SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY

FREDERICK MCKINLEY and
LISA VIZCARRA, individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

CONOPCO INC.
and UNILEVER UNITED STATES, INC.,

Defendants

Index No. 805260/2024E

Memorandum of Law in Support of Plaintiffs' Motion for Final Certification of the Settlement Class; Final Approval of the Class Action Settlement; Payment of Attorney Fees and Reimbursement of Expenses to Class Counsel, and Payment of Service Awards to the Class Representatives

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INTRODUCTION

Frederick McKinley and Lisa Vizcarra ("Plaintiffs" or "Class Representatives") respectfully submit this memorandum of law in support of their motion for final certification of the settlement class; final approval of the class action settlement; payment of attorney fees and expenses to Class Counsel; and payment of service awards to the Class Representatives.[1]

Plaintiffs have contested certain representations that Conopco Inc. and Unilever United States, Inc. ("Defendants") make on the label of Defendants' Breyers Natural Vanilla ice cream (the "Product" or "Products"). Specifically, Plaintiffs alleged that, by prominently displaying on the packaging of the Products the words "Natural Vanilla" and images of vanilla flowers, cured vanilla beans, and a scoop of ice cream with visible dark specks that appear to be flecks of vanilla bean (collectively, the "Representations"), Defendants misleadingly marketed the Product to consumers as containing vanilla flavor derived only from the vanilla plant when, in truth, the Product contains vanilla flavors and enhancers from non-vanilla plant sources.

After more than four years of hard-fought litigation and settlement negotiations in the above-captioned action and a related matter that was filed on April 21, 2020,[2] Class Counsel and the Class Representatives were able to achieve a significant Settlement on behalf of class members that provides excellent relief to Settlement Class Members. The Settlement provides a full refund of the price premium that Plaintiffs alleged were paid by consumers for the Products based on the false Representations. The Settlement also provides excellent injunctive relief by requiring Defendants to reformulate the Products so that the vanilla flavor comes exclusively from ingredients derived from the vanilla plant, such as vanilla extract.

[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Settlement Agreement, which is submitted herewith.
[2] *Vizcarra v. Unilever United States, Inc.*, case no. 4:20-cv-92777 (N.D. Cal.) ("*Vizcarra*").

Recognizing this achievement, on August 14, 2024, this Court issued an order granting preliminary approval of the Settlement as well as preliminary certifying the Settlement Class.

As detailed in the affirmation of the Court Appointed Co-Lead Class Counsel ("Class Counsel Aff.") (filed concurrently herewith), this Litigation has been hard-fought since inception and has included extensive motion practice and extensive discovery – including both factual and expert discovery. Moreover, this Litigation reached settlement only after two all-day mediation sessions with a highly respected mediator in New York – Peter Woodin of JAMS – and after numerous follow-up settlement discussions. (*Id.* at ¶ 8).

Plaintiffs' objective in filing this Litigation was to compensate putative Class Members damaged by the alleged misrepresentations and also to require reformulation of the Product to remove the non-vanilla plant vanilla flavoring. Both of these objections have been achieved by the Settlement.

Through this Litigation that culminated with the Settlement Agreement, Plaintiffs achieved substantial relief for the Settlement Class. The Settlement requires Defendants to make available 8.85 million dollars ($8,850,000) that will be used to pay for valid claims from Settlement Class Members; the costs of notice and claims administration; service awards to each of the Class Representatives for their time and effort in prosecuting this matter; and Class Counsel's attorney fees and expenses.

Each Settlement Class member will receive full reimbursement of the alleged price premium of $1.00 per Product, up to eight Products for a total of $8.00 without proof of purchase, and no cap on the number of Products with proof of purchase. Additionally, pursuant to the Settlement Agreement, Defendants will reformulate its Product such that all the vanilla flavoring will come from the vanilla plant. Thus, the Settlement is an outstanding result for Class Members.

While providing significant benefits for the Settlement Class Members, the Settlement also considers the substantial risks the Parties would face if the Litigation continued.

Because the Settlement provides for such excellent results, Plaintiffs now respectfully request the Court grant final certification of the Settlement Class and grant final approval of the Settlement. Additionally, because these results were only achieved through the hard-work and perseverance of Class Counsel and the Class Representatives, they now respectfully request the Court grant their motion for payment to Class Counsel of attorneys' fees for one-third of the settlement amount (in the amount of $2,950,000); reimbursement to Class Counsel of $200,954.98 for their out-of-pocket expenses; and payment of $5,000 (for a total of $10,000) to the named Plaintiffs Frederick McKinley and Lisa Vizcarra for their service as the Class Representatives in this matter.

ARGUMENT

I. FINAL CERTIFICATION OF THE SETTLEMENT CLASS IS WARRANTED

This Court has already preliminarily certified the Settlement Class. No facts have changed since the Court's preliminary approval order. Accordingly, Class Counsel now respectfully request the Court grant final certification of the Settlement Class.

Indeed, it is well established that, in deciding whether to certify a class, "a court must be mindful of [the Appellate Division's] holding that the class certification statute should be liberally construed." (*Kudinov v. Kel-Tech Const. Inc.*, 65 A.D.3d 481, 482 [1st Dept 2009]); (*see also Pruitt v. Rockefeller Center Properties. Inc.*, 167 A.D.2d 14, 21 [1st Dept [199l] ("Appellate courts in this state have repeatedly held that the class action statute should be liberally construed... any error, if there is to be one, should be... in favor of allowing the class action.")).

To obtain class certification, a plaintiff must satisfy the five statutory requirements of CPLR § 901 and the factors in CPLR § 902. As seen below, all of these factors are met here.

A. THE CPLR § 901 FACTORS ARE SATISFIED

The five factors of CPLR § 901 are numerosity, predominance, typicality, adequacy, and superiority. CPLR § 901(a)(1)-(5).

1. CPLR § 901(a)(1) Is Satisfied Because Numerosity Is Established

Courts have held that as low as 18 class members meets the numerosity requirement. (*Maor v. Serenuse, Inc.*, 2018 NY Slip Op 32535[U], 2018 WL 5020421, at *7 [Sup Ct, Bronx County 2018] (finding certification warranted where there were at least 28 putative class members)).

Here, there is no dispute that hundreds of thousands of people nationwide purchased the Products during the Class Period. Accordingly, CPLR § 901(a)(1) is satisfied.

2. CPLR § 901(a)(2) Is Satisfied Because Common Questions of Law and Fact Predominate Over Individual Issues

In considering CPLR § 901(a)(2)'s predominance of commonality requirement, the central issue is "whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." (*Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 97 [2d Dept 1980]).

Accordingly, commonality requires that the proposed class members' claims all centrally "depend upon a common contention," which "must be of such a nature that it is capable of classwide resolution," meaning that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." (*Divlijanovic v. Saks & Co.*, 2018 N.Y. Slip Op 30236, at *4 [Sup Ct, New York County 2018]).

"The fundamental issue under CPLR § 901(a)(2) is whether the proposed class action asserts a common legal grievance, *i.e.*, whether the common issues predominate over or outweigh the subordinate issues that pertain to individual members of the class." (*Geiger v. Amer. Tobacco Co.*, 696 N.Y.S.2d 345, 351 [Sup Ct, Queens County 1999]).

In determining whether the claims of Plaintiffs and Class Members share common questions of law or fact, "factual identity between [their] claim[s] and those of the class [they] seek[] to represent is not necessary if these claims arise, at least in part, from a common wrong or set of wrongs regardless of individual factors." (*Pajaczek v. Rema Construction Corp.*, 18 Misc 2d 1140[A] [Sup Ct, New York County 2005]).

Here, there are common questions of law and fact that will generate common answers that will drive the resolution of the litigation, including whether Defendants likely deceived consumers as to the vanilla flavor in the Products and whether the Representations were misleading to a reasonable consumer. Resolution of these common question are not individualized because a court must apply "an objective definition of deceptive acts and practices, whether representations or omissions, limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances." (*Oswego Laborer's Local 214 Pension Fund v. Marine Midland Bank, N.A.,* 623 N.Y.S.2d 529, 647 [1995]).

3. CPLR § 901(a)(3) Is Satisfied Because the Claims of the Plaintiffs Are Typical to Claims of Class

Section 901(a)(3) requires that the Plaintiffs' claims be "typical" of the claims of the proposed class, a standard that is satisfied in this case. Typicality is satisfied when the plaintiffs' claims "derive from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory." (*See Pludeman v. N. Leasing Sys., Inc.*, 74 A.D.3d 420, 423 [1st Dept 2010]). Here, that standard is easily met as the claims of both Plaintiffs derive from the same practice and the same legal theory as the members of the Settlement Class.

Therefore, Plaintiffs have satisfied the "typicality" requirement of CPLR § 901(a)(3).

4. CPLR § 901(a)(4) Is Satisfied Because Plaintiffs and Plaintiffs' Counsel Have and Will Fairly and Adequately Protect Interests of Class

Adequacy of representation requires that "counsel for the named Plaintiffs be competent and that the interests of the named Plaintiffs and the members of the class not be adverse." (*Pajaczek*, 18 Misc 2d 1140[A] (citing *Pruitt*, 167 A.D.2d at 24).

First, Class Counsel are qualified, experienced, and able to conduct the litigation. Class Counsel do not represent clients with interests at odds with the interests of the Settlement Class Members. Class Counsel have invested considerable time and resources into the prosecution of the actions. (Class Counsel Aff. at ¶¶ 4-7, 17-22). Moreover, Class Counsel have been appointed as lead counsel in numerous other class actions and have a proven track record of successful prosecution of class actions. (*Id.* at ¶ 15; Ex. 1 (Reese LLP's firm résumé), Ex. 2 (Sheehan & Associates, P.C. firm résumé)).

Second, the named Plaintiffs possess the same interests as the proposed Settlement Class Members because Plaintiffs and the Settlement Class Members were all allegedly injured in the same manner based on their purchase of the Products. Accordingly, the named Plaintiffs' claims are not adverse to other Class Members; to the contrary, the named Plaintiffs' claims are aligned with that of other Class Members. Accordingly, the "adequacy of representation" requirement of CPLR § 901(a)(4) has been met. (Class Counsel Aff. at ¶ 16).

5. CPLR § 901(a)(5) Is Satisfied Because a Class Action Is Superior to Other Available Methods to Fairly and Efficiently Resolve the Issues

In accordance with CPLR § 901(a)(5), courts have concluded that a class action is "best method of adjudicating" claims of affected persons where the amount in question is too small to litigate individually. (*Pesantez v. Boyle Envtl. Servs., Inc.*, 251 A.D.2d 11, 12 [1st Dept 1998]).

Should this action not proceed on a class-wide basis, "[t]he alternative of requiring dozens of individual actions [would be] ineffective and inefficient method, which could lead to conflicting determinations and the imposition of different and, perhaps, incompatible standards upon [Defendants]." (*Galdamez v. Biordi Const. Corp.*, 831 N.Y.S.2d 347, 347 [Sup Ct, New York County 2006]). Accordingly, a class action is superior here.

6. CPLR § 901(b) Is Inapplicable

CPLR § 901(b) does not apply because Plaintiffs' causes of action are not based on "a statute creating or imposing a penalty, or a minimum measure of recovery."

Nothing in CPLR § 901(b) precludes "[a] statutory class action for actual damages," which is what Plaintiffs seek to recover here. (*Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 211 [N.Y. 2007] (citing legislative history of CPLR § 901(b)).

B. CONSIDERATION OF CPLR § 902 SUPPORTS CLASS CERTIFCATION

CPLR § 902 also sets forth additional factors for consideration whether a class should be certified. All those factors are met here. Given the small amount of recovery per Class Members when weighed against the costs of litigation, separate actions are not in the best interest of Class Members, as prosecuting thousands of separate actions would be impractical and inefficient. Furthermore, a nationwide class adjudicated in New York (where Defendant Conopco is incorporated) is preferred to piecemeal litigation in potentially 50 or more separate courts throughout the United States. Finally, there is no difficulty likely to be encountered in the management of this class action.

Accordingly, for these reasons, Plaintiffs respectfully request the Court grant final certification of the Settlement Class.

II. FINAL APPROVAL OF THE SETTLEMENT IS WARRANTED BECAUSE THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE

A. LEGAL STANDARD

Under CPLR § 908, a Court must approve any proposed "compromise" of a class action after considering its "fairness [], its adequacy, its reasonableness and the best interests of the class members." (*Fiala v. Metro. Life Ins. Co.*, 899 N.Y.S.2d 531, 537 [Sup Ct, New York County 2010]). Relevant factors in determining whether a settlement is fair, reasonable, and adequate include "the likelihood of success, the extent of support from the parties, the judgment of counsel, the presence of bargaining in good faith, and the nature of the issues of law and fact." (*Hastings v. Regeis Care Center, LLC*, 2018 WL 6488279, at *2 [Sup Ct, Bronx County 2018] quoting *In re Colt Indus. Shareholder Litig.,* 155 A.d.2d 154, 160 [1st Dept. 1990]). A court should also "balance[e] the value of [a proposed] settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation." (*Hastings*, 2018 WL 6488279 at *2). All of these factors weigh in favor of approving the settlement.

1. The Value of the Benefits Offered to the Class Outweigh the Likelihood of Plaintiffs' Success on the Merits

The Settlement is an excellent result for Class Members. Damages in this matter is measured by the price premium (*i.e.* the amount overpaid based on the misrepresentations) that consumers paid for the Products. As seen in the First Amended Complaint, the price premium alleged here is 99 cents. (*See* NYSCEF Doc. No. 5 at ¶ 4; *See also* Class Counsel Aff. at ¶ 9). The Settlement provides for a full refund of this price premium, in that Class Members who submit valid claims will each receive $1.00 per Product purchased, up to eight Products without proof of purchase, and with no limitation on the number of Products with proof of purchase. Not only is this result fair and within the range of reasonable, it is likely more than the amount that consumers would have received if the case had gone to trial and Plaintiffs had prevailed.

2. The Class Members and Parties Overwhelming Support the Settlement

Under New York law, support for a proposed settlement from class members demonstrates its fairness. (*See, e.g., Hibbs v. Marvel Enters,*, 19 A.D.3d 232, 233 [1st Dept. 2005]; *Fiala*, 899 NYS2d at 533, n. 1 [approving settlement where 256 people opted out of class settlement]).

Here, as of October 17, 2024, the Court-appointed claims administrator Epiq Class Action & Claims Solutions, Inc. (hereafter, "Epiq") has received 1,120,673 claims. (*See Affirmation of Cameron R. Azari of Epiq Regarding Implementation and Adequacy of Notice Plan* at ¶ 31). In stark contrast, not a single class member has objected. (*Id.* at ¶ 29). And only 224 have opted out from the Settlement. (*Id.*). This overwhelmingly favorable reaction by the Class Members thus strongly supports approval of the Settlement. Finally, the Named Plaintiffs and Defendants have expressed their support for the Settlement by signing the Settlement Agreement.

3. The Experienced Judgment of Class Counsel Support the Settlement

New York courts grant significant weight to the judgment of experienced counsel when ruling on final approval.

Here, Class Counsel are highly experienced in litigating class actions, having been appointed by the courts numerous times as class counsel. (Class Counsel Aff., Exs. 1, 2). Additionally, Class Counsel have worked steadfastly to reach a fair, reasonable, and adequate Settlement. (*See generally* Class Counsel Aff,). Class Counsel believe the claims are strong and have merit, but Class Counsel recognize that significant expense and risk are associated with continuing to prosecute the claims through trial and any appeals. (*Id*. at ¶¶ 12-13).

In negotiating and evaluating the Settlement, Class Counsel have taken into account the risk of establishing liability in light of Defendants' purported defenses. Class Counsel also has taken into account the costs and uncertainties as well as the delays inherent in complex class action litigation. (Class Counsel Aff. at ¶¶ 12-13). Additionally, in the process of investigating and

litigating the action, Class Counsel conducted significant research on the consumer protection statutes at issue, as well as the overall legal landscape, to determine the likelihood of success and reasonable parameters under which courts have approved settlements in comparable cases. (*Id*.).

In light of all of the foregoing reasons, Class Counsel believe this Settlement provides significant relief to the Settlement Class Members and is fair, reasonable, adequate, and in the best interests of the Settlement Class. (Class Counsel Aff. at ¶ 23).

Accordingly, this factor also strongly supports final approval of the settlement. (*See Hastings*, 2018 WL 6488279 at *2 [granting final approval of class settlement and holding that "[i]n reaching the settlement, Class Counsel took into account the risks of establishing liability, and also considered the time, delay, and financial repercussions in the event of trial and appeal by Defendant."]).

4. The Settlement Is the Result of Good Faith, Arm's-Length Negotiations

A class settlement's fairness is presumed when "a class settlement is reached in arm's length negotiations between experienced, capable counsel." (*Fiala*, 899 NYS2d at 538).

The Settlement at issue here was the product of intense and protracted arm's-length negotiations conducted by experienced counsel after formal discovery. (Class Counsel Aff. at ¶¶ 7-8). Additionally, the Settlement was reached through the assistance of a highly respected mediator, Peter Woodin of JAMS, following two in-person mediations sessions. (*Id.* at ¶ 8).

Accordingly, this factor strongly weighs in support of final approval of the settlement.

5. The Nature of The Legal and Factual Issues Was Complex

Here, the nature of the legal and factual issues heavily supports final approval. While Class Counsel believe the claims are strong, they are not without risk. Plaintiffs' principal contentions are strongly disputed by Defendants. Plaintiffs' motion for class certification would have been hard fought and highly contested. Even if Plaintiffs were to succeed on their class certification motion, the Parties would have had to spend a substantial amount of time on Defendants' potential appeal. In addition, it is highly possible that Defendants would have moved for summary judgment or that Defendants could have won at trial, either of which would have led to the dismissal of this action. Furthermore, even had Plaintiffs obtained class certification and won at trial, it is possible that the Settlement Class would have been awarded less damages than they are receiving in this Settlement. Accordingly, this factor also weighs heavily in favor of final approval of the settlement.

For all of the foregoing reasons, the settlement is fair, adequate, and reasonable, and should be approved.

III. PAYMENT OF ATTORNEYS FEES TO CLASS COUNSEL IS WARRANTED

CPLR § 909 permits courts to order payments of attorney fees and reimbursement of expenses in class action litigation. "If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class based on the reasonable value of legal services rendered[.]" CPLR § 909.

A. LEGAL STANDARD

When reviewing a motion for payment of class counsel fees under either the commonly accepted percentage of the fund methodology, or less common alternative lodestar methodology (both discussed below), courts consider the following factors:

> the risks of the litigation, whether counsel had the benefit of a prior judgment, standing at bar of counsel for the plaintiffs and defendants, the magnitude and complexity of the litigation, responsibility undertaken, the amount recovered, the knowledge the court has of the case's history and the work done by counsel prior to trial, and what it would be reasonable for counsel to charge a victorious plaintiff.

(*Hastings*, 2018 WL 6488279 at *4). Here, consideration of these factors supports the award of one-third of the settlement amount for class counsel's fees.

1. The Risk of Litigation

The risk of litigation is "the foremost factor to be considered in determining award of appropriate attorneys' fees." (*Taft v. Ackermans*, 2007 WL 414493, at *10 [S.D.N.Y. Jan. 31, 2007]). Here, Class Counsel undertook significant risk litigating this matter over the last four years. Class Counsel has litigated this matter completely on a contingency basis, having not been paid anything to date for their considerable efforts. (Class Counsel Aff. at ¶ 17). There was no guarantee of any recovery, and there was a substantial risk of no recovery at all given the strong defenses of Defendants. If Class Counsel had not reached this Settlement, and the case was dismissed, the class not certified, or if Defendants were to prevail on summary judgment, at trial, or appeal, Class Counsel would have lost all the time and expenses they put into this matter. Accordingly, the fact that this matter was litigated completely on a contingency basis strongly supports the requested fee. (*See Hastings*, 2018 WL 6488279 at *5 (awarding one-third of the fund for class counsel's fees and holding that "[t]he fee requested is also reasonable based on the fact Class Counsel did substantial work over a period of 2.5 years on a fully contingent basis.")).

2. Whether Counsel Had the Benefit of a Prior Judgment

Underscoring the risk taken on by Class Counsel in this matter is the fact that Class Counsel did not have the benefit of a prior judgment against Defendants in litigating this matter. This factor also further supports the requested fee.

3. Standing of Counsel for the Plaintiffs and Defendants

Class Counsel have extensive experience in prosecuting consumer class actions, particularly with respect to food products that are allegedly deceptively labeled. (*See* Class Counsel Aff. at ¶ 15, Exs. 1, 2 (firm resumes)). Class Counsel have been appointed numerous times as class counsel in food related, and other types of class actions. (*Id.*) Class Counsel's extensive experience was directly responsible for this exceptional settlement. (*Id.*. at ¶ 15). Defense counsel also has extensive experience and success defending class actions. (*Id.*).

This factor therefore also further supports Court approval of the requested fee.

4. The Magnitude and Complexity of the Litigation

There is an inherent complexity in pursuing any class action. This class action, which concerns the ingredients in Defendants' Products and the marketing of those Products to hundreds of thousands of consumers nationwide, presented many novel and complex issues. While Plaintiffs believe that their claims are strong, they are not completely without risk. For example, Defendants disputed and continues to dispute that they engaged in deceptive conduct and that the source of the vanilla flavoring comes solely from vanilla extract or from other vanilla-flavor sources. While Plaintiffs believe that they would have ultimately prevailed, the Settlement eliminates these risks and will provide substantial recovery for the Class without the risk and delay of continued litigation.

This factor therefore also further supports Court approval of the requested fee.

5. The Case History and the Responsibility Undertaken by Class Counsel

Class Counsel litigated this action (and the related *Vizcarra* action) extensively, and Defendants put up hard-fought defenses all throughout the litigation. (Class Counsel Aff. at ¶¶ 4-7). Class Counsel engaged in through pre-filing investigation of Plaintiffs and Class Members' claims and damages, working closely with experts as Class Counsel drafted the initial complaints. (*Id.* at ¶ 12). Class Counsel also had to engage in significant contested motion practice, including defeating Defendants' motion to dismiss as well as achieving certification of a class over Defendants' opposition (both in the *Vizcarra* matter). (*Id.* ¶¶ 5-7). Class Counsel also engaged in significant discovery, both factual and expert discovery. (*Id.*).

Significant efforts were also involved in connection with the protracted settlement negotiations, which took place through a highly-respected mediator. (Class Counsel Aff. at ¶ 8). Class Counsel also worked closely with an expert during the settlement negotiations to determine the price premium. (*Id.*). Class Counsel also prepared the settlement papers as well as the motion for preliminary approval, which this Court granted on August 14, 2024. (*Id.*). Since reaching the settlement, Class Counsel have also responded to inquires from numerous Class Members and coordinated the settlement process with the Claims Administrator. (*Id.*). Class Counsel anticipates expending additional time after the filing of this memorandum of law, including, but not limited to, preparing for the final approval hearing and continued work administering the Settlement after final approval. (*Id.*).

This factor therefore also further supports Court approval of the requested fee.

6. Amount Recovered

Class Counsel's hard work has led to the creation of a substantial recovery on behalf of the Class. The settlement provides for Defendants to pay up to $8,850,000 to cover the payment of all

valid claims made by Class Members; the costs of notice and claims administration; the payment of attorney fees and reimbursement of expenses to Class Counsel; and payment of service awards to the Class Representatives. Significantly, each Class Member will receive one dollar for each Product claimed (subject to certain restrictions based on proof of purchase), which represents a complete recovery for the damages they suffered as the price premium attributed to the allegedly misleading statements is a little less than one dollar. Accordingly, the Settlement is clearly an excellent result, and this factor therefore also further supports Court approval of the requested fee.

7. Reasonable Charge by Counsel to a Victorious Plaintiff

"Consumer class actions…have value to society…both as deterrents to unlawful behavior…and as private law enforcement regimes that free public section resources. If we are to encourage these positive societal effects, class counsel must be adequately compensated." (*Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 287 [6th Cir. 2016]). Moreover, given the contingency nature of class action litigation, it is reasonable for Class Counsel to be compensated based upon a percentage of the fund. As discussed below, the percentage method is "consistent with and, indeed, is intended to mirror, practice in the private marketplace where contingent fee attorneys typically negotiate percentage fee arrangements with their clients." (*Strougo ex rel. Brazilian Equity Fund, Inc., v. Bassini*, 258 F. Supp.2d 254, 262 [S.D.N.Y. 2003]). Indeed, "contingency fees provide access to counsel for individuals who would otherwise have difficulty obtaining representation...and transfer a significant portion of the risk of loss to the attorneys taking a case. Access to the courts would be difficult to achieve without compensating attorneys for that risk." (*deMunecas v. Bold Food LL*C, 2010 WL 3322580, at *8 [S.D.N.Y. 2010]). Many individual litigants, "cannot afford to retain counsel at fixed hourly rates...yet they are willing to pay a portion of any recovery they may receive in return for successful representation." *Id.*

Moreover, given the substantial risk of contingency work, whereby Class Counsel are only paid if they are successful in recovering for the Class Members, courts routinely award a "one-third fee request [as] consistent with the norms of class litigation..." (*Hastings*, 2018 WL 6488279 at * 4 [awarding one-third of fund holding "[t]he Court finds that the fee Class Counsel seeks is reasonable, as Class Counsel's request for 33% of the settlement fund is consistent with that awarded in these types of cases."](collectively cases)).

Accordingly, the Court should now grant the motion for attorney fees in the amount of one-third, as that is consistent with what would be charged to a victorious plaintiff in contingency class action litigation.

B. USE OF THE PERCENTAGE OF THE FUND METHODOLOGY IS WARRANTED HERE FOR CALCULATION OF CLASS COUNSEL'S FEES

Here, "Class Counsel's one-third fee request is consistent with the norms of class litigation[.]" (*Hastings*, 2018 WL 6488279 at *4 (awarding 33% of fund holding "[t]he Court finds that the fee Class Counsel seeks is reasonable, as Class Counsel's request for 33% of the settlement fund is consistent with that awarded in these types of cases") (collectively cases)).

Indeed, courts have recognized a strong preference to award class counsel's fees as a percentage of the fund instead of using lodestar because "[t]he lodestar method has the potential to lead to inefficiency and resistance to expeditious settlement because it gives attorneys an incentive to raise their fees by billing more hours." (*Cox v. Microsoft Corp.*, 26 Misc.3d 1220(A), 4 [N.Y. Sup. 2007]). As such, "[t]he trend…is toward the percentage method,...which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of the litigation." (*Wal-Mart Stores, Inc. v. VISA U.S.A., Inc.*, 396 F.3d 96, 121 [2d Cir. 2005]).

The percentage method also "mimics the compensation system actually used by individual clients to compensate their attorneys." (*In re Sumitomo Copper Litig.*, 74 F.Supp.2d 393, 397 [S.D.N.Y. 1999]); (*Strougo ex rel. Brazilian Equity Fund, Inc.,* 258 F. Supp.2d at 262 (the percentage method is "consistent with and, indeed, is intended to mirror, practice in the private marketplace where contingent fee attorneys typically negotiate percentage fee arrangements with their clients.")). Indeed, such "contingency fees provide access to counsel for individuals who would otherwise have difficulty obtaining representation...and transfer a significant portion of the risk of loss to the attorneys taking a case. Access to the courts would be difficult to achieve without compensating attorneys for that risk." (*deMunecas*, 2010 WL 3322580, at *8). Many individual litigants, "cannot afford to retain counsel at fixed hourly rates...yet they are willing to pay a portion of any recovery they may receive in return for successful representation." (*Id.*).

The percentage method also preserves judicial resources because it "relieves the court of the cumbersome, enervating, and often surrealistic process of evaluating fee petitions." (*Savoie v. Merchs. Bank*, 166 F.3d 456, 461 n.4 [2d Cir. 1999]). As the Second Circuit noted in *Goldberger v. Integrated Resources*, 209 F.3d 43 (2d Cir. 2000), the "primary source of dissatisfaction [with the lodestar method] was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits." Accordingly, "[t]rial courts evaluating fee requests 'need not, and indeed should not, become green-eyeshade accountants.'" (*Torres v. Gristede's Operating Corp.,* 519 F. App'x 1, 3 [2d Cir. 2013] quoting *Fox v. Vice*, 563 U.S. 826, 838 [2011])).

Nonetheless, as seen below, under either the percentage of the fund or lodestar methodology, the requested fee is warranted.

C. THE FEE IS JUSTIFIED BY THE ALTERNATIVE LODESTAR METHODOLOGY

While the Court can and should award the fee request based upon a percentage of the fund methodology, if the Court instead decides to base it on lodestar, the amount of time and effort here by Class Counsel also justifies the requested fee.

As detailed in the Class Counsel Affirmations, Class Counsel put in a substantial amount of work – more than 2652 hours in this litigation – without any guarantee of payment. (Class Counsel Aff. at ¶ 17). The total lodestar to date is $3,705,205, which is greater than the fee requested here. (*Id.*). While Class Counsel is not seeking a multiplier on its lodestar, it should be noted that courts routinely apply a multiplier to the lodestar because "[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." (*City of Detroit v. Grinnell Corp.*, 495 F2d 448, 470 [2d Cir. 1974]). Indeed, New York courts have observed that "in contingent litigation, lodestar multipliers of over 4 are routinely awarded." (*Milton v. Bells Nurses Registry & Emp. Agency, Inc*., 2014 WL 5430622, at *6 [N.Y. Oct. 28. 2014] quoting *In re Telik, Inc. Sec. Litig*., 576 F. Supp.2d 570, 590 [S.D.N.Y. 2008]).

Accordingly, even if this Court were to use the alternative lodestar methodology, the requested fee is more than justified.

IV. REIMBURSEMENT OF CLASS COUNSEL'S EXPENSES ARE WARRANTED

Plaintiffs' Counsel have also expended $200,954.98 in costs, for which they should now be reimbursed. (Class Counsel Aff. at. ¶ 22). These costs included costs for extensive discovery (including depositions of both factual and expert witnesses); experts; and several rounds of mediation, which were all integral to the prosecution of the case and the process by which the litigation was resolved. (*Id.*) "It is well-settled that attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients." (*Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 216, 222 [S.D.N.Y. 2015]).

V. PAYMENT OF SERVICE AWARDS TO THE CLASS REPRESENTATIVES IS WARRANTED.

It is common for courts to grant service awards in a class action. Such awards "rewards the named plaintiffs for the effort and inconvenience of consulting with counsel over the many years [a] case was active and for participating in discovery[.]" (*Cox*, 26 Misc.3d 1220(A) at *4.

Courts routinely grant service awards of $10,000 or more per class representative. (*See e.g. Hastings*, 2018 WL 6488279 at *2 ("The Court finds reasonable the service awards of $12,500.00 for Plaintiff Hastings, $12,500.00 for Plaintiff Briscoe and $10,000.00 for Plaintiff Walker."); *Sewell v. Bovis Lend Lease, Inc*., 2012 WL 1320124, at *13 [S.D.N.Y. 2012] (approving service awards of $15,000 and $10,000 for the class representatives)).

Here, the requested service awards of $5,000 for each of the two Class Representatives is well within line of the service awards granted by the courts of New York. Accordingly, the requested $5,000 service award per class representative should be granted.

CONCLUSION

For the foregoing reasons, the Class Representatives, the Class and Class Counsel respectfully request that the Court grant their motion for Final Approval.[3]

Dated: October 22, 2024

Respectfully submitted,

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[3] Class Counsel will submit a Proposed Final Approval and Judgment as soon as practicable before the November 21, 2024 Final Approval Hearing.