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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KATHLEEN SMITH and MATTHEW DOWNING, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

KEURIG GREEN MOUNTAIN, INC.,

Defendant.

Case No. 4:18-cv-06690-HSG

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

Date: December 8, 2022
Time: 2:00 p.m.
Location: Courtroom 2, 4th Floor
Judge: Hon. Haywood S. Gilliam, Jr.

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on December 8, 2022 at 2:00 p.m., or as soon thereafter as this matter may be heard in the courtroom of the Honorable Haywood S. Gilliam, Jr., Plaintiffs Kathleen Smith and Matthew Downing ("Plaintiffs") will, and hereby do, respectfully apply to this Court for an award of attorneys' fees not to exceed $3,000,000 and litigation expenses of $568,180, as well as service awards to the class representatives in the total amount of $6,000. Plaintiffs make this motion pursuant to the California Consumer Legal Remedies Act, Cal. Civ. Code § 1780(e), California's private attorney general statute, Cal. Code Civ Pro. § 1021.5, and Mass. Gen. Laws Ch. 93A §§ 2, 9 ("Chapter 93A"). *See also* Settlement § VIII.A-B; ECF No. 128-1, Exh. 1.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the accompanying Declaration of Howard Hirsch ("Hirsch Decl.") and exhibits attached thereto, the Declaration of Ian McLoughlin ("McLoughlin Decl.") and exhibits attached thereto, the Declarations of Plaintiffs Kathleen Smith ("Smith Decl.") and Matthew Downing ("Downing Decl."), other papers on file in this action, and such other submissions or arguments that may be presented before or at the hearing on this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After nearly 4 years of litigation, more than 5,700 attorney hours and staff time and over $568,000 in out-of-pocket expenses, Class Counsel[1] has obtained a $10 million Settlement that provides significant injunctive relief and monetary recovery to consumers who purchased Keurig K Cup coffee pods ("the Challenged Products") believing them to be widely recyclable. Class Counsel respectfully seek an order granting (1) attorneys' fees in an amount not to exceed $3 million (30% of the Settlement Fund), which is less than their anticipated lodestar of attorneys' fees; (2) reimbursement of $568,180 in out-of-pocket litigation expenses incurred in prosecuting the *Smith* and *Downing* actions that are resolved pursuant to the Settlement; and (3) service awards for Plaintiffs Kathleen Smith (of $5,000) and Matthew Downing (of $1,000). The parties reached the Settlement at an advanced stage of the litigation, after extensive fact and expert discovery and motion practice, after class certification, and prior to trial. The Settlement has been well received to date with over 110,000 claims filed since the Notice was issued. The Settlement is a terrific outcome that will provide injunctive and monetary relief to a nationwide class of consumers.

In a certified class action, a court may award reasonable attorneys' fees authorized by law or by the parties' agreement. Fed. R. Civ. P. 23(h). The Court has the discretion to award reasonable attorneys' fees based on either: (1) the percentage-of-the-fund method or (2) the lodestar method. Here, under either method, Class Counsel's request for attorneys' fees and costs is reasonable. There can be no serious dispute that Plaintiffs were successful. They prevailed on nearly every legal challenge to their claims and obtained significant injunctive and monetary relief for the entire Class. A lodestar multiplier would be appropriate in light of the relief obtained for the Class, the significant novelty and risk associated with this case, and the other lodestar enhancement factors. Nevertheless, Class Counsel do not seek a lodestar multiplier. Instead, Class Counsel are seeking to recover their lodestar, which is anticipated to be $3 million (or 30% of the

[1] Class Counsel is the Lexington Law Group and Shapiro Haber & Urmy LLP.

common fund). Thus, the requested fees are reasonable under both a percentage-of-the-fund and lodestar methods, and the Court should approve the $3 million in attorneys' fees,[2] $568,180 in litigation expenses, and service awards to Plaintiffs Smith and Downing totaling $6,000.

II. LITIGATING THIS CASE WAS TIME AND LABOR INTENSIVE

Prior to and since initiating this case with a pre-suit demand in July 2018, Class Counsel have engaged in extensive investigation, case management efforts, discovery, pleadings challenges, motion practice, class certification proceedings, appellate practice, and settlement negotiations, including two separate mediations.

A. Class Counsel Conducted Extensive Factual and Legal Investigation Prior to Filing This Action.

Before commencing this action in the summer of 2018, Plaintiff Smith and her counsel conducted a comprehensive examination and evaluation of the relevant law and facts to assess the merits of the claims and to determine how to best serve the interests of the class members. Hirsch Decl. ¶ 2. At that time, no court had addressed the viability of consumer protection claims challenging recyclability representations. *Id*. Because of the novelty of the legal issues, Class Counsel were required to conduct significant legal research prior to filing the action. *Id.*

In addition to their legal research, Class Counsel conducted a pre-suit factual investigation that included interviewing and communicating with putative class members and consulting with expert witnesses. Hirsch Decl. ¶ 3. It also included investigating Keurig Green Mountain Inc.'s ("Keurig") marketing and labeling of the Challenged Products, preparing the requisite pre-suit notice pursuant to the CLRA, and drafting the complaint. *Id.* On September 28, 2018, Plaintiff Smith filed the original complaint in California State Court.

B. This Case Required Significant Case Management and Litigation Efforts.

After removing the case to federal court, on December 7, 2018, Keurig filed a motion to dismiss (ECF No. 18). Plaintiff Smith then filed the First Amended Complaint ("FAC") on

[2] Class Counsel's current lodestar is nearly $2.9 million, and they anticipate their final lodestar will be at least $3 million. Class Counsel will file an updated declaration with an updated lodestar before the final approval hearing.

December 28, 2018 (ECF No. 20). Keurig moved to dismiss the FAC on January 28, 2019 (ECF No. 26), while also filing an unsuccessful motion to stay discovery (ECF Nos. 25, 36). Keurig's motion to dismiss raised at least six distinct legal theories that Class Counsel had to oppose. (ECF No. 26). The Court denied Keurig's motion to dismiss in its entirety (ECF No. 50) and Keurig filed its answer to the FAC on July 15, 2019 (ECF No. 51).

Plaintiff Downing filed his class action complaint in the District Court of Massachusetts on September 9, 2020, asserting a claim against Massachusetts-based Keurig under the Massachusetts consumer protection statute, Chapter 93A, on behalf of a nationwide class, or, in the alternative, a Massachusetts class. McLoughlin Decl. ¶ 5; *see also Downing v. Keurig Green Mountain, Inc.*, No. 1:20-cv-11673-IT, (D. Mass) (Dkt. No. 1). On December 12, 2020, Keurig filed a motion to dismiss in that case, along with a motion to strike the nationwide class allegations. *Id*. at ¶ 7. On June 11, 2021, the District Court denied Keurig's motion to dismiss but granted Keurig's motion to strike the nationwide class. *Id*.; *see also Downing v. Keurig Green Mountain, Inc.*, No. 1:20-cv-11673-IT, 2021 U.S. Dist. LEXIS 110334 (D. Mass. June 11, 2021). Plaintiff Downing petitioned for permission to appeal the court's ruling striking allegations on behalf of a nationwide class, and that petition remains pending in the First Circuit. *Id*.

On July 13, 2022, Plaintiffs filed a Second Amended Complaint ("SAC") on behalf of a nationwide class of consumers, pursuant to California consumer protection laws and Massachusetts consumer protection law (ECF No. 141).

C. Plaintiffs Successfully Certified a California Class of Consumers.

On December 17, 2019, Plaintiff Smith filed her motion for class certification (ECF No. 65). *See also* Hirsch Decl. ¶ 7. This motion was heavily litigated. In connection with the motion, Plaintiffs consulted with experts regarding the method of calculating damages on a classwide basis, the recyclability of the Challenged Products, and Keurig's labeling and marketing of the Challenged Products. Plaintiffs prepared and submitted three detailed expert declarations with their motion. Keurig vigorously opposed the motion. Its opposition brief was accompanied by approximately 300 pages of testimony by experts, third parties, and key Keurig employees (ECF

No. 74-3). Hirsch Decl. ¶ 7. On September 21, 2020, the Court certified a class under both Rule 23(b)(2) and Rule 23(b)(3) (ECF No. 96).

After certification was granted, on October 5, 2020, Keurig filed a Rule 23(f) petition before the Ninth Circuit seeking permission to appeal the Court's decision granting class certification (ECF No. 98). On November 25, 2020, the Court of Appeals denied Keurig's petition (ECF No. 104). Hirsch Decl. ¶ 8.

In the meantime, on October 21, 2020, this Court set the scheduling order through trial, setting deadlines for the exchange of opening and rebuttal expert reports and the close of discovery. From October 2020 to October 21, 2021, Class Counsel spent substantial time and resources on discovery and experts. Plaintiffs consulted with and retained several merits experts regarding: (1) the recyclability of the Challenged Products; (2) the amount of the premium allegedly charged based on the recyclability representations on the Challenged Products; (3) the proper calculation of damages and restitution in the case; and (4) consumer perception of the recyclability representations at issue. Hirsch Decl. ¶ 10.

D. Class Counsel Engaged in Substantial Discovery Efforts on Behalf of the Class.

Extensive discovery was completed both before and after Plaintiff Smith's motion for class certification. Discovery included the production and review of hundreds of thousands of pages of documents from parties and non-parties, preparing for and defending Ms. Smith's deposition, taking Rule 30(b)(6) depositions of Keurig employees in Burlington, Massachusetts (where Keurig is located), and serving and responding to over a hundred discovery requests. Hirsch Decl. ¶ 6.

In addition, Plaintiff Smith was required to serve five sets of requests for production of documents, three sets of interrogatories and two sets of requests for admission on Keurig. Hirsch Decl. ¶ 6. Plaintiff Smith also served subpoenas on approximately twenty-five non-parties, and Class Counsel took the depositions of three non-parties after class certification. *Id*. Plaintiff Smith also conducted many meet and confer efforts with Keurig and filed joint discovery letters and other requests for resolution of discovery disputes before this Court (ECF Nos. 59, 69, 116, 112).

The parties also had numerous disputes over scheduling, case management, and other related issues, several of which required Court intervention (ECF Nos. 54, 66, 76, 89, 121 and 122). Plaintiffs continued to engage in discovery and extensive expert work up through October 2021 because a term sheet was not signed by the parties until October 27, 2021, the same date expert reports were due. Accordingly, Plaintiffs had already finalized three merits expert reports by the time the settlement was reached. Hirsch Decl. ¶ 10.

E. Class Counsel Engaged in Intensive Settlement Negotiations and Mediation.

The parties have engaged in settlement discussions throughout the pendency of this litigation, including before, during, and after two full-day mediation sessions. Hirsch Decl. ¶ 11. On May 11, 2021, the parties and their counsel participated in their first full-day mediation with Hon. Morton Denlow (Ret.). *Id*. The parties did not settle during that mediation session; however, the parties made considerable progress toward resolving Plaintiffs' claim for injunctive relief. *Id*. The parties and their counsel then participated in multiple conference calls with Judge Denlow. *Id*. On September 21, 2021, the parties and their counsel made additional progress at a second full-day mediation with Judge Denlow. *Id*. On October 27, 2021, after further discussions between the parties and their counsel, the parties executed a settlement term sheet to resolve both this action and the *Downing* action as part of a single settlement. The parties requested that the Court to stay all proceedings and set a deadline for the present motion. *Id*.[3] On February 24, 2022, Plaintiffs filed their motion for preliminary approval (ECF No. 128). The Court heard the motion on April 14, 2022 (ECF No. 135), and the Court granted preliminary approval on July 8, 2022 (ECF No. 140). *Id*. at ¶ 12.

F. The Value of the Settlement to the Class.

The Settlement provides significant injunctive and monetary relief to the thousands of purchasers of the Challenged Products who allegedly paid a premium over other coffee products that did not purport to be recyclable. The $10 million Settlement Fund represents a significant

[3] Likewise, the *Downing* case and associated appeal have been stayed pursuant to the agreement of the parties pending this Court's consideration of the Settlement.

percentage of the damages alleged by the class. Hirsch Decl. ¶ 14. This Settlement Fund constitutes more than 10% of the maximum alleged actual damages to the class as a whole. Keurig charged approximately $6.40 for ten (10) single-serve coffee pods during the class period. While hotly disputed by Keurig, Plaintiffs' expert has determined that the average damages a class member suffered was approximately $0.10 per ten pods. *Id*., *see also* ECF No. 65 at ¶ 53. Under the Settlement, each Class member can recover more than their actual damages by obtaining $0.35 per ten pods with proof of payment, with a minimum of $6.00 and a maximum of $36.00 per household. Settlement § III.B.4. Even class members who did not keep such records may recover $5.00 without proof of purchase. *Id*., § III.B.4. Because customers did not purchase pods individually but instead purchased pods in packages that typically contained dozens of pods per package, the benefit provided by the settlement with proof of purchase may be substantial for any class members who kept records of their purchases (as reflected by the $36.00 maximum benefit per household). Hirsch Decl. ¶ 14.

These monetary benefits, which class members may obtain through a simple claims process, exceed those of other consumer deception settlements approved in this District, including cases involving mislabeling of food and beverages. *See*, *e.g.*, *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588 (N.D. Cal. 2020) (final approval of $6.5 million settlement); *Miller v. Ghirardelli Chocolate Co.*, No. 12-cv-04936-LB, 2015 U.S. Dist. LEXIS 20725 (N.D. Cal. Feb. 20, 2015) (final approval of $5.25 million settlement); *Larsen v. Trader Joe's Co.*, No. 11-cv-05188-WHO, 2014 U.S. Dist. LEXIS 95538 (N.D. Cal. July 11, 2014) (final approval of $3.375 million settlement); *Zeisel v. Diamond Foods, Inc.*, No. C 10-01192 JSW, 2012 U.S. Dist. LEXIS 148893 (N.D. Cal. Oct. 16, 2012) (final approval of $2.6 million settlement). In order to provide notice of the Settlement to as many Class members as possible, Keurig sent an email to its purchaser list of over 1 million customers. Since the notice was issued, Class members have filed over 110,000 claims.

The Settlement also provides significant, impactful injunctive relief. The Settlement requires Keurig to modify all its labels, advertising, and marketing of the Challenged Products to

qualify any recycling representation with the statement, "Check Locally – Not Recycled in Many Communities." Settlement § III.A.1. This qualifier must appear in close proximity to any representation regarding recycling and in a font size no smaller than 55% of the font size of any recyclable representation. *Id*. § III.A.2. The qualifying language required by the Settlement is substantially stronger than anything Keurig has ever included on the labels of the Challenged Products, and at least 20% larger than its current qualifier to ensure that consumers actually notice and read the qualification. The Settlement also requires Keurig to include additional qualifying language about the recyclability of the Challenged Products to ensure that consumers are not misled into believing that the Challenged Products can be recycled in any community that recycles #5 plastic. *Id*. § III.A.8. The Settlement further requires modifications to Keurig's publicly available corporate responsibility and sustainability reports, requiring Keurig to use the new qualifications on any page referencing the recyclability of the Challenged Products. *Id.* § III.A.7.

III. CLASS COUNSEL ARE ENTITLED TO THEIR REASONABLE ATTORNEYS' FEES

A. Class Counsel are Entitled to Attorneys' Fees Under the Common Fund Doctrine.

The Supreme Court has stated that "a litigant or 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).

The purpose of the common fund doctrine is to avoid unjust enrichment by requiring "those who benefit from the creation of the fund [to] share the wealth with the lawyers whose skill and effort helped create it." *Fleming v. Impax Lab'ys Inc*., No. 16-cv-06557-HSG, 2022 U.S. Dist. LEXIS 125595, at *23-24 (N.D. Cal. July 15, 2022), *quoting In re Wash. Pub. Power Supply Sys. Sec. Litig*., 19 F.3d 1291, 1300 (9th Cir. 1994). The Court has discretion to choose either the lodestar method or the percentage-of-the-fund method to calculate reasonable attorneys' fees so long as the fee awards out of common funds are "reasonable under the circumstances." *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990). Here, Class Counsel secured a $10 million common fund for the benefit of a nationwide class, and their fee request of $3 million is reasonable under

either the percentage-of-the-fund or lodestar methods.

B. Plaintiffs' Are Entitled to Recover Their Attorneys' Fees Under the CLRA, California's Private Attorney General Statute, and Chapter 93A.

Because this is a diversity action removed to this Court by Keurig under the Class Action Fairness Act, 28 U.S.C. § 1332, California or Massachusetts law applies to Plaintiffs' entitlement to attorneys' fees and the method of calculating fees. In a diversity action, where state substantive law governs plaintiff's claims, "it also governs the award of fees." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Mangold v. California Public Utilities Commission*, 67 F.3d 1470, 1478 (9th Cir. 1995); *Wolph v. Acer Am. Corp.*, C 09-01314 JSW, 2013 U.S. Dist. LEXIS 151180, at *2 (N.D. Cal. Oct. 21, 2013).

Plaintiffs are eligible to recover their attorneys' fees under two California fee-shifting statutes and Massachusetts's Chapter 93A. First, the CLRA mandates an award of fees and costs here. Under the CLRA, "[t]he court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to [the CLRA]." Cal. Civ. Code § 1780(e); *Kim v. Euromotors W./The Auto Gallery*, 56 Cal. Rptr. 3d 780, 786 (Cal. App. 2d Dist. 2007) (attorney fee award to prevailing plaintiff is mandatory under CLRA "even where the litigation is resolved by a pre-trial settlement agreement."). A litigant is the "prevailing plaintiff" when he or she either: (1) obtained a net monetary recovery; or (2) "realized [his or her] litigation objectives." *Kim* at 786-87. Here, Plaintiffs are prevailing parties under either approach. The Settlement results in a monetary recovery of $10 million in cash for the benefit of members of the Class. Plaintiffs also realized their litigation objectives by obtaining a Settlement that provides significant injunctive relief in the form of label and advertising changes related to Keurig's recyclability representations. Thus, Plaintiffs are entitled to a fee award under the CLRA as prevailing plaintiffs.

Second, California's private attorney general statute authorizes the requested fee award. The private attorney general statute allows a court to award attorneys' fees to a "successful party" in an action to enforce "an important public right" where: (1) a significant benefit has been conferred on a large class of persons; (2) the necessity and financial burden of the private

enforcement are such as to make the award appropriate; and (3) such fees should not in the interest of justice be paid out of the recovery, if any. Cal. Code Civ. P. § 1021.5, *see also Winans v. Emeritus Corp*., No. 13-cv-03962-HSG, 2016 U.S. Dist. LEXIS 3212, at *21 (N.D. Cal. Jan. 11, 2016). The term "successful party" is synonymous with the term "prevailing party" used in the CLRA, and requires only that the plaintiff achieve its litigation objectives, whether by judgment, settlement, or other means. *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 150 (Cal. 2004). Here, for the same reasons previously discussed, Plaintiffs satisfy the "successful party" standard.

Plaintiffs meet section 1021.5's other criteria as well. The action enforced important consumer protection rights under the UCL and the CLRA, and will likely discourage other companies from using similar unfair and deceptive "recyclable" representations on consumer plastic products. *Graham,* 101 P.3d at 156 ("It is well settled that attorney fees under section 1021.5 may be awarded for consumer class action suits benefiting a large number of people."). The action also conferred a significant benefit on a large class of individuals who purchased the Challenged Products believing them to be widely recyclable by reimbursing purchasers for a portion of the Challenged Products' purchase price. *See id*. Further, the necessity and financial burden of private enforcement make an award appropriate. Without the incentive of an attorneys' fees award, Plaintiffs could not have afforded to hire counsel to pursue this case given that the Challenged Products at issue here typically cost less than $20. *See* Smith Decl. ¶ 2. Similarly, justice does not require that the attorneys' fees be paid out of Plaintiffs' recovery given their relatively small individual damages compared with the significant fees and costs incurred in successfully litigating this action on behalf of the Class.

Third, the Massachusetts consumer protection act, Chapter 93A, upon which claims on behalf of a national class are predicated, mandates an award of attorneys' fees to a prevailing plaintiff. Mass. Gen. Laws Ch. 93A, § 9(4) ("petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and costs"). As a prevailing party under Chapter 93A, Plaintiffs are entitled to an award of their attorneys' fees.

IV. CLASS COUNSEL'S REQUESTED FEES ARE REASONABLE AND FAIR

Class Counsel have expended considerable time and out-of-pocket expenses litigating this action and the *Downing* action, resulting in the Settlement for the Class. In total, Class Counsel have spent over 5,300 hours through August 31, 2022, resulting in an aggregate lodestar of $2.89 million. Hirsch Decl. ¶¶ 36-39, 48-50, 52. This lodestar does not include time spent drafting this motion and its supporting declarations. Class Counsel anticipate spending additional time responding to Class member inquiries, preparing the motion for final approval, attending the final approval hearing, and distributing the Settlement, which will result in a total anticipated lodestar in excess of $3 million. *Id*. at ¶ 53. Class Counsel may also have to engage in additional briefing, or an appeal, which would further increase their lodestar. Class Counsel's anticipated lodestar will be in excess of $3 million. *Id*. The out-of-pocket litigation expenses incurred by Class Counsel are $568,180 to date. *Id*. at ¶¶ 42-43, 52. The amounts of the lodestar and litigation costs are reasonable for a class action case of this size and complexity, particularly given the cases' novel issues and that the cases were hotly contested and heavily litigated.

Courts in the Ninth Circuit award attorneys' fees in common fund cases under either the "percentage of the fund" method or the "lodestar" method. *See Vizcaino*, 290 F.3d at 1047, *see also Bautista-Perez v. Juul Labs Inc*., No. 20-cv-01613-HSG, 2022 U.S. Dist. LEXIS 110872, at *20 (N.D. Cal. June 22, 2022), *Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 504 (Cal. 2016), *Giroux v. Essex Prop. Tr.*, No. 16-cv-01722-HSG, 2019 U.S. Dist. LEXIS 41968, at *12 (N.D. Cal. Mar. 14, 2019).[4] Here, under either method, Class Counsel's requested fee is reasonable.

[4] Because the operative SAC alleges claims under Massachusetts consumer protection law, the Court could also look to Massachusetts law and the First Circuit in assessing the reasonableness of the fee. The First Circuit similarly permits either a percentage-of-the-fund or lodestar approach, *United States v. 8.0 Acres of Land*. 197 F.3d 24, 33 (1st Cir. 1999), but courts in that circuit focus primarily upon the percentage of the fund method, while using lodestar as a cross-check for reasonableness. *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *Gordan v. Mass. Mut. Life Ins. Co.*, No. 13-CV-30184-MAP, 2016 U.S. Dist. LEXIS 195935 (D. Mass. Nov. 3, 2016) ("As held by the First Circuit, the 'percentage of fund' approach offers distinctive advantages including: (1) it is less burdensome to administer; (2) it reduces the possibility of collateral disputes; (3) it enhances the efficiency throughout the litigation; (4) it is less taxing on judicial resources; and (5) it better approximates the workings of the marketplace.") (citation omitted); *In re Lupron Mktg. & Sales Practices Litig.*, (footnote continued)

A. Class Counsel's Fee Request Is Reasonable Under the Percentage of the Fund Method.

When applying a percentage-of-the-fund calculation to attorneys' fees, the Ninth Circuit generally starts with a 25% benchmark and adjusts upward or downward depending on certain factors, including: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases. *See Black v. T-Mobile USA, Inc*., No. 17-cv-04151-HSG, 2019 U.S. Dist. LEXIS 123676, at *15 (N.D. Cal. July 24, 2019); *see also Vizcaino*, 290 F.3d at 1048-50, *In re Wells Fargo & Co. S'holder Derivative Litig.*, 445 F. Supp. 3d 508, 519 (N.D. Cal. 2020), aff'd, 845 F. App'x 563 (9th Cir. 2021); *Resnick v. Frank (In re Online DVD-Rental Antitrust Litig.)*, 779 F.3d 934, 954–55 (9th Cir. 2015), *Impax Lab'ys Inc.*, 2022 U.S. Dist. LEXIS 125595, at *26.[5]

Although 25% is the benchmark, 25% is often awarded when a case settles before the class is certified or when the plaintiffs did not engage in "substantial motion practice or other litigation going to the merits." *In re Apple iPhone/iPod Warranty Litig*., 40 F.Supp.3d 1176, 1178 (N.D. Cal. 2014) (awarding 25% of the $53 million common fund for fees and costs when settled early in the case); *see also Ko v. Natura Pet Prods*., No. C 09-02619 SBA, 2012 U.S. Dist. LEXIS 128615, at *30-31 (N.D. Cal. Sep. 10, 2012) (awarding 25% in pre-certification settlement "[g]iven the lack of motion practice, substantive work performed on this case prior to settlement and Class Counsel's failure to show that complex factual or legal issues were litigated or

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Nos. 1430, 01-CV-10861-RGS, 2005 U.S. Dist. LEXIS 17456, at*3 (D. Mass. Aug. 17, 2005) (noting First Circuit's approval of percentage method, because "it is less burdensome to administer, it reduces the possibility of collateral disputes, it enhances efficiency throughout the litigation, it is less taxing on judicial resources, and it better approximates the workings of the marketplace.").

[5] In the First Circuit there is no presumptive benchmark for a percentage-of-the-fund award, but courts often award attorneys' fees as high as 33%. *See, e.g., Thirteen Appeals*, 56 F.3d at 309 (affirming award of attorneys' fees representing 31% of common fund); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 77–82 (D. Mass. 2005) (33.33% award "well within the applicable range of percentage fund awards); *Mazola v. May Dep't Stores Co.*, No. 97CV10872-NG, 1999 WL 1261312, at *4 (D. Mass. Jan. 27, 1999) ("[I]n this circuit, percentage fee awards range from 20% to 35% of the fund.").

mediated"). Indeed, "in most common fund cases, the award exceeds [the 25%] benchmark." *In re Omnivision Techs*., 559 F. Supp. 2d 1036, 1047-48 (N.D. Cal. 2007), citing *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989) ("This court's review of recent reported cases discloses that nearly all common fund awards range around 30%. . . .").

This case was hard-fought over nearly four years to achieve an excellent result for the Class. Class Counsel engaged in substantial motion practice, including a successful motion for certification of a California class, and extensive discovery practice, including multiple depositions. Accordingly, an award of attorneys' fees of 30% from the common fund compensates Class Counsel for steadfastly litigating this action on behalf of Keurig's consumers.

a. Class Counsel achieved excellent results for the Class.

Securing a Settlement Fund of $10 million is an exceptional result for the Class, particularly given the tremendous risks and challenges Class Counsel faced. Class Counsel's work enabled Plaintiffs to certify a California Class, defeat all dispositive motions, and obtain a substantial settlement for the Class. Indeed, the Settlement Fund constitutes more than 10% of the maximum possible alleged damages to the whole Class and represents a significant recovery in light of the substantial risks of trial. Hirsch Decl. ¶ 14. Under the Settlement, each Class member can recover more than their actual damages by obtaining $0.35 per ten pods with proof of payment, with a minimum of $6.00 and a maximum of $36.00 per household. Settlement § III.B.4(b). Consumers that do not have proof of purchase may still receive $5.00 under the Settlement. Settlement § III.B.4(a), *see also* Hirsch Decl. ¶ 14.

In addition, Class Counsel secured significant injunctive relief for the Class and future consumers. Settlement § III.A. The Settlement prohibits Keurig from using any recycling representations in its labeling or advertising of the Challenged Products without clearly and prominently including the qualifying statement, "Check Locally – Not Recycled in Many Communities." *Id*., § III.A.1. The Settlement further mandates other changes to Keurig's advertising to ensure that consumers are not misled as to the recyclability of the Challenged Products. Id. § IIII.A.8. These changes to Keurig's business practices will result in an excellent

benefit for the Class and for potential future consumers of the Challenged Products.

b. This case was novel and posed significant risks and challenges.

Class counsel's work and success in this case merits an upward adjustment from the 25% benchmark to 30% of the settlement amount. Plaintiffs' theory of the case—that the Challenged Products are not recyclable based on the Federal Trade Commission's Guides for Environmental Marketing Claims and California's Environmental Marketing Claims Act—was the first of its kind, remains largely untested, and was therefore extremely risky for Class Counsel.[6] Hirsch Decl. ¶ 2. Class counsel spent an enormous amount of time litigating this case for over three years, including procuring certification of a class of purchasers, a significant victory that paved the way for the Settlement. *Id*. at ¶¶ 7, 36. The risk and uncertainty as to whether Plaintiffs would prevail and Class Counsel would ever be paid for their work – as well as the substantial delay in receiving such payment – warrant a fee enhancement. Accordingly, Plaintiffs' efforts and success support their request for attorneys' fees of 30% of the total Settlement Fund of $10 million, as well as their costs.

c. Class Counsel's skill enabled an exceptional result for the Class.

Class Counsel's experience and skill allowed for a Settlement that not only provides monetary relief for consumers but also delivers significant injunctive relief in the form of revised Product labels and promotional materials. Class Counsel were only able to prosecute this case so effectively and efficiently by virtue of their considerable experience in this area of the law. Class Counsel specialize in consumer class actions and have served as counsel for classes of plaintiffs in a variety of substantive areas. Hirsch Decl. ¶¶ 29-30; McLoughlin Decl. ¶¶ 2, 14. In particular, Class Counsel have considerable experience representing aggrieved consumers in class action cases alleging that products' environmental attributes were falsely advertised. Hirsch Decl. ¶ 29;

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[6] Indeed, at least two courts have ruled against plaintiffs in cases challenging recyclable representations on the grounds that "recyclability" means "capable of being recycled." *See Duchimaza v. Niagara Bottling, LLC*, 2022 U.S. Dist. LEXIS 139837, at *24-25 (S.D.N.Y. Aug. 5, 2022) and *Curtis v. 7-Eleven, Inc.*, No. 21-cv-6079, 2022 U.S. Dist. LEXIS 164850 (N.D. Ill. Sep. 13, 2022).

Class Counsel also have extensive experience in solid waste and recycling industry practices. Hirsch Decl. ¶ 45. The skill demonstrated by Class Counsel in litigating and ultimately settling this action supports the requested fee. Further, Class Counsel's hourly rates are reasonable and in line with (and often lower than) those prevailing in the community by lawyers of comparable skill, experience, and reputation. *See Blum v. Stenson*, 465 U.S. 886, 895 (1994); *Larsen*, 2014 U.S. Dist. LEXIS 95538, at *32. Hirsch Decl. ¶ 31.

d. Class Counsel's litigation on a contingency basis supports the fee request.

Class counsel managed this case on a contingency basis. The Ninth Circuit has held that a fair fee award must include consideration of the contingent nature of the fee. *Online DVD,* 779 F.3d at 954-55 & n. 14; *Vizcaino*, 290 F.3d at 1050. "Courts have recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing for their work." *Larsen,* 2014 U.S. Dist. LEXIS 95538, at *30-31, *see also In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994); *Vizcaino*, 290 F.3d at 1050; *In re Omnivision*, 559 F. Supp.2d 1036, 1047 (N.D. Cal. 2007); *see also Relafen*, 231 F.R.D. at 79 (risk important consideration in attorney fee award analysis in First Circuit).

Here, Class Counsel worked diligently on a contingent basis to achieve excellent results for the Class and to maximize the Class's recovery against top-tier defense attorneys. Plaintiffs had to litigate the case through class certification and fact discovery. It was not until the day the parties exchanged expert reports that they agreed to a settlement in principle. Hirsch Decl. ¶¶ 10-11. In the meantime, Class Counsel fronted all fees and costs, including substantial expert costs. Class Counsel litigated complex factual and legal issues, opposed Keurig's motion to dismiss, certified a California class of consumers, opposed an appeal of the class certification decision to the Ninth Circuit and engaged in lengthy fact and expert discovery in preparation for expert reports and trial, all with no certainty that they would ever be paid for their work. Any recovery of attorneys' fees and costs was entirely contingent, with the only certainty being that there would be no fee without a successful result. Hirsch Decl. ¶ 36; McLoughlin Decl. ¶ 19.

Class Counsel have received no compensation for their efforts during the four years of this litigation and have advanced significant sums for litigation expenses. Hirsch Decl. ¶ 36. Specifically, Class Counsel have risked non-payment of more than $568,00 in out-of-pocket expenses and over 5,700 hours in attorney time expended on this matter, knowing that if their efforts were not successful no fee would be paid, and they would not recoup their expenses. Likewise, due to the heavy burdens created by this litigation, Class Counsel have foregone significant other fee-generating work. *Id.* at ¶ 41. Accordingly, the fee award should reflect the contingency risks, and the upward adjustment to 30% reasonably compensates Class Counsel for their work.

e. Other Ninth Circuit and Courts in this District have made similar awards.

Courts in this District and in the Ninth Circuit routinely award class counsel fees exceeding the 25% benchmark in similar circumstances. *See e.g.*, *Bautista-Perez*, 2022 U.S. Dist. LEXIS 110872 at *20 (approving award of 30% of common fund), *Impax Lab'ys Inc*., 2022 U.S. Dist. LEXIS 125595 (approving award of 30% of common fund), *In re Pac. Enterprises Sec. Litig*., 47 F.3d 373, 379 (9th Cir. 1995) (approving award of 33% of common fund), *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW, 2010 U.S. Dist. LEXIS 49482 (N.D. Cal. Apr. 22, 2010), (awarding fee of 30% of common fund); *In re Activision*, 723 F.Supp. at 1375 (awarding fee of 32.8% of common fund); *Linney v. Cellular Alaska P'ship*, Nos. C-96-3008 DLJ, C-97-0203 DLJ, C-97-0425 DLJ, C-97-0457 DLJ, 1997 U.S. Dist. LEXIS 24300 (N.D. Cal. July 18, 1997) (awarding fee of 33.3% of common fund); *see also* n.5, *infra* (collecting First Circuit authorities to same effect). Courts often look at fees awarded in comparable cases to determine if the fee requested is reasonable. *Vizcaino*, 290 F.3d at 1050 n.4. A review of attorneys' fees awards in other public interest class action cases supports the requested award here:

- In a labor class action alleging defendant violated various wage and overtime laws, the Court awarded attorneys' fees equal to 33.3% of the common fund. *Franco v. E-3 Sys*., No. 19-cv-01453-HSG, 2021 U.S. Dist. LEXIS 107399, at *20 (N.D. Cal. June 8, 2021).

- In a consumer class action alleging defendant misled consumers regarding its "non-GMO" claims about its food products, the court awarded attorneys' fees equal to 30% of common fund ($1.95 million in fees and $636.556.28 in fees in costs) in a $6.5 million settlement.

Schneider v. Chipotle Mexican Grill, Inc., 336 F.R.D. 588 (N.D. Cal. 2020).

- In a consumer class action alleging that defendants' software created performance, privacy and security issues, the court awarded attorneys' fees equal to 30% of the settlement amount ($2.49 million in attorneys' fees and $340,798.70 in costs). *In re Lenovo Adware Litig.*, No. 15-md-02624-HSG, 2019 U.S. Dist. LEXIS 69797 (N.D. Cal. Apr. 24, 2019).

- In an employment class action alleging defendant failed to comply with state and federal laws by violating requirements to provide compliant pay statements to pay workers for all hours worked, the court awarded attorneys' fees equal to 30% of the total settlement amount. *Bautista-Perez v. Juul Labs, Inc.*, No. 20-cv-01613-HSG, 2022 U.S. Dist. LEXIS 110872 (N.D. Cal. June 22, 2022).

- In an employment class action alleging defendants failed to provide timely written notice to mass layoffs in violation of state and federal law, the court awarded attorneys' fees equal to 30% of the settlement fund, which amounted to $900,000 in fees and $9,894 in costs. *McDonald v. CP OpCo, LLC*, No. 17-cv-04915-HSG, 2019 U.S. Dist. LEXIS 80501 (N.D. Cal. May 13, 2019).

- In an employment class action alleging defendant violated California and federal labor laws, the Court approved a fee award equal to 30% of the settlement fund. *Bower v. Cycle Gear, Inc*, No. 14-CV-02712-HSG, 2016 U.S. Dist. LEXIS 112455, at *7 (N.D. Cal. Aug. 23, 2016).

B. The Lodestar Cross-Check Confirms the Reasonableness of the Requested Fees.

Under the lodestar method, "a lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation by a reasonable hourly rate for the region and for the experience of the lawyer." *Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*, 654 F.3d 935, 941 (9th Cir. 2011). When a settlement results in injunctive relief, the lodestar method is the appropriate measure for calculating fees. *Guttmann v. Ole Mexican Foods, Inc.*, No. 14-cv-04845-HSG, 2016 U.S. Dist. LEXIS 100534, at *13 (N.D. Cal. Aug. 1, 2016), citing *Lilly v. Jamba Juice Co.*, No. 13-cv-02998, 2015 U.S. Dist. LEXIS 58451, at *5 (N.D. Cal. May 4, 2015).

Here, Plaintiffs asserted numerous causes of action for violating California's unfair competition law, Cal. Bus. & Prof. Code § 17200, *et seq.* ("UCL"), False Advertising Law (Cal. Bus. & Prof. Code § 17500, *et seq.* ("FAL"), California's Consumer Legal Remedies Act (Cal. Civ. Code § 1750, et seq. ("CLRA"), Massachusetts' Chapter 93A, and for breaches of express warranties, unjust enrichment and misrepresentation. Specifically, Plaintiffs' eligibility to recoup

their attorneys' fees is premised on the CLRA and Cal. Code Civ. Pro. § 1021.5, as well as Mass. Gen. Laws Ch. 93A § 9.

As detailed in the Declarations of Howard Hirsch and Ian J. McLoughlin, Class Counsel expended over 5,700 attorney and staff hours prosecuting this case and incurred over $568,180 in reasonable litigation expenses. In addition, Class Counsel could rightfully seek a multiplier for its work on this case but has elected not to do so, which further supports the reasonableness of Class Counsel's fee request. *See Vizcaino*, 290 F.3d at 1051 n.6 (noting that the majority of class action settlements approved had fees multipliers that ranged between 1.5 and 3). Class Counsel's billing rates of between $600 to $850 for partners, $300 to $575 for associates, and $195 to $225 for paralegals are reasonable given the prevailing hourly rates in the community for similar work performed by attorneys of comparable skill, experience and reputation. *See, e.g., McDonald*, 2019 U.S. Dist. LEXIS 80501, at *17-20, *Camacho v. Bridgeport Fin., Inc*., 523 F.3d 973, 979 (9th Cir. 2008), *Bower*, 2016 U.S. Dist. LEXIS 112455, at *7. Class Counsel's fee request is reasonable under the lodestar analysis, particularly because Class Counsel is not seeking a multiplier, which would be appropriate in light of the relief obtained for the Class, the significant novelty and risk associated with this case, and the other lodestar enhancement factors. *MacDonald v. Ford Motor Co.*, No. 13-cv-02988-JST, 2016 U.S. Dist. LEXIS 70809, at *28 (N.D. Cal. May 31, 2016).

V. CLASS COUNSEL SHOULD BE REIMBURSED FOR THEIR OUT-OF-POCKET LITIGATION EXPENSES

Class Counsel are entitled to reimbursement of reasonable out-of-pocket expenses. "In a certified class action, the court may award . . . nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, the Settlement, the CLRA, Cal. Civ. Code § 1780(e), and Chapter 93A, Mass Gen. Laws Ch. 93A § 9(4), allow Class Counsel to recoup their reasonable out-of-pocket costs that would normally be billed to a fee-paying client. *See Ghirardelli Chocolate Co.*, 2015 U.S. Dist. LEXIS 20725, at *7; *Sadowska v. Volkswagen Group of Am., Inc.*, CV 11-00665-BRO AGRX, 2013 U.S. Dist. LEXIS 188582, at *10 (C.D. Cal. Sept. 25, 2013) (awarding "reasonable costs and expenses . . . that would normally be charged to a fee

paying client" under the CLRA).

Class Counsel have incurred $568,180 in costs while prosecuting the action. These expenses are set forth with particularity in the accompany declarations of Class Counsel. *See* Hirsch Decl. ¶¶ 42-44 and McLoughlin Decl. ¶¶ 23-25. Class Counsel seek reimbursement for the categories of expenses routinely charged to hourly paying clients, such as Lexis research, mediation fees, expert fees, copying expenses, postage, express deliveries, travel costs, and court fees. *Id.* These expenses also include monthly rates from Class Counsel's e-discovery vendor to house the hundreds of thousands of pages Keurig produced in this litigation. Hirsch Decl. ¶¶ 42-43. Class Counsel reasonably incurred all of these expenses and, therefore, should be reimbursed. *Id.* ¶ 44.

VI. THE CLASS REPRESENTATIVES SHOULD RECEIVE SERVICE AWARDS FOR THEIR EFFORTS IN SECURING THE SETTLEMENT

Class Counsel request that the Court authorize service awards totaling $6,000 to Plaintiffs for their work prosecuting this action. Class Counsel seek $5,000 for Plaintiff Smith and $1,000 for Plaintiff Downing. Service awards are appropriate to compensate named plaintiffs for their work done in the Class's interest. *In re Cellphone Fee Termination Cases,* 113 Cal. Rptr. 3d 510, 521-22 (Cal. App. 1st Dist. 2010); *Carlson v. Target Enter.*, 447 F. Supp. 3d 1, 5 (D. Mass. 2020) ("Incentive awards are an appropriate means for encouraging individuals to undertake the responsibility of representative lawsuits."). The efforts of the class representatives were instrumental in achieving the Settlement on behalf of the class. To date, the class representatives have received no compensation whatsoever for their efforts. Smith Decl. ¶ 8; Downing Decl. ¶ 7. The requested service awards are well-deserved.

The amounts of the requested service awards are modest under the circumstances and well in line with awards courts have approved in this District. In the Northern District, a "$5,000 payment [to class representatives] is presumptively reasonable." *Smith v. Am. Greetings Corp.*, No. 14-CV-02577-JST, 2016 U.S. Dist. LEXIS 11718, at *10 (N.D. Cal. Jan. 29, 2016); *see also Odrick v. UnionBancal Corp.*, No. C 10-5565 SBA, 2012 U.S. Dist. LEXIS 171413, at *7

(N.D. Cal. Dec. 3, 2012) (granting an award of $5,000 to plaintiff prosecuting a wage and hour class action); *Harris v. Vector Mktg. Corp.*, No. C-08-5198 EMC, 2012 U.S. Dist. LEXIS 13797, at *7 (N.D. Cal. Feb. 6, 2012) (observing that "as a general matter, $5,000 is a reasonable amount"); *Austin v. Foodliner, Inc.* No. 16-cv-07185-HSG, 2019 U.S. Dist. LEXIS 79638, at *20 (N.D. Cal. May 10, 2019); *see also Carlson*, 447 F. Supp. 3d at 5 (granting $7,500 award to class representative who was "activate participant in the litigation").

Service awards "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publishing Corp*., 563 F.3d 948, 966 (9th Cir. 2009). Plaintiff Smith filed the initial complaint in September 2018 and has performed a number of tasks that have greatly assisted in the preparation, prosecution, and settlement of the case. Among other things, Plaintiff Smith: (1) consulted with Class Counsel on a regular basis throughout the case; (2) attended two mediations; (3) was deposed by Keurig; (4) provided factual background to assist in the development of the case and in responding to several rounds of Keurig's discovery requests; (5) reviewed pleadings and correspondence in the case; (6) collected and produced documents; and (7) evaluated and approved the Settlement papers. *See* Smith Decl. ¶¶ 3-4; Hirsch Decl. ¶ 13. Plaintiff Smith also received unwanted media attention and privacy intrusions as a result of her role as class representative in this litigation. Smith Decl. ¶ 9. Thus, the $5,000 award to Plaintiff Smith is more than justified by her time and efforts on behalf of the class over three and half years of litigation.

Plaintiff Downing filed a separate complaint in September 2020, seeking to obtain benefits for a national class under Massachusetts law (the state in which Keurig engaged in the wrongdoing Plaintiffs alleged). Plaintiff Downing consulted with Class Counsel regularly throughout his case, provided factual background, and reviewed pleadings, correspondence, and Settlement papers. Although the *Downing* case settled at an earlier stage than *Smith*, Plaintiffs' request for a modest $1,000 service award for Mr. Downing reflects that different procedural posture; it is justified.

VII. CONCLUSION

For all the foregoing reasons, the Court should award Class Counsel $3 million in attorneys' fees and $568,180 in litigation expenses, and should authorize service awards of $5,000 to Plaintiff Smith and $1,000 to Plaintiff Downing.

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Respectfully submitted,

LEXINGTON LAW GROUP

By: /s/ Howard J. Hirsch

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