UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUSAN SWETZ, individually on behalf of herself and all others similarly situated, Plaintiffs, -against- GSK Consumer Health, Inc., Defendant.	:	CASE NO. 7:20-cv-04731-NSR

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, LITIGATION COSTS, AND SERVICE AWARDS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

LEGAL ARGUMENT 3

I. LEGAL STANDARD 3

II. CLASS COUNSEL'S FEE REQUEST IS FAIR AND REASONABLE 4

A. The Fee Request is Reasonable Under the *Goldberger* Factors 6

1. Class Counsel Invested Substantial Time and Resources Over the Course of This Litigation 6

2. This Class Action Included Complex Legal Issues 7

3. The Requested Fee is Warranted Based on the High-Risk Nature of the Litigation 8

4. Class Counsel Provided (and Continue to Provide) High-Quality Representation 10

5. The Fee Request Is Reasonable in Relationship to the Settlement 12

6. Public Policy Supports Approval of the Fee 12

B. The Requested Fee is Reasonable Under a Percentage-of-Recovery Analysis 13

C. A Lodestar-Multiplier "Cross-Check" Further Confirms the Reasonableness of Class Counsel's Requested Fee 14

D. The Reaction of Class Members Supports Class Counsel's Fee Request 15

III. CLASS COUNSEL FILED THIS CLASS ACTION DESPITE THE CONSIDERABLE CONTINGENT RISKS PRESENTED BY THIS LITIGATION AND THE STRONG LEGAL OPPOSITION OF GSK 16

IV. CLASS COUNSEL LITIGATED THIS CASE FOR THE BENEFIT OF THE CLASS 16

V. CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF LITIGATION COSTS IS REASONABLE 17

VI. PLAINTIFFS' REQUEST FOR MODEST SERVICE AWARDS IS REASONABLE 18

VII. PAYMENT OF CLAIMS ADMINISTRATOR FEES AND EXPENSES ... **Error! Bookmark not defined.**

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

Abel v. Town Sports Int'l, LLC,
No. 09 CIV. 10388 DF, 2012 WL 6720919 (S.D.N.Y. Dec. 18, 2012) 6

In re Am. Bank Note Holographics,
127 F. Supp. 2d 418 (S.D.N.Y. 2001).....11

Asare v. Change Grp. of N.Y., Inc.,
No. 12 Civ. 3371 (CM), 2013 WL 6144764 (S.D.N.Y. Nov. 18, 2013) 17

In re Beacon Assocs. Litig.,
No. 09 CIV. 3907 CM, 2013 WL 2450960 (S.D.N.Y. May 9, 2013) 7

Beckman v. KeyBank, N.A.,
293 F.R.D. 467 (S.D.N.Y. 2013) 17

Blum v. Stenson,
465 U.S. 886 (1984).....6

Boeing Co. v. Van Gemert,
444 U.S. 472, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980).....15

Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.,
504 F.3d 229 (2d Cir. 2007).....16

Chatelain v. Prudential-Bache Sec.,
805 F. Supp. 209 (S.D.N.Y. 1992) 12

In re Citigroup Inc. Bond Litig.,
988 F. Supp. 2d 371 (S.D.N.Y. 2013).....10

In re Citigroup Inc. Sec. Litig.,
965 F. Supp. 2d 369 (S.D.N.Y. 2013).....7

City of Providence v. Aeropostale, Inc.,
No. 11 Civ. 7132 (CM), 2014 WL 1883494 (S.D.N.Y. May 9, 2014).....17

In re Colgate-Palmolive Co. ERISA Litig.,
36 F. Supp. 3d 344 (S.D.N.Y. 2014).....16, 17

In re Credit Default Swaps Antitrust Litig.,
No. 13MD2476 (DLC), 2016 WL 2731524 (S.D.N.Y. Apr. 26, 2016).....6, 17, 20

DeLeon v. Wells Fargo Bank, N.A.,
No. 12 Civ. 4494 (RLE), 2015 WL 2255394 (S.D.N.Y. May 11, 2015).....21

Fleisher v. Phoenix Life Ins. Co.,
No. 11-cv-8405 (CM), 2015 WL 10847814 (S.D.N.Y. Sept. 9, 2015) 14, 20

Frank v. Eastman Kodak Co.,
228 F.R.D. 174 (W.D.N.Y. 2005).....12

In re Glob. Crossing Sec. & ERISA Litig.,
225 F.R.D. 436 (S.D.N.Y. 2004) 11

Goldberger v. Integrated Res.,
209 F.3d 43 (2d Cir. 2000)..... *passim*

In re Hi-Crush Partners L.P. Sec. Litig.,
No. 12-CIV-8557 CM, 2014 WL 7323417 (S.D.N.Y. Dec. 19, 2014).....18

In re Holocaust Victim Assets Litig.,
No. CV 06-0983 (FB) (JO), 2007 WL 805768 (E.D.N.Y. Mar. 15, 2007) 10

Jermyn v. Best Buy Stores, L.P.,
No. 08 Civ. 214 CM, 2012 WL 2505644 (S.D.N.Y. June 27, 2012).....13

Maley v. Dale Global Techs. Corp.,
186 F. Supp. 2d 358 (S.D.N.Y. 2002).....17

In re Marsh & McLennan Cos., Inc. Sec. Litig.,
No. 04 CIV. 8144 (CM), 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009).....7

In re Marsh ERISA Litig.,
265 F.R.D. 128 (S.D.N.Y. 2010) 16

McDaniel v. Cnty. of Schenectady,
595 F.3d 411 (2d Cir. 2010).....6

Meredith Corp. v. SESAC, LLC,
87 F. Supp. 3d 650 (S.D.N.Y. 2015).....20

In re Merrill Lynch Tyco Rsch. Sec. Litig.,
249 F.R.D. 124 (S.D.N.Y. 2008) 13

Mills v. Elec. Auto-Lite Co.,
396 U.S. 375 (1970).....19

In re NASDAQ Mkt.-Makers Antitrust Litig.,
187 F.R.D. 465 (S.D.N.Y. 1998) 10, 14

GB ex rel NB v. Tuxedo Union Free School Dist.,
894 F. Supp. 2d 415 (S.D.N.Y. 2012).....8

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,
991 F. Supp. 2d 437 (E.D.N.Y. 2014).....13

In re Rite Aid Corp. Sec. Litig.,
396 F.3d 294 (3d Cir. 2006).....9

In re RJR Nabisco, Inc. Sec. Litig.,
No. 88 Civ. 7905 (MBM), 1992 WL 210138 (S.D.N.Y. Aug. 24, 1992).....17

Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.,
No. 01-CV-11814 (MP), 2004 WL 1087261 (S.D.N.Y. May 14, 2004).....11

In re Telik, Inc. Sec. Litig.,
576 F. Supp. 2d 570 (S.D.N.Y. 2008).....11

Velez v. Novartis Pharms. Corp.,
No. 04 CIV 09194 CM, 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010).....16

In re Visa Check/Mastermoney Antitrust Litig.,
297 F. Supp. 2d 503 (E.D.N.Y. 2003), *aff'd sub nom.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005).....20

In re Vitamin C Antitrust Litig.,
No. 06-MD-1738 (BMC) (JO), 2012 WL 5289514 (E.D.N.Y. Oct. 23, 2012).....19

Wal-Mart Stores Inc. v. U.S.A. Inc.,
396 F.3d 96 (2d Cir. 2005).....6, 7, 8

In re Warner Comm'ns. Secs. Litig.,
618 F. Supp. 735 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986).....14

In re WorldCom, Inc. Sec. Litig.,
388 F. Supp. 2d 319 (S.D.N.Y. 2005).....7, 14, 15

Statutes

New York General Business Law §§ 349 and 350.....18

Other Authorities

Alba Conte, *Attorney Fee Awards* § 2.08 (3d ed. 2004).....19

Federal Rule of Civil Procedure 23(f).....12

Federal Rule of Civil Procedure 23(h).....7, 19

PRELIMINARY STATEMENT

Plaintiff Susan Swetz ("Plaintiff"), along with Plaintiff Phillip White in *White v. GlaxoSmithKline Consumer Healthcare Holdings (US) LLC*, Case No. 5:20-cv-04048-SVK (N.D. Cal.) ("*White*") (collectively, "Plaintiffs"), individually and on behalf of all others similarly situated, respectfully submit this memorandum of law in support of Plaintiffs' Motion For Attorneys' Fees, Litigation Costs, And Service Awards.

The parties reached a settlement that provides significant relief for the benefit of the Settlement Class.[1] The settlement, which was preliminarily approved by this Court on June 8, 2021, provides that Defendant GSK Consumer Health, Inc. ("GSK" or "Defendant") will pay $6.5 million and make appropriate changes to its product labeling, marketing and advertising concerning the products at issue. The settlement secured by Class Counsel was only achieved following several months of arm's-length negotiations through a respected mediator, former United Stated District Court Judge Morton Denlow (Ret.).

The settlement reflects the skill, expertise, and diligent work of Class Counsel. The resulting benefit to Class Members is substantial when compared to the considerable litigation risks, including the legal uncertainty of proving Plaintiffs' claims and the substantial resources of GSK, a large pharmaceutical company. Class Counsel devoted substantial time, effort and resources in prosecuting this action prior to the settlement. *See generally* Declaration of Jason P. Sultzer in Support of Plaintiffs' (1) Motion For Final Approval of Class Action Settlement and (2) Motion For An Award of Attorneys' Fees, For Reimbursement of Litigation Expenses, and Service Awards For The Named Plaintiffs ("Sultzer Decl."). Class Counsel faced risks in continuing to

[1] Unless otherwise indicated, capitalized terms shall have the same meaning as they do in the Settlement Agreement. References to "§" are to sections of the Settlement Agreement, ECF No. 46-1, and all Settlement Agreement exhibits are referred to as "Ex #."

litigate including the legal uncertainty surrounding Plaintiffs' claims—including the risks that the FDA could issue guidance or regulations substantiating GSK's use of the "100% Natural" claim and the risk that the jury could find the "natural" claim justified because Benefiber is a product derived from a single ingredient that GSK would argue underwent only minimal processing[2]—and the financial risks in proceeding through fact and expert discovery. *Id*. ¶¶ 11, 25, 29, 30. The significant benefits—both monetary and injunctive in nature—that Class Counsel obtained on behalf of the Class weighed against the risk inherent in any complex class action, including this action, elucidate the strength of this result for class members. Finally, the significant result obtained by Class Counsel was achieved only after months of hard-fought settlement negotiations and with Judge Denlow's assistance and recommendation which led to the Agreement between the parties. *Id*. ¶¶ 17-19.

Class Counsel respectfully request that the Court award attorneys' fees in the amount of $2,166,666 as compensation for their efforts. The requested fee represents one-third of the Gross Settlement Fund, which, as explained below (section II.B, *infra*), is well within the amounts of fees awarded in the Second Circuit. The reasonableness of this award is supported and confirmed by the fact that a lodestar "cross-check" results in a 1.37 multiplier. In addition, Class Counsel also seek reimbursement in the amount of $22,903.98 for reasonable and necessary litigation expenses, which were advanced by Class Counsel without any guarantee that they would be reimbursed, as well as modest service awards of $3,000 to each of the named Plaintiffs ($6,000 total) in recognition of their efforts and sacrifices in leading this Litigation.

As a result of the robust, Court-approved Notice (*see* ECF No. 46-001 Exs. 2 and 3), all Class Members will have an opportunity to be heard on this motion. The Notice informed all Class

[2] *See* Plaintiffs' Brief in Support of Final Approval filed concurrently herewith at 14.

Members that Class Counsel would seek an award of attorneys' fees and reimbursement of litigation expenses consistent with this motion. Class members were also informed of the Settlement Website that was established, https://www.nationalbenefibersettlement.com, on which the Notice could be found. This motion will be posted on the Settlement Website contemporaneously upon filing. Furthermore, Class Counsel also informed Class members that the Court will determine the amount of the attorneys' fees and litigation expenses to be paid to Class Counsel. *Id*. Finally, Class Members were informed that they may object to any aspect of the settlement and that the deadline to do so is September 7, 2021. *Id*. Prior to the Court's fairness hearing on November 18, 2021, Class Counsel will file a response with respect to any objections received, including any directed at this motion.

As detailed herein, this motion comports with applicable law, is well-justified, and should be granted.

LEGAL ARGUMENT

I. LEGAL STANDARD

"Attorneys whose work created a common fund for the benefit of a group of plaintiffs 'may receive reasonable attorneys' fees from the fund." *See In re Credit Default Swaps Antitrust Litig.*, No. 13MD2476 (DLC), 2016 WL 2731524, at *16 (S.D.N.Y. Apr. 26, 2016) ("*CDS*"). "The party seeking fees bears the burden of demonstrating that its requested fees are reasonable." *Abel v. Town Sports Int'l, LLC*, No. 09 CIV. 10388 DF, 2012 WL 6720919, at *26 (S.D.N.Y. Dec. 18, 2012) (citing *Blum v. Stenson*, 465 U.S. 886, 897 (1984)). Courts "may award attorneys' fees in common fund cases under either the 'lodestar' method or the 'percentage of the fund' method" although "'the trend in this Circuit is toward the percentage method.'" *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010); *see also Blum*, 465 U.S. at 900 n.16 (noting that in common fund cases, "a reasonable fee is based on a percentage of the fund bestowed on the

class"); *Wal-Mart Stores Inc. v. U.S.A. Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (noting that "[t]he trend in this Circuit is toward the percentage method, which 'directly aligns the interest of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation'") (citations omitted).

The percentage method provides "appropriate financial incentives" necessary "to attract well-qualified plaintiffs' counsel who are able to take a case to trial," while also "directly align[ing] interests of the class and its counsel" by providing "a powerful incentive for the efficient prosecution and early resolution of litigation." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355, 359 (S.D.N.Y. 2005). "Although district courts may use both methods when approving an award of attorneys' fees, the Second Circuit encourages using the lodestar method only as a cross-check for the percentage method." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 CIV. 8144 (CM), 2009 WL 5178546, at *14 (S.D.N.Y. Dec. 23, 2009) (citing *Goldberger v. Integrated Res.*, 209 F.3d 43, 50 (2d Cir. 2000)).

II. CLASS COUNSEL'S FEE REQUEST IS FAIR AND REASONABLE

Federal Rule of Civil Procedure 23(h) provides that courts may award "reasonable attorney's fees and nontaxable costs that are authorized by law or the parties' agreement." Fed. R. Civ. P. 23(h). In cases such as this, where there is a common fund, courts in the Second Circuit apply either the "percentage of the fund" method or the "lodestar" method. *See Goldberger*, 209 F.3d at 50. "[T]he trend in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases." *In re Beacon Assocs. Litig.*, No. 09 CIV. 3907 CM, 2013 WL 2450960, at *5 (S.D.N.Y. May 9, 2013). The trend of courts applying the percentage of the fund method to compensate class counsel for their time and effort is "firmly entrenched in the jurisprudence of this Circuit." *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 388 (S.D.N.Y. 2013).

Applying the percentage of the fund method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart*, 396 F.3d at 121. "In contrast, the 'lodestar [method] create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in gimlet-eyed review of line-item fee audits.'" *Id*. (quoting *Baffa v. Donaldson Lufkin & Jenrette Secs. Corp.*, 2002 WL 1315603, at *1 (S.D.N.Y. June 17, 2002)). The *Goldberger* court specifically described the difficulties with the lodestar method versus the percentage of the fund method:

> As so often happens with simple nostrums, experience with the lodestar method proved vexing. Our district courts found it created a temptation for lawyers to run up the number of hours for which they could be paid. For the same reason, the lodestar created an unanticipated disincentive to early settlements. But the primary source of dissatisfaction was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits. There was an inevitable waste of judicial resources.

Goldberger, 209 F.3d at 48-49; *see also GB ex rel NB v. Tuxedo Union Free School Dist.*, 894 F. Supp. 2d 415, 427 (S.D.N.Y. 2012) (citing *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182 (2d Cir. 2008)) ("courts in the Second Circuit no longer use the 'lodestar' method for computing attorneys' fees").

In the Settlement Agreement, the Parties have agreed that Class Counsel may seek attorneys' fees. (ECF No. 46-1 at G.35.a.) Accordingly, Class Counsel request a fee award of $2,166,666 to be paid from the common fund. Under either the percentage-of-recovery or lodestar approach, Class Counsel respectfully submit that the request of one-third of the settlement is reasonable. The fee request compensates Class Counsel for their investment of time, expertise, and capital, which produced a successful outcome for the Settlement Class in a case that was both complex and high risk.

A. The Fee Request is Reasonable Under the *Goldberger* Factors

Courts evaluating whether a fee is reasonable consider "'(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.'" *Goldberger*, 209 F.3d at 50. The *Goldberger* factors "need not be applied in a formulaic way" because each case is different and "in certain cases, one factor may outweigh the rest." *In re Rite Aid Corp. Sec. Litig*., 396 F.3d 294, 301 (3d Cir. 2006). Class Counsel respectfully submit that an analysis of the *Goldberger* factors, as well as the percentage-of-recovery and lodestar analyses herein, demonstrate that the fee and expense request is reasonable and appropriate and warrants approval by the Court.

1. Class Counsel Invested Substantial Time and Resources Over the Course of This Litigation

As detailed in the concurrently filed Memorandum in Support of Plaintiffs' Motion for Final Approval, Class Counsel have dedicated their time, effort, and expense to this litigation, and they have done so entirely on a contingent basis with no guarantee of compensation or even reimbursement of expenses.[3] As fully set forth in Section II.C below, since the inception of this case in June, 2020, Class Counsel have dedicated 2,086.06 hours of attorney and other legal professional time through August 1, 2021. Class Counsel have also spent $22,903.98 for reasonable and necessary litigation expenses in prosecuting this Litigation. *See* Section V *infra*. Class Counsel has been working on this case since at least May 2020, when they began their detailed investigations into GSK's products and "Natural" and "100% Natural" representations. Sultzer Decl. ¶ 46. Class Counsel interviewed numerous potential class representatives and

[3] The extensive factual and legal investigation and prosecution of the *Swetz* and *White* matters is detailed in the Sultzer Decl. and Declaration of Katherine A. Bruce of Clarkson Law Firm, P.C. ("Bruce Decl.").

reviewed publicly available information as part of their investigations. *Id*. ¶ 47. Class Counsel also spent significant time and resources drafting pleadings, including the complaints and amended complaints, and crafting discovery. *Id*. ¶ 48.; *see* Bruce Decl. ¶¶ 5, 12, . Further, Class Counsel opposed Defendant's motions to transfer and to dismiss in the *White* action. Sultzer Decl. ¶ 49.

Shortly after the *White* Court's ruling on Defendant's motion to dismiss, the Parties engaged in settlement discussions. *Id*. ¶ 50. Class Counsel engaged in several months of arms'-length negotiations. *Id*. ¶¶ 17-20. As part of the settlement negotiations, two mediation sessions took place with Judge Denlow (Ret.). *Id*. ¶ 17. On or about February 23, 2021, the Parties reached an agreement in principle. *Id*. ¶ 20. Thereafter, Class Counsel drafted the Settlement Agreement in accordance with the term sheet. *Id*. ¶ 19. In addition, Class Counsel sought bids from notice providers and ultimately engaged the services of JND Legal Administration ("JND"). *Id*. ¶ 23. Class Counsel worked to develop a Notice Plan and the notice documents that would be submitted to the Court with Plaintiffs' Motion For Preliminary Approval. *Id*. ¶ 24. Preliminary approval of the Settlement was granted on June 8, 2021. That Class Counsel reached an excellent and expeditious settlement should not impede their ability to recover for their efforts.

Thus, this factor weighs heavily in favor of this fee application.

2. This Class Action Included Complex Legal Issues

"[C]lass actions 'have a well-deserved reputation as being most complex.'" *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998). In cases that require more expertise, a larger percentage of the fund should be awarded to the lawyers who can competently prosecute the case. *See In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 379 (S.D.N.Y. 2013) ("The upshot is that the magnitude and complexity of the litigation also weigh in favor of a significant award.").

This Litigation is no exception. This class action, had it been litigated, would have involved complex damages methodologies and a scientific battle of the experts as to the fairness or falsity of the labeling of the Covered Products. These factors make actions such as this inherently complex and high risk. Relative to other lawsuits, there are additional burdens in the instant Litigation that Plaintiffs faced including the possibility of intervening FDA guidance or regulations, other issues concerning the merits of the claims, class certification, and establishing and calculating damages. Thus, a fee award that accounts for the prosecution of litigation that was "extraordinary in both complexity and scope" is appropriate. *In re Holocaust Victim Assets Litig.*, No. CV 06-0983 (FB) (JO), 2007 WL 805768, at *46 (E.D.N.Y. Mar. 15, 2007); *see also NASDAQ*, 187 F.R.D. at 477 ("There can be no doubt that this class action would be enormously expensive to continue, extraordinarily complex to try, and ultimately uncertain of result.").

3. The Requested Fee is Warranted Based on the High-Risk Nature of the Litigation

The Second Circuit "has identified the risk of success as perhaps the foremost factor to be considered in determining" reasonable attorneys' fees. *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004); *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 592 (S.D.N.Y. 2008) ("Courts have repeatedly recognized 'that the risk of the litigation' is a pivotal factor in assessing the appropriate attorneys' fees to award plaintiffs' counsel in class actions."). Courts in this Circuit have long recognized that the risk associated with a case bears heavily upon the determination of an appropriate fee award. *See In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 432-33 (S.D.N.Y. 2001) ("[It is] appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award."). The risk of non-payment is especially high in class actions with contingent fee arrangements, like here. *See Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-CV-11814 (MP), 2004 WL 1087261, at *3

(S.D.N.Y. May 14, 2004) ("Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation.").

"It is well-established that litigation risk must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55. At the time of filing of this Litigation, there were complex issues of fact and law, which presented significant risks that continue through today. In particular, the claims asserted herein have been met with strong opposition in courts nationwide. Further, there have been varying results in actions involving similar claims in federal courts in different districts. Here, Class Counsel have prosecuted this action diligently from the outset despite the considerable risks. On November 3, 2020, GSK served, but did not file, a motion to dismiss the Complaint, ECF No. 1. The motion to dismiss involved complex issues of consumer protection law that required significant research and briefing. Plaintiffs amended the *Swetz* Complaint to add claims related to Benefiber Healthy Shape as well as new causes of action for breach of express warranty, violation of the Magnuson Moss Warranty Act, fraudulent misrepresentation, and fraudulent concealment on December 16, 2020. Sultzer Decl. ¶ 11.

While Class Counsel believe that the Plaintiffs' claims are meritorious, there were substantial risks through continued litigation. As discussed in Plaintiffs' Memorandum in Support of their Motion For Final Approval, the FDA is considering regulation to define the term "natural" including the degree of processing permissible before an ingredient of natural origin (like the wheat used to manufacture wheat dextrin) should be considered not "natural." An intervening decision could significantly weaken (or bolster) Plaintiffs' claims. In addition, Plaintiffs run that risk that a jury could agree with GSK that the wheat dextrin is minimally processed thus maintaining its "natural" attributes and/or that the satiety claims are supported by competent studies.

Moreover, although Class Counsel believe that a class would be certified even over GSK's objections, there was always a risk that GSK would successfully oppose class certification. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (noting that "[w]hile plaintiffs might indeed prevail [on a motion for class certification], the risk that the case might be not certified is not illusory"). Even if the Class was certified by the Court, GSK could have then attempted to appeal the certification decision under Federal Rule of Civil Procedure 23(f) or argued for decertification as the litigation progressed. *See Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) ("Even if certified, the class would face the risk of decertification."). Lastly, it is important to note that Class Counsel undertook and litigated this case on a fully contingent bases. Sultzer Decl. ¶ 51. "Counsel should be rewarded for undertaking [those risks] and for achieving substantial value for the class." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 441 (E.D.N.Y. 2014); *see also Jermyn v. Best Buy Stores, L.P.*, No. 08 Civ. 214 CM, 2012 WL 2505644, at *10 (S.D.N.Y. June 27, 2012) ("[T]he risk of non-payment in cases prosecuted on a contingency basis where claims are not successful…can justify higher fees.").

Class Counsel were able to secure a significant settlement on behalf of Class members for complex claims asserted against GSK, a major pharmaceutical company. This was done despite the significant risks Plaintiffs faced in pursuing claims against such a corporate behemoth with substantial resources. As such, the settlement is a direct result of Class Counsel's skills and dedication in this Litigation.

4. Class Counsel Provided (and Continue to Provide) High-Quality Representation

When evaluating *Goldberger's* "quality of representation" factor, courts in the Second Circuit "review the recovery obtained and the backgrounds of the lawyers involved in the lawsuit."

In re Merrill Lynch Tyco Rsch. Sec. Litig., 249 F.R.D. 124, 141 (S.D.N.Y. 2008). Class Counsel practice extensively in complex federal civil litigation, particularly the litigation of consumer protection and false advertising class actions, and have successfully litigated these types of actions in courts throughout the country.

"[T]he quality of representation . . . may be measured in large part by the results that counsel achieved for the classes." *Payment Card*, 991 F. Supp. 2d at 441. Beyond general qualifications, this factor is satisfied by Class Counsel's obtaining a $6.5 million settlement on behalf of the Class. Class Counsel's ability to obtain such a substantial recovery from an aggressive, well-funded defendant such as GSK represented by zealous counsel is a testament to the skill with which Class Counsel have prosecuted this case. *See Fleisher v. Phoenix Life Ins. Co*., No. 11-cv-8405 (CM), 2015 WL 10847814, at *22 (S.D.N.Y. Sept. 9, 2015) ("The quality of opposing counsel is also important in evaluating the quality of [Co] Lead Counsel's work.") (internal quotations omitted); *NASDAQ*, 187 F.R.D. at 489 (approving fee award where defense counsel included "the nation's biggest and best defense firms operating on a seemingly unlimited budget over a period of four years"); *WorldCom*, 388 F. Supp. 2d at 357-58 (finding that counsel "obtained remarkable settlements for the Class while facing formidable opposing counsel from some of the best defense firms in the country"); *In re Warner Comm'ns. Secs. Litig*., 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work."). Here, GSK is represented by Morgan, Lewis, & Bockius LLP ("Morgan Lewis"). Morgan Lewis fervently represented GSK and defended against Plaintiffs' claims.

This settlement represents a highly favorable result for the Class attributable to the diligence, determination, and hard work by Class Counsel, who developed, litigated, and

successfully negotiated the settlement against a highly-skilled and determined defense team backed by a client with substantial resources. *See generally* Sultzer Decl.; Declaration of Melissa S. Weiner in Support of Plaintiffs' Motion for Final Approval and Motion for Attorneys' Fees, Litigation Costs and Service Awards; Bruce Decl. Accordingly, the quality-of-representation factor weighs heavily in favor of supporting Class Counsel's fee request.

5. The Fee Request Is Reasonable in Relationship to the Settlement

Courts in this circuit recognize that large, complex class action lawsuits present considerable risk and require extensive work by counsel. As such, courts often award fees at or even above the percentage requested here. As described more fully in Section II.B below, the one-third fee requested is reasonable, falling in line with fee awards in comparable actions in the Second Circuit.

6. Public Policy Supports Approval of the Fee

Public policy also strongly supports the requested fee award. Without private counsel taking on the risk of this lawsuit and having the skill and resources to pursue the claims vigorously, the Settlement Class here would have recovered nothing, and important public interests would not have been vindicated. Awarding a reasonable percentage of the common fund properly motivates zealous enforcement of consumer protection laws and incentivizes skilled counsel to bring meritorious cases even where, at the outset, the prospect of any recovery is uncertain and the costs are daunting. *See WorldCom*, 388 F. Supp. 2d at 359 ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.").

Class Counsel's efforts in this Litigation are the only way Plaintiffs will receive any compensation. Plaintiffs' counsel in such cases are typically retained on a contingent basis due to the huge commitment of time and expense required relative to the losses suffered by an individual

representative plaintiff. Furthermore, the significant expense, combined with the high degree of uncertainty of ultimate success, means that contingent fees are virtually the only means of recovery in such cases. Class Counsel assumed substantial risk by undertaking this Litigation and achieved a significant benefit to the Class. An important public policy interest is served by awarding attorneys' fees adequately compensating counsel. Accordingly, public policy supports Class Counsel's requested fee.

B. The Requested Fee is Reasonable Under a Percentage-of-Recovery Analysis

"It is by now well established that a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 749, 62 L. Ed. 2d 676 (1980); *see also Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007). "The federal courts have established that a standard fee in complex class action cases like this one, where plaintiffs' counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit." *Velez v. Novartis Pharms. Corp.*, No. 04 CIV 09194 CM, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) (emphasis added); *accord In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010) ("Traditionally, courts in this Circuit and elsewhere have awarded fees in the 20%–50% range in class actions.") (citing *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), aff'd, 798 F.2d 35 (2d Cir. 1986)). "District courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater." *Velez*, 2010 WL 4877852, at *21. This is especially true where the fund is not a "mega recovery." *See In re Marsh ERISA Litig.*, 265 F.R.D. at 149.

The fee requested by this motion, $2,166,666 or one-third of the settlement, is consistent with many other fee awards granted in other class actions in this Circuit. Additionally, Class

Counsel's fee request is reasonable given the complexities and risks discussed herein and within the parameters of fee awards in similar class actions in this Circuit. As discussed above in Section II.A, Class Counsel's fee request is also supported by the *Goldberger* factors. Therefore, Class Counsel's requested fee is reasonable under a percentage-of-recovery analysis.

C. A Lodestar-Multiplier "Cross-Check" Further Confirms the Reasonableness of Class Counsel's Requested Fee

The lodestar fee calculation method has "fallen out of favor particularly because it encourages bill-padding and discourages early settlements." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014). Accordingly, the lodestar method is used in this Circuit only "as a sanity check to ensure that an otherwise reasonable percentage fee would not lead to a windfall." *Id.* "[W]here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50.

Class Counsel collectively billed nearly 2,086.06 hours in this Litigation. Sultzer Decl. ¶ 69. At their usual and customary rates, and applying the rates in existence at the time the work was undertaken, these hours translate into approximately $1,573,594.50 in total lodestar as of August 1, 2021.[4] *Id.* ¶ 69. As such, Class Counsel's request for $2,166,666 in attorneys' fees represents a total multiplier of approximately 1.37.

This multiplier is squarely within the range awarded by courts in this District, as well as across the country. *See, e.g.*, *CDS*, 2016 WL 2731524, at *17 (approving attorneys' fees constituting a multiple of 6.36 times the lodestar); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Asare v. Change Grp. of N.Y., Inc.*, No. 12 Civ. 3371

[4] "[W]here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50.

(CM), 2013 WL 6144764, at *19 (S.D.N.Y. Nov. 18, 2013) ("Typically, courts use multipliers of 2 to 6 times the lodestar."); *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM), 2014 WL 1883494, at *13 (S.D.N.Y. May 9, 2014) (noting "lodestar multiples of over 4 are awarded by this Court"); *Maley v. Dale Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (describing a 4.65 lodestar multiple as "modest" and "fair and reasonable"); *In re RJR Nabisco, Inc. Sec. Litig.*, No. 88 Civ. 7905 (MBM), 1992 WL 210138, at *6-8 (S.D.N.Y. Aug. 24, 1992) (awarding a lodestar multiplier of 6).

Therefore, Class Counsel respectfully submit that the lodestar cross-check supports the reasonableness of the requested fee award.

D. The Reaction of Class Members Supports Class Counsel's Fee Request

Finally, the reaction of Class members to the settlement and Class Counsel's fee and litigation expense request, which was disclosed in the Notice disseminated on June 22, 2021, confirms the reasonableness of Class Counsel's request. *See In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-CIV-8557 CM, 2014 WL 7323417, at *18 (S.D.N.Y. Dec. 19, 2014) ("In addition to the criteria set forth in *Goldberger*, courts in the Second Circuit consider the reaction of the class to the fee request in deciding how large a fee to award."). The Notice informed members of the Settlement Class that Class Counsel intended to seek a fee award of up to one-third of the common fund and reimbursement of litigation expenses up to $22,903.98 plus any additional costs of settlement claims administration. *See Long Form Notice*, ECF No. 46-001 Ex. 2. This motion is consistent with the Notice provided.

The Settlement has been well received by the public. Online news outlets including Bloomberg Law, The Daily Journal and topclassactions.com reported the news of Plaintiffs' settlement with GSK. As of the filing of this fee request, there has been no objections to the

Settlement. Additionally, to date, there have been no objections to the fee award requested by Class Counsel. The date to file any objections is September 7, 2021. If any objections to the requested fee award are filed, Class Counsel will address them in a supplemental filing before the final approval hearing.

III. CLASS COUNSEL FILED THIS CLASS ACTION DESPITE THE CONSIDERABLE CONTINGENT RISKS PRESENTED BY THIS LITIGATION AND THE STRONG LEGAL OPPOSITION OF GSK

Plaintiffs filed their Class Action Complaint against GSK asserting that GSK violated New York General Business Law §§ 349 and 350, and was unjustly enriched by deceptively advertising Benefiber Original as "100% Natural." ECF No. 1; Sultzer Decl. ¶ 10. Class Counsel knew from the outset of this Litigation that there were difficult legal hurdles to overcome on liability, damages, and class certification. In addition, Defendant is a major pharmaceutical company and has significant resources to defend claims brought against it. Nevertheless, Class Counsel aggressively prosecuted this Litigation despite the possibility that they would recover nothing for their services. Ultimately, Class Counsel, with Judge Denlow's assistance, was able to reach an agreement with GSK. Sultzer Decl. ¶¶ 17-20.

IV. CLASS COUNSEL LITIGATED THIS CASE FOR THE BENEFIT OF THE CLASS

Plaintiffs, through their counsel, conducted a thorough investigation of the claims asserted against GSK prior to the filing of the various complaints. *Id*. ¶ 9. Class Counsel conducted a detailed and extensive analysis of the claims alleged in the respective complaints, including labeling claims and advertising campaigns for the Covered Products, the manufacturing process to derive wheat dextrin, and the industry and scientific literature regarding the ability of fiber supplements to reduce appetite or otherwise "curb cravings." *Id*. ¶ 11; Bruce Decl. ¶ 12. Class Counsel also analyzed a report issued by the National Advertising Division ("NAD"), a Better

Business Bureau nonprofit program, issued on May 14, 2020. Sultzer Decl. ¶ 14; Bruce Decl. ¶ 12.

V. CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF LITIGATION COSTS IS REASONABLE

Under the common fund doctrine, class counsel customarily are entitled to reimbursement of reasonable expenses incurred in the litigation. Fed. R. Civ. P. 23(h); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970) (recognizing the right to reimbursement of expenses where a common fund has been produced or preserved for the benefit of a class); Alba Conte, *Attorney Fee Awards* § 2.08, at 50-51 (3d ed. 2004); *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC) (JO), 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."); *Fleisher*, 2015 WL 10847814, at *23 (noting as typical expenses in complex cases "fees paid to experts, mediation fees, notice costs, computerized research, document production and storage, court fees, reporting services, and travel in connection with th[e] litigation").

Here, Class Counsel have incurred $22,903.98 in reasonable and necessary litigation costs and expenses. Sultzer Decl. ¶ 70. These expenses include all filing, general litigation, and mediation-related expenses that were all incurred in the normal course of business and were essential to the successful prosecution of this lawsuit. Class Counsel are entitled to be reimbursed for those expenses in addition to the attorneys' fees because "substantial expenses were necessary in this complex antitrust case." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2015); *see also CDS*, 2016 WL 2731524, at *18. None of Class Counsel's expenditures have yet been reimbursed. Indeed, "[t]he fact that Class Counsel was willing to expend their own money, where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary." *Fleisher*, 2015 WL 10847814, at

*19. These expenses have also been reviewed by Class Counsel and were found to be reasonable. In sum, there is "no reason to depart from the common practice in this circuit of granting expense requests." *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003), *aff'd sub nom.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). Class Counsel therefore respectfully request that litigation costs and expenses in the amount of $22,903.98 be reimbursed.

VI. PLAINTIFFS' REQUEST FOR MODEST SERVICE AWARDS IS REASONABLE

Class Counsel seeks a $3,000 service award for each of the named Plaintiffs for their active participation in this Litigation. In the Second Circuit, plaintiff service awards "are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant and any other burdens sustained by plaintiffs." *DeLeon v. Wells Fargo Bank, N.A.*, No. 12 Civ. 4494 (RLE), 2015 WL 2255394, at *7 (S.D.N.Y. May 11, 2015). Plaintiffs' participation in this Litigation included carefully reviewing pleadings including the complaint and amended complaint, regular communication with Class Counsel, and participation in mediation.

As such, Class Counsel request the Court grant a $3,000 service award for each of the named Plaintiffs ($6,000 total).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court approve the request for: (i) the payment of attorneys' fees in the amount of one-third of the Settlement Fund, or $2,166,666; (ii) reimbursement of reasonable and necessary litigation expenses in the amount of $22,903.98; and (iii) a $3,000 service award for each of the named Plaintiffs ($6,000 total).

Dated: August 3, 2021. Respectfully submitted,

THE SULTZER LAW GROUP, P.C.

By: */s/ Jason P. Sultzer*
Jason P. Sultzer, Esq.
Joseph Lipari, Esq.
85 Civic Center Plaza, Suite 200
Poughkeepsie, NY 12601
Phone: (845) 483-7100
Fax: (888) 749-7747
sultzerj@thesultzerlawgroup.com
liparij@thesultzerlawgroup.com

Melissa S. Weiner
PEARSON, SIMON & WARSHAW, LLP
800 LaSalle Avenue, Suite 2150
Minneapolis, Minnesota 55402
Telephone: (612) 389-0600
Facsimile: (612) 389-0610
mweiner@pswlaw.com

Douglas J. McNamara
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave., NW, Fifth Floor
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
dmcnamara@cohenmilstein.com

Gary E. Mason
MASON LIETZ & KLINGER LLP
5101 Wisconsin Ave. NW, Ste 305
Washington, DC 20016
Telephone: (202) 640-1160
Facsimile: (202) 429-2294
gmason@masonllp.com

Charles E. Schaffer
LEVIN SEDRAN & BERMAN
510 Walnut Street, Suite 500
Philadelphia, PA 19106
Telephone: (215) 592-1500
Facsimile: (215) 592-4663
cschaffer@lfsblaw.com

Ryan J. Clarkson
Katherine Bruce
CLARKSON LAW FIRM, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069
Telephone: (213) 788-4050
Facsimile: (213) 788-4070
rclarkson@clarksonlawfirm.com
kbruce@clarksonlawfirm.com

Christopher D. Moon
MOON LAW APC
600 West Broadway, Suite 700
San Diego, CA 92101
Telephone: 619-915-9432
Facsimile: 650-618-0478
chris@moonlawapc.com

Attorneys for Plaintiffs and the Settlement Class