IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE NCS HEALTHCARE, INC. SHAREHOLDER LITIGATION	:	Consolidated C.A. No. 19786

PLAINTIFFS' REPLY BRIEF
IN SUPPORT OF APPLICATION
FOR ATTORNEYS' FEES AND EXPENSES

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INTRODUCTION

Plaintiffs submit this brief in response to the four objections to plaintiffs' application for attorneys' fees and expenses which have been filed, respectively, by (1) Omnicare Inc. and its now wholly owned subsidiary NCS Healthcare Inc. ("NCS") ("collectively "Omnicare"); (2) two former NCS directors, defendants Sells and Osborne; (3) the other two former NCS directors, defendants Outcalt and Shaw; and (4) Ramius Capital ("Ramius"), a former NCS shareholder. Because there is considerable overlap in the objections, plaintiffs will discuss the objections collectively, without distinguishing between them except where discrete issues have been raised by fewer than all objectors.

Three themes predominate in the objections. First, according to the objectors, Sugarland Indus. Inc. v. Thomas, 420 A.2d 142 (Del. 1980) dictates that a lesser percentage of the benefit should be accorded to the post-injunction increase in the price Omnicare paid for NCS (raising its bid from $3.50 per share to $5.50 per share). The objectors concede, either explicitly (e.g., Ramius Br. at 12) or implicitly, as they must on this record, that plaintiffs satisfy the cause and effect test for fee awards as to that $2.00 per share bump by "opening the door" to the post-injunction auction (see Sugarland, 420 A.2d at 150-151). They say, however, that plaintiffs and the litigation had nothing to do with Omnicare's willingness to pay as much as $5.50 per share for NCS so the percentage award for the $2.00 per share increase should be modest. Second, the objectors argue this is a "megafund" case, calling for a lesser percentage of the benefit for fee determination purposes. Third, the objectors claim that the percentage of the benefit should be discounted to take account of the contribution of Omnicare's counsel in discovery and briefing before this Court and the Delaware Supreme Court.

Plaintiffs will discuss each of these themes *seriatim*. Before doing so, mention should be

made of the quantum of benefit to which the fee percentages should be applied. In their opening brief, plaintiffs estimated the benefit at $102,000,000, based on publicly available information concerning the number of NCS shares and options acquired or extinguished in the Omnicare acquisition. Defendants Osborne and Sells point out that that calculation includes 634,758 out-of-the-money options and 358,167 options exercisable at $4.25 per option. Sells and Osborne Br. at 7, 8. Taking those options into account, the benefit is about $99,000,000. Id. Plaintiffs have no reason to doubt the accuracy of this calculation, so the benefit may be valued at $99,000,000 rather than $102,000,000.

I. THIS CASE DIFFERS FROM SUGARLAND

As this Court observed at the hearing on plaintiffs' application for a temporary restraining order ("TRO"), "each case presents a unique set of facts and circumstances and considerations. . ..". Feb. 2, 2003 Tr. at 30. To state the obvious: this case is not Sugarland, and Sugarland is not this case. Indeed, as Chief Justice Veasey states in his dissenting opinion, this case is "unique". Omnicare, Inc. v. NCS Healthcare and Miles v. Outcalt, ____ A.2d ____, 2003 WL 1787943, *21 (Del.) (hereinafter "Supr. Ct. Op.") (Ex. A hereto). Outcalt and Shaw agree. Outcalt and Shaw Br. at 8.

In Sugarland, plaintiffs' attorneys represented Sugarland shareholders and a hostile bidder for Sugarland's "South Tract", a property which Sugarland had agreed to sell for less than the hostile bidder offered. After just two weeks of litigation, the Court of Chancery enjoined the Company's agreed-to deal and ordered the South Tract to be auctioned. See 420 A.2d at 144-145. A third party ("Hines") outbid the hostile bidder for the South Tract and also purchased another Sugarland

property called the North Tract. So ended "Phase I" of Sugarland[1].

The Court of Chancery awarded plaintiffs' counsel 20% of the "fund" created through their efforts ($44,000,000 minus $23,800,000 or about $21,812,000) with a $3,000,000 cap. The Supreme Court agreed with the 20% award, but only as to the difference between the agreed-to price ($23,800,000) and the hostile bid ($27,000,000). The Supreme Court reduced to 5% the percentage to be applied to the balance of the economic benefit the Company realized from the injunction. The Court reasoned that plaintiffs' counsel could not "take full credit for the price which Hines was willing to pay for both tracts." 420 A.2d at 151.

The objectors here play up the Supreme Court's decision to reduce the fee percentage in Sugarland from 20% to 5% for the incremental amount Hines was willing to pay for Sugarland's properties. In doing so, the objectors gloss over the fact that the Supreme Court affirmed the 20% award for the difference between the price Sugarland's favored suitor was willing to pay and the price the hostile bidder offered. The objectors also fail to acknowledge the fact that plaintiffs' counsel in Sugarland had been retained on a non-contingent fee basis. Rather, they had received an initial retainer and were guaranteed payment of most of their hourly billing rates and all expenses (while reserving the right to seek a court-awarded fee), a fact which the Supreme Court noted in fixing the percentages awarded to plaintiffs' counsel. 420 A.2d at 151. Finally, the objectors ignore the facts that both this Court and the Supreme Court approved an award of attorneys fees for, among other things, the sale of the North Tract which was not even a subject of the litigation; and, as noted above, the litigative efforts that led to the injunction in Sugarland lasted only two weeks from beginning to end.

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[1] A second action ("Phase II") lasted over four years and led to a non-monetary settlement, with a $500,000 fee award to plaintiffs' counsel.

This case and Sugarland are different. Here, there was no disconnect between pre- and post-injunction events. Omnicare's bid of $5.50 per share represented the end-point of a continuous flow of events. By late July 2002, it was manifest that Genesis and Omnicare were the only parties eager to bid for NCS (as contrasted with Sugarland where Hines emerged only in the post-injunction phase). The injunction thwarted Genesis's deal to buy NCS for approximately $1.60 worth of Genesis stock for each NCS share. Genesis immediately raised its bid to $3.50 worth of Genesis stock, i.e., more than doubling its offer. That move prompted Omnicare to respond within hours with what proved to be a preemptive bid at $5.50 per share. Plaintiffs urge the Court to reject out-of-hand the contention put forward by the former NCS directors -- the same persons who committed to sell NCS for $1.60 worth of Genesis stock per NCS share -- that "[a]fter the Genesis merger was enjoined the shareholders could have been left with no transaction, on the brink of bankruptcy", suggesting there was little relationship or causal connection between pre- and post-injunction events, Shaw and Outcalt Br. at 11. That comment defies reality and credence. Their attempt to claim large credit for the post-injuction auction and the ultimate Omnicare - NCS deal is equally stupefying.[2] Id.

Moreover, this case involved (1) extraordinary litigation risks; (2) "new" principles in the jurisprudence of mergers and acquisition (Chief Justice Veasey dissenting, Sup. Ct. Op. at *22, *26; Justice Steele dissenting, Supr. Ct. Op. at *29); (3) "unique" and "highly complex" facts (Chief Justice Veasey at *21; this Court's November 26, 2002 Order Refusing Certification at p. 7, ¶11); (4) daunting time pressures; and (5) highly skilled, resourceful adversaries in a fierce no-holds-

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[2] Defendants Shaw and Outcalt have the temerity to say that "Omnicare and Genesis continued to negotiate with NCS, in large part because of the groundwork already laid by NCS." Br. at 11. [Emphasis added].

barred defense.

In short, this case differs from Sugarland and should be judged on its own facts and circumstances. Sugarland espouses flexibility in fee awards, taking into account all the factors which pertain to fairness and reasonableness.

II. THE MAGNITUDE OF THE BENEFIT IN THIS CASE DOES NOT WARRANT AN EXCESSIVE DISCOUNT

In analyzing Sugarland, the objectors ask the Court to separate plaintiffs' fee application into two parts, pre- and post-injunction. At the same time, the objectors ask the Court to view this as a unitary case in which plaintiffs are seeking compensation for an almost $100,000,000 benefit which in the objectors' view, classifies this as a "megafund" case, with correspondingly reduced percentages for fee determination purposes.

Defendants' inconsistent arguments illustrate why catch-words or tags to establish bright-line standards for fee awards are poor substitutes for informed, deliberative judgment. Some of the flaws in the megafund approach are delineated in the Seventh Circuit's decision in In re Synthroid Marketing Litig., 264 F.3d 712 (7th Cir. 2001). In chiding the District Court for rigidly employing a definition of megafunds, the Seventh Circuit said:

> The district judge defined megafunds as settlements of $75 million and up. Fees in "megafund" cases should be capped at 10% of the recovery, the judge held, although she recognized that fees of 30% and more are common and proper in smaller cases. This means that counsel for the consumer class could have received $22 million in fees had they settled for $74 million but were limited to $8.2 million in fees because they obtained an extra $14 million for their clients (the consumer fund, recall, is $88 million). Why there should be such a notch is a mystery. Markets would not tolerate that effect; the district court's approach compels it. A notch could be avoided if the 10% cap in "megafund" cases were applied only to the *portion* of the recovery that exceeded $74 million, but that is not what the district court did; it capped fees at 10% of the whole fund. Under the court's ruling, a $40 million settlement would have led to the same

> aggregate fees as the actual $132 million settlement. Private parties would never contract for such an arrangement, because it would eliminate counsel's incentive to press for more than $74 million from the defendant. Under the district court's approach, no sane lawyer would negotiate a settlement of more than $74 million and less than $225 million; even the higher figure would make sense only if it were no more costly to obtain $225 million for the class than to garner $74 million.

264 F.3d at 718.

In In Re: Digex Inc. Shareholders Litig., Del. Ch., Cons. C.A. No. 18336, Chancellor Chandler noted that in megafund recoveries in the Federal Courts, the "typical common fund percentage awarded is in the range of anywhere from 3 to 7 percent." Digex, April 6, 2001 Tr. at 146 (Ex. B hereto). Nonetheless, the Chancellor awarded a fee outside that range and, as this Court noted at the TRO hearing:

> Even a range between 3 and 7 percent is itself such a broad range as to not be very useful; and then to award a fee outside of that range, as was done in Digex, if anything, just shows it's a difficult business to try to say what a normal range of what a fee should be.

January 21, 2003 Tr. at 30 (Ex. C hereto), showing that in fee decisions, like many other judgmental endeavors, the selective compilation of statistical data is seldom helpful.

Plaintiffs submit that the Delaware approach to fee awards is much preferable to the rigid megafund concept urged by the objectors. The Delaware approach contemplates flexibility and permits each case to be decided on its own facts with guidance, of course, from Sugarland and its progeny.

To be sure, as the objectors point out, the trend in Delaware jurisprudence is the larger the benefit, the smaller the percentage for fee award purposes. But that approach, like all other considerations in fixing fair and reasonable fee awards, must be applied in the context of the specific case before the Court. For example, multi-million dollar benefits in prior cases often resulted from

the sheer magnitude of the number of shares involved,[3] although the percentage increase was modest. Here, the benefit to the former NCS shareholders is substantial not only in absolute dollar amount, but also in the percentage increase over the value of the Genesis merger. The Omnicare acquisition at $5.50 per NCS share is 3.4 times or 340% greater than the value of the Genesis deal. In the aggregate, the almost $100,000,000 benefit is 250% more than the entire value of the Genesis merger. Plaintiffs submit that these astounding numbers, almost unprecedented in the annals of transactional litigation, represent a feature of this case which must be taken into account in determining fair and reasonable compensation. Shareholder plaintiffs should be encouraged to seek top dollar, not penalized for doing so.

III. COUNSEL'S SERVICES

In his affidavit, Richard Bemporad, one of plaintiffs' attorneys, describes the collaborative services performed by plaintiffs' counsel and Omnicare's counsel. The former NCS directors and Ramius put their own "spin" on Mr. Bemporad's description of those services in a transparent effort to denigrate the contribution of plaintiffs' counsel (although they take pains to state that that is not their objective (e.g. Ramius Br. at 9, fn. 5)). It is telling that Omnicare, which has direct knowledge of the services of its own attorneys and plaintiffs' attorneys, does not do the same. To the contrary, Omnicare starts its brief with the following compliment to plaintiffs' attorneys:

> Omnicare respects and is grateful for the efforts of Plaintiffs' counsel. They worked hard to help achieve a superb result and, without their efforts, stockholders of NCS would likely have been relegated to an inferior stock-for-stock merger with Genesis. . ..

Omnicare Br. at 1. See also Ramius Br. at 10 ("Plaintiffs' counsel provided excellent representation

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[3] See, e.g., Joseph v. Shell Oil Co., Del. Ch., C.A. No. 7450, Hartnett, V.C. (April 19, 1985) (where there were 100 million shares at issue, 3.33% increase in per-share merger consideration from $58 to $60 produced a $200 million benefit).

to the class in difficult litigation, for which they are entitled to a significant fee").

It would be pointless to try to embellish on the Bemporad affidavit by attempting to quantify in words or percentages or by some other comparative means the joint and individual contributions of plaintiffs counsel *vis a vis* Omnicare's counsel.[4] Omnicare does not try, nor will plaintiffs. What is significant is that Omnicare was dismissed from the litigation, and plaintiffs and their counsel had to "carry the ball" thereafter, and did so in exemplary fashion. As this Court said at the Temporary Restraining Order hearing:

> THE COURT: Plaintiffs are the only reason that the first deal didn't happen.
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> * * *
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> THE COURT: It's only because of the litigation, just to repeat myself, that -- and I think this is very different than in a case you're citing [MCA, McCaw, North American Phillips]. Had it not been for the efforts of the plaintiffs, your board would have concluded the first transaction it negotiated with Genesis.
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> * * *
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> THE COURT: That didn't happen. They're the only reason -- they and the decision of the Supreme Court, they are the only reason there was any opportunity for Omnicare to -- to negotiate a transaction with the company.

January 2, 2003 Tr. at 21-22 (Ex. C hereto) (cases cited by NCS counsel at 20).

As plaintiffs said in their opening brief, after this Court dismissed Omnicare's fiduciary duty claims for lack of standing, "the role of plaintiffs' counsel became indispensable and, in the Supreme Court, determinative". PB at 7. The objectors do not dispute this statement nor can they because it is fact.

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[4] As but one example, Ramius is mistaken in believing that "it makes sense that Omnicare's counsel assisted plaintiffs' counsel in its preparation for oral argument. . .". Ramius Br. at 17. In fact, that did not happen in connection with the successful Supreme Court argument.

IV. PLAINTIFFS SEEK A FAIR AND REASONABLE FEE AWARD

A fee award must be fair both to the petitioning attorneys and to the beneficiaries of their efforts. Fairness to the beneficiaries is the linchpin of reasonableness and the underpinning of the Court's responsibilities in awarding fees. Goodrich v. E.F. Hutton Group, Inc., 681 A.2d 1039, 1046 (Del. 1996). Plaintiffs submit that the objectors have a rather perverse view of fairness. Ramius, a former NCS shareholder, states that a fee award of about $4,800,000 would be fair (Ramius Br. at 18, 22), only $2,300,000 more than the minimum amount Omnicare has agreed to pay on account of the fee award.[5] That means that Ramius believes fairness translates into assessing the beneficiaries of this action only about 7½ cents out of a gross benefit of $3.90 per share for each of the more than 25,000,000 shares and options held by the former NCS shareholders.[6] Defendants Sells and Osborne, who advocate a fee award of approximately 5% of the almost $100,000,000 benefit (Sells and Osborne Br. at 24), argue in the same sphere of fairness (or, more accurately, the lack thereof). Defendants Shaw and Outcalt, who have reaped millions of dollars from plaintiffs' services, are even more covetous. They advocate an award between $2,934,000 -- which means they want to pay virtually nothing out of their own pockets -- and $3,930,000, less than 5 cents per NCS

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[5] Defendants Sells and Osborne take plaintiffs to task for asserting that Omnicare's agreement to pay $2,500,000 to $4,500,000 on account of the fee award is a compensable benefit. Br. at 9, fn. 5. This cavil is perplexing because at no point in plaintiffs' submissions did or do plaintiffs add the dollar amount of Omnicare's agreement to the benefit for which plaintiffs seek compensation. However, it is a fact that NCS's former shareholders will be relieved of a portion of their obligation to pay plaintiffs' attorneys. As the Delaware Supreme Court recently held in upholding the settlement of Shapiro v. Quickturn Design Systems, Inc., C.A. No. 16850 (Del. Ch.), that type of agreement constitutes adequate consideration for settlement of a class action. Mentor Graphics Corp. v. Shapiro, _____ A.2d _____, 2003 WL 1572129, *3 (Del.) (Ex. D hereto).

[6] Omnicare has agreed to pay the first $2,500,000 of the fee award and 18.18% of the balance with a cap of $4,500,000. Hence, Omnicare would pay $2,500,000 plus $418,140 of a $4,800,000 award; the former NCS shareholders would pay only about $1,880,000 or 7 ½ cents per share.

share. Shaw and Outcalt Br. at 18. Omnicare proposes an award of $3.5 million (Omnicare Br. at 23), or less than 3½ cents per NCS share to be paid by the former shareholders for plaintiffs' counsel's services in achieving a $3.90 per share benefit.

Of course, the fee award must be fair to plaintiffs' attorneys as well as the shareholders. Omnicare's contribution, while welcome, does not mean that plaintiffs' application should be measured only by what the former NCS shareholders will pay. The totality of the award must be fair. In this regard, it is noteworthy that, with one exception, the objectors do not take issue with the fact that plaintiffs' application indisputably and overwhelmingly satisfies the Sugarland "elements of the Delaware standard governing fees". 420 A.2d at 149. The objectors do not question the skills applied to this litigation by plaintiffs' counsel, the fact that plaintiffs' counsel's engagement was contingent upon success and the standing and ability of plaintiffs' counsel. Id., citing Chrysler Corp. v. Dann, 223 A.2d at 384 (Del. 1966). Plaintiffs have already discussed the time and effort they have expended (supra. at 7-8), and the result achieved in the litigation speaks for itself.

Omnicare alone questions the complexity element of the fee calculus. Omnicare Br. at 18-19. Since the Court is intimately familiar with the factual and legal issues in this litigation, plaintiffs will let the record speak for itself. As noted above, this Court has already characterized the facts as "highly complex". November 26, 2002 Order refusing certification at p. 7, ¶11. Chief Justice Veasey opines that the majority of the Supreme Court adopted "a new rule of law" to reverse this Court's decision. Supr. Ct. Op. at *22, *26; Justice Steele agrees, Supr. Ct. Op. at *29. The legal and factual issues consumed almost 300 pages of briefing on plaintiffs' motion for a preliminary injunction. Of course, additional briefing was presented to the Supreme Court. This Court wrote a 47 page opinion denying a preliminary injunction and a 9 page order denying certification, not counting the Court's opinion with respect to the application of NCS' charter to the voting agreements

among Shaw, Outcalt and Genesis. In an unprecedented step, the Supreme Court reversed itself and vacated its refusal to hear plaintiffs' appeal. In reversing this Court's decision, the Supreme Court split, three to two, a rare occurrence in the history of the Supreme Court (Supr. Ct. Op. at *21, n.90), and the majority and minority opinions total 87 pages in length. All this bespeaks complexity of the most exceptional kind. Plaintiffs believe Omnicare's *post-hoc* view of this case is just plain wrong.

Plaintiffs have already discussed the extraordinary litigation risks they faced, the cutting edge issues they had to litigate, the daunting time pressures which had to be endured and the stature of their opposition, some of the preeminent law firms in the mergers and acquisitions field, including Skadden Arps Slate Meagher & Flom LLP for NCS and Wachtell Lipton Rosen & Katz for Genesis. And plaintiffs were opposed by the entire four member Board of Directors of NCS who were free of conflicts of interest. It may be noted that in Digex where this Court awarded plaintiffs' counsel 7½ % of the $165,000,000 fund, the independent Digex directors opposed the will of the majority shareholder and its representatives on the Digex Board. Plaintiffs do not suggest that Digex was an easy case, without complexity, but the fact remains that in this litigation plaintiffs faced a steep uphill battle from the start. It is also worthy of note that the fee award in Digex ($12,300,000) amounted to 9 times counsel's lodestar (Digex, April 6, 2001 Tr. at 141, Ex. B hereto), so a $400.00 hourly rate would translate into $3,600 per hour and a $500.00 hourly rate would translate into $4,500 per hour.[7]

It is noteworthy that defendants Sells and Osborne contend that the decision in Dow Jones & Co. v. Shields, 1992 WL 44907 (Del. Ch.) is closely analogous to this case. Sells and Osborne

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[7] Chancellor Chandler recently noted that "$450 to $500 an hour is about the prevailing rate for partners in firms who do complex civil and corporate litigation." In re Ugly Duckling Corp. Shareholders Deriv. And Class Action, Cons. C.A. No. 18746, 4/17/02 Tr. at 84. (Ex. E hereto.)

Br. at 1-2 *et seq*. There, this Court awarded plaintiffs' counsel $5,000,000 for a $95,000,000 benefit. The Delaware Supreme Court remanded that decision to the Court of Chancery to explain its reasons which led to the opinion just cited. The Supreme Court then affirmed once again. (Ex. F hereto). Tellingly, in his opinion, then Vice Chancellor Hartnett noted that "the independent committee significantly contributed to the benefit. . .". 1992 WL 44907 at *3. The Court also said pertinently:

> [I]f this litigation alone had caused the increased tender offer benefit [of $95,000,000], as was the case in Sugarland, plaintiffs' counsel would likely have been entitled to the $8,000,000 they requested and to considerably more, based on comparisons with other similar awards in this Court.

Id. at *2.

Unlike Dow Jones, this litigation is the sole reason why NCS's former shareholders have enjoyed the fruits of the Omnicare acquisition. This fact also distinguishes this case from other fee awards on which the objectors rely, Robert M. Bass Group Inc. v. Evans, 1989 WL 137936 (Del. Ch.); In re Anderson Clayton S'holders Litig., 1988 WL 97480 (Del. Ch.); and In re Dunkin' Donuts Sh'holders Litig., 1990 WL 189120 (Del. Ch.), where plaintiffs' counsel were basically compensated on a quantum meruit basis for the "monitoring" or otherwise secondary role they played in creating benefits for shareholders. Indeed in Anderson Clayton, the shareholder plaintiffs were not even parties to the decisive second injunction action. AC Acquisition v. Anderson Clayton & Co., 519 A.2d 193 (Del. Ch. 1986)

As set forth in plaintiffs' opening brief, plaintiffs evaluated the Sugarland factors and the help they received from Omnicare's counsel in determining to apply for a fee award of $13,500,000, inclusive of expenses. The application represents a substantial discount from fee awards of 20% to

30% which this Court has rendered on prior occasions.[8] Plaintiffs submit their application is fair and reasonable. The award sought represents less than 55 cents per NCS share or about 13.64% of the $99,000,000 benefit. The beneficiaries of this action would only have to pay approximately 35 cents per NCS share, less than 10% of the $3.90 per share difference between the Genesis deal and the Omnicare acquisition (because Omnicare has agreed to pay $4,500,000 toward a $13,500,000 award.) The objectors argue that the application is too high, both in absolute dollar amount and in the percentage sought. The objectors, however, disregard the unique circumstances of this case which make it deserving of a fee award which will take into account the magnitude of the benefit, the labor and skills of plaintiffs' attorneys, the risks they assumed, the complexities of the litigation, the exhausting time pressures they endured and the public policy considerations set forth in plaintiffs' opening brief at p. 18.

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[8] As then Vice Chancellor Hartnett said in Appraisal of Shell Oil Co., 1992 WL 136416 (Del. Ch.) at *25, "fee awards at or near 25% have often been granted" as a result of large benefits after trial.

CONCLUSION

For the foregoing reasons and the reasons set forth in plaintiffs' opening brief and the Affidavit of Mr. Bemporad, plaintiffs submit that their application for an award of $13,500,000, inclusive of expenses is fair and reasonable and should be approved.

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