

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE TJX COMPANIES RETAIL
SECURITY BREACH LITIGATION

(including cases transferred pursuant to: THE
TJX COMPANIES, INC., CUSTOMER
DATA SECURITY BREACH LITIGATION)

Master Docket
Civil Action No. 07-10162
(Lead Case)

MDL Docket No. 1838

This Document Relates to:

CONSUMER TRACK ACTIONS

**PETITION OF PLAINTIFFS' COUNSEL FOR AN AWARD OF
ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES**

Plaintiffs' counsel respectfully submit this Memorandum of Law in support of their petition for a joint award of attorneys' fees of \$6.5 million and reimbursement of litigation expenses of \$150,000.

I. PRELIMINARY STATEMENT

This action (the "Action") is on behalf of all persons in the United States, Puerto Rico, or Canada, who shopped at TJX Stores, made a purchase or return and have had personal or financial data stolen or placed at risk of being stolen from TJX's computer systems, and who were or may be damaged thereby (the "Class"). As described more fully in the accompanying Joint Declaration of Sherrie R. Savett, Lester L. Levy, and Ben Barnow in Support of Final Approval of the Proposed

Settlement and the Award of Attorneys' Fees and Reimbursement of Expenses (the "Decl.")¹ and in the accompanying Memorandum of Law in Support of Final Approval of Proposed Class Action Settlement (the "Settlement Memorandum"), the Settlement obtained in this case creates benefits to the Class valued at over \$200 million. This result must be viewed in light of the very real risks facing the Class relating to its ability to prove liability, causation, and damages. Notably, in a parallel action brought against the same defendants as in this Action by a class of financial institutions stemming from the same security breach at TJX (the "Financial Institution Track case"), this Court dismissed three of five claims on substantive grounds at the motion to dismiss stage and then denied class certification on the two remaining claims, as the Court found that individual issues of reliance, causation, and damages predominated in the action. Those rulings indicate risks that Defendants would assert, the Class faced in this Action.

Plaintiffs' counsel, who have prosecuted this case on a wholly contingent fee basis, were able to develop the case skillfully enough to obtain the substantial benefits created by this settlement.

In accordance with this Court's Order, dated January 9, 2008, notice of the proposed settlement and fee and expense request (the "Notice") was designed to have a targeted reach of not less than approximately 80% of the putative Class, targeted to adults over 18 years of age, in the United States, Puerto Rico, and Canada. Notice was published in, *inter alia*, approximately 979 U.S. newspapers and 23 Canadian newspapers, with publications appearing in English, Spanish, and French. Decl. ¶7. In addition, Notice was directly mailed to the approximately 454,500 Class Members who made a return to a TJX store without a receipt, and were previously notified by letter

¹ The Declaration is an integral part of this submission. The Court is respectfully referred to it for a detailed description of the factual and procedural history of the Action, the claims asserted, Plaintiffs' investigation and discovery, and the negotiations leading to the Settlement.

from TJX that their personal or financial information may have been compromised. Notice was also published via the settlement website at www.TJXsettlement.com. Decl.¶ 7.

The Notice described the litigation, the proposed settlement, as well as Plaintiffs' counsel's intention to request a joint award of up to \$6.5 million in attorneys' fees and reimbursement of their expenses of up to \$150,000. The Notice also informed Class Members of their right to opt out of the settlement or to object to the settlement and/or the fee application. More than 454,000 notices were mailed, and only 4 objections were received to the joint fee and expense request.

II. THE REQUESTED FEE AWARD IS FAIR AND REASONABLE

Courts have long recognized that when, as in a case like this one, a common benefit is conferred onto a Class, Plaintiffs' counsel are entitled to attorneys' fees. *See In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire*, 56 F.3d 295, 311 (1st Cir. 1995) (those "who labored as representative counsel conferred a common benefit, and must be compensated accordingly.").

The First Circuit Court of Appeals has held that courts should perform a lodestar calculation in order to determine the reasonableness of a requested attorneys' fee when there is an "absence of any true common fund." *See Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 526, n.10 (1st Cir 1991).

If an alternative method is not expressly dictated by applicable law, we have customarily found it best to calculate fees by means of the time-and-rate method known as the lodestar... Given the lodestar method's proven usefulness as an understandable and manageable way of determining reasonable attorneys' fees in statutory cases, we find no reason why district courts should be divested of authority to employ it in analyzing fee applications submitted for approval in connection with class action settlements under Rule 23(e).

Id., citing *United States v. Metropolitan Dist. Comm'n*, 847 F.2d 12, 15 (1st Cir. 1988); *Segal v.*

Gilbert Color Systems, Inc., 746 F.2d 78, 85-86 (1st Cir. 1984); *Codex Corp. v. Milgo Electronic Corp.*, 717 F.2d 622, 632 (1st Cir. 1983); *Furtado v. Bishop*, 635 F.2d 915, 919-20 (1st Cir. 1980).

III. THE REQUESTED FEE IS FAIR AND REASONABLE UNDER THE LODESTAR METHOD AND IS CONSISTENT WITH FEE AWARDS IN COMPARABLE CASES²

In selecting an appropriate award based upon the lodestar method, it has been recognized by the federal courts nationwide that it is appropriate to apply a multiplier in some cases to reflect the contingent nature of any fee, the delay in payment, the quality of representation, and the results obtained. See *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 951 (1st Cir. 1984); *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 118 (3d Cir. 1976); *In re Cabletron Systems, Inc. Sec. Litig.*, 239 F.R.D. 30, 37 (D.N.H. 2006) (“The hourly rates, which presumably reflect the market, and the fee amount may be adjusted by applying a multiplier reflecting the difficulty of the case, risk, the length of time the case has taken to settle, and other similar considerations.”); *Nilsen v. York County*, 400 F. Supp. 2d 266, 272 (D. Me. 2005) (multiplier enhancements for lodestar awards are not restricted when determining a reasonable fee after a settlement, as “it is well established that a defendant may settle, for a single lump sum, all outstanding claims in a fee-shifting case, including claims for attorney fees.”).

Plaintiffs’ counsel here have expended a total in excess of 7,394 hours resulting in a lodestar

² The Court’s latitude in awarding attorneys’ fees is broad and the Court may calculate fees either on a percentage of benefit basis or on a lodestar basis. Because of the nature of the settlement benefits obtained, Plaintiffs’ counsel believe that the lodestar method is most appropriate. Under a percentage of benefit approach, the fee is also eminently fair, as it requests an award of only 3.25% of the benefit achieved. See *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Fire Litig.*, 56 F.3d 295 (1st Cir. 1995) (affirming fee award of roughly 31% of \$220 million common fund, resulting in a fee award of approximately \$68 million).

of more than \$3,300,000.³ Decl., at ¶¶89-90. This lodestar requires only a reasonable enhancement (or multiplier) of 1.97 to equate with the fee requested by Plaintiffs' counsel. This multiplier is comparable to or significantly less than the multipliers recognized by courts as reasonable for compensating plaintiffs' counsel for the contingency risk they have taken on to represent a class. *See, Krausz v. ING Investments, LLC*, No. 06-12145-RGS, 2008 WL 217102, at *1 (D. Mass. Jan. 23, 2008) (finding that a multiplier of 2 is reasonable); *In re Tyco Intern., Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 271 (D.N.H. 2007) (finding that a multiplier of 2.697 was appropriate, though noting that it was relatively low); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (D. Mass. 2005) (finding that a multiplier of 2.02 is well within the range of reasonableness); *In re CVS Corp. Sec. Litig.*, No. 01-11464-JLT, slip op. at 7 (D. Mass. Sept. 7, 2005) (awarding attorneys' fees equating with 3.27 multiplier); *Mazola v. May Dept. Stores Co.*, No. 97CV10872-NG, 1999 WL 1261312, at *3 (D. Mass. Jan. 27, 1999) (multiplier of approximately 3 is reasonable); *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181 (Bankr. D. Mass. 1998) (finding that multiplier of 8.9 is reasonable).

A. Relevant Factors Support Plaintiffs' Counsels' Fee Request

The courts of the First Circuit have enumerated several factors to consider in determining the reasonableness of attorneys' fees. These factors include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney(s) due to acceptance of the case; (5) the customary fee; (6) the nature of the fee (fixed or contingent); (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience,

³ The lodestar of Settlement Class Co-Lead counsel, alone, amounts to \$2,188,125 (see Exhibits 1,2,3 hereto). Plaintiffs' counsels' remaining lodestar is that of the 22 other law firms that filed suits throughout the United States and Canada and worked to achieve the results obtained.

reputation, and ability of the attorney(s); (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) the size of awards in similar cases. *See, Coutin v. Young & Rubicam Puerto Rico, Inc.*, 124 F.3d 331, 337 n.3 (1st Cir. 1997); *Zayas v. Puerto Rico*, 451 F. Supp. 2d 310, 314 n.1 (D.P.R. 2006); *In re LaFrance*, 311 B.R. 1, 20 (Bankr. D. Mass. 2004). The fees sought by Plaintiffs’ counsel here are reasonable and appropriate in light of the factors that the First Circuit courts traditionally consider in determining fee awards.

1. Results Obtained

One of the primary factors Courts look to in deciding the reasonableness of the fee request are the results obtained. *See Connolly v. Harrelson*, 33 F. Supp. 2d 92, 94, n.1 (D. Mass. 1999) (“The “lodestar” figure is itself subject to adjustment, upward or downward, in light of other relevant factors such as the level of success obtained.”). Courts have recognized that non-monetary benefits also support a fee request using the lodestar method. *See Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003); *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544 (7th Cir. 1999).

In this case, that factor supports the reasonableness of the fee request. The Settlement makes available the following substantial benefits to Settlement Class Members:

- For each of the approximately 454,500 Class members whose name, address, and driver’s license, military, state, or tax identification number (which for some customers was the same as their social security number) may have been compromised:
 - a. three years of Equifax’s “Credit Watch™ Gold with 3-in-1 Credit Monitoring” product, which includes \$20,000 in identity theft insurance;
 - b. cash reimbursement for the replacement costs of Class members’ driver’s licenses;
 - c. cash reimbursement of identity theft losses up to a combined total of \$1 million for those Class members whose driver’s license, military, state, or tax

identification number was the same as their social security number; and

d. dispute resolution through JAMS/Endispute for any identity theft claim disputes with respect to the \$1 million “fund,” referenced above, available for Class members subject to the identity theft loss, with all JAMS resolutions costs paid for by defendants;

- For Class members who used a credit card, debit card, or check at TJX Stores from December 31, 2002 through September 2, 2003 or May 15, 2006 through December 18, 2006, \$30.00 Vouchers (which are transferable and stackable) or \$15.00 cash alternatives, with certain Class members being eligible for up to \$60 in Vouchers or \$30 in cash;⁴
- An unprecedented, extended-hours, one-day 15%-off special event on all merchandise, to be held by TJX in all of its stores;
- Substantially-enhanced security measures implemented by TJX to prevent future intrusions, all of which have been confirmed by plaintiffs’ expert;
- Payment of notice and claims administration costs to be entirely funded by defendants; and
- Payment up to the amount of \$6.5 million to Settlement Class Co-Lead Counsel for attorneys’ fees and up to \$150,000 in expenses, which will be entirely separate and apart from, and in addition to, any payments made to Class members.

Each of these benefits is specifically tailored to prevent a reoccurrence of the harm complained of, prevent further damage to Class Members from the past misconduct and omissions by Defendants, and to provide some restitution for damage that has already occurred. Considering the difficulties that would be faced in litigating this case, particularly in proving damages, this is the best possible result that could have been achieved. These benefits have an estimated value of over \$200 million. Decl., at ¶¶ 51-62. When compared to that \$200 million plus value of the Settlement, the requested fee of \$6.5 million represents only 3.25% of the value created for the Class.

⁴ As detailed below, under a Self-Certification Category, Voucher and cash claims are collectively subject to a \$10 million cap, whereas under the Documentary Support Category, cash claims are subject to a \$7 million cap and Voucher claims are not subject to any cap.

Additionally, Plaintiffs' efforts, through their counsel, were the substantial factor that resulted in the benefits achieved. *See BTZ, Inc. v. Great Northern Nekoosa Corp.*, 47 F.3d 463, 465-66 (1st Cir. 1995) (awarding fees is proper if plaintiffs' counsels' participation was a "substantial" or "material factor" in the outcome of the settlement).

Importantly, the fees and expenses of Plaintiffs' counsel awarded by the Court will be paid by Defendant TJX and will not have to be paid by the members of the Class. Since TJX had every incentive to negotiate for as low a fee as possible, and since the fee was negotiated only after the settlement benefits were agreed to⁵, the Court can be assured that TJX bargained hard to pay the lowest fee possible. Moreover, TJX at the time it negotiated the fee, was fully familiar with the efforts that Plaintiffs' counsel made on behalf of the Class throughout the prosecution and settlement of the litigation.

2. Contingent Nature of the Fee

Courts have consistently recognized that another important factor in evaluating an application for fees is the contingent nature of counsel's engagement. *See Iverson v. Braintree Property Associates, L.P.*, No. 04cv12079-NG, 2008 WL 552652, at *2 (D. Mass. Feb. 26, 2008) ("Once the lodestar is calculated, the fee may be adjusted in consideration of a number of factors, including ... whether the fee is fixed or contingent"); *In re Laberge*, 380 B.R. 277, 282 (Bankr. D. Mass. 2008); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 372 (S.D.N.Y. 2002) ("Class counsel undertook a substantial risk of absolute non-payment in prosecuting this action, for which they

⁵ See Decl., at ¶12, footnote 4.

should be adequately compensated.”).⁶

When Plaintiffs’ counsel undertook to represent Plaintiffs and the Class in this litigation, it was with the expectation that they would have to devote many hours of hard work to the prosecution of a case involving difficult factual and legal issues without any assurance of ever getting paid for their efforts or even reimbursement of their out-of-pocket expenses. Plaintiffs’ counsel assumed the difficult tasks of analyzing complex documents, performing necessary legal research, preparing briefs, retaining experts, and conducting vigorous negotiations to produce the result before the Court, as detailed further below. Furthermore, many such contingent cases do not result in compensation for plaintiffs’ counsel because cases are dismissed at the pleadings stage, summary judgment, after a trial on the merits, or even on appeal, and after the expenditure of hundreds or thousands of hours of attorney and staff time. There have been many hard-fought lawsuits where, because of the discovery of facts unknown when the case was commenced, changes in the law while the case was pending, or decisions of judges or juries following a trial on the merits, excellent professional efforts of members of the plaintiffs’ bar produced no fee for counsel.⁷ Thus, there existed a demonstrable

⁶ The law is still in the developmental stage in security breach/identity theft cases. Accordingly, there is a high degree of uncertainty as to any recovery. See, for example, the dismissal of the financial track cases.

⁷ In fact, there have been numerous class actions in which plaintiffs’ counsel expended thousands of hours and advanced significant litigation expenses and yet received no remuneration whatsoever, despite their diligence and expertise. See, e.g., *Broderick v. PricewaterhouseCoopers LLP*, No. 04-56057, 2006 U.S. App. LEXIS 4680 (9th Cir. Feb. 23, 2006); *AUSA Life Ins. Co. v. Ernst & Young*, No. 00-9472, 2002 U.S. App. LEXIS 13845 (2d Cir. Jul. 8, 2002) (affirming district court’s dismissal after a full bench trial and earlier appeal and remand); *Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of \$81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (appellate court overturned securities fraud class action jury verdict for plaintiffs in case filed in 1973 and tried in 1988, on the basis of an 1994 Supreme Court opinion); *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (class won

risk that Plaintiffs' counsel would invest substantial efforts and funds and receive nothing and this factor, too, supports the fee requested.

3. Time and Effort of Plaintiffs' Counsel

This Settlement represents the product of complex and active litigation against TJX and Fifth Third Bancorp. Plaintiffs' and their counsels' decision to enter into this Settlement was made with knowledge of the facts and circumstances underlying Plaintiffs' claims, and the strengths and weaknesses of those claims.

The Settlement was only reached after Plaintiffs' counsel conducted an extensive factual investigation and legal analysis. Decl., at ¶¶ 18-46. Plaintiffs' counsels' investigation included, *inter alia*: the review and analysis of various news articles, TJX's press releases and website disclosures, and TJX's filings with the Securities and Exchange Commission; the review and analysis of Defendants' initial disclosure statements and documents produced pursuant to Fed. R. Civ. P. 26; the review and analysis of applicable industry rules and regulations governing the storage and protection of credit card information; the research and analysis of the law regarding Plaintiffs' claims, Defendants' defenses, class certification issues, and damages; the review and analysis of approximately 2 million pages of documents produced by Defendants; the review and analysis of thousands of pages of third party documents, deposition transcripts, pleadings, and court orders generated in the related Financial Institution Track case; propounding document requests; responding to interrogatories and document requests; preparing comprehensive briefs in opposition to Defendants' motions to dismiss, reviewing reports generated by entities which conducted forensic

substantial jury verdict and motion for judgment n.o.v. was denied, but on appeal judgment was reversed and case dismissed after 11 years of litigation).

investigations of TJX's security breach; and conducting an interview of Donald Campbell, Vice Chairman at TJX responsible for overseeing TJX's response to the security breach. Moreover, Plaintiffs' Counsel retained a renowned security breach expert, JANUS Associates, Inc. JANUS, after review of TJX's security system modifications and its interview of TJX's security system consultant, furnished a report to Plaintiffs' Counsel as to the adequacy of TJX's security system.

Settlement Class Co-Lead Counsel assessed the length of time necessary to prosecute this action through trial, post-trial motions, and likely appeals, taking into consideration the significant uncertainties in predicting the outcome of this action and the delay in recovery, if any, which would necessarily occur. As such, the settlement was the product of intense active litigation conducted by Plaintiffs' Counsel, who were fully informed about the facts of the case, and it was the product of arm's-length negotiations which lasted several months.

4. The Skill, Diligence, and Ability of Plaintiffs' Counsel

Another factor courts consider in evaluating a fee request is the standing and ability of counsel. *See In re Heritage Bond Litig.*, No. 02-ML-1475-DT (RCX), 2005 U.S. Dist. LEXIS 13627, at *39 (C.D. Cal. Jun. 10, 2005) ("prosecution and management of a complex national class action requires unique legal skills and abilities") (citation omitted). The lead attorneys who represent the Class in this action, Wolf Popper LLP, Berger & Montague, P.C., and Barnow and Associates, P.C., have excellent nationally recognized reputations in the field of complex class action litigation. *See* Exhibits 1,2,3 hereto. The services rendered were performed efficiently and effectively, reflecting the practical and accumulated knowledge of counsel. The Court may also consider the standing of opposing counsel when evaluating a fee application. *See Lazy Oil, Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 322 (W.D. Pa. 1997); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 749

(S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976). Defendants here are represented by skilled law firms: Ropes & Gray, LLP; Skadden, Arps, Slate, Meagher & Flom LLP; and Vorys, Sater, Seymour and Pease, LLP, each a highly respected firm, noted for vigorously representing their clients. The ability and determination of opposing counsel enhance the significance of the results Plaintiffs' counsel have achieved.

5. Importance of the Litigation

Identity theft is “one of the fastest growing criminal offenses in the 21st century” requiring “each victim [to spend] an average of 30 hours straightening out the problems caused by the identity theft, and an average of 60 hours in cases that involved the fraudulent opening of new accounts.” *Daly v. Met. Life Ins. Co.*, 782 N.Y.S.2d 530, 535 & n.6 (N.Y. Sup. Ct. 2004) (citations omitted). The data theft from TJX is the largest reported theft of personal data in history. The stolen information has already been used for credit card theft and identity theft, and Plaintiffs have spent money and time trying to rectify and minimize the damage caused by Defendants' alleged laxity and violations of their legal obligations. However, as in the case of most complex class actions, the expense and time of litigating is not feasible on an individual or non-contingent basis. Much of the public would be denied any avenue of redress for violations of their legal rights if contingency fees are restricted so that they failed to adequately and fairly compensate Plaintiffs' counsel for the services provided, the serious risks undertaken, and the delays normally occurring before compensation is received. *See Mazola*, 1999 WL 1261312, at *4 (“this [attorneys' fees and expenses] application has to be put in context. It is after all a *consumer* class action. While each plaintiff's individual claim is small; the transaction costs for any individual to bring this kind of an action is prohibitively high. The litigation is critical, because it gives voice to relatively small

claimants who may not be aware of statutory violations or have an avenue to relief. The only way for such a plaintiff to recover is to become part of a consumer class action...” (emphasis in original); *In re Union Carbide Corp. Consumer Products Business Sec. Litig.*, 724 F. Supp. 160, 169 (S.D.N.Y. 1989) (recognizing that a “large segment of the public might be denied a remedy for violations of the securities laws if contingent fees awarded by the courts did not fairly compensate counsel for the services provided and the risks undertaken.”).

The complexity and societal importance of complex class action litigation calls for the involvement of the most able counsel obtainable. To encourage first-rate attorneys to represent plaintiffs on a contingent basis in this type of socially important litigation, attorneys’ fees awarded and out-of-pocket expenses reimbursed should reflect this goal. *See, generally, Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876 (Del. 1980). This Court recognized the quality of Plaintiffs’ Counsel’s work when it characterized the proposed settlement herein as “innovative” and “ground-breaking”. See Dec. at ¶48.

6. Reaction by Class to Fee and Expense Request

Courts around the country have found that the near- absence of objections from the class to the attorneys’ fees requested supports the fairness and reasonableness of a request for attorneys’ fees. *See, e.g., In re Relafen Antitrust Litig.*, 231 F.R.D. at, 86 (approving fee request despite four objections); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d at, 374 (“The reaction by members of the Class is entitled to great weight by the Court.”) *In re Rite Aid Sec. Litig.*, 396 F.3d 294, 305 (3rd Cir 2005) (finding that district court did not abuse its discretion by finding that the absence of substantial objections by class members to fee request weigh in favor of approval.).

While approximately 454,500 notices were mailed and a summary notice of the fee request

was published in approximately 1002 different newspapers and other periodicals, only 4 objections have been received to the fee and expense request. Decl., ¶ at 98. In this day of professional objectors appearing to oppose fee requests (*see In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 218 n.52 (D. Me. 2003)), the parsimony of objections here is highly significant to a determination of the reasonableness of Plaintiffs' Counsel's joint application for fees and reimbursement of out-of-pocket expenses. *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d 34, 49 (D. Me. 2005); *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181; *In re Fleet/Norstar Sec. Litig.*, 935 F. Supp. 99, 107 (D.R.I. 1999) ("the lack of objections to the proposed settlement must be taken into account"); *see also Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975); *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1378 (9th Cir. 1993).

IV. PLAINTIFFS' COUNSEL SHOULD BE REIMBURSED FOR THEIR REASONABLY INCURRED LITIGATION EXPENSES

Plaintiffs' Counsel have incurred litigation expenses of substantially greater than \$150,000 in prosecuting this action. However, as limited by the Stipulation of Settlement, Plaintiffs' Counsel is limiting its expense reimbursement request to \$150,000. These expenses were incidental and necessary to the representation of the Class. *See In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 606 (1st Cir. 1992). A breakdown of the aggregate expenses incurred by the Settlement Class Co-Lead Counsel by category attached in Exhibits 1, 2, and 3 herein.

The Notice sent to Class Members stated that Plaintiffs' Counsel would seek reimbursement of up to \$150,000 of expenses. No Class Member has raised an objection to the request for reimbursement of expenses. As noted, even though Plaintiffs' Counsel's expenses substantially

exceeded \$150,000, Plaintiffs' Counsel are limiting their expense reimbursement request to \$150,000, as that was the maximum amount set forth in the Notice to the Class. Plaintiffs' Counsel respectfully submit that the Court should award the expenses requested.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the accompanying Settlement Memorandum, Plaintiffs' Counsel respectfully request that the Court award attorneys' fees in the amount of \$6.5 million and reimbursement of their expenses in the amount of \$150,000.

Dated: July 3, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on July 3, 2008.

/s/ Lester L. Levy
Lester L. Levy