UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

IN RE: HILL'S PET NUTRITION, INC. DOG FOOD PRODUCTS LIABILITY LITIGATION **This Document Relates to All Cases, Except:** ***Diana Anja Eichhorn-Burkhard v. Hill's Pet Nutrition, Inc. et al.*, No. 19-CV-02672- JAR-TJJ;** **and** ***Bone v. Hill's Pet Nutrition, Inc.*, No. 19-CV-02284-JAR-TJJ, *Schwegmann v. Hill's Pet Nutrition, Inc.*, No. 19-CV-2149-JAR-TJJ, *Navarrete v. Hill's Pet Nutrition, Inc.*, No. 19-CV-2312-JAR-TJJ, and *Jubinville v. Hill's Pet Nutrition, Inc.*, No. 19-CV-2302-JAR-TJJ (This document DOES apply to all claims within these complaints that are included in the Settlement).**	**MDL No. 2887** **Case No. 2:19-md-02887-JAR-TJJ**

ORDER GRANTING PLAINTIFFS' PETITION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS TO CLASS REPRESENTATIVES, AND DENYING APPLICATION OF WEXLER WALLACE LLP FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

Before the Court is Co-Lead Counsel's May 28, 2021, Petition for Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards to Class Representatives (the "Petition"), Doc. 121. No opposition was filed in response to this Petition. Also before the Court is the Application of Wexler Wallace LLP ("Wexler Wallace") for Attorneys' Fees and Reimbursement of Expenses ("Wexler Application"), Doc. 118, which is opposed. Having considered the Petition and the Wexler Application, the supporting evidence, and counsel's argument at the July 27, 2021

hearing, and in the absence of any opposition or objection to the Petition, the Court makes the following findings, **GRANTS** Plaintiffs' Petition for the reasons set forth therein and as stated below and in detail on the record at the July 27 hearing, **DENIES** the Wexler Wallace Application for the reasons set forth below and on the record at the July 27 hearing, and further **ORDERS** as follows:

1. Co-Lead Counsel, who were initially appointed by this Court by an Order dated July 21, 2020, Doc. 20, have applied for: (i) an award of attorneys' fees in the amount of $4,000,000, which represents 32% of the gross Settlement amount; (ii) reimbursement of out-of-pocket costs and litigation expenses totaling $35,694.64; and (iii) approval of $500.00 service awards to each of the Settlement Class Representatives.

2. Notice of Co-Lead Counsel's Petition was directed to the Class in a reasonable manner as required by Federal Rules of Civil Procedure 23(h), as set forth in this Court's Preliminary Approval Order dated February 3, 2021, Doc. 105. These pleadings additionally were posted on the public Settlement website, www.petfoodsettlement.com.

3. On July 27, 2021, a Zoom hearing on the Petition was held in conjunction with a hearing on Plaintiffs' Motion for Final Approval of the Class Action Settlement (which is subject to a separate Order to be entered by the Court).

4. In accordance with Rule 23(h) of the Federal Rules of Civil Procedure, Defendants agreed, subject to Court approval and pursuant to the Settlement Agreement, that Class Counsel would be paid an award of attorneys' fees and reimbursable expenses, which would cover attorneys' fees and reimbursable expenses for all counsel for all Plaintiffs. *See* Rule 23(h); *see also* Doc. 98-1, ¶ 76 ("Settlement Class Counsel will file a motion for an award of attorneys' fees and litigation costs and expenses to be paid from the Settlement Fund."). The Parties did not

negotiate any fees or expenses, including at any time prior to the conclusion of the negotiations regarding relief to the Class. Defendants have not filed any opposition to the Petition.

5. The Court finds that these amounts sought in the Petition are in accordance with the terms of the Settlement Agreement. Under prevailing precedent and the circumstances of this case, these requests are reasonable and appropriate, and for the reasons set forth in more detail below and on the record at the July 27, 2021 hearing, the requests will be approved.

6. The Court makes this Order under Federal Rule of Civil Procedure 23(h), and specifically makes these findings and decisions pursuant to Rule 52(a).

A. Attorneys' Fees Award

7. Co-Lead Counsel request that the Court award 32 percent of the $12.5 Settlement Fund, which is $4,000,000, for payment of attorneys' fees ("Fee Request"). The dominant method of determining attorneys' fees in common-fund cases is awarding a percentage of the fund. *See* 4 Newberg on Class Actions §14:6 (4th ed. 2010); Manual for Complex Litigation, Fourth, § 14.121; *Report of Third Circuit Task Force: Selection of Class Counsel*, 208 F.R.D. 340, 355 (2002) ("A percentage fee, tailored to the realities of the particular case, remains superior to any other means of determining a reasonable fee for class counsel."). The Supreme Court itself has expressly stated that "under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).

8. This is particularly true in this Circuit and this District. "The Tenth Circuit has expressed a preference for the percentage-of-the-fund method of awarding attorney fees in common fund cases." *In re Syngenta AG MIR162 Corn Litigation (Syngenta)*, 357 F. Supp. 3d 1094, 1111 (D. Kan. Dec. 7, 2018) (citing *Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 (10th Cir. 1995); *Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994)); *see also Nakamura v. Wells*

Fargo Bank, Nat'l Ass'n, No. 17-4029-DDC-GEB, 2019 WL 2185081, at *1 (D. Kan. May 21, 2019). This approach is favored because, among other things, it best aligns the interests of the class and its counsel and appropriately approximates the market by basing a fee on what private counsel ordinarily would charge in contingency-fee matters. *See Shaw v. Interthinx, Inc.*, No. 13-CV-01229-REB-NYW, 2015 WL 1867861, at *5 (D. Colo. Apr. 22, 2015).

9. Moreover, an award of 32% of the Settlement Fund is a reasonable amount that falls within the range of amounts approved by courts in similar cases. In this Circuit and District, courts typically award one-third of the fund as payment for attorneys' fees in complex class action cases like this MDL. *See, e.g., Syngenta*, 357 F. Supp. 3d at 1113 ("The Court finds that a one-third fee is customary in contingent-fee cases."); *In re: Urethane Antitrust Litig.*, No. 04-1616-JWL, 2016 WL 4060156, at *5 (D. Kan. July 29, 2016) ("The Court agrees with counsel that a one-third fee is customary in contingent-fee cases, and indeed that figure is often higher for complex cases or cases that proceed to trial."); *Droegemueller v. Petroleum Dev. Corp.,* No. CIV.A.07-CV-2508, 2009 WL 961539, at *4 (D. Colo. Apr. 7, 2009) (awarding attorneys' fees to class counsel equal to one-third of settlement fund); *In re Anadarko Basin Oil & Gas Lease Antitrust Litig*., No. CIV-16-209-HE, 2019 WL 1867446, at *2 (W.D. Okla. Apr. 25, 2019) (same).

10. Although the Notice to the Class said that Co-Lead Counsel might request up to one-third of the Settlement Fund for their fees, the actual request is for $4,000,000, which is slightly below the typical one-third award. This amount, representing 32 percent of the Settlement Fund, is consistent with the Tenth Circuit's requirements that any fee be reasonable under analysis of applicable factors.

11. Under both the percentage-of-the-fund and the lodestar approaches, reasonableness is determined by consideration of the now well-known *Johnson* factors:

> (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) any prearranged fee-this is helpful but not determinative; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Brown v. Phillips Petroleum Co., 838 F.2d 451, 454−55 (10th Cir. 1988) (quoting *Johnson v. Georgia Highway Express, Inc.* factors, 488 F.2d 714−19 (5th Cir. 1974)); *see also Gottlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994) (*Johnson* factors "for statutory fee cases apply equally to percentage fee awards in common fund cases."); *Syngenta*, 357 F. Supp. 3d at 1111−16 (applying *Johnson* factors). Not every factor will apply in every case; the Court has discretion regarding which factors it considers and the relative weight given to each. *See Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854 (10th Cir. 1993) ("rarely are all of the *Johnson* factors applicable; this is particularly so in a common fund situation" (citations omitted)). The 32 percent request here is well supported by the applicable *Johnson* factors.

12. Considering Factor 1, *the time and labor involved*, the Court finds that this litigation required extensive time and labor by Co-Lead Counsel. The fee declarations submitted by Co-Lead Counsel show a total of 3,100.1 hours spent on the litigation by Co-Lead Counsel alone after the Court's July 31, 2019 Order Appointing Counsel, Doc. 20. *See* Doc. 122 at 21. This does not include the hundreds of hours spent by Co-Lead Counsel prior to this Order, or other hours spent by the Executive Committee and other counsel at the direction of Co-Lead Counsel. This number is not surprising given the scope of the litigation. Co-Lead Counsel have calculated that their total lodestar, exclusive of work performed by the members of the Executive Committee and other

counsel for plaintiffs who performed common benefit work, yields a very modest multiplier of 1.61. *See* Doc. 122 at 22.

13. Despite the dedicated efforts of the Parties to achieve an early resolution, this case involved complex issues encompassing the law of all fifty states and the District of Columbia and a protracted and hard-fought mediation. The time and effort put into this litigation favors approval of the fee award.

14. Considering Factors 2, 3 and 10, *novelty and difficulty, skill required, and undesirability*, the Court finds that the risk of non-payment is a key consideration in assessing the reasonableness of a requested fee and should be incorporated into any ultimate fee award. *See Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir. 2007) .

15. Here, Co-Lead Counsel pursued class-wide resolution knowing full well that success was not guaranteed. Co-Lead Counsel faced strong legal challenges to both class certification and the merits, including predominance of individualized causation issues, variations in the law of all 50 states and the District of Columbia, the ability to demonstrate class-wide damages, the categorization of animals as property under state law, and the fact that Hill's voluntarily implemented a recall and continuously maintained a reimbursement program throughout the course of the litigation. If the litigation had continued, such challenges, if successful, would drastically decrease or eliminate any recovery for Plaintiffs and putative class members. Further, given the complexity of the issues and the amount in controversy, the defeated party would likely appeal any decision on either certification or merits.

16. Co-Lead Counsel "assumed a significant risk of non-payment or underpayment. Numerous cases recognize such a risk as an important factor in determining a fee award." *Gevaerts v. TD Bank*, No. 11:14-cv-20744, 2015 WL 6751061, at *13 (S.D. Fla. Nov. 5, 2015); *see In re:*

Urethane Antitrust Litig., 2016 WL 4060156, at *4. The risk of no recovery, and no payment, factors into undesirability (factor 10), along with the risks of obtaining class certification and establishing liability.

17. Co-Lead Counsel were able to apply to this matter their substantial depth of experience prosecuting consumer class actions generally, and cases involving dog food in particular. Working closely together, Co-Lead Counsel were able to draw on their well of experience to guide this complex matter to a successful resolution. Factors 2, 3 and 10 favor approval of the fee award.

18. Considering factor 4, *preclusion of other employment by the attorney due to acceptance of the case*, the significant time spent litigating the case demonstrates that the lawsuit precluded Co-Lead Counsel from working on other matters. *See* Doc. 122 at 24. Accordingly, the Court finds that each Co-Lead Counsel dedicated significant time to this litigation, which required turning down work on other matters to dedicate their time to this MDL.

19. Considering Factors 5 and 12, *customary fee and awards in similar cases*, as the Court recognized during the Preliminary Approval Hearing, a one-third fee is typical in contingent-fee cases. *See Nakamura*, 2019 WL 2185081 at *2−3 ("The Fee Request here—33%—is within the range of customary fees awarded in similar cases."); *In re: Urethane Antitrust Litig.*, 2016 WL 4060156, at *5; *Nieberding v. Barrette Outdoor Living, Inc.*, 129 F. Supp. 3d 1236, 1250 (D. Kan. 2015). Given that Plaintiffs' Notice informed the Class that counsel might request up to one-third (33 1/3 percent) of the Settlement Fund for fees and expenses and no one objected to the possibility of one-third, the 32 percent sought here is below that number, and is well within the range typically awarded in class actions. These factors therefore support the fee award.

20. Factor 8, *the amount involved and the results obtained*, is often given greater weight than the other *Johnson* factors. *See Farrar v. Hobby*, 506 U.S. 103, 114 (1992) ("[T]he most critical factor in determining the reasonableness of a fee award is the degree of success obtained." (quotations omitted)). Here, Co-Lead Counsel achieved a significant cash recovery of $12,500,000 for the Settlement Class despite the existence of serious questions concerning class certification and the calculation of class-wide damages, and they did so in relatively short order. The Settlement is clearly advantageous as it avoids future uncertainties and provides cash recovery in the near term. *See Koehler v. Freightquote.com, Inc*., No. 12-2505-DDC-GLR, 2016 WL 3743098, at *7 (D. Kan. July 13, 2016). Because this Settlement "avoids the uncertainty and rigors of trial and produces a favorable result for plaintiffs," *id*., this factor favors approval of the requested fee award.

21. Consideration of Factor 9, *the experience, reputation, and ability of the attorneys*, favors approval of the Fee Request. Co-Lead Counsel have substantial experience in prosecuting complex class action and consumer cases. *See* Doc. 122 at 26. The Court previously recognized "counsel's experience, the resources provided, and the great performance in this case to date." Doc. 110, Hearing Tr. at 36:17−20. This factor supports the Fee Request.

22. Finally, the reasonableness of the requested award is confirmed by a cross-check of the relevant lodestar amount submitted just on behalf of Co-Lead Counsel. Doc. 122 at 27−31.

23. For the foregoing reasons, the Court finds that Co-Lead Counsel's request for a fee award of 32% of the Settlement Fund, which is $4,000,000, is fair and reasonable.

B. Out-Of-Pocket Expenses

24. Co-Lead Counsel seek reimbursement of costs and expenses totaling $35,964.64, which includes common benefit expenses submitted on behalf of Co-Lead Counsel and other plaintiffs' counsel in the MDL. Consistent with the Protocol, this does not include any expenses incurred prior to the July 31, 2019 Order Appointing Counsel, such as costs associated with travel to the JPML hearing in New Orleans or this Court's hearing on leadership applications.

25. Pursuant to the Protocol, each law firm requesting reimbursement for any common benefit expenses was required to send an email attesting to the accuracy of those expenses to Co-Lead Counsel. Co-Lead Counsel reviewed those expenses and exercised their judgment to ensure that the expenses conformed to the Protocol. Throughout the litigation, expenses were submitted by the categories outlined in the Protocol and the expenses approved by Co-Lead Counsel are listed in the chart below by category:

Expense Category	Total Expenses
Federal Express / Local Courier	$179.30
Postage Charges	$44.26
Conference Call Phone Charges	$262.06
In-House Photocopying	$462.15
Hotels	$2,949.37
Meals	$772.56
Mileage	$60.32
Air Travel	$3,650.97
Lexis/Westlaw/Bloomberg	$2,637.64
Witness and Expert Expenses	$758.00
Hearing and Trial Transcripts	$278.10
Ground Transportation	$2,116.02
Mediation	$21,720.20
Miscellaneous	$39.66
TOTAL	**$35,964.64**

Doc. 122 at 33.

26. The Court finds that these are the type of expenses routinely charged to hourly clients, the expenses were appropriately documented by plaintiffs' counsel in the MDL and reviewed by Co-Lead Counsel, and they appear to have been necessary and reasonable to prosecute the litigation. Accordingly, the Court finds that the full requested amount should be reimbursed.

C. Incentive Awards for Settlement Class Representatives

27. In recognition of their service, Co-Lead Counsel request $500 for each of the 71 named plaintiffs on the Consolidated Class Action Complaint, Doc. 96. When considering the appropriateness of a service award, the Court may consider: (1) the actions the representative took to protect the interests of the class; (2) the degree to which the class benefitted from those actions; and (3) the amount of time and effort the representative expended in pursuing the litigation. *Tuten v. United Airlines, Inc*., 41 F. Supp. 3d 1003, 1010 (D. Colo. 2014).

28. As explained in the declaration submitted by Co-Lead Counsel, each of the named plaintiffs here were subject to an extensive vetting interview, generally lasting 45-60 minutes. Doc. 122-1 at ¶ 34. These named plaintiffs submitted documentation to prove they purchased the products and additional documents to support their claims of injury, including the production of purchase receipts, sales receipts, photographs and veterinarian records, and each was prepared to take on the responsibilities of a class representative, including testifying at trial. *Id*.

29. Courts in this Circuit and District have found much larger incentive fees to be fair and reasonable. *See, e.g.*, *Enegren v. KC Lodge Ventures LLC*, No. 17-2285-DDC-GEB, 2019 WL 5102177, at *9 (D. Kan. Oct. 11, 2019); *Sibley v. Sprint Nextel Corp*., No. CV 08-2063-KHV, 2018 WL 2134077, at *10 (D. Kan. May 9, 2018); *Nieberding*, 129 F. Supp. 3d at 1250–52; and *Thompson v. Qwest Corp*., No. 17-CV-1745-WJM-KMT, 2018 WL 2183988, at *3−4 (D. Colo. May 11, 2018).

30. The proposed $500 service awards for the Class Representatives are in line with awards by courts in other class actions. Accordingly, the Court finds that the requested $500 service awards to the Class Representatives are fair and reasonable and grants the request for these service awards.

D. Wexler Wallace Application

31. At the beginning of this litigation, the Court entered an Order on July 31, 2019 ("July 31, 2019 Order"), Doc. 20, requiring that all counsel must keep contemporaneous records of any "time and expenses devoted to this matter" and "must submit these records for the preceding month in summary form by the end of each month to Plaintiffs' Liaison Counsel." Doc. 20 at 7.

32. Consistent with the July 21, 2019 Order, Co-Lead Counsel filed their Notice of Plaintiffs' Protocols for Time and Expenses (the "Protocol"), Doc. 37, which provided additional guidance on how all plaintiffs' attorneys were to track and submit common benefit time and expenses in the litigation. As the Protocol stated, Co-Lead Counsel would file "a single application seeking fees and expenses out of the overall class recovery funds" and "[t]here is no guarantee that the time submitted by any counsel or firm to Lead Counsel for consideration will be included in any fee petition to the Court and the submitted hourly rate for the work is not guaranteed." *Id.* at 2. The Protocol set out standards for any time or expenses submitted, including that "only time and expense incurred after the Court's July 31, 2019 Order appointing Plaintiffs' Leadership shall be submitted and considered as potential eligible time." *Id.* at 12. The Protocol additionally stated: "Authorization to perform work on behalf of the classes must be obtained from Lead Counsel." *Id.* at 3. "In the event that MDL Counsel are unsure if the action they are about to undertake may be compensable as defined herein, they shall ask Lead Counsel in advance as to whether such time may be compensable." *Id.* at 2.

33. No party, including Wexler Wallace, filed an objection to the Court's July 31, 2019 Order or the subsequent Protocol.

34. On May 28, 2021, the Wexler Application was filed. Doc. 118. This was the only stand-alone fee application filed by any law firm in this litigation.

35. The Wexler Application sought $105,645 in lodestar and reimbursement of $1,309.77 in expenses.

36. Despite the Court's Order requiring submission of monthly time to Liaison Counsel, the Wexler Application states that it "has not submitted certain time and expenses that are the subject of this Motion" to Plaintiffs' Liaison Counsel because the "time and expense involved in these efforts could not be properly submitted to Lead Counsel under the Protocol…." Doc. 118 at 1-2.

37. While Wexler Wallace claims that it was impossible to timely submit its time to Co-Lead Counsel, Co-Lead Counsel have explained that Wexler Wallace did submit lodestar to Co-Lead Counsel for the same type of work at issue in the Wexler Application. *See, e.g.,* Doc. 123 at 3 n.2.

38. Pursuant to the Court's July 31, 2019 Order and Protocol, Wexler Wallace should have timely submitted all time and expenses to Plaintiffs' Liaison Counsel for review, as all other law firms in this MDL did. At minimum, if Wexler Wallace felt that its time and expenses were not compensable under the terms of the Protocol—but nonetheless should have been considered for reimbursement—Wexler Wallace should have met and conferred with Co-Lead Counsel well in advance of the date on which Co-Lead Counsel's fee application was due and before filing its own separate fee application.

39. At the Final Approval Hearing, Wexler Wallace argued that it performed three categories of work that merit compensation. First, Wexler Wallace argues that certain work performed before the July 31, 2019 Order appointing Plaintiffs' Leadership should be compensated. Wexler Wallace acknowledged at the hearing that the Protocol expressly stated that work performed before the Leadership Order would not be treated as compensable time, and Co-Lead Counsel ultimately excluded such time spent by all MDL counsel, including themselves, in the best interests of the Class. To the extent Wexler Wallace objected to the Protocol and its exclusion of pre-appointment time, Wexler Wallace should have timely objected to the Protocol when it was filed on August 22, 2019.

40. Moreover, the Court does not find that Wexler Wallace's pre-appointment work produced a beneficial result for the class. Wexler Wallace's pre-appointment work in the *Jubinville* litigation in Rhode Island was only partially successful and did not impact the vast majority of the class. When asked at the hearing to specify how much of the overall fee request was spent on the unsuccessful portions, Wexler Wallace stated that it was not possible to segregate the time on the successful portion from the unsuccessful portions, further underscoring the unreasonableness of this fee request.

41. As explained in detail on the record at the July 27, 2021 hearing, the Wexler Application is denied to the extent that it seeks compensation for pre-appointment time and expenses.

42. Wexler Wallace seeks compensation for two other types of work performed after the Court's appointment of Co-Lead Counsel: work related to non-recalled food and work related to a small modification to the claim form. Wexler Wallace neither submitted this time to Co-Lead Counsel nor made a good-faith effort to meet and confer before filing a separate fee application,

and its request for reimbursement is therefore denied. Despite being untimely and despite failing to comply with the Court's July 31, 2019 Order and the Protocol, within seven (7) calendar days of this Order, Wexler Wallace may submit to Co-Lead Counsel for their review and consideration any detailed time records for post-appointment time included in the Wexler Application that were not previously submitted to Co-Lead Counsel. Attorneys' fees shall be allocated by Co-Lead Counsel in their sole discretion, consistent with the Protocol and applicable law.

NOW, THEREFORE, THE COURT ORDERS AS FOLLOWS:

43. The Court **GRANTS** Co-Lead Counsel's Petition and awards attorneys' fees in the amount of 32% percent of the $12.5 Settlement Fund, which is $4,000,000, to be paid from the Settlement Fund;

44. Attorneys' fees shall be allocated by Co-Lead Counsel at their sole discretion, consistent with the Protocol, Doc. 37, and applicable law;

45. The Court **GRANTS** Co-Lead Counsel's Expense Request for reimbursement of common benefit costs and expenses submitted on behalf of Co-Lead Counsel and other counsel in the amount of $35,694.64, to be paid from the Settlement Fund;

46. The Court **GRANTS** Co-Lead Counsel's request that the Court approve service awards to Settlement Class Representatives, in the amount of $500 per representative, to be paid from the Settlement Fund;

47. The Court **DENIES** the Wexler Application; and

48. Within seven (7) calendar days of this Order, Wexler Wallace may submit to Co-Lead Counsel for their review and consideration any detailed time records for post-appointment time included in the Wexler Application that were not previously submitted to Co-Lead Counsel.

Attorneys' fees shall be allocated by Co-Lead Counsel in their sole discretion, consistent with the Protocol and applicable law.

IT IS SO ORDERED.

Dated: July 30, 2021

S/ Julie A. Robinson
JULIE A. ROBINSON
CHIEF UNITED STATES DISTRICT JUDGE