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

REYNALDO REYES,
on behalf of himself and all
others similarly situated,

Plaintiff,

v.

ZIONS FIRST NATIONAL BANK,
NETDEPOSIT, LLC,
MP TECHNOLOGIES d/b/a MODERN
PAYMENTS, TELEDRAFT, INC.,
NATIONAL PENN BANK, WELLS FARGO
BANK, N.A., and WACHOVIA BANK, N.A.,
Defendants.

CIVIL ACTION NO. 10-00345

PLAINTIFF'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES, SERVICE AWARD, AND REIMBURSEMENT OF EXPENSES

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I. INTRODUCTION

Class counsel submits this application in support of an award of $12,500,000 in attorneys' fees, representing one-third of the settlement fund, and $251,553.19 in expenses, as well as approval of a service award for the class representative, Reynaldo Reyes, of $25,000.

The settlement is an extraordinary result for the proposed class. Class members suffered both direct damages—in the form of money taken from their accounts by the telemarketers—and secondary damages—in the form of bank fees incurred as a result of the debits. The settlement fund of $37,500,000 is more than the total direct damages and represents the majority of total damages by any measure.

This case also resulted in important case law that will have significant implications for the banking system as a whole. The Third Circuit ruled that banks should be held responsible if they facilitate mass-marketing fraud and that class certification in such circumstances is appropriate. The decision put banks on notice of the significant liability they face if they fail to safeguard the banking system against telemarketing fraud. As leading banking industry organizations stressed in their amicus briefs to the Third Circuit, a ruling in Plaintiff's favor would result in fundamental change to the American banking system. *See, e.g.*, Motion of RMA to Appear as Amicus Curiae at 5, *Reyes v. Netdeposit, LLC*, 802 F.3d 469 (3d Cir. May 21, 2014) (No. 14-1228).

The settlement exemplifies the deterrent effect of the Circuit's decision. Most of the money generated by the scheme was kept by the telemarketers themselves—and subsequently transferred abroad, rendering recovery from them impossible. The Zions Defendants themselves made less than one million dollars from the scheme, yet they have now agreed to pay more the thirty-seven times that amount to settle the case.

Class counsel worked to achieve these results in the face of great risk—risk exemplified

not only by the District Court's initial denial of class certification, but also by the dismissal and subsequent affirmance of a similar case brought by class counsel in the Sixth Circuit. *See Johnson v. U.S. Nat. Bank Ass'n*, 508 F. App'x 451, 452 (6th Cir. 2012). The Sixth Circuit specifically rejected as "unpersuasive" this Court's decision denying Zions's motion to dismiss. Counsel litigated this case for more than seven years and faced substantial risk of nonpayment throughout.

The percentage applied for—33 1/3—is well within the range of comparable cases and is the same portion awarded by the district courts in each of the RICO class actions cited by the Third Circuit in its decision in this case, *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 475 (3d Cir. 2015). *See Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 150 (E.D. Pa. 2000) ("[T]he award of one-third of the fund for attorneys' fees is consistent with fee awards in a number of recent decisions within this district"); *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 155 (D.N.J. 2013) ("The requested award in this matter is 33% .... This percentage has regularly been found acceptable in common fund settlements in this District."). The settlement here is substantially more favorable than in either of those cases.

II. BACKGROUND

A. The Importance of this Case

In 2009, this Court approved the settlement in a case involving similar allegations against Wachovia Bank. The Court emphasized the powerful public interest vindicated by private class actions in combatting telemarketing fraud. *See* Tr. of Hearing at 77, *Faloney v. Wachovia Bank, N.A.*, No. 07-1455 (E.D. Pa. Jan. 22, 2009) (finding class certification to be "a significant matter of public interest" in addressing "a national scourge of telemarketing fraud").

The *Wachovia* case, which was settled by class counsel in conjunction with the Department of Justice and the Office of the Comptroller of the Currency, generated wide

publicity, including a story on the front page of the business section of the *New York Times*. Charles Duhigg, *Papers Show Wachovia Knew of Thefts*, N.Y. Times, Feb. 6, 2008. In fact, the President of NACHA, the agency that regulates ACH transactions, sent that story to the Zions officer who was the chairman of Zions's payment processing subsidiary, Defendant Modern Payments, because of NACHA's concerns about Zions's relationships with the telemarketers at issue. The leading industry publication reported that the enforcement action against Wachovia was "likely to force banks to step up oversight of telemarketing customers." Cheyenne Hopkins, *Wachovia OCC Order Called Sign of "New Era"*, Am. Banker, April 28, 2008.

That prediction turned out to be premature. Despite its awareness of the *Wachovia* litigation, Zions continued to provide access to the banking system for many of the underlying schemes.[1] By January 2010, when counsel filed this case, it was clear that Zions had engaged in the kind of conduct that should have ceased following *Wachovia*.

The industry's reaction to this case was quite different than the reaction following the revelations of Wachovia's behavior. No action was taken by NACHA or any other regulatory body against Zions. Wachovia's CEO, Kenneth Thompson, was contrite in the wake of that episode. "'I can't make excuses' for that case, the Wachovia chairman, president, and chief executive replied, calling it 'the worst experience of my 32-year career' at Wachovia." Paul Davis, *A Question of Controls at Wachovia*, Am. Banker, Apr. 29, 2008. By contrast, Zions argued throughout this litigation that it should not be held responsible for the same kind of conduct. It argued that its conduct was appropriate and that some of the telemarketers may have been legitimate businesses.

[1] It continued servicing Group One (ultimately shut down by the FTC) and Platinum Benefits Group ("PBG") for over another year; PHS (also shut down by the FTC) through May 2008, and Zazoom through April, 2008, debiting millions of dollars on their behalf.

By the time the case was appealed to the Third Circuit, in fact, the industry's position had hardened. Just five years after the leading publication of the banking industry predicted that the *Wachovia* case was "likely to force banks to step up oversight of telemarketing customers," the largest banking organizations in the United States, the American Bankers Association ("ABA"), the Independent Community Bankers of America ("ICBA"), and the Risk Management Association ("RMA"), argued before the Third Circuit that substantially the same conduct fully comported with American banking standards. The ABA and the ICBA argued to the Circuit that Zions "and its payment processors have complied with appropriate legal and regulatory requirements applicable to merchants utilizing their services." Br. Amicus Curiae of ABA and ICBA, *Reyes v. Netdeposit, LLC*, 802 F.3d 469 (3d Cir. May 21, 2014) (No. 14-1228). The RMA argued that the Defendants exceeded the legal requirements: "Zions conducted thorough and regular reviews and internal audits of defendant Modern Payments and the level of Zions' involvement far exceeded that recommended and contemplated in the FFIEC's BSA/AML Examination Manual." Br. Amicus Curiae of RMA at 14, *Reyes v. Netdeposit, LLC*, 802 F.3d 469 (3d Cir. May 21, 2014) (No. 14-1228)[2]; *accord* ABA/ICBA Br. at 9 ("[T]he Defendants met or exceeded the oversight and due diligence required by the applicable NACHA Operating Rule and Guidelines, and … related anti-money laundering laws and regulations ….").

The position of the banking industry substantially raised the stakes of this litigation. For example, the banking organizations denigrated the use of excessive return rates as evidence of wrongdoing by a bank, notwithstanding that such return rates are, at the very least, widely accepted to be powerful indicia of fraud. This was especially true here, because all of entities

[2] The RMA represented to the Third Circuit that it is "the only association that specializes in promoting effective and prudent risk management practices for institutions of all sizes, across the entire financial services industry." RMA Motion at 2.

with the high rates had been directly or indirectly the subject of government fraud actions.

By defending Zions's conduct in spite of the extensive record amassed by Plaintiff, these significant banking organizations demonstrated the need for exactly the kind of reform against which they argued. Put simply, the main institutions of the banking industry, notwithstanding the lessons of *Wachovia*, were seeking license for *all* banks to ignore clear indicia of fraud while giving fraudulent telemarketers access to the banking system. As the RMA correctly argued, given the industry's position, a favorable outcome for the Plaintiff would have a "substantial impact on the financial services and other industries." RMA Motion at 5.[3]

Moreover, the stakes were high not only with respect to establishing banks' culpability for their relationships with mass-marketing frauds, but also with respect to the ability to pursue fraud claims by class actions more generally. In adopting the sham-enterprise theory advanced by class counsel and applying the preponderance of the evidence standard for class certification to that theory, the Court of Appeals recognized that class actions such as this one could deter repetition of the type of conduct alleged in this case. The Court of Appeals stressed that to adopt the arguments of the banking industry would adopt "[a]n interpretation of Rule 23 that places class actions beyond the reach of consumers who have been victimized by fraudulent schemers who are wise enough to adopt schemes with subtle (but meaningless) variations . . . " *Reyes*, 802 F.3d at 491. It continued:

> Class actions are often the only practical check against the kind of widespread mass-marketing scheme alleged here. … This is particularly true when, as is often the case, the scheme targets unsophisticated consumers with little disposable income and without the means or wherewithal to seek assistance of legal counsel.
>
> …

[3] The recent revelations regarding what was accepted practice at Wells Fargo underscore the importance of assuring that Rule 23 serve as a means of redress for misconduct by banks.

> In such cases, the class action can "create[ ] greater access to judicial relief[.]" *Marcus*, 687 F.3d at 594. "[I]t is[, in fact,] possible to think of consumer class actions as providing an indispensable mechanism for aggregating claims when the individual stake is low and the similarity of the challenged conduct is high." Samuel Issacharoff, *Group Litig. of Consumer Claims: Lessons from the U.S. Experience*, 34 Tex. Int'l L.J. 135, 149 (1999). Thus, class actions have the practical effect of allowing plaintiffs who have suffered relatively *de minimis* loss to nevertheless function as private attorneys general and thereby deter fraud in the marketplace.

Id. at 491-92 (bracketed modifications in original).

The settlement reflects the importance of the Third Circuit's rulings on these issues. Because it is now clear that banks can and will be held liable for facilitating mass-marketing fraud, Plaintiff was able to obtain a settlement that provides an extraordinary level of recovery for class members and that creates a powerful incentive for banks to avoid this conduct in the future.

These results were obtained by class counsel, working alone, over the course of nearly eight years. Counsel brought specialized knowledge of banking and class action law to bear and developed an extensive record, which, together with the Third Circuit's adoption of Plaintiff's theory of liability, made this settlement possible.

B. The Risks Counsel Faced in Prosecuting the Case

The significance of the litigation is matched by the risk faced by counsel. In *Wachovia*, the Court acknowledged the work of the United States Attorney's Office and the Comptroller of the Currency in disclosing conduct that gave rise to what the private suit discovered to be a far larger scheme. Here, no government action revealed bank misconduct.[4] The risks class counsel

[4] Rather, years after the case was initiated, Zions disclosed that the government was investigating conduct disclosed in the *Reyes* action and stated, more recently, that the government had advised it that it would be taking action with regard to that conduct. *See* Zions Bancorporation, Form 10-Q, Aug. 5, 2016, at 49 ("We understand that the Department of Justice desires to pursue claims against us.").

assumed when they initiated this case were much greater than when they initiated the *Wachovia* case. *See* Declaration of Stephen A. Saltzburg ("Saltzburg Decl."), ¶¶22-29. This was borne out by subsequent events:

(a) At the outset, the court dismissed claims against three of the four defendant banks, leaving only claims against the Zions entities and Teledraft. *Reyes v. Zion First Nat'l Bank*, No. 10-345, 2012 WL 947139 (E.D. Pa. Mar. 21, 2012).

(b) Shortly after this Court upheld the claims against Zions, the Sixth Circuit affirmed dismissal of a similar case class counsel had brought against another bank. It found this Court's decision allowing Plaintiff to proceed against Zions "unpersuasive." *Johnson*, 508 F. App'x at 452.

(c) Defendant Teledraft declared bankruptcy in the midst of the litigation.

(d) Class certification was initially denied. *Reyes v. Zions First Nat. Bank*, No. 10-345, 2013 WL 5332107 (E.D. Pa. Sept. 23, 2013).

(e) The FTC had sued several of the frauds at issue but had not recovered sufficient sums to warrant any distribution to victims.

Only by expending thousands of hours of time over nearly eight years in the face of this extraordinary risk were class counsel able to reach the settlement now before the Court.

C. The Key Events in the Litigation

1. Pre-Complaint

Reynaldo Reyes approached class counsel in early February 2009, after receiving a distribution of funds in the *Wachovia* case. He inquired why he had not received compensation for funds withdrawn from his account by other apparent scammers.

There were other Government investigations of Zions's practices during the time period at issue, but they did not address the conduct charged by plaintiff. The Comptroller of the Currency fined Zions for taking on "high risk customers in 2006 and 2007 without sufficient regard to BSA/AML compliance implications." *See* http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-16.html. But these were entirely different high risk customers than those at issue. Similarly, the United States Attorney for the Southern District of New York identified Zions as having opened hundreds of accounts for a criminal defendant who was the subject of an extensive investigation of internet gambling and money laundering. Tom Harvey, *Zions Bank Processed Illegal Poker Payments, Records Show*, Salt Lake Trib., June 26, 2013.

Class counsel investigated Mr. Reyes's case for a year. They obtained records from Mr. Reyes's bank, which indicated that he had been scammed by a company known as NHS through transactions at Zions First National Bank. They discovered that NHS was the subject of an FTC action pending in the Eastern District of Pennsylvania. The public record in that case also identified Zions as well as Modern Payments, Teledraft, and the banks that transferred the stolen funds offshore. The firm undertook internet searches, review of public records in multiple government actions, interviews with those involved in the various actions, and with victims. Class counsel were able to relate Zions and Modern Payments to other fraudulent schemes and to obtain records from government cases against certain of those schemes. That investigation provided a basis for the initial complaint alleging multiple RICO claims against the Zions defendants, several other banks, and Teledraft.

2. The Complaint and Initial Motions

The complaint was filed on January 27, 2010, almost a year after Mr. Reyes approached class counsel. It alleged a direct RICO cause of action and conspiracy causes of action against Zions, Modern Payments, and Teledraft, which served as the conduits through which money was withdrawn from class members' accounts. It also asserted claims against the banks that transferred the funds overseas—National Penn Bank, Harleysville National Bank, Wells Fargo, and Wachovia. Defendants moved to dismiss in April 2010. Plaintiff amended the complaint. Defendants renewed their motions to dismiss that July. That month, the case was reassigned from Judge Pollak to Judge Sanchez. The motions to dismiss were argued in November 2010.

In March 2011, the Court ordered Plaintiff to file a RICO Case Statement. Defendants then again renewed their motions to dismiss. A year later, the Court granted the motions to dismiss as to the banks other than Zions. The Court refused to dismiss Zions and Teledraft. The

Court made clear that, at the time, the core allegations supporting denial of Defendants' motion involved only the NHS fraud, which was a limited, $6 million, scheme.[5]

3. Discovery Results in Construction of Stronger and Larger Case

The scheduling order of April 24, 2012, provided only a five-month discovery period. Zions resisted producing documents on a rolling basis and successfully opposed Plaintiff's efforts to obtain extensions. As a result, class counsel reviewed thousands of documents produced by the Defendants and third parties—including NACHA, the Federal Reserve, and the receiver of NHS—and took all of the fact depositions in less than four months. To meet this schedule, class counsel halted much of their other work during this period and devoted the firm to completing discovery.

Plaintiff had to develop a strong record because Zions stressed the implausibility of allegations that a publicly traded national bank had engaged in a RICO enterprise. It argued that Plaintiff's class-wide proof of fraud under a "complete sham" theory had to be absolute—that every alleged victim was injured in the complete amount taken from his or her account. It

[5] The Court held:

> In alleging the Zions Defendants knew the transactions were fraudulent, Reyes pleads facts showing Zions Bank and MP/ND [Modern Payments] were aware of several blatant indications of fraud, including NHS's and related telemarketers' staggeringly high rates of ACH returns, and in particular, rates of return for lack of authorization. Reyes asserts Zions Bank discussed the high return rates with MP/ND, and MP/ND communicated frequently with the allegedly fraudulent telemarketers about their return rates. Reyes also alleges Zions Bank and MP/ND received notification from another bank they were violating NACHA's rule prohibiting ACH TEL transactions for outbound telemarketing, and received at least one complaint about unauthorized ACH transactions originated by NHS which they processed. Furthermore, Reyes asserts Zions Bank, in complying with its due diligence requirements, either knew or remained willfully blind to the fact that several of the telemarketers for which it processed ACH TEL debits, including NHS, had been sanctioned for operating fraudulent telemarketing schemes.

2012 WL 947139, at *6.

pointed to the relative dearth of authority for certification of a class consisting of multiple frauds. Plaintiff had to persuade a Court that a bank that had profited only modestly from a scheme should nevertheless be subject to a class action asserting liability against it for the entire damage wrought by the scheme.

Through discovery, Plaintiff ultimately adduced evidence that Zions and Modern Payments had knowingly provided six underlying frauds with access to the ACH system, resulting in millions of dollars being taken from accounts at banks throughout the United States. The complaint was amended to conform to that discovery.

Ten Zions officials were deposed. The depositions established that officials at Zions were aware of the nature of Modern Payment's business: its high-risk customers, the return rates they generated and the implications of these return rates, the risk that those customers were engaged in possible fraud and money laundering, and the reputational risk to Zions.

Class counsel also obtained discovery from non-parties, including NACHA, the Federal Reserve, and the receiver of NHS. *See* Appellant's Br. at 7, *Reyes v. Netdeposit, LLC*, 802 F.3d 469 (3d Cir. Apr. 14, 2014) (No. 14-1228). Counsel also successfully pursued a two-year Freedom of Information Act request against the Department of Justice and Federal Reserve that included filing a lawsuit in the United States District Court for the District of Columbia. This discovery helped refute Zions's central argument that it had promptly cut off the telemarketers when their potential fraud was brought to its attention. This factual record adduced through discovery allowed class counsel to refute abstract arguments on appeal. And it strengthened their hand in subsequent settlement negotiations.

4. Class Certification

Class certification posed great risk because class counsel could cite to no contested class

that had been certified involving multiple telemarketing entities and oral communications. In *Wachovia*, this Court granted class certification, but of a settlement class. To address this challenge, class counsel did not move for class certification until a full record had been developed.

a. Plaintiff's Experts

Three prominent experts retained by class counsel reviewed the record and provided their opinions on the issues relating to class certification. Professor Amelia Boss of the Kline School of Law at Drexel University provided detailed testimony by declaration regarding the relevant banking regulations and practices relating to the conduct at issue, including the relevance of high return rates. Professor Robert Meyer of the Wharton School testified as a marketing expert and analyzed each of the alleged frauds and found them to be essentially similar. He concluded that they were all total frauds. Barbara Blake, a former consumer fraud investigator with the Iowa attorney general's office, reached similar conclusions.

b. Zions's Successful Opposition to Class Certification

Zions successfully persuaded the Court to adopt an absolute position, i.e., that Plaintiff, in advancing his complete sham theory, had to establish beyond doubt that every class member was injured by the frauds in order for the case to proceed as a class action. How else, Zions argued, could a plaintiff prove the shams were truly complete? Zions's counsel argued that even if the underlying schemes were, in fact, frauds, two Third Circuit decisions, *Johnston v. HBO Film Management, Inc.*, 265 F.3d 178 (3d Cir. 2001), and *In re LifeUSA Holding, Inc.*, 242 F.3d 136 (3d Cir. 2001), prevented class certification where oral communications were involved. Zions bolstered its argument by stressing the different tactics used by the alleged frauds and the variety of their alleged "products" and "services." Zions persuaded the Court that because the case

involved so many oral frauds, it could not proceed on a class basis.

Once the Court adopted the absolute standard Zions had advanced, Zions only had to create "doubt" that each and every class member was injured to preclude certification. Zions's argument shifted the Court's focus from Zions's conduct to an analysis of whether there was any evidence creating any doubt that each and every class member could prove injury. It did so by arguing that the alleged frauds were businesses that sold legitimate products, even if they were sold in questionable ways.

As discussed, this strategy raised the stakes. In the *Wachovia* action, Wachovia had not challenged the fraudulent nature of the underlying schemes or questioned the impropriety of a bank accepting their accounts. If, as Zions contended, any of the six entities at issue were to be deemed by a court to be appropriate customers for a national bank, consumers would be at risk. All had staggering return rates, government fraud actions implicating them, as well as independent evidence of their fraud. As the Third Circuit was to recognize, to consider them appropriate would give banks license to provide further frauds access to the banking system. The deterrent force of the *Wachovia* litigation would have been vitiated.

To create "doubt," Zions adduced testimony of the owners of two of the alleged underlying frauds, who testified that they ran legitimate businesses even though their schemes were identified as fraudulent in other government actions.[6] Zions adduced declarations of two experts. One denigrated the significance of high return rates as proof of fraud and a second opined that "Zions Defendants developed policies and procedures at Modern Payments that met or exceeded the prevailing regulatory guidance and practices by comparable financial institutions." Expert Report of Peter G. Djinis, April 19, 2013, ¶2.

[6] These witnesses are discussed at length elsewhere. *See, e.g.*, Appellant's Br. at 33, 58-60, *Reyes v. Netdeposit, LLC*, 802 F.3d 469 (3d Cir. Apr. 14, 2014) (No. 14-1228).

This head-on attack by Zions proved successful. By calling alleged fraudsters as witnesses and citing their declarations, Zions created "doubt" that succeeded in persuading the Court to deny class certification.

c. Rule 23(f) Review

Plaintiff successfully petitioned the Third Circuit to grant interlocutory review of the denial of class certification under Federal Rule of Civil Procedure 23(f). Zions did not oppose the petition. Plaintiff's odds were long—at the time of the petition, the Third Circuit had never vacated or reversed a district court's denial of class certification on Rule 23(f) review.

The appeal raised fundamental issues for consumer protection cases. A significant number of amici filed briefs in support of the request for interlocutory review. These included United States Senators Richard Blumenthal, Robert Casey, and Edward Markey, United States Representative Allyson Schwartz, the AARP, the Consumers Federation of America, the National Consumer Law Center, the Public Interest Law Center of Philadelphia, Community Legal Services, and Wayne Geisser, the receiver appointed by the Court for NHS. All of these entities and individuals then filed subsequent amicus briefs on the substance of the appeal after leave to appeal was granted by the Circuit.[7]

5. The Third Circuit's Opinion

The stakes on appeal were very high. The case pitted the major consumer interests in the country against the key banking interests. The appeal raised the issue of the standards to be applied to class certification and, as the presence of the amici underscored, the degree to which legitimate businesses could be pursued for their involvement with consumer fraud. As the Circuit

[7] The Third Circuit was struck by the amici arrayed on each side: "[T]he conduct alleged here has attracted the attention of the impressive array of amici who have filed briefs in this matter, including the AARP, four members of the United States Congress, and the American Bankers Association." 802 F.3d at 475 n.3.

recognized in its opinion, in most cases class actions represented the only practical means of redress for fraudulent conduct like that asserted here. *Reyes*, 802 F.3d at 491.

Plaintiff's briefing before the Circuit presented extensive facts accompanied by expert analysis explaining the import of the factual record. The Appendix spanned nine volumes. Of particular importance was the declaration of Professor Boss, which presented a lengthy exposition of the literature and regulatory material pertaining to return rates, explaining the relationship of return rates to fraud and why the return rates at a certain level were proof of fraud.[8]

The Circuit emphasized that the expert opinions were supported by a detailed factual record that went far beyond reliance on return rates alone:

> In particular, Reyes points to "broader eviden[ce] ... includ[ing] three experts (all of whom opined that the underlying mass-marketing schemes were completely fraudulent), the related government proceedings, Mr. Geisser's testimony, and a wealth of documentary evidence and deposition testimony reflecting Defendants' knowledge of the fraud they were furthering." According to Reyes, the "evidence [presented about the fraudulent companies] applies to the class as a whole, [therefore] the jury's consideration of th[e] evidence would apply to each class member's claim." If accepted, the District Court may conclude that this evidence supports a finding that there was a single fraudulent RICO enterprise, that each defendant participated in that enterprise, and that all members of the proposed class were damaged in the amount of the funds debited from their bank accounts pursuant to the fraudulent scheme.

Reyes, 802 F.3d at 493–94 (internal citations omitted).

Because the record was as developed as it was, the Circuit had little trouble distinguishing the present case from its prior *Johnston* and *LifeUSA* decisions, which had been interpreted by some to create an absolute rule precluding class certification in cases involving varying oral misrepresentations. The Court recognized that applying that rule to this case—where the facts of the underlying fraud were so strong—would place the public in danger:

[8] The Circuit found her analysis highly persuasive. Its opinion cites her declaration seventeen times and suggested that the high return rates alone could have proven the fraud.

> We do not believe that our discussion of predominance in our prior cases intended to either license such behavior by placing it beyond the reach of Rule 23 or to supply a roadmap that would guide the unscrupulous in designing fraudulent schemes that would be beyond the reach of Rule 23. Otherwise, although such subtle but irrelevant variations in the manner of defrauding members of the public would not insulate unscrupulous marketers from liability in individual suits, it would—for all practical purposes—insulate them from class actions. An interpretation of Rule 23 that places class actions beyond the reach of consumers who have been victimized by fraudulent schemers who are wise enough to adopt schemes with subtle (but meaningless) variations would invite the kind of consumer fraud that Reyes is alleging here.

Reyes, 802 F.3d at 491. And the Court adopted, for the first time at the appellate level, the "complete sham" theory that Judge Brody had articulated in *Cullen*, 188 F.R.D. at 228.

The rejection of a restrictive interpretation of *Johnston* and *LifeUSA* and the adoption of the complete sham theory, together with the guidance that fraud was to be proven by a preponderance of the evidence, represented a major victory for class members and all consumers.

6. The Settlement Negotiations

Settlement negotiations extended from November 2015 through June 2016. They are described in greater detail in the memorandum in support of the settlement. The negotiations were contentious. There was no pause in proceedings during the negotiations and several important decisions were handed down over the months of negotiation. By the time of the settlement, class certification had been fully briefed on remand.

Class counsel never departed from the principle that a settlement would have to be sufficient to cover the direct damages incurred by every class member—that is, the money taken from each and every class member's account. Because of the factual record that had been amassed, counsel likewise rejected repeated arguments as to why the amount should be reduced because this or that scheme should be viewed as legitimate.

Ultimately, class counsel were persuaded through mediation that, because of the passage of time and class counsel's own experience in the prior *Wachovia* case regarding the difficulty in

distributing funds, the $37.5 million would likely provide single damages to all class members to whom funds could ultimately be successfully distributed. That sum is greater than the full measure of the most direct damages: the amounts taken from victims' accounts. And it leaves a substantial sum, almost an additional $8 million, for compensation for NSF charges. Even after counsel fees and settlement administration expenses are deducted, it is likely to provide full, single damages for all class members who can be compensated.

III. LEGAL STANDARDS REGARDING THE AWARD OF ATTORNEYS' FEES

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Where, as here, counsel "recovers a common fund for the benefit of persons other than himself or his client," that counsel "is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Awards of attorneys' fees from a common fund encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons and to discourage future misconduct of a similar nature. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980). The Third Circuit explained in this case that it was the ability to aggregate claims, and consequently create an appropriate incentive to attract quality counsel, that was the underlying purpose of the class action rule:

> A class action "permit[s] the plaintiffs to pool claims which would be uneconomical to litigate individually. … [M]ost of [such] plaintiffs would have no realistic day in court if a class action were not available." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). "[C]onsumers have little interest in litigating their claims individually because of the small amount of money per plaintiff that is at stake." Cabraser, [Elizabeth J. Cabraser, *Trends and Developments in the Filing, Certification, Settlement, Trial and Appeal of Class Actions*, SE99 A.L.I.-A.B.A. 743, 821 (2000)] at 822 (quotation marks omitted). Moreover, obtaining counsel to pursue such a claim is usually the height of impracticality—even for those who can afford to do so. "What rational lawyer would have signed on to represent the [party] in litigation for the possibility of fees stemming from a $30.22 claim?" *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333[, 365] (2011) (Breyer, J., dissenting).

> In such cases, the class action can "create[ ] greater access to judicial relief[.]" *Marcus*, 687 F.3d at 594. "[I]t is[, in fact,] possible to think of consumer class actions as providing an indispensable mechanism for aggregating claims when the individual stake is low and the similarity of the challenged conduct is high." Samuel Issacharoff, *Group Litig. of Consumer Claims: Lessons from the U.S. Experience*, 34 Tex. Int'l L.J. 135, 149 (1999). Thus, class actions have the practical effect of allowing plaintiffs who have suffered relatively *de minimis* loss to nevertheless function as private attorneys general and thereby deter fraud in the marketplace.

Reyes, 802 F.3d at 491–92 (footnote omitted).

There is no better example of the advantages of private enforcement augmenting the government's enforcement powers than in a case like the present one where there has been no government action as yet. This is all the more true where, as here, it appears that the government has instituted its own investigation as a result of the work of the private action. Zions recently informed its shareholders that it "understand[s] that the Department of Justice desires to pursue claims against us." Zions Bancorporation, Form 10-Q, Aug. 5, 2016, at 49.

In the Third Circuit, attorneys' fees requests in cases involving a common fund are assessed under the percentage-of-recovery approach. The percentage-of-the-recovery approach "is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 330 (3d Cir. 2011) (quoting *In re Rite Aid Corp. Securities Litig.*, 396 F.3d 294, 300 (3d Cir. 2005)). District courts may also use the lodestar method, but only "to cross-check the reasonableness of a percentage-of-recovery fee award." *Id.* (quoting *In re AT & T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir.2006)).[9] *See also Gunter v. Ridgewood*

[9] The percentage-of-the-fund method was adopted by the Third Circuit following the Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 242 (3d Cir. Oct. 8, 1985). The findings of the initial Task Force were reaffirmed by a Second Task Force appointed by former Chief Judge Becker. Report of Third Circuit Task Force on the Selection of Class Counsel (Final Report Jan. 2002) (hereinafter the "Second Task Force Report"), available at http://www.ca3.uscourts.gov/classcounsel/final%20report%20of%20third%20circuit%20task%2

Energy Corp., 223 F.3d 190, 199 (3d Cir. 2000).

In *Gunter*, Chief Judge Becker set forth seven factors for district courts to take into consideration when assessing the reasonableness of attorney's fees: "(1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the Class to the settlement terms and/or the fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases." *Id.* at 195 n.1. In addition to the seven factors issued by the court in *Gunter*, the Third Circuit, in *AT&T*, reiterated these considerations and added three additional considerations it found "relevant and important": "(1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations; (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any 'innovative' terms of settlement." 455 F.3d at 165 (citations omitted).

The Supreme Court has warned that "the determination of fees should not result in a second major litigation." *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011) (quotation omitted). Plaintiffs must meet their burden of providing an appropriate basis for a fee, but "trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal … is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." *Id.* at 2216.

0force.pdf). Plaintiff's expert supporting the present motion, Professor Saltzburg, chaired the Second Task Force.

All of the *Gunter* and *AT&T* factors strongly support the requested fee.[10]

IV. THE REQUESTED ONE-THIRD FEE IS FAIR AND REASONABLE UNDER THIRD CIRCUIT'S *GUNTER* AND *AT&T* FACTORS

The requested fees and expenses are reasonable. The request for one-third of the settlement is in line with fees recovered in comparable cases, and properly reflects the time and effort put in by Plaintiff's counsel. Indeed, the extraordinary recovery means that the percentage is in line with cases that resulted in much less successful recoveries. All of the factors identified by the Third Circuit support the request: experienced class counsel devoted a substantial amount of time and expense in an exceedingly complex and risky case, producing high-quality work against several top-tier defense firms, while achieving an exceptional result for a sizable class. Moreover, the substantial results achieved by class counsel were independent of any government assistance, and the class will be delivered their funds through an innovative reverse-ACH process. *See* Saltzburg Declaration, ¶22.

A. The Requested Percentage is Consistent with Fees Typically Awarded in Actions of This Nature

Courts commonly award one-third of the fund. As noted, that is the portion that was awarded in the two RICO cases that the Third Circuit cited in adopting class counsel's arguments. In *Cullen*, Judge Brody had found that, "the award of one-third is consistent with fee awards in a number of recent decisions within this district." 197 F.R.D. at 150. Thirteen years later, Judge Chesler held that 33% "has regularly been found acceptable in common fund settlements in this District." *Ins. Brokerage*, 297 F.R.D. at 155.

These conclusions are supported by a large number of decisions within the Circuit and particularly within the Eastern District. *See, e.g.*, *In re Flonase Antitrust Litig.*, 291 F.R.D. 93,

[10] The element concerning the number of class objections cannot be addressed because the final date for objections is November 1, 2016. As of the date of this submission, there have been no objections. A supplemental paper addressing this issue will be filed after that date.

104 (E.D. Pa. 2013) ("A one-third fee award is standard in complex antitrust cases of this kind."); *Esslinger v. HSBC Bank Nev., N.A.*, No. 10-3213, 2012 WL 5866074, at *16 (E.D. Pa. Nov. 20, 2012) ("[C]lass counsel's fees in this case represent 33 percent of the common fund and is within the range of reasonable fees, on a percentage basis, in the Third Circuit. Therefore, the size of the fund in relation to the number of people weighs in favor of finding the fees reasonable."); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085, 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005) (33.33% of a $175 million settlement); *In re Ravisent Tech., Inc. Sec. Litig.*, 2005 WL 906361, at *11 (E.D. Pa. April 18, 2005) ("[C]ourts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses."); *In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 497 (E.D. Pa. 2003) (33 percent); *Mabry v. Hildebrandt*, No. 14-5525, 2015 WL 5025810, at *4 (E.D. Pa. Aug. 24, 2015); *Rouse v. Comcast Corp.*, 2015 WL 1725721, at *12 (E.D. Pa. April 15, 2015) (35 percent); *Blackman v. O'Brien Envtl. Energy, Inc.*, 1999 WL 397389, at *2 (E.D. Pa. May 11, 1999) (35 percent); *In re ValueVision Int'l Sec. Litig.*, 957 F. Supp. 699, 700 (E.D. Pa. 1997) (34 percent); *Ratner v. Bennett*, 1996 WL 243645, at *9 (E.D. Pa. May 8, 1996) (35 percent).

The fee counsel seek here is well within the standard range of such awards, despite the unusually high risk of non-payment that existed in this case and the exceptional result obtained—the recovery far exceeds the percentage of damages recovered in any of the cases cited above.

B. The Value of Benefits Accruing to Class Members Attributable to the Efforts of Class Counsel Support the Requested Fee

Even discounting the benefit of the ruling class counsel obtained from the Third Circuit, this case achieved a far greater percentage recovery of damages for the class than in the many prior cases that awarded counsel fees of one-third of the fund. The settlement exceeds the amounts actually debited from the class member's accounts, and represents most of the damages

the class sought in the litigation. It is such a significant portion that it is likely that all class members who can be found will obtain full single damages, even after the fees and costs counsel seek are paid.[11]

The present case involves close to 550,000 class members. The fund of $37.5 million, less the fees and costs awarded, will be distributed to class members by ACH electronic delivery without the need for any claims form. Class counsel believe that the present recovery of $37.5 million is the second largest reported recovery in a consumer class action in the Third Circuit achieved without the benefit of a prior government action, exceeded only the recovery on behalf of diamond purchasers against De Beers, following a default judgment. *See Sullivan*, 667 F.3d at 288. The fund is large both in absolute terms and in the context of the case. Moreover, it is cash, not coupons or illiquid securities whose value might be questioned. And all of the money set aside for class members will be distributed to class members, since it is being directly deposited in the victims' accounts and there is no reversion of unclaimed funds.

That the money will be distributed without requiring the filing of a claim is very important, because even where classes have obtained judgments following trial, significant unclaimed funds have often reverted back to the defendant. *See e.g.*, *Boeing*, 444 U.S. at 476 n.4 (despite extensive efforts by special master after judgment, only 47% of class securities were represented by filed claims); *Greenhaw v. Lubbock County Beverage Ass'n*, 721 F.2d 1019,

[11] Aside from the *Wachovia* litigation, which involved significant government participation, counsel is aware of only three finalized class actions that came close to full recovery, each of which was an antitrust case involving the pharmaceutical industry. *See In re Buspirone Patent Antitrust Litig.*, MDL No. 1410 (S.D.N.Y. Apr. 11, 2003); *In re Cardizem CD Antitrust Litigation*, MDL No. 1278 (E.D. MI. Nov. 26, 2002) (settlement estimated to be 95% of the overcharge). Counsel was awarded 1/3 of the fund in each case. The recent Volkswagen diesel settlement, which involved both government participation and an admission of wrongdoing, also appears to provide full recovery. *See In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, No. 15-md-02672 (N.D. Cal.). That settlement has not been finalized and no fee has yet been awarded.

1032 (5th Cir. 1983) ("The potential class recovery was probably in the vicinity of $2,000,000," but because of low claims, "the actual recovery by members of the plaintiff class was only $17,482 after trebling.").

Wachovia was among the first to distribute class funds by check without the need for claim forms. While the case resulted in a very high level of distribution for a consumer class action—60% of class members participated and deposited the checks they received—40% did not deposit the checks sent to them. The unclaimed funds were returned to Wachovia. Direct payment by ACH will guarantee that as much of the fund as is reasonably possible will be distributed to class members. There is no reversion to Defendants and any funds not initially successfully distributed will be distributed to those class members to whom funds were successfully distributed.

Even without taking into account the novel distribution scheme, the benefit to class members is substantially greater than in most of the cases in which Courts of this district have awarded one-third of the fund. For example, in *Cullen*, "[t]he settlement that was achieved represent[ed] approximately seventeen percent of single damages to the class, an amount significantly higher than the proportion of damages obtained in settlement agreements approved by other courts." 197 F.R.D. at 144. In *In re Ikon Office Solutions, Inc., Securities Litigation*, 194 F.R.D. 166, 183 (E.D. Pa. 2000), Judge Katz awarded thirty percent of the fund as fees where "the settlement provide[d] a recovery of approximately 5.2% of the best possible recovery for those who acquired common stock and approximately 8.7% for those who acquired convertible preferred stock." *See also In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085, 2005 WL 3008808, at *9 (D.N.J. Nov. 9, 2005) (awarding 33.3% where "the Settlement represents 56% to 69% of the maximum single damages Plaintiffs could hope to recover"); *In re Corel*

Corp. Inc. Sec. Litig., 293 F. Supp. 2d 484, 490 (E.D. Pa. 2003) (awarding 33% for settlement of 15% of maximum provable damages).

In his declaration, Professor Saltzburg explains that the recovery at its lowest valuation is comparable to the highest valuations achieved in other cases. Declaration of Stephen A. Saltzburg, ¶¶34-35. At its midpoint valuation, it is among the highest percentage recoveries reported. *Id.* at ¶36.

C. The Complexity of the Case and Class Counsel's Contribution to the Result

The third, fourth, and sixth *Gunter* factors, as well as the first *AT&T* factor, concern the complexity of the case and the skill and contributions of counsel to the result. This was a highly complex case. It involved an esoteric payment vehicle, complex regulations and statutory schemes, and review of multiple prior enforcement actions by federal and state regulators. The discovery and the technical work undertaken to use that discovery were massive.

RICO, of course, is one of the most complex federal statutes. Moreover, this case involved a particularly complex factual situation, even for RICO, involving multiple defendants and numerous distinct, non-party fraudulent organizations. Plaintiff put forth unsettled theories of liability under RICO. The complex factual situation, including the multitude of fraudulent entities and schemes, also raised significant challenges for class certification, as was confirmed by this Court's initial refusal to certify the case as a class.

The case has extended over seven years, nearly eight when one includes the investigation preceding filing of the initial complaint. It involved an appeal of such complexity that the Circuit asked for supplemental briefing and ultimately issued a forty-one-page decision nearly a year after oral argument.

The Court is well-positioned to assess the skill that class counsel have exhibited in this litigation. Previously, in *Wachovia*, this Court "acknowledge[d] class counsel's tireless efforts,

their dogged pursuit of fairness and justice in this case, their exemplary legal skill, and their scrupulous ethics throughout this proceeding." Tr. at 80-81.

The members of the firm collectively have several decades of experience successfully litigating complex class actions, and their ability to litigate complex cases has been noted repeatedly. *See, e.g.*, *Cullen*, 197 F.R.D. at 149 ("The skill of each of these attorneys is reflected both in settlement and in the aggressive manner in which they pursued this litigation from start to finish."); Tr. of Hearing at 86, *In re Linerboard Antitrust Litig.*, No. MDL 1261 (E.D. Pa. Mar. 24, 2006) ("I'm going to end on this note, that when the President of the United States called me and said he was going to nominate me to this position I never dreamed it would be quite as good as it has been in this case."). More recently, the firm was sole lead counsel in two "unusually complex and sweeping" antitrust class actions involving the broadcasting practices of Major League Baseball and the National Hockey League, which resulted in settlements worth hundreds of millions of dollars and involving significant changes to the leagues' respective broadcasting rules.[12] *Laumann v. NHL*, 117 F. Supp. 3d 299, 315 (S.D.N.Y. 2015). Indeed, the American Antitrust Institute recently announced that it is granting the firm's attorneys its award for Outstanding Antitrust Litigation Achievement in Private Litigation for their work in those cases.[13] The biographies of counsel are available at www.langergrogan.com.

Class counsel has particular expertise in payment systems, complex banking regulations, and mass consumer fraud. Indeed, as sole counsel for the classes both here and in *Wachovia*, it is the only firm in the country that has successfully litigated a case of this type.

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[12] As a result of the successful resolution of those cases, follow-on cases were filed by a number of firms challenging the National Football League's broadcasting practices. Langer, Grogan & Diver was appointed co-lead interim class counsel in the multidistrict litigation that resulted. *In re NFL Sunday Ticket Antitrust Litig.*, No. 15-ml-02668 (C.D. Cal. June 8, 2016) (Doc. 148).

[13] *See* http://www.antitrustinstitute.org/content/antitrust-enforcement-award-honorees-announced.

As to class counsel's contribution to the result, all of the benefits achieved in this case are attributable to class counsel. Without the aid of government action against the bank or the payment processors, class counsel spent a year investigating the facts and exploring legal theories before filing the case. The detailed, powerful record adduced by class counsel in a discovery period spanning less than six months could only have been achieved by counsel bringing a high degree of expertise to the matter.

Class counsel also brought a high degree of expertise to the settlement table. The extraordinary portion of class members' actual damages that they will recover reflects this skill. Class counsel also rejected out-of-hand any "claims made" settlement. They knew that claims-made distribution usually results in claims rates of less than 10% in consumer cases. *See, e.g.*, *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d. 34, 44 (D. Me. 2005) ("'Claims made' settlements regularly yield response rates of 10 percent or less.").

The skill of counsel is also reflected in the efficiency with which the case was prosecuted. While the complexity of the case led to long delays while initial motions were being considered by the District Court and the appeal was being considered by the Third Circuit, the overall hours spent, although significant, are modest relative to what counsel was able to accomplish. Discovery itself was completed in five months. The case was carefully staffed; the work was done by a concentrated group; strategies were employed to maximize efficiency. This large class action was prosecuted by a single, small firm rather than by a consortium of firms. Class counsel prepared this case in a fraction of the time taken in "mega" class actions involving a single defendant, while maintaining a high level of representation.

Class counsel expended a total of 9,785 hours in prosecution of this case, which included preliminary dispositive motions, full discovery, a class certification motion and hearing, a Rule

23(f) petition and subsequent briefing and argument of an appeal, and extensive settlement negotiations. One is hard pressed to find any case of this significance litigated through all the phases of this case so efficiently. For example, the De Beers antitrust case—which was resolved following a default judgment—a consortium of law firms expended 38,829.50 hours in a case against a single group of defendants. *Sullivan v. DB Investments, Inc.*, No. 04-2819, 2008 WL 8747721, at *35 (D.N.J. May 22, 2008). In *In re Linerboard Antitrust Litig.*, No. 98-5055, 2004 WL 1221350, at *16 (E.D. Pa. June 2, 2004), which, like the present case, involved a Rule 23(f) appeal, counsel incurred 51,268 hours.

The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered by plaintiffs' counsel. *Ikon*, 194 F.R.D. at 194; *In re Warner Comms. Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985). Here, a firm of five attorneys faced, first, Sullivan & Cromwell and Hangley, Aronchick, Segal, Pudlin & Schiller, and then Blank Rome. Class counsel's ability to obtain relief for the class in the face of such formidable opposition confirms the quality of class counsel's representation.

D. The Risk of Non-Payment

The risk of non-payment is among the most important factors is setting a fee. "No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." *Detroit v. Grinnell Corp.*, 495 F. 2d 448, 470 (2d Cir. 1974). Risk of non-recovery is primarily measured from the perspective at the time the case commenced. *Sullivan*, 667 F.3d at 332. Here, class counsel undertook this action on an entirely contingent basis, assuming a substantial risk that the case would yield no recovery.

Few RICO cases have been brought against major banks, and only two on theories similar to this case. *Wachovia* resulted in a successful settlement, but it resulted in no published

opinions. The first such case brought after *Wachovia* was *Johnson v. U.S. National Bank Association*, 508 F. App'x 451 (6th Cir. 2012), which resulted in the Sixth Circuit affirming the dismissal of the complaint. Indeed, in *Johnson*, the Sixth Circuit specifically rejected this Court's decision denying the motion to dismiss against Zions, which it found "not persuasive." *Id.* at 452.[14]

This risk of non-payment was multiplied in this case, because payment required class certification. The risk of failing to obtain class certification was obviously significant when the case was filed. As discussed, before the Third Circuit's opinion in this case, no reported opinion had certified a class involving fraudulent schemes, by multiple entities. The law was especially unsettled where oral statements were involved. This point is made clear by the fact that the district court denied class certification. *Reyes v. Zions First Nat. Bank*, No. 10-345, 2013 WL 5332107 (E.D. Pa. Sept. 23, 2013).

Overall, the complexity of the case meant that any one of a number of arguments by the defendants presented a risk of non-payment if adopted by the Court. And there is no question that the risk of no recovery in class actions generally is genuine. Many major class action cases have been lost after years of discovery, some following trial. *See, e.g., In re Richardson-Merrell, Inc. Bendectin Prods. Liability Litig.*, 624 F. Supp. 1212, 1216 (S.D. Ohio 1985); *aff'd*, 857 F.2d 290 (6th Cir. 1988) ($120 million settlement negated when class was decertified on appeal; jury subsequently returned a verdict for the defendant).[15]

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[14] The challenges in bringing a RICO case against major financial institutions was further underscored by this Court's dismissal of the claims against three of the four banks charged at the outset.

[15] *See also, e.g.*, *In re Brand Name Prescription Drug Antitrust Litig.*, 186 F.3d 781 (7th Cir. 1999) (summary judgment reversed on the issue of conspiracy only to have judgment entered again at the conclusion of their case); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million reversed on appeal); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d

The risk attendant to this case was especially high because of the lack of government action implicating the defendants. As the Third Circuit explained in *In re AT & T Corp.*, 455 F.3d 160, 173 (3d Cir. 2006), "class counsel in this case was not aided by a government investigation. In *Prudential,* we noted this as a significant factor for district courts to consider." *See also In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 641 (E.D. Pa. 2003) ("The Second Circuit has identified a basic factor that is used to assess risk in antitrust class action cases: '[T]he only truly objective measurement of the strength of plaintiffs' case is found by asking: 'Was defendants' liability *prima facie* established by the government's successful action?'" (quoting *Grinnell*, 495 F.2d at 455)). To the contrary, Zions could point to the fact that it had been investigated by the OCC, which found other violations, but not those at issue.

Risk was also greater than in other large cases where risk is spread among many firms who form a consortium to prosecute the case. Here, Langer, Grogan & Diver, PC, assumed the entire risk alone.[16] Saltzburg ¶¶ 37-38. The fact that no other firms have filed similar cases is

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1215 (10th Cir. 1996) (jury verdict overturned in case filed in 1973 and tried in 1988, on the basis of 1994 Supreme Court opinion); *In re Apple Computer Sec. Litig.*, No. C-84-20148, 1991 U.S. Dist. LEXIS 15608 (N.D. Cal. Sept. 6, 1991) (vacating substantial jury verdict against two individual defendants on motion for judgment n.o.v.); *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (jury verdict reversed and dismissed on appeal—after 11 years of litigation); *cf. Blomkest Fertilizer v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8th Cir. 2000) (summary judgment following full discovery); *In re Baby Food Antitrust Litig.*, 166 F.3d 112 (3d Cir. 1999), *In re Citric Acid Litig.*, 191 F.3d 1090 (9th Cir. 1999); *Williamson Oil Co. v. Philip Morris, USA*, 346 F.3d 1287 (11th Cir. 2003); *Hall v. United Airlines*, 2003 WL 22534443 (E.D.N.C. Oct. 30, 2003). Class counsel themselves have not been immune from such risks. *See e.g.*, *Harley v. Minnesota Min. and Mfg. Co.*, 284 F.3d 901 (8th Cir.2002) (summary judgment of major ERISA class action following completion of discovery); *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78 (2d Cir. 2001) (same); *see also Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124 (3d Cir. 2000) (affirming denial of class certification after years of discovery); *Pohl v. NGK Metals Corp.*, 2003 WL 24207633 (Pa. C.P. Ct. July 9, 2003) (denying class certification after discovery and hearings extending over months).

[16] This degree of risk is underscored by the nature of the objections that were described by the Court in *Sullivan*, 667 F.3d at 329, where class members objected that the fee was excessive because the large number of consolidated cases ameliorated the risk to counsel.

further indication of the risk they perceived. Saltzburg ¶ 37.

In addition, class counsel assumed over $250,000 in costs. The cost of notice to a class of 550,000, which class counsel was fully prepared to bear, would have been several hundred thousand dollars more. In short, class counsel faced an unusually high level of risk in bringing this case, and the requested fee would appropriately compensate them for the result they achieved in the face of that risk.

E. The Requested Fee is Consistent with Contingent Fee Arrangements Negotiated In Non-Class Litigation

In *AT&T*, the Court noted the relevance of the percentage that counsel would be expected to negotiate if the fee were determined by private negotiation. 455 F.3d at 165. The courts of this district have recognized that "a 33 1/3% contingent fee is commonly negotiated in the private market." *In re OSB Antitrust Litig.*, No. 06-826, slip op. at 8 (E.D. Pa. Dec. 9, 2008) (order), *accord In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 224 (E.D. Pa. 2014) ("In private contingency fee cases, lawyers routinely negotiate agreements for between 30% and 40% [ ] of the recovery."); *Esslinger v. HSBC Bank Nevada, N.A.*, No. 10-3213, 2012 WL 5866074, at *14 (E.D. Pa. Nov. 20, 2012) (same); *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 123 (D.N.J. 2012); *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("[P]laintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."); *Blum v. Stenson*, 465 U.S. 886, 904 (1984) (Brennan, J., concurring) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.").

Professor Saltzburg explains that this was an issue studied by the Second Task Force. The analysis necessarily turns on the issue of risk, which, as demonstrated above, was very high here. Analyzing the risk and the prevailing market, both *ex ante*, i.e., from the perspective of the

parties before suit was commenced, and checking that result *ex post*, i.e., from the current perspective with the benefit of hindsight, and assessing the actual time and work of litigation as well as the result, Professor Saltzburg concludes that the 33 1/3% sought is reasonable and well within the market for such services. Saltzburg ¶ 45.

It is clear that the members of the class would not likely have been able to obtain counsel in this case at the outset for less than a 33 1/3% contingency.

F. The "Innovative" Terms of Settlement Justify the Requested Award

Several aspects of the settlement are innovative. Most significantly, the fund in this case is to be distributed through the ACH system without the need for the overwhelming majority of class members to do anything. This ameliorates the risk that occurred in the *Wachovia* litigation, where checks were sent without the need for class members to file claims, but a significant percentage of checks were uncashed despite extraordinary efforts.

Class counsel retained a consultant during settlement negotiations to advise them on the practicability of such a means of distribution. In designing the plan of distribution, they worked with a bank specializing in ACH distributions. To class counsel's knowledge, this is the among the first class action settlements under Rule 23 in which such a form of distribution is being used without any need for filing a claim.

Further, there is no reversion to the Defendants of any unclaimed funds. Any remainder after initial distribution will be redistributed to those class members to whom a successful first distribution has been made. The settlement was carefully drafted to assure that no sums vested in a class member until those sums were successfully deposited in their account.

G. The Lodestar "Cross-Check" Confirms the Propriety of the Fee Requested.

Although the percentage-of-the-recovery method is appropriate, courts often perform to lodestar "cross-check" to ensure the reasonableness of the award. Counsel's lodestar confirms

that the requested award is reasonable and appropriate.

"[W]e reiterate that the percentage of common fund approach is the proper method of awarding attorneys' fees." *Rite Aid*, 396 F.3d at 306; *AT & T Corp.*, 455 F.3d at 164 ("The lodestar cross-check … should not displace a district court's primary reliance on the percentage-of-recovery method."). Nor is it to be a backdoor into the detailed review of hours and time records that the adoption of the percentage of the fund method was intended to replace. "The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *Rite Aid*, 396 F.3d at 306-07.

The multiplier in the present case is only 2.41 of the lodestar.[17] Given the extraordinary results obtained in the face of substantial risk—especially since it was obtained without the assistance of prior government action—this multiplier is quite modest. In *Wachovia*, this Court found a multiplier of 6.6 to "fall well within the range of multipliers approved [by] judges in this District." Order, Jan. 22, 2009, ¶ 5. Substantially higher multipliers than that have been approved where justified by the case. *See, e.g.*, *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, No. 03-4578, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (multiplier of 15.6).

The present multiplier is well within the standard range. The Third Circuit has recognized that "[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998) (citing 3 Newberg § 14.03 at 14–5). Recent decisions

[17] The lodestar is calculated using the rates multiplied by hours expended and current rates are to be applied. *See Lanni v. New Jersey*, 259 F.3d 146, 150 (3d Cir. 2001) ("When attorney's fees are awarded, the current market rate must be used."); *see also Simring v. Rutgers*, 634 Fed. App'x 853, 859 (3d Cir. 2015) (citing with approval the holding in *Lanni* that the current market rate, calculated at the time of the fee petition, "must be used"). The lodestar calculation is set out in the accompanying Declaration of Howard Langer.

confirm this. *See In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 225 (E.D. Pa. 2014), *appeal dismissed* (Aug. 11, 2014) ("I find that a lodestar multiplier of 2.6 is acceptable and does not require that I reduce the amount of the requested attorneys' fee award."); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 750–51 (E.D. Pa. 2013) ("a multiple of 2.99 is within the generally acceptable range and provides additional support for approving the attorneys' fees request. Thus I will award counsel thirty-three and a third percent of the common fund, for a total of $50,000,000.00, in attorneys' fees.").[18] This range is comparable to ranges permitted in other Circuits. *See, e.g.*, *Johnson v. Brennan*, No. 10-4712, 2011 WL 4357376, at *21 (S.D.N.Y. Sept. 16, 2011) ("[M]ultipliers of two to six times total lodestar … are regular[ly] awarded in this district.").

Class counsel's hourly rates here of between $225 and $850 are well within the reasonable rates for attorneys practicing complex litigation in the Eastern District of Pennsylvania. Blank Rome, the law firms representing the Zions Defendants, was included in National Law Journal's January 2014 survey.[19] Blank Rome had partner billing levels well above the effective hourly rate sought by class counsel here. Blank Rome had a top partner hourly rate of $940, and a top associate hourly rate of $565. *Id.* In addition, class counsel's rates have been accepted as reasonable by district courts in numerous other matters, as recently as earlier this

[18] *See also, e.g.*, *In re AT & T Corp.*, 455 F.3d 160, 173 (3d Cir. 2006) (pointing out that in *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722 (3d Cir. 2001), the Circuit had found a multiplier of 2.99 "was reasonable in a short and 'relatively simple' case…"); *Schuler v. Medicines Co.*, No. 14-1149, 2016 WL 3457218, at *9 (D.N.J. June 24, 2016) (citing with approval *Prudential* in approving lodestar multiplier of 3.57) ; *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340 at 9 (D. Del. Apr. 23, 2009) (approving a one-third fee where lodestar multiplier was 3.93); *Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718 at *24 (E.D. Pa. Aug. 14, 2006) (approving a percentage fee award that translated to a 4.77 multiplier); *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 104 (D.N.J. Sept. 27, 2001) (approving a lodestar multiplier of 2.81 and citing common fund cases in which the lodestar multiplier ranged from 2.04 to 3.6).

[19] http://www.nationallawjournal.com/id=1202636785489/Billing-Rates-Across-the-Country

year, in *Garber v. Office of the Commissioner of Baseball*, No. 12-3704, at 53 (S.D.N.Y. Apr. 27, 2016) (Order); *see also, e.g.*, *Laumann v. National Hockey League*, No. 12-1817 (S.D.N.Y. Sept. 1, 2015) (Order); *Faloney v. Wachovia Bank, N.A.*, No. 07-1455, at 4 (E.D. Pa. Jan. 22, 2009) (Order) ("Langer Grogan's hourly fees on which the lodestar is calculated … are well within those charged by comparable skilled attorneys.").

The risk and result in the present case would warrant a far higher multiplier. The multiplier is constrained by counsel's decision to limit their request to one-third of the fund and limited by the fact that to obtain the settlement they had to incur the time to litigate the case though discovery, class action hearing and appeal.

V. CLASS COUNSEL ARE ENTITLED TO RECOVER THEIR COSTS

Class counsel incurred out-of-pocket costs of $251,553.19. The costs are set out in paragraph 10 of the Declaration of Howard Langer. The costs include the costs of experts, transcripts, travel and attendant discovery expenses.

VI. THE SERVICE AWARED REQUEST IS REASONABLE

Finally, class counsel respectfully move the Court for the service award of $25,000 for class representative Renaldo Reyes. Mr. Reyes was the only class representative in this case and has been an exemplary representative throughout. In contrast to class representatives in many other cases, it was Mr. Reyes, previously a class member in *Wachovia*, who made class counsel aware of the allegedly fraudulent activity at issue here. He persevered as class representative through eight years, despite efforts to frustrate his continued involvement.

Such awards are routinely granted in this context, in order to recognize the efforts of these individuals in pursuing their claims on behalf of a class. *See, e.g.*, *Flonase*, 951 F. Supp. 2d at 751 (citing numerous cases in holding that "reasonable payments are permissible to compensate named plaintiffs for the expenses they incur during the course of class action

litigation"). Here, the amount requested for the service award is smaller than in many other cases because there is just one class representative.

Mr. Reyes persevered in the litigation though he understood the risks he faced and the degree of scrutiny his personal life would receive as class representative. These risks and scrutiny were made all too real at his deposition, where he endured aggressive questioning about all aspects of his private life. Before the deposition, he had collected documents and reviewed interrogatory answers, met with counsel to review the complaint, and kept himself apprised of the litigation as it proceeded.

Mr. Reyes remained willing and able to assist in all stages of the litigation, even if it went to trial. The amount of the award sought here is an amount that is routinely granted in similar circumstances. *See, e.g.*, *Foster v. City of Pittsburgh*, No. 12-1207, 2015 WL 11112431, at *1–3 (W.D. Pa. Nov. 18, 2015) ($20,000 service award for $985,000 settlement, six-year litigation); *Brady v. Air Line Pilots Association, International*, No. 02-2917, 2014 WL11395839, at *3 (D.N.J. May 29, 2014) (awarding service awards of $640,000 to be split over twelve litigants, with ten out of twelve receiving greater than $20,000 and the top two receiving greater than $100,000); *Flonase*, 951 F. Supp. 2d at 751–52 ($50,000 and $40,000 awards, $150 million fund, five years); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 479 (D.N.J. 2008) ($60,000 per plaintiff, $160 million fund, five-year case); *Meijer, Inc. v. Minnesota Mining and Manufacturing Co.*, No. 04-5871, 2006 WL 2382718, at *24–25 (E.D. Pa. August 14, 2006) ($25,000 award, out of $27 million, two-year litigation); *In re Remeron Direct Purchaser Antitrust Litigation*, No. 03-0085, 2005 WL 3008808, at *18 (D.N.J. November 9, 2005) (awarding incentive award of $60,000 total to two plaintiffs, out of $75 million, two-year case).

VII. CONCLUSION

For the reasons set forth above, class counsel respectfully submit that their request for an

award of $12.5 million in fees, and $251,553.19 in costs should be granted. In addition, a service award of $25,000 for class representatives Reynaldo Reyes is appropriate.

Dated: October 17, 2016

Respectfully Submitted,

Howard Langer

Howard Langer
John Grogan
Edward Diver
Irv Ackelsberg
Peter Leckman
LANGER, GROGAN & DIVER, P.C.
1717 Arch Street, Suite 4130
Philadelphia, PA 19103
Telephone: (215) 320-5660
Facsimile: (215) 320-5703

Class Counsel