IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN KEEPSEAGLE, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:99CV03119 (EGS)
TOM VILSACK, Secretary, United States Department of Agriculture,	)	Judge: Emmet G. Sullivan Magistrate Judge: Alan Kay
Defendant.	)	

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO THE MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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I. INTRODUCTION

After eleven years of heavily-contested litigation, class counsel, on behalf of the class, entered into a Settlement Agreement with the United States Department of Agriculture ("USDA") that provides $760 million in monetary relief to the class, as well as groundbreaking programmatic relief that will benefit the class for years to come. Under the Settlement Agreement, the parties agreed that Plaintiffs would seek fees as a percentage of the common fund:

> Plaintiffs will ask the Court to approve an award of attorneys' fees and costs . . . payable as part of the common fund awarded to the Class, with the understanding that the Plaintiffs may seek, and the Court may award, such attorneys' fees and costs the total amount of which shall be at least 4% and not more than 8% of $760,000,000.

Settlement Agreement, Dkt. 576, at § XV.B.

Consistent with the Settlement Agreement, Plaintiffs subsequently filed a motion requesting attorneys' fees and expenses from the common fund in the amount of 8% of the $760 million monetary benefits secured for the class. Dkt. 581. Plaintiffs' memorandum in support identified the "percentage-of-the-fund method," rather than the lodestar method, as "the appropriate mechanism for determining the attorney fees award in common fund cases" under controlling precedent. Dkt. 581-1 ("Fee Motion") at 18-21, 26-38 (quoting *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993)). Plaintiffs further supported the award sought by applying the seven factors this Court considers when determining fees under the percentage-of-the-fund method, and demonstrating those factors supported the requested fee award. Plaintiffs litigated this case without compensation for 11 years, overcoming fierce opposition from defendant, and obtaining extraordinary results for the class. Moreover, the fee award requested is below the range of awards made in similar cases. Fee Motion at 26-38.

Remarkably, the USDA's opposition to Plaintiffs' motion disregards this Circuit's

binding precedent adopting the percentage-of-the-fund method and rejecting the lodestar method for determining common fund fee awards, as well as the Settlement Agreement in which the USDA agreed that the common fund approach would be used in awarding fees in this case.[1] *See* Defendants' Response to Plaintiffs' Motion for an Award of Attorneys' Fees and Expenses and to Plaintiffs' Motion for Approval of Class Representative Incentive Awards ("Response"), Dkt. 586. The Response also fails to address the factors applied in this Court when evaluating common fund fee awards. Instead, the USDA engages in a lodestar analysis, arguing that limitations on the fees assessed against losing defendants pursuant to fee-shifting statutes, where fees are presumptively limited to the lodestar amount, should be imported into the common fund context and applied here to limit the award so that it approximates the lodestar amount.

Defendant's argument that lodestar provides a limitation on common fund awards was explicitly rejected by the D.C. Circuit in *Swedish Hospital Corp.*, 1 F.3d at 1268-71 (D.C. Cir. 1993), which remains good law, and is binding on this Court. The USDA has offered no basis—other than its own preference for lodestar awards—for asking this Court to disregard established law. Because an 8% fee is amply justified under the controlling percentage-of-the-fund analysis, and represents a percentage of the fund well below the range typically awarded, Plaintiffs respectfully request that the Court approve the full award requested in the amount of $60.8 million.

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[1] As the Department of Justice recently explained in opposing the fee request in *Cobell v. Salazar* as inconsistent with the parties' settlement, a settlement agreement is a contract, and the Court should give effect to the intent of the parties to the settlement. *See Cobell v. Salazar*, No: 96-cv-01285 (D.D.C.), Dkt. 3694 (Feb. 24, 2011) at 21-22 (attached as Exhibit 1) (citing *Bluewater Network v. Salazar*, 721 F. Supp. 2d 7, 19 (D.D.C. 2010); *Lindell v. Landis Corp. 401(K) Plan*, 640 F. Supp. 2d 11, 15 (D.D.C. 2009)).

II. THE REQUESTED ATTORNEYS' FEE AWARD IS FULLY JUSTIFIED UNDER CONTROLLING LAW

A. Pursuant to the Settlement Agreement and Controlling Law, Plaintiffs' Fee Request Appropriately Seeks an Attorneys' Fee Award as a Percentage of the Common Fund.

The Settlement Agreement entered into by the parties creates a substantial monetary fund for the benefit of the class and states that Plaintiffs will seek an award of attorneys' fees and expenses payable as a percentage of that fund. Settlement Agreement, Dkt. 576, at XV.B. This fee agreement is unremarkable: it is "well established" that pursuant to the common fund doctrine "'a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'" *Swedish Hosp.*, 1 F.3d at 1265 (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). Moreover, it is equally well established in this Circuit that the "percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases." *Swedish Hosp.*, 1 F.3d at 1271. Plaintiffs' motion for an award of attorneys' fees and expenses as a percentage of the common fund is thus consistent with the Settlement Agreement and these well-settled precedents.

Despite the fact that Plaintiffs seek an attorneys' fee award from the common fund, rather than from the USDA pursuant to a statutory fee-shifting provision, the USDA devotes the bulk of its opposition to discussing the limitations on fees awardable pursuant to fee-shifting statutes. The USDA's position rests on two central beliefs: (1) that common fund fee awards should not be used in cases where fee-shifting statutes are available, and (2) that where a defendant has agreed to a common fund award, it can nonetheless impose lodestar limitations on the award. *See* Response at 3-5. However, the USDA does not cite a single case supporting its startling positions. *Id.* Instead, the USDA merely suggests that Plaintiffs have not cited "enough" cases

applying common fund principles in cases where fee-shifting statutes were in play, or where a government entity was the defendant. *Id.* at 5-6. To the contrary, Plaintiffs' opening memorandum cited substantial precedent in support of using the common fund method in cases such as this one, while the USDA has offered no cases at all which would support a change in the governing law. *See* Fee Motion at 19-20.

Swedish Hospital, the seminal D.C. Circuit common fund case, is itself a case against a government defendant—the Department of Health and Human Services. The D.C. Circuit rejected as "without merit" defendants' argument that an award from the common fund should be assessed differently or reflect different equity considerations simply because the government is the source of the common fund. *Swedish Hosp.*, 1 F.3d at 1270. Similarly, fees are routinely awarded pursuant to the common fund doctrine following settlements of claims brought under statutes with fee-shifting provisions. Plaintiffs provided multiple authorities in support of this proposition, including: (1) several cases directly holding that attorneys' fees are properly awarded pursuant to the common fund method notwithstanding the availability of a fee-shifting provision;[2] (2) the influential Third Circuit Task Force report on Court Awarded Attorney Fees;[3]

[2] *See* Fee Motion at 19-20 citing *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003) ("[T]here is no preclusion on recovery of common fund fees where a fee-shifting statute applies."); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 564 (7th Cir. 1994) ("Common fund principles properly control a case which is initiated under a statute with a fee-shifting provision but is settled with the creation of a common fund."); *County of Suffolk v. Long Island Lighting Co*., 907 F.2d 1295, 1327 (2d Cir. 1990) ("fee-shifting statutes are generally not intended to circumscribe the operation of the equitable fund doctrine"); *Nilsen v. York County*, 400 F. Supp. 2d 266, 269 (D. Me. 2005) (awarding a percentage attorney fee "from a common fund in a class action settlement even if the fee effectively represents a multiplier of the lodestar amount" notwithstanding that 42 U.S.C § 1988 would provide for fee-shifting if the action had been successfully litigated to trial).

[3] *See* Court Awarded Attorney Fees, Report of the Third Circuit Task Force (Arthur R. Miller, Reporter), reprinted in 108 F.R.D. 237, 255-56 (1985).

and (3) cases approving common fund awards where a fee-shifting provision was available.[4] *See* Fee Motion at 19-20. Additionally, throughout the Fee Motion, Plaintiffs cited many antitrust cases both inside and outside this Circuit where fees were awarded pursuant to the common fund method notwithstanding the availability of fee-shifting under 15 U.S.C. § 15(a). *See, e.g.*, *In re Vitamins Antitrust Litig*., No. 99-197, 2001 U.S. Dist. LEXIS 25067 (D.D.C. July 13, 2001). Furthermore, this Court recently awarded fees pursuant to the common fund doctrine in a case filed against a government defendant *and* litigated under a statute with a fee-shifting provision. *In re Dep't of Veterans Affairs Data Theft Litig.*, 653 F. Supp. 2d 58, 60 (D.D.C. 2009) (applying the common fund doctrine in awarding as fees 18% of the common fund, two times lodestar, after class settled Privacy Act claims against the Department of Veterans Affairs).[5]

In contrast, the USDA does not cite a *single* authority in support of the novel proposition that common fund awards are unavailable or limited where the government is the defendant or the claims underlying the settlement fund allege violations of statutes with fee-shifting provisions. Moreover, the position advanced by the Department of Justice here is inconsistent with the position it advanced in its opposition to the fee petition in *Cobell v. Salazar*, No: 96-cv-01285, which is also currently pending before this Court. Although *Cobell* is likewise a case against a government defendant where a fee-shifting statute is available (and in fact, has been applied to award interim fees), the government's response to the *Cobell* fee petition states

[4] *See* Fee Motion at 19-20 citing *Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.,* 504 F.3d 229, 249-50 (2d Cir. 2007); *In re Workers Comp. Ins. Antitrust Litig.*, 77 F. Supp. 284 (D. Minn. 1991); *In re SmithKline Beeckman Corp. Sec. Litig.*, 751 F. Supp. 525 (E.D. Pa. 1990); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989); *Smith v. DaimlerChrysler North America LLC*, No. 00-cv-06003 (D.N.J. Oct. 24, 2005) (Dkt. 150) (attached as Exhibit 8 to Fee Motion); *Cason v. Nissan Motor Acceptance Corp.*, No. 98-cv-223 (M.D. Tenn. Mar. 27, 2003) (Dkt. 590, 605) (attached as Exhibit 9 to Fee Motion). Like *Keepseagle*, both *Smith* and *Cason* were brought under the Equal Credit Opportunities Act, 15 U.S.C. § 1591 *et seq*.

[5] The Privacy Act contains a fee-shifting provision under 5 U.S.C. § 552a(g)(4)(B).

unequivocally that it is a common fund case governed by *Swedish Hospital*, and that the fee must be determined under the percentage-of-the-fund method. *See Cobell v. Salazar*, No:196cv01285 (D.D.C.), Dkt. 3694 (Feb. 24, 2011) at 6 (attached as Exhibit 1). In sum, Defendant's objection to Plaintiffs' request for fees is not supported by law and is inconsistent with the government's position in similar litigation.

B. Limitations on Fees Awarded Pursuant to Fee-Shifting Statutes Are Not Applicable to Fees Awarded Pursuant to the Common Fund Doctrine.

The USDA argues that even if the common fund doctrine applies here, the lodestar amount should nonetheless "constitute a substantial limit" on the award. Response at 5. However, the D.C. Circuit has expressly rejected the USDA's position, holding that the presumptive limits of the lodestar approach do not apply to common fund cases. *Swedish Hosp*., 1 F.3d at 1269 (specifically rejecting the notion that the Supreme Court's fee-shifting jurisprudence controlled awards in common fund cases). The USDA's attempt to get around this longstanding and binding Circuit precedent by relying on the Supreme Court's decision in the fee-shifting case of *Perdue v. Kenny A., ex rel. Winn*, 130 S. Ct. 1662 (2010) is unavailing. *Perdue*, by its terms, applies only to statutory fee-shifting cases, as it addressed the narrow question of whether an attorney's fee awarded "under federal fee-shifting statutes" may be enhanced above the lodestar amount due to superior performance or results. 130 S. Ct. at 1669. *Perdue* neither presented nor addressed the reasonableness of fees exceeding the lodestar under the common fund doctrine,[6] which the Court has specifically recognized as a distinct method of awarding fees where amounts can exceed the lodestar. *See Blum v. Stenson*, 465 U.S. 886, 900

[6] Indeed, the government recognized this in its amicus brief in *Perdue*, noting that although Respondents had argued below that the district court should have applied a common fund or common benefit doctrine to enhance their fee award, they had not sought review of the court's decisions on those issues. *See* Brief of the United States as Amicus Curiae in *Perdue v. Kenny A., ex rel. Winn* , 2008 U.S. Briefs 970, at *11 n.1 (2009).

n.16 (1984). Thus *Perdue* cannot supersede D.C. Circuit precedent governing the appropriate assessment of common fund fees.

1. Controlling D.C. Circuit Precedent Holds that the Presumptive Lodestar Limitation on Fees Awarded Pursuant to Fee-Shifting Statutes Is Inapplicable to Common Fund Awards.

As the court explained in *Swedish Hospital*, the presumptive limitation on fees to the lodestar amount applied by the Supreme Court in fee-shifting cases does "not govern common fund awards because of several important, and ultimately decisive, differences between the two types of cases." 1 F.3d at 1268. Fee-shifting statutes are intended to ensure that reliable compensation, paid by the opposing party, is available to attorneys who succeed in privately enforcing certain statutes, even where the results obtained are modest or nonmonetary. *Id.* at 1268; *see also In re Vitamins Antitrust Litig*., 2001 U.S. Dist. LEXIS 25067 (D.D.C. July 13, 2001) ("The lodestar method … is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation." (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998)). A lodestar award accomplishes this objective by providing a method for calculating a reliable fee that is not dependant on the size of any monetary recovery, and assessing it against a losing defendant. *Swedish Hosp.*, 1 F.3d at 1268.

The common fund doctrine serves an entirely different purpose: it seeks to equitably allocate the proceeds of a common fund between counsel and client, and to align the interests of class and counsel. *Swedish Hosp.*, 1 F.3d at 1265, 1269. The percentage-of-the-fund method satisfies this purpose by approximating the contingent fee arrangements often used to compensate plaintiff-side counsel in the market, thereby rewarding counsel for increasing recovery for plaintiffs and including the risk of contingent arrangements in the fee calculation.

Id. at 1269. In contrast, using the lodestar approach to award fees from the common fund would fail to align counsel's interest with that of the class, encourage inefficiency (as class counsel may be incentivized to prolong litigation and bloat their hours to increase their lodestar fee), and impose greater demands on scarce judicial resources by requiring the court to engage in the difficult task of reviewing "attorney billing information over the life of a complex litigation" and second-guessing the judgment of counsel "as to whether a task was reasonably undertaken or hours devoted to it reasonably expended"—without the assistance of a truly adversarial context to sharpen the issues. *Id.* at 1268-70.

Because the lodestar approach and limitations adopted by the Supreme Court in the fee-shifting cases are inconsistent with the purposes of the common fund doctrine, the D.C. Circuit held that the lodestar approach should not to be imported into common fund cases. *Id.* The Court thus rejected defendants' argument that a common fund fee should be limited to the lodestar amount. *Swedish Hosp.*, 1 F.3d at 1269. Indeed, common fund fees frequently reflect substantial multiples of the lodestar amount, including in cases where fee-shifting provisions are available. *See, e.g.*, *In re Lorazepam & Clorazepate Antitrust Litig.*, No. 99-0790, 2003 U.S. Dist. LEXIS 12344 at *32 (D.D.C. June 16, 2003) (observing that "multiples ranging up to four are frequently awarded in common fund cases"); *Oncology & Radiation Associates, P.A. v. Bristol-Myers Squibb Company and American Bioscience, Inc.*, No. 1:01CV02313 (EGS) (D.D.C. Sept. 3, 2003), (Dkt. 75 at 5; 72-1 at 6) (awarding 30% of common fund, which represented a multiplier of nearly 10) (order and declaration in support of fees attached as Exhibit 2); *Wal-Mart Stores v. VISA USA, Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (noting that "multipliers of between 3 and 4.5 have become common" (quoting *In re NASDAQ Market-*

Makers Antitrust Litig., 187 F.R.D. 465, 489 (S.D.N.Y. 1998)).[7]

Finally, the USDA's attempt to suggest that the term "reasonable" means the same thing in the fee-shifting context as in the common fund context is readily dismissed. *See* Response at 4-7. While both methods of analysis reference awarding a "reasonable fee," the divergent tracks adopt not merely different methodologies for calculating fees, but different criteria for judging what is "reasonable," and the standard of reasonableness from fee-shifting cannot properly be imported as the standard of reasonableness in the common fund context. Because the fee-shifting statutes allow only for a fee against a losing party that is "adequate to attract competent counsel" to a "meritorious" case, a fee is "reasonable" if it satisfies this purpose of adequacy or sufficiency of compensation. *Perdue*, 130 S. Ct. at 1672-73. Notably, a reasonable fee pursuant to a fee-shifting statute may not reflect an enhancement based on risk or contingency because "just as the *statutory language* limiting fees to prevailing . . . parties bars a prevailing plaintiff from recovering fees relating to claims on which he lost so should it bar a prevailing plaintiff from recovering for the risk of loss" against the defendant. *City of Burlington v. Dague*, 505 U.S. 557, 565 (1992) (internal citations omitted) (emphasis added). In contrast, the common fund doctrine is concerned with equity or fairness in the allocation of the proceeds of a common fund between counsel and client, and thus a "reasonable" fee provides counsel a proportion of the fund that is fair when taking into account factors such as counsel's degree of success, risk of loss or nonpayment, efforts invested, and percentages awarded in other cases. *See, e.g. Swedish*

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[7] Further, courts have awarded fees representing significantly higher multipliers in cases with large recoveries comparable to the monetary relief obtained here. *See, e.g.*, *In re UnitedHealth Group Inc. PLSRA Litig.*, 643 F. Supp. 2d 1094, 1106 (D. Minn. 2009) (6.5 multiplier); *In re Enron Corp. Sec. Litig.*, 586 F. Supp. 2d 732, 791 (S.D. Tex. 2008) (5.2 multiplier); *In re Cardinal Health, Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 770 (S.D. Ohio 2007) (6 multiplier); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) (4 multiplier); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 488-89 (S.D.N.Y. 1998) (3.97 multiplier).

Hosp., 1 F.3d at 1269; *In re Veterans Affairs Data Theft Litig.*, 653 F. Supp. 2d at 60; *see also Florin v. Nationsbank, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994) (reasoning that unlike in a fee-shifting case, "in a common fund case . . . because compensation for risk is charged against the plaintiff class, defendants would not be forced to subsidize directly plaintiffs' attorneys' losing endeavors" and that "there is no injustice in requiring plaintiff class members to shoulder the burden of compensating counsel for prosecuting the class' case without any assurance of compensation.").

2. *Perdue* Addressed Fees Awardable Pursuant to Fee-Shifting Statutes and Does Not Alter the *Swedish Hospital* Approach.

The USDA's attempt to get around this binding Circuit precedent by relying on *Perdue* is unavailing. The USDA cavalierly dismisses *Swedish Hospital* on the grounds that it "significantly predates" *Perdue*. Response at 6. But *Perdue* did not break any new ground since *Swedish Hospital* was decided by stating that, when awarding fees pursuant to a fee-shifting statute, "there is a 'strong presumption' that the lodestar figure is reasonable" and should only be enhanced in "exceptional circumstances." 130 S. Ct. at 1673 (internal quotations omitted). Rather, the Court was quoting and reaffirming its prior decisions regarding fee-shifting statutes in *Dague*, 505 U.S. at 562, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) and *Blum*, 465 U.S. at 897. All of these cases predate *Swedish Hospital*. Thus *Perdue* is far from the first Supreme Court case adopting restrictions on fees awardable pursuant to fee-shifting statutes, and the D.C. Circuit has considered and rejected the argument that the reasoning in the Supreme Court's statutory fee-shifting cases should also apply to limit awards payable from a common fund. *See Swedish Hosp.*, 1 F.3d at 1268 ("We disagree with the proposition that *Burlington [v. Dague]* . . . mandate[s] an unenhanced lodestar approach in common fund cases."). Moreover, the Supreme Court has itself previously disclaimed the

relevance of its lodestar jurisprudence outside of the fee-shifting context, "emphasiz[ing]" . . . [that] the lodestar method was designed to govern imposition of fees on the losing party" and that "[n]othing prevents the attorney from gaining additional fees . . . from his own client." *Gisbrecht v. Barnhart*, 535 U.S. 789, 806 (2002). *Swedish Hospital* therefore continues to control on this point.

The USDA's attempt to attach significance to the number of post-*Perdue* cases cited in Plaintiffs' Fee Motion is similarly unavailing. *See* Response at 5 (alleging that although Plaintiffs cite numerous class action cases in which awards were made from the common fund pursuant to the percentage-of-the-fund method, "almost none" post-date *Perdue*). First, given that *Perdue* was decided less than one year ago, there simply have not yet been many subsequent relevant class action fee opinions. Second, contrary to the USDA's suggestion, Plaintiffs cited to four post-*Perdue* cases from four different circuits explicitly recognizing that *Perdue* did not preclude awards in common fund cases in amounts that may exceed the lodestar. *See* Fee Motion at 21-22.[8] Finally, most post-*Perdue* common fund cases brought under statutes with fee-shifting provisions have, unsurprisingly, not addressed fee-shifting limitations at all, and have continued to award common fund fees without limitation by the lodestar. *See, e.g., Velez v.*

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[8] Citing *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 683 (N.D. Tex. 2010) ("[T]he Supreme Court did not purport to overrule the reasoning or results of common fund fee awards. . . . *Perdue* therefore neither requires nor suggests that this court reconsider [its prior percent of the fund award in a common fund case]."); *Dewey v. Volkswagen of Am.*, --- F. Supp. 2d ----, 2010 U.S. Dist. LEXIS 79304, at *27, *45 (D.N.J. July 30, 2010) (noting that post-*Perdue*, lodestar multipliers are rarely permitted in fee-shifting cases, but that in common fund cases where awards are based on percentage of the fund, multipliers are often appropriate, even where fees might alternately be available under a fee-shifting statute); *Lambrecht v. Taurel*, No. 08-cv-68, 2010 U.S. Dist. LEXIS 75633 at *8-10 (S.D. Ind. June 8, 2010) (concluding that *Perdue* did not preclude award of a multiplier in common fund case); *Navarro v. Servisair*, No. 08-cv-02716, 2010 U.S. Dist. LEXIS 41081 at *5-12 (N.D. Cal. Apr. 27, 2010) (citing *Perdue* in the context of lodestar multipliers, and awarding a multiplier in common fund case after noting that the "Ninth Circuit has expressed general approval of multipliers between 1.0 and 4.0 in common fund cases").

Novartis, No. 04 Civ. 09194, 2010 U.S. Dist. LEXIS 125945, at *64 (S.D.N.Y. Nov. 30, 2010) (awarding 21.8% of $175 million constructive common fund, representing 2.4 multiplier, in Title VII gender discrimination case); *Rubinstein v. Department Stores Nat'l Bank*, No. 08-cv-1596, 2011 U.S. Dist. LEXIS 6101 (S.D.N.Y. Jan. 11, 2011) (awarding 23% of common fund and 2.25 lodestar multiplier in Truth in Lending Act case); *Chu v. Wells Fargo Investments LLC*, No. 05-cv-4526, 2011 U.S. Dist. LEXIS 15821 (N.D. Cal. Feb. 16, 2011) (awarding 25% of common fund in FLSA case).

Thus Plaintiffs have cited a plethora of post-*Perdue* cases supporting the conclusion that *Perdue* worked no change on the award of fees under the common fund method—including rulings from this Court. In contrast, the USDA cites only a single district court case which considered *Perdue* relevant to a common fund award. Response at 6 (citing *Van Horn v. Nationwide Prop. and Cas. Ins. Co.*, 1:08-cv-605, 2010 U.S. Dist. LEXIS 42357 (N.D. Ohio 2010)). As Plaintiffs explained in identifying this case in their opening motion, under Sixth Circuit precedent no firm distinction exists between fee analyses under the common fund and lodestar methods, thus making cases decided under that rubric inapposite in the D.C. Circuit. Fee Motion at 22 n.11.

3. Capping Common Fund Fees in Cases Brought Pursuant to Statutes with Fee-Shifting Provisions Would Be Inconsistent with Statutory Intent.

Finally, to the extent that the USDA argues that common fund fees should be limited to the lodestar amount only in cases brought pursuant to a statute with a fee-shifting provision, this argument is not only unsupported by the law, but is entirely inconsistent with the statutory intent behind fee-shifting provisions. Fee-shifting provisions are intended to provide an incentive for competent counsel to undertake representation of plaintiffs in civil rights cases, and other cases where the primary relief may not be monetary. *See Turner v. D.C. Bd. of Elections & Ethics,*

354 F.3d 890, 895 (D.C. Cir. 2004) (fee-shifting statutes exist "to attract competent counsel to serve as private attorneys general on behalf of plaintiffs, who are 'the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority'" (quoting *Miller v. Staats*, 706 F.2d 336, 340 (D.C. Cir. 1983)). To read fee-shifting statutes to limit or set a ceiling on fees payable by plaintiffs to counsel undertaking civil rights class actions, where similar ceilings do not exist for class actions in other areas, would put private prosecution of civil rights cases at a disadvantage in competing for resources with cases arising in other fields. *Cf. Venegas v. Mitchell*, 495 U.S. 82, 90 (1990) ("Indeed, depriving plaintiffs of the option of promising to pay more than the statutory fee if that is necessary to secure counsel of their choice would not further § 1988's general purpose of enabling such plaintiffs in civil rights cases to secure competent counsel.").

C. The 8% Fee Requested Is Fully Justified Under the Applicable Percentage-of-the-Fund Analysis, and Represents a Fair Allocation of the Litigation Proceeds Between Class and Counsel.

As set forth in detail in Plaintiffs' motion for fees, and addressed above, the percentage-of-the-fund method—and not the lodestar method—is the appropriate mechanism for evaluating Plaintiffs' fee motion. *Swedish Hosp.*, 1 F.3d at 1271. Although the USDA strains to identify ways in which the fee motion might fall short if it had been made pursuant to a fee-shifting statute and the lodestar approach, it fails *entirely* to address the factors that are applicable to an assessment of a request for fees from a common fund.

In general, this Court looks to seven factors in determining the reasonableness of a requested fee award based on the percentage-of-the-fund method: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or to the attorneys' fees requested; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the

risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 6-7 (D.D.C. 2008); *In re Lorazepam*, 2003 U.S. Dist. LEXIS 12344, at *27 (citing *Gunter Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000)); *In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d 14, 17 (D.D.C. 2003). As detailed in Plaintiffs' fee motion, all of these factors counsel in favor of an award at least as large as the 8% sought here. *See* Fee Motion at 26-37.

Although the USDA asserts that the 8% fee requested is unreasonable and should be reduced to 4%, it cannot cite any common fund cases in which counsel achieved comparable success on behalf of a class but received such a low percentage of the fund. In fact, the 8% award sought here is already *less than half* the percentage typically awarded in common fund cases, including those cases with common funds comparable to those payable here. The USDA's reference to 8% being the "top of the range" the parties agreed to in the Settlement is irrelevant. The plaintiffs sought an award of fees and costs permitted by the settlement, and the factors by which the fee request must be evaluated all favor the award sought.

Significantly, courts in this Circuit have observed that "a majority of common fund class action fee awards fall between twenty and thirty percent" and have frequently approved awards in that range. *Swedish Hosp.*, 1 F.3d at 1263, 1272; *In re Dept of Veterans Affairs Data Theft Litig.*, 653 F. Supp. 2d at 61 ("The majority of fee awards . . . fall in a range of 20 percent to 30 percent of the common fund.").[9] Notably, the percentages awarded from common funds in civil rights cases are consistent with these general benchmarks: a recent study analyzing class action

[9] *See also In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d 14, 17 (D.D.C. 2003) (awarding 28% of common fund); *In re Lorazepam*, 2003 U.S. Dist. LEXIS 12344, at *33 (30% of fund); *Oncology & Radiation Associates, P.A. v. Bristol-Myers Squibb Company and American Bioscience, Inc.*, No. 1:01CV02313 (EGS) (D.D.C. Sept. 3, 2003), (Dkt. 75 at 5; 72-1 at 6) (30% of fund) (Ex. 2); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067, at *58-60 (D.D.C. July 13, 2001) (approving award of 33% and citing cases).

cases from 1993-2008 in which fees were awarded from the common fund found that the mean award was 24% in civil rights cases.[10] *See also Velez*, 2010 U.S. Dist. LEXIS 125945, at *64 (S.D.N.Y. Nov. 30, 2010) (awarding 21.8% of $175 million constructive common fund, representing 2.4 multiplier, in Title VII gender discrimination case).

Moreover, even in "mega-fund" class actions where the fund is comparable in size to that here, "fees of fifteen percent are common." *In re Lorazepam*, 2003 U.S. Dist. LEXIS 12344, at *26 (citing *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 989 (E.D. Tex. 2000) (surveying cases)); *see also In re Cardinal Health, Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 770 (S.D. Ohio 2007) (18% of $600 million fund); *In re Royal Ahold N.V. Securities and ERISA Litig.*, 461 F. Supp. 2d 383, 385 (D. Md. 2006) (12% of $1.1 billion); *In re Lucent Techs.*, 327 F. Supp. 2d 426, 445 (D.N.J. 2004) (17% of $517 million); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465 (S.D.N.Y. 1998) (14% of $1.027 billion). The fee requested here is about half that percentage. Additionally, this Court has awarded considerably higher percentages in cases with large common funds, reasoning that "it is not fair" to counsel to reduce the percentage award simply because the settlement fund is large. *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067, at * 67 (D.D.C. July 13, 2001) (awarding 33% of $360 million fund).

An 8% fee is amply justified by the remaining factors applied in assessing awards under the percentage-of-the-fund method. Among the most important factors are the degree of success achieved for the class and the risk class counsel faced of nonpayment. *See In re UnitedHealth Group Inc. PSLRA Litig.*, 643 F. Supp. 2d 1094, 1104 (D. Minn. 2009) ("In considering a fee

[10] *See* Eisenberg, Theordore & Miller, Geoffrey P., Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008 (Cornell Faculty Working Paper No. 64, 2009), 7 J. Empir. L. Stud. 248 at T.5 (2010), *available at* http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1066&context=clsops_papers.

award, the most critical factor is the degree of success obtained." (internal citations omitted)); *In re Vitamins Antitrust Litig*., 2001 U.S. Dist. LEXIS 25067, * 62 (D.D.C. July 13, 2001) (recognizing "exceptional benefits to a large class as grounds for a higher fee award*"); Detroit v. Grinnell Corp*., 495 F.2d 448, 471 (2d Cir. 1974) (abrogated on other grounds by *Goldberger v. Integrated Res*., 209 F.3d 43, 48-50 (2d Cir. 2000) (noting that "[p]erhaps the foremost" of the factors relevant to a common fund fee is the attorney's "risk of litigation"). Here, class counsel secured an exceptional recovery for the class: the $760 million in monetary relief provided by the Settlement amounts to 98% of the $776 million that Plaintiffs' expert calculated to be the maximum amount of demonstrable economic losses sustained over the class period.[11] Counsel also faced significant risk of nonpayment or minimal payment, particularly in light of the risks that a damages class might not be certified and the gaps in documentary evidence that could make establishing class membership and damages difficult. *See* Fee Motion at 33-34. Moreover, class counsel labored over this case and advanced costs for over eleven years without receiving any compensation. In its Response, the USDA does not contest Plaintiffs' application of these critical factors.

Finally, the period for filing objections to the Settlement, including its fee provision, has now closed, and only two class members submitted objections to the fee provision. *See* Memorandum in Support of Final Approval of the Settlement Agreement and In Response to Objections at 47-49. This number stands in stark contrast to the nearly 13,000 likely class members who received long-form notices explaining that class counsel would seek up to 8% of the $760 million fund in fees and expenses. *See id*. at 8-9. Further, both objections appeared to rest on a misunderstanding of the fee provision, and concluded that class counsel would receive

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[11] *See* Motion for Class Certification, Ex. 2, Dkt. 551-4 (Dec. 4, 2009) at 6-7.

all, or at least half, of the entire fund.[12] As discussed in Plaintiffs' Memorandum in Support of Final Approval at 47-49, these objectors are mistaken in their interpretation of the Settlement: class counsel seek only 8% of the total fund. The USDA's claim that its objection is prompted by concern for the interests of the class, Response at 2, 7, is belied by the nearly unanimous silence by class members to the fee request. Indeed, the USDA's expression of concern for the interests of class sharply contrasts with its past treatment of Native American farmers and ranchers and its vigorous efforts for eleven years of litigation to deny the class any relief at all.[13] *Cf. Swedish Hosp*., 1 F.3d at 1270 (noting that "the Secretary's stated concern for money getting to the [plaintiff] hospitals rings particularly hollow given the history of this litigation" and "would have this Court ignore the fact that the government, left to its own devices, would have paid nothing" to plaintiffs).

D. The Lodestar "Cross-check" Is an Optional Tool in Common Fund Cases that Does Not Import Otherwise Inapplicable Requirements from the Fee-Shifting Context.

Some courts have applied a "lodestar cross-check" in considering the reasonableness of a common fund fee otherwise assessed under the percentage-of-the-fund approach. This cross-

[12] *See* Objection of Sillitti, Dkt. 585, Ex. 19, ¶ 2, 11 (complaining that "after class counsel and the lead plaintiffs get their entitlement the class members will get nothing"); Objection of Corning at 1 (objecting that attorneys would receive "60.8 million dollars *each*" and that the Settlement would "take six law firms divided by this 760 million dollars").

[13] The force of the USDA's objections is diminished further, as the portion of the fee request it contests would not revert to the United States if its opposition were successful. Accordingly the USDA also lacks any stake in the size of the fee awarded here because the Court's ruling on its opposition will not affect the total amount of money it must pay in this settlement. Were it successful in its opposition, the USDA simply would deter well-qualified counsel from undertaking class action litigation against the government in the future by substantially limiting the fees that can be recovered, even in highly successful common fund settlements such as this. Discouraging experienced counsel from taking on worthy cases is neither of service to these class members, nor consistent with public policy supporting incentives for such cases.

check, however, is not required in this Circuit.[14] *See In re Baan Co. Secs. Litig.,* 288 F. Supp. 2d at 19. Nor are lodestar cross-checks used to limit a common fund award to the amount of lodestar; rather, cross-checks are applied primarily to ensure that the percentage sought does not result in a fee that constitutes an excessive multiple of the nominal lodestar. *See, e.g., In re Lorazepam*, 2003 U.S. Dist. LEXIS 12344 at *32; MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.122 (2004) (noting that the lodestar cross-check is useful in percentage of the fund cases because it generates a "lodestar multiplier to compare to multipliers in other cases").[15] Fees awarded pursuant to the common fund doctrine frequently represent multiples of 4 times the lodestar or more, and do not require any special justification. *See In re Lorazepam*, 2003 U.S. Dist. LEXIS 12344 at *32 (observing that "multiples ranging up to four are frequently awarded in common fund cases") (citing *In re Prudential*, 148 F.3d at 341); *Oncology & Radiation Associates, P.A. v. Bristol-Myers Squibb Company and American Bioscience, Inc.*, No. 1:01CV02313 (EGS) (D.D.C. Sept. 3, 2003), (Dkt. 75 at 5; 72-1 at 6) (awarding 30% of common fund, which represented a multiplier of nearly 10) (Ex. 2).[16] As Plaintiffs explained in the Fee Motion, an 8% award here would represent a multiplier of 2.3, which would fall well within the typical range of such awards, and is much lower than multipliers frequently approved in cases

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[14] Given that the D.C. Circuit has explicitly rejected the lodestar method for assessing fees from the common fund, *see Swedish Hospital Corp*., 1 F.3d at 1271, and does not require a lodestar cross-check in common fund cases, Plaintiffs do not bear a "burden" of "justifying the lodestar figure," as the USDA contends. *See* Response at 7.

[15] Indeed, in *Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82 (2d Cir. 2010), cited by the USDA for the proposition that courts "have used a lodestar approach to determine whether or not the proposed common fund recovery is reasonable," Response at 4, class counsel was awarded a fee that represented a lodestar multiplier of 2.89. 623 F.3d at 86.

[16] *See also Wal-Mart Stores*, 396 F.3d at 123 (noting that "multipliers of between 3 and 4.5 have become common"); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 & n.6 (9th Cir. 2002) (approving a multiplier of 3.65 and noting that it fell within typical range for common fund cases).

with common funds of comparable size to that here. *See* Fee Motion at 23-24.[17]

As described in the USDA's response, the full lodestar analysis applied in fee-shifting cases generally requires the submission and court review of detailed billing records and adequate justification of billing rates. *See* Response 7-9; *see also In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005) (observing that the lodestar method "compels district courts to engage in a gimlet-eyed review of line-item fee audits"). Relying solely upon cases from this fee-shifting context, the USDA argues that Plaintiffs' failed to meet "their burden . . . in justifying the lodestar amount" by: (1) submitting billing and expense summaries rather than their full billing records to the Court; (2) not deducting for withdrawn claims or lost motions; (3) not justifying billing rates under the *Laffey* matrix; (4) using current rates to calculate their fees. *See* Response 7-9.

However, these requirements are inapplicable in common fund cases. First, when using a lodestar fee merely as a cross-check in a case assessing fees under the percentage-of-the-fund method, a full record review and lodestar analysis is neither necessary nor appropriate. Because the lodestar amount calculated for a cross-check is only used as a rough comparator, and not as the actual fee to be assessed, the "lodestar cross-check calculation need entail neither mathematical precision nor bean-counting," and "may rely on summaries submitted by the attorneys." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005).[18] Indeed, in

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[17] *See also Velez*, 2010 U.S. Dist. LEXIS 125945 at *64-66 (Title VII case reasoning that because the 2.4 multiplier fell "at the lower end" of the range generally approved, the cross-check provided further support for approving the requested 21.8% fee).

[18] *See also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.122 (2004) ("The lodestar is . . . useful as a cross-check on the percentage method by estimating the number of hours spent on the litigation and the hourly rate, using affidavits and other information provided by the fee applicant. The total lodestar estimate is then divided into the proposed fee calculated under the percentage method. The resulting figure represents the lodestar multiplier to compare to multipliers in other cases.").

adopting the percentage-of-the-fund method for common fund cases, the D.C. Circuit reasoned that one of its major advantages over the lodestar approach is that the percentage method does not make the "considerable demands upon judicial resources" that the lodestar requires, "since it can be exceptionally difficult for a court to review attorney billing information over the life of a complex litigation and make a determination about whether the time devoted to the litigation was necessary or reasonable." *Swedish Hosp*., 1 F.3d at 1269-70. The Court of Appeals also observed that under the percentage approach "the court need not second-guess the judgment of counsel as to whether a task was reasonably undertaken or hours devoted to it reasonably expended." *Id.* at 1270. Requiring class counsel nonetheless to submit their voluminous fee records in common fund cases, and further requiring the court to pore over those records searching for reductions for cross-check purposes, would eliminate important benefits of the percentage approach. Thus when courts in this Circuit and beyond engage in a lodestar cross-check, they generally use an approximation of the lodestar based on summaries submitted by counsel. *See, e.g*., *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 284 (3d Cir. 2009) (summaries of time records sufficient in common fund case because Court used information only to cross-check reasonableness of fee award); *In re WorldCom, Inc. Sec. Litig*., 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005) ("Where the lodestar fee is used as 'a mere cross-check' to the percentage method of determining reasonable attorneys' fees, the hours documented by counsel need not be exhaustively scrutinized by the district court."); *see also In re Veterans Affairs Data Theft Litig.* 653 F. Supp. 2d at 61 (using lodestar summaries in affidavit for lodestar cross-check); *Cohen v. Warner Chilcott Pub. Ltd. Co.*, 522 F. Supp. 2d 105, 123 (D.D.C. 2007) (awarding a fee representing 23% of constructive common fund, and accepting for comparison class counsels' declaration in which they "aver[] that they expended an aggregate of 3,653.7

hours prosecuting this action, resulting in a total lodestar of $ 2,006,231"); *In re Lorazepam*, 2003 U.S. Dist. LEXIS 12344, at *33 (awarding all costs and expenses sought by counsel, which were substantiated through affidavits, and stating "the fact that petitioners were willing to expend their own money, as an investment whose reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary"). Therefore, Plaintiffs' submission of declarations and exhibits attesting to counsel's fees and expenses and offer to provide billing records at the request of the Court was appropriate.

Second, the USDA's contention that Plaintiffs should have subtracted fees for any unsuccessful claims or motions from the lodestar fee is meritless. The authorities on which the USDA relies for this proposition are two fee-shifting cases disallowing fees for unsuccessful claims to be included in an award of fees to the "prevailing party." *See* Response at 8. This statutory restriction is not applicable here, where the lodestar is being calculated as an estimate of the total fees reasonably incurred in litigating the case (and where the fees are payable from the common fund), and not as the amount awardable to a prevailing party pursuant to a fee-shifting statute.[19]

Third, the USDA's argument that Plaintiffs must justify their hourly rate under the *Laffey* matrix is similarly unavailing. The *Laffey* matrix was developed in a fee-shifting case, and, by its own terms, is "intended to be used in cases in which a 'fee-shifting' statute permits the prevailing party to recover 'reasonable' attorneys' fees." *See* Laffey Matrix 2003-2010, *available at* http://www.justice.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_8.html (explanatory note 1). The two fee-shifting cases the USDA cites fail to support use of the *Laffey*

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[19] Even assuming the limitations on unsuccessful claims were applicable here, Plaintiffs would not have to deduct their fees for pursuing APA claims because these claims were "not wholly unrelated" to the ECOA claims. *Lunday v. City of Albany,* 42 F.3d 131, 134 (2d Cir. 1994).

matrix in common fund cases, and this Court has previously performed lodestar cross-checks without reference to *Laffey*. *See, e.g*., *In re Dept of Veterans Affairs Litig.*, 653 F. Supp. 2d at 61; *Cohen*, 522 F. Supp. 2d at 123 n.4 (common fund case utilizing billing rates in excess of *Laffey* for cross-check); *see also Velez*, 2010 U.S. Dist. LEXIS 125945 at *63 (same).

Finally, the USDA argues that Plaintiffs erred in using current rates to calculate the lodestar, either because current rates should not be applied against the United States, which is immune from liability for interest, or because applying current rates and considering the delay in compensation as a factor supporting the fees would amount to double-counting. However, the fees here are not being assessed against the government, but against the class. Therefore, the rule against interest is inapplicable. *See Library of Congress v. Shaw*, 478 U.S. 310, 316-320 (1986). Moreover, common fund cases regularly apply current rates when calculating lodestar cross-check amounts and still return multipliers and consider the length of time the attorneys went without compensation as a relevant factor. *See Velez,* 2010 U.S. Dist. LEXIS 125945 at *64; *In re NASDAQ Market-Makers Antitrust Litig*., 187 F.R.D. 465, 489 (S.D.N.Y. 1998). This is appropriate because the rates may not adequately compensate for the delay in payment of the fees, and because particularly in the common fund context, where counsel is litigating on a contingency basis, the length of time without compensation is also relevant to the risk of non-payment faced.

In short, a lodestar cross-check, while not required in this Circuit, provides further support for the reasonableness of Plaintiffs' fee request, as it reflects the modest size of the multiplier that the award of fees and costs would represent. The USDA has failed to provide any authority supporting its attempt to import fee-shifting principles into the calculation of the lodestar for cross-check purposes. While the USDA's few specific challenges to the time and

costs expended by class counsel in achieving this exceptional settlement can easily be refuted—for example, USDA's extraordinary position that counsel were unjustified in traveling to meet clients and witnesses located in at least 40 states—such nit picking cannot be justified in challenging lodestar fee awards, much less in consideration of the common fund fee award sought here. Plaintiffs decline to be drawn further into discussion of what fee would be appropriate under the incorrect legal principles advocated by Defendant. Under the proper and controlling legal standards, the award of attorneys' fees and costs sought herein is more than justified.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for an Award of Attorneys' Fees and Expenses.

April 1, 2011

Respectfully submitted,

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