

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**IN RE: MOTOR FUEL TEMPERATURE )  
SALES PRACTICES LITIGATION )  
(This Document Relates to All Cases) ) MDL No: 1840  
) No: 07-md-1840-KHV-JPO**

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**MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND  
CLASS REPRESENTATIVE INCENTIVE AWARDS  
AND MEMORANDUM IN SUPPORT THEREOF**

PUBLIC, REDACTED VERSION

Plaintiffs, for their Motion for Award of Attorneys’ Fees, Expenses and Class Representative Incentive Awards (“Plaintiffs’ Motion”), state as follows:

**I. OVERVIEW**

Costco Wholesale Corporation has agreed to do what no motor fuel retailer has ever agreed to do in the United States; it has agreed to compensate consumers for the effect that temperature has on motor fuel. Temperature compensation is already systemic in the petroleum industry, from the oil well to the refinery, from the refinery to the terminal and from the terminal to the gas station. But until now, the industry’s use of temperature compensation ended at the station level and consumers were neither sold a uniform compensated gallon, nor told they were not receiving a uniform gallon.

Now, with this Settlement, Costco has agreed to remedy that problem. Costco has agreed to install temperature-compensation devices on a phased schedule in all states where it purchases fuel on a temperature-compensated basis. That remedy is groundbreaking,

substantive and tangible. Indeed, expert economist Dr. Andrew Safir has calculated that Costco's utilization of automatic temperature compensation ("ATC") equipment will result in a net Class benefit that exceeds \$100,000,000,<sup>1</sup> a calculation that Costco has not disputed.

This beneficial outcome is the result of hard work and diligent efforts by Plaintiffs and their counsel in the face of concerted and rigorous opposition from the retail motor fuel industry. The work that went into this Settlement, and this case, has been very substantial. Now, Plaintiffs and their counsel request that the Court award them attorneys' fees and expenses in recognition of their work. Specifically, Plaintiffs seek an award of reasonable attorneys' fees and expenses in the amount of \$10,000,000 to be paid by Costco within fifteen (15) days after the effective date of the Settlement. Any attorneys' fee this Court awards will be paid directly by Costco, and will not reduce the Settlement benefits provided to the Class.<sup>2</sup> This request for fees and expenses is supported by the Declaration of Prof. Robert Klonoff, attached hereto.<sup>3</sup>

Class Plaintiffs also request an incentive award in recognition of their services and effort. Like the requested award for attorneys' fees and expenses, the request for Class Plaintiff incentive awards is fair and reasonable given the significant time and attention the named Class Plaintiffs have devoted to this litigation.

## **II. FACTUAL AND PROCEDURAL HISTORY**

Previously, this Court granted preliminary approval of this Settlement, and appointed the undersigned as Class Counsel for the Settlement Class.<sup>4</sup> Costco provided notice of the settlement

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<sup>1</sup> See Declaration of Dr. Andrew Safir, previously submitted to the Court as Exhibit 1 to Doc. #1620 ("Safir Decl.").

<sup>2</sup> The reasonableness of Plaintiffs' fee request is also manifest from the fact that of the 10,134,738 class members who received direct notice of this Settlement pursuant to the Court's prior Order (Doc. # 1284), only 29 filed an objection (not all of which took issue with the requested fee), which equates a 0.0003% objection rate. In fact, some objectors agreed that if the Settlement provides the intended benefits and relief, Class Counsels' fee request is "imminently fair." See Objection of Amy Alkon, Doc. # 1578, pg. 24.

<sup>3</sup> Exhibit A ("Klonoff Dec.").

<sup>4</sup> See Doc. # 1273. Plaintiffs have previously set forth the detailed factual and procedural history of the instant litigation and the Settlement, and Plaintiffs incorporate herein by reference the background information contained in

to the Settlement Class (over 10 million class members) and subsequently, twenty-nine objections to the Settlement were filed. On April 1, 2010, this Court heard oral argument from the parties regarding the fairness of the Settlement, as well as from several objectors who appeared in person at the fairness hearing. On August 13, 2010, this Court entered its Order [Doc. # 1707] overruling all objections but finding two issues that prevented the Court from granting final approval: the inclusion of states where Costco does not operate and Plaintiffs' request that five Class members represent all Class members from all states at issue. *Id.* at 35-36, 44-45.

On Friday, February 4, 2011, Plaintiffs filed their Renewed Motion for Final Approval [Doc. # 1769], unopposed by Costco, and submitted the parties' Amended Settlement Agreement to the Court, which resolves the two problematic issues the Court previously noted with respect to this Settlement.

### **III. COSTCO HAS CONTRACTUALLY AGREED TO PAY AN ATTORNEYS' FEE**

Costco has contractually agreed to pay an attorneys' fee. Therefore, the only relevant question for this Court is whether Plaintiffs' fee request is "reasonable."<sup>5</sup>

Section 7.1 of the Settlement Agreement states:

7.1 Application. **Class Counsel may apply** to the District Court for an award of fees and costs in this Action (the "Fee Application"). **Costco agrees to pay** any fees and costs awarded by the Court and such payment shall not reduce any of Costco's obligations to the Settlement Class pursuant to this Agreement.<sup>6</sup> [emphasis added]

This language expressly creates, by contract and agreement of the parties, a right to seek attorneys' fees and costs that is independent of any underlying fee-shifting statute or common

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their Unopposed Motion for Preliminary Approval of Class Settlement (Doc. # 1015), Unopposed Motion for Final Approval of Class Action Settlement (Doc. # 1620) and Renewed Motion for Final Approval of Class Action Settlement (Doc. #1769), which are incorporated herein by reference.

<sup>5</sup> Whether a plaintiff is entitled to an award of attorney's fees and expenses is, of course, left to the sound discretion of the district court. *Hall v. Cole*, 93 S.Ct. 1943, 1951 (1973); *Gottlieb v. Barry, et al.*, 43 F.3d 474, 486 (10th Cir. 1994).

<sup>6</sup> See Settlement Agreement attached to Plaintiffs' Renewed Motion for Final Approval of Class Action Settlement, Doc. # 1769, as Exhibit A.

law principle. Costco has agreed: (1) Class Counsel are entitled to seek a fee; (2) Costco will pay, and not appeal, whatever attorneys' fees and costs this Court awards, and (3) Costco's obligation to pay an attorneys' fee is independent, and will not impair, Costco's obligation to install ATC equipment pursuant to the Settlement. The parties' fee agreement was confirmed by Costco's counsel during the April 1, 2010 fairness hearing, where he specifically stated, "**We've agreed in the agreement** to pay reasonable fees as awarded by this Court . . . We will pay the fees that this Court says are fair and reasonable."<sup>7</sup>

There can be no question that such attorneys' fee agreements are permissible. In fact, they are specifically allowed by Rule 23 of the Federal Rules of Civil Procedure which states, in pertinent part:

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law **or by the parties' agreement**. (Emphasis added).

Therefore, the only question pertinent to the instant Motion is whether the requested fee is "reasonable."<sup>8</sup>

Plaintiffs' fee request is reasonable when analyzed under any one, or both, of two separate methodologies: (1) a percentage of the common settlement benefits conferred, or (2) application of the *Johnson v. Georgia Highway Express, Inc.* factors.<sup>9</sup>

#### **IV. CLASS COUNSELS' FEES ARE REASONABLE WHEN MEASURED AS A PERCENTAGE OF THE COMMON BENEFIT CONFERRED**

Plaintiffs respectfully request an attorneys' fee in the form of a percentage of the value of the Settlement benefits conferred on the Class.

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<sup>7</sup> Transcript, Doc. #1696, pgs. 91-92 (emphasis added).

<sup>8</sup> The instant situation is not an anomaly; the Ninth Circuit faced a virtually identical scenario in *Wing v. Asarco Inc.*, 114 F.3d 986 (9th Cir. 1997), where the parties agreed, in their class action settlement agreement, that the defendant would pay the reasonable attorney's fee set by the Court. The *Wing* Court recognized that because the parties' agreement placed no limits on the district court's discretion to determine the fee, the only restriction on the district court's fee analysis was that the fee must be "reasonable." *Id.* at 988.

<sup>9</sup> 488 F.2d 714 (5th Cir. 1974).

1. Federal Court Jurisprudence Supports The Percentage Approach

As explained by Prof. Klonoff in the attached declaration, measuring an attorneys' fee award in this case by using a percentage of the fund ("POF") methodology is proper and supported by applicable legal authorities.<sup>10</sup> Although this Court is aware of the doctrine allowing plaintiffs to obtain a percentage attorney fee from a "common fund" obtained for a class,<sup>11</sup> percentage attorney fees are also recognized under the "common benefit" doctrine when the settlement provides future settlement benefits that can be valued. The Tenth Circuit has characterized the common benefit doctrine as allowing an "award of attorney's fees to plaintiffs in class action and derivative suits" when the plaintiff's success confers "a substantial benefit" on the members of a particular class of individuals.<sup>12</sup>

Although Plaintiffs need not rely on the common benefit doctrine as the source of their fee request (since Costco has contractually agreed to pay a fee), common benefit cases are instructive in determining whether Plaintiffs' fee request is reasonable for a number of reasons. First, these cases recognize that attorney fees based upon a percentage of a settlement's value are permissible, even though the benefit conferred is nonpecuniary in nature.<sup>13</sup> Indeed, courts considering the common benefit doctrine have stated:

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<sup>10</sup> Klonoff Dec., pgs. 1-3

<sup>11</sup> See *West, et al. v. First Franklin Fin. Corp.*, Order, Case No. 2:06-CV-02064-KHV-WO (D. Kan. July 31, 2007).

<sup>12</sup> *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1444 (10<sup>th</sup> Cir. 1995). In addition to the Tenth Circuit, many other courts have discussed or recognized the common benefit doctrine as a potential source for attorney fees. *Amalgamated Clothing v. Wal-Mart Stores, Inc.*, 54 F.3d 69, 71 (2<sup>nd</sup> Cir. 1995) ("The common-benefit rule permits a prevailing party to obtain reimbursement of attorney's fees in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class."); *Johnson v. HUD*, 939 F.2d 586, 590 (8<sup>th</sup> Cir. 1991) ("[A] prevailing party cannot recover attorney's fees from a losing party absent express statutory authority or bad faith or unless the litigation involves a common fund or confers a substantial benefit on an ascertainable group."); *Southerland v. International Longshoremen's Union*, 845 F.2d 796, 798 (9<sup>th</sup> Cir. 1988) ("The 'substantial benefit' principle is based on the premise that a successful plaintiff should be able to spread the costs of his litigation among those who benefited from the successful outcome."); *Walker v. Teamsters Local No. 71*, 830 F. Supp. 291, 292 (W.D.N.C. 1993) ("The rationale [for the common benefit doctrine] is that, by prevailing, the plaintiff has also accomplished a victory for the other members of the [ascertainable class].")

<sup>13</sup> *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 169-70 (3<sup>rd</sup> Cir. 1975).

[w]hat is of utmost importance here is the nature and quality of the common benefits attained from litigation rather than any particular quantification into dollar amounts. As a result, the fact that the plaintiffs did not procure damages in their action against the (defendant) is inapposite to our analysis and would not, on its own, preclude fee-shifting under the common benefit doctrine.<sup>14</sup>

Second, common benefit cases are instructive because they recognize that an attorneys' fee can be awarded even if the future settlement benefits are contingent and not guaranteed. For example, in *Wing v. Asarco Inc.*,<sup>15</sup> the Ninth Circuit upheld an attorneys' fee that was based upon a percentage of a settlement's value when the vast majority of that value was contingent. Indeed, a leading common benefit case from the U.S. Supreme Court, *Mills v. Electric Auto-Lite Co.*,<sup>16</sup> makes clear, "[t]he fact that this suit has not yet produced, **and may never produce**, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale."<sup>17</sup> A similar reasoning was applied in *Hanlon v. Chrysler Corporation*,<sup>18</sup> where the Ninth Circuit upheld a district court's settlement approval and attorneys' fee award, despite the fact that the settlement benefits were subject to future suspension based upon potential government action and, therefore, the plaintiffs' efforts could theoretically produce no net benefit to the class.<sup>19</sup>

Injunctive relief that truly benefits the class "is not an outcome to be sneered at."<sup>20</sup> As the Federal Judicial Center ("FJC") has noted, "by putting an end to illegal practices, an injunction will benefit more class members than a small award."<sup>21</sup> The FJC has emphasized that if injunctive relief can be given monetary value using objective criteria, such relief should be so

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<sup>14</sup> *Polonski v. Trump Taj Mahal Assoc., et al.*, 137 F.3d 139, 146 (3<sup>rd</sup> Cir. 1998).

<sup>15</sup> 114 F.3d 986.

<sup>16</sup> 90 S.Ct. 616 (1970).

<sup>17</sup> *Id.* at 625 (emphasis added).

<sup>18</sup> 150 F.3d 1011, 1029 (9<sup>th</sup> Cir. 1998).

<sup>19</sup> *Id.*

<sup>20</sup> *In re Mexico Money Transfer Litigation*, 267 F.3d 743, 748 (7<sup>th</sup> Cir. 2001).

<sup>21</sup> Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, 3d. Ed., 21 (2010).

valued. For instance, the FJC notes, “an injunction against an overcharge may be valued at the amount of the overcharge multiplied by the number of people likely to be exposed to the overcharge in the near future.”<sup>22</sup> As Prof. Klonoff explains, injunctive relief is as capable of providing real value to consumers as monetary relief.<sup>23</sup> For purposes of determining a reasonable attorneys’ fee, when that injunctive relief can be valued it should be treated like a fund “even if it does not include a pot of money” for the class.<sup>24</sup> That recognition of the preference for the POF approach has been recognized by the American Law Institute (“ALI”) in its Aggregate Litigation Project, where the ALI adopted the POF approach as “the method [that should be] utilized in most common fund cases, with the percentage being based on both the monetary and the nonmonetary value of the judgment or settlement.”<sup>25</sup>

In essence, these authorities teach that a reasonable attorneys’ fee can be based upon a percentage value of future settlement benefits, even when those future settlement benefits are contingent in nature<sup>26</sup> and stem from injunctive relief.

Costco may argue that the proper attorneys’ fee calculation methodology is the “lodestar” approach. Prof. Klonoff’s testimony is also instructive for its explanation of why that approach is not advisable in situations like the instant case. As Prof. Klonoff explains, the lodestar

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<sup>22</sup> *Id.* at 34-35.

<sup>23</sup> Klonoff Dec., pg. 8.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> In fact, such fee awards can be based on total value to the Class even when some of the unclaimed common fund may revert back to the defendant. *See Williams v. MGM-Pathé Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (discussing class action settlement without expressing concern as to provision for reversion of unclaimed funds to defendant); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 816 (5th Cir. 1989) (approving settlement containing provision that unclaimed funds under consent decree would be divided between plaintiffs’ counsel and defendant); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990) (holding unclaimed amount of class action judgment against defendant may be returned to defendant “when deterrence is not a goal of the statute or is not required by the circumstances”); *In re Microsoft I-V Cases*, 135 Cal. App.4th 706, 721, 37 Cal. Rptr.3<sup>rd</sup> 660 (2006) (noting, under California law, “a court approved settlement could properly include a ‘reversion of ... funds to the defendant,’ such as the one-third reversion” of unclaimed settlement funds provided for in settlement therein) (citation omitted; ellipsis in original); Herbert Newberg & Alba Conte, 3 *Newberg on Class Actions* §§ 10:15, 10:17 (4th ed.2002) (citing cases).

approach is cumbersome and encourages overbilling as opposed to efficiency and early settlement. For those reasons, and many others, courts such as the Tenth Circuit have routinely favored the POF method rather than the lodestar method.<sup>27</sup> In Prof. Klonoff's opinion, the Court should reject any invitation to determine an attorneys' fee using the lodestar method, and utilize the POF method.<sup>28</sup>

## 2. The Settlement Provides Tangible Benefits

Since the inception of this litigation almost five (5) years ago, this case has been about the inherent unfairness in the petroleum industry's double standard of temperature compensating when they buy and sell among themselves, but refusal to temperature compensate motor fuel sold to the public. Indeed, this Court has noted that "[o]btaining injunctive relief for temperature adjusted motor fuel sales is a primary goal of plaintiffs' cases" and "[t]he proposed injunctive relief responds to plaintiffs' claims and provides the same relief which plaintiffs might obtain if they proceeded to trials."<sup>29</sup> At every stage before it gets to the consumer, the wholesale motor fuel trade allows for adjustment of motor fuel to a standard volume of 60 degrees Fahrenheit.<sup>30</sup> The temperature of the motor fuel is known at the wholesale level both to the person selling the motor fuel and the person buying the motor fuel.<sup>31</sup> The adjustment for the retailer is made on the basis of a standard gallon; defined as 231 cubic inches at 60° F.<sup>32</sup> That adjustment is made for the retailer but not for the consumer.<sup>33</sup> Indeed, consumers are not told the temperature of the motor fuel that is sold to them, and oil companies understand that, without that missing material information, consumers have no way to make an "apples to apples" comparison when they make

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<sup>27</sup> Klonoff Dec., pg. 5-6 (citing *Gotlieb v. Barry*, 43 F.3d 474 (10<sup>th</sup> Cir. 1994)).

<sup>28</sup> Klonoff Dec., pg. 6.

<sup>29</sup> Doc. #1707, pg. 41.

<sup>30</sup> See excerpts from the deposition of Defendants' expert John O'Brien, attached to Plaintiffs' Omnibus Appendix To Plaintiffs' Reply Briefs In Support Of Class Certification, Doc. #1503, as Exhibit A, pg. 134.

<sup>31</sup> Deposition of O'Brien, pgs. 141-142.

<sup>32</sup> Deposition of O'Brien, pg. 65.

<sup>33</sup> Deposition of O'Brien, pgs. 39-41.

purchasing decisions.<sup>34</sup>

That missing information matters because temperature matters. The temperature of motor fuel sold to consumers can be completely different on the same day for stations just across the street from each other, at the various pumps located at a particular station and even during the course of a single fill up at a station. In fact, according to one defense expert, it is possible for a consumer to get 90° F gas (which has less energy than a 60° gallon) from a station and pay \$3.00 per gallon and 15 minutes later, at the same station, another consumer will get gas significantly cooler, thus containing more energy, and still pay \$3.00 per gallon.<sup>35</sup> Obviously, the customer that got the 90° F \$3.00 gallon received less value. That discrepancy does not go unnoticed by oil companies, and documents obtained in this litigation prove that motor fuel retailers reap profits from selling motor fuel to consumers without compensating for temperature.<sup>36</sup>

ATC corrects this inequity. ATC adjusts each motor fuel transaction to ensure that consumers receive a fair, uniform and transparent purchase based upon the temperature of the fuel at the point of sale. Accordingly, governmental weights and measures officials, and some defendants (before this litigation began), have acknowledged that temperature correction is the most fair and equitable method of selling motor fuel:

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<sup>34</sup> See excerpts from the Deposition of the Shell Defendants' representative Hugh Cooley, attached to Plaintiffs' Response to Defendant Marathon Petroleum Company's Motion for Summary Judgment, Doc. #1371, as Exhibit 28, pgs. 170:10-172:25.

<sup>35</sup> See excerpts from the deposition of Defendants' expert Harri Kytomaa, attached to Plaintiffs' Omnibus Appendix To Plaintiffs' Reply Briefs In Support Of Class Certification, Doc. #1503, as Exhibit B, pgs. 100-106.

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- Temperature compensation ensures that “[REDACTED]”,<sup>37</sup>
- Temperature compensation is the “most equitable way to sell products”;<sup>38</sup>
- Temperature compensation “would provide transparency in unit price v. volume”;<sup>39</sup>
- Temperature compensation “is a superior method of measurement”;<sup>40</sup>
- “Automatic temperature compensation would result in the same ‘gallon’ being sold at retail as it is at wholesale so that buyer and seller are both dealing in ‘net gallons’. The obvious benefit for consumers is improved retail price transparency”;<sup>41</sup>
- “If ATC were mandated for use at retail stations, consumers would be able to more accurately and fairly compare prices because variations in temperature would be corrected by the ATC equipment”;<sup>42</sup>
- Temperature compensation is “the most equitable way fuel can be sold without the buyer or seller gaining a competitive advantage”;<sup>43</sup>
- “Selling fuel adjusted to the volume at 15° C (60° F) throughout the distribution system is the most equitable way fuel can be sold without the buyer or seller gaining a competitive advantage”;<sup>44</sup>
- Temperature compensation is the “most equitable way” to sell motor fuel at retail;<sup>45</sup>
- “Determining the accurate weight or volume of an object is fundamental to ensuring fair commerce”;<sup>46</sup>

<sup>37</sup> See Document Bates No. [REDACTED], pg. 2, ¶ 9.

<sup>38</sup> See 2001 Report of the NCWM L&R Committee, pg. 7 (noting recommendation from the Northeastern Weights and Measures Association with respect to vehicle tank meters).

<sup>39</sup> See NCWM’s ATC Steering Committee January, 2008 Progress Report, pg. 31.

<sup>40</sup> *Id.*

<sup>41</sup> See December 19, 2008 Statement of Robert Atkins, San Diego County Director of Weights and Measures.

<sup>42</sup> See California Energy Commission’s 2009 Fuel Delivery Temp. Study, pg. 12.

<sup>43</sup> See 2006 Interim Report of the NCWM Laws & Regulations Committee, pg. 4.

<sup>44</sup> See NCWM L&R Committee’s 2005 Final Report, pgs. 6-7.

<sup>45</sup> See NCWM L&R Committee’s 2001 Final Report, pg. 7.

Clearly, the ATC benefits provided by this Settlement are real, tangible and will provide substantial value to the Class.

3. *The Settlement Benefits Can Be Valued*

Through this Settlement, Plaintiffs have obtained Costco's agreement to phase-in ATC pumps over a five year span. That injunctive relief cuts to the heart of Plaintiffs' claim and cures the inequity that currently plagues the retail motor fuel marketplace. And the enormity of convincing a retail motor fuel giant like Costco to change its method of sale cannot be overstated. Of the twenty-six states involved in this litigation, this settlement directly affects twenty-one of those states, including all of the largest states in terms of population, motor fuel consumption and temperatures over 60° F. Costco is one of the largest owners of retail gasoline stations in the country. In just the last eight years, in only the 14 conversion states, Costco has sold approximately \$25 billion of motor fuel and made over \$106 million by selling phantom gallons of motor fuel.

For purposes of determining a reasonable attorneys' fee as a percentage of the Settlement value, the injunctive relief that Costco has agreed to implement is clearly susceptible to valuation. Expert economist Dr. Andrew Safir analyzed economic information and developed a report regarding the value of the Settlement.<sup>47</sup> Dr. Safir utilized sales information drawn from records submitted by Costco, Costco's own estimate of its hot fuel "swellage," and historical forecasting data from the United States Energy Administration.<sup>48</sup> For example, Costco provided actual data for the state of California indicating just for the years 2008 and 2009, the difference between hot gas sold and gallons measured at 60 degrees amounted to 7,319,683 gallons of

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<sup>46</sup> See President's Address, National Conference on Weights and Measures, July 11, 2006.

<sup>47</sup> See Exhibit 1 hereto. Dr. Safir's report was previously submitted to the Court as Exhibit 1 to Plaintiffs' Motion for Final Approval, Doc. #1620.

<sup>48</sup> See Exhibit 1, pg. 3-4.

swellage, and an overcharge of \$22,088,760. Clearly, Dr. Safir's analysis was not drawn from whole cloth; it was premised on hard data.

Costco did not oppose Dr. Safir's analysis or opinion. Indeed, Costco was aware of Dr. Safir's valuation opinion before it was submitted to the Court for purposes of final approval in April, 2010, and Costco voiced no concern or objection. When Dr. Safir's opinion about the value of the Settlement was discussed during the April 1, 2010 fairness hearing on the original Settlement, Costco voiced no objection or opposition to Plaintiffs' valuation.<sup>49</sup> Rather, Costco stated:

Costco is committed to being at the low price in the markets in which it serves in which it sells gasoline. If Costco is selling gasoline at a temperature-adjusted basis in a market and we have to compete with people who are not, we're going to keep our price. I don't see Costco changing its pricing philosophy on this point. We're going to keep our price lower, and as a result, the margin that it makes on gasoline would go down.<sup>50</sup>

Costco cannot now be heard to say that Dr. Safir's analysis is erroneous or inaccurate.

#### 4. The Settlement Benefits Have Been Valued

Not only can the Settlement be valued, it has been valued. Dr. Safir has determined that Costco's implementation of ATC pumps on the phase-in schedule set forth in the Settlement will result in a net benefit to Class Members that will *exceed* \$100 million within five years after the end of the pump phase-in period.<sup>51</sup> Specifically, the amount is \$105,481,329.00. This number is conservative because: 1) it gives almost no value to the benefit that the Class will receive during the 5 year implementation period as Costco phases in ATC pumps;<sup>52</sup> 2) Dr. Safir's analysis takes

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<sup>49</sup> In that respect, the *Wing* case is analogous. 114 F.3d 986. In *Wing*, the court based an attorney fee on a percentage of a contingent settlement, which the defendant agreed had a set value. *Id.* at 990. Here, Costco has voiced no objection to Plaintiffs' valuation of this Settlement. Costco should not now be heard to say that Plaintiffs' valuation of this Settlement is inaccurate or inflated.

<sup>50</sup> Transcript of April 1, 2010 fairness hearing, pg. 57.

<sup>51</sup> See Exhibit 1 hereto.

<sup>52</sup> In other words, if Costco first installs ATC pumps at all of its California locations during the first year of the phase-in cycle, Dr. Safir's analysis has excluded all value California residents would receive until 2014.

into account the anticipated costs of installation of ATC pumps, and has deducted that cost from his analysis of the overall Class benefit;<sup>53</sup> 3) Dr. Safir's analysis only pertains to Costco's current stores, and the phase-in of ATC pumps at those locations; 4) Dr. Safir's analysis ends in 2020 even though the benefit of ATC conversion will continue indefinitely, and 5) his analysis gives no value to the benefit that consumers will receive from new Costco locations that are built in conversion states, despite the fact that under the terms of the settlement agreement, Costco is obligated to put ATC into these new stores.<sup>54</sup>

Plaintiffs' requested attorney fee of \$10,000,000 represents less than 10% of the value that Dr. Safir concluded that the Class would realize within the first few years after Costco's ATC phase-in. The actual value of the settlement only increases when other costs are included in the valuation. For example, Costco has estimated that it will spend over \$8 million to phase-in ATC pumps.<sup>55</sup> Costco has informed Plaintiffs that it has already paid \$5 million related to providing the Class with direct notice. In addition, the total value of the Settlement would also include any amounts awarded by the Court for attorneys' fees and costs. All of these factors are costs that would *ordinarily* be borne by Plaintiffs and thus, are appropriate components to consider in valuing a settlement.<sup>56</sup>

In essence, Plaintiffs' requested attorneys' fee is considerably less than 10% of the total actual value of this Settlement.

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<sup>53</sup> Exhibit 1, ¶ 13.

<sup>54</sup> It has been reported that Costco plans to open almost thirty new stores in 2011 alone. *See* <http://risnews.edgl.com/retail-news/Costco-to-Open-29-Stores-in-2011,-More-than-Double-its-2010-Total43698>.

<sup>55</sup> *See* Plaintiffs' Renewed Motion for Final Approval, pg. 5.

<sup>56</sup> *See Staton v. Boeing*, 327 F.3d 938, 975 (9th Cir. 2003) ("We conclude that where the defendant pays the justifiable cost of notice to the class-but not, as here, an excessive cost-it is reasonable (although certainly not required) to include that cost in a putative common fund benefiting the plaintiffs for all purposes, including the calculation of attorneys' fees."); *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."); *Parker v. Time Warner Entertainment Co., L.P.*, 631 F. Supp.2d 242 (E.D.N.Y. 2009)(factoring in costs of administration into total settlement value).

5. The Requested Percentage Fee Is Imminently Reasonable

An attorney fee percentage of 10% or lower<sup>57</sup> is well within the range of percentage fees awarded in class action litigation, as Prof. Klonoff explains in detail. Professor Klonoff demonstrates that based upon empirical data compiled from previous class action settlements, the instant fee request is well within, and actually far below, the average fee percentage.<sup>58</sup> That conclusion is supported by the recent findings of Judge Posner in *In re Trans Union Corp. Privacy Litigation*,<sup>59</sup> where he had occasion to survey the landscape of class action percentage fee awards,<sup>60</sup> observing that in cases that settled for value between \$79 million and \$190 million (the range within which this Settlement falls), the average attorneys' fee awards were approximately 17.6-19.5% of the settlement.<sup>61</sup> Thus, even if this Court were to conclude that the value of the benefits obtained by Plaintiffs in this Settlement will be **half** of what Dr. Safir has concluded (i.e., \$52,740,664), the percentage of Plaintiffs' requested fee only rises to 19%, which is what Judge Posner noted to be within the nationwide *average*.<sup>62</sup> Indeed, courts in this District have routinely awarded attorney fees based on much larger percentages of the overall settlement value.<sup>63</sup>

Moreover, the actual value of Plaintiffs' requested fee is further diminished by other

<sup>57</sup> Plaintiffs generally refer to the requested fee percentage as 10% of the settlement benefits, while Prof. Klonoff scrutinizes the requested fee in greater detail and calculated that the true attorney fee is actually only 8.4% of the settlement benefits calculated by Prof. Safir. *See*, Klonoff Dec., pg. 9-10.

<sup>58</sup> Klonoff Dec., pgs. 10-11.

<sup>59</sup> 2011 WL 117108 (7th Cir. Jan. 14, 2011).

<sup>60</sup> *Id.* at 3 (quoting Theodore Eisenberg & Geoffrey P. Miller, "Attorney Fees In Class Action Settlements: An Empirical Study," 1 *J. Empirical Legal Stud.* 27, 51 (2004)).

<sup>61</sup> In reversing the lower court's fee award and remanding for entry of an increased fee award, the *In re Trans Union* Court held that the district court had improperly discounted the value of future injunctive relief and, in fact, had failed to demonstrate why the attorney's were not entitled to value the injunctive relief the same as the cash fund that had been established. *Id.* at 6.

<sup>62</sup> The same logic was utilized by the district court in *Meyenburg v. Exxon Mobil Corp.*, 2006 WL 2191422 (S.D.Ill. 2006) where the court held that a "common benefit" percentage attorney fee was appropriate based on the estimated value of a settlement containing both monetary relief and future injunctive relief because, "even if the court assumes that the recovery is one-fifth of what the plaintiffs assume the value of the recovery to be . . . the attorneys fees would still be reasonable."

<sup>63</sup> *See West, et al. v. First Franklin Fin. Corp.*, Order, Case No. 2:06-CV-02064-KHV-WO (D. Kan. July 31, 2007).

factors. First, Plaintiffs have agreed that any class representative incentive awards are to be paid by Costco in a manner that will reduce the amount of attorneys' fees that Costco will pay. Second, the actual fee will be reduced by the amount of expenses awarded by the Court as fully set forth below. Finally, Plaintiffs' counsels' work in this Settlement is not complete. Under the Settlement, Plaintiffs' counsel have certain obligations related to Costco's implementation of ATC, in addition to being available to respond to Class member inquiries and enforce the contractual elements of the Settlement, among other duties. Factoring such future work into the Court's attorneys' fee calculus is clearly appropriate, as courts have noted.<sup>64</sup>

In sum, Plaintiffs have obtained a readily definable, substantial benefit that inures to all Class members. That benefit has tangible value, and is susceptible to being quantified, as Dr. Safir has proven. An award of attorneys' fees that represents less than 10% of that value is authorized, appropriate and earned.

**V. CLASS COUNSELS' FEES ARE REASONABLE WHEN MEASURED BY APPLICATION OF THE JOHNSON FACTORS**

Plaintiffs' requested attorney fee is also reasonable under the factors articulated by the Fifth Circuit Court of Appeals in *Johnson v. Georgia Highway Express, Inc.*,<sup>65</sup> which the Tenth Circuit has adopted for purposes of determining whether a settlement is reasonable.<sup>66</sup> Indeed, the Tenth Circuit has held that when a common benefit settlement in a class action is not susceptible to valuation for purposes of an attorneys' fee, the proper fee analysis is application of the *Johnson* factors, rather than a lodestar analysis.<sup>67</sup> The applicable *Johnson* factors<sup>68</sup> are: (1) the novelty and

<sup>64</sup> See *Hanlon v. Chrysler Corporation*, 150 F.3d 1011, 1029 (9th Cir. 1998); *Wing v. Asarco Inc.*, 114 F.3d at 989.

<sup>65</sup> 488 F.2d at 717-19.

<sup>66</sup> *Gottlieb v. Barry*, 43 F.3d 474 (10<sup>th</sup> Cir. 1994).

<sup>67</sup> *Rosenbaum v. McCallister*, 64 F.3d 1439 (10<sup>th</sup> Cir. 1995). That logic has been echoed by other courts that, when faced with a settlement that was difficult to value, awarded fees based upon some, or all, of the factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d at 717-19. See also *Merola v. Atlantic Ritchfield Company*, 515 F.2d 165, 172-73 (3d Cir. 1975); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1021 (5th Cir. 1977); *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 118 (3d Cir. 1976);

difficulty of the questions presented by the case, (2) the amount involved and the results obtained, (3) the time and labor required, (4) the skill requisite to perform the legal service properly, (5) the experience, reputation and ability of the attorneys, (6) the preclusion of other employment by the attorneys due to the acceptance of the case, (7) the customary fee, (8) whether the fee is fixed or contingent, and (9) awards in similar cases. Consideration of these factors militates in favor of Plaintiffs' fee request.

*1. The Novelty And Difficulty Of The Issues*

That this case involves difficult, novel questions should not be disputed, as this Court has observed<sup>69</sup> and as Professor Klonoff has concluded.<sup>70</sup> Indeed, Plaintiffs' claims involve the law of more than twenty-five jurisdictions. Defendants have raised numerous arguments and defenses, such as equitable abstention, the political question doctrine, primary jurisdiction and preemption. Defendants have initiated four appellate proceedings<sup>71</sup> and sought a fifth.<sup>72</sup> Defendants have filed seven dispositive motions<sup>73</sup> (none of which have been

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*O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 305 (E.D. Pa. 2003) (valuing settlement involving mixed monetary and injunctive relief, but considering fairness factors); *Loring v. City of Scottsdale, Ariz.*, 721 F.2d 274 (9th Cir. 1983)(reversing lower court's fee award because it failed to consider factors similar to the *Johnson* factors and the "total benefit conferred").

<sup>68</sup> Courts recognize that not all twelve factors will apply in every case, and this fact does not affect the appropriateness of awarding a percentage of the fund. *See In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1270 (D. Kan. 2006) (noting the inapplicability of three of the *Johnson* factors).

<sup>69</sup> *See* Order denying final approval to Costco settlement, Doc. # 1707, pg. 40 ("the case presents serious questions of law and fact which place the ultimate outcome of litigation in doubt.").

<sup>70</sup> Klonoff Dec., pg. 14.

<sup>71</sup> Specifically: (1) Tenth Circuit case number 10-3086, certain defendants' collateral order appeal from this Court's May 28, 2009 (Doc. # 1080), March 4, 2010 (Dk. No. 1583), March 26, 2010 (Doc. # 1612), and April 2, 2010 (Doc. # 1625) Orders regarding Defendants' First Amendment discovery objections; (2) Tenth Circuit case number 10-3101, certain defendants' mandamus proceeding related to this Court's May 28, 2009 (Doc. # 1080), March 4, 2010 (Doc. # 1583), March 26, 2010 (Doc. # 1612), and April 2, 2010 (Doc. # 1625) orders regarding Defendants' First Amendment discovery objections; (3) Tenth Circuit case number 10-601, certain defendants' attempt to obtain appellate review of this Court's May 28, 2009 (Doc. # 1675) pursuant to Fed.R.Civ.P. 23(f), and (4) Tenth Circuit case number 10-602, certain other defendants' attempt to obtain appellate review of this Court's May 28, 2009 (Doc. # 1675) pursuant to Fed.R.Civ.P. 23(f).

<sup>72</sup> *See* Order denying certain defendants' Motion for Certification Pursuant to 28 U.S.C. § 1292 (Doc. #. 1711).

<sup>73</sup> *See* All Defendants' Motion to Dismiss, Doc. #196, Citgo Motion to Dismiss, Doc. # 534, Citgo Motion for Summary Judgment, Doc. # 1739, Marathon Motion to Dismiss, Doc. # 684, Marathon Motion for Summary Judgment, Doc. #1254, Certain Defendants' Motion to Dismiss for Lack of Jurisdiction Under Political Question

successful) that raised a plethora of arguments and issues. Certainly, the issues in this case have been novel, protracted and complex.<sup>74</sup>

2. The Amount Involved and the Results Obtained

The result achieved by Class Counsel in this Settlement cannot be overstated.<sup>75</sup> Class Counsel were successful in convincing Costco to break ranks with the petroleum industry and agree to install ATC devices at the retail level. This result is even more impressive in light of the industry’s decades-long resistance to retail ATC, which has manifested in several venues and forms, including threats of boycott that resulted in calls for an attorney general investigation. Indeed, in light of the potential for industry coercion, Costco insisted that the Settlement include a provision addressing the possibility that Costco’s suppliers may retaliate by cutting off Costco’s access to the wholesale motor fuel market.<sup>76</sup>

The implementation of ATC at all Costco locations will result in a net Class benefit that will exceed \$100,000,000. This Settlement has substantial value because it is undeniable that the failure to temperature correct motor fuel sales works to the economic detriment of consumers. That much is made clear from discovery obtained in this case:

- “ [REDACTED] ”<sup>77</sup>
- “ [REDACTED] ”  
[REDACTED]
- “ [REDACTED] ”<sup>78</sup>
- “ [REDACTED] ”

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Doctrine (Doc. # 1242), Certain Defendants’ Motion for Judgment on the Pleadings (Doc. # 1258).

<sup>74</sup> See Klonoff Dec., pg. 14.

<sup>75</sup> Klonoff Dec., pg. 16.

<sup>76</sup> See Agreement, pg. 12, ¶ 4.8. Costco does not refine motor fuel; thus, it is entirely dependent on the wholesale motor fuel market to supply fuel to its locations.

<sup>77</sup> See [REDACTED].

<sup>78</sup> See [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED],<sup>79</sup>

- “[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED],<sup>80</sup>

Clearly, the failure by motor fuel retailers to temperature correct motor fuel sales works to the economic disadvantage of consumers. Costco’s agreement to voluntarily implement ATC is an “exceptional result for the class”<sup>81</sup> because it halts that inequitable practice; and, as noted above, the value of the Settlement is substantial. As this Court has observed, “in addition, those class members would benefit from increased price transparency and fairness, accuracy and consistency of fuel measurement for their fuel dollar, regardless of fuel temperature at the time of pumping.”<sup>82</sup> This factor weighs in favor of Plaintiffs’ request.

3. Time/Labor Required, The Skill Requisite To Perform The Legal Services and The Experience, Reputation and Ability of the Attorneys

Although Plaintiffs’ counsel was successful in achieving a favorable result before trial, a substantial amount of time and energy was required to obtain this result.<sup>83</sup> First, Plaintiffs’ counsel spent significant time in the initial investigation and commencement of the dozens of lawsuits that comprise this MDL. Second, substantial time was devoted to the briefing and

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<sup>79</sup> See [REDACTED].

<sup>80</sup> See [REDACTED].

<sup>81</sup> Klonoff Dec., pg. 16.

<sup>82</sup> Order, Doc. # 1707, pg. 49.

<sup>83</sup> See the Declaration of Co-Lead Counsel Robert A. Horn, attached hereto as Exhibit B.

argument regarding the consolidation and transfer of these actions by the Judicial Panel on Multi District Litigation. Then, significant time was devoted by Plaintiffs' counsel to the orderly administration of this case once the actions were transferred to this District. This Court appointed three co-lead counsel who organized a plaintiffs' steering committee ("PSC"), which has been responsible for the bulk of the work in this case. Members of the PSC are assigned different tasks; some are responsible for the Plaintiffs' discovery, some are responsible for the Defendants' discovery, some are responsible for appellate issues, etc. Because each member of the PSC is not involved on a granular level in every facet of this litigation, they must be kept informed of all activities, which also requires time and effort. That supply of information is even more critical now that this Court has indicated its intention to remand all non-Kansas cases to their respective transferor courts. In addition, the PSC has been engaged, and continues to be engaged, in substantial discovery and briefing in this case, as the 1,700 plus docket entries suggest.

These logistical, procedural and substantive efforts have required a substantial amount of time and effort over the course of the four years of this litigation. As set forth in the summary time records attached hereto collectively as Exhibit C, as of the date of this filing, Class Counsel and the other members of the Plaintiffs' Steering Committee have devoted almost 65,000 hours of common, joint time to the prosecution of this litigation, which has a time-value in excess of \$23,000,000.00.<sup>84</sup> Time devoted to specific defendants, which is reflected on Exhibit D hereto and which constitutes an additional 18,000 hours with a value in excess of \$5,000,000, is not included in that "common time." Time devoted specifically to Costco, which is reflected on

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<sup>84</sup> Using the standard billing rate of Costco's counsel (\$597/average hourly for partner time, \$387/average hourly for associate time and \$198 average hourly for paralegal time), the resulting figure is much higher. Given the location of some Plaintiffs' counsel in geographic areas that demand much higher prevailing attorney rates (such as Los Angeles and New York), adoption of Costco's counsel's lower billing rate is imminently reasonable.

Exhibit E hereto and which constitutes an additional 2,200 hours with a value in excess of \$1,000,000, has also been removed from that “common time.” Time from more than twenty-five other law firms that have worked on this case has also been removed from that “common time.” Importantly, as noted above, if the Court grants final approval of the Settlement, many more hours will be spent by Plaintiffs’ counsel. Thus, the time and commitment that Plaintiffs’ counsel devote to this case will only increase if this Settlement is approved.<sup>85</sup>

It should be noted that this factor of the *Johnson* analysis (the time and labor required) is to be distinguished from strict application of the “lodestar” methodology, which has been noted to have “encouraged inefficient behavior, turned judges into bean counters and created antagonistic interests between the class and class counsel.”<sup>86</sup> When considering plaintiffs’ attorney fees outside of the strict lodestar context, such as here, the focus is **not** on the “necessity and reasonableness of every hour” of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys.<sup>87</sup> Such a results-oriented focus “lessens the possibility of collateral disputes [regarding time records] that might transform the fee proceeding into a second major litigation.”<sup>88</sup>

This Court has noted that the settling parties are represented by “top-notch” lawyers who

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<sup>85</sup> Plaintiffs’ counsel have submitted the time summaries attached hereto as Exhibits C-E to facilitate the Court’s consideration of the relevant *Johnson* factors, in light of Plaintiffs’ request that the Court utilize a percentage of the fund fee methodology. Should the Court determine that a lodestar methodology is the appropriate tool to use in determining a reasonable fee, Plaintiffs request leave to submit detailed attorney time and expense records *in camera* to assist with the Court’s lodestar fee determination.

<sup>86</sup> *O’Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 305 (E.D. Pa. 2003) (citing *Third Circuit Task Force: Court Awarded Attorney Fees*, 108 F.R.D. 237, *passim* (1985); see also *Blum v. Stenson*, 104 S.Ct. 1541 (1984) (criticizing lodestar); *In re Cendant Corp. Litig.*, 264 F.3d 201, 256 n. 32(3d Cir. 2001) (criticizing lodestar for taxing the judiciary, mis-aligning class and counsel interests; providing an extensive reading list to consider the percentage-of-recovery method); *In re GM*, 55 F.3d 768 at 821 (3d Cir. 1995) (faulting lodestar for failing to align class and class counsel interests); *Matter of Continental Illinois Securities Litig.*, 962 F.2d 566, 572-72 (7th Cir. 1992) (criticizing lodestar); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268 (D.C. Cir. 1993).

<sup>87</sup> See *In re Thirteen Appeals*, 56 F.3d 295, 307 (1st Cir. 1995).

<sup>88</sup> *Id.*

have vigorously litigated the case on behalf of their clients.<sup>89</sup> Regarding the skill required for litigation of this magnitude, it is well-known that large scale consumer class actions of this type are, by their very nature, complicated and time-consuming. A law firm undertaking representation of a plaintiff consumer class case inevitably must be prepared to make a tremendous investment of time, energy, and resources. In this MDL proceeding, the Defendants are represented by some of the largest and most prestigious defense firms in the country. Indeed, Costco is represented by the law firms Morrison Foerster and Polsinelli Shughart, P.C., two firms that have twenty-nine offices and one thousand five hundred attorneys spread through twenty-six cities around the globe. Due to the contingent nature of the customary fee arrangement, lawyers must be prepared to make this investment with the very real possibility of an unsuccessful outcome and no fee of any kind. The demands and risks of this type of litigation overwhelm the resources – and deter participation – of many traditional plaintiff law firms. The Class Counsel and Plaintiffs’ counsel involved in this Settlement all have substantial experience in prosecuting complex consumer class actions, and their professional accomplishments are summarized in the firm resumes previously provided.

4. *Preclusion of other employment, customary fee, whether the fee is fixed or contingent and awards in similar cases.*

In terms of the preclusion of other work, this case has been prosecuted efficiently and for some Plaintiffs’ counsel, it demanded all, or nearly all, of their available time and energy.<sup>90</sup> For all Plaintiffs’ counsel, the significant hours devoted to this lawsuit necessarily precluded them from spending that time on other cases, which weighs in favor of an award.<sup>91</sup>

Regarding a customary fee, in a case such as this the fee is normally contingent upon a

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<sup>89</sup> Doc. # 1707 at pg. 40

<sup>90</sup> Klonoff Dec., pg. 12, 18-19.

<sup>91</sup> See *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. at 1270.

successful outcome.<sup>92</sup> In prosecuting plaintiff class actions, Plaintiffs' counsel customarily enter into contingent attorneys' fee agreements providing for a percentage of any recovery, and no fee if there is no recovery. In this case, the Class Plaintiffs executed a retainer agreement which entitled Plaintiffs' counsel to receive a much larger percentage of recovery than the 10% percent referenced above. Thus, the requested percentage of the fund is substantially less than that contained in the retainer agreements executed with the named Class Plaintiffs, and therefore, below the contingency percentage available in the marketplace.<sup>93</sup>

Finally, as it relates to awards in similar cases, based on historical awards of attorneys' fees in other percentage-of-fund cases, the percentage of the fund requested here – less than 10% – is presumptively reasonable. It is well below the average fee percentage noted by the Seventh Circuit in *In re Trans Union Corp. Privacy Litigation*.<sup>94</sup> noted above, and this Court has previously approved attorneys' fee awards amounting to three times the requested percentage sought by Plaintiffs.<sup>95</sup> Other federal courts in this District and elsewhere regularly award attorneys' fees in the range of thirty percent of a settlement fund.<sup>96</sup>

In light of these factors, the requested attorneys' fee is certainly reasonable. Plaintiffs have spent a very substantial amount of time prosecuting these claims, have successfully worked through many of the issues and arguments raised by the Defendants and have entered into an agreement whereby a large and sophisticated motor fuel retailer has agreed to implement temperature correction at the retail level. All of the relevant *Johnson* factors indicate that

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<sup>92</sup> See *Ramah Navajo Chapter v. Babbit, et al.*, 50 F.Supp.2d 1091, 1104 (D. NM. 1999)

<sup>93</sup> See *Swedish Hosp. Corp. v. Shalala*, 1 F.3d at 1268.

<sup>94</sup> 2011 WL 117108 (7<sup>th</sup> Cir. Jan. 14, 2011).

<sup>95</sup> See *West, et al. v. First Franklin Fin. Corp.*, Order, Case No. 06-cv-02064-KHV-WO (D. Kan. October 23, 2007) (awarding class counsel attorneys' fees and costs in the amount of thirty percent (30%) of settlement fund).

<sup>96</sup> See *Barnwell, et al. v. Corrections Corporation of America*, Order Approving Settlement Agreement, Case No. 08-cv-02151-JWL-DJW (D. Kan. Feb. 12, 2009) (approving as an attorneys' fee award thirty-three percent (33%) of settlement fund); *Perry v. National City Bank*, Order, Case No. 05-cv-00891-DRH-PMF (S.D. Ill. March 3, 2008) (approving requests for attorneys' fees and costs in the amount of thirty-three percent (33%) of the Settlement Fund).

Plaintiffs' requested fee is reasonable.<sup>97</sup>

**VII. PLAINTIFFS' COSTS WERE REASONABLY INCURRED AND SHOULD BE REIMBURSED**

As noted above, Costco has agreed to pay any attorneys' fees and costs ordered by this Court. Plaintiffs' overall costs total approximately \$3,000,000.00, and are detailed under oath in the declaration of Co-Lead Counsel Robert Horn and the Plaintiffs' counsel time summaries, Exhibits B through E hereto. However, Class Counsel request an award of their costs related solely to Costco in this litigation in the amount of \$ \$279,855.01. Each of the cost categories for which reimbursement is sought is appropriate for payment, such as expert witness costs, deposition costs,<sup>98</sup> travel expenses<sup>99</sup> and electronic legal research.<sup>100</sup> Because these expenses are of the type routinely charged to paying clients, Plaintiffs are entitled to an award reimbursing them for these expenses.

**VIII. CLASS REPRESENTATIVES ARE ENTITLED TO INCENTIVE AWARDS.**

The time an individual devotes to a lawsuit which inures to the common benefit of the class warrants entitlement to an incentive award "above and beyond what the typical class member is receiving."<sup>101</sup> In light of their efforts resulting in a favorable settlement on behalf of the Class, named Plaintiffs Annie Smith (Alabama), Christopher Payne (Arizona), Phyllis Lerner (California), Herb Glazer (California), Mara Redstone (Florida), Brent Crawford (Georgia), Victor Ruybalid (Indiana), Zach Wilson (Kansas), Lisa McBride (Kentucky), Raphael Sagalyn

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<sup>97</sup> Klonoff Dec., pgs. 12-19.

<sup>98</sup> See *Callicrate v. Farmland Industries, Inc.*, 139 F.3d 1336 (10<sup>th</sup> Cir. 1998)(affirming award of expenses for depositions ultimately not used in disposition of case).

<sup>99</sup> See *Nelson v. State*, Case No. 99-4184-JTM, 2003 WL 22871685, \*4 (D. Kan. Nov. 13, 2003)(allowing reimbursement for travel expenses).

<sup>100</sup> *Case v. Unified School Dist. No. 233, Johnson County, Kan.*, 157 F.3d 1243, 1257-1258 (10<sup>th</sup> Cir. 1998); *Godinet v. Management and Training Corp.*, 182 F.Supp.2d 1108, 1114 (D.Kan. 2002).

<sup>101</sup> *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d at 1271 (awarding \$5,000 incentive award to each of four class representatives); see also *Cimarron Pipeline Constr., Inc. v. National Council on Compensation Ins.*, 1993 WL 355466 (W.D. Okla. June 8, 1993) (awarding \$10,000 incentive award to each of three class representatives); *Camp v. The Progressive Corp.*, 2004 WL 2149079 (E.D. La. 2004) (approving up to \$10,000 in incentive awards to class representative and other plaintiffs participating in the litigation).

(Maryland), Brent Donaldson (Missouri), Gary Kohut (Nevada), Richard Gaulauski (New Jersey), Charles Byram (New Mexico), Jean Neese (North Carolina), Shonna Butler (Oregon), Gerald Panto (Pennsylvania), Joann Korleski (South Carolina), Tamara Miller (Tennessee), Priscilla Craft (Texas), Jeff Jenkins (Utah), and James Graham (Virginia) (collectively "Class Representatives") are entitled to incentive payments.

In this case, Class Representatives provided invaluable guidance and assistance to Plaintiffs' counsel in prosecuting these claims. Each Class Representative responded to multiple rounds of written discovery from the Defendants, including three sets of interrogatories, multiple requests for documents and requests for admissions. Each Class Representative gathered and produced documents responsive to Defendants' requests including, in some instances, very substantial documents.<sup>102</sup> Each Class Representative set aside the necessary time (in many instances, taking unpaid leave from their employment to do so) to give lengthy depositions at Defendants' request.<sup>103</sup> Such time and commitment warrants compensation. Further, there is no question that Class Representatives' conduct has inured to the substantial benefit of the respective classes. Without their efforts, this case would not have been brought and this settlement would not have been achieved.

The Amended Settlement Agreement provides that each Class Representative will receive an incentive no greater than \$2,000 for their service as Class Representative, to be paid from any attorneys' fee awarded to Class Counsel.<sup>104</sup> Thus, any incentive awards to the Class Representatives will not affect the Class.

For these reasons, payment of the requested incentive to each Class Representative is justified.

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<sup>102</sup> For example, Class Representative Zach Wilson alone has produced several thousand documents.

<sup>103</sup> For example, the deposition of Class Representative Dennis Mann lasted almost seven hours.

<sup>104</sup> See Settlement Agreement, ¶ 7.4.

Dated: March 23, 2011

Respectfully submitted,

s/ Robert A. Horn

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LIAISON COUNSEL FOR PLAINTIFFS

**CERTIFICATE OF SERVICE**

I hereby certify that on March 23, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send a notice of electronic filing to all person registered for ECF as of that date.

/s/ Joseph A. Kronawitter

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**IN RE: MOTOR FUEL TEMPERATURE )  
SALES PRACTICES LITIGATION )  
(This Document Relates to All Cases) ) MDL No: 1840  
) No: 07-md-1840-KHV-JPO**

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**MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND  
CLASS REPRESENTATIVES INCENTIVE AWARDS  
AND MEMORANDUM IN SUPPORT THEREOF**

**EXHIBIT A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**IN RE: MOTOR FUEL TEMPERATURE )  
SALES PRACTICES LITIGATION )  
(This Document Relates to All Cases) ) MDL No: 1840  
) No: 07-md-1840-KHV-JPO**

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**DECLARATION OF ROBERT H. KLONOFF**

ROBERT H. KLONOFF, under penalty of perjury, declares as follows:

**I. INTRODUCTION**

1. I am Dean and Professor of Law at Lewis & Clark Law School. I am submitting this Declaration on the issue of the reasonableness of attorneys' fees requested by class counsel in connection with the proposed settlement with Costco Wholesale Corp. ("Costco"). I recognize that the ultimate decision on the reasonableness of attorneys' fees rests with the Court. Nonetheless, based on my academic and practical experience in the field of class actions, I believe I can assist the Court by highlighting important facts, issues, and other considerations. (All citations of authority are contained in the endnotes to this Declaration, which begin on page 20.)<sup>1</sup>

**II. QUALIFICATIONS AND BASIS FOR TESTIMONY**

2. My qualifications are set forth in paragraphs 1-9 of my March 19, 2010 Declaration on the fairness of the proposed settlement between Costco and the class. The basis for my testimony is set forth in paragraph 10 of that Declaration. I incorporate those discussions by reference here. I have updated my resume since March 2010, so I attach a copy of the latest version of my resume.

**IV. SUMMARY OF OPINIONS**

3. Plaintiffs have offered expert evidence that the monetary value in this case is in excess of \$105 million. Assuming that this Court credits that evidence, the Court would be well justified

in awarding fees based on a percentage of this “fund” (POF) rather than under the lodestar method (*i.e.*, the number of hours worked multiplied by the normal hourly rate, increased or decreased by a multiplier). The POF best aligns the clients’ interests with those of counsel by focusing on the results obtained. The lodestar approach is cumbersome and encourages overbilling as opposed to efficiency and early settlement. The Tenth Circuit has expressed a preference for POF over lodestar when the benefit can be valued.

4. The merit of using of POF is not diminished by the fact that the relief is essentially injunctive rather than damages. Courts, as well as the Federal Judicial Center, support using POF when injunctive relief can be valued.

5. Counsel request \$10 million, an amount that includes fees, expenses, and incentive payments. Costco has agreed to pay the fees ordered by this Court. As I explain below, by reducing the request for expenses, and by treating the \$10 million paid by Costco as part of the benefit to the class (since the Court will not need to assess fees against the class), the percentage sought as attorneys’ fees works out to 8.4% of the value of the settlement.

6. Empirical research by several commentators supports fees of significantly more than 8.4%. Case law within the Tenth Circuit also supports significantly higher fees. An award of 8.4% is lower than that awarded by most courts in class action settlements.

7. Despite the apparent reasonableness of an 8.4% fee award, courts in the Tenth Circuit must apply 12 factors set forth in *Johnson v. Georgia Highway Express, Inc.*<sup>2</sup> Here, those factors confirm the reasonableness of counsel’s request:

- Counsel have devoted thousands of hours to this litigation. The Court, however, need not do a strict lodestar here, since the amount sought by counsel is reasonable given the results obtained.
- This case raised myriad novel and complex issues, and defendants have left few, if any, stones unturned.
- Because the issues are so complicated, the case called for class counsel with great skill in handling complex legal, technical, regulatory, and procedural questions.
- The burden of this case prevented at least some of the plaintiff lawyers involved from taking on other matters.

- A POF award is customary in a class action like this one, where the value of the relief can be quantified.
- Class representatives entered into contingent-fee agreements. Such agreements never contemplated that counsel would be paid on an hourly basis.
- I do not know of any special time limitations imposed in this case.
- Class counsel achieved an outstanding result: a benefit that plaintiffs' expert, Dr. Andrew Safir, valued at over \$105 million. Clearly this was not a "sweetheart" deal for Costco, as evidenced by the fact that none of the other 70+ defendants have signed on to similar terms.
- Class counsel are some of the leading plaintiff lawyers in the United States, and they have vast experience in handling complex class actions.
- Because of the myriad novel and complicated issues in this case, the case posed great risks to class counsel. This is not a case in which counsel could ride the coattails of a government prosecution. Rather, class counsel had to develop and substantiate every aspect of the case.
- To my knowledge, the class representatives do not have a longstanding relationship with class counsel.
- Awards in class actions settlements are frequently quite modest. Here, by contrast, Costco has agreed to a significant remedy that provides substantial relief going forward.

## V. BACKGROUND

8. This Court is thoroughly familiar with the terms of the proposed settlement and I will not repeat them here. I will note crucial terms when relevant to a particular point that I am making.

9. Counsel for the class has asked this Court to award \$10 million in attorneys' fees and expenses, to be paid by Costco in installments as significant benchmarks are achieved in the process of implementing the settlement. Such incremental payments will be made at the Court's discretion. Class counsel will ask that the funds be deposited into an interest bearing account under the Court's control. The \$10 million sought by class counsel covers not only attorneys' fees, but also incentive payments to class representatives and expenses incurred in the litigation against Costco. The \$10 million also covers future work that class counsel must undertake to implement the settlement.

10. It is my understanding that, while Costco agreed to pay costs and fees as awarded by the Court,<sup>3</sup> it has not agreed to the \$10 million sought by class counsel and intends to argue for a lower sum.

## **VI. REASONABLENESS OF ATTORNEYS' FEES**

### **A. Criteria in the Tenth Circuit**

11. Under the American Rule, each party is responsible for its own litigation expenses. There are several exceptions to that rule. First, there are “fee shifting” cases, in which the losing defendant pays for the plaintiff’s fees and expenses.<sup>4</sup> Fees are shifted to the defendant—either pursuant to statute or under the equitable powers of the court—when “[the defendant] has acted ‘in bad faith, vexatiously, wantonly, or for oppressive reasons.’”<sup>5</sup> The underlying rationale in such cases is “punitive, and the essential element in triggering the award of fees is therefore the existence of ‘bad faith’ on the part of the unsuccessful litigant.”<sup>6</sup>

12. Two other exceptions to the American Rule are designed to enable plaintiffs’ litigation expenses to be distributed equally among the plaintiffs and class members who benefit from the lawsuit. First, in “common fund” cases, “the successful plaintiff is awarded attorney fees because his suit creates ‘a common fund, the economic benefit of which is shared by all members of the class.’”<sup>7</sup> Class members’ attorneys’ fees are taken directly from the fund in proportion to each class member’s share so that litigation expenses are spread fairly among the class.<sup>8</sup> Second, the “common benefit” exception was derived by courts from the common fund line of cases.<sup>9</sup> In common benefit cases, the plaintiffs typically share a non-monetary benefit, such as the ability to exercise shareholders rights or the right to free speech within a union.<sup>10</sup> As with common fund cases, attorneys’ fees in common benefit cases are spread proportionately among the plaintiff class.<sup>11</sup> Both the common fund and common benefit line of cases are justified under the principle of avoiding unjust enrichment by requiring class members who benefit from a lawsuit to share in the litigation costs.<sup>12</sup>

13. The method for calculating fees varies based on the nature of the relief provided.<sup>13</sup> For fee shifting cases, courts generally use the lodestar approach.<sup>14</sup> Under that approach, the number of hours expended by counsel is multiplied by the normal hourly rate charged for similar work by attorneys of comparable skill. The total may be enhanced or decreased by a multiplier factor,

taking into consideration the level of risk, complexity, and level of skill required, as well as the contingent nature of the lawsuit.<sup>15</sup> In common benefit cases in which the value of relief cannot be quantified, courts rely on the lodestar approach.<sup>16</sup> In common fund or common benefit cases in which the relief *can* be quantified, courts generally prefer the percentage of fund (POF) approach, even if there is no discrete pot of money.<sup>17</sup>

14. As I discuss below, the class has offered expert evidence on the monetary value of the settlement. I am advised by class counsel that, notwithstanding this expert testimony, Costco will take the position that fees in this case should be based on the lodestar method. As discussed below, the modern trend favors the use of the POF method when the settlement can be valued, and there are strong policy reasons for that approach.

15. The most recent affirmation of the POF approach was by the American Law Institute in May 2009. In the *ALI Aggregate Litigation* project, for which I served as Associate Reporter, the ALI adopted the POF approach as “the method [that should be] utilized in most common fund cases, with the percentage being based on both the monetary and the nonmonetary value of the judgment or settlement.”<sup>18</sup> The Tenth Circuit permits courts to use either the POF or lodestar approach, but recent cases have expressed a preference for the POF approach.<sup>19</sup> Indeed, in *Gottlieb v. Barry*,<sup>20</sup> the Tenth Circuit held that the district court abused its discretion in using the lodestar method in a common fund case where a special master had recommended use of the POF method. The court noted that “the more recent trend has been toward utilizing the percentage method in common fund cases.”<sup>21</sup> In endorsing the special master’s approach, the court discussed several reasons why the special master had adopted the POF approach, including the fact that “it ‘most closely matches the methodology actually employed in the marketplace,’” it “provide[s] incentive for counsel to pursue” large class actions, “it is less subjective than the lodestar plus multiplier approach,” “it gives primary consideration to the results obtained by counsel,” and when a contingent fee agreement exists, the POF approach “most closely approximates the original agreement between client and counsel.”<sup>22</sup> These policy arguments cited in *Gottlieb* make good sense, and similar considerations played a major role in the approach taken in the *ALI Aggregate Litigation* project.

16. Indeed, for many years prior to the ALI’s *Aggregate Litigation* project, courts and commentators had discussed the myriad deficiencies with the lodestar method.<sup>23</sup> For instance, a

Task Force established by the Third Circuit to evaluate the lodestar method recommended that, for common-fund cases, courts should utilize the POF method.<sup>24</sup> The Task Force noted that the lodestar method (1) “increases the workload of an already overtaxed judicial system,” (2) “creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law,” (3) is “subject to manipulation by judges,” (4) “creates a disincentive for the early settlement of cases,” and (5) “does not provide the district court with enough flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered.”<sup>25</sup> Courts throughout the country—including in the Tenth Circuit—have also noted significant flaws with the lodestar method,<sup>26</sup> including the lodestar’s “tedious task . . . of examining lengthy and detailed billing records.”<sup>27</sup>

17. By contrast, courts and commentators have identified several advantages of the POF approach. Most importantly, the POF approach is a simple calculation for the court to perform.<sup>28</sup> In addition, a POF approach ensures a direct correlation between the success of the lawsuit and the attorneys’ fee award.<sup>29</sup> And, unlike the lodestar approach, which creates an incentive for attorneys to bill as many hours as possible, even to the detriment of their clients, the POF method encourages lawyers to be as efficient as possible in their handling of the case.<sup>30</sup> Finally, the percentage fee is an accepted part of the legal system, as a result of its use as the standard method of payment in personal injury litigation.<sup>31</sup>

18. To be sure, the POF approach is not without criticism. Some authorities have pointed out that fee award percentages have varied considerably from case to case.<sup>32</sup> Additionally, some authorities have noted that lawyers may, in some circumstances, settle cases—to the disadvantage of the class—sooner and for smaller amounts, in an effort to maximize their hourly return.<sup>33</sup> In the view of most courts and commentators, however, the strengths of the POF approach outweigh the weaknesses. In their view, when a monetary value can be placed on a settlement, the POF approach is preferable. Indeed, empirical studies confirm that the vast majority of recent cases opt for the POF approach over the lodestar.<sup>34</sup>

19. In sum, assuming that the expert testimony offered by the class persuades this Court that the settlement can be given a monetary value, I would urge the Court to reject Costco’s expected invitation to eschew the POF approach in favor of a strict lodestar approach.

20. Significantly, in the Tenth Circuit, there is even less reason than in many other circuits to adopt a strict lodestar approach: even if this Court adopts the POF method, it must also test the fee award for “reasonableness” under the 12 factors established by the Fifth Circuit in *Johnson v. Georgia Highway Express*.<sup>35</sup> As the *Gottlieb* court noted, “in all cases, whichever method is used [POF or lodestar], the court must consider the twelve *Johnson* factors.”<sup>36</sup>

21. The 12 *Johnson* factors are as follows:

(1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) any prearranged fee—this is helpful but not determinative; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.<sup>37</sup>

As discussed below, under Tenth Circuit law, the weight to be given to each *Johnson* factor will depend on the facts and circumstances of the particular case.<sup>38</sup>

## **B. Analysis Based on the Facts of this Case**

### **1. Nature of This Case**

22. This is not a fee shifting case. Defendants are not being asked to pay fees because of a statute or on equitable grounds. Nor does this case clearly qualify as a traditional common fund. Although the settlement obligates Costco to undertake expensive and important remedial action, no pot of money is created for distribution to class members. The common benefit cases include a spectrum of circumstances that run from traditional common benefits (like free speech within a union) to remedies that more closely resemble a common fund (like discount travel vouchers that have a calculable monetary value). Courts have the discretion to select the method for calculating fee awards. Because of the overwhelming preference for (and advantages of) the POF approach, courts have used the POF method for common benefits that have a readily ascertainable monetary value. While this case is not, strictly speaking, a common fund case, it is a close relative. Thus, in my opinion, the POF approach is appropriate here.

## 2. Factual Basis for Fee Award

23. Plaintiffs' expert, Dr. Andrew Safir, has calculated the value of the benefit conferred on the class. For purposes of my Declaration, I assume the validity of his analysis. I do not have the technical expertise to opine on whether Dr. Safir's analysis is correct. It is important to note, however, that to my knowledge Costco has not disputed Dr. Safir's estimation of the value of the ATC installation. This evidence was in fact used by the class at the fairness hearing to establish the fairness of the settlement, a position that Costco supported.

24. According to Dr. Safir, the value of the benefits (in present value dollars) up to 2020 is \$105,481,329. Dr. Safir calculated this number based on data supplied by Costco—the number of gallons of motor fuel sold by Costco from 2003–2009 in each pertinent state, along with Costco's historical estimate of the gallons from 2003–2009 that were not provided to consumers because of the expansion of the fuel at temperatures greater than 60°F.

## 3. Appropriateness of Treating Injunctive Relief as a Fund

25. As I discussed above, when a settlement can be valued, even if it does not include a pot of money, it can and should be treated like a fund. Certainly, for example, if a settlement provided goods or service to class members, expert testimony could place a value on such goods or services. Here, however, the relief is different: Costco has agreed to install ATC equipment that will result in motor fuel sold in the affected states being adjusted in price or volume when the fuel temperature is greater than 60°F. This remedy is in the nature of injunctive relief.

26. Some forms of injunctive relief are difficult to value. For instance, in a race discrimination case, it might be difficult to place a monetary value on a company's agreement to hire an ombudsman to address employee grievances. Here, however, Dr. Safir has testified that the remedy agreed to by Costco can be quantified. The question remains, however, whether injunctive relief can and should count as value for purposes of quantifying the financial benefit of a settlement in a POF determination.

27. In my opinion, injunctive relief is in some circumstances as capable of providing value as monetary relief. The Seventh Circuit has aptly noted that injunctive relief that truly benefits the class "is not an outcome to be sneered at."<sup>39</sup> As the Federal Judicial Center ("FJC") has

pointed out in its authoritative guide for administering class action litigation, “by putting an end to illegal practices, an injunction will benefit more class members than a small award.”<sup>40</sup> To be sure, a lower fee award for in-kind relief may be appropriate when the value of such relief is questionable or subject to serious debate.<sup>41</sup> Coupon settlements, for example, are often worth only a fraction of their face value, and such settlements are now subject to regulation under the Class Action Fairness Act.<sup>42</sup> If, however, injunctive relief can be given a monetary value using objective criteria, such relief should be so valued. For instance, as the FJC has noted, “an injunction against an overcharge may be valued at the amount of the overcharge multiplied by the number of people likely to be exposed to the overcharge in the near future.”<sup>43</sup> Here, as noted, the injunctive relief provided by the settlement has been given a precise monetary value by Dr. Safir.<sup>44</sup> Assuming this Court finds Dr. Safir’s analysis to be credible and reliable, the value determined by Dr. Safir can and should be treated as a fund created by the settlement. Numerous courts have similarly used the POF method for determining attorneys’ fees where the monetary value of injunctive relief can be readily calculated.<sup>45</sup>

#### **4. Reasonableness of the Actual Fee Sought By Counsel Based on Value to the Class**

28. Having concluded that it is reasonable to treat the settlement as a “fund” based on Dr. Safir’s analysis, I now address whether counsel’s request for \$10 million in fees (including incentive payments and out-of-pocket expenses) is reasonable under a POF approach.

29. At the outset, it is important to determine what percent of the benefit of the settlement is being sought as attorneys’ fees. Counsel seek a total of \$10 million in attorneys’ fees, incentive payments to class representatives, and out-of-pocket expenses. According to class counsel, expenses accrued thus far related exclusively to the Costco case total \$275,000. An additional \$2.5 million in expenses have been incurred in the overall litigation, and it would be appropriate to attribute some portion of those expenses to the Costco case. As an extremely conservative estimate, I attribute only one percent of that amount (\$25,000) to this settlement. A much larger percentage could be well attributed to Costco. Because Costco agreed to pay fees ordered by the Court,<sup>46</sup> I include, for purposes of my calculation, the \$10 million as part of the benefit achieved by the settlement. (Absent Costco’s agreement to pay, fees would have to be assessed against the class under the common benefit doctrine.) Thus, using Dr. Safir’s analysis, the total benefit

is \$115,481,329 (\$105,481,329 (Dr. Safir's number) + \$10,000,000). Using extremely conservative expense figures (\$275,000 + \$25,000), and conservatively assuming that no money sought will be paid to the class representatives as incentive payments, I subtract \$300,000 from the total fees and expenses sought: \$10 million – \$300,000 = \$9.7 million. The percentage of the “fund” representing attorneys’ fees, therefore, can be calculated as follows:  $\$9,700,000 / \$115,481,329 = 8.4\%$ . I do not include as part of the “fund” the cost of notice and administration (approximately \$5 million) or the cost that Costco expects to incur to convert the pumps (approximately \$8 million). Had I done so, the percentage would have been even lower.

30. It is useful to put the 8.4% fee request in perspective based on recent empirical studies. Numerous courts have reviewed and analyzed empirical studies in determining the appropriate fee award percentage.<sup>47</sup> The most current, and in my view the most complete, study is the one conducted by Professor Brian Fitzpatrick of Vanderbilt University Law School.<sup>48</sup> Fitzpatrick attempted to collect all federal class action settlements approved between 2006 and 2007, in both published and unpublished decisions. Based on his research, Fitzpatrick discovered and analyzed 688 settlements.

31. Looking at all 688 cases, Fitzpatrick found that, overall, 13% (2006) and 20% (2007) of the recoveries were awarded as attorneys’ fees. For consumer cases, the percentages were 24% (2006) and 9% (2007), respectively. Fee awards in the cases using the POF approach ranged from 3% to 47%, with a median of 25% and a mean of 25.4%. For consumer cases, the fee awards for POF cases were 24.6% (median) and 23.5% (mean). Fitzpatrick also analyzed the data on a circuit-by-circuit basis. For the Tenth Circuit, the median award in POF cases was 25.5%, and the mean was 25.3%.<sup>49</sup>

32. Prior to the Fitzpatrick study, commentators had concluded that attorney fee percentages were smaller in so-called “mega-fund” cases.<sup>50</sup> Put another way, as the amount of the settlement fund increased, the percentage going to the lawyers decreased. Fitzpatrick’s empirical results support that prior view. In contrast to the overall Tenth Circuit median and mean of 25.5% and 25.3%, for cases between \$100 million and \$250 million, the national median and mean were 16.9% and 17.9%.

33. Another important study was conducted by Professors Eisenberg and Miller in 2004,<sup>51</sup> and that study was recently updated to include cases through 2008.<sup>52</sup> That study is often cited by courts considering attorneys' fees in class action cases. The updated study reviewed 689 class action settlements in a 16-year period (1993-2008). The resulting mean and median fees awarded by district courts were, respectively, 23% and 24% of the settlement nationally and 22% and 23% in the Tenth Circuit. In consumer cases, the mean and median fees were 25% and 20%. Even in cases with recoveries of over \$175.5 million, Eisenberg and Miller found that the mean and median fees were 12% and 10.2% of the settlement. Eisenberg and Miller found that the POF approach was by far the most widely used method, and that the most important determinant of the fee award was the size of the recovery.<sup>53</sup>

34. Yet another study was published by Logan, Moshman, and Moore in 2003.<sup>54</sup> The study suggests that there has been an increase in the average percentage awards. In their original 1990 study, which involved 404 cases, the average percentage awarded was 14.8%. In their revised 2003 study, the authors reviewed 1,120 cases (including the previous 404 cases) and found an average percentage awarded of 18.4%. The study also analyzed fee awards based on the size of recovery. For cases of \$100 million and over, the fee percentage average was 15.1%.<sup>55</sup>

35. Awards within the Tenth Circuit are, as the empirical studies above demonstrate, well above the 8.4% sought here. As one district court in Colorado recently noted (citing authorities), "in cases before the 10th Circuit, reasonable and acceptable fee awards based upon common fund have ranged from 13% to 22.5%."<sup>56</sup>

36. Based on the empirical studies and on cases in the Tenth Circuit, a fee of 8.4% is very reasonable, far below the mean and median for recoveries of this magnitude, and about a third less than the low end of the range (13%) of cases within the Tenth Circuit. Indeed, as noted above, Fitzpatrick found median and mean fees of about double that amount—16.9% and 17.9%—in cases involving settlements valued at between \$100 million and \$250 million.<sup>57</sup> Thus, assuming Dr. Safir is correct in his analysis, a fee award of 8.4% is quite reasonable.

37. Even though a fee of 8.4% of value may be reasonable for a settlement of more than \$10 million in value, based on prior class action cases from the Tenth Circuit and elsewhere, the Tenth Circuit requires a separate confirmation of reasonableness using the 12 *Johnson* factors. I

turn to those factors below.

## **B. Discussion of 12 *Johnson* Factors**

38. As demonstrated below, an analysis of the *Johnson* factors supports the reasonableness of the fees sought by class counsel.

### **1. Time and Labor Involved**

39. I am advised by class counsel that the Hot Fuel litigation is coordinated by 14 law firms—three lead counsel, one liaison counsel, and 10 firms on the steering committee. Approximately 25 other firms also have some involvement in the litigation, but I am told that their total hours would not add a significant percentage to the total hours generated by the 14 firms. I am advised that the total hours recorded by the 14 law firms through December of 2010 is more than 82,000. I am told that each firm was requested to exercise billing judgment and eliminate hours it felt were duplicative, excessive, and unproductive. In addition, I am told that many time keepers who had billed less than 10 hours total to this litigation were eliminated.

40. According to class counsel, each of the 14 firms was asked to break out its hours into three categories: time specific to Costco; time specific to other defendants; and common time. I am advised that Costco-specific hours are approximately 2,200; other defendant specific time is approximately 16,000; and common time is approximately 64,000. Using the same hourly rates that Costco's lawyers are charging to defend Costco, I am advised that the dollar value of the Costco-specific time is approximately \$1,160,416, and the value of the common time is approximately \$27,331,886. Since there are over 70 defendants in this litigation, Costco might argue that its share on an hourly basis should be no more than 1/70th. This approach, however, would be erroneous. It ignores the fact that Costco was sued in more states and sells more gas than nearly any other defendant in this litigation.

41. In any event, the Tenth Circuit has made clear that the weight to be given to specific *Johnson* factors should vary based on the facts and circumstance of the case.<sup>58</sup> For example, in one common fund case from within this Circuit, *Ramah Navajo Chapter*, a district court specifically held that “a lodestar analysis would not be helpful in setting or even evaluating [a fee award] . . . . Rather the Court finds that the other *Johnson* factors . . . would . . . more accurately

determine a reasonable . . . attorneys' fees.”<sup>59</sup> The court explained that “[t]he marketplace would not determine the value of these services by the number of hours worked, and neither will the Court.”<sup>60</sup> The court thus awarded almost \$9 million in attorneys’ fees—or 11% of the common fund—and gave almost no weight to the fact that the attorneys had expended only about 3,200 hours on the case. Here, in a case with a significant monetary benefit created through the outstanding work of class counsel, this Court should likewise be reluctant to attach considerable weight to a mechanical calculation of hours—in essence awarding fees based on a lodestar approach. As the Tenth Circuit has aptly noted:

We hold here . . . that in awarding attorneys’ fees in a common fund case, the “time and labor involved” factor need not be evaluated using the lodestar formulation when, in the judgment of the trial court, a reasonable fee is derived by giving greater weight to other factors, the basis of which is clearly reflected in the record.<sup>61</sup>

42. Here, a mechanical focus on the sheer number of hours would implicate all of the flaws of the lodestar approach. The Costco-specific hours and common-time hours show that counsel put considerable effort into the case. Any further scrutiny would require a laborious analysis of thousands of pages of time sheets by lawyers in 14 firms and an assessment of how “common time” should be attributed to the Costco case. Focusing on time sheets, as opposed to the value of the settlement, would send a perverse message to class counsel that, if they want to increase their fees, they should eschew efficiency and avoid settling too early, even if a defendant’s settlement proposal presents an outstanding opportunity for the class. Moreover, a strict hourly approach would ignore the fact (discussed below) that the class representatives all entered into contingent-fee agreements with counsel, thereby recognizing the contingent nature of the case. The hallmark of this case (as discussed *infra*) is that an extraordinary, unprecedented settlement that Dr. Safir opines is worth more than \$105 million<sup>62</sup> was achieved with great efficiency. An award based solely or primarily on hours performed would greatly undervalue the huge contribution made by class counsel. The exceptional terms of the settlement refute any concern that class counsel sacrificed the interests of the class by settling too early. As a sister Circuit pointed out in *Synthroid II*, the efficient work of class counsel should not “reduce class counsel’s percentage of the fund that their work produced.”<sup>63</sup>

43. Furthermore, a strict lodestar-type approach makes little sense here because much work by counsel remains to be done in implementing the settlement. Specifically, I am advised by

class counsel that anticipated future work will include: responding to class members' questions and concerns about the settlement; handling possible Tenth Circuit appeals on the fairness of the settlement and the reasonableness of the fees; monitoring Costco's progress in implementing the ATC conversion process on schedule; and, if necessary, obtaining regulatory approval in numerous states to permit Costco to convert its pumps to ATC. This additional work could involve thousands of attorney hours and significant out-of-pocket expenses.

## **2. Novelty and Difficulty of Questions Involved**

44. This is one of the most difficult and complex class actions I have seen in my more than 20 years of experience in the field. The legal, scientific, and regulatory issues that class counsel have had to confront have been enormous. And with over 70 defendants represented by the best law firms in the country, few (if any) of these difficulties have been overlooked.

45. The Court addressed many of these issues in its February 21, 2008 Order denying defendants' motion to dismiss; its August 13, 2009 Order granting conditional class certification and preliminarily approving the settlement with Costco; its May 28, 2010 Order sustaining in part plaintiffs' motion for class certification; and its August 13, 2010 Order overruling plaintiffs' motion for final approval of the Costco settlement (and identifying aspects of the settlement requiring restructuring). A review of the Court's thorough and well-reasoned orders reveals the extraordinary novelty and difficulty of the issues. And many difficult issues would be raised were this case to be tried.

## **3. Skill Required to Perform Legal Services Properly**

46. Based on the difficulty of the issues presented, this case required exceptional legal skill, including ability to analyze complex legal and regulatory issues; familiarity and experience with class actions and multi-district litigation; experience working with expert witnesses; and the ability to brief and argue difficult issues in a persuasive fashion. Few law firms in the country have the skill, expertise, and resources to litigate this case effectively.

#### **4. Preclusion of Other Employment by the Attorneys Due to Acceptance of the Case**

47. As discussed in paragraph 40, the Costco-specific time, other defendant-specific time, and common time totaled more than 82,000 hours. Clearly, even with 14 law firms involved, undertaking the Hot Fuel litigation necessarily precluded other opportunities. Two of the key lawyers in the case—lead counsel Bob Horn and liaison counsel Tom Bender—have advised me that they have worked on the Hot Fuel litigation nearly full time for the past four years.

#### **5. Customary Fee for Similar Work**

48. In my experience, work on the plaintiff side in a complex class action is almost never done on an hourly basis. Instead, in virtually all cases (including this one), counsel enter into contingent-fee agreements with class representatives up front. Ultimately, in the typical case involving a fund or other quantifiable benefit, counsel are paid a percentage of the benefit they have created. The empirical evidence discussed above reveals that the typical percentage in most class actions is well above the 8.4% sought here.

#### **6. Whether the Fee is Fixed or Contingent**

49. There is no fixed fee in this case. I am advised that every class representative entered into a contingent-fee agreement with his or her counsel. Most of these agreements set the award at one third or more of the recovery. The contingent-fee agreements show that the class representatives were comfortable in relinquishing a significant portion of their recovery to their lawyers for fees and were comfortable paying based on results achieved rather than by the hour. There is no indication that these contingent-fee agreements were anything but arms' length or that these representatives somehow lacked understanding or bargaining power.<sup>64</sup>

#### **7. Time Limitations Imposed by the Client or the Circumstances**

50. I am unaware of any special time limitations imposed by the client or the circumstances.

## 8. Amount Involved and Results Obtained

51. In *Brown*, the Tenth Circuit indicated that in applying the *Johnson* factors, “a decisive factor in [a] common fund class action case is the amount involved and the results obtained.”<sup>65</sup>

The court explained that:

The [eighth] *Johnson* factor—the amount involved and the results obtained—may be given greater weight when, as in this case, the trial judge determines that the recovery was highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class. . . . [R]arely are all of the *Johnson* factors applicable; this is particularly so in a common fund situation.<sup>66</sup>

Other circuits have also concluded, in applying the *Johnson* factors, that the most weight should be given to the factor measuring the results achieved by counsel.<sup>67</sup>

52. Similarly, while not addressing the *Johnson* factors per se, the Supreme Court has said that the “most critical factor [in setting a fee award] is the degree of success obtained.”<sup>68</sup> The Federal Judicial Center is in accord, stating that in determining attorneys’ fees in a common fund situation, the “fundamental focus is the result actually achieved for class members.”<sup>69</sup>

53. The amounts at issue here were enormous, and counsel achieved superb results for the class. If the allegations of the complaint are correct, the defendants (including Costco) unfairly reaped many millions of dollars because Costco’s pumps did not contain ATC. Moreover, unless Costco installed ATC, the class members in the relevant states faced the prospect of overpaying for motor fuel in the future. As class expert Dr. Safir determined, the savings by Costco gasoline purchasers as a result of the settlement is well over \$100 million. This is an exceptional result for the class. Indeed, it is significant that Costco is the only one of the more than 70 defendants in this case that has agreed to settle on these terms. Were this some collusive “sweetheart” deal that benefited defendants and class counsel at the expense of the class, I would have expected to see all (or virtually all) of the other defendants lining up to sign on to the same terms that Costco negotiated. Instead, the other defendants, unwilling to make the financial commitment that Costco has made, have refused to agree to such terms and are fighting hard on every issue.

## **9. Experience, Reputation and Ability of the Attorneys**

54. The class in this case is represented by some of the most prominent plaintiff and class action lawyers in the United States.

55. By way of example, steering committee member Stephen Susman (of Susman Godfrey) and lead counsel Thomas Girardi (of Giardi Keese) are widely regarded as two of the finest lawyers in the country. Both have been honored repeatedly for their work, and have been rated by multiple listings as among the best litigators in the United States. Both have won many multi-million dollar verdicts and settlements. Susman has been plaintiffs' counsel in many leading antitrust, patent infringement, breach of contract, breach of fiduciary duty, fraud, and securities fraud cases. Many of those cases were class actions. He is also a major player in the recent global warming litigation. His stellar credentials include graduating number one in his class from the University of Texas School of Law and clerking for U.S. Supreme Court Justice Hugo Black. Thomas Girardi has been a major player in the Vioxx litigation, the Rezulin litigation, auto safety litigation against Ford, and major antitrust and regulatory lawsuits. He was plaintiff counsel in the widely publicized toxic tort case that was the subject of the movie Erin Brokovich.

56. In the course of my expert work on the case, I have had extensive contact with two of the key plaintiff lawyers: lead counsel Bob Horn and liaison counsel Tom Bender. I have been extremely impressed by their knowledge, skill, creativity, and ethics, as well as their keen understanding of their role as fiduciaries for the class.

## **10. The Undesirability of the Case**

### **i. Risks of Litigation**

57. Class counsel undertook enormous risk in bringing this case. As noted *supra*, a favorable outcome was anything but certain. This case has been contentious from the outset, and defendants have raised myriad substantive and procedural issues. It is a novel case, and counsel did not have the benefit of prior similar litigation or precedent. Nor did they have the assistance of a governmental entity, as is often the case in major securities fraud and antitrust cases, where the government frequently does much of the heavy lifting. With more than 70 defendants, including numerous Fortune 500 companies, defendants have spared no expense in retaining the

top national law firms and the finest local and regional counsel. For instance, Costco's counsel include one of the leading national law firms (Morrison & Forester) and a highly respected local firm (Kansas City's Polsinelli Shugart). Other prestigious national firms representing various defendants include Arnold & Porter; Gibson, Dunn & Crutcher; Akin Gump Strauss Hauer & Feld; Morgan, Lewis & Bockius; Weil, Gotshal & Manges; Pillsbury Winthrop Shaw Pittman; Holland & Hart; Ropes & Gray; Dechert; Shook Hardy; Husch Blackwell; and many others. Any lawyers joining the plaintiff side knew full well that this litigation would be expensive, protracted, and fraught with risk because of all of the substantive and procedural hurdles, and because of the involvement of the country's premier defense law firms.

58. As one district court in the Tenth Circuit said in a similar situation:

In evaluating the services rendered in this case, appropriate consideration must be given to the risks assumed by plaintiffs' counsel in undertaking the litigation. The prospects of success were by no means certain at the outset, and indeed, the chances of success were highly speculative and problematical. . . . [P]laintiffs' counsel did not have the assistance of prior (or contemporaneous) governmental proceedings. Accordingly, the entire burden of (a) developing the facts, (b) developing viable and probable theories for recovery and (c) the management and organization of a complex case with a myriad of documents and depositions was borne by plaintiffs' counsel.<sup>70</sup>

59. Given the favorable settlement that plaintiffs were able to negotiate with Costco, it is tempting, as a matter of 20/20 hindsight, to say that this was a routine class action case that posed little risk. Nothing could be further from the truth.

### **11. Nature and Length of the Professional Relationship with the Client**

60. As far as I know, the class representatives did not have longstanding relationships with class counsel.

### **12. Awards in Similar Cases**

61. I know of no case similar to this one, so it is difficult to find good examples for comparative purposes. What I do know, however, is that in most settlements, class members are lucky if they recover even 15% of their losses.<sup>71</sup> Here, the class realistically could not have hoped to do better, even if the case had been litigated for years. This settlement puts a halt to Costco's alleged unfair practice of selling its costumers "hot fuel." For each year that the case

remained unresolved, class members would have been forced to continue overpaying for hot fuel, thus adding to their losses. Plainly, this settlement provides true, measurable value to the class.

### VIII. CONCLUSION

62. For the foregoing reasons, assuming this Court finds the expert evidence of Dr. Safir persuasive, the Court would be on solid ground in awarding the \$10 million in fees and expenses urged by class counsel.

I declare that the foregoing is based on information known to me and that is true and accurate to the best of my knowledge, subject to the laws against perjury pursuant to 28 U.S.C. sec. 1746.

A handwritten signature in black ink, which appears to read "Robert H. Klonoff", is written over a horizontal line. To the right of the signature, the date "3/2/11" is handwritten.

Robert H. Klonoff

## Endnotes

<sup>1</sup> Courts have repeatedly accepted and cited expert testimony by law professors on the issue of the reasonableness of attorneys' fees. *See, e.g., Shaw v. Toshiba America Info. Sys.*, 91 F. Supp. 2d 942, 988 (E.D. Tex. 2000); *In re Lucent Tech. Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 443 (D.N.J. 2004); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 487 (S.D.N.Y. 1998); *In re Royal Ahold N.V. Sec. Litig. & ERISA Litig.*, 461 F. Supp. 2d 383, 386 (D. Md. 2006); *In re Enron Corp. Sec. Litig.*, 586 F. Supp. 2d 732, 741 (S.D. Tex. 2008).

<sup>2</sup> *Johnson v. Georgia Highway Express Inc.*, 488 F. 2d 714 (5th Cir. 1974).

<sup>3</sup> Settlement Agreement § 7.1

<sup>4</sup> *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 966 (9th Cir. 2003) (explaining that in fee-shifting statutes, a prevailing party may recover attorneys' fees from the losing party).

<sup>5</sup> *See Hall v. Cole*, 412 U.S. 1, 5 (1973) (citing 6 J. Moore, Federal Practice 54.77(2), p. 1709 (2d ed. 1972)).

<sup>6</sup> *Id.*

<sup>7</sup> *Aguinaga v. United Food and Commercial Workers Intern. Union*, 993 F.2d 1480, 1482 (10th Cir. 1993).

<sup>8</sup> *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir.1988) ("unlike statutory fees, which result in a shifting of the fee burden to the losing party, common fund fees result in a sharing of the fees among those benefited by the litigation") (emphasis in original).

<sup>9</sup> *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970) ("The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on [the common fund] rationale . . . [Nothing in the case law] indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses.").

<sup>10</sup> *Mills v. Electric Auto-Lite Co.*, 396 U.S. at 395 ("a corporation may receive a 'substantial benefit' from a derivative suit, justifying an award of counsel fees, regardless of whether the benefit is pecuniary in nature").

<sup>11</sup> *Hall v. Cole*, 412 U.S. 1, 8 (1973) ("There can be no doubt that, by vindicating his own right of free speech guaranteed by [the Labor-Management Reporting and Disclosure Act] respondent necessarily rendered a substantial service to his union as an institution and to all of its members . . . Reimbursement of respondent's attorneys' fees out of the union treasury simply shifts the costs of litigation to 'the class that has benefited from them and that would have had to pay them had it brought the suit.'").

<sup>12</sup> *Id.* at 5-6 (explaining that an "established exception [to the American Rule] involves cases in which the plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.' . . . 'Fee shifting' is justified in these cases, not because of any 'bad faith' of the defendant but, rather, because '[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense'") (citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. at 392); *Brown v. Phillips Petroleum Co.*, 838 F.2d at 454 (noting that "the common fund doctrine 'rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense'") (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)).

<sup>13</sup> *See, e.g., Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 172 (3rd Cir. 1975) (providing that if probative evidence of the monetary value of the benefit is available, it should serve as the basis for the court's determination of attorneys' fees); *Petruzzi's Inc. v. Darling-Delaware Co., Inc.*, 983 F.Supp. 595 (1996) ("Courts have relied on 'common fund' principles and the inherent management powers of the court to award fees to lead counsel in cases that do not actually generate a common fund.") (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3rd Cir.), *cert. denied*, 516 U.S. 824 (1995)).

<sup>14</sup> *Brown v. Phillips Petroleum Co.*, 838 F.2d at 453 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434(1983)); *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003).

<sup>15</sup> *See, e.g., In re Global Crossing Securities and ERISA Litigation*, 225 F.R.D. 436, 466 (S.D. N.Y. 2004).

<sup>16</sup> *Perry v. FleetBoston Financial Corp.*, 229 F.R.D. 105, 119 (2005) (lodestar should be used when "the nature of the settlement evades the precise evaluation needed for the percentage of recovery method").

<sup>17</sup> *Id.* (explaining that "[the percentage of recovery] method is generally favored in [cases that closely resemble] common fund cases because it . . . rewards counsel for success and penalizes it for failure") (citations omitted). *See also Merola v. Atlantic Richfield Co.*, 515 F.2d at 172 (providing that if probative evidence of the monetary value of the benefit is available, it should serve as the basis for the court's determination of attorneys'

fees); *Petruzzi's Inc. v. Darling-Delaware Co., Inc.*, 983 F.Supp. at 604 (“Courts have relied on ‘common fund’ principles and the inherent management powers of the court to award fees to lead counsel in cases that do not actually generate a common fund.”) (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768); *Staton v. Boeing*, 327 F.3d at 974 (when the value of injunctive relief can be accurately ascertained, courts include it when determining a percentage-based fee award); *Ashley v. Regional Transportation District*, No. 05-cv-01567-WYD-BNB, 2008 WL 384579, at \*9 (D. Colo. Feb. 11, 2008) (granting a percentage based fee award even though no common fund was created); *In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297 (N.D. Ga. 1993) (using the “common fund” approach to fee awards where settlement included discount travel tickets for which a monetary value could readily be calculated); *Shaffer v. Continental Cas. Co.*, 362 Fed.Appx. 627 (2010) (applying the POF approach to fees where settlement provided adjustments to insurance coverage for which an accurate monetary value had been calculated).

<sup>18</sup> *ALI Principles of the Law of Aggregate Litigation* § 3.13(b).

<sup>19</sup> *See, e.g., Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994) (indicating that it is permissible to use either percentage of the fund or lodestar for calculating fees, but that there is a preference for percentage based fee awards).

<sup>20</sup> *Id.* at 474.

<sup>21</sup> *Id.* at 482.

<sup>22</sup> *Id.* at 484 (quoting report of Magistrate Judge Bruce D. Pringle, sitting as a special master).

<sup>23</sup> *See, e.g., In re Comdisco Sec. Litig.*, 150 F. Supp. 2d 943, 949 (N.D. Ill. 2001) (“To view the matter through the lens of free market principles, [lodestar analysis] (with or without a multiplier) is truly unjustified as a matter of logical analysis.”); Charles Silver, *Due Process and the Lodestar Method: You Can’t Get There From Here*, 74 Tul. L. Rev. 1809 (2000); John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. Ill. L. Rev. 903, 911 n.54.

<sup>24</sup> Report of the Third Circuit Task Force on Court Awarded Attorney Fees, 108 F.R.D. 237, 246-49 (1985) [hereinafter Third Circuit Task Force Report].

<sup>25</sup> Third Circuit Task Force Report, *supra* note 24, at 246-49.

<sup>26</sup> *See, e.g., Ramah Navajo Chapter v. Babbitt*, 50 F.Supp.2d 1091, 1107 (D. N.M. 1999) (“The lodestar method is difficult to apply, time consuming to administer, inconsistent in result, and capable of manipulation to reach a predetermined result. Accordingly, it has been criticized by courts, commentators, and members of the bar.”); *In re Copley Pharmaceutical, Inc.*, 1 F.Supp.2d 1407, 1411 (D. Wyo. 1998) (administering lodestar is tedious, time-consuming, highly subjective, requires second-guessing counsel, and rewards inefficiency).

<sup>27</sup> *Davitt v. Information Resources, Inc.*, 1995 U.S. Dist. LEXIS 5085 (N.D. Ill. 1995).

<sup>28</sup> Report on Contingent Fees in Class Action Litigation: January 11, 2006: Task Force on Contingent Fees, Tort Trial and Insurance Practice Section of the American Bar Association, 25 Rev. Litig. 459, 469 (2006) [hereinafter 2006 ABA Task Force Report] (“the percentage is a simple calculation”). *See also Gaskill v. Gordon*, 942 F. Supp. 382 (N.D. Ill. 1996) (using the POF approach to free the court from the necessity of reviewing billing records generated during eight years of litigation).

<sup>29</sup> *See, e.g., Gaskill v. Gordon*, 942 F. Supp. 382 (holding that the POF approach would be utilized to encourage lawyers to make “prudent economic decisions during course of representation”).

<sup>30</sup> *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 721 (7th Cir. 2001) (in contrast to the POF, “the lodestar approach creates the opposite incentive to run up the billable hours”); 2006 ABA Task Force Report, *supra* note 28, at 469.

<sup>31</sup> *McKinnie v. JP Morgan Chase Bank*, 678 F. Supp. 2d 806, 815 (E.D. Wis. 2009) (“The court will award attorneys’ fees as a percentage of the common fund because it most closely replicates the market for the legal services provided.”).

<sup>32</sup> *See, e.g.,* Third Circuit Task Force Report, *supra* note 24, at 242; 2006 ABA Task Force Report, *supra* note 28, at 470.

<sup>33</sup> *See, e.g.,* 2006 ABA Task Force Report, *supra* note 28, at 469-70 (offering an example to show how clients could suffer under the POF method because lawyers might prefer a “‘quick hit’ settlement” if they can “maximiz[e] [their] hourly return”); Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27 (2004), available at <http://ssrn.com/abstract=456600> [hereinafter Eisenberg & Miller].

<sup>34</sup> *See, e.g.,* 2006 ABA Task Force Report, *supra* note 28, 472. *See also* Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7 J. Empirical Legal Studies (forthcoming 2010), available at <http://ssrn.com/abstract=1442108> [hereinafter “Fitzpatrick 2010 Study”] (finding that the lodestar method was used

in only 12 percent of cases reviewed); Theodore Eisenberg & Geoffrey Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248 (2010), available at <http://ssrn.com/abstract=1605473> [hereinafter Eisenberg & Miller II] (finding that the lodestar method was used in only 9.6 percent of all cases reviewed).

<sup>35</sup> *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

<sup>36</sup> *Gottlieb v. Barry*, 43 F.3d 483 (10th Cir. 1994). *Accord, e.g., Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988); *Bruner v. Sprint/United Management Co.*, Nos. 07-2164-KHV, 08-2133-KHV, 08-2149-KHV, 2009 WL 2058762, at \*3 (D. Kan. 2009).

<sup>37</sup> *Brown v. Phillips Petroleum Co.*, 838 F.2d at 454 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d at 717-19).

<sup>38</sup> *See, e.g., Brown v. Phillips Petroleum Co.*, 838 F.2d at 456 (“The inherent differences between statutory fee and common fund cases could justify a trial judge’s decision to assign different relative weights to those factors in the two types of cases.”).

<sup>39</sup> *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001).

<sup>40</sup> Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, 3d Ed., 21 (2010) [hereinafter Class Action Pocket Guide].

<sup>41</sup> *See, e.g., In re Trans Union Corp. Privacy Litig.*, 2011 U.S. App. LEXIS 684, at \*18 (7th Cir. 2011) (Posner, J.).

<sup>42</sup> *See, e.g., Robert Klonoff & Mark Hermann, The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 Tul. L. Rev. 1695, 1698-1705 (2006).

<sup>43</sup> Class Action Pocket Guide, *supra* note 40, at 34-35.

<sup>44</sup> *See* Affidavit of Dr. Andrew Safir, Mar. 26, 2010.

<sup>45</sup> Fitzpatrick 2010 Study, *supra* note 34, at 15-17. *In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 351-52 (N.D. Ga. 1993); *Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003) (“where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained . . . courts include such relief . . . for purposes of applying the percentage method of determining fees”); *Shaffer v. Continental Cas. Co.*, 362 Fed.Appx. 627 (2010); *Pinto v. Princess Cruise Lines, Ltd.*, 513 F.Supp.2d 1334, 1343 (S.D. Fla. 2007) (“[W]hen determining the total value of a class action settlement for purposes of calculating the attorneys’ fee award, courts usually consider not only the compensatory relief, but also the economic value of any prospective injunctive relief obtained for the class.”); *Sheppard v. Consol. Edison Co. of New York, Inc.*, No. 94-CV-0403(JG), 2002 WL 2003206, at \*7 (E.D.N.Y. Aug. 1, 2002) (in valuing total settlement for percentage-based attorneys’ fee award, the court included \$6.745 million in monetary relief and “an estimated \$5 million in non-monetary, injunctive relief”); *Dewey v. Volkswagen of America*, 728 F.Supp.2d 546, 593 (D. N.J. 2010) (granting a POF fee award after calculating total value of benefits to class, including injunctive relief); *McCoy v. Health Net, Inc.*, 569 F.Supp.2d 448, 487 (D. N.J. 2008) (using POF where estimated value of injunctive relief was included in total value of the settlement).

<sup>46</sup> Settlement Agreement, ¶¶ 7.1, 7.3, 7.4.

<sup>47</sup> *See, e.g., In re: Lawnmower Engine Horsepower Marketing & Sales Practices Litig.*, 2010 US Dist. LEXIS 87285 (E.D. Wis. 2010) (citing Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F.L. Rev. 879 (2008), and relying on Eisenberg & Miller II, *supra* note 34); *In re Cabletron Sys. Sec. Litig.*, 239 F.R.D. 30, 43 (D.N.H. 2006) (performing its own survey of published opinions); *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 864 n.30 (E.D. La. 2007) (relying on Eisenberg & Miller study, *supra* note 33)); *Harman v. Lymphomed, Inc.*, 787 F. Supp. 772 (N.D. Ill. 1992) (citing 1990 empirical study); *Spicer v. Chicago Board Options Exch.*, 844 F. Supp. 1226 (N.D. Ill. 1993) (citing Third Circuit Task Force Report, *supra* note 24, at 247 n. 32).

<sup>48</sup> Fitzpatrick 2010 Study, *supra* note 34, at 25.

<sup>49</sup> *Id.* at 23, 24, 27, 29, 30.

<sup>50</sup> Eisenberg & Miller, *supra* note 33, at 8; Eisenberg & Miller II, *supra* note 34, at 265; Theodore Eisenberg, Geoffrey Miller & Michael A. Perino, *A New Look at Judicial Impact: Attorneys’ Fees in Securities Class Actions after Goldberger v. Integrated Resources, Inc.*, 29 Wash. U. J.L. & Pol’y 5, 14-24 (2009); Michael A. Perino, *Markets and Monitors: The Impact of Competition and Experience on Attorneys’ Fees in Securities Class Actions*, available at <http://ssrn.com/abstract=870577>.

<sup>51</sup> Eisenberg & Miller, *supra* note 33.

<sup>52</sup> Eisenberg & Miller II, *supra* note 34.

<sup>53</sup> *Id.* at 250, 259, 260, 262.

54 Stuart J. Logan, Jack Moshman, & Beverly C. Moore, Jr., *Attorney Fee Awards in Common Fund Class*  
*Actions*, 24 Class Action Rep. 167 (2003).

55 *Id.* at 168.

56 *Ashley v. Regional Transp. Dist. & Amalgamated Transit Union Division*, Civ. No. 05-cv-01567-WYD-  
 BNB, 2008 WL 384579, at \*8 (D. Colo. Feb. 11, 2008) (citing *In re Copley Pharm., Inc.*, 2000 U.S.App. LEXIS  
 25245 (10th Cir. 2000) (13%); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir.1994) (22.5%)).

57 Fitzpatrick 2010 Study, *supra* note 34, at 34.

58 *See, e.g., Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir.1988).

59 *Ramah Navajo Chapter v. Babbitt*, 50 F.Supp.2d 1091, 1106 (D. N.M. 1999).

60 *Id.*

61 *Brown v. Phillips Petroleum Co.*, 838 F.2d at 456.

62 Affidavit of Dr. Andrew Safir, Mar. 26, 2010.

63 *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979-80 (7th Cir. 2003) (Easterbrook, J.).

64 *Id.* at 978-79 (“So it is not possible to say, without other evidence of a kind missing in this record, that ...  
 the 22% contingent fee agreed to in arms’ length transactions between well informed parties in this case is ‘too  
 high.’”).

65 *Brown v. Phillips Petroleum Co.*, 838 F.2d at 456.

66 *Id.*

67 *In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 350 (N.D. Ga. 1993) (noting that “the  
*Johnson* factors continue to be appropriately used in evaluation, setting, and reviewing percentage fee awards  
 in common fund cases . . . . [T]he prevailing determinant of the fee to be awarded is the measure of the recovery  
 achieved by counsel”) (citations omitted).

68 *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983).

69 Class Action Pocket Guide, *supra* note 40, at 33 (citing the 2003 Committee Note to Rule 23(h)).

70 *Oppenlander et. al. v. Standard Oil Co.*, 64 F.R.D. 597, 616 (D. Colo. 1974).

71 *See, e.g.,* 151 Cong. Rec. S 999, 1001 (2005) (“[I]t has become all too common for certain State courts to  
 approve proposed settlements where class members receive little or nothing of value.”); 151 Cong. Rec. H 646  
 (2005) (“Lawyers go file a class-action lawsuit and collect millions of dollars, ... and the clients, who they barely  
 know, most times they have never even met most of these folks, those clients are receiving pennies.”); Denise  
 Martin et al., National Econ. Research Ass’n, *Recent Trends IV: What Explains Filings and Settlements in*  
*Shareholder Class Actions* 10-11 (NERA 1996) (finding that the average settlement comprises between 9% and 14%  
 of plaintiffs’ claimed damages).

## RÉSUMÉ

### **ROBERT H. KLONOFF**

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Date of Birth: March 15, 1955  
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### **EDUCATION:**

J.D., Yale University, 1979

A.B., University of California, Berkeley, 1976, Majored in Political Science/Economics  
(Highest Honors)

### **WORK EXPERIENCE:**

#### **Current Position:**

Dean and Professor of Law, Lewis & Clark Law School (since July 1, 2007)

#### **Prior Positions:**

Douglas Stripp/Missouri Endowed Professor of Law, University of Missouri-Kansas City School of Law (from August 2003-June 2007)

Jones Day, Washington, D.C. (Partner, 1991-July 2003; Of Counsel, 1989-1991, August 2003-June 2007)

Adjunct Professor of Law, Georgetown University Law Center (class action law and practice) (1999-2003)

Visiting Professor of Law, University of San Diego School of Law (1988-1989)

Assistant to the Solicitor General of the United States (1986-1988)

Assistant United States Attorney (Criminal Division, District of Columbia) (1983-1986)

Associate, Arnold & Porter, Washington, D.C. (1980-1983)

Law Clerk to the Honorable John R. Brown, Chief Judge, United States Court of Appeals for the Fifth Circuit (1979-1980)

Summer Associate, Baker & Botts, Houston, and Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C. (1978)

Summer Associate, Sidley & Austin, Washington, D.C. (1977)

**SPECIAL HONORS AND ACHIEVEMENTS:**

Associate Reporter, American Law Institute's Principles of the Law of Aggregate Litigation (class action project; drafts presented at several annual meetings; final version approved by full ALI in May 2009 annual meeting and published in May 2010)

Fellow, American Academy of Appellate Lawyers

Fellow, American Bar Foundation

Recipient, 2007 Award for Outstanding UMKC Law Professor (based on vote of 3d year class)

2007 UMKC Law School Commencement Speaker (based on vote of 3d year class)

Recipient, 2006 UMKC Law School Elmer Pierson Teaching Award for Most Outstanding Teacher in the Law School (selected by the Dean)

Recipient, 2005 President's Award for Outstanding Service from the UMKC Law School Foundation

Reporter, 2005 National Conference on Appellate Justice (co-sponsored by Federal Judicial Center, National Center for State Courts, and other organizations)

Co-Recipient, District of Columbia Bar's Frederick B. Abramson Award for Superior Service to the Community (June 1998)

Attorney General's Special Achievement Award for Outstanding Work as an Assistant to the Solicitor General of the United States (1986, 1987)

Attorney General's Special Achievement Award for Outstanding Work as an Assistant United States Attorney (1984, 1985)

The Benjamin N. Cardozo Prize for Best Moot Court Brief for Academic Year 1978-1979, Yale Law School

Semi-Finalist, Moot Court Oral Argument, Yale Law School (Fall, 1978)

Phi Beta Kappa

U.C. Berkeley's Most Outstanding Political Science Student (1976)

The Edward Kraft Award for Outstanding Work as a Freshman Student, U.C. Berkeley (1974)

**MEMBERSHIPS:**

U.S. Supreme Court Bar

Various Federal Circuit and District Courts

District of Columbia Bar

Missouri Bar

American Law Institute

American Bar Association

American Bar Association Committee on Class Actions & Derivative Suits (Section of Litigation)

**PUBLICATIONS:**

**Books:**

Klonoff, *Class Actions and Other Multi-Party Litigation in a Nutshell* (Thomson West 4th ed.) (2011) (forthcoming)

Klonoff, Bilich & Malveaux, *Class Actions and Other Multi-Party Litigation: Cases and Materials* (Thomson West 3d ed. 2011) (with teacher's manual) (forthcoming)

Klonoff (associate reporter), *Principles of the Law of Aggregate Litigation*, American Law Institute Publications (2010) (along with Samuel Issacharoff, reporter, and associate reporters Richard Nagareda, and Charles Silver)

Castanias & Klonoff, *Federal Appellate Practice and Procedure in a Nutshell* (Thomson West) (2008)

Klonoff & Colby, *Winning Jury Trials: Trial Tactics and Sponsorship Strategies* (NITA 3d ed, 2007)

Klonoff, *Class Actions and Other Multi-Party Litigation in a Nutshell* (Thomson West 3d ed.) (2007)

Klonoff, Bilich & Malveaux, *Class Actions and Other Multi-Party Litigation: Cases and Materials* (Thomson West 2d ed. 2006) (with teacher's manual)

Klonoff, *Class Actions and Other Multi-Party Litigation in a Nutshell* (Thomson West 2d ed. 2004)

Klonoff & Colby, *Winning Jury Trials: Trial Tactics and Sponsorship Strategies* (Lexis Nexis 2d ed. 2002)

Klonoff & Bilich, *Class Actions and Other Multi-Party Litigation: Cases and Materials* (West Group 2000) (with teacher's manual; supplemented annually)

Klonoff, *Class Actions and Other Multi-Party Litigation in a Nutshell* (West Group 1999)

Klonoff & Colby, *Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials* (Michie Co. 1990)

**Articles and Book Chapters:**

*Introduction and Memories of a Law Clerk*, 47 *Houston L. Rev.* 529, 573 (2010)

*ALI's Aggregate Litigation Project Has Global Impact*, 33 *ALI Reporter* 7 (fall 2010)

Book Review, *In the Public Interest*, 39 *Env. Law* 1225 (2009)

*The Public Value of Settlement*, 78 *Fordham L. Rev.* 1177 (2009)(co-author)

*Making Class Actions Work: The Untapped Potential of the Internet*, 69 *U. Pitt. L. Rev.* 727 (co-author)(2008), adapted and published in 13 *J. Internet Law* 1 (2009)

*The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 *Tul. L. Rev.* 1695 (co-author) (2006) (part of a symposium on class actions)

*The Twentieth Anniversary of Phillips Petroleum v. Shutts, Introduction to the Symposium*, 74 *UMKC L. Rev.* 433 (2006) (part of a symposium on class actions)

*The Adoption of a Class Action Rule: Some Issues for Mississippi to Consider*, 24 *Miss. C. L. Rev.* 261 (2005) (part of a symposium on class actions)

*Antitrust Class Actions: Chaos in the Courts*, 11 *Stan. J.L. Bus. & Fin.* 1 (2005), reprinted in *Litigation Conspiracy: An Analysis of Competition Class Actions* (Stephen G.A. Pitel ed. Irwin Law 2006), and 3 *Canadian Class Action Review* 137 (2006) (part of a collection of papers presented on April 1, 2005, at a competition class action symposium sponsored by the University of Western Ontario College of Law)

*The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 *Mich. St. L. Rev.* 671 (2004) (part of a symposium on class actions)

*Class Action Rules — Are They Driven by Substance?*, 1 Class Action Litigation Report 504 (Nov. 10, 2000) (co-author)

*Response to May 2000 Article on Sponsorship Strategy*, 63 Tex. B.J. 754 (Sept. 2000) (co-author)

*A Look at Interlocutory Appeals of Class Certification Decisions Under Rule 23(f)*, 1 Class Action Litigation Report 69 (May 12, 2000) (co-author)

*The Mass Tort Class Action Gamble*, 7 Metro. Corp. Counsel 1, 8 (Aug. 8, 1999) (co-author)

“Legal Approaches to Sex Discrimination” (co-author), in H. Landrine & E. Klonoff, *Discrimination Against Women: Prevalence, Consequences, Remedies* (Sage Pub. 1997)

*Sponsorship Strategy: A Reply to Floyd Abrams and Professor Saks*, 52 Md. L. Rev. 458 (1993) (co-author)

*A Trial Lawyer’s Roadmap for Handling Bad Facts: The Role of Credibility*, 16 Trial Diplomacy Journal 139 (July/Aug. 1993) (co-author)

*Opening Statement*, 17 Litigation 1 (ABA Spring 1991) (co-author)

Contributing Editor, *Criminal Practice Institute Trial Manual*, Young Lawyers Section, Bar Ass’n of D.C. (1986)

*The Congressman as Mediator Between Citizens and Government Agencies: Problems and Prospects*, 15 Harv. J. Legis. 701 (1979)

*A Dialogue on the Unauthorized Practice of Law*, 25 Villanova L. Rev. 6 (1979) (co-author)

*The Problems of Nursing Homes: Connecticut’s Non Response*, 31 Admin. L. Rev. 1 (1979)

**SIGNIFICANT LEGAL EXPERIENCE:**

Argued eight cases before the U.S. Supreme Court

Authored dozens of U.S. Supreme Court filings (certiorari petitions, certiorari oppositions, merits briefs, reply briefs)

Briefed and argued numerous cases before various U.S. circuit and district courts and state trial and appellate courts

Tried dozens of cases (primarily jury trials)

Handled more than 100 class action cases as counsel

Served as an expert witness in several class action cases

Worked extensively with testifying and consulting experts on class action issues, including economists, securities experts, medical and scientific experts, and leading academics

Presented more than 100 cases to the grand jury while serving as an Assistant U.S. Attorney

Handled hundreds of sentencing hearings, preliminary hearings, and probation revocation hearings

### **SIGNIFICANT SPEAKING ENGAGEMENTS**

Speaker on Class Actions, Seoul National University School of Law (May 18, 2010)

Keynote Speaker (addressing US Supreme Court confirmation process), Alaska Bar Annual Meeting (April 28, 2010)

Speaker, Conference on the Future of Animal Law, Harvard Law School (April 11, 2010)

Speaker, Conference on Aggregate Litigation: Critical Perspectives, George Washington University Law School (Mar. 12, 2010)

Speaker, U.S. Supreme Court Confirmation Process, Multnomah County Bar Association and City Club of Portland, (Sept. 30, 2010)

Lecturer on class actions, American Legal Institutions, and American Legal Education at National Law Schools of India in Bangalore, Hyderabad, Calcutta, Jodhpur, and Delhi (August 2009)

Speaker, China/US Conference on Tort and Class Action Law, Renmin University of China School of Law, Beijing, China (July 11-12, 2009)

Speaker on class actions, Southeastern Association of Law Schools annual meeting, Palm Beach, Florida (August 1, 2008)

Speaker on class actions, National Foundation for Judicial Excellence (meeting of 150 state appellate court judges), Chicago, Illinois ((July 12, 2008)

Speaker on class actions, Practising Law Institute, New York, NY (July 10, 2008)

Speaker at Conference on Class Actions in Europe and North America, sponsored by New York University School of Law, the American Law Institute, and the European University Institute, Florence, Italy (June 13, 2008)

Speaker on class actions at the American Bar Association Tort and Insurance Section Meeting, Washington, D.C. (Oct. 26, 2007)

Speaker on antitrust class actions at the American Bar Association's Annual Antitrust Meeting, Washington D.C. (April 18, 2007)

Chair, Organizer, and Moderator of Class Action Symposium at UMKC School of Law (April 7, 2006) (other speakers (26 in all) included, *e.g.*, Professors Arthur Miller, Edward Cooper, Sam Issacharoff, Geoffrey Miller, and Linda Mullenix, as well as several prominent federal judges and practicing lawyers)

Speaker on class actions, Missouri CLE (Nov. 18, 2005)

Speaker on class actions, Practising Law Institute (July 29, 2005)

Speaker on class actions, Kansas CLE (June 23, 2005)

Speaker on class actions at Bureau of National Affairs Seminar on the Class Action Fairness Act of 2005 (June 17, 2005)

Visiting lecturer on class actions, Peking University (May 30-June 3, 2005)

Speaker on oral argument, American Bar Association 2005 Section of Litigation Annual Conference (April 22, 2005) (part of panel including Second Circuit Chief Judge Walker and several others)

Speaker on class actions, Federal Trade Commission/Organization for Economic Co-operation and Development, Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace (April 19, 2005)

Speaker at antitrust class action symposium, University of Western Ontario College of Law (April 1, 2005)

Speaker at class action symposium, Mississippi College of Law (February 18, 2005)

Speaker on class actions, Practising Law Institute (July 30, 2004)

Visiting lecturer on class actions, Peking University (June 2004)

Visiting lecturer on class actions, Tsinghua University (June 2004)

Speaker at class action symposium, Michigan State University (April 16-17, 2004)

Speaker on U.S. Supreme Court advocacy, David Prager Advanced Appellate Institute (Kansas City Metropolitan Bar Association) (Feb. 27, 2004)

Speaker on class actions, Institute of Continuing Legal Education in Georgia (Oct. 24, 2003)

Speaker on class actions, Practising Law Institute (July 31, 2003)

Speaker on class actions, Practising Law Institute (Aug. 5, 2002)

Speaker on class actions, Practising Law Institute (Aug. 16, 2001)

Speaker on many occasions throughout the country on "Sponsorship Strategy" (1990-present) and advocacy before the U.S. Supreme Court (1988-present)

**OTHER LEGAL ACTIVITIES:**

Member, Board of Directors, Citizens' Crime Commission (Portland, Oregon)

Member, Advisory Committee, Lawyers' Campaign for Equal Justice (Portland, Oregon)

Advisory Board, The Flawless Foundation (an organization that serves troubled children)

Served on numerous UMKC School of Law committees, including Programs, (Chair), Promotion and Tenure, Appointments, and Smith Chair Appointment

Chair of pro bono program for all 27 offices of Jones Day (2000-2004); also previously Chair of Washington office pro bono program (1992-2003)

Organizer and coordinator of class action symposium edition for spring 2006 UMKC Law Review (contributing authors include prominent law professors, judges, and practitioners)

Member, Board of Directors, Washington Lawyers' Committee for Civil Rights and Urban Affairs (2000-2003)

Member, Board of Directors, Bread for the City (a D.C. public interest organization providing medical, legal, and social services) (2001-2003)

Master, Edward Coke Appellate Practice Inn of Court in Washington, D.C. (other participants include Ted Olson, Seth Waxman, Ken Starr, Walter Dellinger, and several sitting appellate judges) (2001-2003)

Advisory Board Consulting Editor, *Class Action Litigation Report* (BNA)

Contributing Editor, *Class Actions & Derivative Suits* (American Bar Association, Section of Litigation)

Member, D.C. Court of Appeals Committee on Unauthorized Practice of Law (1997-2000)

Handled and supervised numerous pro bono matters (*e.g.*, death penalty and other criminal defense, civil rights, veterans' rights)

Helped to develop walk-in free legal clinic in D.C.'s Shaw neighborhood

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**IN RE: MOTOR FUEL TEMPERATURE )  
SALES PRACTICES LITIGATION )  
(This Document Relates to All Cases) ) MDL No: 1840  
) No: 07-md-1840-KHV-JPO**

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**MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND  
CLASS REPRESENTATIVES INCENTIVE AWARDS  
AND MEMORANDUM IN SUPPORT THEREOF**

**EXHIBIT B**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**IN RE: MOTOR FUEL TEMPERATURE )  
SALES PRACTICES LITIGATION )  
(This Document Relates to All Cases) ) MDL No: 1840  
) No: 07-md-1840-KHV-JPO**

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**DECLARATION OF ROBERT A. HORN IN SUPPORT OF PLAINTIFFS' MOTION  
FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND  
CLASS REPRESENTATIVES INCENTIVE AWARDS**

I, Robert A. Horn, hereby declare as follows:

I am an active member of the Missouri Bar, a founding partner of the law firm of Horn Aylward & Bandy, LLC and the Court-appointed Chairman of the Lead Counsel Group for Plaintiffs in this matter. This declaration is based on my personal knowledge and if called as a witness I could, and would, testify competently thereto. I make this declaration in support of Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Class Representative Incentive Awards ("Plaintiffs Petition for Fees").

1. Attached hereto as Exhibit C is a true and correct summary of the common litigation time and expenses incurred by the Plaintiffs' Co-Lead Counsel, Plaintiffs' Liaison Counsel and Plaintiffs' Steering Committee member firms (collectively, the "PSC") in this matter, excluding time and expenses related to specific defendants, including Defendant Costco Wholesale Corp. Exhibit C was prepared by personnel in my office under my oversight and is based upon detailed and itemized billing and expense records submitted to me by the PSC at my request.

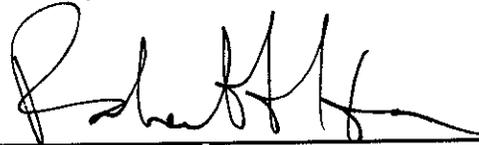
2. Attached hereto as Exhibit D is a true and correct summary of the time and expenses incurred by the PSC related to specific defendants in this matter, excluding Defendant Costco.

Exhibit D was prepared by personnel in my office under my oversight and is based upon detailed and itemized billing and expense records submitted to me by the PSC at my request.

3. Attached hereto as Exhibit E is a true and correct summary of the time and expenses incurred by the PSC related solely to Defendant Costco in this matter. Exhibit E was prepared by personnel in my office under my oversight and is based upon detailed and itemized billing and expense records submitted to me by the PSC at my request.

I declare under the penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 22<sup>nd</sup> Day of March, 2011 in Kansas City, Missouri.

A handwritten signature in black ink, appearing to read "Robert A. Horn", written over a horizontal line.

Robert A. Horn

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**IN RE: MOTOR FUEL TEMPERATURE )**  
**SALES PRACTICES LITIGATION )**  
**(This Document Relates to All Cases) )** MDL No: 1840  
**)** No: 07-md-1840-KHV-JPO

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**MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND  
CLASS REPRESENTATIVES INCENTIVE AWARDS  
AND MEMORANDUM IN SUPPORT THEREOF**

**EXHIBIT C**  
**FILED UNDER SEAL**  
**CONFIDENTIAL**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**IN RE: MOTOR FUEL TEMPERATURE )  
SALES PRACTICES LITIGATION )  
(This Document Relates to All Cases) ) MDL No: 1840  
)  
) No: 07-md-1840-KHV-JPO**

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**MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND  
CLASS REPRESENTATIVES INCENTIVE AWARDS  
AND MEMORANDUM IN SUPPORT THEREOF**

**EXHIBIT D**  
**FILED UNDER SEAL**  
**CONFIDENTIAL**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**IN RE: MOTOR FUEL TEMPERATURE )**  
**SALES PRACTICES LITIGATION )**  
**(This Document Relates to All Cases) ) MDL No: 1840**  
**) No: 07-md-1840-KHV-JPO**

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**MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND  
CLASS REPRESENTATIVES INCENTIVE AWARDS  
AND MEMORANDUM IN SUPPORT THEREOF**

**EXHIBIT E**  
**FILED UNDER SEAL**  
**CONFIDENTIAL**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**IN RE: MOTOR FUEL TEMPERATURE )  
SALES PRACTICES LITIGATION )  
(This Document Relates to All Cases) ) MDL No: 1840  
) No: 07-md-1840-KHV-JPO**

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**MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND  
CLASS REPRESENTATIVE INCENTIVE AWARDS  
AND MEMORANDUM IN SUPPORT THEREOF**

**PUBLIC, REDACTED VERSION**

Plaintiffs, for their Motion for Award of Attorneys' Fees, Expenses and Class Representative Incentive Awards ("Plaintiffs' Motion"), state as follows:

**I. OVERVIEW**

Costco Wholesale Corporation has agreed to do what no motor fuel retailer has ever agreed to do in the United States; it has agreed to compensate consumers for the effect that temperature has on motor fuel. Temperature compensation is already systemic in the petroleum industry, from the oil well to the refinery, from the refinery to the terminal and from the terminal to the gas station. But until now, the industry's use of temperature compensation ended at the station level and consumers were neither sold a uniform compensated gallon, nor told they were not receiving a uniform gallon.

Now, with this Settlement, Costco has agreed to remedy that problem. Costco has agreed to install temperature-compensation devices on a phased schedule in all states where it purchases fuel on a temperature-compensated basis. That remedy is groundbreaking,

substantive and tangible. Indeed, expert economist Dr. Andrew Safir has calculated that Costco's utilization of automatic temperature compensation ("ATC") equipment will result in a net Class benefit that exceeds \$100,000,000,<sup>1</sup> a calculation that Costco has not disputed.

This beneficial outcome is the result of hard work and diligent efforts by Plaintiffs and their counsel in the face of concerted and rigorous opposition from the retail motor fuel industry. The work that went into this Settlement, and this case, has been very substantial. Now, Plaintiffs and their counsel request that the Court award them attorneys' fees and expenses in recognition of their work. Specifically, Plaintiffs seek an award of reasonable attorneys' fees and expenses in the amount of \$10,000,000 to be paid by Costco within fifteen (15) days after the effective date of the Settlement. Any attorneys' fee this Court awards will be paid directly by Costco, and will not reduce the Settlement benefits provided to the Class.<sup>2</sup> This request for fees and expenses is supported by the Declaration of Prof. Robert Klonoff, attached hereto.<sup>3</sup>

Class Plaintiffs also request an incentive award in recognition of their services and effort. Like the requested award for attorneys' fees and expenses, the request for Class Plaintiff incentive awards is fair and reasonable given the significant time and attention the named Class Plaintiffs have devoted to this litigation.

## **II. FACTUAL AND PROCEDURAL HISTORY**

Previously, this Court granted preliminary approval of this Settlement, and appointed the undersigned as Class Counsel for the Settlement Class.<sup>4</sup> Costco provided notice of the settlement

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<sup>1</sup> See Declaration of Dr. Andrew Safir, previously submitted to the Court as Exhibit 1 to Doc. #1620 ("Safir Decl.").

<sup>2</sup> The reasonableness of Plaintiffs' fee request is also manifest from the fact that of the 10,134,738 class members who received direct notice of this Settlement pursuant to the Court's prior Order (Doc. # 1284), only 29 filed an objection (not all of which took issue with the requested fee), which equates a 0.0003% objection rate. In fact, some objectors agreed that if the Settlement provides the intended benefits and relief, Class Counsels' fee request is "imminently fair." See Objection of Amy Alkon, Doc. # 1578, pg. 24.

<sup>3</sup> Exhibit A ("Klonoff Dec.").

<sup>4</sup> See Doc. # 1273. Plaintiffs have previously set forth the detailed factual and procedural history of the instant litigation and the Settlement, and Plaintiffs incorporate herein by reference the background information contained in

to the Settlement Class (over 10 million class members) and subsequently, twenty-nine objections to the Settlement were filed. On April 1, 2010, this Court heard oral argument from the parties regarding the fairness of the Settlement, as well as from several objectors who appeared in person at the fairness hearing. On August 13, 2010, this Court entered its Order [Doc. # 1707] overruling all objections but finding two issues that prevented the Court from granting final approval: the inclusion of states where Costco does not operate and Plaintiffs' request that five Class members represent all Class members from all states at issue. *Id.* at 35-36, 44-45.

On Friday, February 4, 2011, Plaintiffs filed their Renewed Motion for Final Approval [Doc. # 1769], unopposed by Costco, and submitted the parties' Amended Settlement Agreement to the Court, which resolves the two problematic issues the Court previously noted with respect to this Settlement.

### **III. COSTCO HAS CONTRACTUALLY AGREED TO PAY AN ATTORNEYS' FEE**

Costco has contractually agreed to pay an attorneys' fee. Therefore, the only relevant question for this Court is whether Plaintiffs' fee request is "reasonable."<sup>5</sup>

Section 7.1 of the Settlement Agreement states:

**7.1 Application. Class Counsel may apply to the District Court for an award of fees and costs in this Action (the "Fee Application"). Costco agrees to pay any fees and costs awarded by the Court and such payment shall not reduce any of Costco's obligations to the Settlement Class pursuant to this Agreement.<sup>6</sup> [emphasis added]**

This language expressly creates, by contract and agreement of the parties, a right to seek attorneys' fees and costs that is independent of any underlying fee-shifting statute or common

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their Unopposed Motion for Preliminary Approval of Class Settlement (Doc. # 1015), Unopposed Motion for Final Approval of Class Action Settlement (Doc. # 1620) and Renewed Motion for Final Approval of Class Action Settlement (Doc. #1769), which are incorporated herein by reference.

<sup>5</sup> Whether a plaintiff is entitled to an award of attorney's fees and expenses is, of course, left to the sound discretion of the district court. *Hall v. Cole*, 93 S.Ct. 1943, 1951 (1973); *Gottlieb v. Barry, et al.*, 43 F.3d 474, 486 (10th Cir. 1994).

<sup>6</sup> See Settlement Agreement attached to Plaintiffs' Renewed Motion for Final Approval of Class Action Settlement, Doc. # 1769, as Exhibit A.

law principle. Costco has agreed: (1) Class Counsel are entitled to seek a fee; (2) Costco will pay, and not appeal, whatever attorneys' fees and costs this Court awards, and (3) Costco's obligation to pay an attorneys' fee is independent, and will not impair, Costco's obligation to install ATC equipment pursuant to the Settlement. The parties' fee agreement was confirmed by Costco's counsel during the April 1, 2010 fairness hearing, where he specifically stated, "We've agreed in the agreement to pay reasonable fees as awarded by this Court . . . We will pay the fees that this Court says are fair and reasonable."<sup>7</sup>

There can be no question that such attorneys' fee agreements are permissible. In fact, they are specifically allowed by Rule 23 of the Federal Rules of Civil Procedure which states, in pertinent part:

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. (Emphasis added).

Therefore, the only question pertinent to the instant Motion is whether the requested fee is "reasonable."<sup>8</sup>

Plaintiffs' fee request is reasonable when analyzed under any one, or both, of two separate methodologies: (1) a percentage of the common settlement benefits conferred, or (2) application of the *Johnson v. Georgia Highway Express, Inc.* factors.<sup>9</sup>

#### **IV. CLASS COUNSELS' FEES ARE REASONABLE WHEN MEASURED AS A PERCENTAGE OF THE COMMON BENEFIT CONFERRED**

Plaintiffs respectfully request an attorneys' fee in the form of a percentage of the value of the Settlement benefits conferred on the Class.

<sup>7</sup> Transcript, Doc. #1696, pgs. 91-92 (emphasis added).

<sup>8</sup> The instant situation is not an anomaly; the Ninth Circuit faced a virtually identical scenario in *Wing v. Asarco Inc.*, 114 F.3d 986 (9th Cir. 1997), where the parties agreed, in their class action settlement agreement, that the defendant would pay the reasonable attorney's fee set by the Court. The *Wing* Court recognized that because the parties' agreement placed no limits on the district court's discretion to determine the fee, the only restriction on the district court's fee analysis was that the fee must be "reasonable." *Id.* at 988.

<sup>9</sup> 488 F.2d 714 (5th Cir. 1974).

1. Federal Court Jurisprudence Supports The Percentage Approach

As explained by Prof. Klonoff in the attached declaration, measuring an attorneys' fee award in this case by using a percentage of the fund ("POF") methodology is proper and supported by applicable legal authorities.<sup>10</sup> Although this Court is aware of the doctrine allowing plaintiffs to obtain a percentage attorney fee from a "common fund" obtained for a class,<sup>11</sup> percentage attorney fees are also recognized under the "common benefit" doctrine when the settlement provides future settlement benefits that can be valued. The Tenth Circuit has characterized the common benefit doctrine as allowing an "award of attorney's fees to plaintiffs in class action and derivative suits" when the plaintiff's success confers "a substantial benefit" on the members of a particular class of individuals.<sup>12</sup>

Although Plaintiffs need not rely on the common benefit doctrine as the source of their fee request (since Costco has contractually agreed to pay a fee), common benefit cases are instructive in determining whether Plaintiffs' fee request is reasonable for a number of reasons. First, these cases recognize that attorney fees based upon a percentage of a settlement's value are permissible, even though the benefit conferred is nonpecuniary in nature.<sup>13</sup> Indeed, courts considering the common benefit doctrine have stated:

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<sup>10</sup> Klonoff Dec., pgs. 1-3

<sup>11</sup> See *West, et al. v. First Franklin Fin. Corp.*, Order, Case No. 2:06-CV-02064-KHV-WO (D. Kan. July 31, 2007).

<sup>12</sup> *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1444 (10<sup>th</sup> Cir. 1995). In addition to the Tenth Circuit, many other courts have discussed or recognized the common benefit doctrine as a potential source for attorney fees. *Amalgamated Clothing v. Wal-Mart Stores, Inc.*, 54 F.3d 69, 71 (2<sup>nd</sup> Cir. 1995) ("The common-benefit rule permits a prevailing party to obtain reimbursement of attorney's fees in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class."); *Johnson v. HUD*, 939 F.2d 586, 590 (8<sup>th</sup> Cir. 1991) ("[A] prevailing party cannot recover attorney's fees from a losing party absent express statutory authority or bad faith or unless the litigation involves a common fund or confers a substantial benefit on an ascertainable group."); *Southerland v. International Longshoremen's Union*, 845 F.2d 796, 798 (9<sup>th</sup> Cir. 1988) ("The 'substantial benefit' principle is based on the premise that a successful plaintiff should be able to spread the costs of his litigation among those who benefited from the successful outcome."); *Walker v. Teamsters Local No. 71*, 830 F. Supp. 291, 292 (W.D.N.C. 1993) ("The rationale [for the common benefit doctrine] is that, by prevailing, the plaintiff has also accomplished a victory for the other members of the [ascertainable class].")

<sup>13</sup> *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 169-70 (3<sup>rd</sup> Cir. 1975).

[w]hat is of utmost importance here is the nature and quality of the common benefits attained from litigation rather than any particular quantification into dollar amounts. As a result, the fact that the plaintiffs did not procure damages in their action against the (defendant) is inapposite to our analysis and would not, on its own, preclude fee-shifting under the common benefit doctrine.<sup>14</sup>

Second, common benefit cases are instructive because they recognize that an attorneys' fee can be awarded even if the future settlement benefits are contingent and not guaranteed. For example, in *Wing v. Asarco Inc.*,<sup>15</sup> the Ninth Circuit upheld an attorneys' fee that was based upon a percentage of a settlement's value when the vast majority of that value was contingent. Indeed, a leading common benefit case from the U.S. Supreme Court, *Mills v. Electric Auto-Lite Co.*,<sup>16</sup> makes clear, "[t]he fact that this suit has not yet produced, **and may never produce**, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale."<sup>17</sup> A similar reasoning was applied in *Hanlon v. Chrysler Corporation*,<sup>18</sup> where the Ninth Circuit upheld a district court's settlement approval and attorneys' fee award, despite the fact that the settlement benefits were subject to future suspension based upon potential government action and, therefore, the plaintiffs' efforts could theoretically produce no net benefit to the class.<sup>19</sup>

Injunctive relief that truly benefits the class "is not an outcome to be sneered at."<sup>20</sup> As the Federal Judicial Center ("FJC") has noted, "by putting an end to illegal practices, an injunction will benefit more class members than a small award."<sup>21</sup> The FJC has emphasized that if injunctive relief can be given monetary value using objective criteria, such relief should be so

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<sup>14</sup> *Polonski v. Trump Taj Mahal Assoc., et al.*, 137 F.3d 139, 146 (3<sup>rd</sup> Cir. 1998).

<sup>15</sup> 114 F.3d 986.

<sup>16</sup> 90 S.Ct. 616 (1970).

<sup>17</sup> *Id.* at 625 (emphasis added).

<sup>18</sup> 150 F.3d 1011, 1029 (9<sup>th</sup> Cir. 1998).

<sup>19</sup> *Id.*

<sup>20</sup> *In re Mexico Money Transfer Litigation*, 267 F.3d 743, 748 (7<sup>th</sup> Cir. 2001).

<sup>21</sup> Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, 3d Ed., 21 (2010).

valued. For instance, the FJC notes, “an injunction against an overcharge may be valued at the amount of the overcharge multiplied by the number of people likely to be exposed to the overcharge in the near future.”<sup>22</sup> As Prof. Klonoff explains, injunctive relief is as capable of providing real value to consumers as monetary relief.<sup>23</sup> For purposes of determining a reasonable attorneys’ fee, when that injunctive relief can be valued it should be treated like a fund “even if it does not include a pot of money” for the class.<sup>24</sup> That recognition of the preference for the POF approach has been recognized by the American Law Institute (“ALI”) in its Aggregate Litigation Project, where the ALI adopted the POF approach as “the method [that should be] utilized in most common fund cases, with the percentage being based on both the monetary and the nonmonetary value of the judgment or settlement.”<sup>25</sup>

In essence, these authorities teach that a reasonable attorneys’ fee can be based upon a percentage value of future settlement benefits, even when those future settlement benefits are contingent in nature<sup>26</sup> and stem from injunctive relief.

Costco may argue that the proper attorneys’ fee calculation methodology is the “lodestar” approach. Prof. Klonoff’s testimony is also instructive for its explanation of why that approach is not advisable in situations like the instant case. As Prof. Klonoff explains, the lodestar

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<sup>22</sup> *Id.* at 34-35.

<sup>23</sup> Klonoff Dec., pg. 8.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> In fact, such fee awards can be based on total value to the Class even when some of the unclaimed common fund may revert back to the defendant. See *Williams v. MGM-Pathé Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (discussing class action settlement without expressing concern as to provision for reversion of unclaimed funds to defendant); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 816 (5th Cir. 1989) (approving settlement containing provision that unclaimed funds under consent decree would be divided between plaintiffs’ counsel and defendant); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990) (holding unclaimed amount of class action judgment against defendant may be returned to defendant “when deterrence is not a goal of the statute or is not required by the circumstances”); *In re Microsoft I-V Cases*, 135 Cal. App.4th 706, 721, 37 Cal. Rptr.3<sup>rd</sup> 660 (2006) (noting, under California law, “a court approved settlement could properly include a ‘reversion of ... funds to the defendant,’ such as the one-third reversion” of unclaimed settlement funds provided for in settlement therein) (citation omitted; ellipsis in original); Herbert Newberg & Alba Conte, 3 *Newberg on Class Actions* §§ 10:15, 10:17 (4th ed.2002) (citing cases).

approach is cumbersome and encourages overbilling as opposed to efficiency and early settlement. For those reasons, and many others, courts such as the Tenth Circuit have routinely favored the POF method rather than the lodestar method.<sup>27</sup> In Prof. Klonoff's opinion, the Court should reject any invitation to determine an attorneys' fee using the lodestar method, and utilize the POF method.<sup>28</sup>

## 2. The Settlement Provides Tangible Benefits

Since the inception of this litigation almost five (5) years ago, this case has been about the inherent unfairness in the petroleum industry's double standard of temperature compensating when they buy and sell among themselves, but refusal to temperature compensate motor fuel sold to the public. Indeed, this Court has noted that "[o]btaining injunctive relief for temperature adjusted motor fuel sales is a primary goal of plaintiffs' cases" and "[t]he proposed injunctive relief responds to plaintiffs' claims and provides the same relief which plaintiffs might obtain if they proceeded to trials."<sup>29</sup> At every stage before it gets to the consumer, the wholesale motor fuel trade allows for adjustment of motor fuel to a standard volume of 60 degrees Fahrenheit.<sup>30</sup> The temperature of the motor fuel is known at the wholesale level both to the person selling the motor fuel and the person buying the motor fuel.<sup>31</sup> The adjustment for the retailer is made on the basis of a standard gallon; defined as 231 cubic inches at 60° F.<sup>32</sup> That adjustment is made for the retailer but not for the consumer.<sup>33</sup> Indeed, consumers are not told the temperature of the motor fuel that is sold to them, and oil companies understand that, without that missing material information, consumers have no way to make an "apples to apples" comparison when they make

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<sup>27</sup> Klonoff Dec., pg. 5-6 (citing *Gotlieb v. Barry*, 43 F.3d 474 (10<sup>th</sup> Cir. 1994)).

<sup>28</sup> Klonoff Dec., pg. 6.

<sup>29</sup> Doc. #1707, pg. 41.

<sup>30</sup> See excerpts from the deposition of Defendants' expert John O'Brien, attached to Plaintiffs' Omnibus Appendix To Plaintiffs' Reply Briefs In Support Of Class Certification, Doc. #1503, as Exhibit A, pg. 134.

<sup>31</sup> Deposition of O'Brien, pgs. 141-142.

<sup>32</sup> Deposition of O'Brien, pg. 65.

<sup>33</sup> Deposition of O'Brien, pgs. 39-41.

purchasing decisions.<sup>34</sup>

That missing information matters because temperature matters. The temperature of motor fuel sold to consumers can be completely different on the same day for stations just across the street from each other, at the various pumps located at a particular station and even during the course of a single fill up at a station. In fact, according to one defense expert, it is possible for a consumer to get 90° F gas (which has less energy than a 60° gallon) from a station and pay \$3.00 per gallon and 15 minutes later, at the same station, another consumer will get gas significantly cooler, thus containing more energy, and still pay \$3.00 per gallon.<sup>35</sup> Obviously, the customer that got the 90° F \$3.00 gallon received less value. That discrepancy does not go unnoticed by oil companies, and documents obtained in this litigation prove that motor fuel retailers reap profits from selling motor fuel to consumers without compensating for temperature.<sup>36</sup>

ATC corrects this inequity. ATC adjusts each motor fuel transaction to ensure that consumers receive a fair, uniform and transparent purchase based upon the temperature of the fuel at the point of sale. Accordingly, governmental weights and measures officials, and some defendants (before this litigation began), have acknowledged that temperature correction is the most fair and equitable method of selling motor fuel:

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<sup>34</sup> See excerpts from the Deposition of the Shell Defendants' representative Hugh Cooley, attached to Plaintiffs' Response to Defendant Marathon Petroleum Company's Motion for Summary Judgment, Doc. #1371, as Exhibit 28, pgs. 170:10-172:25.

<sup>35</sup> See excerpts from the deposition of Defendants' expert Harri Kytomaa, attached to Plaintiffs' Omnibus Appendix To Plaintiffs' Reply Briefs In Support Of Class Certification, Doc. #1503, as Exhibit B, pgs. 100-106.

<sup>36</sup>



- Temperature compensation ensures that “[REDACTED]”,<sup>37</sup>  
[REDACTED],<sup>37</sup>
- Temperature compensation is the “most equitable way to sell products”,<sup>38</sup>
- Temperature compensation “would provide transparency in unit price v. volume”,<sup>39</sup>
- Temperature compensation “is a superior method of measurement”,<sup>40</sup>
- “Automatic temperature compensation would result in the same ‘gallon’ being sold at retail as it is at wholesale so that buyer and seller are both dealing in ‘net gallons’. The obvious benefit for consumers is improved retail price transparency”,<sup>41</sup>
- “If ATC were mandated for use at retail stations, consumers would be able to more accurately and fairly compare prices because variations in temperature would be corrected by the ATC equipment”,<sup>42</sup>
- Temperature compensation is “the most equitable way fuel can be sold without the buyer or seller gaining a competitive advantage”,<sup>43</sup>
- “Selling fuel adjusted to the volume at 15° C (60° F) throughout the distribution system is the most equitable way fuel can be sold without the buyer or seller gaining a competitive advantage”,<sup>44</sup>
- Temperature compensation is the “most equitable way” to sell motor fuel at retail,<sup>45</sup>
- “Determining the accurate weight or volume of an object is fundamental to ensuring fair commerce”,<sup>46</sup>

<sup>37</sup> See Document Bates No. [REDACTED], pg. 2, ¶ 9.

<sup>38</sup> See 2001 Report of the NCWM L&R Committee, pg. 7 (noting recommendation from the Northeastern Weights and Measures Association with respect to vehicle tank meters).

<sup>39</sup> See NCWM’s ATC Steering Committee January, 2008 Progress Report, pg. 31.

<sup>40</sup> *Id.*

<sup>41</sup> See December 19, 2008 Statement of Robert Atkins, San Diego County Director of Weights and Measures.

<sup>42</sup> See California Energy Commission’s 2009 Fuel Delivery Temp. Study, pg. 12.

<sup>43</sup> See 2006 Interim Report of the NCWM Laws & Regulations Committee, pg. 4.

<sup>44</sup> See NCWM L&R Committee’s 2005 Final Report, pgs. 6-7.

<sup>45</sup> See NCWM L&R Committee’s 2001 Final Report, pg. 7.

Clearly, the ATC benefits provided by this Settlement are real, tangible and will provide substantial value to the Class.

3. *The Settlement Benefits Can Be Valued*

Through this Settlement, Plaintiffs have obtained Costco's agreement to phase-in ATC pumps over a five year span. That injunctive relief cuts to the heart of Plaintiffs' claim and cures the inequity that currently plagues the retail motor fuel marketplace. And the enormity of convincing a retail motor fuel giant like Costco to change its method of sale cannot be overstated. Of the twenty-six states involved in this litigation, this settlement directly affects twenty-one of those states, including all of the largest states in terms of population, motor fuel consumption and temperatures over 60° F. Costco is one of the largest owners of retail gasoline stations in the country. In just the last eight years, in only the 14 conversion states, Costco has sold approximately \$25 billion of motor fuel and made over \$106 million by selling phantom gallons of motor fuel.

For purposes of determining a reasonable attorneys' fee as a percentage of the Settlement value, the injunctive relief that Costco has agreed to implement is clearly susceptible to valuation. Expert economist Dr. Andrew Safir analyzed economic information and developed a report regarding the value of the Settlement.<sup>47</sup> Dr. Safir utilized sales information drawn from records submitted by Costco, Costco's own estimate of its hot fuel "swellage," and historical forecasting data from the United States Energy Administration.<sup>48</sup> For example, Costco provided actual data for the state of California indicating just for the years 2008 and 2009, the difference between hot gas sold and gallons measured at 60 degrees amounted to 7,319,683 gallons of

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<sup>46</sup> See President's Address, National Conference on Weights and Measures, July 11, 2006.

<sup>47</sup> See Exhibit 1 hereto. Dr. Safir's report was previously submitted to the Court as Exhibit 1 to Plaintiffs' Motion for Final Approval, Doc. #1620.

<sup>48</sup> See Exhibit 1, pg. 3-4.

swellage, and an overcharge of \$22,088,760. Clearly, Dr. Safir's analysis was not drawn from whole cloth; it was premised on hard data.

Costco did not oppose Dr. Safir's analysis or opinion. Indeed, Costco was aware of Dr. Safir's valuation opinion before it was submitted to the Court for purposes of final approval in April, 2010, and Costco voiced no concern or objection. When Dr. Safir's opinion about the value of the Settlement was discussed during the April 1, 2010 fairness hearing on the original Settlement, Costco voiced no objection or opposition to Plaintiffs' valuation.<sup>49</sup> Rather, Costco stated:

Costco is committed to being at the low price in the markets in which it serves in which it sells gasoline. If Costco is selling gasoline at a temperature-adjusted basis in a market and we have to compete with people who are not, we're going to keep our price. I don't see Costco changing its pricing philosophy on this point. We're going to keep our price lower, and as a result, the margin that it makes on gasoline would go down.<sup>50</sup>

Costco cannot now be heard to say that Dr. Safir's analysis is erroneous or inaccurate.

#### 4. The Settlement Benefits Have Been Valued

Not only can the Settlement be valued, it has been valued. Dr. Safir has determined that Costco's implementation of ATC pumps on the phase-in schedule set forth in the Settlement will result in a net benefit to Class Members that will *exceed* \$100 million within five years after the end of the pump phase-in period.<sup>51</sup> Specifically, the amount is \$105,481,329.00. This number is conservative because: 1) it gives almost no value to the benefit that the Class will receive during the 5 year implementation period as Costco phases in ATC pumps;<sup>52</sup> 2) Dr. Safir's analysis takes

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<sup>49</sup> In that respect, the *Wing* case is analogous. 114 F.3d 986. In *Wing*, the court based an attorney fee on a percentage of a contingent settlement, which the defendant agreed had a set value. *Id.* at 990. Here, Costco has voiced no objection to Plaintiffs' valuation of this Settlement. Costco should not now be heard to say that Plaintiffs' valuation of this Settlement is inaccurate or inflated.

<sup>50</sup> Transcript of April 1, 2010 fairness hearing, pg. 57.

<sup>51</sup> See Exhibit 1 hereto.

<sup>52</sup> In other words, if Costco first installs ATC pumps at all of its California locations during the first year of the phase-in cycle, Dr. Safir's analysis has excluded all value California residents would receive until 2014.

into account the anticipated costs of installation of ATC pumps, and has deducted that cost from his analysis of the overall Class benefit;<sup>53</sup> 3) Dr. Safir's analysis only pertains to Costco's current stores, and the phase-in of ATC pumps at those locations; 4) Dr. Safir's analysis ends in 2020 even though the benefit of ATC conversion will continue indefinitely, and 5) his analysis gives no value to the benefit that consumers will receive from new Costco locations that are built in conversion states, despite the fact that under the terms of the settlement agreement, Costco is obligated to put ATC into these new stores.<sup>54</sup>

Plaintiffs' requested attorney fee of \$10,000,000 represents less than 10% of the value that Dr. Safir concluded that the Class would realize within the first few years after Costco's ATC phase-in. The actual value of the settlement only increases when other costs are included in the valuation. For example, Costco has estimated that it will spend over \$8 million to phase-in ATC pumps.<sup>55</sup> Costco has informed Plaintiffs that it has already paid \$5 million related to providing the Class with direct notice. In addition, the total value of the Settlement would also include any amounts awarded by the Court for attorneys' fees and costs. All of these factors are costs that would *ordinarily* be borne by Plaintiffs and thus, are appropriate components to consider in valuing a settlement.<sup>56</sup>

In essence, Plaintiffs' requested attorneys' fee is considerably less than 10% of the total actual value of this Settlement.

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<sup>53</sup> Exhibit 1, ¶ 13.

<sup>54</sup> It has been reported that Costco plans to open almost thirty new stores in 2011 alone. See <http://risnews.edgl.com/retail-news/Costco-to-Open-29-Stores-in-2011,-More-than-Double-its-2010-Total43698>.

<sup>55</sup> See Plaintiffs' Renewed Motion for Final Approval, pg. 5.

<sup>56</sup> See *Staton v. Boeing*, 327 F.3d 938, 975 (9th Cir. 2003) ("We conclude that where the defendant pays the justifiable cost of notice to the class-but not, as here, an excessive cost-it is reasonable (although certainly not required) to include that cost in a putative common fund benefiting the plaintiffs for all purposes, including the calculation of attorneys' fees."); *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."); *Parker v. Time Warner Entertainment Co., L.P.*, 631 F. Supp.2d 242 (E.D.N.Y. 2009)(factoring in costs of administration into total settlement value).

5. The Requested Percentage Fee Is Imminently Reasonable

An attorney fee percentage of 10% or lower<sup>57</sup> is well within the range of percentage fees awarded in class action litigation, as Prof. Klonoff explains in detail. Professor Klonoff demonstrates that based upon empirical data compiled from previous class action settlements, the instant fee request is well within, and actually far below, the average fee percentage.<sup>58</sup> That conclusion is supported by the recent findings of Judge Posner in *In re Trans Union Corp. Privacy Litigation*,<sup>59</sup> where he had occasion to survey the landscape of class action percentage fee awards,<sup>60</sup> observing that in cases that settled for value between \$79 million and \$190 million (the range within which this Settlement falls), the average attorneys' fee awards were approximately 17.6-19.5% of the settlement.<sup>61</sup> Thus, even if this Court were to conclude that the value of the benefits obtained by Plaintiffs in this Settlement will be **half** of what Dr. Safir has concluded (i.e., \$52,740,664), the percentage of Plaintiffs' requested fee only rises to 19%, which is what Judge Posner noted to be within the nationwide *average*.<sup>62</sup> Indeed, courts in this District have routinely awarded attorney fees based on much larger percentages of the overall settlement value.<sup>63</sup>

Moreover, the actual value of Plaintiffs' requested fee is further diminished by other

<sup>57</sup> Plaintiffs generally refer to the requested fee percentage as 10% of the settlement benefits, while Prof. Klonoff scrutinizes the requested fee in greater detail and calculated that the true attorney fee is actually only 8.4% of the settlement benefits calculated by Prof. Safir. See, Klonoff Dec., pg. 9-10.

<sup>58</sup> Klonoff Dec., pgs. 10-11.

<sup>59</sup> 2011 WL 117108 (7th Cir. Jan. 14, 2011).

<sup>60</sup> *Id.* at 3 (quoting Theodore Eisenberg & Geoffrey P. Miller, "Attorney Fees In Class Action Settlements: An Empirical Study," 1 *J. Empirical Legal Stud.* 27, 51 (2004)).

<sup>61</sup> In reversing the lower court's fee award and remanding for entry of an increased fee award, the *In re Trans Union* Court held that the district court had improperly discounted the value of future injunctive relief and, in fact, had failed to demonstrate why the attorney's were not entitled to value the injunctive relief the same as the cash fund that had been established. *Id.* at 6.

<sup>62</sup> The same logic was utilized by the district court in *Meyenburg v. Exxon Mobil Corp.*, 2006 WL 2191422 (S.D.Ill. 2006) where the court held that a "common benefit" percentage attorney fee was appropriate based on the estimated value of a settlement containing both monetary relief and future injunctive relief because, "even if the court assumes that the recovery is one-fifth of what the plaintiffs assume the value of the recovery to be . . . the attorneys fees would still be reasonable."

<sup>63</sup> See *West, et al. v. First Franklin Fin. Corp.*, Order, Case No. 2:06-CV-02064-KHV-WO (D. Kan. July 31, 2007).

factors. First, Plaintiffs have agreed that any class representative incentive awards are to be paid by Costco in a manner that will reduce the amount of attorneys' fees that Costco will pay. Second, the actual fee will be reduced by the amount of expenses awarded by the Court as fully set forth below. Finally, Plaintiffs' counsels' work in this Settlement is not complete. Under the Settlement, Plaintiffs' counsel have certain obligations related to Costco's implementation of ATC, in addition to being available to respond to Class member inquiries and enforce the contractual elements of the Settlement, among other duties. Factoring such future work into the Court's attorneys' fee calculus is clearly appropriate, as courts have noted.<sup>64</sup>

In sum, Plaintiffs have obtained a readily definable, substantial benefit that inures to all Class members. That benefit has tangible value, and is susceptible to being quantified, as Dr. Safir has proven. An award of attorneys' fees that represents less than 10% of that value is authorized, appropriate and earned.

V. **CLASS COUNSELS' FEES ARE REASONABLE WHEN MEASURED BY APPLICATION OF THE JOHNSON FACTORS**

Plaintiffs' requested attorney fee is also reasonable under the factors articulated by the Fifth Circuit Court of Appeals in *Johnson v. Georgia Highway Express, Inc.*,<sup>65</sup> which the Tenth Circuit has adopted for purposes of determining whether a settlement is reasonable.<sup>66</sup> Indeed, the Tenth Circuit has held that when a common benefit settlement in a class action is not susceptible to valuation for purposes of an attorneys' fee, the proper fee analysis is application of the *Johnson* factors, rather than a lodestar analysis.<sup>67</sup> The applicable *Johnson* factors<sup>68</sup> are: (1) the novelty and

<sup>64</sup> See *Hanlon v. Chrysler Corporation*, 150 F.3d 1011, 1029 (9th Cir. 1998); *Wing v. Asarco Inc.*, 114 F.3d at 989.

<sup>65</sup> 488 F.2d at 717-19.

<sup>66</sup> *Gottlieb v. Barry*, 43 F.3d 474 (10<sup>th</sup> Cir. 1994).

<sup>67</sup> *Rosenbaum v. McCallister*, 64 F.3d 1439 (10<sup>th</sup> Cir. 1995). That logic has been echoed by other courts that, when faced with a settlement that was difficult to value, awarded fees based upon some, or all, of the factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d at 717-19. See also *Merola v. Atlantic Ritchfield Company*, 515 F.2d 165, 172-73 (3d Cir. 1975); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1021 (5th Cir. 1977); *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 118 (3d Cir. 1976);

difficulty of the questions presented by the case, (2) the amount involved and the results obtained, (3) the time and labor required, (4) the skill requisite to perform the legal service properly, (5) the experience, reputation and ability of the attorneys, (6) the preclusion of other employment by the attorneys due to the acceptance of the case, (7) the customary fee, (8) whether the fee is fixed or contingent, and (9) awards in similar cases. Consideration of these factors militates in favor of Plaintiffs' fee request.

1. *The Novelty And Difficulty Of The Issues*

That this case involves difficult, novel questions should not be disputed, as this Court has observed<sup>69</sup> and as Professor Klonoff has concluded.<sup>70</sup> Indeed, Plaintiffs' claims involve the law of more than twenty-five jurisdictions. Defendants have raised numerous arguments and defenses, such as equitable abstention, the political question doctrine, primary jurisdiction and preemption. Defendants have initiated four appellate proceedings<sup>71</sup> and sought a fifth.<sup>72</sup> Defendants have filed seven dispositive motions<sup>73</sup> (none of which have been

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*O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 305 (E.D. Pa. 2003) (valuing settlement involving mixed monetary and injunctive relief, but considering fairness factors); *Loring v. City of Scottsdale, Ariz.*, 721 F.2d 274 (9th Cir. 1983) (reversing lower court's fee award because it failed to consider factors similar to the *Johnson* factors and the "total benefit conferred").

<sup>68</sup> Courts recognize that not all twelve factors will apply in every case, and this fact does not affect the appropriateness of awarding a percentage of the fund. See *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1270 (D. Kan. 2006) (noting the inapplicability of three of the *Johnson* factors).

<sup>69</sup> See Order denying final approval to Costco settlement, Doc. # 1707, pg. 40 ("the case presents serious questions of law and fact which place the ultimate outcome of litigation in doubt.").

<sup>70</sup> Klonoff Dec., pg. 14.

<sup>71</sup> Specifically: (1) Tenth Circuit case number 10-3086, certain defendants' collateral order appeal from this Court's May 28, 2009 (Doc. # 1080), March 4, 2010 (Dk. No. 1583), March 26, 2010 (Doc. # 1612), and April 2, 2010 (Doc. # 1625) Orders regarding Defendants' First Amendment discovery objections; (2) Tenth Circuit case number 10-3101, certain defendants' mandamus proceeding related to this Court's May 28, 2009 (Doc. # 1080), March 4, 2010 (Doc. # 1583), March 26, 2010 (Doc. # 1612), and April 2, 2010 (Doc. # 1625) orders regarding Defendants' First Amendment discovery objections; (3) Tenth Circuit case number 10-601, certain defendants' attempt to obtain appellate review of this Court's May 28, 2009 (Doc. # 1675) pursuant to Fed.R.Civ.P. 23(f), and (4) Tenth Circuit case number 10-602, certain other defendants' attempt to obtain appellate review of this Court's May 28, 2009 (Doc. # 1675) pursuant to Fed.R.Civ.P. 23(f).

<sup>72</sup> See Order denying certain defendants' Motion for Certification Pursuant to 28 U.S.C. § 1292 (Doc. #. 1711).

<sup>73</sup> See All Defendants' Motion to Dismiss, Doc. #196, Citgo Motion to Dismiss, Doc. # 534, Citgo Motion for Summary Judgment, Doc. # 1739, Marathon Motion to Dismiss, Doc. # 684, Marathon Motion for Summary Judgment, Doc. #1254, Certain Defendants' Motion to Dismiss for Lack of Jurisdiction Under Political Question

successful) that raised a plethora of arguments and issues. Certainly, the issues in this case have been novel, protracted and complex.<sup>74</sup>

2. The Amount Involved and the Results Obtained

The result achieved by Class Counsel in this Settlement cannot be overstated.<sup>75</sup> Class Counsel were successful in convincing Costco to break ranks with the petroleum industry and agree to install ATC devices at the retail level. This result is even more impressive in light of the industry's decades-long resistance to retail ATC, which has manifested in several venues and forms, including threats of boycott that resulted in calls for an attorney general investigation. Indeed, in light of the potential for industry coercion, Costco insisted that the Settlement include a provision addressing the possibility that Costco's suppliers may retaliate by cutting off Costco's access to the wholesale motor fuel market.<sup>76</sup>

The implementation of ATC at all Costco locations will result in a net Class benefit that will exceed \$100,000,000. This Settlement has substantial value because it is undeniable that the failure to temperature correct motor fuel sales works to the economic detriment of consumers. That much is made clear from discovery obtained in this case:

- " [REDACTED] ”<sup>77</sup>
- " [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED] ”<sup>78</sup>
- " [REDACTED]

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Doctrine (Doc. # 1242), Certain Defendants' Motion for Judgment on the Pleadings (Doc. # 1258).

<sup>74</sup> See Klonoff Dec., pg. 14.

<sup>75</sup> Klonoff Dec., pg. 16.

<sup>76</sup> See Agreement, pg. 12, ¶ 4.8. Costco does not refine motor fuel; thus, it is entirely dependent on the wholesale motor fuel market to supply fuel to its locations.

<sup>77</sup> See [REDACTED]

<sup>78</sup> See [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED],<sup>79</sup>

• “[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED],<sup>80</sup>

Clearly, the failure by motor fuel retailers to temperature correct motor fuel sales works to the economic disadvantage of consumers. Costco’s agreement to voluntarily implement ATC is an “exceptional result for the class”<sup>81</sup> because it halts that inequitable practice; and, as noted above, the value of the Settlement is substantial. As this Court has observed, “in addition, those class members would benefit from increased price transparency and fairness, accuracy and consistency of fuel measurement for their fuel dollar, regardless of fuel temperature at the time of pumping.”<sup>82</sup> This factor weighs in favor of Plaintiffs’ request.

3. *Time/Labor Required, The Skill Requisite To Perform The Legal Services and The Experience, Reputation and Ability of the Attorneys*

Although Plaintiffs’ counsel was successful in achieving a favorable result before trial, a substantial amount of time and energy was required to obtain this result.<sup>83</sup> First, Plaintiffs’ counsel spent significant time in the initial investigation and commencement of the dozens of lawsuits that comprise this MDL. Second, substantial time was devoted to the briefing and

<sup>79</sup> See [REDACTED].

<sup>80</sup> See [REDACTED].

<sup>81</sup> Klonoff Dec., pg. 16.

<sup>82</sup> Order, Doc. # 1707, pg. 49.

<sup>83</sup> See the Declaration of Co-Lead Counsel Robert A. Horn, attached hereto as Exhibit B.

argument regarding the consolidation and transfer of these actions by the Judicial Panel on Multi District Litigation. Then, significant time was devoted by Plaintiffs' counsel to the orderly administration of this case once the actions were transferred to this District. This Court appointed three co-lead counsel who organized a plaintiffs' steering committee ("PSC"), which has been responsible for the bulk of the work in this case. Members of the PSC are assigned different tasks; some are responsible for the Plaintiffs' discovery, some are responsible for the Defendants' discovery, some are responsible for appellate issues, etc. Because each member of the PSC is not involved on a granular level in every facet of this litigation, they must be kept informed of all activities, which also requires time and effort. That supply of information is even more critical now that this Court has indicated its intention to remand all non-Kansas cases to their respective transferor courts. In addition, the PSC has been engaged, and continues to be engaged, in substantial discovery and briefing in this case, as the 1,700 plus docket entries suggest.

These logistical, procedural and substantive efforts have required a substantial amount of time and effort over the course of the four years of this litigation. As set forth in the summary time records attached hereto collectively as Exhibit C, as of the date of this filing, Class Counsel and the other members of the Plaintiffs' Steering Committee have devoted almost 65,000 hours of common, joint time to the prosecution of this litigation, which has a time-value in excess of \$23,000,000.00.<sup>84</sup> Time devoted to specific defendants, which is reflected on Exhibit D hereto and which constitutes an additional 18,000 hours with a value in excess of \$5,000,000, is not included in that "common time." Time devoted specifically to Costco, which is reflected on

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<sup>84</sup> Using the standard billing rate of Costco's counsel (\$ [REDACTED]), the resulting figure is much higher. Given the location of some Plaintiffs' counsel in geographic areas that demand much higher prevailing attorney rates (such as Los Angeles and New York), adoption of Costco's counsel's lower billing rate is imminently reasonable.

Exhibit E hereto and which constitutes an additional 2,200 hours with a value in excess of \$1,000,000, has also been removed from that “common time.” Time from more than twenty-five other law firms that have worked on this case has also been removed from that “common time.” Importantly, as noted above, if the Court grants final approval of the Settlement, many more hours will be spent by Plaintiffs’ counsel. Thus, the time and commitment that Plaintiffs’ counsel devote to this case will only increase if this Settlement is approved.<sup>85</sup>

It should be noted that this factor of the *Johnson* analysis (the time and labor required) is to be distinguished from strict application of the “lodestar” methodology, which has been noted to have “encouraged inefficient behavior, turned judges into bean counters and created antagonistic interests between the class and class counsel.”<sup>86</sup> When considering plaintiffs’ attorney fees outside of the strict lodestar context, such as here, the focus is **not** on the “necessity and reasonableness of every hour” of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys.<sup>87</sup> Such a results-oriented focus “lessens the possibility of collateral disputes [regarding time records] that might transform the fee proceeding into a second major litigation.”<sup>88</sup>

This Court has noted that the settling parties are represented by “top-notch” lawyers who

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<sup>85</sup> Plaintiffs’ counsel have submitted the time summaries attached hereto as Exhibits C-E to facilitate the Court’s consideration of the relevant *Johnson* factors, in light of Plaintiffs’ request that the Court utilize a percentage of the fund fee methodology. Should the Court determine that a lodestar methodology is the appropriate tool to use in determining a reasonable fee, Plaintiffs request leave to submit detailed attorney time and expense records *in camera* to assist with the Court’s lodestar fee determination.

<sup>86</sup> *O’Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 305 (E.D. Pa. 2003) (citing *Third Circuit Task Force: Court Awarded Attorney Fees*, 108 F.R.D. 237, *passim* (1985); see also *Blum v. Stenson*, 104 S.Ct. 1541 (1984) (criticizing lodestar); *In re Cendant Corp. Litig.*, 264 F.3d 201, 256 n. 32(3d Cir. 2001) (criticizing lodestar for taxing the judiciary, mis-aligning class and counsel interests; providing an extensive reading list to consider the percentage-of-recovery method); *In re GM*, 55 F.3d 768 at 821 (3d Cir. 1995) (faulting lodestar for failing to align class and class counsel interests); *Matter of Continental Illinois Securities Litig.*, 962 F.2d 566, 572-72 (7th Cir. 1992) (criticizing lodestar); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268 (D.C. Cir. 1993).

<sup>87</sup> See *In re Thirteen Appeals*, 56 F.3d 295, 307 (1st Cir. 1995).

<sup>88</sup> *Id.*

have vigorously litigated the case on behalf of their clients.<sup>89</sup> Regarding the skill required for litigation of this magnitude, it is well-known that large scale consumer class actions of this type are, by their very nature, complicated and time-consuming. A law firm undertaking representation of a plaintiff consumer class case inevitably must be prepared to make a tremendous investment of time, energy, and resources. In this MDL proceeding, the Defendants are represented by some of the largest and most prestigious defense firms in the country. Indeed, Costco is represented by the law firms Morrison Foerster and Polsinelli Shughart, P.C., two firms that have twenty-nine offices and one thousand five hundred attorneys spread through twenty-six cities around the globe. Due to the contingent nature of the customary fee arrangement, lawyers must be prepared to make this investment with the very real possibility of an unsuccessful outcome and no fee of any kind. The demands and risks of this type of litigation overwhelm the resources – and deter participation – of many traditional plaintiff law firms. The Class Counsel and Plaintiffs’ counsel involved in this Settlement all have substantial experience in prosecuting complex consumer class actions, and their professional accomplishments are summarized in the firm resumes previously provided.

4. *Preclusion of other employment, customary fee, whether the fee is fixed or contingent and awards in similar cases.*

In terms of the preclusion of other work, this case has been prosecuted efficiently and for some Plaintiffs’ counsel, it demanded all, or nearly all, of their available time and energy.<sup>90</sup> For all Plaintiffs’ counsel, the significant hours devoted to this lawsuit necessarily precluded them from spending that time on other cases, which weighs in favor of an award.<sup>91</sup>

Regarding a customary fee, in a case such as this the fee is normally contingent upon a

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<sup>89</sup> Doc. # 1707 at pg. 40

<sup>90</sup> Klonoff Dec., pg. 12, 18-19.

<sup>91</sup> See *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. at 1270.

successful outcome.<sup>92</sup> In prosecuting plaintiff class actions, Plaintiffs' counsel customarily enter into contingent attorneys' fee agreements providing for a percentage of any recovery, and no fee if there is no recovery. In this case, the Class Plaintiffs executed a retainer agreement which entitled Plaintiffs' counsel to receive a much larger percentage of recovery than the 10% percent referenced above. Thus, the requested percentage of the fund is substantially less than that contained in the retainer agreements executed with the named Class Plaintiffs, and therefore, below the contingency percentage available in the marketplace.<sup>93</sup>

Finally, as it relates to awards in similar cases, based on historical awards of attorneys' fees in other percentage-of-fund cases, the percentage of the fund requested here – less than 10% – is presumptively reasonable. It is well below the average fee percentage noted by the Seventh Circuit in *In re Trans Union Corp. Privacy Litigation*.<sup>94</sup> noted above, and this Court has previously approved attorneys' fee awards amounting to three times the requested percentage sought by Plaintiffs.<sup>95</sup> Other federal courts in this District and elsewhere regularly award attorneys' fees in the range of thirty percent of a settlement fund.<sup>96</sup>

In light of these factors, the requested attorneys' fee is certainly reasonable. Plaintiffs have spent a very substantial amount of time prosecuting these claims, have successfully worked through many of the issues and arguments raised by the Defendants and have entered into an agreement whereby a large and sophisticated motor fuel retailer has agreed to implement temperature correction at the retail level. All of the relevant *Johnson* factors indicate that

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<sup>92</sup> See *Ramah Navajo Chapter v. Babbit, et al.*, 50 F.Supp.2d 1091, 1104 (D. NM. 1999)

<sup>93</sup> See *Swedish Hosp. Corp. v. Shalala*, 1 F.3d at 1268.

<sup>94</sup> 2011 WL 117108 (7<sup>th</sup> Cir. Jan. 14, 2011).

<sup>95</sup> See *West, et al. v. First Franklin Fin. Corp.*, Order, Case No. 06-cv-02064-KHV-WO (D. Kan. October 23, 2007) (awarding class counsel attorneys' fees and costs in the amount of thirty percent (30%) of settlement fund).

<sup>96</sup> See *Barnwell, et al. v. Corrections Corporation of America*, Order Approving Settlement Agreement, Case No. 08-cv-02151-JWL-DJW (D. Kan. Feb. 12, 2009) (approving as an attorneys' fee award thirty-three percent (33%) of settlement fund); *Perry v. National City Bank*, Order, Case No. 05-cv-00891-DRH-PMF (S.D. Ill. March 3, 2008) (approving requests for attorneys' fees and costs in the amount of thirty-three percent (33%) of the Settlement Fund).

Plaintiffs' requested fee is reasonable.<sup>97</sup>

**VII. PLAINTIFFS' COSTS WERE REASONABLY INCURRED AND SHOULD BE REIMBURSED**

As noted above, Costco has agreed to pay any attorneys' fees and costs ordered by this Court. Plaintiffs' overall costs total approximately \$3,000,000.00, and are detailed under oath in the declaration of Co-Lead Counsel Robert Horn and the Plaintiffs' counsel time summaries, Exhibits B through E hereto. However, Class Counsel request an award of their costs related solely to Costco in this litigation in the amount of \$ \$279,855.01. Each of the cost categories for which reimbursement is sought is appropriate for payment, such as expert witness costs, deposition costs,<sup>98</sup> travel expenses<sup>99</sup> and electronic legal research.<sup>100</sup> Because these expenses are of the type routinely charged to paying clients, Plaintiffs are entitled to an award reimbursing them for these expenses.

**VIII. CLASS REPRESENTATIVES ARE ENTITLED TO INCENTIVE AWARDS.**

The time an individual devotes to a lawsuit which inures to the common benefit of the class warrants entitlement to an incentive award "above and beyond what the typical class member is receiving."<sup>101</sup> In light of their efforts resulting in a favorable settlement on behalf of the Class, named Plaintiffs Annie Smith (Alabama), Christopher Payne (Arizona), Phyllis Lerner (California), Herb Glazer (California), Mara Redstone (Florida), Brent Crawford (Georgia), Victor Ruybalid (Indiana), Zach Wilson (Kansas), Lisa McBride (Kentucky), Raphael Sagalyn

<sup>97</sup> Klonoff Dec., pgs. 12-19.

<sup>98</sup> See *Callicrate v. Farmland Industries, Inc.*, 139 F.3d 1336 (10<sup>th</sup> Cir. 1998)(affirming award of expenses for depositions ultimately not used in disposition of case).

<sup>99</sup> See *Nelson v. State*, Case No. 99-4184-JTM, 2003 WL 22871685, \*4 (D. Kan. Nov. 13, 2003)(allowing reimbursement for travel expenses).

<sup>100</sup> *Case v. Unified School Dist. No. 233, Johnson County, Kan.*, 157 F.3d 1243, 1257-1258 (10<sup>th</sup> Cir. 1998); *Godinet v. Management and Training Corp.*, 182 F.Supp.2d 1108, 1114 (D.Kan. 2002).

<sup>101</sup> *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d at 1271 (awarding \$5,000 incentive award to each of four class representatives); see also *Cimarron Pipeline Constr., Inc. v. National Council on Compensation Ins.*, 1993 WL 355466 (W.D. Okla. June 8, 1993) (awarding \$10,000 incentive award to each of three class representatives); *Camp v. The Progressive Corp.*, 2004 WL 2149079 (E.D. La. 2004) (approving up to \$10,000 in incentive awards to class representative and other plaintiffs participating in the litigation).

(Maryland), Brent Donaldson (Missouri), Gary Kohut (Nevada), Richard Gaulauski (New Jersey), Charles Byram (New Mexico), Jean Neese (North Carolina), Shonna Butler (Oregon), Gerald Panto (Pennsylvania), Joann Korleski (South Carolina), Tamara Miller (Tennessee), Priscilla Craft (Texas), Jeff Jenkins (Utah), and James Graham (Virginia) (collectively "Class Representatives") are entitled to incentive payments.

In this case, Class Representatives provided invaluable guidance and assistance to Plaintiffs' counsel in prosecuting these claims. Each Class Representative responded to multiple rounds of written discovery from the Defendants, including three sets of interrogatories, multiple requests for documents and requests for admissions. Each Class Representative gathered and produced documents responsive to Defendants' requests including, in some instances, very substantial documents.<sup>102</sup> Each Class Representative set aside the necessary time (in many instances, taking unpaid leave from their employment to do so) to give lengthy depositions at Defendants' request.<sup>103</sup> Such time and commitment warrants compensation. Further, there is no question that Class Representatives' conduct has inured to the substantial benefit of the respective classes. Without their efforts, this case would not have been brought and this settlement would not have been achieved.

The Amended Settlement Agreement provides that each Class Representative will receive an incentive no greater than \$2,000 for their service as Class Representative, to be paid from any attorneys' fee awarded to Class Counsel.<sup>104</sup> Thus, any incentive awards to the Class Representatives will not affect the Class.

For these reasons, payment of the requested incentive to each Class Representative is justified.

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<sup>102</sup> For example, Class Representative Zach Wilson alone has produced several thousand documents.

<sup>103</sup> For example, the deposition of Class Representative Dennis Mann lasted almost seven hours.

<sup>104</sup> See Settlement Agreement, ¶ 7.4.

Dated: March 23, 2011

Respectfully submitted,

s/ Robert A. Horn

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 23, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send a notice of electronic filing to all person registered for ECF as of that date.

/s/ Joseph A. Kronawitter