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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**
**COUNTY OF SAN BERNARDINO**

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| STACY DORCAS, individually and on behalf of all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>ATERIAN, INC.,<br><br>Defendant. | Case No. CIVSB2222117<br><br>**CLASS ACTION**<br><br>**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND REQUEST FOR FEES**<br><br>[*Filed concurrently with Notice of Motion for Final Approval of Class Action Settlement; Declarations of Lisa Omoto, Katherine Rovertoni, and Luciano McCollam; and [Proposed] Order*]<br><br>Date: March 7, 2024<br>Time: 8:30 am<br>Dept.: S26<br>Judge: Hon. David Cohn<br><br>Complaint Filed: December 9, 2022 |

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## MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff and Class Representative Stacy Dorcas ("Class Representative" or "Plaintiff"), on behalf of the Settlement Class,[1] hereby moves the Court for entry of an Order Granting Final Approval of the Settlement Agreement (the "Settlement Agreement" or "Settlement"), Certifying the class for purposes of settlement, and approving Plaintiff's requested fees, costs, and class representative service award in this matter. Defendant Aterian, Inc. ("Defendant") does not oppose the Grant of Final Approval or the Certification of the Settlement Class.[2] Class Representative and Defendant are referred to herein as the "Parties."

## I. INTRODUCTION

Pursuant to the Court's August 3, 2023 order granting Plaintiff's preliminary approval motion (the "Preliminary Approval Order"), the Settlement Class has received Court-approved notice of the Settlement, and has had an opportunity to submit claims, opt-outs, or objections. The response from Settlement Class Members has been overwhelmingly positive. Due to the use of Amazon's email notice capabilities, over 95% of the putative class members were provided with direct personal notice of the settlement and there has been a *de minimus* number of opt-outs and objections to date.

As further detailed below, Settlement Class Members will benefit from fair, reasonable, and adequate compensation. In addition to the monetary compensation, the Settlement Agreement provides for Defendant ceasing, for no less than five (5) years, to use the word "Austria" or the Austrian flag on any of the Mueller-branded products, its packaging, labeling, and/or its online marketing, including but not limited to its Mueller-branded products listings on third-party retail sites such as Amazon.com and websites maintained by Aterian (including muellerdirect.com). This is an excellent result for the Settlement Class, as the Settlement fulfills the dual purpose of the consumer protection laws at issue in this case: restitution to the Settlement Class through monetary relief and equitable relief in the form of labeling and advertising changes to protect consumers on a going-

[1] All capitalized terms have the same definition as provided in the Settlement Agreement, unless otherwise specified.

[2] Defendant does not oppose the Final Approval of the Settlement. Pursuant to the Court's August 3, 2023 Order, Plaintiff's request for Award of Attorneys' Fees and Costs is also included within the instant brief *infra* Section VI. Defendant remains free to oppose to Plaintiffs' request for Award of Attorneys' Fees and Class Representative Service Award as, discussed *infra*, there is no "clear sailing" provision in the Settlement Agreement.

forward basis. In all respects, the Settlement is fair, adequate, and reasonable. As such, final approval should be granted.

Moreover, Class Counsel respectfully seek $171,520.07 in attorney's fees which represents 21% of the common fund and a 44% reduction in their lodestar to date. Class Counsel have dedicated themselves to this matter, incurring to date a lodestar based on current billing rates of $303,613.50 in billable professional time, all without receiving any compensation in advance for their time and efforts. The fees sought represents a ***negative*** "multiplier" of .56 which is even lower than the range of positive multipliers often approved in similar cases. In sum, Class Counsel's fees requested are reasonable in light of the risks assumed by Class Counsel by taking on a complex case with no assurance of compensation for their work, and by achieving an outstanding result.

Class Counsel have additionally incurred $28,479.93 in out-of-pocket litigation costs and expenses, which, without a victory, would go uncompensated. The requested costs were all reasonably incurred and necessary for the prosecution of this matter, such as fees to Amazon for providing direct notice and to compensate the Hon. Louis M. Meisinger, who served as a mediator in this matter.

Finally, Plaintiff was actively involved in the investigation, negotiation, and settlement of this matter and contributed substantial personal time to pursuing its resolution. Such commitment is regularly rewarded by the courts in putative class action cases. As such, Plaintiff now respectfully seeks $1,500 as a service award, to compensate her for her time and efforts in bringing this matter to a resolution.

Accordingly, the class should be certified for the purposes of settlement and the requested fees, costs, and expenses are reasonable and should be awarded in full.

## II. THE SETTLEMENT TERMS

### A. The Settlement Class

The Settlement Class is defined as:

> All Persons who purchased any of the Covered Products in the United States, its territories, or at any United States military facility or exchange during the Class

Period.

Decl. of Lisa Omoto in Supp. of Pl.'s Mot. for Final Approval of Class Action Settlement ("Omoto Decl.") ¶ 3, Ex. 1, Art. I, ¶ JJ.

Excluded from the Settlement Class are: counsel of record (and their respective law firms) for the Parties; the Honorable David S. Cohn; Mediator Louis M. Meisinger, and their employees, legal representatives, heirs, successors, assigns, or any members of their immediate family; any government entity; Defendant, any entity in which Defendant has a controlling interest, any of Defendant's subsidiaries, parents, affiliates, and officers, directors, employees, legal representatives, predecessors in interest, heirs, successors, or assigns, or any members of their immediate family; and any Persons who timely opt-out of the Settlement Class. *Id.*

**B. The Settlement Consideration**

1. Monetary Relief

The Settlement provides for substantial restitution to Settlement Class Members. Defendant has agreed to pay a total Settlement Amount of $800,000.00, part of which will be available to pay claims made by eligible Settlement Class Members ("Authorized Claimants"). *Id.* Art. I, ¶ K. Proof of purchase is not required for this payment. *Id.* Art. III, ¶ D.1. Authorized Claimants shall be paid from the "Residual Settlement Amount." *Id.* Art I, ¶¶ D.3-4. The Residual Settlement Amount is $800,000 (the Settlement Amount) minus: (a) the amount paid as a service award to the Plaintiff (not more than $1,500); (b) the cost of claims administration (estimated to be at most $170,000); and (c) the amount awarded as attorneys' fees and costs to the lawyers representing Plaintiff and the Settlement Class (not to exceed 25% of the gross Settlement Amount). *Id.* Art. I, ¶ GG.

2. Changes To The Labeling And Advertising Of The Covered Products

In addition to monetary relief, Defendant has agreed to substantial equitable in the form of changes to the labeling and marketing of the Covered Products. Defendant will, for no less than five (5) years, cease to use the word "Austria" or the Austrian flag on any of the Mueller-branded products, its packaging, labeling, and/or its online marketing, including but not limited to its Mueller-branded products listings on third-party retail sites such as Amazon.com and websites maintained by Aterian

(including muellerdirect.com). *Id*., Art. III, ¶ D.5. This relief is separate and in addition to the monetary compensation provided by the Settlement Fund, and the costs related to the labelling and advertisement changes are bore entirely by the Defendant.

### C. Release By The Settlement Class

In consideration for the monetary and equitable relief outlined above, Plaintiff and Settlement Class Members will release the claims alleged or arising out of the Complaint in this action. *Id*., Art. I, ¶ FF; Art. III ¶ C. This release is appropriate as it is narrowly tailored to encompass only the claims at issue in this action, and expressly excludes claims for personal injury or claims to enforce the Settlement Agreement. *Id*. *See e.g., Gonzalez-Tzita v. City of L.A.*, No. CV 16-0194 FMO (Ex), 2019 WL 7790440, at *10 (C.D. Cal. Dec. 9, 2019) (considering "whether the settlement contains an overly broad release of liability" and deciding that because "the settlement class members are not giving up claims unrelated to those asserting in [the] action . . . the release adequately balances fairness to plaintiffs and the absent class members with defendant's' [sic] interest in ending this litigation."); *see also Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 327-28 (C.D. Cal. 2016) (finding that the settlement release was adequate where it only released claims related to the subject matter of the litigation).[3]

## III. NOTICE TO THE CLASS AND CLAIMS ADMINISTRATION

### A. Direct Email Notice Program

To administer the Settlement and provide notice to the Class, the Parties retained A.B. Data Settlement Administration LLC ("A.B. Data"), the legal notice and claims administration firm appointed by the Court in its Preliminary Approval Order at ¶¶ 12-14.

To reach Settlement Class Members, the Settlement Administrator disseminated a copy of the Direct Email Notice to the Settlement Class Members who purchased Covered Products on the muellerdirect.com website via email, with a delivery confirmation rate in excess of 98% of Settlement Class Members. *See* Rovertoni Decl. ¶¶ 5-7. Additionally, Plaintiff's counsel paid for Amazon to

[3] *Cellphone Termination Fee Cases*, 113 Cal. Rptr. 3d 510, 520 (Cal. Ct. App. 2010), *as modified* (Cal. Ct. App. July 27, 2010) ("California courts may look to federal authority for guidance on matters involving class action procedures."); *see also In re Tobacco II Cases*, 207 P.3d 20, 33 (Cal. 2009)(noting that requirements for class certification are comparable under Federal rules and California Code of Civil Procedure).

provide direct email notice to any Settlement Class Members who purchased Covered Products on Amazon.com. *See* Omoto Decl. ¶ 28, Ex. 7. Amazon calculates that delivery was successful to 100% of the Settlement Class Members it had contact information for. *See* Declaration of Luciano McCollam, ("McCollam Decl.") ¶ 9. The Direct Email Notice directed users to the Settlement Website, where potential Settlement Class Members received more information about the settlement, including the Long Form Notice and the Claim Form. Rovertoni Decl. ¶¶ 9-10. Further, this court and others have found in the past that direct notice given to the consumers indeed constitutes the "best practicable" notice to the Settlement Class. *See Secola v. Pressed Juicery, LLC*, No. CIVDS1709347, 2018 WL 9439413, at *1 (San Bernardino Super. Ct. July 2, 2018) (D. Cohn) (granting final approval of a direct notice plan, concluding direct notice was "best practicable" notice); *McCurley v. Royal Seas Cruises, Inc*., No. 17-CV-00986-BAS-AGS, 2019 WL 3817970, at *2 (S.D. Cal. Aug. 14, 2019)(noting that direct notice is always preferable to publication notice when feasible); *Good v. Am. Water Works Co., Inc.*, No. CV 2:14-01374, 2016 WL 5746347, at *7 (S.D.W. Va. Sept. 30, 2016) (describing direct notice as "gold standard for class notice.")

1. Publication Notice, Settlement Website, Toll-Free Telephone Support, And Incoming Mail

In compliance with the Settlement Agreement and California's Consumers Legal Remedies Act ("CLRA"), Civil Code § 1750, *et seq*., summary publication notice was published four times over the course of four weeks in the San Bernardino Sun. *See* Omoto Decl. ¶ 3, Ex. 1, Art. V, ¶ A.5.; Rovertoni Decl. ¶ 8. A.B. Data also maintained a Settlement Website dedicated to the settlement and claims process, where Settlement Class Members were able to review a summary of the case, Settlement Class Member rights and options, copies of the Long-Form Notice and relevant pleadings, important dates, any pertinent updates concerning the Action, and the ability to submit a Claim Form electronically. Rovertoni Decl. ¶ 9. A.B. Data also maintained a toll-free number that Settlement Class Members could call to obtain general information about the case and request a hardcopy of the Long Form Notice and Claim Form. *See id*. ¶ 12.

2. Identification And Verification Of Suspicious Claims

In appointing A.B. Data as Settlement Administrator, The Parties' Settlement Agreement stated in part that,

> "The Settlement Administrator shall use good faith and appropriate procedures to prevent, detect, and reject the payment of Fraudulent Claims and ensure payment of only legitimate claims. The Settlement Administrator shall notify the claimant via mail or email of the rejection…. If any claimant whose Claim Form has been rejected fails to respond to the Settlement Administrator within twenty-one (21) calendar days from receipt of the rejection, the rejection shall be deemed final and valid. The Settlement Administrator, in consultation with Defendant's Counsel and Class Counsel, shall notify the Claimant of its decision within ten (10) business days from receipt of the Claimant's reply contesting the rejection."

Omoto Decl. ¶ 3, Ex. 1, Art. VI, ¶ E.

Importantly, the claims process includes a court-approved verification and fraud detection process conducted by the Settlement Administrator, designed to reduce the risk of invalid and/or fraudulent claims. *See* Rovertoni Decl. ¶¶ 14-15. In conjunction with this duty, the Settlement Administrator takes proactive steps to identify and reject fraudulent claims filed by so-called artificial intelligence based "bots."[4] *Id.* Indeed, the Settlement Administrator estimates that at least 90% of the claims received are in fact the result of fraud. *Id.* ¶ 15. Once the identification process is completed and A.B. Data has verified and eliminated any fraudulent claims, the Parties and A.B. Data will report to the Court on the outcome, including the number of valid verified claims to be allowed and the number of invalid claims to be disallowed. The identification process is designed to be simple for humans to complete, thus eliminating only "bot" claims and protecting the interests of bona fide

[4] "Bots are computer generated claims that are completed using a variety of techniques including IP spoofing, random name, address, telephone, and email generation for the purpose of receiving multiple distributions from a single settlement. Whereas bot claims are created using different information for each claim, these claims cannot be tracked in a database of known fraudulent filers." *See* Rovertoni Decl. ¶ 14 n.1

class members. Pending the outcome of the verification process, however, it would be premature to draw any final conclusions as to the actual number of valid claims.

## IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

### A. Legal Standards For Final Approval

Rule 3.769 of the California Rules of Court sets forth the procedures for approval of class action settlements in California. *Cellphone Termination Fee Cases*, 104 Cal.Rptr.3d 275, 281 (Cal. Ct. App. 2009). To grant final approval the Court ultimately must determine that the settlement is fair, adequate, and reasonable. California Rules of Court, Rule 3.769(g); *see also In re Microsoft I–V Cases*, 37 Cal.Rptr.3d 660, 673 (Cal. Ct. App. 2006); and *Dunk v. Ford Motor Co*., 56 Cal.Rptr.2d 483 (Cal. Ct. App. 1996). In reaching that determination courts in California consider whether the settlement is entitled to (1) a presumption of fairness and (2) whether the settlement is reasonable.

A settlement is entitled to a presumption of fairness when: (1) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow the court and counsel to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Id.* at p. 1802

In addition, to determine whether a settlement is reasonable the court may consider the following factors to the extent relevant:

> "…the strength of the plaintiffs' case, the risk, expense, complexity and duration of further litigation as a class action, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of class members to the proposed settlement."

*In re Microsoft*, 37 Cal.Rptr.3d at 673.

This list of factors is not exclusive nor is it mandatory, and the court is free to engage in balancing and weighing of factors depending on the circumstances of the case. *Dunk*, 56 Cal.Rptr.2d at 488-89. "In short, the trial court may not determine the adequacy of a class action settlement

without independently satisfying itself that the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." *Luckey v. Sup. Ct.*, 174 Cal. Rptr. 3d 906, 916 (Cal. Ct. App. 2014) (internal citations omitted).

In performing these inquires, "[d]ue regard . . . should be given to what is otherwise a private consensual agreement between the parties." *7-Eleven Owners for Fair Franchising v. Southland Corp*., 102 Cal.Rptr.2d 777 (Cal Ct. App. 2000) (internal quotation marks omitted). California courts favor settlement, particularly in class actions and other complex cases in which substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. *See In re Microsoft*, 37 Cal.Rptr.3d at 673 n.14 ("Public policy generally favors the compromise of complex class action litigation."); *7-Eleven Owners*, 102 Cal.Rptr.2d at 787 (noting that voluntary settlement is the preferred means of dispute resolution); *Stambaugh v. Super. Ct. of Sonoma Cty.*, 132 Cal.Rptr. 843, 846 (Cal. Ct. App. 1976)(collecting cases supporting proposition that compromises are preferrable to continued litigation).

**B. The Proposed Settlement Is Entitled To A Presumption Of Fairness**

1. The Settlement Was The Product Of Arms-Length Negotiations By Counsel

The Settlement Agreement was the product of arms-length negotiations between counsel for the Parties, who are experienced consumer class action practitioners. Omoto Decl. ¶ 4. In reaching the Settlement Agreement, Plaintiff's counsel reviewed and analyzed relevant law and facts to assess the merits of the claims, and determined based on their findings, the best way to serve the interests of the Settlement Class. Omoto Decl. ¶ 10. Plaintiff's counsel also attended a full-day mediation with the Hon. Louis Meisinger, Ret., of Signature Resolution, who oversaw and helped facilitate a good faith resolution of this action. *Kullar v. Foot Locker Retail, Inc.*, 85 Cal.Rptr.3d 20, 30 (Cal. Ct. App. 2008) ("The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's length transaction entered without self-dealing or other potential misconduct."). As a result, counsel for the Parties endorse the proposed Settlement Agreement. As courts have noted,

the endorsement of counsel is entitled to great weight following arms-length settlement negotiations. *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004)("Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation"); *DeStefano v. Zynga, Inc.*, No. 12-cv-04007-JSC, 2016 WL 537946, at *9 (N.D. Cal. Feb. 11, 2016) (citation omitted) ("[U]nless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results."). Indeed, absent a finding of fraud or collusion, settlement agreements negotiated and endorsed by experienced counsel are presumptively fair and reasonable. *See Dunk*, 56 Cal.Rptr.2d at 488. Thus, the evidence demonstrates that the proposed Settlement is the product of serious, informed, non-collusive negotiations and there is no question that the Settlement was reached through extensive, arms-length bargaining.

2. The Extent of Investigation and Discovery Completed

The Parties engaged in extensive pre-litigation investigation and informal discovery and evaluated the factual strengths and weaknesses of this case before agreeing to the Settlement. Throughout this case, Class Counsel engaged in sufficient discovery and investigation to evaluate the merits and risks associated with the prosecution of this matter, including engaging in independent research, review and evaluation of documents and data produced by Defendant. Class Counsel was sufficiently informed of the nature of the claims and defenses and was in an ideal position to evaluate the Settlement for fairness, adequacy, and reasonableness at the time of the mediation. Class Counsel believes the Settlement is in the best interest of the Class. The Settlement came only after the case was fully investigated by Class Counsel and the litigation had reached the stage where "the Parties certainly have a clear view of the strengths and weaknesses of their cases" to support the Settlement. (*Boyd v. Bechtel Corp*., 485 F.Supp. 610, 617 (N.D. Cal. 1979)).

3. Counsel Is Experienced In Similar Litigation

As set forth in the declaration of Lisa Omoto, Class Counsel is competent and experienced in the representation of consumers in class action litigation. *See* Omoto Decl. ¶¶ 7-9, Ex. 2 (Firm Resume). Class Counsel is particularly experienced in litigation involving false advertising claims

and claims regarding misrepresentations relating to the geographic origin of the product, such as the Covered Products here. *Id*. *See, e.g., Hesse v. Godiva Chocolatier, Inc.,* 463 F.Supp.3d 453 (S.D.N.Y 2020)(involving chocolate misrepresented as being made in Belgium); *Broomfield v. Craft Brew Alliance, Inc.,* No. 17-CV-01027-BLF, 2020 WL 1972505, at *1 (N.D. Cal Feb. 5, 2020)(involving beer misrepresented as being made in Hawaii); *Shalikar v. Asahi Beer U.S.A., Inc.*, No. LA CV17-02713 JAK (JPRx), 2017 WL 9362139, at *1 (C.D. Cal. Oct. 16, 2017)(involving beer misrepresented as being made in Japan). Further, Class Counsel's experience with these claims have given them first-hand experience as to the risks and rewards of continued litigation. Accordingly, Class Counsel's assessment is entitled to great weight, and strongly supports final approval of the Settlement. *See Dunk*, 56 Cal.Rptr.2d at 488; and *Kullar*, 85 Cal.Rptr.3d at 30.

4. There Is Virtually No Opposition To The Settlement

In the case of few opt-outs and/or objectors, courts have uniformly held that such settlements are fair and adequate. *See Chavez v. Netflix, Inc.*,75 Cal.Rptr.3d 413, 423 (Cal. Ct. App. 2018); *7-Eleven Owners*, 102 Cal.Rptr.2d at 788-789 (80 out of 5,454 class members objecting). Here, after extensive notice, there was only *one* objection and only twenty-three opt-outs to date. Rovertoni Decl. ¶¶ 16-17. Plaintiff will provide finalized figures of valid claims in supplemental briefing before the final approval hearing. This factor weighs heavily in favor of settlement approval and the Court should find that the "presumption of fairness" applies in this case.

**C. The Settlement Is Fair, Adequate, And Reasonable**

1. The Strength Of Plaintiff's Case And The Risk, Expense, Complexity And Likely Duration Of Further Litigation

To assess the adequacy of a class action settlement, the Court should weigh the risk inherent in continued litigation against the immediacy and certainty of substantial settlement proceeds. *See Dunk*, 56 Cal.Rptr.2d at 488-89; *Wershba v. Apple Computer, Inc.*, 110 Cal.Rptr.2d 145, 163 (Cal. Ct. App. 2001)("The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial.").

Although Plaintiff believes her case is strong, such confidence must be tempered by the fact that the Settlement is beneficial (providing a significant immediate return) and that there are significant risks of lesser or no recovery, particularly in a complex case such as this one. Class Counsel is convinced that the Settlement is in the best interests of the Class based on the negotiations and detailed knowledge of the issues presented. Omoto Decl. ¶ 10. In negotiating the Settlement, Class Counsel carefully considered the injunctive relief and the compensation to Settlement Class Members; specifically, Class Counsel balanced the Settlement against the possible outcomes of a trial on the merits. *Id.* The risks of trial and the normal "perils" of litigation were all weighed in reaching the Settlement. *Id.* ¶ 11. Here, litigating the case through to trial would have been expensive, required extensive resources, involved substantial risk, and would not have been fully resolved for years. *Id.* ¶¶ 12-13. Further, given Class Counsel's experience with geographic origin litigation in which no benefit was provided to the class due to the court granting defendant's motion to dismiss or denying class certification, Plaintiff is confident that the settlement in this case is fair and reasonable.

Even if Plaintiff had expended the time and resources litigating the case to trial and prevailed, the Class would face additional risks if Defendant decided to appeal or move for a new trial. Moreover, a trial would likely not commence for a few years. Omoto Decl. ¶ 11. Thus, any monetary and injunctive relief that could have been obtained at trial, which is not guaranteed and likely would not be as substantial as what Plaintiff has achieved with this Settlement, would probably be delayed for at least a few years. *Id.* In the meantime, Defendant would be permitted to continue to deceptively package the Covered Products with impunity to the financial detriment of Settlement Class Members. By contrast, the Settlement provides significant and certain relief that is available now as opposed to a fraction of this recovery potentially and hypothetically in the distant future.

Additionally, the monetary and injunctive relief is structured to account for the substantial risk that Defendant may be incapable of paying a financial award in the future should the case continue through further litigation. Further, the uncertain financial status of the Defendant identified in Plaintiff's Motion for Preliminary Approval has not improved. In its most recent Quarterly Report

filed with the Securities and Exchange Commission, Aterian, Inc. report that it has "incurred significant losses and negative cash flows from operations since our inception and expect to continue to incur such losses and negative cash flows for the foreseeable future until such time that we reach a level of profitability to sustain our operations." *Id*. At ¶ 11, Ex. 3. Aterian, Inc. also reported "substantial doubt about our ability to continue" and a potential need to "seek long-term strategic alternatives, such as a significant curtailment of our operations, a sale of certain of our assets, a divestiture of certain product lines, a sale of the entire enterprise to strategic or financial investors, and/or **allow our enterprise to become insolvent**." *Id.* (emphasis added). Class Counsel has taken this into account by requiring the Settlement Fund to be placed into escrow following the Court's Preliminary Approval Order, in order to preserve the Class Member's rights. Omoto Decl. ¶ 3, Ex. 1, Art. III(D)(2).

Consequently, this monetary and injunctive relief is clearly reasonable, particularly when weighed against the substantial risk that class members may be left with *no* relief even if Plaintiff were to prevail at trial. This supports approval of the settlement. *Cavazos v. Salas Concrete, Inc*., No. 1:19-cv-00062-DAD-EPG, 2022 WL 2918361, at *5 (E.D. Cal. July 25, 2022) (finding Defendant's uncertain financial condition weighed heavily in favor of granting final approval); *Ramirez v. Benito Valley Farms, LLC*, No. 16-CV-04708-LHK, 2017 WL3670794, at *5 (N.D. Cal. Aug. 25, 2017) (finding that continued litigation was actually adverse to the class given Defendant's weakened financial condition).

Furthermore, complex class actions can be expensive and time-consuming to prosecute. Indeed, the Parties' expert costs alone would quickly accumulate as a result of expert depositions, expert reports, expert challenges, and testimony, and could quickly lead to a scenario in which settlement might not be economically feasible for either party. *Id*. at ¶ 12. As such, the Settlement in this case is consistent with the "overriding public interest in settling and quieting litigation" that is "particularly true in class action suits" and thus, provides another reason to approve the Settlement. *Van Bronkhorst v. Safeco Corp*., 529 F.2d 943, 950 (9th Cir. 1976).

Class Counsel also carefully considered the time value of the present settlement, the fact that changes will be made to the Covered Products' labeling and advertising, and the monetary relief that will be provided to members of the Class. Omoto Decl. ¶ 13. This settlement also creates an enforceable legal obligation with respect to those changes. *Id*. Because the Settlement provides immediate and significant relief, without the attendant risks of continued litigation, the Court should approve the Settlement as fair, reasonable, and adequate.

2. The Amount Offered and Claimed in Settlement

This factor favors granting approval of the Settlement. The monetary and injunctive relief offered in the Settlement Agreement is more than fair compensation for the Settlement Class. It is well-established that "the merits of the underlying class claims are not a basis for upsetting the settlement of a class action." *Wershba*, 110 Cal.Rptr.2d at 163. Indeed, "even if 'the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated,' this is no bar to a class action settlement because 'the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.'" *Id.* At 166.

As discussed in Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement (the "Mot."), the expense to prosecute this case would have been substantial, especially in light of the need for expert testimony from multiple disciplines (consumer perception, damages, etc.). *See* Omoto Decl. ¶ 12. Were this case to proceed, costs would quickly accumulate as a result of discovery, motion practice, and expert fees. *Id*. The additional accumulation of such costs could quickly lead to a scenario in which settlement might not be economically feasible for either party. *Id*.

Further, were Plaintiffs to proceed to and succeed at trial, the "best case" recovery may not be better than the Settlement remedy. As outlined in Plaintiff's preliminary approval motion, Settlement Class Members are recovering a significant portion of the price of each Covered Product, and are receiving adequate compensation from the Settlement. Mot. 23; Rovertoni Decl. ¶ 20. If the Parties

were to litigate the case on its merits, the possibility of the Settlement Class Members receiving similar monetary relief is low, especially given that Defendant will challenge liability and damages. The Court should also consider the value that the Settlement Agreement's injunctive relief provides, as the risk of continued litigation also includes the possibility that Settlement class Members, and the general public, will not receive that benefit. *See Colgan v. Leatherman Tool Grp., Inc.*, 38 Cal.Rptr.3d 36, 65 (Cal. Ct. App. 2006) (stating that "[t]he lawsuits also resulted in a significant benefit for a substantial number of people by causing [Defendant] to change its labeling and advertising practices and by enjoining it from making future misleading representations."); *see also Brazil v. Dell Inc.*, No. C-07-01700 RMW, 2012 WL 1144303, at *1 (N.D. Cal. Apr. 4, 2012) (finding that the "benefits achieved by Class Counsel . . . come in the form of structural changes to [Defendant]'s advertising practices[.]"). As discussed above, the alternative – continued litigation – carries numerous risks that would likely lead to a lesser benefit to the Settlement Class. Indeed, if Defendants continue with costly litigation, funds potentially available for class compensation could instead be devoted to mounting legal fees. As such, cessation of litigation efforts is a benefit for the Class.

Here, as noted above, over 95% of potential class members received direct notice of the settlement. Following the claims administration verification process, the Parties' supplemental briefing will include a breakdown of the amount of meritorious claims received, which the Parties and Settlement Administrator are confident will be in keeping with approved claim rates in this and other jurisdictions.

3. The Extent of Discovery Completed And The Stage Of Proceedings

As discussed in Section IV.b.1 of this motion, Plaintiff and Class Counsel have conducted extensive pre-litigation investigations into all corners of this case, becoming well-equipped with the information necessary to act intelligently on behalf of the Settlement Class. *See also 7-Eleven*, 102 Cal.Rptr.2d at 787 (stating that it "is not the law" that settling a class action requires completing discovery, and that formal discovery is not required where the parties "had sufficient information to make an informed decision about settlement.") (quoting *Linney v. Cellular Alaska P'ship*, 151 F.3d

1234, 1239-40 (9th Cir. 1998); *see also Stewart v. Applied Materials, Inc.*, No. 15-CV-02632-JST, 2017 WL 3670711, at *6 (N.D. Cal. Aug. 25, 2017) (finding that the parties engaged in sufficient discovery "by 'the sharing of information through an informal discovery process,'" which allowed counsel to negotiate a fair and reasonable settlement). Here, Class Counsel had sufficient information to make an informed decision about the settlement and is confident that it is fair, adequate, and reasonable and therefore merits granting final approval.

4. The Experience And Views Of Counsel

As discussed in Sections IV.B.2, counsel for both Parties are experienced and respected class action attorneys and believe the settlement is fair, adequate, and reasonable. Class Counsel's endorsement is entitled to great weight following arms-length settlement negotiations. *See DIRECTV*, 221 F.R.D. at 528 ("'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.") (internal quotation marks omitted). Indeed, as the *DIRECTV* court explained, counsel "are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation." *Id.* (quoting *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)). As such, absent a finding of fraud or collusion, settlement agreements negotiated and endorsed by experienced counsel are presumptively fair and reasonable. *See Dunk*, 56 Cal.Rptr.2d at 488.

The Parties are in favor of settlement, as evidenced by the many months of negotiation leading up to the Settlement. Class Counsel is highly capable and experienced in class action and consumer litigation and, in particular, geographic origin false advertising class action litigation. *See* Omoto Decl. ¶¶ 7-9, Ex. 2. By virtue of its investigation, Class Counsel was also able to thoroughly evaluate the respective strengths and weaknesses of their positions, as well as the extent of available recovery. Class Counsel worked diligently to secure the best possible result for the Class through vigorous, arms-length negotiations. Class Counsel's views and recommendations concerning the Settlement are the product of a thorough analysis and consideration of the issues and risks of continued litigation. Class Counsel believes that the results achieved by the Settlement are eminently fair, adequate and

reasonable. Because the Parties and their counsel agree that the Settlement is fair and provides valuable benefits to the Settlement Class, this factor favors final approval.

5. The Reaction Of Class Members To The Proposed Settlement

As discussed in Section IV.B.ii.2, Settlement Class Members have indicated an overwhelmingly positive response to the proposed Settlement. There were only twenty-three opt-outs and only one objector. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (finding a favorable reaction to the settlement by the class where, out of 376,301 putative class members, only fifty-four submitted objections."); *Garner v. State Farm Mut. Auto. Ins.*, No. CV 08 1365 CW (EMC), 2010 WL 1687832, *15 (N.D. Cal. April 22, 2010) (an opt-out rate of 0.4 percent supported "the fairness of the Settlement"). Class counsel will address this objection in greater detail in its response to the objections, pursuant to this Court's August 3, 2023 Preliminary Approval Order. For purposes of the instant motion, counsel notes that the Objection of Marlene Janco requested that the class members should receive an "evenly" distributed fund after attorneys' fees and class membership awards have been distributed. *See* Omoto Decl., Ex. 4 (Janco Objection). This has, to the extent possible, already been achieved by the language in the Settlement Agreement calling for a pro-rata distribution of the cash payments and vouchers once the claims submission process has closed. As such, in many ways, Ms. Janco's objection can be seen as an endorsement of the overall settlement structure and merely a misunderstanding as to the specific terms of the Settlement Agreement.

Because this Objection should be overruled as further discussed in Plaintiff's forthcoming responses, and given the small number of exclusions and objections, which collectively represent a minuscule percentage of the anticipated number of Class members, the response of the Class supports granting final approval of the Settlement. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 2008) ("[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness."); *Hoover v. Mom365, Inc.*, No. 2:17-cv-01328-TLN-CKD, 2019 WL 6828294, at *2 (E.D. Cal. Dec. 13,

2019)(finding that opt outs representing less than 1% and zero objections was "strong evidence" of the reasonableness and fairness of this settlement.).

6. The Lack of A Governmental Participant

Because there is no governmental participant or objection in this class action, this factor should weigh in favor of approval. *See Ehret v. Uber Techs., Inc.*, No. 3:14-cv-113-EMC, 2017 WL 11680856, at *3 (N.D. Cal. Feb. 16, 2017)(noting the lack of a governmental agency objection favors settlement approval); *Emerson v. Frazee Indus., Inc*., No. 13cv2816 (BLM), 2015 WL 13828596, at *3 (S.D. Cal. May 4, 2015) (finding that "even though there is no governmental participant in the present action, the failure of any Attorney General to object to the proposed settlement supports this Court's final approval of the proposed settlement.").

**D. Notice To The Class Was Thorough And Fulfilled Due Process**

In assessing notice in a class action settlement, "[t]he standard is whether the notice has a 'reasonable chance of reaching a substantial percentage of the class members.'" *Wershba*, 110 Cal.Rptr.2d at 167. However, it is not necessary to show that notice reached each member of a nationwide class. *Id*. Moreover, the Court has a great deal of discretion in applying this standard. *See Chavez*, 75 Cal.Rptr.3d at 428 ("[T]he manner of giving notice is subject to the trial court's virtually complete discretion.").

Here, the Parties are in the unique position of being able to provide almost perfect notice to the class members. Because the overwhelming majority of Defendant's customers purchased their items via Amazon.com, and the Parties were able to arrange direct email notification to the consumers, notice here exceeded 95% of the Settlement Class at a fraction of the usual cost. The Parties were able to save a significant portion of the settlement fund which could have been depleted on expensive ad campaigns on billboards, on social media, and via postcard campaigns as is often required in other class actions.

As the Court determined in granting preliminary approval, the class notice designed for this action more than meets the applicable due process requirements. It has now been executed by the Settlement Administrator and Amazon as planned and in accordance with the specific notice plan

approved by the Court, and successfully notified Settlement Class Members of the Settlement. Indeed, based on the robust notice plan implemented, over 95% of the Settlement Class was given direct notice of the Settlement. Rovertoni Decl. ¶¶ 5-7. Courts regularly acknowledge that far less thorough notice plans are adequate. *See, e.g., In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 19-md-02913-WHO, 2023 WL 6205473, at *2 (N.D. Cal. Sept. 19, 2023)(finding that notice plan provided "best practicable notice" and satisfied due process where at least 80% of Settlement Class Members were reached); *Testone v. Barlean's Organic Oils, LLC*, No. 3:19-cv-00169-RBM-BGS, 2023 WL 2375246, at *2 (S.D. Cal. Mar. 6, 2023)(approving notice plan with reach of 71% of class members nationwide). Accordingly, this factor weighs in favor of final approval.

## V. The Court Should Confirm Certification Of The Class For Purposes of the Settlement

In granting preliminary approval of the settlement, the Court has already determined that the settlement Class meets the requirements for certification under Cal. Code Civ. Proc. § 382 in that: (1) the Class is so numerous that joinder is impractical; (2) there are questions of law and fact that are common, or of general interest, to the Class, which predominate over any individual issues; (3) Plaintiff's claims are typical of the claims of the Class; (4) Plaintiff and her counsel will fairly and adequately protect the interests of the Class; and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *See* Preliminary Approval Order ¶ 6. Before doing so, this Court carefully scrutinized the Class Action Settlement Agreement and Release, which sets forth the material terms of the Settlement. In the absence of any new evidence that requires revisiting the issue, Plaintiff respectfully requests that the Court confirm certification of the Settlement Class. "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for benefit of all." Cal. Code Civ. P. § 382. Indeed, the judicial policy of California is to favor the maintenance of class actions. *Richmond v. Dart Indus., Inc.*, 29 Cal.3d 462, 473 (Cal. 1981) ("This state has a public policy which encourages the use of the class action device.").

**A. The Class Is Ascertainable And Sufficiently Numerous**

A class is ascertainable "when it is defined 'in terms of objective characteristics and common transactional facts' that make 'the ultimate identification of class members possible when that identification becomes necessary.'" *Noel v. Thrifty Payless, Inc.*, 445 P.3d 626, 634 (Cal. 2019). Here, the Settlement Class is defined based on objective criteria, as it includes all customers who purchased a product from Defendant during the Class Period, and their identity is readily available through sales records kept by both Defendant and Amazon. The Class is also sufficiently numerous, as it is comprised of customers numbered in the millions. *See Pool v. Ameripark, LLC*, No. 19cv1103-LAB (WVG), 2022 WL 848322, at *3 (S.D. Cal. Mar. 22, 2022)(finding a settlement class of 1,024 sufficiently numerous that "joinder of all members is impracticable.").

**B. There Is A Community of Interest**

The "community of interest" requirement embodies three factors: (a) predominant common questions of law or fact; (b) class representatives with claims or defenses typical of the class; and (c) class representatives who can adequately represent the class. *Richmond*, 29 Cal.3d at 470. All of these factors are met here.

1. Common Issues Of Law And Fact Predominate

The commonality criterion requires the existence of a common question of law or fact and is generally established with the issues of predominance and typicality. *See Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 713-14 (Cal. 1967). All that is required is a common question of fact or law exists which predominates over issues unique to individual plaintiffs. The existence of individual issues or facts is not a bar to class certification as long as they do not render class litigation unmanageable or predominate over the common issues. *See B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 235 Cal.Rptr. 228, 236 (Cal. Ct. App. 1987) ("presence of individual damage issues cannot bar certification"). Here, Plaintiff's claims present sufficient common issues of law and fact that predominate over individual issues and warrant class certification. For example, Plaintiff alleges that Defendant's labelling practices, which were uniform across all products in the Class Period, were deceptive and misleading regarding the geographic origin of the Products. Accordingly, the

commonality requirement is satisfied.

2. Plaintiff's Claims Are Typical Of The Claims Of The Class

To satisfy the typicality requirement, California law does not require that a plaintiff have claims identical to the other class members. Rather, the test of typicality for a class representative is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiff, and whether other class members have been injured by the same course of conduct. *See Seastrom v. Neways, Inc*., 57 Cal.Rptr.3d 903, 908 (Cal. Ct. App. 2007). As the claims of Plaintiff and Class Members are based on the same legal theories, and arise out of the same misleading practices, the typicality requirement is satisfied.

3. Plaintiff Will Fairly And Adequately Represent The Class

The question of adequacy of representation "depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation in the plaintiff's interest or not antagonistic to the interests of the class." *McGhee v. Bank of America*, 131 Cal.Rptr. 482, 487 (Cal. Ct. App. 1976). These considerations are satisfied here, as Plaintiff's counsel are attorneys who are qualified and experienced in consumer class litigation, particularly as it pertains to the geographic origin of the product. Further, because Plaintiff's claims are typical of other Class Members and are not based on unique circumstances that might jeopardize the claims of the Class, there is no antagonism between the interests of Plaintiff and those of the Class. Indeed, in granting preliminary approval, the Court has already determined that Plaintiff and her Counsel can adequately represent the Class. Plaintiff and Class Counsel have continued to diligently represent the Class since then.

**C. Proceeding As A Class Action Is Superior To Individual Actions**

Under the circumstances, proceeding as a class action is a superior means of resolving this dispute. Class certification is the most efficient means of affording compensation to the Class, to resolve their claims in one fell swoop, and to deter future violations of the CLRA. *See Linder v. Thrifty Oil Co*., 23 Cal.4th 429, 434 (Cal. 2000). Further, individual actions arising out of the same operative facts would unduly burden the courts and could produce inconsistent results, which may be avoided by class certification. Finally, the monetary value of the individual actions is not substantial,

and the resolution on a class-wide basis is a superior remedy than litigating millions of small claims nationwide. *See Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc*., 326 F.R.D. 592, 616 (N.D. Cal. 2018)("[A] class action is superior because in the absence of a class action, no individual plaintiff would file suit because the amounts at issue for each class member would likely be a few dollars."); *Bruno v. Quten Rsch. Inst., LLC*, 280 F.R.D. 524, 537 (C.D. Cal. 2011) "Given the small size of each class member's claim, class treatment is not merely the superior, but the only manner in which to ensure fair and efficient adjudication of the present action.")

## VI. REQUEST FOR ATTORNEY'S FEES AND COSTS

### A. Class Counsel Is Entitled To An Award Of Reasonable Attorneys' Fees and Expenses Under The Common Fund Doctrine

When a class action case results in class relief, whether by settlement or by contested judgment, class counsel is entitled to its reasonable fees for services. *Lealao v. Beneficial Cal*., 97 Cal.Rptr.2d 797, 803-809 (Cal. Ct. App. 2000); *Serrano v. Priest*, 20 Cal. 3d 25, 34-48 (Cal. 1977). The award for reasonable attorney's fees should also include reimbursement for litigation expenses reasonably incurred. *Bussey v. Affleck*, 275 Cal.Rptr. 646, 648 (Cal. Ct. App. 1990). The common fund doctrine provides that when a settlement or adjudication results in the establishment of a common fund for the benefit of a class, fees may be awarded to the attorneys creating the benefits as a matter of equity. *Lealao*, *supra*, at 27; *Serrano*, 20 Cal. 3d at 35.

> Although American courts, in contrast to those of England, have never awarded counsels' fees as a routine component of costs, at least one exception to this rule has become as well established as the rule itself: that one who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs. This, the so-called 'common fund' exception to the American rule regarding the award of attorneys fees (i.e., the rule set forth in section 1021 of our Code of Civil Procedure), is grounded in 'the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund of property itself or directly from the other parties enjoying the benefit.'

*Serrano,* 20 Cal. 3d at 35 (internal citations omitted).

Similarly, where litigation creates a "substantial benefit" for a class and where funds are available for payment of attorneys' fees for such benefits, class counsel is also entitled to fees for creating that benefit. *Serrano v. Unruh,* 32 Cal. 3d 621, 627-32 (Cal. 1982); *In re Sutter Health Uninsured Pricing Cases,* 89 Cal.Rptr.3d 615, 629 (Cal. Ct. App. 2009); *Jordan v. Dep't of Motor Vehicles* 123 Cal.Rptr.2d 122, 133-134 (Cal. Ct. App. 2002) (citation omitted).

**B. Class Counsel Is Also Entitled to Fees Under The CLRA, Which Provides For A Mandatory Award Of Attorneys' Fees To The Prevailing Party**

Plaintiff brought claims against Defendant under the California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* (the "CLRA"), which has its own attorneys' fees provision. This section mandates an award of attorneys' fees and costs to a prevailing plaintiff. An award of attorneys' fees to the prevailing party is mandatory under Civil Code § 1780(d), which provides:

> "The court *shall* award court costs and attorney's fees to a *prevailing plaintiff* in litigation filed pursuant to this section. . . ." "The word 'shall' is usually deemed mandatory, unless a mandatory construction would not be consistent with the legislative purpose underlying the statute." Our Supreme Court has observed that "the availability of costs and attorneys fees to prevailing plaintiffs is integral to making the CLRA an effective piece of consumer legislation, increasing the financial feasibility of bringing suits under the statute." Thus, a mandatory construction of the word "shall" in section 1780(d) is consistent with the legislative purpose underlying the statute.

*Kim v. Euromotors West/The Auto Gallery,* 56 Cal.Rptr.3d 780, 786 (Cal. Ct. App. 2007)(emphasis in original)(internal citations omitted).

Plaintiff is the "prevailing plaintiff" under the CLRA because she has achieved her litigation objectives of making Defendant change the labeling and advertising of the Covered Products to dispel consumer deception, as well as negotiating monetary relief to consumers who bought the Covered Products during the class period.

### C. Class Counsel's Request for Fees and Costs Is Fair, Reasonable and Should Be Granted

Under both of these bases for an award of fees and costs the court must determine what amount is fair and reasonable. In analyzing this question courts in California had utilized two distinct methods often in conjunction with one another. The first method, often referred to as the percentage of the benefit method, was described by California Supreme Court as follows:

> "We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation convince us the percentage method is a valuable tool that should not be denied our trial courts."

*Laffitte v. Robert Half Internat. Inc*., 376 P.3d 672, 686 (Cal. 2016)(citations omitted).

#### 1. The Value of the Settlement is $800,000

To calculate attorneys' fees based on the percentage of the benefit, the Court must first determine the value of the Settlement Fund. In doing so, the Court must include the value of the benefits conferred to the Class, including any attorneys' fee and cost payments to be made. See, e.g., *Staton v. Boeing*, 327 F.3d 938, 972-74 (9th Cir. 2003); *Hartless v. Clorox Co*., 273 F.R.D. 630, 645 (S.D. Cal. 2011), *aff'd*, 473 F. App'x. 716 (9th Cir. 2012). Stated otherwise, California courts include the requested attorney's fees when calculating the total value of the settlement fund. *Lealao*, 97 Cal.Rptr.2d at 808. Thus, "the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class …." *Consumer Privacy Cases*, 96 Cal.Rptr.3d 127, 133 (Cal. Ct. App. 2009) (quoting the Manual for Complex Litigation § 21.71 at 525 (4th 21ed. 2008)). Thus, here,

the requested attorneys' fees of $171,520.07 is included in the common fund of $800,000 when valuing the settlement. This is particularly true when addressing what the California Supreme Court has characterized as a "true common fund" with a fixed sum, "without any reversion to defendant and with all settlement proceeds, net of specified fees and costs, going to pay claims by class members." *Laffitte*, 376 P.3d at 687. Here, there will be no reversion to the Defendant as, per the Settlement Agreement, the settlement fund will be distributed pro-rata in its entirety to the class members accordingly once the claims have all been received, and fees and costs have been deducted.[5]

The $800,000 valuation of the Settlement Fund values the vouchers at their face value, or 100 cents on the dollar. *See McKnight v. Hinojosa*, 54 F.4th 1069, 1076 (9th Cir. 2022) (affirming district court conclusion that credits issued to class members were not coupons where members had the option to receive cash instead, the credits were valid for a range of products or services, and did not contain a blackout date.); *In re Groupon, Inc., Mktg. & Sales Pracs. Litig.*, No. 11md2238 DMS (RBB), 2012 WL 13175871, at *7 (S.D. Cal. Sept. 28, 2012)(including vouchers in the settlement valuation where a two-tier settlement structure allowed members to opt for either cash or a voucher); *Reibstein v. Rite Aid Corp.*, 761 F.Supp.2d 241, 255–56 (E.D. Pa. 2011)(reasoning that gift cards provided to customers which were freely transferrable, did not have an expiration date, and could be used on many products at the buyer's discretion are "more like 'cash' than 'coupons.'") Here, the Settlement Agreement offers class members an option to opt for cash payments or the vouchers. Further, the vouchers are freely transferrable to others, may be combined, and have no expiration date, distinguishing them from disfavored coupon settlements.

Finally, the Court should include the costs of notice and claims administration in the value of the settlement, which is a common practice in the Ninth Circuit. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015) ("[A]dministrative costs in particular make it possible to distribute a settlement award in a meaningful and significant way.); *In re Nat'l Collegiate*

[5] Any check not cashed after 180 calendar days shall be dealt with in accordance and compliance with California Code of Civil Procedure § 384.

*Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 768 F. App'x 651, 654 (9th Cir. 2019) (same).

Class Counsel solicited competitive bids from several qualified claims administrators to ensure the administration process would optimize efficiency and value to the class, and paid for the lion's share of the notice (effectuated by Amazon directly to over 95% of the class members) out of pocket. Omoto Decl. ¶ 28. Once AB Data was identified as an ideal choice, the parties coordinated with AB Data and Amazon to ensure that the Notice and Claims Administration would be thorough, convenient for the class members, and efficient both in notice and in scrutinizing potentially fraudulent claims, all of which benefits the Class and favors including the costs for notice and claims administration in the value of the settlement.

In conjunction with Amazon, Plaintiff was able to provide direct notice to the class members and mitigate the costs of potential advertising and notice campaigns. Claims could be submitted both via mail and online, ensuring convenience for the class members. Finally, the Claims Administrator is experienced in identifying fraudulent claims and confirming their authenticity or lack thereof, ensuring that only bona fide claims are paid out, and increasing the monetary benefits of the Settlement due to the pro-rata calculations. *See* Rovertoni Decl. ¶¶ 14-15. Accordingly, the value of the settlement fund should be the full $800,000.

2. The Amount of the Fee Is Appropriate Under the Percentage of the Benefit Approach

Once the size of the fund has been determined the next step in the analysis is to determine the appropriate percentage of the fund to award in fees. A fee award of 25% "'[i]s the "benchmark" award that should be given in common fund cases.'" *Lealao*, 97 Cal.Rptr.2d at 801 n. 1 (quoting *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)). In determining whether to deviate up or down from the benchmark, courts in California consider factors including: quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent

risk presented. *See Lealao*, 97 Cal.Rptr.2d at 803. Although 25% is considered the benchmark, courts frequently deviate upward to award 33% and even 40% in consumer class action settlements.[6]

Here, the total value of the monetary settlement benefit is $800,000. Class Counsel's requested fees of $171,520.07 (once out-of-pocket costs of $28,479.93 are subtracted) is 21% of this monetary value. As discussed above, this percentage actually falls ***under*** the benchmark of reasonable attorneys' fees awarded in other cases involving similar recoveries in California.

**D. Class Counsel Has Conferred Significant Benefits to a Large Class of Persons**

Class counsel who has produced a significant benefit for the class is entitled to compensation. The total value of the benefits to the class, i.e. the "success achieved," includes all positive results achieved by the litigation. *See Netflix*, 75 Cal.Rptr.3d at 421 (explaining that the "success achieved" in a class settlement includes, *inter alia*, the dollar value of the settlement, the absolute size of the class of persons who are eligible for the benefit, and changes in company policies). The settlement achieved by Class Counsel confers substantial benefits on the class, and accomplishes the primary purpose of California's consumer protection laws—to stop and prevent unfair competition and provide redress to consumers harmed by the unfair competition. This factor alone supports Class Counsel's fee request.

First, the Settlement provides an excellent recovery for the Settlement Class. Under the terms of the Settlement Agreement, Defendant has agreed to provide a total settlement fund of $800,000,

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[6] *Laffitte*, 376 P.3d at 688 (upholding award of 33.33% of the common fund as attorneys' fees where the trial court reasonably used a benchmark percentage plus consideration of counsel's time spent on the case); *see also Razo v. AT&T Mobility Servs., LLC*, No. 1:20-cv-0172 JLT HBK, 2023 WL 3093845, at *26 (E.D. Cal. Apr. 26, 2023)(finding a 33% award was "fair, adequate and reasonable"); *Gonzalez v. Xtreme Mfg*., LLC, No. 1:20-cv-1704 JLT SKO, 2023 WL 3304285, at *27 (E.D. Cal. May 8, 2023)(same); *In re Robinhood Outage Litig*., No. 3:20-cv-01626-JD, 2023 WL 5321525 (N.D. Cal. July 28, 2023) (awarding 30% of common fund); *Dearaujo v. Regis Corp*., No. 2:14-cv-01408-KJM-DB2017, 2017 WL 3116626, at *13 (E.D. Cal. July 21, 2017) (awarding one-third of common fund*); Bennett v. SimplexGrinnell LP*, No. 11-cv1854-JST, ECF No. 278, at 11 (N.D. Cal. Sept. 3, 2015) (awarding 38.8% of common fund); *Schiller v. David's Bridal, Inc.*, No. 1:10-cv-00616-AWI, 2012 WL 2117001, at *7 (E.D. Cal. June 11, 2012) (same)*; Amaro v. Anaheim Arena Mgmt., LLC*, 284 Cal.Rptr.3d 566, 585 (Cal. Ct. App. 2021), *review denied* (Dec. 29, 2021) (approving a 29% fee even when the fee was "substantially higher" than the lodestar); *Adauto v. Door Components, Inc*., Los Angeles Sup. Ct. No. BC469230 (July 1, 2013) (Judge Lee Edmon awarded attorney's fees equal to 40% of the settlement fund, plus costs); Ayala *v. Denbeste Mfg., Inc*., Kern County Sup. Ct. No. S-1500-CV275248 (Feb. 7, 2013) (awarded attorney's fees equal to approximately 40% of the settlement funds, plus costs); *Crandall v. U-Haul Int'l*, Los Angeles Sup. Ct. No. BC 178775 (Sept. 30, 1997) (Judge Czuleger awarded plaintiffs' counsel attorney's fees equal to 40% of the settlement fund).

which will be used to pay: (1) Class Member claims, (2) the costs of notice and claims administration (approximately $170,000), (3) Plaintiffs' attorneys' fees and costs (not to exceed $200,000); and (4) Plaintiff's incentive award ($1,500). Such a large number of class members have benefitted from this settlement because no proof of purchase was required, which resulted from the great efforts of Class Counsel during the negotiation of this settlement.

Furthermore, the Settlement Agreement provides Class Members with significant injunctive relief because Defendant has agreed to change its labeling and marketing practices. Omoto Decl. ¶ 3, Art. III, ¶ D.5. Specifically, Defendant has agreed not use the word "Austria" or the Austrian flag on any of the Mueller-branded products, its packaging, labeling, and/or its online marketing. *Id*. This change in the advertising and labeling of Defendant's products provides long-lasting benefits to consumers and helps eliminate false advertising throughout the industry as attention from nationwide settlements often results in a chilling effect on other companies engaging in similar false advertising. Indeed, courts in other false advertising cases have recognized significant value derived from substantially similar injunctive relief. *See Marty v. Anheuser-Busch Cos.*, No. 13-CV-23656-JJO, 2015 WL 6391185, at *2 (S.D. Fla. Oct. 22, 2015) (holding that "injunctive changes such as label modifications represent a benefit to the class and should be considered when approving a class settlement[,]" and collecting cases in accord). Thus, based on the scope of the injunctive relief and its effect on the marketplace, the requested fee award is reasonable and warranted. *See Chavez*, 75 Cal.Rptr.3d at 430.

**F. The Novelty and Difficulty of the Issues Involved and Class Counsel's Skill in Resolving Them Warrant Approval of the Requested Attorneys' Fees**

This case involves complex issues because, as with any contested class action, not only must Plaintiff prove the merits of her claims, but also obtain class certification. Here, Plaintiff contends that Defendant misled consumers into believing that the Covered Products are made or designed in Austria when, in fact, they are not. This necessarily requires a showing that Defendant's marketing and labeling of the Covered Products deceives a significant portion of consumers, that such deceptive representations were material to consumers, and that those consumers paid a price premium. *See e.g.*,

*Lavie v. Procter & Gamble Co.*, 129 Cal.Rptr.2d 486, 495 (Cal. Ct. App. 2003). These are the issues that Class Counsel spent a significant amount of time navigating in its negotiations with counsel for Defendant, and based on the skill of Class Counsel, ultimately overcame in reaching a resolution in this matter.

Courts also consider the professional experience of counsel in determining an appropriate fee award. *See Serrano*, 20 Cal.3d at 49; *see also Hanlon*, 150 F.3d at 1029. Here, the reputation, experience and ability of Class Counsel in litigating consumer class action litigation were essential to successfully negotiating a favorable settlement. *See Zepeda v. PayPal, Inc*., No. C 10-1668 SBA, 2017 WL 1113293, at *20 (N.D. Cal. Mar. 24, 2017) (noting counsel's experience with consumer class action litigation was "particularly beneficial in this action, in view of the substantive and procedural complexities involved in litigation and the protracted settlement process.") As forth in the declaration submitted herewith, Class Counsel have extensive experience litigating class actions and other complex civil litigation—particularly litigation involving consumer false advertising claims. Omoto Decl. ¶¶ 7-9, Ex. 2. Class Counsel's history of successfully prosecuting consumer class actions demonstrates that they were committed to pursuing this litigation until they achieved a fair result for Class Members. Indeed, Class Counsel has consistently displayed a high level of skill regarding the complex legal issues presented in this matter. It worked diligently to achieve a resolution in this matter that would encompass all Class Members, and ensure they receive real and substantial benefits.

**G. The Court Should Consider the Extent to Which the Nature of the Litigation Precluded Class Counsel from Undertaking Other Cases**

From the very beginning, this nationwide class action has demanded a great deal of attention from Class Counsel. Due to the considerable expenditure of time, effort and resources – including a significant pre-filing investigation, review of informal and confirmatory discovery, mediation, and extensive negotiations– Class Counsel was required on some occasions to forego other employment in order to commit the necessary resources to the prosecution of this case. *Id*. ¶ 26.

Class Counsel will continue to devote additional time and resources to this litigation assisting

Class Members in the settlement claims process, monitoring the distribution of claims, responding to Class Member inquiries, preparing for and attending the final fairness hearing, and responding to any settlement objectors and formal appeals. *Id*. ¶ 18. As such, the requested fee is reasonable and appropriate, and does not account for the additional time and resources Class Counsel will devote to this case as a result of these post-settlement activities.

**H. The Contingent Nature of the Fee Award Supports Its Approval**

By choosing to pursue a large-scale class action against Defendant involving complex issues and claims, Class Counsel assumed a significant risk. In the event that Plaintiff was not successful with her claims, her counsel bore a significant risk of losing substantial funds in litigating this class action, which is usually a costly and expensive endeavor. *Id.* ¶ 27. Given the contingent nature of the fee in this case, Class Counsel's fee request is reasonable and certainly justified. *See Rader v. Thrasher,* 57 Cal.2d 244, 253 (Cal. 1962) ("[A] contingent fee contract, since it involves a gamble on the result, may properly provide for a larger compensation than would otherwise be reasonable.").

**I. The Factors Considered in the Percentage-of-the-Benefit Analysis Support Granting the Fee Request**

As established above, a plethora of the considerations identified by California Courts in scrutinizing a Counsel fee award would in fact support an upward deviation above the "benchmark" 25% recovery. *See supra* n.10. In this context of comparable fee awards approved in other consumer class action cases to attorneys of comparable experience, Counsel's requested 21% Counsel fee of $171,520.07 should be viewed as particularly reasonable and be approved by this Court.

**J. A Lodestar Cross-Check Supports Class Counsel's Fee Request**

Under binding California Supreme Court jurisprudence, in a common fund case, it is not an abuse of discretion for the trial court to assess and award attorney's fees solely under the percentage of benefits method. *Laffitte*, 376 P.3d at 688 ("[Trial courts] also retain the discretion to forgo a lodestar cross-check . . . ."). Thus, the Court need not conduct a lodestar cross check here, particularly when Class Counsel is requesting a percentage that is below what is typically approved in this

jurisdiction. However, even if the Court chose to conduct a lodestar cross-check here, the cross-check reveals that Class Counsel's fee request is fair and reasonable.

Under the "lodestar" approach, an initial lodestar is calculated by multiplying the reasonable hours expended in the action by a reasonable hourly rate for each attorney expending that time. *Lealao,* 97 Cal.Rptr.2d at 803. Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative "multiplier" to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented. *See* Richard M. Pearl, *California Attorney Fee Awards* (2d ed.1998) §§ 13.1-13.7. This is done because "the lodestar method better accounts for the amount of work done, while the ***percentage of the fund method more accurately reflects the results achieved***." *Laffitte,* 376 P.3d at 687 (quoting *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (emphasis added). Here, Class Counsel worked a total of 492.50 hours, with a lodestar of $303,613.50. Omoto Decl. ¶ 15.

1. The Hours Worked by Class Counsel Were Reasonable

The starting point for the determination of the reasonable number of hours meriting compensation is the evidence of the actual number of hours spent on the litigation. *Horsford v. Board of Trustees*, 33 Cal.Rptr.3d 644, 673 (Cal. Ct. App. 2005). Class Counsel spent nearly 500 hours litigating this case. *See* Omoto Decl. ¶ 15. The number of hours spent was reasonable given the extensive pre-mediation investigation conducted by Class Counsel (*supra* § II), the Parties' negotiations, and Class Counsel's time spent obtaining Court approval of the Settlement. In determining whether the number of hours expended on the litigation was reasonable, the court "should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (noting that "[l]awyers 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."). Further, this analysis does not take into account a significant unknown: the often considerable amount of time

counsel spends in facilitating the settlement administration and advocating for the class members' rights *after* the approval is granted. *See supra* section VI.G; *see also Luna v. Universal City Studios, LLC*, No. CV 12-9286 PSG (SSx), 2016 WL 10646310, at *9 (C.D. Cal. Sept. 13, 2016) (acknowledging counsel's estimate that settlement administration would entail a further 50 hours of counsel's time).

2. Class Counsel's Hourly Rates Are Reasonable

In assessing the reasonableness of an attorney's hourly rate, courts consider whether the claimed rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). The relevant community is the community in which the court sits. *See Schwarz v. Sec. of Health & Human Servs.*, 73 F.3d 895, 906 (9th Cir. 1995). "In making its calculation, the court should also consider the experience, skill, and reputation of the attorney requesting fees." *Heritage Pac. Fin., LLC v. Monroy*, 156 Cal.Rptr.3d 26, 54 (Cal. Ct. App. 2013) (citing *Schwarz*, 73 F.3d at 906). "Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determination in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). Here, Class Counsel's hourly rates ranging from $425 for associates and $800 for partners are within the range of rates charged in the community for comparable work by individuals with comparable background, experience and ability and which have been approved by California courts in the past. *See* Omoto Decl. ¶¶ 20-24, Ex. 5. *See also:*

- *Carlotti v. ASUS Computer Int'l*, No. 18-CV-03369-DMR, 2020 WL 3414653, at *5 (N.D. Cal. June 22, 2020) (ranging from $450 to $900 for attorneys and up to $1,025 for partners);
- *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588, 601 (N.D. Cal. 2020) ($830 to $1,275 for partners and $425 to $695 for associates);

- *Lopez v. Mgmt. & Training Corp*., Case No. 17cv1624 JM(RBM), 2020 WL 1911571 (S.D. Cal. Apr. 20, 2020) (approving attorneys' fee request with rates ranging from $500 to $900 per hour);
- *Spangler v. Nat'l Coll. of Tech. Instruction*, No. 14-CV-3005 DMS (RBB), 2018 WL 846930, at *2 (S.D. Cal. Jan. 5, 2018) (approving rates of $825 for named partner and $795 for partner, as well as $525 for senior associate);
- *Mount v. Wells Fargo Bank, N.A*., No. B260585, 2016 WL 537604 (Cal. Ct. App. 2016) (Hourly rates ranging from $300 to $1,100 were reasonable in a 2016 consumer class action case).

Plaintiffs' Counsel calculated their hourly rates by the reasonable market value of Counsel's services on an hourly basis. As such, they are reasonable under California law. (*Ketchum v. Moses*, 24 Cal.4th 1122, 1134 (Cal. 2001); *Blum*, 465 U.S. at 895 n. 11; *Camacho v. Bridgeport Fin., Inc*. 523 F.3d 973, 979 (9th Cir. 2008); see also *Robertson v. Fleetwood Travel Trailers of Cal., Inc*. 50 Cal.Rptr.3d 731, 757 (Cal. Ct. App. 2006); *Blanchard v. Bergeron* 489 U.S. 87, 96 (1989) (assessing reasonable market value for attorneys working on a contingent fee basis.)

3. Class Counsel Have Incurred a "Negative" Multiplier Here, Which Is Below the Range Commonly Applied by Both California and Federal Courts

Class Counsel is seeking $171,568.86,000 in attorneys' fees even though their lodestar in this case is $303,613.50, thereby resulting in a *negative* multiplier of .56. Omoto Decl. ¶ 24. An inverse or "negative" multiplier occurs when the fees requested are ***less than*** Class Counsel's lodestar. Fee requests which produce an inverse lodestar multiplier support an inference of reasonableness. *See, e.g., Carlotti v. ASUS Computer Int'l*, No. 18-CV-03369-DMR, 2020 WL 3414653, at *6 (N.D. Cal. June 22, 2020)( "A negative multiplier strongly suggests the reasonableness of a negotiated fee.")(internal quotation marks omitted); *Rosado v. Ebay Inc*., No. 5:12-cv-04005-EJD, 2016 WL 3401987, at *8 (N.D. Cal. June 21, 2016) (same); *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007) ("The resulting so-called negative multiplier suggests that the percentage-based amount is reasonable and fair based on the time and

effort expended by class counsel."); *Schiller v. David's Bridal, Inc.*, No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at *23 (E.D. Cal. June 11, 2012) ("An implied negative multiplier supports the reasonableness of the percentage fee request"); *Chun-Hoon v. McKee Foods Corp*., 716 F. Supp. 2d 848, 854 (N.D. Cal. 2010) ("[negative multiplier] suggests that the negotiated fee award is a reasonable and fair valuation of the services rendered to the class by class counsel.")

Indeed, substantial ***positive*** multipliers (when counsel seeks an amount in fees that is greater than its lodestar) have been found to be reasonable in this jurisdiction. For example, in determining an appropriate multiplier, the court in *Wershba* stated "[m]ultipliers can range from 2 to 4 or even higher." *Wershba*, 110 Cal.Rptr.2d at 170; *see also City of Oakland v. Oakland Raiders*, 249 Cal. Rptr. 606 (Cal. Ct. App. 1988)(affirming a multiplier of 2.34). Numerous other cases have applied a positive multiplier between 5.2 and 12 to class counsel's lodestar. *See, e.g., Craft v. Cnty. of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008) (multiplier of 5.2); *Glendora Cmty. Redevelopment Agency v. Demeter*, 202 Cal.Rptr. 389 (Cal. Ct. App. 1984) (multiplier of 12); *Wilson v. Bank of America Nat'l Trust & Sav. Ass'n.* No. 643872 (Cal. Sup. Ct. Aug. 16, 1982)(multiplier of 10 applied to hourly rate). Because courts routinely approve positive multipliers, a ***negative*** multiplier inherently supports the finding of reasonableness.

The requested fee of $171,520.07 is therefore particularly justified here given that this is a large and complicated class action for which Class Counsel dedicated significant time and resources. Omoto Decl. at ¶¶ 23-27. Accordingly, it is well within the Court's discretion, and appropriate here, to award the full fee amount sought by Class Counsel.

## VII. CLASS COUNSEL SHOULD BE AWARDED REIMBURSEMENT OF COSTS

As demonstrated above, Class Counsel's time and efforts in this case show that their requested fees are reasonable. In regard to out-of-pocket costs, attorneys in a class action may be reimbursed for costs incurred "in the ordinary course of prosecuting [a] case" in addition to attorneys' fees incurred. *See X-Ray Film Antitrust Litig*., No. 960886, 1998 WL 1031494, at *11 (Cal. Sup. Ct. Alameda Cnty. Oct. 22, 1998) (awarding class counsel $29,051.40 in costs and

expenses). "[T]he prevailing view is that expenses are awarded in addition to the fee percentage and are routinely reimbursed in contingency cases." *Nat. Gas Anti-Tr. Cases I, II, III & IV*, No. 4221, 2006 WL 5377849, at *4 (Cal. Super. Ct. Dec. 11, 2006) (citations omitted). In *Serrano*, 20 Cal.3d at 35, the Supreme Court advised that reimbursement of costs in a common fund is "grounded in the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property.'" *Id.* Furthermore, California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.*, expressly allows for an award of court costs to Plaintiff in addition to an award of attorney fees. Cal. Civ. Code § 1780(e) ("[t]he court shall award court costs and attorney's fees to a prevailing plaintiff.").

Here, Class Counsel's costs and expenses to date which include fees for filing, meditation, and travel are $28,479.93. Omoto Decl. ¶ 28 Ex. 6. This amount does not include additional costs Class Counsel expects to incur after the filing of this Motion. *Id.* This request should be granted because all the costs were reasonably incurred and necessary given the complex nature of this case.

## VIII. A SERVICE AWARD FOR PLAINTIFF SHOULD BE GRANTED

Lastly, due to her diligent efforts serving as a class representative on behalf of the Settlement Class, Plaintiff respectfully requests that this Court grant a service award of $1,500 as allowed for in the Settlement Agreement. Omoto Decl. ¶3, Ex. 1, Art. III ¶ E. Pursuant to the Settlement Agreement, Defendant has the right to contest the award. *Id.* Service awards for class representatives are not only common in class actions, but are typically awarded in excess of what Plaintiff is seeking in this case. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 112 Cal. Rptr.3d 324, 334-335 (Cal. Ct. App. 2010) ("[I]t is established that named plaintiffs are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class."); *See also*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (approving a $5,000 service award for each class representative); *In re Toys "R" Us-Del., Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 470-72 (C.D. Cal. 2014)

(granting a $5,000 award to each named plaintiff, finding that "[t]hese proposed awards are consistent with the amount courts typically award as incentive payments."); *see also Asghari v. Volkswagen Grp. of Am., Inc.*, No. CV 13-02529 MMM (VBKx), 2015 WL 12732462, at *52 (C.D. Cal. May 29, 2015) ("Nonetheless, it is well-established that the court may grant a modest incentive award to class representatives, both as an inducement to participate in the suit and as compensation for time spent in litigation activities, including depositions."). Indeed, courts have granted similar service awards in cases settling at similar procedural postures as this instant action. *See Id.*, 2015 WL 12732462, at *54 (finding $2,500 as a reasonable service award when the parties settled before conducting any depositions or briefed a class certification motion).

Here, Plaintiff is requesting a service award of $1,500, which is modest compared to service awards that courts in California have found reasonable and have approved. Furthermore, a service award is particularly warranted in this case because Plaintiff has played an integral role in the commencement, pursuit, and resolution of this action on behalf of Class Members. Specifically, Plaintiff spent significant time and resources providing Class Counsel with the information necessary for her claims, working with Class Counsel on numerous occasions to discuss the status of the action, the merits of the case, and settlement negotiations. Declaration of Stacy Dorcas ("Dorcas Decl.") ¶¶ 8-10. Plaintiff also contributed a significant amount of time reviewing the class action complaint, Settlement Agreement, and notice documents. *Id.*; *see also* Theodore Eisenberg & Geoffrey P. Miller, *Symposium: Emerging Issues in Class Action Law: Incentive Awards to Class Action Plaintiffs: An Empirical Study,* 53 UCLA L. Rev. 1303 (2006) (stating that "representative plaintiffs might be rewarded for their performance in taking on risky litigation because, if such litigation generates a settlement, it may be inferred that the representative plaintiff has provided superior service to the class.").

Plaintiff was also fully prepared to undertake the work necessary to fully litigate this case if necessary. Dorcas Decl. ¶ 11. Such efforts and commitment have resulted in significant monetary and injunctive benefits to the Class Members. As such, Plaintiff respectfully requests that the Court

award her a service award of $1,500, as provided for in the Settlement Agreement.

## IX. CONCLUSION

Plaintiff respectfully submits that the proposed Settlement is fair, adequate, and reasonable on its merits. Settlement Class Members have indicated overwhelming positive support for the Settlement. Furthermore, experienced counsel recommends the proposed Settlement because it is in the best interests of the Settlement Class in light of the risks of continued litigation. Accordingly, Plaintiff requests that the Court issue an order granting final approval of the Settlement. Additionally, Plaintiff respectfully requests that the Court grant her request for $1,500 as an incentive award, and Class Counsel's request for an award of attorneys' fees in the amount of $171,520.07 and $28,479.93 in out-of-pocket costs and expenses.

Dated: January 22, 2024

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