THE LAW OFFICE OF
PAUL K. JOSEPH, PC
PAUL K. JOSEPH (SBN 287057)
paul@pauljosephlaw.com
4125 W. Point Loma Blvd. No. 309
San Diego, CA 92110
Phone: (619) 767-0356
Fax: (619) 331-2943
THE LAW OFFICE OF
JACK FITZGERALD, PC
JACK FITZGERALD (SBN 257370)
jack@jackfitzgeraldlaw.com
TREVOR M. FLYNN (SBN 253362)
trevor@jackfitzgeraldlaw.com
MELANIE PERSINGER (SBN 275423)
melanie@jackfitzgeraldlaw.com
Hillcrest Professional Building
3636 Fourth Avenue, Suite 202
San Diego, California 92103
Phone: (619) 692-3840
Fax: (619) 362-9555
Counsel for Plaintiff and
the Settlement Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHERRY HUNTER on behalf of herself, all others similarly situated, and the general public,

Plaintiff,

v.

NATURE'S WAY PRODUCTS, LLC and SCHWABE NORTH AMERICA, INC,

Defendants.

Case No: 3:16-cv-00532-WQH-AGS

MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARD

Date: Dec. 13, 2019
Time: 1:30 p.m.
Courtroom: 14B
Judge: Hon. William Q. Hayes

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

THE SETTLEMENT, NOTICE, AND THE CLASS'S RESPONSE 2

I. THE SETTLEMENT 2

A. The Class 2

B. Benefits to the Class 2

1. Defendants' Removal of the Challenged Health & Wellness Claims 2

2. The $1,850,000 Common Fund 3

C. Notice and Administration Costs 3

D. The Class's Response 3

E. Attorneys' Fees, Costs, and an Incentive Award 4

ARGUMENT 4

I. THE COURT SHOULD GRANT FINAL APPROVAL 6

A. The Strength of Plaintiff's Case; the Risk, Expense, Complexity, and Duration of Further Litigation; and the Risk of Maintaining Class Certification Through Trial 6

B. The Extent of Discovery Completed and the Stage of the Proceedings 8

C. The Amount of Settlement 8

D. The Experience and Views of Class Counsel 11

E. The Reactions of the Class Members 12

II. CLASS COUNSEL IS ENTITLED TO AN AWARD OF FEES AND COSTS 13

III. CLASS COUNSEL'S REQUEST FOR FEES AND COSTS IS REASONABLE 14

A. The Fee Request is Reasonable Under a Lodestar Analysis, as it is Just 75 Percent of Counsel's Presumptively Reasonable Lodestar 15

1. The Hours Expended on the Litigation are Reasonable 16

2. Class Counsel's Rates are Reasonable 18

3. Class Counsel's Fee Request is Substantially Less Than Its Lodestar, Indicating the Reasonableness of the Request 20

B. The Requested Fee is Reasonable Considering a Percentage-of-Fund Cross-Check 20

C. The Request for Reimbursement Costs is Reasonable 22

IV. AN INCENTIVE AWARD FOR PLAINTIFF IS REASONABLE 23

CONCLUSION 25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases

Boyd v. Bechtel Corp.,
485 F. Supp. 610 (N.D. Cal. 1979) 11

Brazil v. Dell Inc.,
2012 U.S. Dist. LEXIS 47986 (N.D. Cal. Apr. 4, 2012) 18

Chavez v. Netflix, Inc.,
162 Cal. App. 4th 43, 66 (2008) 20

Chun–Hoon v. McKee Foods Corp.,
716 F. Supp. 2d 848 (N.D. Cal. 2010) 5

Churchill Vill., LLC v. Gen. Elec.,
361 F.3d 556 (9th Cir. 2004) 5

Class Plaintiffs v. City of Seattle,
955 F.2d 1268 (9th Cir. 1992) 6

Cunningham v. County of Los Angeles,
879 F. 2d 481 (9th Cir. 1988) 16

Dalton v. Lee Publications, Inc.,
2014 WL 5325698 (S.D. Cal. 2014) 4

Elliott v. Rolling Frito-Lay Sales, LP,
2014 WL 2761316 (C.D. Cal. June 12, 2014) 5, 6, 14

Grant v. Martinez,
973 F.2d 96 (2d Cir. 1992) 16

Hughes v. Microsoft Corp.,
2001 WL 34089697 (W.D. Wash. Mar. 26, 2001) 12

In re Bluetooth Headset Prods. Liab. Litig.,
654 F.3d 935 (9th Cir. 2011) 5

1 *In re Consumer Privacy Cases*,
2 175 Cal. App. 4th 545 (2009) 15

3 *In re Heritage Bond Litig.*,
4 2005 WL 1594403 (C.D. Cal. June 10, 2005) 6

5 *In re Nucoa Real Margarine Litig.*,
6 2012 U.S. Dist. LEXIS 189901 (C.D. Cal. June 12, 2012) 19

7 *In re Omnivision Techs., Inc.*,
8 559 F. Supp. 2d 1036 (N.D. Cal. 2008) 15

9 *In re Online DVD–Rental Antitrust Litig.*,
10 779 F.3d 934 (9th Cir.2015)..........12

11 *In re Pacific Enters. Secs. Litig.*,
12 720 F. Supp. 1379 (D. Ariz. 1989)..........5

13 *In re Pool Prod. Distrib. Mkt. Antitrust Litig.*,
14 2015 WL 3486434 (E.D. La. June 2, 2015)..........10

15 *In re Washington Pub. Power Supply Sys. Sec. Litig.*,
16 19 F.3d 1291 (9th Cir. 1994)..........15

17 *Johnson v. Quantum Learning Network, Inc.*,
18 2017 WL 747462 (N.D. Cal. Feb. 27, 2017) 12

19 *Ketchum v. Moses*,
20 24 Cal. 4th 1122 (2001) 16, 18

21 *Lealao v. Beneficial Cal., Inc.*,
22 82 Cal. App. 4th 19 (2000)..........16

23 *Linney v. Cellular Alaska P'ship*,
24 1997 WL 450064 (N.D. Cal. 1997) 11

25 *Low v. Trump University, LLC*,
26 246 F.Supp.3d 1295, 2017 WL 1275191 (S.D. Cal. 2017) 3

27 *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*,
28 671 F. Supp. 819 (D. Mass 1987) 11

1 *Margolin v. Regional Planning Comm.*,
2 134 Cal. App. 3d 999 (1982)....................17

3 *Paggos v. Resonant, Inc.*,
4 2017 WL 3084162 (C.D. Cal. May 15, 2017)....................5

5 *Parkinson v. Hyundai Motor Am.*,
6 796 F. Supp. 2d 1160 (C.D. Cal. 2010)....................23

7 *Paul, Johnson, Alston, & Hunt v. Graulty*,
8 886 F.2d 268 (9th Cir. 1989)....................15

9 *Rodriguez v. West Publ'g Corp.*,
10 563 F.3d 948 (9th Cir. 2009)....................6

11 *Sci. App. Int'l Corp. v. Super. Ct.*,
12 39 Cal. App. 4th 1095 (1995)....................23

13 *Stuart v. Radioshack Corp.*,
14 2010 WL 3155645 (S.D. Cal. Aug. 9, 2010)....................19

15 *Tait v. BSH Home Appliances Corp.*,
16 2015 WL 4537463 (C.D. Cal. July 27, 2015)....................5

17 *Torrisi v. Tucson Elec. Power Co.*,
18 8 F.3d 1370 (9th Cir. 1993)....................5

19 *Viceral v. Mistras Grp., Inc.*,
20 2017 WL 661352 (N.D. Cal. Feb. 17, 2017)....................21

21 *White v. Experian Info. Sols., Inc.*,
22 2009 WL 10670553 (C.D. Cal. May 7, 2009)....................5, 11

23 *Widrig v. Apfel*,
24 140 F.3d 1207 (9th Cir. 1998)....................19

25 *Yoo v. Wendy's Int'l Inc.*,
26 No. 07-cv-4515-FMC (C.D. Cal.)....................18

27

28

Statutes

Cal. Code Civ.P. § 1033.5 22

Rules

Fed. R. Civ. P. 23(c)(2) 3

Fed. R. Civ. P. 23(e) 4

Other Authorities

Manual for Complex Litigation 4

MANUAL FOR COMPLEX LITIGATION, Second 5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION

On August 30, 2019, the Court preliminarily approved a nationwide class action Settlement between plaintiff Sherry Hunter and defendants Schwabe North America, Inc. and Nature's Way Products, LLC (collectively, "Nature's Way" or "Defendants"). *See* Dkt. No. 113; *see also* Dkt. No. 115 (Amended Order). The Settlement resolves allegations that Defendants misleadingly and unlawfully marketed the Nature's Way Coconut Oil as healthy.

Notice has been provided to the Class in accordance with the approved Notice Plan, providing over 16.9 million web impressions. The Class's response has been strong, and uniformly positive. More than 76,000 claims—significantly higher than estimated—have been filed. No Class Members opted out, and no objections have been received.

The positive response is for good reason. The Settlement provides substantial relief to the Class: a $1,850,000 non-reversionary common fund, and prospective relief prohibiting use of the terms "Healthy," "Ideal for Exercise and Weight Loss Programs," "Recommendation: Take 1 tablespoon (14g) up to 4 times daily," and "Non-hydrogenated, no trans fat," for five years absent a change in the law that permits such use. Dkt. No. 111-2, Fitzgerald Prelim. Approval Decl. Ex. 1, Settlement Agreement ("SA") ¶ 2.2. This is not only fair, reasonable, and adequate, but an excellent result for the Class, with a monetary component that might exceed the price premium Plaintiff would have been able to prove at trial, while eliminating the inherent risk of litigation.

Class Counsel obtained this settlement without compensation thus far, and California's consumer protection statutes under which Plaintiff brought the Class's claims require fee-shifting under such circumstances. Pursuant to the Settlement Agreement, Class Counsel seek reimbursement of their out-of-pocket expenses, plus fees of less than 80% of their presumptively-reasonable lodestar incurred in prosecuting this case. The requested fee-and-expense award is fair and reasonable in light of, among other things, Class Counsel's lodestar and the results obtained for the Class. Similarly, the award requested for Ms. Hunter is reasonable compensation for her service to the Class, and as a policy matter, to incentivize

future volunteer class representatives.

Accordingly, Plaintiff respectfully requests the Court grant the motion and enter judgment consistent with the concurrently-filed Proposed Order Granting Final Approval and Entering Judgment.

THE SETTLEMENT, NOTICE, AND THE CLASS'S RESPONSE[1]

I. THE SETTLEMENT

A. The Class

The proposed Settlement is on behalf of a Class of all persons in the United States who purchased during the Class Period, for personal or household use, any Nature's Way coconut oil product bearing at least one of the challenged labeling claims, and including specifically the 16-ounce or 32-ounce jar of Nature's Way Extra Virgin Coconut Oil, and any bottle of Nature's Way Liquid Coconut Oil, including the 10-ounce and 20-ounce bottles. SA ¶¶ 1.3, 1.10. The Class Period ran from January 28, 2012 to the date of preliminary approval, *id.* ¶ 1.4, which occurred on August 30, 2019, Dkt. No. 113.

B. Benefits to the Class

1. Defendants' Removal of the Challenged Health & Wellness Claims

For a period of five years following Final Approval, Defendants will not advertise (including in print, online, on Coconut Oil Product labels or packaging, and in sales pitches or public statements) the Nature's Way Coconut Oil Products using the following terms and phrases, or substantially similar terms or phrases:[2]

- "Healthy"
- "Ideal for Exercise and Weight Loss Programs"

---

[1] The relevant procedural history was laid out in Plaintiff's Motion for Preliminary Approval. Dkt. No. 111-1.

[2] If, however, there is a change in law, regulations, science, or if the Food and Drug Administration offers further guidance permitting the use of the aforementioned claims, then Defendants are permitted to include on their labels anything expressly permitted under the new law, regulation, or FDA guidance. SA ¶ 2.2.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- "Recommendation: Take 1 tablespoon (14 g) up to 4 times daily"
- "Non-hydrogenated, no trans fat" (unless the statement is made with the disclosures required by the FDA)

SA ¶ 2.2.

2. The $1,850,000 Common Fund

Defendants have established a non-reversionary $1,850,000 common fund to pay Class Member claims and all Settlement expenses, namely notice and administration, and any incentive award and attorneys' fees and costs awarded by the Court. SA ¶ 2.3.

C. Notice and Administration Costs

Where there is a proposed settlement, "[d]ue process requires notice to be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Low v. Trump Univ., LLC*, 246 F. Supp. 3d 1295, 1311 (S.D. Cal. 2017). The Court previously approved the Settlement's Notice Plan, including the form and content of the Class Notice and the procedures for disseminating it, finding the plan "meets the requirements of Federal Rule of Civil Procedure 23(c)(2), and due process, and further constitutes the best notice practicable under the circumstances." Dkt. No. 115, ¶ 8.

Class Administrator, RG2, subsequently executed the Notice Plan in accordance with the Settlement Agreement. *See* Boub Decl. ¶¶ 3-7. Originally, RG2 estimated total cost of notice and administration of $128,599, based on an anticipated approximately 21,000 claims. *See* Dkt. No. 111-1, Mot. for Prelim. Approval at 6. Due to a strong response by the Class—nearly 4.5 times the estimated number of claims—RG2 now estimates total costs of notice and administration will be approximately $224,262. This increase is primarily due to the increased cost of processing and mailing (postage costs) for the higher-than-estimated number of claims. Boub Decl. ¶¶ 12-13.

D. The Class's Response

The response from the Class has been strong and uniformly positive, with over 76,000

claims having been received.[3] No opt-outs or objections have been received. Boub Decl. ¶¶ 8-9.[4]

E. Attorneys' Fees, Costs, and an Incentive Award

As of November 5, 2019, Class Counsel had expended over 1,270 hours of work on this matter, incurring a fee lodestar of $809,468.50. Pursuant to the Settlement Agreement, they request herein a fee award of only $610,500, which is approximately 75% of Counsel's lodestar. Counsel also request reimbursement for $258,430.19 in out-of-pocket expenses. Fitzgerald Decl. ¶¶ 13-14; Joseph Decl. ¶¶ 42-44. Finally, Plaintiff requests an incentive award of $7,500 for her work as the Class Representative.

ARGUMENT

A class action settlement must be approved by the Court before it can become effective. *See* Fed. R. Civ. P. 23(e). The process for court approval of class action settlements is comprised of three steps: (1) preliminary approval, (2) dissemination of notice to the class which provides class members the opportunity to object or opt out and, (3) a final approval hearing, at which the court decides whether the proposed settlement should be approved as fair, adequate, and reasonable to the class and whether plaintiff's request for attorneys' fees, expense reimbursement and service awards should be approved. *See* MANUAL FOR COMPLEX LITIGATION, §§ 21.632-34; *see also Dalton v. Lee Publications, Inc.*, 2014 WL 5325698, at *1 (S.D. Cal. 2014). The first two steps are completed and Plaintiff now seeks an order finally approving the Settlement.

"The Court may issue final approval of a class settlement 'only after a hearing and on finding that it is fair, reasonable, and adequate.'" *Tait v. BSH Home Appliances Corp.*, 2015

---

[3] The claims period closed on October 31, 2019, and so this number is likely very close to the final claims rate since it is unlikely that valid claims postmarked on or before October 31, 2019 are still in transit and the administrator has already validated most claims. *See* Boub Decl. ¶¶ 10-11.

[4] The deadline to opt out was October 31, 2019, while the deadline for objections is November 25, 2019. *See* Dkt. No. 115 at 2.

1 WL 4537463, at *3 (C.D. Cal. July 27, 2015) (citing Fed. R. Civ. P. 23(e)(2); *In re Bluetooth*
2 *Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)). In making this determination,
3 a court considers a number of factors, including: (1) the strength of plaintiff's case; (2) the
4 risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining
5 class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of
6 discovery completed and the stage of the proceedings; (6) the experience and views of
7 counsel; (7) the presence of a governmental participant; and (8) the reaction of the class
8 members to the proposed settlement. *Id.*, at *4 (citing *Churchill Vill., LLC v. Gen. Elec.*, 361
9 F.3d 556, 575 (9th Cir. 2004)). "This list is not exhaustive, and different factors may
10 predominate in different factual contexts." *Elliott v. Rolling Frito-Lay Sales, LP*, 2014 WL
11 2761316, at *3 (C.D. Cal. June 12, 2014) (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d
12 1370, 1376 (9th Cir.1993)).

13 "The Court may also consider the procedure by which the parties arrived at the
14 settlement to determine whether the settlement is truly the product of arm's length bargaining,
15 rather than the product of collusion or fraud." *Id.* (citing *Chun–Hoon v. McKee Foods Corp.*,
16 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010)). "Where, as here, a proposed class settlement has
17 been reached after meaningful discovery and arm's length bargaining, conducted by capable
18 counsel, and the proponents of the settlement are counsel experienced in similar litigation,
19 the settlement should be entitled to a presumption of fairness." *White v. Experian Info. Sols.,*
20 *Inc.*, 2009 WL 10670553, at *13 (C.D. Cal. May 7, 2009) (citing NEWBERG § 11.41; MANUAL
21 FOR COMPLEX LITIGATION, Second, § 30.41 at 237).

22 In evaluating the above factors, "[t]he Court must also bear in mind that judicial policy
23 favors settlement in class actions and other complex litigation where substantial resources
24 can be conserved by avoiding the time, cost, and rigors of formal litigation." *Elliott*, 2014
25 WL 2761316, at *3 (citing *In re Pacific Enters. Secs. Litig.*, 720 F. Supp. 1379, 1387 (D.
26 Ariz. 1989)); *see also Paggos v. Resonant, Inc.*, 2017 WL 3084162, at *2 (C.D. Cal. May 15,
27 2017) ("In the Ninth Circuit, there is a 'strong judicial policy that favors settlements,
28

particularly where complex class action litigation is concerned.'" (citation omitted)).

Further, "[t]he Court's role in evaluating the proposed settlement 'must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned." *Elliott*, 2014 WL 2761316, at *3 (citing *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)); *see also In re Heritage Bond Litig.*, 2005 WL 1594403, at *2 (C.D. Cal. June 10, 2005) ("[A] settlement hearing is 'not to be turned into a trial or rehearsal for trial on the merits,'" nor should the proposed settlement "be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." (quoting *Officers for Justice*, 688 F.2d at 625)). "[A]pproval of the settlement terms rests in the sound discretion of the district court." *Elliott*, 2014 WL 2761316, at *2 (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992)).

I. THE COURT SHOULD GRANT FINAL APPROVAL

A. The Strength of Plaintiff's Case; the Risk, Expense, Complexity, and Duration of Further Litigation; and the Risk of Maintaining Class Certification Through Trial

Of the many coconut oil lawsuits Class Counsel have brought and prosecuted during the last several years, this case presents uniquely significant challenges, which Defendants highlighted in their opposition to Plaintiff's motion for class certification. *See generally* Dkt. No. 74. On the merits, Plaintiff and her counsel believe there is a strong scientific case that coconut oil consumption is unhealthy, increasing LDL cholesterol and risk of heart disease, and that on this basis, there is a reasonably good chance a jury would find it misleading, within the meaning of California's consumer protection statutes, to advertise coconut oil in a manner stating or suggesting that it is healthy. Fitzgerald Prelim. Approval Decl. ¶ 10. But here, the labels Defendants used changed repeatedly between May 2010 and July 2015, dropping the more explicit claims related to consumer health and instead utilizing less

1 concrete health claims like "Ideal for exercise and weight loss programs." *Id.* ¶ 11.
2 Defendants argued these labeling variations made certification inappropriate, Dkt. No. 74 at
3 16-17 (citing *Gartin v. S&M NuTec LLC*, 245 F.R.D. 429, 437 (C.D. Cal. 2007)), posing a
4 significant risk the Class would not be certified.

5 There are also unique challenges in proving Plaintiff's damages model as a result of
6 Defendants' use of different labels, at different times, bearing different challenged statements.
7 A proper measure of damages in a consumer fraud case is the difference between the value
8 of the product as misrepresented, and its actual value, or the "price premium." *See*, *e.g.*,
9 *Werdebaugh v. Blue Diamond Growers*, 2014 WL 2191901, at *22 (N.D. Cal. May 23, 2014)
10 (plaintiff "must present a damages methodology that can determine the price premium
11 attributable to [defendant's] use of the [challenged] labeling statements"). While Plaintiff's
12 expert developed a damages model reflecting the changing labels, that model was vigorously
13 attacked by Defendants in their opposition to class certification. *See* Dkt. No. 74 at 20-21.

14 Given the difficulty of establishing damages, there is no guarantee Plaintiff could
15 obtain and maintain class certification through trial. In fact, certification was recently denied
16 in another of Class Counsel's coconut oil cases, *Shanks v. Jarrow Formulas*, 2019 U.S. Dist.
17 LEXIS 160199 (C.D. Cal. Aug. 27, 2019), highlighting the risk of proceeding through
18 certification and underscoring the value of the certainty of securing the present relief. *See In*
19 *re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015) ("Immediate receipt
20 of money through settlement, even if lower than what could potentially be achieved through
21 ultimate success on the merits, has value to a class, especially when compared to risky and
22 costly continued litigation.").

23 Further, even if Plaintiff had obtained certification, it would have been on behalf of a
24 California class only, whereas the Settlement resolves the claims of a nationwide class. *See*
25 *Chamber v. Whirlpool Corp.*, 214 F. Supp. 3d 877, 888 (C.D. Cal. Oct. 11, 2016) ("Because
26 plaintiffs had not yet filed a motion for class certification, there was a risk that the class would
27 not be certified. That risk was magnified in this case because nationwide class certification
28

under California law or the laws of multiple states is rare." (citations omitted)). And even if Plaintiff obtained certification, it would have been expensive and risky to continue the litigation and proceed to summary judgment and trial. Fitzgerald Prelim. Approval Decl. ¶ 15. Courts considering approval rightly consider "all the normal perils of litigation as well as the additional uncertainties inherent in complex class actions." *In re Beef Indus. Antitrust Litig.*, 607 F. 2d 167, 179 (5th Cir. Nov. 26,1979). "[U]nless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecomms. Co'op. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. Jan. 5, 2004); *Nguyen v. Radient Pharms. Corp.*, 2014 WL 1802293, at *2 (C.D. Cal. May 6, 2014) (granting final approval where "although the claims were quite strong, there were clear factual challenges facing Plaintiffs at trial" including "challenges of calculating damages").

B. The Extent of Discovery Completed and the Stage of the Proceedings

Significant discovery and investigation has been completed, which permits the parties and Court to make an informed analysis. Not only have the parties exchanged tens of thousands of pages documents and written discovery responses, but both consulted with experts on merits and damages issues. A class certification motion was fully briefed. And Plaintiff was informed, not just by the evidence in this case, but also consumer research and other evidence developed in similar cases, which is applicable here. *See* Joseph Prelim. Approval Decl. ¶¶ 8-10.

C. The Amount of Settlement

The $1,850,000 common fund represents a significant recovery for the Class in light of the expense and challenges of continued litigation, and the likelihood that damages recovered at trial could be small.

Based on information obtained during discovery, sales of the challenged products in California were approximately $10.2 million of the Extra Virgin product, and $2.1 million of the Liquid products. Fitzgerald Prelim. Approval Decl. ¶ 16. The estimated nationwide sales

were approximately $81.6 million for the Extra Virgin, and $16.8 million for the Liquid, for a total of about $98.4 million. *Id.*

Plaintiff's survey expert determined that the challenged claims carried premiums between 5.9% and 20.9%, with an average of 13.1%. *See* Dkt. No. 60-4 at p. 43 of 268 (ECF header), Dennis Decl. Ex. 4 (Conjoint Results). Although it is virtually impossible that the claims of a nationwide class could ever be adjudicated in a single trial, assuming they could, the Class's estimated recovery based on the average premium is approximately $12.9 million (13.1% of $98.4 million). The $1.85 million settlement thus represents approximately 14.3% of the largest potential judgment after trial. This is quite substantial for a class action where no class had been certified at the time of settlement, weighing in favor of granting approval. *See Van Ba Ma v. Covidien Holding, Inc.*, 2014 WL 2472316, at *3 (C.D. Cal. May 30, 2014) ("[I]t is not uncommon for a class action settlement to amount to approximately 10% of the total potential value. The Court finds that this factor weighs in favor of final approval because the settlement is somewhere between 9% and 18% of what the plaintiffs were likely going to recover." (citation omitted)); *cf. City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974) ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.").

Due to the high claims rate requiring a pro-rata reduction, Class Members will receive an average $3.27 *per unit* claimed and approximately $9.87 per claimant.[5] This is significant for a food labeling case such as this. *Compare Hendricks v. Starkist Co.*, 2016 WL 5462423, at *5 (N.D. Cal. Sept. 29, 2016) (approving settlement in which class members would receive $1.97 cash or $4.43 tuna can voucher per claim for, and noting that the "settlement amount, while constituting only a single-digit percentage of the maximum potential exposure, is

[5] The amount each Class Member claimant is reimbursed for each unit depends on both the non-claim expenses (which determines the amount of claims funds left to divide among the claimed units), and the number of units claimed. This projection assumes the Court awards fees, costs, and an incentive award in the amount requested.

1 reasonable given the stage of proceedings and defenses asserted").
2 Further, this compares favorably to what could have likely been obtained at trial.
3 Depending on size, the products had average retail prices of $10, $11.50, or $20. With a
4 13.1% average premium, this equates to damages of $1.31, $1.51, or $2.62 *per unit*
5 respectively. But claimants will receive, on average, $3.33 *per unit*, exceeding the likely
6 damages they would have been able to receive at trial.
7 This favorable comparison to potential recovery at trial strongly supports granting
8 final approval. *C.f. In re Pool Prod. Distrib. Mkt. Antitrust Litig.*, 2015 WL 3486434, at *7,
9 *11 (E.D. La. June 2, 2015) (granting final approval when settlement fund was less than 3.8%
10 of the maximum potential damages); *Rigo v. Kason Indus., Inc.*, 2013 WL 3761400, at *5
11 (S.D. Cal. July 16, 2013) (amount of settlement weighed in favor of final approval where
12 "[e]ven after proration of claims, class members will receive 40% of the total amount paid
13 for the hardware components" and "40% appears above and beyond their actual damages");
14 *Martin v. AmeriPride Servs., Inc.*, 2011 WL 2313604, at *6-7 (S.D. Cal. June 9, 2011)
15 (granting final approval where "common fund represents approximately 36% of the total
16 potential damages").
17 This is particularly true where, as here, there remain significant obstacles to both
18 certification and full recovery at trial. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454,
19 459 (9th Cir. 2000) ("the Settlement amount . . . was roughly one-sixth of the potential
20 recovery, which, given the difficulties in proving the case, is fair and adequate"); *In re Toys*
21 *R Us-Delaware, Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D.
22 438, 454 (C.D. Cal. 2014) (amount of settlement weighed in favor of approval where award
23 "represent[ed] 5% to 30% of the recovery that might have been obtained" since that was "not
24 a de minimis amount" "[g]iven the likelihood that plaintiffs would have been unable to prove
25 actual damages and the risk that they would have been unable to prove willfulness"); *Smith*
26 *v. Am. Greetings Corp.*, 2016 WL 2909429, at *4–5 (N.D. Cal. May 19, 2016) (award of 20%
27 of potential recovery was fair and reasonable "[b]ecause of the risk, expense, complexity, and
28

likely duration attached to the litigation of these claims"); *In re Am. Apparel, Inc. S'holder Litig.*, 2014 WL 10212865, at *12 (C.D. Cal. July 28, 2014) (settlement recovery equal to "24% of [the] potential recovery at trial" was fair and adequate because "[i]t takes into account the risks the class faced in seeking certification and at trial" and "eliminates the possibility that class members would have to wait years to receive compensation" (citing *Jaffe v. Morgan Stanley & Co.*, 2008 WL 346417, *9 (N.D. Cal. Feb. 7, 2008) ("The settlement amount could undoubtedly be greater, but it is not obviously deficient, and a sizeable discount is to be expected in exchange for avoiding the uncertainties, risks, and costs that come with litigating a case to trial")) (other citations omitted)).

D. The Experience and Views of Class Counsel

"The judgment of experienced counsel regarding the settlement is entitled to great weight." *White*, 2009 WL 10670553, at *12 (citing *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 822 (D. Mass 1987); *Linney v. Cellular Alaska P'ship*, 1997 WL 450064, at *5 (N.D. Cal. 1997). Indeed, "[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Id.* (quoting *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)).

Class Counsel believe the settlement is not only fair, adequate, and reasonable, but an excellent result for the Class. In prosecuting similar actions involving misleading health claims on coconut oil, Class Counsel has developed a deep understanding of this case's strengths and risks. Counsel has reviewed hundreds of thousands of documents, taken many expert and party depositions, consulted with and retained damages and liability experts, and have become uniquely expert at understanding consumer research relating to the purchasing and usage behaviors of coconut oil purchasers. In this case, Plaintiff took depositions of the Defendants and their experts and reviewed tens of thousands of pages of documents. Thus, counsel have an especially strong understanding of this case, both on merits and potential damages, not only from litigating against the Defendants here for over two years, but based on other coconut oil class actions. Fitzgerald Prelim. Approval Decl. ¶ 9; Dkt. No. 111-3,

Joseph Prelim. Approval Decl. ¶¶ 5-6, 8-10.

Three other coconut oil cases have settled on nationwide class bases with common funds of $312,500, $775,000, and $1.1 million (comprised of $650,000 in cash and $450,000 in gift cards). *See* Joseph Prelim. Approval Decl., Ex. 1 at 1. The Settlement in this case provides the greatest monetary relief among settlements in similar cases, as well as important changes to Defendants' advertising practices. Thus, Class Counsel believe this Settlement is a strong result for the Class. Fitzgerald Prelim. Approval Decl. ¶ 13; Dkt. No. 111-3, Joseph Prelim Approval Decl. ¶¶ 13-15.

E. The Reactions of the Class Members

The reaction to the Settlement has been strong, with approximately 76,416 claims filed, no class members opting out (with the deadline to do so expired), and no Class Members yet objecting. Joseph Decl. ¶¶ 4-5. The high number of claims combined with the lack of opt-outs and objections strongly weighs in favor of approving the Settlement. *See Johnson v. Quantum Learning Network, Inc.*, 2017 WL 747462, at *2 (N.D. Cal. Feb. 27, 2017) ("The lack of objections and the low rate of opt-outs (less than 1%) are 'indicia of the approval of the class.'" (citation omitted)); *In re Online DVD–Rental Antitrust Litig.*, 779 F.3d 934, 941 (9th Cir. 2015) (district court did not err in approving settlement with 3.4% claim rate where 30 objections were lodged).

In sum, the Settlement provides a substantial common fund as well as valuable and important changes to Defendants' advertising practices. The common fund allows claimants to receive an amount that is likely more than they would have received at trial, and at the same time removing the substantial risk that the case may not be certified or plaintiff would not prevail at trial. In Class Counsel's experience, this is a strong outcome for the Class and the Class's approval of the Settlement—as demonstrated by the high number of claims and lack of objections and opt-outs—confirms this view. Accordingly, the Court should grant final approval to the settlement. *See Pilkington v. Cardinal Health, Inc.*, 516 F.3d 1095, 1101 (9th Cir. 2008) ("Public policy "strong[ly] . . . favors settlements, particularly where complex

class action litigation is concerned.")

II. CLASS COUNSEL IS ENTITLED TO AN AWARD OF FEES AND COSTS

"An award of attorneys' fees incurred in a suit based on state substantive law is generally governed by state law." *Champion Produce, Inc. v. Ruby Robinson Co*., 342 F.3d 1016, 1024 (9th Cir. 2003). Here, Plaintiff invokes the fee-shifting provisions of California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq*., and Private Attorney General Statute, Cal. Civ. Proc. Code § 1021.5.

Successful claims under the CLRA mandate an award of fees to a prevailing plaintiff. Cal. Civ. Code §§ 1780(e) (court "shall award court costs and attorney's fees to a prevailing plaintiff"), 1788.30(c); *see also Tait*, 2015 WL 4537463, at *9 ("Under Cal. Civ. Code § 1780(e), a prevailing plaintiff in an action under the CLRA is entitled to an award of costs and attorneys' fees." (quotation omitted)). This is because the Act "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protections," Cal. Civ. Code § 1760, and "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." *Meyer v. Sprint Spectrum L.P*., 45 Cal. 4th 634, 644 (2009) (quoting *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 1086 (1999)); *see also Haywood v. Ventura Volvo*, 108 Cal. App. 4th 509, 512 (2003). "Accordingly, an award of attorney fees to 'a prevailing plaintiff' in an action brought pursuant to the CLRA is mandatory, even where the litigation is resolved by a pretrial settlement agreement." *Kim v. Euromotors W./The Auto Gallery,* 149 Cal. App. 4th 170, 178-79 (2007).

California's Private Attorney General Statute, Cal. Code Civ. P. § 1021.5, similarly provides for an award of fees to a "successful" plaintiff if: (1) the action "has resulted in the enforcement of an important right affecting the public interest," (2) "a significant benefit, whether pecuniary or nonpecuiary, has been conferred on the general public or a large class

of persons," and (3) "the necessity and financial burden of private enforcement . . . are such as to make the award appropriate . . . ." *Serrano v. Stefan Merli Plastering Co., Inc.*, 52 Cal. 4th 1018, 1020 (2011) (quoting Cal. Code Civ. P. § 1021.5, and citing *Woodland Hills Residents Assn., Inc. v. City Council*, 23 Cal. 3d 917, 935 (1979)). Although § 1021.5 "is phrased in permissive terms . . . the discretion to deny fees to a party that meets its terms is quite limited," *Lyons v. Chinese Hosp. Ass'n*, 136 Cal. App. 4th 1331, 1344 (2006).

Plaintiff is "prevailing" and "successful" under these statutes because, through the Settlement Agreement, the litigation achieved its main objectives—securing monetary and injunctive relief for the Class. *See Tait*, 2015 WL 4537463, at *9 ("Plaintiffs in this case qualify as "prevailing plaintiff[s]" because of the monetary recovery provided by the settlement."); *Graciano v. Robinson Ford Sales, Inc.*, 144 Cal. App. 4th 140, 153 (2006) ("It is settled that 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.'" (citation omitted)).

The additional requirements of section 1021.5 are also satisfied. In determining the propriety of fees pursuant to the Private Attorney General Statute, the key question is "whether the financial burden placed on the party [claiming fees] is out of proportion to its personal stake in the lawsuit." *Lyons*, 136 Cal. App. 4th 1352. Here, Class Members spent between $10 and $20 for each product, which is far too small to economically justify individual litigation. Further, the non-monetary benefits and "elimination of allegedly false representations . . . confer[] a benefit on both the class members and the public at large," *see Brazil v. Dell Inc.*, 2012 WL 1144303, at *1 (N.D. Cal. Apr. 4, 2012) (citation omitted).

III. CLASS COUNSEL'S REQUEST FOR FEES AND COSTS IS REASONABLE

"[A] private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Elliott v. Rolling Frito-Lay Sales, LP*, 2014 WL 2761316, at *9 (C.D. Cal. June 12, 2014) (quoting *Vincent v. Hughes Air W., Inc.*, 557 F.2d

759, 769 (9th Cir. 1977)). "This rule, known as the 'common fund doctrine,' is designed to prevent unjust enrichment by distributing the costs of litigation among those who benefit from the efforts of the litigants and their counsel." *Id.* (quoting *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (quoting *Paul, Johnson, Alston, & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989))).

"District courts have the discretion to calculate fees by either calculating a lodestar or awarding a percentage of the common fund." *Id.* (citing *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994)). "Regardless of whether attorneys' fees are determined using the lodestar method or awarded based on a 'percentage-of-the-benefit' analysis under the common fund doctrine, [t]he ultimate goal . . . is the award of a 'reasonable' fee to compensate counsel for their efforts, irrespective of the method of calculation." *Tait*, 2015 WL 4537463, at *10 (quoting *In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 557-58 (2009) (internal quotation marks omitted). "[P]articularly where obtaining injunctive relief likely accounted for a significant part of the fees expended, courts can use the common fund version of the lodestar method either to set the fee award or as a cross-check to assist in the determination of how the 'relevant circumstance' of the injunctive relief should affect a percentage award." *Staton*, 327 F.3d at 974.

A. The Fee Request is Reasonable Under a Lodestar Analysis, as it is Just 75 Percent of Counsel's Presumptively Reasonable Lodestar

"In cases where injunctive relief represents a significant aspect of the class recovery, courts typically use a lodestar calculation." *Beck-Ellman v. Kaz USA, Inc.*, 2013 U.S. Dist. LEXIS 189308, at *23 (S.D. Cal. June 11, 2013). "[The lodestar] figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Elliott*, 2014 WL 2761316, at *10 (citing *Vizcaino*, 290 F.3d at 1050) (quoting *Bluetooth*, 654 F.3d at 941) (alterations in original). The Ninth Circuit has explained that "the lodestar figure is 'presumptively valid,'" *In re Bluetooth*, 654 F.3d at 941

(quoting *Cunningham v. County of Los Angeles*, 879 F. 2d 481, 488 (9th Cir. 1988)); *see also ICU Med., Inc. v. Alaris Med. Sys. Inc.,* 2007 WL 6137002, at *1 (C.D. Cal. June 28, 2007).

"[T]he unadorned lodestar reflects the general local hourly rate for a fee bearing case; it does not include any compensation for contingent risk, extraordinary skill, or any other factors a trial court may consider," *Ketchum v. Moses*, 24 Cal. 4th 1122, 1133 (2001). California courts may therefore adjust the lodestar upward, applying a positive multiplier to approximate a "percentage fee[] freely negotiated in comparable litigation." *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 50 (2000).

As demonstrated below, Class Counsel's hours and rates are reasonable. These rates and hours generate a presumptively reasonable lodestar of $809,468.50. Accordingly, counsel's fee request of $610,500 is just 75 percent of the presumptively-reasonable lodestar (or a *negative*, -0.25 multiplier). This strongly indicates that the request is reasonable.

1. The Hours Expended on the Litigation are Reasonable

Class Counsel are entitled to be compensated for reasonable time spent at all points in the litigation. Courts should avoid engaging in an "ex post facto determination of whether attorney hours were necessary to the relief obtained." *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992). The issue "is not whether hindsight vindicates an attorney's time expenditures, but whether at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Id*.

Timekeepers from The Law Office of Jack Fitzgerald, PC ("LOJF") include principal Jack Fitzgerald, and associates Trevor M. Flynn and Melanie Persinger. Timekeepers from The Law Office of Paul K. Joseph, PC ("LOPJ") include the principal Paul Joseph and associate Richelle Kemler Vanden Bergh. Each timekeeper's total hours is as follows.

1
2
3
4
5

Timekeeper	Position	Total Hours
Jack Fitzgerald	Principal (LOJF)	426.6
Trevor Flynn	Associate (LOJF)	109.3
Melanie Persinger	Associate (LOJF)	81.1
Paul K. Joseph	Principal (LOPJ)	584.1
Richelle Kemler Vanden Bergh	Associate (LOPJ)	69.7
	Total =	**1270.8**

6 This time includes, *inter alia*: pre-filing investigation and research; subsequent
7 pleadings, motions, oppositions, and briefing; propounding and responding to formal
8 discovery; document review of over 40,000 pages; legal research and analyses of the
9 applicable laws; third party subpoenas; preparation of expert reports; mediation and
10 settlement negotiations; and ensuring the Class Notice was disseminated, Class Members'
11 questions were answered, and their claims properly recorded.

12 "[S]ummaries and declarations provide a sufficient showing of the hours counsel
13 performed on this case." *Morey v. Louis Vuitton N. Am., Inc.*, 2014 U.S. Dist. LEXIS 3331,
14 at *28 (S.D. Cal. Jan. 9, 2014) (Hayes, J.). *See also Wershba v. Apple Computer, Inc.*, 91 Cal.
15 App. 4th 224, 255 (2001) ("California case law permits fee awards in the absence of detailed
16 time sheets."); *Margolin v. Regional Planning Comm.*, 134 Cal. App. 3d 999, 1006-07 (1982)
17 (attorney declaration as to number of hours worked by firm members was sufficient).[6] To
18 give the Court a clear understanding of how Class Counsel's time was spent, time entries
19 were categorized into 13 the following categories.

20
21
22
23
24
25

Task	Hours	%
Investigation and Complaint	30.8	2.4%
Rule 12 Briefing	87.4	6.9%
Case Management	23.5	1.8%
Party Written Discovery	210.4	16.6%
Third Party Written Discovery	9.8	0.8%

26
27
28

[6] Nevertheless, Class Counsel's detailed time records can be provided to the Court upon order should it exercise its discretion to undertake a more detailed review than required by these authority.

Task	Hours	%
Motions to Compel	58.1	4.6%
Fact Witness Depositions	142.9	11.2%
Expert Witness Depositions	124.9	9.8%
Work with Plaintiff Experts	132.1	10.4%
Class Certification and Related Motions	328.6	25.9%
Mediation and Settlement	36.6	2.9%
Motion for Preliminary Approval	44.6	3.5%
Motion for Final Approval and Fee Motion	41.1	3.2%
Total =	**1270.8**	**100%**

The need for careful investigation and pleading, and extent of the discovery and law and motion practice, as reflected on the Court's docket and summarized in the Motions for Preliminary and Final Approval, and supporting declarations, readily demonstrates the time expended was reasonable and necessary to obtain this substantial Settlement for the Class.

The total time expended by Class Counsel on this matter, 1270.8 hours, is less than 50 hours a month, even when only counting the 26 months of active litigation (from filing until settlement). This is very reasonable for a consumer protection class action of this type. *Compare Brazil v. Dell Inc.*, 2012 U.S. Dist. LEXIS 47986 (N.D. Cal. Apr. 4, 2012) (in unfair business practices action approving fee based on 15,855.5 hours spend over 55 months, or 288 hours per month); *Yoo v. Wendy's Int'l Inc.*, No. 07-cv-4515-FMC (C.D. Cal.) (in false advertising matter concerning trans fat that settled less than a year after filing class counsel had expended 1,630 hours, or over 130 hours per month).

Thus, the hours expended in this litigation are reasonable.

2. Class Counsel's Rates are Reasonable

"A reasonable hourly rate is determined pursuant to the prevailing market rates in the relevant community." *Hartless v. Clorox Co.*, 273 F.R.D. 630, 643-44 (S.D. Cal. 2011). *See also Blum v. Stenson*, 465 U.S. at 895-96 & n.11 (1984); *Ketchum*, 24 Cal. 4th at 1133. "Plaintiff's counsel's rates are afforded a 'presumption of reasonableness.'" *Manner v. Gucci Am., Inc.*, 2016 U.S. Dist. LEXIS 142770, at *14 (S.D. Cal. Oct. 13, 2016) (quoting *United*

States v. $28,000 in U.S. Currency, 802 F.3d 1100, 1106 (9th Cir. 2015)).

To assist courts, a plaintiff must submit "satisfactory evidence . . . that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonable comparable skill, experience and reputation." *Blum*, 465 U.S. at 896 n.11. "Declarations regarding the prevailing market rate in the relevant community suffice to establish a reasonable hourly rate." *In re Nucoa Real Margarine Litig.*, 2012 U.S. Dist. LEXIS 189901, at *89-90 (C.D. Cal. June 12, 2012) (citing *Widrig v. Apfel*, 140 F.3d 1207, 1209 (9th Cir. 1998)).

Class Counsel's rates are as follows.

Timekeeper	**Position**	**Rate Requested**
Jack Fitzgerald	Principal (LOJF)	$750
Trevor Flynn	Associate (LOJF)	$575
Melanie Persinger	Associate (LOJF)	$510
Paul K. Joseph	Principal (LOPJ)	$600
Richelle Kemler Vanden Bergh	Associate (LOPJ)	$500

As evidenced in the accompanying Fitzgerald and Joseph Declarations, these rates are reasonable because they are in line with previous fee awards and rates charged for similar complex class action litigation by attorneys here in Southern California with comparable experience, skill, and reputation.[7] *See* Fitzgerald Decl. ¶¶ 9-12; Joseph Decl. ¶¶ 14-41.

The reasonableness of Class Counsel's rates is further supported by its blended lodestar rate, calculated by taking the total lodestar and dividing it by the total hours of all timekeepers. The blended lodestar rate is $636.98 ($809,468.50 ÷ 1270.8 hours). This compares favorably to the blended rate in recent cases in Southern California. *See*, *e.g.*, *See also Stuart v. Radioshack Corp.*, 2010 WL 3155645, at *6 (S.D. Cal. Aug. 9, 2010) (finding blended rate

[7] The rates are also reasonable because they reflect additional costs often billed to clients for which Class Counsel does not seek reimbursement, such as photocopying, first class postage, legal research, and PACER charges. Fitzgerald Decl. ¶ 13.

of $708 reasonable). Accordingly, Class Counsel's rates are reasonable.

3. Class Counsel's Fee Request is Substantially Less Than Its Lodestar, Indicating the Reasonableness of the Request

Although factors such as contingent risk may support applying a multiplier to Class Counsel's lodestar, Class Counsel does not seek one here, instead requesting fees that are substantially *less* than its lodestar. Accordingly, the $809,468.50 lodestar method supports the reasonableness of the $610,500 fee requested, as it is just 75 percent of Class Counsel's lodestar, equivalent to a 25% *negative* multiplier.

B. The Requested Fee is Reasonable Considering a Percentage-of-Fund Cross-Check

District courts have the discretion to apply the lodestar method in awarding fees even in common fund cases, where, as here, the lodestar award would be greater than the 25% percent-of-fund benchmark. *In re Ferrero Litig.*, 583 Fed. Appx. 665, 668 (9th Cir. 2014) ("Objectors' argument relies on the incorrect premise that the district court was, or should have been, using a 'percentage of the fund' calculation method, in which fees are typically limited to 25% of the overall value of a settlement fund. . . . However, the district court here had discretion instead to award attorneys' fees using the lodestar method." (citing *Staton*, 327 F.3d at 968). While "[t]he Ninth Circuit has explained that . . . 25% of the fund is the presumptively reasonable 'benchmark,'" for common fund cases, *Viceral v. Mistras Grp., Inc.*, 2017 WL 661352, at *3 (N.D. Cal. Feb. 17, 2017), "[n]umerous courts in this Circuit and elsewhere have awarded fees exceeding 25%, including fee awards of one-third of the common fund generated by the work of plaintiffs' counsel, under circumstances similar to this case," *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2013 WL 12387371, at *9 n. 17 (N.D. Cal. Nov. 5, 2013), report and recommendation adopted, 2014 WL 12879521 (N.D. Cal. June 27, 2014); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008) ("[e]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the

recovery”).

Here, Class Counsel’s fee request is 33% of the common fund, which is within the range of reasonableness and supported by the circumstances of this case.

First, the injunctive relief obtained by for the Class justifies an increase from the benchmark. *Staton*, 327 F.3d at 974 (injunctive relief should not normally be used to calculate the value of the common fund but “courts should consider the value of the injunctive relief obtained as a ‘relevant circumstance’ in determining what percentage of the common fund class counsel should receive as attorneys’ fees”). Here, the Settlement provides important prospective relief that prohibits Defendants from advertising the products as healthy. SA ¶ 2.2. This is important relief going to the heart of the suit, and thus justifying an upward adjustment from the benchmark, which otherwise does not account for the value this provides to the class. *See In re HP Laser Printer Litig.*, 2011 U.S. Dist. LEXIS 98759, at *18 (C.D. Cal. Aug. 31, 2011) (“The injunctive relief accepted by Defendant provides substantial benefit. The Court has considered the disproportion between the monetary value for the class in the form of e-credits and the multi-million dollar fee award and concludes that the fees are justified due to the lodestar calculation and the benefit of the injunctive relief.”); *Bennett v. SimplexGrinnell LP*, 2015 WL 12932332, at *6-7 (N.D. Cal. Sept. 3, 2015) (“Although the requested award represents 38.8% of the common fund—on the higher side of the range of approved awards in this circuit—the Court concludes that such an award is warranted in this case” in part because “Plaintiffs obtained substantial prospective relief”); *Linney*, 1997 WL 450064, at *7 (granting fee award of one-third common fund where settlement provided additional non-monetary relief).

Second, Class Counsel took on substantial risk in litigating this case on a contingency basis. For example, there was a risk the case would not be certified, as evidenced by the recent denial of certification in another coconut oil matter. *Shanks*, 2019 U.S. Dist. LEXIS 160199. Further, there were substantial risks even after the case settled on a nationwide basis, as it was stayed “pending the Ninth Circuit’s decision on the petitions for rehearing *en banc* in *In*

re Hyundai & Kia Fuel Economy Litigation." Dkt. No. 104. Had the Ninth Circuit not granted the *en banc* hearing and vacated the prior decision, there was a risk this case could not be resolved on a nationwide basis. This risk, which delayed the approval process by a year, also justifies a modest increase from the 25 percent benchmark. *Bennett*, 2015 WL 12932332, at *6-7 ("the attorneys' fee award should take into account the risk of representing these class action Plaintiffs on a contingency basis over a period of four years").

The requested fee is also justified by the contingent nature of the case and Class Counsel's expenditure for the Class of over a quarter of a million dollars in out-of-pocket expenses since January 2016, for which they have received no compensation. *See Hendricks*, 2016 WL 5462423, at *12-13 ("the Court finds some multiplier is warranted to reflect the substantial risks of litigation in this case and the financial risks class counsel assumed."), *aff'd sub nom. Hendricks v. Ference*, 754 F. App'x 510 (9th Cir. 2018).

Given that the fee request is only 75 percent of counsel's presumptively-reasonable lodestar, an increase from the benchmark is justified by the efforts expended, the inherent risk of the case, the delay in payment (especially given the significant costs) and the injunctive relief obtained. Accordingly, the Court should grant Class Counsel's requested fee of $610,500. *See In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at *4 (N.D. Cal. Sept. 20, 2018) ("a fee award of one-third is within the range of awards in this Circuit" (collecting cases)); *Torres v. Pick-A-Part Auto Wrecking*, 2018 WL 3570238, at *9 (E.D. Cal. July 23, 2018) (approving fees of 33% where "counsel's requested award is less than the lodestar, even without the application of a multiplier, which further supports the reasonableness of the requested fee amount").

C. The Request for Reimbursement Costs is Reasonable

Under California Code of Civil Procedure §§ 1033.5 (a)(1), (3) (4), and (9), the Court must award costs for court fees, service of process fees, deposition costs. In addition, § 1033.5(c) provides discretion to award reimbursement of other costs if they are "reasonably necessary to the conduct of the litigation, rather than merely convenient or beneficial to its

preparation." *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1176 (C.D. Cal. 2010) (quoting *Sci. App. Int'l Corp. v. Super. Ct.*, 39 Cal. App. 4th 1095, 1103 (1995)).

Class Counsel has incurred $23,243.81 in automatically recoverable costs. Counsel also seek $235,186.38 in costs "reasonably necessary to conduct the litigation." The vast majority of these necessary costs, $230,607.95, were for experts Plaintiff hired to support models for class wide damages, or to show falsity of the advertising, Fitzgerald Decl. ¶¶ 13-14; Joseph Decl. ¶¶ 42-44 (itemizing expenses), which was necessary to support the Class Certification Motion. *See Werdebaugh*, 2014 WL 2191901, at *22. Accordingly, the Court should grant Class Counsel's request for $258,430.19 in costs.

IV. AN INCENTIVE AWARD FOR PLAINTIFF IS REASONABLE

"It is common in class action cases to provide incentive awards to named plaintiffs." *Vinh Nguyen v. Radient Pharm. Corp.*, 2014 WL 1802293, at *11 (C.D. Cal. May 6, 2014) (citation omitted). "These awards 'are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.'" *Id*. (citing *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009)).

In class actions, incentive awards typically range from $5,000 to $10,000, with "[m]any courts in the Ninth Circuit hav[ing] . . . held that a $5,000 incentive award is 'presumptively reasonable.'" *Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877, 906 (C.D. Cal. 2016) (quoting *Hawthorne v. Umpqua Bank*, 2015 WL 1927342, *8 (N.D. Cal. 2015)).

Here the requested award of $7,500 is well within the normal range of incentive awards, and is justified by Ms. Hunter's substantial efforts—without which there would be no recovery for the Class—and her fortitude to continuing to prosecute the matter in the face of what she considered harassing behavior of her family by Defendants. *See Cifuentes v. Ceva Logistics U.S., Inc.*, 2017 U.S. Dist. LEXIS 176279, *18, *22-23 (S.D. Cal. Oct. 23, 2017) (finding $7,500 incentive award reasonable where "Plaintiff has protected the interests of the class by assisting counsel in the development of this case, 'including participating in several

hours of in-person and telephonic interviews.'"); *Gutierrez-Rodriguez v. R.M. Galicia, Inc.*, 2018 U.S. Dist. LEXIS 49801, *23-24 (S.D. Cal. March 26, 2018) (finding $7,500 incentive payment reasonable where plaintiff "states that she has been active in this litigation since its inception, providing class counsel with critical information regarding the calls she received from Defendant, responding to discovery requests, and conferring with class counsel about mediation and the Proposed Settlement").

Specifically, Ms. Hunter volunteered to serve as a named plaintiff in this matter four years ago. Since then, she has invested significant time in this case and has been vital in its successful prosecution. For example, Ms. Hunter assisted in providing in information to help counsel draft the original complaint, as well as both amended complaints, and reviewed and approved the pleadings' filings. She also reviewed many court filings, and invested time responding to interrogatories and requests for admission, and searching for documents responsive to Defendants' requests. And while most depositions of Plaintiffs in false advertising class actions should last for just a few hours, Ms. Hunter underwent a taxing deposition lasting eight-and-a-half hours from start to finish, using essentially all of the maximum permissible seven hours on the record. Ms. Hunter also made herself available to assist counsel with numerous other tasks necessary to the litigation, attended the settlement conference, and carefully reviewed the Settlement Agreement to ensure it was in the best interest of the Class. Further, Ms. Hunter endured what she reasonably considered harassment of her and her family by Defendants—who, at times during this litigation, had agents staked out in front of her house and even followed her when she left her home. Ms. Hunter and her counsel even needed to seek a protective order as Defendants served subpoenas and sought to depose her family members. *See* Hunter Decl. ¶¶ 2-15.

In short, Ms. Hunter's substantial and exemplary efforts as Class Representative render the requested award of $7,500 reasonable. Moreover, the requested award is justified because, as the only named plaintiff, without Ms. Hunter's willingness to volunteer and give assistance in the case, the Class would not have obtained the significant monetary and injunctive benefits

provided by the Settlement that she helped secure. *See Staton*, 327 F.3d at 977 (In determining a reasonable enhancement award, courts consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation."); *Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998) ("Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.").

CONCLUSION

For the foregoing reasons, the Court should grant final approval to the Settlement and enter judgment consistent with the concurrently-filed Proposed Order Granting Final Approval and Entering Judgment. The Court should also award Class Counsel $610,500 in fees, $258,430.19 in costs, and award Plaintiff an incentive award of $7,500.

Dated: November 15, 2019

Respectfully Submitted,

/s/ Paul K. Joseph

THE LAW OFFICE OF PAUL K. JOSEPH, PC
PAUL K. JOSEPH
paul@pauljosephlaw.com
4125 W. Point Loma Blvd. #309
San Diego, CA 92110
Phone: (619) 767-0356
Fax: (619) 331-2943

THE LAW OFFICE OF JACK FITZGERALD, PC
JACK FITZGERALD
jack@jackfitzgeraldlaw.com
TREVOR M. FLYNN
trevor@jackfitzgeraldlaw.com
MELANIE PERSINGER
melanie@jackfitzgeraldlaw.com
Hillcrest Professional Building
3636 Fourth Avenue, Suite 202

San Diego, California 92103
Phone: (619) 692-3840
Fax: (619) 362-9555

Attorneys for Plaintiff and the Settlement Class