IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FERNANDA GARBER, et al., on behalf of themselves and all others similarly situated, Plaintiffs, v. OFFICE OF THE COMMISSIONER OF BASEBALL, et al., Defendants.	12-cv-3704 (SAS) ECF Case

PLAINTIFFS' APPLICATION FOR AN AWARD OF ATTORNEYS' FEES, SERVICE AWARDS, AND REIMBURSEMENT OF EXPENSES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Class counsel respectfully submits this application and the accompanying declarations in support of an award of $16.5 million in attorneys' fees and expenses, as well as approval of service awards for class representatives Mark Lerner, Vincent Birbiglia, Derek Rasmussen, and Garrett Traub of $10,000 each.[1]

I. INTRODUCTION

This action was litigated jointly with the related case, *Laumann v. National Hockey League*, No. 12-1817, until June 2015, when a settlement was reached in the *Laumann* case. This Court finally approved that settlement in September 2015. The *Laumann* settlement achieved a number of important goals: it created single-team options for out-of-market consumers, and mandated lower prices for one year (for the league's Internet product) or two years (for the league-wide television bundle). The *Laumann* settlement provided ground-breaking relief—it was the first time any league offered stand-alone subscriptions for single teams—but the relief obtained in this case is far greater than that obtained in *Laumann* by any measure. The monetary value is far greater, and the Plaintiffs have obtained important new choices for class members.

Plaintiffs request that the Court award the requested amounts for the following reasons:

First, Plaintiffs and their counsel have obtained very substantial relief that aligns directly with the goals of the litigation, achieving both increased choices and lowered costs for consumers of Major League Baseball broadcasts. Unlike *Laumann*, it guarantees reduced pricing for five full years. A conservative valuation of these settlement benefits places their worth at approximately $200 million. *See* Decl. of Ian Ayres ¶ 31. The settlement thus achieves a substantial portion of the relief sought on behalf of the class. Its direct monetary value is approximately seven times greater than the *Laumann* settlement, and creates more new choices

[1] This motion is made by lead counsel Langer Grogan & Diver, P.C. together with plaintiffs' counsel Klein Kavanagh Costello, LLP, Boni & Zack LLC, Cohen Milstein Sellers & Toll PLLC, Kohn, Swift & Graf, P.C., Motley Rice, LLC, and Pomerantz, LLP (collectively referred to as "Class Counsel") on behalf of all Plaintiffs.

of programming for consumers, including access to programming for certain consumers that has never been available before.

Second, Plaintiffs structured the settlement to ensure that the money paid to the attorneys is separate from, and does not in any way reduce, the benefits obtained by class members. The award will be paid by Defendants and does not diminish the relief provided to the class. The parties did not broach the topic of fees in the negotiations until they had reached an agreement in principal on the substantive terms of the settlement, and class counsel emphasized during the negotiations that the outcome of the fee negotiation would have no impact on the relief afforded to the class. *See* Decl. of Howard Langer ¶ 14 (Doc. 509); Decl. of Robert Bowman ¶ 6.

Third, the award sought represents an amount that is reasonably related to both the value conferred on the class and to Plaintiffs' lodestar and actual out-of-pocket expenses. The amount here sought is roughly eight percent of the value of the settlement as estimated by Dr. Ayres, significantly lower than the percentage in *Laumann*. *See* Decl. of Stephen Saltzburg ¶ 12. As detailed in Plaintiffs' declarations and supporting papers, the overall lodestar expended in connection with the *Garber* litigation through preliminary approval was $9.2 million using their attorneys' current hourly rates.[2] *See* Decl. of David White, Exs. C and D. The value of all time spent on the case (including all time spent applied to both *Laumann* and *Garber*) is $12.7 million. *Id.* Class counsel also advanced nearly $2 million in expenses without any assurance that they would ever be reimbursed. *See id*., Ex. E.

Fourth, Class counsel performed the work necessary to produce the result before the Court without payment for more than four years in a case with a very real prospect of not getting paid at all. The risk undertaken by counsel thus justifies the requested amount.

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

Fifth, given the risks undertaken and result obtained by class counsel, there is a strong public policy interest supporting the award. The private enforcement of the Sherman Act by class actions such as this one ought to be encouraged by the award of a fee that rewards and compensates the professional services undertaken to produce this result.

In addition, for the reasons discussed below, the named plaintiffs made a significant contribution to the litigation, justifying the requested service awards.

II. BACKGROUND

A. Counsel Conducted a Lengthy Investigation before Filing

Lead counsel began its investigation of MLB's broadcasting practices in October 2011, seven months before the complaint was filed. *See* Decl. of Edward Diver ¶ 2. This lengthy investigation was necessary because the case presented a uniquely complicated factual situation, involving a web of interrelated agreements between and among the teams and the league, national broadcasters, local regional sports networks ("RSNs") and over-the-air stations, and multichannel video programming distributors ("MVPDs"). *Id.* ¶ 4. Understanding these complex relationships and the various rules and restraints imposed at various levels of production and distribution was critical to the case. *Id*.

The case also presented a unique set of potential legal obstacles to relief. Counsel did not agree to prosecute this or the *Laumann* action until it was satisfied that consumers would be able to defeat a number of likely defenses, including, for example, that Plaintiffs would not be able to establish antitrust standing, that the challenged practices were protected by various statutes, regulations, and exceptions to the antitrust laws, and that the leagues' status as joint ventures protected them from liability. *Id.* ¶ 6. Class counsel also investigated the many issues involved with certifying the actions for class treatment, including the applicability of any arbitration clauses, the requirements of Rule 23, and the ability to establish damages. *Id*.

For this case, counsel also had to be assured that Defendants would not be able to invoke

baseball's antitrust exemption to preclude Plaintiffs' claims. The need to address this unique issue was one reason that the *Garber* case was not filed until after the *Laumann* case was filed.

While doing this research, lead counsel assembled a team of firms to assist them in prosecuting the case, including Cohen Milstein Sellers & Toll PLLC, Kohn Swift & Graf P.C., Klein Kavanagh Costello LLP, and Pomerantz LLP. Diver ¶¶ 8-9. While these firms ultimately determined to go forward and have continued to participate as counsel in these cases (as have Boni & Zack LLC and Motley Rice LLC, which subsequently joined the case), a number of other firms declined the invitation to participate in the lawsuit in light of the risks associated with so complex a challenge to the broadcasting practices at issue—especially one that raised the prospect of litigating the baseball antitrust exemption. *Id*. ¶ 9.

B. Counsel Defeated the Defendants' Initial Motions to Dismiss

Plaintiffs filed their initial complaint on May 9, 2012. In July, Defendants filed their motion to dismiss the complaint in its entirety (submitting a joint memorandum with the defendants in the *Laumann* action). Defendants' eighty-six pages of briefing (including their initial memorandum and the reply memorandum, filed September 21, 2012) put forth a laundry-list of arguments and defenses including: (1) that, as a matter of law, their practices did not reduce output or injure competition; (2) that Plaintiffs could not claim the loss of choice as an injury; (3) that the consumers lacked antitrust standing as indirect purchasers under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); (4) that the Television Defendants did not participate in any cognizable antitrust conspiracy; (5) that Plaintiffs lacked antitrust standing for having injury too remote from the violation under *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983); (6) that Plaintiffs lacked standing to seek injunctive relief; (7) that the broadcasts at issue are "core" or "necessary" practices of the leagues that are consequently immune from antitrust scrutiny; (8) that the leagues and clubs should be treated as a "single entity" for purposes of antitrust analysis; (9) that the teams could not conspire to

restrain trade by virtue of the ownership and control of certain rights by the league; (10) that Plaintiffs had failed to allege a relevant product market; and (11) that Defendants do not possess monopoly power. *See* Mem. Supp. Defs. Mot. to Dismiss, Doc. No. 66 (S.D.N.Y. July 27, 2012).

Plaintiffs filed their opposition on September 5, 2012, responding to each of the Defendants' proposed bases for dismissal.

On December 5, 2012, the Court denied Defendants' motion in large part, but granted it as to certain discrete issues as to some parties. In particular, the Court accepted that even though all plaintiffs properly alleged antitrust injury, those who were subscribers to MVPDs but not also purchasers of out-of-market packages lacked antitrust standing because of the "remoteness" of their injuries. *Laumann v. Nat'l Hockey League*, 907 F. Supp. 2d 465, 484-85 (S.D.N.Y. 2012). The Court also found that while the Plaintiffs had adequately pleaded a claim for monopolization under Section 2 of the Sherman Act against the League Defendants, those claims should be dismissed as to the Television Defendants. *Id*. at 491-92. The Court rejected each of Defendants' other arguments. As a result, no claims were dismissed from the case entirely—every claim alleged in the complaint could be asserted by the named plaintiffs who purchased out-of-market packages against at least some of the defendants.

C. Counsel Conducted Significant Discovery

Defendants together produced more than 300,000 documents, which constituted millions of pages (in addition to the hundreds of thousands of documents produced by the NHL for the *Laumann* litigation). Diver ¶ 18. Plaintiffs made extensive efforts to limit the time and cost of reviewing these documents by using technology to filter documents for targeted review. *Id*. Nevertheless, the review process was necessarily extensive. *Id*. In addition to the documentary discovery, the Plaintiffs obtained transactional databases with millions of records. *Id*.

A total of twenty-six depositions were taken for the *Garber* case (in addition to eleven depositions that were of hockey witnesses and hockey-only plaintiffs for *Laumann*). *Id.* ¶ 20.

Plaintiffs' counsel took the depositions of seventeen defense fact witness, including former Commissioner Allan "Bud" Selig and current Commissioner Robert Manfred. Class counsel defended the depositions of the four named plaintiffs. *Id.* Five economic experts were deposed, four taken by class counsel and one by Defendants' counsel of Plaintiffs' expert. *Id.*

Scores of requests for admission and interrogatories were served and answered by the parties in these cases. *Id*. ¶ 21. Fact discovery continued until January 2014, although supplemental productions continued to be made as late as December 2015. *Id*. ¶ 22.

In addition to reviewing the massive discovery record, class counsel conducted extensive research of sources outside of that record. *Id*. ¶ 23. Central to Plaintiffs' case was the extensive understanding of the history of the league, its broadcasting practices, and the application of the antitrust laws. *Id.* ¶ 24. This wide ranging research looked to such sources as scholarly books and articles, congressional history, and original sources going back to the beginning of televised sports. *Id*. This was particularly important with respect to baseball because of the prior Supreme Court cases recognizing a limited antitrust exemption for MLB. Counsel conducted extensive original research into the historical record concerning the exemption. *Id.* ¶ 25.

Counsel also researched records in other prior cases involving sports, broadcasting, and antitrust law. *Id*. ¶ 26. In addition, counsel devoted substantial resources to understanding the practices and history of broadcasting in other sports, both in the United States and internationally, as well as the law and economics of broadcasting more generally. *Id*. ¶ 27.

D. Counsel Rebuffed Defendants' Attempts to Compel Arbitration

From before the filing of the complaint, Plaintiffs' counsel devoted extensive energy ensuring that any arbitration clauses would not present significant obstacles to litigation either on an individual or a class basis. Diver ¶ 28. When the case was filed, DirecTV's and Comcast's user agreements contained arbitration clauses. An arbitration clause purportedly governing purchases of MLB.tv was added to MLB's website in early 2012. *Id*. ¶ 29.

Under the governing law of the Second Circuit at the time, no plaintiff's arbitration clause was enforceable to prevent class adjudication. *In re American Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012), decided shortly before the filing of the present action, precluded the use of such clauses where, as here, such a clause would have the effect of preventing the effective vindication of rights under the Sherman Act. *Id*. The parties agreed that they would defer any arbitration motions until the Supreme Court completed review of the case.

Notwithstanding the earlier agreement, the Television Defendants unsuccessfully moved to stay the case pending the resolution of *Amex* in the Supreme Court. On January 7, 2013, shortly after the opening of fact discovery, the Television Defendants jointly moved to stay the proceedings pending the Supreme Court's resolution of *Amex*. Diver ¶ 31. Plaintiffs opposed the motion on the basis that the result of *Amex* would have no practical effect, because even if the arbitration clauses were enforceable, they would apply only to certain Defendants. *Id*.

The Court denied the Television Defendants' motion, concluding that "staying the case would merely delay litigation and likely result in greater inefficiencies to the Court and litigants than simply permitting the litigation to proceed on schedule." *Laumann v. Nat'l Hockey League*, Nos. 12-1817, 12-3704, 2013 WL 837640, at *3 (S.D.N.Y. Mar. 6, 2013).

The Supreme Court reversed the Second Circuit on June 20, 2013. *Am. Express v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). Subsequently, Plaintiff Birbiglia, who had purchased MLB Extra Innings through DirecTV, entered into an agreement to stay his claims against DirecTV, which was entered as a stipulation by this Court on August 9, 2013 (Doc. 157). Comcast did not agree to enter into a similar agreement with Garrett Traub, who had purchased MLB Extra Innings through Comcast. On August 19, 2013, Comcast filed a motion to compel arbitration and stay the claims of all Plaintiffs, including those with whom it had no contractual relationship. Plaintiffs did not oppose Comcast's motion to stay Mr. Traub's claims against Comcast, but otherwise opposed the motion. Also on August 19, DirecTV filed a motion to compel arbitration

of Plaintiff Lerner's claims, notwithstanding its agreement to stay the other plaintiffs' claims, on the basis of his wife's purchase of DirecTV television service, even though Mr. Lerner had only asserted claims on the basis of his purchase of MLB.tv over the Internet.

On November 25, the Court granted Comcast's motion to stay the claims of the named plaintiffs with contractual relationships with Comcast, but otherwise denied their motion. *Laumann v. Nat'l Hockey League*, 989 F. Supp. 2d 329 (S.D.N.Y. 2013). The Court denied DirecTV's motion. The effect of the ruling was essentially the same as the stipulation entered into with DirecTV: the plaintiffs could assert their claims against any Defendants with whom they did not have arbitration agreements, but could not assert them against the Television Defendant through which they purchased Extra Innings. All plaintiffs, all defendants, and all claims remained in this Court.

E. Counsel Defeated Defendants' Motions for Summary Judgment

Plaintiffs' motion for class certification was originally due on August 9, 2013. On July 15, 2013, however, the Court held a conference to consider the possibility of early summary judgment motions. By agreement of the parties, the schedule was altered to permit Defendants to move for summary judgement before Plaintiffs' motion for class certification. Diver ¶ 41.

Pursuant to this revised case plan, Plaintiffs served the expert report of Dr. Roger Noll, professor emeritus at Stanford University, on February 18, 2014. Professor Noll, considered by many to be the leading expert in sports and broadcast economics for over forty years, produced a 121-page report (plus exhibits) addressing the core economic issues, including, among others, market definition, market power, and anticompetitive effects. *Id*. ¶ 42. Professor Noll also addressed preliminarily the procompetitive justifications the Defendants had discussed in their answers and previous briefing. *Id*.

On April 22, 2014, Defendants submitted their summary judgment papers. The MLB Defendants, the Comcast Defendants, the DirecTV Defendants, and the NHL Defendants each

filed separate motions, supported by separate memoranda, which together totaled ninety pages and were accompanied by hundreds of pages of declarations and exhibits.[3] *Id*. ¶ 43. Like their motions to dismiss, these motions asserted a wide-ranging array of defenses encompassing arguments that (1) consumers had not been injured; (2) Defendants had at least five decisive "procompetitive justifications"; (3) Plaintiffs lacked standing for both monetary and injunctive relief; and (4) the Television Defendants did not participate in any agreements in restraint of trade or conspiracies to restrain trade. The League Defendants also asserted the antitrust exemption as a defense, which they had not done at the motion to dismiss stage.

Plaintiffs responded on May 27, 2014, with a comprehensive ninety-page memorandum addressing each of the issues raised by all of the defendants and providing substantial documentary and economic evidence to support Plaintiffs' position. *Id*. ¶ 44. On August 4, 2014, the Court ruled in Plaintiffs' favor, denying all of the motions in full. *Laumann v. Nat'l Hockey League*, 56 F. Supp. 3d 280 (S.D.N.Y. 2014). MLB subsequently sought interlocutory review of the Court's ruling denying application of the antitrust exemption, which was rejected by this Court, *Garber v. Office of the Comm'r of Baseball*, 120 F. Supp. 3d 334 (S.D.N.Y. 2014), and the Second Circuit, *In re: Office of the Commissioner of Baseball*, No. 14-4233 (2d Cir. Jan. 28, 2015) (denying petition for writ of mandamus).

F. Counsel Obtained Certification of Rule 23(b)(2) Class

Class counsel worked closely with Professor Noll on all issues related to class certification, including the classwide nature of his merits conclusions and his damages model, which had been worked on for well over a year, and continued to be improved and modified during the class certification briefing period. Diver ¶ 47.

Class certification involved extensive expert discovery, with Dr. Noll producing two

[3] Much of the memorandum filed by the NHL was incorporated by reference by MLB, effectively making all of the briefing applicable in this case.

reports and sitting for a day-and-a-half-long deposition. Defendants relied on the reports of three separate economists, each of whom filed a report and sat for a full-day deposition. *Id*. ¶ 48.

The Defendants opposed class certification and also moved to exclude certain of the opinions of Dr. Noll, filing over seventy pages of briefing, three expert declarations, and eleven fact declarations. *Id*. ¶ 49. Plaintiffs responded to all of Defendants' papers and submitted a reply report by Dr. Noll, which prompted Defendants' filing of two sur-rebuttal expert reports and then two more supplemental expert reports. *Id*. The Court held a three-day hearing in March 2015, at which the Court heard the testimony of each of the four economic expert witnesses.

On May 14, 2015, the Court granted in part and denied in part Plaintiffs' motion for class certification, and granted in part and denied in part Defendants' motion to exclude certain testimony of Professor Noll. In particular, the Court granted Plaintiffs' request to certify a Rule 23(b)(2) class, clearing the way for Plaintiffs to seek injunctive relief on behalf of all class members. *See Laumann v. Nat'l Hockey League*, 105 F. Supp. 3d 384, 413 (S.D.N.Y. 2015); *Laumann v. Nat'l Hockey League*, 117 F. Supp. 3d 299, 322-29 (S.D.N.Y. 2015).

G. Trial Preparation

Further expert discovery on the merits was conducted after class certification. The MLB Defendants and the Television Defendants served separate merits expert reports from two new experts on August 24, 2015. Diver ¶ 51.

These reports contained both rebuttal to Professor Noll's prior reports and analysis intended to affirmatively support Defendants' positions on a wide number of issues. Plaintiffs worked with Professor Noll to reply to criticisms of his analysis. They also retained a separate expert, Professor Einer Elhauge, a leading scholar of antitrust law and economics, to rebut Defendants' new experts' affirmative opinions. *Id.* ¶ 51.

On September 30, 2015, the Court scheduled a two- to three-week trial to begin on January 19, 2016. Plaintiffs' trial preparations were extensive. In the three months between the

scheduling of trial and settlement, class counsel took four more depositions, including that of Commissioner Robert Manfred. They also, among other things, produced an exhibit list with 396 exhibits and reviewed all of Defendants' 512 proposed trial exhibits. They prepared numerous summary and demonstrative exhibits. Counsel submitted a trial brief and a comprehensive reply to Defendants' trial brief. They filed substantive motions in limine, and prepared to put on Plaintiffs' 6 potential witnesses and to cross examine Defendants' 14 witnesses, while also preparing deposition testimony of 18 witnesses for presentation at trial. In short, when the parties reached their preliminary agreement on January 11, 2016, Plaintiffs and their counsel were fully prepared to begin trial in this "unusually complex" case as scheduled on January 19.

H. Settlement Negotiations

The first settlement discussions were held with the parties in both cases in December 2013, before briefing for either summary judgment or class certification. Following a series of meetings with separate groups of Defendants, the parties met with Magistrate Judge Dolinger on December 16, 2013, pursuant to a referral by this Court. Diver ¶ 55.

All parties understood that settlement of these cases presented unique complications. While the Defendants' interests are overlapping, they differ in important ways. Plaintiffs have always insisted on practice changes, and not merely monetary relief, as a necessary component of any settlement. *Id.* ¶ 56. It became apparent that no settlement was likely until at least after the Court's resolution of the Defendants' anticipated summary judgment motions. No further substantial discussions were held following up on this mediation. Diver ¶ 57.

On June 10, 2015, the parties in *Laumann* reached a settlement. Shortly thereafter, discussions with MLB were held for the first time since the unsuccessful mediation in 2013. The Plaintiffs made clear from the start that, because of important differences between the two cases, a settlement of *Garber* could not simply mirror the settlement of the *Laumann* case.

Formal settlement talks began in July 2015, when a meeting was held between counsel

for MLB and class counsel. A second meeting was held among counsel for all parties on October 2. These meetings were unsuccessful, and the parties appeared to be at an impasse.

On November 10, 2015, all of the parties in the *Garber* action participated in a full-day mediation before Stephen M. Orlofsky, former United States District Judge of the District of New Jersey, who had mediated the *Laumann* settlement. A settlement was not reached at that time, and progress was not sufficient to warrant continuing the discussions at that time.

On November 16, 2015, MLB served an Offer of Judgment on Plaintiffs presenting terms similar to those in the *Laumann* settlement. Plaintiffs did not accept the offer. Instead, they continued to insist on additional relief and outlined the parameters of any acceptable settlement. Three weeks later, MLB counsel responded, at which point active settlement negotiations recommenced in earnest, notwithstanding that counsel was actively preparing for trial.

After extensive, often heated negotiations, by January 8, 2016, the plaintiffs had reached a framework for agreement with MLB. The settlement could not be finalized without the agreement of the Television Defendants, however. Intense, non-stop negotiations were required to finalize the agreement with the participation of the Television Defendants. A term sheet was finally agreed to on January 11, 2016, in the midst of the Court's final pre-trial conference. Round-the-clock negotiations were required to complete a final, formal agreement by January 19, 2016, the date on which trial was scheduled to start.

I. The Settlement Agreement

The agreement provides relief for Class members and the broader public through both increased consumer choice and lower prices. As in *Laumann*, in addition to its existing league-wide bundle, MLB will offer single-team Internet packages for at least five years—allowing for the purchase of single-team packages for a price that is more than twenty percent below the price of the bundled package. Agreement ¶ 55.[4] Consumers will thus be able to choose between a

[4] Plaintiffs filed the agreement, including exhibits, as part of their motion for preliminary

package of an individual team from outside their local markets, or a league-wide out-of-market bundle—a choice that no major American sports league offered before the *Laumann* settlement.

The *Garber* agreement incorporates the basic framework of the *Laumann* settlement, but adds other important elements of choice. First, the league will be required to offer a "Follow Your Team" option that removes certain existing blackouts. Where available,[5] consumers will have the option of paying an extra sum (of not more than $10) to receive their favorite team's telecasts even when that team is playing an in-market team. These blackout lifts require that the consumer be a subscriber to the local teams' RSN in order to watch the favorite team's telecast, but it will make those telecasts available to consumers for the first time.

The agreement also pushes the league to offer in-market streaming of local team's games over the Internet. It requires in-market streaming to be available through all Defendant RSNs by the start of the 2017, or the league will be prevented from raising its prices on MLB.tv subscriptions at all for the remainder of the five-year term of the settlement.

Finally, the agreement mandates that consumers who have no access to MVPD service from any provider be afforded the option of obtaining in-market games as part of an MLB.tv subscription. Together, these changes substantially increase the availability of games streamed over the Internet for class members.

The agreement also mandates price concessions for consumers that provide significantly more value to the class than the price concessions in *Laumann*. Agreement ¶¶ 55-57. A league-wide subscription to MLB.tv Premium will drop from $129.99 per season to $109.99 per season and, unlike in *Laumann*, the league is prevented from increasing that price by more than 3% per year, guaranteeing five years of price relief. The pricing of the $85 single-team option—which is

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approval. *See* Doc. 352, Ex. 1.

[5] These games will be available where the local RSN and the relevant MVPD have agreed to participate. The Defendant RSNs and MVPDs have agreed, and the agreement includes requirements for increasing the access beyond these Defendants. Agreement ¶ 58.

by far the lowest price for any full-season subscription by the four major American sports leagues—is similarly constrained for a full five years. Also, like in *Laumann*, Comcast and DirecTV will reduce their prices for MLB Extra Innings for the next two seasons by at least 12.5%. *Id*. Taken as a whole, these pricing benefits represent a significant departure from the *status quo* that inures to the benefit of the class and are worth more than $200 million—approximately seven times as much as the estimated value of the *Laumann* settlement.

III. STANDARD

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The Second Circuit has instructed district courts considering the reasonableness of fee requests by class action counsel to act 'as a fiduciary who must serve as a guardian of the rights of absent class members.'" *In re Initial Public Offering Sec. Litig.*, 671 F. Supp. 2d 467, 502 (S.D.N.Y. 2009) (Scheindlin, J.) (quoting *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000)). Where, as here, "money paid to the attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members." *McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006).

"[T]he parties to a class action properly may negotiate not only the settlement of the action itself, but also the payment of attorneys' fees." *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (citing *Evans v. Jeff D.,* 475 U.S. 717, 734-35, 738 n.30 (1986)). As Judge Posner observed in *In Re Continental Illinois Securities Litigation*, 962 F. 2d 566, 570 (7th Cir. 1992), the parties negotiating attorneys' fees are adversarial market participants (the defendants who must pay the fee want to minimize the payment, while the lawyers receiving it wish to maximize it), leading to a reasoned outcome reflecting the fact that the "markets know market value better than judges do." Thus, "[a] court can generally assume

that the defendants have closely examined the plaintiffs' fee request and agreed to pay only a reasonable amount …." *M. Berenson Co., Inc. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 829 (D. Mass. 1987) (*citing In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 582 (3d Cir. 1984)).

In assessing the reasonableness of the agreed fee, the Court may make use of any of a number of different approaches, including the "percentage of the recovery" and "lodestar" methods for comparison's sake to the negotiated outcome. *See, e.g.*, *McBean*, 233 F.R.D. at 392-93 (confirming reasonableness of separate, agreed fee with, inter alia, lodestar and percentage methods); *In re Sony SXRD Rear Projection TV Class Action Litig.*, No. 06-5173, 2008 WL 1956267 at *15-16 (S.D.N.Y. May 1, 2008). Where the monetary value of the recovery can be assessed, the "the overwhelming trend" in the Second Circuit is to use the percentage of the recovery method. *See In re Platinum & Palladium Commodities Litig.*, No. 10-3617, 2015 WL 4560206, at *1 (S.D.N.Y. July 7, 2015). When a percentage of the fund is awarded, district courts are also encouraged to review counsel's lodestar as a "cross-check" to affirm its reasonableness, *McDaniel v. County of Schenectady*, 595 F.3d 411, 421-22 (2d Cir. 2010), although both methods are effectively cross-checks where, as here, the fee has been separately negotiated.

In *Goldberger*, a common fund case, the Second Circuit set forth six factors for district courts to take into consideration: (1) counsel's time and labor; (2) the litigation's complexities and magnitude; (3) the litigation risks; (4) quality of representation; (5) the relationship of the requested fee to the settlement; and (6) considerations of public policy. 209 F.3d at 50.

The Supreme Court has warned that "the determination of fees 'should not result in a second major litigation.'" *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011) (citing, *inter alia*, *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). Plaintiffs must meet their burden of providing an appropriate basis for a fee, but "trial courts need not, and indeed should not, become green-

eyeshade accountants. The essential goal in shifting fees … is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." *Id.* at 2216.

IV. ARGUMENT

Plaintiffs submit that the requested fees and expenses are reasonable. The $16.5 million in fees and expenses represents less than 8% of the estimated value of the settlement. *See* Ayers ¶¶ 14-29 All of the *Goldberger* factors support the request: experienced class counsel devoted a substantial amount of time and expense into highly complex and risky litigation, producing high-quality work against several top-tier defense firms and achieving a valuable result for class members. The agreement provides significant benefits to consumers in the form of increased choice and decreased price, representing a substantial portion of the available relief. It is conservatively valued at more than $200 million, even without taking into account the value of some of the new choices that would not be available without the settlement. Ayres ¶¶ 14-29. That achievement could not have been achieved without the dedicated and skilled work of class counsel—nor without their substantial investment of time and money, amounting to more than 15,600 hours of work over the four-year lifespan of the litigation with a collective lodestar of $9.2 million, together with costs in the amount of $1.95 million. *See* Decl. of Joshua Snyder; Decl. of Jeffrey Dubner; Decl. of Kevin Costello; Decl. of Robert LaRocca; Decl. of Peter Leckman; Decl. of Michael Buchman; Decl. of Marc Gross; White, Exs. A and E.

Given the novelty of the case, class counsel's significant out-of-pocket expenses underscore the level of risk undertaken here. Saltzburg ¶ 9. Nor was there any conflict of interest between class counsel and the class, because the fee award cannot diminish the relief awarded to the class and was negotiated separately and subsequent to the determination of that relief. With all of this in mind, a full award of the agreed-to amount is consistent with the public policy concerns that animate Rule 23—encouraging skilled counsel to represent those who seek redress

for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature.

A. The Fee and Expense Request Is Reasonable

The first, second, and fourth *Goldberger* factors all deal with the complexity of the litigation and the quantity and quality of counsel's work in that litigation. These factors all strongly support a finding that the fee request here is reasonable.[6]

As detailed in Plaintiffs' declarations and supporting papers, counsel expended 15,608 hours overall on the litigation to bring this litigation from conception to the eve of trial (the total is more than 20,000 hours when all of the time billed to both *Garber* and *Laumann* is counted). *See* Snyder, Ex. A; Dubner, Ex. A; Costello, Ex. A; LaRocca, Ex. A; Leckman, Ex. A; Buchman, Ex. A; Gross, Ex. A. These hours were appropriately divided as between partner-level attorneys, associate-level attorneys, and professional staff, especially in light of the highly technical and sophisticated nature of the antitrust claims here at issue. *Id*. Given the enormity of this litigation's requirements—involving millions of pages of discovery, multiple multi-pronged dispositive motions, class certification and *Daubert* disputes, attempts to compel arbitration, deep economic analysis, unusually complicated econometric models, and preparation for a two- to three-week trial—the time spent is reasonable and, indeed, quite efficient.

As set forth in the declaration of Professor Saltzburg, achieving these results while expending less than 20,000 hours of time demonstrates extraordinary efficiency. Saltzburg ¶ 15. Professor Saltzburg cites *In re Linerboard Antitrust Litigation*, in which he served as an expert, as an example. There, the Court analyzed the time expended in complex antitrust cases:

> While the total number reported—51,268 hours—is obviously substantial,

[6] It bears emphasis that the agreed upon amount of $16.5 million encompasses both attorneys' fees of Class Counsel, as well as their incurred expenses. *See* White, Exs. A-E. The Court may compensate Class Counsel for reasonable expenses necessary to the representation of the Class. *See In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y 2003).

> through effective management petitioners held down the number of hours and other resources required to effectively prosecute the case. Fee Petition at 22. Fewer hours of attorney time were expended in this case than in comparable litigation. For instance, *In re Flat Glass* involved fewer defendants and more firms and the fee petition covered 83,067 hours. *In re Commercial Tissue Antitrust Litigation* involved a comparable number of defendants, a similar industry, a conspiracy covering a similar time period and was resolved at a comparable stage but the fee petition covered 87,849 hours excluding time expended by the Attorney General of Florida in a separate action which was consolidated with the class action. *Id*. This development should be rewarded when it reflects, as in this case, the efficiency of counsel in maximizing total recovery to the class by minimizing attorneys' fees expenses.

In re Linerboard Antitrust Litig., MDL No. 1261, 2004 WL 1221350, at *13 (E.D. Pa. June 2, 2004).

The magnitude and complexity of this litigation further justifies the fee request. The Court has previously characterized this litigation as "an unusually complex and sweeping class action lawsuit." Daubert *Op.*, 117 F. Supp. 3d at 315. *See also In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 123 (S.D.N.Y. 2008) ("Antitrust cases, by their nature, are highly complex.") (quotation omitted). One need look no further than the complex economic evidence presented in this case to gauge the complexity of challenging the MLB's territorial restraints on competition. Defendants would not have gone to the expense of hiring five separate economists—one a Nobel laureate—if the issues were not "unusually complex."

Counsel provided a high quality of representation to the Plaintiffs and the class in this litigation. Class counsel include some of the foremost plaintiffs' counsel practicing antitrust law in the country today, with decades of experience and hundreds of millions of dollars in recoveries to their credit. Plaintiffs have faced and responded to several onslaughts of arguments filed by Defendants' veritable armies of lawyers, matching them issue for issue and rising to the occasion at each turn.[7] The quality of their work is evident by the results they have obtained, and

[7] For example, Class Counsel's informal count of defense counsel present at the class certification hearing estimated the number of attorneys for the *Laumann* and *Garber* Defendants to be somewhere over 50. By contrast, Class Counsel never broke double digits.

has drawn favorable comments from the Court. *See, e.g.*, Tr. of March 19, 2015, at 590:19-20.

Class counsel's hourly rates here ($525-$1000 for partners and $330-$690 for associates) are well within the reasonable rates for attorneys practicing complex litigation in the Southern District of New York. A January 2014 *National Law Journal* survey found that New York's hourly rates were the highest in the country, with firms whose largest office is in New York charging an average of $882 per hour for partners and $520 per hour for associates.[8]

By way of additional comparison, the law firms defending the MLB Defendants (Paul Weiss), Comcast (Davis Polk), and DirecTV (Alston & Bird and Kirkland & Ellis) were each included in *National Law Journal*'s January 2014 survey.[9] Each of these firms had partner billing levels well above the effective hourly rate sought by class counsel here. Paul Weiss had a top partner hourly rate of $1,120 with an average of $1,040. *Id.* Davis Polk had a top partner hourly rate of $985 with an average of $975. *Id.* Alston & Bird, whose largest office is in Atlanta, had a top partner hourly rate of $875 and an average of $675. Kirkland & Ellis (Chicago) had a high of $995 per hour and an average partner rate of $825. Plaintiffs' requested rates fall on the low side of these measures.[10]

Class counsel's overall lodestar through preliminary approval was $9.2 million using current hourly rates and $8.2 million using historical hourly rates. As demonstrated by the

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[8] Karen Sloan, *$1,000 Per Hour Isn't Rare Anymore*, Nat'l L.J., Jan. 13, 2014, at 1. *See also, e.g.*, *Platinum & Palladium*, 2015 WL 4560206, at *4 (citing *NLJ* survey yielding an average hourly partner billing rate of $982 in New York); *City of Providence v. Aéropostale, Inc.*, No. 11--7132, 2014 WL 1883494, at *13 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 2015 WL 3604407 (2d Cir. June 10, 2015) (approving billing rates of attorneys in New York firms ranging from $335 to $875 per hour).

[9] *See* "Billing Rates Across the Country: The National Law Journal's Annual Survey of Law Firm Billing Rates for Partners and Associates," *available at* http://www.nationallawjournal.com/id=1202636785489/Billing-Rates-Across-the-Country?slreturn=20150622120638.

[10] The same pattern holds for associates. According to the *National Law Journal*, Paul Weiss's highest associate billing rate was $760 and its average is $600; Davis Polk's highest is $975 and its average $615; Kirkland & Ellis's high was $715 and its average $540; and Alston & Bird's highest is $575 and its average $425.

extensive litigation history recounted above, this lodestar reflects class counsel's efficient litigation of this case. The full award would constitute $1.95 million in reimbursed costs and $14.5 million in fees. This represents a multiplier of 1.6 when half of joint *Garber*/*Laumann* time is counted, and 1.1 when all joint time is counted. These values understate the actual lodestar insofar as the significant amount of time expended on settlement after January 31 (including time to be expended in the future), is not included. "[M]ultipliers of two to six times total lodestar … are regular[ly] awarded in this district," *Johnson v. Brennan*, No. 10-4712, 2011 WL 4357376, at *21 (S.D.N.Y. Sept. 16, 2011); *see also, e.g.*, *Berry v. Schulman*, 807 F.3d 600, 617 (4th Cir. 2015) (affirming 1.99 multiplier in 23(b)(2) injunctive settlement); *Oh v. AT&T Corp.*, 225 F.R.D. 142 (D.N.J. 2004) (finally approving 23(b)(2) settlement and fee of 2.15 times lodestar).

B. Class Counsel Achieved Substantial Relief for Class Members

Consistent with the fifth *Goldberger* factor, the Court may examine the results of the litigation in adjudging the reasonableness of the fee request. The results obtained by Plaintiffs and their counsel will significantly benefit the class. The agreement increases the choices available to class members and other baseball fans, while significantly reducing the prices of all out-of-market packages on both the Internet and television platforms.

In support of this petition, Plaintiffs submit the declaration of Professor Ian Ayres.[11] Professor Ayres explains that even using a conservative set of assumptions about the subscriber rate for the new and newly discounted options, the value of the settlement is estimated to be worth between $178 million and $214 million.[12] Ayres ¶¶ 14-29. These figures reflect the

[11] Professor Ayres is the William K. Townsend Professor at Yale Law School, and a Professor at Yale's School of Management, as well as the former editor of the Journal of Law, Economics and Organization and an elected member of the American Academy of Arts and Sciences. *See* Ayres, Appx. 2.

[12] Dr. Ayres assumes that 30% of consumers will choose a single-team option, except that 50% of those who would otherwise purchase MLB.tv Basic would switch, accounting for the fact that Basic subscribers are more likely to be price sensitive. Ayres ¶ 18.

The difference between the high and low estimates is whether the value of the in-market

combined value of the elements of injunctive relief included in the agreement. The unbundled, single-team MLB.tv Internet subscriptions are to be offered by the MLB at a price more than 20% less than the least-expensive pre-existing option, and 35% less than MLB.tv Premium, which was by far the most popular option prior to the settlement. It is also less than half of the price of Extra Innings through Comcast and DirecTV in 2015. Using conservative assumptions about single-team subscription rates, savings for consumers who purchase single-team packages instead of one of the other options are estimated to be worth between $97 million and $109 million over the five-year term. Ayres, Table 5, at 19. Price reductions for those who choose league-wide subscriptions are worth $81 to $105 million over five years. *Id.* Moreover, Dr. Ayres's estimate does not assign a value to the increased options in the form of the Follow Your Team option and increased programming availability for truly unserved fans.

Plaintiffs' counsel fee request represents between six and eight percent of the range of values estimated by Dr. Ayres. *See* Saltzburg ¶ 12. This is well within the acceptable range identified by Courts using the "percentage of the recovery" method.[13] *See, e.g.*, *City of Providence*, 2014 WL 1883494 at *12 (collecting cases and determining that an award representing 33% of the settlement fund in mature, complex litigation was appropriate).

C. An Award in the Full Amount Has No Effect on Class Relief

Another justification for the requested award is that it will be paid separately by

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streaming provision is counted. That provision requires in-market streaming for all Defendant RSNs by the start of the 2017 season, or MLB will not be permitted to raise any of its prices. The additional savings represented by that eventuality is a reasonable basis for evaluating the value of that provision. Class members receive a benefit either way, and the $36 million saved over five years is far lower than any reasonable estimate of the value of the additional programming that is expected to be available.

[13] While courts often primarily use the lodestar method in 23(b)(2) cases, were, as here, the value of the relief can be reasonably estimated, courts also use the percentage-of-the-recovery method. *See, e.g.*, *Oh*, 225 F.R.D. at 151 (approving fee of approximately 25% of the estimated value of injunctive relief); *Bezio v. Gen. Elec. Co.*, 655 F. Supp. 2d 162, 168 (approving fee of 25% of estimated value of settlement, including value of injunctive relief).

Defendants and can in no way diminish the relief provided to the class. The fee and cost award is a separate payment from Defendants to class counsel that is segregated from the settlement benefits for the class. *See* Agreement ¶ 70 ("Any award shall not reduce any obligations described in any other paragraph."). The fee and cost amount memorialized in the agreement was negotiated separately from the class relief. The topic of fees was not broached in the negotiations until an agreement in principal had been reached between class counsel and the league. *Id.* Indeed, there was no discussion of fees until the afternoon of the day an agreement was reached. Langer ¶ 14; Bowman ¶ 6. "Under these circumstances, the danger of conflicts of interest between attorneys and class members is diminished." *Sony SXRD*, 2008 WL 1956267 at *15 (S.D.N.Y. May 1, 2008); *accord Shapiro v. JPMorgan Chase & Co.*, No. 11-8331, 2014 WL 1224666, at *19 (S.D.N.Y. March 24, 2014); *Blessing v. Sirius XM Radio Inc.*, No. 09-10035, 2011 WL 3739024, at *4 (S.D.N.Y., Aug. 24, 2011).

In addition, the request is reasonable because it is the product of arm's-length negotiation. *Sony SXRD*, 2008 WL 1956267 at *15. The agreement took six months to complete, even though the parties had the *Laumann* settlement as a template. Plaintiffs held firm on their insistence that class members must obtain additional, structural modifications, as well as longer guarantees of price relief. Counsel for MLB told this court that they were "at a bit of a loss" as to why the case could not be settled for less than was ultimately obtained for the class, Nov. 24, 2015 Trans. 28:5, confirming that the negotiations were anything but collusive. Thus there is no danger of any "conflict of interest between the attorneys and class members," and "the Court's fiduciary role in overseeing the award is greatly reduced." *McBean*, 233 F.R.D. at 392.

D. The Request Is Justified by the Risk Undertaken by Class Counsel

The third *Goldberger* factor recognizes that the reasonableness of a fee award ought to reflect the risk associated with class counsel's litigation effort. "The Second Circuit has identified 'the risk of success as 'perhaps the foremost' factor to be considered in determining' a

reasonable fee award." *Shapiro*, 2014 WL 1224666 at *21 (quoting *Goldberger*, 209 F.3d at 54). Litigation risk "must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55. "No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." *Detroit v. Grinnell Corp.*, 495 F. 2d 448, 470 (2d Cir. 1974).

The risks of bringing this case were substantial. *See* Saltzburg ¶ 10. The practices at issue had been in place for many years before Plaintiffs brought this case, and, despite having obvious anticompetitive effects and being highly unpopular with consumers, had not attracted substantial challenges by consumers before this case. The risk is exemplified by the fact that no other private class actions challenging these practices had been successfully brought before. Saltzburg ¶ 10b. Indeed, the potential pitfalls of the litigation were illustrated by the only prior consumer challenge to the MLB's or NHL's broadcasting practices under federal antitrust laws, *Kingray, Inc. v. NHL Enterprises, Inc*., No. 00-1544 (S.D. Cal. July 2, 2002), whose complaint was dismissed. And there was no precedent for consumers successfully defeating MLB's assertion of an antitrust-exemption defense.[14]

Only after the settlement of the *Laumann* case was publicized were copycat actions filed by other lawyers (copying large swaths of the complaint in this case verbatim) against the NFL and DirecTV. *Id*. No similar case has ever been brought by consumers challenging MLB's broadcasting practices under the antitrust laws.

While the government challenged sports leagues' geographical restraints on broadcasting in the past, it has not done so in over fifty years. The particular practices subject to challenge were not in place when the last federal government actions occurred. The few cases challenging sports broadcasting practices in more recent years were typically brought by individual teams

[14] Notably, the plaintiff in *Kingray* brought cases against the NBA and the NHL, but not MLB. *See Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002).

(or, in the case of collegiate sports, universities). Many of the defenses asserted in this case, including those related to consumer standing, consumer injury, arbitration, and the roles of the RSNs and MVPDs, were not relevant to those actions. Saltzburg ¶ 10e.

This case was an unprecedented challenge to the manner in which MLB and its broadcasting partners had conducted business for decades without interruption. Class counsel performed the work without payment for more than four years. Class counsel also advanced nearly $2 million in expenses for numerous experts, consultants, mediation, and other necessary litigation expenses without any assurance that any of these substantial expenses would ever be reimbursed. Saltzburg ¶ 11. This substantial risk justifies the requested amount.

E. Public Policy Supports the Request

Courts in the Second Circuit acknowledge that, in addition to providing just compensation for the work performed, awards of fair attorneys' fees ought also to serve to encourage competent counsel "to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature." *City of Providence*, 2014 WL 1883494 at *11 (collecting cases in support). Private enforcement of antitrust law is a necessary adjunct to government actions because the public sector agencies entrusted with its prosecution do not have sufficient resources to address abuse in every form. *See Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 711 F.3d 1264, 1270 n.14 (11th Cir. 2013); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.").[15]

[15] The *Laumann* and *Garber* cases have already had wider effect. The NBA responded to the *Laumann* settlement by offering its own single-team options. Similar cases were filed against the NFL in response to the *Laumann* settlement, and it has been reported that "the NFL is also working on a system to offer the single-team option to fans." Eriq Gardner, *Baseball Fans Reach Settlement over MLB Telecasts on Verge of Antitrust Trial*, The Hollywood Reporter, Jan. 19,

Given the nature of this factor to "consider what fee would adequately encourage plaintiffs' counsel to continue bringing cases of merit in the future," *IPO*, 671 F. Supp. 2d at 511, the modest magnitude of this award in relation to the results obtained supports its full grant.

F. The Service Awards Request is Reasonable

Finally, class counsel respectfully move the Court for the service awards of $10,000 each for class representatives Vincent Birbiglia, Marc Lerner, Derek Rasmussen, and Garrett Traub, as recited in the agreement. ¶ 54. Such awards are routinely granted in this context, in order to recognize the efforts of these individuals in pursuing their claims on behalf of a class. *Sewell v. Bovis Lend Lease, Inc.*, No. 09-6548, 2012 WL 1320124, at *14 (S.D.N.Y. April 16, 2012) (collecting cases). The agreed sum for each plaintiff is the same as the Court awarded to the named plaintiffs in *Laumann*.

Each of the named plaintiffs maintained an active role in the litigation over the past four years. They collected documents in order to respond to the Defendants' requests. They were each deposed and most had to travel significant distances. They exposed themselves to repeated (and inaccurate) criticism by Defendants in public filings challenging their standing to sue and their ability to represent a class. They assisted in the trial preparations and were prepared to testify at trial. The awards sought here are in an amount that is routinely granted in similar circumstances; indeed, "much larger awards have also been granted." *Id.* (granting service awards of $10,000 and $15,000 and collecting cases with awards ranging from $15,000 to $425,000).

V. CONCLUSION

For the reasons set forth above, the request of class counsel for an award of $16.5 million in fees and costs should be granted. In addition, service awards in the amount of $10,000 each for class representatives Vincent Birbiglia, Marc Lerner, Derek Rasmussen, and Garrett Traub should be granted.

2016.http://www.hollywoodreporter.com/thr-esq/baseball-fans-reach-settlement-mlb-857077.

Respectfully Submitted,

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