UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

MATT DIFRANCESCO, ANGELA MIZZONI, and LYNN MARRAPODI, individually and on behalf of all others similarly situated, Plaintiffs, v. UTZ QUALITY FOODS, INC., Defendant.	Civil Action No. 1:14-CV-14744-DPW

PLAINTIFFS' MEMORANDUM IN SUPPORT OF ASSENTED TO MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1
II. ARGUMENT 3
A. Legal Standard 3
B. The Requested Percentage of the Settlement Is A Reasonable Fee Award Under Factors Considered By Courts in the First Circuit 4
1. The Extent of the Benefit Obtained Supports the Requested Fee 5
2. Reaction of the Class Members 5
3. The Skill and Efficiency of the Attorneys Involved 6
4. Complexity and Duration of the Litigation 6
5. The Risk that the Litigation Will Be Unsuccessful 7
a. Success at Trial Was Far from Guaranteed 7
b. The Contingent Nature of Class Counsel's Representation Also Supports the Requested Fee 8
6. The Amount of Time Devoted to the Case by Class Counsel 10
a. Investigation 10
b. Motion Practice 10
c. Discovery Practice 10
d. Settlement Negotiations 11
C. The Requested Fees Fall Well within the Range of Fees Awarded in Cases within the First Circuit 12
D. Class Counsel's Lodestar Supports Their Fee Request 12
E. Class Counsel's Request for Reimbursement of Expenses Should Be Granted 14
F. Each Plaintiff Should Be Awarded a $2,500 Service Award 14
III. CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Ahearn v. Credit Suisse First Boston LLC, No. 03-CV-10956 (D. Mass. Jun. 7, 2006) 16

Bezdek v. Vibram USA, Inc. 79 F. Supp.3d 324 (D. Mass 2015) 4

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) 3

Bussie v. Allamerica Fin. Corp., No. 97-CV-40204, 1999 U.S. Dist. LEXIS 7793 (D. Mass. May 19, 1999) 15

Hochstadt v. Boston Scientific Corp., No. 08-CV-12139 (D. Mass. Aug. 11, 2011) 12

In re Am. Bank Note Holographics, Inc., Sec. Litig., 127 F. Supp. 2d 418 (S.D.N.Y. 2001) 8

In re Aetna Inc. Sec. Litig., No. MDL 1219, 2001 U.S. Dist. LEXIS 68 (E.D. Pa. Jan. 4, 2001) 13

In re Computron Software, Inc., Sec. Litig., 6 F. Supp. 2d 313 (D.N.J. 1998) 6

In re Cont'l Ill. Sec. Litig., 962 F.2d 566 (7th Cir. 1992) 9

In re CVS Corp. Sec. Litig., C.A. No. 01-11464 (JLT) (D. Mass. Sept. 7, 2005) 13

In re Fidelity/Micron Sec. Litig., 167 F.3d 735 (1st Cir. 1999) 3, 4, 14

In re Lupron Mktg. & Sales Practices Litig., No. 01-cv-10861, 2005 U.S. Dist. LEXIS 17456 (D. Mass. Aug. 17, 2005) 5, 9, 14, 16

In re Prudential Sec. Ltd. P'ships Litig., 985 F. Supp. 410 (S.D.N.Y. 1997) 8

In re Puerto Rican Cabotage Antitrust Litig., No. 3:08-md-1960, 2011 U.S. Dist. LEXIS 113980 (D.P.R. Sept. 13, 2011) 8, 9, 16

In re Relafen Antitrust Litig., 231 F.R.D. 52 (D. Mass. 2005) ....passim

In re San Juan Dupont Plaza Hotel Fire Litig., 50 F. Supp. 2d 100 (D.P.R. 1995) 9

In re Stocker Yale, Inc. Sec. Litig., No. 05-CV-117, 2007 WL 4589772 (D.N.H. Dec. 18, 2007) 12

In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295 (1st Cir. 1995) 3, 4

In re TJX Cos. Retail Sec. Breach Litig., 584 F. Supp. 2d 395 (D. Mass. 2008) 4

In re Tyco Int'l, Ltd., 535 F. Supp. 2d 249 (D.N.H. 2007) 8, 14

In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503 (E.D.N.Y. 2003) 13

Latorraca v. Centennial Techs., Inc., 834 F.Supp.2d 25 (D. Mass. 2011) 3

Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) (*en banc*)......13

Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973)......13

Malanka v. de Castro, Nos. 85-CV-2154, 1990 U.S. Dist. LEXIS 18171 (D. Mass. Nov. 20, 1990)......12

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)......14

New England Carpenters Health Benefits Fund v. First Databank, Inc., No. 05-11148, 2009 WL 2408560 (D. Mass. Aug. 3, 2009)......12, 13

Overby v. Tyco, Int'l. Ltd., No. 02-CV-1357 (D.N.H. Nov. 23, 2009)......12

Ressler v. Jacobson, 149 F.R.D. 651 (M.D. Fla. 1992)......6

Teachers' Ret. Sys. v. A.C.L.N. Ltd., No. 01-CV-11814, 2004 U.S. Dist. LEXIS 8608 (S.D.N.Y. May 14, 2004)......8

United States v. 8.0 Acres of Land, 197 F.3d 24 (1st Cir. 1999)......4

Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985)......13

RULES

Fed. R. Civ. P. 23(h)......1

Pursuant to Fed. R. Civ. P. 23(h), Plaintiffs Matt DiFrancesco, Angela Mizzoni, and Lynn Marrapodi (collectively, "Plaintiffs") respectfully submit this Memorandum of Law in Support of Assented to Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Service Award ("Motion") in connection with the above-captioned consumer class action ("Action") by Plaintiffs against Defendant, Utz Quality Foods, Inc. ("Utz" or "Defendant").

I. PRELIMINARY STATEMENT

Class Counsel[1] achieved an excellent settlement for the Class and, with this motion, seek an award of $375,000 in attorneys' fees, reimbursement of expenses in the amount of $9,953.36, and a $2,500 Service Award for each of the three Class Representatives, all to be paid from the Settlement Fund. Through their efforts, Class Counsel obtained a $1.25 million non-reversionary fund on behalf of the Settlement Class. The requested fees of $375,000 represent 30% of this fund and amounts to a negative multiplier of approximately .727 based on Class Counsel's current lodestar of $515,446.10.

To achieve this result, Class Counsel devoted an enormous effort to the Action on a wholly contingent basis with no guaranteed payment. *First*, Class Counsel initiated and fiercely litigated this action, conducting significant discovery and defeating Defendant's attempt to get the case dismissed on the pleadings. *Second*, Class Counsel negotiated an excellent Settlement for the Class, which if approved promises Settlement Class Members submitting valid claims cash that is significant in relation to the relatively low monetary value of the snack products at issue. [2] *Third*, Class Counsel worked to address the Court's concerns with the initial Settlement agreement through two amendments, resulting in the current, amended Settlement at Docket 93

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[1] For the purposes of this Motion, Class Counsel includes all attorneys who performed service on behalf of the Plaintiffs and the Class in this matter. All other capitalized terms have the same meaning as set forth in the Amended Settlement Agreement filed on December 6, 2017 ("Settlement") (Dkt. No. 93).

[2] Although at current claim numbers it is likely that the maximum amount of $2 per Eligible Product claimed will be pro-rated, the resulting cash going to Class Members will nonetheless be significant in relation to the low monetary value of the snack products. *See* Motion for Final Approval at 1-2.

(the "Settlement"). *Fourth*, Class Counsel successfully secured the Court's order authorizing dissemination of Notice to the Class, which has secured a healthy response from Settlement Class Members, as reflected in the concurrently filed Declaration of Steven Weisbrot ("Weisbrot Decl.").

Furthermore, Class Counsel engaged in extensive and protracted arm's length settlement negotiations with Utz, including a full-day, in-person mediation before the Honorable Peter D. Lichtman (Ret.) of JAMS. The Settlement does not include a clear sailing provision or any other agreement regarding the amount of fees and expenses. (Dkt. 93, § IX.)

These efforts came at a cost, resulting in Class Counsel's accrual of a $515,446.10 lodestar[3] and $9,953.36 in costs to date and respectfully request that the Court approve a total of $375,000 for attorneys' fees and costs, all of which will be paid from the Settlement Fund. The requested attorneys' fees represent 30% of the total $1,250,000 monetary value of the Settlement, and the $375,000 in requested attorneys' fees and costs represents a negative .727 multiplier[4] of Class Counsel's lodestar, without taking into account the value of the conduct changes being implemented by Utz. The percentage and the multiplier are reasonable and well within the acceptable range of attorney awards in class settlements. Class Counsel incurred over $9,953.36 in uncompensated and necessary out-of-pocket litigation expenses, and the agreed-to request for reimbursement of these expenses is also reasonable and to be paid from the Settlement Fund.

Finally, it is respectfully requested that the Court approve a Service Award of $2,500 for each Plaintiff, to be paid from the $1.25 Million Settlement Fund, for the time and efforts

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[3] Class Counsel's time and expenses are discussed below and detailed in the concurrently filed Declaration of Tina Wolfson in Support of Plaintiffs' Motions for Final Approval of Class Action Settlement and for Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards ("Wolfson Decl."), ¶¶ 27-31. The hourly billing rates applied by Class Counsel are commensurate with those charged by law firms in the Boston area. (*Id.* ¶¶ 47-50.)

[4] The multiplier is calculated by taking the requested total of $375,000 for fees and dividing the result by Class Counsel's $515,446.10 lodestar: 375,000 / 515,446.10.

each devoted to this Action. This amount is well within the range of awards in similar actions of this nature.

In sum, Plaintiffs respectfully submit that the requested attorneys' fees, reimbursement for expenses, and service awards are entirely reasonable under the circumstances and should be approved by the Court.

II. ARGUMENT

A. Legal Standard

The Supreme Court has recognized that when attorneys' efforts create a fund, those efforts entitle the attorneys to reasonable attorneys' fees from that fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) ("lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax"). This policy equitably provides that those who have profited from successful litigation should share in its costs. *See In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 n.6 (1st Cir. 1995) ("The common fund doctrine is founded on the equitable principle that those who have profited from litigation should share its costs").

The First Circuit recognizes two methods for calculating attorneys' fees in the class action context. *Id.* at 307. Under the percentage of the fund method, counsel may be awarded a reasonable percentage of the common fund. *Id.* at 305, 307. Within the First Circuit, courts generally award fees "in the range of 20–30%, with 25% as 'the benchmark.'" *Latorraca v. Centennial Techs., Inc.*, 834 F.Supp.2d 25, 27–28 (D. Mass. 2011).

"Although the [percentage of the fund] method is generally favored in the class action context because it is less burdensome and 'better approximates the workings of the marketplace,' the First Circuit also recognizes the 'lodestar' method for calculating attorneys'

fees." *Bezdek v. Vibram USA, Inc.* 79 F. Supp.3d 324, 351 (D. Mass 2015) (citing *Thirteen Appeals*, 56 F.3d at 306–07). "Under that method, the court 'determine[s] the number of hours reasonably expended multiplied by a reasonable hourly rate for attorneys of similar skill within that geographic area.'" *Id.* (citations omitted). "This calculation is further 'subject to a multiplier or discount for special circumstances, plus reasonable disbursements.'" *Id.* (citations omitted).

Moreover, in the First Circuit, a trial court enjoys "extremely broad latitude" in determining an appropriate fee award "and may calculate such an award either on the basis of a reasonable percentage of the fund, or using a lodestar method to multiply a reasonable hourly rate by the compensable hours the attorney worked on the matter." *United States v. 8.0 Acres of Land,* 197 F.3d 24, 33 (1st Cir. 1999); *Thirteen Appeals*, 56 F.3d at 309. Courts possess broad discretion '"because each common fund case presents its own unique set of circumstances,"' so each court '"must assess each request for fees and expenses on its own terms."' *8.0 Acres*, 197 F.3d at 33 (quoting *In re Fidelity/Micron*, 167 F.3d at 737).

B. The Requested Percentage of the Settlement Is a Reasonable Fee Award Under Factors Considered By Courts in the First Circuit

Although the First Circuit has not established specific factors to be used in evaluating the reasonableness of a fee request, district courts within the First Circuit have applied factors developed by other courts outside the First Circuit. For example, in *In re TJX Cos. Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 401 (D. Mass. 2008), the court looked to the following factors to assess reasonableness of attorneys' fees: (1) the reaction of class members to the settlement and proposed attorneys' fees; (2) the skill and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risk that the litigation will be unsuccessful; (5) the amount of time devoted to the case by counsel; and (6) the extent of the benefit obtained. *See also In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 79 (D. Mass. 2005); *In re Lupron Mktg. & Sales Practices Litig.*, No. 01-cv-10861, 2005 U.S. Dist. LEXIS

17456, at *11 (D. Mass. Aug. 17, 2005). Applying these factors to this case demonstrates that the requested attorneys' fees are reasonable.

1. The Extent of the Benefit Obtained Supports the Requested Fee

The Settlement provides significant benefits to the Settlement Class. Pursuant to the Parties' Settlement Agreement, the Settlement Class will receive a settlement fund of $1.25 million that will not revert to Utz. (Settlement Agreement, p. 16 (Dkt. No. 93).) As of May 31, 2019, there have been 124,134 claims submitted to the Settlement Administrator, for 1,144,530 purchases of Eligible Products. (Weisbrot Decl. ¶ 11.) Class Counsel currently estimates that Claimants will receive, on average, approximately $4.24 per claim, after pro ration adjustment to the $2 per Qualifying Purchase allowed under the Settlement's terms.[5]

In addition to creating a significant non-reversionary monetary benefit for the Settlement Class, Class Counsel also sought injunctive relief in the complaints they filed. As indicated in the Settlement Agreement, Utz agreed to implement changes in their conduct regarding the products in question. (Settlement Agreement, p.p. 16-18 (Dkt. No. 93).)

2. Reaction of the Class Members

To date the reaction of the Class Members has been extremely positive. As of May 31, 124,134 individual Settlement Class Members have submitted Claims, even though the Claims Deadline is not until July 28, 2019. (Weisbrot Decl. ¶ 11.) In contrast, to date no one has submitted a request for exclusion from the Settlement (*Id.* ¶ 14.) and no objections to the Settlement or to the fee request have been received (the opt-out and objection deadline - June 13, 2019 - has not yet occurred). (*Id.*) Accordingly, in the absence of any objections thus far, the low number of opt outs, and the 124,134 Claims, this factor strongly weighs in favor of this Court's approval of the fee request here.

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[5] This figure assumes: that 5,490 of the Claims received are duplicative; total costs of Settlement Administration in the amount of $350,000, as promised by the Settlement Administrator; and that the Court awards $375,000 in Attorney Fees, $9,953.36 in Expenses, and $7,500 in total Service Awards to the three Plaintiffs ($2,500 each).

3. The Skill and Efficiency of the Attorneys Involved

The quality of the representation and the standing of counsel at the bar are important factors in determining the reasonableness of the requested fee. *See Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992). Here, Class Counsel are well experienced attorneys in complex representative litigation, including consumer fraud class actions. (Wolfson Decl., ¶¶ 33-43 & Ex. A.)

Class Counsel's skillful and efficient litigation clearly demonstrates their quality here. From their extensive, thorough, and detailed complaints, to the extensive discovery they conducted, to their motion practice, to their skillful settlement negotiations, Class Counsel obtained a settlement that will provide a value of $1.25 million (without including the value of the conduct changes being implemented by Utz).[6] This factor supports the reasonableness of Class Counsel's fee request.

4. Complexity and Duration of the Litigation

Nationwide consumer fraud class actions, like this Action, are difficult and complex. For example, Class Counsel faced complex questions about standing, liability and calculation of damages on a class wide basis. If the litigation continued, Plaintiffs would likely face complex continuing arguments by Utz that its acts did not cause any injury-in-fact to Plaintiffs, that damages attributable to the allegedly false "all natural" label cannot be calculated with sufficient certainty, and the Settlement Class could not be certified in this case. For example, Utz would most certainly argue that Plaintiffs and the Class Members saw and relied on different advertisements, that the products at issue do in fact meet with all representations in Utz's advertising and marketing, that certain putative Settlement Class Members purchased the products for reasons unrelated to the representations at issue in this

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[6] Courts have viewed the quality of opposing counsel as an important factor in evaluating the quality of the services rendered by plaintiffs' counsel. *See In re Computron Software, Inc., Sec. Litig.*, 6 F. Supp. 2d 313, 323 (D.N.J. 1998) ("performance and quality of opposing counsel" was factor in determining appropriate fee). Here, Utz was represented by able and experienced counsel at a prominent national law firm (Cozen O'Connor), who proved to be formidable opponents throughout the duration of the Action.

Action, and that Settlement Class Members suffered no damages. These and other complex issues would have required extensive expert testimony and there was no guarantee that a jury would believe Plaintiffs' experts over those of Utz.

Accordingly, this factor strongly supports the reasonableness of the fee request.

5. The Risk that the Litigation Will Be Unsuccessful

a. Success at Trial Was Far from Guaranteed

Although Plaintiffs and Class Counsel strongly believe in the merits of the Action, the proposed Settlement Class faced a very real risk of recovering nothing at all if the case continued. Utz raised numerous issues that could have lead to the dismissal of Plaintiffs' claims prior to trial. For example, Plaintiffs' claims might not have survived Utz's pre-trial attacks regarding, *inter alia*, class certification and liability.

Furthermore, victory at trial was by no means assured. A trial of liability and damages issues would most certainly involve substantial attorney and expert resources, voluminous documentary and deposition evidence, vigorously contested motions, and considerable judicial resource expenditures. In negotiating the Settlement, Class Counsel had to recognize the substantial risk of recovering nothing in light of the uncertainties inherent in class actions.

Even assuming the Settlement Class could recover a larger judgment at trial, the delay through trial, post-trial motions, and the appellate process would likely deny the Settlement Class any recovery for years.

Thus, in light of these risks, Class Counsel achieved a substantial recovery for the Settlement Class, possibly more than would have been recovered from Utz if the litigation continued. Therefore, Class Counsel believe they achieved a significant recovery for the Settlement Class considering these numerous risks and, therefore, the requested fees and expenses are fully justified and should be awarded.

b. The Contingent Nature of Class Counsel's Representation Also Supports the Requested Fee

"Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Teachers' Ret. Sys. v. A.C.L.N. Ltd.*, No. 01-CV-11814, 2004 U.S. Dist. LEXIS 8608, at *11 (S.D.N.Y. May 14, 2004); *see also In re Puerto Rican Cabotage Antitrust Litig.*, No. 3:08-md-1960, 2011 U.S. Dist. LEXIS 113980, at *36 (D.P.R. Sept. 13, 2011) (noting that "whenever an attorney takes a case on a contingency basis, as [l]ead [c]ounsel has done, there is always the risk of non-payment. Certainly there are instances where diligent and experienced plaintiffs attorneys pour thousands of hours and dollars into their class action case only to recover little or nothing at trial or on appeal"); *In re Lupron*, 2005 U.S. Dist. LEXIS 17456, at *15 ("Many cases recognize that the risk assumed by an attorney is perhaps the foremost factor in determining an appropriate fee award.") (citations and internal quotations omitted); *In re Am. Bank Note Holographics, Inc., Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (concluding it is "appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award"); *In re Prudential Sec. Ltd. P'ships Litig.*, 985 F. Supp. 410, 417 (S.D.N.Y. 1997) ("Numerous courts have recognized that the attorney's contingent fee risk is an important factor in determining the fee award.").

This risk encompasses the risk of underpayment or no payment at all. *See In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 268 (D.N.H. 2007) ("Co-Lead Counsel, it must be remembered, took this case on a wholly contingent basis. Had they lost on summary judgment or fallen short of establishing liability at trial, they would have lost the tens of millions of dollars in expenses and all of the attorney time that they collectively invested in the case."); *In re Relafen*, 231 F.R.D. at 80 ("As class counsel notes, indeed, when Class Counsel undertook representation of the End-Payor Purchaser Class, there were no assurances that any fees would be received. Class Counsel were aware that they would likely have to expend thousands of hours, and hundreds of thousands of dollars, in prosecuting this case over an extended period of time before having even a possibility of recovering a fee. Class Counsel alone bore the risk of

the case being dismissed at the pretrial stage, of not prevailing at trial, or even losing on appeal."); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 50 F. Supp. 2d 100, 104 (D.P.R. 1995) ("[C]ounsel have undertaken this litigation subject to substantial risks of loss on the merits and have devoted many hours to the prosecution of this cause with virtually no assurances of payment of their fees."); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 569-70 (7th Cir. 1992) (reversing district court's fee award where court failed to account for, among other things, risk of underpayment to counsel).

Evaluating the risks undertaken by Class Counsel in prosecuting this complex consumer class action fully supports the reasonableness of the requested fee. Class Counsel undertook the Action on a wholly contingent basis. Class Counsel have not been compensated for their time or expenses since this case began, and would have received no compensation or expense reimbursement had this case not been successful.

From the beginning, Class Counsel understood they were embarking on a complex, expensive, and lengthy litigation with no guaranteed compensation for the enormous investment of time and money the case would require. Because of the nature of a contingent practice where predominantly complex cases last several years, not only do contingent litigation firms have to pay regular overhead, but they also must advance substantial litigation expenses. Under these circumstances, the financial burden for contingent-fee counsel is far greater than for firms paid on an ongoing basis. The factor labeled by the courts as "the risks of litigation" is not an empty phrase. Indeed, meaningful settlements in actions such as this can occur because defendants and their counsel know that leading members of the plaintiffs' bar (such as those here) stand ready to force a resolution on the merits and force a trial in the case.[7]

[7] To this end, public policy considerations, which is another factor some courts consider in evaluating attorneys' fees requests, favor awarding Class Counsel the fees requested here because Class Counsel provided an "invaluable service by aggregating the seemingly insignificant harms" of Class Members who would likely not pursue redress for harms on an individual basis. *See In re Puerto Rican Cabotage*, 2011 U.S. Dist. LEXIS 113980, *44-45; *see also In re Lupron*, 2005 U.S. Dist. LEXIS 17456, at *22-23 ("While in the abstract, the public has no particular interest in whether or not lawyers are paid a fee for bringing class actions, there is a significant societal interest in obtaining redress for prescription drug consumers

6. The Amount of Time Devoted to the Case by Class Counsel

Class Counsel and their professional support staff expended substantial time (approximately 746.9 hours) and effort pursuing the Action on behalf of the Class for approximately eight-and-a-half years. (Wolfson Decl., at ¶¶ 29-31.) Further, Class Counsel will need to devote additional time to bring the Settlement to a final resolution, time that will not be part of the attorney time being submitted to the Court. (*Id.* ¶ 31.)

a. Investigation

Class Counsel conducted an extensive and thorough investigation prior to and after filing the initial complaints in the Actions. (Wolfson Decl., at ¶¶ 8-9.) Class Counsel analyzed the relevant legal claims, conducted an extensive fact investigation, and engaged in formal discovery. (*Id.* ¶ 10.) Class Counsel vetted Defendant's numerous advertisements and other representations pertaining to its products. (*Id.* ¶ 8.)

Class Counsel also gathered any available substantiation and research relating to the claims made in the subject advertising, and conducted an independent investigation of the scientific and factual basis for the claims in the advertising of Defendant's products. (*Id.* ¶ 8.)

b. Motion Practice

The parties engaged in extensive litigation prior to reaching a resolution. Class Counsel successfully defended a Motion to Dismiss filed by the Defendants, as well as filing a number of other pleadings before the Court, including those related to the presentation of the Settlement to the Court.

c. Discovery Practice

There was considerable discovery practice in this case. Plaintiff served on Utz a total of 117 requests for production, 30 interrogatories, and 54 requests for admission. This resulted in Defendant's production of written responses and over 2,200 pages of documents in electronic

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whose harms could not, given the cost of litigation, be pursued on an individual basis. The public interest is also served by the defendants' disgorgement of the proceeds of predatory marketplace behavior.").

form, which were thoroughly reviewed by Class Counsel. For its part, Utz served a total of 36 interrogatories, 69 requests for production and 27 requests for admission. Plaintiffs served written responses and produced a total of 879 pages of documents. (*Id.* ¶ 10.)

In connection with the mediation, Plaintiffs requested substantial supplemental information from Defendant. Utz produced additional documents sufficient to permit Plaintiffs and Class Counsel to evaluate the claims and potential defenses and to meaningfully conduct informed settlement discussions. In connection with the Parties' mediation, Plaintiffs obtained discovery regarding: (i) product packaging and advertisements throughout the Class Period; (ii) information regarding product ingredients; (iii) the use of the phrases "Natural" and "All Natural" on product labels; and (iv) sales and retail sales data, including the total amount of wholesale revenue, by product type, throughout the Class Period. Plaintiffs also produced to Utz additional information regarding Plaintiffs' purchases of the Products. (*Id.* ¶ 12.)

d. Settlement Negotiations

Class Counsel obtained an excellent result for the Class through their skillful settlement negotiations. As detailed more fully in the Wolfson Declaration, after Plaintiffs defeated Utz's motion to dismiss, and after discovery had gotten under way, the parties began intensive settlement negotiations culminating in a full-day in-person mediation session with the Honorable Peter D. Lichtman (Ret.) of JAMS, following preparation and submission of mediation briefs. (*Id.* ¶ 11.)

After reaching a settlement in principle, the parties commenced memorializing the full Settlement, which generated numerous additional rounds of comprehensive and often spirited negotiations. The parties extensively negotiated each specific aspect of the Settlement, including each of its eight exhibits. For example, counsel negotiated and meticulously refined the final Notice program and each document comprising the Notice (the Class Notice and Summary Settlement Notice), with the assistance of Angeion, a company that specializes in developing class action notice plans and the proposed Settlement Administrator in this case, to

ensure that the information disseminated to Settlement Class Members is clear and concise. (*Id.* ¶ 13.)

C. The Requested Fees Fall Well within the Range of Fees Awarded in Cases within the First Circuit

The requested fee award of 30% of the $1,250,000 monetary value of the Settlement is consistent with the percentage awarded in numerous litigations throughout this Circuit.[8] *Hochstadt v. Boston Scientific Corp.,* No. 08-CV-12139, slip op. at 10 (D. Mass. Aug. 11, 2011) (awarding 33 1/3% of gross settlement fund); *Overby v. Tyco, Int'l. Ltd.*, No. 02-CV-1357, slip op. at 1 (D.N.H. Nov. 23, 2009) (granting requested fee of 30% of $70.525 million settlement); *In re Stocker Yale, Inc. Sec. Litig.*, No. 05-CV-117, 2007 WL 4589772, at * 6 (D.N.H. Dec. 18, 2007) (awarding 33% of gross settlement fund); *In re Relafen*, 231 F.R.D. at 82 (awarding 1/3 of settlement fund); *Malanka v. de Castro*, Nos. 85-CV-2154, 1990 U.S. Dist. LEXIS 18171, at *3 (D. Mass. Nov. 20, 1990) (awarding one-third of settlement fund). The amount requested is also warranted given the amount of the lodestar expended to date and the fact that such hours yield a negative multiplier. Accordingly, the requested percentage of attorneys' fees here are, Plaintiffs submit, fair and reasonable and should be awarded by the Court.

D. Class Counsel's Lodestar Supports Their Fee Request

The requested fees are also reasonable when evaluated in relation to Class Counsel's lodestar. In the First Circuit, the lodestar approach, though not required, can serve as a check on the appropriateness of the percentage of funds fee. *See New England Carpenters Health Benefits Fund v. First Databank, Inc.,* No. 05-11148, 2009 WL 2408560, at *1 (D. Mass. Aug. 3, 2009) (citations omitted); *see also In re Relafen*, 231 F.R.D. at 81-82.

Under the lodestar method, a court must engage in a two-step analysis: first, to determine the lodestar, the court multiplies the number of hours each attorney spent on the case by each

[8] "Courts in this circuit generally award attorneys' fees in the range of 20-30%, with 25% as 'the benchmark[.]'" *Latorraca*, 2011 U.S. Dist. LEXIS 135435, at *10-11.

attorney's reasonable hourly rate; and second, the court increases that lodestar figure (by applying a multiplier) to reflect such factors as the risk and contingent nature of the litigation, the result obtained, and the quality of the attorney's work. *See, e.g.*, *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167-69 (3d Cir. 1973), subsequently refined in *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 116-18 (3d Cir. 1976) (*en banc*). Performing the lodestar cross-check here confirms the reasonableness of the fee requested by Class Counsel.

Class Counsel spent, in the aggregate, 746.9 hours in the prosecution of the Action, resulting in a lodestar of $515,46.10 for the Action. (Wolfson Decl. ¶ 29.) The hourly rates used to calculate this lodestar are commensurate with those charged in the Boston area marketplace. (*Id.* ¶¶ 47-49.) The requested fee of $375,000 results in a negative multiplier of .727. The requested fee is reasonable in this context as the First Circuit has noted that multipliers as high as 4.5 have been appropriately awarded in protracted complex litigation. *See Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 613 (1st Cir. 1985) ("While multiples of 2, 3, 4, and 4.5 have occasionally been given, these multipliers occur primarily in protracted multidistrict antitrust and securities cases involving recoveries of ten million dollars or more"); *see also New England Carpenters*, 2009 WL 2408560, at *2. Moreover, the 2.15 multiplier here falls within the range of multipliers awarded by courts within this Circuit and elsewhere. *See, e.g., In re CVS Corp. Sec. Litig.,* C.A. No. 01-11464 (JLT), slip op., at 7 (D. Mass. Sept. 7, 2005) (awarding 25% of $110 million, representing 3.27 multiplier); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) (3.5 multiplier); *In re Aetna Inc. Sec. Litig.*, No. MDL 1219, 2001 U.S. Dist. LEXIS 68, at *59 (E.D. Pa. Jan. 4, 2001) (awarding 30% of $82.5 million settlement fund, representing 3.6 multiplier). As of May 31, 2019, no objection to the fee request has been received.

E. Class Counsel's Request for Reimbursement of Expenses Should Be Granted

In addition to attorneys' fees, Class Counsel also respectfully request the approval of the reimbursement of expenses incurred while prosecuting the Action. A total of over $9,953.36 in expenses was reasonably and actually incurred. (Wolfson Decl. at ¶ 52.) It is well-settled that attorneys who have created a common fund for the benefit of a class are entitled to reimbursement for their expenses incurred in creating the fund. *See, e.g., Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 389-98 (1970); *In re Fidelity/Micron Sec. Litig.*, 167 F.3d at 737 ("lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled . . . to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax."); *Tyco Int'l*, No. 02-1357, slip op. at 1 (awarding plaintiffs' counsel sum of $1,982,873.88 as expense reimbursement).

The submitted expenses in this case were all reasonable, necessary, and directly related to the prosecution of the Action. (Wolfson Decl. at ¶ 53-55.) Class Counsel respectfully submit that the request for reimbursement of these expenses is reasonable.

F. Each Plaintiff Should Be Awarded a $2,500 Service Award

Federal courts often approve case contribution awards to plaintiffs who prosecuted actions on the theory that there would be no class-wide benefit absent their suits. These awards recognize the burdens assumed by plaintiffs in instituting and prosecuting the actions, the time spent on communicating with counsel and fulfilling responsibilities of supervision, and the risks that plaintiffs bear in bringing the suit. *See In re Relafen*, 231 F.R.D. at 82 ("Because a named plaintiff is an essential ingredient of any class action, a service award can be appropriate to encourage or induce an individual to participate in the suit.") (citation omitted); *In re Lupron*, 2005 U.S. Dist. LEXIS 17456, at *24-25 ("Incentive awards serve an important function in promoting class action settlements, particularly where, as here, the named plaintiffs participated actively in the litigation.").

"In granting incentive awards to named plaintiffs in class actions, courts consider not only the efforts of the plaintiffs in pursuing the claims, but also the important public policy

of fostering enforcement laws and rewarding representative plaintiffs for being instrumental in obtaining recoveries for persons other than themselves." *Bussie v. Allamerica Fin. Corp.*, No. 97-CV-40204, 1999 U.S. Dist. LEXIS 7793, at *11-12 (D. Mass. May 19, 1999).

The Plaintiffs here have been actively involved in all stages of the litigation. Though none of these Plaintiffs lost income as a result of this litigation, they vigorously pursued the interests of the Class by undertaking the responsibilities attendant with serving as a named plaintiff, communicating with Class Counsel, assisting with discovery and with the pre-filing investigation of this action, keeping abreast of the litigation and settlement negotiations, and generally making themselves available whenever needed. (Wolfson Decl. ¶¶ 22-23.)

Plaintiff Matt DiFrancesco is a firefighter for the City of Boston. He is not an hourly worker and has not lost any wages as a result of this litigation. He has no prior relationship with any of the attorneys representing Plaintiffs in this case, nor has he ever previously served a class representative. (*Id.* ¶ 24.)

Plaintiff Angela Mizzoni is an assistant manager at a call center. She is paid hourly but has not lost any wages as a result of this litigation. She has no prior relationship with any of the attorneys representing Plaintiffs in this case, nor has she ever previously served a class representative. (*Id.* ¶ 25.)

Plaintiff Lynn Marrapodi is a retired fine artist. She is not an hourly worker and has not lost any wages as a result of this litigation. She met Keith Custis, who was Of Counsel at AW, approximately two months before the initial complaint in this action was filed. She has no prior relationship with any other attorneys representing Plaintiffs in this case, nor has she ever previously served as a class representative. (*Id.* ¶ 26.)

As set forth in the Class Notice and Settlement Agreement, each Plaintiff seeks a $2,500 service award from the $1.25 Million Fund. Moreover, the $2,500 sought in service awards represents a level that is less than or even with other awards approved in similar class actions in

this Circuit.[9] In sum, the requested modest awards to the named Plaintiffs are fair and reasonable and should be approved by the Court.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their request for an award of attorneys' fees in the amount of $375,000, reimbursement of expenses in the amount of $9,953.36, and for service awards of $2,500 for each of the three named Plaintiffs.

Dated: May 31, 2019

AHDOOT & WOLFSON, PC

By: ______________________________
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[9] *See In re Puerto Rican Cabotage*, 2011 U.S. Dist. LEXIS 113980, at *64-65 (awarding an $8,000 service award per class representative totaling $48,000); *Ahearn v. Credit Suisse First Boston LLC*, No. 03-CV-10956, slip op. at 5 (D. Mass. Jun. 7, 2006) (awarding $35,000 ($25,000 and $10,000) to two class representatives); *In re Relafen*, 231 F.R.D. at 82 (awarding $8,000 to each named consumer plaintiff, $9,000 to each consumer organization, and $14,000 for each named third party payor plaintiff); *In re Lupron*, 2005 U.S. Dist. LEXIS 17456, at *24-25 (granting 18 plaintiff awards ranging from $2,500 to $25,000 each).

CERTIFICATE OF SERVICE

I hereby certify I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 31, 2019.

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