IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BUDICAK, INC., BLUE MARLIN ARBITRAGE, LLC, and PRIME TRADING, LLC, individually, and on behalf of others similarly situated,

Plaintiffs,

v.

LANSING TRADE GROUP, LLC, CASCADE COMMODITY CONSULTING, LLC, and JOHN DOES NOS. 6-10,

Defendants.

Case No. 2:19-cv-02449

District Judge Toby Crouse

Magistrate Judge Angel D. Mitchell

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND REQUEST FOR SERVICE AWARDS TO CLASS REPRESENTATIVES

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Lowey Dannenberg, P.C. ("Lowey") and Cafferty Clobes Meriwether & Sprengel, LLP ("Cafferty" and with Lowey, "Class Counsel") respectfully submit this memorandum of law in support of their motion for an award of attorneys' fees, reimbursement of litigation expenses and service awards for the three named Plaintiffs[1] in the above-captioned Action (the "Action").

INTRODUCTION

Following years of hard-fought litigation and arm's length settlement negotiations between Plaintiffs and Defendants,[2] Class Counsel secured the resolution of this Action and the creation of an $18,000,000 common fund to compensate the Settlement Class for the harms caused by Defendants' alleged manipulation of Chicago Board of Trade ("CBOT") wheat futures and options contracts. This outcome is the direct result of the dedicated and efficient efforts of highly experienced counsel who worked diligently, and without compensation, to represent Settlement Class Members in a highly contentious litigation. Assisted by Additional Plaintiffs' Counsel,[3] Class Counsel skillfully prosecuted the Action; overcame Defendants' motions to dismiss (filed in two jurisdictions), conducted extensive fact and expert discovery, fully briefed Plaintiffs' class certification motion, and negotiated the Settlements. But for Class Counsel's willingness to undertake this challenging and risky litigation and to devote substantial resources towards vindicating the Class's interests, the two Settlements would not have been possible.

When Class Counsel's efforts are viewed together with the risks of the Action and the benefits resulting from the Settlements, a suitable attorneys' fee award is warranted. Accordingly, pursuant to the Settlement Agreement and this Court's inherent authority under the common-fund

[1] "Plaintiffs" means Budicak, Inc., Blue Marlin Arbitrage, LLC, and Prime Trading, LLC.

[2] "Defendants" means Lansing Trade Group, LLC ("Lansing") and Cascade Commodity Consulting, LLC ("Cascade").

[3] "Additional Plaintiffs' Counsel" are Cavanaugh Biggs & Lemon P.A. and McCallister Law Group, LLC.

doctrine and Rule 23(h), Class Counsel respectfully request that the Court award one-third of the $18,000,000 settlement fund, or $6,000,000, for payment of attorneys' fees. In addition, Class Counsel request reimbursement of their litigation costs and expenses in the amount of $476,401.02. These requests are reasonable based on the facts and circumstances of this case and the application of the twelve-factor test established in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.,* No. 17-MD-2785-DDC-TJJ, 2022 WL 2663873, at *4 (D. Kan. July 11, 2022) ("The Tenth Circuit … has instructed that a court making a percentage fee award in a common fund case should analyze the fee award's reasonableness under the *Johnson* factors.").

Finally, Class Counsel requests that the Court approve service awards from the common fund to each of the three Plaintiffs, in the amount of $20,000 per representative, for a total of $60,000. These requests are reasonable, fully justified by the work performed by these class representatives, the risks in pursing this Action, and the law and should also be granted.

ARGUMENT[4]

I. THE FEE REQUEST IS FAIR AND REASONABLE

Rule 23(h) of the Federal Rules provides that "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). It has long been recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Gottlieb v. Barry*, 43 F.3d

[4] The factual background of this Action is included in the Joint Declaration of Raymond P. Girnys and Jennifer W. Sprengel in Support of (A) Plaintiffs' Motion for Final Approval of Class Action Settlement; and (B) Class Counsel's Motion for An Award of Attorneys' Fees, Reimbursement of Expenses, and Request for Service Award ("Joint Decl.").

474, 482 (10th Cir. 1994); *Nieberding v. Barrette Outdoor Living, Inc.*, 129 F. Supp. 3d 1236, 1248 (D. Kan. 2015) ("In Kansas, an attorney who recovers a common fund in a class action has the right to recover a reasonable fee from the fund as a whole."). An award of attorneys' fees and the reimbursement of litigation expenses would compensate Class Counsel for prosecuting the Action on a fully contingent basis for nearly five years.

A. The Court May Award Attorneys' Fees Based on a Percentage of the Common Fund

Courts may determine the reasonableness of any attorneys' fee request using either the percentage of the common fund or the lodestar method. *See Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455, 459 (10th Cir. 2017) (in a common fund case, "either method is permissible."). However, "[t]he Tenth Circuit prefers the percentage of the fund method in determining the award of attorneys' fees in common-fund cases." *Nakamura v. Wells Fargo Bank, Nat'l Ass'n*, No. 17-4029-DDC-GEB, 2019 WL 2185081, at *1 (D. Kan. May 21, 2019). The percentage of the fund approach is favored because it best aligns the interests of counsel and the class by basing a fee on what counsel ordinarily would charge in contingency-fee matters in the relevant market. *See Shaw v. Interthinx, Inc.*, No. 13-CV-01229-REB-NYW, 2015 WL 1867861, at *5 (D. Colo. Apr. 22, 2015) ("[The] percentage of the common fund 'is less subjective than the lodestar plus multiplier approach,' matches the marketplace most closely, and is the better suited approach when class counsel were retained on a contingent fee basis").

The complexity of the matter is a significant consideration in calibrating the attorneys' fee award under the percentage method, with cases requiring skilled and specialized counsel and significant resources entitled to a greater percentage fee award than less sophisticated actions. In the Tenth Circuit and this District, courts have awarded one-third of the fund as attorneys' fees in complex class actions. *See, e.g.*, *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094,

1113 (D. Kan. 2018) (awarding a one-third fee and noting that the award "is customary in contingent-fee cases. . ."); *In re Urethane Antitrust Litig.*, MDL No. 1616, 2016 WL 4060156, at *5 (D. Kan. July 29, 2016) (antitrust case in which the Court awarded one-third fee).

Here, Class Counsel's one-third attorneys' fee request is well within the range of reasonable fee awards by Tenth Circuit courts. As described below and based on the record in this Action, the prosecution of the claims was inherently difficult. *See In re EpiPen* 2022 WL 2663873, at *5 ("[a]n antitrust class action is arguably the most complex action to prosecute"). Moreover, the facts and circumstance of this case made the Action particularly challenging to litigate.

B. The *Johnson* Factors Support the Fee Request

"[The] court must consider the twelve *Johnson* factors" in assessing the reasonableness of the attorneys' fee request. *Gottlieb*, 43 F.3d at 483. The factors include:

> (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) any prearranged fee . . . ; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Brown v. Phillips Petroleum Co., 838 F.2d 451,454-55 (10th Cir. 1988). When applying the test, "[t]he weight given to each *Johnson* factor varies from case to case, and each factor may not always apply." *In re EpiPen,* 2022 WL 2663873, at *4; *see also Uselton v. Com. Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854 (10th Cir. 1993) ("rarely are all of the *Johnson* factors applicable; this is particularly so in a common fund situation."). Here, Class Counsel's Fee Request is well supported based on each of the applicable *Johnson* factors.[5]

[5] *Johnson* factors 7 (time limitations imposed) and 11 (the nature and length of the professional relationship with the client) are not applicable here. *See In re EpiPen*, 2022 WL 2663873, at *6.

1. Factors 1 and 4: Class Counsel Devoted Significant Time and Labor, Foregoing Other Work to Best Represent Class Members

Counsel expended considerable time prosecuting the complex factual and legal issues presented in this Action. Over the past five years, counsel dedicated a total of 13,882.70 hours to litigating the Action. Joint Decl. ¶ 51, 53. Moreover, those reported hours do not include the time Class Counsel spent preparing this motion and the motion for the final approval, or any time that will be spent administering the Settlements after final approval is granted. Joint Decl. ¶ 51.

As detailed in their Joint Declaration, Class Counsel conducted an extensive investigation. They initially filed a complaint in the Northern District of Illinois on behalf of Plaintiff Budicak after the Commodity Futures Trading Commission's ("CFTC") announcement of a $3.4 million fine against Lansing for its alleged misconduct. Joint Decl. ¶ 12. As their investigation advanced and accumulated additional facts, Class Counsel distilled the additional relevant information and on October 1, 2018 amended the complaint to add Cascade and the remaining Plaintiffs, and to further strengthen the allegations. *See* Joint Decl. ¶¶ 13, 15.

At the same time, on September 7, 2018, Lansing moved to transfer the litigation from the Northern District of Illinois to the District of Kansas. Joint Decl. ¶ 14. Subsequently, Defendants both moved to dismiss the complaint. Joint Decl. ¶ 16. In response to these motions, Class Counsel promptly researched, prepared, and filed vigorous oppositions advocating for their clients. Joint Decl. ¶¶ 16, 18-19. Class Counsel's efforts were instrumental in defeating Defendants' motions to dismiss and allowing the case to proceed to discovery. Joint Decl. ¶ 20.

The discovery work that followed the motions to dismiss included serving multiple discovery requests, negotiating discovery protocols, engaging in numerous, lengthy discovery

(determining that factors 7 and 11 need not be addressed); *In re Motor Fuel Temperature Sales Practices Litig.*, 07-MD-1840-KHV, 2016 WL 4445438, at *9 (D. Kan. Aug. 24, 2016) (factors 7 and 11 do not apply to class actions). As a result, Class Counsel does not analyze these factors.

meet and confers to negotiate the production of hundreds of thousands of pages of documents and information and performing a thorough review of the documents and hundreds of hours of audiotaped trader conversations. Joint Decl. ¶ 21. Following several months of in-depth analysis and research and engaging recognized experts, Class Counsel filed their motion for class certification and supporting expert report. Joint Decl. ¶¶ 22-24. After Lansing filed its opposition to the class certification motion and moved to exclude Plaintiffs' expert, Class Counsel submitted a well-crafted reply brief supporting the basis for class certification, opposed Lansing's motion to exclude Plaintiffs' expert, and moved to exclude the testimony of Lansing's two experts. Joint Decl. ¶ 25; ECF Nos. 243, 245, 247, 249, 250-51.

While motion practice was ongoing, Class Counsel first reached a settlement with Cascade in 2020, which negotiated access to cooperation materials from Cascade intended to assist in the further prosecution of Lansing. Joint Decl. ¶ 33. Class Counsel first had discussions with Lansing about a potential settlement in 2018, and continued to engage Lansing throughout the litigation, including through mediation supervised by The Honorable Morton Denlow (Ret.) of JAMS. Joint Decl. ¶¶ 35-36. After almost four years of aggressively prosecuting the Action, Class Counsel achieved a favorable settlement with Lansing in April 2022. Joint Decl. ¶ 38. Once this milestone was achieved, Class Counsel immediately turned to preparing the motion for preliminary approval of the Settlements and coordinating with the Settlement Administrator to ensure a robust Notice Plan was implemented. Joint Decl. ¶ 41. And Class Counsel will continue working after final approval to ensure that the distribution of the Net Settlement Fund is efficient and effective.

During the nearly five years of litigating the Action, Class Counsel devoted a substantial portion of their firms' time and effort that otherwise could have spent pursuing other employment opportunities, including hourly rate cases, alternative fee arrangement cases, or contingent cases

that are less risky and therefore more likely to result in a successful outcome. *See Brown*, 838 F.2d at 455 (considering class counsel's preclusion from employment opportunities in analyzing the reasonableness of an attorneys' fee award); *Nakamura*, 2019 WL 2185081, at *4 ("firms have a finite number of hours to invest in complex class action cases such as this one, and the court has little difficulty concluding that these firms likely turned away other opportunities to pursue cases they already have accepted."). Here, Class Counsel and Additional Plaintiffs' Counsel expended 13,882.70 contingent hours and a lodestar value of $10,068,834. Joint Decl. ¶ 53. The significant time spent litigating this case provides ample support of the sacrifice Class Counsel made to bring this case. As a result, *Johnson* factors 1 and 4 favor granting the fee award.

2. Factor 2: The Factual and Legal Questions Were Novel and Difficult

Class actions have "a well-deserved reputation as being most complex" with antitrust class actions "arguably the most complex action to prosecute." *In re EpiPen*, 2022 WL 2663873, at *5. Similarly, Commodity Exchange Act ("CEA") manipulation claims are "notoriously difficult to prove" and "more difficult and risky than securities fraud cases." *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 395, 397 (S.D.N.Y. 1999). This Action involved both CEA and antitrust claims, and the challenging nature of the Action was reflected throughout the litigation, including in the briefing on the motions to dismiss and class certification, as well as discovery.

Not only do the underlying claims present novel and difficult questions, but there are also myriad sub-questions that demonstrate the prosecution of this Action satisfies the second *Johnson* factor. In this case, Cascade challenged whether this Court had personal jurisdiction and was the proper venue for the claims, which required the Court to assess the use of the nationwide service of process provisions under the Sherman and Clayton Action to confer personal jurisdiction and determine which venue rules must apply. While the Court found that venue in this District was

appropriate, it noted nevertheless that the "Tenth Circuit has not yet addressed the severability of the venue and jurisdiction provisions of [the Sherman and Clayton Acts]," and that there was a circuit split among those that had. *See* ECF No. 160 at 6 n.20.

Lansing's motion to dismiss also raised a question whether a heightened pleading standard applied to Plaintiffs' CEA claims. Before finding that the amended complaint satisfied even the heightened pleading requirement, the Court noted that "[the] Tenth Circuit has not had occasion to weigh in on the applicable pleading standard for CEA claims. A survey across other federal circuits reveals reluctance to squarely answer the question . . . ." ECF No. 167 at 14-15. Lansing raised another issue not addressed by the Tenth Circuit, whether the CEA preempts common law unjust enrichment claims, which the Court resolved with assistance from case law in other circuits. Accordingly, the novelty and difficulty of this litigation satisfies the second *Johnson* factor.

3. Factors 3 and 9: The Skill, Experience, Reputation and Ability of Counsel

The antitrust and CEA claims litigated in this complex class action required highly skilled attorneys. Class Counsel are established and experienced attorneys at leading class action law firms with considerable experience in litigating complex CEA, antitrust, and other class actions. *See* ECF Nos. 351-8, 351-9. Lowey has been appointed lead or co-lead counsel in numerous CEA and antitrust class actions, recovering more than $1.9 billion for class members across a dozen cases during the last decade alone. *See* ECF No. 351-8. Cafferty has been appointed lead or co-lead counsel in various antitrust class actions and other complex litigation, recovering billions of dollars for class members over the past 30 years. *See* ECF No. 351-9. Further, Class Counsel has a well-known reputation for effectively and innovatively handling complex class action litigation and achieving significant settlement awards. *See* Joint Decl. ¶ 29.

The extent of Class Counsel's experience and capabilities can further be understood when viewed in context of the opposing counsel against which they prosecuted the Action. Lansing's counsel are some of the leading defense practitioners in CEA and class action litigations. Cascade's counsel are highly sophisticated and have nationwide experience in complex litigation. This case required the diligence, specialized skill, and extensive experience of Class Counsel to obtain this impressive settlement award in light of opposing counsel's substantial qualifications. *See In re Urethane*, 2016 WL 4060156, at *5 (considering the quality of opposing counsel in analyzing the third *Johnson* factor). Such a result confirms the reasonableness of the requested fee.

4. Factors 5 and 12: The Requested Fee is Comparable to Similar Cases

In awarding an attorneys' fee, courts also consider the "customary fee[s] for similar work in the community[.]" *Johnson*, 488 F.2d at 718. The focus of this inquiry is to ensure that the proposed fee is within the range of reasonable awards in light of the nature of the action and the results. *Id.* ("It is open knowledge that various types of legal work command differing scales of compensation."). As described above in Part I.A., in complex, contingent fee class actions brought in this Circuit and District, a fee award of one-third is within the range of reasonableness.

5. Factors 6 and 10: Class Counsel Successfully Litigated an Undesirable Action Under a Contingent Fee Arrangement

Closely related to the novelty and difficulty involved in prosecuting the Action, whether Class Counsel are prosecuting the case under a fixed fee or contingent fee arrangement is relevant to the reasonableness of fee request. It is another means of evaluating the risks, specifically "the risk of receiving little or no recovery [in] attorneys' fees" and whether "it would [] have been economically prudent or feasible [for] Class Counsel . . . to pursue the case under any prospect that the Court would award a fee on the basis of normal hourly rates." *Rhea v. Apache Corp.*, No. 6:14-CV-00433-JH, 2022 WL 18621782, at *7 (E.D. Okla. June 23, 2022). Here, Class Counsel

assumed an immense risk by prosecuting this complex class action on an entirely contingent basis, particularly in light of the nature of the alleged manipulation.

Courts have recognized that such a risk contributes to the undesirability of an action and favors approval of a substantial fee award. *See In re EpiPen*, 2022 WL 2663873, at *5 ("bearing the risk of huge expenditures on a contingent basis . . . favors the requested one-third fee award."); *In re Syngenta*, 357 F. Supp. 3d at 1114 (requiring counsel to "risk huge expenditures on a contingent basis" added to the undesirability of the action). Additionally bearing on the issue of undesirability is whether "law firms would be willing to risk investing the time, trouble, and expenses necessary to prosecute this litigation for multiple years." *Rhea v. Apache Corp.*, 2022 WL 18621782, at *7 (finding that the "investment by Class Counsel of their time, money, and effort, coupled with the attendant potential of no recovery and loss of all the time and expenses advanced by Class Counsel, rendered the case sufficiently undesirable so as to preclude most law firms from taking a case of this nature"). No other law firms brought an action to recover the damages caused by Defendants' alleged misconduct. In such circumstances, "[t]he amount of the fee award must also work to encourage attorneys to take [other] undesirable cases whether undesirability stems from the risks involved or the stigma attached to a particular type of case." *Brewer v. S. Union Co.*, 607 F. Supp. 1511, 1532 (D. Colo. 1984).

When Class Counsel filed this Action, they were fully aware that doing so involved taking on the risk that they may not recover anything. The contingent nature of this case, coupled with the complexity of legal claims was such that this case could only be brought on a contingent basis, and therefore was less than desirable other cases where a recovery was certain. As a result, this factor favors the reasonableness of the fee award.

6. Factor 8: Class Counsel Achieved Impressive Results and Secured a Significant Award for Class Members

The amount involved and the results obtained by Counsel "deserves greater weight than the other *Johnson* factors." *Nakamura*, 2019 WL 2185081, at *2. In fact, "a court may give this factor greater weight when 'the recovery was highly contingent' and 'the efforts of counsel were instrumental in realizing recovery on behalf of the class.'" *In re EpiPen*, 2022 WL 2663873, at *4.

Class Counsel achieved a significant recovery of $18,000,000 for the Class despite the Defendants' challenges concerning the merits of the Action, the ability to certify a class, and the total value of class-wide damages. Based on Plaintiffs' experts' estimate of damages caused by Defendants' alleged manipulation, the recovery represents 12% to 15% of the estimated class-wide damages. *See* Joint Decl. ¶ 44. Class Counsel secured substantial benefits for Class Members while simultaneously avoiding the future uncertainties that inevitably come with a trial. *See Koehler v. Freightquote.com, Inc.*, No. 12-2505-DDC-GLR, 2016 WL 3743098, at *7 (D. Kan. July 13, 2016) ("settlement avoids the uncertainty and rigors of trial and produces a favorable result for plaintiffs. This factor favors approval of the fee award."). Further, the $18,000,000 Settlement Fund will be distributed equitably to the Class, using a *pro rata* distribution based on a calculation of the impact of the alleged manipulation on Class Member's transactions, and no funds will revert to the Defendants. This result supports Class Counsel's one-third fee request.

C. The Fee Request Is Also Reasonable Under the Lodestar Cross-Check Method

Courts may "cross-check" the reasonableness of a fee award under the lodestar method. *In re Syngenta*, 357 F. Supp. 3d at 1115; *In re Urethane*, 2016 WL 4060156, at *7. However, "[t]he Tenth Circuit has repeatedly held that a lodestar cross check is not required." *Chieftain Royalty Co. v. Marathon Oil Co.*, No. CIV-17-334-SPS, 2019 WL 7758915, at *9 (E.D. Okla. Mar. 8, 2019); *In re EpiPen*, 2022 WL 2663873, at *5 ("[A] lodestar analysis (or crosscheck) is neither

required nor needed to assess reasonableness in a percentage of the fund determination."). Nonetheless, in the present action, this analysis confirms the reasonableness of the fee request.

The lodestar method is calculated by taking "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *M.B. v. Howard*, 555 F. Supp. 3d 1047, 1058 (D. Kan. 2021). This calculation requires both the number of hours worked to be reasonable and the hourly fee charged to be consistent with the market rate. *See Faulkner v. Ensign United States Drilling Inc.*, No. 16-CV-03137-PAB-KLM, 2020 WL 550592, at *6 (D. Colo. Feb. 4, 2020).

In calculating the number of necessary hours worked, a court "considers all fee applications submitted by plaintiffs' attorneys." *In re Syngenta*, 357 F. Supp. 3d at 1115. The attached declarations from Class Counsel and Additional Plaintiffs' Counsel provide factual support that the time undertaken, and the expenses incurred were necessary and reasonable. The declarations also summarize the work performed and the number of hours worked by partners, associates, and paraprofessionals on behalf of the Class. Class Counsel has reviewed the time records to ensure consistent billing practices were adhered to and duplicative or unnecessary hours were eliminated.

In determining a reasonable hourly fee, a court may look to "the hourly rate that is 'normally charged in the forum where the case is prosecuted [,]'" *Gottlieb*, 43 F.3d at 484, and consider the current billing rate. *See In re Urethane*, 2016 WL 4060156, at *7 n.7 ("Because of the long delay in receiving payment for past work, the Court concludes that use of current billing rates is appropriate in conducting this lodestar cross-check."). However, the Tenth Circuit "recognized the need to look to similar cases to determine whether counsel charged reasonable rates" opposed to the forum alone. *See Voulgaris v. Array Biopharma, Inc.*, 60 F.4th 1259, 1266 (10th Cir. 2023); *Gottlieb*, 43 F.3d at n.8 (10th Cir. 1994) ("in an unusual case, where the prevailing party used out-of-town counsel whose rates were higher than those charged locally, we

have permitted an award based on those higher rates"). Courts may also rely on affidavits submitted by counsel to determine the reasonableness of a fee under a lodestar cross-check. *See Syngenta*, 357 F. Supp. 3d at 1115 (relying on counsel's declarations to calculate lodestar).

When calculating the lodestar cross-check, Class Counsel and Additional Plaintiffs' Counsel used their usual and customary hourly rates. These rates are "generally consistent" with similar complex cases brought in this District. *Voulgaris*, 60 F.4th at 1266 (affirming reasonableness of attorney rates between $455 and $1,050). In total, 13,882.70 hours were expended by Class Counsel and Additional Plaintiffs' Counsel, reflecting a lodestar amount of $10,068,834. Joint Decl. ¶ 53. This calculation is inherently understated as Counsel will inevitably spend considerable additional hours in connection with the final approval of the settlement, claims administration and the distribution of settlement proceeds.

Based on the lodestar incurred in the Action, Class Counsel's Fee Request reflects a "negative" multiplier of 0.60. *See Hapka v. CareCentrix, Inc.*, No. 2:16-CV-02372-KGG, 2018 WL 1879845, at *2 (D. Kan. Feb. 15, 2018) ("The Court … concludes that a combined attorneys' fees and expense award of $400,000—a negative multiplier (0.87) on Class Counsel's lodestar—is inherently reasonable."). Cases in this District have approved much higher multipliers as within the range of reasonableness. *See Syngenta*, 357 F. Supp. 3d at 1115 (a lodestar multiplier of 1.4 is "extremely modest in light of the great risk undertaken in pursuing these claims on a contingent-fee basis."). The lodestar cross-check confirms the reasonableness of the fee request.

II. THE COURT SHOULD GRANT CLASS COUNSEL'S EXPENSE REQUEST

Courts are authorized to reimburse counsel for "non-taxable costs that are authorized by law or by the parties' agreement." FED. R. CIV. P. 23(h). "As with attorneys' fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement

of all reasonable costs incurred." *Vaszlavik v. Storage Corp.*, No. 95-B-2525, 2000 WL 1268824, at *4 (D. Colo. Mar. 9, 2000). Further, the Settlement Agreement authorizes Class Counsel to seek "costs and expenses incurred in litigating this action." Settlement Agreement at ¶ 8.

Class Counsel and Additional Plaintiffs' Counsel have incurred $476,401.02 in reasonable expenses on items typically covered by clients in non-contingent fee litigation including: expert costs, court reporting services, document management, travel, electronic research, photocopying, overnight delivery, phone charges, and mediation services. Joint Decl. ¶ 58; *In re Bank of Am. Wage & Hour Emp. Litig.*, No. 10-MD-2138-JWL, 2013 WL 6670602, at *4 (D. Kan. Dec. 18, 2013) (finding requested expenses reasonable when "the expenses are of the kind and character typically borne by clients in non-contingent fee litigation, including the retention of experts, copying charges, transcript charges, online research and mediation services."). The expenses incurred are typical and were directly related to the prosecution of this Action. Class Counsel and Additional Plaintiffs' Counsel have maintained detailed records documenting these expenses as summarized in the attached declarations. The Court should approve Counsel's $476,401.02 expense request.[6]

III. THE COURT SHOULD GRANT CLASS REPRESENTATIVES REQUEST FOR SERVICE AWARDS

[6] This Court inquired whether "Kansas ethics require[d]" the attorneys' fees to be deducted from the common fund "post-expenses." Dec. 16, 2022 Hr'g Transcript at 27:17-28:22. Although Kansas Rule of Professional Conduct ("KRPC") 1.5(d) contemplates "expenses … be[ing] deducted before the contingent fee is calculated", courts in this district have recognized that class actions are differently situated and have granted expenses separately from fees. *See, e.g.*, *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL, 2018 WL 6839380, at *5, *15 (D. Kan. Dec. 31, 2018) (adopting the KRPC in overseeing attorney conduct and stating "the Court shall award reimbursement of reasonable expenses from the settlement fund, separate from the one-third award of attorney fees.").

"At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class." William Rubenstein, 5 Newberg and Rubenstein on Class Actions § 17:1 (6th ed. 2022). The Court may consider: (1) the actions the representative took to protect the interests of the class; (2) the degree to which the class benefitted from those actions; and (3) the amount of time and effort the representative expended in pursuing the litigation. *See Tuten v. United Airlines, Inc.*, 41 F. Supp. 3d 1003, 1010 (D. Colo. 2014). "[A] class representative may be entitled to an award for . . . additional effort and expertise provided for the benefit of the class." *UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp.*, 352 F. App'x 232, 235 (10th Cir. 2009).

As reflected in their accompanying declarations,[7] the three class representatives have made significant contributions to the benefit of the Class by gathering information, aiding in the creation of pleadings, producing responsive documents and data, and working with Class Counsel to respond to Defendants' discovery requests. The class representatives also worked with Class Counsel to review relevant documents, written discovery responses, and other case materials. Further, the class representatives stayed informed about the case and approved the Settlement Agreement. They performed their duties capably for the benefit of Class Members, and they did so without guarantee of compensation for the work they performed on behalf of the Class. Joint Decl. ¶ 7. Perhaps most importantly, Plaintiffs took a risk to protect the interests of the Class when no one else was willing or able to serve as a class representative. Without them, the Settlements and recovery would not have been possible. In recognition of their efforts, Class Counsel requests $20,000 for each of the three class representatives, or $60,000 in the aggregate.

[7] *See* Declaration of Prime Trading, LLC; Declaration of Edward V. Dolinar ¶¶ 2-4; Declaration of Michael Budicak ¶¶ 2-4, filed herewith.

CONCLUSION

For the aforementioned reasons, Class Counsel request that the Court grant this Motion.

Dated: March 24, 2023

Respectfully submitted,

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