UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BARBARA KEILER, MONA GAY THOMAS, and LINDA BARRETT, on behalf of themselves and all others similarly situated, Plaintiffs, v. HARLEQUIN ENTERPRISES LIMITED, a Canadian corporation; HARLEQUIN BOOKS S.A., a Swiss company; and HARLEQUIN ENTERPRISES B.V., a Dutch company, Defendants.	12 Civ. 5558(WHP)

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES, SERVICE AWARDS, AND REIMBURSEMENT OF EXPENSES

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Class Counsel, Boni & Zack LLC and DavidWolfLaw pllc (collectively, "Class Counsel"), respectfully submit this application and the accompanying declarations in support of an award of $1,025,000 in attorneys' fees and $28,206.25 in expenses, as well as approval of service awards for class representatives Barbara Keiler, Mona Gay Thomas, and Linda Barrett ("Named Plaintiffs") of $5,000 each.

I. INTRODUCTION

The hard-fought litigation and settlement of this class action will provide a common fund of $4.1 million that will ensure that authors are more fairly compensated for the sales of their older works that were republished by Defendants Harlequin Enterprises, Harlequin Books S.A. and Harlequin Enterprises B.V (collectively, "Defendants" or Harlequin") as ebooks. The $4.1 million common fund comprises approximately 75% of Class Counsel's informed view of actual damages based on the materials reviewed in discovery and provided by Harlequin for the purposes of settlement.

Claims will be paid automatically to settlement class members with no possibility of any reversion of funds to Defendants. Such extraordinary relief was only made possible through the efforts of Class Counsel who diligently and effectively litigated this case for more than three years. Under well-settled precedent, Class Counsel should be compensated with a reasonable fee for their work, which was necessary for the creation of the fund that will provide a common benefit to the class.

A consideration of the factors set forth by the Second Circuit in *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43 (2d Cir. 2000), confirms that the requested fee is reasonable. First, Class Counsel spent a significant, but reasonable, amount of time litigating this action, including resurrecting this action on appeal after the complaint was originally dismissed, as well as taking discovery and developing a record necessary to mediate the dispute and reach the settlement.

Second, this class action involved a number of complex issues, including analysis of international inter-company transactions and the valuation of intellectual property rights in a newly emerging marketplace. Third, Class Counsel performed the work necessary to achieve the settlement without payment for more than three years in a case with a very real prospect of not getting paid at all. Fourth, the quality of the representation is demonstrated by the favorable result achieved in the face of a strong defense mounted by the highly skilled and respected counsel representing the Defendants. Fifth, the award sought represents an amount that is reasonably related to both the value conferred on the class (25% of the common fund) and to Class Counsel's lodestar (at a negative multiplier of 0.75). Finally, given the risks undertaken and result obtained by Class Counsel, there is a strong public policy interest supporting the award.

In addition, for the reasons discussed below, Class Counsel should also be reimbursed for their reasonable out-of-pocket expenses, and the Named Plaintiffs should be granted the requested service awards, which are justified by their contributions to the litigation.

II. BACKGROUND

A. Class Counsel's Work In Developing This Case, Preparing The Pleadings, And Responding To The Motion To Dismiss

Class Counsel commenced this action in order to obtain for a class of authors their contractually fair share of ebook royalties for the publication by Harlequin of their backlist romance novels as ebooks. The publishing agreements at issue were entered into prior to 2005. Because these works were originally published before Harlequin was selling ebooks, the publishing agreements did not contain a specific term setting forth the royalty for ebooks. Thus, a dispute arose as to how authors would be compensated when Harlequin began to republish these works as ebooks in later years. For publication not covered by an express royalty provision,

the publishing agreements contained an "All Other Rights" clause, which provided that authors would be paid "[o]n all other rights exercised by Publisher or its Related Licensees fifty percent (50%) of the Net Amount Received by Publisher for the license or sale of said rights." In 2011, Harlequin sent written communications to authors in which it explained how royalties for ebooks were being calculated under this clause. It stated that royalties would be based on the net amount received by Harlequin's foreign subsidiaries ("Harlequin Switzerland"), from a license that Harlequin Enterprises stated Harlequin Switzerland granted to it to publish these ebooks. Class Counsel and the Named Plaintiffs believed that such practices resulted in the authors receiving less than their fair share for the sales of these ebooks.

Working with the Named Plaintiffs, who provided information concerning their publishing agreements and their dealings with Defendants, Class Counsel filed a class action complaint on July 19, 2012 (ECF No. 1), which included four counts of breach of contract and one count for unjust enrichment. The first three of those breach of contract causes of action alleged, under theories of agency, alter ego, and assignment, that the amount due to authors should have been calculated based on the amount received by Harlequin Enterprises as the true publisher rather than Harlequin Switzerland. Based, in part, on information provided by the Named Plaintiffs, the complaint alleged that Harlequin Enterprises was the true publisher because, among other things, it drafted, negotiated, and administered those publishing agreements and performed all of the functions of the publisher. The fourth cause of action for breach of contract alleged that even if the class members' ebook royalties were properly calculated based on what Harlequin Switzerland received from "licensing" the right to publish the ebooks to its parent corporation, that does not mean that Defendants were free to shortchange Plaintiffs' royalties by setting an artificially low intra-company licensing fee.

Defendants filed their motion to dismiss the original complaint on October 19, 2012. (ECF No. 11.) Class Counsel responded to certain issues raised in Defendants' motion to dismiss by preparing a First Amended Complaint, which they filed on November 5, 2012. (ECF No. 17.) Defendants then filed a motion to dismiss the First Amended Complaint on November 30, 2012. (ECF No. 19.) Class Counsel prepared a memorandum of law in opposition to Defendants' motion, which was filed on January 4, 2013. (ECF No. 22.) Class Counsel then argued the motion to dismiss on March 22, 2013. (ECF No. 35.) The District Court (Baer, J.) ultimately dismissed the complaint in its entirety by order entered April 2, 2013. (ECF No. 34.)

B. Class Counsel Successfully Appealed The Order Dismissing The Complaint

After the motion to dismiss was granted, Class Counsel filed a notice of appeal with the Second Circuit Court of Appeals on April 30, 2013. Class Counsel prepared and filed their brief in support of the appeal and the joint appendix on June 19, 2013, and their reply brief on August 7, 2013. Class Counsel then argued the appeal before the Second Circuit on November 21, 2013.

On May 1, 2014, the Second Circuit issued a precedential opinion affirming in part and reversing in part the District Court's ruling dismissing Plaintiffs' complaint. *Keiler v. Harlequin Enterprises Ltd.*, 751 F.3d 64 (2d Cir. 2014). The Second Circuit affirmed the dismissal of the breach of contract causes of action under theories of agency, alter ego, and assignment, but reversed the dismissal of the fourth cause of action for breach of the All Other Rights clause. The Second Circuit ruled that Plaintiffs adequately alleged a claim that "defendants breached the Publishing Agreements because the licensing fees Harlequin Enterprises paid to Harlequin Switzerland—the figure on which plaintiffs' royalties were based—were not 'equivalent to the amount reasonably obtainable . . . from an Unrelated Licensee.'" *Id.* at 70.

C. Class Counsel Conducted Thorough And Efficient Discovery

While the parties were briefing the motion to dismiss, they also began to commence discovery since the Court originally scheduled a discovery deadline of April 30, 2013. (ECF No. 15.) The parties exchanged initial disclosures, Class Counsel served initial document requests in November 2012, and Defendants served document requests and interrogatories to which Class Counsel provided responses with the assistance of Named Plaintiffs in December 2012 and January 2013.

The parties then negotiated and obtained court approval of a stipulated protective order (ECF No. 25), and began their document production. From January through March 2013, Defendants made their initial productions of approximately 10,000 pages of documents. The Named Plaintiffs searched their electronic and hard copy files from which they collected and produced approximately 3,000 pages of documents, including their publishing contracts, emails, and correspondence with the Defendants.

After reviewing Defendants' initial document production, in March 2013, Class Counsel prepared and served Second and Third Document Requests on Defendants. The parties also set dates for numerous depositions that they were preparing to take in April 2013, including the depositions of the three Named Plaintiffs and several of Defendants' witnesses. The Named Plaintiffs' depositions were scheduled to begin on April 4, 2013, but were cancelled when the District Court issued its order dismissing the complaint just two days earlier. One of the Named Plaintiffs had already traveled to New York to prepare for her deposition when the order was issued.

On remand, after Judge Baer passed away, the case was reassigned to this Court. Counsel appeared for a status conference with the Court on August 8, 2014, to establish a new scheduling order for discovery. The focus of discovery shifted in light of the Second Circuit's ruling.

Previously, discovery had focused on the relationship of the Harlequin entities and their role in the publication of the class members' books. Based on the Second Circuit's ruling, the emphasis of discovery focused on, among other things: (1) the manner in which Defendants had established the inter-company license rate paid by Harlequin Enterprises to Harlequin Switzerland, including Harlequin's international tax accounting for those transactions; and (2) the evidence concerning the market value of the right to publish the class members' books as ebooks; i.e., "the amount reasonably obtainable . . . from an Unrelated Licensee." In doing so, Class Counsel began to work with expert witnesses, including experts in the publishing industry, as well as experts in intellectual property damage calculations.

In response to new discovery requests prepared by Class Counsel and previously outstanding requests, Defendants produced additional documents totaling approximately 90,000 pages, which Class Counsel reviewed and analyzed. With the assistance of Named Plaintiffs, Class Counsel also searched for and produced additional documents in response to Defendants' requests. Throughout discovery, the parties had a number of discovery disputes, which they were able to resolve after several meet-and-confer conference calls.

The parties deferred taking a number of depositions in order to focus on settlement discussions, as discussed below. By March 2015, the prospects of settlement appeared uncertain, so Plaintiffs noticed the deposition of several of Defendants' witnesses and the depositions of the three Named Plaintiffs were scheduled to take place in April 2015 as well. Class Counsel completed the depositions of two of Defendants' key witnesses, including the Vice President of Taxation of Defendants' parent corporation. The depositions of the Named Plaintiffs and additional defense witnesses were adjourned when the parties agreed to pursue mediation.

D. Class Certification

Prior to the original order dismissing the complaint, Class Counsel prepared and filed an initial motion for class certification. (ECF Nos. 30 & 31.) That motion was supported with evidence Class Counsel had reviewed and compiled from Defendants' initial document production. (ECF No. 31.) The parties had agreed to a briefing schedule, but the order dismissing the case was issued prior to Defendants' response.

After the Second Circuit's decision, the parties proposed a briefing schedule on an amended motion for class certification. At the Court's suggestion, Class Counsel worked with Defendants and agreed to stipulate to class certification. After the parties negotiated a slightly modified definition of the class, Class Counsel prepared and filed a stipulated class certification order, which was entered by the Court (ECF No. 49.) Class Counsel thereafter prepared a motion seeking approval of a notice plan and proposed form of notice (ECF No. 52) on December 19, 2014. As discussed below, however, once it appeared that there was a possibility of settlement, the parties sought to defer notice so as to avoid the unnecessary expense of duplicative notice and burdening class members with potentially conflicting notices.

E. Class Counsel Mediated This Case And Negotiated A Favorable Settlement

Class Counsel participated in a preliminary in-person meeting with defense counsel in New York to first discuss potential settlement in November 2014, and continued those efforts by phone in early 2015. The parties also sought an extension of the discovery deadline in order to focus on settlement efforts. During this time, the parties continued their document productions and exchanged information related to the issue of damages necessary to evaluate a proposed settlement, but deferred taking any depositions.

By mid-April, the parties' settlement discussions appeared to reach an impasse, and the parties then agreed to seek the assistance of mediator Peter H. Woodin, a JAMS New York

mediator with more than 20 years of ADR experience. Prior to the in-person mediation session, Class Counsel prepared a comprehensive mediation statement based on the information they had compiled from discovery. The statement included hundreds of pages of exhibits that Plaintiffs intended to use in support of their claims and preliminary damages calculations. Class Counsel also worked with one of their industry expert witnesses, Leon Friedman, who has more than 50 years of experience in the publishing industry, to prepare a preliminary expert report, which was included with the mediation statement.

On August 4, 2015, the parties participated in an all-day mediation session with Mr. Woodin. The in-person session resulted in many subsequent intensive telephonic negotiations involving Mr. Woodin. Class Counsel also prepared an additional written submission for Mr. Woodin outlining their position on disputed issues that had arisen during the mediation and telephonic negotiations.

Eventually, the parties agreed on October 14, 2015 to settle for a common fund of $4.1 million. From that date until March 11, 2016, the parties negotiated vigorously, and at times contentiously, to draft and finalize the settlement agreement and supporting settlement papers (i.e., the Notice of Class Action Settlement, the proposed Order granting preliminary settlement approval, the proposed Final Judgment and Order granting final settlement approval, and a confidential supplemental agreement regarding opt-outs).

Class Counsel prepared and filed a motion for preliminary approval of the settlement on March 18, 2016. (ECF Nos. 67, 68 & 69.) The Court held a telephonic hearing on the motion on April 5, 2016, and preliminarily approved the settlement. (ECF No. 72.) Since that time, Class Counsel has worked with the Claims Administrator to distribute notice to the class, which was

accomplished on April 20, 2016, and are preparing to seek final approval of the settlement, with the fairness hearing scheduled for June 30, 2016.

III. LEGAL STANDARD

"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." Fed. R. Civ. P. 23(h). "Pursuant to the 'equitable' or 'common fund' doctrine established more than a century ago in *Trustees v. Greenough*, 105 U.S. 527, 532-33, 15 Otto 527, 26 L.Ed. 1157 (1881), attorneys who create a common fund to be shared by a class are entitled to an award of fees and expenses from that fund as compensation for their work." *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695CM, 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007) (internal quotation marks omitted).

"A court may calculate reasonable attorneys' fees either by determining the lodestar amount, or by awarding a percentage of the settlement. The overwhelming trend, however, is to award a percentage of the fund." *In re Platinum & Palladium Commodities Litig.*, No. 10CV3617, 2015 WL 4560206, at *1 (S.D.N.Y. July 7, 2015) (Pauley, J.). "Even where the percentage method is used, the lodestar method remains useful as a 'cross-check on the reasonableness of the requested percentage.'" *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 128 (S.D.N.Y. 2009) (Pauley, J.) (quoting *Goldberger,* 209 F.3d at 47, 50).

Applying the standards set forth by the Second Circuit in *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43 (2d Cir. 2000), district courts take six factors into consideration for awarding a percentage of a common fund: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of the representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Sakiko Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 435 (S.D.N.Y. 2014) (Pauley, J.) (citing *Goldberger,* 209 F.3d at 50).

The Supreme Court has warned that "the determination of fees 'should not result in a second major litigation.'" *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011) (citing, *inter alia*, *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). Plaintiffs must meet their burden of providing an appropriate basis for a fee, but "trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees … is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." *Id.* at 2216.

IV. ARGUMENT

Plaintiffs submit that the requested fees and expenses are reasonable. The $1,025,000 in attorneys' fees represents 25% of the value of the common fund, and the $28,206.25 in expenses is less than seven tenths of a percent of the fund. All of the *Goldberger* factors support the request: experienced Class Counsel devoted a substantial amount of time and expense into risky litigation, producing high-quality work against a top-tier defense firm and achieving a valuable result for class members in the form of a $4.1 million common fund comprising approximately 75% of Class Counsel's informed view of actual damages. The benefits to the class could not have been achieved without the dedicated and skilled work of Class Counsel—nor without their substantial investment of time and money, amounting to more than 2559 hours of work over the more-than-three-year lifespan of the litigation with a collective lodestar of $1,367,669.00, together with costs in the amount of $28,206.25. (Boni Decl. ¶¶ 3-6 & Ex. 1 & 2; Wolf Decl. ¶¶ 3-6 & Ex. 1 & 2.) A full award of the requested fees and expenses is consistent with the public policy concerns that animate Rule 23—encouraging skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature.

A. The Fee Request Is Reasonable

1. Class Counsel Expended A Substantial, But Reasonable, Amount Of Time Litigating This Action

The first *Goldberger* factor is counsel's time and labor. As set forth in the accompanying declarations, Class Counsel spent 2559.60 hours, with a collective lodestar of $1,367,669.00 in litigating this case. (Boni Decl. ¶¶ 3, 5 & Ex. 1; Wolf Decl. ¶¶ 3, 5 & Ex. 1.) Class Counsel also incurred out-of-pocket expenses of $28,206.25. (Boni Decl. ¶ 6 & Ex 2; Wolf Decl. ¶ 6 & Ex. 2.) Although this time represents a significant investment over the course of more than three years of litigation, the work performed was done in an efficient manner and reasonably necessary to achieve the favorable settlement for the benefit of the class. Class Counsel spent this time, among other things:

- Developing the theories of the case and drafting the complaint;
- briefing and arguing the motion to dismiss;
- briefing and arguing the decision dismissing the complaint before the Second Circuit;
- briefing the original motion for class certification, negotiating a stipulated class certification order after the appeal was decided, and preparing a proposed form of notice;
- substantially completing document discovery, which involved reviewing more than 90,000 pages of documents, as well as taking the deposition of two key witnesses and preparing for the depositions of other witnesses;
- working with expert witnesses; and
- ultimately mediating this dispute and negotiating the settlement agreement.

(*See* Boni Decl. ¶ 2; Wolf Decl. ¶ 2.)

Class Counsel performed this work efficiently and attempted to avoid unnecessary expenses by, for example, deferring depositions and other discovery and focusing on settlement when it appeared that a favorable resolution could be achieved. Additionally, Class Counsel worked with Defendants to resolve discovery disputes rather than filing unnecessary motions to compel and cooperated with Defendants on the class certification order and original notice proposal.

Accordingly, consideration of counsel's time and labor in litigating this case supports the fee request.

2. The Complexities Involved In The Litigation Support The Requested Fee

"Class actions have a well deserved reputation as being most complex." *Jermyn v. Best Buy Stores, L.P.*, No. 08 CIV. 214 CM, 2012 WL 2505644, at *10 (S.D.N.Y. June 27, 2012) (citations omitted). Although at first blush this case may appear to present an ordinary contract dispute, this action implicated more complex factual and legal issues. This case required Class Counsel to obtain discovery and to analyze more than a decade of inter-company licensing transactions among Defendants' numerous foreign affiliates. It implicated questions surrounding the international tax accounting for those transactions. It also required analyses of the valuation of the intellectual property rights at issue in an emerging marketplace. Such complexities support Class Counsel's fee request.

3. The Risk Class Counsel Took Justifies The Fee Request

Class Counsel took on substantial risk in bringing these claims. "The most important *Goldberger* factor is often the case's risk." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014). "[T]his factor recognizes the risk of non-payment in cases prosecuted on a contingency basis where claims are not successful," which

"can justify higher fees." *Jermyn*, 2012 WL 2505644, at *10. Unlike, for example, securities cases, which routinely settle for large sums, *see, e.g.*, *Goldberger*, 209 F.3d at 52 ("At least one empirical study has concluded that 'there appears to be no appreciable risk of non-recovery' in securities class actions, because 'virtually all cases are settled.'") (citation omitted), this case presented novel claims where the likelihood of success and value of a potential recovery was far less established. Indeed, the risk in bringing this litigation is confirmed by the order originally dismissing this action, as well as other unsuccessful class actions involving royalty disputes with authors. *See, e.g.*, *Cordell v. McGraw-Hill Cos.*, No. 12 CIV. 0637 ALC RLE, 2012 WL 5264844 (S.D.N.Y. Oct. 23, 2012) (dismissing class action complaint by authors alleging breach of publishing agreements in connection with calculation of sales by publisher's international subsidiary), *aff'd*, 525 F. App'x 22 (2d Cir. 2013).

If this case had proceeded, counsel faced additional risks that Defendants could have prevailed on their arguments for summary judgment. Harlequin asserted numerous defenses to Plaintiffs' claims. Among other things, it contended that the inter-company license rates have been established in good faith and verified by its accountants. Harlequin indicated its intention to move for summary judgment based on what it argued was a lack of evidence of bad faith in establishing the inter-company license rates. While Class Counsel disputed Harlequin's interpretation of both the facts and the law, they nonetheless faced the risk that Harlequin could prevail on its defenses at summary judgment or at trial.

Even if Plaintiffs had survived summary judgment and prevailed on questions of liability at trial, the damages remained uncertain as Harlequin vigorously disputed Plaintiffs' damages calculations and argued that there was insufficient evidence that Harlequin Switzerland could have obtained a higher license rate from an unrelated licensee. Thus, Plaintiffs faced the risk of

recovering damages that could have been even less than the amount obtained by settlement, which further supports the requested fee. *See, e.g.*, *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. at 129 (noting the fact that "damages were uncertain" among "significant risks remaining in this litigation"); *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 372 (S.D.N.Y. 2002) ("Even if the Class were able to overcome a motion to dismiss, a motion for summary judgment and a jury verdict, they would still confront the question of the amount of damages, if any, incurred by the Class.").

Additionally, although the parties stipulated to class certification, there was the risk that Defendants could have moved to decertify the class if individualized issues arose concerning Harlequin's defenses or in connection with Plaintiffs' final damages expert report.

In sum, the substantial risks Class Counsel faced when filing this suit and even up to the point of settlement strongly support the requested fee.

4. The Successful Result Evidences The Quality Of The Representation

"To determine the 'quality of the representation,' courts review, among other things, the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *Taft v. Ackermans*, No. 02 CIV. 7951 (PKL), 2007 WL 414493, at *10 (S.D.N.Y. Jan. 31, 2007). Here, the significant recovery for the class speaks volumes for the quality of the representation. Such a positive result could not have been achieved without strong representation. As set forth in the accompanying declarations, Class Counsel are experienced and skilled in the field of class action litigation, and have specialized experience representing authors in disputes with publishers. (Boni Decl. Ex. 3; Wolf Decl. Ex. 3.) Additionally, "[t]he quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance" and the fact that counsel "achieved a positive result in this case while facing well-resourced and experienced defense counsel" demonstrates "the caliber of representation that was necessary."

Jermyn, 2012 WL 2505644, at *11 (citations and internal quotation marks omitted). Here, the fact that Class Counsel litigated this case against the highly skilled and respected counsel that represented Harlequin further speaks to the quality of representation and supports Class Counsel's fee request.

5. The Requested Fee Is Reasonable In Relationship To The Settlement

The requested fee representing 25% is reasonable in relationship to the $4.1 million common fund and is at or below the standards in this Circuit for similar settlements. *See, e.g.*, *Ramirez v. Lovin' Oven Catering Suffolk, Inc.*, No. 11 CIV. 0520 JLC, 2012 WL 651640, at *4 (S.D.N.Y. Feb. 24, 2012) ("Class Counsel's request for 25% of the fund is reasonable and consistent with (if not lower than) the norms of class litigation in this Circuit."); *In re Canadian Superior Sec. Litig.*, No. 09 CIV. 10087 SAS, 2011 WL 5830110, at *4 (S.D.N.Y. Nov. 16, 2011) (finding "twenty-five percent fee is reasonable in relation" to a $5.2 million settlement); *cf. In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *4 & n.5 (finding "requested amount of attorneys' fees, $1.65 million-representing 30% of the total all-cash recovery to the Class of $5.5 million" to be "consistent with fees awarded in similar class action settlements of comparable value"). Additionally, claims from the common fund will be paid to settlement class members automatically and none of the money from the fund will revert back to the Defendants. *Cf. Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980) (holding that attorneys' fees should be awarded from the entire common fund created notwithstanding defendant's contentions that it had a potential right to return of unclaimed money).

"As the size of the settlement fund increases, the percentage of the fund awarded as fees often decreases so as to prevent a windfall to plaintiffs' attorneys." *Hicks v. Stanley*, No. 01 CIV. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005). A settlement of the size at issue in this case, however, does not create such an issue. *See id.* ("A settlement amount of $10

million does not raise the windfall issue in the same way as would a $100 million settlement, and a 30% fee does not produce such a windfall."); *see also Taft*, 2007 WL 414493, at *10 (same).

Accordingly, the *Goldberger* factor that requires the Court to consider the relationship of the requested fee to the settlement confirms the reasonableness of the fee sought.

6. Public Policy Considerations Favor The Requested Fee

"Public policy favors the award of reasonable attorneys' fees in class action settlements." *Jermyn*, 2012 WL 2505644, at *12. "The fees awarded must be reasonable, but they must also serve as an inducement for lawyers to make similar efforts in the future." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005). The settlement will confer a substantial benefit to the members of the Class, which would not have been possible if there were no incentives for counsel to bring such claims.

Accordingly, public policy weighs in favor of Class Counsel's requested fee.

7. The Requested Fee Of 25% Percent Of The Common Fund Is Reasonable

The percentage method is the "preferred method" for awarding attorneys' fees in the Second Circuit in common fund cases. *See Asare v. Change Group of New York, Inc.*, No. 12 CIV. 3371 CM, 2013 WL 6144764, at *16-17 (S.D.N.Y. Nov. 18, 2013). This method is preferred because it (1) "'directly aligns the interests of the class and its counsel' because it encourages attorneys to resolve the case efficiently and to create the largest common fund from which payments to the class can be made"; (2) "provides a powerful incentive for the efficient prosecution and early resolution of the litigation"; and (3) "preserves judicial resources." *Id.* (citations omitted). For the reasons explained above, the requested fee comprising 25% of the common fund is reasonable and satisfies all of the *Goldberger* factors.

8. The Lodestar Cross Check Supports The Requested Fee

The Second Circuit "encourages" an analysis of counsel's lodestar "as a 'cross check' on the reasonableness of the requested percentage." *Goldberger,* 209 F.3d at 50. "Where the lodestar is 'used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court.'" *In re Platinum & Palladium Commodities Litig.*, 2015 WL 4560206, at *3 (quoting *Goldberger*, 209 F.3d at 50).

Class counsel's overall lodestar from investigation of the case to April 30, 2016, was $1,367,669.00 million using current hourly rates and $1,349,825.25 using historical hourly rates.[1] Class Counsel's hourly rates here (ranging between $490 and $750 per hour, with 84.5% of the work performed by attorneys with billing rates of $500 or less) are the same as the usual and customary hourly rates charged for their services in non-contingent billable matters and/or that have been accepted and approved by courts in other class action litigation. (Boni Decl. ¶ 4; Wolf Decl. ¶ 4.) Class Counsel's hourly rates are also well within the reasonable rates for attorneys practicing in the Southern District of New York. A January 2014 *National Law Journal* survey found that New York's hourly rates were the highest in the country, with firms whose largest office is in New York charging an average of $882 per hour for partners and $520 per hour for associates. By way of additional comparison, the law firm representing Defendants, Paul Weiss, was included in *National Law Journal*'s January 2014 survey and had a top partner hourly rate of $1,120 with an average of $1,040, and a top associate rate of $760 with an average of $600. *Id.* Class Counsel's requested rates fall on the low side of these measures. As

[1] "[I]n order to provide adequate compensation where the services were performed many years before the award is made, the rates used by the court to calculate the lodestar should be 'current rather than historic hourly rates.'" *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (quoting *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989)).

demonstrated by the extensive litigation history recounted above, this lodestar reflects Class Counsel's efficient litigation of this case.

"In the 'usual' case, the multiplier applied to the lodestar typically is positive, to account for the contingent nature of the engagement and the risk of such a case." *Jermyn*, 2012 WL 2505644, at *10 (quoting *In re NTL, Inc., Sec. Litig.,* 2007 U.S. Dist. LEXIS 13661, at *30 (S.D.N.Y. Mar. 1, 2007)). "[M]ultipliers of two to six times total lodestar … are regular[ly] awarded in this district." *Johnson v. Brennan*, No. 10-4712, 2011 WL 4357376, at *21 (S.D.N.Y. Sept. 16, 2011). Here, however, the lodestar multiplier is negative—0.75 using current hourly rates and 0.76 using historic hourly rates. Courts have found a negative lodestar multiplier to be "a strong indication of the reasonableness of the proposed fee." *In re Bear Stearns Co. Sec., Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012); *see also City of Providence v. Aeropostale, Inc.*, No. 11 CIV. 7132 CM GWG, 2014 WL 1883494, at *13 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015); *Jermyn*, 2012 WL 2505644, at *10 (same).

Accordingly, the lodestar cross check, which yields a negative multiplier of 0.75, confirms the reasonableness of the requested fee.

B. The Expense Request Is Reasonable

"Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients." *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. at 131 (citations omitted). As detailed in the accompanying declarations, Class Counsel have incurred out-of-pocket expenses of $28,206.25. (Boni Decl. Ex. 2; Wolf Decl. Ex. 2.) The largest of these charges are for expert witness fees and the mediation session, which helped yield the ultimate settlement. The balance of Class Counsel's expenses are for online legal research, document imaging and copying, deposition and court transcripts, travel expenses (including costs

of attending court hearings, depositions, and meetings with expert witnesses), and other litigation support services. Such charges are consistent with the expenses routinely awarded. *See In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d at 525 (finding "no reason to depart from the common practice in this circuit of granting expense requests" where "[t]he lion's share of these expenses reflects the costs of experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses").

C. The Service Awards Request Is Reasonable

Finally, Class Counsel respectfully move the Court for the service awards of $5,000 each for class representatives Barbara Keiler, Mona Gay Thomas, and Linda Barrett, as set forth in the agreement. (Settlement Agreement, ECF No. 69, Ex. 1, ¶ 36.) Such awards are routinely granted in this context, in order to recognize the efforts of these individuals in pursuing their claims on behalf of a class. *Sewell v. Bovis Lend Lease, Inc.*, No. 09-6548, 2012 WL 1320124, at *14 (S.D.N.Y. April 16, 2012) (collecting cases).

Each of the Named Plaintiffs maintained an active role in the litigation over the past three and half years. *See Gattinella v. Kors*, No. 14CV5731, 2016 WL 690877, at *2 (S.D.N.Y. Feb. 9, 2016) (Pauley, J.) (approving service awards for named plaintiffs who "provided assistance that enabled Class Counsel to successfully prosecute this action and reach the settlement, including: (1) submitting to interviews with Class Counsel; (2) locating and forwarding relevant responsive documents and information; and (3) participating in conferences with Class Counsel."). Each Named Plaintiff searched her files and computers and collected documents in order to respond to the Defendants' discovery requests. They provided counsel assistance in reviewing pleadings. Although they did not ultimately have their depositions taken, on two separate occasions their depositions were noticed. In the first instance, their depositions were scheduled to go forward on April 4 and 5, 2013, but the District Court (Judge Baer) issued the opinion granting Defendants'

motion to dismiss on April 2, 2013 (ECF No. 34). In the second instance, their depositions had been noticed for the last week of April 2015. These depositions were adjourned after the parties resumed their settlement negotiations and agreed to go to mediation. Again, however, each Named Plaintiff made travel arrangements, incurred expenses, and worked with counsel in preparing for her deposition.

Aside from the actual work performed and expenses incurred, the Named Plaintiffs were exposed to personal risk by agreeing to step forward and represent the class. *See, e.g.*, *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. at 131 (granting service award to named plaintiffs who faced "a substantial personal risk"). Harlequin is the largest publisher of romance novels in the world. Authors, such as the Named Plaintiffs, are dependent upon publishers, such as Harlequin, agreeing to publish their works. Thus, the Named Plaintiffs put their very livelihood on the line by challenging Harlequin's practices in this suit for the benefit of their fellow authors.

The three $5,000 awards for each Named Plaintiff total approximately 0.37% of the total settlement fund, which is "is well within the range of service awards recently approved in the Southern District of New York." *Mills v. Capital One, N.A.*, No. 14 CIV. 1937 HBP, 2015 WL 5730008, at *18 (S.D.N.Y. Sept. 30, 2015) (approving service awards that in total comprised "approximately .52% of the settlement fund").

Accordingly, the requested service awards are reasonable.

V. CONCLUSION

For the reasons set forth above, the request of Class Counsel for an award of $1,025,000 in attorneys' fees and $28,206.25 in expenses should be granted. In addition, service awards for class representatives Barbara Keiler, Mona Gay Thomas, and Linda Barrett of $5,000 each should be granted.

Respectfully submitted,

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/s/ Michael J. Boni

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