UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY KERRIGAN, LORI MIKOVICH and RYAN M. VALLI, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

VISALUS, INC., a corporation, et al.,

Defendants.

Case No. 2:14-cv-12693

Hon. Matthew F. Leitman

PLAINTIFFS' CORRECTED MOTION FOR AN AWARD OF ATTORNEYS' FEES, LITIGATION COSTS AND EXPENSES, AND INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES

Plaintiffs Timothy Kerrigan, Ryan M. Valli and Lori Mikovich, on behalf of a settled class of ViSalus distributors, hereby move the Court, pursuant to Rules 23 and 54 of the Federal Rules of Civil Procedure, for an award of attorneys' fees, litigation costs and expenses, and incentive awards for the Class Representatives, from the proceeds of the settlement with the ViSalus Defendants. Plaintiffs seek the following amounts:

Attorney fees: **$4,093,096.85**

Litigation Costs and Expenses: **$181,903.15**

Incentive Fees: **$35,000**

In support of this motion, Plaintiffs rely upon the accompanying brief and the Declarations attached thereto, which are incorporated by reference herein.

Dated: August 20, 2019

Respectfully submitted,

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EASTERN DISTRICT OF MICHIGAN
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TIMOTHY KERRIGAN, LORI MIKOVICH and RYAN M. VALLI, individually, and on behalf of all others similarly situated, Plaintiffs, v. VISALUS, INC., a corporation, et al., Defendants.	Case No. 2:14-cv-12693 Hon. Matthew F. Leitman

PLAINTIFFS' BRIEF
IN SUPPORT OF THEIR CORRECTED MOTION FOR AN AWARD OF ATTORNEYS' FEES, LITIGATION COSTS AND EXPENSES, AND INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES

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STATEMENT OF ISSUES PRESENTED

1. Under either the percentage or the lodestar basis, or alternatively percentage cross-checked with lodestar or lodestar cross-checked with percentage, should the Court award Plaintiffs' Counsel attorneys' fees and costs of $4,275,000?

2. Should the Court award the Class Representatives total incentive awards of $35,000?

I. INTRODUCTION

This litigation was started on July 9, 2014 [Dkt. 1]. A preliminary settlement approval order has been entered nearly five years later, on June 27, 2019 [Dkt. 230]. In the interim five years, Plaintiffs' counsel investigated and pursued this RICO and securities-based consumer action against over 40 defendants. Plaintiffs' Counsel have devoted a substantial amount of time and money to pursuing these claims on behalf of the class members. Pursuant to the terms of the settlement agreement and preliminary approval order, Plaintiffs' Counsel now respectfully move for an order awarding: 1) attorneys' fees of **$4,093,096.85**; 2) litigation costs and expenses of **$181,903.15** incurred by Plaintiffs' Counsel; and 3) incentive awards in the amount of $15,000 for Class Representative Timothy Kerrigan and $10,000 each for Ryan M. Valli and Lori Mikovich. For the reasons set forth herein, and as further supported by their contemporaneously filed Declarations, Plaintiffs' Counsel respectfully submit that the requested fee, expense, and incentive awards are fair to the class members, Plaintiffs, and Plaintiffs' Counsel, and are reasonable under both well-established Sixth Circuit precedent concerning awards of attorneys' fees in class action litigation.

II. BACKGROUND AND SUMMARY OF WORK PERFORMED TO DATE BY PLAINTIFFS' COUNSEL

Plaintiffs' Counsel has primarily been the Southfield, Michigan firm Sommers, Schwartz, P.C., ("Sommers"), Houston, Texas-based Prebeg, Faucett &

Abbott, LLP, ("PFA"), and Chicago-based Wexler Wallace LLC ("Wexler") [Dkt. 1, 6, 38].[1] Sommers' senior partner Andrew Kochanowski, together with Matthew Prebeg of PFA and Mark Miller of Wexler, were the core leadership team in this litigation and performed much of the legal work expended in this case.[2] Plaintiffs' Counsel generally:

- Worked with the Plaintiffs and performed extensive investigations into the structure, history, and activities of the named defendants, who included the principals and over 20 distributors and outside funders and others. That work involved finding and reviewing hundreds of videos, interviewing many witnesses, and obtaining and reviewing thousands of pages of documents, including SEC filings;

- Drafted and filed a 200+ page, multi-count complaint [Dkt. 1];

- Responded to a motion to dismiss [Dkt. 36-53] resulting in Opinion and Order [Dkt. 54];

- Drafted an Amended Complaint [Dkt. 56] adding securities allegations;

- Responded to a motion to dismiss/summary judgment motion against the Amended Complaint [Dkt. 61-62, 67-74], resulting

[1] In 2018, a former Sommers attorney, Amy Marino ("Marino"), joined the case [Dkt. 213].

[2] Both Sommers and PFA had experience in multi-level marketing fraud litigation prior to this case. Kochanowski and Prebeg had litigated and were named as co-Class Counsel in a similar case in the Fifth Circuit, *Torres v. SGE LLP*. The *Stream* case involved a multi-level marketing energy provider with approximately 200,000 distributors. That case was approved for settlement in October, 2018 on similar terms as this case, with the Court awarding over $10 million in fees. (*Exhibit 1*, approval order).

in a second Opinion and Order [Dkt. 75] largely denying Defendants' motions;

- Drafted a 200+ page Second Amended Complaint [Dkt. 78] which added certain additional parties;

- Negotiated a discovery plan with opposing parties [Dkt. 87];

- Prepared discovery requests for Defendants and negotiated with Defendants regarding their responses;

- Responded to Defendants' discovery requests;

- Prepared and fully briefed several motions to compel production of documents [Dkt. 91-109];

- Reviewed, analyzed, and coded over 1 million pages of produced documents including electronic records concerning hundreds of thousands of distributors;

- Issued multiple subpoenas for third-party discovery;

- Took 13 depositions of various Defendants in the United States and Canada and defended three named Plaintiffs' depositions;

- Located and interviewed numerous third-party witnesses throughout the United States and obtained detailed sworn declarations from three witnesses;

- Retained a forensic accounting firm and prepared an expert report concerning class issues and damages, responded to Defendants' expert report, and took and defended expert depositions;

- Drafted a lengthy motion for class certification and fully briefed a class certification motion [Dkt. 115, 121, 124];

- Reviewed many additional videos and searched produced documents in order to prepare a Third Amended Complaint [Dkt. 117, 129, 131] which included additional party Defendants;

- Prepared a motion to exclude Defendants' expert report [Dkt. 125];

- Fully briefed a third motion to dismiss [Dkt. 158-178];

- Attended multiple hearings and telephone conferences with the Court;

- Fully briefed Defendants' motions to strike class allegations [Dkt. 185-186, 189-190], resulting in order denying the motion [Dkt. 192];

- Engaged in negotiations with certain third-parties regarding production of documents;

- Prepared and filed a 200+ page Fourth Amended Complaint against a corrected group of Defendants after taking select depositions and reviewing and analyzing thousands of pages of Defendant and third-party document production [Dkt. 196];

- Fully briefed a fourth round of motions to dismiss [Dkt. 205, 214-220];

- Successfully negotiated settlement with the Defendants through mediation over several sessions in Detroit, Dallas, and New York;

- Prepared the settlement agreement;
- Drafted the settlement notices, orders, and the preliminary and final approval briefs seeking approval from the Court for the settlements;
- Prepared the motion for preliminary approval [Dkt. 228].

(*Exhibit 2*, Declaration of Andrew Kochanowski). Throughout the case Plaintiffs' Counsel have sought to avoid duplication of efforts among the attorneys and to work cooperatively and efficiently with defense counsel and the Court. (*Exhibit 3*, Declaration of Edward Wallace; *Exhibit 4*, Declaration of Matthew Prebeg).

III. CLASS NOTICE

As required by Fed. R. Civ. P. 23(h), the Notice of Proposed Settlement approved by the Court [Dkt. 231] informed the class members that Plaintiffs would seek $4.275 million in attorney fees and costs. The Notice was transmitted to all potential Settlement Class members identified by Defendants. A copy of the Notice has also been posted on-line in accordance with the terms of the preliminary approval order.[3] The Notice also informed the Settlement Class Members that Plaintiffs' Counsel would seek payment of incentive awards for the individual Class Representatives in

[3] Counsel for Defendants have informed Plaintiffs' Counsel that their respective clients fulfilled their obligations under 28 U.S.C. § 1715 (the "Class Action Fairness Act of 2005"). The Notice and associated documents have been posted at https://visalussettlement.com/.

the amounts sought. It also explained how Settlement Class Members could object to the requests.

The deadline for submission of any objections is August 28, 2019. To date, there have been no filed objections to the requested fees, expense reimbursements, incentive awards, proposed settlements, or distribution plan. There has been one request for exclusion. Plaintiffs' Counsel will provide the Court with a final report on any objections or requests for exclusion before the October 1, 2019 scheduled Fairness Hearing.

IV. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE

Federal Rule of Civil Procedure 23(h) provides that "[i]n 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." Federal courts at all levels encourage litigants to resolve fee issues by agreement whenever possible. As the United States Supreme Court explains, "[a] request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *see also Johnson v. Georgia Hwy. Exp., Inc.*, 488 F.2d 714, 720 (5th Cir. 1974) ("In cases of this kind, we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees."). Plaintiffs' Counsel have complied with the requirements of Rule 23(h)(1) and (2),

which provide for notice to the class of the attorneys' fees request and an opportunity to object. What remains for the Court to determine is whether the requested fee is reasonable and fair to the class members and Plaintiffs' Counsel under the circumstances. Plaintiffs' Counsel believe their attorneys' fees request is fair to the class members, reasonable under the circumstances, and well-supported by applicable law.

A. EITHER THE PERCENTAGE-OF-THE-RECOVERY METHOD OR LODESTAR IS AN APPROPRIATE METHOD FOR ASSESSING THE FEE REQUEST AND UNDER BOTH METHODS THE AMOUNT SOUGHT IS REASONABLE.

"When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016). Sixth Circuit law grants district courts discretion to select an appropriate method for determining the reasonableness of attorneys' fees in class actions, between a pure percentage fund, a pure lodestar, or a mixture of the two, where one method effectively cross-checks the other.[4] According to *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993):

[4] As recently described:

> It is necessary that district courts be permitted to select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *[citation omitted]* … "District courts have the discretion to select the particular

> The lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved. For these reasons, it is necessary that district courts be permitted to select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them.

See also Gascho v. Global Fitness Holdings, LLC, 822 F.3d 269, 279 (6th Cir. 2016) (discussing the advantages and disadvantages of the two methods); *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. Appx. 496, 497 (6th Cir. 2011); *In re Automotive Parts Antitrust Litig.*, 2016 WL 8201516, at *1 (E.D. Mich. Dec. 28, 2016) (citations omitted). Either method, when cross-checked with the other, reveals that in this litigation the fees sought by Plaintiffs' Counsel are reasonable and appropriate. If the Court uses the lodestar method, the lodestar amount (with a requested 1.33 multiplier) is well within the range routinely approved in this district in complex class litigation. If the Court uses a percentage basis, Plaintiffs' Counsel seeks at most 16% of the benefits that flow to the settling class.

B. THE REQUESTED FEE CONSTITUTES A FAIR AND REASONABLE PERCENTAGE OF THE SETTLEMENT.

> method of calculation, but must articulate the 'reasons for adopting a particular methodology and the factors considered in arriving at the fee.'

Martin v. Trott Law, P.C., No. 15-12838, 2018 WL 4679626, at *7 (E.D. Mich. Sept. 28, 2018).

While this is not a typical "common fund" settlement (because there is not a complete cap and attorney fees are not being paid out of the fund), principles from common fund cases allow the Court to align the necessary analysis with "common fund" cases. A "percentage-of-the-fund … method of awarding attorneys' fees… eliminates disputes about the reasonableness of rates and hours, conserves judicial resources, and aligns the interests of class counsel and the class members." *In re Automotive Parts Antitrust Litig.*, 2016 WL 8201516, at *1 (collecting cases); see also *Rawlings*, 9 F.3d at 515 ("trend towards adoption of a percentage of the fund method in [common fund] cases").

1. THE REQUESTED FEE AWARD IS WELL WITHIN THE RANGE OF REASONABLENESS.

The settlement reached in this case has both cash and benefits election options made available to each class member, totaling nearly 400,000 current and former distributors.[5] On the cash-electing side, each promoter who spent $49 or more to

[5] There were 399,146 individuals identified by unique ID number in the database maintained by ViSalus who qualified for inclusion in the settling class. The claims administrator, Epiq, sent an initial 286,137 emailed notices on July 19, 2019 and 113,005 initial postcard notice mailings on July 26th to the class. Epiq has reported that there were 99,021 undeliverable emails. These Class Members were later mailed postcard notices if they had a valid mailing address. Of these postcards 1,573 were again undeliverable. Between the two class notices, Epiq reports that approximately 387,000 individuals successfully received the notice, or 97% of the class, following preliminary approval.

obtain distributor rights, is entitled to receive $25.[6] If that distributor also purchased at least a month of the Vi-Net web access, he or she can elect a cash payment of $50. The total cash payments under the settlement may (but are not expected to be) be reduced in the event a substantial number of distributors elect the cash option and exceed a monetary payment cap. The settling class members who choose this option will terminate their distribution rights.

The other election automatically available to all settling class members is substantially increased cash commissions of 25% on sales for one year, a 35% product discount on ViSalus products up to $1,000 in purchases, and six months to one year of free personalized website sales support through individualized the Vi-Net web portal.

The value of this benefit can be calculated as $370 per distributor without accounting for the commission payments, if any, that are also part of the benefits option. (*Exhibit 2*, Declaration of Andrew Kochanowski at pars. 29-37). At historical website and product purchase usage, should every settling distributor elect the benefits option, the resulting benefit would total approximately $111 million. (*Id.* par. 37). The "right to share the harvest of the suit upon proof of [class claimants]

[6] The settlement agreements and a summary of the settlement terms are contained in the motion for preliminary approval. For brevity they will not be fully described here. The relief obtained for the benefit of the settling class also includes injunctive relief, which is not being quantified in this motion.

identity, *whether or not they exercise it*, is a benefit in the fund created by the efforts of class representatives and their counsel." *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 282 (6th Cir. 2016) (citing *Boeing Co. v. Van Gemert*, 444 U.S.472, 480 (1980) (allowing district courts discretion to award fees based on rights conferred on every class member whether or not exercised). *Gascho* noted:

> Consumer class actions, furthermore, have value to society more broadly, both as deterrents to unlawful behavior—particularly when the individual injuries are too small to justify the time and expense of litigation—and as private law enforcement regimes that free public sector resources. If we are to encourage these positive societal effects, class counsel must be adequately compensated—even when significant compensation to class members is out of reach (such as when contact information is unavailable, or when individual claims are very small).

822 F.3d at 287. Even a 15% response rate will result in $26.5 million in cash and product and free service benefits to the settling class. (*Id.* at par. 38). Plaintiffs' fee request represents 16% of the fractional amount.

The requested award is significantly lower than a wealth of authority from this Circuit and others approving class action fees in the range of 30% to one-third of a common fund. *See Bessey v. Packerland Plainwell, Inc*., 2007 WL 3173972, at *4 (W.D. Mich. 2007) ("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") (internal quotation marks omitted); *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d, 521, 528 (E.D. Ky. 2010) ("Using

the percentage approach, courts in this jurisdiction and beyond have regularly determined that 30% fee awards are reasonable"); *Bourne v. Ansara Rest. Group, Inc.*, 2016 WL 7405804 at *3 (E.D. Mich. Dec. 22, 2016) (approving "a third of the potential gross recovery and creation of the common benefit fund"); *Allan v. Realcomp II, Ltd.*, 2014 WL 12656718 at *2 (E.D.Mich. Sept. 4, 2014) (finding award of one-third of the common fund reasonable); *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473 (E.D. Mich. Jan. 20, 2015) (one-third of a $19 million fund); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 2946459, *1 (E.D. Tenn. Jun. 30, 2014) (one-third of a $73 million fund).[7]

C. CONSIDERATION OF THE FACTORS IDENTIFIED BY THE SIXTH CIRCUIT SUPPORTS THE REQUESTED FEE WHETHER THE COURT USES A PERCENTAGE METHOD, A LODESTAR METHOD, OR BOTH CROSS-CHECKED WITH EACH OTHER.

The Sixth Circuit has identified the following factors to guide courts in weighing a fee award: 1) the value of the benefit rendered to the class; 2) the value of the services on an hourly basis; 3) whether the services were undertaken on a contingent fee basis; 4) society's stake in rewarding attorneys who produce such benefits in order to

[7] *Martin v. Trott Law, P.C., supra*, summarizes additional cases in this district on the common fund percentage method, finding many in the 20-33% percent range. "The Court finds that 33-1/3% is both a reasonable and appropriate attorneys' share of the common fund in this case." 2018 WL 4679626, at *8.

maintain an incentive to others; the complexity of the litigation; and 6) the professional skill and standing of counsel involved on both sides. *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009); *Bowling v. Pfizer, Inc.*,102 F.3d 777, 780 (6th Cir. 1996). When applied to the facts of this case, these factors indicate that the fee requested constitutes fair and reasonable compensation for Plaintiffs' Counsel's efforts.

1. PLAINTIFFS' COUNSEL SECURED A VALUABLE BENEFIT FOR THE CLASS.

The result achieved for the class is the principal consideration. *E.g., In re Delphi Corp. Sec. Derivative & ERISA Litig.*, 248 F.R.D. 483, 503 (E.D. Mich. 2008). Here, Plaintiffs' Counsel have achieved an excellent recovery of up to $111 million in cash, services and product for the settlement class.

2. THE VALUE OF THE SERVICES ON AN HOURLY BASIS CONFIRMS THAT THE REQUESTED FEE IS REASONABLE AND, ALTERNATIVELY, THE COURT COULD TREAT THE ATTORNEY FEES IN THIS CASE ON A LODESTAR BASIS.

A lodestar "cross-check" on the reasonableness of a fee calculated as a percentage of the fund is appropriate and reveals that the Plaintiffs' Counsel is not obtaining a windfall. *In Re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 754 (S.D. Ohio 2007); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *18. Alternatively, the Court can treat this case as a pure lodestar fee case, a method

that some decisions in this Circuit appear to prefer.[8] One reason to treat this as a lodestar fee case is that many of the claims at issue were of a type that typically supports using a lodestar analysis. *City of Plantation Police Officers' Employees' Ret. Sys. v. Jeffries*, No. 2:14-CV-1380, 2014 WL 7404000, at *11 (S.D. Ohio Dec. 30, 2014) (in securities case lodestar method of calculation is appropriate). Regardless which method the Court chooses, or both cross-checked with one another, the amount of time Plaintiffs' Counsel have expended since the inception of the case in 2014 makes clear that the fee requested is well "aligned with the amount of work the attorneys contributed" to the recovery, and does not constitute a "windfall."

To calculate the lodestar a court must first multiply the number of hours counsel reasonably expended on the case by their reasonable hourly rate. *See Isabel v. City of Memphis*, 404 F.3d 404, 415 (6th Cir. 2005). Here, a very substantial amount of time had to be spent by Plaintiffs' Counsel litigating the case and achieving the settlements. At all times, these tasks were managed with an eye toward efficiency, and avoiding duplication. As the Declarations submitted by the law firms set forth,

[8] "The lodestar method's listing of hours spent and rates charged provides greater accountability. In addition, enhancing the lodestar with a separate multiplier can serve as a means to account for the risk an attorney assumes in undertaking a case, the quality of the attorney's work product, and the public benefit achieved. The lodestar method also encourages lawyers to assess the marginal value of continuing work on the case, since the method is tied to hours and rates, and not simply a percentage of the resulting recovery." *Rawlings*, 9 F.3d at 516.

Plaintiffs' Counsel have expended a total of **5971** professional hours from the inception of the case through August 18, 2019. (*Exhibit 2*, Declaration of Andrew Kochanowski at pars. 12-13). Plaintiffs' Counsel submit that the hours expended on this case since inception are reasonable. The firms each kept detailed minute entries of their time spent, and the identity of the attorneys performing these tasks, as well as the detail of what occurred in this litigation is supplied in the attached declarations. As noted there, should the Court wish to have and inspect the actual daily detail, Plaintiffs' Counsel is prepared to submit these *in camera*.[9] However, each of the declarations describes the particular work done in sufficient detail that counsel do not believe an *in camera* inspection is either required or necessary.

Each counsel has utilized its customary rates in class action and complex litigation practice. (*Exhibits 2*, *3*, and *4*). The partner rates charged range from $735-750 per hour (Detroit and Houston area counsel) to $900 (Chicago). Associate rates range from $325-400 (Detroit and Houston) to $600 (senior associate Chicago).[10]

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[9] Where the district court uses, as suggested here, a percentage basis cross-checked with a lodestar, the Sixth Circuit does not require submission of the actual time records. *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 281 (6th Cir. 2016) ("the district court also employed the percentage of the fund cross-check … that method independently validated the decision to award the attorney's fees in the case). Plaintiffs nevertheless present a detailed listing of the tasks performed in this case in their declarations. Should the Court decide to treat this as a pure lodestar case, detailed time records can be delivered in advance of the Final Fairness Hearing.

[10] "The prevailing market rate is 'that rate which lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record.' "*[citations omitted]* "The appropriate rate, therefore, is not necessarily the exact value sought by a particular firm, but is rather the market rate in the venue sufficient to encourage competent representation." *[citations*

These rates have not only been found to be reasonable by courts for the Plaintiffs' Counsel (for example, Sommers and PFA were awarded the same or similar hourly rate fees at a 2X multiplier by the *Torres v. SGE LLC* court, Exhibit 1) but have been found reasonable by courts in the Sixth Circuit. See, e.g., *Miller v. Davis*, 267 F. Supp. 3d 961, 996 (E.D. Ky. 2017) (fee shifting case approves $700 hourly rates). The paralegal rates charged have also been found to be reasonable. *Kehoe Component Sales Inc. v. Best Lighting Prods., Inc.*, No. 2:10–cv–00789, 2014 WL 5034643, at *8 (S. D. Ohio Oct.8, 2014) ($125 per hour for paralegals). The blended rate for all counsel is **$516.25**. Applying rates currently charged by counsel to the hours expended in this case yields a "lodestar" time/hourly value of **$3,082,637**.[11]

To this lodestar Plaintiffs' Counsel seeks an upward multiplier of **1.33X**. Multipliers of this range and much higher have readily been approved in this district and elsewhere in complex class litigation. *In re Cardinal Health, Inc. Securities*

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omitted] "A court may, however, award a higher hourly rate for an out-of-town specialist if (1) hiring the out-of-town specialist was reasonable in the first instance, and (2) if the rates sought by the out-of-town specialist are reasonable for an attorney of his or her degree of skill, experience, and reputation." *[citation omitted]*

City of Plantation Police Officers' Employees' Ret. Sys. v. Jeffries, No. 2:14-CV-1380, 2014 WL 7404000, at *13 (S.D. Ohio Dec. 30, 2014)

[11] The United States Supreme Court has held that the use of current rates, as opposed to historical rates, is appropriate to compensate counsel for inflation and the delay in receipt of the funds. *Missouri v. Jenkins*, 491 U.S. 274, 282-84 (1989); see also *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987).

Litigation, 528 F. Supp. 2d 752, 767-68 (S.D. Ohio 2007) (approving multiplier of 6, and observing that "[m]ost courts agree that the typical lodestar multiplier" in a large class action "ranges from 1.3 to 4.5.").[12] A 2x multiplier was recently applied by the federal district court in the *Torres v. SGE, LLP* RICO pyramid scheme litigation. (*Exhibit 1*).

3. THE REQUESTED FEE IS FAIR AND REASONABLE GIVEN THE REAL RISK THAT PLAINTIFFS' COUNSEL COULD HAVE RECEIVED NO COMPENSATION FOR THEIR EFFORTS IF THE LITIGATION HAD NOT BEEN SUCCESSFUL.

The settling Defendants are represented by highly experienced and competent counsel. Absent the settlement, Plaintiffs believe that these Defendants and their counsel were prepared to defend this case through trial and appeal. Litigation risk is inherent in every case, and this is particularly true with respect to class actions. Therefore, while Plaintiffs remained optimistic about the outcome of this litigation, they must acknowledge the risk that Defendants could prevail with respect to certain legal or factual issues, which could result in reducing or eliminating any potential recovery.

[12] *City of Plantation v. Jeffries* recently summarized multipliers in securities actions as well as common fund cases, finding a range of awards with a positive multiplier of 1.25 to 2.29. 2014 WL 7404000, at *15 (S.D. Ohio Dec. 30, 2014). The court noted that in shareholder litigation involving a common fund a typical multiplier is in the range of 1.25 to 5.

In light of this reality, the risk factor attempts to compensate class counsel in contingent fee litigation for the possibility that they may end up receiving less than their normal hourly rates, or even nothing at all. *See, e.g. Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981), *overruled on other grounds, Int'l Woodworkers of Am. AFL-CIO and its Local No. 5-376 v. Champion Intern. Corp.*, 790 F.2d 1174 (5th Cir. 1986); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *19 (risk of non-payment a factor supporting the requested fee).

There was certainly a risk that Plaintiffs' Counsel would recover nothing, or an amount insufficient to support a fee that covered their lodestar. Further, during the pendency of this case, as explained at several junctures in the litigation, ViSalus suffered a drastic drop in sales even before the litigation commenced. Therefore, the risk of non-payment is another factor that supports the requested fee. *In re Wire Harness Cases*, 2:12-cv-00101 (E.D. Mich.) (Doc. 495), at 4.

4. SOCIETY HAS AN IMPORTANT STAKE IN THIS LAWSUIT AND IN AN AWARD OF REASONABLE ATTORNEYS' FEES TO CLASS COUNSEL.

It is well established that there is a "need in making fee awards to encourage attorneys to bring class actions to vindicate public policy (e.g., the antitrust laws) as well as the specific rights of private individuals." *In re Folding Carton Antitrust Litig.*, 84 F.R.D. 245, 260 (N.D. Ill. 1979). Courts in the Sixth Circuit weigh "society's stake in rewarding attorneys who [win favorable outcomes] in order to

maintain an incentive to others . . . Society's stake in rewarding attorneys who can produce such benefits in complex litigation such as in the case at bar counsels in favor of a generous fee . . ." *In re Cardizem CD Antitrust Litigation*, 218 F.R.D. 508, 534 (E.D. Mich. 2003), app. dismissed 391 F.3d 812 (6th Cir. 2004) (internal quotation marks omitted). *Accord*, *Delphi*, 248 F.R.D. at 504.

This case sought to vindicate a tremendous number of mostly small but collectively significant losses from people who Plaintiffs claimed were tricked into joining a pyramid scheme. The Federal Trade Commission and the Securities and exchange Commission, the federal entities typically charged with enforcing consumer/investor rights in such cases did not file proceedings. Thus, in a significant sense, in this case the Plaintiffs' counsel have acted as private attorney general to vindicate the settling class rights. In this regard, the substantial recovery Plaintiffs' Counsel have obtained makes it clear that violations of this type will be the subject of vigorous private civil litigation that will deter similar future conduct. Since society as a whole gains from competitive markets free of this type of conduct, Plaintiffs' Counsel's work benefitted the general public.

5. THE COMPLEXITY OF THIS CASE SUPPORTS THE REQUESTED FEE.

Plaintiffs' Counsel and the Court have already grappled with a variety of complex issues in this case, and there would have been more to address later in the absence of the settlements. The Court's opinions have highlighted the legal issues

that range from the relationship of RICO and federal securities laws and the application of numerous state law claims to pyramid scheme allegations. There have been few cases like this in the United States, and thus, this litigation has proceeded on largely a novel set of theories as applied to a multi-year, multi-defendant litigation.

6. SKILL AND EXPERIENCE OF COUNSEL.

The skill and experience of counsel on both sides is a factor that courts may consider in determining a reasonable fee award. *E.g., Polyurethane Foam,* 2015 WL 1639269, at * 7; *Packaged Ice,* 2011 WL 6219188, at *19. Plaintiffs' Counsel have the requisite skill and experience in class action and pyramid scheme litigation to effectively prosecute these claims.

But in the final analysis, as a district court in Florida has observed, "[t]he quality of work performed in a case that settles before trial is best measured by the benefit obtained." *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988), *aff'd,* 899 F.2d 21 (11th Cir 1990). As explained *supra*, a very substantial cash and other benefit was obtained for the Settlement Classes in this case. Given the excellent result achieved, the complexity of the claims and defenses, the work performed by Plaintiffs' Counsel, the real risk of non-recovery, formidable defense counsel, the delay in receipt of payment, the substantial experience and skill of Plaintiffs' Counsel, the reasonable multiplier on the lodestar, and the societal benefit

of this litigation, a 16% or less attorneys' fee award would be reasonable compensation for Plaintiffs' Counsel's work.

V. REIMBURSEMENT OF LITIGATION COSTS AND EXPENSES.

Plaintiffs' Counsel respectfully request an award of litigation costs and expenses in the amount of **$181,903.15**. *In re Cardizem CD Antitrust Litigation*, 218 F.R.D. 508, 535 (E.D. Mich. 2003, app. dismissed 391 F.3d 812 (6th Cir. 2004) ("class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and in obtaining settlement, including expenses incurred in connection with document productions, travel and other litigation-related expenses."). The expenses incurred by each law firm are set forth in the Declarations attached as *Exhibits 2*, *3*, and *4*. These expenses were reasonable and necessary to pursue the case and to obtain the substantial settlements reached in this litigation.

VI. INCENTIVE AWARDS TO THE CLASS REPRESENTATIVES ARE WARRANTED.

Plaintiffs' Counsel also respectfully request that the Court award the three Class Representatives varying amounts to compensate them for their substantial time and effort in seeing this case through for five years. Plaintiffs request that Timothy Kerrigan be awarded $15,000, and the other Class Representatives each obtain $10,000. The Notice received by the class members discloses these amounts, which will be paid by the Defendants and not out of a common fund.

The Sixth Circuit has noted that incentive awards may be appropriate under some circumstances, although it has never explicitly approved or disapproved of them. *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 311 (6th Cir. 2016); *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003). In surveying decisions from other courts, the Court of Appeals in *Hadix* explained:

> Numerous courts have authorized incentive awards...These courts have stressed that incentive awards are efficacious ways of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class. Yet applications for incentive awards are scrutinized carefully by courts who sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain.

Hadix, 322 F.3d at 897 (internal citations omitted). This is not a case where the class representatives compromised the interests of the class for personal gain. None of the class representatives were promised incentive awards. Each settlement was negotiated by Plaintiffs' Counsel and then presented to the class representatives for their review and approval without discussion of incentive awards, which evinces that such awards were not the reason the representative plaintiffs approved these settlements. *Hillson v. Kelly Servs. Inc.*, 16 2017 WL 279814, at *6 (E.D. Mich. 2017).

In deciding whether an incentive award is appropriate, courts may consider, among other things, "whether the actions of the named plaintiffs protected the

interests of the class members and have inured to the substantial benefit of the class members," and "the amount of time and effort expended by the named plaintiffs in pursuing the class action litigation." *See In re S. Ohio Corr. Facility*, 175 F.R.D. 270, 275 (S.D. Ohio 1997). Incentive awards are "typically justified" in circumstances where, as here, "the named plaintiffs expend[ed] time and effort beyond that of other class members in assisting counsel with the litigation. . ." *Id.* at 273. Indeed, here, the Class Representatives devoted substantial time and effort in representing the interests of the class members, including:

- Communicating and meeting with counsel to discuss the nature of the claims, their experience with ViSalus, their friends' experience, and locating and collecting documents;
- Communicating with counsel to discuss collecting documents for review and potential production to Defendants;
- Working with counsel to respond to interrogatories served by Defendants;
- Reviewing pleadings and keeping apprised of the status of the litigation;
- Preparing for and giving their detailed depositions; and
- Reviewing the details of, and conferring with counsel regarding settlements.

(*Exhibit 2*, Declaration of Andrew Kochanowski at pars. 41-42). The requested incentive awards are lower than those awarded in other cases. Depending

on the circumstances, incentive awards of $30,000 or more are common in lengthy, highly complex cases such as this. *See also In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473, at *5 (granting class representatives awards of $50,000 each); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 2946459, at *1 (same). It is appropriate to treat these representatives as business entities—each was an investor in a distribution business. The Class Representatives put in time and effort and provided commendable service on behalf of the class members to create the settlement. The requested awards are fair to the class and appropriate.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for an Award of Attorneys' Fees, Litigation Costs and Expenses, and incentive awards to the Class Representatives.

Dated: August 20, 2019

Respectfully submitted,

s/ Andrew Kochanowski
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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2019, I electronically filed the foregoing document with the Clerk of the court using the ECF system, which will send notification of such filing to all counsel of record registered for electronic filing.

s/ Andrew Kochanowski
Andrew Kochanowski