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13 UNITED STATES DISTRICT COURT  
 14 NORTHERN DISTRICT OF CALIFORNIA  
 15 SAN FRANCISCO DIVISION

17 HERBERT ANTHONY ADDERLEY, on  
 18 behalf of himself and all others similarly  
 situated,

19 Plaintiffs,

20 vs.

21 NATIONAL FOOTBALL LEAGUE  
 PLAYERS ASSOCIATION, a Virginia  
 22 corporation, and NATIONAL FOOTBALL  
 LEAGUE PLAYERS INCORPORATED  
 23 d/b/a PLAYERS INC., a Virginia  
 corporation,

24 Defendants.  
 25

CIVIL ACTION NO. C07 0943 WHA

**CLASS COUNSELS' APPLICATION FOR  
 PRELIMINARY AND FINAL  
 DETERMINATION OF COSTS, FEES,  
 EXPENSES, AND AN INCENTIVE  
 PAYMENT FOR CLASS  
 REPRESENTATIVE, HERBERT  
 ADDERLEY, AS WELL AS  
 DETERMINATION OF FORM OF CLASS  
 NOTICE AND SCHEDULING ORDER**

Date: January 8, 2009  
 Time: 8:00 a.m.  
 Judge: Honorable William H. Alsup

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1 **I. INTRODUCTION**

2 Through their efforts, risking millions of dollars, Counsel for the GLA Class (“Plaintiffs’  
3 Counsel” or “Petitioner”) has secured a jury verdict and resultant judgment awarding \$28.1  
4 million, plus interest, for the nationwide GLA Class (“Judgment”). The Judgment dated  
5 November 12, 2008 represents an outstanding result in an extremely difficult case.

6 As the Court is aware, the verdict and judgment were achieved after nearly two years of  
7 vigorous and hard-fought litigation in the above-captioned action (the “Lawsuit”). During this  
8 time, Plaintiffs’ Counsel spent a multitude of hours of attorney and paralegal time analyzing  
9 thousands of pages of documents; conducted numerous depositions across the country; drafted  
10 scores of briefs and motion papers; battled over class certification, pleading amendments, and  
11 choice of law; defeated a motion for summary judgment, motions to dismiss, motions for  
12 sanctions, and motions to decertify the class; participated in numerous court hearings; consulted  
13 with accounting and damage experts, and victoriously prosecuted a three-week trial. Several  
14 attorneys and paralegals worked on this case on a nearly exclusive basis for months at a time.

15 The Lawsuit was hard-fought and intense from beginning to end opposing well-funded,  
16 able and tenacious Defense counsel from multiple law firms. The Defendants’ contentiousness  
17 and certainty of their position was underscored by their refusal to participate in any settlement  
18 negotiations. Furthermore, the defendants have promised to continue to attempt to overturn the  
19 Judgment.

20 Plaintiffs’ Counsel respectfully petition this Court for a preliminary and final award of  
21 attorneys’ fees for services in the amount of \$8,430,000.00, which is 30% of the net award after  
22 expenses. In view of this litigation’s complexity, the quality of Plaintiffs’ Counsel’s  
23 representation, and the time and resources that Plaintiffs’ Counsel committed to this litigation in  
24 the face of a substantial risk of zero recovery, Plaintiffs’ Counsel respectfully submit that a fee  
25 award of \$8,430,000.00 representing 30% of the net Judgment amount is fair and reasonable  
26 under either a percentage-of-the-fund standard or a lodestar recovery. Additionally, Plaintiffs’  
27 Counsel seek to gain reimbursement of their costs and expenses which are substantial, since the  
28 Defendants forced them to trial. Plaintiffs’ Counsel further request that the sole class

1 representative, Herbert Adderley, be awarded an incentive fee for his generous participation on  
2 behalf of the entire GLA Class, in the amount of \$60,000. Finally, Plaintiffs' Counsel seek a  
3 determination of the form of class notice on the above.

4 Plaintiffs' Counsel requests that this Court set a hearing to make a preliminary  
5 determination on the above matters and to approve a form of class notice to be provided to the  
6 Court at a later date. As well, Plaintiffs' Counsel seek a scheduling order for the submission of a  
7 form of class notice, objections, and for a final approval hearing.

8 **II. PLAINTIFFS' COUNSEL REQUESTS AN AWARD OF 30% OF THE NET FUND**  
9 **AS ATTORNEYS' FEES.**

10 Plaintiffs' counsel requests 30% of the net common fund after expenses are deducted.<sup>1</sup>  
11 Declaration of Ronald S. Katz ("Katz Decl.") ¶ 22. Petitioners are firms which devote some  
12 portion of their legal practice to contingency litigation. *Id.* Customary fees for Petitioners in  
13 such contingency cases are typically a percentage of the amounts recovered, typically between  
14 33% and 40%. *Id.*

15 The straight hour fees in this case or lodestar amount would be \$6,907,298.40. Katz Decl.  
16 ¶¶ 21, 32-249; Declaration of Lewis LeClair ("LeClair Decl.") ¶¶ 5, 19-218. The requested fee  
17 award of 30%, or \$8,430,000.00, amounts to a multiplier of approximately 1.22 . Katz Decl.  
18 ¶ 22.

19 **A. The Legal Standards Governing The Award Of Attorneys' Fees In Common**  
20 **Fund Cases**

21 The Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a  
22 common fund for the benefit of persons other than himself or his client is entitled to a reasonable  
23 attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).  
24 It is well established that the "common fund doctrine" allows an attorney whose efforts created,  
25 increased or preserved a fund to recover from the fund the costs of his litigation, including  
26 attorneys' fees. *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *see also*

27 \_\_\_\_\_  
28 <sup>1</sup> *See Begin Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000) (explaining that it makes no difference  
whether attorneys' fees are based on the net or gross recovery, so long as the fee is reasonable).

1 *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); *Cathedral Ave. Co-op., Inc. v.*  
2 *Carter*, 947 A.2d 1143, 1159-60 (D.C. 2008). The common fund doctrine is designed to prevent  
3 unjust enrichment by distributing the costs of litigation among those who benefit from the efforts  
4 of the litigants and their counsel and encourages counsel to protect the rights of those who may  
5 have very small claims. *Id.*

6 Because D.C. law governed the claims, it also governs the award of fees. *See Vizcaino v.*  
7 *Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). In awarding reasonable attorneys' fees  
8 from a common fund, two different approaches have generally been employed: the percentage  
9 method and the "lodestar" method. Under D.C. law, the percentage-of-recovery approach is used  
10 in calculating fees in common fund cases. *Swedish Hosp. Corp.*, 1 F.3d at 1268-70 ("We adopt a  
11 percentage-of-the-fund methodology ... because it is more efficient, easier to administer, and  
12 more closely reflects the marketplace."); *Fresh Kist Produce, L.L.C., v. Choi Corp., Inc.*, 362 F.  
13 *Supp. 2d* 118, 127 (D.C. Cir. 2005) (Since *Swedish Hospital*, the D.C. Circuit has consistently  
14 applied the percentage-of-the-fund method to common fund attorneys' fee disputes); *Henderson*  
15 *v. District of Columbia*, 493 A.2d 982, 1002 (D.C. 1985) (a calculation of attorney's fees under  
16 the common fund doctrine is based on a percentage of the fund bestowed on the class).<sup>2</sup> *See also,*  
17 *Democratic Cent. Committee of Dist. of Columbia v. Washington Metropolitan Area Transit*  
18 *Com'n*, 3 F.3d 1568, 1573 (C.A.D.C. 1993) (citations omitted)("every Supreme Court case that  
19 has addressed the issue has determined reasonable fees payable from a common fund on a  
20 percentage of the fund basis.") The percentage-of-the-fund calculation places a lighter burden on  
21 the court and the parties than the lodestar method because there is no dispute over billing  
22 practices. *Swedish Hosp. Corp.*, 1 F.3d at 1269-70.<sup>3</sup>

23 <sup>2</sup> In the Ninth Circuit, district courts presiding over common fund cases have the discretion to award  
24 attorneys' fees based on either the lodestar method (essentially a modification of hourly billing) or the percentage  
25 method. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N. D. Cal. 2008) (Conti, J.). Even so, use of the  
26 percentage method in common-fund cases appears to be dominant and has been adopted by the United States District  
27 Court, Northern District of California. *Id.* ("The advantages of using the percentage method have been described  
28 thoroughly by other courts. . . . The Court finds those advantages persuasive, and adopts the percentage method in  
this matter.")

3 The lodestar method voraciously consumes enormous judicial resources, unnecessarily complicates already  
complex litigation, and inaccurately reflects the value of services performed. *See Swedish Hosp. Corp. v. Shalala*, 1  
F.3d 1261, 1269-70 (D.C.Cir.1993) ("[t]he lodestar method makes considerable demands upon judicial resources  
since it can be exceptionally difficult for a court to review attorney billing information over the life of a complex

1 The ultimate goal under either method of determining fees is to reasonably compensate  
2 counsel for their efforts in creating the common fund. *See* F.R.C.P. Rule 23(h) (“In a certified  
3 class action, the Court may award reasonable attorney’s fees and nontaxable costs that are  
4 authorized by law. . . .”); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal.  
5 2008). It is not sufficient to arbitrarily apply a percentage; rather, the district court must show  
6 why that percentage and the ultimate award are appropriate based on the facts of the case. *Id.*

7 Courts have looked to several factors in assessing the reasonableness of a fee request,  
8 including: (1) the size of the fund created and the number of persons benefited; (2) the presence  
9 or absence of substantial objections by members of the class to the settlement terms and/or fees  
10 requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and  
11 duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case  
12 by plaintiffs’ counsel; and (7) the awards in similar cases. *In re Lorazepam & Clorazepate*  
13 *Antitrust Litig.*, 2003 WL 22037741, at \*8 (D.D.C. 2002) (hereinafter “*Lorazepam*”). Finally,  
14 where appropriate, the court may factor in consideration of a particular case’s public interest.  
15 *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 8 (D.D.C. 2008) (The settlement serves the public  
16 interest by sounding a cautionary note to the insurance industry: policyholders must be treated  
17 fairly).

18 **1. The size of the fund created and the GLA Class**

19 The overall result and benefit to the class from the litigation is the most critical factor in  
20 granting a fee award. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046. Despite  
21 Defendants’ arduous efforts and numerous lawyers, Plaintiffs’ Counsel was able to achieve a  
22 momentous jury verdict of \$28.1 million, which has been widely praised by the Class members.

23  
24 litigation and make a determination about whether the time devoted to the litigation was necessary or reasonable.”).  
25 “This Court has reiterated the Supreme Court’s warning that “[a] request for attorney’s fees should not result in a  
26 second major litigation. “ *Id.*, [citations omitted]. as Judge Vance of the Fifth Circuit noted in a separate opinion in  
27 *Foster v. Boise-Cascade, Inc.*, 577 F.2d 335, 337 n. 1 (5th Cir.1978): “The hourly rate approach ... frequently [bears]  
28 little or no relationship to the value of the services performed in anything but the most routine work. A flash of  
brilliance by a trial lawyer may be worth far more to his clients than hours or days of plodding effort. Few among us  
would contend that an operation by a gifted surgeon who removes an appendix in fifteen minutes is worth only one  
sixth of that performed by his marginal colleagues who require an hour and a half for the same operation.” Simply  
put, the lodestar method rewards plodding mediocrity and penalizes expedient success.



1 Katz Decl. ¶ 30 and Exh. C.

2 **2. The Absence of Substantial Objections by Class Members to the Fee**  
3 **Requested**

4 On behalf of the putative class, Herbert Adderley, as class representative, signed a fee  
5 agreement, acknowledging that his lawyers would seek a portion of any recovery for expenses  
6 and fees. LeClair Decl. ¶ 3; Katz Decl. ¶ 23 and Exh. A. Additionally, the class notice provided  
7 that in the event of a victory, Plaintiffs' Counsel would seek a percentage of funds as attorney's  
8 fees. Katz Decl. ¶ 23 and Exh. B.

9 Plaintiffs' Counsel will mail notice of their intent to seek 30% as a fee award to each  
10 Class Member, as well as litigation expenses, and will inform that any Class Member can object  
11 to the fee application. Katz Decl. ¶ 23. Plaintiffs' Counsel request that this Court set a hearing  
12 on the appropriate form of a class notice and at that time, also set a deadline for objections and a  
13 date for a final hearing.

14 **3. The Quality of Plaintiffs' Counsel**

15 "The quality of plaintiffs' counsels' representation of the class is a key factor in a court's  
16 consideration of counsels' fee request." *In re Warner Communic'ns Sec. Litig.*, 618 F. Supp. 735,  
17 748 (S.D.N.Y. 1985). Plaintiffs' Counsel are experienced litigators and they have detailed their  
18 efforts in declarations filed herewith. Plaintiffs' Counsel respectfully submit that the quality of  
19 their representation is reflected by the excellent results. They successfully defeated several  
20 motions to dismiss, motions to deny certification, motions for sanctions, motions for judgment on  
21 the pleadings, a motion for summary judgment, an opposition to a motion seeking leave to file  
22 amended pleadings, and motions for judgment as a matter of law. Katz Decl. ¶ 25. They were  
23 able to wade through thousands of complex and often arcane accounting materials and identify  
24 the critical documents that substantiated Plaintiffs' claims. *Id.* ¶ 26. They pushed aggressively  
25 for additional documents and depositions in the face of repeated resistance from Defendants'  
26 counsel and third parties aligned with Defendants. *Id.* ¶¶ 26, 27. At trial, they faced and  
27 overcame innumerable obstacles. *Id.* ¶ 29. The substantial jury verdict evidences Plaintiffs'  
28 Counsel's abilities in the face of steep opposition.

1 Plaintiffs' Counsel were litigating against several of the most prominent and highly-  
2 respected law firms in the country that regularly contested virtually every aspect of the litigation  
3 and devoted numerous attorneys to the defense of their clients. Plainly, "[t]he caliber of opposing  
4 counsel was clearly of the highest order and required that counsel for plaintiffs and the Class be  
5 capable of providing comparable services." *Lorazepam*, 2003 WL 22037741, at \*8.  
6 Accordingly, the quality of representation by Plaintiffs' Counsel weighs strongly in favor of  
7 Counsel's fee request.

8 **4. The Novelty and Difficulty of the Questions of Law And Fact and the**  
9 **Skill Required To Perform The Legal Services Properly**

10 This Lawsuit was fraught with novel and complex issues related to liability, damages and  
11 class certification. Katz Decl. ¶ 25. Factual and legal issues were (and will continue to be)  
12 highly contested. *Id.* ¶ 29. The fact that Plaintiffs' Counsel were able to prevail on most of these  
13 issues demonstrates significant skill in providing valuable services to Plaintiffs and the Class who  
14 will benefit from the Judgment.

15 **5. The Risks of Nonpayment.**

16 Despite the most vigorous and competent of efforts, attorneys' success in contingent  
17 litigation is never assured. The risk of nonpayment is a factor to be considered in the amount of  
18 the award. As noted "[C]ounsel have, without receiving compensation, engaged in extensive  
19 motions practice and conducted considerable discovery." *Lorazepam*, 2003 WL 22037741, at \*8  
20 (citations omitted). "The risk of nonpayment through either an award of summary judgment to  
21 Defendants or loss at trial was significant and real in this case." *Id.* As the Court is also well  
22 aware, the "Defendants mounted an aggressive and vigorous defense throughout the course of this  
23 litigation." *Id.* (citations omitted). Plaintiffs therefore "faced substantial factual and legal hurdles  
24 in establishing their core allegations." *Id.* (citations omitted). The Court in *Lorazepam*  
25 concluded: "Accordingly, because this class action was vigorously litigated for a protracted  
26 period of time, raised novel and complex issues, involved a substantial risk of absolute non-  
27 payment, and demonstrated the quality of Class Counsel's reputation, an award of 30% of the  
28 common fund in attorneys' fees is appropriate." *Id.* at 9.

1 The same factors are present here. Defendants' contentious opposition presented severe  
2 obstacles to any recovery in this case (as an example, Defendants refused all settlement  
3 discussions and, to date, have never offered anything to settle this case) and Plaintiffs' Counsel  
4 undertook grave risk of nonpayment of millions of dollars. Katz Decl. ¶ 28.

## 5 **6. The Time and Labor Involved**

6 Throughout the litigation, Petitioners exerted substantial time and effort to obtain an  
7 excellent result for the Class. In large part, this substantial time commitment resulted from the  
8 complexity of the case and the large volume of tasks involved, as described more fully in the  
9 accompanying declarations. Katz Decl. ¶¶ 32-249; LeClair Decl. ¶¶ 19-218.

### 10 a. Investigating and Filing of the Complaints

11 Plaintiffs' Counsel devoted significant time and effort to the preparation of the four  
12 Complaints filed in this Lawsuit, along with Motions for Leave and other responses to the  
13 resistant efforts of Defendants. Katz Decl. ¶ 25. All of Defendants' materials had to be obtained  
14 and carefully reviewed. *Id.* ¶ 26; LeClair Decl. ¶¶ 75, 81, 99, 102, 115, 140, 169. Plaintiffs'  
15 Counsel also consulted extensively with experts to analyze the complex transactions that were a  
16 principal focus of the claims asserted. Numerous (putative) class members were interviewed.  
17 Katz Decl. ¶ 25. Legal research under California law, Virginia law and the District of Columbia  
18 law had to be performed. *Id.*; LeClair Decl. ¶¶ 24, 31, 39, 44, 49, 62, 76, 127, 131, 153, 166, 212.  
19 Multiple drafts of each of the Complaints were prepared and revised before the final products  
20 were served and filed. *Id.*

### 21 b. Motion Practice

22 The motion practice that took place during the case was extensive and extraordinarily  
23 labor-intensive. Plaintiffs' Counsel researched and prepared memoranda of law in connection  
24 with: Opposition to Motion for Sanctions; Opposition to Motion for Judgment on the Pleadings;  
25 Opposition to Motion to Change Venue, Opposition to Motion to Dismiss Second Amended  
26 Complaint, letter filings re: production of Defendants' financial statements, Motion for Leave to  
27 File a Third Amended Complaint, Motion to Certify Class, Opposition to Motion to Strike the  
28 Declaration of Marvin Miller, Letter filings re: document requests and discovery responses,

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4 Jason Brenner, Christine Finch, and Steve Byrd Filed in Support of Defendants' Motion for  
5 Summary Judgment, letter filings re: scrambling of player images by EA, as related to  
6 Defendants' summary judgment motion, Opposition to Motion to Decertify class, letter filings re:  
7 summary judgment arguments, motions in limine and oppositions thereto and various trial briefs  
8 and oppositions thereto. Katz Decl. ¶ 25.

9 The legal research associated with these motions was complex and often involved varying  
10 rules of law under different jurisdictions. Katz Decl. ¶ 25.; LeClair Decl. ¶¶ 24, 31, 39, 44, 49,  
11 62, 76, 127, 131, 153, 166, 212.

12 In addition to preparing scores of legal briefs and memoranda of law, Plaintiffs' Counsel  
13 drafted proposed scheduling orders; prepared and responded to several sets of extensive  
14 interrogatories and requests for admissions; and sent and received numerous letters to and from  
15 opposing counsel regarding deposition scheduling, document discovery, and settlement. Katz  
16 Decl. ¶ 25; LeClair Decl. ¶¶ 38, 61, 63, 71, 73, 77, 94, 95, 98, 101, 111, 112, 121, 161.

17 c. Document Discovery

18 Document review, organization and analysis in this litigation was enormous, both in terms  
19 of the number of parties and non-parties producing documents and the volume of documents  
20 produced. Katz Decl. ¶¶ 25, 26; LeClair Decl. ¶¶ 75, 81, 99, 102, 115, 140, 169. Plaintiffs'  
21 Counsel prepared several successive sets of document requests; prepared non-party subpoenas;  
22 negotiated with Defendants' counsel regarding document productions; conducted follow-up  
23 review of the adequacy of production; attended meet-and-confer sessions with Defendants'  
24 counsel on further production; thoroughly reviewed and analyzed the thousands of documents  
25 produced by Defendants and non-parties; and prepared indices and analyses of the documents in  
26 preparation for depositions, motions, and trial. Katz Decl. ¶¶ 25, 26; LeClair Decl. ¶¶ 19-218.

27 Plaintiffs' Counsel also worked extensively with experts in analyzing the many financial  
28 documents produced during the litigation. Katz Decl. ¶ 25. Plaintiffs' Counsel also obtained,

1 reviewed and prepared documents for production by each of the Plaintiffs' witnesses in the  
2 Lawsuit. *Id.*. All told, Plaintiffs' Counsel devoted thousands of hours of attorney and paralegal  
3 time and effort pursuing, reviewing and utilizing the party and non-party documents produced in  
4 the Lawsuit. Katz Decl. ¶ 26; LeClair Decl. ¶¶ 75, 81, 99, 102, 115, 140, 169.

5 And the work is not yet complete. Defendants have indicated that they intend to file  
6 another Rule 50 JMOL, to be followed by an appeal. Katz Decl. ¶ 29. Plaintiffs Counsel will  
7 supplement this Application as necessary. *Id.* ¶ 3, n.1.

8 d. Depositions

9 The deposition phase of the Lawsuit was similarly time-consuming, hard-fought and  
10 intensive. Katz Decl. ¶ 27. Plaintiffs' Counsel conducted numerous depositions in the Lawsuit,  
11 including those of the named Defendants, and their former employees and representatives. *Id.*;  
12 LeClair Decl. ¶¶ 85, 130, 132, 175, 205-206.

13 The preparation required for these depositions was substantial. Katz Decl. ¶ 27; LeClair  
14 Decl. ¶¶ 78, 81, 86, 95, 109, 112-113, 122, 126, 128-131, 133, 148, 176, 206-207. Databases  
15 were reviewed by paralegals to identify and pull the specific documents associated with each  
16 particular witness. Katz Decl. ¶ 27. Attorneys would then review those documents for relevance  
17 and usefulness. *Id.* Oftentimes, attorneys would consult with Plaintiffs' experts. *Id.* Plaintiffs  
18 tried to be efficient and combine travel whenever possible; but even so, it was necessary to  
19 conduct depositions in various locations throughout the country. *Id.* For example, depositions  
20 were held in California, Philadelphia, Maryland, New York, Texas, and Washington D.C. *Id.*  
21 Plaintiffs' Counsel also defended depositions of the class witnesses and experts. Significant time  
22 and effort was devoted to reviewing the documents of these witnesses and preparing them for  
23 depositions. Katz Decl. ¶ 27.

24 e. Experts

25 Many hours were also devoted by Plaintiffs' Counsel to identifying and consulting with  
26 the experts that were retained during the litigation. Katz Decl. ¶ 25. In particular, Plaintiffs'  
27 Counsel worked extensively with their experts (i) reviewing and organizing the thousands of  
28 pages produced by the Defendants and their representatives; (ii) identifying additional materials

1 to request; (iii) preparing for financial-related depositions; (iv) analyzing the relevant literature;  
2 and (v) reviewing the expert reports submitted on behalf of Defendants. *Id.*

3 f. Settlement Negotiations and Agreement

4 Plaintiffs' Counsel also prepared a settlement letter and attended a settlement conference  
5 in front of Magistrate James Larson. Although plaintiffs were willing to enter into good faith  
6 negotiations for settlement and traveled to the conference, Defendants did not engage in  
7 settlement negotiations. Katz Decl. ¶ 28.

8 g. Trial

9 Defendants refused all settlement negotiations, leaving the plaintiffs no choice but to  
10 proceed to trial. Katz Decl. ¶ 28. During this intense trial in which multiple witnesses were  
11 examined and numerous documentary evidence admitted, Plaintiffs faced additional resistance by  
12 defendants through motions to decertify, motions for JMOL, and exhaustive jury instruction  
13 briefing and argument. *Id.* ¶ 29.

14 Thus, it is evident that Plaintiffs' Counsel expended significant time and labor in building  
15 Plaintiffs' case for trial. At times, those efforts required various members of Plaintiffs' team to  
16 devote nearly all of their time to this litigation for extended durations. Katz Decl. ¶ 26. Those  
17 concerted efforts were undertaken despite the significant possibility that Plaintiffs would not  
18 prevail in this litigation, and that Plaintiffs' Counsel would therefore lose the millions of dollars  
19 invested in this case. The time and labor expended by counsel in producing the Judgment  
20 therefore support the fee requested by Plaintiffs' Counsel.

21 **7. Similar Awards**

22 The normal range of fee recovery is twenty to thirty percent of the common fund. *In re*  
23 *Baan Co. Securities Litigation*, 288 F. Supp. 2d 14, 17 ( D.D.C. 2003). Thirty percent is often  
24 warranted. *Lorazepam*, 2003 WL 22037741, \*7 (citing, *In re Aetna Inc.*, 2001 WL 20928 (E.D.  
25 Pa. Jan. 4, 2001)) (finding thirty percent to constitute a reasonable award); *In re Ampicillin*  
26 *Antitrust Litig.*, 526 F. Supp. 494, 498 (D.D.C. 1981) (noting that several courts have awarded  
27 more than forty percent of a settlement fund). Similarly, the Ninth Circuit uses a "benchmark" of  
28 25%; however, it is recognized that in most common fund cases, the award exceeds that

1 benchmark, equaling 30%. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047.

2 Virtually none of the cases cited involved a three week trial; indeed, most resulted in  
3 settlement. *See, e.g., Lorazepam*, 2003 WL 22037741, at \*3-8 (in a potential class of over 55,000  
4 members, defendants settled for \$35,000,000, and the court granted the attorneys a 30% common  
5 fund award). The massive amount of high-quality work in this case against formidable  
6 adversaries with an excellent result fully justifies the 30% figure.

## 7 **8. Public Interest**

8 Though the public interest is not always named as a separate factor in the fee-award  
9 determination, it is worth serious consideration. *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 8  
10 (D.D.C. 2008). As this Court noted, there was a lot of media interest in this matter; the reason  
11 being that Defendants are powerful unions which affect numerous individuals. The jury verdict  
12 in this case was widely lauded as a message to the Union: to treat individuals fairly and not  
13 engage in an abuse of power. Katz Decl. ¶ 30 and Exh. C.

14 In sum, this case was especially complex, risky and time consuming, which is why it  
15 required a three week trial. It was further of noteworthy public value. Given these factors and  
16 the significant time and effort expended in the case, the necessity of trial, the excellent result  
17 achieved, and the very real risk of substantial loss, Plaintiffs' Counsel respectfully submit that  
18 their request for 30% of the Judgment is fair and reasonable.

## 19 **B. The Requested Fee Is Also Fair And Reasonable Under The Lodestar Method**

20 The reasonableness of the requested amount is confirmed when cross-checked with the  
21 lodestar approach. *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 385 (D.D.C.  
22 2002); *see also In re Omnivision Techs.*, 559 F. Supp. 2d at 1048. To support the reasonableness  
23 of the fees requested, Plaintiffs' Counsel have submitted affidavits detailing the total hours they  
24 have devoted to this case and their lodestars, calculated at current billing rates. *See* Katz Decl. ¶¶  
25 5-7; LeClair Decl. ¶¶ 5-7. The reasonable hourly rate is that prevailing in the community for  
26 similar work. *Bebchick v. Wash. Metro. Area Transit Comm'n*, 805 F.2d 39, 404 (D.C. Cir.  
27 1986). "Of course, the actual rate that applicant's counsel can command on the market is itself  
28 highly relevant proof of the prevailing community rate." *Id.* (quoting *Nat'l Ass'n of Concerned*

1 *Veterans v. Sec’y of Defense*, 675 F.2d 1319, 1326 (D.C. Cir. 1982)). Under the lodestar method,  
2 the court multiplies a reasonable number of hours by a reasonable hourly rate.<sup>4</sup> *Fischel v.*  
3 *Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1006 (9<sup>th</sup> Cir. 2002). The total lodestar in  
4 this case is \$6,907,298.40. Katz Decl. ¶¶ 21, 32-249; LeClair Decl. ¶¶ 5, 19-218. There is a  
5 “strong presumption” that the lodestar figure represents a reasonable award. The requested fee  
6 award amounts to a multiplier of approximately 1.22 . Katz Decl. ¶ 22. In contrast to this  
7 modest multiplier, multipliers ranging up to four are frequently awarded in common fund cases  
8 when the lodestar method is applied. *Lorazepam*, 2003 WL 22037741 \*9, citing, *In re Prudential*  
9 *Ins. Co. Sales Practices Litig.*, 148 F.3d 283, 341 (3d Cir. 1998). The multiplier included in the  
10 requested fee award thus falls near the low end of normal multipliers. *See also In re Omnivision*  
11 *Techs.*, 559 F. Supp. 2d at 1048 (courts have approved multipliers ranging between 1 and 4).  
12 Cross-checked against Counsel’s lodestar, therefore, the requested fee in this case is eminently  
13 fair and reasonable.

14 **III. PLAINTIFFS’ COUNSEL SHOULD BE REIMBURSED FOR THEIR COSTS AND**  
15 **EXPENSES.**

16 Plaintiffs’ counsel have heretofore submitted a cost bill. Katz Decl. ¶ 220; LeClair Decl.  
17 ¶ 220. Plaintiffs’ counsel further requests that, in addition to awarding them reasonable  
18 attorneys’ fees, the Court grant their application for reimbursement of \$1,312,321.55 in costs and  
19 expenses incurred by them in connection with the prosecution of this Lawsuit. Katz Decl. ¶ 252;  
20 LeClair Decl. ¶ 221. Each of Plaintiffs’ law firm’s expenses are summarized in the  
21 accompanying declarations. Katz Decl. ¶ 252; LeClair Decl. ¶ 221. Attorneys may recover their  
22 reasonable expenses that would typically be billed to paying clients in non-contingency matters.  
23 *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1048-49, citing, *Harris v. Marhoefer*, 24 F.3d 16,

24 <sup>4</sup> Courts consider the following factors in calculating the lodestar figure, as are relevant under the  
25 circumstances: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill  
26 requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to  
27 acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed  
28 by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation,  
and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional  
relationship with the client; and (12) awards in similar cases. *Fischel v. Equitable Life Assur. Society of U.S.*, 307  
F.3d 997, 1006 (9<sup>th</sup> Cir. 2002). These factors are similar to the factors considered in the percentage-of-the-fund  
method and many are subsumed therein.



1 19 (9th Cir. 1994); *Lorazepam*, 2003 WL 22037741, at \*10. “The fact that petitioners were  
2 willing to expend their own money, as an investment whose reimbursement was entirely  
3 contingent on the success of this litigation, is perhaps the best indicator that the expenditures were  
4 reasonable and necessary.” *Lorazepam*, 2003 WL 22037741, \*10.

5 The expenses sought were reasonable and necessary. The expenses relate to  
6 photocopying, printing, postage and messenger services, court costs, legal research on Lexis and  
7 Westlaw, experts and consultants, and the costs of travel for various attorneys and their staff  
8 throughout the case. Katz Decl. ¶ 252; LeClair Decl. ¶ 221. Attorneys routinely bill clients for  
9 all of these expenses, and it is therefore appropriate for counsel here to recover these expenses  
10 from the common fund. *In re Omnivision Techs.*, 559 F. Supp. 2d at 1048-49. The Adderley fee  
11 agreement states that the plaintiffs would seek reimbursement for these expenses. Katz Decl.  
12 ¶ 23 and Exh. A; LeClair Decl. ¶ 3. Plaintiffs also note that the trial expenses were made  
13 necessary in part by Defendants’ unwillingness to discuss settlement, despite Plaintiffs’ overtures.  
14 Katz Decl. ¶ 28.

15 **IV. PLAINTIFFS’ COUNSEL REQUEST A \$60,000 INCENTIVE AWARD FOR**  
16 **HERBERT ADDERLEY.**

17 Plaintiffs’ Counsel also seek an incentive award for class representative Herbert Adderley  
18 in the amount of \$60,000. The purpose of this award is to compensate Mr. Adderley for the  
19 significant role he played in helping Plaintiffs achieve the favorable jury verdict reached in this  
20 case.

21 Incentive awards to named plaintiffs are common in class action litigation, particularly  
22 where a common fund has been created for the benefit of the entire class. *In re Lorazepam &*  
23 *Clorazepate Antitrust Litigation*, 2003 WL 22037741, at \*10. Indeed, “courts routinely approve  
24 incentive awards to compensate named plaintiffs for the services they provided and the risks they  
25 incurred during the course of the class action litigation.” *Id.* (internal quotation marks omitted).  
26 Whether to reward Mr. Adderley for his efforts is within this Court’s discretion. *Van Vranken v.*  
27 *Atlantic Richfield Co.*, 901 F.Supp. 294, 299-300 (N.D. Cal. 1995), *citing*, *In re Domestic Air*  
28 *Transp.*, 148 F.R.D. at 357-58 (awarding \$142,500 to class representatives out of \$50 million

1 fund); *In re Dun & Bradstreet*, 130 F.R.D. at 373-74 (awarding \$215,000 to several class  
2 representatives out of an \$18 million fund).

3 The criteria courts may consider in determining whether to make an incentive award  
4 include: 1) the risk to the class representative in commencing suit, both financial and otherwise;  
5 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of  
6 time and effort spent by the class representative; 4) the duration of the litigation and; 5) the  
7 personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.  
8 *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299. “In deciding whether to grant  
9 incentive awards and the amounts of such awards, courts consider factors such as ‘the actions the  
10 plaintiff has taken to protect the interests of the class, the degree to which the class has benefited  
11 from those actions, and the amount of time and effort the plaintiff expended in pursuing the  
12 litigation.’” *In re Lorazepam & Clorazepate Antitrust Litigation*, 2003 WL 22037741, at \*10.  
13 (*quoting Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)).

14 Plaintiffs’ Counsel respectfully request that class representative Herbert Adderley receive  
15 an incentive award in the amount of \$60,000. Mr. Adderley is a well-known Hall of Fame player  
16 who placed his reputation on the line in standing up for a cause in which he believed. *See*  
17 Declaration of Herbert Anthony Adderley In Support Of Plaintiffs’ Counsels’ Application  
18 (“Adderley Decl.”) ¶ 2. Mr. Adderley did so knowing that there would be those who would  
19 criticize him for his efforts. Adderley Decl. ¶ 11. Mr. Adderley also did so despite a very real  
20 threat of retaliation by the NFLPA and its former Executive Director, Gene Upshaw. Adderley  
21 Decl. ¶ 12.

22 Notwithstanding these risks, Mr. Adderley devoted a significant amount of time and effort  
23 to this case – more than 550 hours – throughout its 20-month duration. *See* Adderley Decl. ¶¶ 2-  
24 10; Katz Decl. ¶ 259; *see also Vista Healthplan, Inc. v. Warner Holdings Co. III, Ltd.*, 246 F.R.D.  
25 349 (D.C. 2007) (approving incentive award of \$25,000 to named plaintiffs who spent in excess  
26 of only 50 hours assisting in prosecution of case). More specifically, Mr. Adderley assisted  
27 Plaintiffs’ counsel with each of the three complaints in this matter; searched for and collected  
28 documents in response to Defendants’ document requests; assisted Plaintiffs’ counsel in

1 responding to other discovery requests, including Defendants’ Interrogatories; reviewed  
2 numerous correspondence and (once he was allowed to do so in May 2008) tens of thousands of  
3 pages of Defendants’ confidential documents; prepared for and attended his deposition; prepared  
4 for and served as a witness at trial; and attended every day of a 3-week trial that took place  
5 thousands of miles from his home. *See* Adderley Decl. ¶¶ 2-10. Mr. Adderley often performed  
6 these tasks despite physical discomfort from a back operation. *Id.* ¶ 10; *see also Equal Rights*  
7 *Center v. Washington Metro. Transit Authority*, 573 F. Supp. 2d 205 (D.C. 2008) (approving  
8 incentive award of \$81,000 to named plaintiffs and deposed class members, many of whom had  
9 various disabilities that made travel to and from depositions and other court proceedings  
10 difficult).

11 Mr. Adderley’s active participation in this lawsuit was a key factor in Plaintiffs’ counsels’  
12 ability to obtain a favorable jury verdict on behalf of the class. An incentive award to Mr.  
13 Adderley in the amount of \$60,000 – which represents only .21% of the total judgment – is more  
14 than “reasonable in light of [his] investment[] of time, money, and effort on the part of the class.”  
15 *See Lorazepam*, 2003 WL 22037741 at \* 11. It is also less than other incentive awards granted  
16 by the courts in other cases. *See id.* (approving incentive award of \$80,000 to be shared by 4  
17 class representatives, which was .22% of the total fund); *Equal Rights Center* 573 F. Supp. 2d at  
18 214 n. 10 (approving incentive award of \$81,000 to be shared by 13 named plaintiffs and 16  
19 deposed class members, which was .58% of the total fund); *In re Dun & Bradstreet*, 130 F.R.D.  
20 366, 373-74 (S.D. Ohio 1990) (awarding a total of \$215,000 to five class representatives, which  
21 was 1.2% of an \$18 million fund); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297,  
22 357-58 (N.D. Ga. 1993) (awarding a total of \$142,500 to 42 individuals, which was .285% of \$50  
23 million fund). All of these cases settled such that the class representatives did not need to spend  
24 several weeks at trial like Mr. Adderley. Moreover, each of these cases had numerous class  
25 representatives such that no one class representative had to bear the entire burden like Mr.  
26 Adderley, who was the sole class representative in this matter.

## 27 V. CONCLUSION

28 Based upon the foregoing, it is respectfully submitted that the requested attorneys’ fees ,

1 costs and other expenses are fair and reasonable under the applicable legal standards and in light  
2 of the risks incurred, the result achieved, and the effort expended. As well, it is appropriate to  
3 award Herbert Adderley an incentive award.

4 Plaintiffs' Counsel seeks:

- 5 1) a hearing for a preliminary review of attorneys' fees, costs, and expenses, and  
6 incentive award for class representative, Herbert Adderley; and
- 7 2) a hearing on the form of class notice appropriate on these matters; as well as,
- 8 3) a scheduling order for submission of a proposed class notice; mailing of class  
9 notice, objections, and a final hearing.

10  
11 Dated: November 26, 2008

Respectfully submitted,

12 MANATT, PHELPS & PHILLIPS, LLP

13  
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