

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

JEFFREY WORTH AND ROBERT BURNS,  
on behalf of themselves and others similarly  
situated,

Plaintiffs,

v.

CVS PHARMACY, INC.,

Defendant.

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No. 16-cv-00498-SMG

**MEMORANDUM OF LAW IN SUPPORT  
OF PLAINTIFFS' MOTION FOR  
PAYMENT OF CLASS COUNSEL'S  
ATTORNEY FEES AND EXPENSES  
AND PAYMENT OF  
INCENTIVE AWARDS TO  
THE CLASS REPRESENTATIVES**

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Plaintiffs<sup>1</sup> Jeffrey Worth and Robert Burns respectfully submit this memorandum of law in support of Plaintiffs' motion for the awarding of attorneys' fees and reimbursement of litigation expenses to Co-Lead Class Counsel and Incentive Awards to the class representatives.

## **I. PRELIMINARY STATEMENT**

As discussed in detail in Plaintiffs' memorandum of law in support of their motion for final approval of the class action Settlement filed concurrently herewith ("Final Approval Memorandum"), Class Counsel achieved a very favorable Settlement on behalf of the Settlement Class Members that provides for significant monetary and injunctive relief. The Settlement Agreement, however, was achieved only after more than three years of hard-fought litigation and extensive arm's-length negotiations with the assistance of a professional mediator.

Class Counsel now hereby move for \$477,000 as payment of attorneys' fees and costs.<sup>2</sup> Class Counsel also hereby request payment to plaintiffs Jeffrey Worth and Robert Burns of \$2,500 each (for a total of \$5,000) for their contribution to, and active participation in, the Action as the court-appointed Class Representatives.

As the record before this Court demonstrates,<sup>3</sup> the favorable outcome in this case is the result of Class Counsel's hard work and diligent efforts. The amount requested in fees and expenses for Class Counsel fairly and reasonably compensates them for over three years of hard

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<sup>1</sup> Capitalized terms shall have the meaning as in the Settlement Agreement (ECF No. 103-2).

<sup>2</sup> As previously disclosed to the Court, Class Counsel have a fee split agreement whereby from the fee and costs amount awarded by the Court, after payment of costs, Class Counsel have agreed to split the fee as follows: Kaplan Fox & Kilsheimer, LLP: 11%; Reese LLP: 30%; Mehri & Skalet, PLLC: 30%; and CSPI: 29% ("Fee Split Agreement").

<sup>3</sup> The Declaration of Michael R. Reese in Support of Final Approval ("Reese Final Approval Decl.") is an integral part of this submission. Plaintiffs respectfully refer the Court to it for a detailed description of the factual and procedural history of the litigation, the claims asserted, the work Class Counsel performed, the settlement negotiations, and the numerous risks and uncertainties the litigation presented.

work and diligent efforts in negotiating and litigating this matter, as well as their unreimbursed expenses. The requested amount is in line with prior decisions of courts in the Second Circuit. *See, e.g., Blessing v. Sirius XM Radio Inc.*, 507 F. App'x 1, 4–5 (2d Cir. 2012) (upholding award of \$13 million in fees for injunctive relief settlement achieved after three years of litigation).

Based on the Class Representatives' contributions to the Action and incentive awards in other cases, the Incentive Awards for Plaintiffs Jeffrey Worth and Robert Burns are also fair and reasonable. For all of the reasons given herein, the Court should grant Plaintiffs' motion for the award of attorneys' fees and litigation expenses to Class Counsel and Incentive Awards to Class Representatives Jeffrey Worth and Robert Burns.

## II. ARGUMENT

Class Counsel have spent more than three years litigating this matter. They should now be compensated for their work. As Plaintiffs demonstrate below, the \$447,000 that Class Counsel seeks here is well within range of fee awards in similar cases in the Second Circuit. Accordingly, as detailed below, Class Counsel respectfully request that the Court issue an order granting their request for payment of \$447,000 for their efforts.

### A. Class Counsel Negotiated Fees with Defendant Only after Agreeing upon the Settlement Terms

As an initial matter, it is important to point out that Class Counsel did not negotiate attorneys' fees and expenses with Defendant until *after* the Parties reached agreement as to the terms of the Settlement benefiting the Settlement Class. *See* Reese Final Approval Decl., ¶ 12.

The United States Supreme Court has held that negotiated, agreed-upon attorneys' fee provisions are the ideal toward which the parties should strive. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). "A request for attorney's fees should not result in a second major litigation." *Id.* "Ideally, of course, litigants will settle the amount of a fee." *Id.*; *see also In re Cont'l Ill. Sec.*

*Litig.*, 962 F.2d 566, 568–70 (7th Cir. 1992) (market factors, best known by the negotiating parties themselves, should determine the quantum of attorneys’ fees).

Moreover, alteration of the fee amount here will not affect the monetary benefits available for the Settlement Class Members. A decision to reduce or even to refuse to award a fee, while beneficial to Defendant, will not affect the Settlement Class Members. *See DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995) (approving award of attorneys’ fees where “[t]he vast majority of the fee [would] be paid by [the defendant] and [would] not come out of any class recovery”). Nor does a negotiated fee present the potential for adversity between Class Counsel and the Settlement Class that the traditional common fund fee may present, since the negotiated fee is being paid in addition to the monetary benefits for the Settlement Class. *See Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1277–78 (S.D. Ohio) (recognizing that divergence of interest can arise in traditional common fund situations), *aff’d*, 102 F.3d 777 (6th Cir. 1996). Courts at all levels of the judicial system have endorsed such negotiated fee and expense awards. *See, e.g., Blessing*, 507 F. App’x at 4 (upholding fee award by District Court that was agreed to by the parties, stating that “the fee was negotiated only after settlement terms had been decided and did not, as the district court found, reduce what the class ultimately received”).

**B. The Agreed-upon Attorneys’ Fees and Litigation Expenses Are Reasonable and Warrant Approval**

The fee request here is reasonable and worthy of the Court’s approval.

Courts commonly look at two methodologies to determine the amount to award class counsel for their efforts in achieving relief for settlement class members: the lodestar method and the percentage-of-the-fund method. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47, 50 (2d Cir. 2000); *accord Blessing*, 507 F. App’x at 4. Under the lodestar approach, the court “scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies

that figure by an appropriate hourly rate.” *Goldberger*, 209 F.3d at 47 (citation omitted). Once the court has made the initial computation, it may, in its discretion, increase the lodestar by applying a multiplier. *Id.*; see, e.g., *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 197–98 (S.D.N.Y. 1997) (awarding a 5.5 multiplier).

The courts are “guided by the traditional criteria,” including: “(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.” *Goldberger*, 209 F.3d at 50 (citation omitted) (the “*Goldberger* reasonableness factors”); accord *Blessing*, 507 F. App’x at 4.

Here, the agreed-upon award of \$447,000 in attorneys’ fees is fair given that it is well below the Class Counsel’s lodestar of \$1,424,744.10 and expenses of \$28,772.76. Class Counsel have devoted considerable time and effort to the investigation, prosecution, and settlement of this highly technical, complex action. Over the course of more than three years, Class Counsel have spent in excess of 1600 hours in performance of their services, which has resulted in the Settlement. The Settlement is an outstanding result for the Settlement Class Members, and, indeed, it has already received preliminary approval from the Court. Class Counsel, however, have yet to be paid anything for their labor and efforts over the past three years.<sup>4</sup> Counsel will also incur additional lodestar in seeking final approval of the Settlement.

#### **1. The Requested Multiplier of Less than 1.00 Is Reasonable**

To date, Class Counsel have expended no less than 1,600 hours, for a lodestar of \$1,424,744.10, based on market rates. See Reese Final Approval Decl. ¶¶ 17–19. As of the date

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<sup>4</sup> Class Counsel’s lodestar does not, and will not, include any time incurred in seeking fees, such as the time spent drafting this memorandum.

of the filing of this brief, the multiplier is less than 1.00. This multiplier falls well within the acceptable range awarded by courts within the Second Circuit. *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (finding multiplier of 4.65 to be “well within the range awarded by courts in this Circuit and courts throughout the country”); *Roberts*, 979 F. Supp. at 198 (awarding multiplier of 5.5 as reasonable).

Here, taking into account the significant complexity of the issues, the risks of this litigation, and the contingent nature of the fee, a multiplier of less than 1.00 is certainly reasonable.

## **2. The Complexity, Magnitude, and Risks of the Action and the Contingent Nature of the Fee**

The risk of litigation that Class Counsel undertook was significant in light of the considerable time and resources they devoted to this case strictly upon a contingency basis. From the commencement of this litigation, Class Counsel have been paid nothing for their substantial efforts. The significant outlay of cash and personnel resources that Class Counsel has made has been completely at risk. Payment for Class Counsel’s services was wholly dependent on obtaining some benefit for the Settlement Class. As Plaintiffs discuss in their papers in support of final approval, there was a significant possibility that Class Counsel would recover nothing for their substantial efforts. *See In re Lloyd’s Am. Trust Fund Litig.*, No. 96 CIV. 1262 RWS, 2002 WL 31663577, at \*28 (S.D.N.Y. Nov. 26, 2002) (“[C]ontingent fee risk is the single most important factor in awarding a multiplier[.]”); *In re Union Carbide Corp. Consumer Products Bus. Sec. Litig.*, 724 F. Supp. 160, 164 (S.D.N.Y. 1989) (same).

Courts have recognized that the risk of non-payment in complex cases, such as the case at bar, is very real and is heightened when plaintiffs’ counsel press to achieve the very best result for those they represent. There are numerous class actions in which plaintiffs’ counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and

expertise. *See e.g., Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (class counsel won a jury verdict, but on appeal judgment reversed and the case dismissed, after 11 years of litigation).

### **3. The Result Achieved and the Quality of Representation**

The result achieved and the quality of the services provided are also important factors to consider in determining the amount of reasonable attorneys' fees under a lodestar/multiplier analysis. *See Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547–48 (S.D. Fla. 1988) (“Perhaps no better indicator of the quality of representation here exists than the result obtained. The quality of work performed in a case that settles before trial is best measured by the benefit obtained.”).

Here, the goals of the litigation were two-fold: first, to terminate use of the “Challenged Claims”; and second, to provide monetary compensation for the Settlement Class Members for their purchases of the Products on account of the allegedly false and misleading marketing. Class Counsel’s efforts in the litigation achieved those significant goals. The substantial experience of Class Counsel in prosecuting consumer protection class action cases was an important factor in achieving these significant goals.<sup>5</sup>

### **C. The Court Should Approve the Reimbursement of Class Counsel’s Expenses**

Class Counsel have also expended \$28,772.76 in costs, for which they should now be reimbursed. These costs were integral to the prosecution of this case, including costs associated with mediation as part of the process of reaching a resolution of the Action.

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<sup>5</sup> Furthermore, Class Counsel have a proven track record in the prosecution of class actions, and they have successfully litigated many major class action cases. *See* Reese Final Approval Decl., ¶¶ 1, 17; *see also* Declaration of Michael R. Reese in Support of Preliminary Approval, Exs. 2–5 (firm resumes of Class Counsel).

**D. The Court Should Approve the Proposed Incentive Awards to the Class Representatives**

Plaintiffs have also moved the Court to approve Incentive Award to the Class Representative. “[S]ervice awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiffs.” *Hernandez v. Immortal Rise, Inc.*, 306 F.R.D. 91, 101 (E.D.N.Y. 2015) (citation omitted) (approving service awards of \$2,500 and \$7,500 to named plaintiffs as reasonable); *see also Massiah v. MetroPlus Health Plan, Inc.*, No. 11-CV-05669 BMC, 2012 WL 5874655, at \*8 (E.D.N.Y. Nov. 20, 2012) (collecting cases approving service awards ranging from \$5,000 to \$30,000); 4 WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 11:38 (4th ed. 2008).

Defendant has agreed to pay an incentive award of \$2,500 to each of the Class Representatives (Jeffrey Worth and Robert Burns), for a total of \$5,000, as compensation for their time and effort spent in the litigation. Class Action Settlement Agreement § 5.1, ECF No. 103-2. Plaintiffs Jeffrey Worth and Robert Burns performed an important and valuable service for the benefit of the Settlement Class. Messrs. Worth and Burns met, conferred, and corresponded with Class Counsel as needed for the efficient process of this litigation. They also participated in numerous interviews by Class Counsel, provided personal information concerning the Action, and remained intimately involved in the mediation and litigation processes. Plaintiffs Worth and Burns also actively participated in discussions related to the Settlement. Plaintiffs’ actions have benefitted the Settlement Class to a significant degree (including by culminating in the Settlement). Plaintiffs respectfully request that the Court approve them each the \$2,500 service award as stated in the Settlement Agreement.

### III. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant the Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses to Class Counsel and Incentive Awards to the Class Representatives.

Dated: September 6, 2019

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