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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JONATHAN RETTA, KIRSTEN SCHOFIELD, and JESSICA MANIRE on Behalf of Themselves and all Others Similarly Situated,

Plaintiffs,

v.

MILLENNIUM PRODUCTS, INC., and WHOLE FOODS MARKET, INC.,

Defendants.

Case No. 2:15-cv-01801-PSG-AJW

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES, AND INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES

Date: July 31, 2017
Time: 1:30 p.m.
Courtroom 880

Judge: Hon. Philip S. Gutierrez

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Plaintiffs Jonathan Retta, Kirsten Schofield, and Jessica Manire ("Plaintiffs" or "Class Representatives") respectfully submit this memorandum in support of Plaintiffs' Motion for Attorneys' Fees, Costs and Expenses, and Incentive Awards for the Class Representatives.

I. INTRODUCTION

The Settlement Agreement provides for an $8,250,000 "claims-made" fund to pay all valid and timely claims, attorneys' fees and costs, incentive awards to the Class Representatives, and costs of notice and administration. *See gen*. 1/31/2017 Order Granting Preliminary Approval (Doc. 115); Stipulation of Class Action Settlement, ¶¶ 44-46, 48 (Doc. 103-3).

Due to the vast success of the Notice Plan, as described in detail in the concurrently filed Motion for Final Approval of Class Action Settlement (incorporated herein), 173,000 valid and timely claims have been submitted. Declaration of Steven Weisbrot ("Weisbrot Decl.") ¶¶ 14, 16. To date, no one has objected and only two people have opted-out. *Id*. ¶ 17. The Settlement Administrator projects that "Class Members will receive a 10 percent pro rata diminishment of their submitted claims to account for the high amount of claims and [claims administration and notice] expenses, such that the entire $8.25 million fund will be exhausted." *Id*. ¶ 16. In other words, while technically a "claims-made" deal, the Settlement is now more analogous to a true "common fund," as not one dollar of the $8.25 million will revert to Defendants. As discussed in detail below, this is an excellent result that will provide every claimant (other than a hypothetical claimant purchasing more than 225 Subject Products) *more than full compensation* for any damages they may have suffered.

In light of these considerations, Class Counsel requests that the Court approve an award of attorneys' fees of 25% of the $8,250,000 Settlement Fund, or $2,062,500. This method of calculating the fee award, based on a percentage of the

Settlement Fund, is straightforward, is fair under the circumstances, and is supported by the laws of this Circuit. The 25% fee is also fair in light of the significant time Class Counsel has devoted to this time on a contingency fee basis with the threat of no recovery at all absent a successful resolution.

Class Counsel also seeks reimbursement of $18,121.16 in out-of-pocket expenses. *See* Declaration of L. Timothy Fisher ("Fisher Decl.") ¶¶ 30-31; *see also id.*, Ex. 3 (an itemized listing of each out-of-pocket expense incurred by Bursor & Fisher in connection with this case). The expenses were necessary to the prosecution of this case, were carefully and reasonably expended, and should be reimbursed. *Id.*

II. BACKGROUND AND PROCEDURAL HISTORY

The Declaration of L. Timothy Fisher, submitted herewith, contains a detailed discussion of the background and procedural history of this case, including (i) Plaintiffs' pre-suit investigation and multiple laboratory tests of the Subject Products, (ii) the pleadings and multiple motions to dismiss, (iii) discovery, (iv) the parties' arm's-length settlement negotiations, and (iv) preliminary approval and dissemination of notice.

III. SUMMARY OF THE PROPOSED SETTLEMENT

A. Payment To Settlement Class Members

Defendants have agreed to pay up to $8,250,000 to cover all claims filed by Class Members as well as the costs of settlement administration, incentive awards, and attorneys' fees, costs and expenses. The Settlement Administrator estimates that it has received 173,000 timely and valid claims, 96.8 percent of which have selected the cash option. Weisbrot Decl. ¶ 14. Assuming that Class Counsel's motion for attorneys' fees, reimbursement of costs and expenses, and payment of incentive awards is granted in full, Class Members will be paid $3.15 per Subject Product purchased, up to $31.50 for ten Subject Products purchases within the Class Period. *See id.* ¶ 16.

As discussed at length in Plaintiffs' Motion for Final Approval of Class Action Settlement, which is incorporated herein, this is an excellent recovery that will likely provide far greater than 100 percent of Class Members' losses under a price premium theory of damages. Indeed, with damages estimated at .14 cents per Subject Product, Class Members that made claims for 10 Subject Products will receive full compensation for 225 purchases of the Subject Products. Class Members that claim to have purchased only one Subject Product within the class period will receive *2,250 percent more than they could have recovered at trial*.

B. Payment of Attorneys' Fees, Costs, and Incentive Awards

The Settlement Agreement authorizes Class Counsel to make an application to the Court for an award of Attorneys' Fees and Expenses and Incentive Awards for the Class Representatives of up to $2,000. Settlement Agreement ¶¶ 55-56.

Class Counsel and Defendants have no agreement as to the amount of fees or expenses that Class Counsel would seek, and no agreement as to any amount of requested fees that Defendants would oppose. Fisher Decl. ¶ 40. At no point has Class Counsel negotiated its attorneys' fees with Defendants. *See id*. There is no "clear sailing" provision. *Id*. Defendants are free to challenge the present fee application. *See id*.

IV. THE CLRA PROVIDES FOR A MANDATORY AWARD OF ATTORNEYS' FEES TO THE PREVAILING PARTY

The Class Representative brought claims against Defendants under California's Consumers Legal Remedies Act, Civil Code §§ 1750, *et seq.* (the "CLRA"). For CLRA claims, an award of fees to the prevailing party is mandatory under Civil Code § 1780(d), which provides: "The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section." As the California Court of Appeal has explained, in construing this provision:

> "The word 'shall' is usually deemed mandatory, unless a mandatory construction would not be consistent with the legislative purpose underlying the statute." (*West Shield Investigations and Sec. Consultants v. Superior Court* (2000) 82 Cal. App. 4th 935, 949, 98 Cal.Rptr.2d 612.) Our Supreme Court has observed that "the 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." (*Broughton v. Cigna Healthplans* (1999) 21 Cal. 4th 1066, 1085, 90 Cal. Rptr. 2d 334, 988 P.2d 67.) Thus, a mandatory construction of the word "shall" in section 1780(d) is consistent with the legislative purpose underlying the statute.

Kim v. Euromotors West/The Auto Gallery, 149 Cal. App. 4th 170, 178 (2007). Here, the Class has recovered a Settlement with a total value of $8,250,000. The Class is thus the "prevailing party," and a fee award to Class Counsel is mandatory under the CLRA.

V. CLASS COUNSEL'S REQUESTED ATTORNEYS' FEES AWARD IS FAIR AND REASONABLE

Under Ninth Circuit standards, a District Court may award attorneys' fees under either the "percentage-of-the-benefit" method or the "lodestar" method. *Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). Class Counsel's fee request is fair and reasonable under either of these methods.

A. The Percentage Of The Benefit Method

Under the common fund doctrine, courts typically award attorneys' fees based on a percentage of the total settlement. *See State of Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990); *see also In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378-79 (9th Cir. 1995) (affirming attorney's fee award of 33% of the recovery); *Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th Cir. 2003) (affirming attorney's fee award of 33% of the recovery).

1. The Total Value Of The Settlement Fund Is $8.25 Million

To calculate attorneys' fees based on the percentage of the benefit, the Court must first determine the value of the Settlement Fund. In doing so, the Court must include the value of the benefits conferred to the Class, including any attorneys' fee, expenses, and notice and claims administration payments to be made. *See*, *e.g.*, *Staton v. Boeing*, 327 F.3d 938, 972-74 (9th Cir. 2003); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 (S.D. Cal. 2011), *aff'd*, 473 F. App'x. 716 (9th Cir. 2012). Stated otherwise, California courts include the requested attorneys' fees when calculating the total value of the settlement fund. *Lealao v. Beneficial California, Inc*, 82 Cal. App. 4th 19, 33 (2000). Thus, "the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class …." *In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 554 (2009) (quoting the Manual for Complex Litigation § 21.71 at 525 (4th ed. 2008)). Moreover, the Court must not consider the total monetary amount distributed to the Class; rather, the Court should only consider the amount *made available* to the Class. As articulated in *Young v. Polo Retail, LLC*, 2007 U.S. Dist. LEXIS 27269 (N.D. Cal. Mar. 28, 2007), Ninth Circuit precedent requires courts to award class counsel fees based on the total benefits being made available rather than the amount actually paid out. *Id*. at *23 (citing *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026 (9th Cir. 1997) (ruling that a district court abused its discretion in basing attorney fee award on actual distribution to class instead of amount being made available).

Here, however, since the settlement fund is fully subscribed by the 173,000 timely and valid claims, there is no difference between the amount made available and the actual payout.[1] Accordingly, the total value of the Settlement Fund is $8.25 million.

[1] Although vouchers only make up 3.2 percent of all valid and timely claims, these vouchers are valued at "100 cents on the dollar" here because class members were given a choice between choosing cash or vouchers, and because the vouchers have no expiration date, are freely transferrable, and are redeemable at any retailer that

2. The Ninth Circuit's 25% Benchmark Is Fair And Reasonable In This Case

The Ninth Circuit established 25% of the common fund as a starting benchmark. *Hanlon*, 150 F.3d at 1029. Although Class Counsel believe that an upward departure from the benchmark is merited here, Class Counsel is seeking only the 25% benchmark such that Class Members' claims are not diluted beyond the modest 10% pro rata adjustment.

The Ninth Circuit has identified five factors that are relevant in determining whether requested attorneys' fees in a common fund case are reasonable: (a) the results achieved; (b) the risk of litigation; (c) whether Class Counsel's work generated benefits beyond the Class settlement fund, (d) market rates as reflected by awards made in similar cases; and (e) the contingent nature of the fee and the financial burden carried by the plaintiffs. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir. 2002). Each of these factors shows that the Ninth Circuit's 25 percent benchmark is reasonable, and that any downward adjustment would be manifestly unfair. Here, a fee of 25 percent is reasonable for the reasons set forth below.

a. Class Counsel Achieved Extraordinary Results For The Class

Both the amount of relief offered by the Settlement and the Notice Plan provide extraordinary relief for the class. As discussed above and in Plaintiffs' Motion for Final Approval of Class Action Settlement, the vast majority of Class Members will receive far more than 100 percent of the relief that would have been available to them had they prevailed at trial. Indeed, a Class Member would have needed to have purchased *more than 225 Subject Products* (and never save a receipt)

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sells the Subject Products. *See, e.g. Hendricks v. Starkist Co.*, 2016 WL 5462423, at *7, *10 n. 3 (N.D. Cal. Sept. 29, 2016) (finding that "vouchers are valued at 100 cents on the dollar" where the vouchers have no expiration date, are freely transferrable, and are redeemable at any retailer that sells the products). No reasonable Class Member would have opted for the voucher option had they believed that the vouchers were worth less than the cash option.

during the Class Period to conceivably not be made 100 percent whole by this settlement. Class Counsel is not even aware if such a hypothetical Class Member exists, as persons buying in bulk likely do so for purposes of resale and would, by definition, not be members of the Class. For typical Class Members who bought the Subject Products a few, or a few dozen times, the Settlement will provide them with hundreds, if not thousands, of percent more compensation than would have been available at trial. For example, Class Members that claim to have purchased only one Subject Product within the class period will receive *2,250 percent more than they could have recovered at trial*.

Further, Class Counsel negotiated a Notice Plan that ultimately resulted in at least 87 percent reach, with 173,000 valid and timely claims submitted. Weisbrot Decl. ¶¶ 9-10, 14. Indeed, the $8.25 million made available by the Settlement was almost exactly the amount needed to compensate every Claim in full such that the entire $8.25 million was exhausted without resorting to extensive dilution. Class Counsel is unaware of any other case where, as here, the number and identity of Class Members were not known, the entire claims-made settlement fund was exhausted, and dilution was 10 percent or less. For instance, in *Hendricks*, the settlement at issue stated that class members could receive $25 in cash, but, due to the high number of claims, class members only received about $2 due to dilution. *Hendricks*, 2016 WL 5462423, at *5, *8. Despite this fact, the court awarded Bursor & Fisher, P.A., also class counsel in *Hendricks*, 30 percent of the entire class fund, as the high amount of claims was evidence of a good notice program, not an insufficient fund. *See id*. Here, the size of the Settlement fund and amount of claims are almost perfectly aligned, such that the entire $8.25 million fund will be exhausted with only minor dilution.

The $8.25 million settlement is further outstanding when seen in comparison to an earlier nationwide settlement concerning the same defendant at issue here

(Millennium Products, Inc.), represented by the same law firm (O'Melveny & Myers LLP) and concerning the same products (GT's Kombucha beverages). *See* Fisher Decl. Exs. 12, 13. In November 2011, Judge Munter of the San Francisco Superior Court granted final approval to a nationwide class settlement in *Gauss v. Millennium Products, Inc.*, Case No. CGC-10-503347, where the plaintiff alleged that GT's Kombucha beverages (Millennium's Kombucha beverages preceding the split into a "Classic" and "Enlightened" line) contained high, undisclosed amounts of alcohol. *See id*. The class definition encompassed all purchasers of Millennium's GT's Kombucha products spanning a four-year period between September 2006 and September 2010. *See id*, Ex. 12, at 4-5. All class members that did not have proof of purchase, which was virtually all class members, *received a maximum of six $1 coupons*, which expired one year from issuance, *and nothing else*. *See id*. at 5-6. The settlement did not pay a single dollar to any class member and did not offer much of anything of value at all. Here, by contrast, Class Members will be made more than whole, in cash. Further, the 3.2 percent of claimants that opted for the voucher option are guaranteed to receive an amount of beverages equal to the amount of claims submitted, without having to spend another dollar of their own. In addition, the vouchers never expire and are fully transferable. For the claimants that chose the voucher option, it was, if anything, *more valuable that cash*, as they were free to choose the cash option instead.

b. *Plaintiffs' Novel Claims Carried Substantial Litigation Risk*

The second *Vizcaino* factor looks to the risk and novelty of the claims at issue. Both are certainly present here. *See gen*. Fisher Decl. ¶¶ 16-19 (discussing the risks of litigating Plaintiffs' claims). Class Counsel undertook significant financial risk in prosecuting this case. As an initial matter, every plaintiffs' firm to have ever tried to certify a Rule23(b)(3) monetary damages class in an antioxidant mislabeling case has failed. *See, e.g., Kosta v. Del Monte Foods, Inc.*, 308 F.R.D. 217, 220, 231 (N.D.

Cal. 2015) (denying class certification in antioxidant mislabeling case as to Rule 23(b)(3) and (b)(2) classes); *Khasin v. R.C. Bigelow, Inc.*, 2016 WL 1213767, at *4 (N.D. Cal. Mar. 29, 2016) (same); *Lanovaz v. Twinings N.A., Inc.*, 2014 WL 1652338, at *7 (N.D. Cal. Apr. 24, 2014) (denying certification of 23(b)(3) class in antioxidant mislabeling case). Plaintiffs may have fared no better at summary judgment considering that some antioxidants (*e.g.*, catechins) are actually present in the Subject Products, just not the antioxidant "nutrients" mandated by federal and state law. *See, e.g., Khasin v. R. C. Bigelow, Inc.*, 2016 WL 4502500, at *3-*6 (N.D. Cal. Aug. 29, 2016) (granting summary judgment in favor of defendant in antioxidant labeling case where it was undisputed that the tea beverage contained *some* antioxidants).

Further, even if Plaintiffs were able to prove a price premium of about four percent as to the antioxidant claims, they would face incredible difficulty proving a price premium for the remaining claims. For instance, as to the alcohol claims, it would be difficult to establish a price premium because Millennium's alcoholic kombucha beverages (the "Classic" line) and the purported non-alcoholic beverages (the "Enlightened" line) *retail for the exact same price at the same retail locations*. Even if Plaintiffs were to establish an alcohol labeling problem, the alcohol levels of kombucha products necessarily vary over time due to an ongoing fermentation process. Thus, the amount of alcohol in the accused products varies greatly between purchases, with some class members potentially receiving Enlightened products below and above the 0.5% alcohol by volume threshold. Further, the alcohol labeling claims would likely devolve into an uncertain "battle of the experts." Millennium produced 1,394 tests of the alcohol concentration of Enlightened kombucha beverages spanning several years within the Class Period. Every single test showed that the beverages were *below* the federally mandated 0.5% threshold set for non-alcoholic beverages.

Plaintiffs would face similar issues with their claims concerning the alleged high amounts of sugar in the Subject Products. The Subject Products contain varying amounts of sugar, and, due to the natural fermentation of the products,[2] the amount of sugar varies over time, such that Plaintiffs would have to present a viable damages theory in the face of likely evidence that some Class Members were not injured at all, while others may have been depending on the time the Subject Products remained on the shelves. Further, these inconsistencies would present issues as to commonality and predominance at class certification.

Class Counsel took significant risks in taking on this case and litigating for multiple years. This was not a "novel" case in the sense that no one had ever brought similar claims before. This was a "novel" case because, as far as Plaintiffs are aware, no one has ever been able to prevail under similar theories of relief. In light of these risks, the $8.25 million Settlement is an outstanding result.

c. *Class Counsel Generated Benefits Beyond The Settlement Fund*

The third factor cited in *Vizcaino* looks to whether "counsel's performance generated benefits beyond the cash settlement fund." *Vizcaino*, 290 F.3d at 1049. That is true here as well. The Settlement provides expansive injunctive relief. Millennium has agreed to (1) cease ordering and printing labels bearing the term "antioxidant"; (2) include a warning on its labels that "the products contain naturally occurring alcohol and should not be consumed by individuals seeking to avoid alcohol due to pregnancy, allergies, sensitivities or religious beliefs"; (3) regularly test samples of its products (at the time of bottling and the time of expiration) using a third-party laboratory to ensure compliance with federal and state labeling standards and to ensure the accuracy of the representations regarding the sugar content of its products; and (4) include a warning on its labels that the products may be under

[2] The bacteria in the Subject Products allegedly "eats" the sugar and converts it into alcohol.

pressure and that the failure to refrigerate the products may result in leaking or gushing. Further, should a new, industrywide standard for testing the alcohol content of kombucha be developed, Millennium will adopt that testing methodology.

d. Market Rates As Reflected By Awards In Similar Cases

The fourth factor cited by *Vizcaino* looks to market rates as reflected by awards in similar cases. *Vizcaino*, 290 F.3d at 1049 ("Fourth, the court found the 28% rate to be at or below the market rate."). The reasonableness of Class Counsel's 25% fee request is illustrated by numerous awards ranging from 30% to 40% in similar cases. For example, when awarding 32.8% of the settlement fund for fees and costs, Judge Patel explained: "absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%[,]" as this will "encourage plaintiffs' attorneys to move for early settlement, provide predictability for the attorneys and the class members, and reduce the time consumed by counsel and court in dealing with voluminous fee petitions." *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378–79 (N.D. Cal. 1989); *see also In re Pac. Enters. Sec. Litig.*, 47 F.3d at 378-79 (affirming attorney's fee of 33% of the recovery); *Williams*, 129 F.3d at 1027 (33.33% of total fund awarded); *Morris*, 54 Fed. App'x at 663 (affirming fee award of 33% of the recovery); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010) (citing to five recent class actions where federal district courts approved attorney fee awards ranging from 30% to 33%); *Martin v. AmeriPride Servs., Inc.*, 2011 U.S. Dist. LEXIS 61796, at *23 (S.D. Cal. June 9, 2011) (noting that "courts may award attorneys fees in the 30%-40% range in … class actions that result in recovery of a common fun[d] under $10 million"); *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416, at *22-23 (S.D. Cal. June 1, 2010) (approving attorney fee award of 33.33% of the common fund and holding that award was similar to awards in three other cases where fees ranged from 33.33% to 40%); *Ingalls v. Hallmark Mktg. Corp.*, 2009 U.S. Dist. LEXIS 131081

(C.D. Cal. Oct. 16, 2009) (awarding 33.33% fee on a $5.6 million common fund settlement); *Rippee v. Boston Mkt. Corp*., No. 05-CV-1359 TM (JMA) (Dkt. No. 70, at 7) (S.D. Cal. Oct. 10, 2006) (awarding a 40% fee on a $3.75 million in a common fund settlement).

There is ample authority to make an upwards adjustment from the 25% benchmark here. Certainly, awarding only the 25% in this case is reasonable.

e. The Contingent Nature Of The Fee And Financial Burden Borne By Class Counsel

The fifth factor cited by Vizcaino was the contingent nature of the fee and the financial burden carried by the plaintiffs. *Vizcaino*, 290 F.3d at 1050. To date, Class Counsel has worked for two and a half years with no payment, and no guarantee of payment absent a successful outcome. Class Counsel also advanced $18,121.16 in out-of-pocket expenses, again with no guarantee of repayment. If the case had advanced through class certification, these expenses would have increased many-fold, and Class Counsel would have been required to advance these expenses potentially for several years to litigate this action through judgment and appeals.

B. The Court May Alternatively Grant The Requested Attorneys' Fees Under The Lodestar Method

Under Ninth Circuit standards, a District Court may award attorneys' fees under the "lodestar" method. *Hanlon*, 150 F.3d at 1029. The lodestar figure is calculated by multiplying the hours spent on the case by reasonable hourly rates for the region and attorney experience. *See*, *e.g.*, *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011); *Hanlon*, 150 F.3d at 1029. The resulting lodestar figure may be adjusted upward or downward by use of a multiplier to account for factors including, but not limited to: (i) the quality of the representation; (ii) the benefit obtained for the class; (iii) the complexity and novelty of the issues presented; and (iv) the risk of nonpayment. *Hanlon*, 150 F.3d at 1029;

see also Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975).[3] Courts typically apply a multiplier or enhancement to the lodestar to account for the substantial risk that class counsel undertook by accepting a case where no payment would be received if the lawsuit did not succeed. *Vizcaino*, 290 F.3d at 1051.

1. Class Counsel Spent A Reasonable Number Of Hours On This Litigation At A Reasonable Hourly Rate

Class Counsel worked very efficiently. A single law firm, Bursor & Fisher, served as Class Counsel. Class Counsel was assisted intermittently by Lehrman Beverage Law, PLLC, a boutique firm specializing in alcohol testing, compliance, and regulation, without whom this Settlement would not have been possible. *See* Fisher Decl. ¶ 27; Declaration of Robert Lehrman ¶¶ 8-14. Like Bursor & Fisher, Lehrman Beverage Law has not been paid a single dollar for their extensive work on this case. *See* Lehrman Decl. ¶ 14. There was no duplication of effort. Class Counsel have submitted their detailed daily billing records showing what work was done and by whom. Fisher Decl. Ex. 2. *See also* Lehrman Decl. ¶¶ 8-14. These records confirm Bursor & Fisher's efficient billing. For example, Bursor & Fisher strives to assign as much work as possible to less senior lawyers who bill at lower hourly rates in order to minimize fees for the Class. More than 81% of attorneys' hours (843.7 hours) were billed by associates. Fisher Decl. ¶ 40. However, this was a novel case that involved a lot of original work, which required significant involvement by more experienced lawyers. Bursor & Fisher partners billed 17.7% of

[3] *Kerr* identifies twelve factors for analyzing reasonable attorneys' fees: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and the ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

the total hours (196.4 hours), primarily on developing the litigation strategy, editing briefs on dispositive motions, making court appearances, attending mediations, and negotiating the settlement. *See id*. In total, as of June 15, 2017, Bursor & Fisher billed 1112.1 hours and Lehrman Beverage law, PLLC billed 139,410 hours. *See id*; Lehrman Decl. ¶ 13.

Defendants were represented by very able counsel from some of the largest law firms in the United States. The case was hard fought, with multiple motions to dismiss and requiring five amended pleadings. Given the number of contested motions, the volume of discovery, the nature of the litigation, and the difficulty of the settlement negotiations, the number of hours Class Counsel spent was reasonable.

The blended hourly rate for Bursor & Fisher's work of $414.62 is quite reasonable. Fisher Decl. ¶ 40. Lehrman Beverage Law's blended hourly rate of $375.77 is also reasonable. *See* Lehrman Decl. ¶ 13. And the hourly rates for each of the lawyers who staffed the case, which are set forth in the Fisher and Lehrman declarations and exhibits thereto, are also reasonable and amply supported by the evidentiary material submitted therewith. Fisher Decl. ¶¶ 32-40 & Exs. 1-2, 4-11; Lehrman Decl. ¶¶ 13-14. *See, e.g., In re Amgen Sec. Litig.,* 2016 U.S. Dist. LEXIS 148577, *27 (C.D. Cal. Oct. 25, 2016) (approving "a billing rate ranging from $750 to $985 per hour for partners, $500 to $800 per hour for 'of counsels'/senior counsel, and $300 to $725 per hour for other attorneys. The Court has reviewed the attorneys' **hourly rates** and hours worked, and found them reasonable, given the duration of this litigation and the favorable settlement for the class.") (emphasis in original); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Products Liability Litig.*, No. 10-ml- 02151 NS (FMOx), Dkt. No. 3933 (C.D. Cal. June 24, 2013) (finding that "[c]lass counsel's experience, reputation, and skill, as well as the complexity of the case" justified their rates that ranged from $150 to $950); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 2015 U.S. Dist. LEXIS 168586,

*51-52 (C.D. Cal. Mar. 17, 2015) (finding Class Counsel's hourly rates ranging from $335 to $905 "reasonable for complex class action litigation in Los Angeles.")

2. All Relevant Factors Support Applying A Multiplier To Class Counsel's Lodestar

The lodestar analysis is not limited to the initial mathematical calculation of class counsel's base fee. *See Morales v. City of San Rafael*, 96 F.3d 359, 363-64 (9th Cir. 1996). Rather, Class Counsel's actual lodestar may be enhanced according to those factors that have not been "subsumed within the initial calculation of hours reasonably expended at a reasonable rate." *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983) (citation omitted); *see also Morales*, 96 F.3d at 364. In a historical review of numerous class action settlements, the Ninth Circuit found that lodestar multipliers normally range from 0.6 to 19.6, with most (83%) falling between 1 and 4, and a bare majority (54%) between 1.5 and 3. *See Vizcaino*, 290 F.3d at 1051 n.6; *see also* Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 14:03 (3d ed. 1992) (recognizing that multipliers of 1 to 4 are frequently awarded). Yet state and federal courts often approve multipliers of 4 or more.[4]

In considering the reasonableness of attorneys' fees and any requested multiplier, the Ninth Circuit has directed district courts to consider the time and labor required, novelty and complexity of the litigation, skill and experience of counsel,

[4] *See, e.g.*, *In re Cenco Inc. Sec. Litig.*, 519 F. Supp. 322 (N.D. Ill. 1981) (approving multiplier of 4 in securities class action); *Rabin v. Concord Assets Grp., Inc.*, 1991 U.S. Dist. LEXIS 18273 (S.D.N.Y. Dec. 19, 1991) (approving multiplier of 4.4 in securities class action); *Municipal Auth. of Bloomsburg v. Pennsylvania*, 527 F. Supp. 982 (M.D. Pa. 1981) (approving multiplier of 4.5); *In re Beverly Hills Fire Litig.*, 639 F. Supp. 915 (E.D. Ky. 1986) (approving multiplier of up to 5); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185 (S.D.N.Y. 1997) (approving multiplier of 5.5); *Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890 (1st Cir. 1985) (approving multiplier of 6); *Muchnick v. First Fed. Savs. & Loan Assoc. of Phil.*, 1986 U.S. Dist. LEXIS 19798 (E.D. Pa. Sept. 30, 1986) (approving multiplier of 8.3 in a consumer class action); *Cosgrove v. Sullivan*, 759 F. Supp. 166 (S.D.N.Y. 1991) (approving multiplier of 8.74); *Perera v. Chiron Corp.*, Civ. No. 95-20725-SW (N.D. Cal. 1999, 2000) (approving multiplier of 9.14; cited in California Class Actions and Coordinated Proceedings §15.05).

the results obtained, and awards in similar cases. *Blum v. Stenson*, 465 U.S. 886, 898-900 (1984); *Kerr*, 526 F.2d at 70. All of the factors weigh heavily in favor of the requested fee award in this action. *Vizcaino*, 290 F.3d at 1051.

a. Novelty And Complexity Of This Litigation

As discussed above, this is the first case Plaintiffs are aware of concerning antioxidant or alcohol mislabeling claims where class members actually received a single dollar of cash relief. No one has even succeeded in certifying a Rule 23(b)(3) class where similar allegations were involved. Class Counsel hired experts to conduct multiple, complicated tests concerning the alcohol content of the Subject Products, and even personally inspected the laboratory and equipment used to conduct these tests. *See* Fisher Decl. ¶ 5; Lehrman Decl. ¶¶ 8-10. Class Counsel worked with legal specialists (Lehrman Beverage Law) who make a living advising major corporations on the intricacies of the regulations and testing involved herein. *See* Fisher Decl. ¶ 27; Lehrman Decl. ¶¶ 2-12. Class Counsel's significant investment of time into investigating the scientific and technological issues concerning alcohol and sugar testing is the sole reason this case settled for $8.25 million, instead of the $1 coupons made available in *Gauss*, which involved substantially the same products, the same defendant, and the same defense counsel. *See* Fisher Decl., Exs. 12, 13. Thus, Class Counsel was faced with difficult legal and factual issues, which required creativity and sophisticated analysis.

As the Court is familiar, this action was hotly contested. It required substantial original work, and significant risk that Class Counsel's efforts (and its out-of-pocket costs) would go uncompensated. Settlement negotiations included three formal mediations and many hours of informal settlement discussions, which were complicated both in terms of the subject matter and damages analyses at issue. *See id.* ¶¶ 10-13.

Therefore, a multiplier of 3.43, *see id.* ¶¶ 28, 33, is well within the parameters used throughout this Circuit. Indeed, in light of the novelty and complexity of this case, the trailblazing work it required, and concomitant risks to counsel, a substantially higher multiplier would be justified.

b. Class Counsel Provided Exceptional Representation Prosecuting This Complex Case

Class Counsel respectfully submits that the lawyers at Bursor & Fisher have conducted themselves in this action in a professional, diligent and efficient manner. The lawyers at Bursor & Fisher have extensive experience in the field of class action litigation. *See id.*, Ex. 1 (Bursor & Fisher's resume). Additionally, litigation tasks were allocated to prevent "over-lawyering" and inefficiency. The bulk of the work was performed by a small number of attorneys fully familiar with the complex factual and legal issues presented by this litigation. This division of labor permitted the work to be done efficiently, resulting in an economy of service and avoiding duplication of effort.

c. Class Counsel Obtained Excellent Class Benefits

As discussed above, the Settlement will provide each claimant (other than an unrealistic, hypothetical claimant that purchased more than 225 Subject Products and saved no receipts), more than 100% of the relief that would have been available had Plaintiffs prevailed at trial. The Notice Plan was a resounding success, as 173,000 timely and valid claims have been submitted and the entire $8.25 million fund will be exhausted. The Settlement also offers broad injunctive relief. Indeed, it is difficult to conceive how Class Counsel could have structured a better settlement.

d. Class Counsel Faced A Substantial Risk Of Nonpayment

A critical factor bearing on fee petitions in Ninth Circuit courts is the level of risk of non-payment faced by Class Counsel at the inception of the litigation. *See*,

e.g., *Vizcaino*, 290 F.3d at 1048. The contingent nature of Class Counsel's fee recovery, coupled with the uncertainty that any recovery would be obtained, are significant. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994). In *Wash. Pub. Power*, the Ninth Circuit recognized that:

> It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases …. [I]f this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.

Id. at 1299-1300 (citations omitted) (internal quotations marks omitted). Throughout this case, Class Counsel expended substantial time and costs to prosecute a nationwide class action suit with no guarantee of compensation or reimbursement in the hope of prevailing against sophisticated Defendants represented by high caliber attorneys. *See* Fisher Decl. ¶¶ 38-39. Class Counsel obtained a highly favorable result for the Class, knowing that if its efforts were ultimately unsuccessful, it would receive no compensation or reimbursement for its costs. This fact alone supports a finding that Class Counsel is entitled to a multiplier.

VI. CLASS COUNSEL'S EXPENSES WERE REASONABLE AND NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED ON BEHALF OF THE CLASS

To date, Class Counsel incurred out-of-pocket costs and expenses in the aggregate amount of $18,121.16 in prosecuting this litigation on behalf of the Class. Fisher Decl., Ex. 3. These expenses are attached as Exhibit 3 to the Declaration of L. Timothy Fisher submitted herewith.

The Ninth Circuit allows recovery of litigation expenses in the context of a class action settlement. *See Staton*, 327 F.3d at 974. Class Counsel is entitled to reimbursement for standard out-of-pocket expenses that an attorney would ordinarily

bill a fee paying client. *See*, *e.g.*, *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). These expenses include court fees, copying fees, courier charges, legal research charges, telephone/facsimile fees, travel expenses, postage fees, court reporter fees, videographer fees, transcript costs, and other related expenses. Fisher Decl., Ex. 3.

Each of these expenses was necessarily and reasonably incurred to bring this case to a successful conclusion, and they reflect market rates for various categories of expenses incurred. *See id.* ¶ 30.

VII. THE REQUESTED INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES ARE FAIR AND REASONABLE

In recognition of their efforts on behalf of the Class, and subject to the approval of the Court, Defendants have agreed to pay the Class Representatives up to $2,000 each (for a total of $6,000), as appropriate compensation for their time and effort serving as the class representatives in this litigation.

Incentive awards "are fairly typical in class action cases." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). Such awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Id*. at 958-59. Incentive awards are committed to the sound discretion of the trial court and should be awarded based upon the court's consideration of, inter alia, the amount of time and effort spent on the litigation, the duration of the litigation and the degree of personal gain obtained as a result of the litigation. *See Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995). Incentive awards are appropriate when a class representative will not benefit beyond ordinary class members. For example, where a class representative's claim makes up "only a tiny fraction of the common fund," an incentive award is justified. *Id*., 901 F. Supp. at 299.

The requested amount of $2,000 each for the Class Representatives is appropriate to compensate them for their efforts in bringing this action for the benefit of millions of Class Members. Throughout the litigation, the Class Representatives held regular meetings with Class Counsel to receive updates on the progress of the case and to discuss strategy. Retta Decl. ¶¶ 3-10; Schofield Decl. ¶¶ 3-10; Manire Decl. ¶¶ 3-10. They assisted in Class Counsel's pre-suit investigation by discussing their experiences and providing information on their purchase and use of the Subject Products, among other matters. *Id*. The Class Representatives assisted in drafting all six complaints that have been filed in this litigation, and they reviewed the complaints for accuracy before they were filed. *Id*. The Class Representatives coordinated with Class Counsel to form responses to all discovery requests proffered by Defendants, including responding to 38 requests for production (two separate sets of requests for production) and 24 total interrogatories (two separate sets of interrogatories), and they searched for responsive documents. *Id*. They also assisted with preparing supplemental responses to Millennium's interrogatories. *Id*. They were intimately involved in the settlement process, and have continued to keep abreast of settlement progress to date. *Id*. They were prepared to litigate this case to a verdict if necessary. *Id*. Their dedication and efforts have conferred a significant benefit on millions of purchasers of the Subject Products across the United States. *Id*.

VIII. CONCLUSION

Class Counsel and the Class Representatives have worked on this case for two and a half years. That work produced a benefit to Class members in the form of a $8.25 million Settlement Fund, without even taking into account the injunctive relief. We now seek to be paid fairly for that work. Class Counsel and the Class Representatives therefore respectfully request that the Court approve:

- $2,062,500 in attorneys' fees for Class Counsel, representing 25% of the Settlement Fund;
- $18,121.16 in reimbursement of Class Counsel's out-of-pocket expenses; and
- Incentive awards of $2,000 for each of the Class Representatives (for $6,000 total).

For the foregoing reasons, these amounts are fair and reasonable and should be approved.

Dated: June 19, 2017

Respectfully submitted,

BURSOR & FISHER, P.A.

By: */s/ L. Timothy Fisher*
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