UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DWIGHT SIMONSON, SUSAN DOHERTY, individually and on behalf of all others similarly situated, Plaintiffs, v. THE HERTZ CORPORATION, AMERICAN TRAFFIC SOLUTIONS, INC., and PLATEPASS LLC Defendants.	Civil Action No. 1:10-cv-00359-NLH-KMW

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AGREED-UPON ATTORNEY'S FEES, EXPENSE REIMBURSEMENT, AND CLASS REPRESENTATIVE SERVICE FEE AWARDS

Submitted by:

COHEN, PLACITELLA & ROTH, PC
Christopher M. Placitella, Esq.
Michael Coren, Esq.
127 Maple Avenue
Red Bank, NJ 07701-1717
(732) 747-9003
Attorneys for Plaintiffs and the Class

Of Counsel:

Steven R. Jaffe, Esq.
Mark S. Fistos, Esq.
FARMER, JAFFE, WEISSING, EDWARDS, FISTOS & LEHRMAN, P.L.
425 North Andrews Avenue, Suite 2
Fort Lauderdale, Florida 33301
(954) 524-2820
(Admitted *pro hac vice*)
Attorneys for Plaintiffs and the Class

Stephen A. Dunn, Esq.
EMANUEL & DUNN, PLLC
Post Office Box 426
Raleigh, North Carolina 27602
(919) 832-0329
(Admitted *pro hac vice*)
Attorneys for Plaintiffs and the Class

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Under Rules 23(h)and 54(d)(2) of the Federal Rules of Civil Procedure, settlement Class Representatives, through Class Counsel, respectfully submit the following Memorandum of Law in support of their Motion for Agreed-Upon Attorneys Fees, Expense Reimbursement and Class Representative Service Fee Awards that were negotiated as part of the settling Parties' proposed class action Settlement Agreement ("Agreement"),[1] which Agreement the Court has preliminarily approved on July 1, 2013 [Dkt. 100].

I. PRELIMINARY STATEMENT

As explained in detail below, the agreed-upon fees and expense reimbursement stem from an adversarial and arms-length negotiation process and represents a reasonable and marketplace consistent recovery by Class Counsel given the complexity, difficulty and length of this consumer class action case, the thousands of hours invested by Class Counsel prosecuting it, and the Common Fund of $11,004,000 Class Counsel achieved to provide cash refunds for Class Members. The requested attorneys' fee, $3,026,100, whether measured by the substantial benefit doctrine, the common fund percentage-of-recovery method, or lodestar cross-check, is appropriate and proportionate to the relief obtained for the Class after years of hard-fought litigation and arms-length negotiations. As will be shown, the context of this litigation, the benefits obtained in the settlement (not the least of which is a Common Fund of $11,004,000 for cash refunds to class members), the objective benchmarks for measuring fee requests, and the legal standards for fee awards in complex litigation more than substantiate and justify the negotiated fee. Likewise, the requested service awards to the two class representatives of $5,000

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[1] For consistency, Plaintiffs have capitalized words that the settling Parties defined in the Agreement [Dkt. 98-4]. Plaintiffs incorporate those definitions in this memorandum.

each and the negotiated expense reimbursement of $100,000 to class counsel are reasonable and warranted by the circumstances.

As required by the Court's Preliminary Approval Order, notice of Class Counsel's fee request and Class Representatives' service awards has been provided to thousands of Class Members and the public at large via mail, publication in nationwide periodicals, newswire release, and via the Settlement's website, www.hertzplatepasssettlement.com. Defendant has also notified appropriate government officials pursuant to the Class Action Fairness Act. To date, however, no Class Member and no governmental entity have objected to Class Counsel's request for attorney's fees, cost reimbursement, or the agreed-upon service awards.

The upshot is that this case was adversarial and hard fought from beginning to end. It was hard get past the pleading stage, hard to conduct discovery and, importantly, hard to settle. And no Class Member has to date objected save one who raises technicalities and no real challenge to the substance of the settlement, including no challenge to the fees or service awards being requested. In addition to their declaration submitted in support of preliminary approval ("Jaffe Dec.")[Dkt. 98-3],[2] Class Counsel have submitted an additional declaration in support of Class Counsels' current application for Aggregate Fees and Costs and Class Representative Service Awards ("Jaffe Supp. Dec.")[3] for respectively $3,026,100, $100,000, and $10,000 ($5,000 apiece for Plaintiffs Susan Doherty and Dwight Simonson), all of which are consistent with the terms of the Settlement Agreement. [Agreement ¶¶ 5.4, 5.5 Dkt. 98-4]. Under the Settlement Agreement, Defendants have agreed to separately pay all these in addition to the creation of the $11,004,000

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[2] Declaration of Steven R. Jaffe in Support of Preliminary Approval of Class Action Settlement ("Jaffe Dec.") [Dkt. 98-3].

[3] Declaration of Steven R. Jaffe in Support of Motion for Agreed-Upon Attorney's Fees, Expense Reimburesement, and Class Representative Service Awards ("Jaffe Suppl. Dec.").

Common Fund for Class Member cash refunds. [Agreement ¶ 5.5, Dkt. 98-4]. Thus, any attorney's fees, costs, and service award payments will *not* be paid from and will *not* in any way reduce the $11,004,000 Common Fund or any refund made under the Agreement to any Claimant.[4] These awards are entirely consistent with the marketplace for fees and recoveries made in comparable cases in this District and the Third Circuit. Against this backdrop, as more fully discussed below, Class Counsel is confident that the relief obtained for the Class and the settlement are eminently fair, reasonable and adequate and support Class Counsel's requests under any applicable standard. Class Counsel therefore respectfully requests that the negotiated fees and cost reimbursements be granted in full at the final approval hearing.

II. SETTLEMENT TERMS

A. The Conditionally Certified Settlement Class

On July 1, 2013, the Court, upon the Parties' request and in accordance with their Agreement, certified for purposes of settlement the following agreed-upon Class:

> All natural persons in the United States who: (a) rented a car from Hertz with the first day of the rental between July 1, 2006 and March 31, 2010; (b) used PlatePass during that rental; and (c) paid PlatePass-Related Charges incurred during that rental, but not including those who file a Request for Exclusion, governmental entities, Defendants, their parents, subsidiaries, affiliates, directors, officers, attorneys, and members of their immediate families, and the Court and persons within the third degree of relationship to the Court. [5]

[Dkt. 100 at ¶¶ 1-2]. In its Preliminary Approval Order, the Court found "on a preliminary basis that the Settlement Agreement [wa]s fair, reasonable, and adequate, warranting a Final Approval Hearing and issuance of notice to the Class in the manner and forms set forth in the Settlement

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4 Jaffe Dec. ¶ 31 [Dkt. 98-3].

5 Agreement ¶ 1.5 [Dkt. 98-4].

Agreement, including notice via US first class mail, via publication, via a press release, and via a settlement website" [Dkt. 100 at ¶ 3].

B. Common Benefits Provided Under the Settlement

One of the hallmarks of a meritorious class action settlement is the concrete benefit it confers on the settlement class. Likewise, "[o]ne of the most significant considerations taken into account in setting the ultimate fee is the benefit conferred by the litigation."[6] This settlement meets this criterion: The settlement and the underlying litigation have directly addressed the claimed harm not only through cash refunds, but also through precipitating a change in the Hertz car rental contract, which are essentially what Plaintiffs asked for in their Consolidated Complaint [Agreement ¶ 2.7, Dkt. 98-4]. The cornerstone of the settlement is the substantial, concrete monetary relief and direct cash benefit it provides to Class Members who make claims under the Agreement. Here, first and foremost, the Settlement Agreement requires Defendants to establish a Common Fund of $11,004,000 for settlement and satisfaction of all class action claims.[7]

In addition to the $11,004,000 Common Fund, there are other benefits conferred under the settlement including the requirement that Defendants establish and maintain at their sole expense a transparent settlement administration process, including a Settlement Administrator [Agreement ¶¶ 1.28, 5.2, Dkt. 98-4]. The estimated cost of the administration and notice mailings and publications is slightly in excess of $1 Million. [*See* Declaration of Jeff Dahl annexed to the Jaffe Supp. Dec.]. To this end, Defendants have engaged Dahl, Administration, as

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6 Attorney Fees—Standards for Assessing, 7B Fed. Prac. & Proc. Civ. § 1803.1 (3d ed.).

7 *Id*. ¶ 2.1.

the Settlement Administrator who is administering the settlement under the Court's Preliminary Approval Order.

Dahl in furtherance of that Order has set up a settlement website with on-line Claim Form submission [*id.* ¶¶ 2.2(ii), 2.2(iii), 2.3(i), 3.3] at www.hertzplatepasssettlement.com, and has established a toll-free information line for Class Members to call to receive information on the settlement [*id*. ¶ 2.2(i), Dkt. 98-4], which number has appeared in the Summary Notice, the settlement website, the Publication Notice, long-form Notice and elsewhere.[8] Dahl has also mailed out 1.6 Million post-card summary notices and has handled one of the the two placements of the two summary notice publications in the USA Today. The other is to go out on or before September 16, 2013.

The settlement Agreement provides for streamlined process for administering refunds for settlement Class Members [*id.* ¶¶ 2.2-2.5], which is in progress and will continue after final approval It also establishes a method for resolving any disputes about refunds [*id*. ¶ 2.5]. Following commencement of the Court-ordered notice, Dahl has been overseeing the agreed claims process whereby Class Members submit claims through a Claim Form to Settlement Administrator,[9] at www.hertzplatepasssettlement.com electronically or per requested mailed hard copies of the form.[10] To claim his or her share in the Common Fund, a Class Member must complete the Court-approved Claim Form;[11] and acknowledge on the Claim Form (or electronic website equivalent) that he/she: (1) did not separately rent a PlatePass transponder from Hertz and sign an agreement separate and apart from the Hertz car-rental agreement; (2) paid

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8 Jaffe Suppl. Dec. at ¶ 27.

9 Agreement ¶ 2.3 [Dkt. 98-4]; Jaffe Suppl. Dec. at ¶ 28.

10 Agreement, ¶ 2.2(i); http://hertzplatepasssettlement.com/info/claim. The Claim Form is also available on the website via downloadable PDF; Jaffe Suppl. Dec. at ¶ 28.

11 *Id*. ¶ 2.2; *see* fn 34, *supra*.

PlatePass-Related Charges;[12] and (3) was not aware of PlatePass-Related Charges prior to paying them.[13] Dahl has also set up procedures for resolving disputes about refunds required under the Agreement. [Agreement ¶ 2.5]. Dahl will be submitting a declaration outlining the notice and administration process prior to the Final Approval Hearing.

As pointed out in Plaintiffs' preliminary approval motion [Dkt. 98-2], the amount of a Class Member's refund under the Agreement depends on payment data from Defendants' records that has been pre-populated on each Class Member's electronic or paper Claim Form.[14] Where Defendants' PlatePass-transaction databases do not contain sufficient information to enable the Settlement Administrator to pre-populate the Claim Form with specific PlatePass-Related Charges information, in whole or in part, for any given Class Member, the Class Member is entitled to submit to the Settlement Administrator records or other documentary proof to show past PlatePass use or payment of PlatePass-Related Charges on Hertz rentals during the Class Period.[15] If documentary proof is submitted, the burden will be on Defendants to disprove that Class Member's demand for additional reimbursement.[16]

The Agreement also benefits the Class by allowing Class Counsel confirmatory discovery of data used to calculate cash payments to Class Members and complete, open access to the Settlement Administrator and the settlement administration.[17] Since the Court's issuance of the Preliminary Approval Order on July 1, 2013 [Dkt. 100], Class Counsel has had regular meetings

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[12] *See* Agreement ¶ 1.22-1.24 (defining "PlatePass-Related Charges" that include "PlatePass-Related Service Fees," and "PlatePass-Related Toll Differential" as further defined in the Agreement).

[13] Agreement ¶¶ 2.2-2.3 [Dkt. 98-4].

[14] Agreement ¶¶ 2.2, 2.2(iii).

[15] *Id*. ¶¶ 2.2, 2.4.2.

[16] *Id.* ¶ 2.5.2(c).

[17] *Id*. ¶ 8.2.

and exchanges with Dahl to ensure the settlement administration, notice, and claims process was being conducted fairly and in accordance with the Agreement.[18] Class Counsel have made several inquiries to Dahl and they were responded to promptly.[19] Dahl also provided regular updates on the administrative process, which according to estimates Class Counsel has reviewed should cost Defendants approximately $1,000,000.[20] Dahl has also gone over and created analysis of the defendants' databases which Class Counsel has used to confirm the data on which the Settlement was based.[21]

Another benefit of the settlement is that cash refunds from the $11,004,000 Common Fund paid to eligible Class Members will be *net* of fees and administration costs. Defendants have agreed to separately pay all costs of the notice and administration as well as separately pay a reasonable Attorney's Fees and Costs to Class Counsel as approved by the Court up to limits of, respectively, $3,026,100 and $100,000.[22] Defendants have also agreed to separately pay any Class Representative Service award that the Court may in its discretion award Plaintiffs Doherty and Simonson up to $5000 apiece.[23] Any attorney's fees, costs, and service award payments will therefore not be paid from or in any way reduce the $11,004,000 Common Fund or any refund made under the Agreement to any Claimant.[24] Under established precedent, where the defendants agree to pay such fees and costs separately from the common fund or payments to class members

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18 Jaffe Suppl. Dec. at ¶ 29.

19 *Id.*

20 *Id*. at ¶ 29 and ¶ 36.

21 *Id*. at ¶ 29

22 Agreement ¶ 5.4 [Dkt. 98-4].

23 *Id.* ¶ 5.5.

24 Jaffe Dec. ¶ 31 [Dkt. 98-3].

as part of the settlement, they are included as part of the total class action recovery for purposes of calculating and reviewing attorney's fee awards.[25]

III. NOTICE TO THE CLASS

A. The Class Notice Has Had a Wide Reach and No Class Member or Governmental Entity has Objected to Class Counsel's Fee Requests or Class Representatives' Service Awards

In accordance with the Agreement and the Court's Preliminary Approval Order [Dkt. 100 at ¶ 6], the Settlement Administrator (Dahl, Inc.) and the Parties commenced the process of notifying Class Members of the settlement and its terms.[26] On June 7, 2013, Defendants mailed the Class Action Fairness Act notice of settlement (including among other things, the entire settlement Agreement) to appropriate government officials, including US Attorney General and state Attorneys' General across the U.S.[27] Dahl mailed the Summary Notice to Class Members nationwide on July 24, 2013,[28] and established the settlement website, www.hertzplatepasssettlement.com, containing the long-form Notice, Summary Notice, settlement Agreement, Preliminary Approval Order, and Claim Form. The Parties issued a press release announcing the settlement on July 31, 2013.[29] The settlement website further contains a

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[25] *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig*., 55 F.3d 768, 821 (3rd Cir.), cert. denied, 516 U.S. 824 (1995) ; *Pro v. Hertz Equip. Rental Corp*., 2013 U.S. Dist. LEXIS 86995 (D NJ June 30, 2013) (including amount of separately agreed upon attorneys fee as part of class recovery when calculating and determining fee award in connection with class action settlement); *Lonardo v. Travelers Indemnity Co*., 706 F. Supp. 2d 766, 803 (N.D. Ohio 2010) (holding for purposes of calculating the percentage of the fee, agreed upon attorneys' fee award of $ 4.6 million is part of the Total Class Benefit); *In re Vitamins Antitrust Litig*., 2001 U.S. Dist. LEXIS 25067 *56 (D. D.C. 2000) (holding attorneys' fees that are borne by defendants and not plaintiffs are a valuable part of the settlement and fairly characterized as part of the common fund.")

[26] Jaffe Suppl. Dec. at ¶ 28.

[27] *Id.*

[28] *See* http://hertzplatepasssettlement.com/info/dates.

[29] *See* http://www.prnewswire.com/news-releases/hertz-rental-customers-to-receive-refunds-of-certain-platepass-fees-and-related-charges-incurred-under-proposed-class-action-settlement-217820661.html.

comprehensive explanation of the settlement terms in a series of FAQs.[30] Defendants have arranged for two rounds of nationwide Publication Notice, one that has already appeared in USA Today on August 15, 2013, and the other is set for publication on September 14, 2013.[31] Each publication placement costs approximately $21,000.[32] The materials provided to government entities, the long-form Notice, the Publication Notice, the FAQs, the Agreement, the settlement website, the Preliminary Approval Order, were all disseminated to Class Members and the public at large and either refer to or discuss in detail Class Counsel's agreed-upon fees and the service awards.[33] To date, however, no Class Member and no governmental entity have objected to Class Counsel's request for attorney's fees or the agreed-upon service awards.[34]

III. LEGAL ARGUMENT

As set forth in detail above and as further set forth below, the settlement achieved by Class Counsel represents the result of a highly contested legal struggle and provides significant benefits to the settlement Class. Class Counsel achieved this salutary result through vigorous prosecution of the action, facing numerous factual challenges and legal hurdles along the way, not the least of which were Defendants' highly skilled and determined lawyers. For their efforts in achieving the substantial benefits created by the settlement, Class Counsel seek Court approval of the requested negotiated Aggregate Fees and Costs and service awards because their requests squarely fall within the guidelines courts and Rule 23 have established for both entitlement to and the amounts of reasonable fees and awards in class-action settlements.

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30 *See* http://hertzplatepasssettlement.com/info/faq.

31 Jaffe Suppl. Dec. at ¶ 28.

32 *Id*.

33 *Id*. at ¶ 32.

34 *Id*.

A. Rule 23 Authorizes Agreements on Attorney's Fees in Settlements.

It is common for parties to a class action settlement to agree that a defendant will pay attorneys' fees to plaintiffs' counsel. Such an arrangement poses no particular problem for court approval, so long as the amount of the fee is reasonable under the circumstances and there is no evidence of self-dealing or disabling conflict of interest. Rule 23(h) of the Federal Rules of Civil Procedure expressly incorporates this principle and provides: "In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law *or by agreement of the parties*." *Fed. R. Civ. P.* 23(h) (emphasis added); *see McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 475 (D.N.J. 2008).

B. An Agreed-Upon Fee is Preferred and Entitled to Deference

Federal courts at all levels encourage litigants to resolve fee issues by agreement whenever possible. As the United States Supreme Court explained, "[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. Ga. Hwy. Express, 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."). Accordingly, courts are permitted to award attorneys' fees and expenses where all parties have agreed to the amount, subject to court approval, especially where the amount is in addition to and separate from the defendant's settlement with the class. *See*, *e.g.*, *Pro v. Hertz Equip. Rental Corp.*, 2013 U.S. Dist. LEXIS 86995, 16-17 (D.N.J. June 20, 2013) ("In light of this recognized principle, Courts routinely approve agreed-upon attorneys' fees, particularly when the amount is independent and does not impact the benefit obtained for the class."); *Local 56, United Food and Commercial Workers*

Union v. Campbell Soup Co., 954 F. Supp. 1000, 1005 (D.N.J. 1997) (granting class counsel the maximum amount of fees agreed to by defendant under the settlement agreement, where "class members . . . retain all that the settlement provides [and] do not lose any of the negotiated benefits on account of an attorneys' fee and costs award that equals the 'cap' on such an award set forth in the settlement.").[35] Indeed, the Supreme Court has suggested that such agreements be encouraged as a matter of public policy. *Hensley*, 461 U.S. at 437 ("A request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of the fee.").

C. A Market-Set Price is Preferred and Entitled to Deference

The virtue of a fee negotiated by parties at arms' length is that it is, essentially, a market-set price resulting from opposing interests. Defendants have an interest in minimizing the fee; plaintiffs have an interest in maximizing it; and the negotiations are informed by the parties' knowledge of the work done and result achieved and their views on what the court may award if the matter were litigated. In *In re Continental Ill. Sec. Litig*., 962 F.2d 566 (7th Cir. 1992), Judge Posner of the Seventh Circuit endorsed a market-based approach to evaluating fee requests that has been adopted in this District.[36] According to Judge Posner: "it is not the function of judges in fee litigation to determine the equivalent of the medieval just price." *Id*. at 568. "It is to determine what the lawyer would receive if he were selling his services in the market rather than

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[35] *See In re LG/Zenith Rear Projection Television Class Action Litig.,* Civ. No. 06–5609, 2009 U.S. Dist LEXIS 13568 (D.N.J. Feb. 18, 2009) (approving the attorneys' fees requested for class counsel after a finding that the fees were separate from, and thus did not diminish, the class settlement); *In re Ins. Brokerage Antirust Litig.,* 2007 U.S. Dist. LEXIS 25633 (D.N.J. June 5, 2007), *aff'd* 579 F.3d 241 (3d Cir.2009) (same); *In re Prudential Ins. Co. of Am. Sales Practice Litig.,* 106 F.Supp.2d 721, 732 (D.N.J.2000) (same)).

[36] *See, e.g., Henderson v. Volvo Cars of N. Am., LLC,* 2013 U.S. Dist. LEXIS 46291 (D.N.J. Mar. 22, 2013); *In re Philips/Magnavox TV Litig*., 2012 U.S. Dist. LEXIS 67287 (D.N.J. May 14, 2012***); McGee v. Cont'l Tire N. Am., Inc***., 2009 U.S. Dist. LEXIS 17199 (D.N.J. Mar. 4, 2009); *In re Ins. Brokerage Antirust Litig.,* 2007 U.S. Dist. LEXIS 25633, 2007 WL 1652303 (D.N.J. June 5, 2007).

being paid by court order." *Id.* "Markets know market values better than judges do." *Id*. at 570; *see Missouri v. Jenkins*, 491 U.S. 274, 285 (1989) (US Supreme Court has "consistently looked to the marketplace as our guide to what is reasonable" in awarding attorney's fee). "The object in awarding a reasonable attorney's fee . . . is to give the lawyer what he would have gotten in the way of a fee in an arms' length negotiation, had one been feasible." *In re Continental*, 962 F.2d at 572; *see In re Remeron Direct Purchaser Antitrust Litig.*, 2005 U.S. Dist. LEXIS 27013, *42–46 (D.N.J. Nov. 9, 2005)(following *In re Continental's* market-based approach); *see also Pro v. Hertz Equip. Rental Corp*., 2013 U.S. Dist. LEXIS 86995 (D.N.J. June 20, 2013) (approving negotiated fee and noting "the fee represents a market rate compromise negotiated by sophisticated counsel familiar with complex and class action litigation in the context of mediation").

Additionally, as explained in *McBean v. City of New York*, 233 F.R.D. 377 (S.D.N.Y. 2006), a court need not review an application for attorneys' fees with a heightened level of scrutiny where, as here, the parties have contracted for an award of fees that will not be paid from a common fund. "If money paid to the attorneys comes from a common fund, and is therefore money taken from the class," the court reasoned, "then the Court must carefully review the award to protect the interests of the absent class members." *Id*. at 392 (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123-24 (2d Cir. 2005) and *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000)). "If, however, money paid to attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members." *Id*. The *McBean* court concluded that the parties' agreement for attorneys' fees was objectively reasonable because it was the product of arm's length negotiations. *Id*.

The court in *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig*., 1992 U.S. Dist. LEXIS 14337 at *4 (C.D. Cal. June 10,1992), appeal dismissed, 33 F.3d 29 (9th Cir. 1994), echoed Judge Posner's reasoning in awarding a negotiated fee of $8 million:

> The fee was negotiated at arm's length with sophisticated defendants by the attorneys who were intimately familiar with the case, the risks, the amount and value of their time, and the nature of the result obtained for the class. Where there is such arm's length negotiation and there is no evidence of self-dealing or disabling conflict of interest, the Court is reluctant to interpose its judgment as to the amount of attorneys' fees in the place of the amount negotiated by the adversarial parties in the litigation.

Id.

The rationale espoused by Judge Posner, the *First Capital* court and other courts equally applies here.[37] Defendants here sought to minimize the fees that they must pay in addition to the benefits they will provide to the Class, and therefore Defendants' counsel had a keen interest in negotiating the smallest amount their clients would have to pay. Class Counsel, on the other hand, after negotiating the best settlement that they could obtain for the Class, wished to receive full compensation, as the law encourages, for undertaking this litigation and devoting the resources and skill necessary to successfully win relief for the class. The fee requested in this motion was negotiated at arms' length by sophisticated counsel familiar with the case, the risks for both sides, the nature and result obtained for the Class, the customary fees awarded by courts

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[37] *See also Malchman v. Davis*, 761 F.2d 893, 905 n.5 (2d Cir. 1985) ("an agreement 'not to oppose' an application for fees up to a point is essential to completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged."); *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142 (9th Cir. 2000) (affirming award of fees and expenses, where defendant had agreed not to oppose request for fees and expenses up to a negotiated ceiling and to be paid separately from class settlement benefits); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (upholding the district court's award of attorneys' fees, citing lack of abuse of discretion, where the court had approved attorneys' fees and costs of $5.2 million that were negotiated after the final settlement was achieved); *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 829 (D. Mass. 1987) ("Whether a defendant is required by statute or agrees as part of the settlement of a class action to pay the plaintiffs' attorneys' fees, ideally the parties will settle the amount of the fee between themselves.").

in similar types of cases, and the magnitude of the fee the Court may award if the matter were litigated to trial. Furthermore, under the auspices of Judge Rosen, attorneys' fees were not even negotiated or discussed until after agreement was reached between the parties on all other terms of the Settlement. *See Hanlon*, 150 F.3d at 1029) (citing with approval that "class counsel and [the defendant] did not negotiate or discuss attorneys' fees until after the final settlement"). If the Court were to reduce the award of Class Counsels' fees, doing so would not confer a greater benefit upon the Class, but rather would only benefit Defendants.[38] Thus, this Court should give the agreed-upon, market-set fee deference in analyzing the reasonableness of Class Counsels' fee application and approve the award.

D. Class Counsel's Requested Fee is Reasonable

Once entitlement to a base fee is established, federal courts determine the reasonableness of the fee based on a multitude of factors. *See Nielsen v York County*, 400 F. Supp. 2d 266 (D. Me. 2005). The Third Circuit has adopted the common benefit doctrine and "percentage-of-recovery" analysis, the lodestar approach (sometimes simply as a cross-check),[39] and other non-exhaustive factors relating to both of these. *See In re Diet Drugs Prod. Liab. Litig.,* 582 F.3d 524, 548 (3d Cir.2009); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005). "The awarding of fees is within the discretion of the Court, so long as the Court employs the proper legal standards, follows the proper procedures, and makes findings of fact that are not clearly

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[38] *See In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 106 F. Supp. 2d 721, 732 (D.N.J. 2000) finding it significant that attorneys' fees would not diminish settlement fund and any reduction in fee award "would not confer a greater benefit on the class, but instead would benefit only [the defendant]"); *Dupler* v. *Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 245 (E.D.N.Y. 2010) (same); *Bezio* v. *Gen. Elec. Co*., 655 F. Supp. 2d 162, 167-68 (N.D.N.Y. 2009) (same); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 322 (W.D. Tex. 2007) (same).

[39] *See Varacallo v. Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 207, 249 (D.N.J. 2005)(finding "[w]hile either the lodestar or percentage-of-recovery method should ordinarily serve as the primary basis for determining the fee, the Third Circuit has instructed that it is sensible to use the alternative method to double check the reasonableness of the fee")(citation omitted).

erroneous." *In re Philips/Magnavox Television Litig.*, 2012 U.S. Dist. LEXIS 67287 (D.N.J. 2012) (citing *In re Cendant Corp. PRIDES Litig.,* 243 F.3d 722, 727 (3d Cir.2001)).

1. The Percentage-of-Recovery Methodology Applies

That the settlement confers a calculable common benefit on an ascertainable class in turn informs what primary methodology is used to analyze the reasonableness of a requested attorney's fee. "Each [methodology] has distinct attributes suiting it to particular types of cases." *In re Ins. Brokerage Antitrust Litig.*, 2009 U.S. Dist LEXIS 17755, at *47 (D.N.J. Feb. 17, 2009) (citing *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 249 (D.N.J. 2005)). "Courts generally regard the lodestar method, which uses the number of hours reasonably expended as its starting point, as the appropriate method in statutory fee shifting cases." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995). "Courts use the percentage of recovery method in common fund cases on the theory that the class would be unjustly enriched if it did not compensate the counsel responsible for generating the valuable fund bestowed on the class." *Id.* "The percentage of recovery method resembles a contingent fee in that it awards counsel a variable percentage of the amount recovered for the class." *Id.* at 819 n. 38. The rationale for calculating fees on the percentage-of-recovery method in a common fund case is that "it is consistent with the private marketplace where contingent fee attorneys are routinely compensated on a percentage of recovery method," and "it provides a strong incentive to plaintiffs' counsel to obtain the maximum possible recovery in the shortest time possible under the circumstances." *Varacallo,* 226 F.R.D. 207, 249 (citing *Manners v. American General Life Ins. Co.,* 1999 U.S. Dist. LEXIS 22880, at *86–87). The percentage-of-recovery approach is the preferred methodology in a common fund case because allows the court to reward success and

penalize failure.[40] In this case, Class Counsel handled the case entirely on a contingent basis[41] and they successfully created a segregated Common Fund and other substantial, calculable benefits. A percentage-of-recovery analysis therefore applies, but as shown below, both methods support the reasonableness of the fee.

2. Several of the "Gunter" Factors Support Approval of the Fee

Approval of fee in a common fund case is not however simply measuring what percentage of the recovery the fee represents. Within the "percentage-of-recovery" framework, the Third Circuit has identified several factors, known as the *Gunter* factors, that the Court should consider when evaluating a motion for an award of attorneys' fees in a common fund settlement. Those factors are:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by Lead Counsel; and (7) the awards in similar cases.

In re AT&T Corp. Secs. Litig., 455 F.3d 160, 165 (3d Cir. 2006); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 733 (3d Cir. 2001; *Plymouth Cnty. Contributory Ret. Sys. v. Hassan*, No. 08-cv-1022, 2012 WL 664827, at *2 (D.N.J. Feb. 28, 2012) (Cavanaugh, D.J.) (citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000)). As this Court has explained, additional factors to consider include:

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[40] *In re AT & T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 (3d Cir. 2001); *Henderson v. Volvo Cars of N. Am., LLC,* No. 09-cv-4146, U.S. Dist. LEXIS 46291, at *42 (D.N.J. Mar. 22, 2013) ("The percentage-of-recovery method is preferred in common fund cases"); *Unite Nat'l Ret. Fund v. Watts*, No. 04-cv-3603, 2005 U.S. Dist. LEXIS 26246, at *16 (D.N.J. Oct. 28, 2005) (Cavanaugh, J.) ("Typically, in determining approval of attorneys' fees in large settlements, a court will award fees based on a percentage of recovery of the common fund awarded to the plaintiffs.").

[41] Jaffe Supp. Dec. at ¶ 49.

> (8) the value of benefits attributable to the efforts of class counsel to the efforts of other groups, such as government agencies conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained, and (10) any innovative terms of settlement.

In re Merck & Co. Vytorin ERISA Litig., 2010 U.S. Dist. LEXIS 12344, *24 (D.N.J. Feb. 9, 2010). *See also In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524, 541 (3d Cir. 2009). The Court should not apply the factors "in a formulaic way" because particular facts may require that "[c]ertain factors . . . be afforded more weight than others." *Merck ERISA*, 2010 U.S. Dist. LEXIS 12344, at *25. *See also AT&T,* 455 F.3d at 166 (the factors are not to "be applied in a formulaic way because each case is different, and in certain cases, one factor may outweigh the rest") (internal quotations omitted).

Additionally, the Third Circuit recommends that the Court "use the lodestar method to cross-check the reasonableness of a percentage-of-recovery fee award." *AT&T*, 455 F.3d at 164). *See Merck ERISA*, 2010 U.S. Dist. LEXIS 12344, at *43 (applying lodestar cross-check). However, "[t]he lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method." *AT&T,* 455 F.3d at 164.

a. Class Counsel Conferred a Substantial Benefit Upon the Class

The first *Gunter* factor—benefit to the Class—is oft times the most important factor in determining the reasonable of requested fee awards in class actions. Empirical studies of attorney's fees in class actions supports this proposition. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 Jrl. Emp. L. Stud. 27, p. 28 (March 2004) (finding "that the level of client recovery is by far the most important determinant of the attorney fee amount").

Courts recognize that settlement benefits supporting fee requests may be both monetary

and non-monetary. *See Merola v. Atl. Richfield Co.*, 515 F.2d 165, 170 (3d Cir. 1975); *see also Pro v. Hertz Equip. Rental Corp.*, 2013 U.S. Dist. LEXIS 86995, *18 (D.N.J. June 20, 2013) *Staton v. Boeing, Co*., 327 F.3d 938, 974 (9th Cir.2003). Class Counsels' efforts in litigating and settling this case resulted in "a substantial benefit on members of an ascertainable class" containing approximately 1.8 million Hertz renters who incurred PlatePass-Related Charges during the Class Period. *See Pro v. Hertz Equip. Rental Corp.*, 2013 U.S. Dist. LEXIS 86995, *18 (D.N.J. June 20, 2013) (citing *In re Diet Drugs,* 582 F.3d 524, 546 (3d Cir.2009)) (internal citations and quotations omitted)(acknowledging the "common benefit" doctrine supports class counsel's fee).[42]

Here, as discussed throughout this memorandum, the settlement provides significant pecuniary and non-pecuniary benefits to an ascertainable class—namely, those customers of Hertz who rented vehicles during the Class Period and paid PlatePass-Related Charges incurred during that rental. These benefits include: a segregated Common Fund of $11,004,000 from which members may be paid; the costs of settlement administration exceeding $1,000,000; a substantial business-practice change (owing to the litigation) resulting in an amendment to the Hertz rental agreement in the way the PlatePass-Related Charges are disclosed to the benefit of the Class and future Hertz customers; and attorney fees, cost reimbursement, and Class Representatives' service awards being paid entirely separate and apart from the Common Fund.[43]

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[42] Jaffe Decl. ¶ 26, Dkt. 98-3. *See Hall v. Cole*, 412 U.S. 1, 5 (1973) (citing *Mills v. Electric Auto-Lite Co*., 396 U.S. 375, 393-394 (1970)).

[43] *See Varacallo v. Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 207, 250 (D.N.J. 2005)(determining cash relief, injunctive relief, administrative costs, and attorney's fee payments to constitute a settlement's value for purpose of determining reasonable of an agreed fee); *see Johnston v. Comerica Mortg. Corp*., 83 F.3d 241, 245-46 (8th Cir.1996) ("The award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery."); *Manual for Complex Litigation* § 21.7, at 335 (4th ed. Fed. Jud. Center 2004) ("If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees and expenses ... the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class.... The total fund could be used to measure whether

As such, the settlement confers a substantial and concrete benefit on a class that is easily ascertainable, $15,211,000 in this case. Thus, the first *Gunter* factor—the size of the fund created and the number of persons benefitted—strongly supports a sizeable fee award to Class Counsel.

b. The Duration and Tenor of the Litigation Supports Approval

(i) The Parties Pursued their Positions Zealously

This clearly was not a file and settle case. It has been thoroughly litigated and investigated since its inception in 2009. On December10, 2009, plaintiff Susan Doherty, filed a class action naming Defendants in a New Jersey Superior Court class action that Defendants then removed to United States District Court for the District of New Jersey ("Court"). This case was styled as Susan Doherty v. The Hertz Corporation, American Traffic Solutions, and PlatePass LLC, Case No. 1:10-CV-00359 ("Doherty Action") [Dkt. 1]. Independently, on March 26, 2010, plaintiff Simonson filed a class action naming Defendants in the Court styled Dwight Simonson v. The Hertz Corporation, American Traffic Solutions, and PlatePass LLC, Case No. 1:10-CV-01585 ("Simonson Action"). The Simonson and Doherty Actions alleged similar claims against Defendants regarding the PlatePass®" electronic toll payment system ("PlatePass System") they implemented for Hertz rental cars.

The record demonstrates that the Parties pursued their opposing positions zealously and comprehensively. Defendants tested the pleadings and underlying case theories in both actions. In the Doherty Action, Defendants filed two motions to dismiss: one in February 2010 [Doherty Action Dkt. 7] and one in April 2010 [Dkt. 17]. Doherty filed briefs in opposition to both motions [Doherty Action Dkt. 14, 18]. In the Simonson Action, Defendants filed a motion to

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the portion allocated to the class and to attorney fees is reasonable.").

dismiss on June 22, 2010 [Simonson Action Dkt. 11], and Simonson filed a brief in opposition to Defendants' motion to dismiss on July 3, 2010 [Simonson Action Dkt. 12].

In November 2010, the Court denied the dismissal motion in the Doherty Action [Dkt. 24], and on March 28, 2011, the Court denied the dismissal motion in the Simonson Action [Dkt. 23]. Following denial of these motions, the Court on agreement of the Parties entered an order [Dkt. 40] consolidating the Simonson and Doherty Actions for all purposes into docket number Civil No. 1: 10-cv-00359-NHL-KMW (the "Consolidated Action"). On July 27, 2011, Plaintiffs filed a consolidated amended complaint ("Complaint") [Dkt. 43] that combined all claims against Defendants regarding Defendants' implementation and operation of the "PlatePass System."[44] Defendants then filed their answers to the Complaint [Dkt. 46, 47]. On October 22, 2012, Defendants ATS and PlatePass LLC filed a motion for summary judgment. The Court denied this motion without prejudice in view of the Parties' advice to the Court that this proposed settlement was reached. [Dkt. 74-78].[45]

(ii) Substantial Factual Investigation Preceded the Settlement

Each Party engaged in extensive investigation and discovery to explore and develop its position that in turn led to a thorough review of the strength and weaknesses of each litigant's position prior to reaching a compromise of its position [Jaffe Decl. ¶¶ 12-18, Dkt. 98-3]. From June 2011 through September 2012, the Parties exchanged Rule 26 disclosures; issued bilateral discovery; and took numerous depositions of each other's witnesses. Plaintiffs' disclosures included various documents gathered in pre-suit investigations from numerous publically

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44 At this juncture, Ms. Doherty's counsel turned control of the prosecution over to Mr. Simonson's counsel,: Cohen Placitella & Roth, P.C., Famer, Jaffe, Weissing, Edwards, Fistos & Lehrman, P.L. and Emanuel & Dunn, PLLC.

45 Defendant ATS also zealously defended in the related *Soper* class action in Florida state court.

available sources.[46] Plaintiffs served two sets of requests to produce to each Defendant that resulted in the production of approximately 40,000 pages constituting at least six gigabytes of data that Class Counsel reviewed and analyzed.[47] Indeed, during discovery Hertz produced an entire transactional database for Class Counsel to upload, query, and review.[48] Plaintiffs also served over 200 admission requests and two sets of interrogatories on Defendants whose answers, to the extent deemed deficient, Class Counsel met and conferred about on several occasions.[49] For their part, Defendants met or anticipated each of Plaintiffs' requests with their own by serving multiple rounds of extensive interrogatories and document requests on each Plaintiff.[50]

The settling Parties also conducted several lengthy depositions of each other's principals and managers in various cities and states across the US [Jaffe Decl. ¶¶ 16-18, Dkt. 98-3]: Class Counsel took the deposition of Defendants ATS's and PlatePass LLC's Fed. R. Civ. P. 30(b) (6) designee who was instrumental in developing the PlatePass System in Phoenix, Arizona, on June 21, 2012;[51] the President of ATS in July 2012, in New York, New York;[52] Hertz's corporate representative in Chicago in October 2012;[53] and several other officers of one or more of the

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46 Jaffe Dec. ¶ 13 [Dkt. 98-3].

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id. at* ¶ 14.

51 Jaffe Dec. ¶ 16 [Dkt. 98-3].

52 *Id.*

53 *Id.*

Defendants in various states.[54] Defendants in turn deposed each Plaintiff in Philadelphia, Pennsylvania, in August 2012.[55]

(iii.) Settlement Negotiations Were at Arms-Length

The Parties first attempted to mediate this case at daylong session in front of the Hon. Joel Rosen, U.S. Mag. J. (Retired) ("Judge Rosen") in December 2011 [Jaffe Decl. ¶ 19, Dkt. 98-3]. Despite their best efforts, their first attempt at mediation resulted in an impasse.[56] After the mediation session ended unsuccessfully, Judge Rosen suggested, and the parties agreed, that he stay involved in any further negotiations and that he be updated about the case's status as the litigation proceeded.[57]

Against a backdrop of extensive discovery and hard-fought litigation, interest in settlement re-kindled as the discovery cut-off date drew near. At that time a process of formal and informal settlement negotiations began. Encouraged by Judge Rosen, counsel for the settling Parties engaged in an extended dialogue about possible resolution. They met in Chicago, Illinois, in September, 2012;[58] Fort Lauderdale, Florida in November 2012;[59] and again in Ft. Lauderdale in January 2013.[60] Decision makers and counsel for the Settling Parties then convened in Philadelphia on March 21 and 22, 2013, at which time under the guidance of Judge Rosen, the

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54 *Id.* ¶ 17.

55 *Id.* ¶ 18. As part of the coordination with the *Soper* case, during some of these depositions Mr. Soper's counsel was the lead examiner.

56 *Id*.

57 *Id*. ¶ 23.

58 *Id.* ¶ 24.

59 *Id*.

60 Jaffe Dec. ¶ 24 [Dkt. 98-3].

Settling Parties reached agreement on the class relief and then other terms of settlement that comprise the Agreement they now propose for preliminary approval.[61]

It again bears noting that throughout this process, Class Counsel were absolutely resolute that negotiations of any class relief and any attorney's fees be separate and that the class relief be agreed upon completely prior to discussing fees [Jaffe Decl. ¶ 22, Dkt. 98-3]. As a result, counsel for the settling Parties focused settlement talks on class relief with negotiations on the relief to Class Members proceeding first and separate from any discussion of attorney's fees or service awards to Plaintiffs. Only *after* agreement was reached on class relief did discussions over attorney's fees or awards to Plaintiffs commence.[62] Prior to turning to negotiating fees, the Parties in each other's presence presented the terms of the class relief and stated their assent in principle to Judge Rosen.[63]

c. This Litigation Presented a Substantial Risk for Class Counsel

The fifth *Gunter* factor—the risk of non-payment—is particularly significant here. *See In re Pet Food Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 94603, *112-113 (D.N.J. Nov. 18, 2008), *aff'd in part, vacated in part on other grounds*, 629 F.3d 333 (3d Cir. 2010) ("Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees"). As this Court stated:

> Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

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61 *Id.* ¶ 25.

62 *Id.* ¶ 22.

63 *Id.*

Hall v. AT&T Mobility LLC, 2010 U.S. Dist. LEXIS 109355 (D.N.J. Oct. 13, 2010)(quoting *In re Prudential-Bache Energy Income P'ships Sec. Litig.*, 1994 U.S. Dist. LEXIS 6621, at *6 (E.D. La. May 18, 1994). In undertaking to prosecute this complex action on that basis, Class Counsel assumed a significant risk of nonpayment or underpayment, which in turn warrants the requested fee. It is an established practice to reward attorneys for taking the risk of non-payment by paying them a premium for winning contingency cases. Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless of whether they win or lose. *In re Washington Public Power Supply Sys. Sec. Litig.*, 19 F. 3d 1291, 1299 (9th Cir. 1994); *see In re Continental Ill. Sec. Litig.*, 962 F. 2d 566 (7th Cir. 1992) (holding that when a common fund case has been prosecuted on a contingent basis, plaintiffs' counsel must be compensated adequately for the risk of non-payment).

Public policy concerns—especially ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs whose individual claims would defy vindication—further justify such a fee award. As a sister court observed:

> Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer. . . . A contingency fee arrangement often justifies an increase in the award of attorney's fees. This rule helps assure that the contingency fee arrangement endures. If this "bonus" methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, *especially in light of the risks of recovering nothing.*

Behrens v. Wometco Enters., Inc., 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd by Behrens v. Wometco Enterprises,* 899 F.2d 21 (11th Cir. 1990) (emphasis added).

Class Counsel undertook this action on an entirely contingent fee basis,[64] assuming a substantial risk that the litigation would yield no or very little recovery and leave them uncompensated for their time, as well as for their substantial out-of-pocket expenses totaling approximately $100,000.[65] While all litigation entails some risks, here, there was a very real possibility that Plaintiffs would recover nothing, despite having completed several years of contentious litigation and taken the case to the near end of discovery. This was not a simple class action coming on the heels of a government prosecution or some admission of a repentant CEO. From the outset, Class Counsel understood that they were embarking on complex, expensive, and lengthy litigation. This was not a case where any recovery was assured.

The PlatePass program unfolded over a series of months across the country.[66] This case presented a number of legal issues and challenges: There was a real risk that one-state's law may not apply to all Class Members and class certification would devolve into subclasses over a multitude of states or be completely unmanageable.[67] Because the case involved non-disclosures of material facts relating to PlatePass fees and charges nationwide, Class Counsel also undertook the significant risk that Defendant may prevail at class certification by contending that PlatePass-related fees were adequately disclosed in signage depending on the time and rental location; and that knowledge of the charges could be imputed to some degree to renters around the country who used and paid for the service more than once.[68] Defendants also contended the claims were barred or defeated by the voluntary payment doctrine [Dkt. 7-1]. Additionally, Defendants

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64 Jaffe Supp. Dec. at ¶ 49.

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

demonstrated that they would vigorously present their potentially dispositive arguments at trial and, even if Plaintiffs prevailed, on appeal.[69]

Unlike Defendants' counsel, who were compensated on a current basis, Class Counsel have received no compensation over the past 4 years and have advanced approximately $100,000 in costs in providing legal representation to the Class Representatives and the Class.[70] Further, absent this settlement, there was no guarantee that the Class Members would obtain any relief from Defendants, which would have resulted in Class Counsel receiving nothing for their work on behalf of the Plaintiffs and the Class.[71] Furthermore, the time spent on this case was time that could not be spent on other matters.[72] This factor thus strongly militates in favor of the requested fee.

d. No Class Member Has Objected to Class Counsels' Fee Request

The second *Gunter* Factor—presence or absence of substantial objections—also militates in favor of awarding Class Counsel's requested fee. *See In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 96 (D.N.J. 2001) (finding "absence of any objections mitigates against reducing" the requested fee) (citing *In re Aetna,* 2001 U.S. Dist. LEXIS 68, *11 (E.D.Pa. Jan. 4, 2001)) (holding that the lack of objections to the fee petition supported an award of the fees requested); *In re General Motors,* 55 F.3d at 812 (quoting *Bell Atlantic Corp. v. Bolger,* 2 F.3d 1304, 1313 n. 15 (3d Cir.1993)) (stating that it is generally assumed that "'silence constitutes tacit consent to the agreement'"); *Cullen v. Whitman Med. Corp.,* 197 F.R.D. 136, 149 (E.D.Pa.2000)(a lack of objections supported approval of the fee request)). As stated above,

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69 *Id.*

70 *Id.* at ¶ 50.

71 *Id.*

72 *Id.*

notices of Class Counsel's fee request have been disseminated in various media nationwide. While the deadline for objections does not expire until September 24, 2013, of the approximately 1.8 million Class Members, only one has filed an objection and none has objected to Class Counsel's fee or the service awards to Class Representatives [*see* Dkt. 101].

e. Class Counsel Were Skilled and Efficient

The third *Gunter* factor is skill and efficiency of counsel and is likewise relevant. Prosecuting and settling the claims in this action demanded considerable time and labor, making this fee request reasonable. Throughout the pendency of this action, Class Counsel and their respective law firms were engaged in coordinated, productive work efforts to maximize efficiency and minimize duplication of effort [*See* Jaffe Dec. at ¶¶ 11-25, Dkt. 98-3](detailing the work and effort Class Counsel dedicated to prosecuting this case).[73] Through extensive and aggressive prosecutorial and investigative efforts of Class Counsel, the settlement was reached with Defendants' establishing substantial monetary and non-monetary benefits for the Class. The Third Circuit has explained that the goal of the percentage fee-award device is to ensure "that competent counsel continue to undertake risky, complex, and novel litigation." *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 96 (D.N.J. 2001) (citing *Gunter* at 198) The *Cullen* court explained that "[t]he single clearest factor reflecting the quality of class counsels' services to the class are the results obtained." *Cullen,* 197 F.R.D. at 149.) The settlement here is outstanding. Instead of facing additional years of costly and uncertain litigation, Class Members

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[73] In addition to division of labor and coordination among the three Class Counsel firms, Class Counsel further coordinated and divided the labor on a number of litigation tasks and projects with plaintiff's counsel in the related Florida state only *Soper* class action against ATS and PlatePass. For example, on a few of the ATS/PlatePass depositions, Mr. Soper's counsel took the lead on the examination of the witness, while Class Counsel did so for the rest as well as for all of the Hertz employee depositions. Mr. Soper's counsels' lodestar is accordingly reported and included in the lodestar analysis.

will receive an immediate benefit from an $11,004,000 Common Fund. This result further evidences that the request is justified based on Class Counsel's skill. *See In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 121 (D.N.J. 2012) ("The substantial settlement sum negotiated by Class Counsel . . . further evidences their competence").

Also, Class Counsel include attorneys with national prominence and who are among the most experienced lawyers in the prosecution of consumer class actions and/or complex litigation. The background, experience and accomplishments of the attorneys who prosecuted this action are summarized in the declarations and firm biographies that were submitted with the motion for preliminary approval [Dkt. 98-3]. The quality and vigor of opposing counsel is also germane to evaluating the quality of the services rendered by Class Counsel. *See*, *e.g.*, *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) ("The quality of opposing counsel is also important in evaluating the quality of Lead Counsels' work."); *Moore v. Comcast Corp.*, No. 83-cv-773, 2011 U.S. Dist. LEXIS 6929, at *13 (E.D. Pa. Jan. 24, 2011) (awarding fees of 33% of fund, noting that Lead Counsel "prosecuted the case against opponents represented by highly skilled counsel"); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) (among factors to be considered in measuring class counsel's quality of representation is "the performance and quality of opposing counsel")(internal quotation and citation omitted). Defendants' counsel in this case were attorneys from highly respected, well-heeled national law firms: JENNER & BLOCK LLP and BURNS & LEVINSON LLP. The third *Gunter* factor—skill and efficiency of counsel—is thus satisfied.

f. Class Counsels' Request Parallels Awards in Similar Cases

Class Counsel is requesting approximately twenty (20%) percent of the value of the aggregated class recoveries, which include the Common Fund and the agreed upon attorney's

fees, cost reimbursements and Class Representative service fee awards that Defendants are separately paying. (This amount does not, however, include any amount for the value of the disclosure changes.) This percentage is at or below amounts typically awarded by courts in the Third Circuit, including this Court, in common fund cases. *See*, *e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 2013 U.S. Dist. LEXIS 108042 *108 (D.N.J. Aug 1, 2013) (Courts within the Third Circuit often award fees of 25% to 33% of the recovery); *In re Merck & Co., Inc. Vytorin ERISA Litig.*, Civil Action No. 08-285 (DMC), 2010 U.S. Dist. LEXIS 12344, *40 (D.N.J. Feb. 9, 2010) (awarding 33⅓%, "awards in similar common fund cases appear analogous to the present request"); *Milliron v. T-Mobile, USA, Inc.*, 2009 U.S. Dist. LEXIS 101201, *39 (D.N.J. Sept. 10, 2009) ("The Court is aware that 33⅓% is a standard figure for recovery in a consumer class action of the contingent-fee variety."); *Martin v. Foster Wheeler Energy Corp.*, 2008 U.S. Dist. LEXIS 25712, *14 (M.D. Pa. Mar. 31, 2008) ("District Courts within the Third Circuit have typically awarded attorney's fees of 30% to 35% of the recovery, plus expenses, in settlements of this size.") (collecting cases); *In re Rite Aid Corp. Sec. Litig.*, 146 F.Supp.2d 706, 735 (E.D.Pa.2001) (stating that a review of 289 settlements demonstrates "average attorney's fees percentage [of] 31.71%" with a median value of one-third); *In re Gen. Motors*, 55 F.3d at 822 (explaining that in common fund cases "fee awards have ranged from nineteen percent to forty-five percent of the settlement fund"); *In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ. 03-0085 (FSH) 2005 U.S. Dist. LEXIS 27013, at *1, *12-17 (D.N.J. Nov. 9, 2005) (awarding 33⅓%); *see also In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 U.S. Dist. LEXIS 10532, at *1, *4-17 (E.D. Pa. June 2, 2004) (awarding 30%); *In re EquiMed, Inc. Sec. Litig.*, No. 98-cv-5374 (NS), 2003 U.S. Dist. LEXIS 2998, at *4 (E.D. Pa. Mar. 3, 2003) (awarding 33⅓%); *Cullen*, 197 F.R.D. at 150136 (considering other courts' fee awards and

awarding 33⅓%); *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 439 (E.D. Pa. 2001) (awarding 33⅓%); *In re Safety Components*, 166 F. Supp. 2d at 102 (fee award of 33⅓% was "reasonable when compared to fee awards in other cases" awarding 33⅓%); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 133-34 (D.N.J. 2002) (awarding 33⅓% of initial recovery); *In re Unisys Corp. Sec. Litig.*, No. 99-5333, 2001 U.S. Dist. LEXIS 20160 at *1, *3 (E.D. Pa. Dec. 6, 2001) (awarding 33%); *Blackman v. O'Brien Envtl Energy, Inc.*, No. Civ. A. 94-5685, 1999 U.S. Dist. LEXIS 7160 at *1, *2 (E.D. Pa. May 12, 1999) (awarding 35%); *Ratner v. Bennett*, No. Civ. A. 92-4701, 1996 U.S. Dist. LEXIS 6259, at *1, *9 (E.D. Pa. May8, 1996); *Zinman v. Avemco Corp.*, No. 75-1254, 1978 U.S. Dist. LEXIS 20079, at *1, *2 (E.D. Pa. Jan. 18, 1978) (awarding 50%).

Further, a 2010 paper by professors Eisenberg and Miller studied all published class action settlements from 1993 to 2008 in both state and federal courts. Eisenberg, Theodore et al., *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 Journal of Empirical Legal Studies 248 (2010). Their finding was that the median attorneys' fee in the entire data set was 24% of the class recovery. Class Counsels' request is thus well within the both the national and Third Circuit norms for percentages of recovery.

3. Although Not Necessary, a Lodestar Crosscheck Supports Approval

Class Counsel seek approval of the fee award under three preferred metrics: (1) the agreed-upon market rate doctrine; (2) the substantial benefit doctrine; and (3) the percentage of recovery method. Under any of these analyses, the fee is reasonable. It is thus unnecessary to do a full-blown analysis of loadstar, since the other three preferred criteria demonstrate the propriety of the agreed-upon fee and this Court is very familiar with the work Class Counsel has put into this litigation and the significant effort expended to achieve this settlement. "The lodestar cross-

check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method." *AT&T,* 455 F.3d at 164). Nevertheless, it is instructive to look at lodestar and note that it more than supports the requested fee. Here the multiplier based upon the requested fill negotiated fee is 1.95.

In setting the lodestar crosscheck amount, the court multiplies the number of hours reasonably worked on a client's case by a reasonable billing rate for such services in the given geographical area provided by a lawyer of comparable experience. *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 280 (3d Cir. 2009). " When performing this analysis, the Court 'should apply blended billing rates that approximate the fee structure of all the attorneys who worked on the matter.'" *In re Philips/Magnavox TV Litig*., 2012 U.S. Dist. LEXIS 67287 (D.N.J. May 14, 2012) (citing *In re Rite Aid*, 396 F.3d at 306). " The lodestar cross-check entails 'neither mathematical precision nor bean-counting,' and the court 'need not review actual billing records,' but rather may rely on summaries submitted by attorneys." *George v. Staples Inc. (In re Staples Inc.)*, 2011 U.S. Dist. LEXIS 128601 (D.N.J. Nov. 4, 2011)(quoting *In re Rite Aid*, 396 F.3d at 306-07 (citing *In re Prudential*, 148 F.3d at 342)). The lodestar rate and cost summaries are typically provided in declarations from counsel. *See In re Philips/Magnavox Television Litig.* This Court has found hourly rates for partners ranging from $500 to $855 to be reasonable. *In re Mercedes-Benz Tele Aid Contract Litig.*, 2011 U.S. Dist. LEXIS 101995 (D.N.J. 2011); *In re Philips/Magnavox Television Litig*., 2012 U.S. Dist. LEXIS 67287 (D.N.J. 2012) (approving partner hourly rates of $520, $530, $690, $700, $710, and $815, respectively). The hourly rates of associates ranging from $370 to $475 have been found reasonable. *In re Mercedes-Benz Tele Aid Contract Litig.*, 2011 U.S. Dist. LEXIS 101995.

Once the lodestar amount is calculated, the court "may increase or decrease that amount by applying a lodestar multiplier," which "attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *In re Diet Drugs*, 582 F.3d at 540 n.33. (citations omitted). In the Third Circuit, multipliers are used to account for the risks of non-recovery, as an incentive for counsel to undertake socially beneficial litigation, or as an award for an extraordinary result and to compensate for the risk of nonpayment. "By nature they are discretionary and not susceptible to objective calculation." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 148 F.3d 283, 340 (3d Cir. 1998). The court in *Prudential*, found that "[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *Accord In re Cendant Corp.,* 232 F. Supp. 2d 327, 341-42 (D.N.J. 2002); *Rowe v. E.I. DuPont de Nemours and Co.*, Civil Nos. 06-1810 (RMB/AMD), 06-3080 (RMB/AMD), 2011 WL 3837106, at *1, *22 (D.N.J. Aug. 26, 2011). In *In re Cendant Corp. PRIDES Litig.*, the Third Circuit approved a lodestar multiplier of 2.99 in a case it described as "relatively simple in terms of proof" in which "discovery was virtually nonexistent." *Cendant PRIDES*, 243 F.3d 722, 735-36 (3d Cir. 2001; s*ee also Milliron v. T-Mobile USA, Inc*., 423 F. App'x. 131, 135 (3d Cir. 2011) (2.21 multiplier); *In re Merck & Co.*, 2010 U.S. Dist. LEXIS 12344, at *47 (2.786 multiplier); *McCoy v. Health Net, Inc*., 569 F. Supp. 2d 448, 479 (D.N.J. 2008) (2.3 multiplier); *Varacallo*, 226 F.R.D. at 256 (2.83 multiplier); *In re Remeron End-Payor Antitrust Litig.*, Nos. Civ. 02-2007 FSH, 04-5126 FSH, 2005 U.S. Dist. LEXIS 27011, at *1, *91 (D.N.J. Sept. 13, 2005) (multiplier of 1.73 was "on the low end of the spectrum") (citing cases). Tested by this standard, the requested fee is also reasonable.

The combined lodestar of Class Counsel is $ 1,541,000. [Jaffe Supp, Dec. at ¶ 44]. In addition, the average hourly rate is appropriate, because it is well within the hourly rates for

other complex class action attorneys in this District. [*Id.* at ¶ 43] In total, the fee requested here therefore represents a loadstar multiplier of 1.95, which is comparable to, or well below, those awarded in other cases in this Circuit.

E. Service Awards to Class Representatives are Warranted and the Amount Requested and Agreed upon with Defendants is Reasonable

Class Representative Susan Doherty and Dwight Simonson through Class Counsel request the Court award them each a $5,000 service award for the initiative, effort and time they each devoted to: (1) protecting and advancing the Class's interests; (2) motivating Hertz and ATS's to change their business practices and improve the disclosures and agreement language regarding the PlatePass program; and (3) bringing about the monetary refund benefits provided to Class Members under the settlement Agreement. This request is supported by the declarations Class Representatives previously submitted in this case.[74]

The efforts and determination of Susan Dougherty and Dwight Simonson in commencing and maintaining this action was instrumental to bringing about the settlement benefits now before the Court and merits recognition and reward. Numerous Third Circuit authorities recognize the need to provide such recognition and reward to class representatives in successful class actions and the discretionary power of courts to do so in the form of representative "incentive" or "service awards." *See e.g. - Sullivan v. DB Invs., Inc.*,667 F.3d 273, 333 n.65 (3d Cir. N.J. 2011) ("Incentive awards are not uncommon in class action litigation and particularly where … a common fund has been created for the benefit of the entire class…. The purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation and to reward the public service of

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[74] *See* Dkt. 98-6 at 16-20 and Dkt. 98-7 (Declarations of Susan Doherty and Dwight Simonson in support of Joint Motion for Preliminary Approval of Class Action Settlement.).

contributing to the enforcement of mandatory laws.") (*citations and quotes marks in original omitted*); *In re Budeprion XL Mktg. & Sales Litig.*, 2012 U.S. Dist. LEXIS 91176 (E.D. Pa. Jul. 12, 2012) (citing *Hall v. Best Buy Co.*, 274 F.R.D. 154, 173 (E.D. Pa. 2011); *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546 (D.N.J. 2010) (Shwartz, Mag .J.) (same); In re Varacallo, 226 F.R.D. 207, 257-58 (D.N.J. 2005) (collecting cases).

Here Ms. Dougherty and Mr. Simonson each separately discovered that they and other consumers were being taken advantage of by Hertz's PlatePass program. Each saw Hertz's disclosures and charges for PlatePass as not fair, or improper or wrong and, indeed, strongly enough about it that they consulted with and retained lawyers to bring suit. Each provided information to their counsel, answered Defendants' interrogatories, produced documents requested by Defendants and presented themselves for lengthy (and in many aspects intrusive) depositions.[75] Each faithfully has honored and discharged his or her fiduciary duties to the class by overseeing their lawyers prosecution of the litigation and consulting with and cooperating with counsel at key events in the litigation.[76] Each, the same as every other absent Class Members, stands to recover just a modest amount despite the many, many hours they devoted to the case. Their services and the benefits their services provided for the Class is exemplary and deserves recognition and reward by the Court as part of the settlement approval process.

Pursuant to the Settlement Agreement, defendants have agreed that the Class Representatives may make an application for a reasonable service award in an amount not to exceed $5,000 apiece that Defendants will separately pay. [Dkt. 98-4 at ¶ 5.5]. Should the Court approve such awards as is now requested, they will be paid by defendants separate and apart

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[75] Dkt. 98-6 at 17 and at 19-20; Jaffe Supp. Dec. at ¶¶ 41, 56.

[76] Dkt. 98-6 and 98-7; Jaffe Supp. Dec. at ¶ 56.

from the Common Fund, and will not diminish the relief Class Members may be entitled to under the terms of the Settlement.

In sum, the actions, time, and efforts of Class Representatives in protecting the interests of the class by bringing the actions and helping generate the benefits the Class will receive under the Agreement (and to the extent Hertz changed its business practices in response to the lawsuits as defendants state in the Settlement Agreement occurred) warrant and justify the court granting them the requested $5,000 service awards.

VI. CONCLUSION

For all of the forgoing reasons Class Counsel's Petition for fee awards and cost reimbursement should be granted and the negotiated fees and cost reimbursements awarded in connection with the approval of the settlement at the Final Approval Hearing.

Respectfully Submitted :

DATED: September 9, 2013.

__/s/ Michael Coren_____
Christopher M. Placitella, Esq.
Michael Coren, Esq.
COHEN, PLACITELLA & ROTH, PC
127 Maple Avenue
Red Bank, NJ 07701-1717
(732) 747-9003
Attorneys for Plaintiffs and the Class

Of Counsel:

Steven R. Jaffe, Esq.
Mark S. Fistos, Esq.
FARMER, JAFFE, WEISSING,
EDWARDS, FISTOS & LEHRMAN, P.L.
425 North Andrews Avenue, Suite 2
Fort Lauderdale, Florida 33301
(954) 524-2820
(Admitted *pro hac vice*)
Attorneys for Plaintiffs and the Class

Stephen A. Dunn, Esq.
EMANUEL & DUNN, PLLC
Post Office Box 426
Raleigh, North Carolina 27602
(919) 832-0329
(Admitted *pro hac vice*)
Attorneys for Plaintiffs and the Class