UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

DYLAN MARTIN, on behalf of himself and all others similarly situated, Plaintiff, v. LINDENWOOD UNIVERSITY, Defendant.	Civil Action No. 4:20-cv-01128-RLW Hon. Ronnie L. White

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S ASSENTED TO MOTION FOR ATTORNEY'S FEES, COSTS, EXPENSES, AND INCENTIVE AWARD

Dated: March 7, 2022

BURSOR & FISHER, P.A.
Joseph I. Marchese, #4475983
888 Seventh Avenue
New York, NY 10019
Telephone: (646) 837-7150
Facsimile: (212) 989-9163
Email: jmarchese@bursor.com

Settlement Class Counsel

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

OTHER AUTHORITIES

I. INTRODUCTION AND BACKGROUND

Plaintiff Dylan Martin ("Plaintiff") was a student enrolled in on-campus, in-person courses for the Spring 2020 Semester at Defendant Lindenwood University ("Lindenwood" or "Defendant") (collectively, the "Parties"). Plaintiff alleged that Lindenwood breached its contract with students to provide an in-person, on-campus educational experience when it shut down midway through the Spring 2020 semester and moved to online learning due to COVID-19. After extensive arms' length negotiations, including a full-day mediation with the Honorable Wayne Andersen (Ret.) of JAMS Chicago, the Parties reached a Class Action Settlement (the "Agreement" or "Settlement") that requires Lindenwood to establish a $1.65 million non-reversionary common fund for Settlement Class Members. Moreover, the approximately 6,000 Settlement Class Members will automatically receive a *pro rata* settlement payment as a percentage of the total amount of tuition and fees he or she paid to Lindenwood for the Spring 2020 semester. The Settlement provides that Class Counsel may seek up to one-third in attorneys' fees, costs, and expenses, and a $5,000 incentive award for Plaintiff.

This Court preliminarily approved the Settlement on January 6, 2022 (*see* ECF No. 41), and also approved a detailed Notice of Settlement of Class Action ("Notice") that outlined the Settlement terms, including attorneys' fees, costs, expenses, and incentive award. And the Class response has been overwhelmingly positive. Class Members resoundingly approve of the Settlement—not a single Class Member has objected.

Accordingly, Plaintiff seeks (1) reasonable attorneys' fees and costs totaling $550,000, or one-third of the Settlement Fund; and (2) an incentive service award of $5,000 for Plaintiff in recognition of his contributions to the case, his service to the Class Members, and the efforts and risks he undertook in bringing this litigation.

II. PLAINTIFF'S APPLICATION FOR ATTORNEYS' FEES, COSTS, AND EXPENSES

The Settlement provides that Class Counsel will seek (a) an award of attorneys' fees, costs, and expenses in an amount not to exceed one-third of the Settlement Payment Amount. *See* Agreement ¶ 8.1 (Marchese Decl., Ex. A). This fee is reasonable in light of the complexity of the litigation, the high degree of risk assumed by Counsel, the amount of time and resources expended on the case, and the excellent result achieved for the Class. A more detailed review of the work performed by Class Counsel in this litigation is included in the Declaration of Joseph I. Marchese ("Marchese Decl.") submitted herewith. For the reasons set forth therein and herein, the Court should grant Plaintiff's application for attorneys' fees, costs, and expenses.

III. PLAINTIFF'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES SHOULD BE GRANTED

The relevant considerations all support Class Counsel's fee and expense request. ***First***, this Court should determine Class Counsel's fee based on the total value of the Settlement that was obtained for the Class: $1,650,000. *See infra* § III.A. ***Second***, Class Counsel requests a reasonable percentage of the total settlement recovery. Courts in the Eighth Circuit and nationwide routinely award attorneys one-third, or more, of the total fund in class actions. *See infra* § III.B. ***Third***, the relevant factors support Class Counsel's fee request. *See infra* § III.C (discussing factors considered by courts in the Eighth Circuit). ***Fourth***, a lodestar cross-check confirms the reasonableness of Class Counsel's fee request. *See infra* § III.D.

A. Class Counsel Secured A $1,650,000 Common Fund

This Court should determine Class Counsel's fees and expenses based on the *total value* of the Settlement that was obtained for the class, which is $1,650,000. Class Counsel's fee and expense request is one-third of the $1,650,000 Settlement. It is well-established that the percentage of fund method of calculating fees "is based on a percentage of the actual value to the

class of any settlement fund…." Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* (3d ed.). Here, the overall value of the Settlement is $1,650,000, so the Court should determine Class Counsel's fees and expenses based on a percentage of this total settlement fund. The resulting fee and expense request for one-third of the Settlement is well within the range of reasonableness.

B. Class Counsel's Request for One-Third of the Fund Represents a Reasonable Percentage That is Customarily Awarded

Class Counsel's fee and expense request for one-third of the settlement fund is well within the range of reasonableness. Indeed, courts in this circuit routinely award one-third of common funds in class action settlements. *See In re U.S. Bancorp Litigation*, 291 F.3d 1035, 1038 (8th Cir. 2002) (awarding 36% of $3.5 million common fund, plus $40,000 for expenses); *In re Charter Commc'ns, Inc., Sec. Litig.*, 2005 WL 4045741, at *21 (E.D. Mo. June 30, 2005) ("33% remains the fee most frequently requested."); *see also* 4 Newberg on Class Actions § 14.60 (4th ed. 2010) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.") (citing cases); *Barfield v. Sho-Me Power Elec. Co-op.*, 2015 WL 3460346, at *4-5 (W.D. Mo. June 1, 2015) (collecting cases).[1] Notably, courts in this circuit have awarded one-third in cases with significantly larger funds than this one. *See Caligiuri v. Symantec Corp.*, 855

[1] *In re Iowa Ready-Mix*, 2011 WL 5547159, at *3-4 (N.D. Ia. Nov. 9, 2011) (awarding 36.04% of $18.5 million common fund, plus over $900,000 in expenses); *West v. PSS World Medical, Inc.*, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24, 2014) ("In this case, the court believes that 33 percent is a reasonable percentage for attorney's fees."); *Wiles v. Southwestern Bill Telephone Co.*, 2011 WL 2416291, at *10-11 (W.D. Mo. June 9, 2011) (awarding one-third of $900,000 common fund); *Ray v. Lundstrom*, No. 8:10CV199, 2012 WL 5458425 (D. Neb. Nov. 8, 2012) (awarding one-third of $3.1 million fund, plus $77,900 in expenses); *Brehm v. Engle*, No. 8:07CV254, 2011 U.S. Dist. LEXIS 35127, at *6 (D. Neb. Mar. 30, 2011) (awarding one-third of $340,000 settlement funds in fees, plus $45,000 in expenses); *Kelly v. Phitten USA, Inc.*, 277 F.R.D. 564, 571 (S.D. Iowa 2011) (awarding 33% of settlement).

F.3d 860, 866 (8th Cir. 2017) (awarding one-third of $60 million settlement); *Huyer v. Buckley*, 849 F.3d 395, 398 (8th Cir. 2017) (awarding one-third of $25.75 million settlement).

C. The *Johnson* Factors Support the Reasonableness of the Fee Request

The reasonableness of the requested fee award—under either the percentage method or the lodestar method—is supported by the "*Johnson*" factors, which are approved in the Eighth Circuit. *See Barfield*, 2015 WL 3460346, at *5 (Eighth Circuit "has approved consideration of the twelve factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 719-20 (5th Cir. 1974)."). The *Johnson* factors include:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the attorney's preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. at *5 (quoting *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 944 n.3 (8th Cir. 2007)). Not every factor applies, and the Court has discretion regarding which factors it considers and the relative weight given to each. *See In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980. 993 (D. Minn. Apr. 8, 2005) (citing *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854 (10th Cir. 1993) (noting that "rarely are all of the *Johnson* factors applicable; this is particularly so in a common fund situation"); *see also Yarrington v. Solvay Pharmaceuticals, Inc.*, 697 F. Supp. 2d 1057, 1062 (D. Minn. 2010) ("not all of the individual factors will apply in every case, affording the Court wide discretion in the weight to assign to each factor.") Here, the most salient factors support the requested fee award.

1. The Amount Involved and Results Obtained Demonstrate the Settlement Benefit

The Settlement provides significant and immediate relief to the Class Members: a $1.65 million non-reversionary fund that will benefit the approximate 6,000 Class members. These benefits to the Class are particularly exceptional in light of the risks involved with continued litigation, and because the $1.65 million represents just under half of the maximum possible damages the Class could have received if it were to prevail at trial, according to calculations performed by Settlement Class Counsel. This factor therefore weighs in favor of approving the requested fees and expenses.

2. Plaintiff's Counsel Undertook Significant Risk and Achieved A Beneficial Result

"Courts have recognized that the risk of receiving little of no recovery is a major factor in awarding attorney fees." *Yarrington*, 697 F. Supp. 2d at 1062 (quoting *In re Xcel*, 364 F. Supp. 2d at 994) (quotations omitted). "The risk of non-payment must be judged as of the inception of the action and not through the rosy lens of hindsight." *In re Diet Drugs (Phentermine Fenfluramine, Dexfenfluramine) Products Liab. Litig.*, 553 F. Supp. 2d 442, 478 (E.D. Pa. 2008), *as corrected* (Apr. 9, 2008), *judgment entered*, 2008 WL 2890878 (E.D. Pa. July 21, 2008) and *aff'd sub nom. In re Diet Drugs*, 582 F.3d 524 (3d Cir. 2009). "A determination of a fair fee for Class Counsel must include consideration of the contingent nature of the fee, the wholly contingent outlay of out-of-pocket sums by Class Counsel, and the fact that the risks of failure and nonpayment in a class action are extremely high." *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1339 (S.D. Fla. Feb. 16, 2007). The risk of no recovery factors into undesirability, and is considered in light of, among other things, the risk of obtaining class certification and establishing liability at trial. *Bredbenner v. Liberty Travel, Inc.*,

2011 WL 1344745, at *20 (D.N.J. Apr. 8, 2011).[2] Here, Plaintiff's counsel faced numerous issues and defenses making liability (and consequent payment) uncertain. Moreover, the case was prosecuted on a contingent basis, entailing substantial risk that the litigation would yield little or no recovery or compensation.[3]

Also, given that Defendant was represented by highly qualified and sophisticated counsel, this was clearly a high-risk case whose outcome was uncertain. Accordingly, the fees and expenses requested by Class Counsel are reasonable for a complex, high risk action that yielded a relatively quick and beneficial outcome for class members.

3. The Factual and Legal Issues in this Action are Complex

This complex nature of this litigation favors the requested fee award. It goes without saying that the claims and legal theories at issue are novel, complicated, and unsettled, to put it lightly. This litigation is thus inherently "a complex case raising difficult and in some instances novel legal issues"as well as "thorny issues of fact." *In re Lupron Mktg. & Sales Practices Litig.*, 2005 WL 2006833, at *4 (D. Mass. Aug. 17, 2005). And "Courts have recognized that the novelty, difficulty and complexity of the issues involved are significant factors in determining a fee award." *In re Heritage Bond Litig.*, 2005 WL 1594403, at *20 (C.D. Cal. June10, 2005)

[2] There are ample examples of situations in which attorneys in complex litigation "have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." *In re Xcel*, 364 F. Supp. 2d at 994 (citing *Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir. 2002) (reversing class certification). *See e.g., In re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 437-38 (8th Cir. 1999) (affirming dismissal without leave to replead); *see also Vaszlavik v. Storage Tech Corp.*, 2000 U.S. Dist. LEXIS 21140, at *11 (D. Colo. Mar. 9, 2000) (case undesirable "given the risk of no recovery and the uncertainty of the governing law.").

[3] "It is an established practice to reward attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all." *Kanawi v. Bechtel Corp.*, 2011 WL 782244, at *2 (N.D. Cal. Mar. 1, 2011) (citing *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994)). "Such a practice encourages the legal profession to assume such risk and promotes competent representation for plaintiffs who could not otherwise hire an attorney." *Id.*

(awarding one-third of the $27.8 million fund where the class action "concerned relatively uncharted territory" and "cannot be considered a garden variety … class action" … "Cases of first impression generallyrequire more time and effort on the attorney's part ... [counsel] should not be penalized for undertaking a casewhich may make new law, [but] appropriately compensated for accepting the challenge."). The complexity of this case is further underscored by the challenges Plaintiff faced on a motion to dismiss, and the challenges they were likely to face at class certification and summary judgment. Moreover, further litigation would have been costly and lengthy, with no certainty of success at trial or on appeal. Thus, this factor favors the requested fees and expenses.

4. Counsel For All Parties are Skilled Practitioners in Complex Litigation

Complex litigation and class actions require skill sets and experience needed to perform the legal service properly. Settlement Class Counsel are highly skilled and experienced in class action litigation, particularly in the consumer context, and have achieved a number of exceptional results throughout the country over the last several years. Bursor & Fisher, P.A. has significant experience in litigating class actions of similar size, scope, and complexity to the instant action. The firm has been recognized by courts across the country for its expertise and skilled, effective representation. *See* Marchese Decl. ¶ 39. Moreover, Plaintiff faced well-qualified opposing counsel from a national law firm who skillfully argued defenses on their client's behalf. *See, e.g., Bredbenner*, 2011 WL 1344745, at *20 (performance and quality of opposing counsel considered in measuring the skill and efficiency of class counsel). "Class counsel's success in bringing this litigation to a conclusion prior to trial is another indication of the skill and efficiency of the attorneys involved." *Id.* Counsel's skill in "achieving a speedy and fair settlement" as well as the "use of informal discovery and cooperative investigation to

provide the information necessary to analyze the case and reach a resolution" are to be commended, and weigh in favor of the appropriateness of the fee. *King v. United SA Fed. Credit* Union, 744 F. Supp. 2d 607, 614 (W.D. Tex. 2010); *see also Di Giacomo v. Plains All American Pipeline et al.* 2001 WL 34633373 (S.D. Tex. Dec. 19, 2001), at *10 (commending counsel's "aggressive and efficient strategy that culminated in a substantial recovery in a short period of time, saving plaintiffs large sums of money and avoiding the considerable risk and delays of litigation."); *In re Charter* Commc'ns, 2005 WL 4045741, at *21 (noting with approval that "[t]his is the type of complex litigation that easily could have dragged on for several more years. Instead, it had a relatively short stay of two and a half years on this court's docket because counsel litigated the case efficiently and inexpensively."). Accordingly, this factor weighs heavily in favor of the requested fees and expenses.

5. Class Counsel Dedicated Significant Time and Labor to This Case

Since Settlement Class Counsel began this investigation in May 2020, Counsel has devoted over 269.9 hours to the successful pursuit of this matter. Marchese Decl. ¶ 29. Their dedication to this matter and expenditure of substantial time, effort, and resources have brought this complex litigation to a successful resolution.

(i) Class Counsel Thoroughly Investigated the Claims and Allegations in this Matter

Settlement Class Counsel extensively investigated legal and factual allegations of Plaintiff's breach of contract and unjust enrichment claims. That work included, *inter alia*, conducting an extensive factual investigation, including (i) interviewing witnesses with knowledge of the underlying allegations set forth in the Complaint; (ii) reviewing extensive records and documents provided by the Plaintiff, Defendant and others; (iii) reviewing public statements issued by Lindenwood; (iv) reviewing Lindenwood course registration portals,

various policy documents, and handbooks; and (v) reviewing other publicly available information on Lindenwood's website. *See* Marchese Decl. ¶¶ 3-14.

(ii) Class Counsel Actively Litigated this Case

Settlement Class Counsel drafted pleadings including a comprehensive class action complaint, with input from Plaintiff. In doing so, they collected, reviewed, analyzed and used documents from Plaintiff, class members and Lindenwood. Class Counsel also opposed and defeated a motion to dismiss, which included drafting and submitting notices of supplemental authority. Class Counsel also maintained consistent communication with Lindenwood's counsel concerning the issues presented by this case. *See* Marchese Decl. ¶ 3-14.

(iii) Class Counsel Committed Substantial Time and Resources to Reaching a Comprehensive Class Settlement and Obtaining Preliminary Approval

Class Counsel also dedicated a significant amount of time to reaching a resolution of this matter. Class Counsel worked diligently to formulate a programmatic relief proposal; participated in a full day of mediation; received and reviewed informal discovery documents in furtherance of resolution; negotiated and prepared the Class Action Settlement Agreement and the Class Notice documents and Claim Form; and secured and worked with a Settlement Administrator to effectuate the Settlement. *See* Marchese Decl. ¶¶ 11-14, 26-27.

Class Counsel also successfully moved for Preliminary Approval of the Proposed Class Action Settlement (*see* ECF Nos. 40, 41). Class Counsel provided this Court with lengthy briefing, declarations, and exhibits in support of their Motion.

(iv) Class Counsel's Significant Work After Preliminary Approval

After this Court granted Preliminary Approval, Class Counsel spent a substantial amount of time working with the Settlement Administrator and assisting the Plaintiff and Class Members

with the Settlement and their claims submissions. *See* Marchese Decl. ¶ 27. Throughout this litigation, Class Counsel has participated in numerous calls with the Plaintiff and class members regarding their claims, the litigation, the Settlement, and the claims submission (in addition to extensive written communications). *Id*.

(v) Over the Next Several Months, Class Counsel Will Commit Additional Time and Resources to Monitoring the Settlement

Class Counsel will commit significant ongoing time and resources to this litigation. Marchese Decl. ¶ 30. Class Counsel will, in the immediate future, be required to dedicate time and resources to administering the Settlement. *Id*. Based on Class Counsel's experience in other cases, this ongoing work will likely involve approximately 50-75 total additional hours. *Id*. This additional work should be accounted for as well. *See Roberts v. TJX Companies, Inc.*, 2016 WL 8677312, at *13 (D. Mass. Sept. 30, 2016) (awarding one-third and noting that class counsel has "already committed, and anticipate continuing to commit, additional time to the administration of the claims.").

(vi) Class Counsel's Expeditious Resolution of this Case Should Not Reduce the Fee and Expsense Award

The timing of this settlement does not suggest a reduced percentage fee and expense award. *See id.* (where case settled shortly after pleadings stage, awarding one-third of the total settlement fund based on counsel's efforts and the risk assumed in taking the case on a contingency basis); *Rawa v. Monsanto* Company, 2018 WL 2389040, at *9 (E.D. Mo. May 25, 2018) (awarding fees totaling $6,020,000 after Plaintiffs' counsel resolved case in a speedy and efficient manner); In *re StockerYale, Inc. Sec. Litig.*, 2007 WL 4589772,at *6-7 (D.N.H. Dec. 18, 2007) (awarding 33%, or $1,122,000 in attorneys' fees despite lodestar value of just $521,985); *In re Sequoia Sys., Inc. Sec. Litig.*, 1993 WL 616694,at *1 (D. Mass. Sept. 10, 1993) (awarding one-

third and finding that "the speed with which relatively complex litigation has been resolved" was "a function of the quality of the counsel involved, their ability to get to the core of the case, the jugular of the case promptly, and effect a prompt resolution. That prompt resolution is a time value to the members of the class themselves."). Indeed, as the Eighth Circuit has explained, "[i]t is well established in this circuit that a district court may use the 'percentage of the fund' methodology to evaluate attorney fees in a common-fund settlement." *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999); *see also In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (court finding no abuse of discretion in awarding 36% of the settlement fund under percentage of recovery methodology).

It is axiomatic that Settlement Class Counsel should be rewarded for efficiently reaching an excellent settlement that provides excellent monetary benefits to the Class. An efficient and effective resolution should not be counted against them. *See*, *e.g.*, *Maley v.Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002) (awarding one-third of $11.5 million fund, noting "such efficient prosecution of plaintiffs' claims weighs in favor of a finding of the quality of [Class Counsel's] representation here . . . [A] prompt and efficient attorney who achievesa fair settlement without litigation serves both his client and the interests of justice.' In the contextof a complex class action, early settlement has far reaching benefits in the judicial system."); *see also In re Nat'l Football League Players' Concussion Injury Litig.*, 2018 WL 1635648, at *5-6 (E.D. Pa. Apr. 5, 2018) (awarding over $100 million in attorneys' fees in "mega-fund" case even where the settlement "was secured without formal discovery, with limited litigation of motions, and with no bellwether trials"; because class counsel"mastered the intricacies of this case," they were able to reach a "relatively quick resolution" that allowed class members to receive compensation "as quickly as possible"); *Williamson v. MicrosemiCorp.*, 2015 WL 13650045, at

*2 (N.D. Cal. Feb. 19, 2015) ("This Court will not . . . punish [attorneys] for resolving matters quickly, when such quick resolution is, as here, highly beneficial to the class. Indeed, if Class Counsel had not managed to resolve the case so quickly, the case might have bogged down in expensive and protractedlitigation."); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1365 (S.D. Fla. 2011) (awarding 30% of a $410 million "mega-fund" settlement: "this is one of the occasions when an early resolution may demonstrate that the parties and their counsel are well prepared and well aware of the strength and weaknesses of their positions and of the interests to beserved by an amicable end to the case.") (quotations omitted).

6. The Requested Award is Aligned with Awards in Comparable Cases

Courts in this Circuit routinely award one-third of the total fund in attorneys' fees and expenses. *See supra* Section III.B (collecting cases in this Circuit and throughout the country awarding one-third in attorneys' fees). Class Counsel's fee request for one-third of the total fund is in line with awards in other complex class action settlements within this Circuit. *See id.*

D. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee

Finally, a lodestar cross-check[4] confirms the reasonableness of Settlement Class Counsel's fee and expense request. Settlement Class Counsel have devoted more than 269 hours to litigating and settling this case.[5] *See* Marchese Decl. ¶ 29. Their aggregate lodestar exceeds $157,000. *Id*.

[4] The Eighth Circuit does not require a court to cross check the percentage of fund against the lodestar in its determination of the reasonableness of the requested fee. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) ("[W]e note that although the use of the 'lodestar' approach is sometimes warranted to double-check the result of the 'percentage of the fund' method, we detect no indication here that the award is overly generous."); *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*, 736 F. Supp. 1007, 1009 (E.D. Mo. Apr. 26, 1990) (finding percentage of the recovery in a class action common fund case a more appropriate and efficient means of calculating an attorneys' fee award).

[5] Detailed time records are attached to the Marchese Decl. as Exhibit B.

The requested fee award represents a multiplier of 3.4, which is well within the range of reasonableness. Multipliers of 4 and more have been found reasonable in common fund cases in the Eighth Circuit. *Rawa v. Monsanto Company*, 934 F.3d 862, 870 (8th Cir. 2019) (finding that lodestar multiplier of 5.3 did not exceed the bounds of reasonableness); *Keil v. Lopez*, 862 F.3d 685, 702 (8th Cir. 2017) (finding multiplier of 2.7 to be in line with multipliers used in other cases in this circuit); *In re Xcel*, 364 F.Supp.2d, 980, 999 (approving multiplier of 4.7). Notably, Settlement Class Counsel's lodestar does not account for the additional hours that will be dedicated to administering and overseeing the Settlement over the next several months. Marchese Decl. ¶ 30.

IV. PLAINTIFF IS ENTITLED TO AN INCENTIVE AWARD IN THE AMOUNT REQUESTED

The Settlement states that Plaintiff may seek an incentive award of $5,000. Agreement ¶ 8.3. This incentive award is fair and reasonable in light of the time and effort Plaintiff expended for the benefit of the Class, and the risks he assumed by initiating the litigation and publicly representing the Class. Further, the award is not excessive in light of the overall Settlement Fund.

Courts recognize the importance of named plaintiffs and that an incentive award "promote[s] the public policy of encouraging individuals to undertake the responsibility of representative lawsuits." *Yarrington*, 697 F. Supp. 2d at 1068 (approving $5,000 incentive award to named plaintiff). Incentive awards are viewed favorably in this circuit. *Vogt v. State Farm Life Insurance Company*, 2021 WL 247958, at *4 (W.D. Mo. Jan. 25, 2021). Plaintiff has actively pursued this litigation from the outset. His initiative, time, and effort were essential to the successful prosecution of the case. He: (1) worked with Settlement Class Counsel to initiate, investigate and litigate the case; (2) provided input for the complaint; (3) participated in preliminary discovery and provided counsel with necessary documents, communications, and

information; and (4) conferred with Settlement Class Counsel during the litigation and settlement negotiations. Martin Decl. ¶¶ 4-8. An incentive award is appropriate in light of the efforts made by Plaintiff to protect the interests of the other Settlement Class members, the time and effort he expended pursuing this matter, and the substantial benefit he helped achieve for the other Settlement Class members. An incentive award of $5,000 is well-deserved, reasonable, and equivalent to awards approved by other courts in this Circuit. *See Scovil v. FedEx Ground Package System, Inc.*, 2014 WL 1057079 at *6 (D. Me. 2014) (citing a 2006 study of incentive awards during 1993-2002 found the median incentive payment to be $4,537, with the average being $15,992); *see also, Tussey v. ABB, Inc.*, 850 F.3d 951, 961 (8th Cir. 2017) (approving incentive award of $25,000 to each of the three named plaintiffs); *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017) (finding no error in service award of $10,000). Based on the foregoing, Class Counsel respectfully request that the Court approve an incentive award of $5,000 for Plaintiff.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant Plaintiff's application for attorneys' fees, costs, expenses, and an incentive award to the Plaintiff.

Dated: March 7, 2022

Respectfully submitted,

By: */s/ Joseph I. Marchese*
Joseph I. Marchese

BURSOR & FISHER, P.A.
Joseph I. Marchese, #4475983
888 Seventh Avenue
New York, NY 10019
Telephone: (646) 837-7150
Facsimile: (212) 989-9163
Email: jmarchese@bursor.com

Settlement Class Counsel