Buchanan
Ingersoll·Rooney

Mackenzie A. Baird
412 562 1825
mackenzie.baird@bipc.com

Union Trust Building
501 Grant Street, Suite 200
Pittsburgh, PA 15219-4413
T 412 562 8800
F 412 562 1041

June 2, 2022

VIA ECF
Hon. Sarah L. Cave
Daniel Patrick Moynihan United States Courthouse
500 Pearl St., Courtroom 18A
New York, NY 10007

Re: *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, MDL No. 2542; Response to Plaintiffs' Request for Briefing Schedule

Dear Judge Cave:

I write in response to Plaintiffs' request for a briefing schedule. ECF 1839. During the meet and confer process directed by Your Honor, Plaintiffs demanded that Keurig pay them **more than $2.5 million**. Yet Plaintiffs refused to provide the time records required to support any fee demand.[1] Instead, Plaintiffs said they would provide redacted billing records, but only *after* briefing their motion. This frustrated the meet and confer process that Your Honor directed.

Having lost this opportunity to narrow the issues, Keurig proposes a briefing schedule running from the date when Judge Broderick resolves Keurig's appeal of aspects of the March 28 Order, ECF 1816. The decision will provide useful guidance, and if there is still a dispute at that time, Keurig proposes the following:

[1] Plaintiffs demanded the massive sum of $1.8 million, May 18 Letter, Ex. A; May 25 Letter, Ex. B, but a week later said they fixed miscalculations and increased that to more than $2.5 million. May 27 Letter, Ex. C. Plaintiffs said Keurig was not entitled to see backup. It is black letter law that fee petitions must be supported by contemporaneous billing records. *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1154 (2d Cir. 1983) ("[We] announce for the future that contemporaneous time records are a prerequisite for attorney's fees in this Circuit. . . , any attorney . . .who applies for court-ordered compensation in this Circuit for work done after the date of this opinion must document the application with contemporaneous time records"); *see also Fisher v. SD Prot. Inc.,* 948 F.3d 593, 600 (2d Cir. 2020) ("The fee applicant must submit adequate documentation supporting the requested attorneys' fees and costs" such as "receipts and invoices submitted by counsel"); *Scott v. City of New York*, 626 F.3d 130, 133 (2d Cir. 2010) ("Absent unusual circumstances attorneys are required to submit contemporaneous records with their fee applications . . . *Carey* establishes a strict rule from which attorneys may deviate only in the rarest of cases.").

- 30 days from Judge Broderick's final ruling, Plaintiffs are ordered to provide Keurig with the billing records supporting any fees they still demand. [2]
- For 30 days after that, the parties are directed to meet and confer with the benefit of this information, which should facilitate a narrowing of the issues.
- If briefing is still needed, Plaintiffs are directed to file their fee application at the end of the meet and confer period.
- 30 days after Plaintiffs' file their fee application Keurig is directed to file any opposition.[3]

Keurig's proposal would be in keeping with the practice in this Circuit, which routinely has parties litigate fee petitions following resolution of any appeal.[4] There is no reason to deviate here from this commonsense practice, which conserves the resources of the parties and the Court. Nor was there a need for Keurig to request a stay of the Court's March 28 Order. The Court directed the parties to meet and confer and they have done so. Keurig proposed this schedule once it became clear that an agreement could not be reached and resolution of the inevitable fee petition would require significant resources of the parties and the Court. Keurig's proposal is the most efficient way forward.

Keurig has also repeatedly offered to pay reasonable vendor costs not subject to appeal if Plaintiffs would provide documentary support and payment information. *See* May 18 Letter, Ex. A; May 27 Letter, Ex. C. Keurig requests that Your Honor direct Plaintiffs to provide Keurig with this information within seven days, such that issues not subject to appeal can be resolved.

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[2] The billing records to be provided by Plaintiffs must include individual billing rates and be sufficiently detailed to enable Keurig and the Court to evaluate the appropriateness of the request with only those limited redactions necessary to protect privilege and attorney work product.

[3] This is the schedule that Keurig proposed on May 27 and that Plaintiffs stated they "generally agree[d]" with, other than when the schedule should begin. *See* May 27 Letter, Ex. C; May 31 Letter, Ex. D. Plaintiffs have strongly opposed having reply briefs in this litigation, *see, e.g.*, ECF 1715, and none is needed here. Indeed, a reply would only increase fees spent fighting about fees.

[4] *See, e.g.,* Fed. R. Civ. P. 58 (Advisory Committee Notes, 1993 Amendments) ("Particularly if the claim for fees involves substantial issues or is likely to be affected by the appellate decision, the district court may prefer to defer consideration of the claim for fees until after the appeal is resolved."); *Cf. Allen v. Westpoint-Pepperell, Inc.*, 11 F. Supp. 2d 277, 291-92 (S.D.N.Y. 1997) (holding that "the amount of attorneys' fees to which plaintiffs are entitled will not be determined prior to any appeal" because "[i]t would be inefficient to spend time calculating the exact amount of attorneys' fees owed" while the fee award is on appeal); *Apex Emp. Wellness Servs., Inc. v. APS Healthcare Bethesda, Inc*., 2017 WL 456466, at *12 (S.D.N.Y. Feb. 1, 2017) ("[A] district court is not required to resolve the motion for attorneys' fees before the appeal is completed. Indeed, Courts in this Circuit regularly defer the award of attorneys' fees … pending the resolution of an appeal on the merits").

Respectfully submitted,

/s/Mackenzie A. Baird

Mackenzie A. Baird

cc: Counsel of Record, via ECF

EXHIBIT A

Buchanan Ingersoll·Rooney

Mackenzie A. Baird
412 562 1825
Mackenzie.baird@bipc.com

Union Trust Building
501 Grant Street, Suite 200
Pittsburgh, PA 15219-4413
T 412 562 8800
F 412 562 1041

May 18, 2022

VIA EMAIL

Lauren Duxstad, Esq.
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166

Laura Komarek, Esq.
Alston & Bird
1201 West Peachtree Street, Suite 4900
Atlanta, GA 30309

William V. Reis, Esq.
Robins Kaplan LLP
399 Park Avenue, Suite 3600
New York, NY 10022

Michael M. Buchman, Esq.
Motley Rice LLC
777 Third Avenue, 27th Floor
New York, NY 10017

Re: ***In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation*, MDL No. 2542**
Meet and Confer Regarding Plaintiffs' Fees and Expenses

Dear Counsel:

I write to follow up on our May 16, 2022 meet-and-confer regarding the fees and expenses that Plaintiffs TreeHouse, McLane, and DPPs seek to recover under Judge Cave's March 28 Opinion & Order, ECF 1806.

Based on the information that you provided on the call, Keurig understands that Plaintiffs seek to recover approximately $1.8 million in attorneys' fees and expenses, as broken down below in each of the seven categories stated in the Opinion.

Category	**Plaintiffs' Requested Fees and Expenses**
(i) Plaintiffs' efforts from May 7, 2018 to July 25, 2018 to determine deficiencies in Keurig's productions for its Agreed Custodians;	**Total: $150,000**
	TreeHouse: $150,000
	McLane: $0
	DPPs: $0
(ii) preparing for and participating in meet-and-confer communications and calls concerning Keurig's productions for its Agreed Custodians between July 25, 2018 and May 20, 2019;	**Total: $204,500**
	TreeHouse: $200,000
	McLane: $4,500
	DPPs: $0

Category	Plaintiffs' Requested Fees and Expenses
(iii) additional measures with respect to the hard drives for Rathke and Stacy that TreeHouse sent to its vendor;	**Total: $11,400**
	TreeHouse: $2,900 (fees), $8,500 (vendor expense)
	McLane: $0
	DPPs: $0
(iv) investigating discrepancies in Keurig's CommVault productions;	**Total: $131,500**
	TreeHouse: $120,000 (fees), $11,500 (vendor expense)
	McLane: $0
	DPPs: $0
(v) investigating discrepancies in Keurig's transactional data from February 7, 2019 until February 2020;	**Total: $65,000**
	TreeHouse: $65,000
	McLane: $0
	DPPs: $0
(vi) Plaintiffs' experts' costs while working with Keurig's deficient transactional data between February 7, 2019 and February 2020;	**Total: $689,000**
	All Plaintiffs: $485,000 (joint processing)
	TreeHouse: $160,000
	McLane: $44,000
	DPPs: $0
(vii) preparing the Motion and presenting oral argument.	**Total: $546,000**
	TreeHouse: $490,000
	McLane: $56,000
	DPPs: $0

With respect to Category (iii), please provide the vendor's invoices for the efforts to recover data from Ms. Rathke's and Ms. Stacy's old hard drives. Keurig has not appealed that ruling, and would like to confirm the invoices so as to arrange payment. Please also provide payment information (wire transfer, W-9, etc.). As I indicated during our call, we disagree that the Order contemplated TreeHouse's recovery of attorneys' fees for facilitating these efforts.

As for the other fees and expenses requested, the limited information provided is not sufficient to evaluate the reasonableness of the request. We ask that Plaintiffs provide the following information: (a) the working attorneys' rates and hours for each category; (b) the underlying attorney time entries that substantiate the hours worked/time expended for each category; (c) the underlying expert or vendor invoices showing the hourly rates, hours worked, and task descriptions for the fees and expenses that Plaintiffs now seek to recover.

Keurig requires this information to assess the reasonableness of the fees and expenses, as well as to confirm that they are wholly within the instructions that Judge Cave outlined in the Opinion. As you know, courts require this basic information to support fee petitions, and you should provide this information to Keurig now to make this a meaningful, good faith meet and confer process. *See, e.g., N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983) (fee application "must" be supported by "contemporaneous time records" which "should specify, for each attorney, the date, the hours expended, and the nature of the work done").

Based on the limited information that Plaintiffs were willing to share on our May 16 call, we have serious concerns as to propriety of the claimed fees and expenses. As just one example, in Category (ii), TreeHouse seeks to recover $200,000 in connection with 30 meet-and-confers, but based on our records the majority of these meet-and-confers did not "concern Keurig's productions for the Agreed Custodians." Op. at 88, 118. McLane similarly requests fees for two calls with Keurig concerning the selection of custodians, again unrelated to the alleged spoliation or claimed violations of the ESI Order. Plaintiffs should not try to generate a windfall here by seeking fees that would have been incurred regardless of the claimed spoliation.

Plaintiffs likewise include fees and expenses that are inconsistent with the law in the Second Circuit. In Category (vii), for example, Plaintiffs improperly include the entirety of their fees (totaling **$546,000**) for preparing their motion and presenting oral argument when they did not prevail on the vast majority of the claims in their motion. Under the law this amount must be significantly reduced to reflect the fact that the Court rejected the great majority of Plaintiffs' challenges. Keurig also objects to Plaintiffs' request to recover fees they incurred in connection with the Stipulation as part of Category (vii). Judge Cave found that Plaintiffs' submission amounted to "an unauthorized sur-reply," and the Order does not state that Keurig should pay any portion of that unauthorized work.

Finally, Plaintiffs offer no justification for how Keurig's production of supplemental transactional data resulted in nearly **$700,000** of wasted expert work. Plaintiffs must limit this request to work that was of no value because of the supplement, which is likely a tiny fraction of what you have requested. Please provide documentation as to how you calculated this amount, including all of the relevant expert invoices, and a detailed explanation of why this work was incremental, wasted expense caused by the data supplement. We understand that Plaintiffs have this information at hand: Plaintiffs told the Court approximately one month ago that they had "already begun the process of conferring with their experts to determine what time was actually wasted during the year in which they were working with" Keurig's original transactional data and had "no intention" of seeking to recover for anything more than truly wasted work. ECF 1825 at 22-23.

Please let us know when you can provide the information detailed above and when you are available for another meet-and-confer to discuss and hopefully resolve many of these issues. We are available on Monday (May 23) and Tuesday (May 24) between 12:00 and 3:00.

Sincerely,

/s/ Mackenzie A. Baird

Mackenzie A. Baird

cc: Counsel for TreeHouse, McLane, and DPPs

EXHIBIT B

Filed under seal per
January 11, 2019 Order (ECF No. 496)

WINSTON & STRAWN LLP North America Europe Asia

200 Park Avenue
New York, NY 10166
T +1 212 294 6700
F +1 212 294 4700

LAUREN E. DUXSTAD
Associate
212-294-3568
LDuxstad@winston.com

May 25, 2022

VIA EMAIL

Mackenzie A. Baird, Esq.
Buchanan Ingersoll & Rooney PC
501 Grant Street, Suite 200
Pittsburgh, PA 15219
mackenzie.baird@bipc.com

Re: In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation, MDL No. 2542 Meet and Confer Regarding Plaintiffs' Fees and Expenses

Dear Counsel:

I write in response to Keurig's May 18, 2022 letter to Plaintiffs regarding the fees and expenses that Plaintiffs TreeHouse, McLane, and DPPs seek to recover under Judge Cave's March 28 Opinion & Order, ECF 1806, and further in response to our discussion on May 24, 2022. As we noted during the May 24, 2022 meet and confer, for categories (i) through (vi), Plaintiffs confirm that the amounts of attorneys' fees and expenses that Plaintiffs seek to recover per category are accurately summarized in Keurig's May 18, 2022 letter, with the caveat that these totals are still being finalized, as Plaintiffs noted during the meet and confer discussion. For category (vii), based on our further confirmation of our calculations, we understand that TreeHouse's total fees for the category amounted to approximately $1,206,000. As noted during the May 24, 2022 meet and confer, McLane's attorneys' fees for this category are approximately $66,000. As with the other categories, we are continuing to finalize the total fees for category (vii).

We write in response to each of the additional issues raised in your May 18, 2022 letter below.

Keurig's Request for Plaintiffs' Attorney Rates, Hours, Time Entries, and Vendor Invoices

In response to Keurig's request to provide attorney rates and hours, TreeHouse and McLane provide their preliminary calculation of total attorney hours and blended attorney billing rates for each category below, subject to review and further confirmation. As noted during the meet and confer discussions to date, Winston's attorney billing rates that comprise the blended rates were negotiated with the client and represent a significant discount from Winston's standard

WINSTON & STRAWN LLP
NORTH AMERICA SOUTH AMERICA EUROPE ASIA
200 Park Avenue
New York, NY 10166
T +1 (212) 294-6700
F +1 (212) 294-4700

rates. Please further note that the chart below is limited to attorneys' fees with respect to each category and does not include Plaintiffs' requested costs associated with vendor and expert expenses. Plaintiffs are sharing the following information regarding total hours and blended discounted billing rates on an Attorneys' Eyes Only basis.

Category	Total Hours	Blended Billing Rate	Total Attorneys' Fees (Subject to Review and Confirmation)
(i): Plaintiffs' Efforts from May 7, 2008 to July 25, 2018 to Determine Deficiencies in Keurig's Productions for Its Agreed Custodians	[redacted]	[redacted]	$146,648.50
(ii): Preparing for and Participating in Meet-and-Confer Communications and Calls Concerning Keurig's Production for its Agreed Custodians between July 25, 2018 and May 20, 2019	[redacted]	[redacted]	$206,108.00
(iii): Additional Measures with Respect to the Hard Drives for Rathke and Stacy that TreeHouse Sent to Its Vendor	[redacted]	[redacted]	$2,889.00
(iv): Investigating Discrepancies in Keurig's Commvault Productions	[redacted]	[redacted]	$117,041.00
(v): Investigating Discrepancies in Keurig's Transactional Data from February 7, 2019 until February 2020	[redacted]	[redacted]	$64,112.60
(vii): Preparing the Motion and Presenting Oral Argument	[redacted]	[redacted]	$1,272,577.18
Total Attorneys' Fees Requested (Subject to Review and Confirmation)			**$1,809,376.28**

Plaintiffs do not agree to provide attorney time entries, which are protected on work product and privilege grounds, at this time. Nor does the 502(d) Order or a stipulation among the parties provide sufficient comfort protecting against the claim of a waiver for such a voluntary production, as your own colleague, Ms. Newton, has articulated on a number of prior occasions. If the parties fail to reach agreement, Plaintiffs would be willing to provide attorney time entries to the Court, consistent with applicable law and Judge Cave's practice at the appropriate time.

Finally, Plaintiffs agree to send Keurig copies of the non-expert vendor invoices at issue and will send them under separate cover. Plaintiffs agree to provide high-level summaries of fees from each expert firm, but we will not agree to produce the expert invoices, for the same reason we are declining to do so for attorney time records. Plaintiffs will provide the time entries at the appropriate time, again consistent with applicable law and Judge Cave's practice, and with appropriate confidentiality protections.

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200 Park Avenue
New York, NY 10166
T +1 (212) 294-6700
F +1 (212) 294-4700

Category (ii): Preparing for and Participating in Meet-and-Confer Communications and Calls Concerning Keurig's Production for Its Agreed Custodians between July 25, 2018 and May 20, 2019

Plaintiffs reviewed all time entries during this relevant period and included time related to preparing for and attending at least 30 meet and confers with Keurig concerning Keurig's productions for its agreed-upon custodians. These meet and confers occurred on at least the following dates: July 25, 2018, July 26, 2018, July 27, 2018, August 6, 2018, August 10, 2018, August 13, 2018, August 14, 2018, August 21, 2018, August 28, 2018, September 7, 2018, September 18, 2018, September 28, 2018, October 4, 2018, October 8, 2018, October 11, 2018, October 25, 2018, November 27, 2018, November 29, 2018, December 5, 2018, December 7, 2018, December 19, 2018, January 7, 2019, February 7, 2019, March 11, 2019, April 12, 2019, April 17, 2019, April 22, 2019, May 3, 2019, May 6, 2019, May 7, 2019, May 9, 2019, and May 20, 2019. During our meet and confer discussion on May 24, 2022, you identified certain meet and confers that you believe were inappropriately included in Plaintiffs' request as extending beyond the Court's Order, including the meet and confers occurring on the following dates: July 25, 2018, July 27, 2018, August 10, 2018, August 14, 2018, August 21, 2018, September 7, 2018, September 28, 2018, October 4, 2018, October 8, 2018, October 11, 2018, October 25, 2018, January 7, 2019, February 7, 2019,[1] March 11, 2019, May 6, 2019, and May 7, 2019.[2] In addition, you noted that Keurig did not have any record of a meet and confer occurring on September 18, 2018.

While we disagree with the general arguments you made regarding what categories of meet and confer discussions are appropriately contemplated by the Court's Order, we are reviewing the meet and confers that you identified and will revert promptly. Please confirm that you agree that fees in connection with meet and confers occurring on those dates that you did not identify are appropriately included,[3] or identify the specific reasons you dispute their inclusion.

Category (iii): Additional Measures with Respect to the Hard Drives for Rathke and Stacy that TreeHouse Sent to Its Vendor

Plaintiffs agree to provide Keurig with the vendor's invoices for the efforts to recover data from Ms. Rathke's and Ms. Stacy's old hard drives and a W-9 reflecting payment information.

However, Plaintiffs disagree with Keurig's contention that Plaintiffs cannot recover attorneys' fees with respect to category (iii). Indeed, Judge Cave's Opinion & Order

[1] You noted during the call that two meet and confers took place on February 7, 2019, and that Keurig's position is that neither of those meet and confers is appropriately included in this category.

[2] In addition, you noted that there were two meet and confers on May 20, 2019, including one meet and confer with Evan Miller of Winston related to Plaintiffs' interrogatories. Plaintiffs confirm that we did not include the time related to that meet and confer in our calculations.

[3] We understand that the meet and confers that Keurig has not disputed include those occurring on July 26, 2018, August 6, 2018, August 13, 2018, August 28, 2018, November 27, 2018, November 29, 2018, December 5, 2018, December 7, 2018, December 19, 2018, April 12, 2019, April 17, 2019, April 22, 2019, May 3, 2019 and May 9, 2019.

WINSTON & STRAWN LLP NORTH AMERICA SOUTH AMERICA EUROPE ASIA

200 Park Avenue
New York, NY 10166
T +1 (212) 294-6700
F +1 (212) 294-4700

unambiguously allows for the recovery of TreeHouse's attorneys' fees for facilitating these efforts. *See* ECF 1806 at 118–19 ("Plaintiffs are entitled to recover reasonable *attorneys' fees and* expenses for the following periods and categories […] (iii) additional measures with respect to the hard drives for Rathke and Stacy that TreeHouse sent to its vendor") (emphasis added). If Keurig believed there was any ambiguity in the Order, Keurig could have asked for clarification from Judge Cave or taken an appeal of that point, but Keurig did not do so. Accordingly, Plaintiffs maintain that it is appropriate to recover attorney fees in connection with category (iii).

Category (vi): Plaintiffs' Experts' Costs While Working with Keurig's Deficient Transactional Data Between February 7, 2019 and February 2020

Keurig also objects to Plaintiffs' request for expert fees, claiming that Plaintiffs "offer[ed] no justification" for the category (vi) totals provided to Keurig. That is entirely inaccurate. Plaintiffs' counsel *only* included expert time for work directly affected by Keurig's data production error. Plaintiffs' counsel also explained that the figures provided were almost certainly underestimates.

Category (vii): Preparing the Motion and Presenting Oral Argument

In its May 18, 2022 letter, Keurig claims that Plaintiffs "improperly include the entirety of their fees (totaling $546,000) for preparing their motion and presenting oral argument when they did not prevail on the vast majority of the claims in their motion." Keurig did not raise this issue in its Objections to Judge Cave's March 28 Order & Opinion, ECF 1817, and thus any argument in that regard is waived. We further note that, while Keurig claims these fees are inconsistent with Second Circuit case law, it cited no case law to support its position in its May 18, 2022 letter and specifically refused to provide any case law during our discussion on May 24, 2022. Rather, during the May 24, 2022 meet and confer, you indicated that your letter was referring to general case law in the Second Circuit regarding the reasonableness of attorneys' fees requests. We continue to disagree with your assertion that Plaintiffs' request is contrary to the case law in the Second Circuit, but remain willing to consider any specific cases you provide.

In addition, Keurig improperly objects to Plaintiffs' request to recover fees Plaintiffs incurred in connection with the Stipulation as part of category (vii). As you know, Judge Cave relied on the Stipulation in her March 28 Opinion & Order, ECF 1806. For example, in footnote 29 of the Order, Judge Cave cites the Stipulations regarding the seven custodians for whom Keurig was unable to decrypt hard drives. Accordingly, Plaintiffs' request to recover fees incurred in connection with the Stipulation is entirely appropriate.

Submission to the Court on June 1, 2022

Finally, as to the submission to the Court on June 1, 2022, Plaintiffs proposed requesting that the Court allow 21 days from any Court Order on the schedule for Plaintiffs to submit their fee request to the Court. As noted during the May 24, 2022 meet and confer, Plaintiffs would be willing to consider extending this time period to 30 days, to the extent Keurig believes it needs

WINSTON & STRAWN LLP NORTH AMERICA SOUTH AMERICA EUROPE ASIA

200 Park Avenue
New York, NY 10166
T +1 (212) 294-6700
F +1 (212) 294-4700

more time to respond and to the extent that Keurig agrees to a commensurate time for Plaintiffs to reply to any opposition by Keurig.

However, Plaintiffs cannot agree that the briefing schedule be tethered to Judge Broderick's decision regarding Keurig's objections to the March 28, 2022 Order. As set forth in our opposition, we do not believe that Keurig's objections to the March 28, 2022 Order have any merit and thus do not want to continue to delay this process in the meantime. In this regard, Plaintiffs would like to quickly implement any fees award once Keurig's objections are overruled and do not want to wait to begin that process once Judge Broderick issues his decision. We further note that Keurig did not ask Judge Broderick for a stay of Judge Cave's ruling on fees and, as such, there is no basis to delay this procedure any further.

***

Plaintiffs are willing to discuss these issues further and are available to meet and confer on Friday, May 27, 2022. Otherwise, to the extent that Keurig is unwilling to agree to any of the categories of fees or costs as outlined by Plaintiffs herein and during our meet and confer discussions or make any alternative proposal, please let us know by May 27, 2022.

Sincerely,

/s/ *Lauren E. Duxstad*

Lauren E. Duxstad

EXHIBIT C

Filed under seal per
January 11, 2019 Order (ECF No. 496)

Buchanan
Ingersoll·Rooney

Mackenzie A. Baird
412 562 1825
Mackenzie.baird@bipc.com

Union Trust Building
501 Grant Street, Suite 200
Pittsburgh, PA 15219-4413
T 412 562 8800
F 412 562 1041

May 27, 2022

VIA EMAIL

Lauren Duxstad, Esq.
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166

Re: ***In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation*, MDL No. 2542**
Follow Up to Meet and Confer Regarding Plaintiffs' Fees and Expenses

Dear Lauren:

We are in receipt of Plaintiffs' May 25, 2022 letter, which follows two hours of meet and confer discussion with you over two days (May 16 and May 24) and my letter to Plaintiffs of May 18. Plaintiffs' position during this process has been and remains wholly unreasonable. Plaintiffs seek to recover more than **$2.5 million** in attorneys' fees and expenses, but will not provide **any** documentation to show that these massive fees are both reasonable and recoverable under the Court's March 28 Order. This $2.5 million includes a **seven hundred thousand dollar increase** from Plaintiffs' initial demand, which Plaintiffs say corrects a clerical error they made in last week's calculation. Plaintiffs flatly refuse to provide Keurig with the supporting material required in any fee application and needed to evaluate their fee demand. Instead, Plaintiffs say Keurig should just trust this week's number and pay them $2.5 million. Plaintiffs' position is patently unreasonable.

We again ask Plaintiffs to provide the following information: (a) the individual working attorneys' rates and hours for each category; (b) the underlying attorney time entries that substantiate the hours worked/time invoiced to and paid by your clients for each category; and (c) the underlying expert invoices showing the hourly rates, hours worked, and task descriptions for the fees and expenses that Plaintiffs now seek to recover. Plaintiffs may redact descriptions for information that is protected by the attorney-client privilege or work product doctrine. But Plaintiffs have not identified any authority for the assertion that billing rates and entire time entries are protected from disclosure when a party seeks to recover its fees. As noted in our May 18 letter, parties are required to provide this basic information when petitioning the court for fees. *See e.g.*, *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983) (fee application "must" be supported by "contemporaneous time records" which

"should specify, for each attorney, the date, the hours expended, and the nature of the work done").

As we have explained, Keurig requires this information to evaluate Plaintiffs' request and to narrow the issues before the Court. Your letter states that Plaintiffs will provide this information to the Court (but not to Keurig) "at the appropriate time." Now is the appropriate time, as it could facilitate resolution of these issues. Plaintiffs will be required to provide the information to Keurig if a fee application is litigated, and should have done so weeks ago to facilitate a good faith meet and confer process about your fee demand.

The chart provided in your May 25 letter—which states "blended billing rates" across multiple parties, timekeepers, and law firms—is not sufficient. Plaintiffs have simply divided aggregated hours into the fees sought to calculate these "blended" rates, offering no specifics on the nature of the work performed, the timekeepers who performed that work, or the billing rates actually charged. While your email this afternoon lists the names of the attorneys and paralegals who billed for each of the categories, this does not show the work each individual performed, for how long, or at what rate, which is the core information required to support a fee application to show that fees demanded are in fact reasonable and recoverable.

Based on the very limited information provided, we believe Plaintiffs' fee demand wildly overstates recoverable fees. As stated in our May 18 letter, **more than half** of the meet and confers that Plaintiffs say they included in Category (ii) did not "concern Keurig's productions for the Agreed Custodians" as required under the Order. We identified specific dates during our May 24 call, and Plaintiffs have still not agreed to correct their calculations.[1]

Plaintiffs' refusal to provide supporting detail on the work performed and by whom and at what rates precludes us from having a meaningful discussion of the fee demand. Plaintiffs insisted on our most recent call that calculating a fee demand was not an exact science, and said Plaintiffs' own spreadsheets (which we have not seen) contained one or more errors and, as a result, Plaintiffs were changing the numbers presented on the prior meet and confer. Specifically, TreeHouse said it is increasing its fee demand for "preparing the Motion and presenting oral argument" from $490,000 to more than $1.2 million. Applying Plaintiffs'

[1] We note that Plaintiffs' letter confuses May 6, 2019 (meet and confer with TreeHouse) with May 3, 2019 (one of two calls for which McLane seeks fees). As to the other meet and confers identified in your footnote 3, Keurig cannot agree that Plaintiffs' fees are appropriately included when Plaintiffs have refused to provide documentation for those fees and have not explained why those fees fall within the Court's instructions. *See, e.g.*, Op. at 88 ("The Court does not intend that every expense related to document discovery, or even every expense related to Keurig's violations of the ESI Order, be imposed on Keurig, because Rule 37(b)(2)(C) limits the award to 'reasonable' expenses 'caused by' Keurig's violations of court orders, and Rule 37(e)(1) requires tailoring to 'ameliorate[] the economic prejudice imposed on' Plaintiffs." (citation omitted)). Plaintiffs bear the burden to support their requests. Keurig pointing out overreach with respect to more than half of the claimed meet and confers was a good faith effort to facilitate the process, but Plaintiffs have not corrected their calculation at all, much less provided the requisite support for any fees still demanded.

"blended" rate, Plaintiffs seek fees for an additional [redacted] hours more than they sought on last week's call, for a staggering total of [redacted] **hours** that Plaintiffs say they spent preparing and presenting a 25-page brief and 10-page reply.[2] Plaintiffs have provided no substantiation for their massive initial number much less their even higher "corrected" number. Keurig cannot check Plaintiffs' shifting demands without the supporting material required.

Further, Plaintiffs confirmed on this week's meet and confer that they included all of their experts' time that referenced Keurig's transactional data over a one-year period and did not exclude time for work unaffected by Keurig's supplemental production of transactional data. This is contrary to what Plaintiffs previously told Judge Broderick: that they would determine and seek compensation for only "what time was actually wasted" during that year. ECF 1823 at 22-23.

In sum, Plaintiffs' demand that Keurig pay $2.5 million in fees and expenses pursuant to the Court's March 28 Order is improper. Worse, Plaintiffs have asserted that, if Keurig does not accept their unsubstantiated representations and reach an agreement, then Plaintiffs may seek further fees for briefing a fee application. Keurig remains ready to have a good faith meet and confer process to see if it is possible to avoid a fee application, but in order for this to happen Plaintiffs must provide Keurig with the substantiation required under black letter law.

If the issues must be briefed, in the interests of judicial economy and conservation of party resources, the briefing schedule should run from the date of Judge Broderick's ruling if a fee application is still needed at that time. We would propose the following:

- 30 days from a final ruling from Judge Broderick: Plaintiffs provide Keurig and the Court with all documentary backup related to any fees they believe they are entitled to recover;

- 30 days from completion of provision of backup: Parties complete meet and confers informed by Judge Broderick's ruling and backup provided, and Plaintiffs file their fee application to Judge Cave if needed;

- 30 days from opening: Keurig files any opposition.

This is a reasonable proposal that allows the parties to meet and confer with meaningful support and informed by Judge Broderick's ruling. This proposal also addresses Plaintiffs' concerns by avoiding a possible scenario in which backup is provided, only to have Judge Broderick overrule the sanction. It also avoids burdening the Court with a fee application that may not need to be resolved.

[2] Plaintiffs said these fees were incurred between October 2020 and January 11, 2022. We understand these fees relate to the entirety of Plaintiffs' motion, including the majority of Plaintiffs' challenges that the Court rejected.

Finally, please promptly send us the non-expert vendor invoices, wire transfer information, and W-9 that we requested on May 18, as well as the other materials promised in your letter.

Sincerely,

/s/ Mackenzie A. Baird

Mackenzie A. Baird

cc: Counsel for TreeHouse, McLane, and DPPs

EXHIBIT D

WINSTON & STRAWN LLP North America Europe Asia

200 Park Avenue
New York, NY 10166
T +1 212 294 6700
F +1 212 294 4700

LAUREN E. DUXSTAD
Associate
212-294-3568
LDuxstad@winston.com

May 31, 2022

VIA EMAIL

Mackenzie A. Baird, Esq.
Buchanan Ingersoll & Rooney PC
501 Grant Street, Suite 200
Pittsburgh, PA 15219
mackenzie.baird@bipc.com

Re: *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation*, MDL No. 2542
Meet and Confer Regarding Plaintiffs' Fees and Expenses

Dear Counsel:

I write in response to Keurig's May 27, 2022 letter to Plaintiffs regarding the fees and expenses that Plaintiffs TreeHouse, McLane, and DPPs seek to recover under Judge Cave's March 28 Opinion & Order, ECF 1806. Suffice it to say, we disagree with your contention that Plaintiffs' position has been unreasonable and we dispute several statements made by Keurig regarding the communications between the parties to date.[1] Plaintiffs' fee request is wholly appropriate and reasonable.

We do not dispute that contemporaneous time records are commonly required in connection with a fee request and, as such, have indicated from the beginning that we would provide such time records for *in camera* review at the appropriate time. This is consistent with the procedure adopted by courts in the Southern District of New York. *See, e.g.*, *Rosecliff, Inc. v. C3, Inc.*, No. 94 Civ. 9104 (JFK), 1995 U.S. Dist. LEXIS 20867, at *9 (S.D.N.Y. Dec. 11, 1995) (noting that the law firm "submitted unredacted records for [the Court's] *in camera* review"); *see also Del Med. Imaging Corp. v. CR Tech USA, Inc.*, No. 08 Civ. 8556 (LAP) (DFE), 2010 U.S. Dist. LEXIS 36398, at *32 (S.D.N.Y. Feb. 8, 2010) (noting plaintiff "submitted its attorneys' updated and unredacted invoices for my *in camera* review"). Keurig's cited case is not to the contrary.[2]

[1] As just one example of Keurig's misrepresentations, Keurig incorrectly stated in its May 27, 2022 letter that Plaintiffs "insisted on our most recent call that calculating a fee demand was not an exact science." Plaintiffs have no record of (and do not recall) ever stating that calculating a fee demand is not an "exact science." Rather, Plaintiffs have invested a significant amount of time reviewing contemporaneous time records and calculated a reasonable (and, indeed, conservative) request based on that review.

[2] Indeed, the court in *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 (2d Cir. 1983) did not state that an opposing party is entitled to review these time records, let alone that it would be entitled to access unredacted time records containing privileged information.

WINSTON & STRAWN LLP
NORTH AMERICA SOUTH AMERICA EUROPE ASIA

200 Park Avenue
New York, NY 10166
T +1 (212) 294-6700
F +1 (212) 294-4700

Although Keurig never suggested that it would be satisfied with redacted time records until last week, we are understandably skeptical about the timing and motivation for this late request, especially given that Keurig seeks to delay the entire briefing schedule and also has failed, despite our request, to make any proposals as to what fee award you would regard as reasonable and appropriate. Moreover, given the number of time entries at issue, it would not be practicable to finish preparing redactions by tomorrow. In the interests of cooperation, however, we would be willing to consider extending the proposed thirty-day time for your response to the TreeHouse and McLane fee requests (at which time you will have received the redacted entries) in the event you then make reasonable proposals after such filing. This will have the effect of giving you what you claim you need while also avoid wasting the Court's time if we believe we are close to a mutually satisfactory resolution.

We further disagree with your contention that more than half of the meet and confer discussions we identified are not appropriately included in Plaintiffs' fee requests. While we believe that the time for the meet and confer discussions that occurred on the following dates properly fall within the scope of the Court's Order as they relate to discussions regarding Keurig's productions for its agreed -upon custodians, we are willing to remove our request for these fees solely for the purpose of reaching a compromise with Keurig: July 25, 2018; July 27, 2018; August 10, 2018; September 7, 2018; September 28, 2018; October 4, 2018; October 8, 2018; October 11, 2018; October 25, 2018; February 7, 2019; March 11, 2019; and May 7, 2019. To be clear, to the extent we cannot reach an agreement, Plaintiffs reserve the right to seek fees with respect to each of these meet and confer discussions.

In addition, Keurig incorrectly asserts that Plaintiffs "did not exclude time for work unaffected by Keurig's supplemental production of transactional data," and that Plaintiffs have been inconsistent in their position regarding the scope of recoverable expert fees. The language that you cite in your May 27 letter conveniently omits our reiterated position that "Plaintiffs intend[]to seek reasonable experts' costs incurred specifically 'while working with Keurig's deficient transactional data' during the specified date range." ECF 1823 at 22-23. As we have noted repeatedly, Plaintiffs did not include all the fees that we could have included during this time period with the result that the expert fee estimates we have presented are surely an underestimate of the actual fees incurred.

Finally, while we generally agree with the briefing schedule outlined in your May 27, 2022 letter, we cannot agree that the schedule should run from the date of Judge Broderick's ruling on Keurig's Objections to the Spoliation Order for the reasons outlined in my May 25, 2022 letter. As we previously noted, Keurig did not ask Judge Broderick for a stay of Judge Cave's ruling on the fee request and we therefore see no basis to delay this procedure any further.

Sincerely,

/s/ *Lauren E. Duxstad*

Lauren E. Duxstad