

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE**

MICHAEL TAYLOR, et al.,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. 1616-CV11531
)	
DYNAMIC PET PRODUCTS, LLC et al.,)	
)	
Defendants.)	

**PLAINTIFFS’ AND CLASS COUNSEL’S APPLICATION
FOR AN AWARD OF ATTORNEYS’ FEES AND EXPENSES
AND INCENTIVE AWARDS TO CLASS REPRESENTATIVES**

Plaintiffs Michael Taylor, Dawn Fortner, and Catherine Gemkow (“Plaintiffs”) and Class Counsel, Shank & Moore, LLC, respectfully submit this Application for an Award of Attorneys’ Fees and Expenses and Incentive Awards to Class Representatives. In support of this Application, Plaintiffs and Class Counsel state as follows:

Introduction

After vigorous, arms-length negotiations, Plaintiffs and Defendants Dynamic Pet Products, LLC and Frick’s Meat Products, Inc. (“Defendants”) reached an agreement to settle this class action lawsuit, set forth in the Settlement Agreement attached to the Suggestions in Support of Plaintiffs’ Motion for Final Approval of Class Settlement as **Exhibit 1**. As part of the Settlement, the parties have agreed that Defendants shall pay an award of attorneys’ fees and expenses not to exceed \$700,000 to Class Counsel (Settlement Agreement § 3.1) and an incentive award to each Plaintiff as class representative in an amount not to exceed \$5,000 per plaintiff (Settlement Agreement § 3.2). Through the prosecution of this action, Plaintiffs and Class Counsel have obtained substantial benefits for Settlement Class Members. This successful

outcome is the culmination of months of research, investigation, litigation, discovery, settlement negotiations, and documentation and implementation of the Settlement by Class Counsel. The Affidavit of Christopher S. Shank attached hereto as **Exhibit A** summarizes the work performed by Class Counsel to achieve these results.

The Settlement provides for \$2,400,000 in benefits to Settlement Class Members, not including the value of the injunctive relief component of the Settlement. Specifically, the Settlement allocates \$1,025,000 for product purchase reimbursement claims and \$325,000 for pet injury/property damage claims. The Settlement also provides for payment of \$335,000 in notice and administration expenses, \$700,000 for attorneys' fees and expenses, and \$15,000 for incentive awards to the named Plaintiffs.

Class Counsel has prosecuted this action on a contingency basis and, to date, has not received any compensation for the substantial resources – both in time and money – it has dedicated to the prosecution and settlement of this action. Class Counsel has also incurred litigation expenses and costs in prosecuting this action. Accordingly, Class Counsel submits this Application seeking a total award of \$655,000 in reasonable attorneys' fees and expenses (including both attorneys' fees and reimbursement of the \$14,855.02 in litigation expenses and costs incurred during the prosecution of this case).

Background and Factual Summary

This case involves alleged misrepresentations in the marketing and sale of The Real Ham Bone for Dogs (the "Product") by Defendants Dynamic Pet Products, LLC and Frick's Meat Products, Inc. ("Defendants"). Specifically, Plaintiffs allege that Defendants have falsely represented the Product as safe and appropriate for dogs, when it actually is prone to splinter when dogs chew the Product and cause serious injuries when pieces of the Product are ingested.

Plaintiffs assert claims against Defendants under the Missouri Merchandising Practices Act (“MMPA”).

Before filing this lawsuit, Class Counsel conducted extensive research and investigation into key factual and legal issues. This research and investigation included an investigation into Defendants’ Product, Defendants’ marketing and advertising practices concerning the Product, and complaints submitted online by other purchasers of the Product. Through this investigation, Class Counsel found that numerous purchasers of the Product made similar complaints about the Product that would justify a class action. Class Counsel also evaluated the legal issues likely to arise in litigating the case.

Plaintiffs retained Class Counsel to file a claim on their behalf and on behalf of a putative class of consumers for violation of the Missouri Merchandising Practices Act. Class Counsel drafted Plaintiffs’ petition and filed it on May 16, 2016.

To defend themselves against the claims asserted by Plaintiffs, Defendants engaged skilled and sophisticated defense counsel from the law firm Wilson Elser Moskowitz Edelman & Dicker LLP. Defendants strenuously denied the factual and legal allegations in the Petition and filed a motion to dismiss the Petition on July 13, 2016.

At Defendants’ invitation, Class Counsel attended a mediation in San Diego, California in July 2016 conducted in connection with another pending case, *Reed, et al. v. Dynamic Pet Products, LLC, et al.*, Case No. 3:15-cv-00987-WQH-DHB, United States District Court for the Southern District of California. That mediation was unsuccessful.

After that mediation, Class Counsel prepared and Plaintiffs filed extensive suggestions in opposition to Defendants’ motion to dismiss on August 15, 2016. Preparing these suggestions in

opposition required Class Counsel to undertake additional legal research and analysis of the various arguments raised by Defendants in support of their motion.

Plaintiffs' opposition to Defendants' motion to dismiss was successful, as the Court denied the motion in its entirety by order dated November 21, 2016.

While the motion to dismiss was pending, Class Counsel prepared comprehensive interrogatories, requests for admission, and document requests to Defendants, which Plaintiffs served on September 9, 2016. After Defendants responded to these discovery requests, Class Counsel challenged many of the responses and objections as improper and gained Defendants' agreement to supplement their responses with additional information. Defendants likewise served interrogatories, requests for admission and document requests on Plaintiffs, requiring Class Counsel to obtain the information and documents necessary to respond to these requests.

Through Class Counsel's work, Plaintiffs also obtained discovery from third parties. Plaintiffs served subpoenas on and obtained documents from the Better Business Bureau of Eastern Missouri and Southern Illinois and the Missouri Department of Agriculture, as well as obtaining documents from the United States Food and Drug Administration pursuant to a Freedom of Information Act request.

Beginning in late 2016, Defendants produced over 39,000 pages of documents to Plaintiffs. Class Counsel devoted significant efforts to reviewing the documents produced by Defendants.

On February 16, 2017, a mediation conference was conducted in Kansas City, Missouri before John R. Phillips. A second mediation conference was held on March 16, 2017. Preparing for and participating in the mediation conferences, as well as related discussions before and after these conferences took a substantial amount of time.

Through the mediation process, the parties reached an agreement to settle the case. The essential terms of the agreement were outlined in a Term Sheet prepared by Class Counsel and defense counsel, which was executed on April 4, 2017. Class Counsel then did the majority of the work in preparing the comprehensive settlement agreement dated April 18, 2017, and through Class Counsel's efforts the Court granted preliminary approval of the settlement on April 19, 2017.

After the Court granted preliminary approval of the settlement, Class Counsel has worked with the settlement administrator, Dahl Administration, in providing notice to Class members and addressing issues arising with respect to Class members' claims.

As a result of the work described above, Class Counsel has succeeded in obtaining a valuable settlement providing \$2,400,000 in benefits to the settlement Class. The benefits include \$1,025,000 allocated for product purchase reimbursement claims and \$325,000 for pet injury/property damage claims, \$335,000 for notice and administration costs, \$700,000 for attorneys' fees, and \$15,000 for incentive awards to the named plaintiffs.

Argument and Authorities

I. The Requested Attorneys' Fees are Reasonable and Should Be Approved.

Class Counsel has not received to date any compensation or reimbursement for the substantial time and money invested and risk taken in prosecuting this action. Shank Aff. ¶ 17. Yet because of the efforts, expenditures, and risk taken by Class Counsel in prosecuting this action, the Class will benefit from a valuable Settlement, which Class Counsel has obtained for the Class. In light of the substantial results obtained for the Class, the skill shown and efforts and expenses invested by Class Counsel, and the considerable risk incurred by Class Counsel in

pursuing this action on behalf of the Class, Class Counsel requests an award of reasonable attorneys' fees (including its reasonable expenses) in the total amount of \$655,000.

A. Class Counsel Is Entitled to a Reasonable Fee and Expense Award.

Missouri courts follow the "American Rule," which ordinarily requires litigants to bear their own attorneys' fees and costs in litigation. *Mayor, Councilmen, & Citizens of the City of Liberty v. Beard*, 636 S.W.2d 330, 331 (Mo. banc 1982). However, a recognized exception to the American Rule exists when "equity demands a balance of benefits" pursuant to the common fund doctrine or the common benefit doctrine. *See Gerken v. Sherman*, 351 S.W.3d 1, 13 (Mo. Ct. App. 2011). The common fund doctrine and the related common benefit doctrine provide that counsel are entitled to recover reasonable attorneys' fees when their efforts have resulted in a common fund or a common benefit for a group of similarly situated individuals. As the Missouri Court of Appeals explained in *Gerken*:

First, the common fund doctrine permits a trial court to require non-litigants to contribute their proportionate part of the counsel fees when a litigant successfully creates, increases, or preserves a fund in which the non-litigants were entitled to share. Second, the common benefit doctrine permits recovery of attorney's fees when a successful litigant benefits a group of other individuals similarly situated.

Id. (quoting *Lett v. City of St. Louis*, 24 S.W.3d 157, 162 (Mo. Ct. App. 2000) (internal citations omitted)); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[The United States Supreme Court] has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.").

In this case, Class Counsel is entitled to an award of reasonable attorneys' fees under the common fund doctrine and the common benefit doctrine. Through its efforts, Class Counsel has achieved an excellent Settlement that provides \$2,400,000 in immediate benefits to the Class.

Accordingly, “equity demands a balance of benefits,” and the Court should award Class Counsel reasonable attorneys’ fees for obtaining these significant benefits.

B. Class Counsel’s Fee Request is Reasonable as a Percentage of the Recovery.

As an expert on the subject of attorneys’ fees, the trial court has wide discretion in awarding attorneys’ fees to class counsel in class actions. *Berry v. Volkswagen Group of Am., Inc.*, 397 S.W.3d 425, 430 (Mo. banc 2013) (“The trial court is deemed an expert at fashioning an award of attorneys’ fees and may do so at its discretion.”); *Bachman v. A.G. Edwards, Inc.*, 344 S.W.3d 260, 267 (Mo. Ct. App. 2011) (appellate courts “give great deference to attorney fee awards because the trial court is considered an expert at awarding attorney’s fees, and may do so at its discretion.” (internal quotations omitted)). Because the Court is an expert on attorneys’ fees and has knowledge of the pertinent issues in a case, it “may set a fee award without the aid of evidence.” *In re Alcolac, Inc.*, 903 S.W.2d 680, 682 (Mo. Ct. App. 1995). A trial court’s award of attorney’s fees is reviewed for an abuse of discretion, which requires the complaining party to show that the trial court’s decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one’s sense of justice. *Berry*, 397 S.W.3d at 431; *Bachman*, 344 S.W.3d at 267.

In cases involving a common fund, courts frequently apply a “percentage of recovery” or “percentage of the fund” approach in awarding attorneys’ fees. *See Bachman*, 344 S.W.3d at 267 (awarding a percentage of the settlement value); *see also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) (noting the well-established rule that courts may use the percentage-of-the-benefit method in a common fund settlement case); *Hale v. Wal-Mart Stores, Inc.*, Nos. 01CV218710, 02CV227674, 2009 WL 2206963, ¶ 6 (Mo. Cir. Ct. Jackson Cnty. May 15, 2009) (Midkiff, J.) (“Missouri circuit courts recognize recovery of attorneys’ fees as a

percentage of the common fund.”).¹ In applying the percentage of recovery method, a court must: “(1) value the proposed settlement; and (2) decide what percentage of the proposed settlement should be awarded as attorneys’ fees.” *Sutter v. Horizon Blue Cross Blue Shield of N.J.*, 966 A.2d 508, 519 (N.J. Ct. App. 2009). In this case, the Settlement provides \$2,400,000 in benefits to the Class, including the value provided to the Class by notice and administration costs and the work performed by Class Counsel. To compensate Class Counsel for the substantial time invested and risk incurred in prosecuting this action and achieving an excellent Settlement for the benefit of the Class, Class Counsel requests an award of \$655,000 in reasonable attorneys’ fees and expenses, or approximately 27.3% of the total value of the Settlement.

1. The Settlement Provides \$2,400,000 in Benefits to the Class.

The Settlement in this case provides \$2,400,000 in benefits to the Class. As described in the Settlement Agreement, Defendants have allocated \$1,025,000 to pay Class members’ claims for product purchase reimbursement and \$325,000 for pet injury/property damage claims. In valuing a settlement for purposes of determining attorney’s fees, “a court may use the scope of a claims-made fund (or its ceiling) as a valuation measure.” William B. Rubenstein, *NEWBERG ON CLASS ACTIONS* § 15:56 (5th ed. Dec. 2016 update); *see Estrada v. iYogi, Inc.*, No. 2:13-01989 WBS CKD, 2016 WL 310279, at *6 (E.D. Cal. Jan. 16, 2016) (“When there is a claims-made settlement, such as here, the percentage of the fund approach in the Ninth Circuit is based on the total money available to class members, not just the money actually claimed.”); *College Retirement Equities Fund, Corp. v. Rink*, 2015 WL 226112, at *5 (Ky. Ct. App. Jan. 16, 2015)

¹ The “percentage of the fund” approach is appropriately applied to claims-made settlements as well. *Marty v. Anheuser-Busch Cos.*, No. 13-cv-23656-JJO, 2015 WL 6391185, at *2 (S.D. Fla. Oct. 22, 2015).

(affirming fee award of one-third of all funds made available to class members in a claims-made settlement).

In addition, the Settlement Agreement provides that Defendants will pay the notice and claim administration costs, which were estimated to be \$335,000 at the time the Settlement Agreement was executed, and that Defendant will pay up to \$700,000 in attorney's fees, as well as up to \$15,000 in incentive awards to the named Plaintiffs. Courts may include such notice and administration costs and attorney's fees as part of the benefit when calculating a percentage-of-the-benefit fee amount, as it is reasonable to consider such costs as a benefit to the class members. *Huyer v. Buckley*, 849 F.3d 395, 398 (8th Cir. 2017) (administration costs may be included in determining total value of settlement); *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 282 (6th Cir. 2016) (total benefit to class includes attorney's fees and may include costs of administration); *Amunrud v. Sprint Commc'ns Co.*, No. CV 10-57-BLG-CSO, 2012 WL 443751, at *2 (D. Mont. 2012) ("it is appropriate to base the percentage [of the settlement] on the gross cash benefits available for class members to claim, plus the additional benefits conferred on the class by [the defendant's] separate payment of attorney's fees and expenses, and the expenses of administration").

In determining the value of the Settlement for purposes of awarding attorneys' fees under Missouri law, the Court should consider the value of the entire benefit conferred by the Settlement, and not merely the number or value of the claims made by the Class Members for monetary relief. *Berry v. Volkswagen Group of Am., Inc.*, 397 S.W.3d 425, 428-29 (Mo. banc 2013) (affirming fee award in class action and rejecting arguments that the fee award should be limited by the total payout on claims made by class members); *Hale*, 2009 WL 2206963, ¶ 7 ("Class Counsel are entitled to a fee award based on the percentage of the entire Fund, regardless

of the actual amount of claims made by the respective Class Members.”); *see also Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (“An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not.”); *Amason v. Pantry, Inc.*, NO. 7:09-CV-02117-RDP, 2014 WL 12600263, at *2 (N.D. Ala. 2014) (“common-fund fee awards are properly calculated as a percentage of the benefits made available to the class, regardless of whether each class member redeems the benefits made available to class members, or even whether unclaimed benefits revert to the defendant”).

2. The Amount of Class Counsel’s Fee and Expense Request Falls within the Range Routinely Awarded by Courts in Class Actions.

Class Counsel’s total fee and expense request in the amount of \$655,000 represents approximately 27.3% of the total value of the Settlement, which falls well within the range of awards routinely granted by Missouri courts. *See Bachman*, 344 S.W.3d at 267 (holding that a fee award of approximately one-third of the value of a settlement is “not unreasonable” in cases involving complex litigation or in the class action context);² *Hale*, 2009 WL 2206963, ¶ 30 (“The 38.3% fee requested in this case is customary and well in line with attorneys’ fees awards in similar cases.”); *McLean v. First Horizon Home Loan Corp.*, No. CV228590, 2007 WL 5674689, ¶ 11 (Mo. Cir. Ct. Jackson Cnty. June 7, 2007) (Scoville, J.) (“[33.3% contingency fee is well within the average recovery from recent class action settlements.”).

The fee request also falls within the range awarded in class actions by courts throughout the country, which generally recognize that fee awards as high as 50% of the gross settlement fund are reasonable. *See NEWBERG ON CLASS ACTIONS*, *supra*, § 15:83 (5th ed. December 2016

² The \$21 million attorney fee award in *Bachman* was actually 35% of the \$60 million value of the settlement, *see Bachman*, 2010 WL 5648344, ¶ 3 (trial court order), *aff’d*, 344 S.W.3d at 267.

update) (“Usually, 50 percent of the fund is the upper limit on a reasonable fee award from a common fund, . . . though somewhat larger percentages are not unprecedented.”); *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 7-8 (D.D.C. 2008) (noting that fee awards in common-fund cases may range up to 45%, and approving fee request of 45% of total gross recovery); *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 499 (D.D.C. 1981) (awarding 45% of \$7.3 million gross settlement fund as reasonable attorneys’ fees); *see also Martin v. AmeriPride Servs., Inc.*, No. 08cv440-MMA (JMA), 2011 WL 2313604, at *8 (S.D. Cal. June 9, 2011) (“Other case law surveys suggest that 50% is the upper limit, with 30–50% commonly being awarded in cases in which the common fund is relatively small.”). The requested fee of 27.3% percent of the value of the proposed Settlement is reasonable in light of the substantial monetary relief obtained by Class Counsel here and should be awarded.

3. Performing a Lodestar Cross-Check Further Confirms that Class Counsel’s Fee Request is Reasonable.

In cases where an award of attorneys’ fees is determined using the percentage of recovery approach, the lodestar approach is often used as a cross-check to test the reasonableness of the attorneys’ fee award. *See, e.g., Bachman*, 344 S.W.3d at 267 (approving trial court’s consideration of lodestar cross-check as one of the factors considered by trial court in awarding fees to class counsel); *In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006) (“[T]he percentage-of-recovery method is generally favored because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure. But we have recommended that district courts use the lodestar method to cross-check the reasonableness of a percentage-of-recovery fee award.”); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 49-51 (2d Cir. 2000).³

³ When, as here, the lodestar method “is used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized” by the court. *Goldberger*, 209 F.3d at 50.

The lodestar is calculated by “multiplying the number of hours reasonably expended by a reasonable hourly rate.” *Alhalabi v. Mo. Dep’t of Natural Res.*, 300 S.W.3d 518, 530 (Mo. Ct. App. 2009). Here, as summarized in the attached Shank Affidavit, Class Counsel’s attorneys and paralegals have expended approximately 1,078 hours of work in connection with this case, resulting in a lodestar attorneys’ fees amount of \$613,385. Shank Aff. ¶ 22. Class Counsel’s hourly rates used in calculating the lodestar – lead counsel at \$650 per hour, partners at \$550 per hour, and paralegals at \$175 per hour – are reasonable and in line with the hourly rates awarded in similar cases to counsel of similar skill and experience. *Id.* ¶ 23. These rates are consistent with the rates customarily charged by other attorneys in the community for similar work. *Id.*

In fact, both state and federal courts in Missouri have repeatedly approved rates consistent with or in excess of those charged by Class Counsel. In *Berry*, 397 S.W.3d 425, for instance, the Supreme Court of Missouri affirmed the trial court’s award of attorneys’ fees based on a lodestar calculation with rates of up to \$650 per hour. *Id.* at 432 (stating that “Class counsel’s . . . rates were reasonable.”). Similarly, in *Plubell v. Merck & Co. Inc.*, No. 04CV235817-01 (Mo. Cir. Ct. Jackson Cnty., Mar. 15, 2013) (Roldan, J.), this Court awarded reasonable attorneys’ fees to class counsel and found that rates as high as \$675 per hour for partner time “are well within the rates normally charged for similar work by similarly qualified counsel in Missouri.” *Id.*, Final Judgment and Order of Final Settlement Approval and Dismissal with Prejudice filed March 15, 2013 at 8-9 (attached hereto as **Exhibit 2**). More recently, in *Pollard v. Remington Arms Co.*, No. 4:13-CV-00086-ODS, 2017 WL 991071 (W.D. Mo. Mar. 14, 2017), the court approved hourly rates for class counsel ranging from \$261 through \$897 and

Moreover, the lodestar analysis – which is used here solely for purposes of cross-checking the percentage-of-fund request – requires “neither mathematical precision nor bean-counting,” and allows the Court to “rely on summaries submitted by the attorneys and . . . not review actual billing records.” *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005).

found that the average hourly fees were “not dissimilar to those hourly rates charged in the Kansas City area.” *Id.* at *6.

As demonstrated by the hourly rate surveys conducted by the MLW and the rates found reasonable in *Berry, Plubell and Pollard*, Class Counsel’s rates are reasonable for purposes of a lodestar cross-check. Furthermore, because Class Counsel knew it was possible that it would never be paid for its work on this case if there was no recovery, it had every economic incentive not to engage in unnecessary work. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (“It must also be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee.”); *see also Mohr v. Chicago Sch. Reform Bd. of Trustees of Bd. of Educ. of City of Chicago*, 194 F. Supp. 2d 786, 789 (N.D. Ill. 2002).

In determining whether the fee request by Class Counsel is reasonable under the lodestar cross-check, application of a reasonable multiplier is appropriate. In *Berry*, 397 S.W.3d at 433, the Supreme Court of Missouri indicated that a multiplier should be applied where it is “necessary to ensure a market fee that compensate[s] class counsel for taking [the] case in lieu of working less risky cases on an hourly basis.” In deciding whether a multiplier is appropriate, courts consider factors including (a) the risk class counsel assumed in taking the case on a contingent fee basis, unlike the hourly fees received by Defendant’s counsel; (b) whether undertaking the representation precluded class counsel from accepting other employment that would have been less risky; and (c) whether the time demands of the case delayed work on class counsel’s other work. *See id.* at 432. Here, Class Counsel’s unadjusted lodestar is \$613,385. Shank Aff. ¶ 22. The \$655,000 requested (which includes \$14,855.02 in reasonable litigation

expenses⁴) represents a lodestar multiple of approximately 1.07, which is well within the range of multipliers regularly approved in class actions in Missouri. *See Berry*, 397 S.W.3d at 433 (affirming attorney’s fee award based on lodestar multiplier of 2.0); *Hale*, 2009 WL 2206963, at ¶ 15 (a 2.3 multiplier is “well within the range of multipliers found reasonable for cross-check purposes by courts in similar complex class actions[.]”); *Mitchell v. Residential Funding Corp.*, No. 03-CV-220489 (Mo. Cir. Ct. Jackson Cnty. June 24, 2008) (Del Muro, J.) (awarding nearly \$37 million in attorney’s fees as a percentage of the settlement, representing an approximate 10.9 multiplier of the lodestar); *McLean*, 2007 WL 5674689, at ¶ 11 (approving 2.75 multiplier to account “for the significant risk of non-recovery” and other considerations); *see also* NEWBERG ON CLASS ACTIONS, *supra*, § 15:86 (5th ed. June 2017 update) (“Positive multipliers from 1-3 are the norm, though higher multipliers are not unheard of and may well be warranted in certain circumstances.”).

In this case, the modest lodestar multiplier of 1.07 is well within the range of multipliers approved in comparable class action cases with comparable results. Unlike counsel for Defendant, Class Counsel has not received any compensation or reimbursement for the substantial time and money it has invested in and risk it has incurred prosecuting this Action.

⁴ To date, Class Counsel has incurred \$14,855.02 in litigation costs and expenses, which include filing fees, service of process fees, travel costs, computerized legal research and document retrieval, and postage. Shank Aff. ¶ 17. Each of these costs and expenses were reasonably incurred and were appropriate and necessary to the effective prosecution of this case. *Id.* Expenses of this type are typically awarded to class counsel. *See* 2 Joseph M. McLaughlin, MCLAUGHLIN ON CLASS ACTIONS § 6:24 (8th ed. 2011) (noting that “class counsel also is entitled to reimbursement from the class recovery (without interest) for the costs and reasonable out-of-pocket expenses incurred in prosecuting the litigation”); *Hale v. Wal-Mart Stores, Inc.*, Nos. 01CV218710, 02CV227674, 2009 WL 2206963, ¶ 30 (Mo. Cir. Ct. Jackson Cnty. May 15, 2009) (Midkiff, J.) (“computer-assisted research, photocopying, telephone, facsimile charges, postal messenger, express mail, deposition fees, transcripts, expert witnesses, travel and meals, and subpoena services are reasonably incurred in connection with the prosecution of a [modern], complex litigation.”).

Shank Aff. ¶ 17. Instead, Class Counsel has prosecuted this action solely on a contingency basis, incurring the substantial risk that it might not receive any compensation at all. *See id.* Another factor supporting the application of a multiplier is that Class Counsel achieved the settlement “in a time and cost-efficient manner, without expending thousands of additional hours engaging in protracted litigation.” *McLennan v. LG Electronics USA, Inc.*, No. 2:10-cv-03604 (WJM), 2012 WL 686020 at *10 (D.N.J. Mar. 2, 2012) (applying multiplier of 2.93). Furthermore, application of a multiplier in this case (as well as in similar cases) will help ensure that qualified counsel are willing to incur significant risks of non-payment in future cases and, therefore, will promote the remedial and deterrent purposes of the MMPA. *See Zweig v. Metro St. Louis Sewer Dist.*, 412 S.W.3d 223, 250 (Mo. banc 2013) (finding a multiplier justified in the case to ensure adequate representation for similar claims in the future); *Lealao v. Beneficial California, Inc.*, 82 Cal. Rptr. 4th 19, 53, 97 Cal. Rptr. 797, 823 (Cal. Ct. App. 1st Dist. 2000) (class action “fee awards that are too small can also be problematic, as they chill the private enforcement essential to the vindication of many legal rights and obstruct the representative actions that often relieve the courts of the need to separately adjudicate numerous claims”).

II. The Requested Incentive Awards are Reasonable and Should Be Approved.

Plaintiffs and Class Counsel also apply for incentive awards to Plaintiffs Michael Taylor, Dawn Fortner, and Catherine Gemkow to recognize their initiative and efforts in bringing and prosecuting this case on behalf of the Class. Plaintiffs and Class Counsel respectfully request that the Court approve a reasonable incentive award of \$5,000.00 to each Plaintiff. “The purpose of incentive awards, or supplemental compensation, for class representatives is to encourage people with significant claims to pursue actions on behalf of others similarly situated.” *Hale*, 2009 WL 2206963, ¶ 43; *see also* MCLAUGHLIN ON CLASS ACTIONS, *supra*, § 6:28 (“[I]t is fair

and reasonable to compensate class representatives, ordinarily within the range of \$1,000-\$20,000, for the efforts they make in obtaining a recovery on behalf of the class.”); *Caligiuri v. Symantec Corp.*, No. 16-2015, 2017 WL 1521523, at *6 (8th Cir. Apr. 28, 2017) (“courts in this circuit regularly grant service awards of \$10,000 or greater”); *Bachman*, 2010 WL 5648344, ¶ 4 (awarding \$10,000 each to the two representative plaintiffs); *Hale*, 2009 WL 2206963, ¶ 46 (awarding \$20,000 to each of the class representatives). In other words, “incentive awards promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits.” *Ketty v. Parkinson’s Specialty Care, LLC*, No. 14-cv-04849 (MJD/JSM), 2016 WL 3036300, at *2 (D. Minn. May 27, 2016). In determining an incentive award, the Court should consider: “(1) the actions the named class representatives have taken to protect the interests of the class; (2) the degree to which the class has benefited from those actions; and (3) the amount of time and effort the named class representatives expended in pursuing the litigation.” *Hale*, 2009 WL 2206963, ¶ 43.

Here, Plaintiffs have been instrumental to the prosecution and successful resolution of this case. Their contributions have been active and meaningful throughout the case, from the pre-suit investigation to the negotiation of the Settlement and resolution of the case. As a result of Plaintiffs’ dedication to the Class, Class Counsel was able to prosecute this action and achieved an excellent result for the entire Class. Simply put, the substantial results obtained for the Class would not have been possible without the efforts of Plaintiffs. *See In re Aquila ERISA Litig.*, No. 04-00865-CV-DW, 2007 WL 4244994, at *3 (W.D. Mo. Nov. 29, 2007) (awarding incentive awards ranging from \$5,000 to \$25,000 to the named plaintiffs, reasoning that “[w]ithout the participation of the named plaintiffs, there would have been no case and no settlement”). In light of the substantial benefits provided by the Settlement, which Plaintiffs

made possible through their initiative and efforts, Plaintiffs and Class Counsel submit that the requested incentive award of \$5,000 per Plaintiff is fair and reasonable. *See Jordan v. Paul Financial, LLC*, No. C 07-04496 SI, 2013 WL 6086037, at *3 (N.D. Cal. Nov. 19, 2013) (“In general, courts have found incentive awards of \$5,000 for service to a class to be presumptively reasonable.”).

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court award Class Counsel Shank & Moore, LLC \$655,000 in reasonable attorney’s fees and expenses and \$5,000 incentive awards to Plaintiffs Michael Taylor, Dawn Fortner, and Catherine Gemkow.

Respectfully submitted,

SHANK & MOORE, LLC

By: /s/ Christopher S. Shank
Christopher S. Shank, MO #28760
David L. Heinemann, MO #37622
Stephen J. Moore, MO #59080
1968 Shawnee Mission Parkway,
Suite 100
Mission Woods, Kansas 66205
Telephone: 816.471.0909
Facsimile: 816.471.3888
chris@shankmoore.com
davidh@shankmoore.com
sjm@shankmoore.com

*Attorneys for Plaintiffs Michael Taylor, Dawn
Fortner and Catherine Gemkow*

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing document was eFiled with the Court on July 27, 2017, which shall send a notice of electronic filing to the following counsel of record:

Counsel for Defendants

Daniel E. Tranen
Michael S. Weisenbach
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
101 West Vandalia Street, Suite 220
Edwardsville, Illinois 62025

Steven P. Kuenzel
ECKELKAMP KUENZEL LLP
200 West Main Street
P.O. Box 228
Washington, MO 63090

Counsel for Reed Objectors

Joseph A. Kronawitter
HORN AYLWARD & BANDY, LLC
2600 Grand Boulevard, Suite 1100
Kansas City, MO 64108

The undersigned further certifies that on July 27, 2017, the foregoing document was served on the following by email:

Counsel for Reed Objectors

Robert Horn
HORN AYLWARD & BANDY, LLC
2600 Grand Boulevard, Suite 1100
Kansas City, MO 64108
rhorn@hab-law.com

Timothy G. Blood
Jennifer L. MacPherson
BLOOD HURST & O'REARDON, LLP
701 B Street, Suite 1700
San Diego, CA 92101
tblood@bholaw.com
jmacpherson@bholaw.com

Counsel for Objector Tisha Carey

Richard E. Quintillone II
Quintillone & Associates
22974 El Toro Road, Suite 100
Lake Forest, CA 92630-4961
REQ@Quintlaw.com

The undersigned further certifies that on July 27, 2017, the foregoing document was served on the following by FedEx for next-day delivery:

Objector Victoria M. Mateer

Victoria M. Mateer
315 Freedom Avenue
Upland, CA 91786

Objector David J. Marklein

David J. Marklein
2535 W. Glenmoor Lane
Janesville, WI 53545

/s/ Christopher S. Shank

Attorney for Plaintiffs

EXHIBIT A

Affidavit of Christopher S. Shank

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE**

MICHAEL TAYLOR, et al.,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. 1616-CV11531
)	
DYNAMIC PET PRODUCTS, LLC et al.,)	Division No. 16
)	
Defendants.)	

AFFIDAVIT OF CHRISTOPHER S. SHANK

STATE OF KANSAS)
) ss.
COUNTY OF JOHNSON)

Christopher S. Shank, being duly sworn, deposes and states that:

1. I was admitted to practice law in the State of Missouri in 1980, and have been a licensed Missouri attorney in good standing continuously since that time – nearly thirty-seven (37) years. I am a member (partner) in Shank & Moore, LLC (“Shank & Moore”), previously known as Shank & Hamilton, P.C., which is Class Counsel in the above-captioned case. Throughout my career, I have handled and/or have been involved in many complex commercial litigation matters, including numerous class action lawsuits.

2. I have been actively involved in the prosecution of the instant class action case and, along with my partners David L. Heinemann and Stephen J. (“S.J.”) Moore, have been and remain personally responsible for managing the legal services that have been rendered in this case on behalf of Plaintiffs Michael Taylor, Dawn Fortner and Catherine Gemkow (“Plaintiffs”) and the Class. I have personal knowledge of the matters set forth herein and submit this

Affidavit in support of Plaintiffs' and Class Counsel's Application for an Award of Attorneys' Fees and Expenses and Incentive Awards to Class Representatives.

Summary of the Instant Litigation, Settlement Negotiations, and Settlement

3. This case involves alleged misrepresentations in the marketing and sale of The Real Ham Bone for Dogs (the "Product") by Defendants Dynamic Pet Products, LLC and Frick's Meat Products, Inc. ("Defendants"). Specifically, Plaintiffs allege that Defendants have falsely represented the Product as safe and appropriate for dogs, when it actually is prone to splinter and cause serious injuries when dogs chew the product, and that Defendants' conduct violates the Missouri Merchandising Practices Act ("MMPA").

4. Class Counsel filed this class action lawsuit after conducting research and investigation into key factual and legal issues. This research and investigation included an investigation into Defendants' Product, Defendants' marketing and advertising practices concerning the Product, and complaints submitted online by other purchasers of the Product. Through this investigation, Class Counsel found that numerous purchasers of the Product made similar complaints about the Product that would justify a class action. Class Counsel also evaluated the legal issues likely to arise in litigating the case.

5. Plaintiffs retained Class Counsel to file a claim on their behalf and on behalf of a putative class of consumers for violation of the Missouri Merchandising Practices Act. Class Counsel drafted Plaintiffs' petition and filed it on May 16, 2016.

6. To defend themselves against the claims asserted by Plaintiffs, Defendants engaged skilled and sophisticated defense counsel from the law firm Wilson Elser Moskowitz

Edelman & Dicker LLP. Defendants strenuously denied the factual and legal allegations in the Petition and filed a motion to dismiss the Petition on July 13, 2016.

7. At Defendants' invitation, Class Counsel attended a mediation in San Diego, California in July 2016 conducted in connection with another pending case, *Reed, et al. v. Dynamic Pet Products, LLC, et al.*, Case No. 3:15-cv-00987-WQH-DHB, United States District Court for the Southern District of California. That mediation was unsuccessful.

8. After that mediation, Class Counsel prepared and Plaintiffs filed extensive suggestions in opposition to Defendants' motion to dismiss on August 15, 2016. Preparing these suggestions in opposition required Class Counsel to undertake additional legal research and analysis of the various arguments raised by Defendants in support of their motion.

9. Plaintiffs' opposition to Defendants' motion to dismiss was successful, as the Court denied the motion in its entirety by order dated November 21, 2016.

10. While the motion to dismiss was pending, Class Counsel prepared comprehensive interrogatories, requests for admission, and document requests to Defendants, which Plaintiffs served on September 9, 2016. After Defendants responded to these discovery requests, Class Counsel challenged many of the responses and objections as improper and gained Defendants' agreement to supplement their responses with additional information. Defendants likewise served interrogatories, requests for admission and document requests on Plaintiffs, requiring Class Counsel to obtain the information and documents necessary to respond to these requests.

11. Through Class Counsel's work, Plaintiffs also obtained discovery from third parties. Plaintiffs served subpoenas on and obtained documents from the Better Business Bureau of Eastern Missouri and Southern Illinois and the Missouri Department of Agriculture, as well as

obtaining documents from the United States Food and Drug Administration pursuant to a Freedom of Information Act request.

12. Beginning in late 2016, Defendants produced over 39,000 pages of documents to Plaintiffs. Class Counsel devoted significant efforts to reviewing the documents produced by Defendants.

13. On February 16, 2017, a mediation conference was conducted in Kansas City, Missouri before John R. Phillips. A second mediation conference was held on March 16, 2017. Preparing for and participating in the mediation conferences, as well as related discussions before and after these conferences took a substantial amount of time.

14. Through the mediation process, the parties reached an agreement to settle the case. The essential terms of the agreement were outlined in a Term Sheet prepared by Class Counsel and defense counsel, which was executed on April 4, 2017. Class Counsel then did the majority of the work in preparing the comprehensive settlement agreement dated April 18, 2017, and through Class Counsel's efforts the Court granted preliminary approval of the settlement on April 19, 2017.

15. After the Court granted preliminary approval of the settlement, Class Counsel has worked with the settlement administrator, Dahl Administration, in providing notice to Class members and addressing issues arising with respect to Class members' claims.

16. As a result of the work described above, Class Counsel has succeeded in obtaining a valuable settlement providing \$2,400,000 in benefits to the settlement Class. The benefits include \$1,025,000 allocated for product purchase reimbursement claims and \$325,000

for pet injury/property damage claims, \$335,000 for notice and administration costs, \$700,000 for attorneys' fees, and \$15,000 for incentive awards to the named plaintiffs.

Attorneys' Fees and Expenses Incurred

17. Class Counsel has prosecuted this class action lawsuit on a contingency fee basis. To date, Class Counsel has not received any compensation or reimbursement for the substantial resources – both in time and money – that it has dedicated, or for the substantial risk that it has incurred, with respect to prosecuting this complex class action lawsuit. Consistent with the contingent-fee model and the percentage-of-the fund approach discussed below, Class Counsel requests a total award of \$655,000 for reasonable attorneys' fees and litigation expenses. As part of the \$655,000, this request seeks reimbursement of \$14,855.02 in litigation costs and expenses, which include filing fees, service of process fees, travel costs, copy charges, computerized legal research and document retrieval, and postage. Each of these costs and expenses were reasonably incurred and were appropriate and necessary to the effective prosecution of this case.

18. In my professional judgment, based on nearly thirty-seven (37) years of experience litigating high-stakes, complex commercial cases, including numerous class actions, the fee and expense award requested by my firm is reasonable and should be approved.

19. In connection with my class action practice, I keep myself apprised of national, regional, and local attorney hourly rates and, in doing so, routinely consult published data about such hourly rates. I also make reasonable efforts to keep myself apprised of relevant Missouri and other case law concerning awards of attorneys' fees in class actions. One such resource I have consulted in this regard is the "Billing Rates 2013" issue of *Missouri Lawyers' Weekly*, published on June 17, 2013. Based on this data and my own personal experience, I have become

knowledgeable about attorneys' fees that have been charged and awarded as well as the attorney hourly rates charged and awarded in similar class action cases.

20. For class actions handled on a contingent basis, it is my belief and understanding, based on my experience as a Missouri commercial litigation attorney, that Missouri courts typically award class counsel anywhere from twenty-five percent (25%) to fifty percent (50%) of the total amount of a common fund or the total value of the benefit created by a class settlement. *See, e.g., Bachman v. A.G. Edwards, Inc.*, 344 S.W.3d 260, 267 (Mo. Ct. App. 2011) (holding that a fee award of one-third of settlement is "not unreasonable" in cases involving complex litigation or in the class action context); *Hale v. Wal-Mart Stores, Inc.*, Nos. 01-CV-218701, 02-CV-227674, 2009 WL 2206963, ¶ 6 (Mo. Cir. Ct. May 15, 2009) ("The 38.3% fee requested in this case is customary and well in line with attorneys' fees awards in similar cases."); William B. Rubenstein et al., *NEWBERG ON CLASS ACTIONS* § 15:83 (5th ed. December 2016 update) ("Usually, 50 percent of the fund is the upper limit on a reasonable fee award from a common fund, . . . though somewhat larger percentages are not unprecedented.").

21. As described above, the Settlement achieved in this case through Class Counsel's efforts provides \$2,400,000 in benefits to the Class. The attorneys' fee and expense award of \$655,000 requested in the Application represents approximately 27.3% of the total \$2,400,000 value of the Settlement.

22. The reasonableness of my firm's instant request is confirmed by a lodestar cross-check. The total number of hours that Class Counsel's attorneys and paralegals devoted to this case through June 30, 2017 is reflected in the table attached hereto as Exhibit A. The table is organized by timekeeper and shows the lodestar calculation based on the hours worked and the

hourly rate of each respective attorney or paralegal. As shown in the table, the base lodestar for the services rendered by my law firm with respect to the instant lawsuit is \$613,385.00. Thus, the total request of \$655,000 (including incurred litigation expenses) would reflect a multiplier of approximately 1.07 times this lodestar. In my experience as a commercial litigation and class action lawyer, such a modest multiplier is quite reasonable in light of the multipliers approved in the past by Missouri courts in class action lawsuits. *See, e.g., Hale*, 2009 WL 2206963, at ¶ 6 (finding a 2.3 lodestar multiplier reasonable); *McLean v. First Horizon Home Loan Corp.*, No. CV228590, 2007 WL 5674689, ¶ 11 (Mo. Cir. Ct. Jackson Cnty. June 7, 2007) (Scoville, J.) (approving a 2.75 lodestar multiplier to account “for the significant risk of non-recovery” and other considerations). I believe a multiplier would be appropriate in this case because the fee to be received by Class Counsel was always contingent, unlike the fees of counsel for Defendant, taking this case precluded Class Counsel from accepting other employment that would have been less risky, and Class Counsel’s work on this case delayed Class Counsel’s ability to perform other work.

23. Based on my knowledge and experience as a commercial litigation and class action attorney, as well as my review and knowledge of reported hourly rates typically charged in the Kansas City area for class actions, the hourly rates charged by Class Counsel for its legal services rendered in this case – lead counsel at \$650 per hour, partners at \$550 per hour, and paralegals at \$175 per hour – are consistent with the rates customarily charged in the region by similarly experienced and skilled attorneys for similar class action representation. In *Berry v. Volkswagen Group of Am., Inc.*, 397 S.W.3d 425 (Mo. banc 2013), for instance, the Supreme Court of Missouri affirmed the trial court’s award of attorneys’ fees based on a lodestar

calculation with rates of up to \$650 per hour. *Id.* at 432 (stating that “Class counsel’s . . . rates were reasonable.”). Similarly, in *Plubell v. Merck & Co. Inc.*, No. 04CV235817-01 (Mo. Cir. Ct. Jackson Cnty., Mar. 15, 2013) (Roldan, J.), the court awarded reasonable attorneys’ fees to class counsel and found that rates as high as \$675 per hour for partner time “are well within the rates normally charged for similar work by similarly qualified counsel in Missouri.” *Id.*, Final Judgment and Order of Final Settlement Approval and Dismissal with Prejudice filed March 15, 2013 at 8-9. More recently, in *Pollard v. Remington Arms Co.*, No. 4:13-CV-00086-ODS, 2017 WL 991071 (W.D. Mo. Mar. 14, 2017), the court approved hourly rates for class counsel ranging from \$261 through \$897 and found that the average hourly fees were “not dissimilar to those hourly rates charged in the Kansas City area”). *Id.* at *6.

24. As shown in Exhibit A, Class Counsel has invested over 1,000 hours in the prosecution of this class action case to its successful conclusion with the Settlement it achieved for the Class. Because Class Counsel represents Plaintiffs and the Class on a contingency fee basis, it has an interest in prosecuting this matter efficiently.

25. The overall degree of professional ability and skill required to prosecute this case and achieve a successful outcome was high. The attorneys at Shank & Moore have substantial experience in litigating complex commercial cases, including substantial experience in litigating class action lawsuits. Shank & Moore and its attorneys have been appointed and served as counsel to the plaintiff classes in the following class actions: *Williams, et al. v. JPMorgan Chase Bank, N.A., et al.*, Case No. 0516-CV23560, Circuit Court of Jackson County, Missouri; *Kelly v. popchips, Inc.*, Case No. 1316-CV11037, Circuit Court of Jackson County, Missouri; *Williams, et al. v. Wells Fargo Bank, N.A.*, Case No. 1316-CV08606, Circuit Court of Jackson

County, Missouri; *Curts v. Waggin' Train, LLC, et al.*, Case No. 1316-CV02706, Circuit Court of Jackson County, Missouri; *Ravencamp v. Lenovo (United States), Inc. Bridges v. Coca-Cola Co., et al.*, Case No. 4:13-cv-00644-BCW, United States District Court for the Western District of Missouri, *consolidated with Volz, et al. v. Coca-Cola Co., et al.*, Case No. 1:10-cv-00878, United States District Court for the Southern District of Ohio.

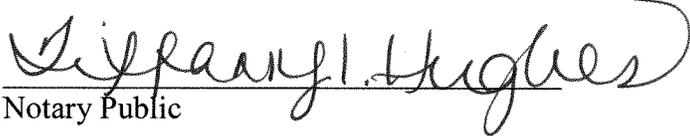
26. Without the experience, professional ability, and determination of the attorneys in my firm during the prosecution of this case and negotiation of the Settlement and Settlement Agreement, the Class would not have obtained such a favorable recovery.

FURTHER AFFIANT SAYETH NOT.



Christopher S. Shank

Sworn to before me and subscribed in my presence this 27th day of July, 2017.



Notary Public

My commission expires:

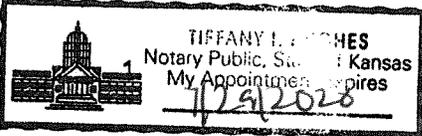


Exhibit A

Summary Table of Lodestar Calculation

Lodestar Summary

Michael Taylor, et al. v. Dynamic Pet Products, LLC, et al.
Case No. 1616-CV11531
Circuit Court of Jackson County, Missouri

Attorney	Hourly Rate	Total Hours	Lodestar
Shank, Christopher (lead counsel)	\$650	502.70	\$326,755.00
Heinemann, David (partner)	\$550	437.90	\$240,845.00
Moore, S.J. (partner)	\$550	57.90	\$31,845.00
Attorney Totals:		998.50	\$599,445.00

Paralegal	Hourly Rate	Total Hours	Lodestar
Lancey, Kathy	\$175	23.20	\$4,060.00
Hughes, Tiffany	\$175	56.40	\$9,870.00
Paralegal Totals:		79.60	\$13,930.00

GRAND TOTALS: 1078.10 \$613,385.00