

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

LASHAWN SHARPE, JIM CASTORO
and STEVE DAILEY, individually and on
behalf of all others similarly situated,

Plaintiffs,

-against-

A & W CONCENTRATE COMPANY and
KEURIG DR PEPPER,

Defendants.

Case No.: 1:19-cv-00768-BMC

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION
FOR PAYMENT OF ATTORNEYS' FEES AND REIMBURSEMENT
OF LITIGATION EXPENSES TO CLASS COUNSEL AND PAYMENT
OF SERVICE AWARDS TO THE CLASS REPRESENTATIVES**

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Class Representatives LaShawn Sharpe, Jim Castoro, and Steve Dailey, individually and on behalf of all others similarly situated, respectfully submit this memorandum of law in support of their motion for payment of attorneys' fees and reimbursement of litigation expenses to Class Counsel and award of service awards to the Class Representatives.¹

INTRODUCTION

As discussed in detail in the Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of the Class Action Settlement filed on August 18, 2023 (ECF No. 124-1) and as set forth in their papers in support of their motion for preliminary approval (ECF No. 120), Class Counsel achieved a very favorable Settlement on behalf of the Settlement Class Members after extensive investigation, motion practice, discovery, and arm's-length negotiations. *See* Declaration of Michael R. Reese in Support of Plaintiffs' Unopposed Motion for Final Approval (ECF No. 124-2) ("Reese Final Approval Decl.") at ¶¶ 6-13. The Parties did not negotiate attorneys' fees and expenses until months after they had reached agreement as to the terms of the Settlement benefiting the Settlement Class Members. *Id.* at ¶ 13. The Settlement is an excellent result of these efforts because it provides the Settlement Class Members with meaningful monetary relief.

The Settlement provides for up to fifteen million dollars (\$15,000,000) to pay for Class Members' claims; the costs of notice and claims administration; payment of Class Counsel's fees and expenses; and payment of service awards to each of the three Class Representatives. Reese Final Approval Decl. at ¶ 17. Each Settlement Class Member who submits a claim will receive a minimum of \$5.50 (regardless of whether or not they submitted proof of purchase) and up to

¹ Unless otherwise indicated, capitalized terms shall have the meaning that the Settlement Agreement ascribes to them. *See* ECF No. 119 ("Settlement Agreement").

\$25.00 (depending on the amount of proof of purchase they submit). *Id.* Thus, Settlement Class Members will receive near full compensation for their injury. *Id.* This substantial recovery is as much as, if not more than, what consumers would likely have received if the case had proceeded to, and succeeded at, trial.

Plaintiffs now hereby move for \$2,918,233.⁵⁰ as payment of attorneys' fees to Class Counsel, or 19.5% of the Settlement Amount, which is *less* than the standard benchmark for fees in the Second Circuit. *See In re Akazoo S.A. Securities Litig.*, 2022 WL 14915812, at *2 (E.D.N.Y. Oct. 6, 2022) (Cogan, J.) ("Class Counsel are hereby awarded attorneys' fees in the amount of one-third of the Settlement Fund"); *Mendez v. MCSS Rest. Corp.*, 2022 WL 3704591, at *9 (E.D.N.Y. Aug. 26, 2022) ("Class Counsel's fee request of one-third (33.33%) of the Settlement Fund is reasonable and consistent with the norms of class litigation in this circuit and should be awarded on the basis of the total funds made available"); *Sarit v. Westside Tomato, Inc.*, 2021 WL 2000328, at *1 (S.D.N.Y. May 19, 2021) ("District courts in the Second Circuit...routinely approve fees to counsel totaling one third of the recovery amount") (citing *Calle v. Elite Specialty Coatings Plus, Inc.*, 2014 WL 6621081, at *3 (E.D.N.Y. Nov. 21, 2014) (collecting cases)); *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at *7 (E.D.N.Y. Nov. 20, 2012) (Cogan, J.) ("Class Counsel's request for thirty percent of the fund is reasonable and consistent with the norms of class litigation in this circuit.") (collecting cases); *see also, Torres v. Gristede's Operating Corp.*, 519 F. App'x 1, 3 (2d Cir. 2013) (Cogan, J. et al.) ("Calculated on the basis of the total funds made available —*i.e.*, as if it were a common settlement fund—the \$3.86 million total award of costs and fees here represents 52.2% of the entire \$7.39 million recovered by plaintiffs.... Such an award does not constitute an abuse of discretion simply because it deviates materially from the percentage usually awarded in similar cases.").

Plaintiffs also seek reimbursement of litigation expenses in the amount of \$306,766.⁵⁰ As the record before the Court demonstrates,² the favorable outcome in this case is the result of Class Counsel's considerable hard work³ and the fronting of significant costs for discovery (including numerous depositions), experts, and several rounds of mediation, all of which were integral to the prosecution and resolution of the case. The amount requested for payment of attorneys' fees and expenses for Class Counsel fairly and reasonably compensates them for their diligent efforts in litigating this matter, as well as their unreimbursed expenses.

Finally, Plaintiffs request payments to the Class Representatives of \$5,000 each (for a total of \$15,000) for their contributions to, and active participation in, the litigation as the Class Representatives. Each of the three Class Representatives spent considerable time on this matter, including, but not limited to, responding to discovery requests and sitting for their depositions. Based on the three Class Representative's material contributions to this litigation, the request for Service Awards for the Class Representatives should be granted. *See Moses v. The New York Times Co.*, --- F.4th ---, 2023 WL 5281138, at *13 (2d Cir. Aug. 17, 2023) (approving payment of service awards); *Massiah*, 2012 WL 5874655 at *8 (granting \$5,000 request for service award). For all the reasons given herein, the Court should grant this motion.

² The Reese Final Approval Decl. is an integral part of this submission. Plaintiffs respectfully refer the Court to this declaration for a detailed description of the factual and procedural history of the litigation, the claims asserted, the work Class Counsel performed, the settlement negotiations, and the numerous risks and uncertainties the litigation presented.

³ *See* Order dated June 6, 2020 (ECF No. 49) (imposing sanctions on Defendants and noting Defendants' "multiplying motion practice"). The requested fee for Class Counsel includes the sanction amount imposed on Defendants, which is payable to Class Counsel but not yet paid.

I. THE COURT SHOULD GRANT THE REQUEST FOR ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES TO CLASS COUNSEL

Class Counsel have spent more than four years prosecuting this matter. Reese Final Approval Decl. at ¶¶ 6-16. They should now be compensated for their work. As shown below, the \$2,918,233.⁵⁰ that Class Counsel seek here below the range of fee awards in similar cases in the Second Circuit. Class Counsel also seek \$306,766.⁵⁰ as reimbursement of expenses they incurred on behalf of the Class. For the reasons below, Class Counsel respectfully request that the Court issue an order granting their request for payment of \$3,225,000 for their fees and expenses.

A. Class Counsel Negotiated Attorneys' Fees with Defendants Only after Agreeing upon the Settlement Terms

As an initial matter, it is important to point out that Class Counsel did not negotiate attorneys' fees and expenses with Defendants until after the Parties had reached agreement as to the terms of the Settlement benefiting the Settlement Class Members. Reese Final Approval Decl. at ¶ 13; *see Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666 (S.D.N.Y. Mar. 24, 2014) (“That the Attorneys' Fee Payment was later separately negotiated weighs in favor of its reasonableness.”). Specifically, Class Counsel did not reach agreement with Defendants on an amount for payment of fees and costs until August 17, 2023—months after the relief had been determined for the Class, as reflected in the Settlement Agreement filed with the Court on June 2, 2023.

Indeed, the U.S. Supreme Court has held that negotiated, agreed-upon attorneys' fee provisions are the ideal towards which the parties should strive. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). “A request for attorney's fees should not result in a second major litigation.” *Id.* “Ideally, of course, litigants will settle the amount of a fee.” *Id.* The Settlement is an outstanding result for the Settlement Class Members, and, indeed, it has already received preliminary approval

from the Court. Due to the low dollar amounts at issue per Settlement Class Member, each member may never have received anything were it not for Class Counsel's efforts. *See Sukhnandan v. Royal Health Care of Long Island LLC*, 2014 WL 3778173, at *9 (S.D.N.Y. July 31, 2014) ("Where relatively small claims can only be prosecuted through aggregate litigation, and the law relies on prosecution by 'private attorneys general,' attorneys who fill the private attorney general role must be adequately compensated for their efforts."). Class Counsel, however, have yet to be paid anything for their labor, efforts, and costs.

B. The Court Should Approve Payment of the Requested Attorneys' Fees Because They Are Reasonable

The attorneys' fee requested here is reasonable and worthy of the Court's approval.

Courts commonly look at two methodologies to determine the amount to award class counsel for their efforts in achieving relief for settlement class members: the lodestar method and the percentage-of-the-fund method. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47, 50 (2d Cir. 2000). The lodestar approach is based upon "the number of hours reasonably billed to the class . . . [multiplied] by an appropriate hourly rate." *Id.* at 47. Once the court has made the initial computation, it may, in its discretion, increase the lodestar by applying a multiplier. *Id.*; *see, e.g., Viafara v. MCIZ Corp.*, 2014 WL 1777438, at *14 (S.D.N.Y. May 1, 2014) ("Courts award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 197–98 (S.D.N.Y. 1997) (awarding a 5.5 multiplier).⁴

Under the percentage-of-the-fund method, the court sets a percentage of the value of the available fund recovery as a fee. *Goldberger*, 209 F.3d at 47. District courts within the Second Circuit have routinely upheld attorneys' fee awards of 33-1/3% in class action cases, and even

⁴ Courts within the Second Circuit use the lodestar method "[a]s a 'cross-check' to a percentage award." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005).

approve higher amounts. *Torres*, 519 F. App'x at 3 (“Calculated on the basis of the total funds made available—*i.e.*, as if it were a common settlement fund—the \$3.86 million total award of costs and fees here represents 52.2% of the entire \$7.39 million recovered by plaintiffs.... Such an award does not constitute an abuse of discretion simply because it deviates materially from the percentage usually awarded in similar cases.”); *Mendez*, 2022 WL 3704591 at *9 (“Class Counsel's fee request of one-third (33.33%) of the Settlement Fund is reasonable and consistent with the norms of class litigation in this circuit and should be awarded on the basis of the total funds made available”); *Sarit*, 202 WL 2000328, at *1 (“District courts in the Second Circuit...routinely approve fees to counsel totaling one third of the recovery amount.”); *Chen v. Xpressa at Terminal 4 JFK LLC*, 2021 WL 4487835, at *6 (E.D.N.Y. Oct. 1, 2021) (“Courts in this circuit routinely grant attorney's fees of 30% to 33.33% in class action cases where counsel's fee was contingent on success.”); *In re Akazoo S.A. Securities Litig.*, 2022 WL 14915812, at *2 (awarding 33-1/3% of class action settlement); *Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 216, 220–22 (S.D.N.Y. 2015) (same); *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *12 (S.D.N.Y. Dec. 19, 2014) (same); *Zeltser v. Merrill Lynch & Co.*, 2014 WL 4816134, at *8 (S.D.N.Y. Sept. 23, 2014) (same).

Furthermore, under the percentage-of-the-fund method, it is appropriate to base the percentage on the full amount, *i.e.*, the gross compensation available for the Settlement Class Members to claim plus the additional benefits conferred on the Settlement Class by Defendants' payment of attorneys' fees and expenses and the expenses of notice and claims administration. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980) (“Although the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that

the value of his claim bears to the total recovery.”).

Here, the value of the Settlement is \$15 million. The request payment of \$2,918,233.⁵⁰ in attorneys’ fees is reasonable under the percentage-of-the-fund method, as it constitutes only 19.5% of the Settlement Amount. Furthermore, the requested fee is also reasonable under the lodestar methodology. Reese Final Approval Decl. at ¶¶ 3-4, 6-13, 23; *see also* Declaration of Spencer Sheehan in Support of Motion for Final Approval of Settlement (ECF No. 124-3) (“Sheehan Decl.”) at ¶¶ 3-5, 7. Over the course of more than four years, Class Counsel have spent in excess of 2800 hours in performance of their services, which has resulted in the Settlement. *See* Reese Final Approval Decl. at ¶ 23; Sheehan Decl. at ¶ 7. Class Counsel’s lodestar to date is no less than \$3.9 million and their expenses are \$306,766.⁵⁰.

Under either method, the courts are guided by the traditional criteria in determining a reasonable fee, including: “(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 (citation omitted). As discussed below, the requested fee should also be approved in light of the *Goldberger* reasonableness factors.

1. The Complexity, Magnitude, and Risks of the Action and the Contingent Nature of the Fee

The risk of litigation that Class Counsel undertook was significant in light of the considerable time and resources they devoted to this case strictly upon a contingency basis. From the commencement of this litigation, Class Counsel have been paid nothing to date for their substantial efforts. The significant outlay of cash and personnel resources that Class Counsel has made has been completely at risk. Indeed, there was a significant possibility that Class Counsel would recover nothing for their substantial efforts. *See In re Lloyd’s Am. Trust Fund Litig.*, 2002

WL 31663577, at *28 (S.D.N.Y. Nov. 26, 2002) (“[C]ontingent fee risk is the single most important factor in awarding a multiplier[.]”). Indeed, courts have recognized that the risk of non-payment in complex cases, such as this case, is very real. There are numerous class actions in which plaintiffs’ counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. *See, e.g., Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (class counsel won a substantial jury verdict, but on appeal the judgment was reversed and the case dismissed after 11 years of litigation). Accordingly, as the Second Circuit has observed: “No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.” *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974).

2. The Result Achieved and the Quality of Representation

The result achieved and the quality of the services provided are also important factors to consider in determining the amount of reasonable attorneys’ fees. *Fleisher v. Phoenix Life Ins.*, 2015 WL 10847814, at *21 (S.D.N.Y. Sept. 9, 2015) (“Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award and in assessing the quality of the representation.”).

Here, the goal of the litigation was to provide monetary compensation for the Settlement Class Members for their purchases of the Products on account of the allegedly false and misleading labelling. Class Counsel’s work in the litigation achieved this significant goal. The substantial experience of Class Counsel in prosecuting consumer protection class action cases was a key factor in this achievement.

3. The Less Than 1.0 Multiplier

To date, Class Counsel have expended no less than 2800 hours, for a lodestar of no less than \$3.9 million, based on market rates. Reese Final Approval Decl. at ¶ 23; Sheehan Decl. at ¶ 7. As of the date of the filing of this brief, the multiplier is 0.75, which falls well within the range awarded by courts within the Second Circuit. *See, e.g., Zeltser*, 2014 WL 4816134, at *9–10 (approving multiplier of 5.1 and citing numerous cases, including referring to cases where the multiplier ranged as high as 19.6); *Shapiro*, 2014 WL 1224666, at *24 (approving multiplier of 3.05); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (approving multiplier of 3.5 on appeal).

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

Class Counsel have also spent \$306,766.⁵⁰ in costs, for which they should now be reimbursed. Reese Final Approval Decl. at ¶ 24. These costs include costs for extensive discovery (including numerous depositions), experts, and several rounds of mediation that were integral to the prosecution and resolution of the case. *Id.* “It is well-settled that attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients.” *Ranieri*, 310 F.R.D. at 222; *see also In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *19 (“Because the expenses here were incurred with no guarantee of recovery, Lead Counsel had a strong incentive to keep them at a reasonable level, and did so.”).

II. THE COURT SHOULD APPROVE THE REQUESTED SERVICE AWARDS TO THE CLASS REPRESENTATIVES

Class Counsel and the Class Representatives also respectfully request the Court to approve Service Awards to the Class Representatives in the amount of \$5,000 each (for a total of \$15,000). “Service 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 risk incurred by becoming

and continuing as a litigant, and any other burdens sustained by the plaintiffs.” *Zeltser*, 2014 WL 4816134, at *11 (awarding service awards of \$12,500 to each of the three named plaintiffs).

Each Class Representative performed important and valuable services for the benefit of the Settlement Class, including, but not limited to, producing discovery in response to Defendants’ requests and sitting for their depositions. Reese Final Approval Decl. at ¶¶ 26-27. Each Class Representative met, conferred, and corresponded with Class Counsel throughout the case as needed for the efficient process of this litigation. *Id.* Each Class Representative also spent considerable time and effort responding to extensive discovery requests served on them by the Defendants. Each Class Representative also sat for their deposition. Accordingly, Plaintiffs respectfully request that the Court approve the \$5,000 Service Awards for each of the Class Representatives (for a total of \$15,000). Indeed, the Second Circuit recently approved of payment of service awards in a situation just as that presented here. *Moses*, 2023 WL 5281138, at *13 (holding that “Rule 23’s mandate...permits fair and appropriate incentive awards”). As held by Your Honor in a similar case:

The Court finds reasonable service awards of \$5,000 each to [the Class Representatives]...Such service awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiffs.

Massiah, 2012 WL 5874655, at *8; *see also Moses*, 2023 WL 5281138, at *13 (approving payment of service awards and holding: “Incentive awards encourage class representatives to participate in class action lawsuits, which are designed to provide a mechanism by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same harm and redress.”)

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Payment of Attorneys' Fees and Reimbursement of Litigation Expenses to Class Counsel and Payment of Service Awards to the Class Representatives.

Date: August 18, 2023

Respectfully submitted,

REESE LLP

/s/ Michael R. Reese

Michael R. Reese

Sue J. Nam

100 West 93rd Street, 16th Floor

New York, New York 10025

Telephone: (212) 643-0500

Facsimile: (212) 253-4272

mreese@reesellp.com

snam@reesellp.com

SHEEHAN & ASSOCIATES, P.C.

Spencer Sheehan

60 Cuttermill Rd, Ste 409

Great Neck, New York 11021

Telephone: (516) 303-0552

Facsimile: (516) 234-7800

spencer@spencersheehan.com

Court Appointed Class Counsel