

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

FLORENCE WALLACE, ET AL. : **CONSOLIDATED TO:**  
 :  
 Plaintiffs, : **CIVIL ACTION NO. 3:09-cv-0286**  
 :  
 v. :  
 : **(JUDGE CAPUTO)**  
 ROBERT J. POWELL, ET AL. :  
 :  
 Defendants. :  
 :  
 .....

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

WILLIAM CONWAY, ET AL. :  
 :  
 Plaintiffs, : **CIVIL ACTION NO. 3:09-cv-0291**  
 :  
 v. :  
 : **(JUDGE CAPUTO)**  
 MICHAEL T. CONAHAN, ET AL. :  
 :  
 Defendants. :  
 :  
 .....

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

H.T., ET AL. :  
 :  
 Plaintiffs, : **CIVIL ACTION NO. 3:09-cv-0357**  
 :  
 v. :  
 : **(JUDGE CAPUTO)**  
 MARK A. CIAVARELLA, ET AL. :  
 :  
 Defendants. :  
 :  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

SAMANTHA HUMANIK,

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Plaintiffs,

CIVIL ACTION NO. 3:09-cv-0630

v.

(JUDGE CAPUTO)

MARK A. CIAVARELLA, JR.,  
ET AL.

Defendants.

.....

**BRIEF IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR  
AWARD OF ATTORNEYS' FEES AND COSTS**

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**I. INTRODUCTION**

Plaintiffs have, contemporaneously with the filing of the present Unopposed Motion for Attorneys' Fees and Costs, filed their Unopposed Motion for Final Approval of Settlement and Class Certification. The present Motion and Brief address only the award of attorneys' fees and costs.

Class Counsel request a combined award of common benefit attorneys' fees and expenses of \$732,968.36. This amount will be paid directly from the Settlement Amount, which totals \$2,500,000.00. The total represents a combined award of common benefit attorneys' fees and common benefit expenses and costs incurred by plaintiffs' counsel of less than 30% (approximately 29.3%). Pursuant to the terms of the Master Settlement Agreement ("MSA"), the Provider Defendant Parties agreed not to oppose an attorneys' fee award up to 30% of the gross settlement (totaling \$750,000.00), plus an additional amount to reimburse Class Counsel for common benefit costs and expenses. *See* MSA, a copy of which is attached hereto, made a part hereof and marked Exhibit "A" at Section II.B.

As stated above, the combined amount of the attorneys' fees and costs will not exceed 30% of the total Settlement Amount and is fair and reasonable considering the thousands of people who benefitted from the Settlement, the skill and proficiency of counsel, the complexity and duration of the litigation, and the

amount of time expended by Class Counsel in achieving the result for the Class. *See Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 (3d Cir. 2000) (identifying seven factors to be considered in the Third Circuit when deciding whether to approve a fee petition); *see also Varacallo v. Mass. Mutual Life Ins. Co.*, 226 F.R.D. 207, 248 (N.J. 2005) (finding requested attorneys' fees of \$58.1 million reasonable using common-fund method of fee calculation on settlement valued at \$771.9 million). The percentage that Class Counsel requests as an award of attorneys' fees is also within the range of attorneys' fees approved in similar cases. *See Boone v. City of Philadelphia*, 668 F. Supp.2d 693, 713 – 15 (finding range of awards for attorneys' fees only in similar actions to be on average 37.1% in class action settlements ranging from \$1 Million to \$50 Million and finding an award of attorneys' fees only totaling 30% in civil rights actions regarding strip searches to be reasonable).

Judicial review of attorneys' fee applications in class actions is mandated to assure that attorneys' fees are fair and reasonable. *See Fed R. Civ. P. 23(h)*; *see also In re General Motors Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819 (3d Cir. 1995). The decision to approve an attorneys' fee petition and the amount of an award of attorneys' fees is within this Court's sound discretion. *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 727-30 (3d Cir. 2001). Using the percentage-of-recovery method of calculating fees, and assessing the fee against



the seven factors enumerated by the Third Circuit in *Gunter*, Co-Lead Counsel submit that their request for Common Benefit Fees and Expenses should be granted.

## II. FACTUAL BACKGROUND

The factual background of this case, together with the procedural history and the background and terms of the Settlement, are well known to this Court and are more specifically set forth in Plaintiffs' Brief in Support of the Unopposed Motion for Final Approval and Class Certification filed contemporaneously with the present Brief and is incorporated by reference as fully as though herein set forth at length.

## III. ARGUMENT

### A. The Percentage-of-Recovery Method is Appropriate for This Case

Courts use two methods for calculating attorneys' fees: the percentage-of-recovery method and the lodestar method. *Id.* at 732. Class Counsel proposed the percentage-of-recovery method because in the Third Circuit the percentage of recovery method is strongly favored for all common fund class actions. *In re Prudential Ins. Co. of Am. Sale Practice Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998) ("*Prudential IP*"). One district court went so far as to proclaim that "[t]he day of the lodestar has passed in [common fund] class actions has passed . . . save

for perhaps its use as a cross-check in some cases.” *In re Diet Drugs Products Liability Litig.*, 2002 U.S. Dist. LEXIS 19396, at \*27 (E.D. Pa. Oct. 3, 2002).

As the Third Circuit has explained, the percentage-of-recovery method encourages experienced counsel to take on risky but socially beneficial cases by rewarding them if successful with fees that are commensurate with the risk they undertook. *See Prudential II*, 148 F.3d at 333; *see also Gunter v. Ridgewood Energy Corporation*, 223 F.3d 190, 198 (2000) (citing *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980)). Simply put, the percentage-of-recovery method ties the attorneys' fees for class counsel to their success, including the degree of their success, or failure in prosecuting the case. *Prudential II*, 148 F.3d at 333 (citing *In re G.M. Trucks*, 55 F.3d at 820).

Conversely, the lodestar method of fee calculation, which takes the attorney's time reasonably expended on the litigation at a reasonable hourly rate and then applies a multiplier to account for the risk undertaken by counsel as well as the results achieved, is most often used in statutory fee-shifting cases where the amount of recovery may be too small to create a common fund of sufficient size to adequately compensate counsel under a percentage-of-recovery method. *Id.* The lodestar method has been criticized as being time-consuming and burdensome to the Court because of the many calculations it can entail. *See Prudential II*, 148 F.3d at 331.

In this case, the percentage-of-recovery method is preferable, for the reasons set forth above.

**1. The Value of the Settlement**

Using the percentage-of-recovery method, the first step is to determine a reasonable estimate of the value of the settlement to which the percentage will be applied. *In re GM Trucks*, 55 F.3d at 822; *see also Varacallo*, 226 F.R.D. at 249. In this case, the value of the settlement is \$2,500,000.

**2. The Percentage**

The second step is for the Court to decide the percentage to be applied to the value of the settlement. *GM Trucks*, 55 F.3d at 822; *Varacallo*, 226 F.R.D. at 249. In the Third Circuit, 25% is a benchmark for the award of attorneys' fees, from which courts move up or down depending on the amount of the award, the complexity of the case, the risk undertaken, the result achieved, and other factors. *Varacallo*, 226 F.R.D. at 249 (quoting *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 262 (D. Del. 2002)). The range, however, in the Third Circuit reaches as high as 45%, with the bulk of the cases falling between 22.1% and 33.33%. *See id.* (citing *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. at 262). The district court in *Boone* found that in class action settlements ranging from \$1 million to \$50 million, the average attorneys' fee was 31.71%, with the median being 33%.

*Boone*, 668 F. Supp.2d at 714. In addition, the Court in *Boone* found that a 30% fee was “commensurate” to other strip search civil rights class actions. *Id.*

In the previous Mericle Settlement in this action, this Court approved a combined award of attorneys’ fees and costs of 24.4% (totaling \$4,335,000). *See* December 14, 2012 Order (Doc. No. 1268). Accordingly, in this case, Plaintiffs’ Counsel’s request for a combined award of attorneys’ fees and costs not to exceed 30% and likely less than 30%, falls well within the range of percentages in similar cases both in amount of settlement and subject matter of the case. *See Boone*, 668 F. Supp.2d at 714.

**B. The Requested Fee Award is Reasonable Under the Percentage-of-Recovery Method**

To assess the reasonableness of the award, including the percentage to be applied to the settlement value, the Third Circuit in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d at 195 n.1 (3d Cir. 2000) established certain factors by which to assess the award. Those factors include:

- (1) the size of the fund and the number of persons benefitted;
- (2) the presence or absence of substantial objections by class members to the fee amount;
- (3) the skill and efficiency of counsel;
- (4) the complexity and duration of the action;
- (5) the risk of nonpayment;

- (6) the amount of time that counsel spent on the case; and
- (7) awards in similar cases.

The *Gunter* factors are not to be applied mechanically, as different factors may have greater relevance in some cases versus others. *Id.*

**1. The complexity and duration of the action support the fee award**

The first factor to be assessed in determining the reasonableness of an award of attorneys' fees in a class action is the complexity and duration of the action. *Id.* at 197. This factor weighs strongly in favor of Class Counsel's fee request. The Plaintiffs asserted constitutional violations under 42 U.S.C. § 1983, RICO and RICO conspiracy violations, and state-law claims of conspiracy and false imprisonment. The gravamen of Plaintiffs' claims is that their constitutional due process rights were violated as a result of the conspiracy among the defendants.

The litigation itself has been pending for over 5 years, during which time Class Counsel have conducted extensive written discovery, including by reviewing hundreds of thousands of documents and preparing fact sheets for a large number of the named Plaintiffs. Class Counsel have engaged experts to analyze the conduct of various Defendants and the reasonableness of the settlement. Plaintiffs have deposed some Defendants and their representatives. Class Counsel litigated multiple discovery issues, including a significant motion regarding the relevance of certain of the juveniles' past criminal and familial histories. Class Counsel also

briefed motions for partial summary judgment and their motion for certification of a litigation class, and they defended Defendants' motions to dismiss and motions for summary judgment. Finally, settlement negotiations themselves lasted for longer than one year, *see Varacallo*, 226 F.R.D. at 253 (noting the length of time over which settlement discussions took place as a factor in assessing the requested attorneys' fee), and included a failed mediation. The requested attorneys' fee was not negotiated until the settlement terms for the Class had been fully negotiated. *See Prudential II*, 148 F.3d at 335.

**2. The value of the settlement and the number of persons benefited support the request**

The value of the Settlement is \$2,500,000. Class Counsel's combined attorneys' fees and costs request equals approximately 29.3% of the value of the Settlement. The proposed settlement covers more than 3,000 unique individuals.

Accordingly, given the substantial value of the Settlement and the large number of persons benefited, Class Counsel's combined attorneys' fees and costs request is well within the range of reasonableness.

**3. Awards in similar cases support the fee request**

Class Counsel's fee request is in keeping with awards in similar cases. *See Gunter*, 223 F.3d at 195 n. 1; *Boone*, 668 F. Supp.2d at 714. The district court in *Boone* found that in class action settlements ranging from \$1 million to \$50 million that the average attorneys' fee was 31.71%, with the median being 33%. *Id.* In

addition, the Court in *Boone* also found that a 30% fee was “commensurate” to other strip search civil rights class actions. *Id.*

In the previous Mericle Settlement, this Court approved a combined award of attorneys’ fees and costs of 24.4% (totaling \$4,335,000). *See* December 14, 2012 Order (Doc. No. 1268). Accordingly, in this settlement, Class Counsel’s request for a combined award of attorneys’ fees and costs not to exceed 30% falls well within the range of percentages in similar cases both in amount of settlement and subject matter of the case. *See Boone*, 668 F. Supp.2d at 714.

**4. The skill and efficiency of counsel support approval of the fee request**

The quality of representation by Class Counsel is measured by “the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.” *See In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) (quoting *In re Computron Software, Inc.*, 6 F.Supp.2d 313, 323 (D.N.J. 1998)). Class Counsel are very experienced in class actions, particularly those involving mass actions and civil rights claims, and constitutional litigation more broadly. *See* descriptions of Caroselli Beachler McTiernan & Conboy, Anapol Schwartz, Hangley Aronchick Segal Pudlin & Schiller and Juvenile Law Center, copies of which are attached hereto, made a part hereof and

marked respectively Exhibits “B,” “C,” “D,” and “E.” Counsel for the Provider Defendants is nationally-recognized as being a leading firm in the defense of class actions and those involving civil rights. Class Counsel have vigorously litigated, and Defendants’ counsel have vigorously defended against, the claims on behalf of the Class.

**5. The absence of any objections supports the approval of the fee request**

There are no objections to the Settlement, including to the aspect of the Settlement relating to attorneys’ fees. The lack of objectors indicates that the Class is pleased with the Settlement as proposed and that the Class does not object to the fee award. *See Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 465 (E.D. Pa. 2008) (absence of substantial objections supports approval of the fee request); *see also Varacallo*, 226 F.R.D. at 251 (finding that fewer than fifty objections to attorneys’ fee request in a class of 3 million supported approval of fee award).

In the Notice of Class Action Settlement attached as Exhibit “A” to the MSA, the Class Members were advised that the amount of money remaining in the Settlement Fund after the payment of court approved fees and costs would be divided among all eligible Settlement Class Members pursuant to the Plan of Allocation. *See* Notice at 3. In addition, all Class Members were instructed on the procedure to object to the Settlement and advised that they could object to any, some, or all of the Settlement. *Id.* at 10. Despite this Notice, no objections were



received to any part of the Settlement including the request for attorneys' fees and costs. This lack of objections demonstrates the Class Members' satisfaction with the Settlement and the reasonableness of the requested attorneys' fees and costs.

*See In re Cell Pathways, Inc.*, 2002 U.S. Dist. LEXIS 18359, at \*24 (E.D. Pa. Sept. 23, 2002) (finding that one objection out of 34,277 notices shows the Class's satisfaction with the settlement and reasonableness of the 30% attorneys' fee).

"The absence of large numbers of objections militates against reducing fee awards." *See In re Cendant Corp.*, 232 F. Supp.2d 327, 337 (D.N.J. 2002).

**6. The risk of nonpayment supports approval of the fee request**

Class Counsel undertook representation of the Plaintiffs on a contingency basis, assuming the risk of non-payment if the case failed. *See Varacallo*, 226 F.R.D. at 253; *see O'Keefe v. Mercedes-Benz U.S., LLC*, 214 F.R.D. 266, 309 (E.D. Pa. 2003) (contingency fee case has risk of nonpayment if unsuccessful). Class Counsel advanced hundreds of thousands of dollars in expenses, none of which would have been recaptured if the case failed. Although Class Counsel were confident in their case, the outcome was uncertain, particularly with the complex issues posed by the civil rights and RICO claims. Class Counsel prosecuted this case over five years without any guarantee of payment, expending thousands of hours and dollars. Indeed, Class Counsel continues to vigorously prosecute this matter against the Non-Released Parties, continuing their risk of non-payment.

Moreover, an expert forensic accountant engaged by Class Counsel determined, after examination of books and records of Provider Defendants, that the Provider Defendants had significant third-party debt obligations that could not be refinanced absent resolution of this case. *See* Expert Report and Curriculum Vitae of Stephen J. Scherf, CPA, a true and correct copy which is attached hereto, made a part hereof and marked Exhibit "J." Accordingly, the Provider Defendants' debt obligation in excess of \$20 million made the risk of non-payment a serious concern beyond the normal risk of non-payment based upon a contingency agreement.

This factor thus supports the approval of the fee request, particularly since one of the goals of fee awards is to encourage skilled counsel to undertake risky but socially beneficial litigation. *See Gunter*, 223 F.3d at 198. This case ranks among the most socially beneficial litigation of recent time.

**7. The amount of time devoted by Class and Plaintiffs' Counsel supports approval of the fee request**

In connection with the Mericle Settlement, the Court found that Class and Plaintiffs' Counsel had spent 34,900 hours prosecuting this matter. *See* December 14, 2012 Order (Doc.No. 1268). That amount of time has only increased since the entry of the December 14, 2012 Order. The amount of hours spent by Class Counsel prosecuting this matter supports approval of their fee request. *See Varacallo*, 226 F.R.D. at 253. At this time, the Claims Committee continues to

spend their time processing this Settlement and anticipates doing so until the completion of this Settlement.

C. **Lead Counsel to Allocate Fees Among Class Counsel**

The Court should permit Class Counsel to allocate the fees among themselves and other Plaintiffs' counsel as agreed between them. Where there are multiple lawyers participating in the prosecution of a class action and an award of attorneys' fees is out of a common fund, the Court has authority to permit lead counsel to allocate the fee among counsel entitled to share in the award. *In re Diet Drugs*, 2002 U.S. Dist. LEXIS 19396 at \*65 (E.D. Pa., October 3, 2002) (citing *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 781 (6<sup>th</sup> Cir. 1996); *Longden v. Sunderman*, 979 F.2d 1095, 1101 (5<sup>th</sup> Cir. 1992); *In re Copley Pharm., Inc.*, 50 F.Supp.2d 1141, 1148 (D. Wyo. 1999); *In re Indigo Sec. Litig.*, 995 F. Supp. 233, 235 (D. Mass. 1998). In *In re Automotive Refinishing Paint Litig.*, 2008 U.S. Dist. LEXIS 569, at \*20-21 (E.D. Pa., Jan. 3, 2008), Judge Surrick granted co-lead counsel's request to allocate and distribute the fees awarded to counsel who had worked on the anti-trust matter:

Courts generally approve joint fee applications which request a single aggregate fee award with allocations to specific firms to be determined by Co-Lead Counsel, who are most familiar with the work done by each firm and each firm's overall contribution to the litigation. As we previously noted, Co-Lead Counsel have directed this case from its inception and are best able to assess the weight and merit of each counsel's contribution. (citation omitted). In addition, allowing Counsel to allocate fees

conserves the time and resources of the courts. *In re Linerboard*, 2004 U.S. Dist. LEXIS 10532, at \*54.

*See also In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 329 n. 96 (3d Cir. 1988) (lead counsel allocating fees conserves judicial resources). In a case in the United States District Court for the Eastern District of Pennsylvania, Judge Dubois approved lead counsel's request for disbursement of funds, noting that such a procedure is commonly used because lead counsel was "better able to describe the weight and merit of each [counsel's] contribution." *In re Linerboard Antitrust Litigation*, 333 F.Supp.2d 343, 351-52 (E.D. Pa. 2004) (quoting *In re Diet Drugs Litig.*, 2002 U.S. Dist. LEXIS 19396 (E.D. Pa. Oct. 3, 2002)).

However, where counsel cannot agree to the allocation of fees by lead counsel, the Court must ultimately make the allocation. *In re Diet Drugs Litig.*, 2002 U.S. Dist. LEXIS 19396 at \*66 (citing *In re Copley Pharm., Inc.*, 50 F.Supp.2d 1141, 1148 (D. Wyo. 1999); *In re Indigo Sec. Litig.*, 995 F. Supp. 233, 235 (D. Mass. 1998)).

When multiple law firms participated jointly in recovering a common fund for the benefit of the class, the court will reach an overall reasonable fee award for all counsel based on a fair percentage of the fund and, in the absence of an allocation agreement among counsel, will allocate the overall award among participating counsel based on the reasonable efforts and relative responsibilities they exercised leading to the creation of the common fund for the benefit of the class. How these efforts and responsibilities are comparatively measured for fee allocation purposes depends on the circumstances involved in

the particular case and is determined by the informed discretion of the court.

4 ALBE CONTE AND HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 14:9 (4<sup>th</sup> Ed. 2002). Lead counsel's proposed allocation, however, is accorded substantial deference, as the District Court of Wyoming noted in *Copley*,

In the case at bar, when the Court became aware that class counsel could not reach a unanimous stipulation, it necessarily gave substantial deference to Lead Counsel's proposed allocation. *See Manual for Complex Litigation* § 20.22 at 27 (3<sup>rd</sup> ed. 1995); *see also In re Indigo Sec. Litig.*, 995 F. Supp. 233, 234 (D. Mass 1998). In a case of this magnitude, the assistance of Lead Counsel on matters such as this is especially invaluable. Accordingly, this Court, after reviewing the previous submissions of class counsel as to hours and expenses, relying on previous discussions with Lead Counsel as well as other members of class counsel, and weighing the relative responsibilities of class counsel members and their contribution to this litigation, as well as when respective attorneys became involved in this litigation, found Lead Counsel's allocation to be fair and reasonable.

*Copley*, 50 F. Supp. at 1149. Notably, the *Copley* court affirmed the allocation performed by lead counsel in that case and overruled all objections. *Id.* at 1157.

**D. Plaintiffs' Expenses are Reasonable and Necessary**

Plaintiffs' Counsel request reimbursement of expenses in the amount of \$107,968.36. *See* Declarations of Sol H. Weiss, Esquire, David S. Senoff, Esquire, Daniel Segal, Esquire, Marsha Levick, Esquire, copies of which are attached hereto, made a part hereof, and marked respectively Exhibits "F," "G," "H," and "I." No Class Member has objected to the fact that Class Counsel's expenses

would be reimbursed from the Settlement. The expenses are summarized in affidavits setting forth the type of expense and the amount. *See Varacallo*, 226 F.R.D. at 256-57 (accepting submissions of affidavits from counsel outlining expenses for prosecution of class action and finding expenses reasonable and necessary).

Plaintiffs' Counsel are requesting a combined award of attorneys' fees and costs totaling \$732,968.36. From that amount, all expenses first will be paid to reimburse the expenses incurred by each of the firms. The remainder will be considered the total fee award and will be distributed at the discretion of Co-Lead Counsel. In addition to the above costs, Class Counsel will incur additional costs in the administration of the settlement, for which Class Counsel will seek later Court approval for payment from the Holdback Fund of the Settlement.

#### **IV. CONCLUSION**

For all the foregoing reasons, Plaintiffs request that their unopposed Motion for Award of Attorneys' Fees and Costs, be granted and that the Court enter an order granting a combined award of attorneys' fees and costs in the amount of \$732,986.36 substantially in the form of Order attached to Plaintiffs' Motion for Final Approval of the Class Action Settlement and for Certification of a Settlement Class.

Dated: May 30, 2014

Respectfully submitted,

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Date: May 30, 2014

**CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT**

I, David S. Senoff, attorney for Plaintiffs, hereby certify, pursuant to the Court's April 28, 2014 Order that the foregoing brief complies with the page limit established by said Order. The brief does not exceed 10,000 words as indicated by the word count function of Microsoft Word 2007.

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**CERTIFICATE OF SERVICE**

I, David S. Senoff, Esquire, hereby certify that, a true and correct copy of the Brief in Support of Plaintiffs' Unopposed Motion for Award of Attorneys' Fees and Costs, was filed electronically on May 30, 2014 and is available for viewing electronically. Additionally, the foregoing Motion was served by First Class Mail upon the following *pro se* parties:

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