IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

ERIN SMID, STACY BOWLAND and BRANDIE LEE, *individually and on behalf of all others similarly situated,*	)	
Plaintiffs,	)	
v.	)	**Case No. 20L0190**
NUTRANEXT, LLC, NUTRANEXT BUSINESS, LLC, NUTRANEXT EHEALTH, LLC, RAINBOW LIGHT NUTRITIONAL SYSTEMS, LLC, RENEW LIFE FORMULAS, LLC, EVEREST NEOCELL LLC, NUTRANEXT DIRECT, LLC, and NATURE'S PRODUCTS, INC.,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES,
COSTS, AND SERVICE AWARDS, AND MEMORANDUM IN SUPPORT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. INTRODUCTION

On April 16, 2020, this Court preliminarily approved a proposed class action settlement between Plaintiffs Erin Smid, Stacy Bowland, and Brandie Lee (collectively "Plaintiffs"), and Defendants Nutranext LLC, Nutranext Business, LLC, Nutranext Ehealth, LLC, Rainbow Light Nutritional Systems, LLC, Renew Life Holdings Corporation, Renew Life Formulas, LLC, Everest Neocell LLC, Nutranext Direct, LLC and Nature's Products LLC (collectively, "Defendants"). Class Counsel's efforts made $6,750,000 available to class members, inclusive of attorneys' fees, costs, and Plaintiffs' service awards. The settlement is claims-made, and the class is open to:

> (1) all individuals in the United States except California residents who purchased any Rainbow Light Prenatal or Rainbow Light Postnatal products between December 1, 2015 and April 16, 2020; and
>
> (2) all individuals in the United States who purchased any Rainbow Light Non-Prenatal products and Non-Postnatal products (*i.e.* all other Rainbow Light vitamins, multivitamins, supplements or other products not specifically labeled as suitable for prenatal or postnatal or lactating mothers) between December 1, 2015 and April 16, 2020.

Class Counsel have zealously prosecuted Plaintiffs' claims, achieving the settlement only after extensive research and informal discovery; briefing and mediation with Hon. Wayne R. Andersen (Ret.); and protracted post-mediation negotiations relating to the mediator's proposal.

As compensation for the benefit conferred upon the Settlement Class, Class Counsel respectfully seek combined attorneys' fees and costs in an amount 26.6% of the total value of the settlement—namely, $1,800,000. This request should be approved because (1) it represents a percentage of the fund well under a range of fees typically awarded by Illinois courts in class action settlements; and (2) represents a reasonable and appropriate amount in light of the substantial risks

presented in prosecuting this action. Plaintiffs further seek service awards in the amount of $9,000, or $3,000 per Plaintiff for their work on behalf of the Class.

II. PROCEDURAL BACKGROUND[1]

a. Early Investigation and Communications

On August 14, 2019, the City Attorney for the City of Los Angeles filed suit against many of the Defendants in this matter in connection with Defendants' advertising of certain vitamins at issue in this case as being, among other things, "free of heavy metals." *See* Declaration of Gary E. Mason in Support of Plaintiff's Motion for Preliminary Approval ("Mason MPA Dec."), ¶ 5, previously filed with this Court on March 3, 2020. The City Attorney brought suit on behalf of the People of the State of California. *Id.* Defendants did not contest the allegations in open court, choosing instead to settle the claims. *Id.* The settlement agreement was filed contemporaneously with the Complaint. *Id.* In settling, Defendants agreed to cease the complained-of conduct, to do product testing every six months to confirm that the lead did not exceed 0.2 micrograms per day on pre-natal products and to set up a $1,500,000 fund for restitution to California consumers who purchased Defendants' prenatal products. *Id.*

Like the State-case brought in California, Plaintiffs' claims in this litigation arise out of the alleged false advertising and mislabeling of Defendants' prenatal vitamins. According to Plaintiffs' Complaint, Defendants have made affirmative representations that their vitamins are "free of heavy metals." *See* Mason Dec., ¶ 7. According to the Complaint, Defendants further represented, under a heading titled "Purity," that it uses botanical materials with the lowest detectable traces of lead levels on the market." *Id.* According to the Complaint, testing showed

[1] To the extent they have not changed, the description of the procedural background of this case has been adopted from Plaintiffs' Memorandum in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, filed on or about March 20, 2020.

these representations to be inaccurate. According to the Complaint, Defendants prenatal vitamin line tested positive for lead, arsenic and/or cadmium. *Id.* Plaintiffs allege these misrepresentations and/or omissions constitute violations of state consumer fraud acts, breaches of express and implied warranties, and unjust enrichment. *Id.* at ¶ 13. Defendants dispute each and every one of these allegations.

b. History of Negotiations

On August 23, 2019, Proposed Class Counsel, on behalf of Plaintiffs Erin Smid, Stacy Bowland, and Brandie Lee, sent a demand letter to certain Defendants outlining Plaintiffs' claims and alleging violations of, among other things, various consumer protection statutes and warranty laws in connection with Defendants' sale of certain Rainbow Light Vitamins. *Id.* at ¶ 12. In essence, Plaintiffs' allegations and the proposed Class cover those State claims and individual potential Class Members left without resolution by the California case. *Id.*

In the weeks leading up to the scheduled mediation, Plaintiffs propounded informal documents requests and the Parties exchanged informal discovery sufficient for Proposed Class Counsel to evaluate the claims, damages, assess any proposed settlement offers, and make appropriate demands. *Id.* at ¶ 13. In addition, prior to the mediation, Plaintiffs and Defendants submitted detailed mediation briefs to Judge Andersen, setting forth their respective views on the strengths of their cases. *Id.* On November 22, 2019, the parties participated in an all-day mediation with respected mediator the Honorable Wayne R. Andersen (Ret.) of JAMS. *Id.* at ¶ 14. Negotiations continued in the weeks after the mediation, eventually culminating in a Settlement Agreement—only reached pursuant to a mediator's proposal—that was finalized in early February 2020. *Id.* at ¶ 15.

III. THE SETTLEMENT[2]

a. Settlement Benefits

Through the Settlement, Defendants will make available to class members $6,750,000, which is structured to cover and include payments and distributions to eligible claimants, notice and administrative costs, attorneys' fees and expenses, and service awards to named representatives. *See* Mason Dec., ¶ 16, Ex. A. The Settlement Class includes:

> All individuals in the United States except California residents who purchased any Rainbow Light Prenatal or Rainbow Light Postnatal products between December 1, 2015 and the date of Preliminary Approval Order; and (2) all individuals in the United States who purchased any Rainbow Light Non-Prenatal products and Non-Postnatal products (*i.e.*, all other Rainbow Light vitamins, multivitamins, supplements or other products not specifically labeled as suitable for prenatal or postnatal or lactating mothers) between December 1, 2015 and the date of the Preliminary Approval Order.

Id. at ¶ 17.

Notably, under the Settlement Agreement, Claimants will be entitled to seek benefits whether or not they are able to provide proof that they purchased the products. *Id.* at ¶ 18, Ex. A. If the Claimant does not have a proof of purchase, the Claimant can recover $4 per bottle for pre-natal and post-natal products and $1 per bottle for non-prenatal and non-postnatal products, subject to a cap of $9.50 per household. *Id.* Where a Claimant can and does provide proof of purchase, the Claimant can recover $7 per bottle for pre-natal and post-natal products and $2 per bottle for non-prenatal and non- postnatal products, subject to a cap of $18 per household. *Id.* In the event that the total claims made exceed the aggregate benefit after paying the notice and administrative costs, attorneys' fees and expenses, and service awards, then the individual class benefit will be reduced pro rata. *Id.* at ¶ 19.

---

[2] The description of the Settlement of this case has also been largely adopted from Plaintiffs' Memorandum in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, filed on or about March 20, 2020.

In exchange for the Settlement Benefits, Class Members will release all claims, whether known or unknown, against the Defendants and other Released Persons relating to, arising out of, or concerning in any way the labeling, advertising, marketing, distributing, or selling of the subject products during the class period as defined in the class definition, including any allegation or claim in the Action involving, relating to, concerning or asserted against any Defendant or other Released Person, or that could have been asserted against any Defendant or Released Person in this or any other action. *Id.* at ¶ 20, Ex. A.

b. Attorneys' Fees, Costs, and Service Awards

Plaintiffs here seek $9,000, or $3,000 each, as Service Awards for bringing and participating in this lawsuit. In addition, Settlement Class Counsel seeks $1,800,000 in combined fees and costs—an amount equal to approximately 26% of the total value of the settlement. To date, Plaintiffs have received no objection to their requested fees, costs, or service awards. Declaration of Gary E. Mason in Support of Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, ("Mason MAFC Dec."), *filed herewith*, ¶ 10; Declaration of Gary M. Klinger in Support of Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, ("Klinger MAFC Dec."), *filed herewith*, ¶ 13. Defendants do not oppose either Plaintiffs' request for Service Awards or Class Counsels' request for fees and costs totaling $1,800,000.

IV. ARGUMENT

a. Plaintiffs' Request for Combined Fees and Costs in the Amount of 26.6% of the Total Settlement Fund is Inherently Reasonable and Should be Granted.

1. The percent-of-fund method of awarding fees is widely endorsed by Illinois Courts.

The common fund doctrine adopted by Illinois Courts allows one who "creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees." *Brundidge v. Glendale Federal*

Bank, F.S.B., 168 Ill. 2d 235, 238 (1995) *quoting Swedish Hosp.Corp. v. Shalala*, 1 F.3d 1261, 1265 (D.C. Cir. 1993). The doctrine stems from the Court's inherent equitable powers; by awarding fees and costs payable from the fund created for the benefit of the class the court can spread the cost of litigation proportionately among those who will benefit from the fund. *Brundidge v. Glendale Federal Bank, F.S.B.*, 128 Ill. 2d at 238, *citing Sprague v. Ticonic National Bank*, 307 U.S. 161, 167 (1939); *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980).

Although attorneys' fees have been awarded using two main metrics—percent-of-fund and lodestar—an early swing towards the lodestar approach has given way to a growing consensus that the percent-of-fund approach is more appropriate in common fund cases. The use of the percentage-of-fund approach in common fund cases likely flows from the fact that the lodestar method has been roundly criticized as "increase[ing] the workload of an already overtaxed judicial system, . . . [being] insufficiently objective and produc[ing] results that are far from homogenous, . . . creat[ing] a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law, . . . le[ading] to abuses such as lawyers billing excessive hours, . . . creat[ing] a disincentive for the early settlement of cases, . . . not provid[ing] the trial court with enough flexibility to reward or deter lawyers so that desirable objectives will be fostered, . . [and being] confusing and unpredictable in its administration. *Ryan v. City of Chicago*, 274 Ill.App.3d 913, 923 (1995) (summarizing findings of the Third Circuit task force appointed to compare the respective merits of the percent-of-recovery and lodestar methods).

On the other hand, the percent-of-fund method of awarding fees has been widely accepted by Courts in Illinois awarding fees from common funds, and is favored by the Seventh Circuit. *See Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill. 2d at 244 (finding "awarding attorney fees to plaintiffs' counsel based on a percentage of the fund held by the court is, overall, a fair and

expeditious method that reflects the economics of legal practice and equitably compensates counsel for the time, effort, and risks associated with representing the plaintiff class"); *Ryan v. City of Chicago*, 274 Ill.App.3d 913, 924 (1995) (approving the circuit court's award of a 33.33% fee of $33 million fund); *Sterk v. Path, Inc.*, No. 2015 CH 08609 (Cir. Ct. Cook. Cnty. Ill. September 21, 2015) (awarding 36% of class benefits); *Campos et al. v. KCBX Terminals, et al.*, N.D. Ill. Case No. 13 CV 08376 (granting attorney fee award of 35% of a $1.4 million fund); *Beesley v. International Paper* Company, 2014 WL 375432, *2 (2014) (noting that the Seventh Circuit uses the percentage basis rather than a lodestar or other basis for calculating fees and finding "[a] one-third fee is consistent with the market rate"); *Kolinek v. Walgreen Co.*, 2014 WL 3056813, *3-4 (N.D. Ill. July 7, 2014) (awarding 36% of class benefits secured under an $11 million common fund); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 599 (N.D. Ill. 2011) ("[a] number of fee awards in common-fund cases from within the Seventh Circuit show that an award of 33.3% of the settlement fund is within the reasonable range"); *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 598-600 (7th Cir. 2005) (finding that the district court was within its discretion in awarding lad counsel 30% of a $7.25 million settlement fund); *Meyenburg v. Exxon Mobil Corp.*, 2006 U.S. Dist. LEXIS 52962 at *2 (S.D. Ill. July 31, 2006) ("[t]he Court is independently aware that 33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace"); *see also Report of the Third Circuit Task Force*, 108 F.R.D. 237, 246–49 (1985) (concluding that the percentage of recovery fee was the best determinant of the reasonable value of services rendered by counsel in common fund cases).

2. *This case presented numerous risks, and Settlement Class Counsel pursued class-wide resolution despite the possibility they may recover nothing.*

"Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (citing *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986)). Thus, the risk of non-payment is a key consideration in assessing the reasonableness of a requested fee and must be incorporated into any ultimate fee award. *See Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir. 2007) (finding abuse of discretion where lower court, in applying percentage-of-the-fund approach, refused to account for the risk of loss on basis that "class actions rarely go to trial and that they all settle[,]" noting that "there is generally some degree of risk that attorneys will receive no fee (or at least not the fee that reflects their efforts) when representing a class because their fee is linked to the success of the suit[;] ... [b]ecause the district court failed to provide for the risk of loss, the possibility exists that Counsel, whose only source of a fee was a contingent one, was undercompensated").

Here Settlement Class Counsel retained clients for this case and pursued class-wide resolution knowing full well that the case may not bear fruit. While Plaintiffs believed they could prevail on their claims against Defendants, they were also aware that they would likely face several strong legal defenses including lack of reliance and materiality of website marketing statements, predominance of individualized issues and inability to demonstrate class-wide damages. Such defenses, if successful, could drastically decrease or eliminate any recovery for Plaintiffs and putative class members. Further, given the complexity of the issues and the amount in controversy, the defeated party would likely appeal any decision on either certification or merits.

3. *Settlement Class Counsel's request for 26.6% of the settlement fund for combined fees and costs is reasonable and well within the range accepted by Illinois Courts.*

Settlement Class Counsel here seek $1,800,000 for combined attorneys' fees and costs. It is well established that counsel who create a common fund are entitled to reimbursement of litigation costs and expenses. *Beesley v. Int'l Paper Co.*, No. 06- 703, 2014 WL 375432, *3 (S.D. Ill. Jan. 31, 2014) (citing Fed. R. Civ. P. 23; *Boeing*, 444 U.S. at 478). Due to Counsel's ability to settle the class early, costs currently total $23,555.86, and are comprised of mediation fees, research costs, and the cost to travel to mediation. *See* Mason MAFC Dec., ¶¶ 7-9; Klinger MAFC Dec., ¶ 12.

Moreover, as noted above, awards of attorneys' fees at 30% to 40% of the value of the common fund, ***plus*** the costs of litigation are the "norm" and regularly approved by Courts. *See Sterk v. Path, Inc.*, No. 2015 CH 08609 (awarding 36% of class benefits); *Taubenfeld v. Aon Corp.*, 415 F.3d at 598-600 (finding that the district court was within its discretion in awarding lad counsel 30% of a $7.25 million settlement fund, and noting a table of 13 cases in the Northern District of Illinois submitted by class counsel showing fees awarded ranged from 30% to 39% of the settlement fund); *Meyenburg v. Exxon Mobil Corp.*, 2006 U.S. Dist. LEXIS 52962 at *2 (noting 33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace).

Here, Settlement Class Counsel have worked, otherwise uncompensated, to create a $6,750,000 fund for Settlement Class Members. They seek $1,800,000—or just 26.6% of the common fund—in ***combined*** costs and fees. Such an amount is inherently reasonable and well within the range of percent-of-fund fees awarded by Illinois Courts in common fund cases.

b. Plaintiff's Request for Service Awards is Reasonable and Should be Granted.

For their efforts on the case, Plaintiffs seek an award of $3,000 each, or $9,000 total. In addition to lending their names to this matter, and thus subjecting themselves to public attention, Plaintiffs were actively engaged in this Action. Among other things, they (1) provided information to Class Counsel for the complaint and other pleadings; (2) reviewed pleadings and other documents, including the complaint; (3) communicated on a regular basis with counsel and kept themselves informed of progress in the litigation and settlement negotiations; and (4) reviewed and approved the proposed settlement. Mason MAFC Dec., ¶ 13; Klinger MAFC Dec., ¶ 16. Payments to class members representing the class are regularly approved. *GMAC Mortgage Corp. v. Stapleton*, 236 Ill. App. 3d 486, 497 (1st Dist. 1992). The amount of $3,000 per Plaintiff is regularly awarded by Illinois courts. *See, GMAC Mortgage Corp. v. Stapleton*, 236 Ill. App. 3d at 497 (approving $2,000 award to class representative); *Bryan v. Pittsburgh Plate Glass Co.*, 59 F.R.D. 616 (W.D. Pa. 1973) ($17,500 award provided to class representatives); *Ryan v. City of Chicago*, 274 Ill. App. 3d at 917 (approving award of $10,000 to each of two plaintiffs).

V. CONCLUSION

Settlement Class Counsel, with the help of Plaintiffs, have created a significant benefit available to class members. In return, they seek fees, costs, and service awards well within the lower ranges of those regularly approved by Illinois courts. The fees, costs, and service awards are inherently reasonable, and as such Plaintiffs respectfully request their approval.

Dated: June 16, 2020

Respectfully submitted,

/s/ Gregory L. Shevlin

Gregory L. Shevlin, IL #6199414
COOK, BARTHOLOMEW, SHEVLIN, COOK & JONES, LLP
12 West Lincoln St.
Belleville, IL 62220
Phone (618) 235-3500
Fax: (618) 235-7286
gls@cbsclaw.com

MASON LIETZ & KLINGER LLP
Gary M. Klinger (IL Bar No. 6303726)
227 W. Monroe Street, Suite 2100
Chicago, Illinois 60630
Phone: 312.283.3814
Fax: 773.496.8617
gklinger@masonllp.com

MASON LIETZ & KLINGER LLP
Gary E. Mason
5101 Wisconsin Avenue NW, Suite 305
Washington, DC 20016
Tel: 202-640-1168
Fax: 202-429-2294
gmason@masonllp.com

Attorneys for Plaintiffs and the Class