IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MEREDITH CORPORATION, et al.	:	
	:	
	:	
v.	:	Case No. 09 Civ. 9177 (PAE)
	:	
SESAC, LLC, et al.	:	

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

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INTRODUCTION

As set forth in detail in the Memorandum of Law in Support of Preliminary Approval,[1] the contemplated settlement of the class action litigation between local television broadcasters and SESAC provides significant relief for the local television industry: it remediates the core alleged anti-competitive practices for a twenty-year period and includes a substantial monetary settlement to compensate class members for alleged license fee overcharges dating back to 2008. This favorable outcome was made possible by the willingness of the Television Music License Committee, LLC ("TMLC") to fund this litigation and the agreement of Class Counsel, Weil, Gotshal & Manges LLP ("Weil"), to work at reduced hourly rates and defer a significant portion of its fees. This motion seeks to reimburse the TMLC and Class Counsel for the considerable expenses they bore and risks they assumed over the more than five years of litigation that preceded the proposed settlement.

The TMLC is a non-profit organization that represents local commercial broadcast television stations in their license dealings with music performing rights organizations (collectively, the "PROs"), including the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and, for a significant period before 2008, SESAC. The TMLC is funded by voluntary contributions from the stations it represents, including the Plaintiffs. Weil has long represented the TMLC and its member stations in, among other matters, rate court proceedings against PROs.

As the Court is well aware, antitrust litigation is complex, expensive, and lengthy. That was certainly the case here. As set forth in the accompanying Declarations of Will Hoyt and R. Bruce Rich, the TMLC and Class Counsel agreed before this litigation was filed that Class

[1] The Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement [Dkt. No. 174], which this Court granted [Dkt. No. 205], is incorporated by reference herein.

Counsel would make certain accommodations in the fees that it billed to the TMLC, leading to a significant reduction in billings below Class Counsel's normal hourly rates. Pursuant to those arrangements, the TMLC has to date incurred more than $16 million in total legal fees and associated costs (e.g., for economic experts). Because of constraints on the TMLC's annual funding ability, close to $8 million of those obligations—principally the remaining fees billed by and owed to Class Counsel—are still outstanding. The requested award for reimbursement of legal fees and associated costs is needed to make the TMLC close to whole for its funding of the litigation to date and to enable it to pay its outstanding obligations to Class Counsel and others for their efforts in connection with this case.

The total requested award of $16 million amounts to 27% of the $58.5 million settlement fund. Net of the $4.2 million of the requested award that seeks reimbursement of expenses, the $11.8 million portion of the award seeking reimbursement of Class Counsel's legal fees amounts to only 20% of the fund. Taking into account the industry savings in SESAC license fees projected to result from the conduct relief over the lifespan of the settlement agreement, the total requested award is a far smaller percentage of the estimated value of the overall settlement. As a cross-check, since the portion of the requested award seeking reimbursement of legal fees is equal to the amount billed to date by Class Counsel to the TMLC, there is no multiplier here. The reasonableness of the requested award is further reflected in the recognition that courts in this District and elsewhere have granted awards of attorney fees of 30% or more of settlement funds that represent multipliers of three or four times the attorney fees incurred.

Accordingly, Class Counsel respectfully submits that it is appropriate for this Court to award $16 million for reimbursement of attorney's fees and other associated legal expenditures incurred by the TMLC.

BACKGROUND

I. The TMLC Is A Non-Profit Trade Association For The Local Television Industry

The TMLC is a non-profit tax-exempt organization under Section 501(c)(6) of Title 26 of the United States Code. *See* Declaration of Will Hoyt, filed contemporaneously herewith, dated Nov. 20, 2014 ("WH Decl."), ¶ 2. The TMLC was formed to represent the mutual interests of U.S. local, full power commercial television stations to procure copyright music performance licenses from the major PROs representing television composers and publishers, namely, ASCAP, BMI, and SESAC. *Id.* To achieve this objective, the TMLC solicits voluntary contributions from television stations, conducts negotiations with the PROs, and oversees any necessary industry-wide litigation concerning music performance rights. *Id.* at ¶ 4.

II. The TMLC Financed This Private Antitrust Suit For The Benefit Of The Settlement Class – The Local Television Industry

For the period from 1995 to 2007, SESAC negotiated the terms and conditions of licenses for local stations with the TMLC. *Id.* at ¶ 5. *See also Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 185 (S.D.N.Y. 2014) (noting that, "in the years leading up to 2008, SESAC's latitude to set the terms of music licenses was otherwise limited" in part by "a series of industry-wide agreements it negotiated with the television broadcast industry").

For the license period commencing in 2008, however, "the negotiations broke down, without an agreement" between the TMLC and SESAC, and "SESAC thereafter began dealing with the stations on an individual basis." *Meredith Corp.*, 1 F. Supp. 3d at 192. *See also* WH Decl. ¶ 5. As this Court recognized, a jury could conclude that SESAC, when dealing with local television stations individually, made a number of important changes to its licenses for the 2008-2012 period – including, but not limited to, significant fee increases and the foreclosure of meaningful alternatives to the SESAC blanket license – to the competitive injury of stations.

Meredith Corp., 1 F. Supp. 3d at 192-94. These increased license fee impositions came about at the same time that local stations were facing significant financial pressures brought about by a major economic recession. *See* Pls.' Opp'n to SESAC's Mot. for Summ. J., Dkt. No. 132, at p. 22 (quoting a Gannett station representative: "The economy's going through essentially a meltdown…. The vast majority of the people that we did business with were willing to negotiate. SESAC dictated fees to us that were insane….").

These circumstances led the TMLC and industry representatives to urge the DOJ to bring an enforcement action against SESAC. *See* WH Decl. ¶ 6. *See also Meredith*, 1 F. Supp. 2d at 194 ("TMLC representatives encouraged the DOJ to sue SESAC for antitrust violations"). Specifically, "[d]uring 2008, while negotiations over the 2008–2012 license period were taking place, several TMLC representatives, including one associated with Plaintiff Meredith, and Plaintiffs' expert, Professor Adam Jaffe, met with the Antitrust Division of the DOJ." *Meredith*, 1 F. Supp. 2d at 194. Class Counsel represented the TMLC in this effort before the DOJ. WH Decl. ¶ 6. One of the reasons that the TMLC sought an enforcement action by the DOJ was to avoid the substantial burden of having to finance a private lawsuit. *Id*. Ultimately, "[t]he DOJ closed its investigation without taking action," *Meredith*, 1 F. Supp. 3d at 194, and this private antitrust lawsuit was commenced by the Plaintiffs and funded by the TMLC. *See* WH Decl. ¶¶ 6-7.

After more than five years of hard-fought litigation, this antitrust case has now come to a positive resolution for the local television industry, as reflected in the terms of the proposed Settlement Agreement. In terms of prospective relief under the contemplated settlement, SESAC will be bound *through 2035* by some of the *same* core conduct restrictions that, under DOJ consent decrees, constrain the anti-competitive potential of the other two U.S. PROs, ASCAP and BMI, in their dealings with local television stations. *See* Settlement Agreement, Dkt. No. 175-1, at pp. 6-15. During this period, if the terms and conditions (such as licensing fees) of

industry-wide through-to-the-viewer public performance licenses to the SESAC repertory cannot be agreed upon with the TMLC, the matter of reasonable license fees can be submitted for resolution in binding arbitration. *Id.* at pp. 14-15. To compensate for past alleged anti-competitive practices, SESAC agreed to pay $58.5 million including attorney's fees and expenses. *Id*. at p. 4. Net of the requested $16 million in attorney's fees and expenses (which SESAC has agreed not to oppose), local stations will receive $42.5 million. *Id*. at pp. 5, 18. This amount will be allocated according to local stations' *pro rata* share of license fees paid to SESAC since 2008. *Id*. at pp. 18-19. *See also id*., Ex. F.

III. To Obtain A Settlement, The TMLC Has Incurred Substantial Expense And Class Counsel Has Prosecuted This Case On A Reduced Fee And Partial Contingency Basis

Over the course of this litigation, the TMLC incurred substantial expenses. Discovery was voluminous: it involved the review of around 1.5 million pages of documents from hundreds of document custodians at dozens of different entities; more than 50 depositions; substantial non-party discovery including over 50 subpoenas for the production of documents; and several reports submitted by expert economists. Before this lawsuit was filed, the TMLC and Class Counsel entered into an arrangement that reflected the risks and costs associated with these types of antitrust litigations. That arrangement contains several fee accommodations the effect of which has been to reduce actual billings by Class Counsel from January 1, 2009 through September 30, 2014 by some $5 million dollars below Class Counsel's normal billing rates. *See* Declaration of R. Bruce Rich, filed contemporaneously herewith, dated Nov. 20, 2014 ("RBR Decl."), ¶¶ 5-6. Fees for this period under this discounted billing arrangement totaled some $11.8 million.[2] *Id.* at ¶ 6.

[2] In return for the various fee accommodations by Class Counsel, the TMLC agreed that in the event of a successful result, including a favorable settlement, Class Counsel would receive additional compensation to be determined.

The remaining approximately $4.2 million of the TMLC's total costs were composed largely of: (1) $1.8 million in ordinary course litigation expenses (*e.g.*, contract document review attorneys, as well as e-discovery and court reporting vendors); (2) $2 million in consulting fees to economic consultants (*e.g.*, expert witnesses); and (3) $350,000 in fees and expenses to separate counsel who represented absent class member television stations responding to SESAC subpoenas. WH Decl. ¶ 11. Since the time that this private antitrust lawsuit was actively considered with the Plaintiffs in 2009, the TMLC has incurred total legal expenses and associated costs of over $16 million. *Id.* at ¶ 10.

The TMLC has relied upon voluntary contributions from local stations to fund this litigation. *Id.* ¶ 7. Even with special assessments beyond the TMLC's normal funding request levels, the monies collected have not kept pace with the litigation expense. *Id.* at ¶ 12. As a result, in addition to making accommodations on its fees at the outset, Class Counsel has prosecuted this action with the majority of its fees and expenses being incurred on a deferred and interest-free basis. RBR Decl. ¶ 7. Based on its actual billings, Class Counsel has carried as much as $8.8 million in fees and expenses interest-free, a sum that currently totals over $7.2 million in fees and $550,000 in expenses. *Id.*

LEGAL STANDARDS

In this Circuit, "[c]lass action fee awards are evaluated based on the six-factor standard set forth in *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43, 50 (2d Cir. 2000)." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014), *appeal filed*, No. 12-4671 (2d Cir.). Accordingly, a court "must weigh '(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the

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WH Decl. ¶ 8. The TMLC has concluded that the proposed class action settlement is a successful result and has agreed to pay Weil an additional $1 million. *Id.* That figure is not included in the amount incurred from January 1, 2009 through September 30, 2014 by the TMLC and is not a component of the reimbursement sought hereby.

litigation … ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.'" *Id.* (quoting *Goldberger*, 209 F.3d at 50).

District courts "may award attorneys' fees using either a percentage of the fund or a lodestar calculation." *Id.* *See also Goldberger*, 209 F. 3d at 50 ("no matter which method is chosen, district courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee"). "The lodestar method multiplies hours reasonably expended against a reasonable hourly rate." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F. 3d 96, 121 (2d Cir. 2005). However, "[t]he trend in this Circuit" is to award attorney's fees based on "the percentage method." *Id.*[3] Under either method, "a fee award should be assessed based on scrutiny of the unique circumstances of each case." *Goldberger*, 209 F. 3d at 53.

As for reimbursement of litigation costs, "'[c]ourts in the Second Circuit normally grant expense requests in common fund cases as a matter of course.'" *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC) (JO), 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012) (quoting *In re Arakis Energy Corp. Sec. Litig.*, No. 95-CV-3421 (AAR), 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001)).[4] Importantly in antitrust cases, the reimbursement of litigation costs in the settlement context typically includes expert witness fees. *See, e.g., In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 131 (S.D.N.Y. 2009) ("Given the magnitude of this case, its national scope, its long duration, and the extensive and expensive expert discovery conducted by the parties, this Court is satisfied that the expenses incurred were reasonable.").

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[3] *See also, e.g., Spicer v. Pier Sixty LLC,* No. 08 Civ. 10240 (PAE), 2012 WL 4364503, at *4 (S.D.N.Y. Sept. 14, 2012) (applying the percentage of the fund method as "consistent with the trend in the Second Circuit"); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 171 (S.D.N.Y. 2007) (same); *Baffa v. Donaldson Lufkin & Jenrette Sec. Corp.*, No. 96 CIV. 0583 (DAB), 2002 WL 1315603, at *1 (S.D.N.Y. June 17, 2002) (same) (citing *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 431 (S.D.N.Y 2001)).

[4] *See also, e.g., Interchange*, 991 F. Supp. 2d at 448 ("As a general rule, counsel are entitled to reimbursement for reasonable out-of-pocket expenses incurred over the course of litigating the case."); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 165 (S.D.N.Y. 2011) (same).

ARGUMENT

I. The Requested Award Is Justified As A Percentage Of The Settlement Fund

All of the *Goldberger* factors support the requested attorney fee award in this case:

A. The Time and Labor Expended by Class Counsel Support the Requested Fee

Class Counsel has worked a total of approximately 30,360 hours from the time this lawsuit was prepared and filed in 2009 to the execution of an agreement in principle to resolve this matter. RBR Decl. ¶ 6 n.3. This time includes: 1) drafting the complaint and amended complaint; 2) opposing SESAC's motion to dismiss; 3) conducting extensive defensive and offensive document and written party discovery as well as voluminous non-party document discovery; 4) taking or defending over fifty depositions of party and non-party fact witnesses and experts; 5) working with merits and class certification expert witnesses on reports; 6) opposing SESAC's motion for summary judgment against all claims; 7) moving for class certification; 8) participating in mediation and negotiation sessions to resolve this matter; and 9) drafting the Settlement Agreement and preliminary approval papers.

B. The Magnitude and Complexity of the Litigation Support the Requested Fee

"The complexity of federal antitrust law is well known." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 510 (E.D.N.Y. 2003) (antitrust class actions "are notoriously complex, protracted, and bitterly fought") (citing *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989)). Similarly, "class actions 'have a well-deserved reputation as being most complex.'" *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)). This case was no different. Indeed, as this Court has already noted, "this case presents complex issues." Dkt. No. 144.

C. The Risks Entailed in the Litigation Support the Requested Fee

There can be no serious question that prosecuting this antitrust case against SESAC involved risks and the results achieved by this proposed class action settlement were far from guaranteed. *First,* unlike ASCAP and BMI, SESAC has never been sued by the DOJ, nor has it ever agreed to be subject to an antitrust consent decree. While the DOJ investigated SESAC, it ultimately decided not to pursue an enforcement action.[5] *Second*, the ability of private plaintiffs (as opposed to DOJ) to obtain twenty years of conduct relief that parallels some of the key aspects of the ASCAP and BMI consent decrees is unprecedented. In fact, as a general matter, the DOJ typically includes sunset provisions in its consent decrees that terminate, at most, after ten years – half as long as the conduct relief in the proposed settlement will be in effect here.[6] *Third*, since ASCAP and BMI began to be regulated by consent decrees, music users challenging PRO licensing practices in private antitrust lawsuits have had little success. *See Meredith Corp. v. SESAC LLC*, No. 09 Civ. 9177 (NRB), 2011 WL 856266, at *12 (S.D.N.Y. Mar. 9, 2011) (stating that "the previous antitrust challenges to the ASCAP and BMI licenses have been unsuccessful"). While the Plaintiffs always have maintained the belief that this case should be decided favorably to them, that litigation history cannot be ignored. *Fourth*, SESAC, represented by extremely able counsel, aggressively defended its challenged licensing practices, and (absent settlement) would have defended its practices at trial and likely on appeal.

[5] *See, e.g., City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) ("[T]he only truly objective measurement of the strength of plaintiffs' case is found by asking: 'Was defendants' liability prima facie established by the government's successful action?'"); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 597 (S.D.N.Y. 1992) ("[T]his is not a case where plaintiffs' counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement … agency has made the kill. They did all the work on their own.").

[6] *See, e.g.,* DOJ, *Antitrust Division Announces New Streamlined Procedure For Parties Seeking to Modify or Terminate Old Settlements and Litigated Judgments*, Mar. 28, 2014, *available at* http://www.justice.gov /atr/public/press_releases/2014/304744.htm (last visited Nov. 19, 2014) ("In 1979, the department determined that entering into perpetual decrees was not in the public interest. Since that time, decrees have included 'sunset' provisions that will automatically terminate them after a term of years, not to exceed 10 years."). As set forth previously, with the exception of two limited termination rights, SESAC has agreed to abide by the conduct relief restrictions through 2035. *See* Dkt. No. 174, at p. 6 & n.8 (citing Settlement Agreement, §§ 3(g), 12(b)).

D. The Quality of Class Counsel's Representation Supports the Requested Fee

Class Counsel drew on its extensive knowledge of antitrust and copyright law, as well as of the music licensing industry, including its representation of local stations and the TMLC during the 2002 and 2006 arbitration proceedings with SESAC. *See* RBR Decl. ¶ 2. Class Counsel successfully opposed SESAC's efforts to end this case at both the pleading and summary judgment stages. *Meredith*, 2011 WL 856266 (Motion to Dismiss Decision); *Meredith*, 1 F. Supp. 3d 180 (Summary Judgment Decision). Further, Class Counsel developed a strong record for trial that this Court concluded "is sufficient to support a verdict in plaintiffs' favor" because, among other things, "[t]he evidence would … comfortably sustain a finding that SESAC, once freed in 2008 from the duty to arbitrate its disputes with the stations, engaged in an overall anti-competitive course of conduct designed to eliminate meaningful competition to its blanket license." *Meredith*, 1 F. Supp. 3d at 196.

E. The Fee Request is Consistent with the Size and Scope of the Settlement

The total requested $16 million award for both reimbursement of attorney's fees and other associated legal expenditures incurred by the TMLC represents 27% of the $58.5 million settlement fund. Insofar as $4.2 million of the request is for reimbursement of the TMLC's reasonable litigation-related expenses other than Class Counsel's attorney's fees, *see supra* at p. 6, the portion of the requested award for reimbursement of Class Counsel's legal fees in and of themselves is some $11.8 million, which constitutes only 20% of the fund.[7] Courts in the Second Circuit have frequently approved attorney fee requests, exclusive of expenses, that are 30% or more of the size of the funds created in class action settlements. *See, e.g., Vitamin C*, 2012 WL 5289514, at *10 (noting that "'[i]n this district alone, there are scores of common fund cases

[7] The approximately $11.8 million portion of the request that seeks reimbursement of Class Counsel's fees is less than 22% of the $54.3 million fund when calculated net of the $4.2 million in other costs the TMLC incurred.

where fees alone … were awarded in the range of 33-1/3% of the settlement fund'") (quoting *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262 (RWS), 2002 WL 31663577, at *26-27 (S.D.N.Y. Nov. 26, 2002)).[8]

When the conduct relief afforded by the settlement through 2035 is factored into the analysis, the requested award can be seen to total as little as 7% of the value of the overall settlement. As calculated in the Memorandum in Support of Preliminary Approval, local stations achieved $8 million per year in savings from arbitration with SESAC for the 2005-2007 license period. *See* Dkt. No. 174, at pp. 11-12. Applying that level of savings over the full term of this settlement (during which the TMLC has the option to arbitrate the fees and terms of its licenses with SESAC) yields $160 million of savings to the industry over a twenty-year period. *Id.* Combined with the $58.5 million settlement fund, the total value of this settlement reasonably could be in the neighborhood of $218.5 million (of which $16 million represents some 7%).

It is appropriate to consider the value of the conduct relief in addition to the size of the settlement fund in determining the overall reasonableness of the requested award. If "the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained," a court may "include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees." *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003). Even if that value cannot be "accurately ascertained," a court nevertheless

[8] *See also, e.g., Spicer*, 2012 WL 4364503, at *4 ("Class counsel's request for one-third of the settlement fund is also consistent with the trend in this Circuit."); *Giant*, 279 F.R.D. at 163 n.6 (same); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding one-third of a settlement fund); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (same); *Newman v. Caribiner Int'l Inc.*, No. 99 Civ. 2271 (S.D.N.Y. Oct. 19, 2001) (same); *In re Prudential Sec., Inc. Ltd. P'ships Litig.*, 912 F. Supp. 97, 103 (S.D.N.Y. 1996) ("Many courts have approved and awarded fees in class actions of one-third of the settlement fund …."); *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350, at *14 (E.D. Pa. June 2, 2004) (citing a "Judicial Center study that found that in federal class actions generally [the] median attorney fee awards were in the range of 27 to 30 percent."); 4 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 14.6 n.9, at 768 (4th ed. 2002) ("'In the normal range of common fund recoveries in securities and antitrust suits, common fee awards fall in the 20 to 33 per cent range.'").

"should consider the value of the injunctive relief obtained as a 'relevant circumstance' in determining what percentage of the common fund class counsel should receive as attorneys' fees, rather than as part of the fund itself." *Id.* *See also Interchange*, 991 F. Supp. 2d at 446 (considering conduct relief as a "relevant circumstance") (*citing Staton*, 327 F.3d at 974); *Visa Check*, 297 F. Supp. 2d at 525 (same).

F. Public Policy Considerations Support the Requested Fee

Private antitrust suits "provide a significant supplement to the limited resources available" to public antitrust enforcers. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). *See also* Brief for the United States As Amicus Curiae Supporting Respondents, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133), 2013 WL 367051, at *21 (Solicitor General noting "the importance of private enforcement as a means of achieving the policy objectives of the antitrust statutes").

Public policy favors the requested award here. The importance of private antitrust suits is reflected in the fact that Congress provided for the recovery of attorney's fees and expenses in the Clayton Act. *See,* 15 U.S.C. § 26 ("Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws …. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.").[9]

[9] *See also Grumman Corp. v. LTV Corp.*, 533 F. Supp. 1385, 1387 (E.D.N.Y. 1982) (noting that fees can be awarded to "plaintiffs who 'vindicate rights' through thwarting 'threatened loss or damage by a violation of the antitrust laws' either through obtaining a final judgment or something which is its functional equivalent"). In addition, Section 4 of the Clayton Act provides that successful plaintiffs who recover treble damages are automatically awarded reasonable attorney's fees and costs. 15 U.S.C. § 15(a). SESAC itself recognized the possibility of having to pay for attorney's fees as a basis to settle. *See* Settlement Agreement, Dkt. No. 175-1, at p. 3 ("[SESAC] has concluded, based on its consideration of a number of factors, specifically including [its] continuing exposure to bearing the continuing, multimillion dollar cost of attorney's fees for both sides, that it is desirable that the Meredith Proceeding be settled.").

It is well-recognized that courts should reward those who are willing to take on the risk of prosecuting difficult and complex cases. *See, e.g., Interchange*, 991 F. Supp. 2d at 441 ("Counsel should be rewarded for undertaking [the risks in the litigation] and for achieving substantial value for the class. If not for the attorneys' willingness to endure for many years the risk that their extraordinary efforts would go uncompensated, the settlement would not exist."); *Linerboard*, 2004 WL 1221350, at *16 (attorney fee award is to "reflect the risks of nonpayment facing counsel, to serve as an incentive for counsel to undertake socially beneficial litigation, or as a reward to counsel for an extraordinary result"). Given the DOJ's decision not to act, the local stations and the TMLC felt it necessary to bring a costly and time-consuming private lawsuit to obtain relief against SESAC under the antitrust laws. *See supra* at p. 4. Class Counsel shared that risk by prosecuting this action on a reduced fee and partial contingency basis.

Absent the requested award, the TMLC will not be reimbursed for the substantial expenses it has incurred and paid already, and, going forward, will be in the precarious financial position of having to seek additional contributions from local stations to pay for the substantial expenses incurred and still owing from this lawsuit. *See* WH Decl. ¶ 4. The requested award is, therefore, necessary to reimburse the TMLC for the considerable financial burden it incurred on behalf of the Settlement Class, and it will put the TMLC on a sound financial footing that will enable it to continue to vigorously represent local stations during license negotiations with all three PROs.

Thus, the requested award is justified as a reasonable percentage of the settlement fund.

II. The Requested Award Is Justified Based On A Lodestar Cross-Check

Courts "use the lodestar figure as a 'cross-check' to assure that the percentage-based fee is reasonable." *Interchange*, 991 F. Supp. 2d at 440 (citing *Goldberger*, 209 F.3d at 50). The reasonableness of an attorney fee request using the lodestar calculation method, including any

multiplier, is evaluated using the same six *Goldberger* factors as the percentage of the fund method. 209 F.3d at 50. Moreover, "where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court," and instead "the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case." *Id.*

For all of the reasons mentioned, the *Goldberger* factors weigh in favor of the attorney fee award, which represents a very low and reasonable multiplier based on the lodestar.

A. Class Counsel's Fees Are Conservatively Calculated For Lodestar Purposes

Based on the normal rates that Class Counsel would have charged absent the fee accommodations made to the TMLC, the lodestar is approximately $17.4 million for 30,360 hours worked. *See* RBR Decl. ¶ 6. Based on the fees actually billed to the TMLC to date, the lodestar is over $11.8 million. *See id.*[10] The lodestar based on actual billings by Class Counsel is conservatively calculated for several reasons. *First*, it does not include bills prior to January 1, 2009 for time spent by Class Counsel to petition the DOJ in 2007 and 2008 and to make certain preparations in 2008 for this civil lawsuit. *Id. Second,* those billings reflected sharply discounted billing rates. *Id.* at ¶ 5. *Third*, as part of the attorney review of billing records, Class Counsel did not bill the TMLC for about $892,000 of their time working on this case. *Id.* at n.3. *Fourth*, the lodestar does not include the time of third-party contract attorneys performing document review analysis for discovery under the supervision of Class Counsel.[11] *Id.* at n.2.

[10] Given that the relative amount of non-attorney time billed on this case was not sizable, and was billed at lower rates, a lodestar based exclusively on attorney work is not meaningfully different. *See id.* The Second Circuit and courts in this District permit the inclusion of such non-attorney time in the lodestar calculation. *See, e.g., U.S. Football League v. NFL*, 887 F.2d 408, 415-16 (2d Cir. 1989) (surveying cases that included paralegal time in attorney fee awards); *Interchange*, 991 F. Supp. 2d at 439 (including paralegal time in calculation of lodestar multiplier); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146 (S.D.N.Y. 2010) (approving fee award that included hours billed for administrative personnel).

[11] *See, e.g.*, *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 394-95 (S.D.N.Y. 2013) (courts "regularly appl[y] a lodestar multiplier to contract attorneys' hours") (citing *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 409 (D. Conn. 2009), *aff'd,* 355 F. Appx. 523 (2d Cir. Dec. 9, 2009)).

Thus, the lodestar is smaller than what it could be, which results in a higher multiplier. *See infra* at pp. 16-17.

B. Class Counsel's Hourly Rates Are Reasonable

In determining the reasonableness of an attorney's hourly rates for fee award purposes, as well as the reasonableness of hours expended, the paramount consideration is the result obtained. *See Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983) ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee."). Based on its discounted fee structure, Class Counsel's hourly rates for attorneys ranged from as low as $230 for first-year associates up to $903 for the most senior partner (and even that has been reduced to $808 over the course of this litigation as Class Counsel's discount arrangement has continued).[12] RBR Decl. ¶ 5 n.1.

These rates are within the normal range for counsel with the expertise necessary to prosecute a case of this complexity. *See, e.g., Interchange*, 991 F. Supp. 2d at 448 (awarding fees where class counsel's supporting declarations indicated hourly rates ranging from $185 to $855); *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC) (JO), 2013 WL 6858853, at *1 (E.D.N.Y. Dec. 30, 2013) (approving hourly rates ranging from "a low of $375 per hour for junior associates to $980 per hour for senior partners"); *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002, 2012 WL 5467530, at *6 (E.D. Pa. Nov. 9, 2012) (awarding fee request based on hourly rates that ranged from $200 to $950). *Cf. In re Indep. Energy Holdings PLC*

[12] These hourly rates are conservative for lodestar calculation purposes in several respects. First, courts in the Second Circuit have used current hourly rates to calculate the lodestar figure. *See, e.g.*, *Velez v. Novartis Pharms. Corp.*, No. 04 Civ. 09194 (CM), 2010 WL 4877852, at *23 (S.D.N.Y. Nov. 30, 2010) ("'The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts.'") (quoting *In re Veeco Instruments Inc. Sec. Litig.*, No. 05-MDL-01695 (CM), 2007 WL 4115808, at *9 (S.D.N.Y. Nov. 7, 2007)). Second, courts have adjusted the lodestar to reflect the time value of money – *i.e.*, to "compensate for the delay in receiving compensation, inflationary losses, and the loss of interest." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989). Third, the hourly rate of third-party contract attorneys, who are not counted in the lodestar because they are being treated as an expenditure, was lower than for junior associates. Class Counsel relied on such contract attorneys for document review to the extent possible.

Sec. Litig., No. 00 Civ. 6689 (SAS), 2003 WL 22244676, at *9 (S.D.N.Y. Sept. 29, 2003) (approving rates that were "not extraordinary for a topflight New York City law firm").

C. The Resulting Multiplier is Reasonable

Based on the more than $17 million that Class Counsel would normally have charged absent the fee accommodations made to the TMLC, *see* RBR Decl. ¶ 6, the lodestar multiplier is less than one for the entire requested award of $16 million (which includes expenses). Based on the discounted fees actually billed to the TMLC to date of over $11.8 million, *see id.*, the lodestar multiplier for the entire requested award of $16 million is only 1.3. When compared to just the portion of the award net of expense reimbursement of $4.2 million, *see supra* at p. 6, the lodestar multiplier is only one.

Under any plausible view, the lodestar multiplier for the requested award falls well within, if not well below, any range that might govern it. *See, e.g., Interchange*, 991 F. Supp. 2d at 448 (finding multiplier of 3.4 for $160 million lodestar to be "reasonable" and "comparable to multipliers in other large, complex cases").[13] Further, because the risk associated with a lawsuit is "'perhaps the foremost factor' to be considered in assessing the propriety of a multiplier," *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 424 (2d Cir. 2010) (citing *Goldberger*, 209 F.3d at 54), for the reasons discussed herein, *see supra* at p. 9, any of the multipliers under the various analyses offered here are certainly reasonable.

Thus, the requested award is justified by the lodestar cross-check.

[13] *See also, e.g., Visa Check*, 297 F. Supp. 2d at 524 (awarding fee with a multiplier of 3.5 in megafund settlement); *Vitamin C*, 2012 WL 5289514, at *10 ("observing that lodestar multiples of between 3 and 4.5 had 'become common'") (quoting *Lloyd's*, 2002 WL 31663577, at *26-27); *Currency Conversion*, 263 F.R.D. at 130 (awarding fee with a multiplier of 1.6 in megafund settlement); *Spicer*, 2012 WL 4364503, at *4 (finding that 3.36 multiplier was "well within the range of reasonableness"); NEWBERG ON CLASS ACTIONS, § 14.6 ("multiples ranging from one to four frequently are awarded in common fund cases"). *See also Brewer v. S. Union Co.*, 607 F. Supp. 1511, 1535 (D. Colo. 1984) (awarding fees with a multiplier of 3 to counsel working on partial contingency fee basis).

III. The Requested Award For Reimbursement Of Expenses Is Justified

As noted above, *see supra* at p. 6, expenses for this litigation totaled about $4.2 million. These expenses were necessary for such a complex antitrust case. For example, as this Court remarked, Plaintiffs' merits expert, Professor Adam B. Jaffe, "persuasively chronicled" the conduct by SESAC challenged in this lawsuit. *Meredith*, 1 F. Supp. 3d at 196. *See also id.* at 214 (remarking that Professor Jaffe "supplies, in fact, a highly persuasive analysis of why, since 2008, neither SESAC's [per-program licenses], nor its direct licenses, have been economically viable for prospective licensees"). Thus, reimbursement of the expenses incurred to prosecute this case is appropriate.

CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that the Court grant this Motion for Award of Attorney's Fees and Expenses.

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Respectfully submitted,

By: /s *Steven A. Reiss*

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