IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: MI WINDOWS AND DOORS, INC. PRODUCTS LIABILITY LITIGATION	)))	**MDL Docket No. 2333** **ALL CASES**

CONTRACTOR PLAINTIFF'S AMENDED MEMORANDUM IN SUPPORT OF REQUEST FOR AWARD OF ATTORNEYS' FEES AND EXPENSES

Contractor Plaintiff, by and through its counsel, hereby moves this Court for entry of an Order for an award of attorneys' fees and expenses to be paid by Defendant MI Windows and Doors, LLC.

I. BACKGROUND OF CONTRACTOR PLAINTIFF'S EFFORTS IN THIS LITIGATION AND THE SETTLEMENT.

Since April 2012, Contractor Plaintiff has prosecuted its claims against Defendant MI Windows and Doors, Inc. ("MIWD"). These claims have been litigated within this MDL in the United States District Court for the District of South Carolina, a process that has led to a joint nationwide settlement for the benefit of class members which include contractors and homeowners.

The scope of Contractor Plaintiff Counsel's efforts and contributions to this litigation has been significant. Contractor Plaintiff's Complaint alleged fraudulent concealment, breach of express and implied warranties, negligence, unjust enrichment, and also sought declaratory relief. The Contractor Complaint included allegations on behalf of a nationwide class which was the only nationwide class alleged in the MDL until Homeowner Plaintiffs' recently amended their complaint on March 9, 2015. MIWD moved to dismiss the Contractor Complaint in its entirety based on the lack of standing to sue, among other things. The Court denied MIWD's motion to dismiss, in part, and let

stand Contractor Plaintiff's claims for breach of express and implied warranties, as well as its unjust enrichment claim, setting the stage for settling this action nationwide.[1]

This MDL also consists of actions from federal courts in approximately 14 states that were brought by homeowners ("Homeowner Plaintiffs") who purported to represent state-based putative class actions of homeowners that have the Windows in their homes. The actions brought by Homeowner Plaintiffs alleged fraud, negligence, and warranty type claims.

Homeowner Plaintiffs have experienced mixed results, at best, with the various cases pending in the MDL. Several Homeowner Plaintiffs' actions were dismissed in their entirety – more than once – due to legal deficiencies.[2] The remaining actions were narrowed significantly by MIWD's repeated motions to dismiss.[3]

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[1] *See Lakes of Summerville v. MI Windows & Doors, Inc.*, Case No. 2:12-cv-01297-DCN, Dkt. No. 42 (Nov. 1, 2012) (Order denying in part MIWD's motion to dismiss).

[2] *See Hildebrand v. MI Windows & Doors, Inc.*, Case No. 2:12-cv-1261-DCN (MIWD's motion to dismiss granted in its entirety; amended complaint filed and again dismissed in its entirety; second amended complaint filed, motion to dismiss pending); *Kennedy v. MI Windows & Doors*, Case No. 2:12-cv-02305-DCN (MIWD's motion to dismiss granted and complaint dismissed in its entirety; motion to dismiss second amended complaint pending); *McGaffin v. MI Windows & Doors, Inc.*, Case No. 2:12-cv-02860-DCN (amended complaint dismissed in its entirety, motion to dismiss second amended complaint pending); *Walsh v. MI Windows & Doors, Inc.*, (voluntarily dismissed by Homeowner Plaintiffs on December 27, 2012).

[3] For example, in the *Johnson v. MI Windows & Doors, Inc.*, Case No. 2:11-cv-00167-DCN, this Court dismissed Homeowner Plaintiffs' express warranty and unjust enrichment claims due to lack of standing, and left standing strict liability, negligence, and implied warranty claims pending later determination of whether such claims may be barred by the economic loss doctrine or whether they were considered "goods" so as to be covered by implied warranty law. Notably, in his ruling, Judge Norton stated that in order to determine whether the window is considered a "good," one must determine whether the alleged "good" is movable at the time of identification to the contract for sale. Tellingly, Judge Norton also indicated that **courts have found that once a good becomes attached to real estate, it loses its status as a "good."** Accordingly, these claims stood on shaky ground, at best. Further, while the Court left standing *Johnson*

As a result of the Court's rulings, Contractor Plaintiff was the only plaintiff in the MDL that possessed warranty claims that could facilitate a national settlement and also trigger coverage under MIWD's insurance policies. *See* footnote 3, *supra*. Further, Homeowner Plaintiffs' remaining claims suffered from serious deficiencies concerning the economic loss doctrine and other issues, such as whether the Windows were movable "goods" at the time of homeowner plaintiffs' purchase. *See id.* Not only did these deficiencies severely limit the damages that were recoverable by Homeowner Plaintiffs, the deficiencies also affected the ability of Homeowner Plaintiffs to trigger coverage under MIWD's insurance policies. In short, Contractor Plaintiff was the only plaintiff that possessed the vehicle to bring nationwide claims that can trigger coverage under MIWD's insurance policies for damages suffered. Contractor Plaintiff was the driving force behind this settlement because Contractor Plaintiffs' claims were the only viable threat.

Homeowner Plaintiffs' state unfair trade practices claims, under South Carolina law, those claims cannot be brought in a representative capacity, so cannot receive class wide treatment. Other cases filed by Homeowner Plaintiffs have been narrowed significantly. *See Wani v. MI Windows & Doors, Inc.*, Case No. 2:12-cv-01255-DCN (MIWD's partial motion to dismiss plaintiff's unjust enrichment, fraudulent concealment, and Ohio Consumer Sales Practices Act claims granted); *Deem v. MI Windows & Doors, Inc.*, Case No. 2:12-cv-02269-DCN (MIWD's partial motion to dismiss granted, dismissing claims for violation of consumer protection act, negligence, fraudulent misrepresentation, and declaratory relief; plaintiff voluntarily dismissed claims for fraudulent concealment and unjust enrichment); *Meifert v. MI Windows & Doors, Inc.*, Case No. 2:12-cv-01256-DCN (first amended complaint's claims for negligence dismissed to the extent barred by economic loss doctrine for any damage to windows or house. Court only let negligence claim stand to the extent damage suffered to "other personal property." Express warranty, declaratory relief, and Wisconsin Deceptive Trade Practices Act claims dismissed. Second amended complaint filed, alleging claims for negligence and breach of express warranty. Court again found negligence claim dismissed to the extent barred by economic loss doctrine. Court previously dismissed breach of express warranty because no basis of bargain was alleged. Court found that express warranty allegations were amended sufficient to survive dismissal. However, court noted that plaintiff did not cite a "specific-enough promise," but that was a question of fact.).

Contractor Plaintiff and MIWD initiated settlement discussions in this case in November 2012.[4] Following Contractor Plaintiff and MIWD's initial settlement discussions, Contractor Plaintiff and MIWD then engaged in a mediation on April 22-23, 2013 in Miami, Florida before mediator Rodney Max in order to finalize settlement negotiations and reached an agreement in principle. *See* Agreement in principle attached hereto as **Ex. A** setting forth a summary of the main points of MIWD's agreement with Contractor Plaintiff based on the mediation sessions on April 22-23, 2013.[5] Notably, MIWD and Contractor Plaintiff agreed, in pertinent part:

> This would be a national claims-made settlement for all owners or former owners of MIWD Windows that contain glazing tape and were manufactured between January 1, 2000, and December 31, 2010;
>
> Class members must prove "eligible damages," and those with eligible damages would be entitled to either (1) a total cash payment of $250, $500, or $2000 depending on the level of consequential damages per home, or (2) certain agreed-upon repairs or sash replacement at MIWD's sole option; and
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> MIWD would fund a national notice program designed to provide notice of the settlement to potential Class members.

Contractor Counsel have consistently put the interests of the Contractor Class ahead of their own interests by attempting to quickly and efficiently reach a fair and reasonable settlement to benefit the Contractor Class and agreed to limit the attorneys' fees to be paid by MIWD in this case in order to facilitate this settlement. These early

[4] Homeowner Plaintiffs were invited to participate on multiple occasions and declined.

[5] Contractor Plaintiff and MIWD's initial agreement in principle was subsequently elaborated upon by Contractor Plaintiff and MIWD to create a more in-depth settlement term sheet dated August 26, 2013, that virtually mirrors the Memorandum of Understanding ("MOU") that was signed by all parties to this litigation on October 7, 2013. *See* **Ex. B** – Contractor Plaintiff and MIWD Settlement Terms, August 26, 2013

discussions, mediation, and resulting agreement in principle proved to serve as the backbone of the nationwide settlement ultimately reached between all of the parties.

On May 6-7, 2013, a second formal mediation was held in Charleston, South Carolina, this time with Homeowner Plaintiffs participating, during which the proposed universal settlement of claims was presented by Contractor Plaintiff and MIWD. The agreement reached between Contractor Plaintiff and MIWD in late April served as the catalyst and backbone of the Settlement Agreement executed by all parties and submitted to this Court.

The substantive terms of the Settlement Agreement are virtually identical to the April 22-23, 2013 (and August 2013) settlement terms previously agreed to between Contractor Plaintiff and MIWD as a result of the Miami mediation. For example, the substantive terms agreed to in the Settlement Agreement are as follows:

> A national claims-made settlement for all current owners or former owners of MIWD Windows that contain glazing tape and were manufactured between July 1, 2000, and March 31, 2010;
>
> Class members must prove "eligible damages," and those with eligible damages would be entitled to either (1) a total cash payment of $250, $500, or $2500 depending on the level of consequential damages per home, or (2) certain agreed-upon repairs or sash replacement at MIWD's sole option; and
>
> MIWD would fund a national notice program designed to provide notice of the settlement to potential Class members.

As evidenced above, as a result of Homeowner Plaintiffs' negotiations with MIWD, the only substantive differences between the April 22-23 agreement in principle and the Settlement Agreement are a 9-month reduction in the claims period (a reduction of approximately 10%), and a $500 increase to the upper tier of damages.

Since the signing of the October 2013 MOU, the parties have engaged in additional settlement discussions relating to the Settlement Agreement, notice plan, claims process, and other supporting documentation. However, no substantive changes have been made to the initial agreement reached by Contractor Plaintiff and MIWD in April 2013. In fact, much of the time spent in the 2 years since the original agreement in principle between Contractor Plaintiffs and MI Windows was reached appears to be posturing by Homeowner Plaintiffs in an attempt to drive and support an inflated attorneys' fee petition.

Contractor Counsel have, therefore, served as the catalyst in achieving this nationwide settlement that provides significant relief to contractors and homeowners on allegations that MIWD improperly manufactured, designed, and installed glazing tape in its windows that prematurely fails and results in water intrusion, water penetration, and leakage at or around the glazing beads.

The results achieved on behalf of the nationwide class and the time, effort, and expenses incurred by Contractor Counsel, demonstrate the scope of Contractor Counsel's contributions. Through April 10, 2015, Contractor Counsel have incurred out-of-pocket expenses in the amount of $42,256.40 and contributed over 1,133 hours of time and effort. In recognition of Contractor Counsel's work, and as set forth in the Settlement Agreement, Contractor Plaintiff and MIWD have agreed that MIWD would not oppose Contractor Counsel's fee and expense request as long as the combined fees and expenses paid by MIWD do not exceed $9,045,000. Taking into consideration the significant results achieved for the Contractor Class, and in light of the significant contributions that Contractor Plaintiff made towards resolving this litigation by serving as the catalyst and

by reaching the agreement in principle that served as the backbone to this settlement, Contractor Plaintiff seeks attorneys' fees in an amount at least equal to the amount that this Court awards to Homeowner Plaintiffs.

For the reasons set forth herein, Contractor Counsel request that this Court order the payment of a reasonable attorneys' fee and reimbursement of expenses to Contractor Counsel. Contractor Counsel's fee request will include all litigation expenses incurred to date and any subsequent expenses incurred hereafter, and the fee would be paid by MIWD directly and not impact the relief made available to the nationwide class.

II. THIS COURT SHOULD APPROVE A REASONABLE ATTORNEYS' FEE BASED ON THE FACTORS ARTICULATED IN *BARBER*.

The Fourth Circuit's *Barber* Factors Confirm That Contractor Counsel's Request For Attorneys' Fees Is Reasonable When Compared Against The Results Obtained In This Litigation.

"It is well established that the allowance of attorneys' fees 'is within the judicial discretion of the trial judge, who has close and intimate knowledge of the efforts expended and the value of the services rendered.'" *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) (quoting *Lea v. Cone Mills Corp.*, 467 F.2d 277, 279 (4th Cir. 1972)). District courts in the Fourth Circuit routinely look to the *Barber* factors, *Barber*, 577 F.2d at 226, to assess the reasonableness of attorneys' fees. This Court's consideration of the twelve *Barber* factors will assist it in evaluating Contractor Counsel's request.

Under the body of law attendant to class action fees, Contractor Counsel submit that this Court should set a reasonable attorneys' fee based on the relief created and made available for the class. A review of Contractor Counsel's efforts against the *Barber*

factors confirms that Contractor Counsel's request is appropriate to compensate the firms who have achieved this nationwide class resolution.

1. Time and labor required.

During the pendency of Contractor Plaintiff's suit, Richardson, Patrick, Westbrook & Brickman, LLC ("RPWB") and Smith, Bundy, Bybee & Barnett, PC ("S3B") have prosecuted claims on behalf of a nationwide class. The Contractor Plaintiff, Homeowner Plaintiffs, and Defendant MIWD now seek to finalize a global resolution of all claims. Contractor Counsel in this litigation have accrued $42,256.40 in out-of-pocket expenses and over 1,133 attorney hours through the filing of this petition which does not include any additional hours to be incurred in obtaining final approval and implementing and overseeing the claims process.[6]

2. Novelty and difficulty of the questions involved.

This litigation involves complex and novel issues that have been skillfully handled by Contractor Counsel and which have been hotly contested by all litigants involved. Upon information and belief, this is the first class action settlement in which a contractor has served as a class representative on behalf of a class of contractor plaintiffs in a window defect case of this nature. As a result of Contractor Counsel's efforts, contractors across the United States have an opportunity to file a claim for monetary relief or to have their windows repaired by MIWD. More importantly, contractors across the nation will be protected from being improperly sued by MIWD for indemnification for the window defects at issue in this case, as Contractor Plaintiff Lakes of Summerville was sued by MIWD as a third-party defendant in *Johnson v. MI Windows & Doors*.

[6] *See* detailed time and expense records of RPWB and S3B, attached hereto as **Ex. C**. Exhibit C also includes paralegal time expended, for this Court's reference.

Contractor Plaintiff Lakes of Summerville spent over $11,500.00 in attorneys' fees and costs defending itself against MIWD in the *Johnson* matter. Importantly, due to the filing of the adversary proceeding against MIWD by Lakes of Summerville in this MDL, Lakes of Summerville did not incur any attorneys' fees or expenses defending itself after June 8, 2012. Contractor Plaintiff can only imagine how many indemnity cases would have been filed and pending in federal and state courts across the United States and the amount of fees and expenses incurred by contractors across the United States if not for Lakes of Summerville's involvement in this MDL and this nationwide settlement. At the very least, Contractor Plaintiff believes that MIWD would have brought in contractors as third party defendants in each of the actions pending in this MDL.

The opinions issued by this Court on MIWD's motions to dismiss also demonstrate the complexity and the difficulty of this litigation. The difficulty of this litigation is also evidenced by the mixed results experienced by Homeowner Plaintiffs with the various cases pending in the MDL. As mentioned above, several Homeowner Plaintiffs' actions have been dismissed in their entirety – more than once – due to legal deficiencies, and the remaining actions have been narrowed significantly by MIWD's repeated motions to dismiss.

3. The skill that is required to perform the legal services properly.

A nationwide class action requires skilled counsel to represent the class. Few law firms have the experience and the resources to pursue such litigation. As reflected by Contractor Counsel's résumé,[7] Contractor Counsel possess unique skills and experience in litigating complex construction and class action litigation and have applied their skills

[7] *See* firm résumé of RPWB and Smith, Bundy, Bybee and Barnett, P.C. attached hereto as **Ex. D**.

and experience to expeditiously reach a settlement on behalf of a nationwide class, thereby saving both the litigants and the Court time, resources, and expense. Contractor Counsel have handled this multidistrict litigation with expertise and professionalism, serving as the early catalyst in this proposed nationwide settlement. Given the stakes in this litigation, the unique legal questions, and the results obtained for the class, Contractor Counsel have demonstrated an exceptional level of skill.

4. The attorneys' opportunity lost in pressing the litigation.

Contractor Counsel have spent time, effort, and resources in prosecuting this litigation that could not be invested in other cases. As set forth above, Contractor Counsel have incurred over 1,133 hours of attorney labor and incurred expenses to finance the litigation, in the amount of $42,256.40 to date, that could not be invested in other cases.

5. Customary fee.

Contractor Counsel have expanded the potential benefits for both Contractor and Homeowner Plaintiffs by creating a platform for homeowners and contractors to receive monetary relief and by achieving the unquantifiable benefit to contractors by extinguishing contractor liability for the window defects at issue in this case. As discussed above, contractor liability was a real threat as evidenced by the fact that the named Contractor Plaintiff, Lakes of Summerville, was sued by Defendant MIWD in the *Johnson* matter.

As discussed below, courts have often awarded attorneys' fees that are at least 25% of the total benefit made available to the class. Although Contractor Counsel could arguably seek a higher fee based upon the results in this case and rewards in other class

actions, Contractor Counsel have limited their request to no more than half of the total amount that MIWD has agreed to pay.

6. The contingent nature of the matter/the attorneys' expectations at the outset of the litigation.

Contractor Counsel understood from the outset of this litigation that there would be no attorneys' fee if there were no recovery. Contractor Counsel expended time, effort, and resources with no payment on this litigation and at great risk of taking no payment at all. Moreover, Contractor Counsel could have lost their entire investment of time, effort and out-of-pocket expenses.

7. The time limitations imposed by the client or circumstances.

This nationwide class action necessitated efforts in briefing, discovery, and protracted and sometimes contentious settlement negotiations. Contractor Counsel have obtained a favorable result for the class in a relatively short period despite the difficulty imposed by novel issues and complex multiparty negotiations.

8. The amount in controversy and the amount obtained.

There were numerous obstacles in this case to a recovery for the class. These hurdles included complex legal issues and complex multiparty negotiations. Despite these roadblocks, Contractor Counsel served as the catalyst and negotiated with MIWD to create the backbone of a nationwide settlement resulting in the opportunity for hundreds of thousands of potentially defective windows to be remedied on a claims' made basis and protected contractors from being sued for indemnity by MIWD for the window defects at issue here. Contractor Counsel undertook obligations and responsibilities in this litigation and produced a significant result. Without these efforts,

it is highly unlikely that the class could have obtained any relief whatsoever, particularly in light of the shaky ground on which Homeowner Plaintiffs' cases stood.

9. The experience, reputation, and ability of counsel.

Contractor Counsel consist of two firms with expertise in complex and construction litigation and with a history of success in difficult, high-stakes litigation. RPWB has an extensive background in multidistrict litigation, class action and complex litigation, including in this judicial district and elsewhere. *See* Ex. D. S3B has an extensive background in complex construction and commercial litigation. Mr. Bundy alone has over 35 years litigating complex construction cases. Contractor Counsel submit that their reputation and experience in litigating complex cases assisted the nationwide class in achieving the results obtained here.

10. The undesirability of the case.

Contractor Plaintiff, Lakes of Summerville, was initially reluctantly brought into this litigation by MIWD as a third party defendant in *Johnson v. MI Windows & Doors, Inc.* It was only after Lakes of Summerville was sued by MIWD that it decided to take the initiative to file a nationwide class on behalf of itself and other contractors in order to protect itself and the proposed Contractor Class from future liability from claims brought by MIWD for indemnity and to provide relief to the Contractor Class for MIWD's defective and improper manufacture, design, and installation of the glazing tape in its Windows.

In further support of the undesirability of this case, prior to Contractor Plaintiff's involvement in this litigation, no contractor had stepped forward and filed suit. Also, Contractor Counsel note that MDLs generally involve a large number of law firms that

file tag-along actions in close proximity to multidistrict litigation treatment. This litigation on behalf of Contractor Plaintiff, by contrast, was litigated by Contractor Counsel that initially filed suit on behalf of Contractor Plaintiff Lakes of Summerville.

11. Nature and length of the professional relationship between attorney and the client.

Contractor Counsel S3B possessed an attorney-client relationship prior to the initiation of this suit with named Contractor Plaintiff, Lakes of Summerville, LLC. Contractor Plaintiff Lakes of Summerville has ably assisted Contractor Counsel in the pursuit of this litigation.

12. Attorneys' fees awarded in similar cases.

Based upon fee awards in other class cases, Contractor Counsel proffer that the fee request is not only reasonable, but arguably could be assessed at a higher amount. If the Court employs a lodestar and multiplier approach, as discussed below, Contractor Counsel submit that a reasonable fee is likely to be set in at least the same range as the amount requested by Contractor Counsel here.

A. Comparing Contractor Counsel's Fee And Expense Request To The Benefit Provided to the Class and Applying A Lodestar Cross-Check Supports The Fee Request By Contractor Counsel.

While this is not a common fund case, it is helpful to look to fees awarded in common fund cases to objectively evaluate the fee request here, as the monetary benefit made available to the nationwide class in this case is much less speculative than that of some traditional common funds.

The Honorable Liam O'Grady surveyed common-fund fee awards in the Fourth Circuit and elsewhere and found percentage awards that ranged from 18% to 30%, inclusive of mega-fund recoveries that reached into the nine figure range. *In re: The*

Mills Corp. Sec. Litig., 265 F.R.D. 246, 264 (E.D. Va. 2009). The *Mills* court utilized the following chart:

Case	Approx. Size of Fund/Recovery	Percentage Awarded
Microstrategy II (E.D. Va. 2001)	$ 152,500,000- $ 192,500,000	18%
Jones (S.D. W.Va. 2009)	$ 40,000,000-50,000,000	20%
Muhammad (S.D. W. Va. 2006)	$ 700,000	33.3%
In re SPX Corp. ERISA Litig. (W.D.N.C. 2007)	$ 3,600,000	
Smith v. Krispy Kreme Doughnut Corp. (M.D.N.C. Jan. 10, 2007)	$ 4,750,000	26%
Mason v. Abbot Labs., (N.D.W. Va. 2009)	$ 1,705,200	25%
Braun v. Culp, Inc., (N.D.W.) 1985	$ 1,500,000	25%
In re Rite Aid Corp. Sec. Litig. (E.D. Pa. 2005)	$ 126,641,315	25%
In re Deutsche Telekon AG Sec. Litig. (S.D.N.Y. 2005)	$ 120,000,000	28%
In re Xcel Energy, Inc. Sec., Derivative & "ERISA" Litig. (D. Minn. 2005)	$ 80,000,000	25%
In re Freddie Mac. Sec. Litig.- (S.D.N.Y. Oct. 27, 2006)	$ 410,000,000	20%
In Re Sunbean Sec. Litig. (S.D. Fla. 2001)	$ 110,000,000	25%
In re Bankamerica Corp. Sec. Litig. (E.D. Mo. 2002)	$ 490,000,000	18%
In re DaimierChrysler A.C. Sec. Litig. (D. Del. 2004)	$ 300,000,000	22.5%
In re Rite Aid Corp. Sec. Litig., (E.D. Pa. 2001)	$ 193,000,000	25%
In re 3Com Corp. Sec. Litig. (N.D. Cal. 2001)	$ 259,000,000	18%
In re IKON Office Solutions, Inc.	$ 111,000,000	30%

Id.

In this case, the potential total benefit to this nationwide class is significant. First, this settlement provides a direct benefit to Contractor Plaintiffs, as well as MIWD and Homeowner Plaintiffs by the avoidance of potential future claims, cross-claims, and

claims for indemnification between contractors, homeowners, and MIWD related to the defects at issue. The amount of fees and expenses requested by Contractor Plaintiff here would pale in comparison to the cost of all of this potential future litigation. Second, this settlement provides a direct benefit to all of the clients and customers of Contractor Plaintiffs. MIWD is one of the nation's largest suppliers of vinyl windows with plants across the country. Assuming that 500,000 windows nationwide qualify for remediation under the settlement, and assuming that each window repair or remediation is $50,[8] a conservative minimum value created for the class is $25,000,000. Further, the benefit to the Contractor Class in avoiding future litigation relating to the window defects at issue in this case is substantial. As of April 17, 2015, approximately 184,466 notices have been mailed to potential class members. Assume that just 1% of the members of the class (1,844) filed a lawsuit against MIWD related to the defects in this case, and MIWD sued the contractor for indemnity, as MIWD did in *Johnson*. Even if the attorneys' fees and expenses related to the indemnity defense of those contractors against MIWD were limited to $20,000,[9] Contractor Counsel have created a further benefit of $36,880,000.00 for the Contractor Class. Even if this Court were to award Contractor Counsel the full $9,045,000 that MIWD has agreed to pay, this amount would fall well below the 25% benchmark in common fund cases. Accordingly, Contractor Counsel's request here falls well within the range of previous awards in common benefit class actions and within the typical lodestar multiplier. As the chart above demonstrates, Contractor Counsel's

[8] This is a conservative estimate of the cost of claims administration and minimal remediation on a per window basis.

[9] Twenty thousand dollars ($20,000) is an extremely conservative estimate, especially when taking into consideration the infant stage of the litigation at which Lakes of Summerville stopped incurring fees relating to its defense in *Johnson*.

request is reasonable even if measured against mega-fund recoveries that typically apply lower percentage awards.

In conducting a review for an attorneys' fee award in class actions, it has become customary for district courts to apply a cross-check as a method of verifying the reasonableness of the fee request. *See, e.g., The Kay Co., et al. v. Equitable Production Co.*, No. 2:06-CV-00612, 2010 U.S. Dist. LEXIS 118256, at *14 (S.D.W.Va. Nov. 5, 2010) ("I will also apply the lodestar cross-check as an element of objectivity in my analysis."). Courts have routinely found lodestar multipliers above 5 to be fair and reasonable. *See, e.g., In re Cardinal Health*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (award of 18% and multiplier of 6); *In re Charter Commc'ns, Inc. Sec. Litig.*, No. 4:02–CV–1186 CAS, 2005 WL 4045741 (E.D. Mo. June 30, 2005) (20% of settlement fund and multiplier of 5.6); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 198 (S.D.N.Y.1997) (16.66% of common fund and multiplier of 5.5); and *In re RJR Nabisco, Inc. Securities Litig.*, No. 88 Civ. 7905, 1992 WL 210138 (S.D.N.Y. Aug. 24, 1992) (awarding 30% of fund with multiplier of 6.0).

Contractor Counsel have incurred expenses and expended time and effort in this litigation, achieving significant results for the benefit of the nationwide class through the filing of this petition. As mentioned above, that number will only increase through final approval and the administration of the settlement. In other words, this Court is likely to find that a reasonable attorneys' fee to Contractor Counsel is the same whether applying a percentage of the potential benefit to the class or a lodestar with a multiplier enhancement.

III. CONCLUSION

For the reasons set forth herein, Contractor Class Counsel respectfully request that this Court provide for a reasonable attorneys' fee and expense reimbursement at least equal to the amount that this Court awards to Homeowner Plaintiffs.

Respectfully submitted,

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