IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LORI COWEN, et al., Plaintiff, vs. LENNY & LARRY'S, INC., Defendant.	Case No. 1:17-CV-01530 Judge Robert W. Gettleman Magistrate Young B. Kim

MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

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I. PRELIMINARY STATEMENT

Plaintiffs Lori Cowen, Rochelle Ibarrola, Ava Adames, Amanda Wells, and Barbara Whalen (together, "Plaintiffs"), individually and on behalf of the Settlement Class, and Defendant Lenny & Larry's, Inc. (converted to and now known as Lenny and Larry's, LLC) ("Defendant") entered into a Settlement Agreement (the "Original Settlement") to resolve Plaintiffs' claims related to the product labeling for Defendant's "The Complete Cookie." Third Am. Compl. (Dkt. 72); Settlement Agreement (Dkt. 94-App. 1).[1] The Original Settlement created a fund valued at $5 million. The fund was comprised of $3.15 million in free product at retail value and $1.85 million in cash, with $350,000 specifically set aside to pay for cash claims. The Original Settlement also provided for a secondary distribution of unclaimed product to Settlement Class Members through retail locations, such as GNC and Vitamin Shoppe.

In December 2018, the Claims Administrator provided the parties with preliminary data on the claims submitted and the breakdown between cash and free product elections. The claims had significantly exceeded the 10,000 total claims submissions contemplated by the parties upon entering into the Original Settlement. The claims data also showed a strong preference for the cash distribution. In total, the Claims Administrator received 66,647 valid claims, with 59,441 claims for cash and 7,206 claims for free product, respectively. As originally structured, Settlement Class Members who elected to receive cash *without proof of purchase* would have received less than $5 per claim compared to the $10 per claim set forth in the Original Settlement.

On March 30, 2019, the parties entered into the Amended Settlement. The Amended Settlement eliminates the secondary product distribution, removes the $350,000 limit on cash

[1] Unless otherwise stated, all defined terms have the meanings given them in the Original Settlement Agreement.

claims, and increases the amount of cash available to Settlement Class Members. The Amended Settlement increases the cash available to claimants from $350,000 to a minimum of $889,867.17, subject to further possible upward adjustment, and provides for $300,000 in free product at retail value. The parties also negotiated and agreed to revised terms for the payment of Class Counsel's attorneys' fees, expenses, and named Plaintiff incentive awards. Defendant will pay up to $455,000 for any such awards, as approved by the Court. Should the Court award less than $455,000 in total, the remaining value shall be distributed to cash claimants on a *pro rata* basis.[2]

Class Counsel seeks Court approval of attorneys' fees in the amount of $410,101.38, reimbursement of $37,398.62 in litigation expenses, and incentive awards to the named Plaintiffs in the amount of $1,500 each. As set forth below, the fee request is reasonable under both the percentage-of-recovery and lodestar methods. Class Counsel's requested fee is further warranted by the success of the Amended Settlement: Settlement Class Members submitted 66,647 valid claims, an extraordinary number in a consumer class action, with twenty-two exclusions and two objections. The Amended Settlement is the result of hard-fought litigation, which included adjudication of Defendant's motion to dismiss and to strike the class allegations, preliminary fact discovery, mediation with a retired federal judge, and months of arm's-length negotiations between experienced class action counsel. Accordingly, Class Counsel requests that the Court grant the requested attorneys' fees, expenses, and incentive awards as fair and reasonable.

II. FACTUAL AND PROCEDURAL BACKGROUND

On February 28, 2017, Plaintiffs filed a Class Action Complaint alleging that the packaging for The Complete Cookies misstated the amount of protein contained in the product. Plaintiffs

[2] The objections made by the Department of Justice and Theodore H. Frank criticized certain provisions in the Original Settlement commonly referred to as "clear-sailing" and "kicker" provisions. See Dkts. 98, 103. The Parties have removed those provisions from the Amended Settlement, which now includes an express reversion to the Settlement Class of any unawarded attorneys' fees, costs, or incentive awards.

alleged that the mislabeling violated several state consumer protection statutes and asserted claims for breach of implied warranty and unjust enrichment. Compl. (Dkt. 1), ¶¶ 50-54. Plaintiffs later amended their complaint to add allegations related to the calories, carbohydrates, fats, and sugars contained in The Complete Cookies.[3] First Am. Compl. (Dkt. 33), ¶¶ 58-62, 88-127. Defendant moved to dismiss Plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) and to strike the class claims. Dkt. 35. On October 12, 2017, the Court granted in part Defendant's motion to dismiss. The Court dismissed Plaintiffs' claims related to product flavors they did not purchase and struck all claims pled on behalf of the multi-state and national classes. The Court upheld the common law and consumer protection claims pled on behalf of the state subclasses. Dkt. 50. Plaintiffs again amended the complaint. The operative Third Amended Complaint brings claims on behalf of a proposed Illinois class for violations of the Illinois consumer protection statute, intentional misrepresentation, and unjust enrichment. Third Am. Compl. (Dkt. 72), ¶¶ 55-74.

On November 28, 2017, the parties held a mediation with the Honorable James Holderman, a retired federal judge. Following mediation, the parties informally exchanged discovery and engaged in settlement negotiations over several months, culminating in the Original Settlement. On October 25, 2018, the parties filed a Joint Motion for Preliminary Approval of the Class Action Settlement. Dkts. 93, 94. The Court granted the parties' joint motion on October 31, 2018 and set the Final Approval Hearing for March 19, 2019. Dkt. 97.

Due to the response to the Original Settlement, the parties filed a Joint Motion for Continuance of Final Approval Hearing on Class Action Settlement Agreement. Dkt. 104. The continuance allowed the parties to negotiate and finalize the Amended Settlement, which modified

[3] Plaintiffs brought their claims on behalf of a Nationwide Class, Consumer Fraud Multi-State Class, and three state subclasses (Illinois, Michigan and Pennsylvania). See First Am. Compl. (Dkt. 33), ¶ 49.

the financial terms of the Original Settlement to account for the overwhelmingly positive response from Settlement Class Members. The Court granted the joint motion on March 12, 2019 and re-set the Final Approval Hearing for May 2, 2019. Dkt. 106.

III. SETTLEMENT RELIEF

The Amended Settlement provides a minimum of $889,867.17 to pay valid cash claims and $300,000 in free product, for a total benefit of $1,189,867.17 to the Settlement Class. Settlement Class Members *with proof of purchase* will receive a cash distribution not exceeding the greater of (i) the amount reflected by the proof of purchase up to $50.00 or (ii) $20.00, or free The Complete Cookies worth between $22 and $35.00 at retail value. Settlement Class Members *without proof of purchase* will receive a cash distribution of $14.60 or free The Complete Cookies worth $21.95 at retail value. The cash and free product relief is meaningful, equitable among Settlement Class Members, and addresses the harm alleged. Had Plaintiffs proceeded to trial, there is no guarantee that they would have obtained equivalent or greater relief than that provided by the Amended Settlement.

IV. CLASS COUNSEL SHOULD BE AWARDED $410,101.38 IN ATORNEYS' FEES

Defendant is obligated to pay up to $455,000 in attorneys' fees, expenses, and incentive awards, subject to Final Settlement Approval and Court approval of the requested awards. The district court has discretion to measure an award for attorneys' fees using either the lodestar method or the percentage-of-recovery method. *See Americana Art China Company, Inc. v. Foxfire Printing and Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014); *see also Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994). Class Counsel requests that the Court approve attorneys' fees in the amount of $410,101.38. The requested fee is reasonable under the percentage-of-recovery method and supported by a lodestar cross-check.

A. Class Counsel's Fee Request is Reasonable Under the Percentage-of-Recovery Method.

The Supreme Court has "recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 563 (7th Cir. 1993). Although the Amended Settlement does not create a traditional common fund, it provides for a sum certain based on the funds available to pay valid claims and the requested fee award, such that common fund principles may still apply in evaluating Class Counsel's fee request. *See In re Sw. Airlines Voucher Litig.*, 898 F.3d 740, 745 (7th Cir. 2018); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) ("Although under the terms of each settlement agreement, attorney fees technically derive from the defendant rather than out of the class' recovery, in essence the entire settlement amount comes from the same source. . . Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery"); *In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1072 (S.D. Tex. 2012) ("Having two funds—one for the claimants, one for the attorneys—is a well-recognized variant of a common-fund arrangement."); *Manual for Complex Litig.* (4th) § 21.7 (2004) ("If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees . . . the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class.").

The percentage-of-recovery method is appropriate where, as here, "there are many lightly damaged plaintiffs, because those sorts of plaintiffs have little ability to monitor counsel's performance to ensure that counsel does not wastefully inflate hours worked in order to obtain higher fees." *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 199 (N.D. Ill. 2018) (citation omitted); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 501 (N.D. Ill. 2015) ("[T]he normal practice in

consumer class actions is to negotiate a fee arrangement based on a percentage of the plaintiffs' ultimate recovery." (citations omitted)). "The rationale behind the percentage of recovery method also applies in situations where, although. . . the fee and settlement are independent, they actually come from the same source." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995). A reasonable fee is calculated as "the ratio of (1) the fee to (2) the fee plus what class members received." *Redman v. Radioshack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014).

The Settlement Class here will receive a minimum benefit of $1,189,867.17. Class Counsel's fee request thus represents 26% of the aggregate settlement value to be divided between the Settlement Class and Class Counsel ($410,101.38 divided by $1,599,968.55).[4] *See Leung*, 326 F.R.D. at 200. Class Counsel's request is consistent with the Seventh Circuit's suggestion that the "fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel." *Pearson*, 772 F.3d at 782.

i. Class Counsel's requested fee is below the prevailing market rate in contingency fee cases.

"The object in awarding a reasonable attorney's fee. . . is to give the lawyer what he would have gotten in the way of a fee in an arms' length negotiation, had one been feasible." *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992). Courts "must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir.

[4] Although Defendant has also agreed to pay expenses, incentive awards, and the cost of claims administration, the Seventh Circuit has held that costs related to settlement administration and incentive awards must be excluded in calculating the benefit to the class. *See Id.*; *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014). Class Counsel does not include those amounts in calculating its attorneys' fees under the percentage-of-recovery method. Similarly, because the Amended Settlement eliminates the secondary product distribution, Class Counsel does not include the value of any such distribution in calculating the ratio of its fee request.

2001). "[I]t is a question of what the Class Members and Counsel would have agreed to *ex ante* in an arm's length negotiation." *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1037 (N.D. Ill. 2011). Courts may consider such factors as the fee agreements between class representatives and their attorneys and fee awards in similar cases. *See Leung*, 326 F.R.D. at 199 (citing *Synthroid*, 264 F.3d at 719-20).

The Seventh Circuit has noted that "[w]hen the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the 'market rate.'" *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (emphasis in original). A court may determine the reasonableness of a requested contingency fee by looking at similar arrangements. *See Synthroid*, 264 F.3d at 719. "[A] customary contingency fee would range from 33 1/3% to 40% of the amount recovered." *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 2001 U.S. Dist. LEXIS 20397, at *10 (N.D. Ill. Dec. 6, 2001); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d at 572 ("We know that in personal-injury suits the usual range for contingent fees is between 33 and 50 percent. . . ."); *Kirchoff*, 786 F.3d at 323 ("40% is the customary fee in tort litigation. . . ."); *Goldsmith v. Tech. Sols. Co.*, No. 92 C 4374, 1995 U.S. Dist. LEXIS 15093, at *26 (N.D. Ill. Oct. 10, 1995).

The requested fee of 26% of the aggregate settlement value[5] is below the market standard of one-third of the recovery in common fund cases. "Where the market for legal services in a class action is only for contingency fee agreements, and there is a substantial risk of nonpayment for the attorneys, 'the normal rate of compensation in the market' is '33.33% of the common fund recovered.'" *Will v. Gen. Dynamics Corp.*, No. 06-698-GPM, 2010 U.S. Dist. LEXIS 123349, at

[5] Assuming *arguendo* that the free product relief has a monetary value less than its nominal retail value, the fee request is still reasonable. For example, valuing the free product relief at only 66% of its retail value results in a $198,000 monetary benefit to the Settlement Class. In this scenario, Class Counsel's request would represent a 27% fee under *Redman* ($410,101.38 divided by $1,497,968.55).

*7 (S.D. Ill. Nov. 22, 2010) (quoting *In re Ready–Mixed Concrete*, No. 1:05–CV–00979, Doc. 732 at 14 (S.D. Ind. Mar. 31, 2009); *see also In re Dairy Farmers of Am., Inc., Cheese Antitrust Litig.*, 80 F. Supp. 3d 838, 842 (N.D. Ill. 2015); *Pavlik v. FDIC*, No. 10 C 816, 2011 U.S. Dist. LEXIS 126016, at *14 (N.D. Ill. Nov. 1, 2011); *City of Greenville v. Syngenta Crop Prot., Inc.*, 904 F. Supp. 2d 902, 909 (S.D. Ill. 2012); *Meyenburg v. Exxon Mobil Corp.*, No. 3:05-CV-15-DGW, 2006 U.S. Dist. LEXIS 52962, at *5 (S.D. Ill. July 31, 2006).[6]

Nothing in this case requires Class Counsel to take less than their fee request. Class Counsel prosecuted this case on a purely contingent basis, investing significant financial and personnel resources, advancing all costs associated with the litigation, and assuming the substantial risk that they would recover nothing. When viewed in relation to the prevailing contingency fee Class Counsel may have negotiated *ex ante*, the requested fee of 26% of the aggregate settlement value is reasonable.

ii. The complexity and likely duration of this case warrants the requested fee award.

A court may consider the complexity, cost, and work necessary to resolve the case in evaluating a fee request. *See, e.g., Synthroid*, 264 F.3d at 721. This action concerned complex nutritional testing and labeling standards for food products. In order to succeed, Plaintiffs would need to prove that the labeling for Defendant's The Complete Cookies violated Illinois statutory and common law because the products' nutritional value was materially less than advertised. Plaintiffs' proof would require expensive expert analysis and testimony on the proper testing

[6] Even post-*Redman*, district courts in this Circuit regularly award attorneys' fees in class actions that represent between 25% and 33.3% of the net settlement fund. *See, e.g., Leung*, 326 F.R.D. at 202("Taking all this into account, an award of 33.3% of the estimated net fund is reasonable and in line with the market."); *Aranda v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2017 U.S. Dist. LEXIS 54080, at *30-31 (N.D. Ill. Apr. 10, 2017), *aff'd sub nom. Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792, 796 (7th Cir. 2018); *Wright v. Nationstar Mortg. LLC*, No. 14 C 10457, 2016 U.S. Dist. LEXIS 115729, at *56 (N.D. Ill. Aug. 29, 2016); *Kolinek*, 311 F.R.D. at 501.

methods to support the claims made on the product packaging; analysis of the true nutritional content and daily percentage values of The Complete Cookies; expert survey assessment on whether the product packaging was misleading or deceptive; and expert analysis on the quantum of economic harm to the Settlement Class. It likely would have taken years to undertake the appropriate discovery and conduct the necessary expert analyses. Furthermore, absent the Amended Settlement, Plaintiffs would need to first certify a damages class to resolve their allegations on a class-wide basis; an inherently uncertain task in product labeling class actions.[7]

There is no guarantee that Plaintiffs would have successfully certified a damages class, prevailed on their claims, or established that the alleged mislabeling reduced the value of The Complete Cookies in an amount that would exceed—or even equal—the amount recovered here through the Amended Settlement.[8] The complexity and likely duration of this case, in addition to the inherent uncertainty of success, weigh in favor of the requested fee award.

iii. The risk of non-payment warrants the requested fee award.

"The market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear." *Synthroid*, 264 F.3d at 721. "[T]he higher the risk of failure the larger the contingent fee that a client would have to pay in an arm's length negotiation with the lawyer in advance of the suit." *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 746 (7th Cir. 2011).

Class Counsel faced substantial risk that this case would generate little or no returns for their efforts. Class Counsel nonetheless pursued this litigation on a purely contingent basis and

[7] *See, e.g., In re Dial Complete Mktg. & Sales Practices Litig.*, 312 F.R.D. 36, 65-67, 76-80 (D. N.H. 2015); *In re Conagra Foods, Inc.*, 302 F.R.D. 537, 576-579 (C.D. Cal. 2014); *Astiana v. Ben & Jerry's Homemade, Inc., No*. C 10-4387 PJH, 2014 U.S. Dist. LEXIS 1640, at *8-11 (N.D. Cal. Jan. 7, 2014).

[8] Importantly, the quantum of damages would likely be highly contested at trial and subject to competing expert analyses.

devoted significant time and resources to developing the allegations in the complaints. Defendant, for its part, steadfastly denied Plaintiffs' allegations and maintained that its product labeling complied with all applicable laws. Had this litigation continued,[9] Plaintiffs would have confronted significant additional challenges, including substantial motion practice on class certification and summary judgment, along with the significant attendant risks that they would fail to certify or maintain a damages class, survive summary judgment, prevail at trial, or defend against post-trial appeals. Indeed, Defendant's vigorous defense eliminated Plaintiffs' claims on behalf of nationwide and multi-state classes and left claims only on behalf of a single state class. There is no doubt that his would have been a protracted and contentious litigation. Class Counsel thus faced a significant risk that they would obtain nothing from further litigation in this case. Accordingly, Class Counsel believes the 26% fee request is reasonable.

B. A lodestar cross-check supports Class Counsel's fee request.

While a lodestar cross-check is arguably unnecessary here, an analysis under the lodestar method supports the reasonableness of Class Counsel's fee request. *See Will*, 2010 U.S. Dist. LEXIS 123349 at *10 ("The use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive."). The Seventh Circuit has recognized that the lodestar approach alleviates "concerns that a percentage approach result[s] in over-compensation for attorneys," offers "greater accountability" for the attorneys by accounting for their hours and rates, and provides for reasonable compensation based on both the hours worked and the risk assumed in undertaking the case. *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 974 (7th Cir. 1991).

[9] "The point at which plaintiffs settle with defendants (or win a judgment against defendants) is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them." *Skelton*, 860 F.2d 258 (reversing "denial of a risk multiplier [based] on the fact that the parties settled at a relatively early stage in the litigation"). What matters is the risk of non-payment assumed by Class Counsel at the outset of the case. *Id.*

The time spent by Class Counsel litigating this case resulted in clear and tangible benefits for the Settlement Class. Considering Defendant's vigorous defense and the arguments made its motion to dismiss, but for Class Counsel's time in this case, the Settlement Class would have received nothing. Class Counsel did not rush the case to settlement in order to maximize their fees. To the contrary, the parties agreed to settle only after nearly two years of hard-fought litigation, which included three amended complaints, briefing on Defendant's motion to dismiss and to strike class allegations, and mediation with a retired federal judge. *See In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liab. Litig.*, No. 06 C 7023, 2016 U.S. Dist. LEXIS 124235, at *34 (N.D. Ill. Sep. 13, 2016) ("[T]he fees sought here are not the result of a quick settlement to maximize an economic windfall but instead are the result of intense advocacy on both sides.").

i. Class Counsel's Lodestar Is Reasonable

"Under the lodestar method, the Court begins by multiplying the number of hours that class counsel reasonably worked by a reasonable hourly rate." *In re Sw. Airlines Voucher Litig.*, No. 11 C 8176, 2013 U.S. Dist. LEXIS 143146, at *25 (N.D. Ill. Oct. 3, 2013). "[T]here is a 'strong presumption' that the lodestar figure is reasonable." *Fricano v. LVNV Funding, LLC*, No. 14 C 08225, 2015 U.S. Dist. LEXIS 121654, at *3 (N.D. Ill. Sep. 8, 2015) (*quoting Perdue v. Kenny A.*, 559 U.S. 542, 554 (2010)). As set forth below, Class Counsel's $833,336.10 lodestar is reasonable.

1. The Time Expended by Class Counsel is Reasonable.

Class Counsel's lodestar is based on the time that was "reasonably expended" in pursuit of Plaintiffs' claims. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Class Counsel devoted significant time and resources to this case from the start. Class Counsel developed the legal and factual claims, which included expensive laboratory analyses to test the veracity of the product labeling, and opposed Defendant's motion to dismiss and to strike the class allegations. The parties

also engaged in preliminary fact discovery, attended mediation before a retired federal judge, and negotiated the settlement for several months. The 1,220 hours billed in this case were necessary to achieve the successful result ultimately obtained through the Amended Settlement.[10]

2. Class Counsel's Hourly Rates are Reasonable

A reasonable hourly rate is "one that is derived from the market rate for the services rendered." *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 640 (7th Cir. 2011) (internal quotation marks and citation omitted). The focus is "the prevailing market rate for lawyers engaged in the type of litigation in which the fee is being sought." *Cooper v. Casey*, 97 F.3d 914, 920 (7th Cir. 1996) (emphasis omitted). The attached declarations provide the detailed hourly rates for Class Counsel.[11] These rates are reasonable and consistent with prevailing market rates.

In assessing the reasonableness of an hourly rate, courts first look to the rate that a firm's fee-paying clients pay in non-contingent matters. *Reid v. Unilever United States, Inc.*, No. 12 C 6058, 2015 U.S. Dist. LEXIS 75383, at *43 (N.D. Ill. June 10, 2015). The rates identified by Class Counsel are the same rates they charge to fee-paying clients in non-contingent matters and/or class action matters. *Id.* ("[A]n attorney's actual billing rate for similar litigation is appropriate to use as the market rate."); *see also* Exs. A, B, C. Courts then look to "evidence of rates similarly experienced attorneys in the community charge paying clients for similar work and evidence of

[10] The firms also efficiently staffed this matter. Barbat Mansour & Suciu PLLC spent a total of 284.50 hours prosecuting the case over two years, with approximately 97% of the work attributable to one attorney. Wasserman Law Group spent a total of 571.20 hours on the case, with the work attributable to Steve Wasserman, one Of Counsel, and one senior associate. Wexler Wallace LLP spent 365.00 hours on this case, with 55% of the work attributable to three associates playing various roles over the course of the case, and most of the remaining work attributable to Edward Wallace (approx. 11%) and one Of Counsel (approx. 24%).

[11] The hourly rate ranges are generally as follows: Managing and/or Name Partner – $650-$900; Partner – $750; Of Counsel – $725-$864; Senior Associate – $685-$717; Associate – $340-$550; Law Clerk - $275; Paralegal – $196-$275.

fee awards the attorney has received in similar cases." *Id*. (*quoting Spegon v. Catholic Bishop of Chi*., 175 F.3d 544, 555 (7th Cir. 1999)). Class Counsel's customary rates have been approved by numerous courts in class actions throughout the country. Exs. A, B, C. Moreover, courts in this Circuit have recently approved hourly rates similar to those typically charged by Class Counsel here. *E.g*., *Rysewyk v. Sears Holdings Corp.*, No. 15-CV-4519, Docs. 211, 215 (N.D. Ill. 2019); *Spano v. Boeing Co.*, No. 06-CV-743-NJR-DGW, 2016 U.S. Dist. LEXIS 161078, at *10-11 (S.D. Ill. Mar. 31, 2016) (finding reasonable: $998/hour (25+ years exp.); $850/hour (15-24 years exp.); $612 (5-14 years exp.); $460 (2-4 years exp.); $309 (Paralegals and Law Clerks); $190 (Legal Assistants)); *Abbott v. Lockheed Martin Corp.*, No. 06-cv-701-MJR-DGW, 2015 U.S. Dist. LEXIS 93206, at *12 (S.D. Ill. July 17, 2015); *Chesemore v. All. Holdings, Inc*., No. 09-cv-413-wmc, 2014 U.S. Dist. LEXIS 123873, at *20 (W.D. Wis. Sep. 4, 2014).[12]

Importantly, Class Counsel's $410,101.38 fee request is less than half their lodestar and represents a .49 risk multiplier. That Class Counsel seeks less than their lodestar further reinforces the reasonableness of their fee request. *See Spano*, 2016 U.S. Dist. LEXIS 161078 at *11 ("[L]odestar multipliers can be reasonable in a range between 2 and 5.").

V. CLASS COUNSEL SHOULD BE AWARDED $37,398.62 IN EXPENSES

Defendant has also agreed to pay Class Counsel's expenses. Courts approving a class action settlement may "award reasonable. . . nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Costs and expenses should be awarded based on the types of "expenses private clients in large class actions (auctions and otherwise) pay." *Synthroid*, 264 F.3d at 722. "It is well established that counsel who create a common fund. . . are entitled to the reimbursement of litigation costs and expenses, which includes such things as. . . computerized

[12] Current rates are an appropriate benchmark. *See Mathur v. Bd. of Trs, of S. Ill. Univ.*, 317 F.3d 738, 744-745 (7th Cir. Ill. 2003).

research; court reporters; travel expense; copy, phone and facsimile expenses and mediation." *Abbott*, 2015 U.S. Dist. LEXIS 93206 at *13.

The $37,398.62 in costs and expenses sought by Class Counsel account for items routinely reimbursed by paying clients, such as laboratory testing for nutritional content, computerized legal research, and travel. Exs. A, B, C; *see also In re Cont'l Ill. Sec. Litig.*, 962 F.2d at 570; *Cook v. McCarron*, No. 92 C 7042, No. 95 C 0828, 1997 U.S. Dist. LEXIS 1090, at *61 (N.D. Ill. Jan. 22, 1997) *aff'd sub nom. Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998); *Beesley v. Int'l Paper Co.*, No. 3:06-cv-703-DRH-CJP, 2014 U.S. Dist. LEXIS 12037, at *12 (S.D. Ill. Jan. 31, 2014); *City of Greenville*, 904 F. Supp. 2d at 910. Moreover, "Class Counsel had a strong incentive to keep expenses at a reasonable level due to the high risk of no recovery when the fee is contingent." *George v. Kraft Foods Glob., Inc.*, No. 1:08-cv-3799, 2012 U.S. Dist. LEXIS 166816, at *14 (N.D. Ill. June 26, 2012). Class Counsel's request for reimbursement of costs and expenses should be approved as fair and reasonable.

VI. INCENTIVE AWARDS OF $1,500 TO THE CLASS REPRESENTATIVES ARE APPROPRIATE

Defendant has agreed to pay service awards of $1,500 to each named Plaintiff. "[A] named plaintiff is an essential ingredient of any class action." *United States v. Granados*, 142 F.3d 1016, 1016 (7th Cir. 1998). Therefore, "an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Id.* To determine if an incentive award is warranted, a district court evaluates "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Id.*

The named Plaintiffs' participation in this case warrants an award of $1,500 each. The potential recovery for the economic damages in this case—the value of the product as represented

versus the product as sold—is too small to warrant any individual bearing the cost and burden of litigating a lawsuit against a large corporate defendant. Thus, an incentive award is warranted. *See In re Sw. Airlines Voucher Litig.*, No. 11 C 8176, 2013 U.S. Dist. LEXIS 120735, at *30 (N.D. Ill. Aug. 26, 2013) ("No individual plaintiff would have lost enough on his or her own to justify filing suit, absent some additional incentive.").

Moreover, Plaintiffs' input and participation have conferred a significant benefit on the Settlement Class. These efforts included assisting in providing information and evidence for the complaints and otherwise working with counsel in prosecuting this action. Courts in this circuit have approved service awards for similar participation. *See, e.g.*, C*astillo v. Noodles & Co.*, *No.* 16-cv-03036, 2016 U.S. Dist. LEXIS 178977, at *6 (N.D. Ill. Dec. 23, 2016); *In re Sw. Airlines Voucher Litig.*, 2013 U.S. Dist. LEXIS 120735 at *30-32; *Heekin v. Anthem, Inc.*, No. 1:05-cv-01908-TWP-TAB, 2012 U.S. Dist. LEXIS 165464, at *5 (S.D. Ind. Nov. 20, 2012).

VII. CONCLUSION

For the reasons set forth above, Plaintiffs and Class Counsel respectfully request that the Court grant the requested attorneys' fees, expenses, and named Plaintiff incentive awards.

Dated: April 2, 2019

Respectfully submitted,

/s/ Edward A. Wallace

Edward A. Wallace
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed using this Court's CM/ECF service, which will send notification of such filing to all counsel of record on this 2nd day of April 2019.

/s/ Edward A. Wallace
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