IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Juan Ramon Torres, Christopher Robison, as Executor of the Estate of Eugene Robison, Deceased, and Luke Thomas,

Plaintiffs,

vs.

SGE Management, LLC, et al.,

Defendants.

Civil Action No. 4:09-cv-2056

MOTION TO AWARD AND DISTRIBUTE ATTORNEY'S FEES AND EXPENSES FOR GOLDSTEIN & RUSSELL, P.C.

Goldstein & Russell, P.C. (G&R), through its attorney and partner Mr. Eric Citron, respectfully asks the Court to grant the firm's application for attorney's fees, Dkt. No. 295, and order distribution of $1,703,182.65 to G&R without further delay. This amount reflects a valid, written agreement with class counsel and is justified under the "lodestar" method based on the well-documented and successful work that associate counsel G&R performed for the benefit of the class and its appointed counsel. So far as can be discerned from the filings to date, G&R's application has not been the subject of dispute from any party or interested attorney. Accordingly, that application should be immediately granted.

1. On October 11, 2018, the Court approved the settlement between Plaintiff Class and Defendants and awarded aggregate attorney's fees and expenses of $10,275,000. Dkt. No. 317 at ¶14. The Court retained jurisdiction to allocate fees among counsel. *Id*. at ¶15. All interested counsel have now filed their fee applications. No class member objected to G&R's fee application.

And no interested attorney has objected to G&R's application, with the possible exception of Mr. Clearman, whose position on G&R's application is unclear. (Mr. Clearman's disputes seem to center around issues arising from the windup of Clearman|Prebeg, L.L.P. and disagreements with other attorneys regarding their relative involvement at earlier stages of the litigation.) G&R's application is thus essentially undisputed, and as that application explains, the amount claimed is fully justified by the lodestar method and G&R's written agreement with class counsel. Thus, the Court should award G&R the requested fees and expenses without delay.

2. To the extent that there are unresolved issues regarding attorney's fees in this matter, they do not appear to concern G&R in any respect. In particular, G&R has no stake in the partnership dispute that appears unresolved between Mr. Clearman and Mr. Prebeg. G&R is also not part of any "camp," and seeks fees primarily based on its written agreement with class counsel, the validity of which is uncontested and incontestable. Thus, the Court may award and distribute fees to G&R before resolving (and perhaps without ever resolving) any other disputes, including the seemingly overlapping fees claimed by Mr. Clearman and Mr. Prebeg's current firm. *See* Dkt. Nos. 321, 297.

3. Mr. Clearman has apparently requested the appointment of a special master or magistrate and some kind of discovery to resolve aspects of his disputes with other counsel. As a formal matter—and to the extent that G&R's entitlement to its fees is undisputed—G&R has no position on these matters, provided that any magistrate appointment or discovery is limited to the allocation of fees between Mr. Clearman and his former partners. G&R opposes, however, any process that would further delay distribution to G&R of its requested fee.

PRAYER FOR RELIEF

For the foregoing reasons, G&R requests the Court immediately award G&R attorney's fees in the amount of $1,698,000.00 and costs in the amount of $5,182.65, for a total award of $1,703,182.65 and order those amounts distributed consistent with Federal Rule of Civil Procedure 62(a).

Dated: October 26, 2018

Respectfully submitted,
/s/ Eric F. Citron

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2018, the foregoing document was served upon all counsel of record by e-mail and through the Court's CM/ECF system.

/s/ Eric F. Citron

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[PROPOSED] ORDER AWARDING FEES AND COSTS TO GOLDSTEIN & RUSSELL, P.C.

After considering the Application for Attorney's Fees on Behalf of Goldstein & Russell, P.C. [Docket No. 295], the Court, under Federal Rules of Civil Procedure 23(h) and 54(d)(2), finds that the attorney's fees and expenses requested by Goldstein & Russell, P.C. are fair and reasonable. By separate order, the Court determined that the proposed class-action settlement reached by the parties is fair, reasonable, and adequate, and is finally approved. [Docket No. 317]. The Court also awarded Plaintiffs $10,275,000 in attorney's fees and expenses. [*Id.*].

1. Pursuant to Federal Rule of Civil Procedure 23(g)(1), on January 13, 2014, this Court appointed Andrew Kochanowski, Matthew Prebeg, and Scott Clearman as Class Counsel in this litigation, and it designated Mr. Prebeg as lead counsel. [Docket No. 169]. The Court did not provide instruction concerning attorney's fees or taxable costs under F.R.C.P 23(g)(1)(D). This Court certified a litigation class, the certification was upheld by the Fifth Circuit, counsel negotiated a settlement of the claim, and the Court has preliminarily approved the settlement and set the final approval hearing on October 4, 2018. As part of the settlement, Stream Energy, LLP

et al. ("Stream" or "Defendants") have agreed not to oppose Plaintiff Class attorney's fees and costs of up to $10,275,000. [Docket No. 189-1]. In their ultimately successful effort to defend the class certification in the Fifth Circuit, class counsel retained Goldstein & Russell, P.C., (G&R) on a contingent basis, promising G&R between 16% and 18% of any attorney's fees awarded.

2. Based on that agreement and its substantial contribution to the case as measured using the "lodestar" method, G&R seeks $1,698,000 in fees and $5,182.65 in nontaxable costs, for a total request of $1,703,182.65. F.R.C.P. 23(h)(1) allows a claim for an award of reasonable attorney's fees and nontaxable costs in a certified class action. For the reasons set forth below pursuant to F.R.C.P. 52(a), the Court finds the application well-supported and concludes that the application should be granted in full.

FACTS RELEVANT TO G&R's PARTICIPATION IN THIS CASE

3. After this Court certified a litigation class in this matter, class counsel Prebeg and Kochanowski approached G&R seeking help in opposing an appeal of that order. G&R is a nationally recognized Supreme Court and appellate litigation boutique, with extraordinary qualifications.

4. Prebeg and Kochanowski ultimately agreed to retain G&R on the terms set forth in a retention agreement executed on June 26, 2014. This agreement specifies that, in the event of a successful resolution of this case, G&R would be entitled to the following percentages from any amount awarded as attorney's fees: 18% of the first $5,000,000; 17% of the next $3,000,000; 16% of any remaining amounts. G&R reasonably (and correctly) believed that Prebeg and Kochanowski had authority to retain G&R for the class's benefit on these terms. This agreement was negotiated at arm's length, and Prebeg and Kochanowski were motivated to bargain for the lowest possible percentage in order to reserve more of the award for the other class counsel.

5. G&R subsequently represented the class as its primary appellate counsel from June 2014 through at least the end of 2017. In that capacity, G&R prepared numerous substantial filings and conducted two oral arguments on behalf of the class. Among other things, G&R drafted and filed or performed:

A. A brief opposing defendants' Rule 23(f) petition,

B. A brief on the merits in the initial appeal,

C. A supplemental appendix for use by the Fifth Circuit in the appeal,

D. A post-argument supplemental brief ordered by the Fifth Circuit,

E. A Rule 28(j) letter respecting new authority,

F. Oral argument before the initial Fifth Circuit panel,

G. A petition for rehearing en banc,

H. A supplemental brief for the en banc Fifth Circuit,

I. An opposition to divided argument requested by defendants' amici,

J. Oral Argument before the en banc Fifth Circuit,

K. A Rule 28(j) letter respecting post-argument submissions by defendants' amici,

L. An opposition to rehearing before the en banc Fifth Circuit, and

M. A brief in opposition to certiorari before the United States Supreme Court.

6. This case required significant time and attention from G&R, and G&R provided it, to the class's benefit. That effort was required by the number of proceedings involved. It was also required by the detailed record presented on appeal, and the resulting need for intensive record review and research. This case also required an extraordinary amount of legal research, which G&R likewise performed. This appeal was a long and hard-fought process in which defendants were represented by extraordinary appellate specialists. It was appropriate for the class to retain

its own extraordinary appellate specialists, and for those specialists to expend a considerable amount of time and attention in this case.

7. This case also required a considerable amicus effort, which G&R coordinated. Strong amici are essential when the appellant has strong amici of its own (as defendants did here—enlisting the U.S. Chamber of Commerce in their appeal). And they are particularly necessary for a successful petition for rehearing en banc. G&R reasonably spent many hours recruiting amici and coordinating their efforts.

8. These efforts are reflected in G&R's detailed time records, which G&R carefully audited and filed with the Court in connection with this petition. Those records reflect that Mr. Eric Citron of G&R recorded 873 hours on this case, Mr. Thomas Goldstein recorded 62 hours, Mr. Tejinder Singh recorded 14.75 hours, and Mr. Kevin Russell recorded 5.25 hours. In an appropriate exercise of billing judgment Mr. Citron wrote off certain hours, and Mr. Citron and Mr. Goldstein according submitted charges on only 855.50 hours and 60.75 hours respectively. These hours underestimate G&R's total time in the case because G&R did not submit time expended in preparing this petition or assisting in settlement-related matters after December 29, 2017, nor did it submit time expended by its student law clerks and staff members, and it used uncompensated outside mooters for some of its moot courts. In total, G&R performed at least 955 hours of work, and submitted 936.25 hours in connection with this case.

9. G&R submitted a declaration from Mr. David C. Frederick, an accomplished appellate litigator who heads a similarly accomplished and specialized appellate and Supreme Court litigation group at Todd, Figel & Frederick P.L.L.C., in Washington, D.C. Mr. Frederick's declaration was disinterested and credible. Mr. Frederick declared that the hours expended by G&R attorneys on this case were reasonable, as were the rates they submitted in this fee

application. Mr. Frederick also credibly declared that G&R minimized unnecessary time expenses by staffing this case leanly and assigning almost all of the work to Mr. Citron, one of G&R's more junior partners. Mr. Frederick further credibly declared that an appeal with a similar number of stages, if litigated by a comparable competing firm, would likely have occupied substantially more time than G&R expended on this case. Mr. Frederick also declared that he found G&R's rates to be reasonable in comparison to other similar firms, and that G&R's total lodestar on this was commensurate with or well below what similar firms would have charged.

10. For the foregoing reasons, the Court finds that G&R's hours submitted in this petition are reasonable and that G&R exercised appropriate billing judgment.

11. The Court also finds that G&R's rates are reasonable. G&R sought its actual rates, and it submitted persuasive evidence from various sources that those rates are customary among appellate specialists with similar credentials, or even well below the current customary rates. Based on Mr. Frederick's declaration, Mr. Citron's declaration, data from a National Law Journal survey, and a public fee application submitted by comparable attorneys in a recent bankruptcy filing, G&R has proven that a rate of at least $850 is customary for highly credentialed appellate specialists like Mr. Citron, Mr. Russell, and Mr. Singh, and that a rate of at least $1,150 is customary among extraordinary appellate advocates like Mr. Goldstein.

12. G&R's total lodestar is also reasonable. After its voluntary write offs, G&R sought a lodestar of $814,037.50 in attorney time expenses. That amount is reasonable based on the reasonableness of the underlying hours and rates. It is also reasonable if considered as a whole. Mr. Frederick credibly declared that the same work performed by a comparable, competing law firm would likely cost in excess of $1,000,000.00. The Court finds that G&R exercised billing

judgment and reduced total costs by assigning the vast majority of the work to Mr. Citron, and that its total lodestar is commensurate with or less than what a comparable firm would have incurred.

13. Mr. Citron credibly declared that G&R faces a complete demand on its time and would have replaced any work it chose not to do in this case with an available stable of full-freight work of its choosing. G&R has doubled in size during the time of this litigation from four attorneys to eight. This growth reflects the availability of replacement work, and the competitive nature of G&R's rates.

14. G&R understood at the time that it undertook this representation that there was a substantial risk of non-recovery, particularly because the Rule 23(f) petition had already been granted. The contingency arrangement that it negotiated reflected its risk. Mr. Citron credibly explained that, in G&R's typical contingency arrangements, the firm often seeks a multiplier of at least 3X on its time, especially when it believes there is a substantial risk of a zero recovery. The court finds that G&R might not have accepted this representation absent some assurance that it could recover the percentage of the attorney's fee it negotiated.

15. The Court also finds that G&R contributed valuably to a very successful result in this case. It is rare to successfully petition for rehearing en banc and convince the Court of Appeals to reverse a panel decision. The course of this appeal demonstrates that this case was novel and difficult and that G&R's expertise as appellate litigators allowed it to achieve an excellent result for the class in the Court of Appeals.

16. G&R incurred a total of $5,182.65 of expenses in this matter for which it seeks reimbursement. This includes $1,250 for the printing of the brief in opposition to certiorari and the remainder for travel associated with the oral arguments in the Court of Appeals.

LEGAL ANALYSIS RESPECTING G&R's REQUESTED AWARD

Based on the foregoing facts, this Court concludes that G&R's fee request is reasonable and justified and should be granted in full. As an initial matter, I conclude that G&R's request is reasonable based on the value of the settlement to the class relative to the total fees sought and G&R's arm's length agreement entitling it to a percentage of those fees. I also conclude that cross-checking the requested award against the lodestar method and the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), results in a multiplier on G&R's lodestar that is very reasonable. Were a higher multiplier necessary, it would be justified as well.

I. Legal Standard

Courts may award reasonable attorney's fees as part of a class action settlement. Fed. R. Civ. P. 23(h). The Court "may award reasonable attorney's fees … that are authorized by law or by the parties' agreement." *Id*. Here, Plaintiffs are entitled to attorney's fees under the parties' agreements, as well as under RICO, 18 U.S.C. § 1961 *et seq*.

As part of its duty to review and approve a class action settlement, the Court must determine whether the agreed-upon attorney's fees are reasonable. *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 849 (5th Cir. 1998). Courts encourage litigants to resolve fees by agreement. *Johnson*, 488 F.2d at 720. When the amount of fees is agreed upon, is separate and apart from the class settlement, and has been negotiated after the other terms have been agreed, the attorney's fee is presumed to be reasonable. *See DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 322–23 (W.D. Tex. 2007). That is what happened in this case: The parties reached a settlement and then negotiated a separate fund for attorney's fees and expenses. Nevertheless, the Court must independently analyze the reasonableness of the fee.

Courts in the Fifth Circuit typically use one of two methods for calculating attorney's fees in class actions: (1) the percentage method, in which the court awards fees as a reasonable percentage of the common fund; or (2) the lodestar method, in which the court computes fees by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate and, in its discretion, applying an upward or downward multiplier." *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 642–43 (5th Cir. 2012). The "flexibility to choose between the percentage and lodestar methods in common fund cases, with [its analysis] under either approach informed by" the 12-factor test that is outlined in *Johnson*. *Id*. at 644; *see also Evans v. TIN, Inc.*, No. 11-2067, 2013 WL 4501061 (E.D. La. Aug. 21, 2013).

The twelve *Johnson* factors are: (1) the time and labor required, (2) the novelty and difficulty of the issues, (3) the skill required to perform the legal services properly, (4) the preclusion of other employment, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Johnson*, 488 F.2d at 717–19.

II. Analysis of requested attorney's fees and expenses.

A. The percentage-of-the-fund calculation justifies the requested fee award.

In this case, there is not a single "common fund," but instead two separate settlement funds—one for the Class and one to pay attorney's fees and costs. This "is a well-recognized variant of a common-fund arrangement" which has been called a "constructive common fund." *In re Heartland Payment Sys., Inc. Customer Data Breach Litig.*, 851 F. Supp. 2d 1040, 1072 & n.22 (S.D. Tex. 2012) (collecting cases). Importantly, because of this arrangement, Class Counsel's fee

request does not diminish the recovery by the Class. *Cf. In re Vitamins Antitrust Litig.*, Misc. Action No. 990197, 2001 WL 34312839, at *12 (D.D.C. July 16, 2001).

Because this settlement is a variation on a common fund, the fees and costs are properly included in the settlement valuation. *See, e.g.*, *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245–46 (8th Cir. 1996). ("The award to the class and the agreement on attorney fees [and costs] represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery."); *see also Vista Healthplan, Inc. v. Warner Holdings Co. III*, 246 F.R.D. 349, 364 (D.D.C. 2007) (explaining that "because the attorneys' fees are borne by defendants and not plaintiffs, they represent a valuable part of the settlement").

As discussed in its order finally approving the settlement, the Court finds that the settlement is worth at least $46,000,000 to $92,296,000 to the Class (excluding the value of attorney's fees and expenses). Defendants then agreed to establish a separate fund for attorney's fees and expenses "up to $10,275,000." Most common-fund fee awards fall between 20% and 30% of the fund. *See Gooch v. Life Invs. Co. of Am.*, 672 F.3d 402, 426 (6th Cir. 2012). The Ninth and Eleventh Circuit generally use a 25% benchmark for common-fund cases. *See, e.g.*, *Faught v. American Home Shield Corp.*, 668 F.3d 1233, 1243 (11th Cir. 2011); *In re Mercury Interactive Corp. Securities Litig.*, 618 F.3d 988, 992 n.1 (9th Cir. 2010)). The Second and Third Circuits caution district courts not to use a rigid benchmark but instead to consider the circumstances of each case based on factors like the Fifth Circuit's *Johnson* factors. *See Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 333 (3d Cir. 2011). A benchmark may be used as a starting point and then adjusted up or down under the *Johnson* factors, or those factors can be applied as part of deciding the benchmark. *In re Heartland Payment Sys.*, 851 F. Supp. 2d at 1080.

After considering the caselaw, the empirical studies provided by Plaintiffs, the settlement in this case, and the evidence presented to it, the Court finds that a fee award of $10,275,000—or, 10% to 18% of the recovery—is fair and reasonable and falls within the appropriate benchmark.

The Court also finds that the fee-sharing agreements negotiated between G&R and class counsel at arm's length entitles G&R to the amount it seeks based on the formula set forth in that agreement. "The fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney's fee expectations when he accepted the case." *Forbush v. J.C. Penney Co.*, 98 F.3d 817, 824 (5th Cir. 1996) (internal quotation marks omitted). In this case, that retention agreement demonstrates the expectations of the clients and attorneys related to the recovery of fees. Accordingly, the Court finds that G&R is entitled to $1,698,000.00 in attorney's fees, which the Court finds to be fair and reasonable given the evidence presented and as confirmed by the *Johnson* factors.

B. The lodestar calculation justifies the requested fee award.

The Court can also use the lodestar method to determine a reasonable fee or cross-check the percentage analysis. *Strong*, 137 F.3d at 850. The Court calculates the lodestar by multiplying the reasonable hours expended by a reasonable fee. *Id.* Once the lodestar has been calculated, the Fifth Circuit applies the *Johnson* factors to assess the reasonableness of the fee and may use a multiplier to adjust the lodestar upward or downward. *Id.*

G&R provided detailed time records of the work its representatives performed on behalf of the class, which the firm also carefully audited to ensure accuracy and avoid billing for unproductive time. As described in the factual findings above, *see* ¶¶5-12, *supra*, G&R's total submitted lodestar of approximately $814,037.50 in attorney time expenses represents a reasonable number of hours and reasonable hourly fees, and is likely less than a comparable firm would have

incurred in a comparable case. "An attorney's requested hourly rate is prima facie reasonable when he requests that the lodestar be computed at his or her customary billing rate, the rate is within the range of prevailing market rates, and the rate is not contested." *In re Heartland Payment Sys.*, 851 F. Supp. 2d at 1087 (internal citation omitted). Because G&R's hours, rates, and total lodestar all compare favorably to the hours, rates, and likely total expenses for similarly situated firms conducting a similarly complicated, four-year appeal process, I conclude that G&R's lodestar of $814,037.50 in attorney time is reasonable and likely conservative. G&R also recorded and submitted receipts for $5,182.65 in expenses, which the Court likewise finds to be reasonable.

G&R also exercised billing judgment by, for example, omitting hours spent on unproductive time, time related to the settlement process after Dec. 29, 2017, and considerable time spent preparing this fee application.

C. Application of the *Johnson* Factors.

Given that the hours expended and hourly rates are reasonable, the Court now assesses the reasonableness of the lodestar in light of the *Johnson* factors. The *Johnson* factors likewise support a lodestar of $814,037.50, as well as the multiplier of 2.08 that results from G&R's request for the fees required by its agreement with class counsel.

This action involved novel and difficult issues. Plaintiffs' claims involve complex legal issues applying the RICO statute to an alleged multi-level marketing pyramid scheme. The case also involved complex factual issues, including complex hierarchical and pay structures. The multiple interlocutory appeals in this case, including a rehearing *en banc* at the Fifth Circuit, are further indication of the case's complexity and novelty. Skilled and specialized appellate advocates were necessary to perform the legal services properly. This was a complex action in a specialized area of law. Defendants put forth a vigorous defense, and retained similarly specialized

and accomplished appellate advocates to present their arguments in this case. G&R's attorneys on this case, principally Mr. Citron and Mr. Goldstein, are experienced, reputable, and able appellate advocates, and they brought their considerable expertise to bear in successfully litigating this action.

G&R obtained an excellent result in this case considering both its victory on the appeal before the *en banc* Fifth Circuit, and the final settlement that class counsel negotiated for the class. G&R and other class counsel have successfully vindicated Class members' rights; not only does the class have the option of receiving 20% of its net loss and completely disassociating itself from defendants, but the class also has the option of attempting the business venture anew, with much lower and fairer associated costs. Based on the likely elections of class members, the monetary value of the settlement to the class is substantial.

The time and labor required in this case were significant. G&R and other class counsel took the case on a contingent basis, and G&R's and other class counsel's litigation of this case precluded other employment. As discussed previously, G&R's investment of time and effort in this case was extensive, precluded other employment, and came with no guarantee of eventual compensate. *See* ¶¶5-12, 13, 14.

Given their complexity and difficulty, cases like this one are often seen as undesirable by attorneys. These cases are often costly, time-consuming, and difficult. G&R litigated this case on appeal alone for four years, without assurance of final success on the merits and recovery of fees. When it accepted class counsel's retention agreement, and for the many years thereafter, G&R faced the distinct possibility that it would receive nothing for its time and labor.

Given the empirical data presented by the plaintiffs, the Court finds that the fee award here is reasonable and fair compared to other consumer class actions and similar types of cases.

The *Johnson* factors just discussed apply to deciding whether the lodestar is reasonable, as well as to adjusting that award by a multiplier once the lodestar is calculated. *Abrams v. Baylor College of Medicine*, 805 F.2d 528, 536 (5th Cir. 1986). District courts within the Fifth Circuit have found upward adjustments (or, enhancements) appropriate if counsel took the case on a contingency basis. *See, e.g.*, *Klein v. O'Neil, Inc.*, 705 F. Supp. 2d 632, 678 (N.D. Tex. 2010) (percentage method); *DeHoyos*, 240 F.R.D. at 330 (lodestar).

As discussed above, the relevant *Johnson* factors support an enhancement of G&R's lodestar consistent with its arm's length and *ex-ante* fee agreement with class counsel. Thus, the Court applies a modest 2.08 multiplier and enhances G&R's lodestar from $814,037.50 to $1,698,000.00 in fees, along with the $5,182.65 in requested expenses. The Court also finds that a higher multiplier would be justified to ensure that G&R receives the amount required by its agreement even if its lodestar were for some reason to be calculated at a lower figure. If G&R incurs additional fees or expenses in its representation of plaintiffs or the certified class, or if other circumstances warrant the Court's further attention, G&R may file amended or supplemental applications for fees or expenses, if necessary.

Accordingly, the Court **GRANTS** the Motion and **AWARDS** G&R **$1,703,182.65**, representing **$1,698,000.00** in attorney's fees and **$5,182.65** in costs and reimbursable litigation expenses.

Signed on _____, 2018.

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Hon. Kenneth M. Hoyt
United States District Judge