**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

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| MONIQUE BELL, TREE ANDERSON, and MELISSA CONKLIN, individually and on behalf of all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>CVS PHARMACY, INC.,<br><br>Defendant. | Case No. 1:21-cv-06850-PK<br><br>Hon. Peggy Kuo |

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND INCENTIVE AWARDS**

Dated: September 22, 2023

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## INTRODUCTION

In this class action, Plaintiffs Monique Bell, Tree Anderson, and Melissa Conklin ("Plaintiffs") allege that CVS Pharmacy, Inc. ("CVS" or "Defendant") violated state consumer protection statutes, state warranty acts, New York General Business Law ("GBL") §§ 349-350, New York Warranty Act, N.Y. U.C.C. § 2-313, The Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, and were unjustly enriched. *See* First Amended Complaint ("FAC") (ECF No. 54) ¶¶ 43-106. Plaintiffs allege that the packaging of Defendant's CVS-branded maximum strength lidocaine patches, creams, sprays, and roll-ons (the "Products") was false and deceptive in that they deceptively and falsely led purchasers to believe that the Products delivered the "maximum strength" amount of lidocaine available (over-the-counter or by prescription) and that the patch Products could reliably adhere to their bodies for up to 8 or 12 hours, depending on the patch. *Id.* ¶¶ 3, 8-10, 24-29.

Now, as a result of Plaintiffs' and Class Counsel's efforts—and with the assistance of the Honorable Frank Maas (Ret.), a former magistrate judge and now with JAMS— the parties reached a Class Action Settlement (ECF Nos. 56, 57) (the "Settlement")[1] that adequately compensates Class Members. The Settlement—preliminarily approved by this Court on July 18, 2023—provides Class Members up to $3,800,000 in cash settlement benefits, plus payment of class notice and administration costs approximating $500,000. Pursuant to the Settlement, Defendant has also agreed to change the labels on the Products bearing the challenged "maximum strength" and patch adherence representations. Finally, the Settlement provides for the payment of attorneys' fees and expenses, notice and administration costs, and incentive awards.

In light of this exceptional result, Plaintiffs respectfully request pursuant to Federal Rule

[1] All capitalized terms used herein shall have the same meaning as defined in the Settlement.

of Civil Procedure 23(h) that the Court approve attorneys' fees, costs, and expenses of $1,140,000, as well as incentive awards of $3,000 each to Plaintiffs for their service as class representatives. For these reasons, and as explained further below, this Court should approve the requested fees, costs, expenses, and incentive awards.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. PLAINTIFFS' ALLEGATIONS

Plaintiffs and Class Members are all purchasers of the Products. Plaintiffs allege that the Products deceptively state "that they deliver a 'Maximum Strength' dose of lidocaine and that the Lidocaine Patches adhere to consumers' bodies up to 12 or 8 hours," when, in fact, they do not. FAC ¶ 3. As such, Plaintiffs allege they are entitled to actual damages, statutory damages, punitive damages, restitution, and other equitable monetary relief. *Id.* ¶¶ 48, 56, 65, 77, 87, 95. Plaintiffs bring claims for unjust enrichment, violation of state consumer protection statutes, violation of state warranty acts, GBL §§ 349-350, breach of implied warranty, and violation of the Magnuson-Moss Warranty Act. *Id.* ¶¶ 43-106. Defendant denies any and all wrongdoing and denies that Plaintiffs can substantiate their claims.

### II. THE LITIGATION AND WORK PERFORMED TO BENEFIT THE CLASS

On December 11, 2021, Plaintiff Monique Bell filed the original class action complaint in the United States District Court for the Eastern District of New York. (ECF No. 1). The material allegations of the complaint were that the packaging of Defendant's Lidocaine Patches was false and deceptive in that it led purchasers to believe that the Lidocaine Patches delivered a "maximum strength" amount of lidocaine and could reliably adhere to consumer bodies for up to 8 or 12 hours, depending on the product. Plaintiff Bell alleged that Defendant violated state consumer protection statutes, state warranty acts, New York General Business Law ("GBL") §§ 349-350, New York

Warranty Act, N.Y. U.C.C. § 2-313, The Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, and was unjustly enriched. *Id.*

On February 14, 2022, Defendant filed an answer to Plaintiff Bell's class action complaint, which asserted 15 affirmative defenses. (ECF No. 14).

On April 7, 2022, Defendant filed two letters seeking a pre-motion conference regarding its anticipated motion for judgment on the pleadings (ECF No. 26) and requesting adjournment of the Court's Initial Scheduling Conference (ECF No. 27). On April 12, 2022, Plaintiff Bell filed two letters in opposition to the above-referenced letters. (ECF Nos. 28, 29).

On April 13, 2022, the Court denied Defendant's request for a pre-motion conference and directed the parties to agree on a briefing schedule in anticipation of Defendant's motion for judgment on the pleadings. Declaration of Joseph I. Marchese ("Marchese Decl.") ¶ 5. Furthermore, on April 13, 2022, the Court also denied Defendant's letter to adjourn the Court's Initial Scheduling Conference. *Id.*

On May 10, 2022, Plaintiff Bell and Defendant, by and through their counsel of record, attended an in-person hearing before Judge Peggy Kuo to discuss the Parties' anticipated motion for judgment on the pleadings and discovery schedule. *Id.* ¶ 6. During the hearing, the Parties also discussed the prospect of settlement and agreed to participate in a settlement conference before the Court on August 23, 2022. *Id.* Since that time, the Parties continued to engage in informal settlement discussions. *Id.*

On May 18, 2022, Defendant served, and subsequently filed, its motion for judgment on the pleadings (ECF Nos. 37, 41-43). On June 17, 2022, Plaintiff Bell filed her opposition to Defendant's motion (ECF No. 44), and Defendant filed its reply in further support of its motion on July 1, 2022 (ECF No. 45).

On May 20, 2022, Plaintiff Bell and Defendant filed, and the Court adopted, a joint confidentiality order. Marchese Decl. ¶ 8. Throughout that time, the Parties continued to engage in settlement meetings and discussions, including exchanging written discovery on issues such as the size and scope of the putative class and Plaintiff Bell's use of Defendant's Lidocaine Patches. *Id.* To that end, the Parties agreed in July 2022 to participate in a private mediation before The Honorable Frank Maas (Ret.) of JAMS New York, an experienced class action mediator. *Id.*

In the weeks leading up to the mediation, the Parties were in regular communication with each other and with Judge Maas, as the Parties sought to crystallize the disputed issues, produce focal information and data, and narrow potential frameworks for resolution. *Id.* ¶ 9. During this period and in connection with the mediation proceedings, Defendant provided Class Counsel with detailed transactional data regarding Defendant's sales of the Lidocaine Products; the Parties exchanged briefing on the key facts, legal issues, litigation risks, and potential settlement structures; and the Parties supplemented that briefing with extensive telephonic correspondence mediated by Judge Maas and in-person meetings to clarify the Parties' positions in advance of the mediation. *Id.* This permitted the Parties to competently assess the strengths and weakness of their claims and defenses and their relative negotiating positions. *Id.*

On September 28, 2022, the Parties attended a full-day, in-person mediation before Judge Maas at JAMS New York. *Id.* ¶ 10. While the Parties engaged in good faith arms'-length negotiations, they failed to reach an agreement that day. *Id.* However, the mediation culminated in a mediator's proposal on October 4, 2022, that both Parties accepted. *Id.* After accepting the mediator's proposal, the Parties memorialized the material terms of the class action settlement in an executed a term sheet (ECF No. 48). *Id.*

During the mediation process, Class Counsel noted the existence of additional plaintiffs, who purchased other CVS-branded maximum strength Lidocaine Products, which they intended to add to this suit. *Id.* ¶ 13. Defendant agreed to permit Plaintiff Bell to file her First Amended Complaint, which was filed on April 21, 2023, adding Plaintiffs Tree Anderson and Melissa Conklin (collectively "Plaintiffs") (ECF No. 54). Declaration of Adrian Gucovschi ("Gucovschi Decl.") ¶ 6.

After accepting the mediator's proposal, Class Counsel worked with defense counsel to collect and analyze bids from multiple settlement administration companies for the notice and administration services. Marchese Decl. ¶ 10. After agreeing to use Kroll Settlement Administration ("Kroll"), Class Counsel collaborated with defense counsel and Kroll to formulate the Court-ordered Notice Program. *Id.*

After finalizing and executing the Class Action Settlement Agreement, Class Counsel prepared Plaintiffs' Motion for Preliminary Approval, which was filed on May 24, 2023 (ECF No. 56). Marchese Decl. ¶ 18; Gucovschi Decl. ¶ 6. On July 18, 2023, the Court granted Plaintiffs' Motion for Preliminary Approval (ECF No. 61). Marchese Decl. ¶ 19.

During and since that time, Class Counsel has worked with the Settlement Administrator to administer the Notice Program. *Id.* ¶¶ 25-26.

## SUMMARY OF THE SETTLEMENT

Class Counsel's efforts resulted in an outstanding settlement which provides that Defendant shall pay up to $3,800,000 in cash refunds in the amount of $4.50 per Unit (Class Members with proof of purchase have no limitations on the amount they may recover and Class Members without proof of purchase may claim up to three units). Settlement § 4.1. Separately, Defendant agreed to pay for notice and administration costs approximating $500,000. Marchese

Decl. ¶ 14. In addition to monetary relief, Defendant also agreed to have the labels on the covered Products changed to clearly identify that the Products contain the "maximum strength" of lidocaine available over the counter ("OTC") without a prescription and to remove any language concerning the length of time the Products in patch form will adhere. *Id.* § 10.1. The Fee Award and Class Representative Service Awards shall be paid from the Settlement Sum. *Id.* § 7.2.

## ARGUMENT

### I. THE REQUESTED ATTORNEYS' FEES, COSTS, AND EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

Under Federal Rule of Civil Procedure 23(h), courts may award "reasonable attorney's fees and nontaxable costs that are authorized by law or the parties' agreement." Fed. R. Civ. P. 23(h).[2] Here, Plaintiffs request a fee and expense award not to exceed $1,140,000, which represents 26.5% of the total value of the Settlement. Settlement § 7.2; Marchese Decl. ¶ 16. This percentage does not take into account the value of the non-monetary relief for the Products' label changes that Class Counsel has procured. *Id.* ¶ 17; *see also Velez v. Novartis Pharm. Corp.*, 2010 WL 4877852, at *8, *18 (S.D.N.Y. Nov. 30, 2010) (both monetary and non-monetary relief considered in calculating value of settlement); *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *10 (S.D.N.Y. Sept. 9, 2015) (same). This satisfies the one-third benchmark used in this Circuit under the percentage-of-the-recovery method—which the Court should employ—

[2] The requested fee award also encompasses unreimbursed, reasonable litigation expenses. Settlement § 2.3. Reasonable litigation-related expenses are customarily awarded in class action settlements and include costs such as document preparation and travel. *See, e.g., Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at *11 (S.D.N.Y. Oct. 2, 2013) ("Class Counsel's unreimbursed expenses, including court and process server fees, postage and courier fees, transportation, working meals, photocopies, electronic research, expert fees, and Plaintiffs' share of the mediator's fees, are reasonable and were incidental and necessary to the representation of the class."). Thus, included in the requested fee award, Class Counsel respectfully seeks reimbursement of $ 19,738.82 for out-of-pocket expenses in these standard categories. *See* Marchese Decl. ¶ 31; *id.* Ex. 2.

and should be approved as such. Alternatively, the requested Attorneys' Fees and Expenses award is reasonable under the lodestar method.

**A. The Percentage Method Should Be Used To Calculate Fees**

Courts in the Second Circuit apply one of two fee calculation methods: the "percentage of the fund" method or the "lodestar" method. *See Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000); *Fresno Cnty. Emps.' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.*, 925 F.3d 63, 68 (2d Cir. 2019). The Court has discretion in choosing which method to employ. *See McDaniel v. County of Schenectady*, 595 F.3d 411, 419 (2d Cir. 2010) (holding that "the decision as to the appropriate method [is left] to 'the district court, which is intimately familiar with the nuances of the case'") (quoting *Goldberger*, 209 F.3d at 48). However, "[t]he trend in this circuit is toward the percentage method because it 'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.'" *Mariani v. OTG Mgmt.*, 2018 WL 10468036, at *12 (E.D.N.Y. Sept. 28, 2018) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005)); *see also Monzon v. 103W77 Partners, LLC*, 2015 WL 993038, at *2 (S.D.N.Y. Mar. 5, 2015). "In fact, the 'trend' of using the percentage of the fund method to compensate plaintiffs' counsel … is now "firmly entrenched in the jurisprudence of this Circuit." *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 388 (S.D.N.Y. 2013); *see also GB ex rel NB v. Tuxedo Union Free School Dist.*, 894 F. Supp. 2d 415, 427 (S.D.N.Y. 2012) (noting "courts in the Second Circuit no longer use the 'lodestar' method for computing attorneys' fees" in fee-shifting cases) (citing *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182 (2d Cir. 2008)).

As the Second Circuit has stated, the percentage method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early

resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). "In contrast, the 'lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in gimlet-eyed review of line-item fee audits.'" *Id.* (quoting *Baffa v. Donaldson Lufkin & Jenrette Secs. Corp.*, 2002 WL 1315603, at *1 (S.D.N.Y. June 17, 2002)). Indeed, over a decade ago, the Second Circuit described difficulties with the lodestar method:

> As so often happens with simple nostrums, experience with the lodestar method proved vexing. Our district courts found it created a temptation for lawyers to run up the number of hours for which they could be paid. For the same reason, the lodestar created an unanticipated disincentive to early settlements. But the primary source of dissatisfaction was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits. There was an inevitable waste of judicial resources.

*Goldberger*, 209 F.3d at 48-49; *see also Hyun v. Ippudo USA Holdings*, 2016 WL 1222347, at *3 (S.D.N.Y. Mar. 24, 2016) ("In this case, where the parties were able to settle relatively early and before any depositions occurred … the Court finds that the percentage method, which avoids the lodestar method's potential to 'creative a disincentive to early settlement' … is appropriate.") (citing *McDaniel*, 595 F.3d at 418); *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *16 (S.D.N.Y. July 27, 2007) ("From a public policy perspective, the percentage method is the most efficient means of compensating the work of class action attorneys. It does not waste judicial resources analyzing thousands of hours of work, where counsel obtained a superior result.").

Although the Settlement does not, strictly speaking, create a common fund, it does provide for cash payments to class members up to $3,800,000, plus an additional estimated $500,000 in notice and administration costs, for an estimated total value of $4,300,000. *See* Marchese Decl. ¶ 14. As the Second Circuit has held, "[a]n allocation of fees by percentage should therefore be

awarded on the basis of the total funds made available, whether claimed or not." *Masters v. Wilhelmia Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007); *see also Torres v. Gristede's Operating Corp.*, 519 F. App'x 1, 5 (2d Cir. 2013) (calculating fee award "'on the basis of the total funds made available,' … i.e., as if it were a common settlement fund") (quoting *Masters*, 473 F.3d at 437); *Adler v. Bank of America, N.A.*, Case No. 7:13-cv-04866-VB, ECF No. 128, at 19:9-13 (S.D.N.Y. July 20, 2016) (calculating fee award based on "the aggregate settlement value," rather than value of funds claimed); *id.* at 8:12-16 ("In other words, potentially Bank of America would be on the hook for 5.7 million dollars to be paid to the class and on top of that would be on the hook for the attorney's fees of 1.5 million dollars.").

Thus, under the circumstances of this case the Court should employ the percentage-of-the-recovery method.

### B. The Reasonableness Of The Requested Fees Under the Percentage-Of-The-Fund Method Is Supported By This Circuit's Six-Factor *Goldberger* Test

The Second Circuit has articulated six factors that should be considered when determining the reasonableness of a requested percentage to award as attorneys' fees: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation []; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger*, 209 F.3d at 50. A review of these factors supports Class Counsel's fee request.

#### 1. Time And Labor Expended By Counsel

Since Class Counsel began investigating this matter in October 2021, Counsel has devoted 802.5 hours to the successful pursuit of this matter. Marchese Decl. ¶ 28. Class Counsel's

dedication to this matter and expenditure of substantial time, effort, and resources has brought this complex litigation to a successful resolution.

Class Counsel's work included, *inter alia*:

i. conducting an extensive, pre-suit factual investigation of Defendant's marketing and sale of the Products, involving an in-depth investigation of similar lidocaine products referenced in peer-reviewed studies, reviewing a detailed Citizen's Petition asking the FDA to ban lidocaine patches, researching pertinent FDA regulations, and finding Defendant's filings of its Products within the National Drug Code Directory to ascertain the quantum of lidocaine contained therein in comparison to other OTC and prescription-strength lidocaine products. In addition, the pre-suit investigation involved reviewing FDA industry guidance for topical patches and other studies related to the adhesive technology of OTC lidocaine patches, including the Products. This extensive investigation permitted Plaintiff's counsel to develop a novel legal theory regarding the veracity of the Products' representations, and Plaintiffs' counsel incorporated the extensive scientific literature and FDA regulatory framework in the initial Complaint to substantiate the allegations;

ii. interviewing numerous interested Class Members, including Plaintiffs, regarding their purchase of and experience with the Products;

iii. drafting the initial Complaint and First Amended Complaint;

iv. drafting pre-motion letters;

v. briefing in opposition to Defendant's Motion for Judgment on the Pleadings;

vi. appearing at in-person court conferences and motion hearings;

vii. holding numerous telephonic calls and in person meetings with defense counsel to advance settlement discussions;

viii. drafting a mediation statement, participating in a full-day mediation with the Honorable Frank Maas (Ret.) of JAMS on September 28, 2022, and continuing to discuss settlement over the next several months with the assistance of Judge Maas;

ix. successfully moving for Preliminary Approval of the Settlement; and

x. communicating with the Claims Administrator regarding implementation of the Notice Plan and sorting out issues with the class data.

*See* Marchese Decl. ¶¶ 2-10, 18-19, 25-26; Gucovschi Decl. ¶¶ 2-6.

Further, Class Counsel's work in this litigation is far from over. On the contrary, Class Counsel will commit significant ongoing time and resources to this litigation, specifically related to administering the Settlement and responding to Class Member inquiries concerning the claims process. Marchese Decl. ¶ 29; Gucovschi Decl. ¶ 11. Based on Class Counsel's experience in other cases, this ongoing work will likely involve approximately 50 total additional hours. Marchese Decl. ¶ 29. This additional work should be accounted for as well. *See Matheson v. T-Bone Rest. LLC*., 2011 WL 6268216, at *9 (S.D.N.Y. Dec. 13, 2011) (awarding one-third of the settlement fund and noting that "[t]he fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward, also supports their fee request") (citations omitted). Thus, this factor favors the fee request.

**2. Magnitude And Complexity Of The Litigation**

The complex nature of this litigation further favors the requested fee award. "[C]lass actions have a well deserved reputation as being most complex." *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) (cleaned up); *see also Shapiro v. JPMorgan Chase 7 Co.*, 2014 WL 1224666, at *21 (S.D.N.Y. Mar. 24, 2014) ("It is well settled that class actions are notoriously complex and difficult to litigate.") (cleaned up). Indeed, as Judge McMahon has observed, "[t]he federal courts have established that a standard fee in complex class action cases … where plaintiffs' counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit," and "[d]istrict courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater." *Velez v. Novartis Pharm. Corp*., 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010).

The complexity of this case is further underscored by the challenges Plaintiffs faced on a motion for judgment on the pleadings, and even more so at the summary judgment, Daubert, and class certification stages. *See* Argument § I.B.3, *infra*. This factor favors the requested fee.

**3. The Risk Of Litigation**

This factor recognizes the risk of non-payment in cases prosecuted on a contingency basis where claims are not successful, which can justify higher fees. *See, e.g., In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk."); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 592 (S.D.N.Y. 2008) (noting risk of non-payment in cases brought on contingency basis).

Here, this case presented a substantial risk of non-payment for Class Counsel. For nearly two years, Class Counsel invested significant time, effort, and resources to the litigation without any compensation. Marchese Decl. ¶¶ 21-23; Gucovschi Decl. ¶ 11. Specifically, Class Counsel faced a motion for judgment on the pleadings which may have eliminated all of Plaintiffs' claims. Marchese Decl. ¶ 23. Moreover, similar claims have been dismissed at the pleading stage. *See Hodorovych v. Dollar Gen. Corp.*, 2023 WL 3602782 (N.D. Ill. May 23, 2023) (granting defendant's motion to dismiss in a "maximum strength" lidocaine product deceptive marketing suit); *Prescott v. Rite Aid Corp.*, 2023 WL 2753899 (N.D. Cal. Apr. 3, 2023) (same); *Agee v. Kroger Co.*, 2023 WL 3004628 (N.D. Ill. Apr. 19, 2023) (partially granting defendant's motion to dismiss in a similar suit). At class certification, in addition to the usual hurdles and complexities encountered at that stage, Class Counsel would have to contend with other issues, including whether a nationwide class could be certified, whether damages could be calculated on a classwide basis, and whether the reasonable consumer could be deceived and injured by the challenged advertising under these circumstances. *See also* Marchese Decl. ¶ 23. Defendant's success on any

one of those issues could have precluded many if not most Class Members from recovering anything. *Id*. Further, even if Plaintiffs succeeded at class certification, Defendants would be entitled to appeal the Court's order pursuant to Fed. R. Civ. P. 23(f). *Id*. And, even success at class certification would not preclude a victory for Defendant on Daubert motions, on the merits at summary judgment, on a motion for decertification, at trial, or on appeal. *Id*. As this Court noted in the Preliminary Approval Order, "Plaintiffs' theory of the case was 'very novel[,]'" making the prospect of prevailing even more uncertain. Decision and Order granting preliminary approval (ECF No. 61) at 13. The fact Class Counsel undertook this representation, despite these significant risks, supports the requested fee and expense award.

**4. The Quality Of Representation**

Class action litigation presents unique challenges and, by achieving an exceptional settlement, Class Counsel proved that they have the ability and resources to litigate this case zealously and effectively. Bursor & Fisher, P.A. has been recognized by courts across the country for its expertise. *See* Marchese Decl. Ex. 13 (Firm Resume); *see also Mogull v. Pete and Gerry's Organics, LLC*, 2022 WL 4661454, at *2 (S.D.N.Y. Sept. 30, 2022) (Briccetti, J.) ("Bursor & Fisher … has represented other plaintiffs in more than one hundred class action lawsuits, including several consumer class actions that proceeded to jury trials in which Bursor & Fisher achieved favorable results for the plaintiffs."); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 566 (S.D.N.Y. Feb. 25, 2014) (Rakoff, J.) ("Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims … The firm has been appointed class counsel in dozens of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in five [now six] class action jury trials since 2008."). Gucovschi Rozenshteyn, PLLC has also been recognized by courts across the country for its expertise. *See* Gucovschi Decl. Ex. 2 (Firm Resume); *see also Dutcher v. Newrez LLC*, No. 21-2062, 2022 U.S. Dist. LEXIS 194706, at *14 (E.D. Pa. Oct. 20,

2022) (Kearney, J.) ("Class Counsel provided highly competent representation for the Class.").

Furthermore, "[t]he quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance." *In re MetLife Demutalization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). Class Counsel achieved an exceptional result in this case while facing well-resourced and highly experienced defense counsel. *See In re Marsh ERISA Litig.*, 265 F.R.D. at 148 ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement.").

Class Counsel litigated this case efficiently, effectively, and civilly. The excellent result is a function of the high quality of that work, which supports the requested fee award.

**5. The Requested Fees and Expenses In Relation To The Settlement**

Class Counsel seeks attorneys' fees and expenses of $1,140,000. Settlement § 7.2. "District courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater." *Velez*, 2010 WL 4877852, at *21. Further, under Second Circuit precedent, Class Counsel's fees must be measured against the relief *made available* to Class Members, not the relief actually claimed. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) ("An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not."). This applies to both common fund settlement and claims made settlements. *See, e.g., Torres v. Gristede's Operating Corp.*, 519 F. App'x 1, 5 (2d Cir. 2013) (calculating fee award "'on the basis of the total funds made available' … *i.e.*, as if it were a common settlement fund") (quoting *Masters*); *Zink v. First Niagara Bank, N.A.*, 2016 WL 7473278, at *7-8 (W.D.N.Y. Dec. 29, 2016) (finding "the weight of authority" holds that attorneys' fees should be based on the amount made available, not the amount actually claimed); *In re Nassau Cnty. Strip Search Cases*, 12 F. Supp. 3d 485, 492-93 (E.D.N.Y. 2014) (noting "that the percentage

is applied to the total amount recovered on behalf of the class (i.e. the 'common fund'), not to the lesser sum that in all probability will be claimed by members of the class from that fund"); *Payero v. Mattress Firm*, No. 21-cv-03061, slip op. at 11 (S.D.N.Y. Aug. 16, 2023) (granting attorneys' fees in a claims made settlement).

Here, the requested Attorneys' Fees and Expenses ($1,140,000) represent 26.5% of the cash value of the Settlement ($4,300,000), which meets the Second Circuit's benchmark for fees. *See* Marchese Decl. ¶ 16. And, this percentage does not take into account the value of the non-monetary relief for the Product label changes Class Counsel has procured. *Id.* ¶ 17. This factor thus supports the requested fee and expense award.

**6. Public Policy Considerations**

The final *Goldberger* factor is public policy. "Skilled counsel must be incentivized to pursue complex and risky claims [that protect the public on a contingency basis]." *Shapiro*, 2014 WL 1224666, at *24. As such, reasonable fee awards must be provided in order to ensure that attorneys are incentivized to litigate class actions, which serve as private enforcement tools to police defendants who engage in misconduct. *See id.* "Attorneys who fill the private attorney general role must be adequately compensated for their efforts," otherwise the public risks an absence of a "remedy because attorneys would be unwilling to take on the risk." *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at *7 (E.D.N.Y. Nov. 20, 2012) (citing *Goldberger*, 209 F.3d at 51). Thus, society undoubtedly has a strong interest in incentivizing lawyers to bring complex litigation that is necessary to protect consumer rights, particularly where it is unlikely that the Class Members will pursue litigation on their own for economic or personal reasons.

Here, public policy considerations also favor Class Counsel's fee request. As a result of the Settlement achieved by Class Counsel, Defendant will compensate Class Members for the

alleged misrepresentation on these pain-relief Products and will change the Product labelling to avoid any potential consumer deception. Accordingly, Class Counsel's work has secured a substantial benefit for the Class, and public policy therefore favors this fee request.

## II. THE REQUESTED ATTORNEYS' FEES AND EXPENSES ARE ALSO REASONABLE UNDER A LODESTAR CROSS-CHECK

A lodestar cross-check further supports the requested fees and expenses. Courts applying the lodestar method generally apply a multiplier to take into account the contingent nature of the fee, the risks of non-payment, the quality of representation, and the results achieved. *See Wal–Mart Stores, Inc.*, 396 F.3d at 121. Where the lodestar is "used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50; *see also Cassese v. Williams*, 503 F. App'x 55, 59 (2d Cir. 2012) (noting the "need for exact [billing] records [is] not imperative" where the lodestar is used as a "mere cross-check").

To calculate lodestar, counsel's reasonable hours expended on the litigation are multiplied by counsel's reasonable rates. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986); *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *Parker v. Time Warner Entertainment Co., L.P.*, 631 F. Supp. 2d 242, 264 (E.D.N.Y. 2009). The resulting figure may be adjusted at the court's discretion by a multiplier, taking into account various equitable factors. *See Parker*, 631 F. Supp. 2d at 264; *Shapiro*, 2014 WL 1224666, at *24 ("[U]nder the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors.") (cleaned up).

The hourly billing rate to be applied is the hourly rate that is normally charged in the community where the counsel practices, *i.e.*, the "market rate." *See Blum*, 465 U.S. at 895; *see also Luciano v. Olsten Corp.*, 109 F.3d 111, 115-116 (2d Cir. 1997) ("The 'lodestar' figure should

be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation'") (alteration in original and citation omitted). Here, the hourly rates used by Class Counsel are comparable to rates charged by attorneys with similar experience, skill, and reputation, for similar services in the New York legal market. *See* Marchese Decl. ¶¶ 33-35.[3]

The hours worked, lodestar, and expenses for Class Counsel are set forth in the Marchese and Gucovschi Declarations, submitted herewith. These records confirm Class Counsel's efficient billing, by, for example, striving to assign as much work as possible to more junior lawyers or paralegals who bill at lower hourly rates in order to minimize the fees for the Class. *See* Marchese Decl. Ex. 1. Indeed, as these billing records indicate, more than half of the time billed by attorneys at Bursor & Fisher was billed by first- and third-year associates. *Id.*

Thus, even under the optional lodestar cross check, Class Counsel's requested fees are reasonable given the unique circumstances of this case. Specifically:

- Class Counsel obtained an excellent Settlement, which will result in Class Members receiving a substantial amount of money quickly and automatically, without the need to submit a claim.
- The litigation was conducted and the Settlement was obtained in an efficient manner, by experienced and qualified class action counsel.
- The case involved complex legal issues and factual theories, which involved significant litigation risks (*see* Argument § I.B.3, *supra*).
- Class Counsel devised a litigation and settlement strategy that factored in

[3] The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) (recognizing "an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise"); *LeBlanc-Sternberg v. Fletcher*, 143 F. 3d 748, 764 (2d Cir. 1998) ("The lodestar should be based on 'prevailing market rates' … and current rates, rather than historical rates, should be applied in order to compensate for the delay in payment.") (citation omitted).

the complex and uncertain nature of the case.

In total, through September 19, 2023, Class Counsel has devoted 802.5 hours to prosecuting this litigation. *See* Marchese Decl. ¶ 28. Class Counsel's aggregate lodestar is $497,722, with a blended hourly rate of $620. *Id.*; *see also Perez v. Rash Curtis & Associates*, 2020 WL 1904533, at *20 (N.D. Cal. Apr. 17, 2020) (concluding Bursor & Fisher's "blended rate of $634.48 is within the reasonable range of rates"); *Edwards v. Mid-Hudson Valley Federal Credit Union*, Case No. 22-cv-0562-TJM-CFH (N.D.N.Y. 2023) (granting final approval of $2.2 million class settlement for alleged illegal overdraft fees and finding B&F's hourly rates reasonable). Therefore, the requested fee award represents a multiplier of approximately 2.29, which is well within the accepted range in this Circuit. *See Asare v. Change Grp. of N.Y., Inc.*, 2013 WL 6144764, at *19 (S.D.N.Y. Nov. 18, 2013) ("Typically, courts use multipliers of 2 to 6 times the lodestar."); *In re Columbia University Tuition Refund Action*, Case No. 20-cv-03208-JMF, ECF No. 115 at ¶ 10 (S.D.N.Y. Mar. 29, 2022) (approving attorneys' fees of one-third of $12.5 million common fund, representing 4.3 times multiplier on Class Counsel's regular hourly rates); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 482 (S.D.N.Y. 2013) (approving attorneys' fees of 33% of a $4.9 million common fund, representing a 6.3 times multiplier on Class Counsel's regular hourly rates); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (approving attorneys' fees of $253,758,000, which reflected a "lodestar multiplier of just over 6").

Moreover, as courts in New York and elsewhere have noted, a high multiplier "should not result in penalizing plaintiffs' counsel for achieving an early settlement, particularly where, as here, the settlement amount was substantial." *Beckman*, 293 F.R.D. at 482; *Hyun*, 2016 WL 1222347, at *3 ("In this case, where the parties were able to settle relatively early and before any

depositions occurred … the Court finds that the percentage method, which avoids the lodestar method's potential to 'create a disincentive to early settlement' … is appropriate."); *see also Perez*, 2020 WL 1904533, at *21 ("The benefit obtained for the class is an extraordinary result, while there was and still is significant risk of nonpayment for class counsel. Moreover, the general quality of the representation and the complexity and novelty of the issues presented weigh in favor of a higher lodestar multiplier.").

Class Counsel's lodestar multiplier is also reasonable because it will decrease over time. *See* Marchese Decl. ¶ 29. "[A]s class counsel is likely to expend significant effort in the future implementing the complex procedure agreed upon for collecting and distributing the settlement funds, the multiplier will diminish over time." *Parker v. Jekyll & Hyde Entm't Holdings, LLC*, 2010 WL 532960, at *2 (S.D.N.Y. Fed. 9, 2010). Here, "[t]he fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward, also supports their fee request." *Yuzary*, 2013 WL 5492998, at *11; *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, 746 F. App'x. 655, 659 (9th Cir. 2018) ("The district court did not err in including projected time in its lodestar cross-check; the court reasonably concluded that class counsel would, among other things, defend against appeals and assist in implementing the settlement."); *Perez*, 2020 WL 1904533, at *19-20 (concluding that expected future hours should be counted towards lodestar cross-check and applying same). Specifically, as noted above, Class Counsel expects to bill another 50 hours on this matter. Marchese Decl. ¶ 29. At Class Counsel's blended hourly rate, this would push Class Counsel's lodestar to $528,722. *Id.* This higher lodestar would reduce Class Counsel's requested multiplier to 2.16.

In sum, Class Counsel's efforts in this case resulted in an exceptional settlement of a

complex and uncertain case. Class Counsel should be rewarded for achieving this result.

## III. THE REQUESTED INCENTIVE AWARD REFLECTS PLAINTIFFS' ACTIVE INVOLVEMENT IN THIS ACTION AND SHOULD BE APPROVED

Incentive awards are common in class action cases and serve to "compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiff[s]." *Reyes*, 2011 WL 4599822, at *9. Incentive awards fulfill the important purpose of compensating plaintiffs for the time they spend and the risks they take. *Massiah*, 2012 WL 5874655, at *8.

Here, the participation of Plaintiffs was critical to the ultimate success of the case. *See* Marchese Decl. ¶¶ 41-43; Gucovschi Decl. ¶¶ 20-22. Plaintiffs spent significant time protecting the interests of the Class through their involvement in this case. Marchese Decl. ¶¶ 41-43; Declaration of Monique Bell ("Bell Decl.") ¶ 3-5; Declaration of Melissa Conklin ("Conklin Decl.") ¶ 3-5; Declaration of Tree Anderson ("Anderson Decl.") ¶ 3-5. Plaintiffs assisted Class Counsel in investigating their claims by providing information necessary to draft and file the Complaint, and the First Amended Complaint. Marchese Decl. ¶ 42; Bell Decl. ¶ 3-5; Conklin Decl. ¶ 3-5; Anderson Decl. ¶ 3-5. During the course of this litigation, Plaintiffs kept in regular contact with their lawyers to receive updates on the progress of the case and to discuss strategy and settlement. Marchese Decl. ¶ 42; Bell Decl. ¶ 5; Conklin Decl. ¶ 5; Anderson Decl. ¶ 5.

On these facts, the $3,000 incentive payments to each Plaintiff are appropriate in light of the efforts made by Plaintiffs to protect the interests of the other Settlement Class members, the time and effort they expended pursuing this matter, and the substantial benefit they helped achieve for the other Settlement Class members. Further, the incentive awards are reasonable and equivalent to awards approved by other courts in this Circuit. *See, e.g., In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2018 WL 3863445, at *2 (S.D.N.Y. Aug. 14, 2018) (approving

incentive awards of $25,000); *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 125 (S.D.N.Y. 2001) (noting case law supports payments of between $2,500 and $85,000).

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (1) approve attorneys' fees, costs, and expenses in the amount of $1,140,000; (2) grant each Plaintiff an incentive award of $3,000 in recognition of their efforts on behalf of the class; and (3) award such other and further relief as the Court deems reasonable and just.

Dated: September 22, 2023

Respectfully submitted,

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