IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

JULIE GEORGE, HEATHER ERWIN, JANET CHILDERS and FRANK LEVITT, individually, and on behalf of all others similarly-situated,	)	
Plaintiffs,	)	No. 1822-CC11811
v.	)	Div. 1
KEURIG DR. PEPPER, INC., and DR. PEPPER/SEVEN UP, INC., Defendants.	)	

APPLICATION FOR AND BRIEF IN SUPPORT OF ATTORNEYS' FEES, COSTS AND CLASS REPRESENTATIVE INCENTIVE AWARDS

Plaintiffs respectfully submit this Application for and Brief in Support of Attorneys' Fees, Costs and Class Representative Incentive Awards Related to the proposed settlement herein, and would show the Court as follows:

I. INTRODUCTION

After intense negotiations, the Parties have agreed to settle as reflected in the Class Action Settlement Agreement (the "Settlement") (Ex. 1). The Settlement provides $11,200,000 in monetary benefits to fund claims submitted by the Class. Additionally, the parties have agreed that Class Counsel will seek up to $1,200,000 in attorneys' fees and costs. *See id*. The parties have also agreed that the Class Representatives may seek a Class Representative Service Award up to $1,000 per Class Representative. Pursuant to the Settlement, the attorney's fee and cost award and all Class Representative Awards will be paid separate and apart from the $11,200,000 settlement fund and shall not take away or otherwise reduce the monetary relief available to the Class. The Settlement further provides that the Court's ruling with respect to subject application will not affect the finality of Settlement or the benefits available to the Class.

Class Counsel respectfully submits this Application seeking an attorneys' fee award of $1,200,000 inclusive of costs and expenses and a Service Award of $1,000 per Class Representative. As is demonstrated below, this valuable settlement was achieved as a result of the skill, tenacity and effective advocacy of Class Counsel. The requested fee is fair and reasonable, supported by applicable Missouri law, and consistent with prevailing awards in class action litigation around the country and in the immediate area. For these reasons, among the others stated herein which are by no means exhaustive, Class Counsel respectfully request the Court to award attorney's fees and costs, and Class Representative Service Awards in the requested sums.

II. EVIDENCE IN SUPPORT OF CLASS COUNSEL'S APPLICATION

Class Counsel incorporates by reference the Motion for Final Approval of Class Action Settlement. Additionally, Class Counsel ask the Court to take judicial notice of the entirety of the case file that have occurred during the course of this proceeding as an additional basis for the award of fees in this case. Also incorporated is the declaration of Mathew H. Armstrong, Class Counsel.

III. SETTLEMENT BENEFITS OBTAINED AND VALUE OF THOSE BENEFITS

The Settlement provides a fair, adequate, and reasonable settlement with significant benefits to the Class. The benefits are described in detail in the Settlement. Notably, the Settlement provides a monetary fund of $11,200,000 to pay claims submitted by the class members in addition to issuance of a permanent injunction requiring the Defendant to remove the label claim, "Made from Real Ginger."

IV. BACKGROUND AND FACTUAL SUMMARY

A. The Settlement is the Result of Class Counsel's Effective Litigation Strategy.

This case presented a theory of recovery against a nationwide beverage manufacturer represented by competent, experienced counsel. Prior to filing suit and during the pendency of the

cases, Class Counsel conducted a detailed analysis of Defendants' sales and marketing practices, engaged in a thorough and extensive investigation into the facts, and fashioned an appropriate remedy to serve the best interests of the Class. The investigation and discovery have included:

(i) conducting a pre-filing investigation and analysis regarding Plaintiffs' claims;

(ii) researching the applicable law with respect to the claims asserted and potential defenses thereto;

(iii) preparing numerous complaints on behalf of plaintiffs;

(iv) the retention of a consulting scientist;

(iv) reviewing over 200,000 pages of documents produced by Defendants; and

(v) extensive discussions and negotiations with defense counsel, including face-to-face meetings, many phone conferences and a mediation conference that spanned months.

This action required considerable skill and experience to result in such a successful conclusion. The case required investigation and a mastery of complex factual circumstances, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. In addition, Defendants were represented by the prominent and well-respected law firm of Baker Botts LLP. This class action case against Defendants required advance planning, strategic skills, imagination, resourcefulness, and management abilities of the highest order to match a highly qualified, experienced and formidable opposition. The prosecution and settlement of this litigation required a very high degree of competence, experience and ability by Class Counsel.

B. <u>The Settlement is the Result of Intense Negotiation</u>.

Plaintiffs' intense litigation, the experience of Class Counsel, as well as effective litigation strategy, has made settlement possible and maximized the Class's recovery. This result was achieved after arm's length negotiations which consisted of the exchange of lengthy and dense confidential business and technical information, numerous telephone calls, meetings, an open

dialogue and a lengthy, arduous mediation process before a well-respected and experienced mediator. The parties worked diligently to understand the underlying business facts in a completely transparent process. After disclosure of the facts, it was clear that the most appropriate relief included both monetary and injunctive relief.

The Settlement was not arrived at until after Class Counsel had (1) conducted an extensive and comprehensive pre-suit investigation relating to the events and transactions underlying plaintiffs' claims prior to filing the Original Complaint; (2) thoroughly researched the law and facts pertinent to plaintiffs' claims and the defenses raised by defendants and assessed the risks of prevailing on each of the respective claims on pre-trial motions and at trial; (3) exchanged, reviewed, and analyzed a substantial amount of confidential business information, and (4) a lengthy negotiation spanning months which ultimately resulted in significant concessions by the Defendant, injunctive relief and a large monetary fund for the Class.

V. ARGUMENTS AND AUTHORITIES

In the face of contested litigation, with a case asserting claims predicated on complex legal and factual issues that were opposed by highly skilled and experienced defense counsel, Class Counsel succeeded in securing not only a meaningful benefit, but a substantial benefit for the Class. Plaintiffs' requested fee is fair and reasonable when considered under applicable legal standards. Indeed, as discussed below, this award is well-within the normal range of awards in class action and contingent fee matters of this type, and is particularly appropriate here in view of both the substantial risks attendant in bringing and pursuing this action, and the significant results achieved.

The Court should determine an award of attorneys' fees and costs according to established rules of law. This procedure is similar to those established in other class actions.[1]

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[1]. *Ohio Public Interest Campaign v. Fisher Foods*, 546 F.Supp. 1 (N.D. Ohio, E.D. 1982); *In Re Montgomery County Real Estate Antitrust Litigation,* 83 F.R.D. 305 (D.Md. 1979); *Arenson v. Board of Trade of City of Chicago,* 372 F.Supp. 1349 (N.D.Ill. 1974); *Mazur v. Behrens*, 1974-2 Trade Cases §75,213 (N.D.Ill., 1974); *Colson v. Hilton Hotels Corporation,* 59 F.R.D. 324 (N.D. Ill. E.D. 1972); *City of Philadelphia v. Chas. Pfizer & Co.*, 345 F.Supp. 454

A. <u>There is No Fixed Standard or Any Absolute Measure for the Fee Award</u>

"The trial court is considered an expert at awarding attorney's fees, and may do so at its discretion." *Bachman v. A.G. Edwards, Inc*., 344 S.W.3d 260, 267 (Mo.App. E.D. 2011), quoting *Weissenbach v. Deeken*, 291 S.W.3d 361, 362 (Mo.App. E.D. 2009). "To demonstrate an abuse of discretion, the complaining party must show the trial court's decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice." *Russell v. Russell*, 210 S.W.3d 191, 199 (Mo. banc 2007).

"The factors to be considered in determining reasonable value of attorneys' fees in Missouri are (1) time, nature, character and amount of services rendered, (2) nature and importance of the litigation, (3) degree of responsibility imposed on or incurred by the attorney, (4) the amount of money or property involved, (5) the degree of professional ability, skill and experience called for and used, and (6) the result achieved." *Koppe v. Campbell*, 318 S.W.3d 233, 242 (Mo.App. W.D. 2010); *Reid v. Reid*, 906 S.W.2d 740, 743 (Mo.App. E.D. 1995).

B. <u>The Settlement Includes a "Fee-Shifting" Agreement</u>

Missouri courts generally follow the American Rule, which requires each party to bear the expense of its attorneys' fees. *Lorenzini v. Short*, 312 S.W.3d 467, 473 (Mo.App. E.D.2010). However, a contractual agreement between the parties which provides that one will pay the other's attorney's fees is well-recognized exception. *See, gen., Lucas Stucco & EIFS Design, LLC v. Landau,* 324 S.W.3d 444, 445 (Mo. banc 2010) ("attorney fees are recoverable … when the contract provides for attorney fees."); *Brooke Drywall of Columbia, Inc. v. Building Const. Enterprises, Inc.,* 361 S.W.3d 22, 27 (Mo.App. W.D. 2011) ("Attorneys' fees are not generally recoverable in the United States, but they may become so if a statute ***or the parties' contract so provides***.") (emphasis supplied); ("Missouri adheres to the American Rule, meaning that generally,

(S.D.N.Y. 1972); *see also, AAMCO Automatic Transmissions v. Tayloe,* 82 F.R.D. 405 (E.D.Pa. 1979); 2 *Newberg On Class Actions* §12.03 (3d ed. 1992).

absent statutory authorization or ***contractual agreement,*** each litigant pays his or her own attorneys' fees, with few exceptions.") (emphasis supplied).

In the present case, the parties have entered into an agreement that Class Counsel will submit to the Court an application seeking a Fee Award of up to $1,200,000 in attorneys' fees, expenses, and costs. (Settlement at Section VI).

Even if this settlement contained a "clear sailing" provision, which it does not, it is well-established that parties may enter into such a fee-shifting agreement. *See, gen, Evans v. Jeff D.*, 475 U.S. 717, 733-34, 106 S.Ct. 1531 (1986) ("a rule prohibiting the comprehensive negotiation of all outstanding issues in a pending case [specifically including claims for attorney fees in a class action] might well preclude the settlement of a substantial number of cases") citing *Marek v. Chesny* (1985) 473 U.S. 1, 7, 105 S.Ct. 3012 ("[M]any a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff"); *see also Hensley v. Eckerhart*, 461 U.S. 424, 437 , 103 S.Ct. 1933 (1983) ("A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.").

Accordingly, courts routinely acknowledge that parties may settle claims for attorneys' fees in a class action by entering into an agreement defendant will pay the plaintiff's fees. *See* 4 NEWBERG ON CLASS ACTIONS (4th ed.) § 12:3 ("defendants in a class action settlement may properly agree to pay the plaintiffs' attorneys' fees and expenses"); *see, e.g., Neel v. Strong*, 114 S.W.3d 272, 273 (Mo.App. E.D. 2003) ("As part of the settlement, the Attorney General and the tobacco companies agreed that the tobacco companies would pay the fees of the outside counsel."); *see also Wing v. Asarco Inc*., 114 F.3d 986, 988 (9th Cir. 1997) ("At the outset, we note that the fee dispute in this case arises [not from a statute or common fund, but] out of contract: in the Settlement Agreement, Asarco agreed to pay the reasonable attorney fees and expenses as

determined and awarded by the court."); *Weinberger v. Great Northern Nekoosa Corp*., 925 F.2d 518, 523 (1st Cir. 1991) (holding that when parties to class action have reached a "clear sailing" fee-shifting agreement as part of settlement, trial court may determine and award reasonable fees "even where no fee-shifting statute or common law exception thrives"); *Deloach v. Philip Morris Companies*, 2003 WL 23094907, *4 at n. 2 (M.D.N.C. December 19, 2003) ("the present petition [for attorney fees] was brought pursuant to a private [settlement] agreement among the parties."), citing *Wing,* 114 F.3d at 989; *see also, gen., Evans v. Jeff D*., 475 U.S. at 738 n. 30 (parties may simultaneously negotiate a "defendant's liability on the merits and his liability for his opponents' attorney's fees."); *In re TJX Companies Retail Sec. Breach Litigation*, 584 F.Supp.2d 395, 399 (D.Mass. 2008) (noting that basis for awarding fees was "part of the Agreement, [in which Defendant] agreed to pay court-approved attorneys' fees not to exceed $6,500,000."); *Browne v. American Honda Motor Co., Inc.,* No. NO. CV 09-06750 (C.D. Cal. October 10, 2010) ("[a] settlement agreement is a binding contract" and "contractual provisions providing for the payment of attorneys' fees … provide a basis for awarding fees.").[2]

C. The Reasonableness of the Requested Fee is Confirmed By Analysis of the Applicable Factors.

1. The time, nature, character and amount of services rendered.

In support of this request, Plaintiffs submit the Declaration of Class Counsel Mathew H. Armstrong. The declaration describes the time reasonably expended on this matter, including the

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[2]. Even if the present settlement did not include a fee-shifting agreement, the relief provided to the class would nonetheless support an award of reasonable attorney fees and expenses to Plaintiffs' counsel under the equity-based substantial benefit/"balancing of the benefits" theory or the "unusual circumstances" exception to the American Rule. As to "balancing of the benefits": *see, Jesser v. Mayfair Hotel, Inc*., 360 S.W.2d 652, 661 (Mo. banc 1962); *Lett v. City of St. Louis*, 24 S.W.3d 157, 162-63 (Mo.App. E.D. 2000); *Feinberg v. Adolf K. Feinberg Hotel Trust*, 922 S.W.2d 21, 26 (Mo.App. E.D.1996). For "special circumstances": *see, Klinkerfuss v. Cronin*, 289 S.W.3d 607 (Mo.App. E.D. 2009); *Goellner v. Goellner Printing*, 226 S.W.3d 176, 179 (Mo.App. E.D. 2007); Volk Const. Co. v. Wilmescherr Drusch Roofing Co., 58 S.W.3d 897 (Mo.App. E.D. 2001); *Temple Stephens Co. v. Westenhaver*, 776 S.W.2d 438, 443 (Mo.App. W.D. 1989). Of course, the Court need not resolve whether fees could be awarded under such theories because the parties here have clearly agreed that Defendants will pay Plaintiffs' attorneys' fees and expenses. *See* Settlement at ¶ VI(A).

contribution of time of counsel in the Related Cases. *See* Decl. at ¶ 17. "Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures." *Hensley,* 461 U.S. at 437 n. 12; *See also, e.g.*, *Lytle v. Carl,* 382 F.3d 978. 989 (9th Cir. 2004) ("Although the time descriptions are minimal, they establish that the time was spent on the matters for which the district court awarded attorneys' fees."); *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 327 (5th Cir.1995) (upholding district court decision to accept time for "pleadings," or "correspondence," noting that "we are mindful that practical considerations of the daily practice of law in this day and age preclude 'writing a book' to describe in excruciating detail the professional services rendered for each hour or fraction of an hour."), cert. denied, 516 U.S. 862, 116 S.Ct. 173 (1995); *Rode v. Dellarciprete*, 892 F.2d 1177, 1190 (3d Cir. 1990) ("[I]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney.").

Here, the lodestar value of Class Counsel's time total more than $523,000. *See* Decl. at ¶17. The primary goal of Class Counsel and the named Plaintiffs was to obtain, by settlement or judgment, the best overall common benefit for the Class Members at the earliest reasonable time. The reality of complex litigation against a well-represented defendant with creative and robust litigation tactics was an anticipated obstacle that Class Counsel considered and sought to overcome from the beginning. The results obtained by Class Counsel through the Settlement owe more to the strategy employed and quality of the work product than sheer time and labor. The mere expenditure of time and labor does not necessarily move a complex action such as this towards certification, judgment or settlement. Class Counsel did not burden the Class Members or the Court with unnecessary delay or wasted time or labor.

It is well-accepted that attorneys will charge a higher hourly rate when the work is

undertaken on a contingent basis. *See, e.g. Koppe*, 318 S.W.3d at 242 (affirming award for attorney who had "***doubled*** the hourly rate of $350 to account for the risk he took in case the appeal was unsuccessful or if the building did not sell.") (emphasis supplied). Here, Class Counsel undertook this action on a contingent fee basis (with the amount of any fee being subject to Court approval), assuming a substantial risk that the litigation would yield no recovery and leave them not only uncompensated, but "in the red" after spending thousands of dollars in hard costs. Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. For example, in, one court has explained the risks of contingent fees in complex litigation as follows:

> Although today it might appear that risk was not great based on Prudential Securities' global settlement with the Securities and Exchange Commission, such was not the case when the action was commenced and throughout most of the litigation. Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

In re Prudential-Bache Energy Income Partnerships Securities Litigation, 1994 WL 202394, *6 (E.D.La. May 18, 1994). Indeed, the risk of no recovery in complex cases of this type is very real. There are numerous class actions in which plaintiff's counsel have expended thousands of hours of effort and yet received no remuneration whatsoever despite their diligence and expertise.[3]

[3]. *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *Eisenstadt v. Centel Corp.*, 113 F.3d 738 (7th Cir. 1997) (Seventh Circuit affirmed the lower court's granting of summary judgment in favor of defendants); *Anixter v. Home-Stake Prod. Co.,* 77 F.3d 1215 (10th Cir. 1996) (Tenth Circuit overturned securities fraud class action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on the basis of 1994 Supreme Court opinion); *In re Apple Computer Sec. Litig.*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,252 (N.D. Cal. Sept. 6, 1991) (class won jury verdict against two individual defendants, but court vacated judgment on motion for judgment notwithstanding the verdict); *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (where the class won a substantial jury verdict and motion for judgment n.o.v. was denied, on appeal the judgment was reversed and the case was dismissed -- after 11 years of litigation); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (multimillion dollar judgment reversed after lengthy trial); *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478 (S.D.N.Y. 1970) (judgment for $145 million overturned after years of litigation and appeals), *modified*, 449 F.2d 51 (2d Cir. 1971), *rev'd*, 409 U.S. 363 (1973).

Simply put, it would not have been economically prudent or feasible if Class Counsel were to pursue the case under any prospect that the Court would award a fee on the basis of "normal" hourly rates applied in other types of litigation.

In the present case, Class Counsel anticipated that the case would be vigorously defended with vast resources by some of the best legal talent money can buy. Class Counsel anticipated an aggressive defense strategy of pursuing every possible forum and stratagem to stop the case dead in its tracks and to exhaust Class Counsel's resources. It has been the experience of Class Counsel that plaintiffs in complex class actions have to prevail on essentially all substantive and procedural issues in order to succeed. The defendants, on the other hand, only have to prevail on any one—be it defeating class certification, reversing class certification, or undermining substantive claims on legal or factual grounds. Class Counsel expended the necessary time and labor required to prosecute this action to a favorable conclusion. Class Counsel undertook this action on a contingent fee basis (with the amount of any fee being subject to Court approval), assuming a substantial risk that the litigation would yield no recovery and leave them uncompensated.

Although Class Counsel are highly experienced law firms, they do not have the manpower and economic resources of Defendants. The size of Class Counsel's law firms range from 1 to 13 attorneys. When Class Counsel undertakes major litigation, such as the litigation against Defendants, it necessarily limits Class Counsel's ability to undertake other complex litigation. During the course of this litigation, Class Counsel devoted significant manpower and resources to the litigation. Class Counsel had to make this commitment at the outset without knowing how long the case would take or if it would ever resolve. Therefore, Class Counsel's willingness to prosecute this action on a contingent fee basis and willingness to advance costs diverted the manpower and resources expended on this action from other cases.

2. The nature and importance of the litigation.

Because consumers are becoming more and more health conscious, it is incumbent upon those that supply the nation's food/beverage chain to do so honestly and with integrity. Consumers rely upon those that supply their food/beverage to represent the food in a way that is not misleading—particularly those beverages that cater to consumers seeking to improve their diets. This case was important because it sought to restore honesty where it was lacking. The litigation ensures that Defendants will not misrepresent the Products at issue and provides recompense for those that were misled.

3. The degree of responsibility imposed on or incurred by the attorney.

In taking on this case, Plaintiffs' counsel incurred a great degree of responsibility. Plaintiffs' counsel took on the hefty responsibility of enforcing the consumer rights of individual citizens against a large, well-funded corporation. As evidenced by the extensive current public discourse regarding food labeling and healthy diets, including natural and organic beverages, the responsibility in undertaking to protect those rights carries much weight. Were this litigation unsuccessful in obtaining meaningful relief, the consumers represented by Plaintiffs' counsel may not otherwise be able to stand up for their rights to fair and accurate information about the beverage products they purchase.

4. The amount of money or property involved.

This case involved a substantial amount of money. Defendant is a national beverage distributor with significant sales and market share. To that end, Class Counsel were able to secure a benefit for the Class that may be as much as $11,200,000. Moreover, the substantial injunctive relief obtained by Plaintiffs' counsel goes a long way to ensuring that the rights of Missouri consumers and consumers from around the country are and will continue to be protected.

5. The degree of professional ability, skill and experience called for and used.

Class Counsel are highly experienced in class action, commercial, *qui tam*, mass tort, securities and other complex litigation. Class Counsel have successfully prosecuted and settled numerous class actions, including consumer and securities class actions. Additionally, Class Counsel have prosecuted cases against some of the world's largest corporations in contingent fee litigation and are among the most experienced complex litigation attorneys in the country.

This action required considerable skill and experience to bring it to such a successful conclusion. The case required investigation and mastery of complex factual circumstances, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. In addition, this Defendants were represented by the prominent and well-respected law firm of Baker Botts LLP. The preeminent standing of opposing counsel should be weighed in determining the fee, because such standing reflects the challenge faced by Plaintiffs' attorneys.[4] This class action case required advance planning, strategic skills, imagination, resourcefulness, and management abilities of the highest order to match a highly qualified, experienced and formidable opposition. Moreover, the Court's experience with Class Counsel forms the basis for assessing the nature, extent and quality of the services rendered by Class Counsel.[5] The ability of Class Counsel to obtain such a settlement for the Class in the face of such formidable legal opposition confirms the superior quality of Class Counsel's representation.

6. The result achieved.

The Settlement provides important and significant monetary and injunctive relief for the Class. The parties have agreed that:

- Upon final approval and occurrence of the Effective Date, Defendant must cease

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4. *See In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976).
5. *Butt,* 98 S.W. 3d at 11-12; *Chrisco* 800 S.W.2d at 719; *Brown*, 838 F.2d at 453; *In Re King Resources Co. Securities Litigation*, 420 F. Supp. at 628.

using the "Made from Real Ginger" statement in connection with the sale of the Products.[6]

Defendants also agreed to a two-tiered claim payment structure under which Defendants will provide cash benefits to Settlement Class Members who timely file Claims by the Claim Filing Deadline (with or without Proof of Purchase) to the Settlement Administrator, up to the amount of $11,200,000.

7. Class Counsel's hour rates are reasonable and consistent with hourly rates charged by similarly skilled lawyers in Missouri.

Here, as summarized in the attached Armstrong Declaration, Class Counsel's attorneys expended approximately829 hours of work prosecuting the case, resulting in a lodestar attorneys' fees amount of $523,350. *See* Decl. at ¶17. Class Counsel's hourly rates used in calculating the lodestar – $650 per hour for Armstrong, Nelson, and Cherry and $550 per hour for Eggnatz and Pascucci – are reasonable and in line with the hourly rates awarded in similar cases to counsel of similar skill and experience. *See* Decl. at ¶19.

In fact, both state and federal courts in Missouri have repeatedly approved rates consistent with or in excess of those charged by Class Counsel. In *Berry*, 397 S.W.3d 432, for instance, the Supreme Court of Missouri affirmed the trial court's award of attorneys' fees based upon a lodestar calculation with rates up to $650 per hour. Similarly, in *Plubell v. Merck & Co., Inc.,* No. 04CV235817-01 (Mo. Cir. Ct. Mar. 15, 2013), the trial court awarded reasonable attorneys' fees to class counsel and found that rates as high as $675 per hour for partner-level time "are well within the rates normally charged for similar work by similarly qualified counsel in Missouri." *Id.,* FINAL JUDGMENT AND ORDER OF FINAL SETTLEMENT APPROVAL AND DISMISSAL WITH PREJUDICE filed Mar. 15, 2013, at 8-9. More recently, in *Pollard v. Remington Arms Co.,* No.

[6]. Defendants are permitted to sell-through all remaining stock of the existing label and introduce the new label as they sell through existing stock, however, the injunction shall prohibit Defendants from printing labels containing the label "Made from Real Ginger" on the Products after the late of 120 days after the Effective Date or June 1, 2019

4:13-CV-00086-ODS, 2017 WL 991071, at *6 (W.D. Mo. Mar. 14, 2017), the court approved hourly rates for class counsel ranging from $261 through $897 and found that the average hourly rates were not dissimilar to those hourly rates charged in the urban areas of Missouri. As demonstrated by the hourly rate surveys conducted by the Missouri Lawyers Weekly and the rates found reasonable in Missouri case law, Class Counsel's rates are reasonable for the purposes of a lodestar cross-check.

D. Class Counsel's Hourly Rates Should Benefit From a Reasonable Multiplier.

In *Berry v. Volkswagen Grp. of Am., Inc.,* 397 S.W.3d 425, 427 (Mo. 2013), the Missouri Supreme Court addressed the issue of attorneys' fees and multipliers in a claims-made class-action settlement. In *Berry,* the parties reached a claims-made settlement in which the available benefit was $23,000,000. Out of the approximately 22,000 class members that received notice, only 177 filed claims such that the total benefits paid to class members totaled $125,261.00.

Class counsel then filed a fee application seeking their lodestar plus a multiplier, which put their requested fee at approximately 25% of the available $23,000,000. Class counsel's lodestar totaled $3,087,320. The trial court found that Class Counsel's lodestar was reasonable, applied a 2.0 multiplier, and awarded Class Counsel $6,174,640 in attorneys' fees. The Court awarded costs separately. That fee equaled approximately 27% of the available $23,000,000 benefit.

On appeal, defendant Volkswagen argued that the trial court abused its discretion in awarding a fee that was "disproportionate to the results obtained for [the] Class." *Id.* at 429. In rejecting Volkswagen's appeal, the Court found that "there is no established principle that the fee may not exceed the damages awarded." *Id.* at 431. Moreover, the Court found that the use of a multiplier was appropriate because, as the trial court found, "'[t]he fee to be received by class counsel was always contingent, unlike the fees received by counsel for Defendant; [t]aking this case precluded class counsel from accepting other employment that would have been less risky

and [t]he time required by the demands of preparing this cause for trial delayed work on class counsel's other work.' These findings support a finding that a multiplier was necessary to ensure a market fee that compensated class counsel for taking this case in lieu of working less risky cases on an hourly basis." *Id.* at 432-33.

As set forth further herein, Class counsel here are seeking a 2.23 multiplier on their $ 523,350 lodestar.[7] If awarded, that fee would equal 10.7% of the total available claim fund,[8] which is less than half of the 25% approved by the Court in *Berry* and well within the range of regularly approved in class actions in Missouri and beyond. *See Berry*, 397 S.W.3d at 433 (affirming attorneys' fee award based upon a lodestar multiplier of 2.0); *Miloro v. Van's International Foods, Inc.*, No. 15PH-CV00642 (Mo. Cir. Ct. Sep 14, 2015) (finding that a multiplier of 3.16 is appropriate, fair, and reasonable and not disproportionately excessive in light of the benefits conferred on the members of the Class); *Mitchell v. Residential Funding Corp.,* No. 03-CV-220489 (Mo. Cir. Ct. June 24, 2008) (awarding nearly $37 million in attorneys' fees as a percentage of the settlement, representing an approximate 10.9 lodestar multiplier); *McLean*, 2007 WL 5674689, at ¶ 11 (approving a 2.75 multiplier to account "for the significant risk of non-recovery" and other considerations); *see also* NEWBURG ON CLASS ACTIONS, *supra,* § 15:86 (5th ed. June 2017 update) ("Positive multipliers from 103 are the norm, though higher multipliers are not unheard of and may well be warranted in certain circumstances.").

Unlike counsel for the Defendants, Class Counsel has not received any compensation or reimbursement for the substantial time and money it has invested in and risk it has incurred prosecuting this matter. *See* Decl. at ¶18. Instead, Class Counsel has prosecuted this action solely on a contingency basis, incurring substantial risk that it might not receive any compensation at all.

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7. Of the $1,200,000 being sought in attorney's fees and costs, $33,2245.83 is attributable to costs.
8. The value of the benefit *at least* equals the $11,200,000 fund established by the Settlement. The true value of the benefit after taking into consideration the value of the injunctive relief and other components of the settlement well exceeds $11,200,000.

See Decl. at ¶18. Another factor supporting the application of a multiplier is that Class Counsel achieved the settlement "in a time and cost-efficient manner, without expending thousands of additional hours engaging in protracted litigation." *McLennan v. LG Electronics USA, Inc.,* No. 2:10-cv-03604 (WJM), 2012 WL 686020, at *10 (D.N.J. Mar. 2, 2012) (applying a 2.93 multiplier). Furthermore, application of a multiplier in this case (as well as in similar cases) will help ensure that qualified counsel are willing to incur significant risks of non-payment in future cases, and therefore, will promote the remedial and deterrent purposes of the Missouri Merchandise Practices Act. *See Zweig v. Metro. St. Louis Sewer Dist.,* 412 S.W.3d 223, 250-51 (Mo. banc 2013) (affirming award of $4.3 million in fees and finding "use of a multiplier in this case was not abuse of discretion" and was justified to ensure adequate representation for similar claims in the future); *Lealo v. Beneficial Cal., Inc.,* 82 Cal. Rptr. 4th 19, 53 (Cal. Ct. App. 1st Dist. 2000) (class action "fee awards that are too small can also be problematic, as they chill the private enforcement essential to the vindication of many legal rights and obstruct the representative actions that often relieve the courts of the need to separately adjudicate numerous claims.").

E. Class Counsel's Fee Request Is Also Reasonable as a Percentage of the Recovery.

As an expert on the subject of attorneys' fees, the trial court has wide discretion in awarding attorneys' fees to class counsel in class actions. *Berry v. Volkswagen Group of Am., Inc.,* 397 S.W.3d 425, 430 (Mo. banc 2013) ("The trial court is deemed an expert at fashioning an award of attorneys' fee and may do so at its discretion."). In class actions, courts frequently apply a "percentage of the recovery" or "percentage of the fund" approach in awarding attorneys' fees. *See Bachman,* 344 S.W.3d at 267 (awarding a percentage of the settlement value); *see also Petrovic v. Amoco Oil Co.,* 200 F.3d 1140, 1157 (8th Cir. 1999) (noting the well-established rule that courts may use the percentage-of-the-benefit method in a common fund settlement case); *Hale v. Wal-Mart Stores, Inc.,* Nos. 01CV218710, 02CV227674, 2009 WL 2206963, ¶ 6 (Mo. Cir. Ct.

May 15, 2009) ("Missouri circuit courts recognize recovery of attorneys' fees as a percentage of the common fund."). The percentage-of-the-fund approach is appropriately applied to claims-made settlements as well. *Marty v. Anheuser-Busch Cos.,* No. 13-cv-23656-JJO, 2015 WL 6391185, at *2 (S.D. Fla. Oct. 22, 2015).

In applying the percentage of the recovery method, the trial court must "(1) value the proposed settlement; and (2) decide what percentage of the proposed settlement should be awarded as attorneys' fees." *Sutter v. Horizon Blue Cross Blue Shield of N.J.,* 966 A.2d 508, 519 (N.J. Ct. App. 2009). The choice of whether to base an attorney fee award on gross or net recovery should not make a difference so long as the end result is reasonable. *Huyer v. Buckley*, 849 F.3d 395 (8th Cir. 2017).

In valuing a settlement for purposes of determining attorneys' fees, "a court may use the scope of a claims-made fund (or its ceiling) as a valuation measure." William B Rubenstein, NEWBURG ON CLASS ACTIONS § 15:56 (5th ed. Dec. 2016 update); *see Estrada v. iYogi, Inc.,* No. 2:13-01989 WBS CKD, 2016 WL 310279, at *6 (E.D. Cal. Jan. 16, 2016) ("When there is a claims-made settlement, such as here, the percentage of the fund approach in the Ninth Circuit is based on the total money available to class members, not just the money actually claimed."); *College Ret. Equities Fund Corp. v. Rink,* 2015 WL 226112, at *5 (Ky. Ct. App. Jan 16, 2015) (affirming fee award of one-third of all funds made available to class members in a claims-made settlement).

The Court should consider the value of the entire benefit conferred by the Settlement, not merely the number or value of the claims made by the Class Members for monetary relief. *Berry,* 397 S.W.3d at 428-429 (affirming fee award in class action and rejecting arguments that the fee award should be limited by the total payout on claims made by class members); *Hale,* 2009 WL 2206963, ¶ 7 ("Class Counsel are entitled to a fee award based on the percentage of the entire

Fund, regardless of the actual amount of claims made by the respective Class Members."); *see also Master v. Wilhemina Model Agency, Inc.,* 473 F.3d 423, 436 (2nd Cir. 2007) ("An allocation of fees by percentage should therefore be award on the basis of the total funds made available, whether claimed or not."); *Amason v. Pantry, Inc.,* No. 7:09-CV-02117-RDP, 2014 WL 12600263, at *2 (N.D. Ala. 2014) ("Common-fund fee awards are properly calculated as a percentage of the benefits made available to the class, regardless of whether each member redeems the benefits made available to class members, or even whether unclaimed benefits revert to the defendant.").

In this case, the Settlement provides $11,200,000 in monetary benefits to the Class alone, in addition to the value provided to the Class by notice and administration costs and the work performed by Class Counsel. To compensate Class Counsel for the substantial time invested and risk incurred in prosecuting this action and achieving an excellent Settlement for the benefit of the Class, Class Counsel requests an award of $1,200,000 in reasonable attorneys' fees and expenses or approximately 10.7% of the $11,200,000 total fund that was established to pay claims as part of the settlement. Of course, this fund only represents one component of the settlement and the true "value" or "benefit" of the Settlement also includes at a minimum, the injunctive relief obtained by the settlement. Accordingly, the amount sought in attorney's fees and costs is an even smaller percentage This percentage of the fund "cross check" confirms that counsels' requested fees are reasonable and consistent with other class settlements.

F. The Amount of Class Counsel's Attorneys' Fees and Expenses Request Falls Within or Below the Range Routinely Awarded by Courts in Class Actions.

Class Counsel's total attorneys' fees and expenses request in the amount of $1,200,000 represents approximately 10.7% of the total value of the $11,200,000 Settlement fund (which again does not take into consideration the value of the injunctive relief or settlement administration costs), which falls well within, if not below, the range of awards routinely granted by Missouri courts. *See Bachman,* 344 S.W.3d at 267 (holding that a fee award of approximately one-third of

the value of a settlement is "not unreasonable" in case involving complex litigation or in the class action context); *Hale,* 2009 WL 2206963, ¶ 30 ("The 38.3% fee requested in this case is customary and well in line with attorneys' fees awards in similar cases."); *McLean v. First Horizon Home Loan Corp.,* No. CV228590, 2007 WL 5674689, ¶ 11 (Mo. Cir. Ct. June 7, 2007) ("[33.3]% contingency fee is well within the average recovery from recent class action settlements.").

The fee request also falls within the range awarded in class actions by courts throughout the country, which generally recognize that fee awards as high as 50% of the gross settlement fund are reasonable. *See* NEWBURG ON CLASS ACTIONS, *supra*, §15:83 (5th ed. Dec. 2016 update) ("Usually, 50 percent of the fund is the upper limit on a reasonable fee award from a common fund, . . . though somewhat larger percentages are not unprecedented."); *Wells v. Allstate Ins. Co.,* 557 F. Supp. 3d 1, 7-8 (D.D.C 2008) (noting that fee awards in common-fund cases may range up to 45%, and approving fee request of 45% of the total gross recovery); *In re Ampicillin Antitrust Litig.,* 526 F. Supp. 494, 499 (D.D.C. 1981) (awarding 45% of $7.3 million gross settlement fund as attorneys' fees); *see also Martin v. AmeriPride Servs, Inc.,* No. 08cv440-MMA (JMA), 2011 WL 2313604, at *8 (S.D. Cal. June 9, 2011) ("Other case law surveys suggest that 50% is the upper limit, with 30-50% commonly being awarded in cases in which the common fund is relatively small."). The requested fee of 10.7% of the proposed Settlement value is reasonable in light of the substantial monetary relief obtained by Class Counsel here and should be awarded.

G. <u>Deference Is Given To Arm's Length Negotiated Fees</u>.

The fee provisions of the Settlement were not negotiated until after the substantive terms of the settlement had been agreed upon. *See* Decl. at ¶7. This is the standard and ethical manner of negotiating the settlement and fee issues. 3 *Newberg on Class Actions*, §12.03. The type of fee provision in the Settlement also is customary. *Id.* In this case, the fees were negotiated at arm's length and reflect a compromise – Plaintiffs accepted less and Defendants paid more, in order to

achieve an appropriate and fair balance for the case.

H. The Class Representatives Deserve a Service Award for Their Participation and Prosecution of these Claims on Behalf of the Class.

The Representative Plaintiffs have participated extensively in the preparation and prosecution of this class action litigation; have been active in all phases of this litigation; and have attended client conferences and provided all necessary information required to successfully settle this case. Overall, the Class Representatives devoted a significant amount of time to this matter.

Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.[9] The purpose of an incentive award is to compensate the Class Representatives for both the extra work and risks undertaken by them that led to the creation of the benefits shared by the entire class.[10] "Many cases note the obvious public policy reasons for encouraging individuals with small personal stakes to serve as class plaintiffs in meritorious cases." *NACA Class Action Guidelines—Revised 2006 (Guideline 5)* (citing *Cook v. Niedert*, 142 F.3d 1104, 1016 (7th Cir. 1998); *In re Cendant Corp*., 232 F.Supp.2d 327, 344 (D.N.J. 2002); *Van Vraken v. Atlantic Richfield Co*., 901 F. Supp. 292, 300 (D. Cal. 1995)). In this case, the Class Representatives' participation have assisted in the prosecution and ultimate settlement of this action.

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9. This is expressly recognized by the NACA (National Association of Consumer Advocates) Class Action Guidelines (Revised 2006)—Guideline 5 ("Serving as a class representative generally requires significantly greater effort, and sometimes, greater risk, than is required of the absent class members. In addition, the class representative's willingness to serve in that capacity enables the litigation to be brought in the first place.")

10. *See In re Linerboard Antitrust Litigation*, 2004 WL 1221350 (E.D. Pa. June 02, 2004) ($25,000 incentive award approved for each of the five class representatives); *Cullen v. Whitman Medical Group*, 197 F.R.D. 136 (E.D. Pa. 2000) (value of settlement was $7.3 million; six plaintiffs granted incentive awards of $1,900.00 to $10,400); *Roberts v. Texaco, Inc*., 979 F. Supp. 185 (S.D.N.Y. 1997) (value of settlement was $115 million; six plaintiffs granted incentive awards ranging from $2,500.00 to $85,000); *In re Remeron End-Payor Antitrust Litig*., 2005 WL 2230314 (D.N.J.2005) (value of settlement was $36 million; incentive payments totaling $75,000 for six named plaintiffs); *Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998) (value of settlement was $ 14 million; incentive award to class representative of $25,000); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.,* 137 F.R.D. 240 (S. D. Ohio 1991) (value of settlement was $56.6 million dollars; incentive awards of $50,000 for each of the six class representatives); *In re Dun & Bradstreet Credit Services Customer Litig*., 130 F.R.D. 366 (S.D. Ohio 1990) (value of settlement was $18 million; incentive awards to five class representatives from $35,000 to $55,000).

Defendants agreed as part of the Settlement to pay Service Awards to up to a total of 4 class representatives, in an amount of not more than $1,000 to each, to compensate for efforts in bringing the Action and achieving the benefits of the Settlement on behalf of the Settlement Class.

"Awards of up to $5,000 should not require overly particularized court examination before approval. In most cases, payment below that amount can be justified by the bare fact that the class representative consented to act on behalf of the absent class members, assuming the fiduciary responsibilities and inconveniences that accompany that role." *NACA Class Action Guidelines—Revised 2006 (Guideline 5)*. Class Counsel believe the participation of the Class Representatives is deserving of the maximum agreed award, and respectfully request that the Court award the following Plaintiffs Service Awards of $1,000 each: Julie George, Heather Erwin, Janet Childers, and Frank Levitt.

VI. CONCLUSION AND PRAYER

For all the reasons set forth herein, Class Counsel request that this Application be granted; that Class Counsel be awarded $1,200,000 in attorneys' fees and expenses; and that the following Class Representative be awarded $1,000 each: Julie George, Heather Erwin, Janet Childers, and Frank Levitt.

Dated: March 4, 2019

Julie George, Heather Erwin, Janet Childers, and Frank Levitt, Individually, and on Behalf of a Class of Similarly Situated Individuals, Plaintiffs

By: */s/ Matthew H. Armstrong*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served by email to all counsel of record on this 4th day of March, 2019.

/s/ *Matthew H. Armstrong*
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