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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EVLYN ANDRADE-HEYMSFIELD, on behalf of herself, all others similarly situated, and the general public,

Plaintiff,

v.

NEXTFOODS, INC.,

Defendant.

Case No. 21-cv-1446-BTM-MSB

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

Judge: Hon. Barry Ted Moskowitz
Date: March 11, 2024
Time: 3:30 p.m.
Location: Courtroom 15B

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NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on March 11, 2024, at 3:30pm, in Courtroom 15B of the United States Courthouse located at 333 West Broadway, San Diego, CA 92101, Plaintiff will move the Court, the Honorable Barry Ted Moskowitz presiding, for an Order awarding attorneys' fees and costs to Class Counsel and service awards to the Class Representatives.

The Motion is based on this Notice of Motion; the below Memorandum; the concurrently-filed Declaration of Jack Fitzgerald ("Fitzgerald Decl.") and all exhibits thereto; all prior pleadings and proceedings, including Plaintiff's Motion for Preliminary Approval (Dkt. No. 53, "PA Mot."), the Declaration of Jack Fitzgerald in Support of Preliminary Approval (Dkt. No. 53-1, "PA Fitzgerald Decl.") and the Settlement Agreement attached thereto as Exhibit 1 (Dkt. No. 53-2, "SA"), the Declarations of Evlyn Andrade-Heymsfield (Dkt. No. 53-7, "Andrade-Heymsfield Decl.") and Valerie Gates (Dkt. No. 53-8, "Gates Decl.") in Support of Preliminary Approval, and the Court's November 9, 2023 Amended Order Granting Motion for Preliminary Approval of Class Settlement (Dkt. No. 56, "Am. PA Order"); and any additional evidence and argument submitted in support of the Motion.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

The Settlement Agreement's $1.25 million non-reversionary Settlement Fund is an excellent result for the Class, representing 276% of the estimated potential trial damages for California Class Members and 42% of hypothetical potential trial damages for Nationwide Settlement Class Members, which total a modest $2.98 million in this small case. *See* PA Mot. at 21; PA Fitzgerald Decl. ¶¶ 15-16. It would likely cost the parties more than that to litigate through trial this and the also-settled *Gates* case against NextFoods in New York.

The Settlement Fund also compares favorably with other settlements resolving food false advertising class actions. PA Fitzgerald Decl. ¶ 17. To achieve this result, Class Counsel worked more than 750 hours and advanced over $47,000 dollars in out-of-pocket expenses, litigating the case for nearly three years on a complex and difficult theory of liability. *See*

generally id. ¶¶ 3-13 (detailing case discovery and settlement negotiations); Fitzgerald Decl. ¶¶ 3-5, 17, 19 (detailing hours and expenses). Success was far from certain. Although Class Counsel has been prosecuting cases under a similar theory and has enjoyed some success, there have also been mixed results, with courts—even recently, even in this district—finding the theory implausible. *See generally* Fitzgerald PA Decl. ¶¶ 17, 20-21.

Indeed, the challenge presented by the case theory is underscored by the procedural history of *this* case. The Court initially found that "because a reasonable consumer would not mistakenly believe the product is promoting that sugar is good for health, or that the product promises overall health in spite of the sugar, Plaintiff's theory is ultimately implausible." *Andrade-Heymsfield v. NextFoods, Inc.*, 2022 WL 1772262, at *4 (S.D. Cal. Apr. 27, 2022) (Moskowitz, J.).

Although Plaintiff was able to fruitfully amend her Complaint, just a few months ago, a different judge in this district dismissed a similar case Class Counsel brought, without even providing an opportunity to amend, highlighting the controversial and risky nature of this liability theory. *See Lee v. Nature's Path Food, Inc.*, 2023 WL 7434963, at *3-4 & n.2 (S.D. Cal. Nov. 9, 2023) (while "acknowledg[ing] that several other district courts have reached the opposing conclusion, finding general claims of healthfulness to be misleading where the food product at issue contained excessive sugar," nevertheless finding "the reasoning and analysis set forth in [other cases] to be more persuasive and more in line with the Ninth Circuit's recent decisions," and holding "Plaintiff's consumer protection claims are implausible," and dismissing the action with prejudice).

Moreover, the present case had an additional wrinkle not present in any previous sugary-foods case Class Counsel has prosecuted: the presence of probiotics in NextFoods' Juice Drinks, whose benefits defendant argued outweighed the harm of the products' sugar. Thus, for example, the draft expert report of Plaintiff's scientific expert addressed the effect of free sugar consumption on gut health specifically, and contained another separate section analyzing "The Health Implications of Specific GoodBelly Probiotic JuiceDrinks Ingredients." Fitzgerald Decl. ¶ 24.

In addition, there was a risk that NextFoods, a small company, could be judgment proof, even if Plaintiff prevailed at trial. It was only through Class Counsel's significant efforts at getting an insurer to the table that the Settlement was reached. *See* PA Mot. at 2; PA Fitzgerald Decl. ¶¶ 10-13. Had Class Counsel failed to do so—or not done so as quickly—the Class would not likely have had the access to the declining policy that Class Counsel maximally leveraged to obtain the Settlement. Had that occurred, there may not have been funds for the Class from another source.

Given these challenges, the $1.25 million non-reversionary Settlement Fund, representing more than 40% of a hypothetical nationwide class's estimated trial damages, is an excellent result, especially in conjunction with the robust injunctive relief the Settlement provides by way of required labeling changes—both subtractions and additions—to the challenged products. Class Counsel now therefore respectfully requests a fee award in the amount of its actual, "presumptively reasonable" lodestar. *See Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 982 (9th Cir. 2008) ("in most cases the lodestar figure is presumptively reasonable" (citation omitted)). Specifically, after examining time records in detail and exercising billing discretion to cut a number of hours, Class Counsel seeks a fee award of $501,016 based on 694.5 hours reasonable expended on the litigation.

"'Where a settlement produces a common fund for the benefit of the entire class,' as here, 'courts have discretion to employ either the lodestar method or the percentage-of-recovery method' to determine the reasonableness of attorneys' fees." *In re Regulus Therapeutics Inc. Secs. Litig.*, 2020 WL 6381898, at *6 (S.D. Cal. Oct. 30, 2020) (Moskowitz, J.) (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ["*Bluetooth*"]). "Under the percentage-of-recovery method," courts consider "'25% of the fund as the benchmark,'" *id.* (quoting *Bluetooth*, 654 F.3d at 942), but "'[t]he benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors,'" *id.* (quoting *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.3d 1301, 1311 (9th Cir. 2011)).

Here, awarding fees based on a percent-of-fund method representing the benchmark 25% of the fund would result in a significant negative multiplier to Class Counsel's lodestar of 0.62. But that is not because of a poor result Class Counsel achieved or any other aspect of the litigation within its control. Instead, it was the modest size of the case and availability of wasting insurance coverage that dictated the Settlement Fund's size. *Cf. Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1168 (C.D. Cal. 2010) ("while a payout of $1,000-$2,000 is a complete or near-complete recovery to a class member, the size of the class does not equate with a large overall recovery such that the fees expended to achieve this result can be cross-checked against a hypothetical overall payout"). "[O]rdinarily, when application of the lodestar cross check produces a 'negative multiplier' . . . it [is] appropriate to consider whether under all of the circumstances of the litigation a fee greater than the 25% benchmark should be awarded." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2013 WL 12387371, at *9 (N.D. Cal. Nov. 5, 2013) (footnote omitted), *report and recommendation adopted sub nom. In re Dynamic Random Access Memory Antitrust Litig.*, 2014 WL 12879521 (N.D. Cal. June 27, 2014).

Moreover, the Settlement's value is not limited to the Settlement Fund, but also includes significant injunctive relief that is difficult to value. Accordingly, there are special circumstances warranting the Court exercising its discretion to determine a reasonable fee using the lodestar method, and Class Counsel respectfully requests it do so.

The Court should also award Class Counsel costs of $47,189, which were necessary to achieve this excellent outcome for the Class. *See* PA Fitzgerald Decl. ¶ 34 & Ex. 5.[1]

[1] On January 5, 2024, Class Counsel received for the first time an invoice from Circana, the predecessor to IRI, for the amount it billed to comply with Plaintiff's subpoena seeking sales of the products at issue. Accordingly, Class Counsel inadvertently did not include the $10,505 invoice in the initial list of expenses provided in connection with the preliminary approval motion. Fitzgerald Decl. ¶ 19. Notably, the total amount Class Counsel seeks in fees and costs ($548,205) is below the total amount set out in the Class Notice ($567,000). *See* SA Ex. 1, Long Form Notice at 8 (Question 20).

Finally, the Court should approve $5,000 service awards for Class Representatives Evlyn Andrade-Heymsfield and Valerie Gates, which is reasonable for the time and effort they spent achieving this result, and in relation to the total value of the Settlement Fund.

II. LEGAL STANDARD

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, fees are authorized both by law and agreement.

First, California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq.* provides a fee-shifting provision. *See id.* § 1780(e). "[T]he availability of costs and attorneys fees to prevailing plaintiffs is integral to making the CLRA an effective piece of consumer legislation, increasing the financial feasibility of bringing suits under the statute." *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 644 (2009) (quotation omitted). "Accordingly, an award of attorney fees to 'a prevailing plaintiff' in an action brought pursuant to the CLRA is mandatory, even where the litigation is resolved by a pre-trial settlement agreement[.]" *Kim v. Euromotors W./The Auto Gallery,* 149 Cal. App. 4th 170, 178-79 (2007).

Second, California's Private Attorneys General Statute, Cal. Code Civ. P. § 1021.5, similarly provides for an award of fees to a "successful" plaintiff if: (1) the action "has resulted in the enforcement of an important right affecting the public interest," (2) "a significant benefit, whether pecuniary or nonpecuiary, has been conferred on the general public or a large class of persons," and (3) "the necessity and financial burden of private enforcement . . . are such as to make the award appropriate . . . ." *Serrano v. Stefan Merli Plastering Co., Inc.*, 52 Cal. 4th 1018, 1026 (2011) (quoting Cal. Code Civ. P. § 1021.5, and citing *Woodland Hills Residents Ass'n., Inc. v. City Council*, 23 Cal. 3d 917, 935 (1979)). Although § 1021.5 "is phrased in permissive terms . . . the discretion to deny fees to a party that meets its terms is quite limited," *Lyons v. Chinese Hosp. Ass'n*, 136 Cal. App. 4th 1331, 1344 (2006) (quotation omitted).

Third, under California law "[a] private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Elliott v. Rolling Frito-Lay Sales, LP*, 2014 WL 2761316, at *9 (C.D. Cal. June 12, 2014) (quoting *Vincent v. Hughes Air W., Inc*., 557 F.2d 759, 769 (9th Cir. 1977)). "This rule, known as the 'common fund doctrine,' is designed to prevent unjust enrichment by distributing the costs of litigation among those who benefit from the efforts of the litigants and their counsel." *Id*. (quoting *In re Omnivision Techs., Inc*., 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (quoting *Paul, Johnson, Alston, & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989))).

Finally, there is a contractual basis for fees because the Settlement Agreement provides that "Class Counsel . . . shall file a motion . . . requesting a Fee Award . . . to be paid from the Settlement Fund." SA ¶ 3.1.

As previously noted, it is well-established that "[w]here a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method." *See Bluetooth*, 654 F.3d at 942 (citing *In re Mercury Interactive Corp.*, 618 F.3d 988, 992 (9th Cir. 2010) (citing *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000))); *see also In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295-96 (9th Cir. 1994). The "goal under either the percentage or lodestar approach [is] the award of a reasonable fee to compensate counsel for their efforts." *Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 504 (2016) (citing *In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 557-58 (2009) ("the ultimate goal is the award of a reasonable fee to compensate counsel for their efforts, irrespective of the method of calculation" (cleaned up, citations omitted))); *accord Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002) ("Reasonableness is the goal, and mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion." (quotation omitted)).

III. ARGUMENT

A. THE COURT SHOULD GRANT CLASS COUNSEL'S FEE REQUEST

1. The Court Should Use the Lodestar Method

"In cases where injunctive relief represents a significant aspect of the class recovery, courts typically use a lodestar calculation." *Beck-Ellman v. Kaz USA, Inc.*, 2013 WL 10102326, at *8 (S.D. Cal. June 11, 2013) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)); *cf. Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003) (

> [P]articularly where obtaining injunctive relief likely accounted for a significant part of the fees expended, courts can use the common fund version of the lodestar method either to set the fee award or as a cross-check to assist in the determination of how the "relevant circumstance" of the injunctive relief should affect a percentage award. (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1049 (9th Cir. 2002))).

Here, injunctive relief is one of the two major forms of relief the Settlement provides, and it includes *both* the removal of challenged "healthy" claims, *and* the addition of information alerting the consumer to the product's sugar levels. SA ¶ 5.1.

The "elimination of allegedly false representations . . . confer[s] a benefit on both the class members and the public at large," *Brazil v. Dell Inc.*, 2012 WL 1144303, at *1 (N.D. Cal. Apr. 4, 2012) (citation omitted), and courts often consider it significant, *see, e.g.*, *McMorrow v. Mondelez Int'l, Inc.*, 2022 WL 1056098, at *6 (S.D. Cal. Apr. 8, 2022) ("Plaintiffs also managed to secure injunctive relief, which is a meaningful outcome in a nationwide false advertising lawsuit. . . . It is the mark of success that the class was able to secure the type of injunctive relief sought in its Complaint," and "supports the Court's conclusion that the settlement is an exceptional result for the class." (footnote and record citation omitted)); *Testone v. Barlean's Organic Oils, LLC*, 2023 WL 2375246, at *6 (S.D. Cal. Mar. 6, 2023) (

> Plaintiffs also achieved significant injunctive relief on behalf of the Class: for five years from the date of this order, the Settlement Agreement prohibits Defendant from using any labeling representations challenged in this lawsuit . . . . Such an injunction will undoubtedly "bring a benefit to class consumers,

> the marketplace, and competitors who do not mislabel their products." (record citations omitted, and quoting *Bruno v. Quten Research Inst., LLC*, 2013 WL 990495, at *4 (C.D. Cal. Mar. 13, 2013))).

The injunctive relief in the instant Settlement Agreement, moreover, "provides substantial *health* benefits to all purchasers . . . in light of the evidence offered by Plaintiff about the health effects of" excessive free and added sugar consumption. *See Guttmann v. Ole Mexican Foods, Inc.*, 2016 WL 9107426, at *3 (N.D. Cal. Aug. 1, 2016) (emphasis added) (record citation omitted). The district court in *Hadley v. Kellogg Sales Co.* specifically found that injunctive relief restricting Kellogg from labeling cereals containing excessive sugars with health and wellness claims "provides health benefits to all purchasers of Defendant's products." 2021 WL 5706967, at *2 (N.D. Cal. Nov. 23, 2021). The same reasoning applies here. And it demonstrates that although this case theory is difficult, it is important.

As some commentators have observed, injunctive relief of the sort Class Counsel obtained "lends credence to the legal theory that a product's added sugars render health-and-wellness claims printed on the product label misleading under consumer-protection laws." *See* Fitzgerald Decl. Ex. 2, Creighton Magid, Washington Legal Foundation Legal Backgrounder, "Developments in Added-Sugar Food-and-Beverage Litigation: Cause for Hope, Cause for Concern," at 6 (Nov. 15, 2019). And "the process of changing product labeling and associated marketing campaigns requires an enormous amount of time and financial resources." *Id.* (citing Martin J. Hahn & Samantha L. Dietle, "State and Federal Food-Labeling Reforms Impose Unappreciated Complexities and Compliance Challenges," WLF Legal Backgrounder (May 18, 2018)). The Settlement thus disincentivizes other manufacturers to toe the line.

Because the Settlement's injunctive relief "represents a significant aspect of the class recovery," *see Beck-Ellman*, 2013 WL 10102326, at *8, but is difficult to value, the Court should exercise its discretion to award fees based on the lodestar method.

Moreover, because a percent-of-the fund method based on the benchmark would unreasonably undercompensate Class Counsel, there are policy reasons the Court should exercise its discretion in this manner. "[T]he amount of attorney fees typically negotiated in comparable litigation should be considered in the assessment of a reasonable fee in representative actions" because "[g]iven the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services"—like Class Counsel here—"must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior," *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 47 (2000) (citations omitted). Since applying the percent-of-fund method would undercompensate Class Counsel despite the excellent result, the Court should use the lodestar method to carry out this important California public policy. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995) ("Because [in a fee-shifting case] the lodestar award is de-coupled from the class recovery, the lodestar assures counsel undertaking socially beneficial litigation (as legislatively identified by the statutory fee shifting provision) an adequate fee irrespective of the monetary value of the final relief achieved for the class.").

Finally, it is worth nothing that "the concerns sometimes associated with using the lodestar method, such as cheap and/or collusive settlements, are not present in this case," further supporting use of the lodestar method. *See Parkinson*, 796 F. Supp. 2d at 1172 (applying lodestar method to determine fees despite defendant urging court to determine award under percent-of-fund method based on benefit claimed by class); *see also* PA Mot. at 15-16; Am. PA Order ¶ 3 (finding "that the Settlement Agreement[ ] is the result of serious, informed, non-collusive, arms-length negotiations . . . .").

2. Class Counsel's Lodestar is Reasonable

"To determine an appropriate fee award" under the lodestar method, "the court first 'multipl[ies] the number of hours reasonably spent on the litigation by a reasonable hourly

rate.'" *Youngevity Int'l v. Smith*, 2021 WL 2559456, at *1 (S.D. Cal. May 19, 2021) (Moskowitz, J.) (quoting *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983))). "[T]he fee applicant bears the initial burden of substantiating the amount of hours worked and the rate claimed and 'should provide documentary evidence to the court concerning the number of hours spent and how it determined the hourly rate(s) requested.'" *Id.*, at *2 (quoting *Dang v. Cross*, 422 F.3d 800, 814 (9th Cir. 2005)). As set forth in the concurrently-filed Fitzgerald Declaration, Class Counsel seeks a fee award of $501,016 based on 694.5 hours of work, Fitzgerald Decl. ¶ 5, which the Court should find reasonable.

a. Class Counsel's Hourly Billing Rates are Reasonable

"To determine the reasonable hourly rate, the court discerns the 'rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation.'" *Youngevity*, 2021 WL 2559456, at *2 (quoting *Camacho*, 523 F.3d at 979). Here, "the relevant community is the Southern District of California because it is the forum in which the district court sits." *Id.* (quoting *Ruiz v. XPO Last Mile, Inc.*, 2017 WL 1421996, at *2 (S.D. Cal. Apr. 20, 2017)). The "party requesting attorneys' fees" must "produce 'satisfactory evidence . . . that the requested rates are in line with those prevailing in the community . . . .'" *Id.* (quoting *Jordan v. Multnomah County*, 815 F.2d 1258, 1263 (9th Cir. 1997)). This includes "rate determinations in other cases, particularly those setting a rate for the [movant's] attorney." *Id.* (quoting *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990)).

Here, Class Counsel's requested rates are consistent both with previous fee awards by three other Southern District of California courts within the last four years, and with prevailing rates in this district for attorneys of similar experience, skill, and reputation. *See* Fitzgerald Decl. ¶¶ 7-16. The Court should thus approve the requested rates. *See Buchannon v. Associated Credit Servs., Inc.*, 2021 WL 5360971, at *15 (S.D. Cal. Nov. 17, 2021) (considering previously approved rates, applying inflation multipliers for each year that passed, and recognizing that one attorney was "promoted to Senior Associate Attorney").

b. The Hours Class Counsel Expended are Reasonable

Here, Class Counsel expended 700.4 hours litigating the case over approximately 32 months (*i.e.*, between the end of April 2021 and end of December 2023). That equates to an average of 262.3 hours per year, 21.9 hours per month, and 5.5 hours per week during that time, which compares favorably to our work on similar class action cases involving health claims on sugary foods, in which we obtained settlements that were ultimately approved. *See* Fitzgerald Decl. ¶ 26. The Court should find these hours were reasonable and necessary to the litigation, especially considering the result obtained for the Class. *See In re High-Tech Emp. Antitrust Litig.*, 2015 WL 5158730, at *10 (N.D. Cal. Sept. 2, 2015) ("36,215 hours is a reasonable amount of time for Class Counsel to have spent on this litigation. . . . [i]n the more than four years that this case has been pending . . . ");[2] *cf. Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992) (The issue "is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." (citation omitted)).

Class Counsel's time is documented, categorized, and submitted to the Court. Fitzgerald Decl. ¶¶ 5-6 & Ex. 1. Before doing so, Class Counsel reviewed its time records and made appropriate cuts due to errors (26.5 hours identified as erroneous and removed) or

[2] *See also Alvarez v. Farmers Ins. Exch.*, 2017 WL 2214585, at *5 (N.D. Cal. Jan. 18, 2017) (finding "reasonable and necessary" 4,727.6 hours "over nearly three years of litigation"); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 644 (S.D. Cal. 2011) ("[g]iven the complexity of the case," 5,995.4 hours was "reasonable," with the time "represent[ing] approximately . . . 28 hours per week for a four year time period"); *In re TracFone Unlimited Serv. Plan Litig.*, 112 F. Supp. 3d 993, 1009 (N.D. Cal. 2015) (finding reasonable "more than 5,000 hours" expended over two years); *Walsh v. Kindred Healthcare*, 2013 WL 6623224, at *2 (N.D. Cal. Dec. 16, 2013) (finding reasonable 5,728 hours expended over 3 years); *Dennings v. Clearwire Corp.*, 2013 WL 1858797, at *5 (W.D. Wash. May 3, 2013) (finding reasonable 4,265.2 hours over 2.5 years of litigation, or approximately 142.1 hours per month); *Aarons v. BMW of N. Am., LLC*, 2014 WL 4090564, at *16-17 (C.D. Cal. Apr. 29, 2014) (finding reasonable 4,673.2 hours over 31 months, or approximately 150.7 hours per month), *objections overruled*, 2014 WL 4090512 (C.D. Cal. June 20, 2014); *Beaver v. Tarsadia Hotels*, 2017 WL 4310707, at *13-14 (S.D. Cal. Sept. 28, 2017) (finding reasonable 9,104 hours over more than six years (73 months), or approximately 124.7 hours per month).

in the exercise of billing judgment (64.9 hours cut, representing approximately 8.5% of Class Counsel's raw time records after erroneous entries were removed). *See id.* ¶¶ 2-3; *cf. Hensley*, 461 U.S. at 434 ("Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary[.]"). And, Class Counsel is not including in its lodestar, and thus not seeking reimbursement for additional time spent on the New York *Gates* case; drafting this motion; and seeing the case through final approval. Fitzgerald Decl. ¶ 4.

Notably, other courts in this district have found Class Counsel's time reasonable in other, similar matters (including implicitly in granting fee applications based on lodestar and time record information provided). *See Testone*, 2023 WL 2375246, at *7; *McMorrow*, 2022 WL 1056098, at *8; *Hunter v. Nature's Way Prods., LLC*, 2020 WL 71160, at *8 (S.D. Cal. Jan. 6, 2020); *Loomis v. Slendertone Distrib., Inc.*, 2021 WL 873340, at *10 (S.D. Cal. Mar. 9, 2021).

3. The Relevant Factors Demonstrate it is Appropriate to Award Class Counsel its Full Lodestar

"Though the lodestar figure is 'presumptively reasonable,' [ ] the court may adjust it upward or downward by an appropriate positive or negative multiplier reflecting a host of 'reasonableness' factors, 'including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.'" *Baker v. SeaWorld Entm't, Inc.*, 2020 WL 4260712, at *9 (S.D. Cal. July 24, 2020) (citations omitted). "Foremost among these considerations, however, is the benefit obtained for the class." *Id.* (citing *Hensley*, 461 U.S. at 434-36; *McCown*, 565 F.3d at 1102 (ultimate reasonableness of the fee "is determined primarily by reference to the level of success achieved by the plaintiff")). Each of the relevant factors supports Class Counsel's request for its full lodestar here (*i.e.*, without a downward departure).

a. The Result Achieved

"First, the Court considers the overall result and benefit to the Class. This factor has been called 'the most critical factor in granting a fee award.'" *In re Anthem, Inc. Data Breach*

Litig., 2018 WL 3960068, at *9 (N.D. Cal. Aug. 17, 2018) ["*Anthem*"] (quoting *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046). In conducting this analysis, "[t]he fact that counsel obtained injunctive relief in addition to monetary relief for their clients is . . . a relevant circumstance to consider in determining what percentage of the fund is reasonable as fees." *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1055-56 (9th Cir. 2019) (alteration and emphasis omitted) (quoting *Staton*, 327 F.3d at 946).

Considering its monetary and injunctive relief, the Settlement is an excellent result achieved by Class Counsel for the Class.

First, the Settlement's monetary relief is an all-cash, non-reversionary common fund—the gold standard for class action settlements because it provides the most transparent and concrete value to class members while minimizing the chances and impact of collusion. *See Rodriguez v. W. Pub'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ("cash . . . is a good indicator of a beneficial settlement"); *cf. In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, 895 F.3d 597, 611 (9th Cir. 2018) ("A reversion can benefit both defendants and class counsel, and thus raise the specter of their collusion[.]" (footnote and citation omitted)). As described in Plaintiff's Preliminary Approval motion, the $1.25 million Settlement Fund represents a significant recovery of the relevant Classes' potential trial damages. *See* PA Mot. at 21. And the amount claimants are likely to receive represents a significant recovery on an individual Class Member basis compared to the modest per-unit damages. *See id.* at 21-22. Thus, the Settlement Fund is an excellent result, especially considering the risk of maintaining certification to and through trial, and the risk of recovering no damages at trial.

Second, as already discussed, the Settlement's injunctive relief is significant and meaningful. *See supra* Point III(A)(1). Although courts generally do not directly include the monetary value of injunctive relief when calculating attorneys' fees because it is difficult to quantify, *see Winters v. Two Towns Ciderhouse, Inc.*, 2021 WL 1889734, at *1 (S.D. Cal. May 11, 2021), courts should still "determine the significance of th[e] benefit, and employ it as a qualitative factor in deciding whether a[n upward departure from the benchmark] is

warranted," *see Chambers v. Whirlpool Corp.*, 980 F.3d 645, 664 (9th Cir. 2020) (footnote omitted); *de Mira v. Heartland Emp. Serv., LLC*, 2014 WL 1026282, at *3 (N.D. Cal. Mar. 13, 2014) ("[T]he significant risk and non-monetary results achieved by Class Counsel . . . warrant an upward departure from the 25% benchmark.").

That is the case here. In similar circumstances, for example, the Ninth Circuit held that an "attorneys' fee award . . . stands up when evaluated using the factors set forth in *Vizcaino*," and that "counsel's procurement of monetary and injunctive relief appears to have been an exceptional result," where the injunctive relief was "meaningful and consistent with the relief requested in plaintiffs' complaint," *In re Ferrero Litig.*, 583 F. App'x 665, 668 (9th Cir. 2014); *cf. Good Morning to You Prods. Corp. v. Warner/Chappell Music, Inc.*, 2016 WL 6156076, at *4 (C.D. Cal. Aug. 16, 2016) (Where "the settlement has substantial monetary and nonmonetary components," "[t]his factor weighs heavily in favor of an upward departure from the benchmark.").

Finally, the Settlement offers benefits to those who would not otherwise see them because the Settlement Class is comprised of purchasers nationwide, rather than in California and New York only. While it is theoretically possible that, absent settlement, some Settlement Class Members could eventually see relief through additional lawsuits brought in other states, other Settlement Class Members would be left without remedies, since some states preclude class actions and others require individual proof of reliance for consumer fraud claims, making them impossible to adjudicate on a classwide basis. That "Class Counsel successfully negotiated direct payments for a class of individuals that in all likelihood may have never received any compensation or redress for the conduct complained of" weighs in favor of granting Class Counsel's fee request. *See Burnthorne-Martinez v. Sephora USA, Inc.*, 2018 WL 5310833, at *3 (N.D. Cal. May 16, 2018).

All these circumstances demonstrate this factor supports Class Counsel's fee request. *See Larsen v. Trader Joe's Co.*, 2014 WL 3404531, at *8-9 (N.D. Cal. July 11, 2014) (factor favored upward departure where "Class members who ha[d] made claims w[ould] receive cash" and "[t]he Settlement Agreement also provide[d] the equitable relief that [defendant]

will stop using the disputed labels," which were "significant benefits to the class" (citation omitted)).

b. The Contingent Nature of the Representation and Risk Involved in the Litigation

Courts recognize that when "Class Counsel assumed the risk of taking [a] case on a contingency fee basis," *Nangle v. Penske Logistics, LLC*, 2017 WL 2620671, at *6 (S.D. Cal. June 16, 2017) (citation omitted), and faced the additional "risk of non-payment or reimbursement of expenses," these are significant factors to consider in "determining the appropriateness of counsel's fee award," *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1264 (C.D. Cal. 2016) (quotation omitted). "[W]hen counsel takes cases on a contingency fee basis," and especially so when the "litigation is protracted, the risk of non-payment after years of litigation, justifies a significant fee award," *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 261 (N.D. Cal. 2015) (citing *In re Heritage Bond Litig.*, 2005 WL 1594403, at *19 (C.D. Cal. June 10, 2005)). Courts also "tend to find above-market-value fee awards more appropriate in this context given the need to encourage counsel to take on contingency-fee cases for plaintiffs who otherwise could not afford to pay hourly fees." *Id.* (citation omitted); *see also Anthem*, 2018 WL 3960068, at *14 (finding upward departure warranted where the "case was conducted on a contingent-fee basis against well-represented Defendants," "the financial risk of litigation was assumed by Class Counsel throughout the pendency of the action," and "the representation ha[d] lasted for nearly three years and the case schedule was compressed, thereby requiring Class Counsel to forego work on other matters" (citation omitted)).

The circumstances under which Class Counsel brought this case and the risk they faced during the litigation satisfy these criteria, supporting the requested lodestar award. Class Counsel not only took this case on a contingent-fee basis and therefore risked being uncompensated for their time, but also risked tens of thousands of dollars in out-of-pocket expenses for the Class that they may have never recovered. *See* Fitzgerald Decl. ¶ 17.

Besides the inherent risk in all contingency-fee litigation, the risk borne by Class Counsel was magnified by several specific factors. First, as another court has opined, "food labeling claims are difficult to maintain" where plaintiffs "would need to prove that Defendant's labels . . . were misleading entirely by virtue of the product containing" an allegedly harmful nutrient. *See Guttmann*, 2016 WL 9107426, at *3. This makes such cases inherently complex because they involve the intersection of scientific evidence regarding physiology and nutrition, and various aspects of marketing and consumer perception.

That the case's theory of liability was risky from the outset is manifest. Several California district courts—including very recently—have held that other actions brought on the same theory were implausible as a matter of law. *See Lee*, 2023 WL 7434963; *Sanchez v. Nurture, Inc.*, 2023 WL 6391487, at *7 (N.D. Cal. Sept. 29, 2023); *Yoshida v. Campbell Soup Co.*, 2022 WL 1819528, at *1 (N.D. Cal. May 27, 2022); *Clark v. Perfect Bar, LLC*, 2018 WL 7048788 (N.D. Cal. Dec. 21, 2018), *aff'd on other grounds*, 816 F. App'x 141 (9th Cir. 2020); *Truxel v. Gen. Mills Sales, Inc.*, 2019 WL 3940956 (N.D. Cal. Aug. 13, 2019).

Second, the class-action nature of the case added significantly to the time and expenses incurred by Class Counsel. Illustrating the difficulty in pursuing class-wide claims in food cases and successfully recovering damages for a class, numerous California courts initially certified food labeling cases, only to later decertify them or grant defendants summary judgment. *See*, *e.g.*, *McCurley v. Royal Sea Cruises, Inc.*, 2020 WL 4582686, at *2 (S.D. Cal. Aug. 10, 2020) (decertifying primary class when plaintiffs could not obtain certain necessary evidence); *Brazil v. Dole Packaged Foods, LLC*, 2014 WL 5794873 (N.D. Cal. Nov. 6, 2014) (decertifying damages class); *Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923 (N.D. Cal. Dec. 15, 2014) (same); *Allen v. ConAgra Foods, Inc.*, 2020 WL 4673914 (N.D. Cal. Aug. 12, 2020) (granting defendant's motion for summary judgment after having previously decertified several state subclasses); *Ries v. Ariz. Beverages USA LLC*, 2013 WL 1287416 (N.D. Cal. Mar. 28, 2013) (granting defendant's motion for summary judgment and decertifying class); *Morales v. Kraft Foods Group, Inc.*, 2017 WL 2598556 (C.D. Cal. June 9, 2017) (decertifying class and granting defendant partial summary judgment); *Zakaria v.*

Gerber Prods. Co., 2017 WL 9512587 (C.D. Cal. Aug. 9, 2017) (decertifying class and granting defendant summary judgment), *aff'd*, 755 F. App'x 623 (9th Cir. 2018).

Third, even if the Class Representatives obtained and then maintained certification through trial and avoided summary judgement, proving liability at trial would have been difficult, as demonstrated by recent examples of consumer fraud trials ending in defense verdicts. *See*, *e.g.*, *Washington v. CVS Pharm. Inc.*, No. 4:15-cv-3504-YGR (N.D. Cal.), Dkt. No. 611 (June 24, 2021 defense verdict in action alleging overcharging for generic drugs); *Allen v. Hyland's, Inc.*, 2021 WL 718295 (C.D. Cal. Feb. 23, 2021) (defense verdict following jury and bench trial on claims that homeopathic remedies were falsely advertised as effective); *Morizur v. SeaWorld Parks & Entm't, Inc.*, 2020 WL 6044043 (N.D. Cal. Oct. 13, 2020) (defense verdict after bench trial on false advertising claims); *cf. Racies v. Quincy Bioscience, LLC*, 2020 WL 2113852, at *6 (N.D. Cal. May 4, 2020) (decertifying after trial a false advertising class action alleging misleading advertising of memory supplement and noting "the Court found Plaintiff's case at trial underwhelming").

In short, Class Counsel bore all the risk of a contingency-fee-false-advertising class action that was based on a difficult liability theory that Class Counsel developed. The litigation was protracted because of NextFoods' skilled and vigorous defense—indeed, NextFoods' initial Rule 12 motion was successful. Class Counsel took on this risk because the accurate portrayal of the healthfulness of foods is an important matter of public health, especially given the current obesity epidemic, and no individual plaintiff could bear the risk. This justifies Class Counsel's request for a fully-compensatory fee award.

c. The Skill Required and Quality of Class Counsel's Work

Some courts "have recognized that litigating complicated matters, especially unprecedented issues, is a circumstance that points in favor of a larger percentage." *Anthem*, 2018 WL 3960068, at *13 (citing *Spears v. First Am. Eappraiseit*, 2015 WL 1906126, at *2 (N.D. Cal. Apr. 27, 2015) (awarding 35% of $7,557,096 net settlement fund where class counsel "faced at least three significant novel issues of law")). In *Lusby v. GameStop Inc.*, for example, the court awarded one-third of the common fund based in part on counsel having

"litigated a large number of [similar] class actions," "achiev[ing] class certification in many different scenarios," and "develop[ing] an extensive factual record to obtain the evidence needed to convince Defendant of the risks of continued litigation," 2015 WL 1501095, at *4 (N.D. Cal. Mar. 31, 2015). The court also noted class counsel's "history of successful prosecution of similar cases" made "credible its commitment to pursue this action through trial and beyond." *Id.*

Likewise, great skill was required by Class Counsel here, given the challenging theory, procedural hurdles, and technical subject matter requiring expert testimony. Class Counsel skillfully developed the factual record necessary to support class claims and to demonstrate to NextFoods and its insurer the appreciable risks of going to trial. This included reviewing over 103,000 documents produced by NextFoods comprising over 300,000 pages. PA Fitzgerald Decl. ¶ 4.

Class Counsel also exhibited skill in bringing NextFoods' insurer to the table, which was crucial to obtaining the Settlement. *See id.* ¶¶ 10-13.

Moreover, Class Counsel retained three experts who authored reports in preparation for a class certification motion. *See id.* ¶ 7. Understanding and coordinating this type of expert testimony requires significant skill. Here, Class Counsel's use of experts to prepare a strong evidentiary basis for class certification and trial—and to use that, in turn, to leverage the Settlement—was part of their "skillful preparation," *see Hopkins v. Stryker Sales Corp.*, 2013 WL 496358, at *2 (N.D. Cal. Feb. 6, 2013). Here, as in *Hopkins*, the "discovery that was undertaken by Class Counsel brought to light evidence of Defendant's violations of California . . . unfair competition laws," 2013 WL 496358, at *2. Further, as in *Hopkins*, Class Counsel "employed the services of [three] experts," *id*. All of this demonstrates the significant skill and quality work of Class Counsel and further supports the fee request.

d. Awards in Similar Cases

Whereas Class Counsel seeks only its "unadorned" lodestar here, the Honorable Cynthia Bashant recently found in a similar case that a positive lodestar multiplier for Class Counsel was warranted. In *McMorrow*, Judge Bashant awarded Class Counsel fees equal to

one-third of the common fund, noting that "[t]o reach the requested fee award, this Court would need to apply a multiplier of 1.54 to Plaintiffs' lodestar," and "agree[ing] that the quality of Class Counsel's representation and benefit obtained by the class . . . support the modest 1.54 multiplier . . . and justify the fee award of 33.3%." 2022 WL 1056098, at *8 (citations omitted). This supports the "multiplier" Class Counsel requests here, of just 1.0. Moreover, as discussed further below, the resultant percent-of-fund is within the acceptable range.

4. A Percent-of-Fund Cross-Check Demonstrates that Awarding Class Counsel its Full Lodestar is Reasonable

"To guard against an unreasonable result, the Ninth Circuit has encouraged district courts to cross-check any calculations done in one method against those of another method." *Dexter's LLC v. Gruma Corp.*, 2023 WL 8790268, at *9 (S.D. Cal. Dec. 19, 2023) (quoting and citing *Vizcaino*, 290 F.3d at 1048, 1050-51). Here, Class Counsel's $501,016 lodestar represents 40.08% of the Settlement Fund. This proportion is not atypical when viewed as a cross-check on a reasonable lodestar figure. *See Troy v. Aegis Senior Communities LLC*, 2021 WL 6129106, at *3 (N.D. Cal. Aug. 23, 2021) ("[T]he fee requested here . . . represents 39% of the Settlement Fund . . . . Although that exceeds the 25% benchmark, it does fall within the percentage range approved in comparable consumer class actions." (collecting cases)); *Alexander v. FedEx Ground Package Sys., Inc.*, 2016 WL 3351017, at *2 (N.D. Cal. June 15, 2016) ("a percentage award in a megafund case can be 25% or even as high as 30%-40%" (citations omitted)); *Vizcaino*, 290 F.3d at 1050 & n.4 (stating that "the lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted," and appending a survey of "fee awards from 34 common fund settlements," with "[a]wards . . . rang[ing] from 3-40%"); *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1124 (C.D. Cal. 2008) ("One study . . . found that most fee awards in common fund class actions were between 20% and 40% of the gross monetary settlement, with little variation between districts.") Moreover, this proportion falls within market norms. *See Aichele v. City of Los Angeles*, 2015 L 5286028, at *6 (C.D. Cal. Sept. 9, 2015) ("Attorneys regularly contract for

contingent fees between 30% and 40%." (internal quotation marks and quotation omitted)); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2012 WL 13209696, at *7 (N.D. Cal. Nov. 9, 2012) ("contingent fee lawyers typically charge between 25 and 40% of recovery"), *supplemented sub nom.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2012 WL 12918720 (N.D. Cal. Dec. 18, 2012).

First, even when determining fees *based* on the percent-of-fund method, "'[d]istrict courts in this circuit have routinely awarded fees of one-third of the common fund *or higher*'" and "the Ninth Circuit has upheld such awards." *Khoja v. Orexigen Therapeutics, Inc.*, 2021 WL 5632673, at *9 (S.D. Cal. Nov. 30, 2021) (quotation and alteration omitted and emphasis added); *see also Ruiz v. XPO Last Mile, Inc.*, 2017 WL 6513962, at *7-8 (S.D. Cal. Dec. 20, 2017) (approving an attorneys' fees award of 35% of the common fund). Indeed, "[i]n most common fund cases, the award exceeds the 25% benchmark." *Lloyd v. Navy Fed. Credit Union*, 2019 WL 2269958, at *13 (S.D. Cal. May 28, 2019) (citations omitted).

Second, when using the percent-of-fund method to cross-check a reasonable lodestar figure, resulting awards similar to that requested here are not unusual, particularly in cases involving more modest damages and settlements as a result, as here. *See Clayton v. Knight Transp.*, 2013 WL 5877213, at *8 (E.D. Cal. Oct. 30, 2013) ("awards in the Central District are in the 20% to 50% range" (citation omitted)); *Cicero v. DiretTV, Inc.*, 2010 WL 2991486, at *6-7 (C.D. Cal. July 27, 2010) ("case law surveys suggest that 50% is the upper limit, with 30-50% commonly awarded in cases in which the common fund is relatively small"); *Singer v. Becton Dickinson & Co.*, 2010 WL 2196104, at *8 (S.D. Cal. June 1, 2010) (one-third fee award was similar to awards in other wage-and-hour class actions where fees ranged from 30.3% to 40%); *Craft*, 624 F. Supp. 3d at 1127 ("Cases of under $10 million will often result in fees above 25%."); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 297 (N.D. Cal. 1995) (fee awards of 30% to 50% are more typical where recovery is less than $10 million).

B. THE COURT SHOULD GRANT CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF EXPENSES

"There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund." *Selk v. Pioneers Mem. Healthcare Dist.*, 159 F. Supp. 3d 1164, 1181 (S.D. Cal. 2016) (quoting *Ontiveros v. Zamora*, 303 F.R.D. 356, 375 (E.D. Cal. 2014)); *see also Alvarez*, 2017 WL 2214585, at *5 ("Class counsel is entitled to reimbursement of reasonable expenses." (quotation and citations omitted)). Here, Class Counsel seeks reimbursement of $47,189 of expenses, the majority of which relate to expert witnesses. *See* Fitzgerald Decl. ¶ 19. Because "[t]he categories of expenses for which plaintiffs' seek reimbursement are the type of expenses routinely charged to hourly clients," *Larsen*, 2014 WL 3404531, at *10 (citation omitted), including "expert witness fees . . . [and] case-related travel for Plaintiffs," the full amount should be reimbursed. *See In re: High-tech Emp. Antitrust Litig.*, 2014 WL 10520478, at *2 (N.D. Cal. May 16, 2014).

C. THE COURT SHOULD GRANT THE CLASS REPRESENTATIVES' SERVICE AWARDS

Service awards (sometimes called incentive awards) "are intended to compensate class representatives for work undertaken on behalf of a class," and "do not, by themselves, create an impermissible conflict between class members and their representative[s]." *Watkins v. Hireright, Inc.*, 2016 WL 5719813, at *3 (S.D. Cal. Sept. 30, 2016) (quoting *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015)).

> Factors the Court may consider in determining whether an incentive award is appropriate or not include: (1) the risk taken on by the named plaintiff—both financial and otherwise; (2) the notoriety and any personal difficulties faced by the named plaintiff as a result of his work; (3) the amount of time and effort expended by the representative on behalf of the class; (4) the duration of the litigation; and (5) the personal benefit or lack thereof enjoyed by the class representative as a result of the litigation.

Id. (citation omitted).

"Service awards as high as $5,000 are presumptively reasonable in this judicial district," *Regulus*, 2020 WL 6381898, at *8 (citing *Lloyd*, 2019 WL 2269958, at *15); *see also Hopson v. Hanesbrands, Inc.*, 2009 WL 928133, at *10 (N.D. Cal. Apr. 3, 2009) ("In general, courts have found that $5,000 incentive payments are reasonable" (citing, *inter alia*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000))).

Here, each Class Representative has worked with and supported Class Counsel in litigating this matter, and without their effort and participation, the Class would receive nothing. Each assisted counsel while drafting the pleadings, reviewed and authorized the filing of their respective Complaints, stayed abreast of the litigation, and was prepared to testify at trial. Ms. Andrade-Heymsfield travelled from Seattle to attend the ENE. Both Class Representatives were involved in the settlement negotiations that were ultimately fruitful, and each later reviewed the Settlement to ensure it was fair and reasonable. Both were also potentially subject to intrusive discovery. *See* Fitzgerald Decl. ¶¶ 20-23; Andrade-Heymsfield Decl. ¶¶ 5-7; Gates Decl. ¶¶ 7-10. Given these facts and that $5,000 is "presumptively reasonable," the Court should find it reasonable here. *Cf. Winters*, 2021 WL 1889734, at *3 (awarding $7,500 to plaintiff who "assisted with drafting pleadings, helped with informal discovery, sent the cans of product he had retained to the lab for testing, and attended the mediation that resulted in this settlement" (record citations omitted)); *Loomis*, 2021 WL 873340, at *13 ($10,000 incentive award to plaintiff in a $175,000 common fund case, considering the excellent recovery for each claimant and her role in "securing the advertising changes" as injunctive relief).

Moreover, the aggregate service award amount requested, $10,000, is just 0.8% of the Settlement Fund and is thus "significantly less than the approximately 1% of the total settlement awarded by some courts." *See Fowler v. Wells Fargo Bank, N.A.*, 2019 WL 330910, at *8 (N.D. Cal. Jan. 25, 2019) (citing *Sandoval v. Tharaldson Employee Mgmt., Inc.*, 2010 WL 2486346, at *10 (C.D. Cal. June 15, 2010) ($7,500 award, representing 1% of the settlement fund, was fair and reasonable)); *Alvarez*, 2017 WL 2214585, at *1-2 (awarding $10,000 per plaintiff, totaling $90,000, "constitut[ing] 1.8% of the total settlement value").

Accordingly, the Court should grant the requested service awards.

IV. CONCLUSION

The Court should grant Class Counsel's request for an award of $505,046 in attorneys' fees and $47,189 in costs; and grant the Class Representatives requests for service awards of $5,000 each.

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Respectfully Submitted,

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