UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re BLACK FARMERS DISCRIMINATION LITIGATION	)	**Misc. No. 08-mc-0511 (PLF)**
This document relates to	)	
ALL CASES	)	

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S UPDATED MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES

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I. INTRODUCTION AND BACKGROUND

On October 27, 2011, this Court approved a second historic settlement between African-American farmers and the Secretary of the United States Department of Agriculture ("USDA"). *See* Order and Judgment (Docket No. 231) (hereinafter "Final Approval Order"); *In re Black Farmers Discrimination Litig.*, Misc. No. 08-0511 (PLF), 2011 U.S. Dist. LEXIS 124471 (D.D.C. Oct. 27, 2011) ("Final Approval Opinion"). The first settlement was approved by this Court on April 14, 1999 in the case of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) ("*Pigford*").[1] The Consent Decree approved by this Court in *Pigford* brought a measure of justice to thousands of farmers who suffered racial discrimination at the hands of their own government. The saga of trying to obtain justice for black farmers harmed by this racial discrimination did not end with *Pigford*, however. As the Court well knows, tens of thousands of individuals who requested to participate in *Pigford* did so after the claim filing deadline established in the Consent Decree had passed. In the end, over 60,000 potential *Pigford* claimants – nearly three times the number of claimants actually adjudicated – did not have their individual discrimination claims heard on the merits and were denied the opportunity to participate in the *Pigford* non-judicial claims process.

The present case arises from the remedial statute passed by Congress in 2008 to provide certain of those *Pigford* late filers an opportunity to have their claims adjudicated on the merits. Specifically, in 2008, Congress passed Section 14012 of the Food, Conservation, and Energy Act ("Farm Bill"),[2] which created a new cause of action designed to "giv[e] a full determination on the merits for each *Pigford* claim previously denied that determination." Farm Bill § 14012(d).

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[1] *Pigford* involved two consolidated cases, *Pigford v. Glickman*, Case No. 97-1978, and *Brewington v. Glickman*, Case No. 98-1693.

[2] Pub. L. No. 110-246, 112 Stat. 1651 (June 18, 2008).

After several years of litigation and negotiation, Class Counsel and counsel for the Defendant entered into a Settlement Agreement in February 2010 to resolve, on a class basis, all claims under Section 14012.[3] The Settlement Agreement created an orderly and just non-judicial claims process to adjudicate the claims filed under Section 14012, and to allocate the $1.25 billion appropriated by Congress to pay those claims.[4]

This Court's October 27, 2011 Final Approval Order marked the beginning of that claims process, which ran over the course of six months from November 14, 2011 to May 11, 2012. *See* Docket No. 233 (establishing claims period). During those six months, Class Counsel conducted more than 380 unique claims preparation meetings in 66 cities across the United States (spanning 23 states and the District of Columbia), and provided phone assistance to any putative Class Members who were not able attend an in-person meeting. Through these in-person meetings and phone consultations, Class Counsel provided claims assistance to more than 25,000 individual claimants between November 14, 2011 and May 11, 2012, and Class Counsel are continuing to provide claims assistance to additional Class Members at this time. Indeed, because of the volume and careful planning of the locations of meetings, more than 94% of all claimants under the Settlement Agreement had access to in-person meetings with Class Counsel within 50 miles of their homes to assist with claims preparation, and more than 97% had access to such in-person claims meetings within 75 miles of their homes. At the same time, Class Counsel have actively engaged with the Government, the Court, the Ombudsman, and others to ensure that issues of

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[3] The Settlement Agreement has been amended several times since February 2010. The version finally approved by the Court, dated May 13, 2011, was filed as Exhibit 2 to Docket No. 170.

[4] When this case commenced in 2008, the Farm Bill limited relief to Section 14012 claimants to $100 million. *See* § 14012(c). The remaining $1.15 billion to fund Section 14012 was provided in November 2010 as part of the Claims Resolution Act, which conditioned appropriation of these additional funds on the approval of the Settlement Agreement negotiated by Class Counsel and the Government. Pub. L. No. 111-291, § 201, 124 Stat. 3064, 3070 (2010).

notice and process were efficiently and fairly addressed throughout the claims period, the adjudication of claims has proceeded smoothly, all reporting requirements in the Settlement Agreement have been met, and the litigation interests of the Class have been fully represented before this Court and the Court of Appeals for the District of Columbia Circuit.[5]

Class Counsel respectfully submit that the claims process prescribed by the Settlement Agreement has been a model of fairness, efficiency, and integrity, and an extraordinary culmination of the years of work Class Counsel have devoted to obtaining meaningful relief for the members of the Class. This includes, but is certainly not limited to, litigating this case, negotiating and implementing the Settlement Agreement, assisting in securing the funds necessary to effectuate the Settlement,[6] overseeing the claims process, and providing in-person and/or telephone claims assistance to more than 25,000 Class Members. By this Motion, Class Counsel request the Court to award attorneys' fees in the amount of 7.4% of the Settlement Fund Fee Base.[7] Such an award is expressly within the range authorized by the Settlement Agreement and is fair and appropriate compensation for the enormous amount of work Class Counsel have performed for the benefit of the Class and the exceptional results they have achieved.

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[5] Class Counsel successfully defended the Settlement Agreement against three appeals filed before the D.C. Circuit in Case Nos. 11-5326, 11-5334, and 12-5019. These appeals were dismissed in a *per curiam* order on July 26, 2012. *See* Docket No. 299.

[6] While the National Black Farmers Association (spearheaded by John Boyd), the Federation of Southern Cooperatives, and other farm advocacy groups played key roles in advocating for the creation of the cause of action ultimately embodied in the 2008 Farm Bill as well as for passage of the 2010 Claims Resolution Act, Class Counsel provided substantial assistance in support of the efforts to enact the 2010 Act, which expressly conditioned the additional $1.15 billion in funding on Court approval of the Settlement Agreement.

[7] For purposes of this Motion, the term "Settlement Fund Fee Base" means the $1.25 billion in total funds appropriated by Congress for the payment of successful Section 14012 claims, less the $22.5 million in settlement implementation costs that the Settlement Agreement specifies shall be subtracted from the $1.25 billion to yield the "Fee Base." *See* Settlement Agreement, § II.O.

II. THE LITIGATION AND SETTLEMENT AGREEMENT

Plaintiffs will not repeat here the full history of *Pigford* and the present case, which is detailed in their Memorandum of Law in Support of Motion for Preliminary Approval, and catalogued in detail in the Court's Final Approval Opinion. *See* Docket No. 161; *In re Black Farmers Discrimination Litig.*, 2011 U.S. Dist. LEXIS 124471, at *8-31. Plaintiffs will highlight, however, some of the more important facts that bear on the present request for an award of 7.4% of the Settlement Fund Fee Base for attorneys' fees.

A. Pigford v. Glickman

In 1997, African-American farmers initiated the *Pigford* case as a class action against the Secretary of the USDA alleging discrimination by USDA in the administration of farm loan programs, in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a), and the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq*. *Pigford* ultimately was settled, a class was certified, and on April 14, 1999, this Court entered a Consent Decree establishing a claims adjudication process by which class members could seek resolution of their discrimination claims. 185 F.R.D. 82.

The *Pigford* claims adjudication process provided for two "tracks." Under "Track A," a claimant who provided "substantial evidence" of discrimination by the USDA could obtain a liquidated damages award of $50,000, the discharge of all outstanding debt to USDA incurred in the loan program that formed the basis of the discrimination claim, and an additional 25% payment to offset federal income taxes on this award. Under "Track B," a claimant could recover actual damages in an arbitration hearing process by proving by a preponderance of the evidence that he/she had been discriminated against by the USDA and had suffered actual economic losses in the amounts claimed.

Under the terms of the Consent Decree, *Pigford* class members were required to file their claims by October 12, 1999. Docket No. 161, Ex. 3. That deadline could be extended, but only upon a showing by the claimant that the failure to submit a timely claim was due to "extraordinary circumstances beyond [the claimant's] control." *Id.* By Court Order, the deadline for all such "late-filing" requests was set at September 15, 2000. *See* Order of July 14, 2000 (Docket No. 161, Ex. 6).

More than 60,000 "Late Filers" submitted a request to participate in the *Pigford* claims resolution process *after* the October 12, 1999 deadline set by the Consent Decree but *on or before* the September 15, 2000 "late-filing" deadline. More than 58,000 of these late-filing petitioners were determined not to have satisfied the "extraordinary circumstances" test set by the Court. In addition, thousands of additional individuals (so-called "Late-Late Filers") filed their "late-filing" request to participate in the *Pigford* claims resolution process *after* the September 15, 2000 deadline, but before passage of the Farm Bill on June 18, 2008.[8] Thus, altogether, more than 60,000 *Pigford* claimants with potentially meritorious claims did not have their individual claims heard on the merits in *Pigford*.

B. Section 14012 of the 2008 Farm Bill

The tens of thousands of unresolved late claims gave rise to significant dissatisfaction in the African-American farming community concerning the outcome of the *Pigford* case. Several of the lawyers who had served as class counsel in *Pigford* devoted substantial amounts of time to advocating on behalf of these late-filers. Their effort, in conjunction with the efforts of an array

[8] The Facilitator in the *Pigford* case, Epiq Systems, Inc. (formerly Poorman-Douglas Corporation), has records of more than 25,000 written communications relating to the *Pigford* settlement that were received after the September 15, 2000 late-filing deadline in *Pigford* but before the enactment of the Farm Bill in 2008. Epiq has made these records available for use during the claims process in the instant case to assist claimants in satisfying the "request to participate" requirement of the Settlement Agreement. *See* Settlement Agreement, § II.T (defining "Late-Filing Request" as a "written request . . . seeking to participate in the claims resolution processes in the *Pigford* Consent Decree").

of farm advocacy organizations and activists, together with the strong support of a number of the members of the Congressional Black Caucus and others, led to the passage of Section 14012 of the 2008 Farm Bill. This portion of the Farm Bill, signed into law by President Bush on June 18, 2008, created a new cause of action for "any *Pigford* claimant who ha[d] not previously obtained a determination on the merits of a *Pigford* claim" to "obtain that determination . . . in a civil action brought in the United States District Court for the District of Columbia . . . ." Farm Bill § 14012(b). The term "*Pigford* claimant" was defined as "an individual who submitted a late-filing request under section 5(g) of the [*Pigford*] [C]onsent [D]ecree." Farm Bill § 14012(a)(4).

As with the *Pigford* Consent Decree, Section 14012 provides for two "tracks" by which claimants may obtain a determination of the merits of their discrimination claims: (1) an "expedited resolution[]" process, similar to Track A in the *Pigford* case, wherein claimants who prove the merits of their claims by "substantial evidence" are entitled to liquidated damages of $50,000, a payment in recognition of outstanding USDA debt, and a 25% tax payment to offset the additional income, Farm Bill § 14012(e);[9] and (2) a process similar to Track B in the *Pigford* case, wherein claimants who satisfy the higher "preponderance of the evidence" standard of proof for their claims are entitled to recover their actual damages. Farm Bill § 14012(f). And, as in the *Pigford* Consent Decree, Section 14012(g) limits loan acceleration and foreclosures during the pendency of a Section 14012 claim.

There are, however, significant differences between the remedial process established by the *Pigford* Consent Decree and that provided for by Section 14012. First, and most significant, is the limitation on funds available for "payments and debt relief" under Section 14012. While

[9] The 2010 Claims Resolution Act, Pub. L. No. 111-291, § 201, 124 Stat. 3064, 3070 (2010), deleted Subsection 14012(e) and renumbered all subsequent subsections of Section 14012. Thus, for example, Subsection 14012(f) is now codified as Subsection 14012(e). For purposes of consistency, we have used the current codification to refer to these provisions of the Farm Bill.

the *Pigford* claims resolved under the Consent Decree were paid from the Judgment Fund,[10] and thus were not subject to a funding limitation, claims resolved pursuant to Section 14012 are to be paid solely from funds appropriated to the Secretary of Agriculture, or made available from the Commodity Credit Corporation, for this specific purpose. Under the Farm Bill as passed in 2008, this fund was limited to a total of $100 million, an amount that would have permitted fewer than 1,600 *Pigford* late filers to obtain the full relief authorized by Section 14012. The Farm Bill anticipated, however, the possibility that additional funds could be appropriated to pay Section 14012 claims by "authorizing to be appropriated such [additional] sums as are necessary to carry out [Section 14012]." Farm Bill § 14012(h)(2). However, prior to the Settlement Agreement in this case, no such additional funds had been appropriated for this purpose.

Second, the *Pigford* Consent Decree required USDA to pay the substantial costs of implementing the Decree (including the costs of the *Pigford* Facilitator, neutral adjudicators, and Class Notice), the cost of the *Pigford* Monitor, and attorneys' fees from funds separate from those paid out from the Judgment Fund as awards to claimants. Section 14012 of the Farm Bill, by contrast, fails to provide *any* funding for Class Notice, Neutrals, an Ombudsman, or any other components of an extrajudicial claims process. Likewise, Section 14012 provides no funding for attorneys' fees or costs, with the result that the only source of funds available to compensate Class Counsel is the Settlement Fund itself. *See* Farm Bill §§ 14012(c), 14012(h).

Finally, the *Pigford* Consent Decree required claimants to show that they had received less favorable treatment from USDA than a "specifically identified, similarly situated white farmer," in order to obtain relief. *See* Consent Decree § 9(a)(i)(C). This requirement, a leading cause of claim denials in the *Pigford* claims process, was likewise imposed by Section 14012,

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[10] 31 U.S.C. § 1304.

although the burden of adducing such evidence was made easier by the requirement in the original Section 14012(e) that USDA provide claimants with information "on farm credit loans and noncredit benefits, as appropriate, made within the claimant's county" during the relevant time period of the claim.[11]

C. Litigation of Section 14012 Claims

Even before Section 14012 of the 2008 Farm Bill became law, many of the lawyers and law firms involved in *Pigford* were fielding inquiries and being retained by late-filing claimants to assist them in pursuing some kind of remedy to obtain an adjudication of their *Pigford* claims. After the passage of Section 14012, these lawyers and firms, who now are among Class Counsel appointed in this case, began to hold workshops, meetings, and otherwise communicate with late-filing *Pigford* claimants that Congress had provided a vehicle for many of them to obtain an adjudication of their late-filed *Pigford* claims. Other lawyers and law firms in addition to those involved in *Pigford* also began to receive inquiries about the new remedy provided by Section 14012, and these firms likewise undertook substantial outreach and educational efforts aimed at late filers.

As a result of these outreach and educational efforts, tens of thousands of potential claimants who claimed that they had made a request to participate in the *Pigford* claims process after the Court-imposed cutoff date individually retained the various lawyers and law firms that now comprise Class Counsel in this case to assist them with pursuing a remedy under Section 14012. Consistent with the standard contingency fee agreements most of these firms were using, many of these retention agreements provided that the contracting lawyer or law firm would be entitled to 33% of any recovery a late-filing claimant might receive by virtue of a claim filed

[11] As noted above, in accordance with the Settlement Agreement, the Claims Resolution Act deleted Subsection 14012(e).

under Section 14102. On the basis of these signed retention agreements, the lawyers and law firms that now make up Class Counsel began to file suit in this Court as provided by Section 14012.

Between May 2008 and February 2010, more than 28,000 African-American farmers, represented by 25 different law firms, and in 17 separate Complaints, filed suit in this Court under Section 14012.[12] These complaints were consolidated by this Court into the above-captioned case, *In re Black Farmers Discrimination Litigation*, Misc. No. 08-mc-0511 (D.D.C.).[13]

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[12] The seventeen complaints, in order of filing, are:

a. *Agee v. Schafer*, C.A. No. 08-0882;
b. *Kimbrough v. Schafer*, C.A. No. 08-0901;
c. *Adams v. Schafer*, C.A. No. 08-0919;
d. *National Black Farmers Association v. Schafer*, C.A. No. 08-00940;
e. *Bennett v. Schafer*, C.A. No. 08-00962;
f. *McKinney v. Schafer*, C.A. No. 08-1062;
g. *Bolton v. Schafer*, C.A. No. 08-1070;
h. *Black Farmers and Agriculturists Association, Inc v. Schafer*, C.A. No. 08-1188 (this case has been amended and renamed *Copeland v. Vilsack*);
i. *Hampton v. Schafer*, C.A. No. 08-1381;
j. *Robinson v. Schafer*, C.A. No. 08-1513;
k. *James v. Schafer*, C.A. No. 08-2220;
l. *Beckley v. Vilsack*, C.A. No. 09-1019;
m. *Sanders v. Vilsack*, C.A. No. 09-1318 (dismissed for lack of service);
n. *Russell v. Vilsack*, C.A. No. 09-1323;
o. *Bridgeforth v. Vilsack*, C.A. No. 09-1401;
p. *Allen v. Vilsack*, C.A. No. 09-1422; and
q. *Anderson, v. Vilsack*, C.A. No. 09-1507.

[13] After the execution of the initial form of the Settlement Agreement on February 18, 2010, the following six additional complaints were filed:

a. *Edwards v. Vilsack*, C.A. No. 10-0465;
b. *Latham v. Vilsack*, C.A. No. 10-0737;
c. *Andrews v. Vilsack*, C.A. No. 10-0801;
d. *Sanders v. Vilsack*, C.A. No. 10-1053;
e. *Johnson v. Vilsack*, C.A. No. 10-0839; and
f. *Abney v. Vilsack*, C.A. No. 10-1026.

Together with amendments to the 17 earlier filed complaints, these complaints added more than 19,000 additional claimants to this case.

When these individual cases were first filed, many of the lawyers filing Section 14012 actions sought to have the Court administer the cases on a consolidated basis, much like a mass tort. Certain of Class Counsel obtained Court authorization to provide information to potential claimants through a Court-sanctioned website, a toll-free number, and other methods of communication. *See* Case Management Order No. 1 (Dec. 15, 2008) (Docket No. 31). These counsel also agreed to modify their contingency fee contracts with potential Section 14012 claimants to cap the amount of any attorneys' fee recovered at 20%.

D. February 18, 2010 Settlement Agreement

For the better part of two years, counsel for the Plaintiffs in the consolidated actions vigorously pursued the claims of the thousands of individual clients on whose behalf they had filed suit, including researching the array of legal issues relating to Section 14012 and developing an appropriate strategy to secure relief for their clients, extensive briefing on class certification, coordination of case management efforts, and many months of intensive, arms-length settlement negotiations with USDA counsel. These efforts culminated in the execution of a comprehensive Settlement Agreement on February 18, 2010, which provided for a non-judicial claims process to resolve finally and globally all Section 14012 cases through certification of a Federal Rule of Civil Procedure 23(b)(1)(B) "limited fund" settlement class. Subject to Court approval, the Settlement Agreement also provided for a fee award in the range of 4.1% to 7.4% of the total funds appropriated for the Settlement (minus $22.5 million specified for costs of implementing the Agreement). Settlement Agreement, § VIII.B. The Settlement Agreement provided that this fee award would be paid into a Common Benefit Fund to compensate Class Counsel for: (a) their work on behalf of all Class Members prior to, and through, final approval of the Settlement by this Court; (b) their work on behalf of individual Track A Claimants through

the claims process set forth in the Settlement Agreement; and (c) any work performed on behalf of the overall Class following the Settlement. Settlement Agreement, § II.N.

The Settlement Agreement also provides that fees approved by this Court as part of a Common Benefit Fund be administered by Lead Class Counsel according to the terms of a Counsel Participation Agreement ("Participation Agreement") among Class Counsel.[14] A copy of this Participation Agreement is attached hereto as Exhibit A.[15]

Under the Settlement Agreement, both Class Counsel and non-Class Counsel may represent Track B Claimants and be compensated through these contingency fees, which will be negotiated by each individual Claimant and his or her counsel. Settlement Agreement § II.QQ. The Parties agreed, as part of the Settlement, that counsel representing Track B Claimants should be permitted to seek an award that is sufficient to compensate them meaningfully for the additional effort involved in preparing and submitting Track B claims, but is not so great as to diminish significantly a successful Track B Claimant's award. To balance these factors, the Settlement Agreement limits the contingency fee for Track B claims to 8% of an individual claimant's Track B recovery. Settlement Agreement, § X.A.[16]

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[14] Two firms that the Court approved as Class Counsel firms are not signatories to the Participation Agreement: Relman, Dane & Colfax and Kindaka Sanders. Both of these firms made contributions to the overall effort of Class Counsel to date and participated in some of the claims preparation work under the Settlement Agreement. Lead Class Counsel have signed an agreement with Kindaka Sanders to compensate him and his team, at *Laffey* rates, from a Common Benefit Fee award for the work they performed for the benefit of the Class, and have proposed a comparable agreement to Relman, Dane & Colfax.

[15] The fee-sharing agreement among Class Counsel consists of three documents, the Counsel Participation Agreement and two other agreements, which are exhibits to the Participation Agreement. All three documents are attached hereto as Exhibit A. For ease of reference, these documents are collectively referred to herein as the "Participation Agreement."

[16] Under the Settlement Agreement, counsel representing Track B claimants are entitled to negotiate contingency agreements with their clients, at a fee of not more than an 8% contingency. Settlement Agreement § II.QQ. Contingency fees earned by counsel for their successful work on Track B claims, while paid from the successful claimants' awards, will reduce the amount of the Common Benefit Fee for Class Counsel. Settlement Agreement §§ II.N, V.E.10. Thus, if the Court makes an award of $90.8

Track A Claimants, by contrast, are entitled to the assistance of Class Counsel in preparing and submitting their claims, without any charge beyond the "percentage-of-the-fund" awarded as a Common Benefit Fee. However, the Settlement Agreement recognized that there would likely be some Class Members who would want to engage individual counsel other than Class Counsel to assist them with the preparation of claims. The Settlement Agreement permits such involvement by lawyers other than Class Counsel in the claims process, but requires that the Class Member pay for such individual representation out of his or her own funds. To protect Class Members from paying excessive fees for assistance in the claims process, the Settlement Agreement imposes a 2% cap on contingency fees charged by such non-Class Counsel. Settlement Agreement, § X.A.

E. The Claims Resolution Act of 2010

Following the execution of the initial version of the Settlement Agreement on February 18, 2010, Class Counsel engaged in substantial efforts advocating for Congress to satisfy the funding requirement of the Settlement and thus provide the necessary additional funding to afford meaningful relief for farmers with meritorious claims (even if it did not provide sufficient funding to pay all successful claimants the full amount of relief authorized by Section 14012). These advocacy efforts involved more than 1,000 hours of attorney time and included numerous briefings and discussions over many months with Members of Congress and their staffs.

After several attempts to appropriate additional funds fell short, Congress, on November 30, 2010, finally passed the Claims Resolution Act of 2010 ("CRA"),[17] which provided an

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million for fees and expenses (*i.e.*, 7.4% of the Settlement Fund Fee Base) and the total amount of contingency fees paid by successful Track B claimants totals $100,000, then the Common Benefit Fee that would be allocated among Class Counsel would be reduced by $100,000 to $90.7 million. That said, the number of complete Track B claims submitted during the claims period is relatively low, and Class Counsel do not presently expect the reduction for Track B fees to be substantial.

[17] Pub. L. No. 111-291, 124 Stat. 3064, 3070 (2010).

additional $1.15 billion to fund the Settlement that the Parties had negotiated. This Act, which the President signed into law on December 8, 2010, specifically provided that these additional funds are intended "to carry out the terms of the Settlement Agreement," and *expressly conditioned* the availability of these funds on the "[S]ettlement [A]greement dated February 18, 2010 (including any modifications agreed to by the parties) [being] approved by a court order that is or becomes final and nonappealable." CRA §§ 201(a), 201(b).

The language of the CRA also made clear that the additional $1.15 billion that was appropriated is the maximum amount of funds that would be appropriated for the payment of Section 14012 claims. Specifically, the Act deleted two sections of the Farm Bill: original Section 14012(i)(2), which had "authorized to be appropriated such [additional] sums as are necessary to carry out [Section 14012]," and original Section 14012(j), which required reports on the depletion of the first $100 million, presumably so that Congress could determine whether additional appropriations were warranted. CRA §§ 201(f)(4)(B), 201(f)(5).

The CRA also included several provisions aimed at promoting the integrity of the claims process and deterring potential fraud in the process. For example, the Act required that: (1) the Neutrals be approved by the Secretary of Agriculture, the Attorney General, and the Court, and be administered "oaths of office" by the Court before adjudicating claims; (2) the Neutrals be authorized under certain conditions to require claimants to provide additional documentation; (3) attorneys filing claims on behalf of claimants certify that, to the best of their knowledge, information, and belief, the claims they submit "are supported by existing law and the factual contentions have evidentiary support"; and (4) the General Accounting Office and the USDA Inspector General undertake certain reviews and/or audits relating to the claims process. CRA §§ 201(g), 201(h).

F. This Court's Approval of the Settlement Agreement

With the $1.25 billion contemplated in the Settlement Agreement secured, on March 30, 2011, Class Counsel moved this Court to grant preliminary approval of the Settlement Agreement and to certify a Settlement Class. *See* Docket No. 161. This filing detailed the history underlying the *Pigford* case, Section 14012, and the Settlement Agreement, the mechanics of the Settlement Agreement and the proposed claims process, and how the Settlement Agreement met Congress's "remedial purpose of giving a full determination on the merits for each *Pigford* claim previously denied that determination." § 14012(d).

After the Parties' made several modifications to the Settlement Agreement to address issues raised by the Court (*see* Docket Nos. 170, 171), the Court preliminarily approved the Settlement Agreement on May 13, 2011. *See* Docket No. 172. Pursuant to Federal Rule of Civil Procedure 23(c)(2), Class Counsel subsequently drafted notice materials for the putative Class, and distributed this notice through an extensive and coordinated notice program that combined direct mailings to putative Class members, television and radio advertising, print media, earned media, and online outreach. *See* Docket No. 187, Ex. 3 (detailing notice program).

As required under Federal Rule of Civil Procedure 23, this notice provided the opportunity for putative Class members to object to the Settlement and to appear at the Fairness Hearing convened by the Court on September 1, 2011. Twenty-five individuals or entities filed "objections" to the Settlement.[18] Class Counsel responded to each in turn, both in writing and at the Fairness Hearing. *See* Docket No. 191. Class Counsel also filed a motion seeking final approval of the Settlement Agreement notwithstanding the objections that were submitted. *See* Docket No. 187. Ultimately, after consideration of Class Counsel's motion and the arguments of

[18] Many of the "objections" were not really objections at all, but rather were requests to participate in the non-judicial claims process created by the Settlement Agreement.

objectors, this Court, on October 27, 2011, issued a Final Approval Order and Opinion approving the Settlement Agreement in full.

G. The Claims Process Approved by This Court

Under the Court's Final Approval Order, Class Counsel's post-settlement obligations are both extensive and manifold. Most significantly, Class Counsel agreed to provide individual and in-person assistance, without additional charge, to all Class Members electing to submit claims under Track A who requested the assistance of counsel. Settlement Agreement § VIII.A.2.

Even before this Court approved the Settlement Agreement, Class Counsel had devoted substantial time to planning for the proposed claims process, including designing and testing a claims preparation and submission process to enable Class Counsel to provide personalized assistance to tens of thousands of Class Members located across the country. To help ensure that all lawyers involved in the claims assistance process had the necessary expertise, Class Counsel conducted a number of training sessions for the lawyers and paralegals participating in the claims review and submission process. These training sessions included a live presentation to more than 50 lawyers and paralegals held in Washington, D.C., and several subsequent webinars and group telephone conferences designed not only to instruct those participating about the substantive law and underlying USDA farm loan programs at issue in the case, but also to develop and refine the procedures to be used during the claims assistance process. Class Counsel enlisted the assistance of the Farmers Legal Action Group ("FLAG") to prepare training materials and assist in educating the lawyers who were to participate in the claims assistance process. FLAG made a live presentation to Class Counsel and also videotaped their training session so that lawyers who were unable to attend the live training session would have the benefit of that training. Class Counsel's training efforts commenced even before the Court approved the Settlement and continued throughout the claims submission period.

On November 10, 2011, following the entry of the Final Approval Order, this Court issued an Order establishing a claims submission period under the Settlement Agreement from November 14, 2011 to May 11, 2012. Docket No. 233. In order to be able to provide in-person assistance to the more than 84,000 potential Class Members who had been mailed Claim Forms by the Claims Administrator, Class Counsel conducted 384 group meetings in 23 states and the District of Columbia during this 180-day claims period.[19] Through these meetings, more than 94% of putative class members had the opportunity to meet in-person with Class Counsel within 50 miles of their homes, and more than 97% of putative Class Members had the opportunity to meet in-person with Class Counsel within 75 miles of their homes. These group meetings were staffed by multiple attorneys (sometime as many as 10) to ensure that each and every Class Member who attended such a meeting would have the opportunity to meet individually and in-person with an attorney for the purpose of preparing a Claim Form. In addition, to ensure that each of these group meetings was run efficiently, Class Counsel provided paralegals and substantial support staff at all of these meetings to provide logistical assistance to the claimants and Class Counsel.

Class Counsel also provided in-office assistance in Jackson, Mississippi, Birmingham and Selma, Alabama, Durham, North Carolina, and Columbia, South Carolina, and established a toll-free line that enabled any Class Members who were unable to attend the in-person meetings to obtain claims assistance by telephone.

All told, during the 180-day Claim Period, Class Counsel met in person or by phone with more than 25,000 claimants, and signed Claim Forms for more than 13,000 of these claimants. In addition, during this same period, Class Counsel provided substantive claims assistance by

[19] Class Counsel are continuing to conduct meetings and provide claims assistance at the present time to the categories of additional claimants that the Court has authorized to submit claims after May 11, 2012. *See* Settlement Order (Sept. 14, 2012) (Docket No. 304).

telephone to more than 3,400 additional Class Members, of which more than 2,700 submitted Claim Forms. Of course, in addition to the tens of thousands of hours spent in providing this claims assistance to Class Members, Class Counsel have also spent substantial time responding to questions from Class Members and others who seek to participate in the claims process regarding the overall claims process, the status of their individual claims, and the distribution of funds.

In addition to the considerable efforts undertaken by Class Counsel to ensure that all Class Members could, if they wished, meet personally with Class Counsel at locations reasonably close to Class Members' homes, Class Counsel also worked tirelessly to ensure that such meetings were run smoothly and efficiently and provided Class Members with a meaningful opportunity to receive advice of counsel. Class Counsel continuously monitored the claims assistance process throughout the claims period, taking feedback from participants, farm advocacy groups, and the Court-appointed Ombudsman, and using that information to make adjustments to improve the claims assistance processes and procedures as necessary.

In considering the benefit to the Class provided by Class Counsel, it is important to emphasize that Class Counsel's contribution extends beyond a quantitative assessment of the hours worked. Among other things, Class Counsel are required by the Claims Resolution Act of 2010 ("CRA") to fulfill the "integrity" requirements of the claims process imposed by Congress in the CRA, the requirements of which have been incorporated into the Settlement Agreement. Under these provisions, Class Counsel were (and are) required to verify that, to the best of their knowledge, information, and belief, any claim they submit on behalf of a claimant "[is] supported by existing law and the factual contentions have evidentiary support" – a determination that has required careful preparation and detailed discussion with each claimant.

Settlement Agreement § V.A.1.c; CRA § 201(g)(5). In addition, Class Counsel have been required to ensure that the processes and procedures of the claims process were robust enough to meet the standards of the General Accounting Office and the USDA Inspector General, who, pursuant to the Claims Resolution Act, are obligated to undertake certain reviews and audits relating to the claims process. CRA § 201(h). Despite the large volume of claims processed and number of meetings conducted, Class Counsel respectfully submit that the claims process in this case has satisfied these standards.

H. Class Counsel's Additional Implementation Efforts

Class Counsel also have continued to spend substantial time since the conclusion of the claims submission process addressing a wide range of settlement implementation issues. These issues include working with the Ombudsman's Office to address particular claims-related issues, addressing numerous issues raised by the Claims Administrator, meeting with the Court, preparing a Motion to Modify the Court's October 27, 2011 Order to enable certain categories of claimants who did not submit claims prior to the May 11, 2012 Claim Deadline to have their claims adjudicated (Docket No. 300), responding to requests from the General Accounting Office and the USDA Inspector General's Office, coordinating the payment and reporting of interim settlement implementation costs to the Claims Administrator, the Track A Neutral, and others, and responding to inquiries from Class Members.

In addition, Class Counsel litigated, and ultimately successfully obtained dismissal of, three appeals before the D.C. Circuit challenging the Court's Final Approval Order and Opinion. *See* D.C. Circuit Case Nos. 11-5326, 11-5334, 12-5019.

Finally, Class Counsel continues to be actively engaged in ensuring the fairness, integrity, and efficiency of the claims process and the overall settlement implementation, and

anticipates continuing this work until all meritorious claimants are successfully paid and the settlement implementation is completed.

I. The Efforts of Class Counsel

The work effort of Class Counsel in this case leading to the Court's approval of the Settlement Agreement was enormous by any standard. The firms comprising Class Counsel reported to Lead Class Counsel in excess of 40,000 attorney hours and 60,000 paralegal hours spent prior to the Court's October 27, 2011 Final Approval Order. Since Final Approval, Class Counsel have reported to Lead Class Counsel that they have devoted more than 40,000 additional attorney hours and more than 100,000 additional paralegal hours in assisting Class Members with their claims and otherwise implementing the claims process approved by this Court.[20] As noted above, this work remains ongoing, and therefore these numbers will continue to increase.

J. Class Counsel's Out-of-Pocket Expenses

In addition to the tens of thousands of lawyer and paralegal hours for which Class Counsel have received no compensation to date, Class Counsel have also incurred and advanced substantial out-of-pocket costs over this period of time (including transporting attorneys, paralegals, and support staff to attend claims preparation meetings across the country, renting facilities, operating a call center to answer questions from Class members, and an array of other costs). Two firms in particular, the Law Offices of James Scott Farrin (the "Farrin firm") and Morgan and Morgan, P.A. the "Morgan firm") together have expended and/or incurred payment obligations of several million dollars in support of this litigation. Under the Settlement

[20] Should the Court want more detailed information regarding the hours worked by Class Counsel both leading up to the Court's Final Approval Order and in the implementation of that Order, Class Counsel will provide such information in such form as the Court may direct.

Agreement, Class Counsel will not be able to recoup these considerable costs and expenses until the entire claims process is completed and all claimants are paid.[21]

In light of the enormous effort expended, the risk assumed, and the extraordinary results obtained for the Class in this case, Class Counsel respectfully submit that they have earned the full 7.4% of the Settlement Fee Base requested in this Motion, and request that the Court award attorneys' fees accordingly.

III. ARGUMENT

A. The Court Should Use the "Percentage-of-the-Fund" Method to Determine Fees in This Case.

Unlike in *Pigford* and most other civil rights class actions, there is no statutory basis for an award of attorneys' fees in this case. Thus, the only basis for compensating Class Counsel in this case is by means of a common fund. *See Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1265 (D.C. Cir. 1993) (citing *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161 (1939)). The Common Fund doctrine, which has long been recognized in equity, allows "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client" to recover "a reasonable attorney's fee from the fund as a whole," rather than having all fees borne by the representative plaintiff or his counsel. *Id.* (citing *Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980)). The rationale for this doctrine is that beneficiaries of the fund will be unjustly enriched by the attorneys' efforts unless the costs of litigation are spread among them all. *Boeing Co.*,

[21] The Settlement Agreement provides that Class Counsel will not receive the fees awarded by the Court until after the claims of successful Class Members have been paid. *See* Settlement Agreement § V.E.10. While the Settlement Agreement allowed for a potential interim fee award to Class Counsel of a portion of the $20 million authorized for Interim Implementation Costs, Class Counsel did not request such an interim fee award so that the full $20 million would be available to pay the third parties (*e.g.,* Epiq and JAMS) who were providing services critical to the implementation of the Settlement Agreement.

444 U.S. at 478; *Swedish Hospital Corp*., 1 F.3d at 1265; *Bebchick v. Wash. Metro. Area Transit Comm'n*, 805 F.2d 396, 402 (D.C. Cir. 1986).

The rule in this Circuit, established by the Court of Appeals in the *Swedish Hospital* case and consistently followed since then,[22] is that a percentage-of-the-fund approach, rather than a lodestar approach, is the appropriate method for determining a reasonable attorneys' fee award in common fund cases. *Swedish Hospital*, 1 F.3d at 1271. As the court of appeals explained in *Swedish Hospital,* the common fund and lodestar methods for awarding fees serve different purposes and have different rationales: the common fund method approximates the contingent fee arrangements that compensate attorneys in the market and aligns the interests of the class and counsel in achieving success, while the lodestar method used in fee-shifting cases is meant to ensure that compensation, paid by the opposing party, is available to attorneys who offer private enforcement of certain statutes even where the results obtained are modest or non-monetary. *Swedish Hospital Corp.*, 1 F.3d at 1268-70.

The court of appeals in *Swedish Hospital* further reasoned that using a lodestar approach in common fund cases is undesirable because it fails to align class counsel's interest with that of the class; encourages inefficiency (as class counsel may be incentivized to prolong litigation and bloat their hours with the understanding that their reported hours would not be challenged in a

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[22] *See, e.g., Democratic Cent. Committee of Dist. of Columbia v. Washington Metropolitan Area Transit Com'n,* 3 F.3d 1568 (D.C. Cir. 1993); *Trombly v. Nat'l City Bank*, 826 F. Supp. 2d 179 (D.D.C. 2011); *Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73 (D.D.C. 2011); *In re Dept. of Veterans Affairs (VA) Data Theft Litig.*, 653 F. Supp. 2d 58 (D.D.C. 2009); *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1 (D.D.C. 2008); *Vista Healthplan, Inc. v. Warner Holdings Co. III, Ltd.*, 246 F.R.D. 349 (D.D.C. 2007); *Cohen v. Chilcott*, 522 F. Supp. 2d 105 (D.D.C. 2007); *Freeport Partners, L.L.C. v. Allbritton*, Civ. No. 04-2030(GK), 2006 WL 627140 (D.D.C. March 13, 2006); *Fresh Kist Produce, L.L.C. v. Choi Corp., Inc.*, 362 F. Supp. 2d 118 (D.D.C. 2005); *In re Lorazepam & Clorazepate Antitrust Litig.*, MDL No. 1290, 2003 WL 22037741 (D.D.C. June 16, 2003); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369 (D.D.C. 2002); *In re First Databank Antitrust Litig.*, 209 F. Supp. 2d 96 (D.D.C. 2002); *In re Newbridge Networks Sec. Litig.*, Civ. No. 94-1678-LFO, 1998 WL 765724 (D.D.C. Oct. 23, 1998).

truly adversarial context); and imposes greater demands on scarce judicial resources. *Id.* at 1268-69. By contrast, use of the percentage-of-the-fund approach in common fund cases more accurately reflects the economics of law practice, leads to better use of scarce judicial resources, and avoids substantial delay in making fee awards. *Id.* at 1268-70.

Finally, the court of appeals noted that a percentage-of-the-fund approach is less subjective than the lodestar approach, stating that "under the [percentage-of-the-fund approach], the court need not second-guess the judgment of counsel as to whether a task was reasonably undertaken or hours devoted to it reasonably expended." *Id.* at 1270; *see also Democratic Cent. Comm. of Dist. of Columbia*, 3 F.3d at 1573 (noting that the percentage of the fund method was the best way to achieve the goals in common fund cases of fair and reasonable compensation, predictability, simplification, the discouragement of abuses, and fairness to the parties). Under the law of this Circuit, therefore, the percentage-of-the-fund approach is the appropriate method for setting the attorneys' fees in this action.

The percentage-of-the fund approach in this case is also consistent with the Parties' intent, as reflected in the Settlement Agreement. In the Settlement Agreement, the Parties agreed that "Class Counsel shall be paid Common Benefit Fees for their reasonable and compensable work on behalf of the Class" and that that amount "shall be at least 4.1% and not more than 7.4% of the Fee Base." Settlement Agreement §§ X.B and E. Thus, a percentage-of-the-fund method in this case is warranted both by the Parties' Agreement and by the governing law of this Circuit.

B. A Fee Award of 7.4% Is Reasonable and Justified Under the Percentage-of-the-Fund Method in Light of the Efforts and Risks Undertaken by Class Counsel and the Results Achieved in this Case.

When determining the appropriate percentage for an award of attorneys' fees in a percentage-of-the-fund case, courts have a duty to ensure that the overall fee award is reasonable. *Swedish Hospital*, 1 F.3d at 1265. In assessing the reasonableness of a fee request, the courts in

this Circuit have generally considered the following factors: (1) the size of the fund created and the number of persons benefitted; (2) the skill and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risk of nonpayment; (5) the amount of time devoted to the case by plaintiffs' counsel; (6) the awards in similar cases; and (7) the presence or absence of substantial objections by members of the class to the settlement terms and/or to the attorneys' fees requested. *See, e.g., Trombly*, 826 F. Supp. 2d at 204; *Wells*, 557 F. Supp. 2d at 6-7; *In re Lorazepam*, 2003 WL 22037741, at *8 (citing *Gunter*, 223 F.3d at 195 n.1); *In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d 14, 17 (D.D.C. 2003). A review of these factors demonstrates that the 7.4% fee award Class Counsel seeks in this case is reasonable, appropriate, and warranted.

1. Class Counsel Have Obtained Substantial Benefits for the Class.

As this Court has recognized, the terms of the Settlement Agreement negotiated by Class Counsel provide "enormous benefits to the [C]lass." *In re Black Farmers Discrimination Litig.*, 2011 U.S. Dist. LEXIS 124471, at *103. These benefits were the direct result of the intense and sustained efforts of Class Counsel in this action over the duration of the case and of Class Counsel's effective advocacy that, together with the efforts of others, led to the $1.15 billion in additional funding for this Settlement provided by the Claims Resolution Act. The terms of the Settlement Agreement therefore confer exceptional benefits on the class and manifestly justify the fee award requested in this case.

First, because the Settlement Agreement establishes a non-judicial claims process for determining the validity of claims of Class Members, the Agreement enables successful Class Members to receive their awards far more quickly than if their claims were required to be individually adjudicated by this Court, as would have been the case absent the Settlement. Indeed, but for the establishment of the non-judicial claims process, each Class Member would

have been required to litigate his/her individual claim before a judicial officer under the formalities imposed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Even if this Court somehow could have found sufficient judicial resources to adjudicate the individual claims of the tens of thousands of Class Members, there can be no doubt that the process would have taken years to complete. Thus, the relative speed of the claims resolution process established by the Settlement Agreement provides a very important benefit for the Class. The importance of this benefit is particularly significant because so many of the Class Members are in the late stages of life.

Second, the Settlement Agreement significantly reduces the evidentiary burden for Class Members, as compared with the evidentiary burden they would have confronted in the absence of the Settlement Agreement. For example, while Section 14012 requires a claimant to demonstrate that a specific similarly situated white farmer had been given preferential treatment by the USDA, under the Settlement Agreement negotiated by Class Counsel, Class Members need not adduce "similarly situated white farmer" evidence in order to prevail on a Track A claim. As the Court knows, the "similarly situated white farmer" requirement presented a significant hurdle to claimants in *Pigford* and resulted in many members of the *Pigford* class being denied an award.

Class Counsel also were able to obtain, through the Settlement Agreement, the agreement of the USDA to hold off foreclosures on any loans that form the basis of the Class Members' claims during the time Class Members' claims are under review in the claims process. Settlement Agreement, § VI. Under Section 14012(g) of the Farm Bill, and absent the Settlement Agreement, USDA would have been required to postpone foreclosures on loans *only* if the claimant could make "a prima facie case in an appropriate administrative proceeding that

the acceleration or foreclosure is related to a *Pigford* claim." Under the Settlement Agreement negotiated by Class Counsel this forbearance happens automatically, without claimants having to seek foreclosure-relief in an administrative proceeding.

Beyond the substantive terms of the Settlement Agreement, the very achievement of the Settlement Agreement was critical to the 2010 appropriation by Congress of the additional $1.15 billion for the payment of claims under Section 14012. The role of the Settlement Agreement as a precondition to additional funding is made clear by the Claims Resolution Act, which expressly provided that the additional monies appropriated were conditioned upon Court approval of the Settlement Agreement in this case. CRA §§ 201(a), (b). Moreover, Section 201(c) of the CRA provides that use of the additional funds "shall be subject to the express terms of the Settlement Agreement." Thus, *but for* the Settlement Agreement negotiated by Class Counsel, it is likely that only the $100 million appropriated in the 2008 Farm Bill would now be available to pay Class Members' claims. *See In re Black Farmers Discrimination Litig.*, 2011 U.S. Dist. LEXIS 124471, at *102 ("As the Claims Resolution Act's specific references to the settlement agreement make clear, the execution of an agreement between class counsel and defendant's counsel was a necessary catalyst leading to the appropriation of a great deal of additional funding for this litigation."). In other words, but for Class Counsel's successful negotiation of the Settlement Agreement, the funds available to compensate Class Members for the discrimination they suffered likely would be less than 10% of the $1.25 billion that now constitutes the Settlement Fund. Put another way, the additional funding provided by Congress as a result of Class Counsel's successful negotiation of the Settlement Agreement will make it possible for more than ten (10) times as many Class Members to receive the full amount of the remedy established by Section 14012. *Id.* ("In the absence of the services of class counsel, the members

of the plaintiffs' class would not be in a position to divide up $1.25 billion (less implementation costs); they would be engaged in a chaotic struggle to win a portion of the $100 million appropriated by the 2008 Farm Bill before those funds ran out.").

Beyond successfully negotiating the Settlement Agreement that was the predicate for the $1.15 billion in additional Congressional funding, Class Counsel also played an active role in advocating to Congress regarding the significance of the Settlement and the need for Congress to provide the additional funding made available under the CRA. Specifically, Class Counsel engaged in numerous meetings with both House and Senate staff throughout the period following the execution of the February 18, 2010 Settlement Agreement, particularly in the weeks leading up to the passage of the CRA. Class Counsel also played an active role in developing statutory language that ultimately was included in the CRA.

In all, the Settlement negotiated by Class Counsel and the funds Class Counsel helped secure to effectuate the Settlement provide Class Members with an array of substantial benefits that will enable Class Members with meritorious Section 14012 claims to obtain relief much more quickly, and to do so with a significantly reduced evidentiary burden and a far greater chance at meaningful recovery on meritorious claims. These substantial benefits fully support Class Counsel's request for a fee of 7.4% of the Settlement Fund Fee Base.

2. Class Counsel Have Demonstrated Considerable Skill and Efficiency.

As this Court has noted, this case [i]nvolve[d] a wide range of complicating factors [beyond what is typically seen in a civil rights case]. *In re Black Farmers Discrimination Litig.*, 2011 U.S. Dist. LEXIS 124471, at *107. These factors include "an enormous, geographically dispersed plaintiffs' class numbering in the tens of thousands; a multitude of individual claims predicated at least in part upon unique facts and upon events that may have occurred as much as 30 years ago; an authorizing statute never interpreted by a court; a dizzying array of relevant

statutory and regulatory provisions affecting the validity of claims as to both liability and damages; a large number of potential class members who are highly suspicious of both attorneys and the government; and intense scrutiny by Congress, the executive branch, and the press." *Id.* To meet these challenges, navigate these obstacles, and manage this complex process has required considerable skill and efficiency from a team of Class Counsel possessing diverse backgrounds and skill sets.

First, the Court appointed as Lead Class Counsel three highly experienced attorneys: Andrew H. Marks of Crowell & Moring LLP in Washington, D.C., Henry Sanders of Chestnut, Sanders, Sanders, Pettaway & Campbell, L.L.C. in Selma, Alabama; and Gregorio A. Francis of Morgan & Morgan, P.A. in Orlando, Florida. These lead counsel combine considerable experience in class actions and large case management, as well as, in the case of Mr. Sanders, invaluable experience from his work in the *Pigford* case.

In addition to Lead Class Counsel, the Court appointed as Class Counsel a number of other attorneys who have significant experience with national class actions and/or significant trial experience and who have been able to advocate effectively for Class Members in the claims process contemplated by the Settlement Agreement. Included among this group are four additional counsel, David J. Frantz, Phillip A. Fraas, Faya Rose Toure (Sanders), and Anurag Varma, who were extensively involved in *Pigford* and who have brought to the present case both considerable knowledge of USDA farm loan programs and their institutional knowledge of the *Pigford* case.

Without the experience and expertise of Class Counsel, Plaintiffs would not be in the favorable position that they are today. The institutional knowledge of the *Pigford* case held by several of Class Counsel was necessary for Counsel to be able to understand the unique issues

presented in this case, to identify potential pitfalls, and to develop strategies to resolve those issues in light of the lessons learned from *Pigford*. Andrew H. Marks, Laurel Pyke Malson, and other lawyers with Crowell & Moring have provided significant experience litigating with the Department of Justice, knowledge regarding this Court and its procedures, and the legal acumen to tackle many of the complex legal and ethical issues presented by this case. Mr. Marks, Ms. Malson, and J. Andrew Meyer of Morgan & Morgan, P.A. have also brought to bear extensive appellate experience, particularly within the D.C. Circuit, which was used in successfully defending against three appeals of the Final Approval Order. In addition, having experienced class action specialists as a part of the group has ensured that Class Members have had full knowledge and protection of their rights under of Federal Rule of Civil Procedure 23, and made sure that a process is in place to ensure that the funds allocated to pay Section 14012 claims will be distributed fairly.

The Law Offices of James Scott Farrin has provided significant sophistication and expertise in designing, implementing, and ensuring the proper execution of the claims assistance process that has served so many Class Members throughout the nation in locations within a reasonable distance of where they live.[23] The Farrin firm has been instrumental in developing procedures and training support personnel to handle the enormous volume of work required during the claims assistance process in an efficient and fair manner. In addition, the Farrin firm has been largely responsible for communicating with the tens of thousands of Class Members and others seeking information about the status of the case, the Settlement, Congressional

[23] Eric J. Sanchez with the Farrin firm analyzed the longitude and latitude of the claimants' residential zip codes and imported this data into a database that he programmed from scratch. From this database, he was able to develop a comprehensive meeting schedule that was adjusted throughout the claims process based on information received from the Claims Administrator. This database also allowed for detailed reporting by Class Counsel to the Court and the Ombudsman on the progress and effectiveness of the claims process.

funding, and the claims process, as well as assisting many individual claimants. Finally, as noted above, Class Counsel's advocacy skills also played a significant role in generating the additional $1.15 billion in settlement funding provided by the Claims Resolution Act.

In short, without the experience and expertise of all of the Class Counsel firms working together on the various facets of this case, Class Members would not be in the position to finally receive the adjudication of their *Pigford* claims that they have sought for so long. Moreover, a high degree of coordination and cooperation among the various firms appointed as Class Counsel was required to plan and implement such a large claims assistance process. Such coordination and cooperation is a testament to the skill and professionalism of Class Counsel. This factor, therefore, also supports the request for a 7.4% fee award in this case.

3. The Complexity and Duration of this Case Support Class Counsel's Fee Request.

The approval by the Court of the Settlement was the culmination of nearly three years of litigation and intensive negotiations between the Parties, and many more years of advocacy to Congress and the Executive Branch by some of the lawyers who are Class Counsel, and by black farmer organizations and others. The complexity of the Settlement Agreement that was reached demonstrates the skill level required by counsel to establish terms that would ensure that the claims of the Class Members are resolved fairly, efficiently, and with integrity.

For the better part of two years, counsel for the Plaintiffs in the array of cases consolidated by this Court in *In re Black Farmers Discrimination Litigation* vigorously pursued the claims of the tens of thousands of their individual clients who had retained them to pursue claims under Section 14012. These efforts included extensive briefing on class certification, coordination of case management, and intensive, arms-length settlement negotiations. Over the course of this extended period, the Parties exchanged 20 or more comprehensive settlement

drafts, held numerous face-to-face negotiation sessions, and participated in many more conference calls to hammer out the terms of the initial Settlement Agreement that was executed by the Parties on February 18, 2010. These negotiations were carried out by experienced, capable counsel, including more than 20 law firms on the Plaintiffs' side and a highly experienced team of Department of Justice and USDA lawyers on the other side.

Even after the parties reached that initial Settlement Agreement, Class Counsel were required to continue to negotiate changes to the Agreement, first in response to suggestions from the Court, and second in response to requirements imposed by Congress in the Claims Resolution Act. These additional negotiations, which resulted in a number of significant changes to the Settlement Agreement, also required a high level of skill by Class Counsel in order to accommodate new requirements into the existing structure of the Agreement.

In addition, as noted earlier, following execution of the initial version of the Settlement Agreement on February 18, 2010, Class Counsel turned their efforts toward advocating for Congress to satisfy the funding contingency of the Settlement, and helped secure $1.15 billion in additional funding to afford meaningful relief for *Pigford* claimants with meritorious claims.

Class Counsel also devoted substantial efforts to developing a claims assistance process that was able to fairly and efficiently provide claims assistance to more than 25,000 Class Members (and had the capacity to handle thousands more) and ensure that the claims of these Class Members were processed and submitted within the 180-day Claims Period established by the Court. To meet this challenge, Class Counsel were required to assemble a large team of lawyers, paralegals, and administrative staff to assist claimants in preparing and submitting claims. It required considerable skill to marshal these resources and develop practices and

procedures in order to implement a fair and efficient claims process that also addressed the claim integrity issues raised by Congress in the CRA.

The geographic dispersion of potential claimants across the United States also added considerable complexity to the task Class Counsel faced in the claims assistance process. Initial client outreach and case screening in this case required substantial time and expense by Class Counsel because claimants are located in dozens of states and in hundreds of communities throughout these states. Ongoing communications with clients and claimants during the litigation and settlement phases of the case were also more difficult because of this fact. This geographic dispersion of Class Members posed significant challenges to Class Counsel throughout the Claim Period. In order to provide the tens of thousands of Class Members around the country with a reasonable opportunity to obtain in-person claim assistance from Class Counsel, Class Counsel conducted more than 380 group meetings in 66 cities across 23 states and the District of Columbia. *See* https://www.blackfarmercase.com//Meetings.aspx (last visited Sept. 24, 2012) (containing a full list of meetings held and their locations). To schedule all of these meetings during the 180-day Claim Period, Class Counsel often conducted group meetings simultaneously in multiple locations. The logistics involved in coordinating and staffing these planned meetings presented enormous challenges. Only through Class Counsel's expertise and efficiency were they able to meet this challenge.

Moreover, the USDA farm loan programs that underlie Class Members' discrimination claims are complicated. Class Counsel needed significant expertise in this area in order to effectively and efficiently advise Class Members of their rights, and to assist them in preparing tens of thousands of Claim Forms. This expertise was particularly necessary for Class Counsel in light of Congress's requirement that attorneys submitting a claim under the Settlement sign

that Claim Form under penalty of perjury attesting that to the best of counsel's knowledge, information, and belief, the claim is "supported by existing law and the factual contentions have evidentiary support." CRA § 201(g)(5). To help ensure that all lawyers involved in the claims preparation process had the necessary expertise, Class Counsel conducted training sessions for all of the lawyers and paralegals participating in the claims review and submission process to educate them about, among other things, the USDA farm loan programs that are at issue in this case. The complexity of this case therefore manifestly supports the 7.4% fee award requested.

The duration of this case further supports the fee requested by Class Counsel in this case. Class Counsel have reported more than 80,000 attorney hours and more than 160,000 paralegal hours over a period of more than five years in litigating these cases and implementing the Claims Process. As noted above, Class Counsel have also expended and/or incurred obligations of millions of dollars in support of these efforts, with no compensation to date for any of this work or any reimbursement of any of these costs and expenses. Indeed, Class Counsel will not receive any compensation at all until the entire claims process is completed and all successful Class Members receive their awards. *See* Settlement Agreement § V.E.10.

4. Class Counsel Have Faced a Significant Risk of Non-Payment.

As this Court recognized in its Final Approval Opinion, "[w]hen they became involved in this litigation, class counsel . . . assumed a substantial risk that their efforts would never yield much in the way of fees." *In re Black Farmers Discrimination Litig.*, 2011 U.S. Dist. LEXIS 124471, at *109. When the various lawyers who are now Class Counsel first accepted clients with Section 14012 claims, they did so under traditional contingency fee contracts that would have provided compensation to the attorneys only in the event of a successful recovery.

A recovery in any particular case was far from guaranteed at that time, however, as several significant obstacles potentially stood in the way of success. First, most lawyers retained

by individual claimants could not be certain whether, at the end of the day, such claimants would qualify as a "*Pigford* claimant" under Section 14012. Thus, the filing lawyer faced a significant risk that any work performed on behalf of a particular claimant would be uncompensated. Next, without the Settlement Agreement, each individual claimant likely would be required by Section 14012 to present "similarly situated white farmer" evidence. While Section 14012, as originally enacted, required the USDA to provide such information to the claimant, there was no guarantee that the USDA had retained such information so that it could be made available, and no guarantee even if such information were available that it would establish a valid claim. Other evidentiary difficulties made recovery for the lawyers uncertain, as well. For instance, the USDA often did not retain information regarding loan denials prior to 1999, thereby potentially requiring claimants to rely upon the testimony of witnesses who might now be deceased or unable to remember the events of so long ago. In light of these difficulties, there was significant risk to counsel in any individual case that the claimant would be unsuccessful on the merits and that counsel therefore would receive no compensation for their work on behalf of such claimants.

Even if counsel had been able to present a meritorious case on behalf of an individual claimant, in the absence of the Settlement Agreement there was significant risk that there would not be sufficient funds available to pay the claimant and hence to pay counsel. As discussed above, at the time Class Counsel filed these cases, Congress had appropriated only $100 million to fund the payment of all successful Section 14012 claims. This $100 million fund would have been woefully inadequate to pay all expected claims and thus presented the significant risk that either all successful claimants would receive only a small award, or that thousands of successful claimants would receive no award at all. Accordingly, prior to Class Counsel's work in negotiating the settlement and advocating to Congress for additional funding, there was

significant risk to counsel that there would be little or no money available from the initial $100 million fund to pay any recovery to a particular claimant or to that claimant's lawyer. As this Court noted in its Final Approval Opinion:

> There has never been any guarantee that Congress would appropriate additional funding for the adjudication and payment of Section 14012 claims. . . . If available funding had remained capped at $100 million, the more than forty attorneys now acting as class counsel would have been left to scramble for any fees that could be eked out of a fund vastly insufficient to pay all claims against it, and the payment of any fees that were forthcoming may have been delayed for years. This litigation was no sure bet for plaintiffs' lawyers.

In re Black Farmers Discrimination Litig., 2011 U.S. Dist. LEXIS 124471, at *109-110.

Absent settlement, Class Counsel also faced the considerable risk that the Court may have denied Plaintiffs' motion to certify a class and required individual litigation of each claim. Indeed, in several other cases alleging discrimination by USDA brought by other protected classes, the courts involved have refused to certify a class. *See, e.g.*, *Love v. Veneman*, 224 F.R.D. 240 (D.D.C. 2004), *aff'd sub nom Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006) (denying class certification for women farmers); *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004), *aff'd sub nom Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006) (denying class certification for Hispanic farmers). In the absence of class certification, any particular claimant would have faced substantial risk of non-recovery for the reasons discussed above, and that claimant's lawyer, therefore, would have faced a corollary risk.

Finally, even after entry into the Settlement Agreement, Class Counsel faced the risk that the Court would not approve the Settlement Agreement, or that an approval by this Court might be overturned on appeal. Indeed, before preliminary approval of the Settlement by the Court, Class Counsel had to make modifications to the Settlement to assure the Court that the Settlement was fair, reasonable, and adequate, and that sufficient safeguards were in place to

protect Class Members during the non-judicial claims process. *See* Docket Nos. 170, 171. Before final approval, Class Counsel also needed to address and allay any concerns of the Court regarding an array of objections submitted for consideration at the Fairness Hearing. *See* Docket No. 191. Since final approval, Class Counsel have had to defend and successfully obtain the dismissal of three appeals of the Final Approval Order before the D.C. Circuit. *See* D.C. Circuit Case Nos. 11-5326, 11-5334, and 12-5019.

In short, Class Counsel have faced a significant threat of non-payment throughout this case, and yet have persevered and devoted tens of thousands of hours and expended millions of dollars to obtain for the Class a demonstrably beneficial outcome. This factor, too, favors awarding attorney's fees equal to 7.4% of the Settlement Fund Fee Base.

5. The Objections to the Settlement Have Been Minimal.

In light of the tens of thousands of potential claimants who were mailed Claim Forms by the Claims Administrator in this case, the complexity of the Settlement Agreement, and the amount of money involved, the fact that only 25 "objections" to the Settlement were filed confirms that Class Counsel have obtained a substantial benefit for the Class.[24] The fact that Class Counsel received fewer than 25 individual responses to their Motion for Preliminary Approval of the Settlement Agreement (counting collectively the Thedford Rowser-Bey form letters discussed in Docket No. 191, at 5 n.14) – only a handful of which contain actual objections – from a putative class of more than 60,000 black farmers is a strong indication that the Class is strongly supportive of the Settlement Agreement. *See In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 (E.D. Mich. 2003) ("That the overwhelming majority of Class Members have elected to remain in the Settlement Class, without objection, constitutes the

[24] Indeed, at least 11 of these "objections" were not really objections at all but rather were either requests to participate in the Fairness Hearing or requests to participate in the claims process., *See* Plaintiffs' Response to Objections to the Settlement, Docket No. 191, at 6.

'reaction of the class,' as a whole . . . ."). This support and validation of Class Counsel's efforts provides additional support for a fee award of 7.4% of the Settlement Fund Fee Base for Class Counsel in this case.

6. Class Counsel Are Committed to Devoting Significantly More Time and Effort in the Implementation of the Settlement for as Long as the Process Takes.

Although Class Counsel already have reported more than 80,000 attorney hours and 160,000 paralegal hours worked on this case already, Class Counsel's efforts on behalf of the Class are not over. Even in the last several weeks, Class Counsel prepared and filed a motion to modify the Court's Final Approval Order to permit limited categories of claimants with exceptional circumstances, who would have otherwise been denied the opportunity, to participate in the claims process (Docket No. 300). Now that the Court has granted that motion (Docket No. 304), Class Counsel are providing claims assistance to the additional Class Members whom the Court has allowed to file and/or supplement their previously-filed claims. Class Counsel are also actively engaged with the GAO and the USDA Office of the Inspector General to ensure they have the materials and information they need to fulfill their reporting and auditing obligations under Section 201(h) of the Claims Resolution Act. Class Counsel also continue to work with the Claims Administrator to keep Section 14012 claimants apprised of progress in the case, and they continue to engage with the Ombudsman to ensure that the adjudication process is proceeding fairly and efficiently. Finally, Class Counsel are working to support the payment process that will come shortly for meritorious claimants, including preparing a request for proposal and evaluating submissions received for designated banks, coordinating with the Claims Administrator on the logistics of payment, and ensuring that sufficient communications mechanisms are in place so that claimants understand the claim determinations they will be receiving. Class Counsel recognize that the Settlement Agreement, while an historic

achievement, is not an ultimate success until meritorious claimants receive the compensation they are owed on their claims, and Class Counsel are committed to devoting whatever additional time and effort is necessary going forward to bring the claims and payment process to a successful conclusion.

7. The Award Sought in this Case Is Reasonable When Compared to Fee Awards in Similar Cases.

The 7.4% fee award Class Counsel seek in this case is demonstrably reasonable and, in fact, falls below the range typically awarded in common fund cases. The majority of fee awards in common fund cases in the D.C. Circuit, as well as nationally, fall within a 20% to 30% range, with 25% often used as a benchmark. *See Swedish Hospital Corp.*, 1 F.3d at 1263, 1272 (affirming an award of 20% of the common fund and noting that "a majority of common fund class action fee awards fall between twenty and thirty percent"); *In re Dep't of Veterans Affairs (VA) Data Theft Litig.*, 653 F. Supp. 2d at 61 ("[t]he majority of fee awards nationally appear to fall in a range of 20 percent to 30 percent of the common fund"); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-1048, 1050 n.4 (9th Cir. 2002) (summarizing fees awarded in 34 common fund settlements from 1996-2001 and noting that the benchmark award in the Ninth Circuit is 25%); 4 Alba Conte and Herbert Newberg, *Newberg on Class Actions* § 14.6 at 568 (4th ed. 2002) (noting that many courts apply a benchmark of 25% of the award); *see also Trombly*, 826 F. Supp. 2d at 204-07 (25% fee award); *Radosti*, 760 F. Supp. 2d at 78-79 (33% fee award); *In re Lorazepam*, 2003 WL 22037741, at *7-8 (30% fee award); *In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d at 17-21 (28% fee award); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1080-81, 1086 (S.D. Tex. 2012) (20% fee award); *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 461, 464 (D.P.R. 2011) (23% fee award). Indeed, the Court in one case in this Circuit awarded fees of 45% of the common fund.

See Wells, 557 F. Supp. 2d at 6-8. In view of these typical benchmarks, Class Counsel's request of an award totaling 7.4% of the Settlement Fund Fee Base is manifestly reasonable.

While the courts in some larger recovery cases have awarded common fund fees below the 20-30% range, even in these so-called "mega-fund" cases the fees awarded are commonly in the range of 15% or more. *See In re Lorazepam*, 2003 WL 22037741, at *7 (citing *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 989 (E.D. Tex. 2000) (surveying cases)); *see also Silverman v. Motorola, Inc.*, No. 07-C-4507, 2012 WL 1597388, at *4 (N.D. Ill. May 7, 2012) (27.5% fee award from settlement fund of $200 million); *In re Lease Oil Antitrust Litig.,* 186 F.R.D. 403, 443-448 (S.D. Tex. 1999) (25% fee award from fund of more than $190 million)*; In re NASDAQ Market-Makers Antitrust Litig*., 187 F.R.D. 465, 470 (S.D.N.Y. 1998) (14% fee award from fund of $1 billion); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1136-40 (W.D. La. 1997) (36% fee award from fund of $127 million); *In re Enron Corp. Sec., Derivative, and ERISA Litig.*, 586 F. Supp. 2d 732, 740, 828 (S.D. Tex. 2008) (approving award equal to 9.52% of $7.2 billion fund).

It is also noteworthy that the 7.4% fee Class Counsel are requesting in this case is less than the 8% percentage fee awarded to Class Counsel by Judge Sullivan last year in *Keepseagle v. Vilsack*, Case No. 99-cv-3119, which involved a settlement fund of $760 million dollars, and a claims process which resulted in approximately 3,700 claims filed by Class Counsel, as compared to the more than 13,000 claims filed by Class Counsel here. As this Court is aware, *Keepseagle* involved discrimination claims by Native American farmers much like the discrimination claims asserted by black farmers in the current case. Indeed, the *Keepseagle* settlement agreement approved by Judge Sullivan was modeled on the Settlement Agreement

now before the Court in this case. The similarity of *Keepseagle* to the current case makes the 8% fee percentage awarded in that case particularly relevant here.

8. The Award Sought in this Case Is Also Reasonable When Cross-Checked Against Lodestar.

While *Swedish Hospital* makes clear that this Court need not and should not engage in a traditional lodestar analysis when determining a reasonable fee in this case, a lodestar "cross-check" confirms that a 7.4% fee award is wholly reasonable and appropriate in this case. Class Counsel's fee request is for 7.4% of the Settlement Fund Fee Base (see n.4, *supra*). This translates to a fee request of approximately $90 million. As noted above, Class Counsel have already reported more than 80,000 attorney hours and more than 160,000 paralegal hours in connection with the cases that are the subject of the Settlement Agreement. If the Court were to apply rates from the "Laffey Matrix" to the hours of work *already* performed by Class Counsel, the result would be a lodestar of approximately $50 million. Thus, an award of 7.4% of the Settlement Fund in this case would equate to a multiplier of less than 2 times the total lodestar Class Counsel *already* have devoted to this case. Moreover, this multiplier does not take into account the millions of dollars of expenditures that Class Counsel have made both before and during the Claims Process.

The 7.4% fee request in this case is wholly reasonable in light of this lodestar multiplier analysis. Fees awarded pursuant to the common fund doctrine frequently represent multiples of up to 4 times the lodestar. *See In re Lorazepam*, 2003 WL 22037741, at *9 (observing that "multiples ranging up to four are frequently awarded in common fund cases") (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 341 (3d Cir. 1998)); *Wal-Mart Stores, Inc. v. VISA USA, Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (noting that "multipliers of between 3 and 4.5 have become common" and approving a multiplier of 3.5 in mega-fund case)

(quotation marks omitted) (citing *In re NASDAQ*, 187 F.R.D. at 489); *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1051 & n.6 (9th Cir. 2002) (approving a multiplier of 3.65 and noting that it fell within the typical range in common fund cases). Indeed, in *Swedish Hospital*, the D.C. Circuit approved a fee award equating to a 3.2 lodestar multiplier, substantially greater than the lodestar multiplier of less than 2 that a 7.4% fee would represent in this case. *See Swedish Hospital Corp.*, 1 F.3d at 1263, 1272. Other courts have approved significantly higher multipliers in cases that resulted in recoveries similar to that obtained here. *See, e.g.*, *In re UnitedHealth Group Inc. PLSRA Litig.*, 643 F. Supp. 2d 1094, 1106 (D. Minn. 2009) (approving multiplier of 6.5 times lodestar in mega-fund settlement of $925 million); *In re Enron Corp. Sec. Litig.*, 586 F. Supp. 2d 732, 791-803 (S.D. Tex. 2008) (approving multiplier of 5.2 times lodestar in mega-fund settlement of $7.2 billion); *In re Cardinal Health, Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (awarding multiplier of 6 times lodestar in mega-fund settlement of $600 million); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 358-359 (S.D.N.Y. 2005) (approving multiplier of 4 times lodestar in $6.1 billion mega-fund settlement); *In re NASDAQ*, 187 F.R.D. at 488-89 (S.D.N.Y. 1998) (approving lodestar multiple of 3.97 in mega-fund settlement of $1.027 billion).

A multiplier of approximately 2 in this case, therefore, falls well within – actually, significantly below – the typical range of such awards. Accordingly, when the lodestar approach is considered as a "check" on the percentage award sought herein, the reasonable multiplier that a 7.4% fee would represent, as demonstrated by the multipliers approved in other cases, further confirms the reasonableness of the fees sought by Class Counsel.

C. A 7.4% Award Is More Favorable for Class Members Than the Rate Successful Claimants Would Have Been Obligated to Pay Under the Retention Agreements They Executed and Signed With Their Individual Counsel.

In adopting a percentage-of-the-fund analysis for common fund cases, the D.C. Circuit reasoned that such a method "more accurately reflects the economics of litigation practice." *Swedish Hospital*, 1 F.3d at 1269. The court further noted that "'[p]laintiffs' litigation practice, given the uncertainties and hazards of litigation, must necessarily be result-oriented. It matters little to the class how much the attorney spends in time or money to reach a successful result.'" *Id.* (quoting *Howes v. Atkins*, 668 F. Supp. 1021, 1025 (E.D. Ky. 1987)). The court also noted Seventh Circuit Judge Posner's assessment that a percentage-of-the-fund approach most closely approximates the manner in which attorneys are compensated in the marketplace for these kinds of cases. *Id.* As Judge Posner reasoned:

> The judicial task might be simplified if the judge and the lawyers spent their efforts on finding out what the market in fact pays not for individual hours but for the ensemble of services rendered in a case of this character . . . . The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis with a similar outcome.

Matter of Continental Illinois Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992).

The instant case is unusual in that the Court has direct evidence of the "market" price for counsel's services in a case of this nature. That is because, in contrast to most class action cases, we know that soon after Section 14012 was enacted into law, tens of thousands of individuals signed retention agreements with various counsel which provided for the attorneys to be compensated for their work at a 33% contingency rate. Later, at the urging of this Court, all of the lawyers who have now been appointed as Class Counsel agreed to accept a lowered percentage of 20%. Based on the 20% rate urged by the Court, it is clear that the 7.4% fee that

Class Counsel are seeking is far more favorable for Class Members than any contingency rate they could have bargained for outside the context of this Settlement.

D. The Award of Fees to Class Counsel Should Be Directed to Lead Class Counsel to Allocate Among All Class Counsel in Accordance With the Terms of the Counsel Participation Agreement.

Class Counsel ask the Court to direct that the fees approved by this Court as part of a Common Benefit Fund be directed to the three Lead Class Counsel. As noted above, with two exceptions, the lawyers and law firms comprising Class Counsel have entered the detailed Counsel Participation Agreement that is attached hereto as Exhibit A.[25]

The Participation Agreement provides that any fees awarded by the Court to these firms for their work in connection with this case will be administered by Lead Class Counsel according to the terms of the Participation Agreement. The Agreement also makes Lead Class Counsel responsible for apportioning the claims preparation and submission work among all Class Counsel, and provides that the fees to be paid to each Class Counsel should be in close proportion to the overall work effort each Class Counsel will have undertaken for the benefit of the Class. The Participation Agreement also provides a mechanism for Class Counsel to seek reimbursement of certain costs associated with implementing the claims process under the Settlement Agreement for the benefit of the Class. Finally, the Participation Agreement includes a dispute resolution clause that will require any disputes regarding the allocation of fees among Class Counsel to be submitted to binding arbitration.

As Magistrate Judge Facciola noted in *In re Vitamins Antitrust Litigation*, in numerous class actions, courts have "directed lead counsel to apportion the attorneys' fees awards as they deem appropriate, based on their assessments of class counsel's relative contributions." 398 F.

[25] *See supra* n.14 for discussion of Lead Class Counsel's proposal regarding the two firms that have not joined in the Counsel Participation Agreement.

Supp. 2d 209, 224 (D.D.C. 2005) (citations omitted).[26] In adopting this approach, "these courts noted that, because lead counsel had led the cases from their inception, they were 'better able to describe the weight and merit of each [counsel's] contribution.'" *Id.* (quoting *In re Linerboard Antitrust Litig*., MDL No. 1261, 2004 WL 1221350, at *18 (E.D. Pa. June 2, 2004)). Such an approach makes sense "from the standpoint of judicial economy" "because it relieves the [c]ourt of the 'difficult task of assessing counsel's relative contributions.'" *In re Linerboard Antitrust Litig*., 2004 WL 1221350, at *18 (quoting *In re Prudential*, 148 F.3d at 329 n.96).

The Participation Agreement represents an agreement among Class Counsel that includes the relative amount of work and risk each Class Counsel firm has taken on.[27] The guiding principle underlying this agreement is that the allocation of fees among counsel will be based on the work that has been performed and that will be performed for the benefit of the Class. The Participation Agreement charges Lead Class Counsel with the responsibility to ensure that work is allocated to the various firms appointed as Class Counsel to correlate with each firm's ultimate share of any fee award. To effectuate this agreement, the Participation Agreement requires all signatory firms to maintain contemporaneous time records and to report periodically their time to Lead Class Counsel so that Lead Class Counsel can ensure each firm is contributing the agreed-upon percentage of work.

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[26] In *In re Vitamins*, Chief Judge Hogan made an overall attorneys' fee award of $123,188,032, but initially did not rule regarding the allocation of the fee award. 398 F. Supp. 2d at 222. Subsequently, Judge Hogan ordered class counsel to "allocate the attorneys' fees award and expense award in a manner which, in the opinion of [class counsel], fairly compensates respective counsel in view of their contributions to the prosecution of Plaintiffs' claims." *Id.*

[27] Following the execution of the Counsel Participation Agreement, as a result of the unique expense burden carried in this case by the Law Offices of James Scott Farrin, the Farrin firm entered into an agreement with the Morgan firm to reallocate 10% of the fee that was to be paid to the Farrin firm to the Morgan firm, in exchange for the Morgan firm's agreement to increase its workload and to assist in the financing of certain costs that the Farrin firm previously had paid during the prosecution of the consolidated cases.

The Participation Agreement also empowers Lead Class Counsel to allocate attorneys' fees to any lawyers or law firms not parties to the Participation Agreement if Lead Class Counsel believes such lawyers or firms have provided services benefiting the class. Again, the guiding principle for the allocation of any fee award to such lawyers or law firms is the amount of work that such lawyer or law firm has provided for the benefit of the Class.

Because the Participation Agreement embodies a fair and appropriate process for the allocation of the fees awarded by the Court, Class Counsel request that this Court approve its provisions and direct any fee award made to Class Counsel generally to Lead Class Counsel for them to distribute in accordance with Class Counsel's fee sharing agreement.

IV. CONCLUSION

For the reasons set forth herein, Class Counsel ask that the Court approve a Fee Award of 7.4% of the Settlement Fund Fee Base. Class Counsel further ask that Common Benefit Fees be directed to Lead Class Counsel for allocation among Class Counsel in accordance with the Counsel Participation Agreement submitted to the Court.

Respectfully submitted,

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