CIRCUIT COURT FOR THE 20TH JUDICIAL CIRCUIT
COUNTY OF ST. CLAIR, STATE OF ILLINOIS

LISA MOORE, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	No. 19-L-0846
KIMBERLY-CLARK WORLDWIDE, INC.,	)	
Defendant.	)	

APPLICATION FOR ATTORNEYS' FEES, COSTS AND CLASS SERVICE AWARDS

Plaintiff respectfully submits this Application for Attorneys' Fees, Costs, and Class Service Awards related to the proposed settlement herein, and would show the Court as follows:

I. INTRODUCTION

After intense litigation and negotiations, the Parties have agreed to settle as reflected in the Class Action Settlement Agreement (the "Settlement").[1] The Settlement Agreement, attached to the Declaration of Scott A. Bursor in Support of Plaintiff's Application for Attorneys' Fees, Costs, and Class Service Awards ("Bursor Decl.") as Exhibit 1, provides for a $7,000,000 "claims-made" fund to pay all valid and timely claims, separate from and in addition to attorneys' fees, costs and expenses, incentive awards to the Class Representatives, and costs of notice and administration. Settlement Agreement, ¶ 41; *see gen.* Declaration of Scott A. Bursor ("Bursor Decl."). The Parties agreed that Class Counsel would make an application for an award of attorneys' frees, costs, and expenses up to $3,500,000. *Id.* at ¶ 54. In addition to attorneys'

[1] Capitalized Terms contained herein shall have the meaning assigned to them in the Settlement Agreement and/or Supplemental Agreement unless expressly defined herein.

fees and expenses, Defendant has agreed to pay Service Awards up to $10,000 each for Plaintiff Moore and Class Representatives Mills and Parker. *Id.* at ¶ 53. Finally, Defendant has agreed to pay costs associated with the Settlement Administrator, which is estimated to be $650,117. *Id.* at ¶ 60; *see* June 22, 2020 Declaration of Jeanne C. Finegan ("Finegan Decl.") ¶ 31. Any attorneys' fees, costs, and expenses approved by the Court shall not count against the $7,000,000 cap on Benefits to the Class and will have no effect on the amount of relief otherwise made available to Class Members pursuant to the Agreement. *Id.* As discussed in detail in Plaintiff's concurrently filed Motion for Final Approval of Class Action Settlement, Class Counsel was able to retain a reputable class action administration company that has provided a sweeping notice campaign with at least a 70% percent reach and nearly 40 million impressions, and counting. *See* Finegan Decl. ¶¶ 3, 5, 16. As a result of the outstanding notice campaign, Class Counsel and the settlement administrator anticipate that the Settlement Agreement will be fully subscribed, such that, while technically a "claims-made" deal, will be more analogous to a true "common fund." *See id*. at ¶¶ 30-31.

Pursuant to the Settlement Agreement, Class Members can receive cash payments of up to $6.00 for each Subject Product purchased during the Class Period up to $30 without proof of purchase. Settlement Agreement ¶ 42. This is an outstanding result, as this effectively provides a full refund to Class Members who submit claims. In light of these considerations, Class Counsel requests that the Court approve an award of attorney's fees of $3,500,000, or 31.3%[2] of the total benefit of $11,180,117 due under the Settlement (the sum of the $7,000,000 Benefit Fund available to Class Members, $3,500,000 available for Attorneys' Fees, Expenses, and

[2] Class Counsel is seeking a total of $3,500,000 inclusive of reasonable litigation expenses. Taking reasonable litigation expenses (totaling $19,674.14) into account, Class Counsel is in effect seeking an even lower percentage of the total Settlement value.

Costs, $650,117 of estimated Notice Administration costs, and $30,000 available for Service Awards). Calculating the fee award based on a percentage of the Settlement Fund is straightforward, is fair under the circumstances, supported by applicable law, and consistent with prevailing awards in class action litigation around the country and in the immediate area. The 31.3% fee is also fair in light of the significant time Class Counsel has devoted to this case on a contingency fee basis with the threat of no recovery at all absent a successful resolution.

Finally, Plaintiff Moore and Class Representatives Natasha Parker and Christina Mills request that the Court award them service awards in the amount of $10,000 each, as agreed to in the Settlement, to account for the significant time and effort they invested in this case on behalf of the Class. Settlement Agreement ¶ 30.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

An award of attorneys' fees in the amount of $3,500,000 is appropriate here. The Declarations of Scott A. Bursor and David C. Nelson, submitted herewith, as well as the concurrently filed Motion for Final Approval of Class Action Settlement, support the requested attorneys' fees and contain a detailed discussion of the background and procedural history of this case, including (i) Plaintiff's pre-suit investigation of the Subject Products, (ii) the pleadings and motions, (iii) discovery, (iv) the parties' arms-length settlement negotiations, and (v) preliminary approval and dissemination of notice.

A. Payment to Settlement Class Members

Defendant has agreed to pay up to $7,000,000 to cover all timely and valid claims filed by Class Members, separate from and in addition to the costs of settlement administration, incentive awards, and attorney's fees, costs, and expenses. Settlement Agreement ¶ 41. Class Members can receive up to a $6.00 cash award for each Subject Product the Authorized Claimant

purchased during the Class Period, up to a maximum of five (5) claims (or $30.00 in cash) if the Authorized Claimant does not provide Proof of Purchase. *Id.* at ¶ 42. Authorized Claimants who claim more than $30.00 in cash awards must submit Proof of Purchase establishing their purchase during the Class Period of each Subject Product claimed and may receive a full refund in cash awards based on the retail value of the Subject Products shown in the Proof of Purchase. *Id.* The notice administrator anticipates that a total of about 228,311 claims made by Authorized Claimants will exhaust the entire $7,000,000 cash fund provided by the Settlement, such that the Settlement fund will be fully-subscribed. Finegan Decl. ¶ 30. As it stands, approximately 185,0436 claims have already been made. *Id*. at ¶ 27. Should the aggregate value of the cash awards claimed by Authorized Claimants exceed $7,000,000, then the monetary value of the awards to be provided to each Authorized Claimant will be reduced on a *pro rata* basis to ensure that the entire $7,000,000 fund is distributed equitably. Settlement Agreement ¶ 44. Based on the estimated 228,311 Claims, the Settlement Administrator expects the Benefit Fund to be exhausted and payments to Class Members to be reduced by approximately 10-12% on a *pro rata* basis, such that the payment to the average Class Member will be between $26.52 and $26.87. Finegan Decl. ¶ 30. As discussed above, this is an outstanding result because Class Members are effectively getting a near full refund of their purchase prices.

B. <u>Payment of Attorneys' Fees, Costs, Expenses, and Service Awards</u>

The Settlement Agreement authorizes Class Counsel to make an application to the Court for an award of up to $3,500,000 for attorneys' fees, expenses, and incentive awards for the Class Representatives of up to $10,000. Settlement Agreement ¶¶ 53-56. The Settlement Agreement also states that Defendant shall pay all costs associated with providing notice of the Agreement and settlement administration, separate from, and in addition to Class Benefits,

attorneys' fees, and Service Awards. *Id.* at ¶ 45. The notice administrator anticipates that notice costs will amount to $650,117. Finnegan Decl. ¶ 31. Pursuant to the Settlement, attorneys' fees, costs, and expenses approved by the Court shall not count against the $7,000,000 cap on Benefits and will have no effect on the amount of relief otherwise made available to Class Members. Settlement Agreement at ¶ 54. Likewise, the service awards requested by Plaintiff Moore and Class Representatives Mills and Parker do not derogate in any way from the cash payments owed to Class Members. *Id.* at ¶¶ 30, 41. Therefore, when the attorneys' fees and costs, service awards, notice costs, and Benefit Fund are considered in the aggregate, the Settlement provides a total benefit of $11,180,117.

III. CLASS COUNSEL'S REQUESTED ATTORNEYS' FEES ARE REASONABLE

"Illinois follows the 'American Rule,' which provides that absent statutory authority or a contractual agreement, each party must bear its own attorney fees and costs." *McNiff v. Mazda Motor of Am., Inc.*, 384 Ill. App. 3d 401, 405 (4th Dist. 2008) (quoting *Negro Nest, L.L.C. v. Mid-Northern Mgmt., Inc.*, 362 Ill. App. 3d 640, 641 – 2 (4th Dist. 2005)) (quotations omitted). "If a statute or contractual agreement expressly authorizes an award of attorney fees, the court may award fees 'so long as they are reasonable.'" *Id.* (citing and quoting *Career Concepts, Inc. v. Synergy, Inc.*, 372 Ill. App. 3d 395, 405 (1st Dist. 2007)). Here, the Parties have entered into a contractual agreement expressly authorizing an award of attorney fees up to $3,500,000.[3]

[3] *See* William B. Rubenstein, 5 NEWBERG ON CLASS ACTIONS § 15:12 (5th ed. 2019) (parties to suit may have private agreements concerning fees which may include agreement between class counsel and defendant whereby defendant agrees to pay a certain fee requested by class counsel); *see also Evans v. Jeff D.*, 475 U.S. 717, 738 n.30 (1986) (parties may simultaneously negotiate a "defendant's liability on the merits and his liability for his opponents' attorney's fees"); *In re Nutella Mktg. & Sales Practices Litig.*, 589 F. App'x 53, 60 (3d Cir. 2014) (awarding $500,000 in fees for injunctive class settlement where defendant agreed to change its misleading labels); *Wing v. Asacro Inc.*, 114 F.3d 986, 988 (9th Cir. 1997) ("At the outset, we note that the fee dispute in this case arises [not from a statute or common fund, but] out of a contract: in the Settlement Agreement, Asacro agreed to pay the reasonable attorney fees and expenses as determined and awarded by the court."); *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 523 (1st Cir. 1991) (holding that when parties to class actions have reached a "clear

Settlement Agreement ¶ 54.

"When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved." *Brundidge v. Glendale Fed. Bank, F.S.B.*, 168 Ill. 2d 235, 244 (1995). "The decision to award fees based on the lodestar or percentage method is a matter within the sound discretion of the trial court, considering the particular facts and circumstances of each case." *Id.* However, the Court is not required to perform a lodestar cross-check on Class Counsel's fees. *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.,* 2016 IL App (2d) 150236, ¶ 58, 52 N.E.3d 427, 441 (citing *Brundidge,* 168 Ill. 2d at 246) (rejecting an objector's argument that the trial court was required to perform a lodestar cross-check on class counsel's fees and awarding class counsel fees totaling 33% of the common fund, or $7,600,000); *Perez v. Rash Curtis & Associates*, 2020 WL 1904533, at *18 (N.D. Cal. Apr. 17, 2020) ("Generally, a district court is 'not required' to conduct a lodestar cross-check to assess the reasonableness of a fee award."). Indeed, the "[p]ercentage analysis approach eliminates the need for additional major litigation and further taxing of scarce judicial resources." *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 924–25 (1st Dist. 1995). "Accordingly, most federal circuits…have abandoned the lodestar in favor of a percentage fee in common fund cases." *Id.* Here, although a percentage of the fund analysis is favored, the requested fee award is reasonable either as a percentage of the fund or on a lodestar basis.

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sailing" fee-shifting agreement as part of settlement, trial court may determine and award reasonable fees "even where no fee-shifting statute of common law exception thrives"); *Browne v. Am. Honda Motor Co., Inc.*, No. CV 09-06750 (C.D. Cal. Oct. 10, 2010) ("A settlement agreement is a binding contract" and "contractual provisions providing for the payment of attorneys' fees . . . provide a basis for awarding fees."); *In re TJX Cos. Retail Secs. Breach Litig.*, 584 F. Supp. 2d 395, 399 (D. Mass. 2008) (noting that basis for awarding fees was "part of the Agreement, [in which Defendant] agreed to pay court-approved attorneys' fees not to exceed $6,500,000"); *Deloach v. Philip Morris Cos.*, 2003 WL 2304907, at *4 n.2 (M.D.N.C. Dec. 19, 2003) ("the present petition [for attorney fees] was brought pursuant to a private [settlement] agreement among the parties") (citation omitted); *Neel v. Strong*, 114 S.W.3d 272, 273 (Mo. Ct. App. 2003) ("As part of the settlement, the Attorney General and the tobacco companies agreed that the tobacco companies would pay the fees of the outside counsel.").

A. The Requested Fees Are Reasonable as a Percentage of the Class Benefit

Under the common fund doctrine, courts typically award attorneys' fees based on a percentage of the total settlement, which includes any litigation expenses incurred. *Brundidge*, 168 Ill. at 238. "[T]he percentage of the fund method…reflects the results achieved." *Id.* at 244; *see Taubenfeld v. AON Corp.,* 415 F.3d 597, 600 (7th Cir. 2005) (approving fees of 33% of total settlement, noting "thirteen cases in the Northern District of Illinois where counsel was awarded fees amounting to 30–39% of the settlement fund"). "Although the settlement here is not strictly a common fund because the fees were separately negotiated and will be paid apart from money awarded to the class, courts apply many of the same principles as are applied when analyzing a common fund. … As such, the Court [should] analyze common fund factors to determine the reasonableness of the fees requested herein." *Mirakay v. Dakota Growers Pasta Co.*, 2014 WL 5358987, at *11 (D.N.J. Oct. 20, 2014). Furthermore, since the "money paid to attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no potential conflict of interest between attorneys and class members." *Id.*

1. The Total Value of the Settlement is $11,180,117

To calculate attorneys' fees based on the percentage of the benefit, the Court must first determine the value of the Settlement Fund. In doing so, the Court must include the value of the benefits conferred to the Class, including any attorneys' fee, expenses, service award and notice and claims administration payments to be made. *See*, *e.g.*, *Brundidge*, 168 Ill. at 238; *Staton v. Boeing*, 327 F.3d 938, 972-74 (9th Cir. 2003); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 (S.D. Cal. 2011), *aff'd*, 473 F. App'x. 716 (9th Cir. 2012). Indeed, where "an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees and expenses, ... the sum

of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class, with the agreed-on fee amount constituting the upper limit on the fees that can be awarded to counsel." Manual for Complex Litigation (Fourth) § 21.7 (2004). Thus, the Court should consider the *entire benefit* conferred by the Settlement, including the claims-made benefit fund ($7,000,000), agreed on attorneys' fees, costs, and expenses ($3,500,000), cost of notice and claims administration ($650,117), and the Class Representative awards (totaling $30,000), amounting to a total value of 11,180,117.

Moreover, the Court must not consider the total monetary amount distributed to the Class; rather, the Court should only consider the amount *made available* to the Class. *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 816 (E.D. Wis. 2009) (citing *Boeing Co. v. Van Gemert,* 444 U.S. 472, 480 (1980)) ("The court will similarly base its award of attorneys' fees on the entire common fund amount in the instant case."); *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026 (9th Cir. 1997) (ruling that a district court abused its discretion in basing attorney fee award on actual distribution to class instead of amount being made available). Due to the success of the notice program, the Settlement Administrator estimates that by the claims deadline, the Benefit Fund will be exhausted and there will be an approximate 10-12% *pro rata* reduction in payments to Class Members. Finegan Decl. ¶¶ 29-30. The Settlement Administrator estimates that Class Members who submitted timely and valid claims will receive between $26.52 and $26.87, which nearly amounts to a full refund for the Subject Products purchased by Class Members. *Id*. at ¶ 30.

2. The Requested 31.3% of the Total Settlement is Reasonable

Here, the requested $3,500,000 fee, inclusive of expenses, is 31.3% of the $11,180,117 total Settlement value generated on behalf of the class, which falls within the range awarded in

class actions by courts throughout the country. Courts have recognized that fee awards as high as 50% of the gross settlement fund are reasonable. *See* NEWBURG ON CLASS ACTIONS, *supra*, §15:83 (5th ed. Dec. 2016 update) ("Usually, 50 percent of the fund is the upper limit on a reasonable fee award from a common fund, . . . though somewhat larger percentages are not unprecedented."); *Wells v. Allstate Ins. Co.,* 557 F. Supp. 3d 1, 7-8 (D.D.C 2008) (noting that fee awards may range up to 45%, and approving fee request of 45% of the total gross recovery); *In re Ampicillin Antitrust Litig.,* 526 F. Supp. 494, 499 (D.D.C. 1981) (awarding 45% of $7.3 million gross settlement fund as attorneys' fees); *see also Martin v. AmeriPride Servs, Inc.,* 2011 WL 2313604, at *8 (S.D. Cal. June 9, 2011) ("Other case law surveys suggest that 50% is the upper limit, with 30-50% commonly being awarded in cases in which the common fund is relatively small."). The requested fee of 31.3% of the proposed Settlement value is reasonable in light of the substantial monetary relief obtained by Class Counsel here and should be awarded.

"When assessing the reasonableness of fees, a trial court may consider a variety of factors, including the nature of the case, the case's novelty and difficulty level, the skill and standing of the attorney, the degree of responsibility required, the usual and customary charges for similar work, and the connection between the litigation and the fees charged." *McNiff,* 384 Ill. App. 3d at 407 (quoting *Richardson v. Haddon*, 375 Ill. App. 312, 314 – 5 (1st Dist. 2007)) (quotations omitted). Here, each of these factors shows the requested fee is reasonable.

a) *Plaintiff's Novel Claims Carried Substantial Litigation Risk*

The first two factors look to the risk and novelty of the claims at issue. Both are certainly present here. *See gen*. Bursor Decl. ¶¶ 14-16 (discussing the risks of litigating Plaintiff's claims). Class Counsel undertook significant financial risk in prosecuting this case, with no upfront payment, and no guarantee of payment absent a successful outcome. Class Counsel also

advanced $19,674.14 in out-of-pocket expenses, again with no guarantee of repayment. Bursor Decl. ¶¶ 14, Exs. 2, 3; Nelson Decl. ¶ 7. If the case had advanced through class certification, these expenses would have increased many-fold, and Class Counsel would have been required to advance these expenses potentially for several years to litigate this action through judgment and appeals.

Further, as far as Class Counsel knows, no plaintiff's firm has ever obtained class certification in a case against a tampon manufacturer for an alleged product defect. In fact, virtually all labeling and defect claims against tampon manufacturers – including cases against Defendant Kimberly-Cark – have historically been dismissed on preemption grounds. *See Papike v. Tambrands Inc.,* 107 F.3d 737, 741 (9th Cir. 1997) (holding that "because the FDA has established specific counterpart regulations with respect to labeling tampons," the plaintiff's claims were preempted by the MDA); *Moore v. Kimberly-Clark Corp*., 867 F.2d 243, 247 (5th Cir. 1989) (holding that state-law claims asserted against a tampon manufacturer "which are based on inadequate labeling and warning statements are preempted by 21 U.S.C. § 360k and 21 C.F.R. § 801.1(b)"); *Murphy ex rel. Murphy v. Playtex Family Prods. Corp*., 176 F. Supp. 2d 473, 483 (D. Md. 2001) ("[P]laintiffs' failure to warn claims . . . are preempted as they seek to impose state law requirements upon Playtex that are 'different from, or in addition to,' . . . 21 C.F.R. § 801.430."); *Cornelison v. Tambrands, Inc*., 710 F. Supp. 706, 709 (D. Minn. 1989) (holding that the MDA "preempt[s] state tort claims of inadequate warning of the risks associated with tampon use"); *Meyer v. Int'l Playtex*, *Inc*., 724 F. Supp. 288, 293 (D.N.J. 1988) ("The FDA has specifically stated what must appear on tampon boxes and inserts in order to comply with federal law and reserved the power to approve or disapprove the language."); *Ignace v. Int'l Playtex, Inc*., 1987 WL 93996 (W.D. Wis. Aug. 14, 1987) ("[T]he Congressional

intention to preempt the state regulation of the adequacy of the labeling of tampons is clear, indeed, unequivocal."). Notwithstanding this body of case law, Class Counsel was able to defeat Defendant's motion to dismiss and proceed with the instant litigation. *Choi v. Kimberly-Clark Worldwide, Inc.*, 2019 WL 4894120, at *13 (C.D. Cal. Aug. 28, 2019) (denying Defendant's motion to dismiss breach of implied warranty claim and UCL claim).

At class certification, Defendant would likely argue that predominance and commonality cannot be satisfied because purportedly not all of the Subject Products were affected by the alleged defect, such that some class members may not have been harmed at all. Plaintiff would have faced serious risks even before getting to class certification. Defendant most certainly would have sought summary judgment, as well as engaged in extensive and protracted discovery. Despite these risks, the Settlement Agreement allows Class Members to submit claims for up to $6.00 per Subject Products purchased, up to $30.00 (five total claims), without proof of purchase. For most Class Members, the relief provided by the Settlement Agreement amounts to more than a full refund. This is an excellent result that compensates consumers for an alleged defect that may have affected women throughout the country.

b) *The Skill And Standing Of The Attorneys Supports The Requested Fee*

All of the lawyers handling this case are in good standing in their respective jurisdictions. Class Counsel are well-respected attorneys with significant experience litigating consumer class actions of similar size, scope, and complexity. Bursor Decl. ¶¶ 17-21, Exs. 4, 5 (firm resumes for Bursor & Fisher, P.A. and Reich Radcliff & Hoover LLP); Nelson Decl ¶¶ 1-2. Bursor & Fisher, the firm with the greatest investment of time and resources in this case, has been recognized by courts across the country for their expertise. *See id*; *see also Famular v. Whirlpool Corp.*, 2019 WL 1254882, at *4 (S.D.N.Y. Mar. 19, 2019) ("class counsel are

experienced and qualified class action lawyers. Bursor & Fisher, P.A., has been appointed class counsel in dozens of cases in both federal and state courts, and has won several multi-million dollar verdicts or recoveries.") (internal quotation omitted); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 566 (S.D.N.Y. Feb. 25, 2014) (Rakoff, J.) ("Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims. … The firm has been appointed class counsel in dozens of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in [six] class action jury trials since 2008.").

Furthermore, "[t]he quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance." *In re MetLife Demutalization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). Here, Defendant was represented by the prominent and well-respected law firm of Gibson, Dunn & Crutcher LLP. Class Counsel achieved an exceptional result in this case while facing well-resourced and experienced defense counsel from some of the largest firms in the country. *See Marsh ERISA Litig.*, 265 F.R.D. at 148 ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement.").

c) *The Litigation Required A High Degree of Responsibility And Skill*

This action required considerable skill and experience to bring it to such a successful conclusion. The case required investigation and mastery of complex factual circumstances, the ability to develop creative legal theories, and the skill to respond to a host of legal defenses. In taking on this case, Class Counsel undertook the large responsibility of pursuing claims on behalf of a class of consumers against a large corporation with an international presence and experienced defense counsel. Class Counsel also undertook the large responsibility of funding this case, without any assurance that they would recover those costs. Class Counsel not only

took on the obligation to act on behalf of the named Class Representatives, but also the class as a whole.

As described above, Class Counsel fully litigated, and won, motions to dismiss and strike that raised complex issues that heavily favored Defendant. Bursor Decl. ¶¶ 2-4. In addition, the Parties exchanged and met and conferred concerning a number of discovery requests, requests for production and deposition notices. In response, Defendant provided critical information concerning its sales and pricing of certain of the Subject Products. *Id.* at ¶¶ 5-7. Class Counsel conducted extensive independent investigation of the Subject Products and have reviewed Defendant's product reviews, and critical documents. *Id*. Class Counsel also participated in a full-day mediation with Judge Wayne R. Andersen (Ret.) at JAMS in Chicago, Illinois, where, after more than 13 hours of mediation, the Parties executed a binding term sheet setting out the material terms of this Settlement Agreement. *Id.* at ¶¶ 8-9. Through the undertaking of a thorough investigation, hard-fought motion practice, protracted discovery, and substantial arm's-length negotiations, Class Counsel obtained a settlement that provides a real and significant monetary benefit to the Class. Since that time, Class Counsel has moved for preliminary and final approval, applied for attorneys' fees, and diligently monitored the successful notice program and claims administration process.

Defendant is represented by highly experienced attorneys who have made clear that absent a settlement, they were prepared to continue their vigorous defense of this case and oppose class certification. Even assuming a class was certified, and summary judgment defeated, the case would then have moved on to pretrial briefing, a pretrial conference, and then a jury trial, which would have been costly, time-consuming, and very risky for Class Members and for counsel. Class Counsel undertook this representation understanding that the risk of

losing on class certification, or summary judgment, or at trial were significant. Defendant is an international corporation with excellent counsel who vigorously litigated every stage of the case, and would have continued to do so through trial, and through appeals. Bursor Decl. ¶ 14. But for this settlement, Defendant's depositions would have been the next major discovery event in the litigation, followed by expert discovery and class certification motion practice.

d) *The Usual and Customary Charges for Similar Work*

When Class Counsel undertake major litigation such as this, it necessarily limits their ability to undertake other complex litigation cases. During the course of this litigation, Class Counsel devoted significant time and resources to succeed in this case. To date, Class Counsel incurred out-of-pocket costs and expenses in the aggregate amount of $19,674.14 in prosecuting this litigation on behalf of the Class. Bursor Decl., Exs. 2, 3 and ¶ 14, Nelson Decl. ¶ 7. Each of these expenses was necessarily and reasonably incurred to bring this case to a successful conclusion, and they reflect market rates for various categories of expenses incurred. *See* Bursor Decl. ¶ 13. Class Counsel had to make this commitment at the outset of this case without knowing how long the case would take to resolve, if ever. Therefore, Class Counsel's willingness to prosecute this action on a contingent fee basis and to advance costs diverted the time and resources expended on this action from other cases. *See* Bursor Decl. ¶ 14.

Further, as detailed in the Bursor Declaration, the hourly rates used by Class Counsel are comparable to rates charged by attorneys with similar experience, skill, and reputation, for similar services in the relevant legal markets. *See* Bursor Decl. ¶¶ 22-40. And they are the rates paid by hourly-paying clients in non-contingent representations. *See id.* ¶ 25. Both state and federal courts in the region have repeatedly approved rates consistent with or in excess of those charged by Class Counsel. In *Berry v. Volkswagen Group of America, Inc.*, 397 S.W.3d 432,

437 (Mo. 2013), for instance, the Supreme Court of Missouri affirmed the trial court's award of attorneys' fees based upon a lodestar calculation with rates up to $650 per hour. Similarly, in *Plubell v. Merck & Co., Inc.,* No. 04CV235817-01 (Mo. Cir. Ct. Mar. 15, 2013), the trial court awarded reasonable attorneys' fees to class counsel and found that rates as high as $675 per hour for partner-level time "are well within the rates normally charged for similar work by similarly qualified counsel in Missouri." *Id.,* FINAL JUDGMENT AND ORDER OF FINAL SETTLEMENT APPROVAL AND DISMISSAL WITH PREJUDICE filed Mar. 15, 2013, at 8-9. More recently, in *Pollard v. Remington Arms Co.*, 2017 WL 991071, at *6 (W.D. Mo. Mar. 14, 2017), the court approved hourly rates for class counsel ranging from $261 through $897 and found that the average hourly rates were not dissimilar to those hourly rates charged in the urban areas of Missouri.

Additionally, Federal courts in this region have approved lodestar calculated rates north of $1,500 per hour. *Kirby v. Berryhill*, 2017 WL 5891059, at *2 (N.D. Ill. Nov. 29, 2017) (a "lodestar calculated rate of $1,612.28 per hour…is not so far afield from what other courts have awarded as to render it inappropriate solely on that basis.") (citing *Mathis v. Comm'r of Soc. Sec.*, 2017 WL 5891059, at *1 (W.D. Mich. Mar. 17, 2017) (approving approximately $1,640 per hour); *Smith v. Colvin*, No. 14 CV 3923, Dkt. No. 32 (N.D. Ill. Dec. 21, 2016) (awarding effective rate of $1,437 per hour); *Reindl v. Astrue*, 2012 WL 4754737, at *3 (N.D. Ill. Oct. 4, 2012) (awarding effective rate of $1,164.51 per hour); *Kazanjian v. Astrue*, 2011 WL 2847439, at *1 (E.D.N.Y. July 15, 2011) (awarding approximately $2,100 per hour)).

B. <u>The Court May Alternatively Grant The Requested Attorneys' Fees Under The Lodestar Method</u>

The lodestar method is a computation that increases the reasonable value of services

rendered by a weighted multiplier. To calculate lodestar, counsel's reasonable hours expended on the litigation are multiplied by counsel's reasonable rates. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986); *Blum v. Stenson*, 465 U.S. 886, 897 (1984). As explained blow, Class Counsel's requested fee of $3,500,000 is reasonable under the lodestar method.

1. Class Counsel Spent A Reasonable Number Of Hours On This Litigation At A Reasonable Hourly Rate

First, it should be noted that Class Counsel worked very efficiently. *See Brundidge,* 168 Ill. 2d at 244 ("The lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved."). Class Counsel has kept detailed daily billing records showing what work was done and by whom. Bursor Decl. Exs. 4, 7 (detailed daily billing diaries from January 4, 2019 through June 22, 2020); Nelson Decl. Ex. 1. As of this filing, Class Counsel have worked 1004.2 hours on this matter, for a lodestar fee based on current billing rates of $527,405. Bursor Decl. ¶ 30. Based on these numbers, a fee award of 31.3% of the Settlement Fund would amount to a 6.64 multiplier. However, Class Counsel anticipates spending an extra 100-200 hours prior to the issuance of a Final Judgment, including handling issues that may arise with the notice campaign, answering class member questions, responding to any objections, appearing at the final approval hearing, and handling any appeals, if applicable. *Id*. at ¶¶ 31-32. Class Counsel has received two objections that will need to be responded to. Indeed, should an Objector proceed with their claim, an appeal alone may require 200 hours of additional work. Taking into account the additional 100-200 extra hours at a blended hourly rate of $525.2, Class Counsel anticipates that

a fee award of 31.3% of the Settlement Fund would amount to a 5.53 multiplier.[4]

This future work should be considered in the initial lodestar calculation. *See McNiff*, 384 Ill. App. 3d at 408 (finding "the trial court should have awarded additional fees for time spent" after judgment); *Rash Curtis & Associates*, 2020 WL 1904533, at *20 (including future time in lodestar analysis because "[t]he Court recognizes that class counsel will indeed incur continued fees in both the appeal of this case and the subsequent litigation"); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, 746 Fed. Appx. 655, 659 (9th Cir. 2018) (holding that "[t]he district court did not err in including projected time in its lodestar cross-check; the court reasonably concluded that class counsel would, among other things, defend against appeals and assist in implementing the settlement"); *Reyes v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, 281 F. Supp. 3d 833, 856 (N.D. Cal. 2017) (including, over the defendants' objection, "125 anticipated future hours" to be spent on "communicating with the settlement administrator and responding to inquiries from class members" in the lodestar calculation); *Corzine v. Whirlpool Corp.*, 2019 WL 7372275, at *11 (N.D. Cal. Dec. 31, 2019) (including "an estimate of 250 hours for future work to complete Settlement's claims process through 2026" in the lodestar calculation); *In re Equifax Inc. Customer Data Security Breach Litig.*, 2020 WL 256132, at *39-40 (N.D. Ga. Jan. 13, 2020) (including in the lodestar calculation, over a class member's objection, class counsel's estimate of an anticipated 10,000 hours to be spent in the future to implement and administer a class action settlement); *id.*, 2020 WL 256132, at *40 ("Excluding such time … would misapply the lodestar methodology and needlessly penalize class counsel."); *Hausfeld v. Cohen Milstein Sellers & Toll, PLLC*, 2009

[4] Notably, as discussed above, Class Counsel's request for attorneys' fees are inclusive of reasonable litigation expenses. If there are any appeals, Class Counsel will incur additional out-of-pocket expenses.

WL 4798155, at *17 (E.D. Penn. Nov. 30, 2009) (holding that "[w]here attorneys provide additional services post-settlement … courts should award fees for those services").

The hourly billing rate to be applied is the hourly rate that is normally charged in the community where the counsel practices, i.e., the "market rate." *See Blum*, 465 U.S. at 895.[5] The blended hourly rate for Bursor & Fisher's work of $511.97 is quite reasonable in California, where Class Counsel practices and where a significant amount of work was performed in the C.D. Cal. action that preceded this litigation. Bursor Decl. ¶ 39. The combined blended hourly rate of $525.2 for all of Class Counsel's work is also reasonable. *Id*. ¶ 34. And the hourly rates for each of the lawyers (and staff) who worked on the case, which are set forth in the Bursor declaration, are also reasonable and amply supported by the evidentiary materials submitted therewith and the caselaw. *Id*., Ex. 8. *See, e.g., In re Animation Workers Antitrust Litig*., 2016 WL 6663005, at *6 (N.D. Cal. Nov. 11, 2016) (finding rates of senior attorneys of between $845 to $1,200 per hour to be reasonable); *Nitsch v. DreamWorks Animation SKG Inc*., 2017 WL 2423161, at *9 (N.D. Cal. June 5, 2017) (finding rates for senior attorneys of between $870 to $1200 per hour to be reasonable); *Loretz v. Regal Stone, Ltd*., 756 F. Supp. 2d 1203, 1211 (N.D. Cal. 2010) (approving billing rates ranging from $900 per hour (partners) to $150 per hour (law clerks) for Bay Area plaintiff's counsel in complex civil litigation).

As explained above, a blended rate of $525.2 is also accepted in this Court's geographic region. *Plubell,* No. 04CV235817-01 (approving hourly rate of $650); *Pollard*, 2017 WL 991071, at *6 (approving hourly rate of $675); *Berry*, 397 S.W.3d at 437 (approving hourly rate

[5] The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) (recognizing "an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise").

of up to $897; *Kirby*, 2017 WL 5891059, at *2 (approving hourly rate of $1,612.28); *Mathis*, 2017 WL 5891059, at *1 (approving hourly rate of $1,640);); *Smith*, No. 14 CV 3923, Dkt. No. 32 (awarding effective rate of $1,437 per hour); *Reindl*, 2012 WL 4754737, at *3 (awarding effective rate of $1,164.51 per hour); *Kazanjian*, 2011 WL 2847439, at *1 (awarding approximately $2,100 per hour).

2. All Relevant Factors Support Applying A Significant Multiplier To Class Counsel's Lodestar

A fee award of 31.3% of the total Settlement value, $11,180,117, would represent a multipler of 5.53 over the base lodestar fee of $632,445.84. Bursor Decl. ¶¶ 34-35.

As an initial matter, the requested multiplier is well within the range of regularly approved in class actions in the region. *See, e.g.*, *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 59, 52 N.E.3d 427, 441 ("Therefore, had the trial court used the lodestar method, the effective multiplier would have been approximately 2.97, well within the range of multipliers used in other common-fund cases."); *see also id.* ("a survey of multipliers showed a range from 0.6 to 19.6") (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n. 6 (9th Cir. 2002)); *Berry*, 397 S.W.3d at 433 (affirming attorneys' fee award based upon a lodestar multiplier of 2.0); *Miloro v. Van's International Foods, Inc.*, No. 15PH-CV00642 (Mo. Cir. Ct. Sep 14, 2015) (finding that a multiplier of 3.16 is appropriate, fair, and reasonable and not disproportionately excessive in light of the benefits conferred on the members of the Class); *Mitchell v. Residential Funding Corp.,* No. 03-CV-220489 (Mo. Cir. Ct. June 24, 2008) (awarding nearly $37 million in attorneys' fees as a percentage of the settlement, representing an approximate 10.9 lodestar multiplier); *McLean*, 2007 WL 5674689, at ¶ 11 (approving a 2.75 multiplier to account "for the significant risk of non-recovery" and other considerations);

NEWBURG ON CLASS ACTIONS, *supra,* § 15:86 (5th ed. June 2017 update) ("Positive multipliers from 1.0 to 3.0 are the norm, though higher multipliers are not unheard of and may well be warranted in certain circumstances"); *In re Cenco Inc. Sec. Litig.*, 519 F. Supp. 322 (N.D. Ill. 1981) (approving multiplier of 4 in securities class action); *Municipal Auth. of Bloomsburg v. Pennsylvania*, 527 F. Supp. 982 (M.D. Pa. 1981) (approving multiplier of 4.5); *In re Beverly Hills Fire Litig.*, 639 F. Supp. 915 (E.D. Ky. 1986) (approving multiplier of up to 5); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185 (S.D.N.Y. 1997) (approving multiplier of 5.5); *Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890 (1st Cir. 1985) (approving multiplier of 6); *Muchnick v. First Fed. Savs. & Loan Assoc. of Phil.*, 1986 WL 10791, at *3-4 (E.D. Pa. Sept. 30, 1986) (approving multiplier of 8.3 in a consumer class action); *Cosgrove v. Sullivan*, 759 F. Supp. 166 (S.D.N.Y. 1991) (approving multiplier of 8.74); *Perera v. Chiron Corp.*, Civ. No. 95-20725-SW (N.D. Cal. 1999, 2000) (approving multiplier of 9.14; cited in California Class Actions and Coordinated Proceedings §15.05). Indeed, just a few months ago, Judge Gonzalez Rogers approved Bursor & Fisher's fee request of 33.33% of a class judgment, equating to $89,116,333.33 in attorney's fees, and held that a multiplier of 18.15 was reasonable under the circumstances. *See Perez*, 2020 WL 1904533, at *21 (noting that the multiplier was "in line with multipliers that have been approved by other courts") (citing *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (awarding $20 million in attorneys' fees, constituting a multiplier of 15.6)).

Next, all relevant factors support applying a multiplier of 5.53. As the Supreme Court of Illinois has explained, "the reasonable hours devoted by plaintiff's attorneys should be the starting point in assessing fees. … [T]o determine an appropriate computation, the reasonable value of the services rendered should be increased by a weighted multiplier representing the

significance of other pertinent considerations, such as the contingency nature of the proceeding, the complexity of the litigation, and the benefits that were conferred upon the class members." *Brundidge v. Glendale Fed. Bank, F.S.B.*, 168 Ill. 2d 235, 239-40, 659 N.E.2d 909, 912 (1995). Each of these factors supports the reasonable multiplier requested here.

a. *The Contingency Nature of the Proceeding*

This factor recognizes the risk of non-payment in cases prosecuted on a contingency basis where claims are not successful, which can justify higher fees. *See, e.g., Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 59, 52 N.E.3d 427, 441 ("We note that the multiplier here was also justified in light of the trial court's finding that class counsel accepted 'substantial risk in prosecuting this case under a contingency fee agreement given the vigorous defense of the case and defenses asserted by' [MetLife]."). "It is well settled that class actions are notoriously complex and difficult to litigate." *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *21 (S.D.N.Y. Mar. 24, 2014) (internal citation omitted). This case was no exception for the reasons already set forth above. Additionally, the novelty of Plaintiff's claims, in conjunction with the substantial recovery for the Class, supports a higher multiplier. *Sampson v. Eastman Kodak Co.*, 195 Ill. App. 3d 715, 724 (1st Dist. 1990) ("In this case, considering the novelty of the claim, namely, breach of an implied warranty of freedom from patent infringement, and considering the large recovery for the class, we could not conclude that the trial court abused its discretion.").

Moreover, unlike counsel for the Defendant, Class Counsel have not received any compensation or reimbursement for the substantial time and money they have invested in and the risk they incurred prosecuting this matter. Instead, Class Counsel have prosecuted this action solely on a contingency basis, incurring substantial risk that they might not receive any

compensation at all. As the *Berry* Court explained in affirming a weighted multiplier, "[t]he fee to be received by class counsel was always contingent, unlike the fees received by counsel for Defendant; [t]aking this case precluded class counsel from accepting other employment that would have been less risky and [t]he time required by the demands of preparing this cause for trial delayed work on class counsel's other work. These findings support a finding that a multiplier was necessary to ensure a market fee that compensated class counsel for taking this case in lieu of working less risky cases on an hourly basis." *Berry*, 397 S.W.3d at 432-33 (internal quotations omitted).

Furthermore, application of a multiplier in this case (as well as in similar cases) will help ensure that qualified counsel are willing to incur significant risks of non-payment in future cases, and therefore, will promote the remedial and deterrent purposes of consumer protection statutes. *See Zweig v. Metro. St. Louis Sewer Dist.,* 412 S.W.3d 223, 250-51 (Mo. banc 2013) (affirming award of $4.3 million in fees and finding "use of a multiplier in this case was not abuse of discretion" and was justified to ensure adequate representation for similar claims in the future); *Lealo v. Beneficial Cal., Inc.,* 82 Cal. Rptr. 4th 19, 53 (Cal. Ct. App. 1st Dist. 2000) (class action "fee awards that are too small can also be problematic, as they chill the private enforcement essential to the vindication of many legal rights and obstruct the representative actions that often relieve the courts of the need to separately adjudicate numerous claims.").

b. *The Complexity Of The Litigation Supports The Requested Fee*

"[C]lass actions have a well deserved reputation as being most complex." *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) (internal citation and quotations omitted). This case was no exception, both factually and legally. As explained above, this case involved complex issues specific to the Subject Products, including preemption

and product liability, in addition to typical complex issues present in consumer class actions. Bursor Decl. ¶¶ 14-16. Even the motion to dismiss raised complex issues. *Id*. ¶ 16.

Another factor supporting the application of a multiplier is that Class Counsel achieved the settlement "in a time and cost-efficient manner, without expending thousands of additional hours engaging in protracted litigation." *McLennan v. LG Electronics USA, Inc.,* 2012 WL 686020, at *10 (D.N.J. Mar. 2, 2012) (applying a 2.93 multiplier). Here, litigation tasks were allocated to prevent "over lawyering" and inefficiency. The bulk of the work was performed by a small number of attorneys fully familiar with the complex factual and legal issues presented by this litigation. This division of labor permitted the work to be done efficiently, resulting in an economy of service and avoiding duplication of effort.

c. *Class Counsel Obtained Excellent Benefits For The Class*

As discussed above, the Settlement Agreement will provide a full refund for up to five Subject Products purchased within the Class Period without proof of purchase, and a full refund for additional Subject Products with proof of purchase. The notice plan is robust. Indeed, it is difficult to conceive how Class Counsel could have structured a better settlement.

C. The Class Representatives Deserve A Service Award for Their Participation And Prosecution Of These Claims On Behalf Of The Class

A service award of $10,000.00 for the Class Representatives is appropriate here. "In some cases, the amount requested as an incentive award, given the court's knowledge about the advanced stage of the case or other procedural facts, will be so obviously reasonable that only minimal scrutiny will be required for approval, at least in the absence of any objection from class member." 299 F.R.D. 160 at NACA Guideline 5. Defendant has agreed to pay Service Awards to Plaintiff Moore, Ms. Parker and Ms. Mills in the amount of $10,000 each separate from and in

addition to Benefits made available to the Class and attorneys' fees. Settlement Agreement at ¶¶ 30, 53. Ms. Parker and Ms. Mills were named plaintiffs in the California Action, entitled *Parker, et al. v. Kimberly-Clark Worldwide, Inc*., Case No. 8:19-cv-00468-DOC (ADSx) in the United States District Court for the Central District of California. Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incur during the course of class action litigation. *See* 299 F.R.D. 160, NACA Guideline 5 (West 2014) ("Consumers who represent an entire class should be compensated reasonably when their efforts are successful and compensation would not present a conflict of interest."); *see also Cook v. Niedert,* 142 F.3d 1004 (7th Cir. 1998) (value of settlement was $ 14 million; incentive award to class representative of $25,000); *see also In re Remeron End-Payor Antitrust Litig*., No. Civ. 02-2007 FSH, 2005 WL 2230314 (D.N.J. Sept. 13, 2005) (value of settlement was $36 million; incentive payments totaling $75,000 for six named plaintiffs). "Many cases note the public policy reasons for encouraging individuals with small personal stakes to serve as class plaintiffs in meritorious cases." 299 F.R.D. 160, Guideline 5 Discussion (citing cases).

This case is no different. The Class Representatives' participation has been instrumental in the prosecution and ultimate settlement of this action. Here, Plaintiff Moore, Ms. Parker, and Ms. Mills, have spent substantial time on this action, have assisted with the investigation of this action and the drafting of the complaint, have been in contact with counsel frequently, and have stayed informed of the status of the action, including settlement. *See* Bursor Decl. ¶¶ 41-45, Exs. 18-20 (Declaration of Lisa Moore in Support of Plaintiff's Motion for Preliminary Approval, Declaration of Natasha Parker in Support of Plaintiff's Motion for Preliminary Approval, and Declaration of Christina Mills in Support of Plaintiff's Motion for Preliminary Approval).

IV. CONCLUSION AND PRAYER

WHEREFORE, Class Counsel respectfully requests that this Application be granted; that Class Counsel be awarded three and a half million dollars ($3,500,000.00) in attorneys' fees and expenses; and Class Representatives be awarded Class Service Awards of ten thousand dollars ($10,000.00) each.

Dated: June 22, 2020

Lisa Moore, Individually, and on Behalf of a Class of Similarly Situated Individuals, Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2020, I served the foregoing document on the following counsel of record by email:

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