UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

DEVI KHODAY and DANISE TOWNSEND, on behalf of themselves and all others similarly situated, Plaintiffs, v. SYMANTEC CORP., and DIGITAL RIVER, INC., Defendants.	Civil Action No. 11-CV-00180 (JRT-TNL) CLASS ACTION **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS**

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Having obtained a recovery of $60 million in cash (the "Settlement Amount") for the benefit of the Class, Plaintiffs' Counsel now respectfully submit this memorandum of law in support of their motion, pursuant to Fed. R. Civ. P. 23(h), for an award of attorneys' fees in the amount of 33 1/3% of the Settlement Fund (*i.e.*, 33 1/3% of the Settlement Amount with interest on such amount at the same rate as earned by the Settlement Fund).[1] Plaintiffs' Counsel also seek reimbursement of the $738,605.19 in litigation expenses that they reasonably and necessarily incurred in prosecuting and resolving the Action.

INTRODUCTION

As detailed in the Declaration of Andrew N. Friedman filed concurrently with the Motion for Final Approval of Settlement ("Friedman Final Approval Decl.") [Dkt. No. 406], this is a class action against Symantec Corp. and Digital River, Inc. (collectively, "Defendants") alleging, *inter alia*, that Defendants sold download insurance services to consumers called either Extended Download Service ("EDS") or Norton Download Insurance ("NDI") (collectively, "Download Insurance"), which was marketed as the only way to extend the time for customers to download their Norton software beyond 60 days from the date of purchase. The Amended Complaint alleges that Defendants failed to disclose at point of sale that customers could, in fact, redownload their Norton software without purchasing Download Insurance through various free alternatives. Despite the existence of these alternatives, Defendants automatically added Download

[1] Unless otherwise noted, capitalized terms have the meanings set out in the Settlement Agreement dated August 17, 2015, attached to the Declaration of Andrew N. Friedman ("Friedman Final Approval Decl."), filed at Docket No. 406-1 as Exhibit 1 thereto.

Insurance, and its accompanying $4.99 to $16.99 fee, to consumers' online shopping carts, requiring consumers to affirmatively remove the Download Insurance from their carts before checkout if they wanted to avoid purchasing it. After years of hard-fought litigation, including the certification of a nationwide class applying two different states' laws, reviewing and analyzing millions of pages of discovery, over 20 depositions, and three separate mediations, the parties were able to resolve this matter by agreeing to a $60 million cash settlement.

The $60 million proposed Settlement represents an excellent recovery for the Class and was achieved through the skill, tenacity, and advocacy of Plaintiffs' Counsel, who litigated this Action on a purely contingent fee basis against extremely competent defense counsel. The Settlement was achieved in the face of numerous hurdles and risks that posed the risk of no recovery (or a substantially lesser recovery) for the Class.

As detailed in the Friedman Final Approval Decl., Plaintiffs' Counsel Cohen Milstein Sellers & Toll PLLC, Lockridge Grindal Nauen PLLP, The Wentz Law Firm, and McLaughlin & Stern LLP vigorously pursued this litigation on behalf of the Class for over four years. Among other things, Plaintiffs' Counsel: (1) conducted an extensive factual investigation into the alleged fraud; (2) reviewed and analyzed over 1.8 million pages of documents; (3) took 15 fact depositions of current or former Symantec and Digital River employees; (4) defended Plaintiffs' depositions; (5) deposed Defendants' four expert witnesses; (6) defended depositions of Plaintiffs' three expert witnesses; (7) successfully opposed Defendants' motions to dismiss; (8) successfully moved for certification of a nationwide Class applying two states' laws; (9) successfully opposed

Defendants' motion for summary judgment; (10) successfully opposed Defendants' motions to exclude certain of Plaintiffs' expert witnesses' testimony; (11) prepared for the imminent trial of this action; and (12) engaged in extensive settlement negotiations including three distinct mediations, first with Randall Wulff and then before the Honorable Layn R. Phillips (ret.).

The Settlement is an excellent result for the Class when compared to the range of possible recovery and considered in light of the considerable risks confronted in this case from the outset. For example, Defendants argued that they did not make any actionable misstatements or omissions concerning the sale of the services at issue in this case. These allegations were the gravamen of the Complaint. There would also have been significant challenges in proving that any misstatements or omissions were material. Finally, Plaintiffs' Counsel would have faced significant hurdles in establishing that the Class suffered a legally cognizable harm and that such harm could be established on a class-wide basis. In light of these risks, Plaintiffs' Counsel respectfully submit that the Settlement is a testament to their hard work and the quality of their representation.

Given the recovery obtained for the benefit of the Class, the complexity of the litigation, the quantity of the work involved, the skill and expertise required, and the substantial risks that counsel undertook in this Action, Plaintiffs' Counsel submit that the requested award of 33 1/3% of the Settlement Fund and reimbursement of counsel's expenses in the amount of $738,605.19 is fair and reasonable. The requested fee is well within the range of percentage attorneys' fees awarded in consumer class actions and other comparable class actions within this District and throughout the nation. Indeed, the

requested fee here represents a multiplier of less than two, and multipliers of two to five times counsel's lodestar are typically awarded in class actions with substantial contingency risks such as this one.

For all the reasons set forth below, Plaintiffs' Counsel respectfully requests that the Court approve their application for an award of attorneys' fees and reimbursement of expenses.

ARGUMENT

I. PLAINTIFFS' COUNSEL ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES FROM THE COMMON FUND.

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970). The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered and to prevent unjust enrichment of persons who benefit from a lawsuit without bearing its cost. *See Boeing*, 444 U.S. at 478; *Mills*, 396 U.S. at 392; *Krueger, et al. v. Ameriprise Fin., Inc.*, No. 11-CV-02781 (SRN/JSM), 2015 WL 4246879, at *1 (D. Minn. July 13, 2015) (citing *Boeing*); *In re Charter Comm'ns, Inc. Sec. Litig.*, No. MDL 1506, 4:02-CV-1186 CAS, 2005 WL 4045741, at *3 (E.D. Mo. June 30, 2005).

Courts have recognized that, in addition to providing fair compensation, awards of attorneys' fees in successful cases should serve to encourage 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. *See Charter Comm'ns*, 2005 WL 4045741, at *18-19; *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400, 2010 WL 4537550, at *23 (S.D.N.Y. Nov. 8, 2010).

II. THE COURT SHOULD AWARD PLAINTIFFS' COUNSEL A REASONABLE PERCENTAGE OF THE COMMON FUND.

The determination of the amount of a reasonable attorney fee to be awarded from the common fund is committed to the sound discretion of the district court. *See Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1156 (8th Cir. 1999); *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1061 (D. Minn. 2010); *In re Monosodium Glutamate Antitrust Litig.*, No. 00-MDL-1328-PAM, 2003 WL 297276, at *1 (D. Minn. Feb. 6, 2003).

Plaintiffs' Counsel respectfully submit that this Court should award a fee based on a percentage of the common fund obtained for the Class. The Eighth Circuit has expressly approved the percentage method in common fund cases and described its use as "well established." *See, e.g.*, *Petrovic*, 20 F.3d at 1157 ("It is well established in this circuit that a district court may use the 'percentage of the fund' methodology to evaluate attorneys fees in a common-fund settlement."); *Yarrington*, 697 F. Supp. 2d at 1061.

Courts have repeatedly recognized the advantages of the percentage-of-the-fund method, over the alternative lodestar approach, because it aligns the interests of counsel and the class in achieving the maximum recovery possible. *See, e.g.*, *Shackleford v. Cargill Meat Solutions, Inc.*, No. 12-CV-4065-FJG, 2013 WL 937550, at *1 (W.D. Mo.

Mar. 8, 2013) (holding that "[t]he Eighth Circuit, as well as this Court, has held that in 'common fund' cases, where attorney fees and class members' benefits are distributed from one fund a percentage of the benefit method may be preferable to the lodestar method") (citation omitted); *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 991-92 (D. Minn. 2005) ("There are strong policy reasons behind the judicial and legislative preference for the percentage of recovery method."); *Charter Comm'ns*, 2005 WL 4045741, at *13 (the percentage "approach most closely aligns the interests of the lawyers with the class"). In addition, the percentage method is consistent with arrangements in the private marketplace for contingency cases, in which individual clients typically agree to a fee based on the amount recovered. *See id.*; *see also Blum v. Stenson*, 465 U.S. 886, 903 (1984).

III. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE UNDER EITHER THE PERCENTAGE-OF-THE-FUND METHOD OR THE LODESTAR METHOD

A. The Requested Attorneys' Fees Are Reasonable Under the Percentage-of-the-Fund Method.

The Supreme Court has recognized that an appropriate court-awarded fee is intended to approximate what counsel would receive if they were bargaining for the services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). If this were a non-representative action, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 33 1/3% of the recovery. *See Blum*, 465 U.S. at 903. The advantage of the percentage-of-the-fund method is that it uses the amount of the benefit to the Class as the starting point for the analysis of

attorneys' fees and, thus, directly incorporates this factor into its calculation of the fees. *See* Fed. R. Civ. P. 23(h) Advisory Committee note to 2003 Amendment (in a "percentage approach to fee measurement, results achieved is the basic starting point").

The fee requested here was carefully considered and is well within the range of the percentage of fees awarded in this Circuit and around the country in comparable cases. Courts in this District have observed that the range of percentage awards in common fund cases most typically ranges from 25% to 36%. *See Yarrington*, 697 F. Supp. 2d at 1061; *Xcel*, 364 F. Supp. 2d at 998.

The reasonableness of the requested 33 1/3% fee is fully supported by a review of percentage fee awards in comparable class actions in this Circuit. *See, e.g.*, *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (finding "no abuse of discretion in the district court's awarding 36% to class counsel who obtained significant monetary relief on behalf of the class"); *In re Green Tree Fin. Corp. Stock Litig.*, Nos. 97-2666 (JRT/RLE), 97-2679 (JRT/RLE), 2003 WL 23335196, at *5 (D. Minn. Dec. 18, 2003) (Tunheim, J.) (awarding "33 1/3% of the Settlement Amount in fees" as "fair and reasonable"); *Jensen v. Minn. Dep't of Human Servs.*, No. 09-1775 (DWF/FLN), 2011 WL 6178845, at *2 (D. Minn. Dec. 5, 2011) ("The Court finds that a one-third contingent fee is a fair and reasonable fee considering the complexity of the issues and the substantial efforts of Settlement Class Counsel in this matter, and considering the significant benefits the Settlement affords to the Class . . . ."); *Cromeans v. Morgan Keegan and Co., Inc.*, No. 2:12-cv-04269-NKL, 2015 WL 5785576, at *4 (W.D. Mo. Sept. 16, 2015) (awarding Class Counsel fees of one-third of the settlement fund); *In re*

Airline Ticket Comm'n Antitrust Litig., 953 F. Supp. 280, 286 (D. Minn. 1997) (awarding 33 1/3% of $86 million settlement fund); *Carlson v. C.H. Robinson Worldwide, Inc.*, Nov. CIV 02-3780 JNE/JJG, 2006 WL 2671105, at *8 (D. Minn. Sept. 18, 2006) (awarding 35.5% of $15 million settlement).

B. The Requested Attorneys' Fees Are Reasonable Under the Lodestar Method.

The Eighth Circuit has held that the lodestar method may be used to cross-check the reasonableness of a fee awarded under the percentage-of-the-fund method. *See Petrovic*, 200 F.3d at 1157; *Yarrington*, 697 F. Supp. 2d at 999.[2] In cases of this nature, fees representing multiples above the lodestar are regularly awarded to reflect the contingency fee risk and other relevant factors. Here, after four years of diligent and high-quality work on a complex case, Plaintiffs' Counsel achieved an excellent result for the Class on the eve of trial, obtaining a cash settlement that will likely pay approved claimants more than 100 cents on the dollar of their out-of-pocket damages.

In complex contingent litigation such as this Action, lodestar multipliers between two and five are commonly awarded. *See, e.g.*, *In re St. Paul Travelers Sec. Litig.*, No. 04-3801 JRT FLN, 2006 WL 1116118, at *1 (D. Minn. Apr. 25, 2006) (Tunheim, J.) (awarding fee representing a 3.9 multiplier); *Wiles v. Sw. Bill Tel. Co.*, No. 09-4236-CV-C-NKL, 2011 WL 2416291, at *4 (awarding fee representing a 2.3 multiplier);

[2] Under the lodestar method, the court multiplies the number of hours each attorney spent on the case by each attorney's reasonable hourly rate, and then adjusts that lodestar figure (by applying a multiplier) to reflect such factors as the risk and contingent nature of the litigation, the result obtained, and the quality of the attorneys' work. *See Jorstad v. IDS Realty Trust*, 643 F.3 1305, 1312-14 (8th Cir. 1981).

Yarrington, 697 F. Supp. 2d at 1065 (awarding fee representing a 2.26 multiplier); *Xcel*, 364 F. Supp. 2d at 999 (awarding fee representing a 4.7 multiplier); *Charter Comm'ns*, 2005 WL 4045741, at *22 (finding 5.61 multiplier to be "within the range of multipliers awarded in comparable complex cases").

The lodestar cross-check here fully supports the requested percentage fee. Plaintiffs' Counsel's lodestar, derived by multiplying the hours spent by each attorney and paraprofessional by their current hourly rates, is approximately $10,009,873.75.[3] *See* Friedman Fees Decl., the Declaration of Karen Hanson Riebel ("Riebel Decl."), the Declaration of Jean Wentz ("Wentz Decl."), and the Declaration of Lee Shalov ("Shalov Decl.") and the exhibits filed concurrently therewith. The requested 33 1/3% fee, which amounts to $20,000,000 (without interest), therefore, represents a multiplier of less than two times Plaintiffs' Counsel's lodestar amount, not including the substantial work still to be done by Plaintiffs' Counsel leading up to the Settlement Hearing and in the claims administration phase. Thus, the 33 1/3% fee is reasonable and warranted given the excellent result obtained by Plaintiffs' Counsel.

In sum, Plaintiffs' Counsel's requested fee is well within the range of what courts in this Circuit and throughout the country commonly award in hard-fought, complex class

[3] The Supreme Court and courts in this Circuit have approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment, inflationary losses, and the loss of interest. *See Jenkins*, 491 U.S. at 284; *Charter Comm'ns*, 2005 WL 4045741, at *17 ("[U]se of current rates is proper, since such rates compensate for inflation and the loss of use of funds[.]"); *Hughes v. Furniture on Consignment, Inc.*, No. 4:04-CV-3368, 2005 WL 3132345, at *1 (D. Neb. Nov. 22, 2005) (courts may "compensate for any delay in payment (time value of money) by calculating the lodestar in current dollars (the current hourly rate rather than the historical rate)").

actions such as this one, whether calculated as a percentage of the fund or in relation to Plaintiffs' Counsel's lodestar.

IV. OTHER FACTORS CONSIDERED BY COURTS IN THIS CIRCUIT CONFIRM THAT THE REQUESTED 33 1/3% FEE IS FAIR AND REASONABLE.

Courts in the District of Minnesota generally consider the following factors when reviewing the reasonableness of a request for attorneys' fees as a percentage of a common fund:

> (1) the benefit conferred on the class, (2) the risk to which plaintiffs' counsel were exposed, (3) the difficulty and novelty of the legal and factual issues in the case, (4) the skill of the lawyers, both plaintiffs' and defendants', (5) the time and labor involved, (6) reaction of the class, and (7) the comparison between the requested attorney fee percentage and percentages awarded in similar cases.

Yarrington, 697 F. Supp. 2d at 1062; *accord Xcel*, 364 F. Supp. 2d at 993; *Krueger*, 2015 WL 4246879, at *1. Courts also consider the public policy considerations in support of payment of reasonable attorneys' fees. *See, e.g.*, *Charter Comm'ns*, 2005 WL 4045741, at *18. Each of these factors, together with the analyses above, supports the reasonableness of the requested fee.

A. The Benefit Conferred on the Class Supports the Requested Fee.

The benefit conferred on the Class and the quality of the result achieved are important factors in evaluating the reasonableness of requested attorneys' fees. *See Xcel*, 364 F. Supp. 2d at 994. The benefit conferred on the Class here is a cash settlement in the amount of $60 million. The $60 million represents a substantial portion of the entire Class out-of-pocket costs for Download Insurance. That sum will also likely provide

Class members that submit approved claims more than 100 cents on the dollar for the Download Insurance purchased. This Settlement therefore confers a substantial immediate benefit on the Class in contrast to the additional delays, costs, and uncertainty of continued litigation. Moreover, as discussed below, the $60 million settlement is particularly remarkable in light of the significant risks in establishing liability and damages in this Action.

B. The Risks of the Litigation Support the Requested Fee.

In a case undertaken on a contingent fee basis, the risk of the litigation is a key factor in determining an appropriate fee award. *See In re Zurn Plumbing Prod. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2013 WL 716460, at *3 (D. Minn. Feb. 27, 2013) ("[T]he risk of receiving little or no recovery is a major factor in awarding attorney fees[.]") (citing *Xcel*, 364 F. Supp. 2d at 994).). It is appropriate to take this contingent fee risk into account when determining the appropriate fee award. *See id*. ("Throughout this litigation, class counsel invested significant time and expense and faced real risk in cases that involved vigorously contested allegations, considerable discovery efforts, and complex issues of fact and law."). "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." *Pa. v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 736 (1987) (citation omitted).

For purposes of analyzing attorneys' fees, the risks of the litigation must be considered as they existed at the commencement of the Action. *See Xcel*, 364 F. Supp. 2d at 994. "Little about litigation is risk-free, and class actions confront even more

substantial risks than other forms of litigation." *Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, No. 01-CV-11814, 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004). Moreover, the risks did not dissipate as the litigation progressed.

While Plaintiffs' Counsel believed that the claims of Plaintiffs and the Class had substantial merit, Plaintiffs' Counsel recognized that this case presented substantial risks and uncertainties from the time it was filed, which made it far from certain that any recovery would ultimately be obtained for the Class. If Defendants were to have prevailed, the Class—and therefore Plaintiffs' Counsel—would receive nothing. (Friedman Final Approval Decl. ¶ 69.)

Plaintiffs' Counsel succeeded in obtaining certification of a nationwide class in this litigation, a rare and impressive feat. Plaintiffs' Counsel also defeated Defendants' well-researched and drafted motions to dismiss, motions for summary judgment, and motions to exclude certain of Plaintiffs' experts' testimony. (Friedman Final Approval Decl. ¶¶ 11; 33; 42-43.)

None of these successes were guaranteed at the onset of litigation. However, even after these substantial successes, Plaintiffs' Counsel still faced substantial legal hurdles. To succeed on their various claims at trial, Plaintiffs would have needed to prove, among other things: (1) that Defendants' misrepresentations and omissions regarding Download Insurance were material—*i.e.*, that customers would not have purchased EDS or NDI had they known about the free alternatives or would not have paid as much for the service had the free alternative been disclosed; (2) that class members suffered damages as a result of their purchase of the Download Insurance; and (3) the extent of the damages on a class-

wide basis. These significant legal obstacles and defenses rendered recovery in this case uncertain and could have affected the amount of any potential recovery.

Defendants have vigorously defended against the allegations made by Plaintiffs and would be expected to continue to do so should this action proceed through trial. Defendants deny that they misrepresented EDS or NDI or participated in any other wrongdoing. Defendants would likely argue, among other things, that: (1) EDS and NDI were of real value to customers because the free alternatives were not the same as either EDS or NDI and did not render EDS or NDI "unnecessary" or "worthless"; (2) that Defendants had no duty to disclose the free alternatives at the point of sale; (3) that the free alternatives would not have worked for all customers and it would have been misleading for Defendants to tell consumers that EDS and NDI were unnecessary; (4) that the failure to disclose the free alternatives did not cause customers to suffer any legally cognizable harm; and (5) that Plaintiffs cannot establish their claims on a class-wide basis. While Plaintiffs do not agree with Defendants' analysis, they recognize that succeeding at trial was far from certain.

Furthermore, even if successful at trial, Defendants would likely have appealed both the verdict and the certification of the Class in the first place. This risk added to the uncertainty of securing meaningful relief to the Class.

In the face of these uncertainties regarding the outcome of the case Plaintiffs' Counsel undertook this case on a wholly contingent basis, knowing that the litigation could last for years and would require the devotion of a substantial amount of attorney time and a significant expenditure of litigation expenses with no guarantee of

compensation. "There are numerous class actions in which plaintiffs' counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise." *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 WL 3148350, at *32 (N.D. Tex. Nov. 8, 2005). Plaintiffs' Counsel's assumption of this contingency fee risk supports the reasonableness of the requested fee.

C. The Difficulty, Novelty, and Complexity of the Action Support the Requested Fee.

The magnitude and complexity of the Action and the difficulty and novelty of the legal and factual issues involved also support the requested fee. As noted above and the in the Friedman Final Approval Decl., the litigation raised a number of complex factual and legal questions that required extensive efforts by Plaintiffs' Counsel and consultation with experts to resolve. Plaintiffs' Counsel successfully defeated motions to dismiss and, to build the case, engaged in extensive discovery, including reviewing nearly 2 million pages of documents and taking or defending over 20 fact and expert depositions.[4] (Friedman Final Approval Decl. ¶¶ 11; 18; 20; 30; 41.) Plaintiffs' Counsel also succeeded in an unusual attempt to certify a nationwide class applying two different states' laws, despite lacking indication that Class Members had all seen or read the misrepresentation at issue and an attempt to strike Plaintiffs' damages expert's report. (*Id*. ¶¶ 31-35.)

In prosecuting this Action, Plaintiffs' Counsel also relied on a complex theory detailed by one of their experts (a "conjoint analysis") to prove the extent of damages and

[4] The discovery process included several hotly-contested discovery-related disputes. (Friedman Final Approval Decl. ¶¶ 14-17.)

to show that Defendants' misstatements and omissions were manifested in the cost of the Download Insurance. Thus, not only was the conjoint analysis used to create a damage model for the entire Class, but it was also used to meet the "materiality" standard for Plaintiffs' CLRA and CFA claims. By showing that the price of the Download Insurance was greatly inflated because of the alleged deceptive misstatements and omissions, this would also support the conclusion that Defendants' conduct "caused" injury to the members of the Class, obviating any arguments that individual reliance issues might predominate. (*Id*. ¶¶ 31-32, 34-35.) The application of this relatively unusual damage and causation theory required significant research and analysis, and Plaintiffs' Counsel spent a significant amount of time with their experts advancing these theories and successfully defeating Defendants' *Daubert* challenges to their experts. (*Id*. ¶¶ 43, 71.) Conversely, Plaintiffs' Counsel succeeded in limiting the scope of Defendants' experts' testimony. (*Id*. ¶ 46.)

Accordingly, the complexity of this Action and the novelty and difficulty of issues raised support the conclusion that the requested fee is reasonable and fair.

D. The Skills of the Lawyers Involved and the Quality of Plaintiffs' Counsel's Representation Supports the Requested Fee.

The quality of the representation provided by Plaintiffs' Counsel is also an important factor that supports the reasonableness of the requested fee. As demonstrated in their respective firm resumes (attached to the Friedman Decl. as Exhibits 2-5), each of the firms is highly experienced in the field of consumer law and/or class actions. Plaintiffs' Counsel have had substantial success litigating such actions and other complex

litigation both in this District and across the country. The skill and extensive experience of counsel in complex litigation is relevant in determining fair compensation. *See Xcel*, 364 F. Supp. 2d at 995; *Teachers' Ret. Sys.*, 2004 WL 1087261, at *7. Plaintiffs' Counsel prosecuted this Action with great persistence, skill, and creativity and believe that the quality of the result obtained for the Class provides strong evidence of the quality of Plaintiffs' Counsel's representation.

Courts have repeatedly recognized that the quality of the opposition faced by plaintiffs' counsel should also be taken into consideration. *See, e.g.*, *Yarrington*, 697 F. Supp. 2d at 1063 (fact that defendant's attorneys "consist of multiple well-respected and capable defense firms" which "consistently challenged Plaintiffs throughout the litigation" supported class counsel's request for fees); *In re Adelphia Comm'ns Corp Sec. & Derivative Litig.*, No. 03 MDL 1529, 2009 WL 3378705, at *3 (S.D.N.Y. Nov. 26, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsel's work"); *Teachers Ret. Sys.*, 2004 WL 1087261, at *7 ("The quality of opposing counsel is also relevant in evaluating the quality of services rendered by Plaintiffs' Counsel.").

Here, Symantec was represented by Latham & Watkins, LLP and Gaskins Bennett Birell Schupp LLP and Digital River was represented by Skadden Arps Slate Meagher & Flom. There can be no doubt that these counsel represented their clients skillfully and zealously throughout this litigation. Notwithstanding this formidable and well-financed opposition, Plaintiffs' Counsel's ability to present a strong case and demonstrate their

willingness to continue to vigorously prosecute the Action for four years enabled them to achieve a favorable settlement for the benefit of the Class.

E. Time and Labor Expended by Plaintiffs' Counsel Support the Requested Fee.

Plaintiffs' Counsel has expended nearly 20,000 hours prosecuting this Action. (*See* Friedman Decl., Riebel Decl., Wentz Decl., and Shalov Decl. and the exhibits filed concurrently therewith.) Plaintiffs' Counsel's efforts included (1) conducting an extensive factual investigation into the alleged fraud; (2) drafting two complaints; (3) reviewing and analyzing over 575,000 documents; (4) taking 15 fact depositions of current or former Symantec and Digital River employees; (5) defending Plaintiffs' depositions; (5) deposing Defendants' four expert witnesses; (6) interviewing and preparing Plaintiffs' expert witnesses; (6) defending depositions of Plaintiffs' three expert witnesses; (7) successfully opposing Defendants' motions to dismiss; (8) successfully moving for certification of a nationwide Class applying two different state's laws; (9) successfully opposing Defendants' motion for summary judgment; (10) successfully opposing Defendants' motions to exclude certain of Plaintiffs' expert witnesses' testimony; (11) successfully limiting the scope of Defendants' experts' testimony; (12) preparing for and participating in a mock jury trial with the assistance of a jury consultant; (13) preparing for trial, including preparing jury instructions, verdict forms, exhibits, *voir dire*, deposition video and transcript designations, and motions *in limine*; and (14) engaging in extensive settlement negotiations over the course of four years with noted mediators. (*Id*. ¶¶ 5-6; 11; 13; 18; 20; 30; 33-34; 41-43; 46; 49; 50-52.)

Throughout the litigation, Plaintiffs' Counsel staffed the matter efficiently and took steps to avoid duplication of effort. (Friedman Fee Decl. ¶¶ 2, 4.) Plaintiffs' Counsel sought to prosecute this Action in the most cost-efficient manner possible, consistent with their obligation to vigorously represent the interests of the Class. Plaintiffs' Counsel have had an economic incentive to litigate efficiently because they understood that their time and expenditures would only be reimbursed, if at all, at the conclusion of the Action by verdict or settlement. To that end, Plaintiffs' Counsel divided work among the firms, as well as individual attorneys at those firms, to minimize duplication, including assigning specific responsibility for particular tasks and/or subject areas. (*Id*.)

The significant amount of time and effort devoted to this case by Plaintiffs' Counsel and the efficient and effective management of the litigation confirm that the fee request here is reasonable.

F. The Reaction of the Class to Date Supports the Requested Fee.

To date, the reaction of class members to the settlement, as evidenced by the number of objections and opt-outs submitted, has been overwhelmingly positive, which also supports the requested fee. To date, the Settlement Administrator has disseminated the Notice to approximately 14 million potential Class members informing them, among other things, that Plaintiffs' Counsel intended to apply to the Court for an award of attorneys' fees of up to 33 1/3% of the Settlement Fund, as well as for reimbursement of reasonable expenses and costs. Declaration of Jennifer M. Keough filed in Support of Motion for Final Approval [Dkt. No. 406, Ex. 6] ("Keough Decl.") ¶¶ 8-9; Exhibits A &

B thereto. While the time to object to the fee and expense application does not expire until December 21, 2015, to date, only two objections have been received. (Keough Decl. ¶ 17.) Plaintiffs' Counsel will address any objections in their reply papers.

G. A Comparison of Similar Cases Supports the Requested Fee.

As discussed in detail in Section III above, the requested 33 1/3% fee is well within the range of percentage fees that courts in this Circuit and around the country have awarded in comparable cases.

H. Public Policy Considerations Support the Requested Fee.

A strong public policy concern exists for rewarding firms for bringing successful litigation, in order to provide talented counsel with incentive to bring these actions and help deter future wrongdoing. *See Charter Comm'ns*, 2005 WL 4045741, at *19 ("[P]ublic policy favors the granting of [attorneys'] fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions[.]"); *FLAG Telecom*, 2010 WL 4537550, at *29 (if the "important public policy is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook"). Accordingly, public policy favors granting Plaintiffs' Counsel's fee and expense application here.

V. PLAINTIFFS' COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED.

Plaintiffs' Counsel's fee application includes a request for reimbursement of litigation expenses that were reasonably incurred and necessary to the prosecution of this Action. (Friedman Fees Decl. ¶ 7; Riebel Decl. ¶ 6; Wentz Decl. ¶ 7; Shalov Decl. ¶ 7.) These expenses are properly recovered by counsel. *See Yarrington*, 697 F. Supp. 2d at 1067 ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed . . . . The requested costs must be relevant to the litigation and reasonable in amount.") As set forth in detail in the Friedman Fees Declaration and the exhibits filed concurrently herewith, Plaintiffs' Counsel collectively incurred $738,605.19 in litigation expenses on behalf of the Class in the prosecution of the Action. The expenses for which Plaintiffs' Counsel seek reimbursement are the types of expenses that are necessarily incurred in litigation and routinely billed to clients billed by the hour. These expenses include, among others, court fees, service of process fees, expert fees, costs of maintaining a database for the over 575,000 documents produced in discovery, computerized legal and factual research, mediation costs, travel expenses, photocopying, long distance telephone and facsimile charges, postage and delivery expenses, and filing fees. *Id.* These expense items are billed separately by Plaintiffs' Counsel, and such charges are not duplicated in the firms' hourly billing rates. *Id*. Reimbursement of these expenses is fair and reasonable. *See, e.g.*, *Yarrington*, 697 F. Supp. 2d at 1067; *Xcel*, 364 F. Supp. 2d at 999-1000; *Charter Comm'ns*, 2005 WL 4045741, at *24.

The Notice informed potential Class Members that Plaintiffs' Counsel would apply for reimbursement of litigation expenses, which may include the reasonable costs and expenses of Plaintiffs' Counsel directly related to their representation of the Class.

The total amount of expenses requested is reasonable.

VI. THE SERVICE AWARDS FOR THE NAMED PLAINTIFFS ARE APPROPRIATE AND REASONABLE.

The services provided by the named plaintiffs in this action should not go without financial recognition. While service as a representative is not a profit-making position, the law recognizes that it is appropriate to make modest payment in recognition of the services that such plaintiffs perform in successful class litigation. *See, e.g.*, *Yarrington*, 697 F. Supp. 2d at 1068 (upholding service awards and recognizing that "unlike unnamed Class Members who will enjoy the benefits of the Settlement without taking on any significant role, the Named Plaintiffs made significant efforts on behalf of the Settlement Class and participated actively in the litigation").

Respectfully, the Plaintiffs' services in this case support a request for a $10,000 service award to each of the named plaintiffs.[5] These Class Representatives were the principal catalysts to achieving this result for the Class. In this case, as in *Yarrington*, the Class Representatives "each participated in numerous lengthy interviews by Settlement Class Counsel; assisted in responding to multiple discovery requests; [and] were deposed by [Defendants]." (Friedman Final Approval Decl., ¶ 75.) In addition, they participated

[5] Pursuant to the Settlement Agreement, up to $7,500 of the service awards are to be paid by Defendants outside of the Settlement Fund, with any remaining award coming out of the Settlement Fund. *See* Settlement Agreement attached to the Friedman Final Approval Decl. as Exhibit 1 at Section 3.1.2.

in numerous conferences and meetings with their attorneys, and stayed informed of significant developments in the case. (*Id*.) "The valuable efforts of the Named Plaintiffs, their willingness to litigate and pursue their representative claims, and the strength of their claims, have resulted in a settlement that will benefit all Settlement Class Members." *Yarrington*, 697 F. Supp. 2d at 1069.

Consistent with the law and the terms of the Settlement Agreement, it is appropriate to make these payments to the Class Representatives. Moreover, here, as in *Yarrington*, the service awards requested "are at the modest end of the spectrum, especially considering the total amount of the Settlement Fund." *Id*.; *see also* *Zilhaver v. UnitedHealth Group, Inc.*, 646 F.Supp.2d 1075, 1085 (D. Minn. 2009) (awarding two lead plaintiffs $15,000 incentive awards from a common fund settlement of $17,000,000); *Xcel*, 364 F. Supp. 2d at 1000 (awarding $100,000 collectively to a group of eight lead plaintiffs); *In re Employee Benefit Plans Sec. Litig.*, No. 3–92–708, 1993 WL 330595, at *7, (D. Minn. June 2, 1993) (approving attorneys' fees of 33.3% and incentive awards of $5,000 to each of the three representative plaintiffs from a common fund settlement of $10.7 million).

Plaintiffs' Counsel therefore request that the Court approve the requested service awards of $10,000 to each of the two named Plaintiffs.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court award Plaintiffs' Counsel the payment of 33 1/3% of the Settlement Fund in attorneys' fees, reimburse $738,605.19 in expenses, and approve the payment of $20,000 to be distributed as $10,000 service awards to both of the Class Representatives.

DATED this 7th day of December, 2015

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

DEVI KHODAY and DANISE TOWNSEND, on behalf of themselves and all others similarly situated, Plaintiffs, v. SYMANTEC CORP., and DIGITAL RIVER, INC., Defendants.	Civil Action No. 11-CV-00180 (JRT-TNL) CLASS ACTION **LR 7.1(d) WORD COUNT COMPLIANCE**

This brief complies with the word limitation of LR 7.1(d) because this brief contains 6,281 words, including all text, headings, footnotes, and quotations, other than the parts of the brief exempted by LR 7.1(d). This brief was prepared using Microsoft Word 2010.

This brief complies with the type size requirements of LR 7.1(f) because this brief was prepared using at least font size 13, is double-spaced (except for headings, footnotes and quotations that exceed two lines) and is submitted on 8½" by 11" paper with at least one inch margins on all four sides.

Date: December 7, 2015

Respectfully submitted,

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