FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE: BLUE BUFFALO COMPANY, LTD. MARKETING AND SALES PRACTICES LITIGATION	)	**Case No. 4:14 MD 2562 RWS**
RELATES TO: ALL CASES	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' APPLICATION FOR ATTORNEYS FEES AND EXPENSES

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INTRODUCTION

The Settlement reached with Blue Buffalo in this case is the result of extensive investigation, work, and negotiation. It achieves both monetary and injunctive relief for class members and, respectfully, should be approved. Pursuant to the Court's Preliminary Approval Order (Dkt. No. 164), Counsel requests an award of attorneys' fees and expenses in the amount of $8 million, representing 25% of the gross $32 million cash Settlement Fund. As demonstrated below, the record in this case and applicable standards in this circuit fully support the requested fees and expenses. An award of 25% is reasonable, and in fact, is less than fee awards made in comparable cases.

I. HISTORY OF AND INVESTMENT IN THE CASE

A. Counsel Undertook Substantial Work To Achieve the Settlement.

Plaintiffs' Counsel have devoted substantial time and resources to investigating, litigating, and resolving this case. *See* Declaration of Scott A. Kamber ("Kamber Decl."), attached hereto as Exhibit 1, at ¶¶ 4, 13-20, 23-28, 30-31, 33, 37. Beginning on May 7, 2014, consumers in several states filed a series of class actions challenging the veracity of certain claims made by Blue Buffalo regarding the ingredients in its pet foods. On October 17, 2014, the Judicial Panel on Multidistrict Litigation centralized these actions in this Court. Dkt. No. 1. On December 23, 2014, this Court appointed Scott Kamber as Interim Class Counsel and an Executive Committee comprised of Mr. Kamber, John Simon (the Simon Law Firm), Don M. Downing (Gray Ritter & Graham, P.C.), David Steelman (Steelman, Gaunt & Horsefield), and Joseph I. Marchese (Bursor & Fisher, P.A.) (collectively, "Leadership" or "Executive Committee"). *See* Dkt. No. 35. Counsel spent significant time communicating with Plaintiffs, investigating facts, researching the law, and preparing a Consolidated Class Action Complaint ("Compl.") containing multiple counts, including consumer act claims under the laws of seven (now eight) states. Kamber Decl.,

at ¶¶ 13-14. In addition, due to extensive third-party practice that developed during the course of litigation, Counsel worked diligently to keep the class portion of the case moving forward, and to ensure that there was no duplication of effort with a pending Lanham Act case against Purina. *Id.* at ¶¶ 18, 22.

The Consolidated Complaint, filed on January 30, 2015, asserts claims under the Magnuson-Moss Warranty Act, Missouri Merchandising Practices Act, New York General Business Law § 349 (New York Deceptive Trade Practices Act), New York General Business Law § 350 (New York False Advertising Law), California Civil Code § 1750 *et seq.* (Consumers Legal Remedies Act or "CLRA"), California Business and Professions Code § 17200 *et seq.* (Unfair Competition Law or "UCL"), California Business and Professions Code § 17500 *et seq.* (False Advertising Law or "FAL"), New Jersey Consumer Fraud Act, New Jersey Truth-In-Consumer Contract, Warranty and Notice Act, Illinois Unfair Practices Act, Florida's Deceptive and Unfair Trade Practices Act, Ohio Consumer Sales Practices Act, and for Breach of Express Warranty, Breach of Implied Warranty of Merchantability, and Unjust Enrichment. *See* Dkt. No. 36. In drafting the Consolidated Complaint, Counsel engaged in extensive review of the laws asserted and evaluated potential class representatives. Kamber Decl. at ¶¶ 13. Blue Buffalo answered the initial Consolidated Complaint on March 20, 2015. *See* Dkt. No 45.[1]

In connection with discovery, Counsel prepared and served initial disclosures, interrogatories and two sets of document requests; responded to discovery requests, including interrogatories to each named plaintiff; reviewed and coded over 157,000 documents, many of

[1] In connection with the Settlement, and with leave of Court, Plaintiffs filed an Amended Consolidated Complaint on December 21, 2015. Dkt. No. 165. The Amended Complaint corrects a typographical error, adds an additional Class Representative, amends the class definition, and adds an additional claim under the Massachusetts Consumer Protection Act, among other conforming edits. *See* Memorandum In Support Of Motion For Preliminary Approval Of Class Settlement, Certification Of Settlement Class, And Permission To Disseminate Class Notice (Dkt. No. 159) ("Prelim. Approval Mem.") at 2 n.3.

which were highly technical; met and conferred with defense counsel to resolve various discovery disputes; served third-party subpoenas; obtained and digested transcripts of key depositions taken in *Nestle Purina Petcare Company v. The Blue Buffalo Company Ltd.*, No. 4:14-cv-00859-RWS; noticed and prepared for numerous depositions; and prepared numerous Plaintiffs for depositions. Kamber Decl. at ¶ 20. In addition Class Counsel consulted with expert witnesses; retained a branding and economics expert; commissioned independent testing of Blue Buffalo's products to evaluate representations made by Blue Buffalo; and researched and made substantial progress in drafting Plaintiffs' intended motion for class certification, which was due to be filed by December 18, 2015. *Id.* at ¶¶ 21, 26. Discovery was managed to maximize efficiency and ensure that there was no duplication of efforts. *Id.* at 22. The discovery process, which accounts for the majority of attorney time expended in this case, was essential to its successful litigation and settlement. *Id.* Among other things, information obtained during the document review process was utilized in the selection of products to be tested, the tracing of raw materials, and selection of witness. The discovery process also informed the drafting of the class certification motion, and Plaintiffs' strategy during settlement negotiations, which were critical to achieving this Settlement. *Id.* at ¶¶ 22, 26.

The parties engaged in settlement discussions, including a day-long mediation before former United States District Judge Wayne A. Andersen in Chicago, Illinois on October 26, 2015. Kamber Decl. at ¶¶ 27-28. Class Counsel entered the mediation fully informed of the merits, investigative efforts and from document discovery, and zealously advanced the position of Plaintiffs and class members. Counsel was prepared to continue litigation rather than accept a settlement that was not in the best interest of Plaintiffs and class members. *Id.* at 26. Judge Andersen actively supervised and participated in the settlement discussions to help the parties reach an acceptable compromise. An agreement was not reached that day, but Class Counsel,

with the continued assistance of Judge Andersen, was able to negotiate the Settlement notwithstanding the complexities of the case and the involvement of third-party defendants. *Id.* at ¶ 28. After much arms-length negotiation spanning several weeks, and drawing on the continued assistance of Judge Andersen, the parties arrived at an agreement in principle to resolve the case. At no point prior to reaching agreement on the substantive terms of settlement did the parties discuss the incentive fees or payments to Plaintiffs' counsel. *Id.* at ¶ 32.

Among other factors leading to settlement were the extensive work performed by Class Counsel, and the credible threat of success in ongoing litigation based on Counsel's collective trial experience. *Id.* at ¶ 29. Following further intensive negotiation and the exchange of numerous draft agreements between the parties, Class Counsel ultimately was able to a reach a Settlement Agreement that provides both monetary compensation and meaningful injunctive relief, while avoiding the risks and delay of further litigation. The parties selected Heffler Claims Group ("HCG") as a third-party administrator, and counsel has been actively involved in supervising and managing all aspects of HCG's administration of the notice program and claims process. *Id.* at ¶ 33.

B. The Attorney Hours Devoted to the Case Support the Fee Award.

Class Counsel and the Executive Committee have devoted more than 7,229 hours to this case, with a lodestar of approximately $2,900,213 at their regular hourly rates (except for document review time which was uniformly billed at $300 per hour, and reflected the minimum seniority of the reviewing attorneys), and are seeking reimbursement of $152,054 in expenses. *See* Kamber Decl. at ¶¶ 41,44. Counsel will continue to incur additional attorney hours in connection with final approval, responding to inquiries from class members, interacting with the Settlement Administrator, and overseeing implementation of the Settlement. Counsel are not seeking reimbursement for over 900 hours of attorney time, representing approximately

$400,000 in fees, which was performed prior to the appointment of Class Counsel or because of potential duplication of effort. *Id.* at ¶46.

The requested $8 million in attorneys' fees comprises 25% of the $32 million cash fund and is well within the percentages awarded in similar cases, and less than the one-third that is often awarded. *See, e.g., Cromeans v. Morgan, Keegan & Co., Inc.,* 2:12-CV-04269-NKL, 2015 WL 5785576, at *3 (W.D. Mo. Sept. 16, 2015) report and recommendation adopted, 2:12-CV-04269-NKL, 2015 WL 5785508 (W.D. Mo. Oct. 2, 2015) (33.3% of fund reasonable)*; West v. PSS World Med., Inc.*, 4:13 CV 574 CDP, 2014 WL 1648741, at *1 (E.D. Mo. Apr. 24, 2014) (same); *Barfield v. Sho-Me Power Elec. Co-op.*, 2:11-CV-4321NKL, 2015 WL 3460346, at *4 (W.D. Mo. June 1, 2015) (same); *Sanderson v. Unilever Supply Chain, Inc.*, 10-CV-00775-FJG, 2011 WL 6369395 (W.D. Mo. Dec. 19, 2011) (awarding 33.78% of settlement fund); *Wiles v. Southwestern Bell Tel. Co*., 09-4236-CV-C-NKL, 2011 WL 2416291, at *4-5 (W.D. Mo. June 9, 2011) (33% of fund reasonable). *See also* Kamber Decl. at 42.[2] A lodestar check confirms reasonableness of the request, which otherwise is supported by applicable methodologies and factors. The costs incurred for necessary expenses in this litigation also are reasonable and should be approved. *See* Kamber Decl. at ¶ 48.

II. THE REQUESTED ATTORNEYS' FEE AWARD IS FAIR AND REASONABLE

In cases where, as here, class members' benefits and attorneys' fees are to be distributed from a single fund with no reversion to the defendant, the percentage method is typically applied to fee awards. *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) *Barfield,* 2015 WL 3460346, at *4.[3] Indeed, the percentage method is preferred.[4] *See West,* 2014 WL

[2] The fee award will be allocated and distributed by Class Counsel, with the advice and consent of the Executive Committee, among the several law firms providing services in representing Plaintiffs and class members in this case. *See* Stipulation of Settlement (Dkt. 160-1) at §§1.11, 3.1.

[3] None of the funds available to class members will revert to Blue Buffalo under the Settlement and hence "avoids the claim-rate problem that has troubled some courts and caused them to abandon the percentage-of-the-fund method for calculating fees." *Id.* at *5 n.1.

1648741, at *1 ("where attorney fees and class members' benefits are distributed from one fund, a percentage-of-the-benefit method may be preferable to the lodestar method for determining reasonable fees.") (citations omitted); *accord Barfield*, 2015 WL 3460346, at *3; *Wiles*, 2011 WL 2416291, at *4; *see also In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 736 F. Supp. 1007, 1008-09 (E.D. Mo. 1990) (percentage of fund "is a more appropriate and efficient means of calculating an attorneys' fee award" than lodestar method). Courts may, but are not required to, use the lodestar method to cross-check the fairness of a percentage award. *See, e.g.*, *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) (the lodestar approach is "sometimes warranted to double-check the result of the 'percentage of the fund method'").

A. The Fee Request is Reasonable as a Percentage Of The Fund.

Under the percentage method, fees are based on a percentage of the gross value of the common fund. *West*, 2014 WL 1648741, at *1 ("It is appropriate to apply a reasonable percentage to the gross settlement fund."); *Barfield*, 2015 WL 3460346, at *4 ("Under the percentage-of-the-fund method . . . it is appropriate to base the percentage on the gross cash benefits available for class members to claim, plus the additional benefits conferred on the class by the . . . [d]efendants' separate payment of attorneys' fees and expenses, and the expenses of administration."); *see also Johnston*, 83 F.3d at 246 ("Although under the terms of each settlement agreement, attorney fees technically derive from the defendant rather than out of the class' recovery, in essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal. Even if the fees are

[4] The percentage method is the one used by most courts. *See* Newberg on Class Actions § 14:6 (5th ed.) ("in recent years, a majority of the Circuit courts have approved the percentage-of-the-fund method"); MANUAL FOR COMPLEX LITIGATION at 186-87 (2010) ("[T]he vast majority of courts … use the percentage-fee method in common fund cases."); *see also*, *e.g.*, *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1279 (S.D. Ohio 1996) (the "clear trend among courts making awards in common fund cases is to award a reasonable percentage of the fund").

paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery.").

Under the Settlement, Blue Buffalo agreed to pay $32 million in cash into a settlement fund for compensation to Settlement Class Members. *See* Stipulation of Settlement, Dkt. No. 160-1, at ¶¶ 1.27, 2.4. Payments to Settlement Class Members, the Claims Administrator, and Plaintiffs' Counsel are made out of that fund. *See id.* ¶ 2.2. Thus the total value of the settlement fund for purposes of applying the percentage method is $32 million. *See Barfield*, 2015 WL 3460346, at *4 ("The Court finds that the fee and expense request is reasonable. Here, $3,933,333 will be paid to qualifying KAMO Class Members. When administrative costs of $400,000 – to be paid separately by KAMO – KPN-and the attorneys' fees and expenses of $2,166,667 are factored in, the gross value of the Settlement is $6,500,000. The $2,166,667 fee-and-expense award amounts to one-third of the fund as a whole."). Here, an $8 million fee award, or 25% of the $32 million cash fund, is fair and reasonable.

"[C]ourts in this circuit . . . have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund." *In re Iowa Ready-Mix Concrete Antitrust Litig.*, 2011 WL 5547159, at *1 (N.D. Iowa Nov. 9, 2011) (quoting *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 998 (D. Minn. 2005) (collecting cases)). Indeed, awards of one-third of the fund – more than requested here – are common. *See In re Charter Commc'ns, Inc., Sec. Litig.*, 2005 WL 4045741, at *21 (E.D. Mo. June 30, 2005) ("33% remains the fee most frequently requested."); s*ee also* 4 Newberg on Class Actions §14.60 (4th ed. 2010) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.") (citing cases); *Barfield*, 2015

WL 3460346, at *4-5 (collecting cases).[5] A one-third percentage is "consistent with prevailing contingent fee rates in non-class action cases." *Bredbenner v. Liberty Travel, Inc.,* CIV.A. 09-1248 MF, 2011 WL 1344745, at *21 (D.N.J. Apr. 8, 2011) (citing *In re Lucent Techs. Sec. Litig.*, 327 F. Supp. 2d 426, 442 (D.N.J. 2006) ("the customary contingent fee would likely range between 30% and 40% of the recovery"); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) (same). "In private litigation, attorneys regularly contract for contingent fees between 30% and 40% directly with their clients . . . These percentages are the prevailing market rates throughout the United States for contingent representation." *Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334, 1341 (S.D. Fla. 2007). Given that fee requests of 33% or more are routinely granted, the 25% requested here is very reasonable. As discussed below, the requested award also is supported by the *Johnson* factors.

B. A Lodestar Check Confirms the Reasonableness of the Requested Fee.

Employing a lodestar cross check – which aggregates to 2.7 -- demonstrates that the fees requested are well within reasonable and customary awards. To calculate the lodestar, "the hours expended by an attorney are multiplied by a reasonable hourly rate of compensation so as to produce a fee amount which can be adjusted, up or down, to reflect the individualized characteristics of a given action." *Johnston*, 83 F.3d at 244. "[T]he hourly rate to be applied in calculating the lodestar is that which is normally charged in the community where the attorney practices." *In re Genetically Modified Rice Litig.*, 2012 WL 6085153, at *8 (E.D. Mo. Nov. 2, 2012) (quoting *Stoneridge Investment Partners v. Charter Commc'ns, Inc.,* 2005 U.S. Dist.

[5] *See also, e.g.*, *In re U.S. Bancorp Litig.,* 291 F.3d 1035, 1038 (8th Cir.2002) (affirming award of 36% of $3.5 million fund, plus $40,000 for expenses); *In re Iowa Ready–Mix,* 2011 WL 5547159 (awarding 36.04% of $18.5 million common fund, plus over $900,000 in expenses); *West,* 2014 WL 1648741 ("In this case, the court believes that 33 percent is a reasonable percentage for attorney's fees."); *Wiles,* 2011 WL 2416291, at *10–11 (awarding one-third of $900,000 common fund); *Ray v. Lundstrom,* No. 8:10CV199, 2012 WL 5458425 (D. Neb. Nov.8, 2012) (awarding one-third of $3.1 million fund, plus $77,900 in expenses); *Brehm v. Engle,* No. 8:07CV254, 2011 U.S. Dist. LEXIS 35127, at *6 (D.Neb. Mar. 30, 2011) (awarding one-third of $340,000 settlement fund in fees, plus $45,000 in expenses); *Kelly v. Phiten USA, Inc.,* 277 F.R.D. 564, 571 (S.D. Iowa 2011) (awarding 33% of settlement).

LEXIS 14772, at * 54 (E.D. Mo. June 30, 2005); *see also In re Charter Commc'ns*, 2005 WL 4045741, at *17 (applicable rate is that which "is normally charged in the community where the attorney practices."). Use of current fee rates in calculating the lodestar is appropriate. *See id.* ("In addition, 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."). In determining reasonableness of hourly rates, the court may take into account the attorneys' legal reputation, experience, and status, *id* at *17, and may also consider the "contingent nature of success" and the "quality of the attorneys' work." *In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 631 F. Supp. 2d 1151, 1158-59 (D. Minn. 2009). Ultimately, plaintiffs' counsel should "be as well paid as their adversaries who did not work on a contingency basis." *In re Charter Commc'ns*, 2005 WL 4045741, at *17.[6]

"The lodestar cross-check need entail neither mathematical precision nor bean counting. *In re Xcel*, 364 F.Supp.2d at 999. While the court must apply the correct standards and the applicant must submit appropriate documentation, "trial courts need not, and indeed should not, become green-eyeshade accountants." *Fox v. Vice*, 563 U.S. 826, 131 S. Ct. 2205, 2216, 180 L.Ed.2d 45 (2011). The goal is "not to achieve auditing perfection." *Id.* Trial courts "may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time. *Id.* "For example, a court performing a lodestar cross check need not scrutinize each time entry; reliance on representation by class counsel as to total hours may be sufficient."

[6] Among other things, the lodestar approach should not "penalize[e] plaintiffs' counsel for achieving an early settlement, particular where, as here, the settlement amount is substantial." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 482 (S.D.N.Y. 2013); *see also, e.g., Di Giacomo v. Plains All Am. Pipeline,* CIV.A.H-99-4137, 2001 WL 34633373, at *11 (S.D. Tex. Dec. 19, 2001) ("Because counsel prosecuted this action on a contingent fee basis, this court appropriately focuses on the extent of the risk and the results obtained. An undue emphasis on the number of hours spent on a contingency fee case would penalize counsel for obtaining an early settlement and could distort the value of the attorneys' services.").

In re NuvaRing Products Liab. Litig., 4:08 MDL 1964 RWS, 2014 WL 7271959, at *4 (E.D. Mo. Dec. 18, 2014).[7]

A summary of the services, hours, and rates of Class Counsel and Supporting Counsel is provided herewith. *See* Kamber Decl., Exs A-B. Counsel have expended an aggregate of 7,229 hours rendering services to Plaintiffs in this litigation, at rates ranging from $550 to $775 per hour for partners and $300 to $400 for non-partners. *Id.* For some of the firms, these rates included office expenses and/or electronic research fees. These hourly rates are reasonable since they are at par with or below national counterparts from the defense bar, and are in line with the rates approved by courts within this Circuit in comparable cases.[8] *See, e.g.*, *Roeser v. Best Buy Co.*, 2015 WL 4094052, at *12 (D. Minn. July 7, 2015) ("Although, based on the Court's own experience and knowledge of market rates, hourly compensation rates of $775 . . . and $880 . . . are higher than the prevailing market rates in this area, the Court will account for the contingency nature of this case, the high-quality work performed by counsel, and the typically higher compensation rates approved for class counsel, in approving these hourly rates."); *In re Genetically Modified Rice Litig.*, 2012 WL 6085141 (approving hourly rates ranging from $375-$865 for partners and $175-$450 for associates as fair and reasonable); *In re Zurn Pex Plumbing*

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[7] *See also In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2012 WL 6085153, at *10 (E.D. Mo. Nov. 2, 2012), *report and recommendation adopted*, No. 4:06MD1811 CDP, 2012 WL 6085141 (E.D. Mo. Dec. 6, 2012), *aff'd*, 764 F.3d 864 (8th Cir. 2014) ("the court may rely on summaries of attorneys and need not review actual billing records."). *See also, e.g., In re Diet Drugs,* 582 F.3d 524, 539 (3d Cir. 2009) (reviewing individual billing records may be an unnecessary and time-consuming process; reliance on summaries within district court's discretion). This is particularly true when the fee award is reasonable under the percentage method. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000).

[8] In complex litigation, attorneys of the caliber of those in this case often have hourly billing rates exceeding $1,000 per hour. *See* Vanessa O'Connell, Big Law's $1,000-Plus and Hour Club, WALL STREET JOURNAL, Feb. 23, 2011 (available at http://www.wsj.com/articles/ SB10001424052748704071304576160362028728234) (last visited April 12, 2016). The rates are reasonable even if only the locale of the litigation is considered. In the 2011 NATIONAL LAW JOURNAL Survey, Missouri-based firms reported hourly rates of between $275-$850 per hour for partners and $150-$540 per hour for associates. Moreover, even if the maximum billing rates for attorneys and paralegals here were capped at $650 and $175, respectively, the lodestar calculation would be $2,843,435, which would not materially impact the multiplier applied.

Products Liab. Litig., 2013 WL 716460, at *5 (D. Minn. Feb. 27, 2013) (collecting cases approving rates of $500-$800 per hour). *See also* Kamber Decl. ¶ 42.

When the number of hours is multiplied by the rate per hour of each attorney and paraprofessional, the aggregate lodestar equals $2,909,155.50. Kamber Decl. ¶ 44. The fee request thus represents the lodestar with a multiplier of 2.7. *Id.* ¶45.

Fee multipliers "account for, among other things, the results achieved, the quality of representation, the complexity and magnitude of the litigation, the consequent risk of nonpayment viewed as of the time of filing the suit, and the contingent nature of the expected compensation for services rendered." *Stoneridge,* 2005 U.S. Dist. LEXIS 144772 at *56; *see also In re Zurn Pex Plumbing,* 2013 WL 716460, at *4 ("To make certain that the public interest is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding."). The multiplier need not fall within any pre-defined range, so long as the court's analysis justifies the award, such as when the multiplier is in line with multipliers used in other cases." *In re Xcel*, 364 F.Supp.2d at 999.

The multiplier here is well within the range of—and often below—those applied in comparable cases. *See, e.g.*, *In re Xcel* 364 F. Supp. 2d at 999 (collecting cases and approving 4.7 multiplier as reasonable); *In re Charter Commc'ns*, 2005 WL 4045741, at *18 (multiplier of 5.61 "falls within the range of multipliers found reasonable for cross-check purposes by courts in other similar actions"); *In re Diet Drugs,* 553 F. Supp. 2d 442, 478 (E.D. Pa. 2008) (collecting cases with multipliers between 2.4 and 4.5); *In re Rite Aid Corp. Sec. Litig.,* 362 F. Supp. 2d 587 (E.D. Pa. 2005) (on remand, approving award representing multiplier of 6.96); *Sewell v. Bovis Lend Lease, Inc.,* 2012 WL 1320124, at *13 (S.D.N.Y. Apr. 16, 2012) ("Courts commonly award lodestar multipliers between two and six"); *Steiner v. Am. Broad. Co., Inc.,* 248 Fed. Appx. 780, 783 (9th Cir. 2007) (6.85 multiplier "falls well within the range of multipliers that courts have

allowed."); *Roberts v. Texaco, Inc*., 979 F. Supp. 185, 197 (S.D.N.Y. 1997) (awarding multiplier of 5.5); *Cosgrove v. Sullivan*, 759 F. Supp. 166, 167 n.1 (S.D.N.Y.1991) (awarding multiplier of 8.74).[9] Since the multiplier is within—and largely below—the typical range and supported by applicable factors, it is reasonable and should be approved.

C. The *Johnson* Factors Support the Reasonableness of the Fee Request

The reasonableness of the requested fee award – under either the percentage method or the lodestar method – is supported by the "*Johnson*" factors, which are approved in the Eighth Circuit. *See Barfield*, 2015 WL 3460346, at *5 (Eighth Circuit "has approved consideration of the twelve factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 719–20 (5th Cir.1974)."). The *Johnson* factors include:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the attorney's preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the 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.

Id. at *5 (quoting *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 944 n.3 (8th Cir. 2007)). Not every factor applies, and the Court has discretion regarding which factors it considers and the relative weight given to each. *See In re Xcel*, 364 F. Supp. 2d at 993 (citing *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854 (10th Cir. 1993) (noting that "rarely are all of the *Johnson* factors applicable; this is particularly so in a common fund situation"); *see also Yarrington v. Solvay Pharmaceuticals, Inc*., 697 F. Supp. 2d 1057, 1062 (D. Minn. 2010) ("not all of the individual factors will apply in every case, affording the Court wide discretion in

[9] Even in so-called "mega-fund" cases (where the settlement funds exceed $1 Billion), the percentage awards generally are *decreased*, *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 269 (D.N.H. 2007), multipliers have ranged from 2.57 to 4.45, averaging at 3.59. *See id.* ($3.2 billion fund; 2.697 multiplier).

the weight to assign each factor."). Here, the most salient factors support the requested fee award.

1. The Amount Involved and Results Obtained Demonstrate the Settlement Benefit.

The settlement is excellent for the class, particularly in light of the significant risks of litigation. It provides for substantial monetary relief to class members, as well as injunctive relief. Blue Buffalo has agreed to ensure that it no longer represents to the public that its Products do not include chicken or poultry by-product meal unless or until: (i) all specifications for Blue Buffalo Products have been reviewed for the purpose of ensuring that they are consistent with all packaging claims found on the product and representations regarding the products found on the Blue Buffalo website; and (ii) Blue Buffalo has reviewed its supplier relationships and has instituted practices designed to ensure that all materials provided by its suppliers comply with the applicable product specifications. *See* Dkt. No. 160-1) at §2.1. Where settlement includes affirmative relief, "such relief must be considered in evaluating the overall benefit to the class." *Will v. General Dynamics Corp*., 2010 WL 4818174, at *1 (S.D. Ill. Nov. 22, 2010). "[I]t is important to take [that relief] into account . . . so as to encourage attorneys to obtain effective affirmative relief." *Id.*; *see also Pinto*, 513 F. Supp. 2d at 1342-43 (value of injunctive relief should be considered in determining reasonableness of fees) (citing cases); Advisory Committee Note to Rule 23(h) ("it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award"). The injunctive relief is important here, where the claims are brought by persons concerned with accuracy of representations pertaining to the Blue Buffalo Products they purchase. *See* Kamber Decl. at ¶31 ("Injunctive relief was material to Plaintiffs because it was important that the settlement include provisions that would help prevent this type of misrepresentation from happening again.").

Class Counsel also achieved a highly favorable monetary settlement – $32 million – and secured that relief without further protracted and risky litigation. The Settlement amount is substantial in the aggregate, and will provide significant cash benefits to class members. Indeed, given that there is no reversion of funds to Blue Buffalo, and in light of the ability to increase claim amounts pro rata, many class members will actually receive the full amount of valid relief requested in their claims. See Settlement Agreement, ¶2.8, Dkt. #160-1. Obtaining such relief is a significant victory and further supports the fee requested here.

2. Plaintiffs' Counsel Undertook Significant Risk and Achieved A Beneficial Result.

"Courts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees." *Yarrington*, 697 F. Supp. 2d at 1062 (quoting *In re Xcel*, 364 F. Supp. 2d at 994) (quotations omitted). "The risk of non-payment must be judged as of the inception of the action and not through the rosy lens of hindsight." *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liab. Litig.,* 553 F. Supp. 2d 442, 478 (E.D. Pa. 2008), *as corrected* (Apr. 9, 2008), *judgment entered,* 2008 WL 2890878 (E.D. Pa. July 21, 2008) and *aff'd sub nom. In re Diet Drugs,* 582 F.3d 524 (3d Cir. 2009). "A determination of a fair fee for Class Counsel must include consideration of the contingent nature of the fee, the wholly contingent outlay of out-of-pocket sums by Class Counsel, and the fact that the risks of failure and nonpayment in a class action are extremely high." *Pinto*, 513 F. Supp. 2d at 1339. The risk of no recovery factors into undesirability, and is considered in light of, among other things, the risk of obtaining class certification and establishing liability at trial. *Bredbenner*, 2011 WL 1344745, at *20.[10] Here, Plaintiffs' counsel faced numerous issues and defenses making liability

[10] There are ample examples of situations in which attorneys in complex litigation "have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." *In re Xcel*, 364 F. Supp. 2d at 994 (citing *Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir. 2002) (reversing class certification). *See e.g., In re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 437-38 (8th Cir. 1999) (affirming dismissal without leave to replead); *see also Vaszlavik v. Storage Tech Corp.*, 2000 U.S.

(and consequent payment) uncertain. The case was prosecuted on a contingent basis, entailing substantial risk that the litigation would yield little or no recovery or compensation.[11] *See* Kamber Decl. at ¶50 ("Because the fee to be awarded in this matter is entirely contingent, the only certainty from the outset was that there would be no fee without a successful result, and that such a result would be realized only after a lengthy and difficult effort.").

3. The Factual and Legal Issues in this Action are Complex.

Plaintiffs allege nationwide class claims for violation of the Magnuson-Moss Warranty Act ("MMWA"), unjust enrichment, and violation of consumer protection statutes of multiple states. Blue Buffalo denied all liability and asserted nine affirmative defenses. *See* Dkt. No. 45. The claims are complex in terms of subject matter and legal issues resulting from, among other things, uncertainty and a lack of precedent as to certain elements of the MMWA. There are also potential issues regarding choice of law, and the significant number of state laws in play. In addition to substantive legal issues posed by the panoply of state claims involved, Plaintiffs certainly would have faced a vigorous attack on class certification, and achieving class certification via a litigated motion was by no means certain. Uncertainty is also posed by the battle of experts that would surely ensue over scientific testing of Blue Buffalo's ingredients, as well as challenges related to quantifying damages. The time and effort required to prosecute the claims and bring this litigation to settlement has been considerable, involving 7,229 collective hours of legal service by Plaintiffs' Counsel, even without filing dispositive and class certification motions.

Dist. LEXIS 21140, at *11 (D. Colo. Mar. 9, 2000) (case undesirable "given the risk of no recovery and the uncertainty of the governing law").

[11] "It is an established practice to reward attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all." *Kanawi v. Bechtel Corp.*, 2011 WL 782244, at *2 (N.D. Cal. Mar. 1, 2011) (citing *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994)). "Such a practice encourages the legal profession to assume such risk and promotes competent representation for plaintiffs who could not otherwise hire an attorney." *Id.*

4. Counsel for All Parties are Skilled Practitioners in Complex Litigation.

Complex litigation and class actions require skill sets and experience needed to perform the legal service properly. As set out in the Motion to Appoint Interim Class Counsel and Executive Committee (Dkt. No. 11), Plaintiffs' counsel are highly experienced litigators in complex, class-action and/or multidistrict litigation recognized for high quality work and skill. *See Id.* at 3-5 and Exs. 1-5 (firm resumes). Counsel brought their exceptional abilities to bear on behalf of the entire class not only in the quality of legal work, but also in their tenacity and skill at the negotiating table. *See* Kamber Decl. at ¶¶ 27-30. Plaintiffs faced well-qualified opposing counsel from national law firms who pressed defenses on their client's behalf. *See*, *e.g.*, *Bredbenner*, 2011 WL 13447, at *20 (performance and quality of opposing counsel considered in measuring the skill and efficiency of class counsel). "Class counsel's success in bringing this litigation to a conclusion prior to trial is another indication of the skill and efficiency of the attorneys involved." *Id*.

Here, resolution has been both efficient and fair. *See* Kamber Decl. at ¶¶ 37-39 ("Throughout this litigation I have had regular communications with members of the Executive Committee regarding their expenditure of time and expense . . . . and continuously monitored the work being performed by the other firms . . . in order to ensure consistent quality, that each firm was able to contribute constructively, and that there was no unnecessary duplication of efforts."). Counsels' skill in "achieving a speedy and fair settlement" as well as the "use of informal discovery and cooperative investigation to provide the information necessary to analyze the case and reach a resolution" are to be commended, and weigh in favor of the appropriateness of the fee. *King v. United SA Fed. Credit Union*, 744 F. Supp. 2d 607, 614 (W.D. Tex. 2010); *see also Di Giacomo*, 2001 WL 34633373, at *10 (commending counsel's "aggressive and efficient strategy that culminated in a substantial recovery in a short period of time, saving plaintiffs large

sums of money and avoiding the considerable risk and delays of litigation"); *In re Charter Commc'ns*, 2005 WL 4045741, at *21 (noting with approval that "[t]his is the type of complex litigation that easily could have dragged on for several more years. Instead, it had a relatively short stay of two and a half years on this court's docket because counsel litigated the case efficiently and inexpensively.").

5. The Requested 25% Award is Consistent With Awards in Similar Cases.

As discussed, the requested award is well within the range awarded by other courts in similar litigation. *See supra*, II.A. In fact, the 25% fee requested is less than the 33% typically sought and awarded in class actions. *Id.* In sum, the fee requested is reasonable as a percentage of the fund, under a lodestar analysis, and upon consideration of the relevant *Johnson* factors. As such, it should be approved.

D. The Reaction of Class Members Demonstrates that Counsel Achieved a Favorable Outcome.

Pursuant to the Court's order granting preliminary approval, the Settlement Administrator provided direct notice to an estimated 56% of potential class members via email and/or postcard, and also published the notice in People Magazine, which has more than 42 million readers. *See* Declaration of Jeanne C. Finegan ("Finegan Decl."), ¶¶ 28-30, attached as Exhibit 2 to the Brief in Support of Final Approval. In addition, the Claims Administrator engaged in a sustained and sophisticated online notice campaign that served more than 78 million Internet impressions and employed a highly targeted social media strategy. *Id*. ¶¶ 33-34. The notice advised that Plaintiffs' Counsel would apply for an attorney fee award of up to 25% of the Settlement. *See* Publication Notice, Dkt. No. 160-1, Ex. 3 ("Settlement funds of up to $32,000,000 will be made available to partially reimburse Class Members for the Products they purchased and to pay legal fees of not more than $8,000,000, and expenses and administrative costs of not more than

$1,400,000."); Long Form Notice, Dkt. No. 160-1, Ex. 4) ("If the Court approves the proposed settlement, Class Counsel will request that the Court award attorneys' fees in an amount not to exceed $8,000,000).

As of May 9, 2016, 105,172 class members submitted claim forms. Finegan Decl. ¶ 42**.** Additionally, only 16 timely objections were received. Of the 16 objections timely received, 2 were subsequently withdrawn. Marchese Decl ¶¶ 5, 7. Plaintiffs respond more fully to the objections in their Omnibus Response To Objections, filed concurrently with the Final Approval papers. In summary, however, the fee objections lack merit.

Several objectors appear to assume incorrectly that the $1.4 million for administrative costs is paid to the lawyers, which it is not. *See* Dkt. Nos. 169, 170, 184. Rather, that portion of the fund is earmarked for the Claims Administrator to cover the costs of the notice program and the claims administration process. Three objectors suggest that costs be deducted before applying a fee percentage, Dkt. Nos. 182, 186, 190, but it is appropriate to calculate fees as a percentage of the gross rather than the net settlement. *West*, 2014 WL 1648741, at *1; *Barfield,* 2015 WL 3460346, at *4. Other objectors voice conclusory or unsubstantiated grievances pertaining to attorney fees generally. *See* Dkt. Nos. 180, 186, 190. Such "[c]onclusory and unsubstantiated objections are not sufficient to warrant a reduction in fees." *Miller v. Ghirardelli Chocolate Co.,* 12-CV-04936-LB, 2015 WL 758094, at *11 (N.D. Cal. Feb. 20, 2015) (quoting *Lucas v. White,* 63 F.Supp.2d 1046, 1057 (N.D.Cal.1999)).

One objector requests in her objection that the award be limited to the lodestar. *See* Houser Objection, Dkt. No. 179, at 7. But in her deposition she stated the opposite, insisting that a percentage is in fact the appropriate measure for attorneys' fees. Houser depo. at 74:18-76:20. (("Q: … What's your opinion as to what a reasonable way -- a reasonable computation for compensation should be for attorneys who represent plaintiffs in a class action for class counsel?

A: I guess a percentage of the -- a percentage of the final. So in this case it would be --Q: A percentage of the 32 million? A: -- a percentage of the 32 million. Yes. My God. Q: What do you think is a fair percentage of the 32 million? A: I don't know. Q: Is 40 percent a fair percentage? A: I don't know.")) The lodestar method is not preferred in this circuit. *See In re Xcel*., 364 F. Supp. 2d at 997 (rejecting objection to limit fees to lodestar as "this method is not the approved and "well established [method] in this circuit.") (quoting *Petrovic,* 200 F.3d at 1157); *Wiles*, 2011 WL 2416291, at *4 (lodestar "is not the preferred method in a common fund case"). Contrary to this objector's suggestion, it is the multiplier, not the lodestar alone, which compensates for risk. *See, e.g., In re Zurn Pex*, 2013 WL 716460, at *4 (multiplier rewards counsel "for taking on risk and high-quality work"). As discussed, in any event, the multiplier here is well within the range of those approved in comparable cases. As a cross-check, the lodestar confirms reasonableness, but the award is fully supported under the percentage method alone.

Other objectors suggest, incorrectly (by including costs), that the fee request is 30% of the settlement amount. *See* Dkt. No. 169, 170, 184. The fee request equates to 25% of the gross $32 million cash settlement amount. However, even if the request were 30%, that level of award is routine. *See* cases cited *supra,* at Section II.A. These objectors could expect a one-third rate or higher if pursuing relief on a contingency-fee basis in private litigation. *Pinto* 513 F. Supp. 2d at 1341. None of the objectors has shown the requested fee award to be unfair. *In re U.S. Bancorp Litig.*, 291 F.3d at 1038. For all the reasons discussed, the fee request is reasonable, and the objections are without merit.

III. REIMBURSEMENT OF INCURRED EXPENSES SHOULD BE GRANTED.

Reasonable and necessary expenses also have been advanced to prosecute this litigation in the amount of $152,054. Kamber Decl. ¶48. "Reasonable costs and expenses incurred by an

attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement." *Yarrington*, 697 F. Supp. 2d at 1067 (quotations omitted). The requested costs must be relevant to the litigation and reasonable in amount. *Id.* The appropriate analysis to apply in deciding which expenses are compensable in a common fund case of this type is whether the particular costs are the type typically billed by attorneys to paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (allowing recovery of "out-of-pocket expenses that 'would normally be charged to a fee paying client'").

Here, Counsel seeks reimbursement of costs and expenses totaling $152,054 for expenses. While the great majority of the expenses are discovery and expert witness related, expenses also include legal research, pacer fees, court reporters, travel and meals. Kamber Decl. ¶¶ 22, 48 & Ex. C. These are the type of expenses routinely charged to hourly clients and, therefore, the full requested amount should be reimbursed. *See Yarrington*, 697 F. Supp. 2d at 1067 (approving request where "the costs incurred included filing fees; expenses associated with the research, preparation, filing, and responding to the pleadings in this matter; costs associated with copying, uploading, and analyzing documents; fees and expenses for experts; and mediation fees. … All of these costs and expenses were advanced by Settlement Class Counsel with no guarantee they would ultimately be recovered, and most were 'hard' costs paid out of pocket to third-party vendors, court reporters, and experts."); *West*, 2014 WL 1648741, at *1 (costs including mediation expenditures, travel, expert fees, and depositions reasonable).

CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that the Court award Plaintiffs' Counsel attorneys' fees and expenses in the amount of $8 million.

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Respectfully Submitted,

/s
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