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Class Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DEBBIE KROMMENHOCK and STEPHEN HADLEY, on behalf of themselves, all others similarly situated, and the general public,

Plaintiffs,

v.

POST FOODS, LLC,

Defendant.

Case No. 3:16-cv-04958-WHO

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

Judge:	Hon. William H. Orrick
Hearing Date:	June 23, 2021, 2:00 p.m.
Location:	Courtroom 2

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NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD: PLEASE TAKE NOTICE THAT, on June 23, 2021, at 2:00 p.m., or as soon thereafter as may be heard, Plaintiffs will move the Court, the Honorable William H. Orrick presiding, for an Order awarding attorneys' fees and costs, and Class Representatives service awards. 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 the Settlement Agreement (Dkt. No. 286-1, "SA") attached to the Declaration of Jack Fitzgerald in Support of Preliminary Approval (Dkt. No. 286, "PA Fitzgerald Decl."), Plaintiffs' Motion for Preliminary Approval (Dkt. No. 285, "PA Mot."), and the Court's February 24, 2021 Order Granting Preliminary Approval (Dkt. No. 294); and any additional evidence and argument submitted in support of the Motion.

ISSUES TO BE DECIDED

Whether and in what amounts to award attorneys' fees and costs, and Class Representative service awards, pursuant to a proposed nationwide class Settlement that the Court on February 24, 2021 preliminarily approved (*see* Dkt. No. 294).

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

The Settlement Agreement's $15 million non-reversionary common fund appears to be the largest amount any cereal company has ever paid to settle any class action, and one of the largest settlements in United States history resolving any food false advertising class action. Fitzgerald Decl. ¶¶ 2-3. To achieve this result, Class Counsel risked thousands of hours of work and nearly $1 million in out-of-pocket expenses on a novel liability theory, reaching a resolution only after more than four years of litigation, and then only a few months away from trial. *See generally* PA Fitzgerald Decl. ¶¶ 3-24 (detailing case background and investigation, fact and expert discovery, law and motion practice, and settlement negotiations).

Success was far from certain. When counsel filed this and its companion cases against Kellogg and General Mills in 2016, the lawsuits were assailed as "problematic in numerous ways," "not . . . particularly strong on the merits," and "no less absurd than past lawsuits against cereal makers, such as those alleging consumers are misled to believe that FrootLoops contain real fruit," *see* Fitzgerald Decl. ¶¶ 4-6 & Exs. 1-2.

As late as 2018, one member of the defense bar predicted Plaintiffs would "face serious challenges to certification as a class action." *See id.* ¶ 7 & Ex. 3. Post, moreover, is a Fortune 500 company, with more than $5 billion in annual revenue. It was represented by some of most accomplished food lawyers in the country, first at Venable LLP,[1] then primarily at Faegre Drinker Biddle & Reath LLP, a "top 50 firm" with "more than 1,300 experience attorneys, consultants, and professionals."[2] Plaintiffs, by contrast, are lay consumers who were primarily represented by a small law firm with just three attorneys and one paralegal throughout most of the litigation. *Id.* ¶ 11.

Despite these challenges—and before finally obtaining Post's acquiescence to the Settlement—Plaintiffs and their counsel obtained what Post described as "the most sprawling deceptive-practices class ever certified in the Ninth Circuit, covering more than 160 unique cereal packages," *id.* Ex. 7 at 13; survived Post's motion for summary judgment; and defeated Post's motions for reconsideration and § 1292 interlocutory appeal, its Rule 23(f) petition for permission to appeal, its motion for judgment on the pleadings, seeking dismissal of Plaintiffs' equitable claims for monetary relief, and its motion to sever the case into five separate trials.

Given Plaintiffs' novel theory, the case's complex evidence, Post's innovative defenses and persistent motion practice, Class Counsel's skillful lawyering, and the excellent result—all in the face of enormous risk—the Court should grant Class Counsel's request for fees of $5 million, representing one-third of the common fund. The Court should also award Class Counsel's costs of $967,606, which were necessary to prosecute the action in the manner needed to achieve an excellent outcome for the class.

Finally, the Court should grant Class Representatives Debbie Krommenhock and Stephen Hadley service awards of $7,500 each, which are reasonable in light of their contributions to the case, the personal risks they faced, and in relation to the size of the Settlement.

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[1] Mr. Angel A. Garganta, who initially represented Post, is "[a] nationally recognized authority on food, beverage, and supplement litigation and consumer protection laws[.]" *See id.* Ex. 4.

[2] "About Us," *at* https://www.faegredrinker.com/en/about. Ms. Sarah Brew, for example, "has a national reputation for effectively defending food industry clients against labeling and class action consumer fraud claims," and "leads the firm's food litigation and regulatory practice, which is nationally ranked by *Chambers USA*"; and Mr. Aaron Van Oort—who clerked for Hon. Richard A. Posner then Hon. Antonin Scalia—has, according to *Chambers USA*, "notable prominence and presence in" the field of appellate advocacy, as well as substantial experience "develop[ing] and implement[ing] the strategies to defeat class actions" in "more than 150 putative class actions," *see* Fitzgerald Decl. Exs. 5-6.

II. ARGUMENT

A. THE COURT SHOULD GRANT CLASS COUNSEL'S REQUEST FOR FEES

"Pursuant to Federal Rule of Civil Procedure 23(h), a 'court may award reasonable attorneys' fees' to plaintiffs' counsel in class action cases." *In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at *1 (N.D. Cal. Sept. 20, 2018) (Orrick, J.) ["*Lidoderm*"]. "Where 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," so long as "their discretion . . . [is] exercised so as to achieve a reasonable result." *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ["*Bluetooth*"].

Here, Class Counsel requests that the Court apply the percent-of-fund method and award attorneys' fees of $5 million, representing one-third of the $15 million common fund. That amount is also justified under a lodestar-multiplier crosscheck analysis, as it represents a modest 1.78 multiplier to Class Counsel's more than $2.8 million lodestar, which was reasonably expended.

i. Class Counsel's Fee Request is Reasonable Under the Percent-of-Fund Method

"The use of the percentage-of-the-fund method in common fund cases is the prevailing practice in the Ninth Circuit for awarding attorneys' fees and permits the Court to focus on showing that a fund conferring benefits on a class was created through the efforts of plaintiffs' counsel." *In re Apple Inc. Device Performance Litig.*, 2021 WL 1022866, at *2 (N.D. Cal. Mar. 17, 2021) (alteration and quotation omitted). The method "confers 'significant benefits . . . including consistency with contingency fee calculations in the private market, aligning the lawyers' interest with achieving the highest award for the class members, and reducing the burden on the courts that a complex lodestar calculation requires.'" *Id.* (quoting *Tait v. BSH Home Appliances Corp.*, 2015 WL 4537463, at *11 (C.D. Cal. July 27, 2015)). By contrast, "[i]n a common fund case, a lodestar method does not necessarily achieve the stated purposes of proportionality, predictability and protection of the class," *Bolton v. U.S. Nursing Corp.*, 2013 WL 5700403, at *5 (N.D. Cal. Oct. 18, 2013).

Although "[t]his circuit has established 25% of the common fund as a benchmark award for attorney fees. . . . [i]n most common fund cases, the award exceeds that benchmark." *Cheng Jiangchen v. Rentech, Inc.*, 2019 WL 5173771, at *9 (C.D. Cal., Oct. 10, 2019) (quotations omitted). Thus, "fee award[s] of one-third [are] within the range of awards in this Circuit." *Lidoderm*, 2018 WL 4620695, at *4 (citing *Larsen v.*

Trader Joe's Co., 2014 WL 3404531, at *9 (N.D. Cal. July 11, 2014) (Orrick, J.) (collecting cases)); *see also Milburn v. PetSmart, Inc.*, 2019 WL 5566313, at *7 (E.D. Cal. Oct. 29, 2019) ("the payment of 33.33 percent of the settlement in attorney's fees is not out of the ordinary").

In "determining whether to depart from the 25% benchmark," courts consider "'(1) the result achieved; (2) the risk involved in the litigation; (3) the skill required and quality of work by counsel; (4) the contingent nature of the fee; and (5) awards made in similar cases.'" *Lidoderm*, 2018 WL 4620695, at *3 (quoting *Larsen*, 2014 WL 3404531, at *9); *see also Alvarez v. Farmers Ins. Exch.*, 2017 WL 2214585, at *2 (N.D. Cal. Jan. 18, 2017) (Orrick, J.) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002)). Each of these factors supports Class Counsel's fee request.

a. The Result Achieved

"With respect to the first factor, the overall result and benefit to the class from the litigation is the most critical factor in granting a fee award." *Larsen*, 2014 WL 3404531, at *9 (citing *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008)). "The 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 in original omitted) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 946 (9th Cir. 2003)). Considering its monetary and injunctive relief, the Settlement is an excellent result achieved by Class Counsel for the Class, supporting its requested fee. *See Larsen*, 2014 WL 3404531, at *9 (factor favored final approval 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," both of which the court found to be "significant benefits to the class").

First, the Settlement's monetary relief is entirely in the form of an all-cash, non-reversionary common fund, which is the gold standard for class action settlements because they provide 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.").

Second, the amount of the relief is substantial. Our research suggests it is (i) the only classwide settlement Post has ever paid; (ii) the largest class action settlement any cereal company has ever paid (regarding any type of representative claim); (iii) the largest non-reversionary common fund of a food false advertising case involving a price premium damages model in United States history; and (iv) the second-largest non-reversionary common fund settlement of a food false advertising class action in United States history (and likely the second-largest in real value, as well) involving any kind of damages model. *See* Fitzgerald Decl. ¶¶ 2-3. Moreover, as detailed in Plaintiffs' Motion for Preliminary Approval, the amount is fair in relation to potential damages, especially considering that so much of the Class's damages were wrapped up in relatively weaker challenges to Honey Bunches of Oats and the Whole Grains Council Stamp. *See* PA Mot. at 21-22; PA Fitzgerald Decl. ¶¶ 26-29.

Third, the Settlement's injunctive relief is significant. Post has agreed to remove—if not previously removed—and refrain from using on any of the 11 Class Products through December 31, 2022, labeling claims that convey strong health messages, like "Less Processed," "No High Fructose Corn Syrup," "Natural," "Healthy," "Smart," "Nutritious," and "Wholesome," among others, so long as 10% or more of the cereal's calories come from added sugar. SA ¶ 5. By reducing or eliminating the suggestion that the affected products are healthy, this injunctive relief "provides substantial *health* benefits to all purchasers . . . in light of the evidence offered by Plaintiff[s] about the health effects of [added sugar]." *See Guttmann v. Ole Mexican Foods, Inc.*, 2016 WL 9107426, at *3 (N.D. Cal. Aug. 1, 2016) (emphasis added) (record citation omitted); *cf. Bruno v. Quten Research Inst., LLC*, 2013 WL 990495, at *4 (C.D. Cal. Mar. 13, 2013) ("[T]here is a high value to the injunctive relief obtained" where "[n]ew labeling practices affecting hundreds of thousands of [units] per year . . . bring a benefit to class consumers, the marketplace, and competitors who do not mislabel their products."). Moreover, in light of Plaintiffs' *Daubert*-tested and trial-ready damages models, it is possible to conservatively estimate the economic value of the injunctive relief due to the savings consumers will realize, at approximately $22.7 million per year.[3] *See* Dkt. No. 287, Weir

[3] This valuation is conservative because it is based on only a single year of injunctive relief, but Post has agreed to refrain from using the statements through December 31, 2022, 17 months after the Final Approval Hearing. And Post had already removed some of the labeling statements, so the Class has already received some savings not included in the valuation. Finally, the valuation takes into account only 4 of the 16 statements Post has agreed to refrain from using, since those are the only claims for which Plaintiffs had an approved damages model.

1 Decl. ¶ 5 & Table 3; *compare Miller v. Ghiradelli Chocolate Co.*, 2015 WL 758094, at *5 (N.D. Cal. Feb.
2 20, 2015) (record citation omitted) (accepting Mr. Weir's testimony that "changed practices required by the
3 settlement . . . can be expected to eliminate various premiums associated with [the challenged] labeling and
4 save class members at least $13.46 million" in valuing settlement for purposes of awarding attorneys' fees).
5 Given its evidentiary basis and "mathematical[] ascertainab[ility]," the Court could reasonably
6 include this amount in its valuation of the Settlement Agreement. *See Boeing Co. v. Van Gemert*, 444 U.S.
7 472, 479 (1980); *Staton*, 327 F.3d at 972-73. In that case, Plaintiffs' $5 million fee request would represent
8 just ***10.6%*** of the $47,150,598 total Settlement value (*i.e.*, using Weir's yearly savings estimate extrapolated
9 to the approximately 17 months during which Post will be bound by the injunctive relief, and adding the
10 $15 million cash fund), which is eminently reasonable in relation to the 25% benchmark.
11 Plaintiffs, however, are not asking the Court to make a factual finding of the value of the injunctive
12 relief per se, but instead, to, "based on the record, determine the significance of this benefit, and employ it
13 as a qualitative factor in deciding whether a[n upward departure from the benchmark] is warranted." *See*
14 *Chambers v. Whirlpool Corp.*, 980 F.3d 645, 664 (9th Cir. 2020); *compare In re Amtel Corp. Derivative*
15 *Litig.*, 2010 WL 9525643, at *11-12 (N.D. Cal. Mar. 13, 2010) (considering "corporate governance reforms"
16 as a factor justifying departure from the 25% benchmark); *Good Morning to You Prods. Corp. v.*
17 *Warner/Chappell Music, Inc.*, 2016 WL 6156076, at *4 (C.D. Cal. Aug. 16, 2016) ("This factor weighs
18 heavily in favor of an upward departure from the benchmark" where "the settlement has substantial
19 monetary and nonmonetary components."); *cf. In re Ferrero Litig.*, 583 Fed. App'x 665, 667-68 (9th Cir.
20 2014) (In action "alleging that Ferrero was misleadingly advertising Nutella as a healthy breakfast food,"
21 where settlement included "injunctive relief requiring Ferrero to revise its advertising campaign for Nutella
22 and to supply more nutritional information," characterizing injunctive relief as "meaningful and consistent
23 with the relief requested in plaintiffs' complaint," and affirming fee award where "counsel's procurement
24 of monetary and injunctive relief appears to have been an exceptional result[.]").
25 Obtaining this injunctive relief was no small feat. *See* Fitzgerald Decl. ¶ 13. That is likely in part
26 because—as some commentators have noted (at least in the context of similar label changes agreed to in
27 *Hadley v. Kellogg*)—the relief "lends credence to the legal theory that a product's added sugars render
28 health-and-wellness claims printed on the product label misleading under consumer-protection laws." *See*

id. Ex. 8 at 3. Moreover, "the process of changing product labeling and associated marketing campaigns requires an enormous amount of time and financial resources." *Id.* at 2-3 (citing Martin J. Hahn & Samantha L. Dietle, "State and Federal Food-Labeling Reforms Impose Unappreciated Complexities and Compliance Challenges,"[4] WLF Legal Backgrounder (May 18, 2018)).

Fourth, 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 only, and the Settlement extends benefits to purchasers of some products not previously certified. While it is possible that, absent settlement, some Settlement Class Members could eventually see relief if additional lawsuits were 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 practically impossible to adjudicate on a class 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 complainted [sic] of" further 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).

Fifth, the lawsuit (especially in combination with similar suits against Kellogg and others) has had salutary effects beyond the Settlement Agreement's express relief. A March 2021 article about the Settlement Agreement in this case published by the National Law Review, for example, says that because "complex issues surround the impact of health of added sugars in a single product and a product's role in the total diet, nutrition claims that could imply the product is healthy seem risky for foods with added sugars." Fitzgerald Decl. Ex. 9. Another article published on FoodDive.com notes that in light of the lawsuit and Settlement, "[a] number of companies aren't waiting for a legal battle or more formal FDA action to change their product formulations." *Id.* Ex. 10 at 3; *see also id.* Ex. 11 at 3 (November 2019 article on Law360.com titled, "Kellogg's Deal Highlights Sugar Focus in Label Class Actions," saying that "the industry should be wary of making claims inconsistent with current thoughts on what constitutes a healthy food," and "should be reviewing its labels to determine if the claims align with scientific consensus and consumer expectations. If a product has added sugar, its manufacturer may benefit from evaluating whether

[4] *Available at* https://www.wlf.org/2018/05/18/publishing/state-and-federal-food-labeling-reforms-impose-unappreciated-complexities-and-compliance-challenges.

claims about the health aspects of the product are appropriate and consistent with consumers' current understanding of the term.").

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

Class Counsel here "assume[d] substantial risk in litigating this action on a contingency fee basis, and incurring costs without the guarantee of payment for its litigation efforts." *See Schenider v. Chipotle Mexican Grill, Inc.*, 2020 WL 511953, at *9 (N.D. Cal. Jan. 31, 2020); *compare* Fitzgerald Decl. ¶ 18. This also involved substantial sacrifice: because the firm representing Plaintiffs is "small . . . consisting of only [three] attorneys, [it] w[as] [ ] precluded from taking other fee generating employment." *See De Leon v. Ricoh USA, Inc.*, 2020 WL 1531331, at *15 (N.D. Cal. Mar. 31, 2020) (docket quotation omitted); *compare* Fitzgerald Decl. ¶ 19. "[W]hen counsel takes cases on a contingency fee basis, and 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: Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994)). "[C]ourts 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)

Besides the inherent risk in all contingency fee litigation, numerous things made this case especially treacherous. As one court in this district 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. Here, there was the added challenge that the case involved a novel liability theory relying on scientific evidence supporting recommendations for daily added sugar limitations to allege that certain labeling claims suggestive of health and wellness were misleading when advertising individual foods. On top of that, as the Court noted, "plaintiffs' challenge to so many Challenged Statements across so many Product lines *does* make litigation of this case—and plaintiffs' burden of proof at trial—complex." *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 566 (N.D. Cal. 2020) (Orrick, J.) ["*Krommenhock*"]. Plaintiffs had "a complex case to prove given its breadth and scope" because they had "to prove that reasonable consumers would be misled by each particular label used for each Product during the class period," and also had "prove . . . materiality for each

Challenged Statement on each different Product for each subclass," *id.* at 566 & n.10. Yet, the Court found Plaintiffs ultimately developed "ample . . . evidence that the Products are not 'healthy,'" *id.* at 569.

Evincing the difficulty in establishing liability on these types of claims, there are numerous examples of California courts in and outside this district initially certifying food labeling cases, then later decertifying or granting defendants summary judgment. *See*, *e.g.*, *Allen v. ConAgra Foods Inc.*, 2020 WL 4673914 (N.D. Cal. Aug. 12, 2020) (Orrick, J.) (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); *Brazil v. Dole Packaged Foods, LLC*, 2014 WL 5794873 (N.D. Cal. Nov. 6, 2014) (decertifying class); *Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923 (N.D. Cal. Dec. 15, 2013) (same); *see also 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 Fed. App'x 623 (9th Cir. 2018).

There are also numerous recent examples of consumer fraud trials ending in defense verdicts. *See*, *e.g.*, *Allen v. Hyland's, Inc.*, 2021 WL 718295 (C.D. Cal. Feb. 23, 2021) (finding in favor of defendant 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 concerning treatment of orcas by SeaWorld); *cf. Racies v. Quincy Bioscience, LLC*, 2020 WL 2113852 (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").

The litigation was also risky because its subject matter was complex, involving the intersection of scientific evidence regarding human physiology and nutrition, and various aspects of marketing and consumer perception, which resulted in the parties proffering the testimony of nine experts in sugar science, marketing, survey design, and economics. *See* PA Fitzgerald Decl. ¶ 15.

That the case theory was risky is manifest. Two different courts in this district held that two other actions brought on the same theory were implausible as a matter of law. *See Clark v. Perfect Bar, LLC*, 2018 WL 7048788 (N.D. Cal. Dec. 21, 2018), *aff'd on other grounds*, 816 Fed. App'x 141 (9th Cir. 2020); *Truxel*

1 *v. Gen. Mills Sales, Inc.*, 2019 WL 3940956 (N.D. Cal. Aug. 13, 2019). And at least some members of a
2 Ninth Circuit panel hearing the *Truxel* appeal—which Plaintiffs ultimately dismissed—seemed to express
3 skepticism at the theory. *See* PA Fitzgerald Decl. ¶¶ 36-39.

4 The case schedule, which had the parties briefing class certification and summary judgment
5 concurrently, presented additional risk. Whereas, to reduce cost and mitigate risk in moving for class
6 certification, Class Counsel typically provides an expert declaration describing a proposed damages model
7 not yet implemented, here Class Counsel incurred all the expenses attendant to calculating damages—
8 hundreds of thousands of dollars given the need for so many surveys—without knowing whether a class
9 would ever be certified. *See* Fitzgerald Decl. ¶ 20.

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

11 There are several reasons Class Counsel needed to be skilled to prosecute this case successfully. As
12 discussed above, the theory was novel and the subject matter technical, requiring expert testimony about
13 scientific evidence. And the large number of products and statements Plaintiffs challenged required careful
14 organization and management at every step, for example, whether preparing for depositions or working with
15 damages experts. Class Counsel also needed to be skilled because Post's attorneys were creative, strategic,
16 persuasive, and highly-skilled and accomplished lawyers who could easily have leveraged any shortcoming
17 in Class Counsel's representation of the Class. *See In re Ferrero Litig.*, 583 Fed. App'x at 668-69 ("counsel
18 took on considerable risk as Ferrero is well financed and had facially valid defenses"). Finally, counsel
19 needed to be skilled in managing this case as one in a portfolio brought on the same theory, where differences
20 in facts and procedural posture would (and did) inevitably emerge and present cross-case risk.

21 The Court has likely already formed an impression of the quality of Class Counsel's work. We hope
22 that begins with our briefing, which we consider the strongest and most important aspect of our practice,
23 demanding our utmost effort and attention. While we thought Post's briefing was excellent, we hope it
24 speaks to the quality of our lawyering that Plaintiffs prevailed (usually wholly, but sometimes in part or as
25 a practical matter) on 14 of the 19 substantive motions in the case,[5] including all the most important ones
26
27
28

[5] My January 18, 2021 Declaration identifies the 19 motions. *See* PA Fitzgerald Decl. ¶ 16. The five on which we did not prevail were our four motions to strike Post's experts (Dkt. Nos. 184, 190-92), and Post's motion to amend its response to Plaintiffs' Requests for Admission (Dkt. No. 265).

(*i.e.*, under Rules 12, 23, and 56), and also defeated Post's Rule 23(f) Petition for Permission to Appeal. We were also able to persuade this Court to depart from unfavorable holdings in the more procedurally-advanced *Hadley* matter, for example regarding whether the supposed lack of prominence of a challenged labeling claim doomed class certification, *see Krommenhock*, 334 F.R.D. at 563-65,[6] and whether punitive damages claims should go to the jury, *see id.* at 573.

We also hope the Court concludes we displayed quality lawyering by skillfully managing such a complex case, involving so many products, labels, and challenged claims. We could have reduced this breadth and complexity by filing separate lawsuits against individual Post cereals before numerous judges. But although pleading the case in a single lawsuit presented the Court with a substantial workload in resolving several complex motions through lengthy decisions, we did so in hopes that skillfully managing the case would ultimately present the public and judiciary with a far more efficient resolution of a larger number of claims. This doubly fulfilled the efficiency goals of Rule 23 by aggregating in this litigation, not just the claims of individual class members, but effectively the claims of several separate classes, while minimizing the risk, if each product were challenged in a separate lawsuit, that an unfavorable decision in one case could scuttle the chances of success in them all.

The largest part of managing a case like this, of course, is discovery, which, as previously detailed, was extensive here. *See* PA Fitzgerald Decl. ¶¶ 9-15. Class Counsel worked diligently to develop the factual record necessary to support the Class's claims and convince Post of the risks of trial, including reviewing over 59,000 pages of documents produced by Post, serving document subpoenas on 34 third parties, taking 12 depositions and defending another 9, and retaining 5 experts who collectively authored 10 reports, which were opposed by Post's 4 experts and their collective 7 reports. And Class Counsel, who are experienced in this area, brought this large case nearly to trial in far less time than other attorneys have put into similar but simpler actions. *See* Fitzgerald Decl. ¶ 25; *compare Marshall v. Northrop Grumman Corp.*, 2020 WL 5668935, at *3 (C.D. Cal. Sept. 18, 2020) ("[A] one-third fee is appropriate where '[c]ounsel litigated

[6] Based on this Court's holding and Class Counsel's arguments leading to it, the Hon. Lucy H. Koh later indicated her holding in *Hadley*, denying certification to a Nutri-Grain Subclass based on lack of prominence, was in error. *See* Fitzgerald Decl. Ex. 12, *Hadley* Nov. 12, 2020 Hrg. Tr. at 29:23-25 ("I can be and am persuaded that on the prominence of the statements, I can be convinced by Judge Orrick's Order"), 30:22-25 ("I've kind of come around, Mr. Fitzgerald has convinced me on the predominance, the prominence of the statement on the box").

effectively, and their experience was essential for obtaining the result.'" (quoting *Boyd v. Bank of Am. Corp.*, 2014 WL 6473804, at *10 (C.D. Cal. Nov. 18, 2014))). Moreover, in addition to Class Counsel's vigorous pursuit of discovery via the normal devices, counsel dedicated some resources to understanding how potential jurors would view the case, conducting three focus groups (one in 2018 and two in 2020), and using information learned from those exercises to help demonstrate to Post the risks of trial. *See* PA Fitzgerald Decl. ¶¶ 5-6, 21, 32.

Finally, in assessing Class Counsel's quality, we hope the Court recognizes the professionalism with which the case was litigated. In our experience, while counsel were competitive, they were never acrimonious. Discovery disputes were minimal. And briefing rigorously focused on the issues, rather than devolving into personal attacks or other disparaging language.

Given these considerations, the Court should find this factor supports Class Counsel's fee request. *See Lusby v. GameStop Inc.*, 2015 WL 1501095, at *4 (N.D. Cal. Mar. 31, 2015) (factor favored approval where Class Counsel had "litigated a large number of [similar] class actions," "achiev[ing] class certification in many different scenarios," had "developed an extensive factual record to obtain the evidence needed to convince Defendant of the risks of continued litigation," and its "history of successful prosecution of similar cases made credible its commitment to pursue this action through trial and beyond"); *Hopkins v. Stryker Sales Corp.*, 2013 WL 496358, at *2-3 (N.D. Cal. Feb. 6, 2013) ("Significant skill and quality work were involved" where "[t]he discovery that was undertaken by Class Counsel brought to light evidence of Defendant's violations of California labor and unfair competition laws," and counsel had "employed the services of three experts to assist in a proper evaluation of this case," and "investigated, researched, and filed a comprehensive motion for class certification" that was granted "[d]espite [ ] strong opposition"); *cf. Quiruz v. Specialty Commodities, Inc.*, 2020 WL 6562334, at *11 (N.D. Cal. Nov. 9, 2020) (multiplier warranted in part because "counsel . . . litigated the case in a highly professional manner").

d. Awards in Similar Cases

As this Court has noted, "a fee award of one-third is within the range of awards in this Circuit." *Lidoderm*, 2018 WL 4620695, at *4 (citing *Larsen*, 2014 WL 3404531, at *9 (collecting cases awarding fees of 32% or greater); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming award of 33%)); *see also Morris v. Lifescan, Inc.*, 54 Fed. App'x 663, 664 (9th Cir. 2003) (in settlement of class

action alleging defendant failed to disclose defects in glucose monitors that caused inaccurate readings, district court "did not abuse its discretion in finding an award of 33 percent to be reasonable").

Recently, several California courts have awarded fees of 30% in settlements of similar consumer fraud class actions. *See Weeks v. Google LLC*, 2019 WL 8135563, at *3 (N.D. Cal. Dec. 13, 2019); *In re Lenovo Adware Litig.*, 2019 WL 1791420, at *8 (N.D. Cal. Apr. 24, 2019); *Hendricks v. Starkist Co.*, 2016 WL 5462423, at *12 (N.D. Cal. Sept. 29, 2016), *aff'd sub nom.*, *Hendricks v. Ference*, 754 Fed. App'x 510 (9th Cir. 2018); *Fontes v. Heritage Operating, L.P.*, 2016 WL 1465158, at *5-6 (S.D. Cal. Apr. 14, 2016); *Mason v. Heel, Inc.*, 2014 WL 1664271, at *6 (S.D. Cal. Mar. 13, 2014). None of these cases, however, involved the complexities, investment, risk, and excellent result of this case, which warrant granting Class Counsel's slightly larger request of one-third of the common fund, especially in light of the measurable value of the injunctive relief. *Compare Marshall*, 2020 WL 5668935, at *2-3 ($12.375 million common fund, representing 29% of trial damages, and fact that "case was litigated to trial," which "required [plaintiffs' counsel] to devote enormous efforts and resources to this matter" supported "an award of one third of the settlement fund").

ii. A Lodestar Crosscheck Shows Class Counsel's Fee Request is Reasonable

Where a district court may determine fees based on a percent-of-fund method, the Ninth Circuit "has consistently refused to adopt a [lodestar] crosscheck requirement," *Farrell v. Bank of Am. Corp., N.A.*, 827 Fed. App'x 628, 630 (9th Cir. 2020) (collecting cases). Nevertheless, "courts in the Ninth Circuit sometimes examine the lodestar calculation as a crosscheck on the percentage fee award to ensure the reasonableness of the percentage award." *Perez v. Rash Curtis & Assocs.*, 2020 WL 1904533, at *18 (N.D. Cal. Apr. 17, 2020) (citing *Vizcaino*, 290 F.3d at 1050).

"The lodestar figure is calculated by multiplying the number of hours reasonably spent by a reasonable hourly rate," after which "[c]ourts may 'adjust [the lodestar figure] upward or downward by an appropriate positive or negative multiplier reflecting a host of reasonableness factors." *Lidoderm*, 2018 WL 4620695, at *2 (quoting *Bluetooth*, 654 F.3d at 941-42 (citation omitted)). These factors "largely mirror the considerations" discussed above with respect to the percent-of-fund method, *see id.*, at *3, and include "the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues present, and the risk of nonpayment," *id.*, at *2 (quoting *Bluetooth*, 654 F.3d at 942 (quoting *Hanlon v. Chrysler*

Corp., 150 F.3d 1011, 1029 (9th Cir. 1998))). Based on these factors, a "lodestar multiplier is typically applied[]" and those "'in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation.'" *Milburn*, 2019 WL 5566313, at *8 (quoting *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995)).

Here, Class Counsel's reasonable hourly rates multiplied by the reasonable number of hours expended on the litigation, renders a presumptively-reasonable lodestar figure of $2,809,363.50, *see* Fitzgerald Decl. ¶ 35, such that Class Counsel's request for $5 million in fees represents a 1.78 multiplier. That multiplier is reasonable—indeed, modest—under the circumstances of this case and considering the applicable factors.

a. Class Counsel's Hours are Reasonable

From the filing of the Complaint on August 29, 2016 through April 13, 2021—1,689 days in total, approximately 56.5 months—Class Counsel have expended 4,633.4 hours litigating this action,[7] which breaks down to approximately 983.7 hours per year, 82 hours per month, and 19.2 hours per week. *See* Fitzgerald Decl. ¶ 25. This time was spent on extensive fact and expert discovery, law and motion practice, and settlement negotiations. *See* PA Fitzgerald Decl. ¶¶ 4-24. Yet, Class Counsel was more efficient than in *Hadley* (leveraging efficiencies of scale, since *Hadley* was more procedurally advanced during most of the litigation), and several other similar, but simpler cases. *See* Fitzgerald Decl. ¶ 25.

The Court should therefore conclude "that the hours recorded by Class Counsel were reasonable and necessary to the litigation of the case, particularly in light of the result obtained for the class." *See Alvarez*, 2017 WL 2214585, at *5 (finding "reasonable and necessary" 4,727.6 hours "over nearly three years of litigation," including "fact investigation, drafting the complaints, propounding and responding to written discovery, defending named . . . Plaintiffs' depositions, taking depositions of [Defendant's] witnesses, engaging in motion practice, drafting a mediation brief, preparing for and attending a mediation, negotiating the settlement, working with the Claims Administrator, and other tasks necessary to th[e] litigation").[8]

[7] This is Class Counsel's lodestar less Mr. Fitzgerald's 36.3, and Ms. Nguyen's 23.7 pre-filing hours.

[8] *See also Hartless v. Clorox Co.*, 273 F.R.D. 630, 644 (S.D. Cal. 2011) ("Given the complexity of the case," 5,995.4 hours was "reasonable," with the time "representing 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)

b. Class Counsel's Rates are Reasonable

"The second part of the lodestar calculation is multiplying the hours spent by a 'reasonable hourly rate for the region and the experience of the lawyer.'" *Lidoderm*, 2018 WL 4620695, at *2 (quoting *Bluetooth*, 654 F.3d at 941). "A reasonable hourly rate is one that is 'in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *James v. AT&T W. Disability Benefits Program*, 2014 WL 7272983, at *2 (N.D. Cal. Dec. 22, 2014) (Orrick, J.) (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)). Here, Class Counsel requests the following rates:

Timekeeper	Position	Rate
Jack Fitzgerald	Principal	$825
Trevor Flynn	Associate	$625
Melanie Persinger	Associate	$600
Tran Nguyen	Associate	$400
Sid Jackson	Principal	$825
Christian Harben	Associate	$400
Val Erze	Paralegal	$205
Julie Hinton	Paralegal	$205

These rates are reasonable because they are in line with those recently awarded by courts in this district in other consumer fraud class actions. *See* Fitzgerald Decl. ¶¶ 30-34. This Court has several times approved rates similar to or higher than those requested here. *See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 2020 WL 7626410, at *3 & nn.4-5 (N.D. Cal. Dec. 22, 2020) (Orrick, J.) (approving rates of between $925 and $1280 for partners and senior counsel, $545 to $910 for associates, and $390 to $405 for paralegals); *Harvey v. Morgan Stanley Smith Barney LLC,* 2020 WL 1031801, at *21 (N.D. Cal. Mar. 3, 2020) (Orrick, J.) (approving rates between $820 and $1,250 for partners, $315 to $575

(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).

for associates, and $250 to $290 for paralegals);[9] *Lidoderm*, 2018 WL 4620695, at *2 (finding reasonable "historic rates" ranging from $350 to $1,050 for partners and senior counsel, $300 to $675 for associates, and $100 to $400 for paralegals and other litigation staff).

Class Counsel's requested rates are also reasonable in light of historic rates approved by other courts, with those requested here representing a modest annual approximately 5% increase from rates approved nearly three years ago to account for the fact that "hourly attorney fee rates generally increase over time with inflation," *Tehachapi Unified Sch. Dist. v. K.M. by & Through Markham*, 2019 WL 331153, at *6 (E.D. Cal. Jan. 25, 2019); *compare* Fitzgerald Decl. ¶¶ 28-29; PA Fitzgerald Decl. ¶¶ 73, 75-76 & n.17.

c. The Resulting Lodestar Multiplier is Reasonable

Here, "'the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment,'" *Bluetooth*, 654 F.3d at 942 (quotation omitted), all support the 1.78 lodestar multiplier resulting from Class Counsel's $5 million fee request.

The Quality of Representation. As discussed above, "Class counsel provided their clients with diligent and skilled representation in this matter," including "litigat[ing] numerous complex issues[,] and their efforts produced substantial benefits for the [ ] Class." *See Lidoderm*, 2018 WL 4620695, at *3.

The Benefit Obtained for the Class. The Settlement provides Class Members with millions of dollars in relief, including a historic $15 million non-reversionary cash fund and substantial prospective injunctive relief conservatively valued at $22.7 million per year. As discussed above and previously, this compares favorably both with other settlements in similar cases, and to the Class's likely recovery at trial, particularly in light of the risks involved in continuing litigation. *See* PA Mot. at 18-20 & 21-23.

The Complexity and Novelty of the Issues Present. In addition to the complexities and novel claims discussed above or noted by the Court, this case involved several difficult legal and factual issues. For example, when Plaintiffs opposed Post's Motion for Judgment on the Pleadings (*see* Dkt. Nos. 258 & 260), there were just a few district court cases applying *Sonner*, and each had found the decision "fatal to [the] [p]laintiff's UCL claim," *see, e.g.*, *Gibson v. Jaguar Land Rover N. Am., LLC*, 2020 WL 5492990, at *3-4

[9] *See also* PA Fitzgerald Decl. Exs. 27-28 (attaching documents evincing rates requested in *Harvey*).

(C.D. Cal. Sept. 9, 2020) (dismissed with prejudice).[10] Although the Court granted Post's motion in part, it did so with leave to amend, finding Plaintiffs were "able to plausibly allege that their entitlement to damages at law is inadequate to preserve their right to seek equitable restitution." *Krommenhock v. Post Foods, LLC*, 2020 WL 6074107, at *1 (N.D Cal. Sept. 29, 2020). Following that decision, case law has continued to develop favorably to defendants,[11] demonstrating the skill with which Class Counsel navigated this challenging issue.

Class Counsel also brought this case at a time when "[t]he science and research around the impacts of high sugar consumption [wa]s continuing to develop." *Krommenhock*, 334 F.R.D. at 583. This meant Class Counsel had to repeatedly defend against Post's claim that the scientific evidence supporting the detrimental health consequences of consuming excessive added sugar was inconclusive or unsettled, and that Plaintiffs' experts were in the scientific minority. *See*, *e.g.*, *id.* at 569, 583 (noting "Post believes [Plaintiffs' expert's] opinions are in the minority [and] ignored contrary evidence," and its "position that to survive summary judgment plaintiffs need to establish that Post's cereals are unhealthy due to their sugar content based on 'undisputed and settled science'"); *Krommenhock v. Post Foods, LLC*, 2018 WL 1335867, at *4 (N.D. Cal. Mar. 15, 2018) ("Post argues . . . that there is a dispute over the health effects of sugar"). The scientific evidence supporting Plaintiffs' case theory was also complex, leading Class Counsel to engage two scientific experts to explain in different ways the science regarding added sugar consumption, and to retain a courtroom animation company, with its own medical experts on staff, to work with Dr. Lustig to develop animations to aid the jury's understanding at trial. *See* PA Fitzgerald Decl. ¶¶ 15, 21.

The Risk of Nonpayment. "[C]ourts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases." *In re: Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th

[10] *See also Adams v. Cole Haan, LLC*, 2020 WL 5648605, at *2-3 (C.D. Cal. Sept. 3, 2020) (granting motion to dismiss for failing to allege "lack[] [of] an adequate remedy at law"); *Schertz v. Ford Motor Co.*, 2020 WL 5919731, at *2 (C.D. Cal. July 27, 2020) (same).

[11] *See*, *e.g.*, *In re MacBook Keyboard Litig.*, 2020 WL 6047253, at *4 (N.D. Cal. Oct. 13, 2020) (in action alleging defective keyboards, dismissing UCL claim and all other claims for equitable relief); *Williams v. Apple, Inc.*, 2020 WL 6743911, at *10 (N.D. Cal. Nov. 17, 2020) (dismissing Plaintiffs' FAL and UCL claims with prejudice); *IntegrityMessageBoards.com v. Facebook, Inc.*, 2020 WL 6544411, at *6 (N.D. Cal. Nov. 6, 2020) (dismissing with prejudice UCL claims for past harms); *Hassell v. Uber Techs., Inc.*, 2020 WL 7173218, at *8-9, 12 (N.D. Cal. Dec. 7, 2020) (same); *Huynh v. Quora, Inc.*, 2020 WL 7495097, at *20 (N.D. Cal. Dec. 21, 2020) (granting summary judgment to defendant on UCL claim because Plaintiff had adequate remedy at law).

Cir. 1994); *see also id.* at 1302 (it was an abuse of discretion for the district court not to apply a multiplier when the case was "fraught with risk and recovery was far from certain"). As discussed above, and in Plaintiffs' Motion for Preliminary Approval, Class Counsel took this case on a contingency basis and faced a very real risk of non-payment—including non-reimbursement of significant out-of-pocket expenses, the vast majority of which were incurred before Plaintiffs survived summary judgment—as evidenced by the outcomes in *Clark* and *Truxel*. "Because counsel worked on a contingent-fee basis despite risks of litigation, this weighs in favor of awarding more than the lodestar." *See Luna v. Marvell Tech. Grp.*, 2018 WL 1900150, at *4 (N.D. Cal. Apr. 20, 2018) (applying 2.0 multiplier); *see also Lidoderm*, 2018 WL 4620695, at *3 (factor favored applying a positive multiplier where "Class Counsel litigated this action without pay for several years, even though recovery was uncertain" (quotation omitted)); *Quiruz*, 2020 WL 6562334 (1.95 multiplier warranted where counsel "faced a significant risk of nonpayment given the contingent nature of the representation").

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Considering the relevant factors, the Court should find that a lodestar crosscheck, showing that Class Counsel's fee request represents a 1.78 multiplier to its lodestar, is reasonable. *See Corzine v. Whirlpool Corp.*, 2019 WL 7372275, at *11 (N.D. Cal. Dec. 31, 2019) ("a lodestar multiplier of 1.86 is modest"); *see also In re Facebook Biometric Info. Privacy Litig.*, --- F. Supp. 3d ----, ----, 2021 WL 757025, at *12 (N.D. Cal. Feb. 26, 2021) (applying 4.71 multiplier and noting that "empirical data on lodestar multipliers in all cases shows average multipliers in the range of 1.42 and 3.89" (record citation omitted)); *cf. Gutierrez v. Wells Fargo Bank, N.A.*, 2015 WL 2438274, at *7 (N.D. Cal. May 21, 2015) (applying 2.0 multiplier to fees incurred by firm that made "many blunders" and whose "lack of experience and crude effort nearly wrecked th[e] class action," but "[n]evertheless . . . ended up taking on a seven-year risk of non-payment and delay in fees by commencing th[e] lawsuit," but applying 5.5 multiplier to fees incurred by counsel that had "rescued the case").[12]

[12] *See also Wilson v. TE Connectivity Networks, Inc.*, 2019 WL 4242939, at *8 (N.D. Cal. Sept. 6, 2019) (Since in "the Ninth Circuit . . . most multipliers range between 1.0 and 4.0 . . . . a multiplier of 2.38[, which] yields almost exactly the amount of the requested award, [ ] suggests that approving the award is reasonable under the lodestar method, as well."); *Hickcox-Huffman v. US Airways, Inc.*, 2019 WL 1571877, at *1 (N.D. Cal. Apr. 11, 2019) ("a multiplier of 3.11" was "justified based on[] [ ] the difficult and novel legal

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." *Bellinghausen*, 306 F.R.D. at 265 (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." (quoting Fed. R. Civ. P. 23(h)). Here, Class Counsel seeks reimbursement of expenses in the amount of $967,606, the majority of which relates to expert witness expenses (and then the majority of that to Plaintiffs' conjoint damages model, which required their expert, Steven Gaskin, to run multiple surveys covering all the challenged products). *See* PA Fitzgerald Decl. ¶ 79 & Exs. 29-30; Dkt. No. 291-1 (supplemental filing correcting expense amount).[13] Notably, counsel did not use (and thus does not seek reimbursement for) any non-standard or non-economy travel or accommodations, Fitzgerald Decl. ¶ 37, thus the Court is not being asked to approve reimbursement of "unreasonable costs, such as 'first class airplane tickets, luxury hotel accommodations, [or] gourmet dinner meetings' at the expense of a common fund recovery." *See Arredondo v. Delano Farms Co.*, 2017 WL 4340204, at *6 (E.D. Cal. Sept. 29, 2017) (quoting *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1372 (N.D. Cal. 1996)).

Because "[t]he categories of expenses for which plaintiffs' seek reimbursement are the type of expenses routinely charged to hourly clients," including "expert witness fees; [] mediators' fees; . . . court reporting and videographer services . . . and [] case-related travel for Plaintiffs, witnesses, experts, and counsel," the "full amount should be reimbursed." *See Larsen*, 2014 WL 3404531, at *10 (citation omitted); *see also Lidoderm*, 2018 WL 620695, at *4 (similar); *Grace v. Apple Inc.*, 2021 WL 1222193, at *6 (N.D. Cal. Mar. 31, 2021) (Approving reimbursement of $1,090,393.14 in expenses where "[a]bout 91% . . . are

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challenges faced . . . the risks and financial burdens that Class Counsel undertook in litigating this case on a fully contingent basis[,] and [ ] the significant benefits that are being made available to the class"); *Gergetz v. Telenav, Inc.*, 2018 WL 4691169, at *7 (N.D. Cal. Sept. 27, 2018) ("appl[ing] a multiplier of 2.625 in light of the facts that Class Counsel accepted this case on a contingency basis, had to forego other work to litigate this case, and achieved a truly excellent result for the class").

[13] Class Counsel has not incurred any additional expenses for which it is seeking reimbursement since Plaintiffs filed their Motion for Preliminary Approval. Fitzgerald Decl. ¶ 37.

attributable to expert fees, Class Counsel's on-line document database, court reporters, and mediation," and "the remainder is attributable to travel, including economy-class airfare and hotels.").

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

"In the Ninth Circuit, '[i]ncentive awards are fairly typical in class action cases,'" and "'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.'" *Alvarez*, 2017 WL 2214585, at *1 (quoting *Rodriguez*, 563 F.3d at 958-59). Courts "evaluate proposed incentive awards individually, using relevant factors that include 'the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . [and] the amount of time and effort the plaintiff expended in pursuing the litigation.'" *Brown v. Hain Celestial Group, Inc.*, 2016 WL 631880, at *9 (N.D. Cal. Feb. 17, 2016) (quoting *Staton*, 327 F.3d at 977).

"An incentive award of $5,000 is considered 'presumptively reasonable' in this District, but courts have approved higher awards where class representatives can make a strong showing on one or more of the *Staton* factors." *O'Connor v. Uber Techs., Inc.*, 2019 WL 1437101, at *14 (N.D. Cal. Mar. 29, 2019) (citing *Villegas v. J.P. Morgan Chase & Co.*, 2012 WL 5878390, at *7 (N.D. Cal. Nov. 21, 2012)). Moreover, when amounts above the presumptively-reasonable $5,000 service award are requested, "some courts have considered the ratio between the service award and class members' average recovery [in] determin[ing] the propriety of any amount awarded," *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1025 (E.D. Cal. 2019) (citing *Hopson v. Hanesbrands Inc.*, 2009 WL 928133, at *10 (N.D. Cal. Apr. 3, 2009)). However, even a "'very large differential in the amount of damage awards between the named and unnamed class members'" is appropriate if "that differential is justified by the record," through evaluation of the *Staton* factors. *See id.* (quoting *Staton*, 327 F.3d at 978; additional citations omitted).

The Class Representatives' requested service awards of $7,500 each are justified by the record, which shows their active participation in the litigation, including reviewing pleadings and other relevant documents, collecting and producing documents, responding to interrogatories, sitting for deposition, and keeping in touch with Class Counsel and staying informed about the progress of the case throughout more

than 4 years of litigation, including discussing settlement negotiations and the proposed settlement with counsel. Fitzgerald Decl. ¶¶ 38-39.

The Class Representatives also faced personal risk. Post sought their detailed medical records, served interrogatories regarding the information contained therein, and moved to compel when Plaintiffs objected. *See* Dkt. No. 125. Plaintiffs thus risked having to publicly reveal sensitive medical information and, though the Court ultimately denied Post's motion to compel, *Krommenhock v. Post Foods, LLC*, 2018 WL 4203660 (N.D. Cal. Aug. 30, 2018) (Orrick, J.), they were subjected during their depositions to invasive questions about their medical history, diet, and lifestyle choices, *see* Fitzgerald Decl. ¶ 39 & Exs. 18-19.

Plaintiffs' active involvement in this long-running litigation, the excellent result their efforts helped achieve, and the risk that their private medical and other personal information would be a focus of the lawsuit all support granting their request for service awards of $7,500 each. *See Lidoderm*, 2018 WL 4620695, at *4 ($10,000 service awards where "[e]ach Class Representative actively participated in the litigation, including staying abreast of the progress of the case, collecting and produced documents, and responding to interrogatories and, in the case of two of the class representatives, preparing to testify at trial"); *Brown*, 2016 WL 631880, at *9 ($7,500 service awards to plaintiffs that had "consult[ed] with counsel, attend[ed] mediations, [were] deposed, and otherwise participat[ed] in the litigation"); *Fowler v. Wells Fargo Bank, N.A.*, 2019 WL 330910, at *8 (N.D. Cal. Jan. 25, 2019) ($7,500 award to plaintiff who had "participated in the litigation by assisting counsel in obtaining loan documents, [ ] reviewing the complaint as well as relevant motions," "responding to discovery," "attend[ing] the mediation in the case," and participating in "follow-up calls and emails with counsel" (record citations omitted)).

Moreover, the aggregate service award amount requested, $15,000, is just 0.1% of the Settlement Fund and is thus "significantly less than the approximately 1% of the total settlement awarded by some courts." *See Fowler*, 2019 WL 330910, at *8 (citing *Sandoval v. Tharaldson Empl. Mgmt., Inc.*, 2010 WL 2486346, at *10 (C.D. Cal. Jun. 15, 2010) (awarding $7,5000 incentive payment to named plaintiff, comprising 1% of gross settlement amount)); *see also Alvarez*, 2017 WL 2214585, at *1 (awarding a $10,000 service per plaintiff, totaling $90,000, "constitut[ing] 1.8% of the total settlement value"); *Quezada v. Schneider Logistics Transloading & Distrib., Inc.*, 2014 WL 12584436, at *12 (C.D. Cal. May 12, 2014)

(awarding $10,000 to each named plaintiff where "the total requested service awards—$40,000—represent[ed] less than 1% of the total settlement amount of $4.7 million").

III. CONCLUSION

The Court should grant Class Counsel's request for an award of $5 million in attorneys' fees and $967,606 in costs, and grant the Class Representatives' request for service awards of $7,500 each.

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Respectfully Submitted,

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