-cv-00990-WQH-AGS (S.D. Cal.) (“*Kaskorkis*”) and *Harrison v. General Nutrition Centers, Inc. and GNC Holdings, Inc.*, No. 3:16-cv-03086-WQH-AGS (S.D. Cal.) (“*Harrison*”).

As set forth in detail in the declarations of Robert Ahdoot, Gary Lych, and Jeffrey Krinsk, Class Counsel expended considerable efforts on behalf on Plaintiffs, and vigorously litigated this case from the inception of this matter over three years ago. Class Counsel conducted significant pre-filing investigations, which included detailed review and evaluation of the facts, including the existence, nature and amount of price discounts on products for sale GNC’s website and issues related to GNC’s advertising and marketing practices, and comprehensive research and analysis of the applicable law. Lynch Decl. ¶¶ 7-8; Ahdoot Decl. ¶¶ 22, 73; Krinsk Decl. ¶¶ 2, 10. Class Counsel then drafted pleadings for each of the named Plaintiffs, and filed the individual complaints. Lynch Decl. ¶ 5; Ahdoot Decl. ¶¶ 7-8; Krinsk Decl. ¶ 3; Suci Dec. ¶ 12.

In all phases of the litigation, Class Counsel endeavored to gain an ample understanding of the legal issues underlying Plaintiffs’ claims. Lynch Decl. ¶¶ 7-8; Ahdoot Decl. ¶¶ 9-12, 22-25, 29; Krinsk Decl. ¶¶ 10-12. To do so, they engaged in extensive formal and informal discovery, which included, *inter alia*, negotiating and filing a protective order, serving initial disclosures, propounding and responding to interrogatories and requests for production of documents and extensive motion practice related thereto, exhaustive review and analysis of voluminous documents and data produced by GNC, and retention of and consultation with numerous experts. *See generally*, Lynch Decl. ¶¶ 7-8; Ahdoot Decl. ¶¶ 9-13, 22-25; Krinsk Decl. ¶¶ 4-12, 27.

The breadth of information gleaned from their extensive discovery efforts allowed Class Counsel to weigh the likely success of Plaintiffs’ claims and estimate individual damages

associated with Plaintiffs' claims. Lynch Decl. ¶¶ 7-8; Ahdoot Decl. ¶¶ 22-25; Krinsk Decl. ¶¶ 10-12. This necessary work also allowed Class Counsel to formulate a litigation strategy aimed at obtaining meaningful relief for the Settlement Class as efficiently as possible. Lynch Decl. ¶¶ 8; Ahdoot Decl. ¶¶ 22-25; Krinsk Decl. ¶ 12.

Other litigation related work performed by Class Counsel throughout this litigation included, *inter alia*: meetings, emails, phone calls between attorneys and staff at Class Counsel's law firms, and numerous conference calls and correspondence between Class Counsel and defense counsel; regularly communicating with Representative Plaintiffs regarding case developments, discovery, and litigation strategy; preparing case management statements and attending case management hearings. Lynch Decl. ¶ 15; Ahdoot Decl. ¶¶ 13, 26; Krinsk Decl. ¶¶ 10-12, 27.

**B. Class Counsel Engaged in Extensive Arms'-Length Settlement Discussions and Negotiated All Aspects of the Settlement**

The result achieved was not easily won. Rather, the Settlement is the product of extensive arms'-length discussions and negotiations occurring over the course of many months. Lynch Decl. ¶¶ 9-13; Ahdoot Decl. ¶¶ 30-35; Krinsk Decl. ¶ 12.

The Parties engaged in mediation in Pittsburgh, PA with third party neutral Carole Katz in December 2016, and again in July 2017. Lynch Decl. ¶¶ 9; Ahdoot Decl. ¶ 30; Krinsk Decl. ¶ 12. Although these mediations did not result in settlement, but the Parties continued with extensive negotiations spanning a number of months, with the assistance of mediator Katz, until they agreed on the principal terms of the proposed Settlement. Lynch Decl. ¶¶ 9-13; Ahdoot Decl. ¶¶ 30-31; Krinsk Decl. ¶ 12.

Although the Parties reached an agreement in principle, several details of the Settlement remained unresolved. Lynch Decl. ¶ 11; Ahdoot Decl. ¶ 33; Krinsk Decl. ¶ 12. The Parties thus worked diligently and expended additional time and effort to negotiate and finalize the terms of a

written settlement agreement and all of its exhibits, and the plan for Class Notice. Lynch Decl. ¶ 11; Ahdoot Decl. ¶ 33; Krinsk Decl. ¶ 12. These negotiations involved lengthy discussions regarding every provision of the Settlement Agreement, including the structure of the Settlement itself and the method of distribution of Settlement benefits. Lynch Decl. ¶ 11; Ahdoot Decl. ¶ 33; Krinsk Decl. ¶ 14.

Plaintiffs also requested bids from a number of settlement administrators and based on such bids, the Parties agreed upon the Angeion group to serve as the Settlement Administrator. Lynch Decl. ¶ 12; Ahdoot Decl. ¶ 34. The Notice Plan and each document comprising the Class Notice were negotiated and further refined by both Parties to ensure that these materials will be clear, straightforward, and understandable by Class Members. Lynch Decl. ¶ 12; Ahdoot Decl. ¶ 36; Krinsk Decl. ¶ 12. At all times during settlement discussions, counsel for both Parties advocated their respective client's positions and all negotiations were at arms' length. Ahdoot Decl. ¶ 32. Furthermore, it was always Class Counsel's primary goal to achieve the maximum substantive relief possible for the Settlement Class. Ahdoot Decl. ¶¶ 4, 32.

### **C. Preliminary Approval and Supervision of Class Notice**

After the lengthy process that led to finalization of the Settlement, Class Counsel prepared and filed Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Motion for Preliminary Approval"), which included supporting documents, declarations, and exhibits. ECF Nos. 77-78. As discussed therein, despite the risk and uncertainty of class certification and continued litigation, the Settlement provides the very remedies that Plaintiffs sought in their First Amended Complaint: monetary relief for the alleged represented discounts and an actual discount of GNC's everyday pricing that they advertised. See generally *id.* ECF No. 78. In addition, GNC agreed to numerous measures of equitable, forward-looking relief concerning its comparative

discount advertising on its website. *See* SA ¶ 76.

On September 9, 2019, the Court preliminarily approved the Settlement as “fair, reasonable and adequate” and ordered that the Class be given notice. *See* Order Granting Preliminary Approval of Class Action Settlement (“Preliminary Approval Order” or “PAO”) (ECF No. 87) ¶¶ 1, 7. After the Court preliminarily approved the Settlement, the Parties continued to work with the Settlement Administrator to supervise dissemination of Notice to Class Members. Lynch Decl. ¶ 14; Ahdoot Decl. ¶ 36. These efforts included review and drafting of the language and format of the Settlement Website, the script for the automated response to the toll-free number, the language and format of the Notice forms, monitoring exclusion requests and objections, and ensuring prompt response to each and every Class Member inquiry regarding the Settlement. Lynch Decl. ¶ 14; Ahdoot Decl. ¶ 36.

**D. The Settlement Benefits Achieved By Class Counsel**

The details of the proposed Settlement were set forth in Plaintiffs’ Memorandum in Support of their Motion for Preliminary Approval, are incorporated herein, and are only briefly summarized below. ECF No. 78. The Settlement provides substantial monetary and non-monetary benefits to Class Members in exchange for the Release. *See* SA ¶¶ 87-90.

**1. Monetary Benefits to the Class**

The Settlement requires GNC to make available \$6,000,000.00 to create the Settlement Fund for the benefit of the Class. SA ¶ 72. The Settlement Administration Expenses, any Service Payments awarded by the Court to the Representative Plaintiffs, and any attorneys’ fees and expenses awarded by the Court to Class Counsel will be deducted from the Settlement Fund. *Id.* The remaining Net Settlement Fund will be used to pay the consideration to the Class, as described below. *Id.*

Each Class Member may submit a Claim Form and elect to either a \$5 cash payment or a \$15 Voucher that may be redeemed for Merchandise through GNC's Website. *Id.* ¶¶ 26, 63. The Voucher is fully transferrable and has no expiration date. Further, no cash need be spent to redeem its value. *Id.* ¶ 63. Class Members who either made: (i) a total of five or more purchases (each such qualifying purchase must have been made in a unique transaction on a day separate from any other qualifying transaction) from GNC's Website within the Class Period; or (ii) a purchase in excess of \$100.00 in a single transaction from GNC's Website during the Class Period ("Multiple Purchasers") may make a claim for an additional \$5 cash payment or an additional \$15 Voucher under the Settlement ("Multiple Purchaser Relief"). *Id.* ¶¶ 26, 30. Class Members need not submit a proof of purchase, except for Multiple Purchaser Relief Claims.

In addition, the notice of the Settlement sent to Class Members includes a Coupon which may be redeemed as a one-time credit in the amount of thirty dollars (\$30) off of a purchase otherwise totaling one hundred dollars (\$100) or more of Merchandise through GNC's Website. *Id.* ¶¶ 14, 77. These Coupons constitute *additional* consideration on top of relief provided by Vouchers and cash payments, and will not diminish Claimant recoveries. Further, only the value of *redeemed* Coupons will be counted toward GNC's settlement funding obligation, and only after paying full face value of the Vouchers and cash payments to Claimants.

## **2. Injunctive Relief**

The Settlement also requires GNC to take reasonable steps to ensure its comparative discount advertising on GNC's Website complies with then-existing law, including 16 C.F.R. §§ 233.1 and Cal. Bus. & Prof. Code § 17501 (if the advertisement will appear in California). SA ¶ 76. Additionally, GNC will disclose, on its website, the basis of their reference pricing or similar practices for so long as it uses such practices. *Id.* ¶ 76(a).

### 3. Class Release

If the Settlement is approved, Plaintiffs and only Class Members who do not opt out and are included among the Class Member Information will release GNC from all Claims that “(a) arise out of or relate in any way to allegations set forth in the Actions, which, for the avoidance of doubt includes GNC’s alleged discounting of its Merchandise from a regular or original price, advertising of those discounts, and GNC’s sales of Merchandise on GNC’s Website; or (b) that have been, or could have been, brought in the Actions and arose out of the same nucleus of operative facts as any of the claims asserted in the Actions.” *Id.* ¶ 45. Thus, the release is limited and tailored only to apply to allegations alleged in the Actions.

### III. THE REQUESTED ATTORNEYS’ FEES AND EXPENSES ARE FAIR AND REASONABLE

Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure and the Court’s Preliminary Approval Order (ECF No. 87 ¶ 14(c)), Class Counsel request an award of attorneys’ fees, inclusive of costs and expenses, in the total amount of \$1,500,000. SA ¶ 126.

Rule 23(h) provides that in a class action settlement, “the court may award reasonable attorneys’ fees and nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). The amount of the award of attorneys’ fees is within the discretion of the Court, so long as the Court employs the proper legal standards, follows the proper procedures, and makes findings of fact that are not clearly erroneous. *See In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 727 (3d Cir. 2001). In evaluating the award of attorneys’ fees, the Third Circuit uses two methods—the percentage-of-recovery approach and the lodestar approach—each with attributes suited to particular types of cases. *Sullivan v. DB Invs. Inc.*, 667 F.3d 273, 330 (3d Cir. 2011). The percentage-of-recovery approach “‘applies a certain percentage to the settlement fund,’” while the lodestar method “‘multiplies the number of hours class counsel worked on a case by a

reasonable hourly billing rate for such services.” *Id.* (quoting *In re Diet Drugs*, 582 F.3d 524 (3d Cir. 2009)).

**A. Class Counsel’s Fee Request Should Be Evaluated Under the Percentage-of-Recovery Method**

It is well established that attorneys who represent a class whose efforts achieve a benefit for class members are “entitled to a reasonable attorney’s fee from the fund as a whole” as compensation for their services. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The Third Circuit has approved the “percentage of the recovery” method for determining attorneys’ fees where class members recover from a common fund. *Hall v. Best Buy Co.*, 274 F.R.D. 154, 171 (E.D. Pa. 2011). As courts recognize, in addition to providing just compensation, attorney fee awards from a common fund “ensur[e] that competent counsel continue to be willing to undertake risky, complex, and novel litigation.” *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000) (internal quotations omitted). Indeed, 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) (internal quotations omitted).

Class Counsel respectfully submit that their requested fee is fair and reasonable under the percentage-of-recovery method, as supported by the lodestar cross check, as discussed below.

**B. The Requested Fee Is Fair and Reasonable Under the Third Circuit’s *Gunter/Prudential* Factors**

In determining what constitutes a reasonable percentage fee award under the percentage-of-recovery approach, the Third Circuit has directed district courts to engage in a “robust assessment” of the ten factors set forth in *Gunter*, 223 F.3d 190 (3d Cir. 2000), and *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) (the

“*Gunter/Prudential* factors”). Those factors are:

(1) the size of the fund created and the number of beneficiaries, (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, (7) the awards in similar cases, (8) the value of benefits attributable to the efforts of class counsel relative 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 arrangement at the time counsel was retained, and (10) any innovative terms of settlement[.]

*Diet Drugs*, 582 F.3d at 541. These factors are not exhaustive, and should “not be applied in a formulaic way . . . and in certain cases one factor may outweigh the rest.” *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 301 (3d Cir. 2005) (citing *Gunter*, 223 F.3d at 195 n.1). The balance of these factors weighs in favor of approving Class Counsel’s fee request.

**1. The Settlement Fund is Substantial and Confers a Benefit Upon Approximately 3.6 Million Class Members**

The first factor “consider[s] the fee request in comparison to the size of the fund created and the number of class members to be benefitted.” *In re Cigna-Am. Specialty Health Admin. Fee Litig.*, No. 2:16-cv-03967-NIQA, 2019 WL 4082946, at \*15 (E.D. Pa. Aug. 29, 2019) (citations omitted). The result achieved and the number of persons benefits are important factors to be considered in awarding fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“the most critical factor is the degree of success obtained”); *In re Viropharma Inc. Sec. Litig.*, No. 12-2714, 2016 WL 312108, at \*16 (E.D. Pa. Jan. 25, 2016).

The Settlement requires GNC to make available \$6,000,000 to create a *non-reversionary* Settlement Fund for the benefit of a nationwide class of approximately 3.6 million Class Members. Ahdoot Decl. ¶ 23. The Settlement’s distribution method ensures that the maximum amount of the Settlement Fund inures to the benefit of the Class. After payment of Settlement Administration



Expenses and any court-awarded Service Payments and Attorneys' Fees and Expenses, the Net Settlement Fund will be used to pay monetary consideration to Class Members. Under the Settlement, each Class Member may claim up to two \$5 cash payments or two \$15 Vouchers, in addition to receiving a \$30 off \$100 Coupon along with the Notice sent to them.<sup>3</sup> Based on data obtained from GNC during discovery, Class Counsel determined that the proposed relief is proportional to damages incurred by each Class Member. Ahdoot Decl. ¶¶ 22-25.

The Settlement represents an excellent outcome, and compares favorably with settlements reached in similar misrepresented discount class actions. *See, e.g., Gattinella v. Kors*, No. 14-cv-5731, 2016 WL 690877, at \*1 (S.D.N.Y. Feb. 9, 2016) (\$4.875 million settlement reached on behalf of 3.4 million identified class members); *Russell v. Kohl's Dep't Stores, Inc.*, No. EDCV151143RGKSPX, 2016 WL 6694958, at \*2-3 (C.D. Cal. Apr. 11, 2016) (\$6.15 million settlement reached on behalf of 8.82 million identified class members).

The Settlement also confers a non-monetary benefit upon all Class Members. As part of the Settlement, GNC has committed to take reasonable steps to ensure its comparative discount advertising on its website complies with then existing federal or California law. SA ¶ 76. In sum, the \$6,000,000 Settlement Fund and the significant practice changes obtained for the approximately 3.6 million Class Members demonstrate that Class Counsel's fee request is reasonable.

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<sup>3</sup> While the value of this relief can increase or decrease depending on the number of claims made, the Settlement envisions a *pro rata* distribution of any unallocated funds to participating Class Members to prevent any reversion of the Settlement Fund to GNC. SA ¶¶ 74-75, 77-86. Furthermore, any unclaimed residual funds will be provided to a non-profit recipient who works to prevent the same type of misrepresentations at issue here. *Id.* ¶ 86; *see also* <https://www.nclc.org> (last visited October 24, 2019).

**2. The Lack of Opposition to Class Counsel’s Fee Request Weighs in Favor of Approval**

The second factor considers “the presence or absence of substantial objections by members of the class to the settlement and/or fees requested by counsel.” *Gunter*, 223 F.3d at 195 n.1. A small number of objections and/or objections lacking in merit would support Class Counsel’s fee request. *Diet Drugs*, 582 F.3d at 542 (“dearth of objections throughout the settlement and fee adjudication process” weighed in favor of approval); *In re Am. Investors Life Ins. Co. Annuity Marketing and Sales Practices Litig.*, MDL 1712, 2009 WL 4912164, at \*18 (E.D. Pa. Dec. 18, 2009) (“The small number of objections and the objections’ lack of merit” are indications of a reasonable fee request).

Here, the deadline for Class Members to object to or opt-out of the Settlement is November 23, 2019. PAO ¶ 15(c)-(d). To date, Class Counsel is aware of no objections, and 5 Requests for Exclusion (out of a Class of approximately 3.6 million Class Members). Ahdoot Decl. ¶ 37.<sup>4</sup> As the Third Circuit has recognized, “[t]he vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement.” *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001). Thus far, the reaction of the Class has been overwhelmingly positive. This factor weighs in favor of Class Counsel’s fee request.

**3. The Excellent Result Achieved Demonstrates That Class Counsel Litigated this Matter With Skill, and Efficiency**

The third factor, which assesses the skill and efficiency of attorneys involved, is “measured by ‘the quality of the result achieved, the difficulties faced, the speed and efficiency of the

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<sup>4</sup> Class Counsel will address any objections in Plaintiffs’ forthcoming Memorandum in support of Motion for Final Approval of the Settlement.

recovery, the standing, experience and expertise of counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.” *Viropharma*, 2016 WL 312108, at \*16.

In granting preliminary approval, this Court acknowledged that “Class Counsel are competent and capable of exercising their responsibilities as Class Counsel.” Preliminary Approval Order, ECF No. 87 ¶ 4. From the inception of the litigation, through extensive and high-contested discovery, mediation and settlement negotiations, Class Counsel performed with a high level of skill and efficiency. The excellent result achieved here confirms that fact. Here, the Settlement was made possible by Class Counsel’s substantial experience litigating class actions of similar size, scope and complexity like the instant Action. Ahdoot Decl. ¶¶ 57-64 & Ex. A; Lynch Decl. ¶¶ 25-28 & Ex. C; Krinsk Decl. ¶¶ 21-22 & Ex. A; Nathan Decl. ¶¶ 8, 17; Suciu Decl. ¶ 4.

In all stages of the litigation, Plaintiffs faced (and Class Counsel resisted) GNC’s defenses to liability and damages. Lynch Decl. ¶ 10; Ahdoot Decl. ¶¶ 8, 11-12; Krinsk Decl. ¶ 3. Despite this, Class Counsel successfully brought to bear their extensive experience and worked collaboratively and efficiently among themselves to protect and advance the interests of the Class. Ahdoot Decl. ¶¶ 4-5, 64, 73-74; Lynch Decl. ¶¶ 7-10, 25-28; Krinsk Decl. ¶¶ 21-22; Nathan Decl. ¶¶ 8, 17; Suciu Decl. ¶¶ 4-5.

The quality and vigor of opposing counsel is also considered when assessing the quality of services rendered by Class Counsel. *e.g.*, *In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000). Here, Defendants were represented by experienced and able counsel with ample resources. Ahdoot Decl. ¶¶ 57-64. Class Counsel’s ability to obtain an excellent outcome for the Settlement Class in the face of formidable opposition further confirms the quality of Class Counsel’s representation and supports the reasonableness of the requested fee award.

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

The fourth factor is intended to capture “the probable costs, in both time and money, of continued litigation.” *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) (quoting *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 801 (3d Cir. 1974)). This litigation has already been pending for over three years. As discussed in the Plaintiffs’ Motion for Preliminary Approval (ECF No. 78 at p. 9), although Plaintiffs remain confident regarding their claims and the Court’s class certification ruling, Plaintiffs concede that success is not guaranteed. Should the litigation continue, Plaintiffs would have to certify a class, to maintain the class through trial, which has proven difficult in similar cases.<sup>5</sup>

Notwithstanding its duration and progress, if Plaintiffs would continue the litigation, it would likely be additional years of further discovery and motion practice at great expense to the Parties before this case would be prepared for trial. And even if Plaintiffs secured a favorable judgment, it would not end the dispute. Any judgment can be appealed, which will likely take further additional years. Against these risks, the Settlement secures a recovery for Class Members *immediately*—rather than a “speculative promise of a larger payment years from now.” *Viropharma Inc.*, 2016 WL 312108, at \*16. This factor thus heavily weighs in favor of Class Counsel’s fee request.

#### 5. Class Counsel Undertook Significant Risk of Nonpayment

The fifth factor, risk of nonpayment, supports Class Counsel’s fee request. “Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis

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<sup>5</sup> See, e.g., *In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 273 (E.D. Pa. 2012) (“Plaintiffs not only face the risk that they will not succeed in establishing liability and damages, but also the risks associated with certifying and maintain a class.”); *In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 487 (E.D. Pa. 2010) (“If it would be difficult for a plaintiff to establish liability, this factor favors settlement.”).

militates in favor of approval.” *In re Schering-Plough Corp. Enhance ERISA Litig.*, No. 08-1432 (DMC) (JAC), 2012 WL 1964451, at \*7 (D.N.J. May 31, 2012). Class Counsel undertook this Action over the course of three years on a contingency basis while foregoing other work, with no guarantee of payment for any of the hours and expenses they devoted to the litigation. Ahdoot Decl. ¶ 43; Krinsk Decl. ¶¶ 25-27; Nathan Decl. ¶ 16; Suciu Decl. ¶ 3; *see Myers v. Jani-King of Philadelphia, Inc.*, No. CV 09-1738, 2019 WL 4034736, at \*11 (E.D. Pa. Aug. 26, 2019) (“attorneys always risk nonpayment when they accept cases on a contingency fee basis”).

As noted, GNC lodged several substantial defenses that could have eliminated any possibility of recovery for the Settlement Class, as well as non-payment for Class Counsel. Lynch Decl. ¶ 10; Ahdoot Decl. ¶¶ 8, 11-12; Krinsk Decl. ¶ 3. Although Class Counsel achieved an excellent result for the Settlement Class, this outcome was far from certain until shortly before the Settlement was reached. Class Counsel received no compensation for their efforts during the course of this litigation and have incurred significant unpaid fees and costs—which would remain unpaid absent the Settlement, or had GNC prevailed. Ahdoot Decl. ¶ 43; Krinsk Decl. ¶¶ 25-27; Nathan Decl. ¶ 16; Suciu Decl. ¶ 3. This significant risk of receiving little or no recovery supports their fee request. *See Wallace v. Powell*, 288 F.R.D. 347, 374 (M.D. Pa. 2012) (risk of nonpayment “allows courts to award higher attorneys’ fees for riskier litigation”) (citations omitted).

#### **6. Class Counsel Devoted Significant Time Prosecuting this Litigation**

The sixth factor considers the amount of time Class Counsel devoted to the litigation. *Gunter*, 223 F.3d at 199. Bringing this case to a successful resolution demanded a significant commitment of time and resources by a team of experienced lawyers. Ahdoot Decl. ¶¶ 40-48; Lynch Decl. ¶¶ 19, 29; Krinsk Decl. ¶¶ 27, 31-32. Over the course of approximately three years, Class Counsel and their support staff have devoted some 1,832.60 hours prosecuting and settling

this litigation on behalf of Plaintiffs and the Settlement Class. Ahdoot Decl. ¶¶ 40-41. This does not include the additional attorney time that will be devoted to this case following the filing of this Memorandum, and time that Class Counsel will have to spend going forward with obtaining approval of and executing the Settlement, and additional work on appeal if necessary. Ahdoot Decl. ¶¶ 48-49; Lynch Decl. ¶ 20; Krinsk ¶¶ 35-36; Suciu ¶ 14.

As described above, from initiating this Action until reaching the proposed Settlement, Class Counsel continuously engaged in vigorous litigation against well-capitalized Defendants represented by sophisticated counsel. Even though Class Counsel were experienced in false-discount class actions such as this, navigating through the issues raised required exhaustive investigation of the facts and underlying events relating to the claims, as well as the applicable legal principles bearing on this litigation. Lynch Decl. ¶ 7; Ahdoot Decl. ¶ 9-13, 22-25; Krinsk Decl. ¶¶ 4-14.

Discovery was also contentious, and demanded considerable time and labor. Ahdoot Decl. ¶¶ 11-13; Krinsk Decl. ¶¶ 6-9. For example, at the outset of discovery, the Parties faced several disputes which resulted in significant hours of meet-and-confers and motion practice related thereto. Ahdoot Decl. ¶¶ 11-12; Krinsk Decl. ¶¶ 6-9. Class Counsel spent significant time reviewing and analyzing thousands of pages of documents and data produced by GNC, which included extensive records regarding thousands of pages relating to the alleged false-pricing scheme during the Class Period, competitor pricing, pricing history, transactional history, pricing calendars, and advertisements. Ahdoot Decl. ¶¶ 22-25; Krinsk Decl. ¶ 11-12. This necessary work allowed Class Counsel to fully evaluate Plaintiffs' claims, the merits of those claims, and negotiate the terms and structure of a Settlement that offered the precise relief the lawsuit was filed to obtain. Krinsk Decl. ¶ 10.

In sum, Class Counsel have expended, and will continue to expend significant hours beyond the point at which the Parties reached a settlement in seeing this litigation to its conclusion. Accordingly, the substantial amount of time devoted to this case supports Class Counsel's fee request.

**7. Class Counsel's Fee and Expense Request of 25% of the Settlement Fund is in Line With Awards in Similar Cases**

The Third Circuit has noted that fee awards generally range from 19% to 45% of the settlement fund when the percentage of the fund method is used. *See In re Gen. Motors*, 55 F.3d at 822.<sup>6</sup> Class Counsel's fee request of 25% of the Settlement Fund is well within that range and is also in line with, or *below*, recent fee awards in a number of decisions in the Third Circuit and in this District. *See, e.g., Cigna-Am. Specialty*, 2019 WL 4082946, at \*15 (approving fee award of one-third of the settlement fund); *Huffman v. Prudential Ins. Co. of Am.*, No. 2:10-CV-05135, 2019 WL 1499475, at \*7 (E.D. Pa. Apr. 5, 2019) (finding fee equal to one third of the \$9 million settlement fund reasonable); *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 499-501 (3d Cir. 2017) (affirming award of 28% of common fund); *Wallace*, 288 F.R.D. at 375 (finding award of approximately 25% of settlement fund reasonable); *In re Merck & Co., Inc. Vytorin Erisa Litig.*, No. CIV. A. 08-CV-285DMC, 2010 WL 547613, at \*14 (D.N.J. Feb. 9, 2010) (approving common fund fee award of 33 1/3%).

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<sup>6</sup> *See also, e.g., Frederick v. Range Resources-Appalachia, LLC*, No. 08-288, 2011 WL 1045665, at \*9 (W.D. Pa. Mar. 17, 2011) (citing *Lazy Oil Co. v. Witco Corp.*, 95 F.Supp.2d 290, 341 (W.D. Pa. 1997)) (fee awards "typically range from 19% to 45% of the settlement fund when the percentage-of-recovery approach is used, with 25% being the median award."); *McDonough v. Toys "R" Us, Inc.*, 80 F.Supp.3d 626, 653 (E.D. Pa. 2015) ("fee awards generally range between nineteen and forty-five percent of the common fund"); *First State Orthopaedics v. Concentra, Inc.*, 534 F.Supp.2d 500, 524 (E.D. Pa. 2007) ("Many Courts have considered 25% to be the benchmark figure for attorney fee awards in class action lawsuits, with adjustments up or down for case-specific factors ....").

**8. The Settlement Benefits Are Attributable Solely to the Efforts of Class Counsel**

The exceptional outcome here was a direct result of Class Counsel's efforts. No other group or governmental agency aided Class Counsel in developing the claims at issue, litigating the proceedings, and ultimately negotiating the Settlement and securing the \$6 million Settlement Fund for the benefit of the Class. Lynch Decl. ¶ 29; Ahdoot Decl. ¶¶ 4-5, 73; Krinsk Decl. ¶¶ 4-9. Consequently, this factor supports Class Counsel's fee request. *See Harshbarger v. Penn Mut. Life Ins. Co.*, No. CV 12-6172, 2017 WL 6525783, at \*5 (E.D. Pa. Dec. 20, 2017) ("Because Class Counsel were the only ones pursuing the claims at issue in this case, this factor weighs in favor of approval.").

**9. The Percentage Fee Approximates the Fee that Would Have Been Negotiated in the Private Market**

The fee requested here also bodes well in comparison to the probable terms of a contingent fee contract negotiated in private litigation, which customarily range between 30% and 40% of the recovery. *See Cigna-Am. Specialty*, 2019 WL 4082946, at \*14 ("Were this case an individual action, the customary contingent fee would likely range between thirty and forty percent of the recovery."); *Wallace*, 288 F.R.D. at 375 (same); *Ikon*, 194 F.R.D. at 194 (same). Accordingly, this factor also supports Class Counsel's requested fee.

**10. Innovative Terms of the Settlement**

The Settlement does not contain any innovative terms. Thus, this factor neither weighs in favor of nor against approval of the requested fees. *See, e.g., In re Merck & Co.*, 2010 WL 547613, at \*12 (D.N.J. Feb. 9 2010) (finding factor neutral when no innovative terms are highlighted).

Overall, the *Gunter/Prudential* factors demonstrate that Class Counsel's requested fee is reasonable, and therefore, should be approved.



**C. The Lodestar Cross-Check Confirms the Reasonableness of Class Counsel's Fee Request**

The Third Circuit has suggested that “[i]n addition to the percentage-of-recovery approach ... it is ‘sensible’ for district courts to ‘cross-check’ the percentage fee award against the ‘lodestar’ method.” *Rite Aid*, 396 F.3d at 305; *Harshbarger*, 2017 WL 6525783, at \*2 (“The reasonableness of attorneys’ fee awards in common fund cases ... is generally evaluated using a [percentage of recovery] approach followed by a lodestar cross-check.”). The purpose of that cross-check is to ensure that the percentage approach does not result in an “extraordinary” lodestar multiple or windfall. *See In re Cendant Corp.*, 264 F.3d at 285. While the lodestar reasonableness check is used “as a means of assessing whether the percentage-of-recovery award is too high or too low,” it is not a substitute for the percentage-of-the fund method. *Diet Drugs*, 582 F.3d at 545 n.42 (citing *Rite Aid*, 396 F.3d at 306-307). Remarking that a lodestar cross-check is “not a full-blown” inquiry, the Third Circuit has stated that a lodestar analysis requires “neither mathematical precision nor been counting.” *Rite Aid*, 396 F.3d at 306-07. Consequently, district courts “may rely on summaries submitted by attorneys and need not review actual billing records.” *Id.*

In calculating a lodestar, the court first multiplies the applicable number of hours expended by counsel by an hourly rate to get a lodestar amount. *Rite Aid*, 396 F.3d at 305; *see also Mckenna v. City of Phila.*, 582 F.3d 447, 455 (3d Cir. 2009). Once the lodestar is established, the court must then determine whether additional adjustments are appropriate, to account for a variety of contingency factors involved in a particular case. *Rite Aid*, 396 F.3d at 305-306.

Class Counsel’s combined lodestar of \$1,053,927.50, confirms that the requested fee is reasonable, as it reflects a 1.37 multiplier against the requested fee and expense award of 25% of the Settlement Fund. Ahdoot Decl. ¶¶ 40-41; Lynch Decl. ¶ 19; Krinsk Decl. ¶ 31; Suciu Decl. ¶ 7; Nathan Decl. ¶¶ 6-7. A summary of the lodestar of the Plaintiffs’ firms is as follows:

<b>FIRM</b>	<b>HOURS</b>	<b>LODESTAR</b>
Ahdoot & Wolfson, PC	827.8	\$501,685.00
Carlson Lynch, LLP	261.5	\$155,847.50
Finkelstein & Krinsk LLP	515.6	\$238,942.50
Barbat, Mansour & Suciu PLLC	137.7	\$98,050.00
Nathan & Associates, APC	90.0	\$59,402.50
<b>Totals</b>	<b>1,832.60</b>	<b>\$1,053,927.50</b>

As detailed in the accompanying Declarations, Class Counsel's combined lodestar represents 1,832.60 hours of work at the their current hourly rates<sup>7</sup>, and does not take into account the additional time that Class Counsel have spent and will have to spend going forward in obtaining approval of and executing the Settlement, and additional work on any appeal if necessary. Lynch Decl. ¶ 20; Ahdoot Decl. ¶¶ 48-49; Krinsk Decl. ¶¶ 35-36; Suciu Decl. ¶ 9. The reasonableness of Class Counsel's rates is supported by Class Counsel's Declarations, which establish that the billing rates used to calculate their lodestar are in line with their standard hourly rates charged to paying clients in non-contingent matters and are commensurate with the prevailing rates for class action litigation in the relevant geographical areas for attorneys of comparable skill, experience and reputation. Lynch Decl. ¶¶ 21-22; Ahdoot Decl. ¶¶ 65-72 & Exs. B-G; Krinsk Decl. ¶¶ 33-34; Nathan Decl. ¶¶ 8-10, 17; Suciu Decl. ¶ 8. These rates have been approved in other class action cases. Lynch Decl. ¶ 22; Ahdoot Decl. ¶¶ 65-72 & Exs. B-G; Krinsk Decl. ¶¶ 33-34; Nathan Decl. ¶¶ 8-10, 17-19; Suciu Decl. ¶ 8. Moreover, Class Counsel's rates are within the ranges that have been approved by other district courts in this Circuit overseeing class settlements.<sup>8</sup> Given Class

<sup>7</sup> Class Counsel's rates range from \$950 to \$405 for partners and \$600 to \$300 for other attorneys. The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Mo. v. Jenkins by Agyei*, 491 U.S. 274, 283-84 (1989); *In re Schering-Plough*, 2013 WL 5505744, at \*33 n.8 (citing *Jenkins*, 491 U.S. at 283-88); *Ikon*, 194 F.R.D. at 195 ("attorney's hourly rates were appropriately calculated by reference to current rather than historic rates").

<sup>8</sup> *See Cigna-Am. Specialty*, 2019 WL 4082946, at \*15 (approving hourly rates between \$175 and \$995); *Krimes v. JPMorgan Chase Bank, NA.*, No. 15-5087, 2017 WL 2262998, at \*10 (E.D.

Counsel's extensive experience in class action litigation, the complexity and risk of the litigation, and the exceptional result achieved, their rates are reasonable and appropriate.

Class Counsel expended significant time litigating this case and securing the Settlement for the Class. Class Counsel have submitted summaries of the hours expended by attorneys and staff at each firm, and descriptions of the type of work each firm performed. Lynch Decl. ¶¶ 19-21 & Ex. A; Ahdoot Decl. ¶¶ 42-48; Krinsk Decl. ¶¶ 28-31; Nathan Decl. ¶ 22 & Ex. 1; Suciu Decl. ¶¶ 6-7, 12-13. Class Counsel attest that their reported hours are accurate and were reasonably incurred in connection with the prosecution and settlement of claims and that their firms require their attorneys and staff to maintain daily, contemporaneous time records. Lynch Decl. ¶¶ 19-21; Ahdoot Decl. ¶¶ 42-48; Krinsk Decl. ¶ 28-21; Nathan Decl. ¶ 22 & Ex. 1; Suciu Decl. ¶¶ 6-7. The tasks performed and the number of hours worked were necessary to obtain the result achieved here.

Class Counsel's fee request of \$1,452,542.96 equates to a multiple of 1.38 on their \$1,053,927.50 lodestar. In *Prudential*, the Third Circuit recognized, that "[m]ultipliers ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." 148 F.3d at 341 (quoting Newberg & Conte, *Newberg on Class Actions*, §14.03 at 14-5 (3d ed. 1992)). That principle has been consistently recognized by courts in the Third Circuit. *See, e.g., Alexander v. Washington Mut. Inc.*, No. CIV.A. 07-4426, 2012 WL 6021103, at \*4 (E.D. Pa. Dec. 4, 2012) (citing *Prudential*, 148 F.3d at 341); *Diet Drugs*, 582 F.3d at 545 n.2 (same); *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 104 (D.N.J. 2001) (multiplier of one to four is the norm); *In re Am. Inv'rs Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 263 F.R.D.

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Pa. May 24, 2017) (approving hourly rates ranging from \$125 (paralegal) to \$750 (senior partner)); *Viropharma*, 2016 WL 312108, at \*18 (approving hourly rates ranging from \$350 to \$925); *Moore v. GMAC Mortg.*, No. 07-4296, 2014 WL 125318188, at \*2 (E.D. Pa. Sept. 19, 2014) (approving hourly rates ranging from \$325 to \$860); *Merck & Co.*, 2010 WL 547613, at \*13 (approving hourly rates ranging from \$320 to \$835).

226, 245 (E.D.Pa. 2009) (noting that multipliers ranging from one to four are frequently awarded and approving a multiplier of 2.3); *Martin v. Foster Wheeler Energy Corp.*, No. 3:06-cv-0878, 2008 WL 906472, at \*8 (M.D. Pa. March 31, 2008) (“Lodestar multiples of less than four (4) are well within the range awarded by district courts in the Third Circuit.”). Given the contingent nature and significant risks involved in all stages of the litigation and the quality of Class Counsel’s work in bringing this case to a successful resolution, the requested multiplier of 1.38 is appropriate, and supports the reasonableness of the requested fee.

**D. Class Counsel Are Entitled to Reimbursement of Reasonable Expenses**

Attorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable expenses from the fund. *See In re Aetna Inc. Securities Litig.*, No. CIV.A. MDL 1219, 2001 WL 20928 at \*13 (E.D. Pa. Jan. 4, 2001); *see also In re Safety Components*, 166 F. Supp. 2d at 108 (“Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in prosecution of the class action.”) (citing *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995)).

Class Counsel request reimbursement for reasonable expenses incurred in litigating this matter, in the amount of \$47,457.04. Ahdoot Decl. ¶ 52. These costs were necessary to the investigation, prosecution, and settlement of this Action.<sup>9</sup> Lynch Decl. ¶¶ 23-24 & Ex. B; Ahdoot Decl. ¶¶ 52-56; Krinsk Decl. ¶ 37; Nathan Decl. ¶ 23; Suciu Decl. ¶¶ 10-11. The majority of these costs are attributable to professional fees paid by Class Counsel to the Mediator and Experts. Ahdoot Decl. ¶¶ 54-56; Krinsk Decl. ¶ 37. These, as well as the other categories of costs incurred

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<sup>9</sup> Class Counsel also anticipate incurring additional expenses to see this case to completion, for which Class Counsel will not seek additional reimbursement. Ahdoot Decl. ¶ 53.

by Class Counsel (filing fees and court reporter and attorney service fees, among others), are the common types of costs regularly billed to paying clients. Lynch Decl. ¶¶ 23-24 & Ex. B; Ahdoot Decl. ¶¶ 54-56; Krinsk Decl. ¶ 37; Suciu Decl. ¶¶ 10-11; Nathan Decl. ¶ 23. These costs and expenses are fully documented and reasonable, and should be reimbursed.

#### **IV. THE REQUESTED SERVICE PAYMENTS ARE REASONABLE**

“[C]ourts routinely approve incentive awards compensate named plaintiffs for the services they provided and the risks they incurred during the course of a class action.” *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000) (internal quotation omitted); *see also In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199 (E.D. Pa. 2014). “It is particularly appropriate to compensate named representative plaintiffs with incentive awards where they have actively assisted plaintiffs’ counsel in their prosecution of the litigation for the benefit of a class.” *Fleisher v. Fiber Comp., LLC*, No. CIV.A. 12-1326, 2014 WL 866441, at \*15 (E.D. Pa. March 5, 2014).

Representative Plaintiffs here invested significant time assisting the litigation of this case. Lynch Decl. ¶ 16; Ahdoot Decl. ¶¶ 27-28; Krinsk Decl. ¶¶ 38-41. Plaintiffs respectfully request that the Court approve Service Payments in the amount of \$5,000 to each of the five (5) Representative Plaintiffs, an amount which is commonplace and routinely approved by courts in this Circuit. *See Brown v. Progressions Behavioral Health Servs., Inc.*, No. CV 16-6054, 2017 WL 2986300, at \*7 (E.D. Pa. July 13, 2017) (awarding \$10,000 to each named plaintiff because they “were actively involved in the litigation since before it was commenced, they provided the information and documents that formed the basis for the lawsuit” and “because the service award payments represent a small fraction of the \$542,586 Settlement Fund”); *see also In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 125 (D.N.J. 2012) (approving \$5,000 incentive awards

for each class representative); *Haught v. Summit Res., LLC*, No. 1:15-CV-0069, 2016 WL 1301011, at \*7 (M.D. Pa. April 4, 2016) (approving class representative awards from \$1,000-\$5,000, and stating that amounts were in line with those historically awarded in similar cases); *Am. Inv. Ins. Co.*, 263 F.R.D. at 245 (E.D. Pa. 2009) (approving awards of \$5,000-10,500). The requested Service Payments should therefore be approved.

**V. CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request an award of Attorneys' Fees and Expenses in the total amount of \$1,500,000, for Service Payments to the Representative Plaintiffs in the amount of \$5,000 each.

Respectfully submitted,

Dated: November 1, 2019

**AHDOOT & WOLFSON, PC**

By: /s/ Robert R. Ahdoot  
Robert Ahdoot, admitted *pro hac vice*  
*rahdoot@ahdootwolfson.com*  
Tina Wolfson, admitted *pro hac vice*  
*twolfson@ahdootwolfson.com*  
10728 Lindbrook Drive  
Los Angeles, CA 90024  
Tel: (310) 474-9111; Fax: (310) 474-8585

**CARLSON LYNCH, LLP**

By: /s/ Gary F. Lynch  
Gary F. Lynch  
*glynch@carlsonlynch.com*  
1133 Penn Avenue, 5th Floor  
Pittsburgh, Pennsylvania 15222  
Tel: (412) 322-9243; Fax: (412) 231-0246

**FINKELSTEIN & KRINSK LLP**

Jeffrey R. Krinsk, Esq., admitted *pro hac vice*

*jrkr@classactionlaw.com*

Trenton R. Krinsk, Esq., admitted *pro hac vice*

*trkr@classactionlaw.com*

550 West C Street, Suite 1760

San Diego, California 92101-3579

Tel: (619) 238-1333; Fax: (619) 238-5425

**BARBAT, MANSOUR & SUCIU PLLC**

Nick Suciu III, Esq., admitted *pro hac vice*

*nicksuciu@bmslawyers.com*

Barbat Mansour & Suciu PLLC

Bloomfield Hills, Michigan 48302

Tel: (313) 303-3472

**NATHAN & ASSOCIATES, APC**

Reuben D. Nathan, Esq., admitted *pro hac vice*

*rnathan@nathanlawpractice.com*

2901 W. Coast, Suite 200

Newport Beach, California 92663

Tel:(949)270-2798; Fax:(949)209-0303

*Class Counsel*