UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GREGORY BOUTCHARD and SYNOVA ASSET MANAGEMENT, LLC, individually and on behalf of all others similarly situated, Plaintiffs, v. KAMALDEEP GANDHI, YUCHUN MAO a/k/a BRUCE MAO, KRISHNA MOHAN, TOWER RESEARCH CAPITAL LLC, and JOHN DOE NOS. 1-5, Defendants.	Case No. 1:18-cv-07041 Hon. John J. Tharp, Jr.

MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND PAYMENT OF LITIGATION EXPENSES, AND CLASS PLAINTIFFS' REQUEST FOR AN INCENTIVE AWARD

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Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, Lowey Dannenberg, P.C. ("Lowey" or "Lead Counsel") respectively submits this motion for an attorneys' fee award of 33% (or $4,950,000) from the $15,000,0000 common fund established by the settlement (the "Settlement")[1] with Tower Research Capital LLC ("Tower") and an award of $203,060.89 as reimbursement for litigation expenses incurred in prosecuting the Action, plus interest on the awards at the same rate that is earned by the Settlement Fund. Class Plaintiffs also request that the Court approve an incentive award of $30,000 to be shared among them for their work on behalf of the Class.

INTRODUCTION

Lead Counsel, assisted by Cafferty Clobes Meriwether & Sprengel LLP ("Cafferty"),[2] worked diligently and took considerable litigation risk in the face of constant uncertainty to achieve this first of its kind, class-wide settlement of a private Commodity Exchange Act ("CEA") case alleging spoofing-based manipulation. To do so, Lead Counsel devoted thousands of hours to developing the theory of the case, a robust economic framework to determine the market impact of the alleged manipulation and quantify an estimate of damages as a result of the manipulation, aggressively litigating the claims in connection with Defendants' motion to dismiss, and negotiating the settlement over several months with the assistance of a mediator. Lead Counsel, at its own expense, engaged industry leading experts to develop models that identified potential spoofing events, assist counsel to evaluate Defendants' arguments, and assess the potential damages created by these novel claims. Lead Counsel achieved this result for the class in the face of the added uncertainty created by Tower's settlement with the U.S. Department of Justice ("DOJ") and U.S. Commodity Futures

[1] Unless otherwise noted, capitalized terms not defined herein have the same meaning as in the Stipulation and Agreement of Settlement dated January 22, 2021 (the "Agreement" or "Settlement Agreement"). ECF No. 125-1. Unless otherwise noted, internal citations and quotation marks are omitted and ECF citations are to the docket.

[2] Cafferty served as both local counsel and additional Plaintiffs' counsel in this action.

Trading Commission ("CFTC"), which resulted in the creation of the Victims' Compensation Amount ("VCA") that Defendants contended could moot Class Plaintiffs' claims, and despite Defendants' efforts to enforce an arbitration clause. Nevertheless, Lead Counsel developed a successful litigation strategy and obtained significant relief for the Class at an early stage.

In light of the above, and as described below, Lead Counsel's 33% fee request is reasonable. It is consistent with awards in similar cases and other class settlements in this District. Similarly, the expenses for which Lead Counsel seeks reimbursement were reasonably incurred in achieving this excellent result for the Class and should be paid out of the Settlement Fund. Finally, Class Plaintiffs devoted substantial time and effort to this litigation, at substantial personal risk, and an incentive award of $30,000 is appropriate.

ARGUMENT

I. Lead Counsel's Attorneys' Fee Request Is Fair and Reasonable

A. The Awarded Fee Should Be a Percentage of the Fund

In common fund cases, the lawyers that secure the recovery for the class are entitled to a reasonable portion of the fund as attorneys' fees. *See Sutton v. Bernard*, 504 F.3d 688, 691-92 (7th Cir. 2007) (the common fund doctrine "is based on the equitable notion that those who have benefited from litigation should share in its costs."). Although courts within this Circuit "have discretion to choose either the lodestar or the percentage method of calculating fees," *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2009 WL 4799954, at *9 (N.D. Ill. Dec. 9, 2009), the Seventh Circuit has strongly endorsed the percentage-of-the-fund method as it most closely approximates the manner in which attorneys are compensated in the marketplace for contingent work. *See Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund . . . in recognition of the fact that most suits for damages in this country are handled on the plaintiff's side on a contingent-fee basis"); *In re Ky. Grilled Chicken*

Coupon Mktg. & Sales Pracs. Litig., No. 09 C 7670, 2011 WL 13257072, at *3 (N.D. Ill. Nov. 30, 2011) ("[T]he approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred upon the class."); *In re Rough Rice Commodity Litig.*, No. 11-cv-00618, ECF No. 178 (N.D. Ill. Aug. 25, 2015) (awarding fee in a CEA case based on the percentage of the fund); *see also Kolinek v. Walgreen Co*., 311 F.R.D. 483, 501 (N.D. Ill. 2015) (percentage of the fund method preferred as lodestar-based fees "require plaintiffs to monitor counsel and ensure that counsel are working efficiently on an hourly basis, something a class of nine million lightly injured plaintiffs likely would not be interested in doing.").

Conversely, courts in this Circuit have been strongly critical of employing the lodestar method to determine a fee award in class action settlements. *See In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979-80 (7th Cir. 2003) ("*Synthroid II*") (noting that the lodestar method may create a conflict of interest between the attorney and client and reward inefficiency). Courts have reasoned that "[t]he use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive." *Kaufman v. Am. Express Travel Related Servs., Co.*, No. 07-cv-1707, 2016 WL 806546, at *13 n.19 (N.D. Ill. Mar. 2, 2016); *see also Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) ("[C]onsideration of a lodestar check is not an issue of required methodology."); *In re Dairy Farmers of Am., Inc.,* 80 F. Supp. 3d 838, 849 (N.D. Ill. 2015) (same); Nevertheless, Lead Counsel respectfully submit that even upon applying a lodestar cross-check,[3] the requested fee is justified.[4]

[3] The lodestar method involves multiplying the hours devoted to the case by the relevant professional's hourly rate, then applying a case-specific multiplier to compensate for risk, outcome and quality of work. When using the lodestar method, a multiplier is generally "mandated" in successful cases in which counsel bore the risk of loss. *See, e.g., Florin v. Nationsbank of Ga.*, 60 F.3d 1245, 1247 (7th Cir. 1995) ("court[s] must also be careful to sustain the incentive for attorneys to continue to represent such clients on an 'inescapably contingent' basis"); *In re Continental Illinois Secs. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992) ("the need for such an adjustment is particularly acute in class action suits"); *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 253 (7th Cir. 1988) ("the higher the risk . . . the greater the multiplier necessary to compensate plaintiff's attorney for bringing the action").

[4] Lead Counsel's and Cafferty's total lodestar is $2,508,943.00, resulting in a lodestar multiplier of 1.85 if the Court grants Lead Counsel's fee request. Here the lodestar cross-check demonstrates the applicable multiplier is within the range of reasonable multipliers approved in this District. *See Abbott*

B. The 33% Attorneys' Fee Request Is Consistent with Seventh Circuit Authority

The Seventh Circuit has held repeatedly that "in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d at 844; *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*"). Courts consider "the value that the market would have placed on [Class] Counsel's legal services had its fee been arranged at the outset" to "avoid[] assigning a value based on nothing more than a subjective judgment regarding [Class Counsel's] work." *Sutton*, 504 F.3d at 693-94. Additionally, the "market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Synthroid I*, 264 F.3d at 721; *Charvat v. Valente*, No. 12-cv-05746, 2019 WL 5576932, at *11 (N.D. Ill. Oct. 28, 2019) (same).

Applying these principles, "[c]ourts routinely hold that one-third of a common fund is an appropriate attorneys' fees award in class action settlement[s.]" *Koszyk v. Country Fin. a/k/a CC Servs., Inc.*, No. 16-cv-3571, 2016 WL 5109196, at *4 (N.D. Ill. Sept. 16, 2016); *see, e.g., Taubenfeld v. Aon Corp.*, 415 F.3d 597, 599-600 (7th Cir. 2005) (noting courts in this district have awarded fees of 30-39% of the settlement fund); *Gaskill*, 160 F.3d at 362-63 (affirming award of 38% of fund); *Gupta v. Power Sols. Int'l, Inc.*, No. 1:16-CV-08253, 2019 WL 2135914, at *1 (N.D. Ill. May 13, 2019) (awarding 33⅓% of $8.5 million settlement fund);

v. Lockheed Martin Corp., No. 06-cv-0701-MJR-DGW, 2015 WL 4398475, at *3 (S.D. Ill. July 17, 2015) ("Between 1993 and 2008, the mean multiplier in class actions in the Seventh Circuit was 1.85. [. . .] In developing, risky litigation such as this, the Court would anticipate a risk multiplier exceeding the mean.") (citing Theodore Eisenberg & Geoffrey Miller, *Attorneys' Fees and Expenses in Class Action Settlement: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 272 (Table 14) (2010)); *see also Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991) ("Multipliers anywhere between one and four . . . have been approved.").

Goldsmith v. Tech. Solutions Co., No. 92 C 4374, 1995 WL 17009594, at *7-9 (N.D. Ill. Oct. 10, 1995) (awarding fees in the amount of one-third of the settlement fund, noting that "courts in this District commonly award attorneys' fees equal to approximately one-third or more of the recovery"); Order, *In re Steel Antitrust Litig*., No. 08-cv-05214 (N.D. Ill. Feb. 16, 2017), ECF No. 680 (awarding fee of 33% of $30 million settlement); *Beesley v. Int'l Paper Co*., No: 3:06-cv-703-DRH-CJP, 2014 WL 375432 (S.D. Ill. Jan. 31, 2014) (awarding a fee of 33⅓% of $30 million settlement). Plaintiffs' request, therefore, comports with this Circuit's authority.

C. The Requested Fee Is Within the Range of Fees Awarded in Similar Cases

Courts in this District and others award attorneys' fees at or around one-third of the settlement fund in complex CEA manipulation cases. *See, e.g.*, Final Order and Judgment, *In re Rough Rice Commodity Litig.*, No. 11-cv-00618 (N.D. Ill. Aug. 25, 2015), ECF No. 178 (awarding attorneys' fee of one-third of the $625,000 settlement fund); *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d at 862 (granting fee petition seeking one-third of $46 million common fund); Final Judgment and Order, *In re Soybeans Futures Litig.*, No. 89 Civ. 7009 (N.D. Ill. Nov. 27, 1996) Dkt. Nos. 470-71 (33⅓% fee award plus interest and expenses); *see also In re Amaranth Nat. Gas Commodities Litig.*, No. 07-cv-6377(SAS), 2012 WL 2149094, at *2 (S.D.N.Y. June 11, 2012) (awarding a 30% fee); Order, *In re Nat. Gas Commodities Litig.*, No. 03-cv-6186(VM)(AJP) (S.D.N.Y. May 26, 2006), ECF No. 445 (awarding one-third of $72,762,500 common fund as attorneys' fees), Revised Order (Jun. 22, 2007), ECF No. 507 (awarding one-third of $28,087,500 settlement as attorneys' fees).

D. The Risks of This Litigation Support the Requested Fee Award

The risk of non-recovery is an important consideration when determining the reasonableness of a fee award. "The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *See Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013). When determining the reasonableness of a fee

request, courts put a fair amount of emphasis on the severity of the risk that class counsel assumed. *See Sutton*, 504 F.3d at 693.

As described in the Final Approval Mem. and the Briganti Declaration I,[5] Plaintiffs faced significant *ex ante* litigation risks in proving liability, class-wide impact and damages. At all times during the litigation, Class Plaintiffs faced uncertainty in their ability to establish Defendants' liability related to the alleged manipulation by "spoofing" of E-Mini Index Futures on the Chicago Mercantile Exchange ("CME") and/or Chicago Board of Trade ("CBOT"). Briganti Decl. I ¶ 22. This was one of the first private CEA class actions related to spoofing and, as a result, the case carried a great deal of risk of non-recovery. *Id.* At the motion to dismiss stage, Defendants argued that Plaintiffs would be unable to establish actual damages unless they could prove that they traded at the exact second that Defendants' spoof orders were in the Order Book. *Id.* ¶ 21. While Plaintiffs categorically disagree with Defendants' argument, the dearth of caselaw in private spoofing actions led to greater uncertainty and risk of non-recovery for Class Plaintiffs. Similarly, the possibility that Plaintiff Boutchard could have been compelled to arbitrate hung over Plaintiffs right up until settlement.

This uncertainty was amplified when Tower settled with the DOJ and the CFTC and the VCA was created, which Tower contended had the potential to moot Class Plaintiffs' claims and extinguish *all* class-wide damages. While, again, Class Plaintiffs reject these arguments, the question of whether there are damages in a private CEA action in light of compensation payments made available to victims through a related regulatory restitution fund

[5] "Final Approval Mem." refers to Class Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement with Tower Research Capital LLC, "Briganti Declaration I" or "Briganti Decl. I" refers to the Declaration of Vincent Briganti in Support of (A) Class Plaintiffs' Motion for Final Approval of Class Action Settlement with Tower Research Capital LLC; and (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses dated May 27, 2021, and "Briganti Declaration II" or "Briganti Decl. II" refers to the Declaration of Vincent Briganti on Behalf of Lowey Dannenberg, P.C. in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses dated May 27, 2021, filed herewith.

is not simply unsettled but, as far as Lead Counsel are aware, has never been considered. Class Plaintiffs have the burden to prove actual damages. A successful *Daubert* challenge or effective cross-examination at trial could have resulted in a significantly reduced or zero recovery even if liability had been proved. Even where the DOJ or CFTC has settled with defendants, private suits can still fail—especially when damages are contested. *Compare* Order Instituting Proceeding Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions, *In the Matter of: Total Gas & Power North America, Inc. and Therese Tran*, CFTC Docket No. 16-03 (Dec. 7, 2015) (fining respondent $3.6 million for manipulating natural gas prices), *with Harry v. Total Gas & Power N. Am., Inc.*, 889 F.3d 104, 114 (2d Cir. 2018) ("Plaintiffs have failed to provide facts sufficient to allege a plausible connection between their trading and [defendant's conduct].").

At class certification, Class Plaintiffs would have to establish, in part through expert testimony, that Defendants' alleged manipulation caused class-wide impact, that class members' damages could be computed on a common, formulaic basis, and shown with common evidence. While Lead Counsel believe that they could have certified a class based on their long history of successfully certifying CEA class actions,[6] Defendants are represented by sophisticated attorneys that would have coordinated a substantial attack on Plaintiffs' experts.

Finally, the Action—alleging an intricate theory of liability against a sophisticated opponent in an inherently complex and costly area of the law—was prosecuted on a fully

[6] *See Ploss v. Kraft Foods Group, Inc.*, 431 F. Supp. 3d 1003 (N.D. Ill. 2020) (certifying class of investors in wheat futures); *Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672 (7th Cir. 2009) (seminal Seventh Circuit case affirming certification of a CEA class action on behalf of U.S. Treasury note futures contract investors); *In re Sumitomo Copper Litig.*, 182 F.R.D. 85 (S.D.N.Y. 1998) (certifying a two-year class of all investors in COMEX copper futures); *In re Nat. Gas Commodities Litig.*, 231 F.R.D. 171 (S.D.N.Y. 2005) (certifying a class of investors in NYMEX natural gas futures contracts covering more than 60 different contracts over a three-year class period); *In re Amaranth Nat. Gas Commodities Litig.*, 269 F.R.D. 366 (S.D.N.Y. 2010) (certifying a class of investors who purchased and sold NYMEX natural gas futures and options contracts through classic manipulative devices like slamming the close).

contingent basis, with Lead Counsel bearing all financial risk associated with this Action. Courts have long recognized that the attorneys' contingent risk is an important factor in determining the fee award. *See Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994) ("The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent."). Lead Counsel independently investigated the market, developed a comprehensive strategy, including a robust damages model and theory of the case, and pursued the Action for the benefit of the Class. *See In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d at 848 (awarding fee of one-third of the settlement fund despite existence of a CFTC investigation because counsel invested their own "proprietary legal services" to prosecute the case). As a result, this factor favors Lead Counsel's fee request.

E. The Complexity of the Action Justifies the Fee Request

The requested 33% fee is also fair and reasonable given the complexity of the underlying claims in the Action. In order to bring and prosecute these novel claims, Plaintiffs needed to become versed not only on the complex commodities futures market that Tower allegedly manipulated, but the cutting-edge algorithmic trading strategies that its traders used to carry out their manipulation. Class Plaintiffs' allegations concerned thousands of instances of manipulation of three separate futures contracts (and their associated options) on public exchanges over the course of several years. In cases requiring similar expertise, courts have acknowledged that "the issues presented . . . are complex and require[ ] the collection of large amounts of data in order to frame a proper theory for recovery and to amass evidence in support of the complaint." *In re Clark Oil & Ref. Corp. Antitrust Litig.*, 422 F. Supp. 503, 510 (E.D. Wis. 1976). Lead Counsel collaborated with their experts to evaluate immense futures and options data sets and other information to identify the effects of Defendants' alleged manipulation and the market-wide damages. This involved developing a proprietary model to

identify instances of spoofing in the CME Order Book data, calculate the price impact of the spoofing, and measure the duration of that impact in the market. Briganti Decl. I ¶¶ 12, 30-31.

Litigation involving commodity futures markets is regarded as challenging because the issues that can arise are often technical and difficult to grasp. *See Arenson v. Bd. of Trade of City of Chi.*, 372 F. Supp. 1349, 1352 (N.D. Ill. 1974) ("It would be difficult to imagine litigation presenting issues of greater subtlety and complexity" than those involving commodity futures markets). Lead Counsel invested 3,410.70 hours investigating the Defendants' misconduct, reviewing Plaintiffs' trading records, working with economic experts to develop a model for damages, drafting complaints to reflect Plaintiffs' ongoing investigation, and briefing the application of the CEA to manipulation from spoofing. Lead Counsel was supported by Cafferty's contribution of 338 additional hours, all of which led to achieving this positive resolution for the Class. Briganti Decl. II ¶ 6, Fata Decl. ¶ 7.[7] The complexity of the action confirms that Lead Counsel's fee request is reasonable.

F. Lead Counsel's Representation of the Class Supports Granting the Requested Fee

The Court may further consider the amount and quality of Lead Counsel's work in its fee analysis. *Synthroid I*, 264 F.3d at 721. Fees "should be measured in relation to the benefits conferred upon the [class, and] there is no better test than this of the efficacy of the services rendered." *State of Illinois v. Harper & Row Publishers, Inc.*, 55 F.R.D. 221, 224 (N.D. Ill. 1972). As noted above, Lead Counsel and Cafferty together devoted more than 3,700 hours prosecuting this Action and achieving a favorable settlement for the Class.

Lead Counsel developed the class action complaint after extensive investigative work and expending significant resources. Briganti Decl. I ¶¶ 11-17. Lowey developed a proprietary

[7] "Fata Decl." refers to the Declaration of Anthony F. Fata on Behalf of Cafferty Clobes Meriwether & Sprengel LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses.

model to identify instances of spoofing in collaboration with subject matter experts Lead Counsel identified and hired. Briganti Decl. I ¶ 12. Lead Counsel thoroughly vetted and uncovered that both Plaintiffs had traded on days specifically identified in the DOJ and CFTC filings as days when Defendants had engaged in manipulation of E-Mini Index Futures. Briganti Decl. I ¶ 13. The result of this work was an initial complaint that pled CEA and common law claims against Defendants that would be the foundation upon which Lead Counsel would build.

After filing the initial complaint on October 19, 2018, Lead Counsel worked tirelessly and filed three other Amended Complaints. *See* ECF Nos. 26, 45, 82. They also spent considerable time preparing their opposition to Defendants' motions to compel arbitration and to dismiss the Third Amended Complaint, including seeking leave and filing a sur-reply to the motion to dismiss on November 26, 2019 that addressed newly available information contained in Tower's Deferred Prosecution Agreement ("DPA"). ECF Nos. 92, 100.

In mid-November 2019, the Parties began discussing the possibility of settlement and engaged JAMS mediator Jed D. Melnick, Esq. ("Mr. Melnick") on November 22, 2019. Briganti Decl. I ¶ 29. Class Plaintiffs and Tower exchanged mediation statements on January 6, 2020. *Id.* ¶ 30. Class Plaintiffs' mediation statement included a damages model Lead Counsel developed with their experts to demonstrate the harm to Class Members from Defendants' manipulation. The model used CME Order Book data for all E-Mini Index Futures throughout the Class Period and identified instances of spoofing. The model then calculated the price impact of the spoofing and the duration of that price impact in the market. This model was key to establishing that the damage to Class Members exceeded the amount of the VCA, warranting further compensation to the Class beyond what was provided in the DPA. *Id.*

On January 13, 2020, the Parties participated in a day-long mediation session that included Lead Counsel's robust presentation of its views on the litigation and damage analysis,

followed by questions and critiques from Tower. The session lasted more than 10 hours but did not result in a settlement. *Id.* ¶ 32. Following the mediation session, Lead Counsel continued their efforts to negotiate a settlement, working again with Mr. Melnick. Eventually, on April 14, 2020, the Parties accepted the mediator's proposal of a $15,000,000 Settlement with confirmatory discovery, recommended by Mr. Melnick. *Id.* ¶ 33.

Before entering into the Settlement Agreement with Tower, Lead Counsel spent hundreds of hours reviewing the 150,000 documents produced by Tower, including over 100,000 chat and email messages and trading data. Briganti Decl. I ¶ 36. Lead Counsel was able to unravel disclosures regarding the events revealed in government settlements and the scope of the alleged conduct. Lead Counsel and their experts also used the documents produced in confirmatory discovery to examine the number and impact of the alleged manipulative conduct and ultimately determined based in part on this information that the proposed Settlement was in fact fair, reasonable and adequate. *Id.* ¶ 38.

The results achieved by Lead Counsel despite the stern opposition by Defendants at every step of this litigation demonstrate the quality of Lead Counsel's representation and reinforces the reasonableness of their fee request. *In re Linerboard Antitrust Litig.,* MDL No. 1261, 2004 WL 1221350, at *8 (E.D. Pa. Jun. 2, 2004) ("[T]he quality and vigor of opposing counsel is relevant in evaluating the quality of plaintiffs' counsel."). On every issue raised by Defendants and their capable counsel—from the motion to dismiss and compel arbitration, to challenging mediation and negotiation sessions and confirmatory discovery issues—Lead Counsel have argued the Class' case meritoriously and achieved an outstanding result for the Class. The quality of work and outcome achieved support a 33% fee.

G. The Attorneys' Fee Request Is Properly Calibrated to the Stakes of the Action

In evaluating the stakes in the case in relation to the requested fee award, courts are assessing the overall importance of the case, by reference to factors such as the scale of the

challenged conduct, complexity and cost of the action, the potential amount of damages involved, and the risks of continued litigation to judgment. *See AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1038-39 (N.D. Ill. 2011); *see also Heekin v. Anthem, Inc.*, No. 1:05-cv-01908-TWP, 2012 WL 5878032, at *5 (S.D. Ind. Nov. 20, 2012) (measuring the stakes according to class members' losses and the size of the claim against Defendants, class counsel's risk of non-recovery of significant costs, and the opportunity cost of forgoing other representations).

As noted previously, the outcome of this Action at its inception was by no means certain. While the DOJ and CFTC brought charges against Defendants and eventually settled with some, at the same time, it was unclear if the Action would proceed in light of Defendants' motion to dismiss. Briganti Decl. I ¶¶ 18, 21. Based on the analysis of Class Plaintiffs' experts, the losses caused by Defendants' alleged spoofing impacted thousands of market participants. Briganti Decl. I ¶ 30; *see Heekin*, 2012 WL 5878032, at *5 (Class counsel's estimate of between $227 million and $448 million in losses, among other criteria, qualified the case as "incredibly high stakes"). Further, it is likely that, had the Settlement not been reached and litigation moved forward in this Court, litigating to judgment would have been difficult and further exposed the Class to the risk of non-recovery, as well as additional costs deducted from any future recovery. In *Arenson*, the court observed that "the possibility of trial producing a more favorable recovery for the class would be remote, and the class would then have risked the many hazards of litigation such as trial error, appeals, verdict uncertainty, delayed results, etc." 372 F. Supp. at 1358–59 (N.D. Ill. 1974).

In addition, private litigation is widely recognized as an effective supplement to government enforcement of CEA laws and contributes to the maintenance of a fair and competitive economy. *See Cange v. Stotler & Co., Inc.*, 826 F.2d 581, 584 (7th Cir. 1987) (explaining that Congress depends on the "critical" role of additional private suits to deter

violations of the CEA); *Leist v. Simplot,* 638 F.2d 283, 285 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353 (1982) (citing CEA legislative history); *accord Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("[t]his court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws."). The public's interests are furthered by the private prosecution of civil cases that seek recovery for wrongs and serve as a further deterrent to other similar misconduct. Prosecution of Class Plaintiffs' claims promotes market fairness and competition, and also confirms the important stakes at issue in the case. Accordingly, this factor supports Lead Counsel's fee request here.

II. The Request for Payment of Litigation Expenses is Reasonable and Should be Granted

Lead Counsel are entitled to the payment of litigation costs of the type ordinarily charged to paying clients as their work resulted in the creation of a common fund that benefits the Class. *See Synthroid I*, 264 F.3d at 722; (vacating and remanding district court decision denying expenses incurred in creating common fund recovery); *Beesley*, 2014 WL 375432, at *3 ("It is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses.").

As detailed in their accompanying declaration, Lead Counsel and Cafferty incurred $203,060.89 in expenses prosecuting this Action between 2018 and April 30, 2021. *See* Briganti Decl. I ¶ 49; Briganti Decl. II ¶ 10; Fata Decl. ¶ 11. About 92% of these total expenses ($186,127.61) were accrued in connection with the work done by Class Plaintiffs' economics experts to analyze the data in the Action, develop a damages model, assist with the review of confirmatory discovery, and to develop the Distribution Plan, as well as for the fees related to the mediation. Briganti Decl. I ¶ 49; Briganti Decl. II ¶ 10.

A total of $10,210.85 was spent on computer research, which included the cost of acquiring certain institutional market data relevant to the Action and fees directly related to

legal research performed specifically in connection with the Action.[8] The remaining expenses related to photocopies, court costs, confirmatory discovery-related expenses, travel expenses and other charges routinely awarded by courts in the class action settlement context. *See Kolinek*, 311 F.R.D. at 501; *Greenville IL, et al v. Syngenta Crop Protection, Inc. et al,* 904 F. Supp. 2d 902, 910 (S.D. Ill. 2012). In light of the complexity of the litigation and the result achieved for the Class, Lead Counsel's request for payment of expenses is fair and reasonable.[9]

III. The Court Should Grant Class Plaintiffs' Request for an Incentive Award

Incentive awards "are justified . . . to induce individuals to become named representatives." *Synthroid I*, 264 F.3d at 722. In comparison to absent class members, who are able to enjoy the benefit of a class action settlement without spending much (if any) effort, class representatives' efforts are integral to the development and success of a case. They "subject[] [themselves] to various risks, including the burdens of discovery and potential responsibility for a defendant's costs or attorneys' fees should the suit fail." *Charvat*, 2019 WL 5576932, at *10. In deciding an appropriate incentive award, courts consider factors such as the actions taken by the class representative to protect the interests of the class, the benefits reaped by the class from those actions, the amount of time and effort a class representative invested in pursuing the litigation, and the negative consequences that may be endured by the class representative, including the risk of retaliation. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *see also Koszyk*, 2016 WL 5109196, at *2 ("[i]ncentive awards serve the

[8] As noted in Briganti Decl. II and Fata Decl., legal research costs are not included in the attorney billing rates and are separately billed expenses paid by clients. We note there is a conflict in the 7th Circuit whether such legal research expenses may be reimbursed from the common fund. *Compare In re Continental Illinois Secs. Litig.*, 962 F.2d at 570 ("The judge refused to allow the lawyers to bill *any* of their out-of-pocket expenses of using a computerized legal research service (LEXIS) . . . This was another clear error") *with Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 409 (7th Cir. 2000) ("Computer research charges are considered a form of attorneys' fees [and] the charges associated with such research are not separately recoverable expenses").

[9] According to the Settlement Administrator, A.B. Data, Ltd. ("A.B. Data"), the estimated all-in cost for noticing and administering this Settlement is $700,000. The notice and administration expenses are paid directly to A.B. Data upon invoice and are not included in Lead Counsel's expenses.

important purpose of compensating plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred . . . and any other burdens sustained by the plaintiffs.").

Class Plaintiffs ask for an incentive award of $30,000 to be split between them. As reflected in their individual declarations, each devoted significant time and effort to this Action gathering trading records, reviewing all pleadings and motions filed, and conferring with Lead Counsel concerning litigation strategy, posture of the litigation, and settlement negotiations. *See* Declaration of Gregory Boutchard in Support of Class Plaintiffs' Request for an Incentive Award ¶¶ 4-5; Declaration of Jeffrey Wagner in Support of Class Plaintiffs' Request for an Incentive Award ¶¶ 6-7.

Courts have issued similarly sized incentive awards to plaintiffs who demonstrated similar levels of involvement in similar actions, or greater levels of work in less complex matters. *See, e.g.*, *Cook*, 142 F.3d at 1016 (awarding a $25,000 incentive award to named plaintiff in an ERISA action that settled for $13 million); *In re Southwest Airlines Voucher Litig.*, No. 11-CV-8176, 2013 WL 4510197, at *11 (N.D. Ill. Aug. 26, 2013) (approving incentive awards of $15,000 each for two named plaintiffs in a consumer class action). Further, the proposed incentive award comprises 0.2% of the settlement, well within the range of typical incentive awards. *See Beesley*, 2014 WL 375432, at *4 ("Awards of $15,000 to $25,000 for a Named Plaintiff award and total Named Plaintiff awards of less than one percent of the fund are well within the ranges that are typically awarded in comparable cases."). The requested incentive award is reasonable in light of Class Plaintiffs' efforts on behalf of Class.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court approve Lead Counsel's motion for attorneys' fees and payment of litigation expenses, and Class Plaintiffs' request for incentive awards in the amounts set forth above.

Dated: May 27, 2021
White Plains, New York

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