IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 15
ARCTIC GLACIER INTERNATIONAL INC., *et al.*,[1]	Case No. 12-10605 (KG)
	(Jointly Administered)
Debtors in a Foreign Proceeding.	Re: D.I. No. 282

ORDER APPROVING ATTORNEYS' FEES, ATTORNEYS' COSTS AND INCENTIVE PAYMENTS

Upon consideration of Class Counsel's Motion For An Award of Attorneys' Fees, Attorneys' Costs and Incentive Payments (the "Motion") providing for an award of attorneys' fees in the sum of $1,300,000.00 (representing 32.9 percent of the settlement fund), attorneys' costs of $305,033.51 and incentive payments of $1,000.00 for each named plaintiff, and the declarations of Matthew S. Wild, David F. Axelrod, Garrett D. Blanchfield, Jr., Paul G. Cassell, Joseph R. Dulaney, Sr., Ryan Hodge, Daniel R. Karon, Steven A. Owings, Jack Wagoner, III and

[1] The last four digits of the United States Tax Identification Number or Canadian Business Number, as applicable, follow in parentheses: (i) Arctic Glacier California Inc. (7645); (ii) Arctic Glacier Grayling Inc. (0976); (iii) Arctic Glacier Inc. (4125); (iv) Arctic Glacier Income Fund (4736); (v) Arctic Glacier International Inc. (9353); (vi) Arctic Glacier Lansing Inc. (1769); (vii) Arctic Glacier Michigan Inc. (0975); (viii) Arctic Glacier Minnesota Inc. (2310); (ix) Arctic Glacier Nebraska Inc. (7790); (x) Arctic Glacier New York Inc. (2468); (xi) Arctic Glacier Newburgh Inc. (7431); (xii) Arctic Glacier Oregon, Inc. (4484); (xiii) Arctic Glacier Party Time Inc. (0977); (xiv) Arctic Glacier Pennsylvania Inc. (9475); (xv) Arctic Glacier Rochester Inc. (6989); (xvi) Arctic Glacier Services Inc. (6657); (xvii) Arctic Glacier Texas Inc. (3251); (xviii) Arctic Glacier Vernon Inc. (3211); (xix) Arctic Glacier Wisconsin Inc. (5835); (xx) Diamond Ice Cube Company Inc. (7146); (xxi) Diamond Newport Corporation (4811); (xxii) Glacier Ice Company, Inc. (4320); (xxiii) Ice Perfection Systems Inc. (7093); (xxiv) ICEsurance Inc. (0849); (xxv) Jack Frost Ice Service, Inc. (7210); (xxvi) Knowlton Enterprises Inc. (8701); (xxvii) Mountain Water Ice Company (2777); (xxviii) R&K Trucking, Inc. (6931); (xxix) Winkler Lucas Ice and Fuel Company (0049); (xxx) Wonderland Ice, Inc. (8662). The Debtors' executive headquarters is located at 625 Henry Avenue, Winnipeg, Manitoba, R3A 0V1, Canada.

Brent Walker submitted in support thereof, and after due deliberation thereon, notice, and good cause appearing therefor, and following a hearing thereon;

IT IS HEREBY FOUND AND DETERMINED AS FOLLOWS:

ATTORNEY FEE AWARD

1. In setting a fee award, the Court considers several factors, including: "(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 (3d Cir. 2000) (citations omitted). Further, the Court should "cross-check the percentage award at which they arrive against the 'lodestar' award method." *Id.* The Court "determines an attorney's lodestar award by multiplying the number of hours he or she reasonably worked on a client's case by a reasonable hourly billing rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer." The Court "may, in certain circumstances, adjust the award upward or downward to reflect the particular circumstances of a given case." *Id.* It should be noted that "[t]he factors listed above need not be applied in a formulaic way. Each case is different, and in certain cases, one factor may outweigh the rest." *Id.*

1. The Settlement Is Substantial and Benefits Millions of Consumers

2. In the context of the MDL Court approved direct purchaser settlement with Arctic Glacier (*see In re Packaged Ice Antitrust Litig.*, 08-MDL-01952, 2011 WL 6209188 (E.D. Mich. Dec. 13, 2011)), the settlement presented hereby is substantial. In this case, the

indirect purchaser settlement of $3,950,000 covers 16 states and represents, on average, a settlement value of $246,875 per state. By comparison, the direct purchasers' settlement provides value of $12,500,000, but covers all 50 states, and represents, on average, a settlement value of $250,000 per state. The indirect purchaser settlement also benefits potentially millions of consumers. Accordingly, this factor weighs in favor of the requested fee award.

2. Objections

3. Notice to the Settlement Class that Class Counsel would seek a fee not to exceed one-third of the settlement amount, an award of expenses and an award of incentive payments of $1,000 to each of the class representatives was published in *USA Today* and *Parade Magazine*. No objections have been received. This factor thus weighs in favor of the requested fee award.

3. The Skill And Efficiency Of The Attorneys Involved

4. First and foremost, "the single clearest factor reflecting the quality of class counsels' services to the class are the results obtained." *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 149 (E.D.Pa.2000); *see also In re Linerboard Antitrust Litig.*, MDL 1261, 2004 WL 1221350 at *10 (E.D. Pa. June 2, 2004) amended, MDL NO. 1261, 2004 WL 1240775 (E.D. Pa. June 4, 2004) ("The result achieved is the clearest reflection of petitioners' skill and expertise."); *Smith v. Dominion Bridge Corp.*, CIV.A.96 7580, 2007 WL 1101272 at *8 (E.D. Pa. Apr. 11, 2007) ("counsels' efforts have resulted in a favorable outcome for the class, especially considering the insolvency and pending dissolution of Dominion along with the inherent complexities of proving liability and damages").

5. As explained above, Class Counsel obtained an outstanding result on behalf of the Class. By comparison, the direct purchasers had fewer hurdles proving impact and

damages (as they do not have to prove pass on of the overcharge to their class members). Here, Class Counsel obtained a result on par with the direct purchaser settlement in the Direct Purchaser MDL on an average per state basis. This fact alone weighs heavily in favor of the requested award.

6. Another consideration that weighs in favor of the requested award is the opposition faced by Class Counsel. Here, that "defense counsel are members of nationally recognized corporate defense firms with excellent reputations serves to further bolster the quality of lead counsels' reputation." *Smith v. Dominion Bridge Corp.*, 2007 WL 1101272 at *8. In this case, Class Counsel was pitted against some of the top firms in the nation: Jones Day, Hogan Lovells and DLA Piper.

7. Another consideration that weighs in favor of the requested award is the extensive experience and reputations of the team that prosecuted this action. *See, e.g., In re Genta Sec. Litig.*, 70 Fed. R. Serv. 3d 931, 2008 WL 2229843 at *10 (D.N.J. 2008) ("The third factor, the skill and efficiency of the attorneys, weighs in favor of granting the attorneys' fees award. The attorneys involved in this action are experienced in, and adept at, handling securities litigation."). As set forth in the declarations filed in support of the Motion, Class Counsel and co-counsel have extensive experience, and used that experience to obtain a worthy settlement on behalf of the Class.

8. The MDL Court recognized Class Counsel's experience and qualifications when it appointed them interim lead counsel for the indirect purchaser class. *See In re Packaged Ice Litig.*, 08-MD-01952, 2009 WL 1518428 at *3 (E.D. Mich. June 1, 2009). Other members of the team include Reinhardt, Wendorf & Blanchfield, which has served as co-lead counsel in nationwide antitrust class actions, *In re American Express Anti-Steering Rules Antitrust*

Litigation (S.D.N.Y. and E.D.N.Y.); *In re Bromine Antitrust Litigation* (S.D. Ind.); and *In re Euro Rail Antitrust Litig* (S.D.N.Y.), and Professor Paul Cassell, a prominent expert on federal victims' rights and a former federal judge.

9. In sum, the skill and efficiency of Class Counsel and its team weighs in favor of the requested fee award.

4. The Complexity And Duration Of The Litigation

10. This litigation was more complex than even the typically complicated indirect purchaser antitrust class action. It involved novel issues under Chapter 15 and Canadian bankruptcy law, and cross border litigation. This factor weighs heavily in favor of the requested fee award.

11. One court in this Circuit explained, "[a]s to the complexity of the case, an antitrust class action is arguably the most complex action to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome." *In re Linerboard Antitrust Litig.*, 2004 WL 1221350 at *10 *amended*, 2004 WL 1240775 (citations omitted). An indirect purchaser action brought under 16 state laws is considerably more complicated than the typical direct purchaser action. Indeed, during application for appointment as interim lead counsel before the MDL Court, Judge Borman noted as much. *In re Packaged Ice Antitrust Litig.*, MDL No. 1952, Dkt. #173 at 100-101 ("You've got more to do. . . . [M]ost of the people want to do the room service [the direct purchaser case]"). *See also In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 499 (N.D. Cal. 2008) ("the problem of proof in an indirect purchaser case is intrinsically more complex, because the damage model must account for the actions of innocent intermediaries who allegedly passed on the overcharge.")

12. The elements of the indirect purchasers' claim demonstrate its complexity. To prevail, plaintiffs would have been required to prove that the conspiracy encompassed the relevant 16 states, that such conduct violated the laws of these states, the amount that retailers were overcharged by the illegal conduct and the amount of the overcharge that the retailers passed on to consumers.

13. Indeed, the MDL Court's decisions on the motions to dismiss show the novelty of the legal issues (many of which have no controlling law), as well as the Class Counsel's creativity, ingenuity, and effort opposing the motions to dismiss. *See In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642 (E.D. Mich. 2011); *In re Packaged Ice Antitrust Litig.*, 08-MDL-1952, 2011 WL 6178891 (E.D. Mich. Dec. 12, 2011) *reconsideration denied,* 08-MD-01952, 2012 WL 10684 (E.D. Mich. Jan. 3, 2012).

14. Moreover, this was not merely a tag-along case that relied on the government investigation and guilty pleas as the guilty pleas were limited to market and customer allocations that took place only in Southeast Michigan and the Detroit metropolitan area. In fact, various state attorneys general conducted a civil investigation and did not pursue charges, with the exception of Michigan (where the conduct covered by the guilty pleas took place) that reached pre-suit settlements. Plaintiffs alleged that the conspiracy was nationwide. This rendered the case even more complicated. *See, e.g., Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009) ("The court found, with substantial support in the record, that the case is complex and likely to be expensive and lengthy to try. The class in this case does not have the benefit, like some other antitrust classes, of previous litigation between the defendants and the government.").

15. The United States and Canadian bankruptcy issues were likewise complex. Through their participation in these proceedings, Class Counsel was able to negotiate a stipulation that allowed them to file a class proof of claim in the Canadian proceedings and have it heard by a special claims officer with experience in antitrust law and class actions. Nevertheless, Class Counsel had to navigate through the Canadian Proceedings to advance plaintiffs' claim, including the engagement of Canadian bankruptcy attorneys to help protect class members' interests in the bankruptcy proceedings. Relying solely on their own factual investigation (as they lacked the benefit of any formal discovery), Class Counsel (with the assistance of Canadian co-counsel and economists) filed a class proof of claim for the indirect purchasers.

16. Lastly, the litigation has lasted more than four years – another consideration that supports the requested fee. *See, e.g., In re Processed Egg Products Antitrust Litig.*, MDL 2002, 2012 WL 5467530 at *4 (E.D. Pa. Nov. 9, 2012) ("Among other tasks, Plaintiffs' counsel investigated claims, briefed and argued motions to dismiss, negotiated this settlement, and successfully obtained its approval by the Court. Given the complexity that necessarily accompanies consolidated antitrust litigation and the duration of the case [lasting three years], the Court finds that this factor favors granting the motion.")

17. In sum, this antitrust indirect purchaser case presented numerous novel and complex issues and lasted more than four years. This factor weighs heavily in favor of the requested fee award.

5. <u>The Risk Of Non-Payment</u>

18. The risk of non-payment was acute because of the risk of establishing liability and damages as well as the financial condition of the defendants, which deteriorated during the litigation.

19. Any antitrust class action runs the risk of non-payment because of its inherent complexity and risk that plaintiffs may lose. *See, e.g., In re Remeron Direct Purchaser Antitrust Litig.*, CIV.03-0085 FSH, 2005 WL 3008808 at *14 (D.N.J. Nov. 9, 2005) ("A determination of a fair fee must include consideration of the sometimes undesirable characteristics of a contingent antitrust actions, including the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high.") The risk is even greater for the indirect purchaser cases. *See, e.g., In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. at 499 ("the problem of proof in an indirect purchaser case is intrinsically more complex, because the damage model must account for the actions of innocent intermediaries who allegedly passed on the overcharge.")

20. Moreover, the risk was even more substantial because the guilty pleas admitted conduct that was much more limited than the conduct that plaintiffs had to prove to prevail. *See, e.g., In re Packaged Ice Antitrust Litig.*, 08-MDL-01952, 2011 WL 6209188 at *19 (E.D. Mich. Dec. 13, 2011) ("Attorneys who take on such a massive task with a significant risk of nonpayment (all the more so, Lead Counsel suggests, since the DOJ has decided not to seek further indictments in the matter) should be compensated both for services rendered and for the risk of loss or nonpayment assumed by accepting and prosecuting the case.") (citation omitted); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008) ("Risks of establishing liability and damages are substantial .... [when] the criminal investigation

that likely instigated this antitrust litigation was concluded without the issuance of any indictments."); *In re Auto. Refinishing Paint Antitrust Litig.*, MDL NO 1426, 2008 WL 63269 at *5 (E.D. Pa. Jan. 3, 2008) ("Petitioners proceeded to prosecute this case even after the Department of Justice decided not to seek indictments against any of the Defendants. The risk of nonpayment is even higher when a defendants' *prima facie* liability has not been established by the government in a criminal action.") *See also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 304 (3d Cir. 2005) (because there was no indictment, "[t]he court did not abuse its discretion in finding there were significant risks of non-payment or non-recovery, which weighs in favor of approving the fee request.") The absence of criminal convictions relating to a nationwide cartel likewise increased the risk of establishing damages. *See, e.g., In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d at 702 ("Risks of establishing . . . damages are substantial .... [when] the criminal investigation that likely instigated this antitrust litigation was concluded without the issuance of any indictments.") While plaintiffs alleged that the cartel was nationwide, the guilty pleas were limited to market and customer allocations in Southeast Michigan and the Detroit metropolitan area, and Reddy Ice was not indicted. *In re Packaged Ice Antitrust Litig.*, 08-MD-01952, 2011 WL 717519 at *10.

21. Proving damages is also inherently risky in antitrust cases generally. "[T]he 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." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998). This case is no exception to the challenge in proving damages. Plaintiffs would have been required to prove how much less defendants would have charged different types of retailers (*i.e.*, national and regional supermarkets, mass merchants, grocery chains, gas stations and mom-and-pop stores)

that were dispersed nationwide as a result of, among other things, the threat of entry or actual entry by Arctic Glacier, Reddy Ice and Home City Ice into each other's respective territories.

22. Proof of damages is also more difficult in indirect purchaser cases. *See, e.g., In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. at 499 ("the problem of proof in an indirect purchaser case is intrinsically more complex, because the damage model must account for the actions of innocent intermediaries who allegedly passed on the overcharge.") In this case, plaintiffs would have been required to prove pass on of the overcharge from retailers to them – *i.e.*, consumers. The class of consumers bought from national and regional chains as well as mom-and-pop retailers in 16 states. The class would have been required to prove the degree of pass on from each of these types of retailers.

23. Here, the risk of non-payment was particularly acute because of the defendants' deteriorating financial condition. As it turned out, Reddy Ice and Arctic Glacier each filed for bankruptcy. The remaining defendant (Home City) is a privately held company with limited means to withstand a sizeable judgment, particularly after it paid a $9 million fine to the federal government and $13.5 million settlement to the direct purchaser class. Indeed, the MDL Court noted that the deteriorating financial condition of the defendants (even before the bankruptcies) raised "the real possibility that [the Direct Purchaser] Plaintiffs could ultimately be left with nothing at all." *In re Packaged Ice Antitrust Litig.*, 08-MD-01952, 2011 WL 717519 at *11 (E.D. Mich. Feb. 22, 2011). Class Counsel (along with co-counsel) nevertheless continued their vigorous prosecution of the claim even though it was unknown at the time whether Arctic Glacier's going-concern sale would result in sufficient proceeds to be able to pay any judgment or settlement.

24. In sum, Class Counsel has faced the risk of non-payment because of the risk of establishing liability and damages, compounded by the financially poor condition of the defendants. This factor weighs heavily in favor of the requested fee award.

6. The Amount Of Time Devoted To The Case By Plaintiffs' Counsel

25. Class Counsel (and co-counsel) devoted a tremendous amount of time: 7,213.98 hours with a historic lodestar value of $3,444,385.60. Their fee request is but a fraction of their lodestar. Thus, the amount of time devoted to the case by Plaintiffs' Counsel supports the requested fee award.

7. The Awards In Similar Cases

26. Class Counsel seeks an award of 32.9 percent. Such an award is consistent with awards in similar cases.

27. "A one third fee from a common fund has been found to be typical by several courts within this Circuit which have undertaken surveys of awards within the Third Circuit and others." *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808 at *15. One district court in this Circuit observed, "[s]cores of cases exist where fees were awarded in the one-third to one-half of the settlement fund." *In re Amerisoft Sec. Litig.*, 210 F.R.D. 109, 134 (D.N.J. 2002).[2] *See also New England Health Care Employees Pension Fund v. Fruit of the*

[2] Indeed, numerous courts have awarded fees of greater than 33.3%. *See, e.g., In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 499 (D.D.C. 1981) (awarding 45% in fees and expenses of $7.3 million settlement created in an antitrust class action); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (awarding 36% fee of $3.72 million dollar common fund); *In re Combustion, Inc.*, 968 F. Supp. 1116 (W.D. La. 1997) (awarding 36% reserve for attorney fees of gross settlement amount of $127 million); *Williams v. Sprint/United Mgmt. Co.*, CIV. 03-2200-JWL, 2007 WL 2694029 (D. Kan. Sept. 11, 2007) (awarding 35% of $57 million settlement fund); *Faircloth v. Certified Fin. Inc.*, CIV. A. 99-3097, 2001 WL 527489, at *12 (E.D. La. May 16, 2001) (successfully arguing that fee award of 33.34% should be increased to 35% of $1,600,000 settlement fund); *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 7 (D.D.C. 2008) (class received $800,000 and fee award paid separately was $700,000).

Loom, Inc., 234 F.R.D. 627, 635 (W.D. Ky. 2006) ("[A] one-third fee from a common fund case has been found to be typical by several courts") (citations omitted), *aff'd*, 534 F.3d 508 (6th Cir. 2008); *Lewis v. Wal-Mart Stores, Inc.*, 02-CV-0944 CVE FHM, 2006 WL 3505851 at *1 (N.D. Okla. Dec. 4, 2006) ("A contingency fee of one-third is relatively standard in lawsuits that settle before trial").

28. Courts have also frequently awarded fees of one-third in antitrust cases and "there have been several [antitrust] cases where courts have awarded more than 40% of the settlement fund for fees and expenses." *In re Ampicillin Antitrust Litig.* 526 F. Supp. at 498 (awarding 45% in fees and expenses of $7.3 million settlement fund); *see also In re Flonase Antitrust Litig.*, 08-CV-3149, 2013 WL 2915606 *8 (E.D. Pa. June 14, 2013) ("also in the last two-and-a-half years, courts in eight direct purchaser antitrust actions approved one-third fees.") (awarding 33.3% of $150 million settlement fund); *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808 (awarding 33.3% of $75 million settlement fund) (citing four other antitrust cases of fees of one-third with common funds ranging from $25 million to $220 million); *In re Lithotripsy Antitrust Litig.*, 98 C 8394, 2000 WL 765086 at *2 (N.D. Ill. June 12, 2000) ("33.3% of the fund plus expenses is well within the generally accepted range of the attorneys fee awards in class-action antitrust lawsuits"). Other antitrust cases (not cited by *Flonase* or *Remeron*) include *In re Ethylene Propylene Dien Monomer (EPDM) Antitrust Litig.*, No:3:03 MD 1542 (SRU) (D. Conn Oct. 10, 2010) (awarding 33.3% of $25 million settlement); *In re Polyproplene Carpet Antitrust Litig.*, MDL No. 1075 (N.D. Ga. July 27, 2001) (awarding 33.3% of $37.7 million settlement); *In re Foundry Resins Antit. Litig.*, No. 04–mdl–1638 (S.D. Oh. Mar. 31, 2008) (awarding 33.3% of a $14.1 million settlement); *In re OSB Antitrust Litig.*, Master File No. 06-826 (E.D. Pa.) (awarding 33.3% of $120 million settlement); *In re Auto.*

Refinishing Paint Antitrust Litig., MDL NO 1426, 2008 WL 63269 (E.D. Pa. Jan. 3, 2008) (awarding 33.3% of $39 million settlement fund).[3]

29. These figures mask a pattern of fee awards shrinking in percentage terms as settlement amounts increase. *See, e.g., In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 302 (3d Cir. 2005) ("Our jurisprudence confirms that it may be appropriate for percentage fees awarded in large recovery cases to be smaller in percentage terms than those with smaller recoveries.");[4] *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 148 (E.D. Pa. 2000) ("In general, as the size of the settlement fund increases the percentage award decreases.") (awarding 33.3% fee of settlement fund valued at $7.2 million); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. at 486 ("[A]bsent unusual circumstances, the percentage will decrease as the size of the fund increases") (citations omitted). This sliding scale approach reflects that "[i]t is generally not 150 times more difficult to prepare, try and settle a $150 million case than . . . a $1 million case." *Id.* Accordingly, "[f]ee awards ranging from thirty to forty-three percent have been awarded in cases with funds ranging from $400,000 to $6.5 million, funds which are comparatively smaller than many." *Erie Cnty. Retirees Ass'n v. Cnty. of Erie, Pennsylvania*, 192 F. Supp. 2d at 381 (awarding 38% fee). *See also In re Ampicillin Antitrust Litig.*, 526 F. Supp. at

[3] Antitrust cases where the fee awards were less than one-third generally involved settlement funds substantially larger than the $3.95 million fund here – an important consideration as explained below. Even in many of those cases fees were 30%. *See, e.g., In re Linerboard Antitrust Litig.*, 2004 WL 1221350 (E.D. Pa. June 2, 2004) (awarding 30% of $202 million settlement); *Nichols v. SmithKline Beecham Corp.*, CIV.A.00-6222, 2005 WL 950616 (E.D. Pa. Apr. 22, 2005) (awarding 30% of $75 million settlement); *In re Plastic Additives Litig.*, MDL No. 1684 (E.D. Pa. Apr. 10, 2007) (awarding 30% of $46.8 million settlement fund); *In re Processed Egg Products Antitrust Litig.*, MDL 2002, 2012 WL 5467530 (E.D. Pa. Nov. 9, 2012) (awarding 30% of $25 million settlement).

[4] Accordingly, the three studies cited by the *Rite Aid* court stating that the average fees range from 25 to 31.7 percent are inapposite because they are based on common funds substantially greater than the $3,950,000 fund here. *Id.* (one study was of settlements exceeding $10,000,000 and another study was of settlements between $100,000,000 and $200,000,000).

499 (awarding 45% in fees and expenses of $7.3 million settlement fund created in an antitrust class action); *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d at 7 (class received $800,000 and fee award paid separately was $700,000); *In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (8th Cir. 2002) (awarding 36% of $3.72 million dollar common fund); *Faircloth v. Certified Fin. Inc.*, CIV. A. 99-3097, 2001 WL 527489, at *12 (E.D. La. May 16, 2001) (successfully arguing that reasonable fee award of 33.34% should be increased to 35% of $1,600,000 settlement fund because "where the recovery is more modest, the fee percentage tends to be higher on a proportionate basis because of the larger ratio of hours to the amount of recovery").

30. These percentages of fees of common funds have been awarded on the gross settlement amount (*i.e.*, before expenses are deducted). *See, e.g.*, cases cited *supra*; *In re Packaged Ice Antitrust Litig.*, 08-MDL-01952, 2011 WL 6209188 at *17 (E.D. Mich. Dec. 13, 2011) ("The percentage of common fund is calculated on the gross settlement amount.").[5]

[5] Under the common fund doctrine, the fee should be calculated based on the entire common fund made available to the class to claim and not the claims made against the fund. This principle applies even though the unclaimed funds are recaptured by the Arctic Glacier estate as provided by the settlement agreement in this case. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980) ("To claim their logically ascertainable shares of the judgment fund, absentee class members need prove only their membership in the injured class. Their right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel. Unless absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs."); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1297 (11th Cir. 1999) ("In *Boeing Co. v. Van Gemert,* the Supreme Court settled this question by ruling that class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed.") (citation omitted); *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) ("the district court should have calculated their fee as one-third of the entire $4.5 million settlement fund, for a fee of about $1.5 million, rather than calculating it as one-third of the class members' claims against that fund, for a fee of only $3,300"); *Stern v. Gambello*, 480 F. App'x 867, 870 (9th Cir. 2012) ("nor was it error to consider, in cross-checking the fees against the recovery, the potential recovery rather than the claims actually made"); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) ("The entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire

31. It should be noted that the Settlement Agreement provides for a Class Counsel charge of $200,000 to be paid outside of the settlement fund. This has been approved by the Canadian court. This Court still finds a fee of $1,300,000 fair and reasonable even considering the Class Counsel charge. If the $200,000 Class Counsel charge is added to the $1,300,000 fee sought, the total fee is approximately ~~38%~~ 36% of the value of the settlement fund. The Court finds that fee fair and reasonable under the compelling circumstances in this case, including the complexity and duration of the case, the risk of non-payment, the skill and efficiency of counsel, the amount of time counsel devoted to the case, the fees in similar cases when there was small settlement fund and as determined below, the substantial negative multiplier.

Lodestar Cross-Check

32. The Third Circuit has explained, "[t]he lodestar award is calculated by multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 305. The Court is permitted to conduct "an abridged lodestar analysis serving as a cross-check." *Id.* The Third Circuit explained, "[t]he lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records."

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class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not."); *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 815 (E.D. Wis. 2009) ("[a]n award of attorneys' fees is appropriately based upon the total common fund and not on the amount claimed against it. The $2.1 million settlement amount was available to the entire class. . . . Therefore, an award of attorneys' fees should be calculated based upon the full benefit.").

33. As demonstrated in the accompanying declarations, from June 1, 2009 (when Class Counsel was appointed interim lead counsel by the Indirect Purchaser MDL Court) through November 30, 2013, Class Counsel and co-counsel expended 7,213.98 hours with a **historic** lodestar value of $3,443,385.60. Class Counsel's historic lodestar was $2,599,012.50 plus an additional $314,400.00 of historic lodestar expended by Matthew S. Wild (co-lead counsel) when he was at his predecessor firm for a total of $2,913,412.50.[6] The historic hourly rates of Class Counsel's attorneys ranged from $250 to $660 and law clerks were $180. The average historic hourly rate for attorneys and support staff of Class Counsel (and Mr. Matthew Wild at his predecessor firm) was $483.53.

34. Other law firms expended $530,973.10 in historic lodestar. Their attorneys' historic hourly rates ranged from $225 to $795 with support staff ranging from $150 to $195. The average historic hourly rate for these firms was $446.69. The average historic hourly rate of all law firms, including Class Counsel and Mr. Matthew Wild's former law firm, was $477.46.

35. The Court finds that these rates are reasonable given geographical area, the nature of the services provided, and the experience of the attorneys.

36. More exorbitant rates used many years ago have been considered reasonable in performing a lodestar cross check. *See, e.g., In re Gilat Satellite Networks, Ltd.*, CV-02-1510 CPS SMG, 2007 WL 2743675 at *17 (E.D.N.Y. Sept. 18, 2007) ("in performing this cross-check, the Court typically confirm that the percentage amount does not award counsel

[6] Class Counsel (Wild Law Group PLLC) was founded on March 1, 2010. Matthew S. Wild, Esq., was senior counsel to Levitt & Kaizer during the relevant period of June 1, 2009 through February 28, 2010. The lodestar is understated because it does not include time expended by Max Wild, Esq. (co-lead counsel) and John M. Perrin, Esq. (liaison counsel) before they became affiliated with Wild Law Group PLLC on March 1, 2010.

an exorbitant hourly rate. In the present case, the average hourly rate, based on the hours work[ed] and the $6 million fee, would be $602/hour for all personnel. While that amount is significant, it does not appear to be exorbitant.") (citation omitted); *In re Comverse Tech., Inc. Sec. Litig.*, 06-CV-1825 (NGG), 2010 WL 2653354 at *5 (E.D.N.Y. June 24, 2010) ("Using the lodestar as a cross-check confirms the reasonableness of Lead Counsel's request. Lead Counsel expended 43,573 hours of attorney and support time valued at rates ranging from $125 to $880 per hour").

37. Although the Court has carefully scrutinized the hours expended and historic hourly rates, such scrutiny is not as important in this case because, as found below, the lodestar multiplier is so substantially negative. *See, e.g., In re Nigeria Charter Flights Litig.*, MD 2004-1613 RJD MDG, 2011 WL 7945548 at *6 (E.D.N.Y. Aug. 25, 2011) ("since the percentage requested represents a negative multiplier of the lodestar, a lodestar using reduced rates would still support the requested fee award under the cross-check of the percentage method."), *report and recommendation adopted,* 04-CV-304, 2012 WL 1886352 (E.D.N.Y. May 23, 2012), *appeal dismissed* (Sept. 17, 2012); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 367 (E.D.N.Y. 2010) ("[t]he allegedly wasteful efforts of class counsel are not relevant because the fee award is well below class counsel's lodestar calculation, and is primarily based on the percent-of-the-fund method of calculating fees.")

38. Class Counsel has received an interim fee award of $233,333 from the United States Bankruptcy Court for the Northern District of Texas in the Reddy Ice bankruptcy from a common fund of $700,000. Thus, if this Court grants the fee request, Class Counsel will have received fees totaling $1,533,333 against a total recovery of $4,650,000 if the Court includes the Reddy Ice case in its calculation. Taking into account the Reddy Ice fee award, the

lodestar multiplier is substantially negative – less than 0.45 (*i.e.*, $1,533,333 divided by $3,444,385.60). Even if the Court also adds the Counsel Charge of $200,000 for a total aggregate fee award of $1,733,333, the multiplier still remains substantially negative – less than 0.51.

39. The Third Circuit "has recognized that multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 106 (E.D. Pa. 2013) (citations omitted). With a lodestar so substantially negative, the lodestar cross-check thus favors the requested fee award. *See, e.g., id.* ("A negative multiplier strongly underscores the risk counsel accepted to prosecute this case to trial . . . [and] reveals that Class Counsel's fee request constitutes only a fraction of the work they billed. The lodestar crosscheck therefore provides additional support for approving the attorneys' fees request.") (citation omitted); *In re Auto. Refinishing Paint Antitrust Litig.*, 2008 WL 63269 at *6 ("Since the multiplier is less than 1 (a 'negative lodestar') and the requested fee is less than the amount that would be awarded using the lodestar method, we are satisfied that a lodestar cross-check confirms that the requested fee percent is fair and reasonable.")

CLASS COUNSEL TO ALLOCATE FEE AWARD

40. Class Counsel is hereby authorized to allocate the fee award among the other plaintiffs' law firms. Class Counsel, as interim lead counsel in the MDL, has been involved since the litigation's inception, has performed the overwhelming majority of the work and delegated most of the assignments that co-counsel undertook. Class Counsel is thus in the best position to allocate the fees fairly among the numerous co-counsel. *See, e.g., In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188 at *20 ("The Court will aggregate the amount of fees, leaving the specific allocation among the various contributing counsel to Lead

Counsel.") *See also In re Linerboard Antitrust Litig.*, 2004 WL 1221350 at *18 (authorizing lead counsel to allocate fees because they are "better able to describe the weight and merit of each [counsel's] relative contribution."); *In re Auto. Refinishing Paint Antitrust Litig.*, 2008 WL 63269 at *7 ("Courts generally approve joint fee applications which request a single aggregate fee award with allocations to specific firms to be determined by Co-Lead Counsel, who are most familiar with the work done by each firm and each firm's overall contribution to the litigation. . . . Co-Lead Counsel have directed this case from its inception and are best able to assess the weight and merit of each counsel's contribution."); *In re Polyproplene Carpet Antitrust Litig.*, MDL No. 1075 at 7 ("The fee award shall be allocated among all Plaintiffs' counsel pursuant to the determination of Co-Lead Counsel."); *In re Foundry Resins Antit. Litig.*, No. 04–mdl–1638 at 1 ("The Court authorizes Co-Lead Counsel to distributed such fees to Plaintiffs' Counsel in a manner which, in the opinion of Co-Lead Counsel, fairly compensates each Plaintiffs' Counsel firm in view of its contribution to the prosecution of Plaintiffs' claims.")

COST AWARD

41. It is well settled that "[a]ttorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund." *In re Auto. Refinishing Paint Antitrust Litig.*, 2008 WL 63269 at *6 (citation omitted); *see also In re Linerboard Antitrust Litig.*, 2004 WL 1221350 at *18 ("The Court has reviewed the expenses advanced by counsel and concludes they were reasonable and necessary to the prosecution of the case. Therefore, the Court will order that petitioners be reimbursed for these expenses from the Settlement Fund."). "The scope of reimbursable expenses is broad." *Chemi v. Champion Mortgage*, 2:05-CV-1238 (WHW), 2009 WL 1470429 at *13 (D.N.J. May 26, 2009) (noting expenses subject to reimbursement include, *inter alia*, "(1) travel and lodging. (2) local meetings

and transportation. (3) depositions, (4) photocopies, (5) messengers and express service, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, court and witness fees, (9) overtime and temp work. (10) postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund pro hac vice.") (citation omitted). In addition to the foregoing expenses and other expenses reasonable and necessary to the prosecution of the case, Class Counsel (and co-counsel) are entitled to reimbursement for expenses incurred for U.S. and Canadian bankruptcy counsel as reasonable and necessary to the prosecution of the case. The Settlement Agreement (at ¶¶ 2.10 & 5.2) so provides, and the MDL Court reimbursed class counsel for the direct purchasers the expenses they incurred for U.S. and Canadian bankruptcy counsel, *In re Packaged Ice Antitrust Litig.*, 08-MDL-01952, 2012 WL 5493613 at *8 (E.D. Mich. Nov. 13, 2012) (approving as reimbursable expenses "outstanding invoices from three law firms who assisted in the bankruptcy proceedings").

42. Proof of expenses in a common fund case is not supposed to be arduous for the Court to find them reasonable. A summary of expenses attached to a declaration is sufficient. *See, e.g., Chemi v. Champion Mortgage*, 2009 WL 1470429 at *13 ("while the summary of expenses attached to the affidavit's filed by Plaintiffs in support of their request for expenses does not provide considerable detail it is sufficient to satisfy the Court that the expenses requested by Plaintiffs' counsel are reasonable."); *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808 at *17 (relying on "affidavits" to support request for reimbursement of expenses); *In re Ethylene Propylene Dien Monomer (EPDM) Antitrust Litig.*, No:3:03 MD 1542 (SRU) at 2 ("Co-Lead are hereby awarded $725,573.36 for expenses incurred to prosecute this litigation . . . as reported in the Declarations of Petitioning Plaintiffs' Counsel . .

. to be paid from the . . . Settlement Fund"); *In re OSB Antitrust Litig.*, Master File No. 06-826 at 8-9 (reimbursing expenses "documented in declarations submitted to the Court").

43. In this case, Class Counsel's submission is detailed, more so than what is required to permit the Court to assess the reasonableness of the costs incurred. Class Counsel and co-counsel have submitted sworn declarations attesting to and itemizing the expenses that they incurred. Class Counsel has also included invoices for the most significant expenses (*i.e.*, for Canadian and U.S. bankruptcy counsel, experts and document hosting) and summarized the remaining expenses.

44. The Court finds that Class Counsel and co-counsel incurred costs of $305,033.51. The Court further finds that these costs are reasonable and were necessarily incurred to prosecute the case. The Court therefore awards the full sum of $305,033.51 sought.

INCENTIVE AWARD TO CLASS REPRESENTATIVES

45. For their participation in the case, the Court awards each of the Class Representatives $1,000.00.[7] Such awards are consistent with awards of other courts in the Third Circuit. *See, e.g., In re Imprelis Herbicide Mktg., Sales Practices & Products Liab. Litig.*, MDL 2284, 2013 WL 5655478 at *15 (E.D. Pa. Oct. 17, 2013) (awarding $1,500 incentive payments); *Hall v. Best Buy,* 274 F.R.D. 154, 173–174 (E.D. Pa. 2011) (approving incentive award of $5,000 per named plaintiff); *In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.,* 269 F.R.D. 468, 476 (E.D. Pa. 2010) ("If the named plaintiff was deposed, the named plaintiff's

[7] The Court is aware that the named plaintiffs received incentive payments of $200 by the United States Bankruptcy Court for the Northern District of Texas, except for named plaintiff Lawrence Acker who received $2,000 in recognition of his service on the Committee of Unsecured Creditors. There, however, the settlement amount was only $700,000 compared to $3,950,000 here. Thus, even considering these prior awards, the Court finds the total incentive payments for each individual is fair and reasonable.

incentive payment will be $5,000; if the named plaintiff was not deposed, the named plaintiff's incentive payment will be $2,500.").

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Class Counsel's Motion For An Award of Attorneys' Fees, Attorneys' Costs and Incentive Payments is granted in its entirety;

2. Class Counsel is awarded a fee in the sum of $1,300,000.00;[8]

3. Class Counsel is hereby authorized in its discretion to allocate the fee award among the other plaintiffs' law firms;

4. Class Counsel and co-counsel are awarded costs in the sum of $305,033.51;[9] and

5. Each class representative is awarded an incentive payment in the sum of $1,000.00.[10]

Dated: Wilmington, Delaware
February 27, 2014

THE HONORABLE KEVIN GROSS
CHIEF UNITED STATES BANKRUPTCY JUDGE

[8] This fee is in addition to the fee of $233,3333 awarded by the United States Bankruptcy Court for the Northern District of Texas in connection with the indirect purchasers' settlement with Reddy Ice, and the Class Counsel charge of $200,000 provided for by the Settlement Agreement and awarded by the Canadian court.

[9] This cost award is in addition to the costs awarded by the United States Bankruptcy Court for the Northern District of Texas in connection with the indirect purchasers' settlement with Reddy Ice.

[10] These incentive payments are in addition to the incentive payments awarded by the United States Bankruptcy Court for the Northern District of Texas in connection with the indirect purchasers' settlement with Reddy Ice.