

**FILED**

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
ANDERSON DIVISION**

Franklin E. Clark, on behalf of himself )  
and all others similarly situated, )

Plaintiffs, )

vs. )

Experian Information Solutions, Inc., )

Defendant. )

C/A No. 8:00-1217-22

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**ORDER**

Franklin E. Clark and Latanjala Denise )  
Miller, on behalf of themselves and )  
all others similarly situated, )

Plaintiffs, )

vs. )

Equifax, Inc., and Equifax Credit )  
Information Services, Inc., )

Defendants. )

C/A No. 8:00-1218-22

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Franklin E. Clark, on behalf of himself )  
and all others similarly situated, )

Plaintiffs, )

vs. )

Trans Union Corporation and )  
Trans Union L.L.C., )

Defendants. )

C/A No. 8:00-1219-22

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This order establishes the total attorneys' fees, costs, and expenses to be awarded in each of three related cases. For the reasons set forth below, the court awards \$5 million in each of these three actions. The issue of allocation between Class Counsel and Objectors' Counsel shall be

addressed by later order to the extent agreement is not reached.<sup>1</sup> *See infra* at 43 (“Allocation Proceedings”).

## I. BACKGROUND

The present fee petitions follow the court’s approval of the settlements of three related class actions which were pursued against three major credit reporting agencies and their affiliates.<sup>2</sup> The actions challenged Defendants’ common practices for reporting the status of accounts on the credit record of an individual who had not filed for bankruptcy protection where another account holder or user had filed for bankruptcy. Specifically, these actions challenged inclusion of the word “bankruptcy” on the relevant account line of the debtor who had not personally filed for bankruptcy.

The settlements ultimately approved are set forth in the “Second Modified Stipulation[s] of Settlement” filed and approved in each of the above actions.<sup>3</sup> Under these Stipulations, Defendants

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<sup>1</sup> Consistent with the Orders Approving Settlement entered in the three actions captioned above, the court will refer to the groups of attorneys seeking compensation as follows: (1) “Class Counsel” refers collectively to the individual attorney initially designated as such plus the other attorneys designated as “Plaintiffs’ Counsel” in the Settlement Agreements; (2) “Coordinated Objectors” refers to all attorneys who originally objected to the settlements but, ultimately, supported the modified settlements which were approved by the court in the January 14, 2004 Orders Approving Settlement; (3) “Wheelahan” refers to Dawn Wheelahan, Esquire, an attorney who proceeded on her own behalf in opposing both the original and modified settlement agreements but who, nonetheless, seeks compensation for having contributed to the improvement of the latter; and (4) “Objectors’ Counsel” refers to counsel for all represented Objectors when no distinction between them is relevant.

<sup>2</sup> As revealed by the captions, two of the actions were pursued against joint related defendants. For ease of reference, however, the court will refer to the groups of Defendants as follows: Experian Information Solutions, Inc., (“Experian”); Equifax, Inc., and Equifax Credit Information Services, Inc., (collectively “Equifax”); and Trans Union Corporation and Trans Union L.I.C. (collectively “Trans Union”).

<sup>3</sup> The court did not approve the settlements as initially proposed. The court’s specific concerns with the original Stipulation[s] of Settlement are discussed in a single consolidated order entered in all three actions on October 2, 2003. Separate orders approving each of the settlements as modified were entered in each action on January 14, 2004.

agree not to include any reference to bankruptcy under the circumstances addressed above. In addition, the Stipulations provide each Class Member the right to obtain one free credit report. They also provide a variety of remedies in the event a Defendant repeats the complained-of reporting practice in the future. Finally, the Stipulations provide for payment of fees, costs and expenses by Defendants as discussed below.

The first proposed Stipulation[s] of Settlement filed January 17, 2003 included the following language regarding fees:

ATTORNEYS' FEES AND EXPENSES

56. Attorneys' Fees and Expenses were not negotiated by Plaintiff's counsel and [each Defendant] until after full agreement was reached as to the terms of this Stipulation. After all other material terms were agreed upon, **Plaintiff's Counsel agreed to file a request for attorneys' fees and costs not to exceed \$5,000,000, and [each defendant] agreed not to contest** such a request. Plaintiff's request for attorneys' fees and costs will **be subject to court approval**. This amount will be paid by [each defendant] in two stages subject to this Paragraph 56: (a) [each defendant] will use its best efforts to advance \$2,500,000 to Plaintiff's Counsel, as Plaintiffs' [sic] Counsel directs, within five business days of the entry of the Preliminary Approval Order, and (b) the balance of \$2,500,000 will be paid within 10 days of the Effective Date, also to Plaintiff's Counsel, as Plaintiffs' [sic] Counsel directs, except that, if the award of Attorneys' Fees and Expenses awarded by the Court or as modified on appeal is more than \$2,500,000 but less than \$5,000,000, the payment made pursuant to this subparagraph (b) shall be no more than the balance due on said award as of the Effective Date.

57. If the award of Attorneys' Fees and Expenses in the Final Judgment and Order Approving Settlement is reversed, vacated, modified, and/or remanded for further proceedings, so as to reduce the total award of Attorneys' Fees and Expenses to less than \$2,500,000, then Plaintiff's Counsel shall be obligated within 20 days of the entry of the order so reversing, vacating, modifying and/or remanding for further proceedings the Final Judgment and Order Approving Settlement, to return to [each defendant] the amount of the

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award that comprises the difference between the \$2,500,000 [each defendant] advanced to Plaintiff's Counsel as the first stage payment and the award as so ordered. Plaintiff's Counsel will be jointly and severally liable for the \$2,500,000 of advanced fees.

58. If the Final Judgment and Order Approving Settlement is reversed, vacated, modified, remanded for further proceedings or otherwise disposed of in any manner other than an affirmance of the Final Judgment and Order Approving Settlement as to any matter other than a reduction of the award of Attorneys' Fees and Expenses below the \$2,500,000 of the Attorneys' Fees and Expenses, and [each defendant] or Class Counsel [sic] properly and timely terminates this Settlement Agreement, or if [a defendant] elects to terminate this Settlement Agreement subject to the provisions of Paragraph 62 below, then Plaintiff's Counsel shall within 20 days of such termination return to [each defendant] the \$2,500,000 advanced to Plaintiff's Counsel as the first stage payment of Attorneys' Fees and Expenses.

59. Any return of Attorneys' Fees and Expenses under Paragraphs 57 or 58 shall be increased by interest earned by Plaintiff's Counsel on such monies.

60. Plaintiff's Counsel may petition the Court for an incentive award of up to \$1,000 to be paid to [named Plaintiff(s)]. The purpose of such award, if any, shall be to compensate [named Plaintiff(s)] for efforts and risks taken . . . on behalf of the Class. Any incentive award made by the Court shall be paid by [each defendant].

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*See Stipulation[s] of Settlement (filed Jan. 13, 2003)(emphasis added).*

In addition to raising objections to the substantive provisions of the originally proposed Stipulation[s] of Settlement, various objectors raised concerns regarding these attorneys' fee provisions. These concerns focused primarily on two issues: (a) the excessiveness of the request for attorneys' fees (a total of \$15 million dollars for the three cases) given that no monetary relief was provided to the class, and (b) the ambiguity of the class notice insofar as it explained the amount of fees that would be requested.

The court did not approve the settlements as originally written. Neither did it reject the essential form of the settlements. Instead, the court indicated four specific areas of concern which, if adequately addressed, might cure the deficiencies in the terms of the proposed settlements. These included concerns as to: the remedial provisions for future violations of the Stipulations of Settlement; the adequacy of the fix proposed by Equifax;<sup>4</sup> the clarity of the release provisions; and the inadequacy of proof that the court's directives regarding class identification and notification had been followed. *See* Order entered (October 2, 2003).

The parties engaged in further negotiations, filing two subsequent proposed Stipulations of Settlement. *See* Modified Stipulation[s] of Settlement (filed Nov. 7, 2003); Second Modified Stipulation[s] of Settlement (filed Dec. 19, 2003). For present purposes, the court assumes that counsel for at least some of the Objectors participated in the process. After receiving further briefing and hearing argument, the court found these modifications resolved all of the court's concerns and resulted in several additional enhancements not based on the court's stated concerns. The court, consequently, approved the Second Modified Stipulation[s] of Settlement at a hearing on January 12, 2004.

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At the January 12, 2004 hearing and thereafter by order, the court informed the parties that the attorneys' fee request would be decided in the following manner:

**First Stage -- approval of total fee award.**

1. No later than **January 30, 2004**, all persons claiming an entitlement to Attorneys' Fees and Expenses shall submit time, cost and expense record

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<sup>4</sup> The original Stipulations of Settlement allowed Defendants either to eliminate the bankruptcy reference altogether or to include it with the clarifying language that the bankruptcy was "of another." Defendant Equifax implemented the second alternative (referred to herein as the "Equifax fix"). The other two Defendants modified their procedures to remove the reference altogether. Nonetheless, Defendant Trans Union reserved the right to adopt the "Equifax fix" in the future if it was not disallowed by the court.

summaries, along with such affidavits and memoranda in support of the amount of the Attorneys' Fee and Expense award which they believe to be either an appropriate *total* award to all counsel, or, alternatively, the amount the submitting attorneys believe should be awarded to them. To the extent possible, Class Counsel and Objectors are encouraged to make a joint submission as to a total fee, cost and expense award.

2. Any opposition to the *total* amount sought shall be filed no later than **February 9, 2004**.
3. No reply is required. However, any reply shall be filed by **February 13, 2004**.

**Second Stage – Allocation of Fee Award.**

1. Class Counsel and Objectors' Counsel shall be allowed **no more than thirty days** following entry of the order setting a total Attorneys' Fee and Expense award to seek to resolve the issue of allocation of this award. At or before the conclusion of that time, counsel shall file a document setting forth the terms of their agreement or advising the court that they have not been able to reach an agreement.
2. In the event that no agreement is reached, Counsel shall file briefs within **fourteen days** after filing notice of the lack of agreement setting forth their positions as to how the award of Attorneys' Fees and Expenses should be allocated.
3. Opposing briefs shall be filed within **fourteen days** after filing of the initial briefs.

*See* Order (entered Jan. 14, 2004)( internal footnotes omitted).

The court has since received fee submissions from Class Counsel and Objectors' Counsel. While the parties include some discussion or information relevant to allocation between Class Counsel and Objectors' Counsel, the court decides only the total award to all counsel at this time. Class Counsel and Objectors' Counsel seek compensation primarily on a percentage-of-fund basis. They argue that the fund has a value of no less than \$160 million for each case (based primarily on a \$100 value per class member). They have also filed support for a lodestar-based award. *See infra* § III.A.4 & III.C. (findings and conclusions relating to hours, rates and multipliers).

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Specifically, Class Counsel and the Coordinated Objectors argue that the court should apply a percentage-of-fund analysis, valuing the fund at no less than \$480 million (\$100 per 1.6 million class members per Defendant).<sup>5</sup> Several expert witnesses have provided testimony relating to the value of the benefits conferred in support of such an award. The opinion of each expert is summarized below.<sup>6</sup>

<u>Expert</u>	<u>Declaration Date</u>	<u>Valuation Estimate and Basis</u>
1. Richard LeFebvre	3/18/03	The minimum value of the settlements is at least \$100 per Class Member valued from the standpoint of the minimum cost to have a third party rescore their credit or remove the bankruptcy information (noting costs could reach \$1000 per Class Member for these services). Declaration ¶¶ 9-10.
2. Steven Hamm, Esquire <sup>7</sup>	8/22/03	The reasonable value of each settlement, exclusive of fees and expenses, exceeds \$170 million per case. This opinion is based, in part, on Hamm's opinion that "a minimum \$100 per class member" valuation for "correcting a report that falsely indicates 'bankruptcy' . . . is extraordinarily conservative." Hamm Declaration ¶ 12.
3. Stan Smith, Ph.D.	8/22/03	The three settlements have a total combined value of over \$1.2 billion, assuming a class size of 1.6 million

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<sup>5</sup> Objectors' Counsel argue that they are responsible for full value due to the defects in the original settlement terms but, because of their late arrival in the case, they seek only one half of the maximum total fee award (in other words, they seek \$7.5 million).

<sup>6</sup> In addition, Class Counsel filed the affidavit of Alba Conte, Esquire in support of the fee award. *See* Alba Conte affidavit filed 8/22/03. While this affidavit refers to the settlement as having a value of no less than \$179 million, the statements relating to value are presented as assumptions based on the testimony of others. Conte's own opinion relates to the propriety of an award of attorneys' fees in the requested amount based on this assumption of value. Ms. Conte is the author of the current version of *Newberg on Class Actions*.

<sup>7</sup> Mr. Hamm is the former State Consumer Advocate and Administrator for the South Carolina Department of Consumer Affairs.

in each case and based on the following value components: a \$9 free credit report; a \$100-\$1000 value of having the bankruptcy information removed;<sup>8</sup> an economic value in the form of lower interest rates valued at no less than \$100 per class member per case; and the value of the time a class member would personally expend in working with a credit repair agency to have the bankruptcy information removed (calculated at a minimum of \$20 per hour for three hours).

5. Evan Hendricks                      12/19/03                      Generally agreeing with the valuations of the settlements as addressed by Plaintiffs' experts Stan Smith and Richard LeFebvre but noting that emotional distress value could also be added.<sup>9</sup>

Defendants Equifax and Trans Union also filed briefs suggesting that fees in this case can be awarded only pursuant to the Fair Credit Reporting Act's "fee shifting" provision. *See infra* at 11 & n. 12. Thus, they argue that the court is limited to a strict lodestar analysis, with little if any allowance of multipliers, when analyzing the pending fee petition. Notably, these Defendants, who each signed agreements not to contest fee awards of up to \$5 million each, did not make this argument in relation to the original fee applications filed before the September 23, 2003 hearing.<sup>10</sup> Neither did they raise it during the September or January hearings. Through that time, the fee petitions were premised primarily on a percentage-of-fund analysis.

The objections to the fee petitions filed by these Defendants are the only objections filed

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<sup>8</sup> To the extent he bases his total valuation on the cost of credit repair, Mr. Smith is relying on the testimony of others including Mr. LeFebvre.

<sup>9</sup> Mr. Hendricks also affirmed the general opinion of Plaintiff's expert George Finder. The court has not, however, relied on Mr. Finder's opinion and does not, therefore, include this reference here.

<sup>10</sup> These Defendants argue that their agreements not to contest fees are not binding to the extent they challenge the fee petitions of Objectors' Counsel.

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since the January hearing. No Class Member has filed any objection to the fee petitions during this period.

## II. DISCUSSION

### A. Standards and Procedures

**Requirement for Judicial Review.** Attorneys' fees in class actions may be awarded only with court approval. See *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 819 (3d Cir. 1995) (stating "a thorough judicial review of fee applications is required in all class action settlements"). This rule applies regardless of the framework under which fees are awarded. See generally *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (addressing fee award under fee-shifting statute in civil rights class action); *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 733 (3d Cir. 2001) (addressing fee award in common fund securities class action). Moreover, the court is obligated to scrutinize the award even when the fee (or a cap on fees) is agreed to as part of a settlement and even in the absence of any objection to the fee award. See *Cendant*, 243 F.3d at 730 (stating that court is obligated to ensure that fees are proper independent of any objection); Manual on Complex Litigation, Fourth §14.21 at 199 (FJC 2004) (hereinafter "Manual") (stating that a fee "agreement will not be binding in a class action settlement or other common fund litigation").

The purposes of this judicial oversight are threefold: protecting the interests of the class members from conflicts of interest with counsel; protecting the integrity of the class action process; and protecting the public perception of class actions. See *General Motors*, 55 F.3d at 819 ("court's oversight function serves not only to detect instances of the actual abuse that potential attorney-class conflicts may cause, but also the potential public misunderstandings they may cultivate in regard to

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the interests of class counsel”) (internal quotations and editing marks omitted). As noted in the Manual: “Unless the judge protects the interests of absentee class members, those interests may go unrepresented. . . . Calibrating the amount of attorney fees to a reasonable share of the benefits of class settlement or award is an appropriate and effective means of managing class action litigation and preventing abuses of the class action device.” Manual §14.11 at 183-84.

**Procedural Steps.** Rule 23(h) of the Federal Rules of Civil Procedure, set forth below, establishes the steps to be followed in reviewing an attorneys’ fee application in a class action.

**(h) Attorney Fees Award.** In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

**(1) Motion for Award of Attorney Fees.** A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

**(2) Objections to Motion.** A class member or a party from whom payment is sought, may object to the motion.

**(3) Hearing and Findings.** The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

**(4) Reference to a Special Master or Magistrate Judge.** The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

Fed. R. Civ. P. 23(h) (effective December 1, 2003).

**B. Compliance with Fed. R. Civ. P. 23(h).**

The fee requests that are presently before the court were made by motion and in accordance with the procedures set forth by the court at the conclusion of the January 12, 2004 fairness hearing, after the court ruled orally that it would approve the underlying settlements. The Class was given

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notice of the January 12, 2004 fairness hearing through a variety of means and has since been given notice of: (1) the court's approval of the settlement; (2) the procedures to be followed in relation to the fee petitions; and (3) the content of related submissions. Specifically, the court gave oral notice during the initially noticed September 23, 2003 fairness hearing that, in the event the parties proposed modified settlement terms, a second fairness hearing would be held on January 12, 2004. A written order to the same effect was entered on October 2, 2003, and was posted on the court's website and the class website soon thereafter. Likewise, the procedures to be followed in submitting the fee applications were set forth orally during the January 12, 2004 hearing and were repeated in the January 14, 2004 order which was posted on both websites. Subsequent submissions relating to fees were also posted on the class website, giving class members notice of counsels' submissions.

The court finds that these procedures provided class members with adequate notice and the opportunity to object to the fee petitions. They, therefore, satisfy the requirements of Fed. R. Civ. P. 23(h)(1).

Despite this notice, no Class Member has submitted any objection to an award of the fees now sought, which constitute the maximum allowed under the settlement agreements. Those Objectors' Counsel who previously filed objections to the settlements, including as to the fees previously sought, are now either silent as to the total fee award or join in seeking an award of the maximum fee allowed under the settlement agreements (\$5,000,000 per action).<sup>11</sup> The only objections were filed by Defendants Equifax and Trans Union who now argue, *inter alia*, that the

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<sup>11</sup> One group of attorneys, those representing Objectors Murphy and Zupan, objected to the fee requests before and during the September 23, 2003 fairness hearing but did not file any subsequent objection after the January 12, 2004 hearing. For present purposes, the court assumes that their original objections are continuing.

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court may award fees only under the fee-shifting statute at issue in this action and that proper calculation of the fees under this statute would result in an award well below the amount sought by Class Counsel and Objectors' Counsel.<sup>12</sup>

The court has received extensive briefing on the attorneys' fee issues and concludes that a further hearing would not aid the court in determining proper fee awards. The court sets forth its Findings of Fact and Conclusions of Law as to the propriety of the overall fee award in this order as required by Fed. R. Civ. P. 26(f)(3).<sup>13</sup>

The court also concludes that it should resolve the present issue without reference to a special master or magistrate judge in light of the court's familiarity with the proceedings. While the court anticipates resolving the remaining issues relating to allocation without reference under Fed. R. Civ. P. 26(f)(4) (assuming they are not resolved by agreement), it reserves the right to make such reference depending on the complexity of the review.

**C. Framework for Analyzing Fee Award.**

**Two Primary Frameworks Available.** As recently summarized by the Third Circuit Court of Appeals:

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<sup>12</sup> Class and Objectors' Counsel argue that these Defendants are precluded by the terms of their settlement agreements from challenging an award of fees of up to \$5,000,000 each. They also argue that these Defendants have waived their present arguments by failing to challenge Class Counsels' earlier fee requests. Both arguments have merit. Nonetheless, the court will consider the content of objecting Defendants' memorandum in light of the court's independent duty to scrutinize attorneys' fees petitions in class actions.

<sup>13</sup> To the extent the "Discussion" section of this order reaches conclusions as to the proper legal standard and framework for analyzing fees, it should be considered part of the court's conclusions of law. Likewise, the preceding "Background" section should be considered part of the court's findings of fact. Additional findings of fact and conclusions of law are set forth in the Findings and Conclusions section of this order.

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There are two primary methods for calculating attorneys' fees: the percentage-of-recovery method and the lodestar method. The percentage-of-recovery method is generally favored in cases involving a common fund, and is designed to allow courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure. . . . The lodestar method is more commonly applied in statutory fee-shifting cases, and is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation.

*Cendant*, 243 F.3d at 732 (internal citations and quotation marks omitted). *See also Third Circuit Task Force Report on Court Awarded Attorney Fees*, 108 F.R.D. 237, 250 (1985) (discussing distinctions between "fund-in-court" and statutory fee cases).

As noted by the Task Force, the "fund-in-court" or "common fund" doctrine is intended to "avoid the unjust enrichment of those who benefit from the fund . . . and who otherwise would bear none of the litigation costs . . . . A key element [of such a case is that] fees are not assessed against the unsuccessful litigant, . . . but rather are taken from the fund . . . ." *Id.* at 250. *See also General Motors*, 55 F.3d at 821 (noting that common fund recovery is based "on the theory that the class would be unjustly enriched if it did not compensate the counsel responsible for generating the valuable fund bestowed on the class"). By contrast, in statutory fee cases, fees are awarded to the prevailing party and against the losing party to effectuate a legislative intent "to encourage private enforcement of the statutory substantive rights, whether they be economic or non-economic, through the judicial process." *Id.*

Similarly, the Manual explains that common fund cases frequently arise in the class action context where the attorneys' fees "award may be made from recoveries obtained by settlement or by trial." Manual § 14.11 at 185. The Manual also recognizes "[a] variant on the traditional common fund case [which] occurs frequently in mass tort litigation . . . where a separate fund to pay attorney

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fees is created as a part of a settlement.” *Id.* In such cases, the court “must distribute the fund among the various plaintiffs’ attorneys.” *Id.*

**Lodestar Framework in Statutory Fee Cases.** When awarding fees under a fee-shifting statute, the court begins its analysis by calculating the hours reasonably expended multiplied by a reasonable rate. *See Hensley*, 461 U.S. at 436 (noting counsel should “recover a fully compensatory fee” where “plaintiff has obtained excellent results”). This is referred to as the “lodestar.” *See generally City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). The court may reduce the number of compensable hours or rate sought where the success was less than complete, although a plaintiff need not succeed on every contention to allow compensation for all hours expended. *See Hensley*, 461 U.S. at 436 (stating that a “fully compensatory fee” is one adequate to allow counsel to “recover for all hours reasonably expended on the litigation” without reduction “simply because the plaintiff failed to prevail on every contention raised in the lawsuit”).

In determining the proper rate and what hours are reasonable, the court considers twelve factors initially enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), *overruled on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1987). *See Daly v. Hill*, 790 F.2d 1071, 1077-83 (4th Cir. 1986) (discussing application of the *Johnson* factors in the Fourth Circuit). *See also Hensley*, 461 U.S. at 429-30 (discussing Senate’s consideration of *Johnson* factors in enacting fee shifting statute at issue); A number of the *Johnson* factors may also be considered in adjusting the lodestar upward or downward, although the court must be careful not to allow the same factor to be considered in setting and adjusting the lodestar. *See Hensley*, 461 U.S. at 434, n. 9 (noting that court may consider other factors identified in *Johnson* in adjusting fee upward or downward but “should note that many of these factors usually are subsumed within the initial

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calculation of hours reasonably expended at a reasonable hourly rate); *Daly*, 790 F.2d at 1077-78 (noting that court must avoid considering the same *Johnson* factor both in setting the lodestar and in later adjustment).

While *Hensley* noted the availability of upward adjustment in fee shifting cases, it also cautioned that upward adjustment should only be considered "in some cases of exceptional success." *Hensley*, 461 U.S. at 435. More recent Supreme Court cases discussing awards under fee-shifting statutes have also expressed reluctance to allow upward adjustments of the lodestar. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 730 (1987) (discussing concerns with allowing multipliers and concluding that they should be allowed, if at all, only in extraordinary cases where there is a showing that counsel could not have been retained without the enhancement and noting that, where allowed, the enhancement should not exceed one third of the lodestar). See also *General Motors*, 55 F.3d at 821 (recognizing that the lodestar method de-couples the fee award from the class recovery).

The Supreme Court has expressly precluded upward adjustments for contingency under fee-shifting statutes. *Burlington*, 505 U.S. at 566 (declining to follow *Delaware Valley* concurrence and holding "that enhancement for contingency is not permitted under the fee-shifting statutes at issue").<sup>14</sup>

The *Burlington* Court reasoned, *inter alia*,

that an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar. The risk of loss in a particular case (and, therefore,

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<sup>14</sup> Although the Court limited its ruling to the statutes at issue, the Clean Water Act and the Resource Conservation and Recovery Act, the rationale has been assumed to apply to all statutes authorizing an award of "reasonable attorneys fees" to a "prevailing party." See, e.g., Manual at 196, n. 538.

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the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so. . . . Taking account of it again through lodestar enhancement amounts to double counting.

*Burlington*, 505 U.S. at 562-63.

**Percentage-of-Recovery Framework.** By contrast, in a traditional common fund case in which the fees are awarded from the class recovery, the majority of courts apply a percentage-of-recovery framework. Manual § 14.121 at 187 (“the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases”) (internal footnotes omitted).<sup>15</sup> This can result in counsel receiving a fee award far in excess of what they would receive under a lodestar analysis. *See generally Cendant*, 243 F.3d at 732 (discussing allowable “lodestar multipliers” in percentage-of-recovery cases).

A percentage-of-recovery framework may also be used under a “constructive common fund” theory when fees are paid from a separate fund established for the purpose of paying fees, at least if such a framework is otherwise appropriate. *See Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 245-46 (8th Cir. 1996) (finding fees came from a common fund where “[a]lthough . . . attorney fees technically derive from the defendant rather than out of the class’ recovery, in essence the entire settlement amount comes from the same source”); *Vitamins Antitrust Litigation*, 2001 WL 34312839 at \*9 (D.D.C. 2001) (applying a percentage-of-recovery analysis despite defendants’ obligation to pay any fees awarded because particular nature of agreement created “constructive common fund”).<sup>16</sup>

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<sup>15</sup> The Fourth Circuit is not listed in either of the corresponding footnotes.

<sup>16</sup> As noted in *Vitamins*, courts in a variety of “jurisdictions have recognized that in constructive common fund cases, where attorneys’ fees are borne by defendants and not plaintiffs,

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At least one district court within this circuit has, however, held that a constructive common fund is not present when a defendant's agreement to pay fees lacks characteristics such as those found in a "clear sailing agreement."<sup>17</sup> See *DeLoach v. Philip Morris Co., Inc.*, 2003 WL 23094907, slip op. at 4 (M.D.N.C. 2003).

**"Modified" Lodestar Framework.** A modified lodestar<sup>18</sup> framework is applied in common fund cases as a cross-check on the propriety of a percentage based award. See, e.g., *Cendant*, 243

that the attorneys' fees nonetheless are a valuable part of the settlement and thus fairly characterized as part of the common fund." *Vitamins* at \*9. The class recovery in *Vitamins* did, however, also include a substantial common fund payable to class members.

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<sup>17</sup> A "clear sailing agreement" is one in which one party agrees to pay the fees of another up to a specified maximum amount. *Waters v. International Precious Metals Corp.*, 190 F.3d 1291, 1292-93 (11th Cir. 1999). "Such agreements are sometimes included in class action settlements so that defendants have a more definite idea of their total exposure." *Id.* at n. 3. To the extent an actual fund is created, the agreement might provide for reversion of any amounts not awarded as fees, thus presenting a situation in which the class will not benefit from any lower fee award. See *id.* As noted in *Waters*, "clear sailing agreements have been the subject of some controversy in the class action arena" with some judges favoring them while others believe they have "'adverse effects' in that they take away the advantages of the adversarial process and create the likelihood that plaintiff counsel will negotiate away something of value to the class in order to procure the defendant's agreement not to challenge the fee award." *Id.* at n. 4. In the cases presently before the court, the attorneys' fee aspects of the initial settlement agreements were not negotiated until after the parties reached agreement on the substantive settlement terms. This minimized the risk of conflict of interest between the class and counsel. The court acted to insure the risk would remain minimal during the post-September 2003 fairness hearing negotiations by prohibiting fee discussions until the parties completed negotiations to determine if modified settlement terms could be reached which addressed the deficiencies noted by the court.

<sup>18</sup> This court uses the phrase "modified lodestar" as its own description of two ways in which lodestar is used in a less strict manner than it is for assessing fees under a fee-shifting statute. The cases cited tend to refer to the framework simply as lodestar but note either that multipliers are allowed or that a "strict" framework need not be applied. See, e.g., *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000) (abrogating earlier decision precluding use of percentage method and holding that courts may calculate fees in common fund cases under either a percentage-of-fund method or by using lodestar with a multiplier); *Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y. 1997) (pre-*Goldberger* case discussing Second Circuit's preference for use of a lodestar with multiplier over a percentage of recovery framework in common fund cases and awarding multipliers of up to 5.5); *DeLoach*, Slip Op. at \*11 (awarding fees in a class action case using a lodestar analysis with a multiplier of 4.45 after finding that there was no constructive common fund).

F.3d at 732. The critical distinction between the lodestar framework used to cross-check a percentage based award and the strict lodestar framework used in fee-shifting cases relates to the availability of multipliers which are generally not allowed in assessing fees under fee-shifting statutes. *See Cendant*, 243 F.3d at 742, n. 26 (noting that despite the Supreme Court's rejection of "multipliers to enhance the lodestar's hourly rate amount[,] . . . calculation of the lodestar multiplier is still appropriate when used to cross-check the reasonableness of a percentage-of-recovery fee award"); *Cendant*, 243 F.3d at 732, n. 14 (discussing Third Circuit Task Force Report which explained that a lodestar "could be increased or decreased" in a common fund case based on factors including "the contingent nature or risk in the particular case" or "the quality of the attorney's work" and referring to this increase or decrease as a "multiplier"). *See also* Manual § 14.13 at 197 ("Enhancements available in common-fund cases, such as for results obtained, novelty and complexity of the issues presented, and the contingent nature of the litigation, are not appropriate enhancements in a statutory-fee award case.").

While this court has not located any case that expressly so states, it appears that this modified lodestar analysis would also be an appropriate primary framework in what might fairly be described as "common benefit" cases where the benefit is definite but difficult to value and where there is a fund of some form from which fees may be awarded.<sup>19</sup> As stated in *General Motors*:

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<sup>19</sup> The cases which this court has found using the term "common benefit" to describe a category of case are not entirely consistent in their application of the term. Some appear to refer to cases which are not true class actions but which benefit a class of persons. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (distinguishing common fund from common benefit cases and concluding that fees could not be shifted to opposing party under a "private attorney general" theory); *Brzonkala v. Morrison*, 272 F.3d 688 (4th Cir. 2001) (recognizing common benefit doctrine but finding it inapplicable to allow shifting of fees from individual who successfully challenged constitutionality of federal statute to the taxpayers at large or to those persons who would benefit from the ruling). As stated in *Alyeska*,

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Outside the pure statutory fee case, the lodestar rationale has appeal where as here, the nature of the settlement evades the precise evaluation needed for the percentage of recovery method.

\* \* \*

Certainly, the court may select the lodestar method in some non-statutory fee cases where it can calculate the relevant parameters (hours expended and hourly rate) more easily than it can determine a suitable percentage to award.

55 F.3d at 821. Allowance of such an alternative addresses the concern noted in the Manual that:

[w]here . . . actual common benefits are difficult to determine and possibly illusory, a benchmark (or any award based on a percentage recovery) may likewise be inapplicable. Particularly where the common benefits are in the form of . . . declaratory or injunctive relief, estimates of the value or even the existence of a common fund may be unreliable, rendering application of any percentage-of-recovery approach inappropriate.

Manual § 14.121 at 190.

It appears that a number of courts utilize such a modified lodestar framework (lodestar with multiplier) as the *primary* method of calculating an attorneys' fee in common fund or common benefit cases.<sup>20</sup> At the same time, some courts have expressed doubt as to the propriety of allowing

[i]n this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily ascertainable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefitting.

*Alyeska*, 421 U.S. at 265, n. 39 (but finding the criteria not satisfied where the party against whom fees were to be awarded was the losing party (defendant), not a category of persons benefitted by the ruling). Other cases seem to include class actions where there is a common benefit but not a true common fund (that is, no pot of money to be divided among the class members). See *Rosenbaum v. MacAllister*, 64 F.3d 1439 (10th Cir. 1995) (discussed *infra* n. 20). In applying the term in this case, the court intends the latter meaning.

<sup>20</sup> See, e.g., *Goldberger*, 209 F.3d at 47 (discussed *supra* n. 18); *Rosenbaum*, 64 F.3d 1439 (rejecting use of percentage fee because case was a common benefit rather than a common fund case but noting that district court was not required to follow a strict fee shifting analysis); *Microstrategy, Inc., Securities Litig.*, 172 F. Supp. 2d 778 (E.D.Va. 2001) (assuming that multiplier may be applied when a lodestar framework is used to establish the fee award in a common fund case); *DeLoach*, Slip Op. at 9-11 (discussed *infra*, this note).

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multipliers when a lodestar analysis is used to set fees in a common fund (or common benefit) case.<sup>21</sup>

Leading treatises have also noted some debate as to the practice, despite its apparent use by a number of courts.<sup>22</sup>

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In *Rosenbaum*, the Tenth Circuit, nonetheless, held that the 3.16 multiplier used was unwarranted under the circumstances, at least in part because it would result in payment at the rate of \$900 per hour for every hour worked by attorneys, paralegals and law clerks. In addition, the appellate court was critical of the district court's valuation of the benefits conferred.

The fee award in *Microstrategy* was subject to the Private Securities Litigation Reform Act which *limits* fee awards in securities class actions to a reasonable percentage of class recovery. The court held that the statute's limiting language was intended to set a cap on fees, not as a requirement to assess fees using a percentage-of-fund approach. The court ultimately found that the 37,007 reported hours were reasonable, as were attorney rates ranging from \$220 to \$500 per hour. The court applied a multiplier of 2.6 to the resulting lodestar, giving a fee that represented 18% of the common fund.

In *DeLoach*, the district court applied a multiplier of 4.45 to the lodestar after deciding that it could not apply a percentage-of-fund analysis because fees which were to be paid by defendants without a cap set by a "clear sailing agreement" did not constitute a constructive common fund. *DeLoach* at \*11 (finding multiplier appropriate to compensate for the "exceptional result" achieved). *See also DeLoach* at \* 9 (noting that case was not a "pure statutory fee-shifting case" because the payment of fees was pursuant to agreement and concluding that the case was distinguishable from *Burlington* due to "the 'exceptional circumstances that render a multiplier of the lodestar appropriate'"—also citing other cases within the circuit which applied multipliers to a lodestar analysis).

<sup>21</sup> For instance, in *General Motors*, the Third Circuit suggested that the Supreme Court's ruling in *Burlington* precluded use of a multiplier, at least for contingency. More recent Third Circuit cases have, by contrast, expressly held that multipliers are available when a lodestar framework is "used to cross-check the reasonableness of a percentage-of-recovery fee award." *Cendant*, 243 F.3d at 742 n. 26.

<sup>22</sup> *See* Manual § 14.122 at 195-96 (stating as to common fund cases that "[t]he lodestar figure may be adjusted . . . to account for several factors including . . . the quality of the representation, the *benefit obtained* for the class, the complexity and novelty of the issues presented, the *risk of nonpayment*, and any delay in payment") (emphasis added); *id.* ("Whether enhancements for the risks assumed by plaintiffs' attorneys are permissible in common-fund cases was unresolved as of the publication of this manual.") (citing *Burlington*, 505 U.S. at 561, 567 (no contingency enhancement allowed in statutory-fee cases); Newberg on Class Actions, Third Edition (Shepard's/McGraw-Hill 1992) § 14.03 at 14-4 to 14-5 ("Courts applying the lodestar approach will often use large multipliers or monetary enhancements of the time/rate (lodestar) calculation in order to reach fee award results comparable to percentage of recovery fees.")).

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The court declines to reach an ultimate conclusion as to whether it could apply a modified lodestar framework as the primary method of establishing a proper fee award. As discussed below, the court concludes that it can and should apply a percentage-of-fund framework as its primary fee-setting method. The court will, however, utilize the modified lodestar framework as a cross-check on the primary fee award.

**Selecting the Primary Framework.** In light of the variety of available frameworks discussed above, the court's first task is to determine which framework to apply. This entails examining the underlying actions to determine whether they are statutory-fee or common fund cases. *See, e.g., General Motors*, 55 F.3d at 821 ("Ordinarily, a court making or approving a fee award should determine what sort of action the court is adjudicating and then primarily rely on the corresponding method of awarding fees . . . using the alternative method to double check the fee."). Under either analysis, the court may award fees both to the counsel who originally pursued the action and to Objectors' Counsel.<sup>23</sup>

While a lodestar method is commonly applied in statutory fee-shifting cases, the court is not necessarily limited to a lodestar analysis in such cases if the settlement or judgment resulted in the creation of a common fund. *See DeLoach*, slip op. at 3 (discussing which method to apply in antitrust case in which defendants agreed to pay attorneys' fees separate and apart from the significant monies paid to class members). As Judge Osteen noted in *DeLoach*, "in the Fourth

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<sup>23</sup> An award of fees to Objectors' Counsel could be based on a determination that they "provided services that contributed to an increase in the common fund available to a class, aided the court's review of a class-action settlement, or . . . otherwise advanced the interests of the class or assisted the court." Manual at 186. At this stage, the court concludes only that Objectors' Counsel contributed sufficiently that their time should be considered in setting the total fee award. Any determination as to the relative contributions of Class Counsel and Objectors' Counsel is deferred to the second stage of the fee award process.

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Circuit, courts have discretion to choose between the lodestar method and the percentage method in common fund cases.”<sup>24</sup> Similarly, the Third Circuit Task Force, which undertook an extensive study of how attorneys’ fees were being awarded and made recommendations for procedures to be followed in future cases, concluded that: “[T]raditional common-fund case[s] and those statutory fee cases that are likely to result in a settlement fund from which adequate counsel fees can be paid, should be treated differently than the more typical statutory fee case involving the declaration or enforcement of rights or relatively modest sums of money.” Third Circuit Task Force, 108 F.R.D. at 255.

What Fourth Circuit authority is available suggests a flexible approach to the award of fees in common fund cases. Most notably, the Fourth Circuit crafted a unique “quasi-application of the ‘common fund’ doctrine” in *Brewer v. School Board of the City of Norfolk*, 456 F.2d 943 (4th Cir. 1972). Specifically, the court held that the plaintiff-students had received a pecuniary benefit in the form of free transportation and, in order to effectuate the agreement that this benefit would not be reduced, the court directed defendant to pay plaintiff’s legal fees in the absence of a fee-shifting statute or agreement. The Fourth Circuit distinguished rather than disavowed the *Brewer* ruling in its relatively recent decision in *Brzonkala v. Morrison*, 272 F.3d 688 (4th Cir. 2001), when it noted both the unique circumstances in *Brewer* and the court’s reluctant shifting of fees.

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<sup>24</sup> Judge Osteen further noted that the “trend, in this circuit and elsewhere . . . has been to select the percentage fund method in common fund cases.” *Id.* at \*3. Nonetheless, he found that this trend was “largely inapposite” in the case before him because no common fund existed, despite the payment of significant sums to the class members, where the fees would be paid directly by defendants rather than coming from the class members’ recovery. In reaching this conclusion, Judge Osteen distinguished cases with a “constructive common fund” such as might exist in a case with a “‘clear sailing’ agreement limiting the amount of fees that could be awarded.” *Id.* at \*4 (“the parties’ decision to allow the court to award fees, rather than agreeing to a finite maximum amount clearly removes this case from the common fund scheme”).

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There is no need to rely on either *Brewer* or *Brzonkala* as the basis for the fee award in the present case as there is both an agreement to pay fees and a fee-shifting statute available.<sup>25</sup> These two cases are, however, significant in that they reflect the Fourth Circuit's generally flexible approach to awarding fees and support use of a common fund or common benefit theory. *See also Teague v. Bakker*, 213 F. Supp. 2d 571, 583 (W.D.N.C. 2002) (noting that "[t]he Fourth Circuit has not determined the preferred method of calculating attorneys' fees where a common fund has been generated on behalf of a class"). Certainly, district courts within the circuit accept the view that they may select either lodestar or common fund framework when assessing fee awards under anything other than a fee-shifting statute. *E.g., Microstrategy, Inc. Securities Litig.*, 172 F. Supp. 2d at 785-88 (using lodestar with multiplier to award fees subject to the PSLRA and, as required by statute, insuring that the award did not exceed a reasonable percentage of class recovery).

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The present cases have characteristics both of statutory fee-shifting cases and common fund cases. Most obviously, the Complaints asserted claims under the Fair Credit Reporting Act which authorizes an award of fees to the "successful" plaintiff.<sup>26</sup> *See* 15 U.S.C. §§ 1681n(a)(3) & 1681o(a)(2) (FCRA attorneys' fee provisions for willful and negligent violations respectively). In addition, any fee awarded will come directly from Defendants, up to a predetermined cap. To the extent the award is less than the cap, the excess will be retained by Defendants. Thus, the "fund"

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<sup>25</sup> As to reliance on a fee-shifting statute, the court notes that a possible challenge could be raised to Plaintiff's status as "prevailing parties" in light of certain aspects of the settlement agreements (*i.e.* Defendants' denial of liability). Any such challenges are, however, foreclosed both by all Defendants' agreements to pay fees (made without express limitation as to the basis of the award), and the current position taken by two of the Defendants that the fee-shifting statute is the *only* basis on which fees may be awarded.

<sup>26</sup> *See supra* n. 25 regarding Plaintiffs' status as prevailing parties.

available for payment of fees is not part of a common fund in the traditional sense. *See Cendant*, 243 F.3d at 734 (noting case was “not a traditional common-fund case, because the unclaimed portion of the settlement fund is returned to Cendant and because the plaintiffs who recover may not be affected by the attorneys’ fee award”).

At the same time, the present cases have aspects of common fund cases in that Plaintiffs have gained a common benefit. While the benefits may be difficult to value precisely, they clearly have both significant monetary and non-monetary value to the class members. In addition, the “fund” established to pay for counsels’ fees as well as the expenses already paid by Defendants in determining class membership and notifying the class may reasonably be considered to be part of a constructive common fund. *See Cendant*, 243 F.3d at 734 (finding common fund percentage-of-recovery analysis was proper despite fact case was “not a traditional common-fund case”); *Waters*, 190 F.3d at 1292-93 (finding district court did not abuse its discretion in awarding fees on a percentage basis where settlement agreement provided a common fund from which fees and benefits would be paid but also provided for reversion of unclaimed amounts to defendants and set a cap on the amount of the fees).<sup>27</sup> As noted in *Johnston*, “the direct payment of attorney fees by defendants should not be a barrier to the use of the percentage of the benefit analysis.” *Johnston*, 83 F.3d at 245-46.

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<sup>27</sup> The total fee awarded in *Waters* was \$13.3 million out of a \$40 million settlement fund. The settlement provided that any funds remaining after payment of claims and attorneys’ fees and expenses would revert to defendants. Despite their agreement not to challenge fees up to 33 1/3% of the fund, defendants argued that the fee award was improperly based on the total available fund rather than the amount of the fund actually paid out to class members based on claims submitted. The district court and court of appeals both rejected this argument, finding it permissible to consider the total available fund in assessing fees. *Waters*, 190 F.3d at 1297 (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), for the proposition that “class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed”).

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Finally, it is of some significance that the fees at issue are to be awarded under a clear sailing agreement in which Defendants agreed not to oppose fees up to a specified amount. Critically, that agreement places no restriction on the method by which fees may be determined. Moreover, Defendants failed to challenge Class Counsel's initial fee petition which was based on a percentage of recovery theory.<sup>28</sup>

**Conclusion as to Proper Framework.** For the reasons set forth above, the court concludes that despite the presence of a statutory claim under which the court could award fees (presuming the Class Members to be "prevailing parties"), fees can and should be awarded using a common fund or common benefit analysis. The court further determines, as suggested in *In re Cendant* and various other cases, that it should analyze the fees first under a percentage-of-recovery framework and then cross-check that amount using the modified lodestar framework.

**D. Effect of Settlement Agreements**

The parties clearly cannot establish the proper amount of an attorneys' fee award in a class action by agreement. Nonetheless, the settlement agreements in these three cases are an important consideration to the extent they establish both a fund from which fees can be paid and caps on the fees which may be sought.

The court should not and does not begin with the amount set by the caps as some presumed proper award. Nonetheless, consideration of the caps may simplify the analysis in one important respect relative to valuation of the common benefit. That is, to the extent the benefits provided to the Class are difficult to value, the court will first determine whether a *minimum* value assigned to

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<sup>28</sup> Defendants' original intent to allow fees to be awarded either on a percentage-of-fund or lodestar-with-multiplier basis can be assumed given their failure to challenge an award of fees of up to \$5,000,000 per case when Class Counsel initially filed their percentage-of-fund based fee petitions (before the September 2003 fairness hearing) and continuing through the January 2004 fairness hearing.

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the benefits would place the court at or above the caps. To the extent this is the case, the court need not determine an actual or maximum value of the common fund or common benefits.

Similarly, the court will consider the caps in cross-checking using a lodestar with multiplier. If the results using relatively conservative rates, hours, and multipliers are within the caps set by the agreements, the court need not determine whether some higher rates or multipliers could be supported.

**E. Factors affecting rate, hours, and percentages.**

In the Fourth Circuit, the court usually applies the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, in setting both the rate and determining what hours are reasonably compensated when awarding fees under a fee-shifting statute. *See, e.g., Daley*, 790 F.2d at 1077. In *Waters*, the Eleventh Circuit applied these same factors to a percentage-of-fund analysis. *Waters*, 190 F.3d at 1297. The *Johnson* factors include: (1) time and labor expended; (2) novelty and difficulty of the questions; (3) requisite skill; (4) preclusion of other employment; (5) customary fee; (6) fixed or contingent fee; (7) time limitations; (8) amount involved and results obtained; (9) experience, reputation, and ability of attorneys; (10) undesirability of the case; (11) nature and length of professional relationship with client; and (12) awards in similar cases.<sup>29</sup>

The Fourth Circuit has, nonetheless, recognized certain difficulties with application of the *Johnson* factors, including that it can result in double counting of the same factor. *See Daly*, 790 F.2d at 1077-78. While the court must consider all of the factors, they need not be applied in any strict manner as not all may affect the fee in a given case. *See E.E.O.C. v. Service News Co.*, 898 F.2d 958, 965 (4th Cir. 1990) (finding seven of the twelve factors did not affect the fee in that case,

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<sup>29</sup> In more recent statutory fee-shifting cases, the courts restate the sixth factor as relating to counsel's expectations at the outset of the litigation. *See Brodziak v. Runyon*, 145 F.3d 194, 196 (4th Cir. 1998) (quoting *E.E.O.C. v. Service News Co.*, 898 F.2d 958 (4th Cir. 1990)).

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but remanding for further proceedings due to the district court's failure to explain the basis of its fee determination). Moreover, most if not all Fourth Circuit cases discussing these factors relate to the assessment of fees under a fee-shifting statute, not under a common fund framework. *See, e.g., Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978).

The Third Circuit considers a somewhat different set of seven factors in setting a percentage fee award in a common fund case:

- (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.

*In re Cendant*, 243 F.3d at 733 (quoting *Gunter v. Ridgewood Energy Co.*, 223 F.3d 190, 196-97 (3d Cir. 2000)). In recommending that the percentage-of-fund analysis be adopted as the preferred method of determining a proper fee in a common fund case and that the *Gunter* factors be utilized, the Third Circuit Task Force acknowledged that factors established by earlier case law (similar to the *Johnson* factors) had led to abuses, including, *inter alia*, encouraging counsel to expend excessive time, to delay settlement, and to inflate their hours and rates. Task Force Report at 247-48. The Second Circuit's decision in *Goldberger* likewise acknowledged that its earlier case law requiring reliance on a lodestar framework with application of the *Johnson* factors had led to abuses:

As so often happens with simple nostrums, experience with lodestar method proved vexing. Our district courts found that it created a temptation for lawyers to run up the number of hours for which they could be paid. . . . For the same reason, the lodestar created an unanticipated disincentive to early settlements. . . . But the primary source of dissatisfaction was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits. . . . This was an inevitable waste of judicial resources.

*Goldberger*, 209 F.3d at 48 (abrogating earlier prohibition on use of a percentage-of-fund method of assessing fees in a common fund case).

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In various respects, the *Gunter* factors appear better tailored to the assessment of fees in a common fund or common benefit case than do the *Johnson* factors. This is particularly true where a percentage-of-fund framework is applied. Nonetheless, this court will consider both sets of factors, both because they are overlapping and because it is not clear whether the Fourth Circuit would apply the *Johnson* or the *Gunter* factors under the present circumstances.

### III. FINDINGS AND CONCLUSIONS

To the extent the Background section of this order (*supra* at 2-8) sets forth statements of fact, it is intended to be considered as part of the court's findings of fact. To the extent the preceding Discussion section sets forth the legal standards and frameworks that the court will apply, it is intended to be considered as part of the court's conclusions of law. Additional findings of fact and conclusions of law are set forth below.

#### A. Findings as to *Johnson* and *Gunter* Factors

1. **Size of the fund created and the number of persons benefitted. *Gunter* factor. Amount involved and result obtained. *Johnson* factor.**

**Number of persons benefitted.** Although over four million notices were mailed in the above referenced cases, the parties have conceded that a number of these would represent duplicate listings of a single individual resulting, *inter alia*, from the listing of a single individual at multiple addresses. Given that close to one quarter of the notices mailed were returned as undeliverable, the court assumes that the class is comprised of, at most, three million individuals. This is roughly twice the 1.6 million estimated earlier in the litigation. Current estimates place the number of Class Members between 1.9 and 2.3 million per case with the classes in each case consisting of most of the same individuals.

For purposes of the attorneys' fee calculations, the court concludes that the true number of class members is *no less than* 1.5 million and likely somewhat higher. Use of this number takes into

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account the likelihood that some percentage of the persons identified as potential Class Members would be excluded from the Class due to their own bankruptcies or other disqualifying criteria.<sup>30</sup> In addition, it allows for those who opted-out of inclusion and also allows a margin of error for possible over-inclusiveness.<sup>31</sup>

**Results obtained.** The settlement agreements represent significant substantive changes in Defendants' uniform and longstanding reporting procedures as to debts which are included within the "bankruptcy of another." *See supra* at 2-5 (discussing Stipulations of Settlement). The court accepts that Defendants' complained-of practices have been a matter of significant dispute for many years, even though relatively few cases directly challenging such practices were filed. The result ultimately obtained through the present cases ends those practices prospectively. It also provides all Class Members with a choice of remedies in the event of future violations of the agreements. Critically, they will not be required to prove that the practice itself violates the law—a matter that remains unresolved—in order to seek these remedies. The court considers these to be significant results.

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<sup>30</sup> The court has selected a number slightly below the lowest estimate of the parties for the purpose of coming up with a conservative number against which to test the propriety of an award up to the caps allowed under the settlement agreements.

<sup>31</sup> Over four million notices were sent out, of which roughly 873,900 were returned as undeliverable, indicating, most likely, that these represented persons for whom duplicate notices were sent to both an outdated and a valid current address. In addition, notices were published in "Parade Magazine" and "USA Weekend." Thus, it appears that roughly three million potential class members (and possibly more) received notice. Of these, 3,342 opted-out and 249 objected to the initially proposed settlement. Only three, Murphy, Zupan, and Wheelahan, objected to the settlements that were ultimately adopted by the court.

**Value of fund or benefit.** The parties have offered various estimates of the value of the benefits provided. In the court's view, some of these estimates are excessive.<sup>32</sup> Moreover, in valuing the benefit the court assumes that many individuals may not actually have a better credit rating as a result of the change. *See supra* n. 32 and *infra* n. 33. Nonetheless, all achieve the benefit of having a comment, which many individuals personally believe is misleading (even if it is not), removed from their credit history. This saves them from any corresponding emotional distress and the potential lost time and expense they might incur seeking to have the remarks removed or satisfactorily explained to a creditor or potential employer. In addition, all Class Members had the option of seeking a free credit report (valued at \$9 per report), from each of the Defendants, although relatively few actually sought the report.

The Class is also benefitted by the payment of fees and litigation expenses in an amount up to the maximum the court may ultimately award (\$5 million per case). Similarly, they are benefitted

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<sup>32</sup> For example, Class Counsel appear to argue that the fix (removal of the bankruptcy reference) has a minimum value of \$200 to each class member, comprised of two parts: \$100 as the minimum cost to have a commercial entity assist in correcting the information; and another \$100 from the standpoint of having the fix in place. Certainly, the testimony of the experts supports using one or the other of these measures. *See* LeFevbre Declaration at 4 (cost of rescoring would range from \$100 to \$300 while it might cost up to \$1,000 to gain assistance in having the records corrected with the credit bureaus); Smith Declaration (valuing fund at \$1.2 billion, based, *inter alia*, on the potential added costs Class Members would incur in obtaining credit due to the bankruptcy reference). While the court can accept that the fix may be valued either from the standpoint of what it might cost to obtain the fix individually or the value of having the fix in place, it rejects any argument (if such argument is, in fact, intended) that the court should add the two values together.

The court also rejects Smith's estimate of the total value of having the reference removed in that it is apparently based on the assumption that the credit records of a large percentage of the Class will improve with removal of the bankruptcy reference. There is, however, no support offered for this assumption. Therefore, while the court accepts Smith's premise that some Class Members will benefit in this manner, the court rejects his ultimate valuation as speculative. Nonetheless, for the reasons discussed in the text, the court has no difficulty concluding that the settlement has a *minimum* value of \$100 per Class Member.

by the payment of notice-related expenses including the costs of preparing and forwarding notices, and the costs of publication.

While it is difficult to assign a precise value to the benefits, the court concludes that the total benefits will average no less than \$100 per class member, being less for some and more for others. This value is supported by the most conservative valuations offered by the Class' experts LeFebvre and Smith.<sup>33</sup> It is also supported by Steven Hamm, another expert offered by Class Counsel who has extensive experience including as this state's consumer advocate. Finally, it is supported by the testimony of Objectors' expert, Hendricks who accepted generally the valuation testimony of LeFebvre and Smith, once applied to the final settlement agreements.

Using this per-Class-Member value, the total economic benefit of these settlements is at least \$150 million per case (1.5 million Class Members times \$100 each), using conservative numbers both to estimate Class size and per-Class-Member value. The maximum fee and expense award sought per case is three percent (3%) of this amount. As discussed under the sixth factor below, this percentage is well within the allowable percentages for a "fund" of this size.

<sup>33</sup> In reaching this conclusion, the court has made various assumptions geared towards finding a conservative average value. First, the court assumes that some Class Members would not be troubled at all by the complained-of remark on their credit reports. They might, in fact, never have become aware of the remarks and might never have suffered any adverse consequences. The court also assumes that there are a fairly significant number of Class Members who are aware of the remarks and who find them offensive, even if they have not suffered any actual adverse consequences from the inclusion of the remarks. The court also assumes that a lower percentage of Class Members suffered significant distress as a result of the remarks and would likely spend significant time and energy seeking to have the remarks removed. A lesser percentage might seek professional assistance (at a direct cost) in seeking to remove the remarks. Finally, in the interest of making a conservative valuation, the court assumes that there is an even lower percentage of Class Members who would actually have suffered significant adverse consequences, such as denial of credit, denial of a job opportunity, or imposition of a higher interest rate, as a result of someone misunderstanding the intent of the bankruptcy reference. Each of these assumptions is used in reaching a conservative estimate of the value of the fund or benefits.

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**2. The presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel. *Gunter* factor.**

A total of 3,342 Class Members opted out of these class actions while on notice of the proposed terms of the original settlement agreements. Another 249 remained in the Class but filed objections to the settlements as originally proposed. Of these Objectors, only fifteen either personally appeared or were represented by counsel in either of the hearings. At the time the settlements were ultimately approved, only three Objectors (Murphy, Zupan and Wheelahan) continued to advance objections to the approval of the settlement agreements.

None of the Objectors has filed any opposition to the final fee petitions. The court will, nonetheless, assume for present purposes that the two Objectors who filed nothing in regard to the final fee petitions but who opposed the final settlement (Murphy and Zupan) continue to oppose the assessment of fees. The only express objection to fees filed after settlement approval was filed on behalf of Defendants in two of the captioned actions.

To the extent the fee is awarded under a common fund or common benefit theory, as this court concludes is proper, the relevant objections are those of Class Members. Based on the above facts, the court concludes that the Class Members' objections to the final settlement terms were so few as to be inconsequential. Further, as noted above, there are, at most, two remaining Class Members who oppose an award of the maximum amount of fees.

To the extent the court might properly consider Defendants' objections under this factor (as opposed to simply as guidance on the applicable law which the court must consider), the court finds Defendants' objections to have been waived through the combination of the terms of the

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Stipulation[s] of Settlement and their failure to object to the initial fee petitions.<sup>34</sup>

3. **The skill and efficiency of the attorneys involved. *Gunter* factor. The requisite skill required and the experience, reputation and ability of the attorneys. *Johnson* factor.**

The court finds that Class Counsel, through their collective efforts, demonstrated skill and efficiency in obtaining certification of three nationwide class actions, and in managing those actions through settlement negotiations, and now through settlement approval. As to the last phase, modification of the settlements and final settlement approval, Class Counsel were at least aided by Objectors' Counsel.<sup>35</sup>

As noted above, the basic terms of the initial settlement agreements represented significant substantive changes in Defendants' uniform and longstanding reporting procedures which the court accepts have been a matter of significant dispute for many years, even if relatively few cases had been filed directly challenging the practice. Given that Defendants strongly defended the legality of their longstanding procedures and incurred substantial costs to change them, the court concludes that Class Counsel demonstrated substantial skill and ability in obtaining the initial settlement agreements. While there were changes made after the initial fairness hearing, the court assumes for present purposes that it should accord less weight to subsequent changes given that Defendants were,

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<sup>34</sup> The failure to challenge the initial fee petitions is striking not only because those petitions were based primarily, if not solely, on a percentage-of-fund framework, but also because the factors used to evaluate fee petitions under either framework are stronger now than they would have been when the original fee petitions were filed. For example, the hours invested have obviously increased since September 2003. Similarly, the value to the Class has also clearly been improved through the modifications to the Stipulation[s] of Settlement.

<sup>35</sup> For present purposes, the court makes no findings as to the relative contributions of Class Counsel and Objectors' Counsel. It is sufficient to note that the involvement of Objectors' Counsel aided in improving the final settlement terms.

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*#33*

by that time, invested in ensuring that the settlements were approved, particularly because Defendants had, at that point, completed various changes in their procedures at substantial cost.

Finally, the court concludes that obtaining the present settlements was more efficient for the Class than continued litigation. This is particularly true in light of the uncertainty whether the Class would have received any relief at all had the matter proceeded through litigation. Moreover, while the settlements provide no monetary relief, they do result in complete discontinuation of the complained-of practices and provide a range of remedies in the event of future violations of the agreements. These are significant results which might not have been available through trial.

4. **The complexity and duration of the litigation and the amount of time devoted to the case by Class Counsel. *Gunter* factors. The time and labor expended, the novelty and difficulty of the questions, and the requisite skill required. *Johnson* factors (last factor also listed in (3) above).**

These cases were commenced in April 2000. The cases proceeded through intense litigation regarding class certification and were not resolved as to the merits until January 2004. As with any class action, particularly actions seeking to certify a nationwide class, these actions were procedurally complex and presented management challenges. At the same time, they were by no means among the most complex or difficult of class actions. Further, while the critical factual issues as to Defendants' practices were largely undisputed, the issue of their legality was novel and presented both factual and legal complexities. Consequently, Class Counsel necessarily invested significant amounts of time, labor, and skill in bringing the cases to the point of settlement. Objectors' Counsel, likewise, contributed to the final successful settlements, albeit over a shorter period of time and, as discussed below, at less risk.<sup>36</sup>

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<sup>36</sup> As noted above, the court makes no determination as to the proper allocation of the award between Class Counsel and Objectors' Counsel at this time. Nonetheless, the court makes certain

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The following total hours through January 12, 2004,<sup>37</sup> have been reported by Class Counsel and Objectors' Counsel:

<b>Class Counsel</b>	–	11,255 attorney hours plus 662 paralegal hours
<b>Coordinated Objector's counsel</b>	–	3,118 attorney hours plus 172 paralegal hours
<b>Lohr</b>	–	116 attorney hours <sup>38</sup>
<b>Wheelahan</b>	–	182 attorney hours <sup>39</sup>
<b>Total</b>	–	<b>14,671 attorney hours plus 834 paralegal hours</b>

Class Counsel also have certain ongoing obligations under the terms of the settlement. These include but are not limited to the duty to maintain the website and to respond to inquiries from Class

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assumptions relative to the contribution of Objectors' Counsel here that bear on the overall award.

<sup>37</sup> The court has utilized this time period, stopping on the date of the final fairness hearing, because the court is determining the fee award using a common fund or common benefit framework. Such a framework does not allow compensation for the time invested in preparing fee applications because that work, unlike the work of obtaining an agreement for Defendants to pay whatever fees may be awarded, is not for the benefit of the Class. While the court recognizes that some of the post-January 12 time would likely have related to the merits, the court believes this time would be roughly offset by time spent related to fee award issues prior to the January 12, 2004 fairness hearing. Thus, the court has excluded all time after January 12, 2004. The time reported for the relevant periods has also been rounded to the nearest hour.

<sup>38</sup> Terrance G. Lohr, Esquire is among the group referred to herein as the "Coordinated Objectors." His evidence of hours and fees was, however, not included in the Coordinated Objectors submissions due to his delay in submitting it to them. For present purposes, the court will consider these hours without determining what, if any, fees, costs and expenses should ultimately be allocated to Lohr.

<sup>39</sup> While Ms. Wheelahan is an attorney, she was proceeding on her own behalf, not on behalf of a client. Her right to seek compensation for her time may, therefore, be subject to some debate, particularly in the Fourth Circuit. *See, e.g., Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003) (affirming denial of *qui tam* plaintiff's personal litigation related expenses); *Doe v. Board of Education of Baltimore County*, 165 F.3d 260, 261-65 (4th Cir. 1998) (denying fee request made by *pro se* attorney-parent of child on whose behalf IDEA claim was filed).

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Members. While these duties are not likely to require significant time investments beyond the immediate future, the duration of the obligation coupled with the number of inquiries likely in the short term suggest that the time commitment will not be insignificant. While much of this work will be fairly ministerial and, will not, therefore, require great skill, there are certain duties that require a particular knowledge of the case and governing law.

**5. The risk of nonpayment. *Gunter* factor. Whether fee is fixed or contingent. *Johnson* factor.**

Class Counsel's substantial investment of time in pursuing these matters was, at all times, made at the risk of receiving no compensation whatsoever. This is particularly true of the time invested prior to Judge Seymour's preliminary approval order.

Without some upside benefit to having undertaken such risks, competent counsel could not be attracted to handle cases of this nature, which, in order to achieve the result obtained, effectively required certification of these nationwide classes in coordinated actions against multiple Defendants. Indeed, it is likely that the results could not have been obtained (at least through settlement) without pursuing all three actions in a coordinated effort.<sup>40</sup> Counsel undertaking such litigation must also assume that they will be opposed by well-funded defendants with strong motivations to defend their practices. Thus, Class Counsel undertook significant risk and necessarily had to anticipate a long, hard fight when they commenced this action.

The risk assumed by Objectors' attorneys was not as great. In opposing the settlement, they could reasonably assume that they would either preserve the litigation rights of their own current and

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<sup>40</sup> This conclusion is based on two overlapping considerations. First, Defendants are competitors in a nationwide market that would, quite understandably, resist accepting limitations not imposed on all of them. Second, given that a creditor might seek information from any one or all three of the Defendants, obtaining an agreement from one of them to desist in a given practice would be of limited benefit if the other Defendants continued the complained-of practice.

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potential future clients (thus protecting their own opportunity to represent those individuals either in individual or class actions) or would be able to gain some share of fees in the ultimate settlement of the present actions. While neither result was certain, the court will assume for purposes of the present order that the risk undertaken by Objectors' Counsel was significantly less than that for Class Counsel.

**6. Awards in similar cases. *Gunter and Johnson* factor.**

As to this factor, the court looks first at the percentages which have been approved in actions of a similar nature. Cases cited by Class Counsel and in the affidavits of their experts indicate that courts and arbitrators in this state, district, and circuit have awarded from 20% to 40% of the common fund, at least when the fund is below \$50 million. *See* Alba Conte Declaration at ¶¶ 10 & 15 (noting that from 20% to 30% is a typical percentage award in common fund cases valued under \$50 million); Steven Hamm Declaration at ¶¶ 14-17 (supporting percentages of 20% to 40%). These percentages are in keeping with typical percentage fee agreements in non-class action cases and well within the 40% contingency fee agreed to by the two named Plaintiffs. *See* Mullen Declaration, Exhibits A & B (contingency agreements with named Plaintiffs).

As the size of the fund increases, the percentage awarded decreases. *See* Newberg § 14.03 at 14-14 (noting that when a percentage method is used "the fee percentage would be significantly more modest as the common fund recovery begins to reach \$100 million"); Manual § 14.121 at 188 ("in 'mega-cases' in which large settlements or awards serve as the basis for calculating a percentage, courts have often found considerably lower percentages to be appropriate."). Indeed, the percentages allowed may be as low as 3% to 10% when the size of the fund reaches or exceeds \$100 million. *See Cendant*, 243 F.3d at 736 (setting out chart of percentages used in setting fees in common fund cases with funds exceeding \$100 million which reflected a range of from 2.8% to

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36%, with the majority of the cases falling between 5% and 15% – cases cited were from 1987 through 2001); *Conte Declaration* ¶ 15 (noting that 13% to 20% is typical when the fund is valued between \$51 million and 75 million, and 6% to 10% is typical for recoveries above \$75 million).

As noted by Conte:

When extraordinarily large class recoveries of \$75-\$200 million and more are recovered, courts most stringently weigh the economies of scale that are inherent in class action in fixing an appropriate percentage of recovery for reasonable class counsel fees. Accordingly, fee awards in the range of 6 to 10 [percent] are common in this large-scale context, [although] mega fund recoveries have also yielded common fund fees up to 16 [percent].”

Alba Conte Declaration ¶ 15.

In the present case, considering all of the factors addressed above and below, the court concludes that a percentage of 3% of the total common fund (or value of the common benefit) is appropriate.

**7. Preclusion of other employment. *Johnson* factor.**

For all attorneys, the court assumes that time invested in this matter was time that could have been invested in other matters. For Class Counsel, this factor is more significant given the time investment necessary for them to pursue these cases over a significant period of time and in light of the size of their practices. This factor is not, however, considered significant beyond the extent to which it is subsumed within other factors.

**8. Customary fee or rates. *Johnson* factor.**

The preceding discussion as to awards in similar cases addresses this factor to the extent relevant to a percentage-of-fund analysis. To the extent this factor is relevant to the cross-check, it is discussed below under Section III. C.

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**9. Time limitations. *Johnson* factor.**

For Class Counsel, this factor overlaps with and adds nothing to the earlier discussed factor of lost opportunity costs. For Objectors' Counsel, it is somewhat more significant as the court will assume that preparing for and attending the September fairness hearing may have been based on fairly limited notice and, therefore, may have presented greater difficulties. In any case, however, the factor has little, if any, bearing on the ultimate award.

**10. Undesirability of the case. *Johnson* factor.**

Except to the extent this factor overlaps with other factors (such as relating to the time commitment and risk factor), it has no bearing on the fee award. This is, in any case, clearly not a case so unpopular as to deter counsel from active participation.

**11. Nature and length of professional relationship with client. *Johnson* factor.**

This factor, likewise, has no bearing on the fee award.

**B. Calculation under the percentage analysis**

In light of the above factors, the court concludes that a percentage-of-fund based fee award of \$5 million is reasonable in each case, for a total fee award of \$15 million. This conclusion is based on the court's determinations that: (1) the benefit obtained is at least \$150 million per case (\$100 each for no less than 1.5 million Class Members); and (2) counsel should be entitled to 3% of the value of the benefits gained for the Class as valued above.<sup>41</sup> Because this minimum calculation results in a fee equal to or above the agreed cap on fees, the court need not determine

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<sup>41</sup> This valuation is low as it does not include the \$5 million constructive common fund for payment of fees and expenses or the other litigation-related costs borne by Defendants, although adding these figures in would not make a significant difference in the available award.

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whether the value of the benefit exceeds \$150 million.<sup>42</sup>

**C. Cross-check against lodestar analysis**

The attorneys' fee awards which result from the above percentage-of-fund analysis must next be cross-checked against a modified lodestar analysis. This requires the court to first consider whether the rates and hours requested are reasonable and, if not, to set reasonable rates and reduce the hours as appropriate. The court next determines the lodestar and divides that into the percentage-of-fund based attorneys' fee award to determine the effective multiplier. Finally, the court determines whether the effective multiplier is reasonable. The court proceeds with these steps in order.

**Reasonable and Customary rates.** Class Counsel request a blended rate of \$325 for attorneys and \$75 for their legal assistants. They submit affidavits supporting application of these rates or higher based on rates charged to South Carolina companies by in-state as well as out-of-state attorneys. *See* Steve Hamm Second Declaration at ¶¶ 3-8 (indicating that in-state attorneys charge rates of up to \$400 per hour for class action work while out-of-state attorneys charge up to \$550 per hour, and concluding that Class Counsel's work in this case should be compensated at between \$350 and \$450 per hour). Class Counsel do not, however, provide evidence of their normal hourly rates. The court presumes this is based predominantly on the nature of their practices, which may not be amenable to hourly billing.

Coordinated Objectors' counsel (including Lohr) request rates ranging from \$125 to over \$400 per hour but averaging \$334 per hour when weighted for the hours worked at the different

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<sup>42</sup> Assuming a benefitted Class of 1.5 million individuals, this is the equivalent of asking each Class Member to pay \$10 to obtain the benefits of this litigation including discontinuation of the complained-of practice by Defendants in all three actions and the right to receive a credit report from each of the Defendants, but also telling them that Defendants have agreed to reimburse the legal fees and all related costs. Viewed from this perspective, the fees are particularly reasonable.

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rates. They provide evidence that these are their normally charged rates or lower, to the extent they normally charge by the hour. They seek compensation for paralegals at rates ranging from \$60 to \$150 per hour, with most of the time being billed at \$100 per hour. Wheelahan seeks compensation at a rate of \$450 per hour.<sup>43</sup>

This court has rarely if ever found more than \$250 per hour to be a proper rate under a fee-shifting statute for counsel within South Carolina. Because this is a nationwide class action, however, this court will accept a rate which may be slightly higher than that routinely charged by attorneys of similar skill and experience in the forum state. All factors considered, this court determines that a blended rate of \$300 per hour for attorneys and \$75 for paralegals is a reasonable rate to use for cross-checking the proper total award of fees. In using this rate, the court has not considered the risk/contingency factor, efficiency of counsel (that is, the result obtained in light of the hours invested), or ultimate result as it believes those factors are more appropriately considered in evaluating a proper multiplier.<sup>44</sup>

**Resulting Multiplier.** Using the rates set forth above and the total hours reported by all counsel and paralegals who have submitted time records, a percentage-of-fund award of \$15 million

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<sup>43</sup> Some of the affidavits or declarations are not, however, clear as to the source of the hourly rate as it appears counsel may be relying on awards that included multipliers. *See, e.g.*, Wheelahan fee application. Using an hourly rate which includes a multiplier would not be appropriate as it would lead to double counting if multipliers are also allowed. The court has resolved this concern by using the lower overall rate set below.

<sup>44</sup> In *Daly*, the Fourth Circuit listed “results” as among the factors considered in the hours and rate used to establish the basic lodestar, rather than in any potential adjustment to the lodestar. While this court accepts that results should normally be considered in a strict lodestar analysis only in determining what hours and rates are reasonable (thus as part of the lodestar itself), it concludes that, to the extent a modified lodestar analysis is used as a cross-check on a percentage-of-fund fee award, this factor is more properly considered in determining whether the resulting multiplier is reasonable than in setting the basic lodestar.

for all three cases would represent a “modified lodestar” award with a 3.36 multiplier.<sup>45</sup> This understates the true multiplier in some respects, and overstates it in others. For instance, the multiplier would be lower if time invested by counsel for Murphy and Zupan was included. Similarly, the figure would be lower if costs and expenses were first considered, reducing the total available for fees. The ultimate effect of these considerations would, however, be small.

By contrast, the multiplier would increase as the court reduced the compensable hours, as it would likely do in conducting a detailed lodestar analysis.<sup>46</sup> The court will not undertake a precise reduction at this point as that would require consideration of factors reserved to the allocation stage of these proceedings. The court does, however, conclude that the total overall reduction would not exceed fifteen percent of the total hours reported by all counsel. If the hours were reduced by 15%, the percentage-of-fund award would represent a multiplier of four.

**Acceptable Multipliers.** This resulting multiplier is at the high end of multipliers which have been found acceptable. *See generally* Newberg on Class Actions § 14.03 at 14-14 (noting that multipliers of from one to four are common); *Cendant*, 243 F.3d at 742 (noting cases listed in chart

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<sup>45</sup> The calculation is as follows: \$15 million divided by the sum of 14,671 attorney hours at \$300 per hour and 834 paralegal hours at \$75 per hour.

<sup>46</sup> Class Counsel’s time could, for instance, be reduced to account for the lack of specificity in the time records which makes it impossible for the court to determine even the subject matter of the many emails and communications that occurred. While the court fully accepts that a case of this nature requires significant communication between counsel, the lack of specificity coupled with the amount of time spent in such endeavors convinces this court that some time reduction is appropriate.

Likewise, Objectors’ Counsel’s time would be reduced to take into account the inherent duplication of effort not beneficial to the class which results from so many attorneys being involved advancing many of the same concerns. This is not necessarily a suggestion that the time was excessive or misspent in respect to the relationship between counsel and their clients (the individual Objectors), only that the full time spent by so many attorneys cannot fairly be said to have benefitted the Class.

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involved multipliers ranging from 1.35 to 2.99). Nonetheless, the very large size of the fund and small percentage allowed as attorneys' fees makes a higher end multiplier acceptable. *See id.*, (noting that "a large common fund award may warrant an even larger multiplier").

Balancing all of the factors addressed above, including most particularly the large number of class members, the large size of the fund (estimated using a minimum number of class members and per member value), the low percentage of fund allowed as a fee under the percentage-of-fund analysis, the significant risk assumed by Class Counsel (including advancing significant costs and expenses), the court concludes that the attorneys' fee awards established under the percentage-of-fund framework result in a reasonable multiplier.<sup>47</sup>

#### **E. Expenses**

In addition to fees, Class Counsel seek recovery of expenses advanced on behalf of the Class in the amount of \$274,781.<sup>48</sup> Objectors' Counsel, likewise, seek reimbursement of their expenses in the amount of \$77,969.<sup>49</sup> Because the court finds that the reasonable fees are at or above the caps

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<sup>47</sup> The court does not decide whether such a multiplier could be used if a modified lodestar analysis was the primary means of assessing fees. Such an analysis would presumably be made only if the fund could not be valued, in which case one of the most critical factors on which this court has relied in determining the acceptability of this cross-check multiplier would be absent.

<sup>48</sup> Class Counsel petition the court for reimbursement of expenses in the amount of \$274,781.50. *See* Supplemental Declaration of Doug Smith in Support of Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Expenses, Exhibit E (filed January 30, 2004). These expenses can be broken down as follows: (1) copying, postage, telephone, and facsimile - \$26,070.42; (2) travel, food, and lodging - \$16,465.98; (3) litigation, deposition, and expert fees - \$205,399.96; (4) legal research and computer services - \$12,430.59; and (5) media relations, office supply, and miscellaneous - \$14,414.55.

<sup>49</sup> Coordinated Objectors' Counsel petition the court for reimbursement of expenses in the amount of \$77,969.35. *See* Coordinated Objector's Time Allocation Exhibit and Billing Records, Tab I; Time and Expense Records of Terrance G. Lohr (filed Feb 17, 2004). These expenses can be broken down as follows: (1) copying, postage, telephone, and facsimile - \$24,460.07; (2) travel,

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on fees and expenses under the primary framework used above, the court declines to conduct any detailed review of the propriety of these expense requests at this time.<sup>50</sup> It is enough to conclude that at least a significant portion of these expenses appear to be properly compensable and that they, therefore, further support an award of fees, costs and expenses in the amount of \$5 million per action.<sup>51</sup>

### CONCLUSION AS TO FEES AND EXPENSES

The court concludes that a total fee, cost, and expense award of \$5,000,000 per action is proper.

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food, and lodging - \$21,998.32; (3) litigation and expert fees - \$6,990.67; (4) legal research and computer services expenses - \$1,640.79; and (5) office supply and miscellaneous \$22,879.50.

Objector Wheelahan petitions the court for reimbursement of expenses in the amount of \$4,197. *See* Fee Petition Of Dawn Adams Wheelahan, Exhibit 1. p.5. These expenses can be broken down as follows: (1) copying, postage, telephone, and facsimile expenses - \$655; and (2) travel, food, and lodging expenses - \$3,542.

<sup>50</sup> However, as expenses may be at issue in the next stage of the proceedings, the court will address several concerns at this point. First, Class Counsel's expense records fail, at least as to meals and travel, to provide the type of detail necessary to allow the court to determine if the expenses are reasonable. There are, for instance, a number of entries for meals for attorneys with no indication of who was fed or why the expense should be borne by the Class. Similarly, there are expenses listed for travel that give neither the date nor purpose of the travel. While some of Objectors' Counsel's records are more detailed (or the date and purpose of the travel can be assumed in light of their short involvement), a number are still deficient. In addition, a number of the expenses appear to this court to be excessive. For all counsel, therefore, the court will direct that any request that the court determine the reasonableness of expenses include sufficient information from which the court might ascertain: the purpose for which the expense was incurred; the necessity of incurring the expense; and whether the expense, even if necessary, was reasonable in amount. For example, counsel should indicate the class of any air travel, the type vehicle rented if a vehicle was rented, what meals were purchased and in what amounts, the rate charged for any hotel bills and, for all travel, the location to which the travel relates.

<sup>51</sup> While the court has considered costs and expenses last in this order, it advises counsel that it will consider them first to the extent the court is called on to allocate the total award among counsel.

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## INCENTIVE AWARD

Objectors seek to be included in the incentive award provisions of the Stipulations of Settlement on the same terms as the two named Plaintiffs. The court denies this request as the basis for the award to the named Plaintiffs is found in the express language of the Stipulations of Settlement which cannot be read to extend to anyone beyond the named Plaintiffs. This is particularly true given that Objectors' request would amount to a significant increase in the amount of money awarded or so allocated given that there are only one or two named Plaintiffs in each of these cases, while there are 249 Objectors, 15 of whom appeared or were represented by counsel during the fairness hearings.<sup>52</sup>

## ALLOCATION PROCEEDINGS

*CWC #45*

Proceedings for allocation of fees and expenses shall proceed as set forth in the court's order of January 14, 2004 which is quoted on pages 5-6 of this order. In addition to the instructions included therein, the court advises counsel that, if the court is required to allocate expenses, it will need greater detail as indicated above. *Supra* n. 50. In addition, to the extent Wheelahan seeks recovery of fees, she will need to address the body of Fourth Circuit case law which may limit or preclude fee awards to attorneys proceeding on their own behalf and expense awards to *pro se* litigants. *See supra* n. 39.

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<sup>52</sup> No petition for approval of the incentive awards to the named Plaintiffs has yet been filed. The present ruling, therefore, relates only to whether the incentive award can be extended to Objectors.

## CONCLUSION

For the reasons set forth above, the court approves a total award of \$5,000,000 in each of these three actions for attorneys fees, costs and expenses. Allocation among Class Counsel and Objectors Counsel is, however, deferred pending further proceedings as set forth above.

**IT IS SO ORDERED.**

  
CAMERON MCGOWAN CURRIE  
UNITED STATES DISTRICT JUDGE

April 20, 2004  
Columbia, South Carolina

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