IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KENNETH J. SILVER, et al.	:	**CIVIL ACTION**
v.	:	**Case No. 10-cv-2326-MMB**
L.A. FITNESS INTERNATIONAL, LLC	:	
JOSHUA VAUGHN	:	
v.	:	**Case No. 11-cv-2644-MMB**
L.A. FITNESS INTERNATIONAL, LLC	:	
AMALIA SIBLE	:	
v.	:	**Case No. 13-cv-0255-MMB**
L.A. FITNESS INTERNATIONAL, LLC	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND INCENTIVE PAYMENTS FOR PLAINTIFFS

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I. PRELIMINARY STATEMENT

Plaintiffs' Counsel has succeeded in obtaining a settlement consisting of substantial cash, non-cash, and therapeutic relief (the "Settlement Benefits") for the benefit of the Settlement Class (the "Settlement").[1] The Settlement is an excellent result in the face of great risk, and is a result of Plaintiffs' Counsel's vigorous, persistent and skilled efforts, and to Plaintiffs' initiative and sacrifices for the benefit of the Class. Plaintiffs' Counsel now respectfully moves this Court for an award of attorneys' fees and reimbursement of their out-of-pocket litigation expenses in the amount of $1.4 million, which is far below Plaintiffs' Counsel's lodestar of $2,605,061.86 and expenses of $130,530.92. Plaintiffs' Counsel also moves the Court to award the Plaintiffs in these actions incentive payments of $3,000 per plaintiff. The amounts requested for attorneys' fees and expenses and for incentive payments shall be paid by LAF, and will not reduce the recovery available for the Class in any way.

The requested fees and expenses are well within the range of those awarded in class actions in this District and Circuit, as well as numerous decisions throughout the country, and are consistent with the appropriate method of compensating counsel. The amount requested is especially warranted in the light of the substantial benefits obtained for the Settlement Class, the extensive efforts of Plaintiffs' Counsel in obtaining this result, and the significant risks in bringing and prosecuting this litigation. Absent this Settlement, continued litigation through trial and appeals would have likely taken several more years at considerable expense without the Settlement Class receiving the benefits of the Settlement, thus creating the very real risk that the Settlement Class would ultimately receive less, if anything.

[1] Unless otherwise defined herein, capitalized terms have the meaning ascribed to them in the National Class Action Settlement and Release, dated March 6, 2013 (the "Stipulation"), which was attached as Exhibit 1 to Plaintiffs' March 6, 2013 motion for preliminary approval of the Settlement.

This litigation has been vigorously litigated for three years, with the initial complaint filed on May 18, 2010. Prosecution of the litigation was undertaken by Plaintiffs' Counsel on a wholly contingent basis and was extremely risky and difficult from the outset. By the time the litigation settled, Plaintiffs' Counsel, *inter alia*, had: (1) conducted an extensive investigation into the facts alleged; (2) drafted several amended class action complaints; (3) thoroughly researched the law pertinent to the claims and defenses asserted; (4) successfully opposed Defendant's motions to dismiss and to strike the complaints; (5) responded to discovery requests from Defendant and defended Plaintiffs at their depositions; (6) reviewed thousands of pages of documents and data produced by Defendant; (7) interviewed several former LAF employees to obtain facts relevant to Plaintiffs' claims; (8) deposed key employees of LAF with information relevant to the Plaintiffs' claims; (9) consulted with an statistical expert regarding damages; (10) prepared a detailed mediation statement and participated in complex settlement negotiations, including a mediation overseen by a respected former District Court Judge acting as a mediator; and (11) negotiated the final terms of the Settlement contained in the Stipulation.[2]

Indeed, Plaintiffs' Counsel and their paraprofessionals combined have expended 5,156.4 hours in the prosecution of this litigation with a resulting lodestar $2,605,061.86. The fee award requested by Plaintiffs' Counsel represents a negative multiple of 53.7% of Plaintiffs' Counsel's time billings.

From the outset, Defendant has adamantly denied any liability and contested virtually every legal and factual issue. While Plaintiffs believe that the evidence supports their claims, that the case is appropriate for class certification, that the claims would survive summary

[2] The efforts of counsel in achieving this settlement are set forth in greater detail in the accompanying Declaration of Michael T. Fantini in Support of Plaintiffs' Motion for (1) Final Approval of Class Action Settlement and (2) Plaintiffs' Counsel's Application for an Award of Attorneys' Fees and Expenses and Incentive Payments for Plaintiffs ("Fantini Decl.").

judgment, and that Plaintiffs would ultimately prevail at trial, there is no question that continued litigation was fraught with risks for the Settlement Class, with ultimate success far from certain. As detailed in the Declaration of Michael T. Fantini and the Settlement Brief,[3] Plaintiffs and Defendant strongly disagreed on the legal and factual issues in this case. There could be no way of predicting which interpretations of this case's legal and factual issues this Court or a jury would accept. The Court or a jury could have sided with Defendant on some or all of the issues. Despite these and other obstacles, Plaintiffs' Counsel was able to recover substantial benefits for the Settlement Class.

Plaintiffs' Counsel firmly believes that the Settlement is the result of their creative and diligent efforts, as well as their reputations as attorneys who are unwavering in their dedication to the interests of the class and unafraid to zealously prosecute a meritorious case through trial and subsequent appeals. In a case asserting claims based on complex legal and factual issues, which were opposed by highly skilled and experienced defense counsel, Plaintiffs' Counsel succeeded in securing a favorable result for the Settlement Class under difficult and challenging circumstances.

For all the reasons set forth herein, in the Declaration of Michael T. Fantini, and in the Settlement Brief, Plaintiffs' Counsel respectfully submits that the requested attorneys' fees, expenses, and incentive payments are fair and reasonable under the applicable legal standards and, therefore, should be awarded by the Court.

[3] Submitted herewith in support of approval of the proposed Settlement is the Memorandum of Law in Support of Plaintiff's Motion for Final Approval of Class Action Settlement ("Settlement Brief").

II. LEGAL STANDARDS GOVERNING THE AWARD OF ATTORNEYS' FEES IN CLASS ACTIONS

"There are two methods according to which courts review attorneys' fee requests--the lodestar method and the percentage-of-recovery method." *See Chakejian v. Equifax Info. Servs.*, 275 F.R.D. 201, 216 (E.D. Pa. 2011) (*citing Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions),* 148 F.3d 283, 333 (3d Cir. 1998)). The lodestar method may be "applied in cases where the nature of the recovery does not allow the determination of the settlement's value necessary for application of the percentage-of-recovery method.'" *In re Prudential Ins.*, 148 F.3d at 333; *see also In re Budeprion XL Mktg. & Sales Litig.*, 2012 U.S. Dist. LEXIS 91176, at *59 (E.D. Pa. July 2, 2012) noting that where the "settlement's terms evade precise evaluation, the lodestar method is preferred."); *Weber v. Gov't Emples. Ins. Co.*, 262 F.R.D. 431, 449-50 (D. N.J. 2009) (applying lodestar method where the settlement did "not provide for a defined common fund to be distributed among the class members"). "The percentage-of-recovery method is generally favored in cases involving a common fund . . . ." *Id.* "Neither method is mandatory, leaving the district court with a wide range of discretion when selecting which method to employ." *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 119 (E.D. Pa. 2005). "Regardless of the method chosen, … it is sensible for a court to use a second method of fee approval to cross-check its initial fee calculation." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005).

Here, the Court should apply the lodestar method because the Settlement does not create a common fund to be distributed among the Class Members. Rather the Settlement provides for cash payments, without a total maximum amount to be paid by LAF, to certain Class Members making claims, and non-cash benefits to all other Class Members in the form of Access Passes to LAF gyms.

III. THE REQUESTED FEES, EXPENSES AND INCENTIVE PAYMENTS ARE FAIR AND REASONABLE

A. The Parties' Negotiated Attorneys' Fees and Expense Award Should be Given Substantial Deference Where that Award Will Not Diminish the Settlement Fund

The Federal Rules of Civil Procedure expressly authorize that "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Federal courts at all levels encourage litigants to resolve fee issues by agreement whenever possible. As the United States Supreme Court explains, "[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (U.S. 1983); *see also Johnson v. Georgia Hwy. Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974) ("In cases of this kind, we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees."); *M. Berenson Co., Inc. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 829 (D. Mass. 1987) ("Whether a defendant is required by statute or agrees as part of the settlement of a class action to pay the plaintiffs' attorneys' fees, ideally the parties will settle the amount of the fee between themselves."). Accordingly, "[c]ourts routinely approve agreed-upon attorneys' fees, particularly when the amount is independent and does not impact the benefit obtained for the class." *Pro v. Hertz Equip. Rental Corp.*, No. 06-3830, 2013 U.S. Dist. LEXIS 86995, 16-17 (D.N.J. June 20, 2013); *see also McAlarnen v. Swift Transp. Co.*, No. 09-1737, 2010 U.S. Dist. LEXIS 7877, at *30 (E.D. Pa. Jan. 29, 2010) (approving the attorneys' fees requested for class counsel after a finding that the fees were separate from, and thus did not diminish, the class settlement); *In re LG/Zenith Rear Projection Television Class Action Litig.*, No. 06-5609, 2009 U.S. Dist. LEXIS 13568, at *23-25 (D.N.J. Feb. 18, 2009) (same); *In re Ins. Brokerage Antitrust Litig.*, MDL

Docket No. 1663, 2007 U.S. Dist. LEXIS 40729 , at *47 (D. N.J. June 5, 2007), *aff'd* 579 F.3d 241 (3d Cir. 2009) (same).

Here, LAF has agreed to pay Plaintiffs' Counsel a fixed sum of $1.4 million for attorneys' fees and costs, subject to the Court's approval. Stipulation ¶3.6. **This award of attorneys' fees and costs is completely separate and apart from the Settlement Benefits, and the relief to the Class will not be reduced as a result of these payments**. Furthermore, attorneys' fees were not negotiated or discussed until after agreement was reached between the parties on all other terms of the settlement. Stipulation ¶3.6. The agreed amount of attorneys' fees was negotiated by sophisticated counsel familiar with complex and class action litigation. Thus, as the attorneys' fees award requested in this case was agreed to by all parties and does not diminish the Settlement Class relief, this Court should grant Plaintiffs' Counsel the requested award. Indeed, "[i]f the Court were to reduce Class Counsel's fee, that would not confer a greater benefit on the class, but instead would benefit only [LAF]." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 106 F. Supp. 2d 721, 732 (D.N.J. 2000).

In this case, the fee arrangement was negotiated under the best of market conditions – an arm's-length negotiation – a process which the courts have encouraged. *In re Continental Illinois Sec. Litigation*, 962 F.2d 566, 568-70 (7th Cir. 1992) (market factors, best known by the negotiating parties themselves, should determine the quantum of attorneys' fees). The virtue of a fee negotiated by the parties at arm's-length is that it is, essentially, a market-set price. LAF has an interest in minimizing the fee; Plaintiffs' Counsel have an interest in maximizing the fee to compensate themselves (as the case law encourages) for their risk, innovation, and creativity; and the negotiations are informed by the parties' knowledge of the work done and result achieved and their views on what the Court may award if the attorneys' fees award were

litigated. Because the fee arrangement in this case was negotiated by experienced counsel at arm's-length, judicial deference to the parties' fee agreement is warranted.[4]

Additionally, as explained in *McBean v. City of New York*, 233 F.R.D. 377 (S.D.N.Y. 2006), a court need not review an application for attorneys' fees with a heightened level of scrutiny where, as here, the parties have contracted for an award of fees that will not be paid from a common fund. *Id.* at 392 ("If, however, money paid to the attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members."). The *McBean* court concluded that the parties' agreement for attorneys' fees was objectively reasonable because it was the product of arm's-length negotiations. *Id.*

In short, Plaintiffs' Counsel's requested award of $1.4 million for attorneys' fees and reimbursement of costs in connection with conferring a substantial benefit on the Class through obtaining valuable relief is presumptively reasonable where that award will not diminish the settlement fund.

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[4] *See In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, MDL No. 901, 1992 U.S. Dist. LEXIS 14337, at *13 (C.D. Cal. June 10, 1992) (stating that the court should be reluctant to disturb agreed-upon attorneys' fees where class counsel negotiated the fee with sophisticated defense counsel who were familiar with the case, risks, amount and value of class counsel's time, and nature of the result obtained for class), appeal dismissed for class member's lack of standing, 33 F.3d 29 (9th Cir.1994), *superseding* 19 F.3d 470 (9th Cir. 1994); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 695 (N.D. Ga. 2001) (giving "substantial weight to a negotiated fee amount"); *In re Apple Computer, Inc. Deriv.Litig.*, No 06-4128, 2008 U.S. Dist. LEXIS 108195, at *12 (N.D. Cal. Nov. 5, 2008) ("A court should refrain from substituting its own value for a properly bargained-for agreement."); *Cohn v. Nelson*, 375 F. Supp. 2d. 844, 861 (E.D. Mo. 2005) ("[W]here, as here, the parties have agreed on the amount of attorneys' fees and expenses, courts give the parties' agreement substantial deference."); *In re AXA Fin., Inc. S'holders Litig.*, 2002 Del. Ch. LEXIS 57, at *24 (Del. Ch. May 16, 2002) ("Where, as here, the fee is negotiated after the parties have reached an agreement in principle on settlement terms and is paid in addition to the benefit to be realized by the class, this court will also give weight to the agreement reached by the parties in relation to fees.").

B. The Requested Fees and Expense Award is Reasonable Under Third Circuit Standards

1. Plaintiffs' Counsel's Fee and Expense Request is Reasonable Under the Lodestar Method

The lodestar method, as set forth in the seminal *Lindy* cases, is a two-step process. The first step requires that the court ascertain the "lodestar" figure by multiplying the number of hours reasonably worked by the reasonable normal hourly rate of counsel. The second step permits the court to adjust the lodestar by applying a multiple to take into account the contingent nature and risks of the litigation, the results obtained and the quality of the services rendered by counsel. *See Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167-68 (3d Cir. 1973); *accord Hensley*, 461 U.S. 424.

Here, the lodestar method confirms the reasonableness of the requested fee and expense award. The requested award, which is for attorneys' fees and reimbursement of out-of-pocket expenses, represents only 53.7% of Plaintiffs' Counsel's loadstar, before factoring in their $130,530.92 of expenses.

a. Hours Reasonably Expended by Counsel

Under the *Lindy* cases, the court's determination of a reasonable fee begins with the number of hours expended in the prosecution of the action. Plaintiffs' Counsel and their paraprofessionals here have spent, in the aggregate, 5,156.4 hours in the prosecution of this case. For the convenience of the Court and in conformity with practice, the hours of counsel and their paraprofessionals have been submitted to the Court in a summarized form in the accompanying Declaration of Michael T. Fantini.[5]

[5] *See Rite Aid*, 396 F.3d at 306-07 ("The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records.").

As reflected in the accompanying Declaration of Michael T. Fantini, the hours recorded were incurred on matters for the benefit of the litigation and representation of their clients. *See* Fantini Decl., ¶¶ 5, 20-39. Such tasks include: investigation of the case and claims; preparing the complaints and amended complaints, responding to motions to dismiss and strike the complaints and amended complaints, preparing discovery requests, negotiating the scope of discovery, filing a motion to compel discovery, reviewing of the documents and data produced by Defendant, interviewing former LAF employees, taking the depositions of four of Defendants' employees, defending the depositions of all but one of the Plaintiffs, working with a statistical expert to determine the scope of Defendant's alleged breaches of contract and violations of consumer protection statutes, preparing mediation statements, participating in the mediation process and continued settlement discussions; documenting the Settlement; documenting and implementing the Settlement Class notice plan; and litigating the approval of the Settlement. *See* Fantini Decl., ¶¶ 5, 20-39.

Given the effort expended and the complexity of the legal and factual issues involved, the hours incurred are entirely reasonable.

b. Calculating the "Base" Lodestar

To arrive at the lodestar, the hours expended are typically multiplied by each attorney's respective hourly rate. The hourly rate to be applied in calculating the lodestar is that which is normally charged in the community where the attorney practices. *See Blum v. Stenson*, 465 U.S. 886, 895 (1984); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 590-91 (3d Cir. 1984). In addition, the United States Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989); *In re Ikon Office Solutions*, 194 F.R.D. 166, 195 (E.D. Pa. 2000).

In determining whether the rates are reasonable, the Court should take into account the attorneys' legal reputation, experience, and status. The accompanying Declaration of Michael T. Fantini includes a description of the background and experience of the attorneys who worked on this case. These descriptions provide support for the hourly rates charged in this case. Applying these rates to the hours committed to the litigation results in a lodestar of $2,605,061.86. *See* Fantini Decl., ¶ 45.

c. The Lodestar Multiplier

"Calculation of the lodestar, however, is simply the beginning of the analysis." *In re Warner Communications Sec. Litigation*, 618 F. Supp. 735, 747 (S.D.N.Y. 1985). In the second step of the analysis, the court adjusts the lodestar to take into account, among other things, the result achieved, the quality of representation, the complexity and magnitude of the litigation, and public policy considerations. *Rite Aid*, 396 F.3d at 305-306; *Fine Paper*, 751 F.2d at 583; *In re Prudential*, 148 F.3d at 341. The court then applies the appropriate multiplier to the lodestar number to account for these additional factors.

d. Performing the Lodestar Cross-Check

Finally, to perform the lodestar cross-check, the court should determine what the effective multiplier is, and then determine whether the resulting fee would be so unreasonable as to warrant a downward adjustment. As noted, the cumulative lodestar for the services performed by Plaintiffs' Counsel and their paraprofessionals in this action is $2,605,061.86. Plaintiffs' Counsel is seeking an award of $1.4 million for attorneys' fees and reimbursement of expenses. Therefore, the requested fee represents a negative multiple of 0.537. This negative multiplier is much lower than the positive multipliers applied in other cases, where multipliers of 3, 4, or even more times the lodestar have been awarded to reflect the contingency fee risk and other relevant factors. *See, e.g. In re Prudential*, 148 F.3d at 341 ("[m]ultiples ranging from one to four are

frequently awarded in common fund cases when the lodestar method is applied." Where counsel is requesting a fee award that represents a negative multiplier to their lodestar, "there is no need to discuss multipliers and the appropriateness of an increase to the lodestar." *Chakejian v. Equifax Info. Servs.*, 275 F.R.D. 201, 217 (E.D. Pa. 2011) (finding that "the provision for attorneys' fees and costs as laid out in the settlement agreement [was] eminently reasonable, judging from the lodestar"). [6]

2. Plaintiffs' Counsel's Fee and Expense Request is Reasonable Under the Percentage-of-Recovery Method

Courts analyzing a requested fee award under the lodestar method often also analyze the request under the percentage-of –recovery method as a cross check. *See, e.g. Chakejian*, 275 F.R.D. at 218.[7]

"In a common fund case, the Third Circuit has identified ten factors to consider to assess the reasonableness of an attorney's fees award. These include:

(1) the size of the fund created and the number of beneficiaries,

(2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel,

(3) the skill and efficiency of the attorneys involved,

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[6] Because Class Counsel is seeking an award of attorneys' fees and expenses that represents a negative multiplier to their fee lodestar, Class Counsel has not deducted their out-of-pocket expenses from the requested fee and expense award for the purpose of the lodestar analysis. However, the appropriate analysis to apply in deciding which expenses are compensable is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'") (citation omitted); *see also In re Safety Components Int'l, Inc.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001) (*citing Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995)); *Cullen*, 197 F.R.D. at 151; *In re Residential Doors Antitrust Litig.*, No. 94-3744, 1998 U.S. Dist. LEXIS 4292, at *31-32 (E.D. Pa. Apr. 2, 1998). Class Counsel's expenses in this litigation are $130,530.92. *See* Fantini Decl., ¶ 46. As shown in the Declaration of Michael T. Fantini, the categories of expenses for which counsel seek payment here are the type of expenses routinely charged to hourly clients and, therefore, are appropriate for reimbursement.

[7] *But see Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 260 (E.D. Pa. 2011) (noting that "the cross-check's utility is limited in consumer cases where, as in this case, the total class recovery is relatively small. Moreover, the Court is persuaded that class counsel worked efficiently to secure a favorable outcome for the class. Thus, the fact that a crosscheck might militate against awarding $65,000 is not fatal to Plaintiff's motion under the facts of this case.") (*citing In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. Pa. 1995)).

(4) the complexity and duration of the litigation,

(5) the risk of nonpayment,

(6) the amount of time devoted to the case by plaintiffs' counsel,

(7) the awards in similar cases,

(8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations,

(9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and

(10) any innovative terms of settlement."

Chakejian v. Equifax Info. Servs., 275 F.R.D. 201, 218 (E.D. Pa. 2011) (*citing In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524, 541 (3d Cir. 2009).

a. The Size of the Fund Created and the Number of Beneficiaries

This factor strongly weighs in favor of the requested fee and expense award. The Settlement provides some form of relief to all individuals who cancelled their Monthly Dues Membership Agreement with LAF during the Class Period of May 18, 2006 to January 1, 2013, excluding persons who entered into a Monthly Dues Membership Agreement in California and members of the New Jersey Class Action Settlement.

For Class Members with the strongest claims (*i.e.*, those with written proof of mailing their Notice of Cancellation to LAF), the Settlement provides a monetary payment equivalent to one-hundred percent (100%) of all dues paid and collected after the date of the mailing of the Notice of Cancellation for up to one year after the mailing (not including the application of pre-paid last month dues), less any refunds already provided. *See Bredbenner v. Liberty Travel, Inc.*, 2011 U.S. Dist. LEXIS 38663, 55-56 (D.N.J. Apr. 8, 2011) ("The benefit to each class member is all the more significant in that it approximates 100% of the actual damages that they would collect if they prevailed at trial … The settlement therefore creates a substantial benefit for a

large group of class members.") (internal citation omitted). For Class Members who (1) printed a Notice of Cancellation form from LAF's website or obtained a printed Notice of Cancellation form from an LAF club, (2) subsequently paid for monthly dues more than sixty (60) days after obtaining the Notice of Cancellation form; (3) subsequently notified LAF that his or her Notice of Cancellation was not processed, and (4) did not use the health club facilities more than sixty (60) days after obtaining the Notice of Cancellation form, the Settlement provides for a monetary payment equivalent to fifty percent (50%) of all dues paid and collected more than sixty (60) days after the date of the printing of the Notice of Cancellation form for up to one year after the printing (not including the application of pre-paid last month dues), less any refunds already provided. For Class Members without any proof of mailing or obtaining a Notice of Cancellation, who state under oath that they mailed a Notice of Cancellation that was not processed, the Settlement provides a 60 Day Access Pass (which has a monetary value of approximately $60). The Settlement provides all other Class Members a 45 Day Access Pass (which has a monetary value of approximately $45).

In addition, as an alternative to the 45 Day Access Pass, the Settlement permits members of Subclass "A"[8] to submit a Claim for a cash payment equal to one-third (1/3) of the additional one month of dues they paid (via an Electronic Fund Transfer or Credit Card charge) after LAF received the Class Member's written notice of cancellation so long as that payment was not subsequently refunded.[9]

Accordingly, although the Settlement does not create a common fund, *per se*, it provides substantial benefit to a broad Class of individuals.

[8] "Subclass A" is defined at Stipulation ¶1.39.

[9] Moreover, pursuant to the Settlement, LAF will revise its Membership Agreement to clearly state that any form of written Notice of Cancellation is permitted, and that the notice should include sufficient information to identify the member. The Membership Agreement will recommend that the notice should include the member's name, barcode number, address, telephone number and email address.

b. The Presence or Absence of Substantial Objections by Members of the Class to the Settlement Terms and/or Fees Requested by Counsel

"'The absence of large numbers of objections mitigates against reducing fee awards.'" *Chakejian v. Equifax Info. Servs.*, 275 F.R.D. 201, 218 (E.D. Pa. 2011) (*quoting In re Cendant Corp., Derivative Action Litig.*, 232 F. Supp. 2d 327, 337 (D.N.J. 2002)." Here, Class Members were informed of Plaintiffs' Counsel's fee request in the Notice, and only one objection has been filed as to the Settlement and Plaintiffs' Counsel's fee request. Plaintiffs' response to this objection can be found at Section III.C., below, and at Section III.E. of the Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, filed concurrently herewith, this factor weighs strongly in favor of approval of Plaintiffs' Counsel's fee request.

c. The Skill and Efficiency of the Attorneys Involved

It took a great deal of skill to achieve what counsel achieved for the benefit of the Settlement Class. Plaintiffs' Counsel's efforts in bringing this action to such a successful conclusion are the best indicator of the experience and ability of the attorneys involved. *See In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 132 (D.N.J. 2002) ("'the single clearest factor reflecting the quality of class counsels' services to the class are the results obtained'") (*quoting Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 149 (E.D. Pa. 2000)). By any measure, Plaintiffs' Counsel's efforts have resulted in a highly favorable outcome for the benefit of the Settlement Class. The substantial and certain recovery obtained for the Settlement Class is the direct result of the significant efforts of highly skilled and specialized attorneys who possess

substantial experience in the prosecution of complex class actions.[10] Plaintiffs' Counsel's reputations as attorneys who will zealously carry a meritorious case through the trial and appellate levels as well as their demonstrable ability to develop vigorously the evidence in this litigation enabled them to negotiate the outstanding recovery for the benefit of the Settlement Class.

Unlike cases where plaintiffs' counsel are able to "free ride" on the work of others (such as governmental agencies), here Plaintiffs' Counsel – and only Plaintiffs' Counsel – developed the case against Defendant. Plaintiffs' Counsel investigated the case, developed the allegations, as well as successfully litigated and negotiated the highly favorable settlement of this action for the benefit of the Settlement Class. In light of these facts, the Settlement achieved by the efforts of Plaintiffs' Counsel is even more remarkable and should be appropriately acknowledged. Courts have regularly recognized that the efforts of plaintiffs' counsel in achieving a favorable settlement should be accorded greater weight when achieved without the benefit of a governmental investigation.[11]

The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered by plaintiffs' counsel. *See, e.g.*, *Ikon*, 194 F.R.D. at 194; *In re Warner Commc'ns Sec. Litig., 618 F. Supp*. 735, 749 (S.D.N.Y. 1985) ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work."), *aff'd*, 798 F.2d 35 (2d

[10] The experience of the Berger & Montague, P.C. is set forth in the firm biography attached as Exhibit 1 to the accompanying Declaration of Michael T. Fantini. As that biography shows, Plaintiffs' Counsel are highly regarded and practice extensively in the field class actions.

[11] *See In re Rite Aid Corp. Sec. Litig*., 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (in awarding 25% of a $193 million settlement fund, the court noted the skill and efficiency of plaintiffs' counsel and outstanding results "in a litigation that was far ahead of public agencies like the Securities and Exchange Commission and the United States Department of Justice, which long after the institution of this litigation awakened to the concerns that plaintiffs' counsel first identified"); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (In awarding 33-1/3% of the settlement fund, the court noted, "[i]n this Action, Plaintiffs' Class Counsel did not 'piggy back' on any prior governmental action . . . . Plaintiffs' Class Counsel developed, litigated and successfully negotiated this Action by themselves, expending substantial time and effort.").

Cir. 1986). Defendants were represented by Eagan Aevnatti, LLP and Montgomery, McCracken, Walker & Rhoads, LLP, prominent law firms with undeniable experience and skill. The ability of Plaintiffs' Counsel to obtain such a favorable settlement for the Settlement Class in the face of such formidable legal opposition further confirms the superior quality of Plaintiffs' Counsel's representation.

d. The Complexity and Duration of the Litigation

The complexity and duration of the litigation weigh strongly in favor of approval of Plaintiffs' Counsel's fee request. This action has been vigorously prosecuted and defended for over three years. At every stage of the litigation, counsel for Defendant have aggressively defended this action and expressed their belief that the class would not prevail. Even if Plaintiffs succeeded in obtaining class certification, survived summary judgment, and were successful against Defendant at trial by obtaining a significant judgment for the Class, Plaintiffs' efforts to establish liability and damages in the litigation would, in all likelihood, not end with a judgment in the District Court, but would continue through one or more levels of appellate review. In complex and substantial cases such as this, it must be recognized that even a victory at the trial stage does not guarantee ultimate success. Indeed, as the court observed in *Warner Commc'ns*:

> Even a victory at trial is not a guarantee of ultimate success. If plaintiffs were successful at trial and obtained a judgment for substantially more than the amount of the proposed settlement, the defendants would appeal such judgment. An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself.

Warner Commc'ns, 618 F. Supp. at 747-48 (citing numerous examples).

In sum, this highly complex case has been extensively litigated and vigorously contested over an extended period of time. Despite difficulty of the issues raised, counsel secured an excellent result for the Settlement Class. As a result, this factor strongly supports the requested award.

e. The Risk of Non-Payment

Plaintiffs' Counsel undertook this litigation on a contingent fee basis, assuming a significant risk that the litigation would yield no recovery and leave them uncompensated. Unlike counsel for Defendant, who were paid an hourly rate and received reimbursements of their expenses on a regular basis, Plaintiffs' Counsel have not been compensated for any time or expenses since this case began in 2010. Since that time, Plaintiffs' Counsel have expended 5,156.4 hours in the prosecution of this litigation with a resulting lodestar of $2,605,061.86, and incurred $130,530.92 in litigation expenses. Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *See, e.g., Martin v. Foster Wheeler Energy Corp.*, No. 3:06-CV-0878, 2008 U.S. Dist. LEXIS 25712, at *12-13 (M.D. Pa. Mar. 31, 2008) ("because Class Counsel took this case on a contingency basis, the risk of nonpayment favors the granting of the petition to Class Counsel."); *Esslinger v. HSBC Bank Nev., N.A.*, No. 10-3213, 2012 U.S. Dist. LEXIS 165773, at *42 (E.D. Pa. Nov. 19, 2012) (noting "the difficulty that Plaintiffs could have faced in maintaining class certification"). For example, in awarding attorneys' fees in *In re Prudential-Bache Energy Income P'ships*, No. 888, 1994 U.S. Dist. LEXIS 6621 (E.D. La. May 18, 1994), the court noted the risks that plaintiffs' counsel had taken:

> Although today it might appear that risk was not great based on Prudential Securities' global settlement with the Securities and Exchange Commission, such was not the case when the action was commenced and throughout most of the litigation. Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

Id. at *16. The Seventh Circuit confirmed that the risk of loss is real and should be considered in a motion for attorneys' fees. It reversed the district court's order that had rejected counsel's

contention that lawyers faced the risk of nonpayment. *Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir. 2007) ("Because the district court failed to provide for the risk of loss, the possibility exists that Counsel, whose only source of a fee was a contingent one, was undercompensated.").

The primary risk Plaintiffs faced in this action was that manageability issues would undermine Plaintiffs' ability to maintain a certified class though trial. Although Plaintiffs believe a trial plan could have been developed to alleviate any manageability issues, proving damages for the members of the Settlement Classes may have required individual inquiries into, among other things, such Class Members' interactions with LAF, whether they received any refunds from LAF, and possibly their gym usage. Given the nature of and size of the Settlement Class members' claims, without a certified class, it is unlikely that Plaintiffs' Counsel would have been compensated for their efforts and expenses incurred on behalf of the Class.

Notwithstanding this very real specter of nonpayment, Plaintiffs' Counsel committed significant resources of both time and money to the vigorous and successful prosecution of this action. Few law firms could have devoted this kind of time and financial resources to this litigation. In view of the skill of Defendant's counsel and the legal and factual difficulties of this litigation, the risk of never being compensated was real. The contingent nature of counsel's representation strongly favors approval of the requested fee.

f. The Time Devoted to This Case by Lead Counsel Was Significant

As noted above, to date, Plaintiffs' Counsel and their paraprofessionals have expended 5,156.4 hours and incurred $130,530.92 in expenses in the past prosecuting this litigation for the benefit of the Settlement Class. As discussed above and in the Declaration of Michael T. Fantini, this action has been extensively litigated and vigorously defended for over three years. Defendant fought Plaintiffs at every step of the litigation in an effort to defeat Plaintiffs' claims.

In short, the successful conclusion of this litigation required Plaintiffs' Counsel to commit a very significant amount of time, personnel, and expenses to this litigation

g. Awards in Similar Cases

The requested fee award in this case is comparable to, and lower than many, awards in similar consumer class actions. *See Esslinger*, 2012 U.S. Dist. LEXIS 165773, at *49 (awarding attorneys' fees of $7,050,000 in a case concerning debt cancellation and debt suspension products); *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 304 (E.D. Pa. 2003) (awarding fee of $4,896,783.00 in a class action involving allegedly defective rear lift-gate latches); *Henderson v. Volvo Cars of N. Am.*, No. 09-4146, 2013 U.S. Dist. LEXIS 46291, at *54 (D. N.J. March 22, 2013) (awarding $3 million in fees and expenses in a consumer class action); *McGee v. Cont'l Tire N. Am., Inc.*, No. 06-6234, 2009 U.S. Dist. LEXIS 17199 (D. N.J. Mar. 4, 2009) (awarding $2,274,983.70 in fees and expenses in a consumer class action).

Accordingly, this factor weighs strongly in favor of approval Plaintiffs' Counsel's fee and expense request.

h. The Value of Benefits Attributable to the Efforts of Class Counsel Relative to the Efforts of Other Groups

As noted above in Section III.B.2.C., the benefits of the Settlement are attributable solely to Plaintiffs' Counsel and the Plaintiffs in the litigation. Accordingly, this factor weighs strongly in favor of approval Plaintiffs' Counsel's fee and expense request.

i. The Percentage Fee that Would Have Been Negotiated Had the Case Been Subject to a Private Contingent Fee Arrangement at the Time Counsel Was Retained

This factor is not at issue in this case where LAF has agreed to pay the requested fee and expense award separately from the settlement benefits to the Class. *See Chakejian v. Equifax*

Info. Servs., 275 F.R.D. 201, 220 (E.D. Pa. 2011) (noting that where the defendant agreed to pay the attorneys' fees, the "fees requested in this case bear little similarity to contingency fees.").

Notwithstanding the fees here are appropriate because "Class Counsel used their standard hourly rates, which they regularly use in complex class action matters, to calculate the lodestar amount." *Henderson v. Volvo Cars of N. Am.*, No. 09-4146, 2013 U.S. Dist. LEXIS 46291, at *55 (D. N.J. March 22, 2013). These hourly rates are "consistent with hourly rates routinely approved by this Court in complex class action litigation." *Id.; see also* Fantini Decl. ¶ 44; *In re Hemispherx Biopharma, Inc. Sec. Litig.*, No. 09-5262 (E.D. Pa.) (Dkt. No. 81) (February 14, 2011order approving B&M's hourly rates).

j. Any Innovative Terms of Settlement

The Settlement is innovative in at least two respects. First, the relief offered provides Class Members with the strongest claims the opportunity to receive substantial cash benefits of 100% of their damages on a claims-made basis. In many claims-made settlements, the total amount paid by the defendants is capped. Here, however, there is no cap on the total amount that LAF will pay to satisfy valid claims for cash payments.

The Settlement is also innovative in that it requires LAF to clearly state that any form of written Notice of Cancellation is permitted, and that the notice should include sufficient information to identify the member. The Membership Agreement will recommend that the notice should include the member's name, barcode number, address, telephone number and email address. This relief is essential, because Plaintiffs' Counsel's investigation revealed that many cancellations were not processed by LAF where the member had submitted insufficient information to identify the member requesting cancellation. In addition, after this case was initiated, LAF allowed members to cancel their memberships in person at the gyms. This is highly beneficial as Plaintiffs' believe this current cancellation policy will ensure that customers

obtain proof of their cancellations and eliminate all of the alleged issues of receipt and processing that occurred while LAF required members to cancel their memberships by mail. Accordingly, this relief directly addresses the Plaintiffs' and the Class' complaints. *See Chakejian*, 275 F.R.D. at 220 (settlement was innovative where it "brought about a change in [defendant's] practices that will address [plaintiffs'] complaints").

In sum, both the lodestar method and the percentage-of recovery method shows that Plaintiffs' Counsel's request for fees and expenses is reasonable.

C. The Sole Objection to the Plaintiffs' Counsel's Request for an Award of Attorneys' Fees is Meritless and the Court Should Deny the Objection

The sole objection to the Settlement was filed by Daniel and Warren Sibley (the "Sibleys"), who appear to be professional objectors. The Sibleys' objection is discussed in greater detail in Plaintiffs' Memorandum of Law in Support of Final Approval of Class Action Settlement. However, one aspect of the Sibleys' objection is relevant to Plaintiffs' Counsel's request for an award of attorneys' fees. The Sibleys do not object, *per se*, to the fee award requested. Instead, the Sibleys object that the deadline for objections to the Settlement and fee request preceded Plaintiffs' petition for an award of fees, and thus deprived the Class of the opportunity to object to Plaintiffs' Counsels' fee request. The Sibleys request that the Court defer its ruling on Plaintiffs' petition.

The Court set the schedule for the deadline for filing objection and for Plaintiffs' briefs in support of the Settlement and Plaintiffs' Counsel fee request. Plaintiffs have followed the Court's Order. The Notice stated that Plaintiffs' counsel would ask the Court to award them $1.4 million, which is the exact amount they are requesting here. Therefore, the Class had notice of Plaintiffs' Counsel's fee request and had the opportunity to object. In addition, Plaintiffs'

Counsel's fee brief is being filed approximately one month prior to the Court's Fairness Hearing, so objectors have ample time to crystalize their objections prior to the hearing.

In support of their request, the Sibleys rely on a single factually distinguishable decision from the Ninth Circuit, *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010), that has not been followed outside that Circuit.

In discussing "the fee-setting stage of common fund class action suits," the court in *Mercury Interactive*, ruled that that the class must have "an adequate opportunity to review and prepare objections to class counsel's completed fee motion." 618 F.3d 988 at 994-95. Subsequently, district courts in the Ninth Circuit have found that the holding in *Mercury Interactive* inapplicable where the settlement does not involve a common fund. *See In re Lifelock, Inc., Marketing and Sales Practices. Litig.*, MDL No. 08-1977, 2010 U.S. Dist. LEXIS 102612, at *31 (D. Ariz Aug. 31, 2010); *Gittin v. KCI USA, Inc.*, No. 09-CV-05843, 2011 U.S. Dist. LEXIS 41099, at *4-5 (N.D. Cal. Apr. 12. 2011). The Second Circuit has also declined to follow *Mercury Interactive*, finding that notice of class counsel's fee request was reasonable and sufficient to satisfy due process where the notice stated the amount of the maximum fee request, class counsel requested precisely such amount in their subsequent fee request, and any objectors had two weeks to crystalize their objections prior to the fariness hearing. *See Cassese v. Williams*, 503 Fed. Appx. 55, 2012 U.S. App. LEXIS 23834, at *4-6 (2d Cir. Nov. 20, 2012); *see also Bower v. MetLife, Inc.*, 2012 U.S. Dist. LEXIS 149117, at *14-16 (S.D. Ohio Oct. 17, 2012) (noting that "it appears that no court outside the Ninth Circuit has ever followed [*Mercury Interactive's*] conclusion that Rule 23(h) requires a fee petition to be filed before the objection deadline," and that "any alleged error committed by filing the fee petition after the objection deadline would still be harmless because the objectors had a fair opportunity to prepare

objections to the fee petition after it was filed and before the Fairness Hearing."); *Bailey v. AK Steel Corp*., 2008 U.S. Dist. LEXIS 18838 (S.D. Ohio, Feb. 28, 2008) (counsel satisfied Rule 23(h)'s notice requirements by stating in the class notice the amount of fees they intended to ask the Court to approve).

Here, the attorneys' fees and expenses requested will be paid by LAF, not from a common fund, and will not diminish the recovery to the Class. Accordingly, *Mercury Interactive* is inapplicable. In addition, the Class had sufficient notice of Plaintiffs' Counsel's requested fee and ample time to crystalize their objections prior to the Court's fairness hearing.

Therefore, there is no basis for the Court to delay its consideration of Plaintiffs' Counsel's fee and expense request and the Sibleys' objection on such grounds should be denied.

D. The Court Should Approve the Payment of the Incentive Awards to the Class Representatives as Provided for in the Settlement

LAF has agreed to pay each Plaintiff and incentive award of $3000 that will not diminish the Settlement Benefits to the Class.

Incentive awards for class representatives promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits. The efforts of the Class Representatives in this case were instrumental in achieving the Settlement on behalf of the Class and justify the awards requested here. The Class Representatives came forward to prosecute this litigation for the benefit of the Class as a whole. These Class Representatives sought successfully to remedy a widespread wrong and have conferred valuable benefits upon their fellow class members. The Class Representatives provided a valuable service to the Class by: (a) providing information and input in connection with the drafting of the complaints and amended complaints; (b) overseeing the prosecution of the litigation; (c) consulting with counsel; (d)

providing documents that were produced in discovery, and (e) with the exception of Plaintiff Sible, preparing for and giving their deposition testimony. *See* Fantini Decl. at ¶ 19.

A $3,000 incentive award for each of the Class Representatives in recognition of their services to the Class is modest under the circumstances, and well in line with awards approved by federal courts in Pennsylvania and elsewhere. *See Chakejian v. Equifax Info. Servs.*, 275 F.R.D. 201, 221 (E.D. Pa. 2011) (granting plaintiffs' request for $15,000 in personal incentive awards to each plaintiff); *Cullen*, 197 F.R.D. at 145 ("[C]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.") (*quoting In re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997)); *In re American Investors Life Insurance Co. Annuity Marketing and Sales Practices Litig.*, 263 F.R.D. 226, 245 (E.D. Pa. 2009) (awarding 10 representative plaintiffs incentive payments in the amounts of $10,500 each and 2 representative plaintiffs $5,000 each, for a total of $115,000, finding those amounts to be "reasonable compensation considering the extent of the named plaintiffs' involvement and the sacrifice of their anonymity"); *Bezio v. GE*, 655 F. Supp. 2d 162, 168 (N.D.N.Y 2009) (incentive awards in the amount of $5,000 each are "within the range of awards found acceptable for class representatives").

Accordingly, Plaintiffs' Counsel respectfully requests that the incentive awards provided for in the Settlement be approved.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Counsel respectfully request that the Court grant the relief requested herein.

Dated: August 22, 2013 **BERGER AND MONTAGUE, P.C.**

By */s/ Eric Lechtzin*

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