IN THE CIRCUIT COURT OF PHELPS COUNTY
STATE OF MISSOURI

NICHOLAS CAHILL, individually and on behalf of all others similarly situated, Plaintiff, v. NESTLE USA, INC., a Delaware corporation, Defendant.	Case No. 22PH-CV01205

SUGGESTIONS IN SUPPORT OF PLAINTIFF'S MOTION FOR AN ATTORNEYS' FEES AND COSTS AWARD, AND CLASS REPRESENTATIVE SERVICE AWARDS

COMES NOW Plaintiff, Nicholas Cahill, as well as additional Class Representative Julia Yonan, on behalf of all similarly situated persons and a proposed Settlement Class, respectfully submit this Memorandum in Support of Plaintiff's Motion for an Attorneys' Fees and Costs Award, and Class Representative Service Awards.

I. INTRODUCTION

After substantial negotiation, the parties agreed to settle this matter as reflected in the Class Action Settlement Agreement, dated November 28, 2022 (the "Settlement"), which was preliminarily approved by the Court on December 8, 2022. As part of the Settlement, the Defendant has agreed to a Maximum Settlement Amount of $10,000,000. In addition, the parties agreed that Defendant shall pay attorneys' fees and costs awarded by the Court to Class Counsel in an amount not to exceed $2,600,000, and Class Representative Service Awards in an amount not to exceed $3,500 each. *See* Settlement ¶¶ 7.1-7.4. The requested Attorneys' Fees and Cost Award was negotiated at arms' length and with the direct supervision of a neutral, nationally

renowned mediator, Hon. Wayne Andersen (Ret.). The Settlement provides that any order or proceedings related to fees and costs will not affect the finality of the Settlement or the benefits available thereunder to the Class. *Id.* ¶ 7.2.

Accordingly, Class Counsel and Plaintiff respectfully submit this Motion seeking an Attorneys' Fees and Costs award of $2,600,000, inclusive of costs and expenses, and Class Representative Service Awards in the total amount of $3,500 individually. As is demonstrated below, this valuable settlement was achieved because of the skill, tenacity, and effective advocacy of Class Counsel. The requested fee is fair and reasonable, supported by applicable Missouri law, and consistent with prevailing awards in class action litigation in the area. For these reasons, among the others stated herein, Class Counsel respectfully ask the Court to grant the Attorneys' Fees and Costs Award, and Class Representative Service Awards, in the requested sums.

II. EVIDENCE IN SUPPORT OF CLASS COUNSEL'S MOTION

Class Counsel ask the Court to take judicial notice of the file in this proceeding as an additional basis for the award of fees, with specific reference to: the Motion and Suggestions in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, the Settlement Agreement, the Declaration of Jeanne C. Finegan, APR, and the Declaration of L. DeWayne Layfield, Class Counsel, attached and incorporated herein as Exhibit A ("Layfield Decl.").

III. SETTLEMENT BENEFITS OBTAINED AND VALUE OF THOSE BENEFITS

The Settlement provides a fair, adequate, and reasonable settlement with significant benefits to the Class. The benefits are described in detail in the Settlement.

IV. BACKGROUND AND FACTUAL SUMMARY

A. The Settlement is the Result of Class Counsel's Effective Litigation Strategy.

1. Plaintiff brought this case based on allegations that Defendant Nestle USA, Inc. ("Defendant" or "Nestle") deceptively and unlawfully packaged, marketed, and labeled certain powder coffee creamer Products as defined in the Settlement Agreement, which are sold in a variety of sizes, and collectively referred to herein as "Products" or a "Product." Specifically, Plaintiff alleges that Defendant represented that the Products are capable of making up to a specified number of servings; however, contrary to these representations, the Products do not always yield the represented number of servings when consumers follow the "Serving Size" instructions on the labels of the Products.

2. Prior to filing suit and during the pendency of the case, Class Counsel conducted a detailed investigation and analysis of the Products, engaged in thorough and extensive investigation into the facts, and fashioned an appropriate remedy to serve the best interests of the Class. The investigation and discovery have included:

(i) engaging in a substantial pre-suit investigation beginning in 2021 regarding the actual number of servings the Products provide compared to the represented number of servings, including by working with laboratories and independent consultants;

(ii) researching the applicable law with respect to the claims asserted and potential defenses thereto;

(iii) coordination and consolidation by the law firms representing Plaintiff in the Action; and

(iv) engaging in a formal, full-day, mediation with Hon. Wayne Andersen (Ret.) of JAMS, engaging in multiple additional informal follow up

mediation efforts that included participating in several telephone conferences with counsel for Defendant, and crafting a fair, adequate, and reasonable settlement for the Class.

This action required considerable skill and experience to result in such a successful conclusion. The case required investigation and a mastery of complex factual circumstances, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. In addition, Defendant was represented by the prominent and well-respected law firm of King & Spalding LLP. As a result, this class action case against Defendant required substantial advanced planning, strategic skills, imagination, resourcefulness, and management abilities of the highest order to match a highly qualified, experienced, and formidable opposition. The prosecution and settlement of this litigation required a very high degree of competence, experience, and ability by Class Counsel.

B. <u>The Settlement is the Result of Intense Negotiation</u>.

Plaintiff's extensive litigation preparation, the experience of Class Counsel, as well as Plaintiff's effective and coordinated litigation strategy, has made settlement possible. This Settlement is a product of engagement between the Parties, which was preceded by intensive case investigation by Plaintiff. Since shortly after delivery of a demand letter and an exchange of initial telephone conversations between the Parties, the Parties had been engaged in intensive settlement discussions for over a year and three months. The settlement efforts included: an initial settlement demand; provision of Plaintiff's laboratory test results to Defendant; informal discovery from Defendant to Plaintiff; informal settlement discussions between the parties; evaluation of sales data for the Products; a full-day mediation with a neutral mediator, the Hon. Wayne Andersen (Ret.) of JAMS; and weeks of additional follow-up negotiations after the mediation, which ultimately resulted in the Settlement Agreement.

The Parties worked diligently to understand the underlying business facts in a completely transparent process. After disclosure and analysis of the facts, it was clear that the most appropriate remedy included both monetary and injunctive relief.

Indeed, the Settlement was not executed until after Class Counsel had: (1) conducted an extensive and comprehensive pre-suit investigation relating to the events and transactions underlying Plaintiff's claims prior to filing the original Petition, including based on substantial testing and analysis of the Products conducted by an independent laboratory retained by Class Counsel; (2) thoroughly researched the law and facts pertinent to Plaintiff's claims and potential defenses raised by Defendant, and assessed the risks of prevailing on each of the respective claims on pre-trial motions and at trial; (3) engaged in substantial coordination between each counsel for Plaintiff and potential class representatives in the Action, including in an effort to achieve a unified strategy and result; and (4) engaged in a careful and thorough exchange of information as part of the mediation process, including related to confidential business information. In addition, Class Counsel litigated these claims against Defendant in the Southern District of Florida defeating Defendant's motion to dismiss the claims against Defendant.

V. ARGUMENTS AND AUTHORITIES

In the face of contested litigation, with a case asserting claims predicated on complex legal and factual issues that were opposed by highly skilled and experienced defense counsel, Class Counsel succeeded in securing a meaningful benefit for the Class. The requested fee is fair and reasonable when considered under applicable legal standards. Indeed, as discussed below, the award is within the normal range of awards made in class action and contingent-fee matters of this type, and is particularly appropriate here in view of both the substantial risks attendant in bringing and pursuing this action, and the significant results achieved.

The Court should determine an award of attorneys' fees and costs according to established rules of law. This procedure is similar to those established in other class actions where a defendant, as in this case, has agreed to pay class counsel's attorneys' fees and has agreed not to contest fees up to a certain cap.[1]

A. <u>There is No Fixed Standard or Any Absolute Measure for the Fee Award</u>.

"The trial court is considered an expert at awarding attorney's fees, and may do so at its discretion." *Bachman v. A.G. Edwards, Inc.*, 344 S.W.3d 260, 267 (Mo. App. E.D. 2011), quoting *Weissenbach v. Deeken*, 291 S.W.3d 361, 362 (Mo. App. E.D. 2009). "To demonstrate an abuse of discretion, the complaining party must show the trial court's decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice." *Russell v. Russell*, 210 S.W.3d 191, 199 (Mo. banc 2007).

"The factors to be considered in determining reasonable value of attorneys' fees in Missouri are (1) time, nature, character and amount of services rendered, (2) nature and importance of the litigation, (3) degree of responsibility imposed on or incurred by the attorney, (4) the amount of money or property involved, (5) the degree of professional ability, skill and experience called for and used, and (6) the result achieved." *Koppe v. Campbell*, 318 S.W.3d 233, 242 (Mo. App. W.D. 2010); *Reid v. Reid*, 906 S.W.2d 740, 743 (Mo. App. E.D. 1995).

[1] *Ohio Public Interest Campaign v. Fisher Foods*, 546 F. Supp. 1 (N.D. Ohio, E.D. 1982); *In Re Montgomery County Real Estate Antitrust Litigation*, 83 F.R.D. 305 (D. Md. 1979); *Arenson v. Board of Trade of City of Chicago*, 372 F. Supp. 1349 (N.D. Ill. 1974); *Mazur v. Behrens*, 1974-2 Trade Cases §75,213 (N.D. Ill., 1974); *Colson v. Hilton Hotels Corporation*, 59 F.R.D. 324 (N.D. Ill. E.D. 1972); *City of Philadelphia v. Chas. Pfizer & Co.*, 345 F. Supp. 454 (S.D.N.Y. 1972); *see also, AAMCO Automatic Transmissions v. Tayloe*, 82 F.R.D. 405 (E.D. Pa. 1979); 2 *Newberg On Class Actions* §12.03 (3d ed. 1992).

B. <u>The Settlement Includes a "Fee-Shifting" Agreement</u>.

Missouri courts generally follow the American Rule, which requires each party to bear the expense of its attorneys' fees. *Lorenzini v. Short,* 312 S.W.3d 467, 473 (Mo. App. E.D. 2010). However, a contractual agreement between the parties which provides that one will pay the other's attorneys' fees is a well-recognized exception. *See, gen., Lucas Stucco & EIFS Design, LLC v. Landau,* 324 S.W.3d 444, 445 (Mo. banc 2010) ("attorney fees are recoverable … when the contract provides for attorney fees."); *Brooke Drywall of Columbia, Inc. v. Building Const. Enterprises, Inc.,* 361 S.W.3d 22, 27 (Mo. App. W.D. 2011) ("Attorneys' fees are not generally recoverable in the United States, but they may become so if a statute ***or the parties' contract so provides***.") (emphasis supplied); *Klinkerfuss v. Cronin*, 289 S.W.3d 607, 618 (Mo. App. E.D. 2009) ("Missouri adheres to the American Rule, meaning that generally, absent statutory authorization or ***contractual agreement,*** each litigant pays his or her own attorneys' fees, with few exceptions.") (emphasis supplied).

In the present case, the parties have entered into an agreement that "Class Counsel may file a request for an Attorneys' Fees and Costs Award that is less than or equal to $2,600,000 (two million six hundred thousand dollars) in the aggregate, which will cover the attorneys' fees and costs awarded by the Court to Class Counsel for all the past, present, and future attorneys' fees, costs (including court costs), expenses, and disbursements incurred by them and their experts, staff, and consultants in connection with the Action." Settlement ¶ 7.1. It is well-established that parties may enter into such a fee-shifting agreement. *See generally, Evans v. Jeff D.*, 475 U.S. 717, 733-34 (1986) ("a rule prohibiting the comprehensive negotiation of all outstanding issues in a pending case [specifically including claims for attorney fees in a class action] might well preclude the settlement of a substantial number of cases"), *citing Marek v. Chesny* 473 U.S. 1, 7 (1985) ("[M]any a defendant would be unwilling to make a binding settlement offer on terms that left it

exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff"); *see also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.").

Accordingly, courts routinely acknowledge that parties may settle claims for attorneys' fees in a class action by entering into an agreement—as the parties have done in the present case—that the defendant will pay the plaintiff's fees. *See* 4 NEWBERG ON CLASS ACTIONS (4th ed.) § 12:3 ("defendants in a class action settlement may properly agree to pay the plaintiffs' attorneys' fees and expenses"); *see, e.g., Neel v. Strong*, 114 S.W.3d 272, 273 (Mo. App. E.D. 2003) ("As part of the settlement, the Attorney General and the tobacco companies agreed that the tobacco companies would pay the fees of the outside counsel."); *Wing v. Asarco Inc.*, 114 F.3d 986, 988 (9th Cir. 1997) ("At the outset, we note that the fee dispute in this case arises [not from a statute or common fund, but] out of contract: in the Settlement Agreement, Asarco agreed to pay the reasonable attorney fees and expenses as determined and awarded by the court."); *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 523 (1st Cir. 1991) (holding that when parties to class action have reached a "clear sailing" fee-shifting agreement as part of settlement, trial court may determine and award reasonable fees "even where no fee-shifting statute or common law exception thrives"); *Deloach v. Philip Morris Companies*, 2003 WL 23094907, *4 at n. 2 (M.D.N.C. December 19, 2003) ("the present petition [for attorney fees] was brought pursuant to a private [settlement] agreement among the parties."), *citing Wing,* 114 F.3d at 989; *Evans v. Jeff D.*, 475 U.S. at 738 n. 30 (parties may simultaneously negotiate a "defendant's liability on the merits and his liability for his opponents' attorney's fees."); *In re TJX Companies Retail Sec. Breach Litigation*, 584 F. Supp. 2d 395, 399 (D. Mass. 2008) (noting that basis for awarding fees

was "part of the Agreement, [in which Defendant] agreed to pay court-approved attorneys' fees not to exceed $6,500,000."); and *Browne v. American Honda Motor Co., Inc.,* No. NO. CV 09-06750 (C.D. Cal. October 10, 2010) ("[a] settlement agreement is a binding contract" and "contractual provisions providing for the payment of attorneys' fees . . . provide a basis for awarding fees.") (internal citations omitted).[2]

C. The Reasonableness of the Requested Fee is Confirmed by Analysis of the Applicable Factors.

1. The time, nature, character, and amount of services rendered.

In support of this request, Plaintiff submits the Layfield Decl. (*see* Ex. A). Here, the primary goal of Class Counsel and the Class Representatives was to obtain, by settlement or judgment, the best overall common benefit for the Class Members at the earliest reasonable time. The reality of complex litigation against a well-represented Defendant, with creative and robust litigation tactics, was an anticipated obstacle that Class Counsel considered and sought to overcome from the beginning. The results obtained by Class Counsel through the Settlement owe more to the strategy employed and quality of the work product than sheer time and labor. The mere expenditure of time and labor does not necessarily move a complex action such as this towards certification, judgment, or settlement. Class Counsel did not burden the Class Members or the

[2] Even if the present Settlement did not include a fee-shifting agreement, the relief provided to the Class would nonetheless support an award of reasonable attorneys' fees and costs to Class Counsel under the equity-based substantial benefit/"balancing of the benefits" theory or the "unusual circumstances" exception to the American Rule. An award under "balancing of the benefits" would be appropriate. *See Jesser v. Mayfair Hotel, Inc*., 360 S.W.2d 652, 661 (Mo. banc 1962); *Lett v. City of St. Louis*, 24 S.W.3d 157, 162-63 (Mo.App. E.D. 2000); *Feinberg v. Adolf K. Feinberg Hotel Trust*, 922 S.W.2d 21, 26 (Mo.App. E.D.1996). A "special circumstances" award would be appropriate. *See, Klinkerfuss v. Cronin*, 289 S.W.3d 607 (Mo.App. E.D. 2009); *Goellner v. Goellner Printing*, 226 S.W.3d 176, 179 (Mo.App. E.D. 2007); *Volk Const. Co. v. Wilmescherr Drusch Roofing Co*., 58 S.W.3d 897 (Mo.App. E.D. 2001); *Temple Stephens Co. v. Westenhaver*, 776 S.W.2d 438, 443 (Mo.App. W.D. 1989). Of course, the Court need not resolve whether fees could be awarded under such theories because the Parties here have clearly agreed that Defendant will pay Class Counsel's attorneys' fees and costs. *See* Settlement at VII.

Court with unnecessary delay nor wasted time or labor.

Here, Class Counsel undertook this action on a contingent fee basis (with the amount of any fee being subject to Court approval), assuming a substantial risk that the litigation would yield no recovery and leave them uncompensated. Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. For example, one court explained the risks of contingent fees in complex litigation as follows:

> Although today it might appear that risk was not great based on Prudential Securities' global settlement with the Securities and Exchange Commission, such was not the case when the action was commenced and throughout most of the litigation. Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed, and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

In re Prudential-Bache Energy Income Partnerships Securities Litigation, No. 888, 1994 WL 202394, *6 (E.D. La. May 18, 1994). Indeed, the risk of no recovery in complex cases of this type is very real. There are numerous class actions in which plaintiff's counsel expended thousands of hours of effort and yet received no remuneration whatsoever despite their diligence and expertise.[3]

[3] *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *Eisenstadt v. Centel Corp.*, 113 F.3d 738 (7th Cir. 1997) (Seventh Circuit affirmed the lower court's granting of summary judgment in favor of defendants); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (Tenth Circuit overturned securities fraud class action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on the basis of 1994 Supreme Court opinion); *In re Apple Computer Sec. Litig.*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,252 (N.D. Cal. Sept. 6, 1991) (class won jury verdict against two individual defendants, but court vacated judgment on motion for judgment notwithstanding the verdict); *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (where the class won a substantial jury verdict and motion for judgment n.o.v. was denied, on appeal the judgment was reversed and the case was dismissed—after 11 years of litigation); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (multimillion dollar judgment reversed after lengthy trial); *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478 (S.D.N.Y. 1970) (judgment for $145 million overturned

Simply put, it would not have been economically prudent or feasible if Class Counsel were to pursue the case under any prospect that the Court would award a fee on the basis of "normal" hourly rates applied in other types of litigation.

In the present case, Class Counsel anticipated that the case would be vigorously defended with vast resources by superlative opposing legal counsel. Layfield Decl., at ¶ 9. Class Counsel anticipated an aggressive defense strategy that would pursue every possible forum and strategy to stop the case progress and to exhaust Class Counsel's resources. It has been the experience of Class Counsel that plaintiffs in complex class actions have to prevail on essentially all substantive and procedural issues in order to succeed. The defendant, on the other hand, only has to prevail on any one—be it defeating class certification, reversing class certification, or undermining substantive claims on legal or factual grounds. Class Counsel expended the necessary time and labor required to prosecute this action to a favorable conclusion, which included a significant expenditure of pre-suit effort and expense based, on substantial investigation of the Products. Class Counsel undertook this action on a contingent fee basis (with the amount of any fee being subject to Court approval), assuming a substantial risk that the litigation might yield no recovery whatsoever, and leave Class Counsel uncompensated.

Although Class Counsel are highly experienced law firms, they do not have the attorney and economic resources of Defendant. When Class Counsel undertakes major litigation, such as this litigation against Defendant, it necessarily limits Class Counsel's ability to undertake other complex litigation. During the course of this litigation, Class Counsel devoted significant hours and resources to the litigation. *See* Layfield Decl. at ¶¶ 14-15. Class Counsel had to make this

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after years of litigation and appeals), *modified*, 449 F.2d 51 (2d Cir. 1971), *rev'd*, 409 U.S. 363 (1973).

commitment at the outset of the case, without knowing how long the case would take or if it would ever successfully resolve. Therefore, Class Counsel's willingness to prosecute this action on a contingent fee basis, and willingness to advance costs, caused them to divert both human and financial resources that were expended on this action from other cases.

2. The nature and importance of the litigation.

Because consumers read and rely on label representations, it is incumbent upon sellers of consumer products to represent such products accurately and with integrity. Consumers rely upon manufacturers and retailers to label their products in a manner that is truthful and not misleading. This case is important because it sought to restore honesty where Plaintiff alleges it was lacking. The litigation ensures that Defendant Nestle USA, Inc. will truthfully and accurately disclose the number of servings that can be made from the Products and provides recompense for those who were misled.

3. The degree of responsibility imposed on or incurred by attorneys.

In taking on this case, Plaintiff's Class Counsel incurred a great degree of responsibility. Class Counsel took on the hefty responsibility of enforcing the consumer rights of individual citizens against a large, well-funded corporation. Were this litigation unsuccessful in obtaining meaningful relief, the consumers represented by Class Counsel may not otherwise be able to stand up for their rights, including for fair and accurate product labeling and to receive the benefit of their bargain for purchased products.

4. The amount of money or property involved.

This case involved a substantial amount of money. Defendant sold millions of products to U.S. consumers during the Class Period. To that end, Class Counsel was able to secure a monetary benefit for the Class whereby Defendant agreed to provide cash benefits under a two-tiered structure with a gross potential payout of $10 million. Class members have the ability to

claim $0.50 per Unit purchased, up to $5.00 where Class Members do not have a valid Proof of Purchase, and 30% of price paid per Unit, up to $40.00 with a valid Proof of Purchase. *See* Settlement ¶ 5.2. In addition, Defendant is separately paying for all notice and administration costs, as well as providing meaningful injunctive relief. The requested fees and costs are appropriate, and proportional to the monetary benefits available to the class.

5. ***The Programmatic Relief.***

In negotiating this Settlement, the first term that Plaintiff insisted be agreed was the Programmatic Relief—a correction of the challenged label claims. Layfield Decl., at ¶¶ 12-13. Indeed, the Programmatic Relief is a very valuable component of the Settlement for Class Members. Even if no monetary benefits accrued to Class Members, the reasonable Attorneys' Fees and Cost Award sought by Class Counsel is more than supported by the Programmatic Relief alone.

Of critical importance to the Settlement was the meaningful Programmatic Relief which Class Counsel insisted that Defendant undertake to right the alleged labeling wrongs. As described in detail in the Settlement Agreement, beginning on the first-month anniversary date of the entry by the Court of the Preliminary Approval Order and ending on the ninth-month anniversary of the entry of the Preliminary Approval Order ("Restricted Period"), Defendant shall either: (1) revise the Nutrition Facts panel such that the common household measurement and metric mass expressed therein are in compliance with 21 C.F.R. § 101.9(b); or (2) place an asterisk statement on the label that explains that the front-of-pack statement of servings per container is based on a serving size with a mass of 2 grams.

An assessment of the value of the Programmatic Relief should be viewed in light of the following facts:

- Defendant would not have made the required changes to the Products' labeling except in response to the Class claims that are the subject of the Settlement;

- Defendant has begun changing the labeling of the Products to provide this Programmatic Relief; and
- In the Settlement Agreement, Defendant agreed that a compromise payment in the amount of $0.50 per Unit purchased, up to $5.00 where Class Members do not have a valid Proof of Purchase, and 30% of price paid per Unit, up to $40.00 with a valid Proof of Purchase was appropriate to compensate Class Members for the damage or loss they suffered because of purchasing the Products, which provided fewer servings than represented on the Products labels.

Based on application of these facts, the Programmatic Relief is by far the most valuable component of the Settlement to Class Members. Using 20% of the per unit purchase price as the average damage or loss avoided by each Class Member on future purchases of the Product (which is what the Complaint alleges) and extrapolating future sales based on sales of Products over the past six years, and limiting the Programmatic Relief benefit to only the bare minimum 9-month period of Programmatic Relief mandated by the Settlement would mean the Programmatic Relief is valued at approximately $11,350,000 over the 9-month period. *See* Layfield Decl., at ¶ 18. Even if one assumes sales of the Product were to decline, due to market competition, during the 9-month period of Programmatic Relief, under any reasonable interpretation of the facts, the value of the Programmatic Relief significant, approaching or exceeding the value of $10,000,000 cash fund also provided by the Defendant. It is also important to point out that Class Members do not need to file a claim form to receive the benefits of the Programmatic Relief.[4]

[4] In this Action, the damage calculus is simple and does not require expert opinion. Here, the label of the Product promised a certain number of servings could be made following the label directions, but laboratory testing shows that on average approximately 20% fewer servings can be made than promised. The damage calculus is therefore simple arithmetic: average purchase price per unit

6. The degree of professional ability, skill, and experience called for and used.

Class Counsel are highly experienced in class action, commercial, *qui tam*, mass tort, securities and other complex litigation. Class Counsel have successfully prosecuted and settled numerous class actions, including consumer and securities class actions. Additionally, Class Counsel have prosecuted cases against some of the world's largest corporations in contingent fee litigation and are among the most experienced complex litigation attorneys in the country.

This action required considerable skill and experience to bring it so expeditiously to such a successful conclusion. The case required substantial pre-suit investigation, examination and mastery of complex factual circumstances, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. In addition, Defendant was represented by the prominent and well-respected law firm of King & Spalding LLP. The preeminent standing of opposing counsel should be weighed in determining the fee, because such standing reflects the challenge faced by Plaintiff's attorneys.[5] Indeed, this class action required advance planning, strategic skills, imagination, resourcefulness, and management abilities of the highest order to match a highly qualified, experienced, and formidable opposition. Moreover, the Court's experience with Class Counsel forms the basis for assessing the nature, extent and quality of the services rendered by Class Counsel.[6] The ability of Class Counsel to obtain such a settlement so expeditiously for the Class, in the face of such formidable legal opposition, confirms the superior

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* 20%. It is analogous to buying a can of eight ready to bake biscuits, but upon opening the can discovering there are only seven biscuits. The customer bargained for eight biscuits but received only seven. The damages are 1/8 of the purchase price. The simplicity of the damage model in this Action, likewise, greatly simplifies the calculation of the value of the Programmatic Relief to the Class.

[5] *See In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976).

[6] *Butt*, 98 S.W.3d at 11-12; *Chrisco*, 800 S.W.2d at 719; *Brown*, 838 F.2d at 453; *In Re King Res. Co. Sec. Litig*, 420 F. Supp. at 628.

quality of Class Counsel's representation.

7. The result achieved.

The Settlement provides important and significant monetary and Programmatic Relief for the Class. The parties have agreed that:

- Tier 1. Settlement Class Members who elect to fill out the Claim Form section for Tier 1 and who do not have valid Proof of Purchase may recover $0.50 per Unit purchased, up to a maximum of $5.00 per Household; or

- Tier 2. Settlement Class Members who elect to fill out the Claim Form section for Tier 2 and who provide valid Proof(s) of Purchase may recover 30% of price paid per Unit purchased for the number of Units for which a valid Proof of Purchase has been provided, up to a maximum of $40.00 per Household.

- Defendant shall commence the process necessary to revise the Challenged Language according to the terms set out in Section V of the Settlement Agreement.

D. Deference is Given to Arms' Length Negotiated Fees.

The fee provisions of the Settlement were not negotiated until after the substantive terms of the settlement had been agreed upon. *See* Layfield Decl., at ¶ 21. This is the standard and ethical manner of negotiating settlement and fee issues. 3 *Newberg on Class Actions*, §12.03. The type of fee provision in the Settlement also is customary. *Id.* In this case, the fees were negotiated at arms' length and reflect a compromise—Plaintiff accepted less and Defendant paid more, in order to achieve an appropriate and fair balance for the case.

E. The Class Representatives Deserve Service Awards for their Participation and Prosecution of these Claims on Behalf of the Class.

The Class Representatives have participated in the preparation and prosecution of this class action litigation; have been active in all phases of this litigation; and provided all necessary information required to successfully settle this case. Overall, the Class Representatives devoted a significant amount of time to this matter.

Courts routinely approve service awards to compensate Class Representatives for the services they provided and the risks they incurred during the course of the class action litigation.[7] The purpose of a service award is to compensate the Class Representatives for both the extra work and risks undertaken by them that led to the creation of the benefits shared by the entire class.[8] "Many cases note the obvious public policy reasons for encouraging individuals with small personal stakes to serve as class plaintiffs in meritorious cases." *NACA Class Action Guidelines—Revised 2006 (Guideline 5)* (citing *Cook v. Niedert*, 142 F.3d 1104, 1016 (7th Cir. 1998); *In re Cendant Corp*., 232 F. Supp.2d 327, 344 (D.N.J. 2002); *Van Vraken v. Atlantic Richfield Co*., 901 F. Supp. 294, 300 (N.D. Cal. 1995)). In this case, the Class Representatives' participation has assisted in the prosecution and ultimate settlement of this action.

[7] This is expressly recognized by the NACA (National Association of Consumer Advocates) Class Action Guidelines (Revised 2006)—Guideline 5 ("Serving as a class representative generally requires significantly greater effort and sometimes, greater risk than is required of the absent class members. In addition, the class representative's willingness to serve in that capacity enables the litigation to be brought in the first place.")

[8] *See In re Linerboard Antitrust Litigation*, No. MDL 1261, 2004 WL 1221350 (E.D. Pa. June 02, 2004) ($25,000 incentive award approved for each of the five class representatives); *Cullen v. Whitman Medical Group*, 197 F.R.D. 136 (E.D. Pa. 2000) (value of settlement was $7.3 million; six plaintiffs granted incentive awards of $1,900.00 to $10,400); *Roberts v. Texaco, Inc*., 979 F. Supp. 185 (S.D.N.Y. 1997) (value of settlement was $115 million; six plaintiffs granted incentive awards ranging from $2,500 to $85,000); *In re Remeron End-Payor Antitrust Litig*., 2005 WL 2230314 (D.N.J.2005) (value of settlement was $36 million; incentive payments totaling $75,000 for six named plaintiffs); *Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998) (value of settlement was $ 14 million; incentive award to class representative of $25,000); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240 (S.D. Ohio 1991) (value of settlement was $56.6 million dollars; incentive awards of $50,000 for each of the six class representatives); *In re Dun & Bradstreet Credit Services Customer Litig*., 130 F.R.D. 366 (S.D. Ohio 1990) (value of settlement was $18 million; incentive awards to five class representatives from $35,000 to $55,000).

Defendant agreed as part of the Settlement to pay Service Awards in equal amounts to the Class Representatives of $3,500 each to compensate for their efforts in bringing the Action and achieving the benefits of the Settlement on behalf of the Settlement Class. Settlement ¶ 7.3.

"Awards of up to $5,000 should not require overly particularized court examination before approval. In most cases, payment below that amount can be justified by the bare fact that the class representative consented to act on behalf of the absent class members, assuming the fiduciary responsibilities and inconveniences that accompany that role." *NACA Class Action Guidelines—Revised 2006 (Guideline 5)*. Class Counsel believe the participation of the Class Representatives is deserving of the maximum agreed-upon award, and respectfully request that the Court award Service Awards to: Nicholas Cahill and Julia Yonan in the amount of $3,500 each.

VI. CONCLUSION AND PRAYER

For all the reasons set forth herein, Class Counsel request that this Motion be granted; that Class Counsel be awarded $2,600,000 in Attorneys' Fees and Costs; and that the Court grant Service Awards of $3,500 each to Class Representatives Nicholas Cahill and Julia Yonan.

Dated: February 20, 2023

NICHOLAS CAHILL, Plaintiff, individually, and on behalf of all others similarly situated persons,

By: /s/ Bryce Crowley

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was delivered on this February 20, 2023, via the Missouri Court System's Electronic Filing System to all counsel of record.

By: /s/ Bryce Crowley
Bryce Crowley