IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE FAIRLIFE MILK PRODUCTS MARKETING AND SALES PRACTICES LITIGATION	MDL No. 2909
	Master Case No. 19-cv-3924
This Document Relates to:	Hon. Judge Robert M. Dow, Jr.
ALL CASES	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' PETITION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS, AND SERVICE AWARDS

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I. INTRODUCTION

On April 14, 2022, almost three years after this matter was commenced, and only after multiple arm's-length mediation sessions led by the Honorable Wayne R. Andersen (Ret.), the Named Plaintiffs[1] and Defendants (collectively, the "Settling Parties") reached agreement on a proposed nationwide class action settlement (the "Settlement") in connection with Defendants' alleged false and uniform promise that the dairy cows producing their Milk Products were treated humanely. Noting the adequacy of the result achieved, the Court preliminarily approved the Settlement and directed notice to the members of the Settlement Class on April 27, 2022. *See* ECF 163 ¶ 5 (finding that the "Settlement Agreement provides adequate relief to the proposed Settlement Class.").

The Settlement is an excellent result for the Class. Under its terms, Class Counsel accomplished, for the benefit of the Class, (i) a $21 million, non-reversionary cash Settlement Fund that allows the Class to recover 100% of the premium they paid for the Covered Products (25% of the purchase price); and, (ii) meaningful injunctive relief designed to create an accountability structure that ensures the humane treatment of dairy cows. As compensation for their efforts in achieving this outstanding result, and in keeping with precedent from this Circuit, Class Counsel seek an award of attorneys' fees in the amount of one-third of the Settlement Fund—$7,000,000—plus expenses incurred in the prosecution of this action in the amount of $95,198.99. Class Counsel also seek service awards to compensate the nineteen[2] Class Representatives for their

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[1] All capitalized terms herein have the same meaning as defined in the Settlement Agreement (ECF No. 153-1).

[2] They are Terri Birt, Carol Cantwell, Debra French, Karai Hamilton, Henry Henderson, Paula Honeycutt, Michelle Ingrodi, Jae Jones, Nabil Khan, Kaye Mallory, Christina Parlow, Cindy Peters, Jenny Rossano, David Rothberg, Eliana Salzhauer, Connie Sandler, Diana Tait, Demetrios Tsiptsis, and Arnetta Velez.

important contributions to this litigation, including the time and effort that they expended in helping Class Counsel reach this result, in the amount of $3,500 each ($70,000 total).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Defendants' animal welfare promises led to several class action lawsuits.

This multidistrict litigation consists of nine putative class action lawsuits against Defendants, which were transferred to this Court by the Judicial Panel for Multidistrict Litigation ("JMPL") for consolidation and coordination. At its heart, this case is about Defendants' alleged failure to deliver on the very essence of their brands' promise: the humane treatment of the dairy cows from which Defendants' Milk Products derive. Plaintiffs allege that they relied on, and were damaged when, they paid a premium for the false promise that Defendants' dairy cows were treated humanely, which uniformly appeared on Defendants' Milk Product labels. The Litigation alleged, however, that Defendants could not live up to these promises. Contrary to their marketing, video footage from an animal rights organization demonstrated that the dairy cows that produced the Milk Products suffered severe, inhumane treatment and abuse at the hands of Defendants. As discussed in more detail below, Class Counsel's time and effort in prosecuting this case, and bringing it to successful resolution, was substantial.

B. Class Counsel led a significant investigation and negotiated a robust settlement.

Class Counsel's involvement in this case dates back to a time long before the filing of the first complaint. *See* Preliminary Decl.[3] ¶ 5. Prior to the filing of a lawsuit, Class Counsel initiated a detailed investigation into Defendants' deceptive advertising and animal welfare practices. *Id.* Through their extensive research, Class Counsel gained a firm understanding of the products

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[3] Refers to Class Counsel's Omnibus Declaration in Support of Plaintiffs' Motion for Preliminary Approval, ECF No. 153-2.

Defendants sold, their target consumer demographics, and the representations Defendants generally made about Milk Products. *Id.* With this enhanced knowledge, combined with the additional consideration of video footage and reports documented by Animal Recovery Mission ("ARM") via an unrelated investigation that depicted abuse of Defendants' dairy cows at their "flagship farm" Fair Oaks, Class Counsel filed their team's initial class action complaint. *Id.* ¶¶ 4-5. Class action lawsuits containing analogous allegations were filed against Defendants in various federal courts, which were then transferred to this Court for coordination by the JPML *Id.* ¶¶ 4, 7.

Because Class Counsel were concerned about the potential for ongoing abuse of the dairy cows at Defendants' facilities and the facilities of their suppliers, Class Counsel sought to begin mediation discussions with the Defendants to potentially adopt measures related to dairy cow welfare before the cases were consolidated. Although the Parties came to no agreement in those early mediation sessions, overseen by Judge Andersen, they created the foundation for the meaningful injunctive relief achieved in this Settlement. *Id.* ¶ 6.

In recognition of their qualifications, this Court appointed Amy E. Keller of DiCello Levitt Gutzler LLC, Melissa S. Weiner of Pearson, Simon & Warshaw, LLP, and Michael R. Reese of Reese LLP as Co-Lead Interim Counsel on behalf of the putative classes. ECF No. 75.

Upon their appointment as Co-Lead Interim Counsel, Class Counsel immediately demonstrated their continued commitment to the successful resolution of this matter. In addition to conducting additional research and analysis prior to filing a Consolidated Class Action Complaint on behalf of the actions then-transferred into the MDL, Class Counsel also filed a separate complaint sufficient to confer subject matter jurisdiction for claims on behalf of additional plaintiffs and negotiated orders and practices concerning discovery and litigation of this matter. With the Court's support of the Parties' shared interest in exploring settlement, Class Counsel began intense, arm's-length settlement negotiations under the expert guidance of skilled class-

action mediator Judge Andersen, who has particularized knowledge of the laws in this District. Preliminary Decl. ¶¶ 12-17. During this two-year process, Class Counsel participated in numerous, full-day mediation sessions, exchanged written discovery requests, produced and reviewed voluminous documents in response to those requests on several occasions, submitted multiple rounds of mediation briefs to Judge Andersen in advance of each mediation session, along with settlement positions, proposals, and counterproposals during those sessions, exchanged correspondence with Defendants and Judge Andersen, and participated in dozens of conference calls between each mediation session. *Id.* Class Counsel's efforts prosecuting this matter paid off, resulting in a substantial, non-reversionary Settlement Fund of $21 million that provides enormous benefits to the Class, along with important injunctive relief that targets the very heart of Defendants' alleged wrongful conduct: inhumane treatment of their dairy cows. *Id.* ¶ 23.

C. The Settlement's benefits provide valuable monetary relief and important injunctive relief addressing the very concerns which led to the Litigation.

1. The Settlement provides significant monetary relief.

As described in Plaintiffs' Memorandum of Law in Support of their Motion for Final Approval of the Class Action Settlement, Defendants have agreed to pay the $21,000,000.00 to create a non-reversionary Settlement Fund for the benefit of Settlement Class Members to receive Cash Awards for filing Valid Claims (per the Plan of Allocation described below). Settlement Agreement §§ I(73), IV(1), IV(3)(a)-(b), ECF No. 153-1. Subject to certain caps and *pro rata* increases or decreases, Claimants will receive 25% of the purchase price for the Covered Products, which—based upon the experience and work of Class Counsel comparing the Covered Products to other products available on the market—is likely more than the calculated price premium consumers paid for the Products based upon the allegedly false and misleading Animal Welfare Promises. Preliminary Decl. ¶¶ 18-20. Claimants will be eligible to receive up to $20 for claims without Valid Proof of Purchase and up to $80 for claims with Valid Proof of Purchase, for a total

of $100 possible relief. Settlement Agreement § IV(3)(b). Claims will be subject to a *pro rata* increase—upward or downward—depending upon the number of claims filed. *Id.* § V(3). Though the Notice Period has not concluded in its entirety, Epiq estimates that, given the positive reaction to the Settlement and number of Claims filed, combined with any *pro rata* adjustment, the Settlement Fund will be exhausted.[4]

2. Substantial injunctive relief addresses Defendants' welfare promises.

Plaintiffs allege that the Defendants' animal welfare promises were important to them when they purchased the Milk Products, and that they paid a price premium for the Milk Products based upon Defendants' promises that their dairy cows were treated humanely. Preliminary Decl. ¶ 2. Given the importance of those promises to the issues in this Litigation, Class Counsel worked on what measures should be taken to ensure that the dairy cows which produce Defendants' Milk Products are treated humanely. *Id.* ¶ 23. Class Counsel spent years negotiating detailed injunctive relief that will create a monitoring and compliance program, aimed at ensuring their cows receive humane treatment. *Id.*

III. THE REQUESTED ATTORNEYS' FEES ARE SUPPORTABLE AND REASONABLE UNDER CONTROLLING LAW.

A. Class Counsel should be awarded fees based upon a percentage of the Settlement Fund.

In a class action, the Seventh Circuit requires courts to determine reasonable attorneys' fees by "do[ing] their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (collecting cases). Compensation also depends on "the quality of [counsel's] performance, . . . in part on the amount of work necessary to resolve the

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[4] *See* Declaration of Cameron R. Azari ¶ 34, *filed with Plaintiffs' final approval brief.*

litigation, and in part on . . . the stakes of the case." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 597 (N.D. Ill. 2011) (citing *Synthroid*, 264 F.3d at 721).

When a party obtains compensation for the class's benefit in the form of a common fund, courts have long recognized that the costs of the litigation and attorneys' fees should be recovered from the fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to reasonable attorney's fee from the fund as a whole"); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970); *see also Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 548 (7th Cir. 2003) (creation of a common fund "entitles [counsel] to a share of that benefit as a fee"). The percentage of the fund method is "based on the equitable notion that those who have benefited from litigation should share in its costs." *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) (quoting *Skelton v. G.M. Corp.*, 860 F.2d 250, 252 (7th Cir. 1988)) (internal quotation marks omitted); *see also Boeing*, 444 U.S. at 478 (a court prevents inequity "by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit"). Moreover, Federal Rule of Civil Procedure 23(h) provides a court with discretion to "award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement" in a certified class action. Fed. R. Civ. P. 23(h).

Courts in this Circuit have discretion to employ either a percentage of the fund recovered, or the "lodestar amount" plus a "risk multiplier warranted by the contingent nature of the case." *Americana Art China, Co., Inc. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014). Although the decision lies with the district court to choose which method to apply, *id.*, both the Seventh Circuit and this Court favor the percentage-of-the-fund methodology in common fund settlements. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (collecting cases) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a

percentage of the fund . . . in recognition of the fact that most suits for damages in this country are handled on the plaintiffs' side on a contingent-fee basis."); *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *7 (S.D. Ill. Dec. 16, 2018) ("the percentage method is employed by the vast majority of courts in the Seventh Circuit") (internal quotations omitted); *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 844 (N.D. Ill. 2015) (Dow, J.) (applying the percentage-of-the-fund approach, noting that it "has emerged as the favored method for calculating fees in common-fund cases in this district"); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 597-99 (N.D. Ill. 2011) (Dow, J.) (applying percentage-of-the-fund approach); *Williams v. Gen. Elec. Cap. Auto Lease*, No. 1:94-cv-07410, 1995 WL 765266, at *9 (N.D. Ill. Dec. 26, 1995) (collecting cases) ("The approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred on the class.").[5]

Furthermore, it is standard for courts to apply the percentage-of-the-fund method in consumer class cases, such as this one. *See Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 501 (7th Cir. 2015) (noting that the "normal practice in consumer class actions" is to negotiate a fee arrangement based on a percentage of recovery); *In Re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2021 WL 5709250, at *1 (N.D. Ill. Dec. 1, 2021) (applying the percentage-of-the-fund method). More importantly, the percentage-of-the-fund method "is appropriate here because Class Counsel accomplished what that method incentivizes: early resolution of the case without wasteful litigation to increase loadstar hours." *See Day v. NuCO2 Mgmt., LLC*, No. 1:18-CV-02088, 2018 WL 2473472, at *2 (N.D. Ill. May 18, 2018). Accordingly, the Court, in its discretion, should

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[5] *See also* Order Granting Approval of Attorneys' Fees, Costs, and Service Payment to the Class Representative, *Sheppard v. GFL Env't Services USA, Inc.*, No. 1-21-cv-02743, ECF No. 29 (N.D. Ill. Jan. 27, 2022) (Dow, J.) (awarding class counsel one-third of the settlement fund in attorneys' fees).

apply the percentage-of-the-fund method to award reasonable attorneys' fees.

B. The requested attorneys' fees are fair, reasonable, and follow this Circuit's precedent.

To determine the reasonableness of a requested fee award in common fund cases, the Court must determine "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Synthroid*, 264 F.3d at 718; *In re Cont'l Ill. Sec. Litig.,* 962 F.2d 566, 572 (7th Cir. 1992) ("[t]he object in awarding a reasonable attorney's fee . . . is to give the lawyer what he would have gotten in the way of a fee in arm's length negotiation, had one been feasible. In other words the object is to simulate the market where a direct market determination is infeasible."). Factors bearing on the market price for legal fees may include (i) attorneys' fee awards in other class action settlements; (ii) any fee agreements between the parties; (iii) the risk of nonpayment counsel agreed to bear; (iv) the quality of Class Counsel's performance; (v) the amount of work necessary to resolve the litigation; and (vi) the stakes of the case. *See Synthroid*, 264 F.3d at 721; *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 599 (7th Cir. 2005).[6] Each factor, in turn, supports approval of Class Counsel's petition for attorneys' fees.

1. Attorneys' fee awards in other cases support approval of Class Counsel's fee application.

Class Counsel seek attorneys' fees in the amount of one-third of the $21 million Settlement Fund, or $7,000,000 (not including any calculation for the benefit that Settlement Class Members are receiving for the value of the Settlement's injunctive relief provisions).[7] Such an award is

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[6] Rule 23 requires courts to examine whether "the relief provided for the class is adequate, taking into account" among other things, "the terms of any proposed award of attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(iii).

[7] The negotiated injunctive relief sets the Settlement apart from other cases criticized by the Seventh Circuit. *Compare* Settlement Agreement § VI (requiring, among other things, a third-party audit of suppliers, criminal background checks of employees, animal welfare training, approval of an animal welfare plan by a veterinarian, regular welfare visits to each supplying farm, (footnote continued)

reasonable and appropriate given the precedent of this Circuit. *See In Re Broiler Chicken Antitrust Litig.*, 2021 WL 5709250, at *4 ("There is simply little to no precedent recommending anything other than an award of 33 percent. With the only real evidence of the "market rate" being one-third, that is what the Court will award."). *See also Taubenfeld*, 415 F.3d at 599-600 (noting class actions in the Northern District of Illinois have awarded fees of 30-39% of the settlement fund); *Gaskill v. Gordon*, 160 F.3d 361, 362-63 (7th Cir. 1998) (affirming award of 38% of the fund); *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660, 2018 WL 6606079, at *13 (S.D. Ill. Dec. 16, 2018) (collecting cases); *Day*, 2018 WL 2473472, at *2 (awarding plaintiffs' counsel's attorneys' fees request for one-third of the gross settlement amount); *Koszyk v. Country Fin. a/k/a CC Servs., Inc.*, No. 16-cv-3571, 2016 WL 5109196, at *3 (N.D. Ill. Sept. 16, 2016) (granting request for one-third of the gross fund for attorneys' fees plus costs); *Dairy Farmers*, 80 F. Supp. 3d at 842 (awarding fees in the amount of $15,333,333.33, or one-third of the gross fund, plus costs and expenses); 3 Alba Conte et al., Newberg on Class Actions § 14.6 (4th ed. 2002) ("[F]ee awards in class actions average around one-third of the recovery[.]").

Class Counsel's fee application is also reasonable when compared against fee requests approved by courts in other food and beverage class cases. *See* Final Approval Order, *Suchanek et al v. Sturm Foods, Inc. et al*, 3:11-CV-00565, ECF No. 463 (S.D. Ill. Apr. 21, 2020) (granting motion for attorneys' fees in the amount of one-third of the gross $25 million settlement fund in lawsuit alleging defendant deceptively marketed coffee pods as filled with premium ground coffee when in fact it was instant coffee). Accordingly, Class Counsel's fee application is consistent with

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limitations on how animals are moved and handled, changes in marketing language, *and* that none of the injunctive relief is funded from the Settlement Fund) *with Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014) (noting that the negotiated injunction was "substantively empty" and required only "purely cometic changes in wording" to marketing claims).

the market as it falls in line with awards in this Circuit and in other related cases. This factor favors approval.

2. Plaintiffs' requested fee is an appropriate market-based fee.

A fee award of one-third of the Settlement Fund in this case reflects a real-world arm's length transaction between the Class and Class Counsel, and is a generally accepted percentage in the Seventh Circuit. *Dairy Farmers*, 80 F. Supp. 3d at 846; *In re Lithotripsy Antitrust Litig. Et al.*, No. 98-C-8394, 2000 WL 765086, at *2 (N.D. Ill. June 12, 2000). It is justified by the remarkable results obtained for the Class and the risks faced by Class Counsel. The fee award requested here is well within the acceptable range of attorneys' fee awards in protracted, complex, and expensive litigation such as this. Thirty-three and one-third percent is a standard percentage in many fee agreements, including large, complex non-class cases. *In Re Broiler Chicken Antitrust Litig.*, 2021 WL 5709250, at *4 (citing to expert declarations and collecting cases); *see also* Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 248 (1996) (noting that "standard contingency fees" are "usually thirty-three percent to forty percent of gross recoveries"); *Blum v. Stenson*, 465 U.S. 886, 903 (1984) (Brennan, J., concurring) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.").

3. Public policy also favors an attorneys' fee award at the market rate to incentivize competent, experienced counsel to take on high-risk, complex class action litigation.

A material consideration in determining an appropriate fee is the risk of nonpayment. *See Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013); *Taubenfeld*, 415 F.3d at 600 (approving the district court's reliance on this factor in evaluating attorneys' fees). "The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir.

2013); *accord, e.g.*, *Synthroid*, 264 F.3d at 721 (finding that the market rate must account for the "risk of nonpayment a firm agrees to bear."). Thus, "[w]hen determining the reasonableness of a fee request, courts put a fair amount of emphasis on the severity of the risk (read: financial risk) that class counsel assumed in undertaking the lawsuit." *Dairy Farmers*, 80 F. Supp. 3d at 847-48. "[T]his consideration incentivizes attorneys to accept and (wholeheartedly) prosecute the seemingly too-big-to-litigate wrongs hidden within the esoteric recesses of the law, ensuring that the attorneys are compensated for their work at the end of the day." *Id.* at 848. Class Counsel's application for one-third of the Settlement Fund here is reasonable in light of the significant risks of nonpayment.

At the outset of this litigation, Class Counsel initiated this case on a contingent fee basis, assuming the risk that they could receive *no* fee or reimbursement of litigation expenses for their services. *See Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir. 2007) ("We recognized [in an earlier case] that there is generally some degree of risk that attorneys will receive no fee (or at least not the fee that reflects their efforts) when representing a class because their fee is linked to the success of the suit."); *Matter of Cont'l Illinois Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992) ("The lawyers for the class receive no fee if the suit fails"); *Brewer v. Molina Healthcare, Inc.*, No. 16-cv-09523, 2018 WL 2966956, at *3 (N.D. Ill. June 12, 2018) (Dow, J.) (emphasizing that "contingency fee agreements contain the risk of no recovery whatsoever for Plaintiffs or their counsel.").

Class Counsel's decision to pursue this matter on a contingent fee basis thus "compensate[s] [them] for the risk of nonpayment," *Silverman*, 739 F.3d at 958 (citing *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986)), a risk that was not merely speculative. Had Class Counsel continued to litigate this matter, there is no guarantee that Plaintiffs could establish that class treatment was appropriate, and they faced much uncertainty surrounding the determination of damages. This factor weighs in favor of granting the fee application because, as the Seventh Circuit

noted in another matter, Class Counsel "could have lost everything" they invested in taking on this matter. *Matter of Cont'l Illinois Sec. Litig.*, 962 F.2d at 570.

4. The benefits conferred upon the Settlement Class through Class Counsel's efforts during this litigation justify the proposed award.

The next factor in evaluating reasonableness of fees is the quality of Class Counsel's work. *Taubenfeld*, 415 F.3d at 600; *Dairy Farmers*, 80 F. Supp. 3d at 849 ("[y]et another litmus test for assessing reasonableness is quality of Class Counsel's performance in achieving the settlement—that is, whether this is the type of outcome that willing clients would have envisioned from the outset."). Here, the timely and substantial benefits made available to members of the Class through the Settlement evidences the quality and excellence of Class Counsel's performance.

Class Counsel's intent at the outset of this litigation was twofold: (i) achieve a substantial recovery for members of the Class, and (ii) stop Defendants from harming Plaintiffs and members of the Class by inducing them into paying a price premium for Milk Products that bore the false, but express, promises that Defendants treated their dairy cows humanely. The Settlement accomplished these goals in full by (i) making available a substantial non-reversionary Settlement Fund of $21 million from which members of the Class may receive a Cash Award for 25% of the purchase price of the Covered Milk Products, which equates to at least the estimated price premium consumers paid for the Products based upon the false and misleading animal welfare promises, subject to certain caps and pro-rata increases or decreases, and (ii) achieving robust and meaningful injunctive relief that creates an accountability structure to ensure the human treatment of dairy cows, directly targeting the heart of the claims involved in this litigation.

Although hard-fought over several years, these significant benefits were negotiated in a timely manner, further enhancing the value of the settlement to members of the Class. *See Schulte*, 805 F. Supp. 2d at 586 (noting that Class Members "realize both immediate and future benefits" of the lawsuit upon settlement approval); *In re AT & T Mobility Wireless Data Servs. Sales Litig.*,

270 F.R.D. 330, 347 (N.D. Ill. 2010) (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002)) (emphasizing that "a future victory is not as valuable as a present victory" because "'[t]o most people, a dollar today is worth a great deal more than a dollar ten years from now.'"); *Donovan v. Estate of Frank E. Fitzsimmons*, 778 F.2d 298, 309 n.3 (7th Cir. 1985) (a $2 million settlement sum today is worth the same as a $3.6 million recovery five years from now, at a prime interest rate of 12.5%). Because "Class Counsel have navigated a complicated case and have negotiated a Settlement Agreement that provides significant benefits to the Class Members," the "quality of Class Counsel's performance in this litigation favors approval of the fees requested." *Schulte*, 805 F. Supp. 2d at 598.

5. The amount of work necessary to resolve this litigation was substantial.

Evaluating the amount of work necessary to resolve a matter turns on "what the Class Members and Counsel would have agreed to ex ante in an arm's length negotiation." *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1037 (N.D. Ill. 2011). The fee petition set forth by Class Counsel here is reasonable because, at the initiation of this case, it was likely that resolving this matter would require thousands, if not tens of thousands, of hours of attorney time to complete and a significant capital investment. Though the parties reached resolution earlier in the litigation than anticipated, this does not matter. *See id.* (noting that "[i]t is not a requisite of reasonable attorneys' fees that Class Counsel engage in laborious litigation over many years."). Nevertheless, the time and effort Class Counsel expended in advancing this matter was nothing short of substantial.

As detailed herein and in the corresponding attached declarations, consistent with the Court's January 22, 2020 Order appointing Co-Lead Interim Class Counsel to lead this Litigation (ECF No. 75 at 8), Class Counsel developed a protocol for reporting detailed time and expenses to the Court on a monthly basis, and performed an audit of the time and expenses prior to the

submission of this petition. In total, Class Counsel and the other firms performing work for the common benefit of the Settlement Class spent 3,406.5 hours progressing this litigation through June 30, 2022, which represents a lodestar of $2,857,344.00.[8] This time comprised of countless tasks fundamental to the Settlement reached herein, including, *inter alia*, (i) investigating Defendants' advertising practices and treatment of farm animals, which ultimately led to the allegations contained within the initial complaint; (ii) participating in hard-fought settlement discussions and negotiations over the course of two years under the expert guidance of Judge Andersen; and (iii) in support of settlement negotiations, exchanging various written discovery requests, producing and reviewing voluminous sets of documents in response thereto on several occasions, submitting multiple rounds of mediation briefs to Judge Andersen in advance of each of the four day-long mediation sessions, and exchanging a multitude of settlement positions, proposals, counterproposals, correspondence (including numerous rounds of letters and emails), and settlement demands through Judge Andersen. Preliminary Declaration ¶¶ 12-17.

Moreover, Class Counsel's work does not end with the submission of this brief. They will need to prepare for and appear at the Final Fairness Hearing, oversee the claims administration process, and resolve any potential disputes concerning the injunctive relief negotiated in this matter. Because Class Counsel's work continues, and will continue for years after any Court order finally approving the Settlement, this factor weighs in favor of Class Counsel's fee request.

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[8] This is the amount of time spent by counsel after Class Counsel audited all of the firms' time, eliminating as non-billable that time which did not go to the common benefit of litigating this case and/or was non-compensable under the approved Time and Expense Protocol. Exhibit 1, Declaration of Amy Keller ("Keller Decl.") ¶ 15.

6. The stakes in this litigation were high.

The stakes of this case were high from the outset, and thus support Class Counsel's fee application. Several courts in the Northern District of Illinois, including this Court itself, have found that stakes in a case are high where "the class is large, the challenged activity is extensive, the complexity and costs of the legal proceedings are high, and a large amount of money is involved." *See Schulte*, 805 F. Supp. 2d at 598; *AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d at 1038 (same). Each of those considerations is true here. First, the Class that this Court preliminarily certified for settlement purposes is large, comprising of millions of individuals. Second, Defendants' allegedly misleading and deceptive marketing scheme, which Plaintiffs allege has been ongoing for years, is pervasive, appearing on the packaging and labeling of all Defendants' Milk Products. Third, the claims contained herein are complex, and much uncertainty stemming from class certification and the determination of damages has remained.[9] While Plaintiffs' firms have already amassed $95,198.99 in necessary and reasonable litigation expenses (as detailed more fully in Section IV below and in the attached declarations), the case would become much more expensive through continued litigation, including a likely battle of the experts as to the materiality of Defendants' challenged representations. This factor weighs in favor of the requested fees and expenses.

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[9] For example, Defendants have argued that not all consumers purchased the Milk Products due to Defendants' animal welfare claims, which they argue could defeat predominance. *See, e.g.*, *Langendorf v. Skinnygirl Cocktails, LLC*, 306 F.R.D. 574, 582-83 (N.D. Ill. 2014) (denying motion for class certification, finding that plaintiff had not established materiality of defendants' allegedly-deceptive representations of an "all natural" beverage). Additionally, the Litigation may have been either interrupted or complicated based upon the liability assessment of the varying Defendants, including the existence of indemnity and/or defense agreements.

C. Lodestar cross-checks in this Circuit are "not necessary"; regardless, Plaintiffs' counsel's lodestar supports the requested fees.

"In determining fees in a common fund class action settlement the use of a lodestar cross-check is no longer recommended in the Seventh Circuit." *Bell v. Pension Committee of ATH Holding Company, LLC*, No. 15-cv-02062, 2019 WL 4193376, at *5 (S.D. Ind. Sept. 4, 2019) (citing *In re Synthroid Marketing Litig.*, 325 F.3d at 979-80). *See also Redman v. RadioShack Corp.*, 768 F.3d 622, 633 (7th Cir. 2014) (rejecting justification for attorneys' fees based on "amount of time that class counsel reported putting in on the case," and stating "the reasonableness of a fee cannot be assessed in isolation from what it buys"); *Young v. Rolling in the Dough, Inc.*, No. 17-cv-07825, 2020 WL 969616, at *6 (N.D. Ill. Feb. 27, 2020) ("A lodestar cross-check is not necessary.") (citing *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011)); *Kaufman v. Am. Express Travel Related Servs., Co.*, No. 07-cv-1707, 2016 WL 806546, at *13 (N.D. Ill. Mar. 2, 2016), *aff'd sub nom.* 877 F.3d 276 (7th Cir. 2017) (noting that "it is true that courts in this circuit have found that '[t]he use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive.'") (citations omitted); *Dairy Farmers*, 80 F. Supp. 3d at 849 ("Ultimately, the Court sees no utility in considering this somewhat arbitrary (and under-vetted) calculation [of using a lodestar cross-check], and thus disregards [evidence of counsel's lodestar] for purposes of this fee petition."); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500 (N.D. Ill. 2015) (observing that "no Seventh Circuit case law suggests that a percentage-of-the-fund approach will yield a reasonable result only where it satisfies a lodestar cross-check."); *Beesley v. Int'l Paper Co.*, No. 3:06-CV-703-DRH-CJP, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) ("The use of a lodestar cross-check has fallen into disfavor."); *Will, et al. o/b/o Gen. Dynamics Corp. v. General Dynamics Corp.*, No. 06-civ-698, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) ("The use of a lodestar cross-check in a common fund case is unnecessary,

arbitrary, and potentially counterproductive."). Nevertheless, applying a lodestar cross-check analysis confirms the reasonableness of the award to Class Counsel.

Since the matter's inception in 2019, Class Counsel invested 3,406.5 hours of common benefit attorney and other professional time from case inception through June 30, 2022. Keller Decl. *See also* Exhibits 2 through 11 (declarations of additional counsel). The average hourly rate by Class Counsel and their associated professional staff is approximately $581.20, Keller Decl. ¶ 16, a rate comparable to those charged by other law firms with similar experience, expertise, and reputation, for similar services in the nation's leading legal markets. Class Counsel's base lodestar is $2,857,344.00. Keller Decl., Exhibit D. Awarding one-third of the Settlement Fund would result in a conservative "multiplier" of 2.45. Such a multiplier is well within accepted ranges,[10] and is warranted here.

IV. THE REQUESTED REIMBURSEMENT OF COSTS AND EXPENSES IS FAIR AND REASONABLE AND SHOULD BE APPROVED.

"It is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses . . . ." *Beesley*, 2014 WL 375432, at *3 (citing *Boeing*, 444 U.S. at 478); *see also* Fed. R. Civ. P. 23(h); *Mills*, 396 U.S. at 392 (recognizing the right to reimbursement of expenses where a common fund has been produced or preserved for

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[10] *See, e.g.*, *Skelton*, 860 F.2d at 258 (noting that "the district court, familiar as it is with the nature of the litigation, should retain discretion to decide if and to what extent the plaintiffs' counsel should be compensated for risk."). *See also Harman v. Lyphomed, Inc.*, 945 F.2d 969, 974 (7th Cir. 1991) (observing that "[m]ultipliers anywhere between one and four have been approved," although) (internal citations omitted); *Schulte*, 805 F. Supp. 2d at 598 (approving an award that "represent[s] a multiplier of less than 2.5, which is not an unreasonable risk multiplier."); *In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F. Supp. 2d 997, 1015 (E.D. Wis. 2010) (awarding a fee that represented a multiplier of 2.07 on a lodestar cross-check and recognizing that "the mean risk multiplier in cases involving class settlements comparable in size to the present settlement is 2.70.") (citing Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees & Expenses in Class Action Litigation: 1993–2008, 7 *J. of Empirical Legal Stud.* 248, 274 tbl.15 (2010)).

the benefit of a class). Reimbursable expenses are those "that are consistent with market rates and practices," *In re Ready-Mixed Concrete Antitrust Litig.*, No. 1:05-CV-00979-SEB, 2010 WL 3282591, at *3 (S.D. Ind. Aug. 17, 2010), which includes, among other things, "expert witness costs; computerized research; court reports; travel expense; copy, phone and facsimile expenses and mediation." *Beesley*, 2014 WL 375432, at *3; *see also In re Synthroid*, 264 F.3d at 722 ("Reducing litigation expenses because they are higher than the private market would permit is fine; reducing them because the district judge thinks costs too high in general is not.").

In addition to their application for attorneys' fees, Class Counsel respectfully request reimbursement for $95,198.99 costs and expenses incurred in furtherance of this matter.[11] Class Counsel's costs and expenses were incurred in furtherance of the litigation primarily for filing fees, limited travel costs, and mediation costs. Keller Decl. ¶ 17; *see also* Exhibits 1 through 11 (setting forth break down of expenses by firm and by expense category). Due to the risk that they might never be recovered, Class Counsel endeavored to keep expenses to a minimum. Keller Decl. ¶ 18. Therefore, in addition to being eminently reasonable, Class Counsel submit that the requested costs and expenses are consistent with what the market would award in a private setting, and should be approved.[12]

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[11] Class Counsel seek their fees on the gross Settlement Fund. *See Hale*, 2018 WL 6606079, at *13 (collecting cases) ("Courts in this Circuit routinely award a percentage of the gross common fund without netting out separately awarded costs, and this Court sees no reason to depart from that approach here."); *see also Dairy Farmers*, 80 F. Supp. 3d at 842 (awarding fees in the amount one-third of the gross fund plus costs and expenses).

[12] Separate and apart from these costs are the costs to administer the Settlement, which have been and will be incurred by Epiq Class Actions & Claims Solutions, Inc. after a competitive bidding process. *See* Settlement Agreement § XI. The Claims Administrator developed a robust Notice Program and Claims process, consistent with the recent amendments to Rule 23(c), (e)(1), and (e)(2), to encourage the filing of Claims and maximize the number of Settlement Class Members who would receive monetary compensation under the Settlement. *Id.* § I.55.; *see also* Fed. R. Civ. P. 23(e)(2)(C)(ii) (noting that the Court must consider "the effectiveness of any (footnote continued)

V. THE REQUESTED SERVICE AWARDS ARE REASONABLE AND SHOULD BE APPROVED.

In class action cases, courts may make separate awards to class representatives in recognition of their risks taken, time expended, and benefits conferred upon the class. *See Espenscheid v. Direct Sat USA, LLC*, 688 F.3d 872, 876-77 (7th Cir. 2012). The Class Representatives here request a service payment of $3,500 each, in addition to the share of the settlement fund to which they are entitled, for their contributions to the prosecution and resolution of this litigation. The Class Representatives, among other things, (i) assisted with Class Counsel's investigation into Defendants' marketing and animal welfare practices; (ii) maintained electronic and hard-copy information for use in the discovery process; (iii) reviewed and approved the Consolidated Complaint; (iv) conferred and corresponded with Class counsel regularly; (v) participated in settlement discussions; and (vi) reviewed and approved the Settlement Agreement. Keller Decl. ¶¶ 25-26. As a result of their participation, Class Representatives enabled Class Counsel to advance this matter to successful resolution, conferring both significant monetary and injunctive benefit to the Class. Likewise, the proposed award is within the reasonable range of incentive awards in class cases. *See Espenscheid*, 688 F.3d at 877 (noting that the median class representative award is $4,000). Accordingly, each named plaintiff was as an "essential ingredient of [this] class action," *In Re Broiler Chicken Antitrust Litig.*, 2021 WL 5709250, at *4, and should be awarded $3,500 each for their service and willingness to undertake responsibilities and risks attendant with bringing this class action.

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proposed method of distributing relief to the class, including the method of processing class-member claims" when determining whether to approve the Settlement).

VI. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court grant their Petition for an Award of Attorneys' Fees and Costs, and Service Awards, and enter an order awarding:

(1) Class Counsel attorneys' fees in the amount of $7,000,000;

(2) Class Counsel costs and expenses in the amount of $95,198.99; and

(3) A service payment in the amount of $3,500 to each Class Representative, in addition to the share of the settlement fund to which he or she is entitled.

Dated: July 21, 2022

Respectfully submitted,

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SIGNATURE ATTESTATION

Pursuant to the United States District Court for the Northern District of Illinois' General Order on Electronic Case Filing, General Order 16-0020(IX)(C)(2), I hereby certify that authorization for the filing of this document has been obtained from the signatories shown above and that each signatory concurs in the filing's content.

/s/ Amy E. Keller
Amy E. Keller

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed using this Court's CM/ECF service, which will send notification of such filing to all counsel of record this 21st day of July 2022.

/s/ Amy E. Keller
Amy E. Kelle