THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In Re: PARKING HEATERS ANTITRUST LITIGATION	Case No. 15-MC-940 (DLI) (JO)
THIS DOCUMENT RELATES TO: *All Direct Purchaser Class Actions*	

MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS TO NAMED PLAINTIFFS

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PRELIMINARY STATEMENT

Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, plaintiffs Triple Cities Acquisition LLC d/b/a Cook Brothers Truck Parts, National Trucking Financial Reclamation Services, LLC, TrailerCraft Inc., and Myers Equipment Corporation ("Plaintiffs") respectfully move for an award of attorneys' fees, reimbursement of litigation expenses, and an incentive award to each of the named plaintiffs who are serving as representatives of the Settlement Class ("Class Representatives"). The Court has previously preliminarily approved a settlement with defendants Webasto Products North America, Inc., Webasto Thermo & Comfort North America, Inc., and Webasto Thermo & Comfort SE (collectively, "Webasto") and Eberspaecher Climate Control Systems GmbH & Co. KG, Espar, Inc., and Espar Products Inc. (collectively, "Espar," and with Webasto, "Defendants").[1]

In undertaking this litigation, counsel faced numerous challenges to proving damages that posed the serious risk of a lesser recovery than what was achieved through the Settlements for the Settlement Class. For example, even though Espar entered into private settlements with Settlement Class Members representing 75% of the commerce during the Class Period, Co-Lead Class Counsel were able to reach a settlement with Espar that capped the reduction for Espar's $8 million settlement amount to 35%. Webasto's $7 million settlement is a similarly excellent result; Webasto, as the leniency applicant, was likely limited to only paying single damages, and the $7 constitutes approximately 10% of Webasto's sales to Class members during the Class Period. The significant recovery obtained was achieved through the skill, tenacity, and effective advocacy of Co-Lead Class Counsel, which litigated this action on a fully contingent fee basis against well-

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[1] *See* March 16, 2018 Report and Recommendation preliminarily approving the settlements with Webasto and Espar, and March 31, 2018 Order adopting same.

funded defendants and experienced defense counsel.

Moreover, in undertaking this litigation, Co-Lead Class Counsel faced numerous challenges to establishing impact and damages. The risk of recovering very little from this litigation was very real, and that risk was greatly enhanced because Co-Lead Class Counsel would be litigating against large corporate defendants, represented by highly skilled defense counsel. Despite these risks, Plaintiff's counsel collectively dedicated more than 4200 hours of time to this litigation over the course of approximately three years, on a fully contingent basis.

Plaintiffs and Co-Lead Class Counsel respectfully move for an award from the Settlement Fund of attorneys' fees in the amount of 33-1/3% of the Settlement Fund, ranging from $3,250,000 to $4,066,667[2]; reimbursement of all accrued litigation expenses in the amount of $155,275.52 incurred over that period; and an incentive award of $15,000 to each of the Class Representatives. In light of the recovery obtained, the time and effort devoted by Plaintiffs' counsel, the work performed, the skill and expertise required, and the risks that counsel undertook, Co-Lead Class Counsel submit that the requested fee award and the reimbursement of incurred expenses are fair and reasonable. The percentage fee requested is well within the range of fees that courts in this Circuit have awarded in antitrust class actions with comparable recoveries. Further, the requested fee represents a multiplier of between 1.08 and 1.36 on Plaintiffs' counsel's lodestar, which is well within the range of multipliers typically awarded in class actions with substantial contingency risks such as this one. In addition, the expenses for which Co-Lead Class Counsel seek reimbursement

[2] The precise amount of the settlement with Webasto may change because the total settlement amount of $7 million can be reduced depending on the number of members of the Settlement Class who opt out of the Webasto settlement. *See* Webasto Settlement ¶ 33, ECF No. 146-2, Ex. 1 . Once the amount of the reduction is calculated, which will occur shortly after the December 1, 2018 opt-out deadline, DPPs will inform the Court of the precise amount that is equal to 33-1/3% of the total settlement amount with both Defendants.

were reasonable and necessary for the successful prosecution of the case, and the incentive award request is reasonable given the effort the Class Representatives put forth to advance this case on behalf of the Settlement Class.

Accordingly, Plaintiffs and Co-Lead Class Counsel respectively request that the Court grant their request for attorney's fees, expense reimbursement, and an incentive award for the Class Representatives. Co-Lead Class Counsel also respectfully request that the Court authorize Co-Lead Class Counsel to pay out of the Settlement Fund sums actually invoiced by Epiq Systems, Inc. ("Epiq"), the Settlement Administrator, for notice and administration in this matter.

BACKGROUND

I. NATURE OF THE LITIGATION

Defendants are the two primary sellers of Parking Heaters in the United States. During the Class Period (from October 1, 2007 up to and including December 31, 2012), Espar and Webasto had roughly equal market shares. Total combined U.S. sales by Espar and Webasto of aftermarket Parking Heaters for use in commercial vehicles during the Class Period were approximately $140 million.

Parking Heaters heat the cab (and engine, in some cases) of commercial vehicles during rest breaks and other stops, without the need to keep the engine idling. Parking Heaters are recommended by the EPA as an alternative to idling and are increasingly important in the growing number of states and municipalities that prohibit vehicle idling. In 2002, only 1% of Class 8 trucks (the heavyweight truck classification that includes tractor-trailers with sleeping cabs) had parking heaters; now, approximately 12% have parking heaters.

During the Class Period, Webasto and Espar sold two types of Parking Heaters to Class members: air heaters and coolant (or water) heaters. The former heat the cabs of vehicles directly,

whereas the latter heat the engine, which, in turn, heats the cab. Parking Heaters are manufactured in a variety of sizes, from 2 kilowatts up to at least 35 kilowatts.

In 2013, the European Commission ("EC") and the United States Department of Justice ("DOJ") Antitrust Division began investigations into Espar's and Webasto's anticompetitive conduct in Europe and in the United States. The EC concluded that German entities related to Espar and Webasto had breached European Commission antitrust rules by fixing prices and allocating parking heater customers in the entire European Economic Area, fining Espar's German affiliate 68,175,000 Euros for its role in the cartel. Webasto was granted immunity by the EC for revealing the existence of the cartel.

On March 12, 2015, Espar, Inc. pleaded guilty to a one-count violation of the Sherman Antitrust Act, 15 U.S.C. § 1, for conspiring to fix the prices of Parking Heaters sold to aftermarket commercial vehicle customers in the United States between October 1, 2007 and December 31, 2012, and agreed to pay a $14.97 million fine. Plea Agreement ¶ 2, ECF No. 146-2., Ex. 3. As outlined in the sentencing memorandum and confirmed by documents produced to DPPs, DPPs believe that Webasto and Espar entered into at least two price-fixing agreements relating to sales in the United States: First, beginning around October 2007 and continuing until August 2008, DPPs believe that Espar and Webasto agreed to a $600 price floor for 2kw air heater kits and 4kw and 5kw water heater kits. Second, in fall 2008, DPPs believe that Webasto and Espar agreed to increase their list prices for Parking Heaters sold in the United States. Pursuant to this agreement, Webasto, which historically had lower U.S. list prices than Espar, increased its list prices by 25% effective August 1, 2008; Espar increased its list prices on most products by 8% effective January 1, 2009. According to Espar, Inc.'s guilty plea, this second conspiracy continued until the end of 2012.

Webasto has confirmed that it applied for leniency under the Antitrust Division's corporate leniency policy, and has cooperated with the DOJ and with DPPs.

II. SETTLEMENT CLASS COUNSEL HAVE VIGOROUSLY PROSECUTED THIS CASE

From the beginning of this action, Co-Lead Class Counsel effectively maneuvered this case through investigation, discovery, motion practice, and settlements with the Defendants. Co-Lead Class Counsel obtained the significant settlements through a diligent and thorough prosecution of this case. These efforts required substantial investment of human and financial resources by Co-Lead Class Counsel given the complexity of the facts and legal issues.

A. Investigation and Complaint

The first direct purchaser class action was filed in the Eastern District of New York on March 16, 2015 by Plaintiff Triple Cities Acquisition LLC. Ultimately, eleven direct purchaser and indirect purchaser class actions were filed in this district and assigned to District Judge Gleeson and Magistrate Judge Orenstein. Following Judge Gleeson's retirement, the case was re-assigned to Chief Judge Irizarry. Magistrate Judge Orenstein appointed Hausfeld LLP and Roberts Law Firm, P.A. as interim Co-Lead Class Counsel for the DPP class on August 11, 2015. Direct Purchaser Plaintiffs filed a consolidated class action complaint ("CAC") on April 22, 2016. The U.S. Defendants answered DPP's CAC on June 21, 2016, and the German Defendants answered on August 19 and August 22, 2016.

Over the course of several months, the parties engaged in several meet-and-confer sessions to reach a consensus on a proposed Document Preservation Stipulation and Order, ESI Protocol, and Scheduling Order, all of which were submitted to the Court on December 9, 2016 and entered by the Court on December 12, 2016. *See* Joint Declaration of Co-Lead Class Counsel in Support

of Plaintiffs' Motion for an Award of Attorneys' Fees and Litigation Expenses ("Joint Decl.") at ¶ 35.

The parties have engaged in substantial formal and informal discovery. Both Webasto (in accordance with its ACPERA cooperation obligations) and Espar have participated in attorney proffers with DPPs, in which Webasto's and Espar's attorneys provided a narrative description of the conduct and its participants and identified select relevant documents. *See* Joint Decl. ¶ 23. In addition, both Webasto and Espar produced to DPPs all of the documents they produced to the DOJ. Following extensive meet-and-confers, both Defendants responded to DPPs' document requests and interrogatories and began producing responsive documents (in addition to the DOJ productions) in March 2017, including the production of their transactional data. *Id.* at ¶ 24. Ultimately, Defendants produced over 170,000 documents comprising over 500,000 pages. The produced documents include documents reflecting communications between the Defendants, documents concerning the marketing and sale of Parking Heaters, and transactional data reflecting Defendants' sales of Parking Heaters to Class members from 2003 through 2014. *Id.* at ¶ 25.

Further, Co-Lead Class Counsel hired an expert consultant with substantial experience testifying in price fixing and other antitrust cases. *See* Joint Decl. ¶ 27. That expert analyzed the Defendants' transaction data, reviewed the documentary record, and examined publicly available data to determine potential damages should the litigation proceed. *See id.* at ¶ 28.

The Class Representatives also underwent extensive discovery. While the case settled while deposition dates were being negotiated with counsel to Espar, the Class Representatives had already produced substantial documents in response to document requests from Defendants, including documents reflecting their purchases of Parking Heaters. *See* Joint Decl. ¶ 29. Moreover, the Class Representatives put their reputational and financial interest at risk by agreeing to serve

as representatives on behalf of the Settlement Class. Indeed, there is evidence that certain of the Defendants threatened at least one Class Representative with loss of business if the suit was not dropped. *See* Letter Regarding Mot. to Compel ("Letter"), ECF No. 128 (describing threatening communications to Triple Cities Acquisitions LLC).

III. SETTLEMENT NEGOTIATIONS

Both Settlements were reached as a result of extensive, hard-fought, arm's-length negotiations.

A. Webasto

Following several unsuccessful settlement discussions and the exchange of demands and offers between the parties, DPPs and Webasto engaged in mediation before the Honorable William Cahill (Ret.) on February 24, 2017. *See* Joint Decl. ¶ 30. At the end of that mediation, the parties had reached an agreement in principle to settle the case, with the exception of one significant term. Over the following months, the parties continued to negotiate, and finally executed the proposed Settlement Agreement, worth up to $7 million, on August 16, 2017. *See id*.

B. Espar

DPPs and Espar engaged in settlement discussions and the exchange of offers and demands for over two years. Following more than one year of negotiations, DPPs and Espar engaged the Honorable Vaughn Walker (Ret.) to mediate the settlement. *See* Joint Decl. ¶ 30. The first mediation session with Judge Walker occurred on September 1, 2016, but was unsuccessful. *See id*. The parties then continued to negotiate, but remained unable to reach agreement. A second mediation with Judge Walker occurred on September 20, 2017. *See id*. An agreement in principle was reached at this second mediation, although several details remained to be negotiated. *See id*. The Espar Settlement Agreement, worth up to $8 million but reduced to $5.2 million because Espar

verified private settlements with Settlement Class Members representing more than 35% of Espar's Parking Heaters commerce, was finally executed on November 29, 2017. *See id*.

IV. PRELIMINARY APPROVAL AND NOTICE

Plaintiff engaged Epiq Systems, Inc. ("Epiq") to assist with the preparation of notice to members of the Settlement Class. After working to draft notice documents that would fairly inform Settlement Class members about the details of the proposed settlements, Co-Lead Class Counsel secured approval of the notice from the Court, see August 17, 2018 Scheduling Order, and then distributed notice to Class Members through mail, publication, telephonic, and online means, see Joint Decl. ¶¶ 2-6.

ARGUMENT

Over approximately three years of hard-fought litigation, Co-Lead Class Counsel have created substantial benefits for the Settlement Class, entitling Co-Lead Class Counsel to recover reasonable attorneys' fees. The Supreme Court in *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), recognized that "a 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." *Id.* at 478; *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). Having achieved excellent settlements with Defendants, Co-Lead Class Counsel respectfully submit that they are entitled to an award of attorneys' fees of 33-1/3% of the Settlement Fund.

To determine attorneys' fees in a common fund case, the Second Circuit favors "set[ting] some percentage of the recovery as a fee." *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) ("[t]he trend in this Circuit is toward the percentage method"); *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC) (JO), 2012 WL 5289514, at *9 (E.D.N.Y. Oct. 23, 2012) ("the trend in the Second Circuit is to utilize the percentage method"); *Sheppard v.*

Consol. Edison Co. of N.Y., Inc., No. 94-cv-0403(JG), 2002 WL 2003206, at *7 (E.D.N.Y. Aug. 1, 2002) ('"[t]he trend . . . in the Second Circuit appears to be the utilization of the percentage method"' (quoting *Baffa v. Donaldson Lufkin & Jenrette Sec. Corp.*, No. 96-cv-0583(DAB), 2002 WL 1315603, at *1 (S.D.N.Y. June 17, 2002))); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 520 (E.D.N.Y. 2003), *aff'd sub nom.*, *Wal-Mart*, 396 F.3d 96 (2005) (the percentage-of-the-fund approach "spares the court and the parties the 'cumbersome, enervating, and often surrealistic process' of lodestar computation" (quoting *Goldberger*, 209 F.3d at 50)). "The lodestar method can then be used as a 'cross-check.'" *Vitamin C*, 2012 WL 5289514, at *9, citing *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG)(VVP), 2011 WL 2909162, at *5 (E.D.N.Y. July 15, 2011).

I. THE REQUESTED PERCENTAGE IS REASONABLE

The criteria used to determine whether a common fund fee is reasonable include:

(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.

Vitamin C, 2012 WL 5289514, at *9-10 (internal citation omitted); *see also Massiah v. Metroplus Health Plan, Inc.*, No. 11-cv-05669, 2012 WL 5874655, at *8 (E.D.N.Y. Nov. 20, 2012) (applying the *Goldberger* factors in a FLSA case).

1. Time and Labor of Plaintiffs' Counsel

Plaintiffs' counsel have spent 4254.7 hours prosecuting the litigation from inception through September 30, 2018. *See* Joint Decl. ¶¶ 13-20, Exs.1-8 (attaching declarations from all Plaintiffs' counsel requesting fees and reimbursement of expenses and summarizing same). Plaintiffs' extensive efforts are detailed in the Joint Declaration submitted herewith. In addition,

Co-Lead Class Counsel will continue to devote time to this case through the final distribution of the settlements, likely in 2019.

2. **The Litigation's Complexities and Magnitude**

Antitrust price-fixing conspiracy cases are notoriously complex and difficult to litigate. *See, e.g., Wal-Mart*, 396 F.3d at 122 (acknowledging that "antitrust cases, by their nature, are highly complex"); *Vitamin C*, 2012 WL 5289514, at *4 ("federal antitrust cases are complicated, lengthy, and bitterly fought, as well as costly") (internal quotations and citations omitted); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 129 (S.D.N.Y. 2009), *aff'd sub nom., Priceline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010) (noting that "antitrust cases are typically complex"); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (antitrust class actions "are notoriously complex, protracted, and bitterly fought").

Although this litigation involved only two defendants, including one who pleaded guilty, Co-Lead Class Counsel still had to address myriad complications and issues prior to settlement. In addition to the typical complexities plaintiffs face preparing an antitrust class action, including working with an economist to demonstrate impact and damages, Plaintiffs here had to address the effect of Espar's communications—and private settlement agreements—with several members of the Settlement Class. *See* Letter, ECF No. 128; Resp. in Opp'n, ECF No. 130; Min. Entry, ECF No. 131.

3. **The Risks of the Litigation**

Co-Lead Class Counsel have been litigating this matter from the outset with the risk of receiving nothing in return for their efforts. Co-Lead Class Counsel thus incurred significant risk with the possibility of no additional recovery whatsoever. *See In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) (noting appropriateness of compensating attorneys

for accepting the risk of nonpayment); *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2008 WL 63269, at *5-6 (E.D. Pa. Jan. 3, 2008) (finding that risk of nonpayment supported award of one-third fee award in antitrust matter). In addition, Co-Lead Class Counsel have advanced expenses over the past several years that would not have been reimbursed absent a successful result. *See In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 516 (W.D. Pa. 2003) ("Aside from investing their time, counsel had to front copious sums of money. . . . Thus, the risks that counsel incurred in prosecuting this case were substantial and further support the requested fee award."); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05-mdl-01695(CM), 2007 WL 4115808, at *6 (S.D.N.Y. Nov. 7, 2007) ("[T]he risk of non-payment in complex cases, such as this one, is very real."). Co-Lead Class Counsel carried this risk despite the fact that "[a]ntitrust litigation in general, and class action litigation in particular, is unpredictable." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998). "The 'best' case can be lost and the 'worst' case can be won, and juries may find liability but no damages. None of these risks should be underestimated." *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 127 (N.D. Ill. 1990). Co-Lead Class Counsel also faced the risk that class certification would be denied, and that Defendants could prevail on certain of their affirmative defenses at summary judgment.

Moreover, because Espar entered private settlements with customers who purchased a large majority of the volume of Parking Heaters during the Class Period,[3] Co-Lead Class Counsel faced the very real possibility of not recovering anything related to the commerce represented by those private settlements.

[3] *See* Mem. of Law in Supp. of Mot. for Preliminary Approval of Direct Purchaser Pls.' Class Settlements with Espar and Webasto Defs., at 6-7, ECF No. 146-1.

4. <u>Quality of Representation</u>

This factor is intended to take into consideration the role that Co-Lead Class Counsel played in obtaining the results achieved. *Goldberger*, 209 F.3d at 55. Courts typically consider the experience, reputation, and ability of class counsel in evaluating counsel's fee request. *See, e.g., In re Warner Commc'n Sec. Litig.*, 618 F. Supp. 735, 748-49 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986). The quality of representation is best measured by results. *See Goldberger*, 209 F.3d at 55 (discussing results); *Vitamin C*, 2012 WL 5289514, at *10 (noting that "Class Counsel is abundantly qualified and has been victorious on a number of motions before the Court"). Over the three-plus years, Co-Lead Class Counsel fought hard in discovery to obtain the information necessary to determine the impact and damages the Settlement Class suffered as a result of the conspiracy. It is only through these efforts, including winning the motion to compel that forced Espar to produce documents reflecting their communications with absent members of the Settlement Class, that such an excellent settlement result was achieved.

Furthermore, despite the fact that the private settlements Espar entered into with certain Settlement Class Members represented over 75% of the volume of Espar's sales of Parking Heaters during the Class Period, Co-Lead Class Counsel were nevertheless able to negotiate a cap on the reductions in Espar's settlement amount of 35%—an excellent recovery for the Settlement Class. *See* Mem. of Law in Supp. of Mot. for Preliminary Approval of Direct Purchaser Pls.' Class Settlements with Espar and Webasto Defs., at 6-7, ECF No. 146-1; Joint Decl. ¶ 30. And Settlement Class members who entered into private settlements with Espar will still be able to recover from the Settlement Fund if they would have received more from the Espar Settlement than they received in their private settlement. *Id*. at 7. And because Webasto is a leniency applicant, it is very likely that their settlement would have been limited to single damages. The $7 million

settlement with Webasto, about 10% of their commerce during the conspiracy period, is a tremendous result.

These results speak for themselves, particularly in light of the very high quality of opposing counsel from the country's top defense firms. *See Visa Check*, 297 F. Supp. 2d at 524 (measuring quality of plaintiffs' representation in light of the quality of opposing counsel). Thus, this factor favors granting Plaintiff's motion for attorneys' fees.

5. Relationship Between the Requested Fees and the Settlements

The requested fee represents 33-1/3% of the Settlements, resulting in a modest overall multiplier of between 1.08 and 1.36. The requested award is fair given the extensive overall high-level effort that was required to achieve these excellent results.

The requested fee is "well within the range accepted by courts in this circuit." *In re Med. X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, at *7 (E.D.N.Y. Aug. 7, 1998) (awarding 33-1/3% of an approximately $40 million settlement fund); *see also* Joint Decl., Ex. 9, *In re U.S. Foodservice Inc. Pricing Litig.*, No. 3:07-md-1894 (AWT), ECF No. 521 (D. Conn. Dec. 9, 2014) (one-third fee from $297 million fund in a case that settled before summary judgment).

Many courts in other circuits have also awarded fees of 33-1/3% or more of settlement funds in class actions. *See, e.g.,* Joint Decl., Ex. 10, *In re Urethane Antitrust Litig.*, No. 04-MD-1616-JWL-JPO, MDL No. 1616, ECF No. 3276 (D. Kan. July 29, 2016) (awarding attorneys' fees of one-third of the settlement funds of $835 million); Joint Decl., Ex. 11, *Dahl v. Bain Capital Partners, LLC*, No. 1:07-cv-12388-WGY, ECF Nos. 1051 (D. Mass. Nov. 13, 2014), 1095 (D. Mass. Feb. 2, 2015) (33% fee from $590.5 million fund in an antitrust case that settled before class certification); *In re Vitamins Antitrust Litig*, No. 99-Misc.-197, MDL No. 1285, 2001 WL

34312839, at *10 (D.D.C. July 16, 2001) (approving fee award of 34.06% of $359 million fund); Joint Decl., Ex. 12, *In re Neurontin Antitrust Litig.*, No. 02-01830 (FSH), ECF No. 114 (D.N.J. Aug. 6, 2014) (awarding attorneys' fees of 33 1/3% of $190 million fund); Joint Decl., Ex. 13, *Standard Iron Works v. ArcelorMittal*, No. 08 C 5214, ECF No. 539 (N.D. Ill. Oct. 22, 2014) (awarding attorneys' fees of 33% of settlement funds of $163.9 million); *In re Titanium Dioxide Antitrust Litig.*, No. 10-CV-00318(RDB), 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (one-third fee from $163.5 million fund); *In re Southeastern Milk Antitrust Litig.*, No. 07-cv-208, 2013 WL 2155387, at *8 (E.D. Tenn. May 17, 2013) (one-third fee from $158.6 million fund); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 748-52 (E.D. Pa. 2013) (granting attorneys' fees of one-third from a $150 settlement fund after commenting that, "in the last two-and-a-half years, courts in eight direct purchaser antitrust actions approved one-third fees").

If this were a non-representative action, the customary fee arrangement would be contingent and in the range of 30% to 40% of any recovery. *See Blum v. Stenson*, 465 U.S. 886, 903 (1984) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.") (concurring opinion); *Montague v. Dixie Nat'l Life Ins. Co.*, No. 3:09-00687-JFA, 2011 WL 3626541, at *3 (D.S.C. Aug. 17, 2011) ("[i]n non-class contingency fee litigation, a 30% to 40% contingency fee is typical"); see also Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27, 35 (2004) ("[s]ubstantial empirical evidence indicates that a one-third fee is a common benchmark in private contingency fee cases"). The Supreme Court recognizes that an appropriate fee is intended to approximate what counsel would receive if they were bargaining for their services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285 (1989). "[A] district court should consider the rate [a] reasonable, paying client would pay, and

use that rate to calculate the presumptively reasonable fee." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany & Albany Cty. Bd. of Elections*, 522 F.3d 182, 193 (2d Cir. 2007). Because a contingency fee negotiated at the outset of this litigation, given the risks at that time, would have been in the range of 33-1/3% to 40% of the recovery, an attorneys' fee of 33-1/3% is reasonable.

6. <u>Public Policy Considerations</u>

The Supreme Court has recognized "the fundamental importance to American democratic capitalism of the regime of the antitrust laws," and the "central role" that private causes of action play in enforcing this regime. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634-35 (1985); *see also Southeastern Milk*, 2013 WL 2155387, at *5 ("Society's interests are clearly furthered by the private prosecution of civil cases which further important public policy goals, such as vigorous competition by marketplace competitors.").

Here, Co-Lead Class Counsel have devoted substantial resources for more than three years on behalf of victims of Defendants' conspiracy. Public policy favors the award of reasonable attorneys' fees in antitrust class actions such as this one. As the Second Circuit has noted, "In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation." *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.,* 481 F.2d 1045, 1050 (2d Cir. 1973); *see also In re Credit Default Swaps Antitrust Litig.*, No. 13-MD-2476 (DLC), 2016 WL 2731524, at *18 (S.D.N.Y. Apr. 26, 2016) ("It is important to encourage top-tier litigators to pursue challenging antitrust cases such as this one. Our antitrust laws address issues that go to the heart of our economy. Our economic health, and indeed our stability as a nation, depend upon adherence to the rule of law and our citizenry's trust in the fairness and transparency of our marketplace.");

In re WorldCom Inc. Sec. Litig., 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) (it is necessary to provide appropriate financial incentives to well qualified plaintiffs' counsel); *Visa Check,* 297 F. Supp. 2d at 524 ("[t]he fees awarded must be reasonable, but they must also serve as an inducement for lawyers to make similar efforts in the future"); *Southeastern Milk*, 2013 WL 2155387, at *5 ("[F]ailing to fully compensate class counsel for the excellent work done and the various substantial risks taken would undermine society's interest in the private litigation of antitrust cases…. Simply put, anti-competitive conduct such as that alleged in this case would likely go unchallenged absent the willingness of attorneys to undertake the risks associated with such expensive and complex litigation.").

Rather than providing a windfall, the requested award serves the public policy goal of encouraging private enforcement of the antitrust laws, while fairly compensating those counsel who made a substantial commitment of time and resources on behalf of the class.

II. THE REQUESTED FEE IS REASONABLE UNDER THE LODESTAR "CROSS CHECK"

The "lodestar cross-check" supports the request for a 33-1/3% attorneys' fee from the Settlements. As reflected in the declarations attached to the Joint Declaration, Plaintiffs' counsel have spent 4254.7 hours totaling $2,997,868.50 in lodestar prosecuting this action. *See* Joint Decl. ¶¶ 13-20, Exs.1-8. When calculated against the fees sought here of between $3,250,000 to $4,066,667, depending on the number of Settlement Class Members who opt out of the Webasto Settlement, the fees actually accumulated represent a reasonable multiplier of between 1.08 and 1.36 for the work done on behalf of the Settlement Class. That work included:

- Investigating the alleged conspiracy and the Parking Heaters industry, which resulted in the filing of the initial complaints in this matter;
- Drafting the amended complaint, which followed additional investigation and proffer sessions with Defense counsel;

- Engaging in arm's-length settlement negotiations that led to the Settlement Agreements, including multiple meetings and mediations with top executives of certain of the Defendants;
- Preparing and arguing a critical motion to compel that greatly enhanced the ability to settle with Espar;
- Working with an economic expert on impact and damages analyses in preparation for class certification motions;
- Engaging in proffer sessions with attorneys for both Defendants to better understand the scope and details of the conspiracy;
- Implementing a notice program that informed class members of their rights under the Settlement Agreements;
- Interacting with Class Representatives, including keeping them abreast of issues in the litigation and working with them to respond to discovery Defendants propounded;
- Conducting legal and factual research regarding pertinent issues; and
- Preparing for depositions and to file class certification papers.

See Joint Decl. ¶¶ 22-34.

Plaintiffs' counsel's requested fee and its multiplier is a modest request in comparison to the multipliers for attorneys' fees awarded in other class action cases in the Second Circuit and elsewhere. *See Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481-82 (S.D.N.Y. 2013) ("[c]ourts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers"—listing cases); *see, e.g., See Wal-Mart*, 396 F.3d at 123 (multiple of 3.5 for attorneys' fees of $220 million); *Credit Default Swaps*, 2016 WL 2731524, at *17 (multiple of about 6.0 on attorneys' fees of $253.8 million); Joint Decl., Ex. 9, *U.S. Foodservice*, ECF No. 521 (2.23 multiplier on attorneys' fees of $99 million); Joint Decl., Ex. 12, *Neurontin*, ECF No. 114 (multiplier of 1.99 on attorneys' fees of $63.5 million); *Flonase*, 951 F. Supp. 2d at 750-51 (2.99 multiplier on attorneys' fees of $50 million); Joint Decl., Ex. 14, *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-cv-00340, ECF No. 543 (D. Del. Apr. 23, 2009) (multiplier of 3.93 on an

award of $83.33 million in attorneys' fees); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 586 F. Supp. 2d 732, 741 (S.D. Tex. 2008) (5.2 multiplier on a $688 million fee award and collecting similar cases); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (6.96 multiplier on attorneys' fees of $31.6 million).

Accordingly, an award of 33-1/3% of these Settlements that provides an overall lodestar multiple of between 1.08 and 1.36 is fair and reasonable.

III. OBJECTIONS FROM CLASS MEMBERS

Objections from class members, if any, are due to be filed by December 1, 2018. To date, no objections have been received from Settlement Class members. *See* Joint Decl. ¶ 10. If there are any objections, Co-Lead Class Counsel will inform the Court promptly after the December 1, 2018 objection deadline and respond in plaintiffs' motion for final approval, to be filed on December 21, 2018. The Court, therefore, will be able to evaluate any such objection well before the January 9, 2019 Fairness Hearing.

IV. AN INCENTIVE AWARDS TO THE CLASS REPRESENTATIVES ARE APPROPRIATE

Incentive awards may be provided to class representatives as a reward for efforts that benefit the class. "The amount of the incentive award is related to the personal risk incurred by the individual or any additional effort expended by the individual for the benefit of the lawsuit." *Parker v. Time Warner Entm't Co.,* 631 F.Supp.2d 242, 279 (E.D.N.Y. 2009) (citation omitted). Here, while the Class Representatives did not sit for deposition, they did respond to Defendants' discovery and deposition dates were being negotiated at the time of the Espar settlement. *See* Joint Decl. ¶¶ 29-32. And, critically, the risk Class Representatives faced here was more than theoretical. As detailed for the Court, at least one Class Representative understood that it was threatened with a loss of business if the suit was not dropped. *See* Letter, ECF No. 128

(describing threatening communications to Triple Cities Acquisitions LLC). Given those circumstances, an incentive award for the Class Representatives is reasonable.

Additionally, the Class Representatives will not receive a windfall in this litigation. The Settlement Fund from both Settlements will be distributed in proportion to the relevant unit purchase total of Parking Heaters made by each Settlement Class member. *See* Decl. of Cameron R. Azari, Esq., on Settlement Plan and Notices, at 4, ECF No. 146-3, Ex. 2. The Class Representatives will participate in, and receive, their allotted share of, the Settlements, just as any other Settlement Class Member. *See* Joint Decl. ¶ 34.

For these reasons, Co-Lead Class Counsel respectfully requests that the Court award the reasonable sum of $15,000 to each of the Class Representatives.

V. THE REQUESTED EXPENSES ARE REASONABLE AND SHOULD BE REIMBURSED

Notice disseminated to the class stated that counsel would seek reimbursement for expenses incurred in the prosecution of the litigation, and for any costs associated with notice and administration of the Settlements. *See* ECF No. 34-3, Ex. 2, at 6. Co-Lead Class Counsel request reimbursement of all unreimbursed litigation costs and expenses incurred by plaintiffs' counsel from the case's inception through September 30, 2018, in the amount of $155,275.52, which was largely used to pay the economic expert Co-Lead Class Counsel engaged to analyze impact and damages in this matter and travel related to prosecuting this action. *See* Joint Decl. ¶ 21. These expenses were reasonable and necessary in this litigation and have been expended for the direct benefit of the class. "Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *In re Arakis Energy Corp. Sec. Litig.,* No. 95-cv-3421, 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001); *see, e.g., Visa Check*, 297 F. Supp. 2d at 525 (common practice to grant expense request); *Vitamin C*, 2012 WL 5289514, at *11.

Co-Lead Class Counsel also seek permission to pay out of the Settlement Fund sums actually invoiced by Epiq, for notice and administration of the Settlements. Through September 2018, Epiq has invoiced approximately $34,868.73 in expenses to notify the Settlement Class and begin administering the Settlements. *See* Joint Decl. at ¶ 11. Based on discussions with Epiq, Co-Lead Class Counsel estimated that Epiq will invocie approximately $32,314.08 to complete the administration of the settlement. *See id.*, at ¶ 12.

VI. CO-LEAD CLASS COUNSEL SHOULD BE GIVEN AUTHORITY TO DISTRIBUTE THE AWARDED ATTORNEYS' FEES

Co-Lead Class Counsel also request that the Court authorize them to distribute any attorneys' fees awarded from the Settlements in a manner which, in the opinion of Co-Lead Class Counsel, fairly compensates plaintiffs' counsel for their services described in the declarations. *See, e.g., In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209, 224 (D.D.C. 2005) (discussing co-lead counsel allocation in the first instance and citing cases). To the extent that there are any disputes that cannot be resolved, the Court has the authority to resolve them.

CONCLUSION

For the reasons set forth above, the requested attorneys' fees are reasonable and satisfy the *Goldberger* factors, and the expenses incurred were reasonable and necessary to the litigation. Whether judged on a percentage basis or under a lodestar cross-check, the requested fees are fair and should be granted. Co-Lead Class Counsel obtained an excellent result for the Settlement Class. There are no windfalls—only fair compensation to counsel who committed more than three years to recovering significant compensation for the Settlement Class in this case.

Dated: November 1, 2018

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On behalf of Direct Purchaser Plaintiffs and the Settlement Class