UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AMIT HEZI, JOSEPH NINA, and DANIEL PRESCOD individually and on behalf of all others similarly situated, Plaintiffs, v. CELSIUS HOLDINGS, INC, Defendant.	Case No. 1:21-cv-09892-VM

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

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Attorneys for Plaintiffs and the Settlement Class

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Court-appointed Class Representatives, Amit Hezi, Joseph Nina, and Daniel Prescod (collectively, "Class Representatives") submit this memorandum of law in support of their motion for Award of Attorneys' Fees and Costs and Service Awards.[1]

INTRODUCTION

Court-appointed Class Counsel, Clarkson Law Firm, P.C. ("Clarkson" or "Class Counsel"), on behalf of the Settlement Class, has secured a significant nationwide Settlement that ceases the allegedly deceptive "No Preservatives" label claim on Celsius beverage products, and a $7,800,000 common fund for the Settlement Class. The Settlement, which this Court preliminarily approved on November 23, 2022 (Dkt. 37), follows four years of arduous litigation in courts on both coasts, including extensive fact and expert discovery, class certification briefing, motions to disqualify experts, summary adjudication briefing, two interlocutory appeals, and two full-day mediations. With class certification proceedings imminent in this case, and a trial date quickly approaching in the companion Los Angeles case, Plaintiffs achieved certain and timely resolution for all aggrieved consumers nationwide: a Settlement that provides them with immediate monetary relief and substantial injunctive relief, without any additional risk of no recovery.

The Settlement reflects the skill, expertise, and diligent work of Class Counsel. As detailed in the preliminary approval motion and supporting documents (Dkts. 32-36), Class Counsel devoted reasonable but considerable time, effort, and resources in prosecuting both the instant action ("*Hezi*") and *Prescod v. Celsius Holdings, Inc.*, Case No. 19STCV09321

[1] All capitalized terms which are not defined in this memorandum have the meanings set forth and defined in the Settlement Agreement (the "Settlement") dated November 21, 2022 and attached as Exhibit ("Ex.") A to the Declaration of Ryan J. Clarkson ("RJC Decl."), filed concurrently herewith. The attachments to Ex. A have been updated to include the short form and long form notices and paper claim form as found on the Settlement Website, https://www.CelsiusClassActionSettlement.com.

(L.A.S.C.) ("*Prescod*") (*Prescod* and *Hezi* are the "Actions.") *See generally* RJC Decl. Class Counsel did this without any guarantee of recovery, and passed on other substantial work. (RJC Decl. ¶ 60.) Class Counsel secured a substantial benefit for the Settlement Class, in the face of sizable litigation risks against highly skilled opposing counsel. Litigation risks included whether the Court would follow suit in *Hezi* and certify it as a class action, a determination that would have required extensive additional briefing. (*Id.* ¶ 9.) Defendant also intended to seek decertification of *Prescod*, certified to proceed as a class action in the California Superior Court, County of Los Angeles in 2021. (*Id*.) Specifically, Defendant contested whether individual questions predominated over questions common to the class, whether a class action was a superior method to resolve Plaintiffs' claims, and whether a class trial would be manageable. (*Id.*) The motions presented additional risk, expense, and delay for all parties. (*Id*.) After the parties mediated the Actions twice with well-respected former judges of the Los Angeles County Superior Court, they resolved nearly four years after litigation was commenced in *Prescod*, and a year after *Hezi* was filed. The Parties mutually accepted Hon. Peter Lichtman's (Ret.) mediator's proposal, which formed the basis for the Settlement. (*Id.* ¶ 10.)

To date, Class Counsel has dedicated nearly 3,500 hours to the prosecution of this case, constituting a total lodestar amount of $2,648,727. (*Id*. ¶ 11.) Against this backdrop, Class Counsel respectfully requests the Court award a one-third fee award in the amount of $2,600,000 for their efforts. To date, the requested fees amount to only 98% of the total lodestar incurred by Class Counsel to date, for a negative multiplier of .02. (*Id*.) This does not take into account the likely hundreds of hours of additional professional time that will be required of Class Counsel to, *inter alia*, prepare the final approval papers, attend the final approval hearing, address any concerns of class members which may arise, and supervise the accurate and timely

administration of the settlement. (*Id.*) The requested one-third fee is well within the range of attorneys' fees typically awarded by this Court in similar complex cases. Class Counsel also seeks reimbursement of reasonable litigation expenses, which were advanced by Class Counsel without any guarantee that they would be reimbursed, in the amount of $242,294.01. (*Id.*) Class Counsel further seeks incentive awards to the Class Representatives totaling $20,000 in recognition of their active, in some cases years-long assistance to Class Counsel and the Class in prosecuting the Actions. *See generally* Declarations of Amit Hezi ("Hezi Decl."), Joseph Nina ("Nina Decl."), and Daniel Prescod ("Prescod Decl."). $10,000 will be distributed to Prescod for initiating this litigation and vigorously prosecuting it for four years, and $5,000 each will be distributed to Hezi and Nina for their substantial contributions. (RJC Decl. ¶ 11.)

Moreover, the Court-approved Notice (Dkt. 35) informs all Settlement Class Members of their opportunity to be heard on this motion. The Notice informed all Settlement Class Members that Class Counsel would seek an award of attorneys' fees and reimbursement of litigation expenses consistent with this motion. Settlement Class Members were also informed of the Settlement Website, https://www.CelsiusClassActionSettlement.com, on which the Notice can be found. (RJC Decl. ¶ 12.) This motion will be posted on the Settlement Website contemporaneously upon filing. (*Id.*) Class Counsel also informed the Settlement Class that the Court will determine the amount of the attorneys' fees and litigation costs to be paid to Class Counsel. (*Id.*) Settlement Class Members were also informed that they may object to any aspect of the settlement by February 12, 2023. (*Id.*) Prior to the Court's fairness hearing on March 31, 2023, Class Counsel will file a response regarding any objections received, including any directed at this motion. (*Id.*) Class Counsel respectfully requests that the Court approve the requested fees, costs, and service awards.

ARGUMENT

I. A Reasonable Percentage of the Fund Recovered Is the Appropriate Method for Awarding Attorneys' Fees in Common Fund Cases

Attorneys who achieve a benefit for class members in the form of a "common fund" are entitled to be compensated from that settlement fund for their services. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a litigant or a 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.");[2] *see also Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). The purpose of the common fund doctrine is to fairly and adequately compensate counsel for services rendered and to ensure that all class members contribute equally towards the costs associated with litigation on their behalf. *Goldberger*, 209 F.3d at 47; *see also Boeing*, 444 U.S. 472 at 478 ("The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.")

"Courts have recognized that, in addition to providing just compensation, awards of fair attorneys' fees from a common fund should also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature." *City of Providence v. Aeropostale, Inc.*, 2014 U.S. Dist. LEXIS 64517, at *30-31 (S.D.N.Y. May 9, 2014), aff'd, *Arbuthnot v. Pierson*, 607 F. App'x. 73 (2d Cir. 2015).

The Second Circuit authorizes district courts to employ the percentage-of-the-fund method when awarding fees in common fund cases. *See Goldberger*, 209 F.3d at 47. In expressly approving this method, the Second Circuit recognized that "the lodestar method proved vexing" and resulted in "an inevitable waste of judicial resources." *Id.* at 49; *Savoie v. Merchs. Bank*, 166

[2] All internal quotations and citations are omitted unless otherwise stated.

F.3d 456, 460 (2d Cir. 1999) ("the percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases.")

Indeed, "[t]he trend in this Circuit is toward the percentage method, which 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 Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *see also Weiss v. Blech (In re Blech Sec. Litig.)*, 2000 U.S. Dist. LEXIS 6920, at *14-15 (S.D.N.Y. May 19, 2000) ("This court . . . continues to find that the percentage of the fund method is more appropriate than the lodestar method for determining attorney's fees in common fund cases."); *In re Imax Sec. Litig.*, 2012 U.S. Dist. LEXIS 108516, at *17 (S.D.N.Y. Aug. 1, 2012) ("the percentage method continues to be the trend of district courts in the [Second] Circuit"). Lodestar multipliers, apart from difficulties in application, also fail to recognize risks assumed by attorneys with contingent fee agreements. *See, e.g.*, *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992).

In sum, the weight of authority advises that the Court should use the percentage-of-recovery method in determining a reasonable attorneys' fee here.

II. A Fee of One-Third Is Consistent with Comparable Cases in this District

"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 Pharm. Corp.*, 2010 U.S. Dist. LEXIS 125945, at *58 (S.D.N.Y. Nov. 30, 2010); *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.") This is especially true where, as here, the fund is not a "mega recovery." *Id.*

Many courts within this District, including this Court, have previously awarded fees constituting one-third of the total settlement fund in comparable complex class actions. *See*, *e.g.*, *Okla. Police Pension Fund & Ret. Sys. v. Teligent, Inc.*, 2021 U.S. Dist. LEXIS 232636, at *3 (S.D.N.Y. Dec. 1, 2021) (Marrero, J.) (awarding one-third of the total $6 million settlement fund in attorneys' fees and finding this sum to be fair and reasonable); *Merced Irrigation Dist. v. Barclays Bank PLC*, 2018 U.S. Dist. LEXIS 159381, at *7-8 (S.D.N.Y. Sep. 14, 2018) (Marrero, J.) (awarding one-third of total settlement fund in attorneys' fees); *Anwar v. Fairfield Greenwich Ltd.*, 2012 U.S. Dist. LEXIS 78929, at *11 (S.D.N.Y. June 1, 2012) (Marrero, J.) (awarding one-third of the total settlement fund in attorneys' fees); *Swetz v. Gsk Consumer Health*, 2021 U.S. Dist. LEXIS 227209, at *3 (S.D.N.Y. Nov. 22, 2021) (awarding one-third of the total settlement fund in attorneys' fees and finding "the requested amount of attorneys' fees to be fair, reasonable, and appropriate" pursuant to *Goldberger*, 209 F.3d 43); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, 2009 U.S. Dist. LEXIS 27899, at *16-17 (S.D.N.Y. Mar. 31, 2009) ("Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit.")

The one-third fee award is consistent with those awards granted in similar class actions in this Circuit. The request also is reasonable given the complexities and risks of litigating the Actions. As discussed herein, Class Counsel's fee request is supported by each of the *Goldberger* factors, demonstrating its reasonableness under a percentage-of-recovery analysis.

III. The Fees and Costs Award Request Is Reasonable Under the *Goldberger* Factors

The Second Circuit has set forth the following criteria that courts should consider when reviewing a request for attorneys' fees in a common fund case: "(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. These factors demonstrate that Class Counsel's requested fee is reasonable.

A. Class Counsel Have Devoted Substantial Time and Labor to Prosecuting the Actions

The time and effort expended by Class Counsel in prosecuting the Actions and achieving the Settlement support the requested fee. 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 costs.

As set forth in greater detail in the Clarkson Declaration, Class Counsel diligently investigated the claims, defenses, and underlying events and transactions that are the subject of the Actions, and invested substantial time and resources into the prosecution of the Actions, including, among other things: (1) relentlessly pursuing and reviewing thousands of business records; (2) deposing Defendant's corporate designees and experts; (3) subpoenaing third parties for sales and manufacturing data; (4) retaining and working with experts in multiple disciplines, all of whom conducted in-depth studies and produced thorough expert reports on food science, marketing, and conjoint analysis/damages; (5) concurrently litigating *Hezi* and *Prescod*; (6) obtaining class certification in *Prescod*; (7) successfully defending against Defendant's motion for summary adjudication in *Prescod*; (8) overcoming Defendant's interlocutory petitions; (9) attending two full-day mediations; and (10) engaging in months of settlement negotiations. (RJC Decl. ¶ 63.) In connection with this work, Class Counsel expended 3,494.6 hours with a lodestar value of $2,648,727. (*Id*. ¶ 11.) At all times, Class Counsel took care to staff the matter efficiently and avoided unnecessary duplication of effort. (*Id*. ¶¶ 47, 51.)

Accordingly, Class Counsel and Class Representatives respectfully submit that the time and labor dedicated to the Actions support the fee request.

B. The Actions Involved Complex Legal Issues

The magnitude and complexity of the Actions also support the requested fee. *See, e.g.*, *Swetz v. Gsk Consumer Health*, 2021 U.S. Dist. LEXIS 227209 (S.D.N.Y. Nov. 22, 2021) (stating that a similar false advertising class action was "complex [in] nature and scope" and "involved complex factual and legal issues.") 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 case is no exception.

This Action involved difficult, complex, and hotly disputed expert-driven issues regarding, *inter alia*, damages methodologies, food science, and advertising statements. (RJC Decl. ¶¶ 65-66.) These factors make actions such as this inherently complex and high risk. *See, e.g.*, *Fleisher v. Phx. Life Ins. Co.*, 2015 U.S. Dist. LEXIS 121574, at *22 (S.D.N.Y. Sep. 9, 2015) (litigation was "indisputably complex" where it involved conflicting expert testimony and the defendants had "developed defenses to liability, damages, and class certification."); *Knox v. John Varvatos Enters.*, 520 F. Supp. 3d 331, 347 (S.D.N.Y. 2021) ("what typically makes class action discovery and trials complex are the multiple factual issues and damages calculations presented . . . resulting in dozens of depositions, multiple expert reports, and complex discovery."); *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 372 (S.D.N.Y. 2002) (citing *Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 213 (S.D.N.Y. 1992)) (case qualified as

"complex" where issues of establishing liability and damages would require a battle of the experts.)

Relative to other lawsuits, there are additional burdens in prosecuting the Actions that Class Counsel faced including the possibility of issues concerning the merits of the claims, class certification, decertification, and establishing and calculating damages. *See e.g. In re Signet Jewelers Ltd. Sec. Litig.*, 2020 U.S. Dist. LEXIS 128998, at *58 (S.D.N.Y. July 21, 2020) (where litigation raised questions concerning class certification, liability, and damages requiring extensive expert analysis, "the magnitude and complexity of the Action support[ed] the conclusion that the requested fee [was] fair and reasonable"). As such, prosecuting the claims of the Settlement Class required substantial skill and dedication which support the fee request.

C. The Risks of Prosecuting the Actions Support the Requested Fee

"Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, 2004 U.S. Dist. LEXIS 8608, at *11 (S.D.N.Y. May 14, 2004). "Courts have repeatedly recognized that 'the risk of litigation' is a pivotal factor in assessing the appropriate attorneys' fees to award plaintiffs' counsel in class actions." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 592 (S.D.N.Y. 2008). For this reason, the Second Circuit has said "[t]he level of risk associated with litigation . . . is 'perhaps the foremost factor' to be considered in assessing the propriety of the multiplier." *McDaniel v. County of Schenectady*, 595 F.3d 411, 424 (2d Cir. 2010).

"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 *Prescod* was filed, there were complex issues of fact and law, which presented significant risks that apply to *Hezi* and are present today. This is especially true where, as here, liability depends on Plaintiffs' ability to establish elements requiring

subjective determinations of fact. (RJC Decl. ¶ 76.) To establish liability at trial, Plaintiffs were poised to convince a jury that citric acid is a preservative and acts as a preservative in the Products; Defendant had opposing evidence. (*Id.*) And, to establish liability under New York and California consumer protection laws, Plaintiffs would need to convince a jury that the reasonable consumer would be misled by Defendant's misrepresentation. (*Id.*) Such a determination is inherently subjective and introduces uncertainty and risk into the litigation. (*Id.*)

Class Counsel believes the claims are meritorious, tempered by the risks associated with continuing to prosecute the Actions. The Court has not yet certified *Hezi* as a class action, and such a determination would be reached only after exhaustive briefing. *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.") Defendant intended to move to decertify *Prescod*. (RJC Decl. ¶¶ 9, 77.) Defendant likely would have argued that individual questions predominate over questions common to the class, that a class action is not a superior method to resolve Plaintiffs' claims, and that a class trial would not be manageable. (*Id.* ¶ 9.) Both motions would require extensive briefing, thereby increasing risk, expense, and delay. (*Id.*) The Settlement eliminates these concerns. *See, e.g.*, *Swetz*, 2021 U.S. Dist. LEXIS 227209, at *5 ("Had the Settlement Agreement not been achieved, a significant risk existed that Plaintiffs and the Class Members may have recovered significantly less or nothing.")

Lastly, Class Counsel undertook and litigated this case on a fully contingent basis. (RJC Decl. ¶ 60.) "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.*, 2012

U.S. Dist. LEXIS 90289, at *28 (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."); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (concluding it is "appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award.")

Unlike counsel for defendants, who are paid hourly rates and reimbursed for their costs on a regular basis, Class Counsel has not been compensated for any time or costs and would have received no compensation or cost reimbursement had this case not achieved a recovery for the Settlement Class. (RJC Decl. ¶ 49.) From the outset, Class Counsel understood that it was embarking on a complex, expensive, and lengthy endeavor with no guarantee of ever being compensated. (*Id*. ¶ 11.) In undertaking that responsibility, Class Counsel was obligated to ensure that sufficient attorney and professional resources were dedicated to the prosecution of the Actions and that funds were available to compensate staff and to pay for the costs entailed. (*Id*. ¶ 49.) Accordingly, the contingency risk in this case supports the requested fee award.

D. Class Counsel Provided (and Continues to Provide) 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. (*See* RJC Decl., Ex. C (Clarkson Law Firm resume).) Here, Class Counsel brought to bear decades of collective experience prosecuting class actions into the nearly 3,500 hours devoted to this litigation. (*Id.* ¶ 11.)

"[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 the fact that Class Counsel obtained a settlement in which Celsius agreed to cease the alleged deceptive advertising and create a $7.8 million common fund to provide restitution to Settlement Class Members. Class Counsel's ability to obtain this substantial recovery from an aggressive, well-funded defendant like Celsius, represented by well-reputed counsel Faegre Drinker Biddle & Reath LLP, is a testament to the skill with which Class Counsel have prosecuted this case. *See Fleisher v. Phx. Life Ins. Co.*, 2015 U.S. Dist. LEXIS 121574, at *71 (S.D.N.Y. Sep. 9, 2015) ("The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work."); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 357-58 (S.D.N.Y. 2005) (finding that counsel "obtained remarkable settlements for the Class while facing formidable opposing counsel from some of the best defense firms in the country.")

The Settlement represents a highly favorable result for the Settlement 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* RJC Decl.) Accordingly, the quality-of-representation factor weighs heavily in favor of supporting Class Counsel's Fees and Costs Request.

E. The Fee Request Is Reasonable in Relation to the Settlement

A fee application is reasonable in relation to a settlement where the amount requested is consistent with fees awarded in similar class-action settlements of "comparable value. *See In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2009 U.S. Dist. LEXIS 120953, at *56 (S.D.N.Y. Dec.

23, 2009); *In re Veeco Instruments Sec. Litig.*, 2007 U.S. Dist. LEXIS 85554, at *12 (S.D.N.Y. Nov. 7, 2007) (noting that the fee awarded is "consistent with fees awarded in similar class action settlements of comparable value.") Courts in this Circuit recognize that large, complex class actions present considerable risk and require extensive work by counsel. As noted, the Settlement provides the Settlement Class with a cash benefit that was achieved despite the substantial obstacles and risks faced by Class Counsel in prosecuting the Actions. Fees amounting to one-third of the common fund are within the range that are regularly awarded by courts in the Second Circuit, particularly where, as here, the requested fee is *less* than the total lodestar amount. *See, e.g.*, *In re IPO Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding fees of one-third of the settlement fund with an adjusted lodestar negative multiplier of .84); *Mendes-Garcia v. 77 Deerhurst Corp.*, 2014 U.S. Dist. LEXIS 188290, at *14-16 (S.D.N.Y. Aug. 18, 2014) (awarding fees equal to one-third of the settlement fund and approximately 75% of the lodestar amount); *In re Marsh ERISA Litig.*, 265 F.R.D. at 149 (finding fees equal to one-third of the total settlement fund and 87.6% of the lodestar "fair and reasonable in relation to the recovery"); *Fogarazzo v. Lehman Bros.*, 2011 U.S. Dist. LEXIS 17747, at *12 (S.D.N.Y. Feb. 23, 2011) (awarding fees equal to one-third of the settlement fund and approximately 52% of the lodestar amount); *Zai You Zhu v. Meo Japanese Grill & Sushi, Inc.*, 2021 U.S. Dist. LEXIS 193605, at *16 (E.D.N.Y. Oct. 6, 2021) (awarding a 35% fee representing 76% of the lodestar amount). As described more fully in Section II *supra*, the attorneys' fees requested here fall squarely within the range of percentage fee awards in comparable, similarly complex class action cases within this District.

F. Public Policy Considerations Support the Requested Fee

Public policy also strongly supports the requested Fees and Costs Award. New York and federal false advertising laws are remedial in nature and, to effectuate their purpose of protecting consumers, Class Counsel respectfully submits that courts should encourage meritorious private lawsuits such as this one. *See Hesse v Godiva Chocolatier*, 2022 US Dist. LEXIS 72641, at *40 (S.D.N.Y. Apr. 20, 2022) ("the Second Circuit 'take[s] into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation.'") Had Class Counsel not taken on the risk of prosecuting the Actions, and had they not been equipped with the skill and resources necessary to pursue the claims vigorously, the Settlement Class would have recovered nothing, and important public interests would not have been vindicated.

In addition to the substantial monetary recovery obtained for consumers as part of the Settlement, Class Counsel secured meaningful injunctive relief in the form of label modifications designed to dispel consumer deception. (RJC Decl. ¶¶ 5, 7, 71.) Celsius has agreed to remove the allegedly false "No Preservatives" label attribute and adopt a "nutrition facts panel" in place of the current "dietary supplement" label, thereby promoting transparency and fair competition in the marketplace. (*Id.* ¶ 71.) Transparency and truth in advertising increases consumer choice, innovation from competitors, and drives down consumer prices, all substantial benefits to the Class and general public.

The Settlement further benefits the public by requiring that any unclaimed or unused funds that remain after the initial distribution, including interest thereon, will be donated *cy pres* to the following charitable organizations: (1) Eat Learn Play Foundation, which is committed to fighting against childhood hunger, and providing access to quality education and safe places for

children to play and be active; (2) National First Responders Fund, which is designed to provide financial resources for injured first responders dealing with work-related post-traumatic stress injuries; (3) Los Angeles Mission, which is committed to providing solutions for impoverished and homeless individuals in Los Angeles, CA; and (4) Wounded Warrior Project, which provides veterans with programs for physical and mental wellness, career transition, and support in navigating Veterans Affairs. (RJC Decl. ¶ 73.)

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.") Absent Class Counsel's diligent efforts, the Settlement Class would not receive any relief. 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 success, means that contingency fees are virtually the only means of recovery in such cases. Class Counsel assumed substantial risk by prosecuting the Actions and achieved a significant benefit to the Class. Awarding attorneys' fees adequately compensating counsel serves an important public policy interest. Accordingly, public policy supports Class Counsel's requested fee.

IV. The Requested Attorneys' Fees are Reasonable Under the Lodestar Cross-Check

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. Under the lodestar method, a court must engage in a two-step analysis: (1) to determine the lodestar, the court multiplies the number of hours each timekeeper spent on the case by each person's reasonable hourly rate; and (2) the court adjusts that lodestar figure (by applying a multiplier) to reflect such factors as the risk and contingent nature of the litigation, the result obtained, and the quality of the attorney's work. *See, e.g.*, *In re Flag Telecom Holdings*, 2010 U.S. Dist. LEXIS 119702, at *76 (S.D.N.Y. Nov. 5, 2010), at *26 ("Under the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of litigation, the complexity of the issues, the contingent nature of the engagements, the skill of the attorneys, and other factors.") The lodestar cross-check confirms that Class Counsel's request is reasonable.

Class Counsel collectively billed 3,494.6 hours prosecuting the Actions. (RJC Decl. ¶ 11.) At their usual and customary rates, and applying current rates,[3] these hours translate into approximately $2,648,727 in total lodestar as of January 13, 2023. (*Id*.) As such, Class Counsel's request for $2,600,000 in attorneys' fees represents a negative lodestar multiplier of approximately .02, or 98% of the total lodestar amount. (*Id*.) Courts in this District find that a negative lodestar multiplier supports an inference that the fee request is reasonable. *See In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012) (noting that a negative lodestar

[3] "[T]he use of current rates to calculate the lodestar figure has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation." *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 U.S. Dist. LEXIS 177175, at *39 (citing *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989)); *see also Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (similar); *Telik*, 576 F. Supp. 2d at 589 n.10 (similar).

multiplier is a "strong indication of the reasonableness of the proposed fee."); *Jermyn v. Best Buy Stores, L. P.*, 2012 U.S. Dist. LEXIS 90289, at *26-27 (S.D.N.Y. June 27, 2012) ("Here the lodestar multiplier is negative, and this is further indication of the reasonableness of the negotiated fee.") In fact, the negative lodestar multiplier is exceedingly modest in comparison to the range commonly awarded in comparable cases by courts in this District. *See, e.g.*, *In re Credit Default Swaps Antitrust Litig.*, 2016 U.S. Dist. LEXIS 54587, at *53-54 (S.D.N.Y. Apr. 25, 2016) (approving attorneys' fees constituting a multiple of more than 6 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. N.Y., Inc.*, 2013 U.S. Dist. LEXIS 165935, at *51 (S.D.N.Y. Nov. 15, 2013) ("Typically, courts use multipliers of 2 to 6 times the lodestar."); *City of Providence*, 2014 U.S. Dist. LEXIS 64517, at *38-39 (noting "lodestar multiples of over 4 are awarded by this Court"); *Maley v. Del Glob. 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 Sec. Litig.*, 1992 U.S. Dist. LEXIS 12702, at *22 (S.D.N.Y. Aug. 24, 1992) (awarding a lodestar multiplier of 6).

Class Counsel will also continue to incur fees throughout the remaining final approval process, which Class Counsel estimates will be approximately an additional $100,000. (RJC Decl. ¶¶ 52, 68.) For example, Class Counsel will prepare and finalize Class Representatives' final approval motion, correspond with the Notice Administrator, respond to any objections that may be filed, and prepare for and travel to the final approval hearing. (*Id.*)

The hourly rates of Class Counsel here range from $850 to $1,100 for partners, $425 to $775 for associates, and $300 to $365 for litigation support staff. (*Id.* ¶ 51.) "In determining the

propriety of the hourly rates charged by plaintiffs' counsel in class actions, courts have continually held that the standard is the rate charged in the community where the services were performed for the type of services performed by counsel." *Telik*, 576 F. Supp. 2d at 589. Class Counsel respectfully submits that the hourly rates for attorneys and professional staff above are reasonable and customary within the consumer protection class action bar. *See, e.g.*, *Swetz v. Gsk Consumer Health*, No. 7:20-cv-04731-NSR, 2021 U.S. Dist. LEXIS 227209, at *3 (S.D.N.Y. Nov. 22, 2021) (false advertising class action in which the court, in 2021, found reasonable billing rates ranging from $775-$875 for partners, $450 for associates, and $175-$275 for litigation support); *Meyer v. United Microelectronics Corp.*, 2021 U.S. Dist. LEXIS 84216 (S.D.N.Y. Apr. 30, 2021) (Marrero, J.) (consumer class action in which this Court, in 2021, found reasonable hourly billing rates ranging from $975 to $1,050 for partners, $450 to $650 for associates, and $300 to $375 for litigation support); *In re Hudson's Bay Co. Data Sec. Incident Consumer Litig.*, 2022 U.S. Dist. LEXIS 102805 (S.D.N.Y. June 8, 2022) (consumer class action in which the court found hourly rates reasonable within the ranges of $600 to $1,000 for partners, $350 to $700 for associates, and $150 to $400 for paralegals); *Pearlstein v. Blackberry Ltd.*, 2022 U.S. Dist. LEXIS 177786 (S.D.N.Y. Sep. 29, 2022) (consumer class action in which the court found hourly billing rates ranging from $500 (associates) to $1,200 (senior partners) reasonable); *City of Providence v. Aéropostale, Inc.*, 2014 U.S. Dist. LEXIS 64517 (S.D.N.Y. May 9, 2014) (consumer class action in which the court found reasonable hourly billing rates for plaintiffs' counsel within the range of $640 to $875 for partners, $550 to $725 for of counsel attorneys, and $335 to $665 for other attorneys); (*see also* RJC Decl. ¶¶ 56-58, Exs. D-K.)

Therefore, the lodestar cross-check supports the reasonableness of the requested fees.

V. Class Counsel's Costs Are Reasonable and Were Necessarily Incurred to Reach the Settlement

Under the common fund doctrine, Class Counsel is customarily entitled to reimbursement of reasonable costs 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 costs 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.*, 2012 U.S. Dist. LEXIS 152275, at *33 (E.D.N.Y. Oct. 22, 2012) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."); *Fleisher*, 2015 U.S. Dist. LEXIS 121574, at *76-77 (noting as typical costs 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.")

Class Counsel's fee application includes a request for payment of litigation costs, which were reasonably incurred and necessary to prosecute the Actions. The Settlement allows for reimbursement of costs up to $300,000. (RJC Decl. ¶ 11.) Class Counsel incurred $242,294.01 in reasonable and necessary litigation costs. (*Id.*) These costs include all filing, general litigation, expert costs, discovery costs, and mediation-related expenses that were incurred in the normal course of business and were essential to the successful prosecution of this lawsuit. (*Id.* ¶ 54.) Class Counsel is entitled to be reimbursed for these costs. *See In re China Sunergy Sec. Litig*, 2011 U.S. Dist. LEXIS 53007, at *17-18 (S.D.N.Y. May 13, 2011) (in a class action, attorneys should be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation . . .'") None of Class Counsel's expenditures have yet been reimbursed. (RJC Decl. ¶ 49.) 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 U.S. Dist. LEXIS 121574, at *77. Class Counsel have reviewed these costs and find them to be reasonable. (RJC Decl. ¶ 53.) 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 in the amount of $242,294.01 be reimbursed.

VI. The Reaction of the Settlement Class to Date Supports the Requested Fee

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 December 14, 2022, confirms the reasonableness of Class Counsel's request. *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 U.S. Dist. LEXIS 177175, at *47 (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."); *Tiro v. Pub. House Invs., LLC*, 2013 U.S. Dist. LEXIS 129258, at *22 (S.D.N.Y. Sep. 10, 2013) ("Where relatively few class members opt-out of or object to the settlement, the lack of opposition supports court approval of the settlement.") The Notice informed members of the Settlement Class that Class Counsel intended to seek a Fees and Costs Award of up to one-third of the Settlement Fund. (Dkt. 34-001, Ex. 1.) This request is consistent with the Notice provided.

The Settlement has been well received by the Class and overwhelmingly positive with millions of Product units claimed to date. (RJC Decl. ¶ 74.) There have also been zero objections, zero op-outs, and zero exclusions received to date. (*Id.*) If any objections to the

Settlement or the requested fee award are filed, Class Counsel will address them in a supplemental filing before the final approval hearing. (*Id*. ¶ 38.) Class Counsel will also submit an updated report from the Notice Administrator regarding the number of valid claims submitted, units claimed, average class member payout, and any objections/opt-outs before the final approval hearing. (*Id*. ¶ 39.)

VII. Application for Service Awards to Class Representatives

Class Counsel moves for an aggregate of $20,000 in Service Awards to Class Representatives for their active participation and dedication to this litigation. Of this amount, $10,000 will be distributed to Prescod, and $5,000 each will be distributed to Hezi and Nina. (RJC Decl. ¶¶ 11, 82-84.) 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.*, 2015 U.S. Dist. LEXIS 65261, at *15 (S.D.N.Y. May 7, 2015). "Such awards are not uncommon and can serve an important function in promoting class action settlements." *Sheppard v. Consol. Edison Co. of N.Y., Inc.*, 2002 U.S. Dist. LEXIS 16314, at *16 (E.D.N.Y. Aug. 1, 2002). "An incentive award is meant to compensate the named plaintiff for . . . any additional effort expended by the individual for the benefit of the lawsuit." *Dornberger v. Metro Life Ins. Co.*, 203 F.R.D. 118, 124 (S.D.N.Y. 2001); *see also Roberts v. Texaco*, 979 F.Supp. 185, 187-188 (S.D.N.Y. 1997) (approving service award for Class Representative who provided valuable assistance to counsel in prosecuting the litigation); *Denney v. Jenkins & Gilchrist*, 230 F.R.D. 317, 355 (S.D.N.Y. 2005) (service awards serve a particularly important function where the named plaintiff participated actively in the litigation).

An aggregate of $20,000 in Service Awards for the three Class Representatives in this case represents approximately 0.26% of the Settlement Fund, a modest request that is fair to the Settlement Class. *See, e.g.*, *Mills v. Capital One*, 2015 U.S. Dist. LEXIS 133530, at *48 (S.D.N.Y. Sep. 30, 2015) (finding service awards representing approximately 0.52% of the settlement fund within the range commonly approved in this district and collecting cases where service awards totaled between 1.7% and 9.1% of the settlement.) Indeed, the requested service awards, $10,000 to Prescod and $5,000 each to Hezi and Nina, are squarely within the range typically awarded to individual named plaintiffs in comparable cases in this District. *See Hart v. BHH, LLC*, 2020 U.S. Dist. LEXIS 173634, at *13 (S.D.N.Y. Sep. 22, 2020) ("[Service] [a]wards on an individualized basis have generally ranged from $2,500 to $85,000."); *Butt v. Megabus Ne. LLC*, 2012 U.S. Dist. LEXIS 137683, at *24 (S.D.N.Y. Sep. 25, 2012) (finding reasonable a service award of $15,000 to named plaintiff); *Torres v. Gristede's Operating Corp.*, 2010 U.S. Dist. LEXIS 139144, at *22 (S.D.N.Y. Dec. 21, 2010) (finding reasonable service awards of $15,000 to each of 15 named plaintiffs); *Clark v. Ecolab Inc.*, 2010 U.S. Dist. LEXIS 47036, at *30 (S.D.N.Y. May 11, 2010) (granting service awards of $10,000.00 to each of 7 named plaintiffs); *Knox v. John Varvatos Enters.*, 520 F. Supp. 3d 331, 350 (S.D.N.Y. 2021) (granting service award of $20,000 to named plaintiff and collecting cases awarding between $1,500 and $30,000 to named plaintiffs.)

A. Class Representatives Hezi and Nina

Amit Hezi and Joseph Nina have been involved in the Actions as named plaintiffs since the filing of *Hezi* on November 23, 2021. (*See* Declaration of Amit Hezi ("Hezi Decl.") ¶ 8; Declaration of Joseph Nina ("Nina Decl.") ¶ 8.) Since then, they have competently represented

the interests of the Class and have invested their time, effort, and resources into the prosecution of the Actions. (*See* Hezi and Nina Declarations generally.)

In discharging their duties to the Class, Hezi and Nina routinely communicated with Class Counsel concerning this action; remained fully informed about case developments; routinely reviewed the various pleadings and motions filed in this action; reviewed other documents related to the case; closely monitored and actively participated in settlement discussions; responded to Defendant's discovery requests; actively participated in two separate mediations; and carefully reviewed the settlement documents in order to understand and approve the terms of the settlement and the benefits to the class. (Hezi Decl. ¶ 7; Nina Decl. ¶ 7.) Thus, Class Representatives Hezi and Nina each apply to the Court for service awards of $5,000.

B. Class Representative Prescod

Daniel Prescod has been involved in the Actions since early 2019 as the named Plaintiff in *Prescod*. (*See* Declaration of Daniel Prescod ("Prescod Decl.") ¶ 9.) Over four years, Prescod has remained heavily and personally involved in the litigation. (*Id.* ¶ 8.) Prescod's efforts contributed significantly to the prosecution of the Actions and were instrumental in reaching the Settlement. In diligently discharging his duties to the Class, Prescod assisted Class Counsel in investigating Defendant and discussed with Class Counsel the basis and nature of the claims averred in *Prescod* before initiating the action; routinely communicated with Class Counsel concerning the Actions; remained fully informed about case developments; routinely reviewed the various pleadings and motions filed in this action; reviewed other documents related to the case; closely monitored and actively participated in settlement discussions; responded to Defendant's discovery requests; prepared for and sat for deposition; actively participated in two separate mediations; and carefully reviewed the settlement documents in order to understand and

approve the terms of the settlement and the benefits to the class. (*Id.* ¶ 7.) Based on his significant involvement and time spent in this case, Class Representative Prescod applies to the Court for a service award of $10,000.

Class Counsel therefore respectfully submits that service awards of $5,000 each for Amit Hezi and Joseph Nina, and $10,000 for Daniel Prescod, are reasonable and should be awarded.

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 of $2,600,000; (ii) reimbursement of reasonable and necessary litigation costs in the amount of $242,294.01; and (iii) a $5,000 service award each for Hezi and Nina and a $10,000 service award for Prescod.

Dated: January 13, 2023

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