IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

KIM YOUNG, RONALD JOHNSON, WILLIAM JONES, ALLEN GORMAN, GERRAD LAMOUR, LEE MERCADO, BRADLEY HYTREK, CARL GRAY, and MATTHEW LIPTAK, on behalf of themselves and a class of others similarly situated, Plaintiffs,	No. 06-CV-552
v.	JUDGE KENNELLY
COUNTY OF COOK and SHERIFF TOM DART in his capacity as Head of the Cook County Sheriff's Department, Defendants.	

PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES AND INCENTIVE AWARDS

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I. INTRODUCTION

This has been an extraordinarily successful class action. After years of litigation culminating in Class counsels' victories at the damage trials, the Class members were made whole to a truly unusual degree when the County agreed to a $55 million settlement, amounting to thousands of dollars per person. If the case had ended there, this would have gone down as one of the most successful civil rights class actions in history, with nearly 65,000 Class members receiving very fair compensation.

But that was not the end of the litigation. Employing aggressive and creative legal muscle, Class Counsel devised a theory that allowed the Class to substantially enhance its recovery while affording the County and its taxpayers the opportunity to recoup some of the County's losses. Specifically, after negotiating for a partial assignment of the County's fraud and other claims to the Class members, Class Counsel managed to get both the County's and the Class's claims, including a False Claims Act claim, to trial against the AIG companies, and then won a massive $120 million jury verdict. The resulting settlement means an additional $32.5 million for the Class on top of the $55 million previously recovered and distributed.

This is hardly, in other words, a case where class members receive scraps for their injuries while the attorneys get some kind of windfall. Quite the opposite, by recognizing the existence of potential FCA and tort claims that the County had itself missed, and then finding a way to get those claims to trial and prevail, Class Counsel has boosted the recovery for the Class beyond all reasonable expectations. Plaintiffs' counsel has basically created something out of nothing for their clients, on top of what they already recovered.

The question presently before the Court is whether it is now appropriate to award Class Counsel the same one-third attorneys' fee for this new recovery that the Court allowed (with

virtually no objections) on the original fund. Given the extent to which the Class members had already been made whole, coupled with the reality that this new source of funds was essentially created by Plaintiff's counsel's own risk-taking, resourcefulness, and hard work, the answer is clear. The Court should grant counsel's Petition.

II. BACKGROUND

Class Counsel has now secured $87.5 million for the Class. As fully described in Plaintiffs' motions for attorneys' fees and for final approval filed in 2011, Plaintiffs' counsel secured a $55 million cash settlement in against Cook County after more than five years of hard-fought litigation (the original case and settlement will be referred to as "Young I"). The settlement in 2011 is believed to be the largest cash settlement ever in a strip-search class action. But not satisfied that the Class had received all it was due, Class Counsel performed an in-depth analysis of the County's insurance programs over the years and determined that the County had potential claims against its insurers for failing to pay what they owed the County for the 2011 settlement. Based on that analysis, Class Counsel insisted that the Young I settlement also include an assignment of claims against Cook County's insurance companies from the AIG family of companies ("AIG" or the "AIG insurers"). Counsel then filed a case against those insurance entities in 2012 (referred to in this brief as the "Young Insurance" case).[1]

With the assignment in hand, counsel brought their substantial litigation and trial experience to bear again, fighting the $60 billion AIG empire for another five years before securing another massive fund for the Class. At the start of Young Insurance, counsel anticipated another lengthy, hotly disputed case. Counsel's prediction was correct. Just as in Young I, the

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[1] The case was captioned as *Cook County, et al. v. American International Group, et al.*, Case No. 12-L-2765 (Cir. Ct. Cook County, Ill.).

defendants in the Young Insurance case refused to settle the case on fair terms for the Class without years of pretrial litigation and without a trial. Indeed, at summary judgment, the AIG insurers referred to the claims against them as "preposterous," "ludicrous," and "ridiculous." Declaration of Michael Kanovitz ¶62 ("Kanovitz Aff."). They were not just posturing – at that point in the litigation, defendants had never expressed any interest in settling Young Insurance. *Id*. As in Young I, Plaintiffs' counsel represented the Class in Young Insurance through discovery, dispositive motion practice, attempts at interlocutory appeals, a trial, and post-trial motions before ultimately securing another extraordinary settlement that creates $32.5 million common fund.

Beyond that, during the Young Insurance litigation, Class Counsel also negotiated for the Class to receive a 25% share in any future recovery from Cook County's companion case against its former insurance broker, USI Insurance Services of Illinois, Inc. (the "USI case"). And recently, the County retained Loevy & Loevy as additional counsel in the USI case, which has the potential to further increase the pool of money available to the Class.[2]

Thus, the Class has benefitted immensely from having the Loevy firm for its lawyers. To achieve this result, the Class needed a law firm with the skills and resources to do all of the following: (a) litigate a complex civil rights class action, involving hundreds of thousands of class members, including winning partial summary judgment and multiple trials and appeals before reaching a record-setting settlement; (b) analyze years of insurance coverage, specialized insurance law, and adversary coverage correspondence relating to those policies to determine

[2] If there is a recovery in the USI case, Class Counsel will petition the Court for fees relating to that recovery. The County and Loevy & Loevy are currently negotiating the fee arrangement for the firm's representation of the County in the USI case. Whatever the ultimate agreement is, Loevy & Loevy intends to pool any fees earned under that agreement with the 25% of the full recovery already due to the Class, thereby potentially increasing the Class's recovery.

that the County's insurers, part of a multi-billion dollar organization were violating the terms of complex and voluminous insurance policies; (c) negotiate an assignment of claims against the insurers; (d) litigate the assigned claims, through trial, post-trial motions, and attempts at appeals; and (e) add to all the above, the fairly rare expertise under the False Claims Act needed to fully recover from the insurers. There are few firms with the combination of skills and resources to accomplish those tasks and to achieve the results that Class Counsel achieved for the Class.

The Young I settlement states that Plaintiffs' counsel will petition the Court for up to one-third of the recovery in Young I and one-third of any future recovery in the Young Insurance case. No class members objected to that provision of the Young I settlement agreement, and the Court granted counsel's petition for a one-third fee in Young I. Although the final date for objections to the Young Insurance case has not yet come, notice of the Young Insurance settlement went out approximately six weeks ago and indicated that Class Counsel would seek one-third of the Young Insurance recovery, and no one has objected to that request to date. The Young Insurance case was as difficult and at least as risky as Young I at the outset, and a one-third fee, net of administration expenses, is warranted for that case as well. Class Counsel also expended nearly $100,000 in out of pocket costs litigating the Young Insurance case, and it does not seek reimbursement for those costs.[3]

[3] Beyond the nearly $100,000 in expenses litigating Young Insurance, Class Counsel fronted approximately $45,000 to Rust Consulting to effectuate the notice mailing for the Young Insurance settlement. The notice costs the only expense for which Class Counsel seeks reimbursement. Some $500,000 in unclaimed funds from the first settlement remains with the claims administrator. These funds can be used to cover all expected notice and administration cots, with the balance distributed to the Class members.

III. THE YOUNG INSURANCE LITIGATION

The Young Insurance case resulted from Class Counsel's attempts to have the AIG insurers breached their obligation to contribute $20 million in insurance coverage to help Cook County settle Young I. More specifically, the AIG insurers agreed to pay $5 million from a 2006 insurance policy toward the Young I settlement, but Class Counsel contended that they should have paid an additional $20 million from the County's 2007 insurance policies.

Class Counsel thoroughly evaluated the County's various insurance policies that were in place before and during the Young I litigation and determined that the insurers should have contributed at least $20 million in additional insurance coverage to settle Young.

After reviewing additional documents obtained after the Young I settlement, Class Counsel also determined that there was evidence that the AIG insurers defrauded the County by switching the name of the insurer who was to provide the County's first-layer excess insurance policy in 2007, a change that AIG later used as the basis for refusing to pay any additional money toward the Young I settlement.

Based on this work, Class Counsel filed the Young Insurance lawsuit on March 13, 2012, seeking compensatory, treble and punitive damages. The suit alleged that the AIG insurers breached their contracts with the County and committed common law fraud and tortious interference by switching the name of the insurer, and violated that the insurers violated the "reverse false claims" provisions of the Illinois False Claims Act because the County is a government agency whose taxpayers are protected from fraud by the Act. Class Counsel was uniquely suited to recognize this opportunity for the Class and to shape the case to provide maximize the Class' recovery, having experience not only in insurance law and the substantive

civil rights laws to which the policies had to be applied, but also have many years of experience handling cases under federal and state False Claims Acts.

A. **The Young Insurance allegations**

The Young Insurance lawsuit involved numerous complex issues of insurance law, fraud, and false claims act jurisprudence, but for purposes of this motion, Class Counsel's theory in the case can be simplified and explained as follows:[4]

1. In December 2006, AIG issued Cook County a temporary insurance binder for the 2007 policy year, from AIG indirect subsidiary Illinois National;
2. In the spring of 2007, AIG issued the permanent policy to replace the temporary binder;
3. The permanent policy was issued from a different AIG subsidiary, Insurance Company of Pennsylvania ("ICSOP");
4. The ICSOP policy was on the same exact form as the Illinois National policy would have been, with the only difference being that ICSOP was the issuing carrier on the form and Illinois National was not;
5. When AIG issued the ICSOP policy, it also sent a letter stating that the ICSOP policy coverage was complete and accurate based on the Illinois National binder;
6. AIG knew or recklessly disregarded that the switch from Illinois National to ICSOP substantially reduced the County's coverage. Worse, without AIG's intimate familiarity with its policies, the switch can seem innocuous because the policy was otherwise identical to what the County expected to receive. But, what

[4] As used below, AIG collectively refers to the defendants in the Young Insurance case.

AIG knew was that changing the name from Illinois National to ICSOP would AIG to rely on a single sentence in the 31-page policy document to claim that only $5 million in insurance coverage was available for Young I;

7. Had AIG issued the permanent policy on Illinois National paper, as promised in the County's insurance binder, an additional $20 million insurance coverage would have been available to settle Young I. Specifically, the County had contracted for $10 million in first-layer coverage from Illinois National, and an additional $10 million in coverage written on a follow-form policy from another AIG subsidiary, Lexington Insurance company, which would have been required to contribute its $10 million limit toward the Young settlement if Illinois National had remained the County's carrier;
8. The switch in insurers, and the cover letter stating that the ICSOP policy was complete and accurate based on the Illinois National binder, was fraudulent because AIG knew or recklessly disregarded the fact that switching the insurer from Illinois National to ICSOP materially changed the County's coverage, but they failed to explain that to the County. The switch also constituted tortious interference with the County's expectation of receiving an Illinois National insurance policy; and
9. AIG was also on the hook for substantial punitive damages.

See Kanovitz Aff. Ex. 2 (Young Insurance Complaint).

Class Counsel was not then and is not now aware of any similar cases being brought against insurance companies.

B. Class Counsel vigorously litigated Young Insurance

Young Insurance was originally filed under seal, pursuant to the procedures in the Illinois False Claims Act, so that the Illinois Attorney General could investigate the allegations. Kanovitz Aff. ¶48. The Attorney General subsequently declined to intervene. *Id*. That decision is often the death knell for False Claims Act cases. Indeed, in 2016, Department of Justice statistics show that relators in declined federal False Claims Act cases received a *total* of only $28 million, in all declined cases. *See* Department of Justice – Fraud Statistics – Overview - October 1, 1987 - September 30, 2016, p. 2, available at https://www.justice.gov/opa/press-release/file/918361/download ("DOJ FCA Statistics").[5]

Loevy & Loevy, unlike many other firms that represent False Claims Act whistleblowers, litigates and is willing to try declined False Claims Act cases, and Young Insurance was no exception. Kanovitz Aff. ¶50. Indeed, using its False Claims, civil litigation, and trial experience, Loevy & Loevy secured a recovery for the Class that is higher than all other relators in all declined federal False Claims Act cases combined received in 2016, and in every other year but one from 1987-2016. *Id*. at 1-2.

Shortly after the Illinois Attorney General declined to intervene, the defendants filed six separate motions to dismiss, all of which Class Counsel successfully opposed. Kanovitz Aff. ¶51. Later, Cook County intervened in the case to control the False Claims Act claim, but Class Counsel remained as lead counsel throughout the Young Insurance case, including at trial.

[5] We use federal statistics here because there are no comparable readily available statistics for state False Claims Act cases. But federal False Claims Act cases tend to be much bigger than state cases.

Kanovitz Aff. ¶52. Discovery lasted years and included multiple sets of written discovery, 25 depositions, and the exchange of more than 150,000 pages of documents. *Id*. ¶53.[6]

At the close of discovery, defendants filed four separate summary judgment motions, on all claims and for all defendants. Class Counsel filed cross-motions for summary judgment on the breach of contract claims, and argued that a trial was necessary on the tort claims. The court ruled that a trial was necessary on all claims and against all defendants other than for AIG, Inc, which was dismissed for lack of personal jurisdiction. Kanovitz Aff. Ex. 3 (Young Insurance SJ Orders).

Thus, in March of 2016, the parties proceeded to trial, and Class Counsel achieved a resounding success for the Young class members. The jury awarded $20 million for the fraud claim, $20 million for a fraudulent inducement claim, $20 million for the False Claims Act claim, and an additional $20 million in punitive damages. Kanovitz Aff. Ex. 4 (Young Insurance Judgment). The $20 million awarded for the Illinois False Claims Act claim automatically trebled, pursuant to 740 ILCS 175/3(a)(1).

Following trial, the parties filed post-trial motions that, among other things, disputed the amount of the verdict. Class Counsel took the position that the jury had properly reached a verdict valued at $120 million, consisting of $60 million for the False Claims Act claim plus $20 million for the fraud claim plus $20 million for the fraudulent concealment claim plus $20 million for the punitive damages claim. Kanovitz Aff. ¶57. The AIG insurers, on the other hand,

[6] The numbers of requests for production, interrogatories, and requests for admission reflect the written discovery exchanged by Class Counsel, Cook County, and the AIG insurers, and does not count the additional written discovery exchanged between only between Cook County and USI.

took the position that the jury awarded a total of $20 million in compensatory damages, to treble, plus $20 million in punitive damages, for a total award of $80 million. *Id.* ¶58.

The trial court agreed with Class Counsel's view that the jury had awarded a verdict valued at $120 million, but held that such a damages award was cumulative and therefore improper. Kanovitz Aff. ¶59; *see also* Kanovitz Aff. Ex. 5 (Young Insurance Post-Trial Order). The court therefore vacated the damages award, setting the stage for a retrial on damages. *Id*. The court also overturned the common law fraud and fraudulent concealment judgments and vacated the punitive damages award, holding that there was insufficient evidence to warrant those awards. *See id*.

The AIG insurers then filed for leave to take an interlocutory appeal, again sought summary judgment with the trial court, and continued to try to limit the potential damages at a retrial, all of which failed. Kanovitz Aff. ¶61. Dates for a new trial were set several times, the last of which was for March 21, 2017.

C. **The Young Insurance Settlement**

Until the eve of the first trial, the AIG insurers expressed absolutely no interest in settling. Kanovitz Aff. ¶62. It was not until the eve of the first trial that the insurers offered any significant money. *Id*. ¶63. At the pretrial conference, days before trial, they offered the $20 million that should have been paid back when the parties were trying to settle Young I, but refused to pay for the interest owed on the $20 million, which by that time year later was in the millions. Thus, Class Counsel decided that the Class would be best served by trying the case, with the belief that the jury would find in the Class's favor on the tort claims and award punitive damages (plus the fact that compensatory damages would automatically treble under the Illinois

False Claims Act). Kanovitz Aff. ¶63. This was the right assessment. Class Counsel's significant trial experience paid off handsomely for the Class, as described above.

Prior to the retrial, the court limited the damages to a maximum of $60 million, at which time the AIG insurers expressed an interest in settling in that range, far above the range in pre-trial settlement discussions. Kanovitz Aff. ¶64. As the retrial approached, Class Counsel was able to negotiate a $52 million settlement, which is nearly 90% of the potential damages available under the court's post-trial rulings. Kanovitz Aff. ¶65; Kanovitz Aff. Ex. 6 (Young Insurance Settlement Agreement).

As described in Plaintiffs' Motion for Approval of Class Notice, $32.5 million of the Young Insurance settlement is dedicated to a common fund for the Class members in this case, with Cook County receiving $10,833,333, and the State of Illinois receiving $8,666,666.67 as its share of the False Claims Act recovery. Dkt. 858 at 2.

If the Court approves this settlement and Class Counsel's request for attorneys' fees, each class member who submitted a valid, timely claim for the *Young I* settlement will receive more than $300, plus a portion of any recovery in the USI litigation, as described below. As set forth in the settlement agreement in this case, there is no claiming process for this fund. Dkt. 624-1 ¶ 44. Instead, each class member who submitted a valid claim for a portion of the $55 million fund will automatically receive a check for his or her *pro rata* share of the $32,500,000 common fund from the *Young Insurance* case. *Id*.[7]

The notice provides for two payments to be made to the Class members: an interim payment and a final payment. There are two reasons. First, because of certain portions of the

[7] Class Counsel currently estimates that the costs of notice and administration of this settlement will be less than $500,000.

Illinois False Claims Act, the Illinois Attorney General required that half of the $52 million (the portion allocated to the False Claims act claim) be paid directly to the State of Illinois, and then the State of Illinois will pay a total of $17.33 million from that payment ($26 million less the State's $8.67 million share) to the claims administrator and to the County. Dkt. 858-1 ¶¶ 5-7 (Young Insurance Settlement Agreement). The other $26 million will be paid directly by the insurers to the County and the Class. *See id.*

As a result, the claims administrator may be ready to pay claimants out of the $26 million that the insurers will pay directly to the County and the Class before the State of Illinois issues its payments. After the State of Illinois pays, the claims administrator will issue a second set of checks to those class members who cashed their interim check, making a *pro rata* distribution of the payments from the State of Illinois as well as of any remaining funds from uncashed interim-payment checks. Second, the USI case is ongoing, and if it results in a recovery after the interim payment, then the claims administrator can distribute that recovery in the final payment as well.

IV. THE COURT SHOULD APPROVE THE ONE-THIRD CONTINGENCY FEE AUTHORIZED IN THE YOUNG I SETTLEMENT AGREEMENT

A. Applicable legal standard for fee awards in common fund cases

Class Counsel's hard work created a $32.5 million common fund for the Class, and so we seek an award of fees under the common fund doctrine. The common fund doctrine is "based on the equitable notion that those who have benefited from litigation should share its costs." *Skelton v. General Motors Corp.*, 860 F.2d 250, 252 (7th Cir. 1988) (citations omitted).

When awarding fees from a common fund, "[t]he object . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible." *In re Continental Illinois Securities Litigation*, 962 F.2d 566, 572 (7th Cir. 1992).. The relevant fee

is the percentage of the recovery that counsel would have negotiated before undertaking the case, given the expected need for labor and out of pocket costs that counsel need to put at risk. *Sutton v. Bernard*, 504 F.3d 688, 693 (7th Cir. 2007) (the *ex ante* contingency negotiation would be affected by the risk of nonpayment, the quality and quantity of the work needed to litigate the case, and the likely stakes to be won), citing *Synthroid Marketing Litigation*, 264 F.3d 712, 721 (7th Cir. 2001) (*Synthroid I*). "The greater the risk of loss, the greater the incentive compensation required." *Synthroid I*, 264 F.3d at 719.

And although courts in this circuit often issue common-fund fee awards in large cases using the type of declining marginal scale the Seventh Circuit addressed at length in *In re Synthroid Marketing Litigation*, 325 F.3d 974 (7th Cir. 2003) (*Synthroid II*), particularly in consumer cases, *see Aranda v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2017 WL 1369741, at *4 (N.D. Ill. Apr. 10, 2017), such an approach is not mandatory, and it is not appropriate here.

As Judge Dow recently explained when he awarded a one-third fee, plus nearly $500,000 in expenses, in a case involving a $45 million common fund, the *Synthroid* sliding scale "is not a one-size-fits-all recovery scheme, and there are many other factors to consider before declaring this pricing grid the Cinderella slipper." *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 845-46 (N.D. Ill. 2015) (explaining "that there is no shortage of cases supporting the reasonableness of Class Counsel's request"). Thus, courts in this circuit and elsewhere have awarded fees of approximately one-third, or higher, from large common funds where the case was sufficiently risky to justify it, both before and after *Synthroid*. *See*, *e.g.*, *Gaskill v. Gordon*, 160 F.3d 361 (7th Cir. 1998) (approving a fee of 38% of a $20 million dollar common fund in a risky case); *In re Potash Antitrust Litig.*, No. 08-6910, Dkt. 589 at 2 (N.D. Ill. June 12, 2013) (one-third fee awarded from $90 million settlement fund); *In re Dairy Farmers of Am., Inc.*, 80

F. Supp. 3d at 845; *Heekin v. Anthem, Inc.*, No. 1:05-CV-01908-TWP, 2012 WL 5878032, at *5 (S.D. Ind. Nov. 20, 2012) (awarding one-third of a $90 million common fund and acknowledging "numerous cases in which common funds over $50 million resulted in 33.3% fee awards"); *Mansfield et al. v. Airline Pilots Assoc.*, No. 06 cv 6869 at 7 (N.D. Ill. Dec.14, 2009) (approving 35% of a $44 million common fund and finding 35% to be the market rate given that there was a "significant risk" of non-payment) (attached as Exhibit A) (hereinafter "Airline Pilots Assoc."); *In re Household International Inc.*, No. 02 cv 7921 (N.D. Ill. November 22, 2004) (awarding 30% of a $46.5 million fund and finding that 30% was "at or below the market rate") (Der-Yeghiayan, J.); *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, No. 00-584, 2004 WL 287902, at *2 (S.D. Ill. Jan. 22, 2004) (fee award of 29% of $239 million common fund) and Memorandum in Support of Final Approval, *Berger*, No. 00-584 (S.D. Ill. Jan. 20, 2004) (attached as Exhibit B).[8] The awards are based on *ex ante* considerations. The hours spent on litigating the case after filing are not an inherent measure of the *ex ante* risk, and so the Court need not conduct a lodestar cross-check. *E.g.*, *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500

[8] *See also Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1293 (11th Cir. 1999) (affirming fee award of 33 1/3% of $40 million common fund); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010) (approving attorneys' fees of 33 1/3% of a $35 million settlement); *In re Priceline.com, Inc. Secs. Litig.*, No. 3:00-CV-1884, 2007 WL 2115592, at *6 (D. Conn. July 20, 2007) (awarding 30 percent of $80 million fund); *Nichols v. SmithKline Beecham Corp.*, No. 00 cv 6222, 2005 WL 950616, at *22-24 (E.D. Pa. Apr. 22, 2005) (approving 30% fee of the $65 million settlement in pharmaceutical antitrust action); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085, 2005 WL 3008808, at *17 (D. N.J. Nov. 9, 2005) (approving award of 33 1/3% of $75 million common fund); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (D. Mass. 2005) (awarding 33⅓% of $67 million common fund); *In re Oxford Health Plans, Inc., Secs. Litig.*, MDL Dkt. No. 1222, 2003 U .S. Dist. LEXIS 26795, at *13 (S.D.N.Y. June 12, 2003) (awarding 28 percent of $300 million fund); *Gutter v. E.I. Dupont De Nemours & Co.*, No. 95-2152-CIV-GOLD (S.D. Fla. May 30, 2003) (entered June 2, 2003) (awarding 33 1/3% of $77.5 million common fund) (attached as Exhibit C); *In re Linerboard Antitrust Litig.*, No. 98 cv 5055, 2004 WL 1221350, at *19 (E.D. Pa. June 2, 2004) (awarding 30% of a $202 million settlement); *In re General Instrument Securities Litig.*, 209 F.Supp.2d 423, 434 (E.D. Pa. 2001) (awarding a one-third fee from a $48 million fund).

(N.D. Ill. 2015) (Kennelly, J.) ("no Seventh Circuit case law suggests that a percentage-of-the-fund approach will yield a reasonable result only where it satisfies a lodestar cross-check").

B. *Ex ante* negotiations would have yielded at least a straight one-third contingency agreement

Contingency agreements providing for fees of between one-third and forty-nine percent are standard for tort litigation and large commercial contingency cases, and so there is every reason to believe that *ex ante* negotiations between the Class and Class Counsel would have resulted in an agreement somewhere in that range. *See*, *e.g.*, *Gaskill*, 160 F.3d at 362; *see also* Declaration of Richard Hess ¶¶ 38-40 (attached hereto as Exhibit D). That Class Counsel seeks an award at the bottom of the range indicates that the fee is reasonable. In fact, just as it was in Young I, the one-third fee is a particularly good deal for the Class, and the market rate would typically demand 40% or more to handle a case similar to Young Insurance, with difficult facts, complex legal arguments, and extremely well-funded, sophisticated defendants. There are few firms willing or able to take such a complex case to trial, and far fewer that have the zeal to secure a $55 million settlement in a complex civil rights case, analyze relevant insurance policies to determine that common law and statutory causes of action exist against the defendant's insurance companies, negotiate an assignment of those claims, and then spend nearly five years litigating the assigned claims, all of which were necessary to achieve this result for the Class. *See* Kanovitz Aff. ¶66.

If there could have been an *ex ante* negotiation for contingency representation, it would have been prudent for the Class to seek out a firm with the unusual skill set needed to win, and there is no reason to believe that the Class could have shopped around to get a contingency fee of less than one-third for the same level of representation that Class Counsel was able to provide. It

would also have been reasonable for Class Counsel to refuse to negotiate below a fee that is at the low side of a standard contingency, given that the assigned claims required a substantial investment of time and money, all with a risk of loss that was far greater than average.

A *Synthroid*-type sliding scale is inappropriate here, among other reasons, because the assigned claims litigated in *Young Insurance* would never have come to light or been litigated at all absent Class Counsel's diligence and creativity, unlike the very public allegations at issue in *Synthroid*. Nor would an objective observer at the outset of the Young Insurance litigation have expected that case to result in a $52 million settlement. Many False Claims Act cases result in very modest recoveries, and this one had special challenges. Indeed, from 2005-2009, relators in False Claims Act cases that the government declined recovered a total of approximately $24 million. *See* DOJ FCA Statistics at 1-2. That number jumped to approximately $30 million in 2010, but again, that was the *total* recovery for relators in all declined federal False Claims Act cases. *See id*. at 2. The Class here is recovering more than that from one case. For all these reasons, it was exceedingly unlikely at the outset of Young Insurance that Class Counsel would accomplish the type of recovery here, and therefore, exceedingly risky to devote the time and resources necessary to achieve that recovery.

Moreover, unlike for most class actions where there is no private market for similar cases (because, among other reasons, many such cases, such as consumer class actions and other cases with small damages for individual class members, are rarely brought as individual cases) and so courts have to speculate as to what an *ex ante* fee negotiation would look like, there is a substantial private market for the type of large commercial litigation at issue here. The expert opinion of Richard Hess confirms that Class Counsel's fee request is reasonable for that market. Specifically, Mr. Hess, who is the General Counsel of Susman Godfrey, a leading plaintiffs'

contingency firm, explains that the market rate for contingency fee litigation in large commercial cases handled by top notch plaintiffs' firms for sophisticated clients is between 33% and 49%. Hess Decl. ¶33. He further explains that the 33% agreement is typically only used in cases where the clients are advancing the litigation costs and the likelihood of success at the outset is particularly high. *Id.* ¶34. Moreover, a market rate negotiation would not even consider the possibility of recovering punitive damages in setting an appropriate fee. *Id.* ¶38(b). As explained in this brief, none of the factors that would drive a contingency fee to the lower end of the 33%-49% scale were present in Young Insurance – Class Counsel was advancing all of the litigation costs, and the likelihood of success for the class was low. Therefore, a fee award of substantially more than one-third would be reasonable, and so a fee of one-third is certainly reasonable.

Because a one-third contingency award is a reasonable fee that comports with the market rate for this case, it is the fee that the Court should approve. *In re Continental Illinois Securities Litigation*, 962 F.2d at 572. A marginal fee arrangement that reduced the contingency percentage as the recovery exceeded would have been a poor arrangement for the Class in terms of economic incentives, and one that Class Counsel would not have agreed to at the outset of the case. *See Synthroid I*, 264 F.3d at 721 ("This is not to say that systems with declining marginal percentages are always best. They also create declining marginal returns to legal work, ensuring that at some point attorneys' opportunity cost will exceed the benefits of pushing for a larger recovery, even though extra work could benefit the client.").

But even if the market rate for Young Insurance fees was the type of downward sliding scale discussed in *Synthroid*, that fact alone would not determine what fee was appropriate at each band, or what the bands should be. Given the *ex ante* risk of loss and the likely financial

stakes, the market may reasonably produce bands of 50% of the first ten million[9] and one-third of the next $22.5 million. *See* Kanovitz Aff. ¶¶6-7 (discussing expenses and fact that attorneys who worked on Young Insurance had to forego other work). The result would be a fee award even higher than the one-third contingency counsel seeks.

In sum, a one-third contingency estimation is conservative for the market for this type of contingency work. In an *ex ante* negotiation, the Class would have been hard pressed to find many firms that could provide the level of service needed for it to achieve the outstanding result in the Young Insurance case. The supply for the type of representation that the Class needed – civil rights experience, complex litigation and False Claims Act experience, and trial experience, as well as class action experience – is small, and the market power to negotiate below a one-third contingency is non-existent. Accordingly, in an arm's length *ex ante* negotiation, between the Class and Class Counsel, it is unlikely that the Class would have shopped around for less well-situated attorneys or dickered over a 25 or 30 percent fee, because the contribution that L&L was almost uniquely well suited to make could expand the pie available to the Class to such a degree that it would dwarf the effect of the difference in rates. *See Synthroid I*, 264 F.3d at 720 ("Quality varies among lawyers, and awards net of fees could rise with the level of fees if a

[9] The Seventh Circuit in *Kirchoff* noted that retainers commonly provide for a 50% contingency if the case involves appellate work, which happened in Young Insurance when the defendants filed for leave to take an interlocutory appeal of the court's orders on post-trial motions. *Kirchoff v. Flynn*, 786 F.2d 320, 324, (7th Cir. 1986). And a 40% contingency fee is not an uncommon arrangement for risky cases in other practice areas as well. *See*, *e.g.*, *In re Solis*, 610 F.3d 969 (7th Cir. 2010) (40% contingency fee collections contract); *Kenseth v. C.I.R.*, 259 F.3d 881 (7th Cir. 2001) (40% contingency contract for age discrimination case); *Gerald R. Turner & Associates, S.C. v. Moriarty*, 25 F.3d 1356 (7th Cir. 1994) (40% contingency for medical malpractice claim); *Robert W. Karr & Associates, Ltd. v. Novoselsky*, No. 08 cv 1197, 2008 WL 4865573 (N.D. Ill. July 14, 2008) (40% contingency fee to handle attorney malpractice claim); *United States ex rel. LeFan v. Gen. Elec. Co.*, No. 4:00-CV-222, 2008 WL 3390807, at *2 (W.D. Ky. Aug. 8, 2008) (in False Claims Act case, "representation agreement that the attorneys had entered into with the plaintiffs provided for a 40% contingency fee"), *aff'd*, 394 F. App'x 265 (6th Cir. 2010).

higher payment attracts the best counsel. We never see private clients auctioning off their legal work to the lowest bidder.").

C. The absence of objections in Young I indicates that a one-third award is appropriate here

By its terms, the Young I settlement agreement allows Class Counsel to seek a one-third contingency fee for the then-anticipated insurance litigation. Dkt. 624-1 ¶33. No one objected. The Class had every reason to provide a one-third contingency to encourage Class Counsel to continue fighting to get the maximum recovery from the insurers. The Court may therefore infer that the requested rate is consistent with what the Class and Class Counsel would have "bargained for at the outset of the case (that is, when the risk of loss still existed)." *Cf. Furman v. At Home Stores LLC*, No. 1:16-CV-08190, 2017 WL 1730995, at *3 (N.D. Ill. May 1, 2017) ("the Court knows what private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed), because the Named Plaintiff contracted for Plaintiff's Counsel to be compensated with the amount Plaintiff's Counsel now seek.") (internal quotations and citations omitted); *see also Castillo v. Noodles & Co.*, No. 16-CV-03036, 2016 WL 7451626, at *4 (N.D. Ill. Dec. 23, 2016) (same).

Although the lack of objections in Young I is by no means the end of the analysis, it is a strong indication that a one-third fee is reasonable here, given that class action settlements of any value commonly receive objections to attorneys' fees. *See*, *e.g.*, *In Re: Sw. Airlines Voucher Litig.*, No. 11 C 8176, 2016 WL 3418565, at *1 (N.D. Ill. June 22, 2016) (Kennelly, J.) (recounting years-long history of objections, motions to reconsider, and appeals regarding fee award in class action); *Airline Pilots Assoc.* (17 objections to fees), attached as Exhibit B.

In short, Class Counsel took the Young Insurance case, despite the risks and despite the need to invest a substantial amount of attorney hours and out-of-pocket expenses. A one-third fee is reasonable and fair in light of the risks needed to win.

V. THE COURT SHOULD APPROVE $10,000 INCENTIVE AWARDS FOR THE NAMED PLAINTIFFS

Class Counsel requests that the Court approve payment of the $10,000 incentive awards for the Named Plaintiffs. The nine Named Plaintiffs in this action: Kim Young, Ronald Johnson, William Jones, Allen Gorman, Gerrad Lamour, Lee Mercado, Bradley Hytrek, Carl Gray and Matthew Liptak, attached their names to the Young Insurance settlement, which led to an additional substantial benefit for class members. Moreover, they each made substantial contributions to the Class in the underlying case, which helped created the extraordinary settlement that included the assignment in the first place. As discussed in the first fee petition, Named Plaintiff Kim Young persevered in hiring Loevy & Loevy to represent her after ten other firms turned her down, each Named Plaintiff actively participated in discovery and was deposed, and six of the nine testified at trial. *See* Dkt. 637 at 38. Without their contributions in the underlying case, the Young Insurance case might never have existed. In light of how long this litigation has taken (almost 12 years) and the substantial role that the Named Plaintiffs played in ensuring such a favorable outcome, a reasonable incentive award is appropriate.

The Named Plaintiff Incentive Awards sought here are consistent with those awarded in other common fund class actions with active participation such as here. *See*, *e.g.*, *Will v. Gen. Dynamics Corp.*, No. CIV. 06-698-GPM, 2010 WL 4818174, at *4 (S.D. Ill. Nov. 22, 2010) (describing $25,000 named plaintiff incentive award as "well within the ranges typically awarded" for participation in the litigation); *Berger v. Xerox Corp. Retirement Income*

Guarantee Plan, No. 2004 WL 287902, at *3 (S.D. Ill. Jan. 22, 2004) (approving $20,000 named plaintiff incentive awards).

VI. CONCLUSION

For the reasons explained above, Class Counsel requests that the Court approve payment from the Settlement Fund for: (1) a fee award of one-third of the Settlement Fund, plus reimbursement of the amounts it has fronted for Rust Consulting to notify the Class of the Young Insurance settlement; and (2) Named Plaintiffs Incentive Awards in the amount of $10,000 to the nine named plaintiffs.

Respectfully submitted,

/s/ Michael Kanovitz

Arthur Loevy
Michael Kanovitz
Jon Loevy
Scott Rauscher
LOEVY & LOEVY
311 N. Aberdeen St., Third Floor
Chicago, IL 60607
(312) 243-5900
Class Counsel