IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

KIM YOUNG, RONALD JOHNSON, WILLIAM JONES, ALLEN GORMAN, GERRAD LAMOUR, LEE MERCADO, BRADLEY HYTREK, CARL GRAY, and MATTHEW LIPTAK, on behalf of themselves and a class of others similarly situated,	)	No: 06 cv 552
Plaintiffs,	)	JUDGE KENNELLY
v.	)	JURY TRIAL DEMANDED
COUNTY OF COOK and TOM DART, Sheriff of Cook County,	)	
Defendants.	)	

CLASS COUNSEL'S PETITION FOR ATTORNEYS' FEES, COSTS,
AND CLASS MEMBER INCENTIVE BONUSES

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Now Comes Class Counsel, Loevy & Loevy, and respectfully requests an Order approving their Petition for attorneys' fees and costs, as well as incentive bonuses for certain Class members. In support, Petitioners explain as follows.

I. Summary Of The Petition

After five years of hard work, Class Counsel obtained a $55 million settlement for their clients. The litigation also brought about reforms in the strip search procedures at the nation's largest single-site jail facility, meaningful changes that will protect the constitutional rights of hundreds of thousands of citizens in the future.

To achieve that outstanding result, a total of 35 different Class attorneys collectively dedicated more than 15,000 hours of time. All told, Class Counsel created 513 affidavits from class members, took and defended 84 depositions, briefed 47 motions, reviewed over 5,000 pages of discovery documents, and answered almost 21,000 phone calls and letters from the class members seeking an update on the case or asking questions about the case. We also litigated 32 of the defendants' motions, filing 22 briefs; filed and responded to three pleadings in the appellate court; and represented the Class at four jury trials.

Presently before the Court is Class Counsel's request for an award of fees and costs. The agreed Settlement Agreement authorizes compensation of one-third of the fund, as well as reimbursement of out of pocket expenses. As set forth in this Petition, an award in that amount is appropriate for a number of reasons, summarized as follows.

Under the applicable case law, the Seventh Circuit directs this Court to determine what percentage the Class would have negotiated *ex ante* for a contingency. Applying that standard, numerous courts, in this District and elsewhere, have awarded a "market rate" one-third contingency in common funds of similar size for class actions with similar levels of risk. See, e.g., Exhibit A, Mansfield *et al.* v. Airline Pilots Assoc., 06 cv 6869, slip op. at 8-9, (N.D. Ill. Dec. 14, 2009) (Ashman, J.) (awarding 35% fee for similarly-sized $44 million dollar fund, and finding that a 35% fee award is *"consistent with awards in similarly complex cases in this and other jurisdictions, and accurately reflects the market rate for Class Counsel's services consistent with Seventh Circuit case law..."*) (emphasis added).

A key variable in that determination is the extent of the risk. At one end of the class counsel compensation spectrum is the category of cases where the risks are low. Law firms vigorously compete with one another to represent those classes because the issues of liability, and even damages, are clear. The question in those cases is not so much "if" the defendant is going to pay, or even "how much," but mainly "when."

The instant case could not fall any farther from that end of the compensation spectrum. Indeed, the offending practices persisted out in the open for years without anyone undertaking to challenge them. That is at least in part because the prospects for success in mounting such a challenge were so daunting.

First, the largest Class included persons accused of felonies, *i.e.,* people lawfully subject to being strip searched, as long as it was done properly. Their claims required proof of a widespread unconstitutional practice, a sharply-disputed and difficult-to-prove proposition. For the Class of misdemeanants, the case law was uncertain and unwelcoming, and only got worse as the case moved forward. Even in the realm of strip search litigation, this case was a risky outlier because it involved the nation's largest single-site jail and class members who, unlike in the typical strip search class, had already been arraigned and failed to make bail. Moreover, incarcerated class members are among the least sympathetic of plaintiffs, and the Defendants were public safety governmental officials. From a statistical standpoint, prisoner civil rights cases settle infrequently, fail at trial 90% of the time, and rarely prevail on appeal.

Compounding the risk, the County was not in any frame of mind to settle, at least not without first attempting to knock out the claims at class certification, summary judgment, a liability trial, damages trials, and on appeal. A loss at any one of those stages would have meant defeat for the Class, and a total loss of counsel's investments of time and resources. Prevailing at each stage required thousands of hours of diligent and creative legal work of the highest caliber, on par with what the city's leading law firms provide to their highest-paying clients.

The other major reason why no one previously brought this class action, and thus why one-third would be an appropriate *ex ante* fee, is because so few firms are realistically situated to

mount this fight. Complex civil rights cases comprise a very specialized federal practice area, requiring mastery of sophisticated constitutional issues and trial practice skills just to have a chance. Indeed, the lead named plaintiff, Kim Young, contacted ten different attorneys without success before Class Counsel agreed to pursue the claims.

The absence of other alternatives was no coincidence. Few, if any, other law firms have the special combination of attributes required to make this case successful, including: (a) substantial class action experience and the resources to manage and administer a quarter-million Class members; (b) capability of successfully litigating complex constitutional issues; (c) top-tier federal trial and appellate practices; (d) political willingness to take on Cook County; (e) capacity to devote the necessary 16,000 total hours and hundreds of thousands of dollars in expenses without repayment for five years; and (f) willingness to accept the very real risk of losing it all.

Class Counsel's combination of strengths in all of those critical attributes is quite unique. The fact is, our firm and this case were a perfect match. Given the relative absence of other super-qualified firms, coupled with the need for a super-qualified firm if there was to be any chance of winning, the Class undoubtedly would have been willing to pay a heavy premium to secure the services of a firm such as ours in an *ex ante* face-to-face negotiation, much less a market-rate one-third contingency.

The Petition also discusses other reasons why a one-third contingency is appropriate here, including the Declaration of Professor Theodore Eisenberg, a well-respected authority on class action compensation. Professor Eisenberg opines that a one-third contingency is appropriate and similar to many other awards he has surveyed in comparable cases, another useful data point for the Court's consideration.

Professor Eisenberg's analysis also demonstrates the absence of any "scaling effect" (marginally diminishing fee percentages as fund sizes increase) for high-risk civil rights class action awards in the Seventh Circuit. In other words, where the nature of the case is such that additional work increases the fund size, courts recognize that the Class would want its counsel to be incentivized to aim higher and not to quit the fight too soon, *i.e.,* just because a settlement

offer reached the level where counsel's compensation percentage drops off. In this case, for example, Class Counsel rejected earlier $20 and then $40 million offers, believing them to be too low to fairly compensate the Class. By continuing the battle through trial and on appeal (and thereby continuing to incur risk as opposed to locking in a fee) Class counsel was able to greatly expand the overall pie. From an *ex ante* perspective, the Class would have been best served by fully incentivizing that sort of decision-making, especially where, as here, the damages are soft, subjective, and totally unliquidated.

Finally, this Petition concludes by discussing the optional "cross-check" of the lodestar multiplier, as well as the possible applicability *vel non* of banded "stair step" compensation formulas. In both cases, the one-third contingency passes muster as the appropriate market rate.

II. Petitioners' Success In This Litigation Has Achieved A Substantial Settlement Fund, As Well As Important Policy Changes

The cash portion of the Settlement Fund consists of a $55 million common fund, as well as an assignment of additional claims against the insurers. Tens of thousands of members of the Class will receive the entire cash portion, net of the Claims Administrator's fees, the incentive bonuses for class members who participated at trial, and Class Counsel's fee and costs. Assuming the Court approves the incentive bonuses and the one-third contingency fee permitted under the Settlement Agreement, the Class will receive more than 64.3% of the fund, or $35,250,000.00.

The Class members' response to the Settlement Agreement has been favorable. Although the claims administrator has not completed processing all of the claims, our efforts and diligence have achieved an above-average claims rates of approximately 25%. See Exhibit B (Affidavit of Robin Niemic, Claims Administrator) at ¶¶ 21-22.

In addition to distributing over $35 million in cash to the Class members, this litigation accomplished significant programmatic changes at the Cook County Jail (the "Jail"). Most fundamentally, the unconstitutional tactics have been discontinued, resulting in very real benefits for untold numbers of future detainees. As a result of this litigation and the case built by Class

Counsel during discovery, the Jail purchased modern scanning equipment, an improvement that satisfies the Jail's legitimate interests while eliminating the need to continue the abusive blanket strip search policy. Exhibit C (Godinez Dep. at 82:1-16). The Jail's administrators themselves acknowledge that these changes comprise a "win win" because they have actually improved the Jail's ability to detect contraband. Id. at 89:18-90:4, 90:16-91:1, 117:16-19, 161:11-162:21. And even where there is reasonable cause for a strip search, the Jail no longer uses group strip searches. Rather, detainees must be searched individually with privacy. Id. at 124:11-23.

III. The Settlement Agreement's One-Third Contingency Fee Is Appropriate Under The Case Law And Should Be Approved

While not dispositive, Class Counsel begins by noting that not one Class Member has filed an objection to the one-third contingency fee authorized in the Settlement Agreement. The Court obviously has an independent duty to examine the fairness of the fee, but the absence of any objections to the fee is a useful starting point, one that distinguishes this settlement from many that do generate fee objections. E.g., In re Diet Drugs, 582 F.3d 524, 542 (3d Cir. 2009) (15 objections to fees); Mansfield et al. v. Airline Pilots Assoc., No. 06 cv 6869 (N.D. Ill. Dec. 14, 2009) (hereinafter "Airline Pilots Assoc.") (17 objections to fees), attached as Exhibit A. See also Isby v. Bayh, 75 F.3d 1191 (7th Cir. 1996) (13% of jail conditions class members filed objections to settlement).

Lack of objections aside, the law and facts support the full agreed fee for the following reasons.

A. Under The Case Law, The Full Agreed Fee Is Appropriate And Should Be Awarded If It Is Consistent With A Percentage That Would Have Been Negotiated *Ex Ante*

By investing approximately 15,000 hours of high-quality legal work over the course of five years, a total of 35 lawyers for the Class succeeded in creating a common fund benefitting its members. Accordingly, we seek an award of fees under the common fund doctrine, a doctrine "based on the equitable notion that those who have benefitted from litigation should share its costs." Skelton v. General Motors Corp., 860 F.2d 250, 253 (7th Cir. 1988) (citations omitted).

When awarding fees from a common fund, "[t]he object . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible." In re Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992). Because the Class was unable to pay fees or costs, the relevant fee is the percentage of the recovery that counsel would have negotiated before undertaking the case, given the need to invest labor and risk hundreds of thousands of dollars in out of pocket costs, all with the specter of losing it all. Sutton v. Bernard, 504 F.3d 688, 693 (7th Cir. 2007) (*ex ante* contingency negotiation must account for risk of nonpayment, the quality and quantity of the work needed to litigate the case, and the likely stakes), citing Synthroid Mktg. Litig., 264 F.3d 712, 721 (7th Cir. 2001) ("Synthroid I").

B. The Circumstances Surrounding This Litigation Support A Conclusion That Counsel and the Class Would Have Negotiated A One-Third Contingency Fee

There are numerous reasons why a one-third contingency would have been the appropriate negotiated fee in this case. These factors include the relevant market rate, the relative dearth of other law firms in a position to have tackled this litigation, the skill and reputation of Class Counsel, the difficulties in bringing this litigation to a successful conclusion, and the substantial risk of nonpayment. Class Counsel begins with the market rate.

1. Contingencies In The Amount Of One-Third Of The Common Fund Are Consistent With The Market Rate

A standard contingency arrangement for simple tort litigation runs between one-third and forty percent. Gaskill v. Gordon, 160 F.3d 361, 362 (7th Cir. 1998). Civil rights cases tend to be at the higher end of that range; attached as Exhibit D is an affidavit, signed by several local civil rights practitioners, attesting to 40% contingencies as the local market rate, reflecting the risks of loss in civil rights litigation. Cf. Kirchoff v. Flynn, 786 F.2d 320, 323-24 (7th Cir. 1986) (stating that a 40% contingency fee is typical in many practice areas, but that the unlevel playing field confronting civil rights plaintiffs may make a market rate of greater than 40% reasonable).[1]

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[1] A 40% contingency fee is not an uncommon arrangement for risky cases in other practice areas as well. See, e.g., In re Solis, 610 F.3d 969 (7th Cir. 2010) (40% contingency for fee collections contract); Kenseth v. C.I.R., 259 F.3d 881 (7th Cir. 2001) (40% contingency for age discrimination); Gerald R. Turner & Assoc., S.C. v. Moriarty, 25 F.3d 1356 (7th Cir. 1994) (40% contingency for medical malpractice); Robert W. Karr & Assoc., Ltd. v. Novoselsky, No. 08 cv 1197, 2008 WL 4865573 (N.D. Ill. July 14, 2008) (40% contingency for attorney malpractice).

Given this 33%-40% baseline for contingent fee litigation, a great deal of case law supports a one-third fee for common fund settlements. See e.g., Waters v. International Precious Metals Corp., 190 F.3d 1291, 1293 (11th Cir. 1999) (affirming fee award of one-third of $40 million common fund); In re Marsh ERISA Litig., 265 F.R.D. 128, 149 (S.D.N.Y. 2010) (approving attorneys' fees of one-third of a $35 million settlement); In re Priceline.com, Inc. Sec. Litig., No. 3:00 cv 1884, 2007 WL 2115592, at *6 (D. Conn. July 20, 2007) (awarding 30% of $80 million fund); Nichols v. SmithKline Beecham Corp., No. 00 cv 6222, 2005 WL 950616, at *22-24 (E.D. Pa. Apr. 22, 2005) (approving 30% fee of the $65 million settlement in pharmaceutical antitrust action); In re Remeron Direct Purch. Antitrust Litig., No. 03-0085, 2005 WL 3008808, at *17 (D. N.J. Nov. 9, 2005) (approving fee of one-third of the $75 million common fund); In re Relafen Antitrust Litig., 231 F.R.D. 52, 82 (D. Mass. 2005) (awarding one-third of $67 million common fund); In re Linerboard Antitrust Litig., No. 98 cv 5055, 2004 WL 1221350, at *19 (E.D. Pa. June 2, 2004) (awarding 30% of a $202 million settlement); In re Oxford Health Plans, Inc., Sec. Litig., MDL Dkt. No. 1222, 2003 U.S. Dist. LEXIS 26795, at *13 (S.D.N.Y. June 12, 2003) (awarding 28% of $300 million fund); Gutter v. E.I. Dupont De Nemours & Co., No. 95-2152-CIV-GOLD, slip op. at 7, (S.D. Fla. docketed June 2, 2003) (awarding one-third of $77.5 million common fund) (attached as Exhibit E,); Maley v. Del Global Tech. Corp., 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002) (approving fees of one-third of a $11.5 million settlement fund); In re General Instrument Sec. Litig., 209 F. Supp. 2d 423, 434 (E.D. Pa. 2001) (awarding one-third of a $48 million fund).

The same has been true in this Circuit, where courts have awarded fees of approximately one-third in common fund cases where the case was sufficiently risky to justify it. E.g., Gaskill, 160 F.3d 361 (7th Cir. 1998) (approving 38% fee for a $20 million dollar common fund in a risky case); Will v. General Dynamics Corp., No. 06 cv 698, 2010 WL 4818174, at *2 (S.D. Ill. Nov. 22, 2010) (awarding one-third of $15 million common fund and finding: "Where the market for legal services in a class action is only for contingency fee agreements, and there is a substantial risk of nonpayment for the attorneys, the normal rate of compensation in the market is

33.33% of the common fund recovered"); Airline Pilots Assoc., No. 06 cv 6869, slip op. at 7 (N.D.Ill. Dec. 14, 2009) (transferred from Kennelly, J., to Ashman, J.) (approving 35% of a $44 million common fund, and finding 35% to be the market rate given that there was a "significant risk" of non-payment); In re Household Int'l Inc., No. 02 cv 7921 (N.D. Ill. Nov. 22, 2004) (awarding 30% of a $46.5 million fund and finding that 30% was "at or below the market rate"). See also Retsky Family Ltd. v. Price Waterhouse LLP, No. 97 cv 7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) ("A customary contingency fee would range from 33% to 40% of the amount recovered"); Goldsmith v. Tech. Solutions Co., 92 cv 4374, 1995 WL 17009594, at *8 (N.D. Ill. Oct. 10, 1995) (collecting cases and concluding: "where the percentage method is utilized, courts in this District commonly award attorneys' fees equal to approximately one-third or more of the recovery").[2]

2. The Absence Of Other Law Firms In A Position To Pursue This Litigation

In securities and consumer class actions, it is not uncommon for multiple firms to jostle with one another to be class counsel. The same is true for certain MDL litigation. Such cases often present desirable economic propositions, *i.e.,* a high likelihood of success coupled with big stakes. In those situations, firms literally compete for the cherry cases, and courts can establish the market rate via a bidding process.

For example, in In re Synthroid Marketing Litigation, 325 F.3d 974 (7th Cir. 2003) ("Synthroid II"), the court imposed a fee that would equate to 23% of a $55 million common fund. Id. at 975-76. Unlike the case at bar, Synthroid was an MDL consumer class action for which the economics were so attractive relative to the risk that numerous law firms around the country jumped in to compete to represent the class. Synthroid I, 264 F.3d at 714. Moreover, the predicate facts necessary for liability had already been established by a "whistleblower" account

[2] Some trial courts in this Circuit have reduced the percentage below one-third in so-called "mega fund" cases where the stakes reach into the hundreds of millions. See, e.g., Berger v. Xerox Corp. Ret. Income Guarantee Plan, No. 00-584, 2004 WL 287902, at *2 (S.D. Ill. Jan. 22, 2004) (fee award of 29% of $239 million common fund), and Berger, No. 00-584 (S.D. Ill. Filed Jan. 20, 2004) (Memorandum in Support of Final Approval), attached as Group Exhibit F.

published in the Journal of the American Medical Association. Id. at 713-14 ("After the article's publication, lawyers across the country began filing class action suits."). Thus, liability was never in doubt, and damages were certain to be sizable from the outset. Moreover, the defense settlement offer came so early in the litigation that the court concluded that sufficient discovery had not yet been conducted to determine whether the defendants' offer was too low. Id. at 714-15; see also In re Trans Union Corp. Privacy Litig., 629 F.3d 741, 2011 WL 117108, at *5 (7th Cir. 2011) (cases filed after the FTC had already found that Trans Union violated federal law).[3]

Not so here. There was no bidding war for the privilege of representing this prisoner class. Quite the opposite, named Plaintiff Kim Young searched out, but was rejected by, ten different law firms before she found Loevy & Loevy ("L&L"). Exhibit G (Young Aff. at ¶ 3).

From its vantage point, this Court is aware of how few civil rights firms in this District were truly in a position to devote so many thousands of attorney hours and several hundred thousand dollars in cash/credit (in an era when credit is tight), all in the hopes of being paid five or more years down the road – assuming there was any payment at all. The Class also required a firm capable of skillfully handling the staffing and administrative burden associated with almost 250,000 class members, including the ability to respond to thousands of letters and phone calls.

To be sure, such firms exist, but precious few concentrate in civil rights, a highly-specialized field. Summary judgment and then Seventh Circuit review loomed as serious barriers to recovery, and, with the County unwilling to settle prior to testing these waters, the experience and ability needed to address complex constitutional arguments was critical.[4]

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[3] The court also relied on an actual retainer that one of the attorneys had signed with an insurance third party payer to represent it in the case for 22% after liability had essentially become clear. In Re Synthroid Mktg. Litig. ("Synthroid II"), 325 F.3d at 976, 978 (explaining that the 22% rate was agreed to "after a good deal of the risk had been dissipated" and that the insurers still "had to offer 22% to sign up lawyers on a contingent fee").

[4] Class Counsel, for example, had to craft legal positions against a legal backdrop that began shifting unfavorably as our case progressed, when various appellate courts began dismissing class actions for detainees strip searched upon entry to general population. See Florence v. Bd. of Chosen Freeholders, 621 F.3d 296 (3d Cir. 2010) (dismissing claim of putative class strip searched on entry to general population); Bull v. City and County of San Francisco, 595 F.3d 964 (9th Cir. 2010) (dismissing claim for class entering general population); Powell v. Barrett, 541 F.3d 1298 (11th Cir.2008) (dismissing claim for class entering general population and remanding claims of those strip searched before the need to enter general population was determined).

The reality is, if Class Counsel had not taken the case, it likely never would have been brought at all, much less won. After all, the disputed practices had been ongoing out in the open for years, affecting hundreds of thousands of men, all without any prior challenge by any other law firms. This factor weighs strongly in favor of the conclusion that *ex ante* negotiation would have supported a contingency of at least one-third, if not more.

3. Class Counsel's Capability To Perform The Superior Level Of Legal Work Necessary To Obtain The Tremendous Result

All of the foregoing speaks to the relative absence of other firms in any realistic position to prosecute this case properly. But even assuming *arguendo* there had been an availability of other firms competing to represent the Class, law firms are not fungible. Petitioners respectfully submit that the Class enjoyed the advantage of having been represented by one of the premier civil rights law firms in the Midwest, a factor which warrants compensation at the highest end of the spectrum. See Synthroid I, 264 F.3d at 720 ("Quality varies among lawyers, and awards net of fees *could rise with the level of fees if a higher payment attracts the best counsel. We never see private clients auctioning off their legal work to the lowest bidder.*") (emphasis added).

As the Court has had the opportunity to observe during its tenure on the bench, L&L has grown to 21 lawyers, many with the type of stellar resumes which would qualify them to work for the nation's largest and most prestigious law firms on behalf of the highest-paying clients. See Group Exhibit H (affidavits stating qualifications). Instead, our firm's lawyers have devoted their careers to challenging civil rights cases, such as this one. As a result, the Class benefitted from a level of service that can only be characterized as top of the line. Cf. Garcia v. Chicago, No. 01 C 8945, 2003 WL 22175620, at *7 (N.D. Ill. Sept. 19, 2003) (Holderman, J.) ("In the case at hand, were it not for the skill and determination of [Loevy & Loevy], the violations of Garcia's civil rights by the City proven by the evidence at trial would not have been established.").

In further support of Class Counsel's skills, reputation, and accomplishments, we offer affidavits submitted by the distinguished figures in the Chicago civil rights community, including*, inter alia,* Locke Bowman of the MacArthur Justice Center; Harvey Grossman of the American Civil Liberties Union; Craig Futterman of the Civil Rights Police Accountability

Project at the University of Chicago; Flint Taylor of the People's Law Office; Andrea Lyon of DePaul Law School; and Judson Miner of the Miner Barnhill firm. See Group Exhibit I. See also id., Affidavit of Robert S. Grabemann (L&L opposing counsel in recent civil rights trial). We are quite proud of their opinions, all of which place L&L in the highest tier of civil rights firms, and therefore worthy of the highest compensation. See id.[5]

Applying the Seventh Circuit standard of an *ex ante* negotiation, the Class would have been hard pressed to find many firms as well qualified to provide the level of service necessary to win, much less achieve the outstanding result obtained here. Because the supply is limited, the market power to negotiate something less than a one-third (or even greater) contingency is simply not there.

There is an additional factor distinguishing Class Counsel from the rest of the prospective pack. Actual trial practice is extremely rare in the class action world. While there are undoubtedly other class action firms with excellent trial attorneys, there are likely few that take on cases with an eye towards trying them rather than settling pretrial. There are fewer still that have the level of federal civil trial experience (and record of success) that L&L has to offer. This attribute was critical here given the need to obtain the "policy and practice"jury verdict and the high verdicts at the damage trials, without which the settlement, if it happened at all, would not have been anywhere near $55 million.

Even within the subset of class action firms with the capability of trying cases, the market thins further because, whatever the number of remaining firms, it is fair to say that virtually none have substantial experience in civil rights litigation, to say nothing of the level of expertise in this area comparable to L&L. Given L&L's history of litigating and trying Monell policy and practice claims with uncommon frequency, see Exhibit J, Kanovitz Decl. ¶ 50, our firm was uniquely suited to build a case for trial. Granted, many of these other cases have been, for the

[5] In addition to confirming our firm's track record for aggressively and successfully litigating on behalf of our clients, these affidavits also corroborate our law firm's decision to devote thousands and thousands of hours to important civil rights endeavors that are either purely *pro bono,* or else far more about civil rights principles than they are about economic remuneration.

most part, "smaller" individual cases, but we have litigated each with the same thoroughness and vigor with which "big firms" treat the commercial interests of their highest-paying clients.[6]

Summarizing, L&L's unique set of skills, built over more than a decade of trying civil rights cases, proved immensely valuable to the Class. The fact is, some law firms are more expensive than others. Some corporate law firms have earned the right to charge clients significantly higher rates, and some patent law firms command higher contingencies. Civil rights firms are no different, particularly where, as here, the Class required the services of a premium firm, without which it would have been less successful or not successful at all. See discussion, *infra,* at 36 fn. 21 (describing far smaller settlements in comparable class actions brought by other local attorneys). Class Counsel's services provided very good value to the Class at the one-third contingency, and Counsel should capture the full benefit of that service. See Synthroid I, 274 F.3d at 720 (awards "could rise with the level of fees if a higher payment attracts the best counsel").[7]

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[6] Finally, the settlement negotiation itself required experience and skill, including sophisticated and creative analysis of insurance issues. To ensure the Class had every advantage, Class Counsel hired insurance counsel from the Howrey law firm to advise and assist. On their own dime, Class Counsel paid these insurance lawyers almost $50,000 at an hourly rate of $605/hour (for an attorney with the same year of law school graduation as lead counsel, Mike Kanovitz). See Exhibit K (Howrey invoices).

[7] Assuming hypothetically that the Class could have sought out less qualified attorneys who might have accepted a 30% or even a 25% fee, the Class was nonetheless better served by paying L&L a full third because the resulting overall expansion of the pie to $55 million completely dwarfs any potential savings for the Class associated with a reduced rate. This was simply not the type of class action where the pot was fairly fixed and the most rational choice would be to select the cheapest among competing, equally-qualified firms. See fn. 20, infra, discussing far smaller Bullock and Jackson settlements.

4. The *Ex Ante* Risk Of Nonpayment Was Sufficiently Substantial As To Justify The One-Third Contingency

As our Court of Appeals has made clear, "[t]he greater the risk of loss, the greater the incentive compensation required." Synthroid I, 264 F.3d at 719.[8] The Seventh Circuit has, quite properly, singled out civil rights litigation as being amongst the most risky propositions for contingency fee representation. Kirchoff, 786 F.2d at 323 (while "40% is the customary fee in tort litigation," that is the fee for the normal tort litigation and "the risks plaintiffs face in §1983 litigation are greater" than the norm). Unlike regular tort litigation, Section 1983 cases face legal and practical barriers resulting in more unsuccessful plaintiffs, as the Seventh Circuit summarized:

> A §1983 case is not like FELA litigation, in which all but a few defenses have been stripped away. It is not even like ordinary tort litigation. . . . [T]he plaintiff must show more in a §1983 case than in a case under the common law of torts. Negligence is not itself actionable. The plaintiff must show intentional wrongdoing or at least recklessness in most §1983 suits, and every "constitutional tort" will have one or more elements an ordinary negligence suit. The plaintiff also must overcome any immunity from suit the defendants may possess. A plaintiff suing the police may encounter juries sympathetic to the defendants -- more sympathetic, anyway, than juries are apt to be when the defendant is a deep-pocket corporation in a products liability or FELA suit. When the plaintiff wins on the merits, the jury may treat the defendant as having shallow pockets. . . . Litigants under §1983 therefore have a harder time on the merits, and recover less when they win, than plaintiffs in much other tort litigation.

Id. at 323-24.

Empirical evidence bears out these observations. As is discussed in the attached Declaration of Professor Theodore Eisenberg, civil rights cases succeed at far lower rates than other types of plaintiff's litigation. See Exhibit L (Eisenberg Aff. ¶¶ 49-52). Professor Eisenberg analyzed the data from federal court case outcomes made publicly available by the Administrative Office ("AO") of the United States Courts covering fiscal years 1970 through

[8] The converse is also true, and courts have ordered fees of less than one-third in lower risk cases. But, to be clear, they did so because the recovery was more certain at the outset, and thus the market would have dictated less of a contingency fee to compensate for the lower risk of loss. The relative lack of risk associated with certain brands of class actions is the main driver of fee awards lower than one-third.

2008, which include the outcomes of literally millions of federal cases and over 100,000 trials. Id. ¶¶ 45-48.[9]

Not surprisingly, government actors enjoy a significant advantage in litigation, a phenomenon confirmed by empirical research showing a success rate 2.5 times higher than that of businesses. Id. ¶ 55. As Professor Eisenberg's charts illustrate, see id. ¶ 49 (Fig. 1), the trial success rates of incarcerated plaintiffs in civil rights cases hover around 10%, and never exceed 20%. Id. ¶ 49. This contrasts sharply with noncivil rights cases (better than 50%) and even with nonprisoner civil rights cases, in which plaintiffs succeed at trial around 30% of the time.

Moreover, these low trial success rates are not a function of high rates of pretrial success. Civil rights cases are also far less likely than the norm to settle pretrial, and cases involving prisoners settle at the lowest rates of all. Id. ¶ 51 ("The combination of the lowest settlement rates of any major case category and the lowest trial win rates of any case category documents the extreme trial court level risk to counsel of bringing cases like this.").

Risks associated with civil rights cases persist on appeal, with a reversal rate for plaintiff victories at about 50%, compared to about 14% when Defendants win. Id. ¶ 53 ("In short, counsel in civil rights cases, who survive high pretrial dismissal rates, as evidenced by low settlement rates shown in Figure 2, who survive low trial success rates, as shown in Figure 1, still must run the gauntlet of appellate reversal rates that show the highest gap between plaintiff and defendant appellate success of any case categories."). Professor Eisenberg characterizes this as "transcendent, systemic risk," exceeding any other category of litigation. Id. ¶ 54.

Empirical statistics aside, the notion that Cook County would have been willing, or even politically able, to pay $55 million to a class of Jail detainees was not an outcome that anyone would have called "likely" from an *ex ante* perspective. To obtain that result, Class Counsel had

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[9] Helpfully, there is a statistical category labeled "Prisoner civil rights, prison conditions." According to Professor Eisenberg, the AO started using another code in 1998 to separate prison condition cases from other prisoner civil rights cases. AO Code 440, which is described as "Other civil rights" cases, is a reasonable proxy for §1983 cases. Id. ¶ 47, citing Schwab, S., Eisenberg, T., Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 Cornell L. Rev. at 725 (table I).

to confront potentially dispositive pitfalls in terms of class certification, summary judgment, trial, and appeal. Each of those wins was vital to the Class's ability to obtain its sizeable settlement, and failure at any of these stages would have doomed or substantially reduced the recovery. Thus, in contrast to class actions where law firms compete to represent the class, the risk here was substantial, and, as demonstrated by cases such as Gaskill, Airline Pilots Assoc., In re Household Int'l, and Will, the market for riskier cases dictates substantially higher contingency fees, either at or just slightly above/below one-third.[10]

In closing on this point, Petitioners wish to emphasize that when one speaks of "risk" in this context, the potential economic consequences are not merely abstract, particularly for a small or even mid-sized firm. Huge amounts of attorney time and out-of-pocket capital must be spent up front on behalf of the clients. All of this money and billable time can vaporize in an instant. Over the past decade, Class Counsels' firm has invested millions of dollars in civil rights cases for attorney time and expenses that have gone uncompensated because they failed to prevail.[11]

To be clear, Class Counsel is not complaining. That is the nature of the game. These types of cases are very difficult to win. Counsel understand that risk going in, and knowingly assume it. But on the other side of the equation, when the plaintiffs do prevail for their clients – and, as here, where they prevail big – then full compensation commensurate with the scope of the accomplishment is appropriate. This is particular so given the economics of the practice, and the firm's expense in compensating more than twenty highly-qualified attorneys, to say nothing of the multi-million dollar annual overhead associated with running a firm of that size.

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[10] This case was actually riskier than other strip search class actions in the 30% common fund range, which were more attractive because they involved detainees that had not yet been arraigned or who had been ordered released. Boone v. City of Philadelphia, 668 F.Supp. 2d 693 (E.D. Pa. 2009); Calvin v. Sheriff of Will County, No. 03 cv 3086 (N.D. Ill. entered Nov. 27, 2006) (attached as Exhibit M); Gallagher v. County of San Mateo, No. 04-0448 (N.D. Cal. Nov. 29, 2007) (attached as Exhibit N); Connor et al. v. Plymouth County, No. 00-10835-RBC (D. Mass. entered Mar. 11, 2004) (attached as Exhibit O). And, unlike almost any other class action in any category, this one had to proceed through trial and appeal.

[11] As attorney Jon Loevy's affidavit attests (Group Exhibit H) it is not an uncommon occurrence for the firm to lose a substantial investment in a case when the plaintiff fails to prevail for one reason or another. Id. ¶ 29.

C. Additional Evidence Supporting A One-Third Contingency Fee

In addition to the foregoing *ex ante* analysis, other factors also support the one-third contingency set forth in the Settlement Agreement. They are discussed below.

1. Professor Theodore Eisenberg's Survey, Analysis, And Opinion

Class Counsel retained the aforementioned Professor Theodore Eisenberg to provide an opinion on the reasonableness of the fee sought within the context of comparable civil rights class actions. Exhibit L, Eisenberg Declaration. While Class Counsel acknowledges the limitations of relying on this sort of evidence, Professor Eisenberg's analysis and opinion constitutes additional data for the Court's consideration.

Professor Eisenberg is a Professor of Law at the Cornell Law School, and an Adjunct Professor of Statistical Sciences at Cornell University. Id. ¶ 1. He regularly teaches at a Ph.D. program on Institutions, Economics, and Law, and has previously taught at UCLA Law School, Harvard Law School, Stanford Law School, and NYU School of Law. Id. ¶ 1.

It would be difficult to imagine anyone more experienced with the quantitative analysis of common fund attorney fee awards than Professor Eisenberg. See id. ¶¶ 3-10. He has researched and published widely on the subject of attorneys' fees, and his empirical studies, including those regarding attorney fees and class actions, span more than two decades.[12] His articles concerning

[12] See, e.g., *Attorney Fees and Expenses in Class Action Settlements:1993-2008,* 7 *J. Empirical Legal Stud.* 248 (2010) (with G. Miller); *A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions After Goldberger v. Integrated Resources, Inc.,* 29 Wash. U. J. Law & Policy 5 (2009) (with M. Perino)*; Incentive Awards to Class Action Plaintiffs: An Empirical Study,* 53 UCLA L.Rev. 1303 (2006); *Attorney Fees in Class Action Settlements: An Empirical Study,* 1 J. Empirical Legal Stud. 27 (2004) (with G. Miller); *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant,* 73 Cornell L. Rev. 719 (1988); *The Reality of Constitutional Tort Litigation, in Civil Rights & Attorney Fees Annual Handbook* 3 (Lobel & Wolvovitz eds. 1987) (preliminary version of same article appearing in 72 Cornell L.Rev. 641 (1987); *What Is the Settlement Rate and Why Should We Care?,* 6 J.Empirical Legal Stud. 111 (2009) (with C. Lanvers); *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (with C. Lanvers), in *Empirical Studies of Judicial Systems* 2008 (K.C. Huang ed. 2009); *Appeal Rates and Outcomes in Tried and Non-Tried Cases,* 1 *J. Empirical Legal Stud.* 659 (2004)*; The Government as Litigant: Further Tests of the Case Selection Model,* 5 Am. L. & Econ. Rev. 94 (2003) (with H. Farber); Litigation Realities, 88 Cornell L. Rev. 119 (2002) (with K. Clermont); *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 *Illinois L. Rev.* 947 (with K. Clermont); *The Relationship Between Plaintiff Success Rates Before Trial and At Trial,* 154, Part 1, *Journal of the Royal Statistical Society,* Series A 111 (1991).

attorney fee awards have been cited in 29 judicial opinions, including by the Seventh Circuit. Id. ¶¶ 9-10. The Supreme Court, too, has cited and relied on empirical studies he authored or co-authored on various topics, including the eight Supreme Court opinions listed in his affidavit. His empirical studies have been the subject of stories in major media, including the *New York Times*, the *Wall Street Journal*, the *Atlantic Monthly*, among others. He has also testified about law-related empirical matters before federal and state legislatures.

Professor Eisenberg recently presented his empirical analysis of attorney fees to federal MDL judges at the 42nd Transferee Judges' Conference, held in West Palm Beach, Florida, in October of 2009. He is the founder and editor of the Journal of Empirical Legal Studies, which is the official journal of the Society for Empirical Legal Studies. He also served on the editorial board of the American Law and Economics Review, and as an academic adviser to the National Center for State Courts. Professor Eisenberg has substantial experience in the study of civil rights and discrimination litigation. He is the author of Civil Rights Legislation (Lexis Nexis 5th ed. 2004), a casebook that includes hundreds of pages on Section 1983 civil rights litigation.

As set forth at length in his Declaration, Professor Eisenberg opines that a one-third contingency is appropriate here for numerous reasons. First, a one-third contingency is consistent with the market rate for similar awards in civil rights cases and class actions in the same risk category. Id. ¶¶ 41-56. Moreover, as Professor Eisenberg, the fact that the Young Plaintiffs had been arraigned further increases the risk premium, as did the fact that most Class plaintiffs were not challenging the right of the jail to strip search them, but only the manner in which it was done. Id. ¶ 59-60, 84. There is also the matter of the jury trials (which occur in less than 1% of the cases Professor Eisenberg studied, id. ¶ 82) and the interlocutory appeal, which in Professor Eisenberg's opinion are sufficiently unusual and risky to warrant the highest end of the comparable awards. Id. This was also the highest strip search settlement that Professor Eisenberg has been able to locate, a result he describes as "historically high." Id. ¶ 85.

In sum, Professor Eisenberg's opinion provides additional support for the one-third contingency sought here.

2. The Record-Breaking Result

As the Supreme Court has made clear, "the most critical factor" in determining reasonableness of the fee award "is the degree of success obtained." Farrar v. Hobby, 506 U.S. 103, 114 (1992). By any measure, the outstanding degree of success obtained here is beyond debate. This is no "coupon" settlement. Class Counsel broke the cash record for strip search settlements. The amount may well merit inclusion on the list of the highest (collectible) civil rights awards ever. A huge number of Class members – in the tens of thousands – will see meaningful checks to compensate them for the injury they suffered.

Class Counsel should not be "penalized" with a lower percentage merely because we achieved such outstanding results for the clients. In that regard, Professor Eisenberg searched for the existence of a possible "scaling effect" in Seventh Circuit common fund cases, *i.e.*, he reviewed the awards to determine if percentages declined with the size of the recovery. Using regression analysis, he determined that there is almost no scaling effect present in the Seventh Circuit for the category of high risk cases. Id. ¶ 88. That result indicates that courts treat higher-risk cases differently, recognizing that the market, which may sometimes gravitate toward an *ex ante* "banded"-based negotiation in some types of commercial cases with fixed damages, is not universally applicable. Rather, as the Seventh Circuit noted, such arrangements make economic sense mainly when the recovery will not "increase in proportion to the number of hours devoted to the case." Synthroid I, 264 F.3d at 721. This basic lack of scaling also can be seen in the fee awards in other strip search class actions, regardless of the size of the fund. See Exhibit L, Eisenberg Aff. ¶ 66.[13]

[13] These other class actions were also arguably less risky than this one. Most involved blanket strip searches of pre-arraignment detainees not entering general population, or detainees whom the court had already ordered freed, and so those cases did not present the extra proof issues and risk of appellate reversal that this case did. Moreover, none of them appears to have proceeded past summary judgment. See Cazenave v. Foti, No. 00 cv 1246 (E.D. La. July 17, 2008) (awarding 35% in case that settled after summary judgment motions were filed for pre-arraignment detainees) (Order and Reasons attached as Exhibit P); Gallagher, No. 04-0448 (N.D. Cal. Oct. 29, 2004) (awarding 31.6% in case involving female pre-arraignment detainees settled after class certification) (Order of Judgment and Dismissal *and* Application for Attorneys' Fees and Costs, attached as Group Exhibit N); Bynum v. District of Columbia, 412 F. Supp. 2d 73, 81 (D.D.C. 2006) (awarding 33.3% of pre-trial settlement where class involved over-

As discussed, the history of this litigation demonstrates how the amount of the recovery in high risk cases does go up with increased marginal work. Class Counsel almost tripled the Classes' recovery by pushing the case towards trial, and beyond.

3. The Policy Reforms Will Provide Additional Non-Pecuniary Benefit To Hundreds Of Thousands Of Citizens

As substantial as the financial component of this fund may be, the benefits obtained by Class Counsel cannot be measured in dollars alone. This litigation, including the Court's ruling on summary judgment, also brought about meaningful and needed reforms at the country's largest single-site Jail. The Jail now uses scanning technology instead of blanket strip searches. See Exhibit C, Godinez Dep. at 162:22-163:3. A detainee may be strip-searched only if there is particularized reasonable suspicion that he or she is harboring contraband. Id. at 104:4-105:9, 111:20-21, 142:20-143:3, 146:9-16.

As a result of these changes, hundreds of thousands of people will be spared abusive and often barbaric strip procedures that were inflicted on the class members – a policy and practice which has been discontinued in favor of a far more humane solution, all without sacrificing anything in terms of the Jail's ability to detect contraband, which has actually been improved. Id. at 89:18-90:4, 90:16-91:1, 117:16-19, 161:11-162:21.

Under the law, this nonmonetary benefit further supports Counsel's fee petition. See Robinson v. City of Harvey, 489 F.3d 864, 872 (7th Cir. 2007) (affirming fee award in part on nonmonetary benefit of successful Monell claim, described as a "victory that serves the public interest by exposing to light disturbing police malfeasance and grave municipal institutional

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detention and strip searches of persons after a court had ordered them to be released); Calvin, 03 cv 3086 (N.D. Ill. Nov. 27, 2006) (awarding one-third to 40 % where claims involved pre-arraignment arrestees and persons whom the court had already ordered to be released; case settled after summary judgment) (Order Granting Final Approval of Class Action Settlement attached as Exhibit M); Boone, 668 F. Supp. 2d 693 (awarding 30% in a case that settled before class certification was decided; class definition, which includes people arrested on bench warrants, appears to contemplate persons who had not been arraigned notwithstanding that the opinion uses the both "pretrial detainees" and "arrestees" to describe the class); Connor, No. 00-10835-RBC (D. Mass. Mar. 11, 2004) (awarding 31% in case that involved claims by female pre-arraignment detainees as well as those held on default bonds and in protective custody that was settled after class certification) (Final Approval Order and Complaint attached as Exhibit O).

failures, and one that will presumably help to deter future constitutional violations by the City's officers"). See also Chicago Acorn v. City of Chicago, No. 97 cv 6391, 1999 WL 1256260, at *9 (N.D. Ill. Dec. 21, 1999) (plaintiffs' counsel's achievement in obtaining content-neutral policy for admission to city council meetings served an important public purpose, and thus supported fee request); Bynum, 412 F. Supp. 2d at 85 ("The policy achievements obtained through this litigation set it apart from many class fund cases, which provide only monetary relief.").

In some class actions, courts place a valuation on the programmatic reforms as part of the total consideration to the class. We have not requested that sort of accounting here, urging instead that the Court consider the nonmonetary benefit as further support for the reasonableness of the one-third contingency authorized in the Settlement Agreement.[14]

4. The Difficulties And Challenges Class Counsel Had To Overcome To Obtain The Successful Result

In considering the request for compensation, Class Counsel urges the Court to keep in mind just how many obstacles stood in the way of victory for the Class. Putting aside the benefit of hindsight, a list of some of the legal and factual issues we had to prepare to confront is attached as Exhibit Q. Other challenges are discussed in the Declaration of lead counsel Michael Kanovitz ("Kanovitz Decl.") (Exhibit J at ¶ 41), and we review some of them as follows.

Strategic Obstacles

Unlike most other strip search defendants, the Jail did not accept detainees until after they had been arraigned by a judge and ordered into the custody of the Sheriff. The distinction matters, because after arraignment, it is necessary for the detainee to be housed pending trial and, thus, to be admitted into the inner confines of the facility (where different safety challenges are presented), as opposed to awaiting arraignment in holding cells. Compare Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983) (prohibiting blanket strip searches of unarraigned women in a municipal lock-up who were about to make bond).

[14] Even though these new procedures were implemented in response to this litigation, as the Court may recall, the Sheriff refused to memorialize the reforms into the Settlement Agreement. Class Counsel was unwilling to allow impasse on this point to derail the settlement, as the jury's verdicts at the liability and damages trials should be sufficient to ensure future compliance.

Moreover, even under the most favorable expression of the case law for those charged with misdemeanors, blanket strip searches are still permissible so long as the facility demonstrates a history of contraband smuggling by class members. Mary Beth G., 723 F.2d at 1272-73. Here, as Defendants were always quick to point out, the Jail was notorious for problems with dangerous weapons and contraband.[15]

As for the Class' argument about strip search methodology, this was by no means a guaranteed winner. The case of Bell v. Wolfish, 441 U.S. 520 (1979) had assumed, without deciding, that the Fourth Amendment would apply and, thus, require the methodology to be reasonable. But what was "reasonable" under a wide array of circumstances remained open to interpretation. Class counsel found the Jail's practices objectionable, but the Jail definitely had a story to tell in terms of being the nation's largest jail with hundreds of detainees to process in just a few hours each day. See Turner v. Safley, 482 U.S. 78, 89 (1987) (courts should not second-guess jail administrators for failing to choose the least burdensome method for a strip search).

Moreover, Class I's claim concerning the strip search methodology turned, in part, on abuses that were relatively *ad hoc*: terrorizing detainees, using violence and profanity, bodily fluids spilling during the search. Those sorts of conditions were likely unconstitutional, but establishing that they were universal, so as to justify class treatment, was difficult and risky. Plaintiffs argued, and the Court agreed that any differences in the practices were not likely to predominate, Young v. County of Cook, No. 06 cv 0552, 2007 WL 1238920, at *7 (N.D. Ill. Apr. 25, 2007), but that was no foregone conclusion.[16]

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[15] E.g., Rudolph Bush, Inmate Slain in Knife Fight at Cook County Jail, 3 Other Prisoners Sent to Hospitals, *Chicago Trib.,* Mar. 24, 2002, at 3 (reporting inmate fight with shanks); Jeff Cohen, 7 Inmates Injured During Brawl, Jail Fight Leaves 3 Hospitalized in Serious Condition, Chi. Trib., Oct. 28, 2003, at 3 (same); Patrick Rucker and Jo Napolitano, 21 Hurt in Gang Fight at Cook County Jail, 6 Inmates Sent to Area Hospitals, *Chicago Trib.,* Oct. 17, 2004, at 1 (same).

[16] The ruling was also interlocutory, and subject to being revisited as the record unfolded. Accordingly, building the case in discovery and trying it before a jury required special care so as not to permit the Fourteenth Amendment claims to devolve into disparate and varying experiences. The risk of unwinding the Court's certification decision on this claim, and thus of losing some of the most powerful evidence of the unreasonable practices, was omnipresent.

Early Proceedings

Following the Court's denial of Defendants' motions to dismiss, Dckt. Nos. 37, 39, 56, Class Counsel geared up to take discovery required for class certification under Rule 23(b)(3). This involved document discovery, as well as depositions of policymakers, various jail guards and supervisors, and the named Plaintiffs themselves. See Exhibit J, Kanovitz Decl. at ¶ 39.

Class Counsel proceeded to gather class members' accounts of cruelty by the guards. This was a fact-intensive endeavor, and there was no guarantee going into discovery that Class Counsel was going to gather enough evidence to convince a jury to disbelieve the contrary accounts of jail guards, high-ranking administrators, and even jail physicians.

Formal discovery was comprehensive, to say the least. We served 23 separate sets of requests for written discovery, took or defended 84 depositions, and reviewed more than 5,000 pages of documents produced in discovery. This included, for example, intensive scrutiny of thousands of pages of "contraband reports" produced and relied upon by the Jail, and researching court records of the persons identified to determine the nature of their charges and whether they belonged to Class II. We had to fight for much of the discovery we needed, filing and litigating seven discovery motions and responding to multiple others seeking to prevent discovery.

The difficulty of obtaining class certification was compounded in all sorts of ways. For example, Defendants claimed repeatedly, and incorrectly, that the Jail's database was so antiquated that they could not produce to us a list of persons admitted during the class period. See Young v. County of Cook, 2007 WL 1238920, *3 (N.D.Ill. April 25, 2007) ("Plaintiffs sought database discovery from the [Sheriff's Department] to determine the size of this proposed class. The Department claimed that it could not extract the information from its computers . . ."); Exhibit J, Kanovitz Decl. ¶ 39. This prevented Plaintiffs from adducing witness evidence from the class members with which to prove the commonality of the widespread abuses. It also hampered Plaintiffs' ability to establish numerosity for the misdemeanor class. Defendants were claiming that persons charged with non-drug/non-weapons misdemeanors rarely entered the Jail due to the I-bond system, and Plaintiffs had no database with which to disprove it. Accordingly,

Class Counsel had to monitor the publicly admissible records of admissions to the Jail for a period of time and then look up the criminal file of each new detainee to locate those who were charged with Class II charges so as to prove that a misdemeanor class actually existed.[17]

Class Certification

Following Plaintiffs' successful motion for certification, Defendants petitioned the Seventh Circuit for leave to appeal under Rule 23(f). The relief sought by the Defendants would have ended the case. Class Counsel approached the appeal with the seriousness that it deserved, and devoted considerable resources to (successfully) protecting the Class' interests.

Once the Classes were certified, Class Counsel direct-mailed notice (at our expense) to over 180,422 Class Members. Unsurprisingly, many class members took a keen interest, calling and writing with questions. We received over 2,000 phone calls and almost 1,800 letters between the time when we sent notice and when the case went to trial. We were diligent about responding to each of these contacts, and we set up protocols so that class members with questions could speak to an attorney, making sure that written questions appropriate for an attorney were answered by an attorney. Exhibit R, Declaration of Roshna Bala Keen ("Keen Decl.") at ¶¶ 4-7.

News of the case spread as a result of media coverage of the Court's summary judgment decision and of the liability trial. Between the liability trial and the time when we sent notice of the proposed settlement, counsel received another 1,600 phone calls and another almost 7,000 letters, most requesting an update on the case and asking for an explanation of what the case developments meant. Again, we responded to each and every communication, providing the class members with access to an attorney whenever requested. Exhibit R, Keen Decl. ¶ 8. Additionally, since sending out the notice of settlement, we have responded to over 3,200 more phone calls and almost 1,800 letters, explaining the settlement. Id. ¶ 9.

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[17] During discovery, Defendants also inundated Plaintiffs with irrelevant but voluminous documents. One example was an exhibit of 400 "contraband reports" that were *apropos* of nothing at issue at the certification stage, but which still required laborious analysis and tabulation so that Plaintiffs could respond to Defendants' characterizations of what they showed. Another was Defendants' reliance on documents and consent decrees in Duran and the Lewis v. O'Grady case which required Plaintiffs to study those records and dockets as well.

On the investigation side, we undertook a massive project to gather over 500 declarations from randomly selected class members representing a cross section of the class period. We interviewed each declarant personally to produce the declaration. The difficulty in the logistics of the process alone was considerable. Also, given the state of the Jail's charging data on the class members, we conducted a random sample of 2,000 class members and looked up every single file on them. We used this data to estimate the rate of Class II charges and also to analyze issues of length of stay for misdemeanor detainees with the assistance of database experts. We also surveyed procedures of other police departments and facilities and conducted a great deal of internet research to marshal evidence for the case.

Summary Judgment

From the outset of the case, Class Counsel's assessment, based on experience, was that we needed to prevail on summary judgment for Class II because those claims were not particularly viable if tried to a jury. Because the Jail's history of contraband problems was legally relevant to the jury's consideration of the reasonableness of blanket strip searches, if we left a jury question open then the Jail was going to be able to put on a host of incendiary evidence about drugs and shanks and violence towards officers and the detainees themselves. This would have not only destroyed Class II's chances for success, it would also have created the appearance that the Plaintiffs' case was at odds with jail security, thereby creating an unacceptable spillover risk for the Class I strip search methodology claims.[18]

Thus, merely surviving summary judgment so that we could present the case to a jury, which is the most that civil rights plaintiffs usually can hope for in discovery, was not enough. Because there was an undeniable history of contraband entering the Jail, Class Counsel needed to so thoroughly undermine the foundation for any conclusion that the evidence was relevant to Class II's claims as to leave no jury question at all regarding the weight of the evidence. This

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[18] Class Counsel's concerns were validated very quickly after we filed the case when the jury in the Thompson case came back with a defense verdict on roughly the same blanket strip search issue. See Exhibit S, Thompson v. County of Cook, No. 03 cv 7172 (N.D. Ill. Feb. 7, 2006).

was no easy task. There were 2,000 pages of contraband reports, as well as anecdotal evidence from every Jail policymaker and employee who sat for a deposition. Nevertheless, we were able to establish that there was no evidence to link these thousands of contraband incidents to smuggling by members of the misdemeanor class. We also marshaled evidence to establish that it was feasible for the Jail to treat post-arraignment misdemeanor detainees in the same manner as other jails handle the pre-arraignment detainees that were the focus of the extant case law prohibiting blanket strip searches. This included not only issues of processing but, also, housing persons whom the court had ordered to be detained pending trial or making bond.

We also managed to develop sufficient evidence to obtain summary judgment in the Class' favor on the methodology claims even though the Jail initially presented numerous justifications for using a group strip search procedure which, given the extremely large population of new detainees being processed each day, risked creating a jury question on the reasonableness of such searches (a question the Court found was in fact presented for the post-February 2007 class members).

Plaintiffs succeeded on the search methods claim based in large part on two facts Class Counsel were able to marshal during discovery. The first was the Jail administrators' concession that privacy dividers could be installed in the hallway without impeding the timely processing of hundreds of inmates per night. Once we elicited those admissions, we forced the Jail's hand in terms of purchasing the dividers. At the same time, the declaration evidence we gathered indicated that the Jail was not in fact using the dividers as it claimed to be, so there was a fine line which we needed to hew in both demonstrating the reasonableness of the dividers for purposes of summary judgment and, simultaneously, preserving the claims of the post-February 2007 class members.[19]

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[19] We also were fortunate in being able to move the Defendants' own expert from the positions in his report to essentially backing Plaintiffs' position by cross-examining him at his deposition. Separately, we created summaries of the declarations we had gathered in order to present evidence of repeated abuses occurring on over 500 different days of the class period. The summaries presented a powerful picture of routine abuse as a policy at work in the Jail.

Liability Trial

Following the Court's rulings on summary judgment, we briefed Defendants' motions for reconsideration and their request for an interlocutory appeal. Simultaneously, five of our attorneys began preparing for the liability trial.

We took every preparation we could to win the trial, not only for the sake of the post-February 2007 class members, but also to protect those who had prevailed via the Court's summary judgment ruling. Defendants clearly contemplated appealing that ruling, and we feared that a jury verdict for the defense would provide substantial fodder to undermine summary judgment in the eyes of the Seventh Circuit, even if it was not technically relevant. Moreover, the trial presented Defendants three bites at the apple because there were three Class I claims on which we had prevailed at summary judgment and which we needed to prove anew to the jury.

There was extensive additional investigation, discovery and motion practice prior to trial. As explained above, we vetted hundreds of witnesses, and then participated in both written and deposition discovery regarding 34 class members who were disclosed for the trial. Between the Court's February 23, 2009 order on summary judgment and the commencement of trial on August 13, 2009, the parties litigated 55 written motions, including 32 motions *in limine*.

Locating and vetting class members for the trials was also time-consuming. Counsel faced the challenge of finding good witnesses out of a pool of hundreds of thousands of persons in a population that typically have credibility problems. Moreover, we had to prove a continuity of conduct over the course of years, which meant that we needed good witnesses from throughout the relevant time-frame. With a constant eye on preparing cases for jury trial, undersigned counsel invested heavily in locating the best witnesses available to support the Class's claims.

Class counsel also had to retain a number of experts, both as consultants and as testifying experts. We vetted approximately a dozen potential experts and ended up using a jail practice expert, a statistician, two database experts, and a damages expert.

The trial covered eight days and 29 witnesses. Both from the standpoint of preparing the case and of presenting it to a jury, the trial of this class action was largely unchartered territory

for which there was little guidance. As Professor Eisenberg attests, class actions are almost always either dismissed or else settled following class certification and before a trial. Exhibit L, Eisenberg Aff. ¶ 82. See also Jaffe Pension Plan v. Household Int'l, Inc., No. 02 cv 5893, 2010 WL 5017284, at *1 (N.D. Ill. Nov. 22, 2010) ("securities fraud class actions have rarely proceeded to trial, let alone reached subsequent proceedings"); In re Hanger Orthopedic Group, Inc. Securities Litig., 418 F. Supp. 2d 164, 170 (E.D.N.Y. 2006) (same); Waters, 190 F.3d at 1299 ("Rarely do class action litigations proceed to trial."). Indeed, the 700-plus-page *Federal Judicial Manual on Complex Litigation* (Fourth) dedicates a scant three paragraphs to the subject of trials in class actions, concluding: "[t]here is no consensus on the use of [class action trial] procedures, however, and appellate review is scant." Id. at 307. There are precious few precedents for class action trials at all, much less in the context of a case such as this, where there were multiple issues and questions for the jury, and where the evidence consisted largely of anecdotal accounts rather than documents and experts.

Interlocutory Appeal

Following a Plaintiffs' verdict on all three claims, the Defendants filed an interlocutory appeal on immunity grounds, as well as a motion to certify a far broader interlocutory appeal covering the merits of the summary judgment decision and jury verdict, a motion to stay the case, and a motion for new trial and judgment as a matter of law. Plaintiffs successfully briefed each of them, and filed a motion to dismiss the interlocutory appeal in the Seventh Circuit as well as a court-ordered brief on finality of the judgment appealed from. Those issues were sent to the merits panel and briefing was ordered on the appeal. See Young, No. 09-3092, Doc. 17-1 (7th Cir. Nov. 13, 2009).

Despite the fact that the Court denied the Sheriff's motion to certify an interlocutory appeal on the merits, the Sheriff proceeded to make those arguments in his immunity appeal anyway, claiming that the issues were sufficiently intertwined with the immunity issues to give the Seventh Circuit jurisdiction over the whole case. Accordingly, Class Counsel was called upon to defend the entire case on appeal, and we prepared an exhaustive 53-page response addressing every aspect of the summary judgment merits and the jury's verdict.

In the end, the arguments we raised in our motion to dismiss the appeal prevailed. The merits panel found that the Defendant's immunity argument was too insubstantial to create a non-frivolous basis for jurisdiction. The appeal was dismissed without the court reaching any of the substantive issues going to the merits, deferring them until appeal after final judgment. See Mercado v. Dart, 604 F.3d 360, 366 (7th Cir. 2010); see also id. at 364 (agreeing with this Court that "[T]his appeal is substantively frivolous. It is nothing but a delaying tactic and deserves to be swiftly squelched.").

The Damages Phase

After dealing with the slew of Defendants' motions that followed in the wake of the liability verdict, Class Counsel initiated damages discovery, consulted with experts about proving damages on a class-wide basis, and researched procedures for using special masters. This process culminated in Plaintiffs' motion for a jury trial on class-wide damages. See Dckt. No. 493 (Plaintiffs' Motion to Appoint a Special Master for the Damages Phase of the Case). After responsive briefing and argument, the Court denied the motion without prejudice, concluding that it would hold jury trials so that the parties could see what the claims were worth. See Dckt. No. 503.

Thereafter, our five trial attorneys once again geared up for trial on a very short time frame, locating witnesses, participating in written and oral discovery, working with an expert, filing motions, and preparing ten plaintiffs for trial. In addition to the Class members, Counsel prepared to examine corroborating damages witnesses for each Class member (who were deposed but did not ultimately testify). Counsel also deposed thirteen Cermak Health Services employees and Jail employees who were disclosed by the Defendants to rebut the damages Plaintiffs, but who never testified.

Three separate jury trials were held back-to-back over the course of nine days. At the conclusion of each trial, the juries awarded substantial damages to compensate plaintiffs for their injuries.

Settlement Negotiations

Even after Plaintiffs prevailed at each stage – including on motions to dismiss, motions for class certification, cross-motions for summary judgment, two interlocutory appeals to the Seventh Circuit, a liability trial, and three individual damage trials – negotiating a favorable settlement for the Class was not an easy proposition. In addition to the complexity of modeling claims rates and analyzing class sizes, the Parties were far apart on money, a gap that was magnified by several insurers' refusals to pay under the County's policies.

The Court is familiar with the fact that it required at least six mediation sessions, as well as much additional work among the Parties, to finally reach a settlement agreement. Leaving aside the practical and political dimensions of any possible settlement, Class Counsel had to analyze numerous issues of insurance coverage and assignments. This required a great deal of research and creative thinking regarding relatively esoteric issues of insurance coverage, bad faith litigation, and municipal liability insurance policies.

One measure of how complicated the negotiation became is that the lawyers for both sides had to hire coverage counsel to advise them. To ensure that the Class had every advantage, Class Counsel hired an insurance specialist from the Howrey law firm to advise and assist. As stated above, Class Counsel paid the Howrey firm almost $50,000, at hourly rates of $605/hour for an attorney with the same graduation year as Mr. Kanovitz. Exhibit K (Howrey invoices).

Claims Administration And Notice

Once a settlement was reached, Class Counsel took the lead in soliciting competitive bids from possible claims administrators. Counsel also developed training materials for the claims administrator's call center, and helped to train the company's customer service representatives who answer Class Member inquiries. Exhibit B, Affidavit of Robin Niemiec, at ¶ 4(e).

We also used our best efforts to get actual notice to the Class Members so as to facilitate claims by as many eligible people as possible. Prior to mailing, we made sure that the addresses in the Jail's records were updated through national databases for changes of addresses. See Exhibit R, Keen Decl. ¶11. In addition, we obtained, via the Illinois Freedom of Information

Act, a database of all people being held at any Illinois Department of Correction ("IDOC") facility in order to send direct notice to incarcerated class members who would not otherwise have received notice. Id. ¶ 12. We also researched IDOC mail rules for each facility, and instructed the Claims Administrator to print special envelopes complying with the particulars of each facility. Id. ¶ 15. Further, we worked with IDOC's parole division to obtain the current addresses for individuals on parole. Id. ¶ 13. As a result of these efforts, 260,000 individual notice packets were mailed on December 13, 2010. See Exhibit B, Niemiec Affidavit ¶ 12.

We also allocated attorneys and staff within the firm to assist class members in the claims process. We held clinics at the Harold Washington Public Library on weekends to assist class members in submitting claims forms and also accepted myriad "walk-ins" at our office during the week. See Exhibit R, Bala Keen Decl. ¶ 16. Thousands of class members also chose to contact us by telephone and letters. Id. ¶ 9. For a period of time, we had to dedicate two full-time attorneys to respond to all these inquires. Id. We have also received approximately 1,800 inmate letters since sending the Notice of the Settlement and have responded to each of these letters individually. Id. ¶ 8-9.

Even now that the claims period has expired, Class Counsel will continue to invest significant time working with opposing counsel and the Claims Administrator to review the validity of the large number of claims that were submitted, and to determine the proper payment level to which valid claimants are entitled. We estimate that another 610 hours of attorney time will be required before the administration process is completed. Id. ¶ 18.

Response and Claims Rates

The Class has responded positively to the Settlement. As of the date of this filing, 77,933 individuals submitted claim forms. See Exhibit B, Niemiec Aff. ¶ 18. Based on preliminary analysis to date, the Claims Administrator expects that 61,239 of these forms are valid claims, meaning that we will have achieved a 25% claims rate. Id. ¶ 20, 21.

The claims administrator has 30 years of experience administering class actions involving similar populations of claimants, and our efforts yielded one of the best claims rates the company

has ever seen. See Exhibit B, Niemiec Aff. ¶ 1. Indeed, some historical claims rates in strip search settlements involving comparable municipalities have been significantly lower. See, e.g., McBean v. City of New York, 233 F.R.D. 377, 382 (S.D.N.Y. 2006) (7.5% claims rate; of 3,402 claims returned out of 40,352 class members); Tyson v. City of New York, Case No. 97 cv 3762 (S.D.N.Y. filed 7/28/2003) (less than 10% claims rate); Williams v. County of Los Angeles, 2:97 cv 03826-CW (C.D. Cal.) (9.15% participation rate) (available at http://www.clearinghouse.net/detail.php?id=9746). It appears likely that once the claims administration process is completed, over 50,000 class members will obtain benefits from the Settlement Fund.

As things move forward, Counsel will continue to oversee and supervise the claims administrator's processing of claim forms, resolving disputed claims, and making payments to Class Members until the claims processing is completed.

* * * *

In sum, this case was anything but simple. This was not the type of class action in which counsel merely shows up, gets in line with the other law firms, and bides time until distribution of the fund. If there was to be any recovery, Class Counsel was going to have draw on their skills and experience to manufacture a path to victory, a path full of potential pitfalls. This reality further supports the contingency sought here.

5. The Absence Of Any Objections To The Settlement Provision Allowing A One-Third Contingency Fee

As a final note, this Court may also wish to consider that not one of the tens of thousands of responding class members have raised issues with the proposed fee. In contrast to some abusive class actions where recoveries are structured as little more than a pretext to pay counsels' fees, this Class is obviously pleased with the result, as well they should be. Compare Isby v. Bayh, 75 F.3d 1191 (7th Cir. 1996) (13% of the class in a jail conditions case filed objections to a settlement). Here, the total absence of any objections to the proposed fee is further evidence of the reasonableness of a one-third fee.

D. Any "Stair Step" Method Of Reducing The Fee Would Be Inappropriate Here

While recognizing the primacy of risk, some Seventh Circuit decisions also note that clients sometimes negotiate "diminishing marginal" fee structure in which the contingency percentage varies by layer of recovery. See Synthroid I, 264 F.3d at 721. This concept has no valid applicability here for several reasons.

First, the economics that would support such a stair step approach make sense only in cases, such as commercial and consumer cases, where the amount of damages is essentially fixed, such that a greater commitment of time by counsel will not expand the damages available to the Class fund. Id. at 721 (noting that class actions and commercial contingency structures "produce diminishing marginal fees when the recovery will not necessarily increase in proportion to the number of hours devoted to the case"). Here, by contrast, the damages were purely "soft" and, viewed realistically, the upper end of the fund was truly just a function of how hard and far Class Counsel could push the County before one side blinked. In a very real sense, Class Counsel continually expanded the recovery by continuing to fight through trial, appeal, and beyond, until we obtained what we felt to be a fund that was fair for the Class.[20]

As it turned out, the course of the litigation served to confirm that an *ex ante* stair step arrangement would have run directly counter to the Class' best interests. Recall that the County stood on its offer of $20 million – including an $8 million dollar contingency fee – and would go no higher. By refusing to settle on the cheap and instead investing the additional time to continue the battle through the damages trials and appeal, Class Counsel eventually succeeded in increasing the settlement by 275% ($35 million additional dollars) plus the assignment of the insurance claims.

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[20] Comparable cases litigated by other class counsel have resulted in far smaller settlements when counsel accepted settlement offers without taking the case to a liability trial, much less three additional damages trials and an appeal. See Jackson v. Sheriff of Cook County, No. 06 cv 493 (N.D. Ill. Aug. 28, 2007) ($4.575 million fund for strip searches with forced penile swabbing of approximately 160,000 individuals post-arraignment) (Exhibit T); Bullock v. County of Cook, No. 04 cv 1051 (N.D. Ill. Nov. 18, 2010) ($4.2 million dollar fund for strip searches of approximately 150,000 individuals returned to the jail for out-processing after court appearance that warranted their release) (Order Granting Preliminary Approval *and* Mot. for Preliminary Approval, attached as Group Exhibit U).

The Class' interests were thus served quite well by a compensatory incentive to pursue the strategy of pushing the upper limit, despite the substantial additional risk. Class Counsel, in other words, turned down the sure thing, instead risking everything because counsel believed an appropriate fund was much higher than what was being offered. In the end, that perseverance (and the associated incentive) virtually tripled what Class received. Under those circumstances, a marginal fee arrangement that reduced the contingency percentage once the fund exceeded, say, $20 million would have been a terrible deal for the Class. See Synthroid I, 264 F.3d at 721 ("This is not to say that systems with declining marginal percentages are always best. They also create declining marginal returns to legal work, ensuring that at some point attorneys' opportunity cost will exceed the benefits of pushing for a larger recovery, even though extra work could benefit the client.").

Finally, even if this case had been a good candidate for a commercial-type stair step arrangement, that alone would say nothing about what percentages should govern each band of recovery and, thus, sheds no light on whether an overall one-third percentage is proper for this settlement. For example, given that the Class needed Class Counsel to risk more than $200,000 of out of pocket costs and approximately 15,000 attorney-hours to pursue this case, and given the *ex ante* risk of loss and the likely financial stakes, the market may reasonably produce bands of 50% of the first ten million,[21] one-third of the next $25 million, and 25% of any additional recovery. The overall result of that banding example turns out to be exactly the same as a one-third contingency. Given that one-third is a common award in similar-sized and larger funds where the case presented a significant risk of no recovery, there is every reason to believe that the appropriate risk bands should blend to at least one-third.

Furthermore, if anything, the Class here would reasonably have chosen to negotiate a stair-stepped fee that actually increased, rather than decreased. The lower-middle seven figure

[21] In Kirchoff, the Seventh Circuit observed that even in cases far less risky than civil rights litigation, retainers commonly provide for a 50% contingency if the Defendant takes an appeal. 786 F.2d at 324, n.5.

results obtained in cases like Bullock and Jackson set the baseline; assuming the Class wished to do better, a reasonable position is that it would only be willing to pay a low contingency for average results, but that it would pay more for a better recovery, for example, by negotiating for only 25% of the first $5 million, one-third of the next $20 million, and 40% of everything above that. Such an arrangement would equate to a 36% overall fee, which is essentially what Judge Ashman found to be the market rate very recently in a similarly-sized common fund case that had been pending before this Court. Airline Pilots Assoc., No. 06 cv 6869, slip op. at 7 (35% fee award is "consistent with awards in similarly complex cases in this and other jurisdictions, and accurately reflects the market rate for Class Counsel's services consistent with Seventh Circuit case law...") (attached as Exhibit A).

The point is that a one-third overall contingency fee is reasonable and accords with the market for the type of case and representation for which the Class would have been negotiating. The Court should, therefore, approve the one-third fee allowed under the Settlement Agreement.

E. For Cross-Check Purposes, A One-Third Contingency Fee Would Not Create An Unjustified "Windfall"

As explained above, Counsel has requested a fee percentage that is well-within the range of what is normal for cases of this type. That said, courts may, if they chose to do so, utilize a "rough lodestar cross check" to ensure that counsel's total contingency fee as compared to the rough lodestar value of counsel's hourly time is within a reasonable range of multiples of that value. In re Trans Union Corp. Privacy Litig., No. 00 cv 4729, 2009 WL 4799954, at *4 (N.D. Ill. Dec. 9, 2009), *modified and remanded on other grounds,* 629 F.3d 741 (7th Cir. 2011).

To be clear, a cross check is certainly not required, and some courts decline to employ one. See, e.g., Will, 2010 WL 4818174 at *3 ("The use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive"); In re Comdisco Sec. Litig., 150 F. Supp. 2d 943, 949 (N.D. Ill. 2001) ("[T]o view the matter through the lens of free market principles, any such *ex post* reevaluation (with or without a multiplier) is truly unjustified as a matter of logical analysis-and certainly so if it is only a one-way street."). However, even were the Court to consider this analysis, it does nothing to change the result.

1. Multipliers Between Two And Five Times Are Ordinarily Considered Acceptable

Courts that do consider the lodestar have found multipliers within the two to five times range to be acceptable. See, e.g., In re Diet Drugs, 582 F.3d 524, 545 n.42 (3d Cir. 2009) ("Whether the multiplier is 2.6, 3.4, or somewhere in that neighborhood, it is not problematically high"); Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96 (2d Cir. 2005) (multiplier of 3.5 in antitrust class action); In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litig., 364 F. Supp. 2d 980, 999 (D. Minn. 2005) (approving a 4.7 multiplier in lodestar cross-check); In re Rite Aid Corp. Sec. Litig., 362 F. Supp. 2d 587, 590 (E.D. Pa. 2005) (approving fee award of a 6.96 multiplier); In re Interpublic Sec. Litig., No. Civ. 6527 Class Action, 2004 U.S. Dist. LEXIS 21429, at *36-37 (S.D.N.Y. Oct. 26, 2004) (multiplier of 3.96); In re Household Int'l Inc., No. 02-7921 (N.D. Ill. Nov. 22, 2004) (approving fees amounting to a 4.65 multiplier) (attached as Exhibit V); Roberts v. Texaco, Inc., 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (awarding a 5.5 multiplier in race discrimination class action), *reversed on other grounds,* Kaplan v. Rand, 192 F.3d 60 (2d Cir. 1999); In re Abbott Labs. Secur. Litig., No. 92 cv 3869, 1995 WL 792083, at *14 (N.D. Ill. July 3, 1995) (risks of case justified a 2.0 to 4.0 multiplier); Maley, 186 F. Supp. 2d at 369-71 (approving "modest multiplier" of 4.65 in securities fraud class action).

2. Class Counsel's Multiplier Of Approximately Three Is Well Within The Range Of Acceptable

Here, the rough lodestar cross-check confirms that a one-third contingency is comfortably within the range of reasonableness. The total value of our firm's lodestar time expended on behalf of the class comes to approximately $5,994,894.75. Kanovitz Decl. ¶ 42. This lodestar reflects 3,730.5, 11,700, and 1,140 hours of work, billed at competitive market rates for partners, non-partner attorneys, and paralegals, respectively. See Exhibits 1 and 3 to Kanovitz Decl. (time sheets and lodestar summary). At a one-third contingency, the multiplier comes to roughly 3.06. As demonstrated above, this multiplier is definitely within the cross-check range that courts have

found acceptable.[22]

In any event, the lodestar cross-check cannot become a vehicle to "re-engineer" the contingency percentage, because to do so would contravene the Seventh Circuit's market-based *ex ante* approach. See Synthroid II, 325 F.3d at 979-80 (7th Cir. 2003) ("The client cares about the outcome alone" and class counsel's efficiency should not be used "to reduce class counsel's percentage of the fund that their work produced"). Neither should the cross-check cause a court to discount the *ex ante* market assessment of the riskiness of the case by substituting *post-hoc* data suggesting that the bet succeeded. Again, to do so would circumvent the Seventh Circuit's *ex ante* market approach by discounting the economic reality that contingency firms experience losses as well as wins, and must offset the losers with the winners. As Judge Shadur observed in Comdisco:

> [I]t seems entirely unfair to. . . to measure the reasonableness of a bid-generated percentage-of-recovery fee against a lodestar benchmark that has been calculated in hindsight in terms of those actually expended hours. After all, if the litigation had instead taken the path under which counsel had to slug the matter out to get that same result, spending (say) 150% or 200% of the originally anticipated hours, counsel would not be allowed to restructure its percentage bid in comparable hindsight terms to get a bigger share of the recovery.

150 F. Supp. 2d at 948.

IV. Counsel's Request For Reimbursement Of Costs Is Reasonable And Should Be Approved

Class Counsel additionally seeks $227,374.98, said amount being costs they advanced to produce the results achieved here. See Exhibit X (Declaration of Andy Thayer and attached materials).

The Settlement Agreement expressly authorizes payment of Class Counsel's costs from

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[22] Class Counsel have submitted the affidavit of Bruce Meckler in support of their fee petition to opine on their rates, which are significantly below where they would be had counsel remained at their prior law firms representing corporate clients. See Affidavit of Bruce Meckler, attached as Exhibit W. Mr. Meckler frequently opines on attorneys' fees in the context fee litigation. Id. ¶ 2-3. Moreover, even though the "rough lodestar" cross check does not require scrutiny of the billable hours, and even though courts permit counsel to proffer summaries, we have provided detailed time records, not merely a summary of the hours charged, as class counsel often do. Our records demonstrate the reasonable, efficient and hard work that we put in over the past five years to achieve a tremendous result for the class. See Exhibit J, Kanovitz Decl. ¶ 3.

the fund. Dckt. No. 624, ¶ 33. This accords with Rule 23(h), which provides for reimbursement of "reasonable" expenses in common fund class action settlements such as this. Fed. R. Civ. P. 23(h); see also 1998 Advisory Committee Notes (subsection 23(h) applies to cost awards in common fund settlements). Indeed, "[i]t is well-established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses. The expenses that may be reimbursed from the common fund encompass 'all reasonable' litigation-related expenses." In re Marsh ERISA Litig., 265 F.R.D. 128, 150 (S.D.N.Y. 2010).

As reflected in Mr. Thayer's Declaration and the accompanying materials, the costs for which Counsel seeks reimbursement represent the reasonable expenditures necessary to advance the case, such as expert fees for data analysis and jail policy experts, deposition and transcript fees and travel. Counsel incurred these reasonable expenses to aggressively litigate the case, such as conducting the necessary data and statistical analysis and engaging experts. These are the typical expenses the market reimburses as the costs of litigation. See, e.g., Synthroid I, 264 F.3d at 722 (reversing the district court for failure to award costs because court failed to consider the market's reimbursement for such costs); In re Continental Sec. Litig., 962 F.2d at 570 (finding error for district court not to reimburse class counsel for electronic research expenses from common fund).[23] The $227,374.98 sought should be approved.

V. The Court Should Approve The Incentive Bonuses For Class Representatives And Class Members Who Testified At The Liability Trial

Class Counsel requests that the Court approve the $25,000 Named Plaintiff Incentive Awards and the $10,000 Testifying Class Member Incentive Awards, to be paid out of the Settlement Fund, as provided for in Paragraphs 30 and 31 of the Settlement Agreement. The nine Named Plaintiffs in this action (Kim Young, Ronald Johnson, William Jones, Allen Gorman, Gerrad Lamour, Lee Mercado, Bradley Hytrek, Carl Gray and Matthew Liptak) were active, hands-on participants in this litigation, all to the benefit of the Class as a whole.

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[23] Over the course of their representation, Class Counsel generated Westlaw bills in the amount of $355,201. However, Class Counsel has decided not to seek reimbursement for that cost, notwithstanding the legal authority to do so cited in the text, because West invoices our firm at a fixed rate. In that sense, the cost is thus more akin to overhead, and Class Counsel cites it as further support for our request for one-third contingency.

First, Named Plaintiff Kim Young worked hard to locate legal counsel to redress the wrongs she suffered at the Jail; she persevered through ten attorney rejections before locating Class Counsel. See Exhibit G, Young Aff. ¶ 3. The Class further benefitted from the substantial service provided by the nine Named Plaintiffs, and the significant investment of their time, including consulting with Counsel and actively participating in discovery. Each of the Named Plaintiffs prepared for and was deposed by Defendants' counsel, undergoing extensive questioning about their experiences at the Jail. In addition, six of the Named Plaintiffs testified at the nine-day liability trial in August 2009.

The Named Plaintiff Incentive Awards sought here are consistent with those awarded in other common fund class actions with active participation, such as Plaintiffs exhibited here. See Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming award of $25,000 to named plaintiff in recognition of the actions the plaintiff "[took] to protect the interests of the class, the degree to which the class [] benefitted from those actions, and the amount of time and effort" the named plaintiff expended in pursuing the litigation); Will, 2010 WL 4818174, at *4 (describing $25,000 named plaintiff incentive award as "well within the ranges typically awarded" for participation in the litigation); Berger v. Xerox Corp. Retirement Income Guar. Plan, No. 00-584, No. 2004 WL 287902, at *3 (S.D. Ill. Jan. 22, 2004) (approving $20,000 named plaintiff incentive awards).

In addition to the Named Plaintiffs, fifteen class members testified at the liability trial. They too had to participate in discovery, as well as take time away from work and other responsibilities, and endure the rigor and stress of litigation, all without knowing whether they would prevail. Their contributions to the liability trial were essential to the Class's success at that critical juncture in the litigation. Approval of the nine Named Plaintiff Incentive Awards is warranted based on these individuals' active participation in the litigation, their expenditure of time, and the benefit they conferred on the Class.[24]

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[24] The individuals eligible for the Testifying Class Member Incentive Awards are: Paul Beck, Bobby Bishop, Robert Brown, Robert Consiglio, James Curran, Michael Higgs, John Jacobson, Derrick Jones, Dennis Maimonis, Darryl Paul, Osbaldo Santiago, Eric Slapak, Del Wilson and Rickey Winfield.

Conclusion

For the reasons set forth herein, Class Counsel respectfully request that the Court approve payment from the Settlement Fund for: (1) a fee award of one-third of the Settlement Fund in the amount of $18,333,333 to Class Counsel; (2) reimbursement of Class Counsel's costs in the total amount of $227,374.98; (3) Named Plaintiffs' Incentive Awards in the amount of $25,000 to each of the nine named plaintiffs; and (4) Testifying Class Member Incentive Awards in the amount of $10,000 to each of the individuals, who are not Named Plaintiffs, and who testified at the August 2009 trial.

Respectfully submitted,

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Certificate of Service

I, Mike Kanovitz, an attorney, hereby certify that on February 15, 2011, I caused a copy of this Petition to be filed and served on all counsel of record by means of the Court's electronic filing system.

s/ Mike Kanovitz