UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TONY LUIB, on behalf of himself and all others similarly situated, *Plaintiff,* v. HENKEL CONSUMER GOODS, INC., *Defendant.*	No. 1:17-cv-03021-BMC

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES TO CLASS COUNSEL AND INCENTIVE AWARD TO THE CLASS REPRESENTATIVE

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Class Representative Tony Luib respectfully submits this memorandum of law in support of his motion for an award of attorneys' fees and reimbursement of litigation expenses to Class Counsel[1] and Incentive Award to the Class Representative.

I. PRELIMINARY STATEMENT

As discussed in detail in the memorandum of law in support of final approval of the class action settlement filed concurrently herewith, Class Counsel achieved a favorable Settlement on behalf of the Class Members that provides for significant monetary and injunctive relief. The Settlement Agreement, however, was achieved only after more than two years of hard-fought litigation, including, but not limited to, survival of a motion for summary judgment brought by Defendant; wide-ranging discovery; and extensive arm's-length negotiations with the assistance of a retired federal judge acting as a mediator. Class Counsel now hereby move for $495,000 as payment of attorneys' fees and $10,861.21 as reimbursement of litigation expenses, for a total of $505,861.21. Class Counsel also hereby request an incentive award for plaintiff Tony Luib of $7,500 for his contribution to, and active participation in, the action as the court-appointed Class Representative.

As the record before this Court demonstrates,[2] the favorable outcome in this case is the result of Class Counsel's hard work and diligent efforts. The amount requested in fees and expenses for Class Counsel fairly and reasonably compensates them for over two years of hard

[1] Capitalized terms have the meaning the Settlement Agreement ascribes to them. *See generally* Class Action Settlement Agreement, ECF No. 54-3.

[2] The Declaration of Michael R. Reese in Support of Final Approval ("Reese Final Approval Decl.") filed on July 8, 2019, and the Declaration of Michael R. Reese in Support of Motion for Preliminary Approval filed previously on March 1, 2019 (ECF No. 54-2) ("Reese Preliminary Approval Decl.") are integral parts of this submission. Plaintiff respectfully refers the Court to them for a detailed description of the factual and procedural history of the litigation, the claims asserted, the work Class Counsel performed, the settlement negotiations, and the numerous risks and uncertainties the litigation presented.

work and diligent efforts in litigating and negotiating this matter, as well as their unreimbursed expenses. The requested amount is in line with prior decisions of courts in the Second Circuit. *See, e.g., Blessing v. Sirius XM Radio Inc.*, 507 F. App'x 1, 4–5 (2d Cir. 2012) (upholding award of $13 million in fees for class settlement achieved after three years of litigation).

Based on the Class Representative's contributions to the Action and incentive awards in other cases, the Incentive Award requested for Plaintiff is also warranted. For all of the reasons given herein, the Court should grant Plaintiff's motion for the award of attorneys' fees and ligation expenses to Class Counsel and Incentive Award to Class Representative Tony Luib.

II. ARGUMENT

Class Counsel has spent more than two years litigating this matter. They should now be compensated for their work. As Plaintiff demonstrates below, the $495,000 that Class Counsel seeks here is well within range of fee awards in similar cases in the Second Circuit.

A. Class Counsel Negotiated Fees with Defendant Only after Agreeing upon the Settlement Terms

As an initial matter, it is important to point out that Class Counsel did not negotiate attorneys' fees and expenses with Defendant until ***after*** the Parties reached agreement as to the terms of the Settlement benefiting the Settlement Class. *See* Reese Preliminary Approval Declaration (ECF No. 54-2) at ¶ 14.

The United States Supreme Court has held that negotiated, agreed-upon attorneys' fee provisions are the ideal toward which the parties should strive. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). "A request for attorney's fees should not result in a second major litigation." *Id.* "Ideally, of course, litigants will settle the amount of a fee." *Id.*

B. The Agreed-upon Attorneys' Fees and Litigation Expenses Are Reasonable and Warrant Approval

1. The Court Should Award 33% of the Common Fund as Attorney Fees

In cases such as this involving a common fund, courts typically look at the percentage-of-the-fund method, with a lodestar crosscheck. "Courts in the Second Circuit tend to grant class counsel a percentage of any settlement, rather than utilize the 'lodestar method' (multiplying the hours reasonably expended by a reasonable hourly rate), because the percentage method aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 220 (S.D.N.Y. 2015) (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005)). "The lodestar method, on the other hand, disincentivizes early settlements, tempts lawyers to run up their hours, and 'compels district courts to engage in a gimlet-eyed review of line-item fee audits.'"[3] *Id.* (quoting *Wal-Mart*, 396 F.3d at 121); *see also Torres v. Gristede's Operating Corp.*, 519 F. App'x 1, 3 (2d Cir. 2013) (Straub, Raggi, & Cogan, JJ.) (trial courts evaluating fee requests "need not, and indeed should not, become green-eyeshade accountants.").

The percentage method is an appropriate method of fee recovery here because, among other things, it aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum recovery in the shortest amount of time required under the circumstances, is supported by public policy, has been recognized as appropriate by the Supreme Court for cases of this nature, and represents the current trend in the Second Circuit.

Under the percentage-of-the-fund method, the court sets a percentage of the common fund recovery as a fee. *See Goldberger*, 209 F.3d at 47, 50; *accord Blessing*, 507 F. App'x at 4.

[3] "As a 'cross-check' to a percentage award, courts in this Circuit [do] use the lodestar method." *Wal-Mart*, 396 F.3d at 123 (citing *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47, 50 (2d Cir. 2000)).

In courts within the Second Circuit, the amount of the attorneys' fees awarded under the percentage methodology is often 1/3 of the fund, and can at times be higher. *See Torres.*, 519 F. App'x at 5-6 (Straub, Raggi, & Cogan, JJ.) (noting that 1/3 of common fund is the benchmark in the Second Circuit and affirming a higher amount – 52.2% - of value of settlement for attorney fees and costs); *In re Dental Supplies Antitrust Litig.*, No. 1:16-cv-00696-BMC-GRB (E.D.N.Y. June 25, 2019) (Cogan, J.) (approving request for attorneys' fees in the amount of one-third of $80,000,000 settlement fund); *Colabufo v. Cont'l Cas. Co*., No. 04-cv-1863-BMC-MLO, 2009 WL 8626041, at *4 (E.D.N.Y. July 31, 2009) (Cogan, J.) (awarding class counsel attorneys' fees in the amount of one-third of the net settlement payment); *see also Weston v. TechSol, LLC*, No. 17-cv- 0141-CLP, 2018 WL 4693527, at *2, 7–9 (E.D.N.Y. Sept. 26, 2018) (approving request for attorneys' fees in the amount of one-third of $550,000 settlement fund); *Rapoport-Hecht v. Seventh Generation, Inc*., No. 14-CV-9087 (KMK), 2017 U.S. Dist. LEXIS 219060, at *8-9 (S.D.N.Y. Apr. 28, 2017) (33.3% of $4.5 million settlement fund); *Puglisi v. TD Bank, N.A.*, No. 13 Civ. 637 (GRB), 2015 U.S. Dist. LEXIS 100668, at *3–4 (E.D.N.Y. July 30, 2015) (awarding 33.3% of settlement fund); *Raniere*, 310 F.R.D. at 216, 220–22 (approving request for 1/3 of settlement as fees); *Donnelly v. Peter Luger of Long Island, Inc.*, No. 13-cv-1377-LDW, 2014 WL 12769046, at *7–8 (E.D.N.Y. Nov. 13, 2014) ("Class Counsel's request for one-third of the [$250,000] Fund is reasonable and 'consistent with the norms of class litigation in this circuit.'")

Furthermore, under the percentage-of-the-fund method, it is appropriate to base the percentage on the full amount of the fund, *i.e.*, the gross cash benefits available for Settlement Class Members to claim plus the additional benefits conferred on the Settlement Class by Defendant's payment of attorneys' fees and expenses and the expenses of notice and claims administration. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980) ("Although the full

value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery.").

Although the Court should use the percentage of fund method in evaluating the appropriate fee in this case, it should also "'cross-check' the percentage fee award against the lodestar to ensure reasonability." *Flores v. Mamma Lombardi's of Holbrook, Inc.*, 104 F. Supp. 3d 290, 308 (E.D.N.Y. 2015) (quoting *Wal-Mart*, 396 F.3d at 123). In a lodestar crosscheck, the Court reviews "the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate." *Goldberger*, 209 F.3d at 47. Once the court has made the initial computation, it may, in its discretion, increase the lodestar by applying a multiplier. *See id.*; *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 197–98 (S.D.N.Y. 1997) (awarding a 5.5 multiplier). Here the lodestar method confirms that 33% of the common fund for attorneys' fees is appropriate for the award of attorney fees to Class Counsel because it results in a negative multiplier of .92 when taking into account Class Counsel's having accrued $540,550.15 in hourly time compared to the $495,000 in attorneys' fees sought. *See* Reese Final Approval Decl., ¶ 21.

In *Goldberger*, the Second Circuit articulated six factors for courts to consider in determining the reasonableness of fee applications under both the percentage of fund method and the lodestar method: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50. These factors are discussed below.

2. The *Goldberger* Factors

a. Time and labor expended by counsel

As discussed above, Class Counsel have devoted considerable time and effort to the investigation, prosecution, and settlement of this highly complex action. Over the course of more than two years, Class Counsel have spent in excess of six hundred hours in performance of their services, which has resulted in the Settlement. Reese Final Approval Decl. at ¶¶ 5-21. Class Counsel, however, have yet to be paid anything for their labor and efforts.

Class Counsel also have incurred expenses during the course of this case that have yet to be reimbursed, including but not limited to costs associated with mediation and Class Counsel's retention of an expert. Class Counsel's lodestar to date is over $540,550 and expenses are $10,861.21. *See* Reese Final Approval Decl., ¶ 21. This factor strongly supports the reasonableness of the requested fee.

b. Magnitude and complexity of the litigation

The magnitude and complexity of the litigation support the fee award sought by Plaintiff. Consumer class action lawsuits by their very nature are complex, expensive, and lengthy. *See, e.g.*, *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010). The complexity of this case and its attendant risks have only been heightened by the Court's ruling that a jury could reasonably conclude either way on the question of whether the "Natural Elements" label was misleading. *See* Summary Judgment Order, ECF No. 40. Proving classwide damages before the jury using an appropriate method is another challenge that Plaintiff face if he proceeded to a judgment. This factor strongly supports the reasonableness of the requested fee.

c. Risk of the litigation

The significant risks of continuing to litigate this case through trial strongly support the

requested fee award. This factor is often cited as the "first, and most important, *Goldberger* factor." *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 361 (E.D.N.Y. 2010). Class Counsel took the substantial risk of prosecuting this litigation on a full contingency basis, without charging Plaintiff or any Settlement Class Member for fees or expenses. *See* Reese Final Approval Decl., ¶ 21; *see also Goldberger*, 209 F.3d at 53 ("[O]f course, contingency risk . . . must be considered in setting a reasonable fee.").[4] From the commencement of this litigation, Class Counsel have been paid nothing for their substantial efforts. The significant expenditure of resources that Class Counsel have made has been completely at risk. Payment for Class Counsel's services was wholly dependent on obtaining some benefit for the Settlement Class.

Plaintiff would also face considerable challenges in attempting to obtain a judgment providing classwide relief, which requires that Plaintiff, *inter alia*, prevail in his motion to certify a class, potentially defend another summary judgment motion, and ultimately obtain a class judgment following trial. This process, as with any class action litigation, will be fraught with risks at every stage, and at the end of the day, while Plaintiff believes a reasonable consumer would find the term "Natural Elements" on the Products' labeling to be misleading, a jury might not agree. Litigation would also incur immense costs and expenses that ultimately would likely be assessed against any recovery by the Settlement Class, and may not result in any tangible recovery for years, especially if any appeal(s) were taken.

An additional challenge is the calculation of classwide damages. Here, Defendant has argued that no price premium exists and that Base Purex is the closest comparable product to the Products. While Plaintiff does not agree with Defendant's positions and believes that he could

[4] In *Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974), the Second Circuit observed that "[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." (Internal quotations omitted).

ultimately demonstrate a price premium paid for the Products, a proposed settlement eliminates the risk that a class would not be certified on account of damages issues.

Further, if Plaintiff were successful in obtaining certification of a litigation class, the certification would not be set in stone. *See Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."). Given the risks, costs, and potential delays inherent in litigating this Action to judgment, this factor weighs heavily in favor of the reasonableness of the requested fee.

d. Quality of representation

The quality of Class Counsel's representation can be measured mainly by the results achieved. Here, the goals of the litigation were to provide monetary compensation for the Settlement Class Members for their purchases of the Products on account of the allegedly false and misleading marketing and to require Defendant to correct such marketing. Class Counsel's efforts in the litigation achieved those significant goals. The substantial experience of Class Counsel in prosecuting consumer protection class action cases was an important factor in achieving these significant goals.[5] And Class Counsel achieved these results in litigation against opposing counsel of significant skill and reputation. *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."). Accordingly, this factor weighs strongly in favor of the reasonableness of the requested fee.

[5] Furthermore, Class Counsel have a proven track record in the prosecution of class actions, and they have successfully litigated many major class action cases. *See* Reese Preliminary Approval Decl. ¶ 14.

e. Requested fee in relation to settlement

"[T]he percentage used in calculating any given fee award must follow a sliding-scale and must bear an inverse relationship to the amount of the settlement." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013). Where the size of the fund is relatively small, courts typically find that requests for a greater percentage of the fund are reasonable. *See Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 U.S. Dist. LEXIS 24890, at *25 (S.D.N.Y. Oct. 24, 2005) ("A settlement amount of $10 million does not raise the windfall issue in the same way as would a $100 million settlement").

Class Counsel's fee request of $495,000, 33% of the total value of the Settlement, is eminently reasonable and well within the typical percentage of fees granted in class actions with similarly-sized common funds. *See supra*. Accordingly, the relation of the fee request to the value of the Settlement supports the reasonableness of the requested fee.

f. Public policy considerations

Public policy considerations weigh in favor of granting Class Counsel's requested fees. In awarding attorneys' fees, the Second Circuit "take[s] into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation." *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999).

Courts have recognized that fee awards in cases like this serve the dual purposes of encouraging "private attorney[s] general" to seek redress for violations and discouraging future misconduct of a similar nature. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338–39 (1980). Through this action, Plaintiff has operated as a private attorney general to police alleged false advertising claims. Only Plaintiff's and Class Counsel's willingness to bring this litigation has provided the Settlement Class with compensation for their purchases.

An award of attorneys' fees helps to ensure that "plaintiffs' claims [will] . . . be heard." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 189 (W.D.N.Y. 2005). If courts denied sufficient attorneys' fees "no attorneys . . . would likely be willing to take on . . . small-scale class actions." *Id.*; *see also In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003), *aff'd sub nom, Wal-Mart Stores*, 396 F.3d 96 (policy issue in evaluating a fee request is that fees "must . . . serve as an inducement for lawyers to make similar efforts in the future"). This and the other *Goldberger* factors support approval of the attorneys' fees requested by Class Counsel.

C. The Court Should Approve the Reimbursement of Class Counsel's Expenses

Class Counsel have also expended $10,861.21 in expenses, for which they should now be reimbursed. "Attorneys may be compensated for reasonable out-of pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation of those clients." *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. MDL No. 1775, 2015 U.S. Dist. LEXIS 138479, at *149 (E.D.N.Y. Oct. 9, 2015) ("Lawyers are generally entitled to reimbursement for reasonable out-of-pocket expenses"). Here, Class Counsel's expenses were integral to the prosecution of this case, including costs associated with mediation as part of the process of reaching a resolution of the Action. The specific expenses incurred are detailed in the Reese Final Approval Declaration, Sultzer Declaration, and Boyle Declaration.

D. The Court Should Approve the Proposed Incentive Award to the Class Representative

Plaintiff also moves the Court to approve an Incentive Award for the Class Representative. "[Incentive] awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens

sustained by plaintiffs." *Hernandez v. Immortal Rise, Inc.*, 306 F.R.D. 91, 101 (E.D.N.Y. 2015) (approving service awards up to $7,500 to named plaintiffs as reasonable); *see also Massiah v. MetroPlus Health Plan, Inc.*, No. 11-CV-05669 BMC, 2012 WL 5874655, at *8 (E.D.N.Y. Nov. 20, 2012) (collecting cases approving service awards ranging up to $30,000).

Defendant has agreed to pay an incentive award of $7,500 to Plaintiff as compensation for his time and effort spent in the litigation. *See* Class Action Settlement Agreement § 8.4, ECF No. 54-3. Plaintiff performed an important and valuable service for the benefit of the Settlement Class. Plaintiff met, conferred, and corresponded with Class Counsel as needed for the efficient process of this litigation, including the providing discovery in response to discovery requests and submitting evidence during the summary judgment phase. *See* Reese Preliminary Approval Decl. at ¶ 23. Plaintiff also participated in numerous interviews by Class Counsel, provided personal information concerning the Action, and remained intimately involved in the mediation and litigation processes. Plaintiff further actively participated in discussions related to the Settlement. Plaintiff's actions have benefitted the Settlement Class to a significant degree (including by culminating in the Settlement). Accordingly, Plaintiff respectfully requests that the Court approve the $7,500 service award.

III. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant the Motion for Award of Attorneys' Fees and Litigation Expenses to Class Counsel and Incentive Awards to the Class Representative.

Date: July 8, 2019

Respectfully submitted,

By: */s/ Michael R. Reese*

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Court Appointed Class Counsel