IN THE CIRCUIT COURT OF DUPAGE COUNTY, ILLINOIS
EIGHTEENTH JUDICIAL CIRCUIT

JOSEFINA DARNALL, GEORGE WYANT, CHERYL RUTKOWSKI and DEXTER COBB, *individually and on behalf of all others similarly situated*, Plaintiffs, v. DUDE PRODUCTS, INC., Defendant.	Case No. 2023LA000761

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND SERVICE AWARDS

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INTRODUCTION

In this putative class action, Plaintiffs Josefina Darnall, George Wyant, Cheryl Rutkowski, and Dexter Cobb ("Plaintiffs") allege that they were misled into believing that Dude Products, Inc.'s ("Defendant") DUDE Wipes-brand wipe products (the "Dude Wipe Products") were flushable. Defendant denies these and all allegations of wrongdoing and represents that it is agreeing to settle this litigation to avoid the uncertainties and expenses associated with ongoing litigation. After more than a year of substantive settlement discussions and two in-person mediations with the Hon. Wayne A. Andersen (ret.) of JAMS, an experienced and well-respected class action mediator, the Parties have reached a proposed settlement ("Settlement" or "Agreement") that creates a Settlement Fund of up to $9 million, which will be used to pay approved class member claims, notice and administration costs, service awards to the Plaintiffs, and attorneys' fees, costs, and expenses to Class Counsel. If approved, the Settlement will bring certainty, closure, and significant and valuable relief for individuals to what otherwise would likely be contentious and costly litigation regarding Defendant's alleged false and misleading advertising.

Plaintiffs and Class Counsel respectfully request that the Court approve Service Awards of $5,000 to each of the four Representative Plaintiffs (*i.e.*, $20,000 in total) and a Fee Award of one-third of the settlement fund or (*i.e.*, $3,000,000). As detailed below, the requested awards are appropriate under governing Illinois law, consistent with the amounts awarded in prior similar settlements, and fairly compensate Class Counsel and Representative Plaintiffs for the work they performed and the commendable result they achieved in this high-risk litigation.

I. BACKGROUND OF THE LITIGATION

A. Overview Of The Litigation

Prior to commencing litigation, Plaintiffs' counsel conducted extensive pre-suit investigation. Declaration of Gary M. Klinger ¶ 4. After completing that investigation, Plaintiffs' counsel sent a demand letter to Defendant based on an allegation that the "flushable" claim used on the labeling and in connection with the marketing of Defendant's Dude Wipe Products is false or misleading because the Dude Wipe Products are not "flushable." *Id.* ¶ 5.

Thereafter, on February 5, 2021, Plaintiffs Arlene Wyant and Dexter Cobb filed a Class Action Complaint in the United States District Court for the Northern District of Illinois (the "Federal Action"). *Id.* ¶ 6. The Parties then litigated the Federal Action, including pre-answer motions to dismiss and strike, multiple case management conferences, and completing substantial discovery.[1] *Id.*

Following denial of Defendant's motions, the Parties engaged in settlement discussions and, to that end, agreed to participate in a private mediation with Judge Wayne A. Andersen (Ret.), an experienced class action mediator. *Id.* ¶ 7. Prior to the mediation, the Parties exchanged information and conferred about it at length. *Id.* ¶ 8. For example, Defendant provided critical information concerning its sales and pricing of its products, and the size of the putative class. *Id.* The Parties also engaged in pre-mediation settlement negotiations and exchanged detailed mediation statements airing their respective legal arguments. *Id.*

On June 14, 2022, the Parties attended their scheduled mediation with Judge Andersen. *Id.* ¶ 10. At the end of the mediation, the Parties were unable to reach an agreement. The Parties continued to negotiate with the assistance of Judge Andersen for more than a year,

[1] The Federal Action has since been voluntarily discontinued.

including a second mediation on May 22, 2023, until they reached an agreement in June 2023 on all material terms of a class action settlement and executed a binding term sheet setting out the material terms of the Settlement Agreement. *Id.* Thereafter, the Parties ultimately drafted and executed the Settlement Agreement, which is annexed to the Klinger Declaration as Exhibit 1. *Id.* ¶ 12.

On July 20, 2023, Plaintiffs filed this case. Plaintiffs asserted claims for (i) violation of California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq.*; (ii) violation of New York's Gen. Bus. Law § 349; (iii) violation of New York's Gen. Bus. Law § 350; (iv) breach of express warranty; (v) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, et seq.; (v) violation of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510/2, *et seq.*; and (vi) violation of State Consumer Fraud Acts. *Id*. ¶ 11

On July 28, 2023, Plaintiffs filed their Unopposed Motion for Preliminary Approval of the Settlement, and on August 8, 2023, the Court granted that Motion and preliminarily approved the Settlement. *Id.* ¶ 12.

B. Summary Of The Settlement

The Settlement provides an exceptional result for the Class by delivering up to $9,000,000 in cash to Class Members, costs of settlement administration, service awards, and attorneys' fees, costs, and expenses. Settlement Agreement ¶ 1.35. Class Members can receive a cash payment of up to $0.50 per household for each Dude Wipes Product purchased during the class period, up to a maximum of $2.50 (*i.e.*, maximum of five (5) packages). Settlement Class Members submitting such claims need only attest to the information on the claim form. In the alternative, Settlement Class Members who submit documentation showing proof of purchase

may submit a claim for a refund of up to $0.50 per household, for each Dude Wipes Product purchased during the class period, up to a maximum of $20.00 (*i.e.*, a maximum of forty (40) packages). *Id.* ¶ 2.3 (a).

ARGUMENT

I. THE REQUESTED ATTORNEYS' FEES, COSTS, AND EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

"Illinois follows the 'American Rule,' which provides that absent statutory authority or a contractual agreement, each party must bear its own attorney fees and costs." *McNiff v. Mazda Motor of Am., Inc.*, 384 Ill. App. 3d 401, 405 (4th Dist. 2008) (quoting *Negro Nest, L.L.C. v. Mid-Northern Mgmt., Inc.*, 362 Ill. App. 3d 640, 641-2 (4th Dist. 2005)) (quotations omitted). "If a statute or contractual agreement expressly authorizes an award of attorney fees, the court may award fees 'so long as they are reasonable.'" *Id.* (citing and quoting *Career Concepts, Inc. v. Synergy, Inc.*, 372 Ill. App. 3d 395, 405 (1st Dist. 2007)). Here, the Parties have entered into a contractual agreement – the Settlement Agreement – expressly authorizing an award of attorney fees, costs, and expenses up to $3,000,000.[2] Settlement Agreement ¶ 3.1.

[2] *See* William B. Rubenstein, 5 NEWBERG ON CLASS ACTIONS § 15:12 (5th ed. 2019) (parties to suit may have private agreements concerning fees which may include agreement between class counsel and defendant whereby defendant agrees to pay a certain fee requested by class counsel); *see also Evans v. Jeff D.*, 475 U.S. 717, 738 n.30 (1986) (parties may simultaneously negotiate a "defendant's liability on the merits and his liability for his opponents' attorney's fees"); *In re Nutella Mktg. & Sales Practices Litig.*, 589 F. App'x 53, 60 (3d Cir. 2014) (awarding $500,000 in fees for injunctive class settlement where defendant agreed to change its misleading labels); *Wing v. Asacro Inc.*, 114 F.3d 986, 988 (9th Cir. 1997) ("At the outset, we note that the fee dispute in this case arises [not from a statute or common fund, but] out of a contract: in the Settlement Agreement, Asacro agreed to pay the reasonable attorney fees and expenses as determined and awarded by the court."); *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 523 (1st Cir. 1991) (holding that when parties to class actions have reached a "clear sailing" fee-shifting agreement as part of settlement, trial court may determine and award reasonable fees "even where no fee-shifting statute of common law exception thrives"); *Browne v. Am. Honda Motor Co., Inc.*, No. CV 09-06750 (C.D. Cal. Oct. 10, 2010) ("A settlement agreement is a binding contract" and "contractual provisions providing for the payment of attorneys' fees … provide a basis for awarding fees."); *In re TJX Cos. Retail Secs. Breach Litig.*, 584 F. Supp. 2d 395, 399 (D. Mass. 2008) (noting that basis for awarding fees was "part of the Agreement, [in which Defendant] agreed to pay court-approved attorneys' fees not to exceed $6,500,000"); *Deloach v. Philip Morris Cos.*, 2003 WL 2304907, at *4 n.2 (M.D.N.C. Dec. 19, 2003) ("[T]he

II. THE COURT SHOULD APPLY THE PERCENTAGE-OF-THE-FUND METHOD IN THIS CASE

"When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Brundidge v. Glendale Fed. Bank, F.S.B.*, 168 Ill. 2d 235, 244 (1995). "The decision to award fees based on the lodestar or percentage method is a matter within the sound discretion of the trial court, considering the particular facts and circumstances of each case." *Id.* However, the Court is not required to perform a lodestar cross-check on Class Counsel's fees. *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 58, 52 N.E.3d 427, 441 (citing *Brundidge,* 168 Ill.2d at 246) (rejecting an objector's argument that the trial court was required to perform a lodestar cross-check on class counsel's fees and awarding class counsel fees totaling 33% of the common fund, or $7,600,000); *Perez v. Rash Curtis & Associates*, 2020 WL 1904533, at *18 (N.D. Cal. Apr. 17, 2020) ("Generally, a district court is 'not required' to conduct a lodestar cross-check to assess the reasonableness of a fee award."). Indeed, the "[p]ercentage analysis approach eliminates the need for additional major litigation and further taxing of scarce judicial resources." *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 924–25 (1st Dist. 1995). "Accordingly, most federal circuits … have abandoned the lodestar in favor of a percentage fee in common fund cases." *Id.*

In "choosing between the percentage and lodestar approaches," courts "look to the calculation method most commonly used in the marketplace at the time such a negotiation would have occurred." *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500-01 (N.D. Ill. 2015) (citing *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998)); *see also McKinnie v. JP Morgan Chase Bank,*

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present petition [for attorney fees] was brought pursuant to a private [settlement] agreement among the parties.") (citation omitted); *Neel v. Strong*, 114 S.W.3d 272, 273 (Mo. Ct. App. 2003) ("As part of the settlement, the Attorney General and the tobacco companies agreed that the tobacco companies would pay the fees of the outside counsel.").

N.A., 678 F. Supp. 2d 806, 814-15 (E.D. Wis. 2009). In class action litigation, where "the normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery," *Kolinek*, 311 F.R.D. at 500-01, state and federal courts in Illinois and throughout the country are in near unanimous agreement that the percentage-of-the-fund approach best yields the fair market price for the services provided by counsel to the class. *See Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 2006) ("When the prevailing method of compensating lawyers for similar services is the contingent fee, then the contingent fee *is* the 'market rate.'"); *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 923 (1st Dist. 1995) (noting that "a percentage fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases") (citation omitted); *In re Continental Illinois Securities Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (market for legal services paid on a contingency basis shows the proper percentage to apply in a class action that creates a common fund for the benefit of the class)); *Williams v. Gen. Elec. Capital Auto Lease*, 94 C 7410, 1995 WL 765266, *9 (N.D. Ill. Dec. 26, 1995) (noting that "[t]he approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred upon the class"); *see also, e.g., Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (explaining that where "a class suit produces a fund for the class," as is the case here, "it is commonplace to award the lawyers for the class a percentage of the fund," and affirming fee award of 38% of $20 million recovery to class) (citing *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984)); *Sutton v. Bernard*, 504 F.3d 688, 693 (7th Cir. 2007) (directing district court on remand to consult the market for legal services so as to arrive at a reasonable percentage of the common fund recovered); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 794 (N.D. Ill. 2015) ("[T]he court agrees with Class Counsel that the fee award … should be calculated as a percentage of the money recovered for the class.").

This Court should likewise apply the percentage-of-the-fund method. The percentage-of-the-fund method best replicates the *ex ante* market value of the services that Class Counsel provided to the Settlement Class. It is not just the typical method used in contingency-fee cases generally, *see Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998), but it is also the means by which an informed Settlement Class and Class Counsel would have established counsel's fee *ex ante*, at the outset of the litigation. *See Kolinek*, 311 F.R.D. at 500-01 ("[T]he normal practice [is] to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery[.]"). The percentage-of-the-fund method also better aligns Class Counsel's interests with those of the Settlement Class because it bases the fee on the results the lawyers achieve for their clients rather than on the number of motions they file, documents they review, or hours they work, and it avoids some of the problems the lodestar-times-multiplier method can foster (such as encouraging counsel to delay resolution of the case when an early resolution may be in their clients' best interests). *Brundidge*, 168 Ill.2d at 242; *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994); *In re Synthroid Mktg. Litig.*, 264 F.3d 712 at 720-21 (7th Cir. 2001). And it is also simpler to apply. *Id.*; *see also, e.g., Kolinek*, 311 F.R.D. at 501 (percentage of the ultimate recovery method appropriate for awarding fees in TCPA class action "because fee arrangements based on the lodestar method require plaintiffs to monitor counsel and ensure that counsel are working efficiently on an hourly basis, something a class of nine million lightly-injured plaintiffs likely would not be interested in doing"); *Ryan*, 274 Ill. App. 3d at 924.

Accordingly, the Court should apply the percentage-of-the-fund method.

A. The Requested Attorneys' Fees, Costs, And Expenses Are Reasonable As A Percentage Of The Class Benefit

In class action settlements, courts typically award attorneys' fees based on a percentage of the total settlement, which includes any litigation expenses incurred. *Brundidge*, 168 Ill. 2d at

238. "[T]he percentage of the fund method … reflects the results achieved." *Id.* at 244; *see Taubenfeld v. AON Corp.,* 415 F.3d 597, 600 (7th Cir. 2005) (approving fees of 33% of total settlement, noting "thirteen cases in the Northern District of Illinois where counsel was awarded fees amounting to 30–39% of the settlement fund").

An award to Class Counsel of one-third of the Settlement Fund is well within the range of fees typically awarded to class counsel by Illinois courts in comparable all-cash class action settlements.[3] *See, e.g., Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97-cv-7694, U.S. Dist. LEXIS 20397, at *10 (N.D. Ill. Dec. 10, 2001) (noting that a "customary contingency fee" ranges "from 33 1/3% to 40% of the amount recovered") (citing *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986)); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 599 (N.D. Ill. 2011) (same); *Meyenburg v. Exxon Mobil Corp.*, No. 05-cv-15, U.S. Dist. LEXIS 52962, at *5 (S.D. Ill. July 31, 2006) ("33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation"); *see also, e.g., Sabon, Inc.*, 2016 IL App (2d) 150236, at ¶ 59 (upholding an attorneys' fees award of one-third of a reversionary fund recovered in light of the "substantial risk in prosecuting this case under a contingency fee agreement given the vigorous defense of the case and defenses asserted by [the defendant]").

[3] The requested award of fees to Class Counsel of one-third of the settlement fund is inclusive of $163,202.46 in out-of-pocket litigation expenses incurred in the prosecution of this action to date, not including those that will continue to accrue as the Settlement process continues. Klinger Decl. ¶ 29, Ex. 5. Although typically awarded in addition to the requested fee award, in this case Class Counsel do not seek reimbursement of these expenses on top of the requested Fee Award. *See, e.g., Kaplan v. Houlihan Smith & Co.*, No. 12-cv-5134, U.S. Dist. LEXIS 83936, at *12 (N.D. Ill. June 20, 2014) (awarding expenses "for which a paying client would reimburse its lawyer"); *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1256 (N.D. Ill. 1993) (detailing and awarding expenses incurred during litigation).

1. The Total Value Of The Settlement Is $9,000,000

To calculate attorneys' fees based on the percentage of the benefit, the Court must first determine the value of the Settlement Fund. In doing so, the Court must include the value of the benefits conferred to the Class, including any attorneys' fee, expenses, service award, and notice and claims administration payments to be made. *See*, *e.g.*, *Brundidge*, 168 Ill.2d at 238. Thus, the Court should consider the *entire benefit* conferred by the Settlement, including the monetary relief agreed on attorneys' fees, costs, and expenses, cost of notice and claims administration, and the Plaintiffs' incentive awards, amounting to a total value of $9,000,000.

Moreover, the Court must not consider the total monetary amount distributed to the Class; rather, the Court should only consider the amount *made available* to the Class. *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 816 (E.D. Wis. 2009) (citing *Boeing Co. v. Van Gemert,* 444 U.S. 472, 480 (1980)) ("The court will similarly base its award of attorneys' fees on the entire common fund amount in the instant case."); *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026 (9th Cir. 1997) (ruling that a district court abused its discretion in basing attorney fee award on actual distribution to class instead of amount being made available).

2. The Requested One-Third Of The Settlement Fund Is Reasonable

Here, the requested $3,000,000 fee, inclusive of costs and expenses, is one-third of the $9,000,000 Settlement Fund generated on behalf of the class, which falls within the range awarded in class actions by courts throughout the country. As aforementioned, courts have recognized that fee awards as high as 50% of the gross settlement fund are reasonable. *See* NEWBURG ON CLASS ACTIONS, *supra*, §15:83 (5th ed. Dec. 2016 update) ("Usually, 50 percent of the fund is the upper limit on a reasonable fee award from a common fund, … though somewhat

larger percentages are not unprecedented."); *Wells v. Allstate Ins. Co.,* 557 F. Supp. 3d 1, 7-8 (D.D.C 2008) (noting that fee awards may range up to 45%, and approving fee request of 45% of the total gross recovery); *In re Ampicillin Antitrust Litig.,* 526 F. Supp. 494, 499 (D.D.C. 1981) (awarding 45% of $7.3 million gross settlement fund as attorneys' fees); *see also Martin v. AmeriPride Servs, Inc.,* 2011 WL 2313604, at *8 (S.D. Cal. June 9, 2011) ("Other case law surveys suggest that 50% is the upper limit, with 30-50% commonly being awarded in cases in which the common fund is relatively small."). The requested fee of one-third of the Settlement Fund is reasonable in light of the substantial monetary relief obtained by Class Counsel here – despite significant risk – and should be awarded.

"When assessing the reasonableness of fees, a trial court may consider a variety of factors, including the nature of the case, the case's novelty and difficulty level, the skill and standing of the attorney, the degree of responsibility required, the usual and customary charges for similar work, and the connection between the litigation and the fees charged." *McNiff,* 384 Ill. App. 3d at 407 (quoting *Richardson v. Haddon*, 375 Ill. App. 3d 312, 314-15 (1st Dist. 2007)) (quotations omitted). Here, each of these factors shows the requested fee is reasonable.

a. *Plaintiffs' Claims Carried Substantial Litigation Risk*

As detailed above, this case presented substantial litigation risk. *See supra* Introduction. Nonetheless, despite knowing the risks, Class Counsel took on the case, worked on the case, and even undertook a significant financial risk, with no upfront payment, and no guarantee of payment absent a successful outcome. In addition to attorney time spent on the case, Class Counsel also advanced $163,202.46 in out-of-pocket expenses, again with no guarantee of repayment. Klinger Decl. ¶ 29, Ex. 5. If the case had advanced through class certification, these expenses would have increased many-fold, and Class Counsel would have been required to

advance these expenses potentially for several years to litigate this action through judgment and appeals.

Even if the claims survived after the pending appeals are decided, Defendant would have contested class certification, and Plaintiffs would have faced serious risks even before getting to class certification. Defendant most certainly would have sought summary judgment, as well as engaged in extensive and protracted discovery.

Despite these risks, the Settlement Agreement allows Class Members to submit claims for a cash payment of up to $0.50 per household for each Dude Wipes Product purchased during the class period, up to a maximum of $2.50 (*i.e.* maximum of five (5) packages). Settlement Class Members submitting such claims need only attest to the information on the claim form. In the alternative, Settlement Class Members who submit documentation showing proof of purchase may submit a claim for a refund of up to $0.50 per household, for each Dude Wipes Product purchased during the class period, up to a maximum of $20.00 (*i.e.* a maximum of forty (40) packages). Settlement Agreement ¶ 2.3 (a).

This is an excellent result, particularly in comparison with other false advertising settlements, where cases were litigated for years before settling for substantially less relief to the class. *See, e.g.*, *DiFrancesco v. UTZ Quality Foods Inc.*, 1:14-cv-14744 (D. Mass. Sept. 13, 2019) (settlement of $1.25 million to resolve a proposed class action asserting that certain of the defendant's snack foods were deceptively labeled as being "all natural" after more than four years of litigation); *Friend v. FGF Brands*, 1:18-cv-07644 (N.D. Ill. Feb. 16, 2021) (settlement of $1.895 million to resolve a proposed class action alleging the defendant duped consumers into thinking mass-produced naan were hand-baked in traditional tandoor ovens after more than two years of litigation).

b. *The Skill And Standing Of The Attorneys Supports The Requested Fee*

The attorneys handling this case are in good standing in their respective jurisdictions. Class Counsel are well-respected attorneys with significant experience litigating similar class action cases in federal and state courts across the country, including other consumer product cases. Klinger Decl. ¶ 21, Ex. 3 (firm resume of Bursor & Fisher, P.A.); *id.* ¶ 23; id. ¶ 22, Ex. 4 (firm resume of Milberg Coleman Bryson Phillips Grossman, PLLC). Indeed, Class Counsel has been recognized by courts across the country for their expertise. *See id*; *see also Famular v. Whirlpool Corp.*, 2019 WL 1254882, at *4 (S.D.N.Y. Mar. 19, 2019) ("Class counsel are experienced and qualified class action lawyers. Bursor & Fisher, P.A., has been appointed class counsel in dozens of cases in both federal and state courts, and has won several multi-million dollar verdicts or recoveries.") (internal quotation omitted); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 566 (S.D.N.Y. Feb. 25, 2014) (Rakoff, J.) ("Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims. … The firm has been appointed class counsel in dozens of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in [six] class action jury trials since 2008.").

Furthermore, "[t]he quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance." *In re MetLife Demutalization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). Here, Defendant was represented by the prominent and well-respected law firm of Barnes & Thornburg LLP. Class Counsel achieved an exceptional result in this case while facing well-resourced and experienced defense counsel. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement.").

c. *The Settlement Was The Result Of Arms'-Length Negotiations Between The Parties After A Significant Exchange Of Information*

This action required considerable skill and experience to bring it to such a successful conclusion. The case required investigation of factual circumstances, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. In taking on this case, Class Counsel undertook the large responsibility of pursuing claims on behalf of a class of purchasers of a consumer product against a manufacturer and experienced defense counsel. Class Counsel also undertook the large responsibility of funding this case, without any assurance that they would recover those costs. Class Counsel not only took on the obligation to act on behalf of the Plaintiffs, but also the class as a whole.

Class Counsel worked with Defendant's Counsel to gather critical information in advance of the mediations, including the size and scope of the putative class. Klinger Decl. ¶ 8. For example, Defendant provided critical information concerning its sales and pricing of its products, and the size of the putative class. *Id.* ¶ 8. The Parties also engaged in pre-mediation settlement negotiations and exchanged detailed mediation statements airing their respective legal arguments. *Id.* On June 14, 2022, the Parties participated in a mediation with Judge Andersen. *Id.* ¶ 10. At the end of the mediation, the Parties were unable to reach an agreement. The Parties continued to negotiate with the assistance of Judge Andersen for more than a year, including a second mediation on May 22, 2023 until they reached an agreement in June 2023 on all material terms of a class action settlement and executed a binding term sheet setting out the material terms of the Settlement Agreement. *Id.* Through the undertaking of a thorough investigation, informal discovery, and substantial arm's-length negotiations, Class Counsel obtained a settlement that provides a real and significant monetary benefit to the Class. Since that time,

Class Counsel has moved for preliminary approval, applied for attorneys' fees, and diligently monitored the successful notice program and claims administration process.

Defendant is represented by highly experienced attorneys who have made clear that absent a settlement, they were prepared to continue their vigorous defense of this case and oppose class certification. Even assuming a class was certified, and summary judgment defeated, the case would then have moved on to pretrial briefing, a pretrial conference, and then a jury trial, which would have been costly, time-consuming, and very risky for Class Members and for counsel. Class Counsel undertook this representation understanding that the risk of losing on class certification, or summary judgment, or at trial were significant. But for this settlement, Defendant likely would have opposed class certification and moved for summary judgment, resulting in rounds of briefing and a risk of summary judgment and denial of class certification.

d. *The Usual And Customary Charges For Similar Work*

When Class Counsel undertake major litigation such as this, it necessarily limits their ability to undertake other complex litigation cases. During the course of this litigation, Class Counsel devoted significant time and resources to succeed in this case. To date, Class Counsel incurred out-of-pocket costs and expenses in the amount of $163,202.46 in prosecuting this litigation on behalf of the Class. Klinger Decl. ¶ 29, Ex. 5. Each of these expenses was necessarily and reasonably incurred to bring this case to a successful conclusion, and they reflect market rates for various categories of expenses incurred. *See id*. Class Counsel had to make this commitment at the outset of this case without knowing how long the case would take to resolve, if ever. Therefore, Class Counsel's willingness to prosecute this action on a contingent fee basis

and to advance costs diverted the time and resources expended on this action from other cases. *See id.* ¶ 28.

Further, as detailed above, the requested fees, costs, and expenses of one-third of the settlement fund is well within the market range. *See supra* cases cited in Argument §§ I.A-B. And, indeed, courts customarily award one-third or more in fees in class actions settlements. *See*, *e.g.*, *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 WL 1568856, at *10 (N.D. Ill. Dec. 10, 2001) (noting that a "customary contingency fee" ranges "from 33 1/3% to 40% of the amount recovered"); *Sekura v. L.A. Tan Enterprises, Inc.*, No. 2015-CH-16694 (Cir. Ct. Cook Cnty., Ill. 2016) (awarding a 40% fee in BIPA class settlement); *Zepeda v. Intercontinental Hotels Group, Inc*., No. 2018-CH-02140 (Cir. Ct. Cook Cnty., Ill. 2018) (same); *Cowen v. Lenny & Larry's, Inc*., 2019 WL 10892150, at *1 (N.D. Ill. May 2, 2019) (awarding a 34.4% fee in a false advertising class settlement relating to nutritional content of food products); *Adkins v. Nestle Purina PetCare Co.*, 2015 WL 10892070, at *2 (N.D. Ill. June 23, 2015) (awarding a 33% fee in a false advertising class settlement relating to defective chicken jerky dog treats); *see also, e.g., Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236 at ¶ 59, (upholding an attorneys' fees award of one-third of a reversionary fund recovered in light of the "substantial risk in prosecuting this case under a contingency fee agreement given the vigorous defense of the case and defenses asserted by [the defendant]").

III. THE REQUESTED SERVICE AWARDS ARE REASONABLE AND SHOULD BE APPROVED

A service award of $5,000.00 for each Representative Plaintiff is appropriate here. "In some cases, the amount requested as an service award, given the court's knowledge about the advanced stage of the case or other procedural facts, will be so obviously reasonable that only minimal scrutiny will be required for approval, at least in the absence of any objection, from

class member." 299 F.R.D. 160 at NACA Guideline 5. Defendant has agreed to pay service awards to Plaintiffs in the amount of $5,000 each. Settlement Agreement ¶ 3.3. Courts routinely approve service awards to compensate named plaintiffs for the services they provide and the risks they incur during the course of class action litigation. *See* 299 F.R.D. 160, NACA Guideline 5 (West 2014) ("Consumers who represent an entire class should be compensated reasonably when their efforts are successful and compensation would not present a conflict of interest."); *see also Cook v. Niedert,* 142 F.3d 1004 (7th Cir. 1998) (value of settlement was $14 million; service award to class representative of $25,000); *see also In re Remeron End-Payor Antitrust Litig*., No. Civ. 02-2007 FSH, 2005 WL 2230314 (D.N.J. Sept. 13, 2005) (value of settlement was $36 million; service awards totaling $75,000 for six named plaintiffs). "Many cases note the public policy reasons for encouraging individuals with small personal stakes to serve as class plaintiffs in meritorious cases." 299 F.R.D. 160, Guideline 5 Discussion (citing cases).

This case is no different. Plaintiffs' participation has been instrumental in the prosecution and ultimate settlement of this action. Here, Plaintiffs spent substantial time on this action, including by: (i) assisting with the investigation of this action and the drafting of the complaint, (ii) being in contact with counsel frequently, (iii) staying informed of the status of the action, including settlement, (iv) participating in discovery, including searching for documents and responding to discovery requests. *See* Klinger Decl. ¶¶ 34-37; *id.*, Ex. E (Declaration of Josefina Darnall ¶¶ 4-8); *id.*, Ex. F (Declaration of George Wyant ¶¶ 4-8); *id.*, Ex. G (Declaration of Cheryl Rutkowski ¶¶ 4-8); *id.*, Ex. H (Declaration of Dexter Cobb ¶¶ 4-8).

CONCLUSION

For the foregoing reasons, Plaintiffs and Class Counsel respectfully request that the Court approve a service award to Plaintiffs of $5,000 each and approve an award of attorneys' fees,

costs, and expenses of one-third of the Settlement Fund, $3,000,000 to Class Counsel. The requested awards would both adequately reward and reasonably compensate Class Counsel and Plaintiffs for assuming the significant risks that this case presented at the outset and nonetheless expending a substantial amount of time and other resources investigating, litigating, and negotiating a resolution to the case for the benefit of the Settlement Class.

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Respectfully submitted,

By: */s/ Carl V. Malmstrom*

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**Pro Hac Vice Application Forthcoming*

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