

IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

KATHLEEN SWEISBERGER, on behalf of	)	
herself and all others similarly situated,	)	No. CVCV134376
	)	
Plaintiff,	)	CLASS COUNSEL’S MEMORANDUM
vs.	)	OF LAW IN SUPPORT OF
	)	APPLICATION FOR
CITY OF SIOUX CITY, IOWA,	)	ATTORNEYS’ FEES, REIMBURSEMENT
	)	OF EXPENSES AND INCENTIVE
Defendant.	)	AWARD TO CLASS REPRESENTATIVE

I. INTRODUCTION

On April 21, 2014, Plaintiff Class (“Plaintiff Class” or “Class”) and the City of Sioux City (the “City”) entered into a Settlement Agreement providing that the City will pay Plaintiff Class \$6.475 million (the “Settlement Fund”). As part of the Settlement Agreement, the parties agreed that Plaintiff Class’s attorneys (“Class Counsel”) would request the Court approve its fees and costs associated with this litigation. Class Counsel is requesting a fee equal to one-third of the Settlement Fund, \$20,411.64 for reimbursement of out-of-pocket costs and expenses and a \$10,000 Plaintiff Incentive Award to Plaintiff, Kathleen Sweisberger, for her efforts as Class Representative. Class Counsel requests that the Court approve the requested fees and reimburse costs and expenses of this litigation and approve the incentive award to the Class Representative.

II. ARGUMENT

A. Attorneys’ Fees Based are Based Upon a Percentage of the Settlement Fund

There are two methods primarily used to calculate attorneys’ fees in class action litigation: (1) the percentage of recovery method and (2) the “lodestar” method. *See In re Baby Products Antitrust Litigation*, 708 F.3d 163, 176-77 (3d Cir. 2013). As the Third Circuit explained:

The [percentage of recovery method] ‘resembles a contingent fee in that it awards counsel a variable percentage of the amount recovered for the class.’ The [lodestar method] ‘calculates fees by multiplying the number of hours expended by some hourly rate appropriate for the region and for the experience of the lawyer.’

Whichever method is chosen, ‘we have noted previously that it is sensible for a court to use a second method of fee approval to cross check its initial fee calculation.’”

Id. at 176. The percentage of recovery method is generally favored in cases involving a common fund such as here. *Id.* at 177.¹ In *Rerat Law Firm v. Iowa District Court for Pottawattamie County*, the Iowa Supreme Court recognized and approved of the percentage method of the “common fund” in a class action, whereby the attorneys representing one or more members of a class may recover attorneys’ fees (out of the common fund) from other members of the class who benefit from the litigation. *Rerat Law Firm v. Iowa Dist. Ct. for Pottawattamie Cnty.*, 375 N.W.2d 226, 230 (Iowa 1985) (citing *Van Gamert v. Boeing Co.*, 590 F.2d 433 (2d Cir. 1978) (“[H]istorically, the federal courts have exercised an equitable power to allow attorneys’ fees and costs to be charged against a fund created, increased, or protected by successful litigation.”); *see also Hagge v. Iowa Dept. of Revenue & Fin.*, 539 N.W.2d 148, 152 (Iowa 1995) (applying the common fund theory to the payment of attorneys’ fees).

In complex class actions, courts in Iowa have frequently awarded fees of one-third or more of a common fund.² *See, e.g., King v. Armstrong*, 518 N.W.2d 336, 388 (Iowa 1994) (upholding a fee award to class counsel of 50% of the recovery in a class action); *Mussman v. Wal-Mart Stores*,

¹ According to an often-quoted treatise, “Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.” 4 Newberg on Class Actions § 14:6 at 551 (4th ed. 2002).

² Many federal courts are in accord. *See Jones v. Casey’s General Stores, Inc.*, 266 F.R.D. 222 (S.D. Iowa 2009) (awarding class counsel a 31.6% attorneys’ fee from a \$5 million settlement fund); *see also Vandervort v. Balboa Capital Corp.*, 2014 WL 1274049 *7 (C.D. Cal. 2014) (finding an attorneys’ fee award of 1/3 from a \$3.3 million settlement fund was warranted); *Jenkins v. Trustmark Nat. Bank*, 2014 WL 1229661 *16 (S.D. Miss. 2014) (“The Court believes, and holds, that the proper incentive here is a one third (33.33%) fee based on the \$4,000,000 Settlement Fund.”); *City of Greenville v. Syngenta Crop Protection, Inc.*, 904 F. Supp. 2d 902, 908 (S.D. Ill. 2012) (“In a case like this, ‘[w]here the market for legal services in a class action is only for contingency fee agreements, and there is a substantial risk of nonpayment for the attorneys, the normal rate of compensation in the market is 33.33% of the common fund recovered.’”) (citation omitted).

Inc., Case No. LA-27486 (Iowa Dist. Ct., Clinton Cnty, Oct. 13, 2009) (approving attorneys' fees of one-third of an \$11 million class action settlement fund); *Hobbs v. Iowa Health Sys.*, Law No. CL 103167 (Iowa Dist. Ct., Polk Cnty. Dec. 22, 2008) (awarding class counsel attorneys' fees of 36% of the class action settlement fund); *Cohen v. Aronson*, No. CL 81833 (Iowa Dist. Ct., Polk Cnty. Nov. 25, 2003) (awarding class counsel a 1/3 fee from a \$7.5 million class action settlement fund).

Here, Class Counsel seeks attorneys' fees in the amount of \$2,158,333, which represents one-third (1/3) of the Settlement Fund of \$6.475 million. This one-third fee is consistent with the fee contract made with the Plaintiff and filed with the Court on June 12, 2007 pursuant to Iowa R.Civ.P. 1.276 (Davidson Declaration ¶ 2). The requested fee recognizes the immediate cash benefits conferred on the Class and the circumstances under which this result was accomplished, and is well within the customary fees charged in Iowa and other jurisdictions in contingent fee class action cases with settlement funds of comparable size. Accordingly, the fees sought by Class Counsel should be approved.

Although Iowa has not recognized the lodestar method in class action, if Class Counsel were compensated under the "lodestar" method, the value of the time they devoted to the prosecution of this action and the related concurrently filed cases is \$907,761.³ (Davidson Declaration ¶6). An award of \$2,158,333 would apply a multiplier of 2.37,⁴ well within the range

³ Using the lodestar method is a common way courts "cross-check" the reasonableness of a percentage recovery award. *See In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litigation*, 364 F. Supp. 2d 980, 999 (D. Minn. 2005). The "lodestar" of \$901,689 is calculated by multiplying the number of hours expended by Class Counsel (3,356.5) by the hourly rate charged by Class Counsel.

⁴ The 2.37 multiplier is calculated by dividing the attorneys' fees requested by the lodestar of \$907,761. Class Counsel intends to seek an additional \$866,666 in fees in the Dubuque case which was settled for \$2.6 million. Including this amount would increase the multiplier to 3.33, which is also well within the range of multipliers granted by courts.

of multipliers granted by courts for a case of this complexity and duration. *See, e.g. Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008) (affirming a multiplier of 5.2); *In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litigation*, 364 F. Supp. 2d 980, 999 (D. Minn. 2005) (approving a lodestar multiplier of 4.7 and noting that a number of class action attorneys' fee awards resulted in lodestar multipliers in excess of four); *see also In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (affirming a fee award with a 6.96 multiplier); *In re Charter Comm., Inc. Sec. Litig.*, 2005 WL 4045741 (E.D. Mo. June 30, 2005) (multiplier of 5.61); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (applying a "modest multiplier of 4.65"); *DiGiacomo v. Plains All Am. Pipeline*, 2001 WL 34633373 *10-11 (S.D. Fla. Dec. 19, 2001) (multiplier of 5.3); *In re Shell Oil Refining*, 155 F.R.D. 552, 573-74 (E.D. La. 1993) (multiplier of 3.25). As the *Xcel* court observed:

The lodestar cross-check need entail neither mathematical precision nor bean counting but instead is determined by considering the unique circumstances of each case. The resulting multiplier need not fall within any pre-defined range, so long as the court's analysis justifies the award, such as when the multiplier is in line with multipliers used in other cases. As stated before, the lodestar cross-check does not trump the court's primary reliance on the percentage of common fund method.

In re Xcel, 364 F. Supp. at 999 (emphasis added). Thus, although the lodestar method is helpful as a "cross-check," primary reliance should be on whether the percentage of the common fund is fair.

B. Iowa Class Action Rules on Attorneys' Fees

The Iowa Rules of Civil Procedure place the determination of attorneys' fees for representing a class within the Court's discretion. Iowa R. Civ. P. 1.275(1). The court "may order reasonable attorneys' fees and litigation expenses to be paid from" a monetary recovery. Iowa R. Civ. P. 1.275(3). The Court is guided by Iowa R. Civ. P. 1.275(5) in determining the appropriateness of a fee request in a class action. Rule 1.275(5) directs that the Court consider the following factors when reviewing the requested attorneys' fees for a prevailing class:

- (a) The time and effort expended by the attorney in the litigation, including the nature, extent and quality of the services rendered;
- (b) Results achieved and benefits conferred upon the class;
- (c) The magnitude, complexity, and uniqueness of the litigation;
- (d) The contingent nature of success;
- (e) []⁵; and
- (f) Appropriate criteria in the Iowa Rules of Professional Conduct.⁶

Iowa R. Civ. P. 1.275(5); *See also Landals v. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1994) (applying criteria); *Parrish v. Denato*, 262 N.W.2d 281, 285 (Iowa 1978) (applying criteria).

1. The Time and Effort Expended by the Attorneys, Including the Nature, Extent and Quality of the Services Rendered

The first factor is the time and effort expended by the attorney in prosecuting the litigation, including the nature and quality of the service performed. Iowa R. Civ. P. 1.275(5)(a). In this case, Class Counsel has devoted 3,371.2⁷ hours of attorney and paralegal time prosecuting this action over an eight year period, which involved numerous complex motions, a removal to federal court and an interlocutory appeal. (Davidson Declaration ¶6). Class Counsel are partners in an established Iowa law firm with substantial experience in class actions. (Class Counsel Declaration ¶14). Class Counsel's successful efforts in defeating the City's repeated attempts to obtain a dismissal demonstrates the quality, nature and extent of Class Counsel's work on this case. Class Counsel developed a compelling case and repeatedly demonstrated that, notwithstanding the

⁵ Subsection 1.275(5)(e) pertains to attorneys' fees and litigation expenses awarded under subsection 1.275(4) in a case where the relief is declaratory or equitable in nature. This factor does not apply in this case, where the relief is monetary.

⁶ Iowa Rule of Professional Conduct 32:1.5(a) sets forth the factors to be considered in determining the reasonableness of a fee. These factors are discussed in Section B.5, *infra*, at pp. 8-9.

⁷ Class Counsel originally brought seven (7) related cases challenging the collection of excessive franchise fees by cities for gas, electric and cable television. These hours represent time spent on all cases which had identical issues.

barriers erected by the City, they were able to develop facts that supported that case. The recovery for the Class here did not come quickly or easily. Through their skill and effort, Class Counsel were able to bring this case to a successful conclusion. The recovery for the Class obtained here is a direct result of the skill and diligence of Class Counsel. Thus, the substantial time and effort expended by Class Counsel in prosecuting the litigation to a successful conclusion, as well as the nature and quality of the services performed by Class Counsel, merit approval of the Application.

2. The Results Achieved and the Benefits Conferred on the Class

The second factor is the results achieved and the benefits conferred on the class. Iowa R. Civ. P. 1.275(5)(b). Through diligent pursuit of these claims and eight years of litigation, Class Counsel has negotiated a settlement that will confer an immediate cash benefit on the class of \$6.475 million. After deducting fees and costs, the settlement administrator has determined that there are 61,948 members of the Class and the average class member will be entitled to receive a refund of \$69.28. (Class Counsel Declaration ¶12). The settlement represents a refund to the taxpayers of .77% of the 2% franchise fee charged by the City. (Class Counsel Declaration ¶9). In other words, the City will be allowed to keep 1.23% of the 2% franchise fee charged by the City during the relevant period. (Class Counsel Declaration ¶9). This is a compelling result considering that in *Kragnes v. City of Des Moines*, the City of Des Moines was allowed to keep 1.42% of the franchise fee it collected after a three-week trial and two years on appeal, and the Class in that case still has not been paid. (See Class Counsel Declaration ¶6).

Further, *Kragnes* made clear that the City of Sioux City is rightfully entitled to keep *some* of the franchise fees collected to cover its actual costs reasonably related to inspecting, licensing, supervising or otherwise regulating the utility franchises. Recovering 100% of the franchise fees collected was impossible. The City has claimed costs that, if successfully proved at trial, could result in less money to the Class than proposed in the settlement. Given the uncertain nature of

these facts, the results achieved in this case and the immediate cash benefit conferred on the Class is substantial. Thus, Rule 1.275(5)(b) favors approval of the requested fee.

3. The Magnitude, Complexity and Uniqueness of the Litigation

The next factor is the magnitude, complexity and uniqueness of the litigation. Iowa R. Civ. P. 1.275(5)(c). Although not the first case of its kind in Iowa, it is one of seven class action cases filed by Class Counsel involving excessive cable television, gas and electric franchise fees (*Kragnes* involved only gas and electric). This case involved complex issues as evidenced by eight years of litigation including a removal to federal court, the remand to Woodbury District Court, an interlocutory appeal to the Iowa Supreme Court and extensive discovery, motions and negotiations with the City. This factor supports approval of the Application.

4. The Contingent Nature of Success

Rule 1.275(5) requires the Court to consider the contingent nature of the fee and the difficulties that were overcome in obtaining the settlement. Iowa R. Civ. P. 1.275(5)(d). Class Counsel undertook this case, and indeed all the related cases, entirely on a contingent fee basis, advancing all costs and expenses of litigation on the Class's behalf. (See Davidson Declaration ¶2). As mentioned above, Class Counsel originally brought this case as a companion to six other cases involving excessive cable television, gas and electric franchise fees. (Class Counsel Declaration ¶2). In 2007, the Iowa Legislature retroactively legalized the cable television franchise fees resulting in the dismissal of five of the seven cases and substantially reducing the potential recovery in this case. (See Class Counsel Declaration ¶3). Further, at the time of settlement, the substantial risks and uncertainties of continued litigation made it far from certain that the Class would be able to recover an award greater than that proposed in the settlement.

Class Counsel has received no compensation to date during the course of this litigation and have incurred significant out-of-pocket expenses for the benefit of the Class. They have also

expended 3,371.2⁸ hours of attorney and paralegal time to obtain this result for the Class. (Davidson Declaration ¶6). Any fee award or expense reimbursement to Class Counsel has always been completely contingent on the success of the case.

5. The Iowa Rules of Professional Conduct

Rule 1.275(5)(f) also requires consideration of the criteria set forth in Rule 32:1.5 of the Iowa Rules of Professional Conduct. Rule 32:1.5(a) identifies eight factors to consider in determining whether a fee is reasonable:

- (1) The time and labor required, the novelty and difficulty of the questions involved and the skill required to perform the legal services properly
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer
- (3) The fee customarily charged in the locality for similar legal services
- (4) The amount involved and the results obtained
- (5) The time limitations imposed by the client or by the circumstances
- (6) The nature and length of the professional relationship with the client
- (7) The experience, reputation and ability of the lawyer or lawyers performing the services
- (8) Whether the fee is fixed or contingent

Factors 1, 2, 4, 7 and 8 involve the same factors already discussed under Rule 1.275(5)(a-d) above and need not be repeated. Factors 5 and 6 are not applicable to a class action; Factor 3 is discussed below.

⁸ Class Counsel cannot break out hours to a particular case because all seven (7) cases originally brought had identical issues. Accordingly, attorneys' hours are combined.

Contingent fees are common in Iowa and courts in this jurisdiction commonly award fees of 33% or more of a common fund. *See, e.g., King v. Armstrong*, 518 N.W.2d 336, 388 (Iowa 1994) (upholding a fee award to class counsel of 50% of the recovery in a class action); *Mussman v. Wal-Mart Stores, Inc.*, Case No. LA-27486 (Iowa Dist. Ct., Clinton Cty. Oct. 13, 2009) (approving attorneys' fees of 1/3 of an \$11 million class action settlement fund); *Hobbs v. Iowa Health Sys.*, Law No. CL 103167 (Iowa Dist. Ct., Polk Cty. Dec. 22, 2008) (awarded class counsel attorneys' fees of 36% of the class action settlement fund); *Cohen v. Aronson*, No. CL 81833 (Iowa Dist. Ct., Polk Cty. Nov. 25, 2003) (awarding class counsel a 1/3 fee from a \$7.5 million class action settlement fund). The 1/3 contingency fee sought by Class Counsel is customary and in line with fees sought and awarded in similar cases in this jurisdiction.

C. Reimbursement of Expenses.

Class Counsel is seeking reimbursement of \$20,411.64 in out-of-pocket costs and expenses in prosecuting this litigation on behalf of the Class. Class Counsel has provided an itemization of the costs and expenses paid in the Davidson Declaration submitted with the Application. Iowa Rule of Civil Procedure 1.276 provides for the reimbursement of costs and expenses advanced by Class Counsel:

Upon a determination that the costs and litigation expenses of the action cannot reasonably and fairly be defrayed by the representative parties or by other available sources, the court by order may authorize and control ... advances by the attorneys ... subject to reimbursement from any recovery obtained for the class.

Iowa R. Civ. P. 1.276(2) (emphasis added). Pursuant to the Ruling on Motion to Certify Class and Stay of Further Proceedings entered October 4, 2007, this Court entered a finding pursuant to Rule 1.276, the Rules of Professional Conduct and the attorney fee contract between Class Counsel and the Plaintiffs, that Class Counsel would be allowed to advance litigation expenses on behalf of the entire Class. As set forth in Rule 1.276, the \$20,411.64 advanced for litigation expenses is subject to reimbursement from the Settlement. There is strong public policy in favor of reimbursing

successful plaintiffs' counsel for litigation expenses. The comments to the Iowa Rules of Professional Conduct allow the advancement of costs and expenses "because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts." Iowa R. Prof'l. Conduct. 32:1.8 cmt. 10. As the Iowa Supreme Court has noted:

Class actions resemble small claims – usually too small to be worth litigating separately, but repaying the effort in the aggregate. A representative plaintiff gains nothing from the collective proceeding. Under the district court's rationale, however, he could well lose, because filing the class suit would expose him to the entire costs of the case.... The very feature that makes class treatment appropriate – small individual stakes and large aggregate ones – ensures that the representative will be unwilling to vouch for the entire costs. Only a lunatic would do so. A madman is not a good representative of the class!

Comes v. Microsoft Corp., 696 N.W.2d 318, 327 (Iowa 2005) (quoting *Rand v. Monsanto Co.*, 926 F.2d 596, 599 (7th Cir. 1991)). Similar to a single plaintiff who would be unwilling to vouch for the entire cost of litigation, providing reimbursement to plaintiffs' counsel from a recovery obtained for the class provides additional incentive to plaintiffs' counsel to take on class action cases, which in the absence of reimbursement may not be litigated at all. These expenses were reasonable, necessary and appropriate and should be approved by the Court.

D. Class Representative

Class Counsel seeks a \$10,000 Plaintiff Incentive Award to compensate Ms. Kathleen Sweisberger for her time and effort expended with this action as representative of the Class. Awards to class representatives are common in class actions. *See Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) ("Incentive awards are not uncommon in class action litigation and particularly where ... a common fund has been created for the benefit of the entire class.") (citations omitted). The Seventh Circuit has stated:

It is true that class actions are almost always the brainchild of lawyers who specialize in bringing such actions. But they still have to find someone who is a member of the prospective class to agree to be named as plaintiff, because a suit cannot be brought without a plaintiff. And a class action plaintiff assumes a risk;

should the suit fail, he may find himself liable for the defendant's costs or even, if the suit is held to have been frivolous, for the defendant's attorneys' fees.

The incentive reward is designed to compensate him for bearing these risks, as well as for as any time he spent sitting for depositions and otherwise participating in the litigation as any plaintiff must do.

Espenscheid v. Direct Sat USA, LLC, 688 F.3d 872, 876-77 (7th Cir. 2012) (citations omitted).

Thus, when a common fund is involved, "courts have approved incentive awards to be drawn out of that common pool." *Hadix v. Johnson*, 322 F.3d 895, 898 (6th Cir. 2003). Incentive fee awards must be evaluated individually using "relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefited from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

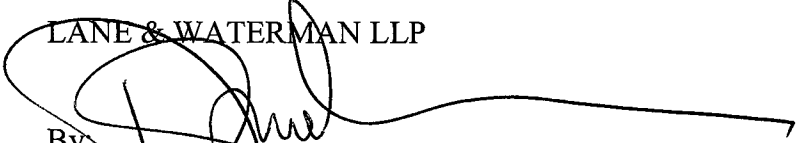
Incentive awards of \$10,000 or more are common in class actions with similarly sized settlement funds. *See Dewey v. Volkswagen of America*, 909 F. Supp. 2d 373, 395 (D.N.J. 2012) (approving a \$10,000 incentive award to each representative plaintiff from a \$9.2 million settlement fund); *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 9 (D.D.C. 2008) (finding reasonable a \$10,000 incentive award to each representative plaintiff with an \$800,000 settlement payment to the class); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award out of a \$5.25 million settlement fund).

Here, Plaintiff assumed any risks of this litigation by agreeing to serve as the Class Representative. Had she not acted as Class representative, this case may not have been filed. Plaintiff has participated with Class Counsel in representing the Class. She has been deposed and has been in frequent communication with Class Counsel regarding the status of the case for the last eight years. Given the length of time Plaintiff has been involved in this case and the substantial benefits achieved for the Class, the \$10,000 incentive award to Plaintiff should be approved as fair and reasonable.

III. CONCLUSION

The settlement of this action is the culmination of years of diligent work by Class Counsel on behalf of the Class. For their efforts, Class Counsel requests that the Court approve a fee from the Settlement Fund of \$2,158,333, \$20,411.64 for expenses advanced in this litigation and for a \$10,000 incentive award to the Class Representative.

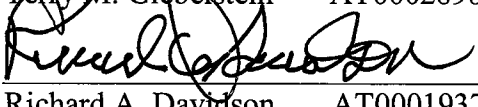
Respectfully submitted,


LANE & WATERMAN LLP

By:

Terry M. Giebelstein AT0002898

By:


Richard A. Davidson AT0001937

220 N. Main St., Suite 600

Davenport, IA 52801

Telephone: 563-324-3246

Fax: 563-324-1616

Email: tgiebelstein@l-wlaw.com

Email: rdavidson@l-wlaw.com

ATTORNEYS FOR PLAINTIFF CLASS

Copy to:

Ivan T. Webber
James R. Wainwright
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, IA 50309

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2014, a copy of the foregoing pleading was presented to the Clerk of Court for filing and uploading into the EDMS system which will send notification to the following EDMS system participants and further such pleading was mailed and emailed to counsel of record at the address set forth below:

Ivan T. Webber
James R. Wainwright
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, IA 50309
Email: iwebber@ahlerslaw.com
Email: jwainwright@ahlerslaw.com

Attorneys for City of Sioux City, Iowa

/s/ Terry M. Giebelstein
Terry M. Giebelstein #AT0002898
LANE & WATERMAN LLP
220 N. Main Street, Suite 600
Davenport, IA 52801
Telephone: 563-333-6614
Facsimile: 563-324-1616
Email: tgiebelstein@l-wlaw.com

ATTORNEY FOR PLAINTIFF CLASS