UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-CV-62136

KIMBERLY E. FERRON, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

KRAFT HEINZ FOODS COMPANY,

Defendant.
_____/

APPLICATION FOR ATTORNEYS' FEES, EXPENSES AND COSTS

As directed by the Court in its Order Preliminarily Approving Class Settlement, Plaintiff, Kimberly E. Ferron, (hereinafter "Plaintiff") respectfully submits this Application for Attorneys' Fees, Expenses and Costs ("Motion"), and in support thereof states as follows:

1. This Application is based on the Memorandum in Support and the Declaration of L. DeWayne Layfield (hereinafter "Layfield Declaration"), filed herewith as Exhibit "A".

2. As set forth in detail in the Memorandum in Support and pursuant to the terms of the Class Action Settlement Agreement reached in the above-captioned case, Plaintiff respectfully requests that the Court award attorneys' fees, expenses, and costs to Class Counsel in the amount of Three Million Nine Hundred Thousand Dollars ($3,900,000.00).

WHEREFORE, Plaintiff, KIMBERLY E. FERRON, individually and on behalf of all others similarly situated, respectfully requests that this Court award Class Counsel

attorneys' fees and costs in the amount of Three Million Nine Hundred Thousand Dollars ($3,900,000.00).

MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED APPLICATION FOR ATTORNEYS' FEES AND COSTS

I. INTRODUCTION

After substantial pre-suit investigation, scientific testing by multiple laboratories and negotiation, including a full day mediation session with Hon Wayne Andersen (United States District Judge, Ret.), and post mediation settlement conferences that stretched over multiple weeks and included dozens of telephonic conferences (some involving the mediator), the parties agreed to settle this matter as reflected in the Class Action Settlement Agreement, filed December 9, 2020 (the "Settlement") [D.E. 39-1]. In the Settlement, Defendant agreed to a $16,000,000.00 class settlement fund ("Settlement Fund"), *id.* at ¶2.51, and programmatic relief in the form of label changes for the thirty-five (35) Products at-issue in this Action, which provides an additional quantifiable benefit to all members of the Class over a 24 month period. *Id.* at ¶5.1. As part of the Settlement, the Defendant agreed to pay attorneys' fees and costs as awarded by the Court to Class Counsel up to $3,900,000.00 out of the Settlement Fund. *See Id.* at ¶ 7.1. The fee and cost award was negotiated at arms' length and with the direct supervision of nationally renowned mediator, Hon. Wayne Andersen (Ret.), and only after reaching agreement on all other material Settlement terms. [Layfield Declaration]. The Settlement provides that any order or proceedings related to fees and costs will not affect the finality of the Settlement or the benefits available thereunder to the Class. [D.E. 39-1¶ 7.1-7.2]. The requested fee is within the reasonable range under the factors listed in *Camden I Condo.*

Ass'n v. Dunkle, 946 F.2d 768 (11th Cir. 1991), and less than the 25% "benchmark" set for reasonable fees as provided for in *Camden I.*

Accordingly, pursuant to the Settlement Agreement and the Notices, and consistent with recognized class action practice and procedure, Class Counsel and Plaintiff respectfully submit this Application seeking an attorneys' fee award of $3,900,000.00 inclusive of costs and expenses, which, considering only the value of the cash Settlement Fund, is approximately 24.4% of the monetary Settlement Fund.[1] [Layfield Declaration]. As is demonstrated below, this valuable settlement was achieved because of the skill, tenacity, and effective advocacy of Class Counsel. The requested fee is fair and reasonable, supported by applicable Florida law, and consistent with prevailing awards in class action litigation in the area. For these reasons, among the others stated herein, Class Counsel respectfully ask the Court to award fees and costs in the requested sum.

II. APPLICATION FOR ATTORNEYS' FEES AND EXPENSES TOTALING $3,900,000.00

A. Class Counsel is Entitled to the Requested Fees, Which Constitute a Reasonable Percentage of the Common Fund

The Settlement provides a fair, adequate, and reasonable settlement with significant benefits to the Class. The benefits are described in detail in the Settlement, and included both economic and non-economic benefits. Specifically, the Settlement secures monetary relief for the benefit of the class, in the form of a $16,000,000.00 class

[1] When the value of the programmatic relief is combined with the value of the cash Settlement Fund to determine the overall value of the settlement fund (which is appropriate in light of the case law in the Eleventh Circuit), an award of $3,900,000.00 is even further below the 25% benchmark. *See Poertner v. Gillette Co.*, 618 F. App'x 624, 628 (11th Cir. 2015); *Montoya v. PNC Bank, N.A.*, 2016 U.S. Dist. LEXIS 50315 *48 (S.D. Fla. Apr. 13, 2016); *Hamilton v. SunTrust Mortg. Inc.*, 2014 U.S. Dist. LEXIS 154762 *13 (S.D. Fla. Oct. 24, 2014).

settlement fund, which provides up to $4.80 per household to Class Members who do not have Proof of Purchase, and up to $25.00 per household to Class Members who provide valid Proof(s) of Purchase. Additionally, the Settlement provides significant programmatic relief, in the form of label changes, for the benefit of the Class.

It is well-established that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *In re Sunbeam Sec. Litigation.*, 176 F. Supp. 2d 1323, 1333 (S.D. Fla. 2001) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *see also US Airways, Inc. v. McCutchen*, 569 U.S. 88, 104 (2013) ("This Court has recognized consistently that someone who recovers a common fund for the benefit of persons other than himself is due a reasonable attorney's fee from the fund as whole.") (internal quotation marks omitted). "Attorneys in a class action in which a common fund is created are entitled to compensation for their services from the common fund, but the amount is subject to court approval." *Camden I Condominium Association v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991).

The common benefit doctrine is applied the same way to claims made settlements. *See Poertner*, 618 F. App'x at 628 n. 2 ("[P]roperly understood a claims-made settlement is . . . the functional equivalent of a common fund settlement where the unclaimed funds revert to the defendant; indeed, the two types of settlements are fully synonymous.") (internal citations omitted).

In the Eleventh Circuit, class counsel is awarded a percentage of the funds made available through a settlement, not the amount of funds actually paid out. *See e.g. Hanley v. Tampa Bay Sports & Entm't Ltd. Liab. Co.*, No. 8:19-CV-00550-CEG-CPT, 2020 U.S.

Dist. LEXIS 89175, at *15 (M.D. Fla. Apr. 23, 2020) (explaining that the percentage of the fund analysis applies to claims made settlements and that the "percentage applies to the total fund created, even where the actual payout following the claims process is lower."); *Gonzalez v. TCR Sports Broad. Holding, LLP*, 2019 U.S. Dist. LEXIS 87506 *16 (S.D. Fla. May 24, 2019) ("Instead, to determine attorneys' fees in a case involving a class action settlement that created a reversionary common fund, [the Eleventh Circuit] held that 'attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class. . . . **The percentage applies to the total fund created, even where the actual payout following the claims process is lower**.") (emphasis added) (internal citations omitted); *Mahoney v. TT of Pine Ridge, Inc.*, 2017 U.S. Dist. LEXIS 217470 *26-27 (S.D. Fla. Nov. 17, 2017) ("Instead, to determine attorneys' fees in a case involving a class action settlement that created a reversionary common fund, [the Eleventh Circuit] held that 'attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class. . . . **The percentage applies to the total fund created, even where the actual payout following the claims process is lower**.") (emphasis added) (internal citations omitted); *Wilson v. EverBank*, 2016 U.S. Dist. LEXIS 15751 * 58 (S.D. Fla. Feb. 3, 2016) ("[T]he Eleventh Circuit was clear in *Poertner*, calculating class counsel's fees as a percentage of the value of the claims actually paid to class members is **not** the appropriate method for awarding fees and expenses in the Eleventh Circuit.") (emphasis added); *Hamilton v. SunTrust Mortg. Inc.*, 2014 U.S. Dist. LEXIS 154762 *20-21 (S.D. Fla. Oct. 24, 2014) ("In the Eleventh Circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for

the benefit of the class. . . **The percentage applies to the total benefits provided, even where the actual payments to the class following a claims process is lower**.") (emphasis added) (internal quotation marks omitted); *Pinto v Princess Cruise Lines*, 513 F. Supp. 2d 1334, 1339 (S.D. Fla. 2007) ("The proper manner to calculate attorneys' fees is to identify the fund created for the benefit of the class and to award Class Counsel a reasonable percentage of that fund as an attorneys' fee. In this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class. . . . **The percentage applies to the total fund created, even where the actual payout following the claims process is lower**") (emphasis added) (internal citations omitted).

In determining the value of the settlement fund, courts consider the value of any nonmonetary relief in addition to the monetary relief. *See Poertner*, 618 F. App'x at 628; *Montoya v. PNC Bank, N.A.*, 2016 U.S. Dist. LEXIS 50315 *48 (S.D. Fla. Apr. 13, 2016); *Hamilton v. SunTrust Mortg. Inc.*, 2014 U.S. Dist. LEXIS 154762 *13 (S.D. Fla. Oct. 24, 2014) ("The Court finds the injunctive changes provided in the Settlement Agreement are important and have significant value to the class members nationwide"). Therefore, in determining the reasonableness of the attorneys' fee award, the Court should consider the maximum cash settlement fund value available to class members, **along with the nonmonetary injunctive relief obtained**. *Poertner v. Gillette Co.*, 618 Fed. Appx. at 630; *Mahoney v. TT of Pine Ridge, Inc.*, 2017 U.S. DIst. LEXIS 217470 at *33 (S.D. Fla. Nov. 17, 2017).

In *Camden I*, which is the controlling authority regarding attorneys' fees in the Eleventh Circuit, the court held that the percentage of the fund approach (versus the

lodestar approach) is the better reasoned approach in a common fund case. Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class. *Camden I*, 946 F.2d at 774; *see also Hamilton v. SunTrust Mortg. Inc.*, No. 13-60749-CIV-COHN/SELTZER, 2014 U.S. Dist. LEXIS 154762, at *20 (S.D. Fla. Oct. 24, 2014) (recognizing attorneys representing a class action are entitled to attorneys' fees based solely upon the total benefits obtained in or provided by a class settlement); *Saccocio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 695 (S.D Fla. 2014) (noting in a claims made situation, the attorneys' fees in a class action are determined based upon the total fund, not just the actual payout to the class); *Carter v. Forjas*, 701 F. App'x 759, 766-67 (11th Cir. 2017) (finding same).

The Court has discretion in determining the appropriate reasonable fee percentage with respect to the common fund. *See Sunbeam*, 176 F. Supp. 2d at 1333 ("There is no hard and fast rule mandating a certain percentage of a common fund which may be awarded as a fee because the amount of any fee must be determined upon the facts of each case.") (quoting *Camden I*, 946 F. 2d at 774). In *Camden I*, the Eleventh Circuit noted that a 25% fee award appeared to be the benchmark percentage fee award, which could be adjusted based on the individual circumstances of each case. 946 F. 2d at 775. The Eleventh Circuit has provided a set of factors to analyze in support of the conclusion on the reasonable percentage to award as an attorneys' fee to class counsel in class actions:

(1) The time and labor required;

(2) The novelty and difficulty of the relevant questions;

(3) The skill required to properly carry out the legal services;

(4) The preclusion of other employment by the attorney as a result of his acceptance of the case;

(5) The customary fee;

(6) Whether the fee is fixed or contingent;

(7) Time limitations imposed by the clients or the circumstances;

(8) The results obtained, including the amount recovered for the Clients;

(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 clients; and

(12) Fee awards in similar cases.

Camden I, 946 F.2d at 772 n. 3 (citing factors originally set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

These twelve (12) factors are guidelines, and are not exclusive. *See Sunbeam*, 176 F. Supp. 2d at 1333 (quoting *Camden I*, 946 F. 2d at 775) ("Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, **any non-monetary benefits conferred upon the class by the settlement**, and the economics involved in prosecuting a class action.") (quoting *Camden I*, 946 F.2d at 775) (emphasis added). The Eleventh Circuit has "encouraged the lower courts to consider additional factors unique to the particular case." *Camden I*, 946 F.2d at 775. As applied, the *Camden I* factors and the facts unique to this case support the reasonableness of the requested attorneys' fees and costs award.

B. The Reasonableness of the Requested Fee is Confirmed by Analysis of the Applicable Camden I Factors and the Facts Unique to this Case

In the face of contested litigation, with a case asserting claims predicated on complex legal and factual issues that were opposed by highly skilled and experienced defense counsel, Class Counsel succeeded in securing meaningful monetary and programmatic benefits for the Class. The requested fee is fair and reasonable when considered under the above-referenced legal standards. Indeed, as discussed below, the award is within the normal range of awards made in class action and contingent-fee matters of this type and is particularly appropriate here in view of both the substantial risks attendant in bringing and pursuing this action, the considerable investigation, testing, informal discovery, coordination and effort exerted by the six (6) law firms representing purchasers of the Products in various jurisdictions throughout the nation, and the significant results achieved.

i. The Settlement Includes A Fee-Shifting Agreement.

In the present case, the parties have entered into an agreement that "Defendants shall not oppose an Attorneys' Fees, Expense and Costs Award that is less than or equal to $3,900,000 in the aggregate, which will cover the attorneys' fees, expenses and costs awarded by the Court to Class Counsel for all the past, present, and future attorneys' fees, costs (including court costs), expenses, and disbursements incurred by them and their experts, staff, and consultants in connection with the Action." [D.E. 39-1 ¶ 7.1]. It is well-established that parties may enter into such a fee-shifting agreement. *See generally, Evans v. Jeff D.*, 475 U.S. 717, 733-34 (1986) ("[A] rule prohibiting the comprehensive negotiation of all outstanding issues in a pending case [specifically including claims for attorney fees in a class action] might well preclude the settlement of a substantial number

of cases") *citing Marek v. Chesny* 473 U.S. 1, 7 (1985) ("[M]any a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff"); *see also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.").

Accordingly, courts routinely acknowledge that parties may settle claims for attorneys' fees in a class action by entering into an agreement—as the parties have done in the present case—that the defendant will pay the plaintiff's fees. *See* 4 NEWBERG ON CLASS ACTIONS (4th ed.) § 12:3 ("[D]efendants in a class action settlement may properly agree to pay the plaintiffs' attorneys' fees and expenses.")

ii. The Time and Labor Required.

Here, the primary goal of Class Counsel and the named Plaintiff was to obtain, by settlement or judgment, the best overall common benefit for the Class Members at the earliest reasonable time. [Layfield Declaration]. The reality of complex litigation against a well-represented Defendant, such as Kraft Heinz Foods Company, with creative and robust litigation tactics was an anticipated obstacle that Class Counsel considered and sought to overcome from the beginning. *Id.*

Prior to filing suit and during the pendency of the case, Class Counsel conducted a detailed investigation and analysis of the Products, retained an independent laboratory to conduct extensive testing of the Products, worked with other laboratories and Defendant to evaluate all results of testing, and engaged in thorough and extensive

investigation into the facts, ultimately fashioning an appropriate remedy to serve the best interests of the Class. The investigation and informal discovery have included:

(i) engaging in a substantial pre-suit investigation for months regarding the actual amount of coffee in the Products compared to the represented amounts, including working with multiple independent laboratories and consultants;

(ii) researching the applicable law with respect to the claims asserted and potential defenses thereto;

(iii) coordination by six (6) law firms representing purchasers of the Products in multiple suits filed in various jurisdictions throughout the nation;

(iv) The exchange of confidential business and technical information regarding the Products; and

(v) engaging in extensive discussions and negotiations with defense counsel, including a full day mediation session with nationally recognized JAMS mediator, Hon. Wayne Andersen (Ret.), and post mediation settlement conferences that stretched over multiple weeks and included dozens of telephonic conferences (some involving the mediator).

Id. Additionally, the results obtained by Class Counsel through the Settlement are also attributable to the strategy employed by, and quality of the work product of, Class Counsel. *Id.* Moreover, the mere expenditure of time and labor does not necessarily move a complex class action, such as the present Action, towards certification, judgment, or settlement. *Id.* Class Counsel did not burden the Class Members or the Court with unnecessary delay and did not waste unnecessary time or labor. *Id.*

iii. The novelty and difficulty of the relevant questions and the Skill Required

Plaintiff brought this case based on allegations that Defendant deceptively and unlawfully labeled, packaged, and marketed the Products[2] as containing enough coffee such that the Products make a range of cups of coffee when following the brewing instructions on the Products' labels. According to Plaintiff, contrary to this representation, the Products do not contain enough ground coffee to make the stated number of cups when following the brewing instructions on the Products' labels. As discussed, *supra*, prior to filing suit and during the pendency of the case, Class Counsel conducted a detailed investigation and analysis of the Products, retained an independent laboratory to conduct extensive testing of the Products, coordinated with other laboratories to confirm results, engaged in thorough and extensive investigation into the facts, and fashioned an appropriate remedy to serve the best interests of the Class. The investigation and informal discovery included:

(i) engaging in a substantial pre-suit investigation for months regarding the actual amount of coffee in the Products compared to the represented amounts, including by working with independent laboratories and consultants;

(ii) researching the applicable law with respect to the claims asserted and potential defenses thereto;

(iii) coordination by six (6) law firms representing purchasers of the products in multiple suits filed in various jurisdictions throughout the nation;

[2] Exhibit "C" of the Class Action Settlement Agreement contains a list of the thirty-five (35) Products involved in this Action and covered by the Settlement. [D.E. 39-1, at Ex. "C"]

(iv) The exchange of confidential business and technical information regarding the Products; and

(v) engaging in extensive discussions and negotiations with defense counsel, including a full day mediation session with nationally recognized JAMS mediator, Hon. Wayne Andersen (Ret.), and post mediation settlement conferences that stretched over multiple weeks and included dozens of telephonic conferences (some involving the mediator).

This action required considerable skill and experience to result in a fair adequate and reasonable combination of cash and programmatic benefits for the Class. The case required investigation and a mastery of complex factual circumstances, the ability to develop creative legal theories, and the skill to respond, at mediation and during negotiations,to a host of legal defenses. [Layfield Declaration].

Additionally, Defendant was represented by the prominent and well-respected national law firms of Jenner & Block LLP and Kenny Nachwalter, P.A., which are well-versed and skilled in class action defense. [Layfield Declaration]. In evaluating the quality of representation and the results achieved by Class Counsel, the Court should also consider the skill of opposing counsel. *Camden I*, 946 F.2d at 772 n.3; *Ressler*, 149 F.R.D. at 654; *see also Walco Insvs. v. Thene*n, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) (stating "[g]iven the quality of defense counsel from prominent national law firms, the Court is not confident that attorneys of lesser aptitude could have achieved similar results."). This class action case against Defendant required substantial advanced planning, strategic skills, imagination, resourcefulness, and management abilities of the highest order to match a highly qualified, experienced, and formidable opposition. The

prosecution and settlement of this litigation required a very high degree of competence, experience, and ability by Class Counsel. [Layfield Declaration].

iv. Class Counsel Assumed Considerable Risk to Pursue this Action on a Pure Contingency Basis

Here, Class Counsel undertook this action on a contingent fee basis (with the amount of any fee being subject to Court approval), assuming a substantial risk that the litigation would yield no recovery and leave them uncompensated. In addition to devoting extensive time and resources in this Action, Class counsel also assumed considerable financial risk in retaining an independent laboratory to test the various Products.

Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. For example, one court explained the risks of contingent fees in complex litigation as follows:

> Although today it might appear that risk was not great based on Prudential Securities' global settlement with the Securities and Exchange Commission, such was not the case when the action was commenced and throughout most of the litigation. Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

In *re Prudential-Bache Energy Income Partnerships Securities Litigation*, No. 888, 1994 WL 202394, *6 (E.D. La. May 18, 1994). Indeed, the risk of no recovery in complex cases of this type is very real. There are numerous class actions in which plaintiff's counsel expended thousands of hours of effort and yet received no remuneration whatsoever despite their diligence and expertise.[3] Simply put, it would not have been economically

[3] *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *Eisenstadt v. Centel Corp.*, 113 F.3d 738 (7th Cir. 1997)

prudent or feasible if Class Counsel were to pursue the case under any prospect that the Court would award a fee on the basis of "normal" hourly rates applied in other types of litigation.

Courts within the Eleventh Circuit also recognize the substantial risk of non-payment that Class Counsel faces when taking on a complex class action:

> 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. Cases recognize that attorneys' risk is "perhaps the foremost' factor" in determining an appropriate fee award. Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result. Numerous cases recognize that the attorney's contingent fee risk is, an important factor in determining the fee award. In *Behrens v. Wometco Enterprises, Inc.,* 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd,* 899 F.2d 21 (11th Cir. 1990), the court noted . . . [g]enerally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer. . . .
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> A contingency fee arrangement often justifies an increase in the award of attorneys' fees. This rule helps assure that the contingency fee arrangement endures. If this "bonus" methodology did not exist, very few lawyers could take on the representation of a class client given the investment of

(Seventh Circuit affirmed the lower court's granting of summary judgment in favor of defendants); *Anixter v. Home-Stake Prod. Co.,* 77 F.3d 1215 (10th Cir. 1996) (Tenth Circuit overturned securities fraud class action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on the basis of 1994 Supreme Court opinion); *In re Apple Computer Sec. Litig.*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,252 (N.D. Cal. Sept. 6, 1991) (class won jury verdict against two individual defendants, but court vacated judgment on motion for judgment notwithstanding the verdict); *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (where the class won a substantial jury verdict and motion for judgment n.o.v. was denied, on appeal the judgment was reversed and the case was dismissed—after 11 years of litigation); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (multimillion dollar judgment reversed after lengthy trial); *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478 (S.D.N.Y. 1970) (judgment for $145 million overturned after years of litigation and appeals), *modified*, 449 F.2d 51 (2d Cir. 1971), *rev'd*, 409 U.S. 363 (1973).

> substantial time, effort, and money, especially in light of the risks of recovering nothing.
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> Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award. . . . In evaluating [the contingent fee] factor the Court will not ignore the pecuniary loss suffered by plaintiffs counsel in other actions where counsel received little or no fee.
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> These factors weigh in favor of awarding Class Counsel 30% of the fund. Class Counsel have received no compensation during the course of this litigation and have also incurred significant expenses in litigating on behalf of the Class, none of which would have been recovered if the case had not been successfully concluded. From the time Class Counsel filed suit, there existed a real possibility that they would achieve no recovery for the Class and hence no compensation. Class Counsel's investment of time and expenses has always been at risk and wholly contingent on the result they achieved. Although Class Counsel have successfully concluded the litigation, this result was not foreseeable at the outset. The relevant risks must be evaluated from the standpoint of Plaintiffs' counsel as of the time they commenced the suit and not retroactively with the benefit of hindsight

Pinto v. Princess Cruises Line, 513 F. Supp. 2d 1334, 1339-40 (S.D. Fla. 2007) (internal citations and quotations omitted); *see also Francisco v. Numismatic Guar. Corp.*, 2008 U.S. Dist. LEXIS 125370 at *33-34 (S.D. Fla. Jan. 30, 2008) (providing the same analysis on the risk involved in taking on a class action on a contingency basis, and explaining the risk is evaluated from the perspective of the Class Counsel at the outset, and not after a favorable resolution has already been reached).

In the present case, when undertaking representation, Class Counsel anticipated that the case would be vigorously defended with vast resources by superlative legal counsel. [Layfield Declaration]. Class Counsel anticipated an aggressive defense strategy of pursuing every possible forum and stratagem to stop the case progress and

to exhaust Class Counsel's resources. *Id.* It has been the experience of Class Counsel that plaintiffs in complex class actions have to prevail on essentially all substantive and procedural issues in order to succeed. *Id.* The defendant, on the other hand, only has to prevail on any one—be it defeating class certification, reversing class certification, or undermining substantive claims on legal or factual grounds. Class Counsel expended the necessary time and labor required to prosecute this action to a favorable conclusion, which included a significant expenditure of pre-suit effort and expense based on substantial investigation of the Products. Class Counsel undertook this action on a contingent fee basis (with the amount of any fee being subject to Court approval), assuming a substantial risk that the litigation would yield no recovery and leave Counsel uncompensated. *Id.*

Although Class Counsel are highly experienced law firms, they do not have the manpower and economic resources of Defendant. When Class Counsel undertakes major litigation, such as this litigation against Defendant, it necessarily limits Class Counsel's ability to undertake other complex litigation. During the course of this litigation, Class Counsel devoted significant manpower and resources to this litigation. Class Counsel had to make this commitment at the outset without knowing how long the case would take or if it would ever resolve. Therefore, Class Counsel's willingness to prosecute this action on a contingent fee basis and willingness to advance costs diverted the manpower and resources expended on this action from other cases.

As summarized above, it is clear that when Class Counsel undertook the prosecution of this case at the outset, on a contingency fee basis, Class Counsel assumed a significant risk of nonpayment or underpayment. [Layfield Declaration]. This

risk is recognized by case law finding that a contingency fee arrangement often justified an increase in the award of attorneys' fees. *Sunbeam*, 176 F. Supp. 2d at 1335 ("A contingency fee arrangement often justifies an increase in the award of attorneys' fees."). Attorneys' risk is perhaps the foremost factor in determining an appropriate fee award, and the relevant risks must be evaluated from the standpoint of plaintiff's counsel as of the time they commenced the suit and not retroactively with the benefit of hindsight. *Francisco v. Numismatic Guar. Corp.*, 2008 U.S. Dist. LEXIS 125370 at * 32 (S.D. Fla. Jan. 30, 2008).

v. The Results Obtained

The Settlement provides important and significant monetary and programmatic relief for the Class, both of which are properly considered in determining the results obtained for the benefit of the Class. The Settlement secures monetary relief for the benefit of the class in the form of two (2) Tiers. Under **Tier 1**, Class Members who do not have valid Proof of Purchase may recover $.80 per Unit purchased, up to a maximum of 6 Units per household. This provides a monetary benefit of up to $4.80 per household to Class Members who do not have Proof of Purchase. Under **Tier 2**, Class Members who provide valid Proof(s) of Purchase may recover $.80 per Unit purchased for the number of Units for which a valid Proof of Purchase has been provided, up to a maximum reimbursement of twenty-five dollars ($25.00) per Household.

Additionally, Class Counsel obtained significant programmatic relief, in the form of a label change, for the benefit of the Class. Specifically, the Settlement provides:

> For a period (the "Restricted Period") beginning on the twelve-month anniversary of the order granting preliminary approval of the Settlement (the "PAO Date") and ending on the three-year anniversary of the PAO Date, Defendant, as manufacturer of the Products, shall either: (1) remove the

> Challenged Language from the Labeling of the Products (referred to herein as "Option 1"); or (2) revise the Challenged Language to list a range of suggested strength servings based on the ratio of one tablespoon per serving at the lower end of the range to the ratio of eight tablespoons per ten servings at the upper end of the range (referred to herein as "Option 2"). For the avoidance of doubt, Defendant shall have the options to select Option 1 or Option 2 with respect to each individual variety or stock-keeping unit ("SKU") of the Products, may elect Option 1 with respect to certain Products and Option 2 with respect to other Products, and may change the labeling of any given Product during the Restricted Period so long as the labeling complies with the requirements of either Option 1 or Option 2. *See* Settlement Section V.

Given the significant litigation risks Class Counsel faced, the Settlement represents a fair, adequate, and reasonable result benefitting all Class members. Rather than facing years of costly and uncertain litigation against Defendant, each Class Member is entitled to claim a cash benefit now. [Layfield Declaration]. Additionally, each Class Member will receive the benefit of the non-monetary programmatic relief prospectively. [Layfield Declaration].

Plaintiff's extensive litigation preparation, the experience of Class Counsel, as well as Plaintiff's effective and coordinated litigation strategy, made the Settlement possible. The Settlement was achieved after engaging in extensive arms' length discussions and negotiations with counsel for Defendant, including an all-day mediation session with nationally renowned mediator, Hon. Wayne Andersen (Ret.), and post mediation settlement conferences that stretched over multiple weeks and included dozens of telephonic conferences (some involving the mediator), the exchange of confidential business and technical information, and an open dialogue. The parties worked diligently to understand the underlying business facts in a completely transparent process. After disclosure and analysis of the facts, it was clear that the most appropriate remedy included both monetary and programmatic relief.

The Settlement was not executed until after Class Counsel had: (1) conducted an extensive and comprehensive pre-suit investigation relating to the events and transactions underlying Plaintiff's claims prior to filing the original Petition, including based on substantial testing and analysis of the Products conducted by multiple independent laboratories retained by Class Counsel and other laboratories retained by Defendant; (2) thoroughly researched the law and facts pertinent to Plaintiff's claims and potential defenses raised by Defendant and assessed the risks of prevailing on each of the respective claims on pre-trial motions and at trial; (3) engaged in substantial coordination between each counsel for Plaintiff who had filed suit, including an effort to achieve a unified strategy and result; and (4) engaged in a careful and thorough exchange of information as part of the mediation process, including related to confidential business information.

vi. Non-Monetary Benefit to the Settlement

Because consumers read and rely on label representations to make comparisons between products and purchasing decisions, it is incumbent upon sellers of consumer products to represent such products accurately and with integrity. Consumers rely upon manufacturers and retailers to label their products in a manner that is truthful and not misleading. This case is important because it sought to restore honesty where it was alleged to be lacking. The litigation ensures that Kraft Heinz Foods Company will truthfully and accurately disclose the number of cups of coffee that can be made from the Products and provides future protection and relief for all consumers of the Products via the label change (programmatic relief) obtained in this matter. Certainly, the label changes for

thirty-five (35) separate and distinct products is a significant non-monetary benefit provided by the Settlement.

vii. The Requested Fee Comports with Fees Awarded in Similar Cases

The fee provisions of the Settlement were not negotiated until after the substantive terms of the settlement had been agreed upon. *See* [Layfield Declaration at ¶ 22]. This is the standard and ethical manner of negotiating the settlement and fee issues. 3 *Newberg on Class Actions*, §12.03. The type of fee provision in the Settlement also is customary. *Id.* In this case, the fees were negotiated at arms' length and reflect a compromise—Plaintiff accepted less and Defendant paid more, in order to achieve an appropriate and fair balance for the case.

Counsel's requested fee of $3,9000,000.00, which is approximately 24.4% of the monetary settlement fund (not taking into consideration the significant value of the programmatic relief obtained for the benefit of the Class over the two-year programmatic relief period), is well within the range of fees typically awarded in similar cases. When the value of the programmatic relief obtained for the benefit of the Class is combined with the monetary settlement fund, the requested attorney fee, expense and cost reward represents substantially less than 24.4% of the overall value of benefits made available to the Class.

Numerous decisions within and outside of the Southern District of Florida and the Eleventh Circuit have found that a 33.33% fee is well within the range of reason under the factors listed by the *Camden I*. *See Legg v. Laboratory Corp. of America*, 14-cv-61543-RLR, Dkt. 227, p.7 (S.D. Fla. Feb. 18, 2016) (FACTA case awarding one-third of gross recovery for attorneys' fees, plus expenses); *Gevaerts v. TD Bank, N.A.*, No. 11:14-

cv-20744-RLR, 2015 U.S. Dist. LEXIS 150354, at *27 (S.D. Fla. Nov. 5, 2015) (finding that a request for 30% of a $20 million dollar fund is justified); *Wolff v. Cash 4 Titles*, No. 03-22778- CIV, 2012 WL 5290155, at *5-6 (S.D. Fla. Sept. 26, 2012) ("The average percentage award in the Eleventh Circuit mirrors that of awards nationwide—roughly one third.") (citing Circuit case law and listing Southern and Middle District of Florida attorneys' fees awards).

Finally, Class Counsel's fee request also falls within the range of awards in FDUTPA cases within this Circuit and elsewhere. *See e.g.*, *Morgan v. Public Storage*, 301 F. Supp. 3d 1237 (S.D. Fla. 2016) (approving class counsel's attorneys' fees request of 33% of the Settlement Fund, or $1,650,000.00); *Francisco v. Numismatic Guar. Corp.*, 2008 U.S. Dist. LEXIS 125370 at * 32-33 (S.D. Fla. Jan. 30, 2008) (approving an award of almost 30% of the cash portion of the settlement in a FDUTPA class action).

In *Morgan*, this Court explained that awarding a fee of 33% of the Settlement Fund was consistent with attorneys' fees awards in class action cases within the Eleventh Circuit, and around the nation. 301 F. Supp. 3d at 1257-58. It also emphasized that the Court should consider the private market rate for contingency fee awards, and that consideration of the private market rate supported the reasonableness of the fee award because 33% of the Settlement Fund was less than the customary rate in the market for similar services. *Id.* at 1255. As part of its analysis on the reasonableness of the award of attorneys' fees totaling 33% of the Settlement Fund, this Court pointed out that under the Florida Bar Rules of Professional Conduct, a contingency fee of forty percent (40%) is reasonable if an answer has been filed, or in other words, attorneys' fees totaling 40% of a settlement fund, in the private market, is reasonable at a very early stage in litigation.

Id. Similarly, in *Francisco*, this Court compared and contrasted a requested class counsel fee award of 30% of the settlement fund against the standard contingency rate in the private market, which it found to be between 30% and 40% of a recovery. 2008 U.S. Dist. LEXIS 125370 at * 34. It found that the requested fee award of approximately 30% of the Settlement Fund reflected the market rate in other complex litigation and supported the fairness and reasonableness of the requested fee. *Id.* at 35.

Under this analysis, this Court should find the requested fee award, which is only 24.4% of the monetary portion of the Settlement Fund is reasonable, as it is well-below the percentage approved in the cases above, and correspondingly well below the private market rate for similar services, all of which supports a finding that the requested fee award is fair and reasonable.

VI. CONCLUSION AND PRAYER

For all the reasons set forth herein, Class Counsel request that this Application be granted and that Class Counsel be awarded $3,900,000.00 in attorneys' fees, expenses and costs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 22, 2021, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that it is being served on all counsel of record via the Court's ECF notification system.

By: s/Nicholas T. Zbrzeznj
Lydia S. Zbrzeznj
Florida Bar No. 98181
Nicholas T. Zbrzeznj
Florida Bar No. 98180
99 6th Street SW
Winter Haven, FL 33880
Telephone: (863)656-6672
Facsimile: (863)301-4500
Emails: lydia@southernatlanticlaw.com
nick@southernatlanticlaw.com

kara@southernatlanticlaw.com
ATTORNEYS FOR PLAINTIFF

L. DeWayne Layfield, Esq.
Law Office of L DeWayne Layfield, PLLC
P.O. Box 3829
Beaumont, Texas 77704
Telephone: 407-832-1891
Fax: 866-280-3004
Email: dewayne@layfieldlaw.com
ATTORNEY FOR PLAINTIFF

Joel Oster
Of Counsel
The Law Office of Howard W. Rubinstein
1281 N. Ocean Dr. Apt. 198
Singer Island, FL 33404
Telephone: 832-715-2788
Fax: 561-688-0630
Emails: howardr@pdq.net
ATTORNEY FOR PLAINTIFF

Todd D. Carpenter
Carlson Lynch LLP
1350 Columbia St., Ste. 603
San Diego, California 92101
tcarpenter@carlsonlynch.com
Tel: (619) 762-1900
ATTORNEY FOR PLAINTIFF

L. Timothy Fisher
Bursor & Fisher, P.A.
1990 N. California Blvd., Suite 940
Walnut Creek, CA 94596
tlfisher@bursor.com
Tel: (925) 300-4455
ATTORNEY FOR PLAINTIFF

Benjamin Heikali
Faruqi & Faruqi, LLP
10866 Wilshire Boulevard, Suite 1470
Los Angeles, CA 90024
bheikali@faruqilaw.com
Tel: (424) 256-2884
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF GOOD FAITH CONFERENCE

Pursuant to Local Rule 7.1(a)(3)(A), I hereby certify that counsel for the movant has conferred with Defendant's counsel, Mr. Dean Panos, on March 22, 2021, and confirmed that Defendant does not oppose the relief sought in this Application.

s/L. DeWayne Layfield
L. DeWayne Layfield