UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 12-21678-CIV-LENARD/GOODMAN

LAURA EGGNATZ and KATRINA GARCIA,
individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

KASHI COMPANY, a California
Corporation,

Defendants.
_____/

MOTION AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR ATTORNEYS' FEES AND COSTS

PLEASE TAKE NOTICE that on January 27, 2016, at 2:30 p.m., or on such date as may be specified by the Court, in the courtroom of the Honorable Joan A. Lenard, United States District Court for the Southern District of Florida, 400 North Miami Avenue, Miami, Florida 33128, Plaintiffs Katrina Garcia and Laura Eggnatz ("Plaintiffs"), on behalf of themselves and the class, will and hereby do move for an entry of an order, pursuant to Fed. R. Civ. P. 23(h) and 54(d)(2), granting the following relief:

1) An award to Class Counsel of $1,500,000 in attorneys' fees; and,

2) An award to Class Counsel of $168,204 in costs.

This motion will be heard concurrent with Plaintiffs' Motion for Final Approval of Class Action Settlement and Motion for Service Awards to the Class Representatives, both of which are separately briefed.

This motion is based on this notice; the accompanying Memorandum of Law; the Joint Declaration in Support of Plaintiffs' Motion for Attorneys' Fees and Costs (filed concurrently herewith); the Settlement Agreement (ECF 179-1); the Motion for Final Approval and accompanying documentation; the Declaration of Mark Schey Regarding Class Notice; and Administration the complete files and records in this action; and on such further oral and documentary evidence which may be submitted, and any further evidence as the Court may receive. Pursuant to Rule 23(h), Fed. R. Civ. P., Class Counsel file this Motion in advance of the December 28, 2015 deadline for objecting to the Settlement. Upon filing, a copy of this Motion for Approval will be posted to the Settlement Website, www.allnaturalsettlement.com, where it can easily be accessed by Settlement Class members.

Dated: December 14, 2015

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case **Page(s)**

FEDERAL CASES

FEDERAL STATUTES

STATE STATUTES

I. Introduction

For nearly three years the Parties engaged in hard-fought litigation regarding whether a class of consumers were misled by the advertising of certain Kashi®-brand food products as "All Natural" or "Nothing Artificial" (the "Products"). After completing full fact and expert discovery, briefing the pending motions for class certification and summary judgment and attending three mediation sessions with a professional mediator, Plaintiffs Katrina Garcia and Laura Eggnatz ("Plaintiffs") and Defendant Kashi Company ("Kashi" or "Defendant") negotiated a fair, adequate and reasonable settlement on behalf of the Class. On September 4, 2015, this Court granted preliminary approval of the proposed Settlement.

The Settlement is an excellent result for the Class, as Plaintiffs secured a non-reversionary $3.99 million cash payment, where at least $2 million of this cash payment will pay Class Members' claims. As agreed in the Settlement,[1] Plaintiffs seek an award of $1.5 million in attorneys' fees, which is *less than* Class Counsel's lodestar and more than reasonable given the excellent result achieved for the Class. Plaintiffs also seek an award to Class Counsel of $168,204 in litigation costs incurred.

The trial court has discretion to determine an award of attorneys' fees under either the lodestar or percentage-of-the-fund approach. Although the cash payment under the Settlement is not a traditional "common fund," the benefit to the Settlement Class is easily quantified. Thus a percentage-of-the-fund approach can easily be applied to determine the amount requested is reasonable. Applying this method results in a fee award of approximately 37.5% of the fund, in accord with the twelve *Camden I* factors enumerated by the Eleventh Circuit. Using Class

[1] The Settlement Agreement ("Agreement") was filed on June 5, 2015 (ECF 179-1). All capitalized terms herein have the same meanings as ascribed in the Agreement.

Counsel's lodestar, 3,708 hours totaling $1,693,788 in fees, confirms the reasonableness of their fee request. Regardless of the method applied, Plaintiffs' fee request warrants approval.

Likewise, Plaintiffs' request for $168,204 in costs incurred is also reasonable and compensable from the Settlement payment by Kashi. Class Counsel's out-of-pocket expenses were necessary to the litigation, as the bulk of these costs were incurred for critical liability experts, depositions and mediation.[2]

Class Counsel respectfully ask that the Court award attorneys' fees and reimbursement of expenses to compensate us for our work in achieving an excellent result for the Class.

II. Background[3]

A. This Action Settled Following Three Years of Hard-Fought Litigation.

1. Summary of Plaintiffs' Claims

Plaintiffs allege the marketing and labeling of certain Kashi food products as "All Natural," "100%," and containing "Nothing Artificial" is false and deceptive because the Products were made with genetically modified organisms ("GMOs") and allegedly synthetic ingredients such as Pyridoxine Hydrochloride, Alpha-Tocopherol Acetate, Hexane-Processed Soy ingredients and Calcium Pantothenate (the "Challenged Ingredients").

2. The Parties Engaged in Heavy Motion Practice.

On May 3, 2012, Plaintiffs Katrina Garcia and Laura Eggnatz filed a class action complaint against Defendant and its parent company, Kellogg Company ("Kellogg"), in this District seeking monetary damages, declaratory relief and injunctive relief. [ECF 1]. On July 7, 2012, Kashi and Kellogg jointly moved to dismiss Plaintiffs' original complaint under Federal

[2] Moreover, Class Counsel will incur future costs to secure Final Approval, for which they will not seek reimbursement.

[3] Plaintiffs respectfully refer the Court to their Motion for Final Approval, filed concurrently herewith, for a more detailed discussion of the Litigation and the terms of the Agreement.

Rule of Civil Procedure 12(b)(6), and after the motion was fully briefed [ECF 7, 13], this action was consolidated with Julie Martin's[4] case (originally filed in the Northern District of California) [ECF 30]. Plaintiffs filed an Amended Consolidated Class Action Complaint on February 1, 2013 [ECF 33], which Kashi again moved to dismiss [ECF 37]. On October 18, 2013, while Kashi's Rule 12(b)(6) motion was pending [ECF 7, 45], Plaintiffs filed a Second Amended Consolidated Class Action Complaint (the "SAC"). [ECF 58]. Kashi moved to dismiss for the third time on December 2, 2013. [ECF 71].

On September 5, 2014, the Court entered an Order granting in part and denying in part Kashi's motion to dismiss Plaintiffs' SAC. [ECF 99]. The Court held Plaintiffs' claims were not preempted by federal law, and that the primary jurisdiction doctrine did not require referral of claims to the Food and Drug Administration (FDA). *Id.* at 16. The Court also rejected Kashi's efforts to dismiss Plaintiffs' claims for FDUTPA violations, negligent misrepresentation, breach of express warranty and money had and received. *Id.* at 32-48. The Court did, however, dismiss Kellogg as a party defendant and Plaintiffs' claims for breach of implied warranty and declaratory judgment, and limited Plaintiffs' claims to the eight Kashi products Plaintiffs actually purchased by the Class Representatives. *Id.* at 1392-94.

On January 16, 2015, Plaintiffs filed a motion for class certification [ECF 118] and Kashi filed a motion for summary judgment [ECF 142]. Briefing on these motions was complete on March 2, 2015. [ECF 163, 166]. Trial was set to commence June 1, 2015. [ECF 100].

3. The Parties Completed Fact and Expert Discovery.

The Parties exchanged written discovery and Class Counsel reviewed thousands of documents and dozens of commercials produced by Defendant. *See* Joint Declaration of Gillian

[4] Ms. Martin is excluded from the Class here and dismissed her claims. [ECF 177].

L. Wade, DeWayne Layfield, Angela Arango-Chaffin and Michael T. Fraser in Support of Plaintiffs' Motion for Attorneys' Fees and Costs ("Joint Decl.") at ¶ 10. Plaintiffs also responded to written discovery and sat for contentious half-day depositions. *Id.*

The Parties also completed expert discovery. *Id.* at ¶ 11. Plaintiffs retained the following key liability experts: (1) Dr. Thomas Maronick, a marketing expert who designed and implemented a consumer survey regarding the Challenged Ingredients and Kashi's labels; (2) Dr. Charles M. Benbrook, Ph.D., an agricultural technology expert who opined on whether products containing the Challenged Ingredients are natural and/or artificial; and, (3) economist David Sharp, Ph.D., who devised two methods for calculating class-wide damages. *Id.* Defendant disclosed three rebuttal experts: (1) Dr. Itamar Simonson (offering a rebuttal opinion to Dr. Maronick); (2) Dr. Roger A. Clemens (offering a rebuttal opinion to Dr. Benbrook); and, (3) Dr. Michael P. Emmert (offering a rebuttal opinion to Dr. Sharp). *Id.* at ¶ 12. Defendant deposed Drs. Maronick and Benbrook. *Id.*

The Parties settled just days before the deadline to file motions *in limine*, thus, Class Counsel had already drafted motions and were engaged in full trial preparation at the time the Parties reached the Settlement. *Id.* at ¶ 13.

B. The Parties Engaged in Non-Collusive, Arms-Length Settlement Negotiations

On December 12, 2012, the Parties engaged in preliminary settlement discussions via private mediation with the Honorable Judge J. Richard Haden (Ret.). Agreement § I(K). The Parties did not reach an agreement. The Court referred the Parties back to mediation, which occurred on June 4, 2014 before Judge Haden. *Id*. In advance of the negotiations, Kashi provided Plaintiffs with documents and information regarding the Products, the Challenged Ingredients and the Products' national sales during the class period. Joint Decl. at ¶ 14. The Parties did not

reach an agreement at the second mediation. *Id*.

After the close of fact and expert discovery, fully briefing class certification and summary judgment motions, and an in-person settlement meeting in Chicago with Defendant's lead counsel, the parties attended another full day of formal mediation before Judge Haden on March 24, 2015. [ECF 160, 163, 166]. At the final mediation, the Parties had the benefit of full fact and expert discovery, including expert reports and depositions, document production, and Class Representative and Rule 30(b)(6) depositions. Joint Decl. ¶ 15. With the assistance of Judge Haden, the Parties reached an agreement to resolve this Litigation on a national class basis (except California residents, in light of the *Astiana* settlement). *Id.* at ¶ 16. At all times throughout the mediation proceedings and settlement discussions, the negotiations were adversarial, non-collusive and at arm's length. *Id*. The Parties executed the Agreement on June 5, 2015, memorializing the agreement reached at mediation. *Id.* at ¶ 17.

The Court granted Preliminary Approval of the Settlement on September 4, 2015. [ECF 183]. In its Order, the Court conditionally certified the Settlement Class, appointed Class Counsel and ordered the dissemination of Notice. *Id.*

C. The Settlement Achieves Meaningful Monetary and Non-Monetary Relief for the Settlement Class

The Settlement involves both monetary and injunctive relief. It obliges Defendant to pay $3.99 million in cash to the Settlement Class. Agreement § IV(A)(2). The proceeds of the Settlement, less the costs of settlement administration, attorneys' fees, expenses and Service Awards, will be distributed to claiming Settlement Class Members. *Id*.

Class Members who make valid claims accompanied by written proof of purchase (i.e. receipts) will receive a full reimbursement for those Products from the Settlement. Agreement § IV(A)(1)(a). There is no limit to the number of units for which Class Members can be

reimbursed where they submit receipts. *Id*. For Class Members who do not submit a proof of purchase with their claims, Kashi will reimburse $0.55 (fifty-five cents) per package for every Product purchased during the Class Period, with a maximum recovery of fifty (50) boxes, for a total recovery of $27.50. *Id.* at § IV(A)(1)(b). The total amount of money available to pay Class Members' eligible claims must be at least $2 million. *Id.* at § IV(A)(1)(a). Claimants' reimbursements may be proportionately modified up or down, on a per-unit basis, depending on the amount of claims made. *Id.* at § IV(A)(3). To date, 96,214 Class Members have made claims totaling approximately $955,750. Declaration of Mark Schey Regarding Class Notice and Administration ("Schey Decl.") at ¶ 19.

Under the Settlement, Kashi agrees not to oppose[5] Class Counsel's request for attorneys' fees of $1.5 million, plus reimbursement of litigation costs and expenses up to $180,000. *Id.* at § VIII(A). Kashi will also not oppose Service Awards of $5,000 for each of the two Class Representatives. The Service Awards, attorneys' fees and costs will be paid from the Settlement payment by Kashi. *Id.* at §§ IV(A)(2)(b), VIII(A).

In addition to this monetary relief, Defendant agreed to significant and valuable injunctive relief—removal of the "All Natural," "100% Natural," and "Nothing Artificial" labels on Products containing any of the Challenged Ingredients, unless such ingredient is approved or determined as acceptable by a federal agency or controlling regulatory body to be designated as "natural."[6] *Id.* at IV(C)(1). Kashi will also provide Plaintiffs' Counsel with

[5] The Eleventh Circuit recently reaffirmed the permissibility of such so-called "clear sailing" clauses. *See Poertner v. Gillette Co*., --- Fed. Appx. ---, 2015 WL 4310896, at *6 (11th Cir. 2015) (overruling objector's argument that such a provision is a "'red flag' of unfairness" and affirming final approval).

[6] Kashi also agreed to remove the 'All Natural' claims from packaging in *Astiana v. Kashi Company,* No. 3:11-CV-01967, ECF 242 (C.D. Cal. September 2, 2014) (entering judgment and

compliance information regarding the Non-GMO Project Verified label designations on certain Kashi products on a bi-annual basis for three years. *Id*. at § IV(C)(2). In the context of food labeling class action settlements, this type of business reform injunctive relief is rare and provides a lasting benefit to the Class and the public years beyond the date of settlement and distribution of monetary relief.

III. The Agreed-Upon Attorneys' Fees and Costs are Reasonable and Should be Approved.

A. Class Counsel's Request for Attorneys' Fees of $1.5 Million is Reasonable.

1. The Law Awards Class Counsel Fees From the Total Cash Payment Created Through Their Efforts

At the conclusion of a successful class action, class counsel may apply to the Court for an award of attorneys' fees. *See* Fed. R. Civ. P. 23(h). As indicated in the Court-approved Notice disseminated to the Class, and consistent with standard class action practice and procedure, Class Counsel request attorneys' fees in the agreed-upon amount of $1.5 million, to be paid from the total cash payment available through Class Counsel's efforts in reaching this Settlement. This fee request is well within the guidelines set forth by the Eleventh Circuit in *Camden I Condo. Ass'n. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991).[7] Not only does the Settlement provide for reasonable attorney's fees from the Settlement payment by Kashi, but "[i]t is well-established that when a representative party has conferred a substantial benefit upon a class, counsel is entitled to an allowance of attorneys' fees based upon the benefit obtained." *In re Checking Overdraft Litig.*, 830 F. Supp. 2d 1330, 1358 (S.D. Fla. Nov. 20, 2011) (citing *Camden I*, 946

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granting final approval). However, the settlement reached in *Astiana* applies only to California residents and does not mention removing the claims from packaging distributed nationally.

[7] "Eleventh Circuit attorneys' fee law governs this request, not the law of Florida." *In re Checking Overdraft*, 830 F. Supp. 2d at 1362, n. 32 (district court presiding over a diversity-based class action has equitable power to apply federal common law in deciding fees) (citing *Allapattah Servs., Inc. v. Exxon Corp*., 454 F.Supp.2d 1185, 1200 (S.D. Fla. Jul. 6, 2006)).

F.2d at 771)).

A settlement's reasonableness is determined within the sound discretion of the district court. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). However, settlements are strongly encouraged. *Id.* ("A request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of the fee"); *see also Cohn v. Nelson*, 375 F. Supp.2d 844, 854 (E.D. Mo. 2005) (where "parties have agreed on the amount of attorneys' fees and expenses, courts give the parties' agreement substantial deference").

It is well-established in the Eleventh Circuit that the "'appropriate percentage to be awarded as a fee in any particular case will undoubtedly vary.'" *Poertner*, 2015 at *4 (affirming final approval and $5.68 million award for attorneys' fees and costs award in a claims-made settlement (where claims only reached $344,850) with a $6 million *cy pres* award). Although 25% is the "bench mark" in this Circuit, "[t]o avoid depleting the funds available for distribution to the class, an upper limit of 50% may be stated as a general rule, although even larger percentages have been awarded." *Camden I*, 946 F.2d at *774-75. "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." *In re Sunbeam Sec. Litig.*, 176 F. Supp.2d 1323, 1335 (S.D. Fla. Nov. 29, 2001) (quoting *Camden I*, 946 F.2d at 774). Here, the Settlement resulted in a $3.99 million cash payment for the benefit of the Settlement Class, plus valuable injunctive relief. Accordingly, attorneys' fees are calculated based on a "reasonable percentage of the fund established for the benefit of the class."[8] *Faught v. Home Shield Corp.*,

8. The calculation of attorney's fees is based on a percentage of the *entire* $3.99 million cash payment, not just the amount claimed against it. *Poertner*, 2015 WL 4310896, at *6 (holding "the value of the nonmonetary relief" was "part of the settlement pie" in calculating attorneys' fees). *See also Boeing Co v. Van Gemert.*, 444 U.S., 478 (1980) ("A litigant or lawyer who recovers a common fund . . . is entitled to a reasonable attorney's fee from the fund *as a whole*")

668 F.3d 1233, 1242 (11th Cir 2011) (citing *Camden I*, 946 F.2d at 744); *In re Checking Overdraft Litig.*, 830 F. Supp.2d at 1358 ("In the Eleventh Circuit, class counsel is awarded a percentage of the fund generated through a class action settlement").

2. The *Camden I* Factors Support Class Counsel's Requested Fee.

In ruling on a fee request, courts consider the "*Camden I* factors" (sometimes referred to as the "*Johnson* Factors"). *Camden I*, 946 F.2d at 772 (citing factors originally set forth in *Johnson*, 488 F.2d 714). These are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney; (5) the customary fee; (6) whether the fee is contingent; (7) the time limitations imposed; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney(s); (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id*. These twelve factors are merely guidelines, as the Eleventh Circuit has "encouraged the lower courts to consider additional factors unique to the particular case." *Id*. (quoting *Walco Inv., Inc. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997)). These include "time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement, and the economics involved in prosecuting a class action." *In re Sunbeam*, 176 F. Supp.2d at 1335 (quoting *Camden I*, 946 F.2d at 775).

i. Class Counsel Devoted a Substantial Amount of Time and Effort to This Case on a Purely Contingent Basis, and Were Precluded From Other Employment as a Result

The first, fourth, sixth and seventh *Camden I* factors—the time and labor involved, the

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(emphasis added); *Waters v. Intl Precious Metals Corp.*, 190 F.3d 1291, 1297 (11th Cir. 1999) ([C]lass counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed").

preclusion of other employment, whether the fee was contingent and the time limitations imposed—are interrelated inquires, each supporting the reasonableness of Plaintiffs' fee request.

In total, Class Counsel has billed 3,708 hours, totaling approximately $1,693,788 in lodestar. Joint Decl. ¶ 25. Class Counsel's lodestar is reasonable. *First,* the hourly rates of Class Counsel in this Litigation ($550 to $575 for partners and $275 to $450 for associates) are comparable to those awarded in other cases in Florida and this District. *Id*. at ¶¶ 26, 38-36, 39-43, 47-52, 54-57, 61. Class Counsel reduced their normal hourly rates (*i.e.* between $575 to $750 for partners and up to $475 for associates) for purposes of this motion to conform to the average billing rates in the Miami-Dade community. *Id*. at ¶¶ 36, 52, Ex. B. *Second,* the hours billed by Class Counsel in the Litigation are reasonable. Prosecuting this action entailed extensive motion practice, fact and expert discovery and trial preparation *Id*. at ¶¶ 27, 37, 44, 53, 58 (providing detailed time summaries). Given the contentious history of the Litigation and the results achieved, the number of hours is reasonable, particularly because Class Counsel will only be compensated for a portion of that time. *Id*. at ¶ 64. Moreover, Class Counsel took appropriate steps to avoid duplication of effort and to efficiently manage, staff, assign and divide the work between the four law firms and amongst lower and higher-level attorneys. *Id*. at ¶ 65. If the lodestar approach were applied, this case would justify a significant multiplier.[9] "In a *pre-Camden I* case, the Court performed both methods of analysis and gathered cases on the range of fee awards under either method and noted that the lodestar multiples 'in large and complicated class actions' range from 2.26 to 4.5, while 'three appears to be the average.'" *Pinto v. Princess Cruise Line, Ltd*. 513 F. Supp.2d 1334 (S.D. Fla. Feb. 16, 2007). Considering a multiplier would

[9] Courts may consider *Camden I* factors to adjust the lodestar. *Hensley*, 461 U.S. at 434 & n. 9.

certainly be justified in this case, Class Counsel's fee request would satisfy a cross-check using the lodestar method. *Id*.

Moreover, Class Counsel's work is not yet done. Class Counsel still need to, among other things: (1) continue to monitor the notice program, communicate with the Claims Administrator, Digital Settlement Group (DSG) and respond to class member inquiries; (2) respond to objections, if any; (3) prepare for and attend the Settlement Hearing; (4) continue to oversee the claims administration process, including addressing any claim review issues; (5) monitor distribution of benefits to the Settlement Class; (6) potentially handle post-judgment appeals; and (7) review and monitor Defendant's submissions of bi-annual compliance reports for three years following the Effective Date, as required by section IV(C) of the Agreement. Joint Decl. ¶ 67.

Furthermore, the time spent on the Litigation was time that could not be spent on litigating other matters. Joint Decl. ¶ 68; *see Yates v. Mobile Cnty Pers. Bd.*, 719 F.2d 1530, 1535 (11th Cir. 1983) (recognizing that the expenditure of 1,000 billable hours, often in significant blocks of time, "necessarily had some adverse impact upon the ability of counsel for plaintiff to accept other work"). The *Yates* Court further acknowledged that such devotion of time and resources to complex matters, like the instant case "should raise the amount of the award"). *Id.*; *see also Schlage Lock Co.*, 505 F. Supp.2d 704, 708 (D. Colo. 2007) ("the *Johnson* Court concluded that priority work that delays a lawyer's other work is entitled to a premium").

Finally, "a determination of a fair fee for Class Counsel must include consideration of the contingent nature of the fee, the wholly contingent outlay of out-of-pocket sums by Class Counsel, and the fact that the risks of failure and nonpayment in a class action are extremely high." *Pinto*, 513 F. Supp.2d, at 1339. "A contingency fee arrangement often justifies an increase in the award of attorney's fees." *In re Checking Overdraft Litig.*, 830 F. Supp. 2d at

1364 (citing *In re Sunbeam*, 176 F. Supp.2d at 1335). Here, Class Counsel have worked on this case since early 2012, when they were contacted by Plaintiffs and investigated their claims. Joint Decl. ¶ 68. In effect, Class Counsel has loaned their legal services to the Settlement Class since that time. Class Counsel have prosecuted this case wholly on a contingency basis, and did so at great risk of never receiving any compensation, due to the risky nature of class action litigation and the developing law with respect to Rule 23 requirements and the implied ascertainability requirement, "All Natural" food-labeling claims, and calculating class-wide damages. *Id*. In addition to the contingent risk of the case, Class Counsel's representation of Plaintiffs and the Class in this heavily litigated case forced Class Counsel to forego other cases. *Id*.

These factors strongly militate in favor of the requested fee.

ii. The Case Involved Difficult Issues Concerning Developing Law and Plaintiffs' Claims Entailed Considerable Risk

The second and tenth *Camden I* factors—the novelty and difficulty of the issues raised in the litigation and the "undesirability" of the case, respectively—are also interrelated and support the requested fee award.

Although Class Counsel were able to achieve fair, adequate and reasonable relief for the Plaintiff Class in this case, the relief obtained cannot be viewed in a vacuum. *See In re Checking Overdraft Litig.*, 830 F. Supp.2d at 1364 ("Undesirability and relevant risks must be evaluated from the standpoint of plaintiffs' counsel *as of the time they commenced the suit*, not retroactively, with the benefit of hindsight") (emphasis added). Ultimately, the "attorneys' risk is perhaps the foremost factor in determining an appropriate fee award." *Francisco v. Numismatic Guar. Corp. of Am.*, No. 06-cv-61677, 2008 WL 649124, at * 14 (S.D. Fla. Jan. 31, 2008) (citing *Pinto*, 513 F. Supp.2d at 1339).

Case law regarding 'natural' labeling on food products has been developing in courts across the Country, and in this District, and are still being met with vigorous opposition. Indeed, at the time Plaintiffs filed suit, there was a growing trend by courts to reject claims similar to those of Plaintiffs here. *See, e.g., Carrea v. Dreyer's Grand Ice Cream, Inc.,* 475 Fed. Appx. 113 (9th Cir. 2012) (affirming dismissal of allegations ice cream was falsely labeled as 'natural'); *Lam v. General Mills, Inc.,* 859 F. Supp. 2d 1097 (N.D. Cal. May 10, 2012) (finding 'natural' claims were preempted); *Jones v. ConAgra Foods, Inc.,* 912 F. Supp. 2d 889 (N.D. Cal. Dec. 17, 2012) (dismissing with leave to amend allegations that 'all natural' claims were false and misleading); *Hairston v. South Beach Bev. Co.,* No. CV 12-1429-JFW (DTBx), 2012 Wl 1893818 (C.D. May 18, Cal. 2012) (same). Plaintiffs' claims have been fraught with risk since inception, as further evidenced by Kashi's multiple Rule 12(b)(6) motions.

While Plaintiffs and Class Counsel are confident in the strength of their case, they are also pragmatic in their awareness of the fact that in order to succeed at trial, Plaintiffs would be required to succeed on their pending Motion for Class Certification and overcome Kashi's defenses on the merits, whether on Kashi's pending summary judgment motion or at trial. Joint Decl. ¶ 70. Kashi vigorously opposed Plaintiffs' Motion for Class Certification, which was filed weeks after an order from the Honorable Beth J. Bloom denying class certification in a similar consumer class action regarding 'all natural' claims. *Id*. Specifically, Judge Bloom found the class was not ascertainable[10] because the variation in the challenged products and labels created a "subjective memory problem," as consumers would have to "remember whether they purchased

[10] At the time the Parties settled, the issue of whether class members can self-identify where retailers have no records identifying class members was on appeal before the Eleventh Circuit and has since been decided. *Karhu v. Vital Pharmaceuticals*, No. 14-11648, 2015 WL 3560722 (11th Cir. 2015) (affirming order denying class certification) (unpublished). This decision, albeit unpublished, would have presented serious obstacles to class certification, as most class members do not have receipts.

the challenged products." *See Randolph v. J.M. Smucker Co.*, No. 13-CIV-80581, 303 F.R.D. 679, 685-692 (Dec. 23, 2014).

Moreover, Defendant put forward evidence, including internal documents, consumer surveys and expert testimony in support of Kashi's contention that consumers have varying definitions of the term 'natural' and that 'All Natural' claims are not material to reasonable consumers. [ECF 142 at pp. 11-14]. Although Plaintiffs and Class Counsel are confident they could have overcome Kashi's challenges with its own expert's consumer survey and testimony regarding commonality and typicality, Plaintiffs recognize the risks associated with proving materiality, reliance and class-wide damages. Joint Decl. ¶ 71. If they were to prevail on their Motion for Class Certification, with Kashi's summary judgment motion under submission, Plaintiffs also faced an imminent risk of judgment being entered against the entire class. *Id*. Even if Plaintiffs prevailed on all of these issues at the district court level, Defendant would have raised them again before the Eleventh Circuit following entry of judgment, thereby creating new risks and years of delay. *Id*.

Each of these risks, standing alone, could have impeded Plaintiffs' successful prosecution of these claims at trial (and in any appeal). *Id*. Together, they overwhelmingly demonstrate that Plaintiffs' claims against Kashi were far from a "slam dunk" and that, in light of all the circumstances, the Settlement achieves an excellent class-wide result. *Id.*

iii. Class Counsel Achieved an Excellent Result for the Class

The eighth *Johnson* factor looks to the amount involved in the litigation, with particular emphasis placed on the "monetary results achieved" in the case by Class Counsel. *See Allapattah,* 454 F.Supp.2d 1185; *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"). The Settlement is outstanding. Instead of facing

additional years of costly and uncertain litigation, Settlement Class Members will receive an immediate cash benefit as well as valuable future non-monetary relief.

Further evidence of the excellent result Class Counsel achieved is the fact that the Settlement has been met with near-universal approval at this stage. *See Lee v. Ocwen Servicing, LLC*, (considering four objections filed by five Class Members a "trivial fraction of the class" and granting final approval and requested fee award). The Notice informed the Class about the Settlement terms, including that Plaintiffs would seek (1) up to $180,000 in costs and $1,500,000 in attorneys' fees and (2) Service Awards of $5,000 for each of the two Class Representatives. Joint Decl. ¶ 73. Moreover, 96,214 Class Members have submitted claims, but there have been no objections or opt-outs to the Settlement. *Id*.

iv. The Requested Fee Is Consistent with Those Awarded in Other Similarly Complex Class Settlements in this Circuit

The fifth and twelfth *Camden I* factors—the customary fee and awards in similar cases, respectively—also support a finding that the agreed-upon fee request is reasonable.

The requested fee falls squarely within the range of awards made in numerous cases brought in this Circuit and District. *In re Managed Care Litig. v. Aetma,* MDL No. 1334, 2003 WL 228000 (S.D. Fla. Oct. 24, 2003) (35.5% including costs on settlement of $100 million); *Waters v. Int'l Precious Metals Corp.,* 190 F. 3d 1291 (11th Cir. 1999), *cert. denied,* 530 U.S. 1289 (2000) (affirming fee award where district court determined the benchmark should be 30% then adjusted fee award higher based on circumstances, even though most of fund ultimately reverted back to defendant); *Wolff v. Cash 4 Titles*, No. 03-22778, 2012 WL 5290155, *6 (S.D. Fla. Sept. 26, 2012) (finding 33% is the market rate in class actions); *Pinto*, 513 F. Supp. 2d at 1341 ("The 30% fee requested in this case is well in line with the bulk of the fee awards in class

action"); *Gevaerts v. TD Bank*, No. 11:14-cv-20744-RLR, 2015 WL 6751061, at *10 (S.D. Fla. Nov. 5, 2015) (awarding attorneys fees equal to 30% of $20 million fund).

Furthermore, the fee requested here matches the fee typically awarded (and affirmed) in similar false advertising cases. *See Poertner*, 2015 WL 4310896, at *6 (affirming final approval in false advertising case regarding batteries and $5.68 million award for attorneys' fees and costs in a claims-made settlement (where claims only reached $344,850) with a $6 million *cy pres* award); *Klacko v. Diamond Foods*, No. 9:14-cv-80005-BB, ECF 71 (S.D. Fla. Jul. 20, 2015) (awarding $775,000 in attorneys' fees in claims-made settlement with a $2.75 million cap on claims in 'all natural' food-labeling case); *Miller v. Ghirardelli Chocolate Co.*, No. 12-cv-04936-LB, ECF 148 (N.D. Cal. Feb. 20, 2015) (awarding $1.575 million in fees and $87,572.15 in litigation costs from $5.25 million common fund in 'all natural' food-labeling case). *See also Braynen v. Nationstar Mortgage, LLC*, No. 14-CV-20726-GOODMAN, 2015 WL 6872519, *18 (S.D. Fla. Nov. 9, 2015) (awarding $5 million in attorneys' fees in claims-made settlement with a potential value of $76 million in lender-placed insurance ("LPI") action); *Lee v. Ocwen Loan Servicing*, No. 14–CV–60649–GOODMAN, 2015 WL 5449813, at *16 (S.D. Fla. Sept. 14, 2015) (awarding $9.85 million in fees and expenses in claims-made settlement in LPI action).

As another member of this Court observed, "federal district courts across the country have, in the class action settlement context, routinely awarded class counsel fees in excess of the 25 percent 'benchmark,' even in so-called 'mega-fund' cases." *Allapattah*, 454 F. Supp. 2d at 1210 (awarding fees equaling 31.5% of settlement of over $1 billion including interest). *See In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 498 (D.D.C. Oct. 19, 1981) (45%); *In re Combustion, Inc.*, 968 F. Supp. 1116 (W.D. La. June 4, 1997); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403 (S.D. Tex. May 10, 1999) (35.1%); *Beech Cinema, Inc. v. Twentieth Century*

Fox Film Corp., 480 F. Supp. 1195, 1199 (S.D.N.Y. Nov. 23, 1979), *aff'd*, 622 F.2d 1106 (2d Cir. 1980) (approximately 53%); *Zinman v. Avemco Corp.*, 1978 WL 5686 (E.D. Pa. Jan. 18, 1978) (50%). Moreover, in the private marketplace, "contingent fees of 33-44 percent are common in mass action and . . . higher fees often prevail[.]" *In re Checking Overdraft Litig.*, 830 F. Supp. 2d at 1366, n. 35 (collecting cases).

Accordingly, factors five and twelve favor Class Counsel's request for $1.5 million.

v. A High Level of Skill Was Necessary to Perform the Legal Services Properly

The remaining *Camden I* factors—the skill required to perform the legal services properly and the experience, reputation, and ability of the attorneys—confirm that the requested fee is reasonable.

Class Counsel are seasoned attorneys with considerable experience litigating and settling consumer protection class actions of similar size, scope and complexity. Joint Decl. ¶¶ 28-33, 39-40, 47-49, 54-55, 74, Ex. A. Class Counsel regularly engage in major complex litigation involving deceptively labeled consumer products and have been appointed class counsel by courts throughout the country. *Id.* Class Counsel's skill at adapting their litigation strategies to address the challenges posed by adverse case law on Rule 23 and 'all natural' food-labeling claims, as well as the formidable defense mounted by Kashi's counsel, was critical in opposing multiple Rule 12(b)(6) motions to dismiss, fully briefing class certification and opposing Defendant's Motion for Summary Judgment. *Id*.

Moreover, Class Counsel thoroughly investigated Plaintiffs' claims and made skillful use of documents and information to assess Defendant's potential exposure as to the claims at issue. Joint Decl. ¶¶ 27, 37, 44, 53, 58, 74, 75. With this information, Class Counsel developed theories of certification and liability after carefully studying, along with Plaintiff's agricultural technology

and consumer marketing experts, and Defendant's internal marketing materials and documents regarding the Challenged Ingredients. *Id.* Class Counsel also enlisted the assistance of Dr. Sharp to assist in developing Plaintiff's damages and restitution theories, utilizing Defendant's internal marketing materials, financial data and shipping records, in addition to third party data. *Id.* Class Counsel marshalled this discovery in briefing on class certification and summary judgment. *Id.*

The skill and competence of Defendant's lawyers should be considered and cannot be doubted. *See In re Sunbeam Sec. Litig.*, 176 F. Supp.2d at 1334 ("In assessing the quality of representation, courts have also looked to the quality of the opposition the plaintiffs' attorneys faced"). Defendant is represented by Jenner Block, full-service global law firm with 480 lawyers, and Buchanan Ingersoll & Rooney, PC, with 510 lawyers, both of whom have the resources and reputations for vigorous and effective advocacy of their clients' interests. *See* www.jenner.com and www.bipc.com. For that reason, Class Counsel had to stay on the very top of every single one of the many, sprawling issues at play during the life of the litigation.

B. Class Counsel's Expenses are Reasonable and Were Necessarily Incurred.

Class Counsel's outlay of $168,204 in litigation costs and expenses indicates the degree to which they had to fight and persevere on behalf of the Class to achieve the $3.99 million cash payment. Costs compensable in a class action include "nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "In addition to the award of taxable costs, FDUTPA allows for the award of non-taxable costs, i.e., those costs that are not taxable under federal law at 28 U.S.C. §1920." *Chow v. Chak Yam Chau*, --- Fed. Appx. ---, 2015 WL 7258668, at *2, n. 4 (11th Cir. 2015) (citing Fla. Stat. 501.2105(1)-(4) and affirming award of $182,992.12 in costs in FDUTPA action).

The categories of expenses for which Class Counsel, as detailed in these declarations, seek

reimbursement here are the type of expenses routinely charged to paying clients in the marketplace and, therefore, the full requested amount should be reimbursed. *See* Joint Decl. at ¶¶ 38, 45, 60, 63. These expenses include but are not limited to: filing fees, court reporter charges and attorney service; photocopies; telephone and conference calls; postage and overnight delivery; mediation fees; fees for Plaintiffs' key liability experts; travel expenses (transportation and lodging) for depositions in La Jolla, California, where Defendant is headquartered, and Miami and Fort Lauderdale, where Plaintiffs reside, mediation in San Diego, California and a meeting with Defendant's counsel in Chicago. *Id*. These expenses are reasonable and justified. *See, e.g., Gevaerts*, 2015 WL at *14 (approving request for reimbursement of $300,666.95 in out-of-pocket costs and expenses for expert fees, photocopies, travel, online research and mediator fees) (citing *Mills v. Electric Auto-Lite Co*., 39 U.S. 375, 391-92 (1970)).[11]

These costs are entirely reasonable given the number of critical litigation experts retained, and the number of depositions that have taken place. *Id.; see also Johnson v. General Mills, Inc.*, No. SACV-10-00061-CJC(ANx), 2013 WL 3213832, at *6 (C.D. Cal. June 17, 2013) (same) (awarding $896,387.09 in costs to class counsel in food-labeling class action, noting that "[d]espite the high dollar figure, class counsel's costs do appear reasonable").

C. The Cost of Class Action Notice and Claims Administration Are Reasonable and Necessary.

The Settlement payment by Kashi will be used to pay the cost of Class Action Settlement Notice and Claims Administration. *See* Agreement at §VIII(A)(2)(a). Using the Settlement payment by Kashi to fund Settlement Class Notice and Claims Administration "does not defeat the legitimacy of the Settlement." *See In re AT&T Mobility Wireless Data Servs. Sales Tax*

[11] Plaintiffs' future costs (*e.g*., travel to the Settlement Hearing) are not included in the requested cost award, and Plaintiffs do not seek reimbursement for those costs. Joint Decl. at ¶63.

Litig., 789 F. Supp. 2d 935, 980 (N.D. Ill. 2011). Administrative services are invaluable to claiming Settlement Class; without them, there would be no benefit to the Class Members that make claims. *See Staton v. Boeing Co.*, 327 F.3d 938, 975 (9th Cir. 2003) ("[t]he post-settlement cost of providing notice to the class can reasonably be considered a benefit to the class"). Whether that means that the administrative costs should be calculated as a benefit to the Class or looked at separately as a cost of the litigation is not an issue in this case, because even excluding the cost of administration, the amount of money that claiming Settlement Class Members will receive in comparison to the money sought for counsel is still within a reasonable range acceptable in the Eleventh Circuit. *See Camden I*, 946 F.2d at 774 (median range is 25% of fund, upper limit is 50% of fund).

DSG has undertaken a number of activities necessary for the Settlement Class, including effectuating Notice and collecting and administering claims. *See* Schey Decl. at ¶¶ 14-21. These steps were all done with approval and oversight of counsel for both parties to ensure Notice was reasonable and the best practicable, but also to keep expenses as low as possible. Joint Decl. at 77. Class Notice and Claims Administration is estimated to cost $300,000. *Id*. This figure will be refined and updated as additional claims are received and further steps are taken towards final approval and distribution. Joint Decl. at ¶ 78.

Accordingly, it is proper to pay the costs of Notice and Claims Administration from the Settlement payment by Kashi, and these costs are reasonable and should be approved.

IV. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Class Counsel's request for $1,500,000 in attorneys' fees and $168,204 in costs, both to be paid from the cash payment by Kashi under the Settlement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that on this 14th day of December, 2015, this filing complies with Local Rule 5.1 and this Court's January 29, 2015 Order (Dkt. 173).

By: /s/ Gillian L. Wade
Gillian L. Wade

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed and served via CM/ECF electronic transmission on December 14, 2015 to those parties that are registered with the Court to receive electronic notifications in this matter.

By: /s/ Michael T. Fraser
Michael T. Fraser