**GUTRIDE SAFIER LLP**
ADAM J. GUTRIDE (State Bar No. 181446)
SETH A. SAFIER (State Bar No. 197427)
MARIE A. MCCRARY (State Bar No. 262670)
100 Pine Street, Suite 1250
San Francisco, CA 94111
Telephone: (415) 271-6469
Facsimile: (415) 449-6469

MATTHEW T. MCCRARY (admitted *pro hac vice*)
265 Franklin St, Suite 1702
Boston, MA 02110
Telephone: (214) 502-2171

**THE MARGARIAN LAW FIRM**
HOVANES MARGARIAN (State Bar No. 246359)
801 North Brand Boulevard, Suite 210
Glendale, California 91203
Telephone: (818) 553-1000
Facsimile: (818) 553-1005

**DURIE TANGRI LLP**
DARALYN J. DURIE (State Bar No. 169825)
ADAM BRAUSA (State Bar No. 298754)
DAVID MCGOWAN (State Bar No. 154289)
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: (415) 362-6666
Facsimile: (415) 236-6300

*Counsel for Plaintiffs and the Class*

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JACKIE FITZHENRY-RUSSELL and GEGHAM MARGARYAN, as individuals, on behalf of themselves, the general public and those similarly situated,

Plaintiffs,

v.

KEURIG DR. PEPPER, INC and DR PEPPER/SEVEN UP, INC.,

Defendants.

Case Nos. 5:17-cv-00564-NC (lead); 5:17-cv-04435-NC (consolidated)

**PLAINTIFFS' MOTION FOR APPROVAL OF CLASS ACTION SETTLEMENT**

**Date: January 9, 2018**
**Time: 1:00 p.m.**
**Courtroom: 7**
**Judge: Honorable Nathanael Cousins**

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

**STATUTES**

**OTHER AUTHORITIES**



**RULES**

## NOTICE OF MOTION AND MOTION

**PLEASE TAKE NOTICE** that on January 9, 2019, at 1:00 p.m. or as soon as the matter may be heard, in Courtroom 7, before the Honorable Nathanael Cousins, Plaintiffs Jackie Fitzhenry-Russell and Gegham Margaryan ("Class Representatives")[1] shall and hereby do move the Court for an order:

(1) approving of sending notice to all class members who would be bound by the settlement of this class action as set forth in the class action settlement agreement dated January 4, 2019 (Dkt. 325) ("Settlement");

(2) directing the dissemination of notice in the form and manner set forth in the Settlement; and

(3) setting a date for a final approval hearing.

A copy of the [Plaintiff's Unopposed Proposed] Order Granting Preliminary Approval of Class Action Settlement is attached to the Settlement Agreement as Exhibit D and also separately submitted herewith.

**PLEASE ALSO TAKE NOTICE** that, after expiration of the time for class members to opt out or object, and upon the occurrence of the final approval hearing, Class Representatives will seek entry of a further order:

(1) granting final approval to the Settlement and entering judgment thereon;

(2) entering an injunction against Defendants Keurig Dr Pepper, Inc and Dr Pepper/Seven Up, Inc. (collectively, "KDP" or "Defendants"), requiring changes to the Labeling of Canada Dry Ginger Ale as further set forth in the Settlement;

(3) requiring Defendants to pay all Valid Claims made by Class Members under the Settlement;

(4) awarding class representative service awards of $5,000 to each of the named plaintiffs Jackie Fitzhenry-Russell and Gegham Margaryan; and

(5) awarding attorneys' fees and expenses to Plaintiffs' counsel in the amount of

[1] The capitalized terms used herein are defined in and have the same meaning as used in the Settlement Agreement unless otherwise stated.

$2,250,000.

A copy of the [Proposed] Order Granting Final Approval of Class Action Settlement is attached to the Settlement Agreement as Exhibit E and separately submitted herewith.

This Motion is based on Federal Rule of Civil Procedure 23, this Notice of Motion, the supporting Memorandum of Points and Authorities, the Gutride Declaration, the Margarian Declaration, the Durie Declaration, the DeBenedictis Declaration, the Finnegan Declaration, the Meyer Declaration, and the pleadings and papers on file in this action, including the class action settlement agreement dated January 4, 2019 (Dkt. 325), and any other matter of which this Court may take judicial notice.

## MEMORANDUM OF POINTS AND AUTHORITIES

### A. Introduction

After years of discovery and hard-fought motion practice, and on the eve of trial in this case, Defendants agreed to settle various copycat cases on a 49-State basis by removing the "Made From Real Ginger" claim from their Canada Dry ginger ales (collectively, the "Products"). They also agreed to allow purchasers to make claims for cash refunds of $0.40 for each Product purchased during the class period, up to a maximum of 13 Products ($5.20) without Proof of Purchase or 10 products ($40.00) with proof of purchase, with a guaranteed minimum payment of $2.00 even if fewer than five purchases are claimed, subject to a cumulative cap for all claims of $11.2 million, above which payments will be reduced pro rata. Although Plaintiffs and their counsel were not directly involved in the negotiations that led to the 49-state settlement, its terms are modeled on proposals made more than a year ago by Plaintiffs in this litigation and in Massachusetts and New York actions also being prosecuted by Plaintiffs' counsel, all of which were on file before the copycat cases that Defendants agreed to settle.

The parties have now agreed to similar settlement terms in the California litigation, including (1) a permanent injunction to be issued by this Court regarding the label changes, and (2) the same monetary relief to each California claimant, except that such claims shall not be subject to the $11.2 million cap. Instead, Defendants may terminate the settlement if more than one million valid claims are submitted by California purchasers, meaning the parties will return to litigation and there is no *pro rata* reduction. Defendants also have admitted that it was the work of Plaintiffs and their counsel that was the catalyst for the injunctive relief and monetary benefits agreed in the 49-State settlement. Defendants will pay all costs of notice and administration.

Each plaintiff seeks a $5,000 representative service award, and Plaintiffs counsel seeks an award of $2,250,000 in fees and in costs.[2] None of these sums comes at the expense of any amount of money set aside for the class. Plaintiffs and their counsel have not yet received any

[2] A separate settlement agreement, also provided to the Court, resolves the Massachusetts and New York actions. As part of that settlement, Defendants have agreed to make improvements to the 49-State Settlement for the benefit of class members. Upon approval of the 49-State settlement and dismissal of the Massachusetts and New York actions, Plaintiffs' counsel will receive an additional $750,000, for a grand total under both settlements of $3,000,000.

compensation for their more than 5741.8 hours of work on this case (equating to a lodestar of $$4,364,398.50) or for the more than $407,611.95 in out-of-pocket expenses they have incurred (for experts, deposition transcripts, filing fees, etc.). Even without the Settlement, Plaintiffs would have been entitled to an award of attorneys' fees under the catalyst theory because KDP agreed in the 49-State Settlement to the injunctive relief sought by Ms. Fitzhenry-Russell since December 2016—i.e., to change the Canada Dry label and advertising. Thus, the Settlement was not motivated by a desire to obtain fees—which Plaintiffs would have received separately as the catalyst for the change—but instead to get monetary relief for the certified class. The monetary relief obtained for the certified class in the form of claims-made in the Settlement is likely superior to results that could have been achieved at trial, because there would still need to be claims after trial and the per-product recovery would be lower.

As the fair, reasonable and adequate Settlement is the product of a non-collusive, adversarial negotiation, and Class Counsel's request for fees and costs is fair and reasonable, Plaintiff respectfully requests that this motion be granted so that notice of the proposal can be given to the class.

## B. Background and Settlement Negotiations

### 1. California Procedural Summary

On December 28, 2016, Jackie Fitzhenry-Russell and Robin Dale, through their counsel Gutride Safier LLP ("GSLLP"), initiated litigation on behalf of against KDP by filing a Class Action Complaint in Santa Cruz County Superior Court. Plaintiffs alleged that Defendants had deceptively marketed and sold its Canada Dry Ginger Ale products with the representation "Made form Real Ginger" on the front label, when in fact it does not contain "real ginger" as reasonable consumers understand that term, nor does it provide the health benefits that consumers reasonably expect from real ginger. Plaintiff further alleged that, as a result of the deceptive label, Defendants caused the Products to be sold at a higher retail price. Plaintiffs alleged claims for violations of the California Consumer Legal Remedies Act, Civil Code § 1780 et seq. ("CLRA"), false advertising under California Business and Professions Code § 17500 et seq.; unfair business practices under California Business and Professions Code § 17200 et seq.; and misrepresentation. Plaintiffs sought

to pursue these claims on behalf of themselves and all purchasers of Canada Dry in the United States (other than resellers) between December 28, 2012 and the present. Plaintiffs sought an injunction to require Defendants to cease using the phrase "Made from Real Ginger" in labeling and marketing. Plaintiffs also sought to recover, on behalf of the class of all purchasers, the dollar amount of the "premium" price attributable to the alleged misrepresentations. GSLLP also drafted and sent a demand letter to KDP pursuant to the CLRA on December 29, 2018. (Gutride Decl., Ex. 1.) Defendants timely removed the action to the Northern District of California on February 3, 2017. (Dkt. #1.)

On February 21, 2017, Defendants moved to dismiss Plaintiffs' complaint. (Dkt. #16.) Defendants argued, *inter alia*, that Plaintiffs lacked standing to sue and that she had failed to plead a claim for relief. Plaintiffs opposed the motion. On April 19, the Court granted in part and denied in part the motion and granted Plaintiffs leave to amend their complaint. (Dkt. #31.) On May 10, 2017, Plaintiffs filed an amended class action complaint. (Dkt. #42.)

On March 14, 2017, another law firm, Faruqi & Faruqi, filed a case in the Central District of California entitled *Arash Hashemi, et al v. Dr Pepper Snapple Group, Inc. et al.*, No. 2:17-cv-02042-FMO. GSLLP moved to stay prosecution of the *Hashemi* case and to appoint GSLLP interim lead counsel for the proposed nationwide class. (Dkt. #48-49.) The Faruqi firm consented to the transfer of the *Hashemi* case to this Court and opposed GSLLP's motion for appointment as interim lead counsel. (Dkt. #54-55.) On June 28, 2017, the Court appointed GSLLP as interim lead counsel and directed all plaintiffs to file a consolidated amended complaint. (Dkt. #60.) The Faruqi firm declined to join in the consolidated amended complaint and dismissed its clients' claims. (Dkt. #64-65.) GSLLP filed the amended complaint on July 19, 2017. (Dkt. #66.)

On July 14, 2017, the Margarian Law Firm filed a case in the Central District of California entitled *Gegham Margaryan, et al v. Dr Pepper Snapple Group, Inc. et al.*, No. 2:17-cv-05234-JFW. This action was also transferred to this Court on August 3, 2017 and was consolidated with the Fitzhenry-Russell case on August 21, 2017 (Dkt. #75)

On August 18, 2017, Defendants moved to dismiss Plaintiffs' amended complaint. Defendants argued, *inter alia*, that Plaintiffs failed to plead fraud with particularity and that the

Court lacked personal jurisdiction over a nationwide class. (Dkt. # 74.) Plaintiffs opposed the motion. On September 22, 2018, the Court denied Defendants' motion without oral argument. (Dkt. #87.) Defendants then requested permission to file an interlocutory appeal on the personal jurisdiction issue. Plaintiffs opposed the request, and the Court denied the motion. (Dkt. # 105.) On October 31, 2017, Plaintiffs filed a second amended consolidated complaint which included the claims of Mr. Margaryan. (Dkt. #97.)

Beginning in early 2017, the parties engaged in extensive discovery. Plaintiffs reviewed over 200,000 pages of Defendants emails and marketing documents. Each of the named plaintiffs was deposed. Plaintiffs also conducted depositions of Defendants' senior employees with authority over marketing, product formulation, and customer inquiries. In addition, Plaintiffs retained and worked with a survey expert to conduct three surveys of California consumers regarding (1) what they understood the phrase "Made from Real Ginger" to mean, (2) how important that perceived meaning was to their purchasing decisions, and (3) how the inclusion of the phrase affected the price of Canada Dry Ginger Ale. Plaintiffs also retained and worked with an economist to estimate classwide damages; he opined that based on the survey results, Class members had paid a price premium for the Canada Dry Ginger Ale purchased during the class period averaging approximately 4% of the purchase price, which equated to a total overpayment of $10,778,477.16 during the class period, or an average of $0.09 per product purchase. Plaintiffs additionally retained and worked with a chemist who used gas chromatography/mass spectrometry to analyze the amount of ginger compounds in Canada Dry as compared to competing brands. This discovery led to motion practice among the parties on several issues, leading to an additional deposition of one plaintiff. There also was extensive motion practice in the District of New Jersey regarding a third party subpoena to Givaudan Flavor Corp., which supplies certain flavor ingredients to Defendants. Plaintiffs retained Michael J. DeBenedictis, an attorney barred in the states of New Jersey and New York, to assist in the motion practice involving Givaudan.

In March 2018, Robin Dale sought permission to voluntarily dismiss her claims without being required to pay Defendants' attorneys' fees. (Dkt. # 159). Defendants' opposed the application. The Court granted permission for voluntary dismissal as requested. (Dkt. # 152).

On April 9, 2018, Plaintiffs moved to certify a class of all purchasers in California of Canada Dry between December 28, 2012 and the present, except for purposes of resale. (Dkt. #180.) In support of the motion, plaintiffs presented expert testimony regarding the results of the survey as well as the damages analysis. Defendants opposed the motion (Dkt. #184), and filed a motion to strike the class certification reports of Plaintiffs' survey and damages experts. (Dkt. # 185). Plaintiffs opposed Defendants' motion to strike. (Dkt. #193.) On June 26, 2018, the Court denied the motion to strike, granted class certification, and appointed GSLLP and the Margarian Law Firm Class Counsel (Dkt. #199.) Defendants applied to the United States Court of Appeals for the Ninth Circuit for permission to appeal from the order of class certification. Plaintiffs opposed the application, and the Ninth Circuit denied it.

After class certification, Plaintiffs retained and worked with two additional experts to prepare reports: a flavor scientist who was also a certified nutritionist, and a marketing professor. Plaintiffs produced each of their five experts for deposition and also deposed Defendants' five opposing experts on the same subjects. Additional motion practice ensued when Defendants presented supplemental expert reports, leading to second depositions of two defense experts.

On August 15, 2018, the parties participated in mediation with Robert Meyer at JAMS in Los Angeles, California. (Dkt. #220; Meyer Decl. ¶ 4.) Prior to and at the mediation, GSLLP stated that no settlement was possible unless Defendants agreed to stop using the unmodified phrase "Made from Real Ginger" in their labeling and marketing. GSLLP proposed that Defendants could be permitted to use the words "real ginger" only if accompanied by the words "flavor" or "extract." Defendants did not agree to Plaintiffs' settlement proposals, and no settlement was reached.

On September 7, 2018, Defendants moved for summary judgment on the ground that no reasonable consumer could be misled by the phrase "Made from Real Ginger." (Dkt. #226.) Defendants simultaneously moved to strike reports of several of Plaintiffs' experts. (Dkt. #225) Plaintiff opposed both motions, proffering three theories of how the Canada Dry label was misleading. (Dkt. #235, 237.) On November 2, 2018, the Court granted summary judgment in part as to one of Plaintiffs' three theories of deception and denied summary judgment as to others.

(Dkt. #261.) The court also granted in part and denied in part Defendants' motion to strike, striking the testimony of Plaintiffs' marketing expert, but permitting the remainder of Plaintiffs' experts to testify. (Dkt. #260.)

After summary judgment, the parties began trial preparations. On November 21, 2018, Plaintiffs and Defendants filed a joint pretrial statement, including witness lists (Dkt. #285), exhibit lists (Dkt. #282), discovery designations (Dkt. #281), proposed *voir dire* (Dkt. #288) and a motion to appoint additional counsel for trial (Dkt. #284). In addition, Plaintiffs submitted joint proposed jury instructions and verdict forms to the Court. All items required extensive negotiation and coordination between the parties as well as legal research. (Dkt. #272.) On November 27, 2018, the parties filed their motions in limine, and on November 30, 2018 the parties filed responses to the opposing motions. The court issued its order granting and denying the motions in limine on December 10, 2018. A jury trial is set to begin on January 9, 2018.

**2. *Webb* Case in Missouri**

As noted above, this Court denied the bid by the Faruqi law firm to be appointed interim lead counsel and instead appointed GSLLP to that role for the nationwide class. The Faruqi firm responded by dismissing its California case as noted above and by filing a new case on July 27, 2017 on behalf of a proposed nationwide class in the United States District Court for the Western District of Missouri entitled *Arnold E. Webb, v. Dr. Pepper Snapple Group, Inc., et al.,* Case No. 4:17-00624-CV-RK. On September 27, 2017, Defendants moved to dismiss the *Webb* case for failure to state a claim; that motion was denied on April 25, 2018. In January 2018, GSLLP retained co-counsel in Missouri to assist with possible intervention and agreed to pay all its fees out-of-pocket. On January 18, 2018, GSLLP, with the assistance of local counsel, moved on behalf of its California clients to intervene in and stay *Webb,* in light of the first-filed rule and the California court's interim lead counsel order. While that motion was pending, on April 9, 2018, Plaintiffs in the California action limited their motion for class certification to a California class. On April 26, 2018, The Missouri court denied the motion to intervene as untimely. On June 20, 2018, the *Webb* case was settled on an individual basis and dismissed with prejudice.

### 3. GSLLP's Massachusetts and New York Cases for Proposed 49-State Class

On June 30, 2018, or four days after the California class was certified, GSLLP commenced a putative class action on behalf of Plaintiff Samuel Fisher and purchasers in Massachusetts against Defendants in the District of Massachusetts. (*Fisher v. Keurig Dr Pepper,* No. 18-cv-11381-MLW (D. Mass) ("*Fisher*") Dkt. #1.) On July 11, 2018, GSLLP and its co-counsel DeBenedictis & DeBenedictis LLC, commenced a putative class action on behalf of Plaintiff Julie Fletcher and purchasers of Canada Dry Ginger Ale in New York against Defendants in the Western District of New York. (*Fletcher v. Keurig Dr Pepper,* No. 18-cv-00766-EAW (W.D.N.Y.) ("*Fletcher*") Dkt. #1.) On August 8, 2018, GSLLP filed an amended complaint in *Fisher* adding Plaintiffs Kacie Lagun, Micah Burdick, Scott Miller, Leroy Jacobs ("Plaintiffs") and a putative 49-state class of all states other than California. (Dkt. #14.)

On August 31, 2018, Defendants moved to dismiss Fletcher's complaint in New York. (*Fletcher* Dkt. #15.) Plaintiffs opposed the motion. At oral argument on October 24, the New York Court indicated that it intended to deny the motion but it has not yet issued a written ruling.

On August 31, 2018, Defendants moved to dismiss Plaintiffs' amended complaint in Massachusetts and to strike all national class allegations. (Dkt. #18.) Plaintiffs opposed the motion and pointed out that Keurig Dr Pepper is headquartered in Massachusetts. Defendants sought leave to file a reply brief. The Massachusetts Court has not yet ruled on Defendants' motion for leave to file a reply, nor on the underlying motion to dismiss and strike.

### 4. Other Non-GSLLP Cases And Proposed 49-State Class Settlement

After GSLLP had obtained class certification in California (on June 26, 2018) and filed its additional cases in Massachusetts and New York (on June 30 and July 11, 2018, respectively), several other law firms unaffiliated with GSLLP filed copycat cases in four state courts on behalf of single-state classes. On July 20, 2018, Plaintiff Heather Erwin filed a lawsuit against Defendants on behalf of an Illinois-only class in the Circuit Court of St. Clair County, Illinois. On July 25, 2018, Julie George filed a lawsuit against Defendants on behalf of a Missouri-only class in the Circuit Court for the State of Missouri. On July 5, 2018, Plaintiff Janet Childers filed a lawsuit against Defendants on behalf of a Texas-only class in the District Court of Tarrant County,

Texas. And on July 30, 2018, Frank Levitt filed a lawsuit against Defendants on behalf of a Florida-only class in the Circuit Court of Broward County, Florida.

Upon learning of the cases, GSLLP immediately sought copies of all the filings in the copycat cases and information from Defendants about their status. Defendants informed GSLLP that all the complaints had been voluntarily dismissed between August 27 and September 28, 2018 and that no consideration had been given in exchange for the dismissals. Defendants failed to inform GSLLP, however, that it had secretly engaged in mediation with the law firms representing the copycat plaintiffs in September 2018, using a different JAMS mediator, former U.S. District Judge Wayne Andersen.

After the mediation, and again without notice to GSLLP, the four copycat lawsuits were refiled as a consolidated complaint in the Illinois court on October 29, 2018, on behalf of a proposed 49-state class. Without notice to GSLLP, the lawyers for the copycat plaintiffs and Defendants then had further settlement discussions and reached a settlement under which the Illinois case would be voluntarily dismissed and a consolidated complaint would instead be filed in the Missouri state court on behalf of a 49-state class. Under the settlement, Defendants would agree to make the label changes that had originally been proposed by GSLLP in the August 2018 mediation in California. Defendants would also agree to provide refunds to class members as described above. Ironically, the refund structure was modeled on a GSLLP settlement in two other cases in this Court before Judges Seeborg and Gonzales-Rogers—down to the same fonts and footnotes. On December 11, again without notice to GSLLP, the four lawsuits were again refiled in the Missouri court, simultaneously with filing the proposed 49-state settlement and motion for preliminary approval. The proposed settlement provides for payment of fees and costs to the lawyers for the copycat plaintiffs of up to $1.2 million, even though those lawyers did nothing other than copy GSLLP's work.

GSLLP did not learn of the new case or the settlement until Defendants informed the California Court on December 19 that, earlier the same day, the Missouri court had entered an order of preliminary approval. On December 20, 2018, Defendants moved to stay proceedings in New York pending approval of a proposed 49-state class settlement. (*Fletcher* Dkt. #30.)

Defendants filed a similar motion in Massachusetts on December 26. (*Fisher* Dkt. #30.) The New York court ordered Fletcher to respond to the motion by January 9. (*Fletcher* Dkt. #31.) The opposition to the motion in the Massachusetts *Fisher* case is due January 10.

After GSLLP learned of the proposed 49-State Settlement, it retained co-counsel in Missouri to assist with possible intervention and objections to the settlement and GSLLP agreed to pay that firm's fees out-of-pocket. GSLLP also researched the authority of the federal courts in Massachusetts, New York and California to stay the Missouri state court action. In addition, GSLLP researched its entitlement to fees as the "catalyst" for the injunctive relief and monetary benefits to be obtained in the 49-State Settlement. Finally, GSLLP communicated with the two JAMS mediators, Robert Meyer and Judge Wayne Andersen. A series of mediated negotiations followed, which led to agreements to settle the California action on behalf of the certified California class and to settle the Massachusetts and New York actions on an individual basis. (Meyer Decl. ¶¶ 5-8.)

### C. The Benefits Conferred on the Certified Class Under the Proposed Settlement of this Action

The proposed settlement agreement ("Settlement") resolves claims between KDP and the certified class of "all persons (other than Excluded Persons) who, between December 28, 2012 and June 26, 2018, purchased, in California, any Product." (Dkt. #325 ("Settlement") ¶ 2.15.) "Product" is defined as any Canada Dry ginger ale product. (Id. ¶ 2.43 and Ex. C.) Excluded Persons are (a) all Persons who purchased or acquired the Product for resale; (b) Keurig Dr Pepper Inc., f/k/a Dr Pepper Snapple Group, Inc., Dr Pepper/Seven Up, Inc., and their directors, officers, employees, principals, affiliated entities, legal representatives, successors and assigns; (c) any Person who files a valid, timely Opt-Out request; (d) federal, state, and local governments (including all agencies and subdivisions thereof, but excluding employees thereof); and (e) the Honorable Nathanael Cousins, the Honorable Wayne R. Andersen (Ret.) of JAMS, Robert A. Meyer of JAMS, and any members of either of their immediate families. (Id. ¶ 2.15.) Under the Settlement Agreement, Class Members (except any such Person who has filed a proper any timely request for exclusion from the Class), will agree to release all claims regarding the labeling, advertising, or formulation of the Products. (Id. ¶ 9.2.)

**1. Changed Practices**

KDP will agree to a Permanent Injunction barring the phrase "Made from Real Ginger" in any Labeling of the Products. (Settlement ¶ 3.1.) KDP shall be permitted, at their option, to use any of the following phrases in the Labeling of the Products: "ginger," "real ginger," or "natural ginger," in combination with one of the following three words in the same typeface and size (or in the case of audio, same volume and speed): "taste," "extract," or "flavor." (Id. ¶ 3.2.) For example, the words "taste," "extract," or "flavor" may be used in the same typeface and size (and volume and speed), preceding, or following, the words "ginger," "real ginger," or "natural ginger." (Id.)

**2. Monetary Relief**

Class members can file a claim for a cash payment of forty cents ($0.40) for each Product purchased during the Class Period (i.e., between December 28, 2012 and June 26, 2018,), with a guaranteed minimum payment for any class member who submits a Valid Claim of $2.00. (Id. ¶ 4.4.) A maximum of $40.00 (i.e., up to 100 purchases) shall be paid to any Household for claimed purchases corroborated with Proof of Purchase. (Id.) A maximum of $5.20 (i.e., up to 13 purchases) shall be paid to any Household for claimed purchases that are not corroborated by Proof of Purchase. (Id.) The amount paid to individual claimants does not depend on the number of claims submitted, the cost of notice or administration, the amount paid in cost or fees, or any amounts paid to Plaintiffs—all of which are borne by KDP. (Id. ¶¶ 4.10-4.11.)

The claim form is simple. The form can be completed online or downloaded and submitted by mail, and is designed to be completed in minutes. (Id., ¶¶ 4.1-4.3.) It requires no purchase details other than the name and number of Products purchased and approximate month(s) and year(s) of purchase. (Id.)

There is no cap on the total number of claims that can be submitted and no pro-rata reduction. However, given the simplicity of the claim form and the fact that claims can be submitted with no proof of purchase, KDP may terminate the settlement should more than one million Valid Claims be filed (without reference to dollar value). (Id. ¶ 13.1.) It is estimated that there are only 2.3 million Class members (Gutride Decl., ¶ 51) and that the likely number of claims based on typical claim rates is around 100,000 (Gutride Decl., ¶ 62; Finnegan Decl., ¶ 36),

so the receipt of more than 1 million Valid Claims could be evidence of such fraud. Further, by using a termination provision instead of a cap, valid claims will not be subject to pro-rata reductions in order to pay fraudulent claims. The proposed settlement notices inform class members that if the settlement does not become final or is terminated, then the litigation will continue on behalf of the certified class. (Settlement Ex. ¶ B1.)

**3. Administrative Expenses, Attorneys' Fees and Costs, Representative Service Awards**

All costs of notice and administration of the Settlement will be paid by KDP. (Id. ¶ 8.1.) There is a cap on such costs of $750,000; the settlement administrator has stated that this amount should be sufficient to cover the required notice and claim administration. (Id. ¶ 8.2.) These costs are reasonable in light of the need to reach all class members and process the claims. The parties propose that Heffler Claims Group serve as the Settlement Administrator. (Id. ¶ 2.51.) The additional information required by N.D. Cal. Procedural Guidance for Class Action Settlements ("N.D. Cal. Guide") ¶ 2 regarding the selection of the settlement administrator is provided in the Gutride Declaration. (Gutirde Decl., ¶ 61.)

In addition, the Settlement provides for a Class Representative Service Award from KDP of $5,000 per Class Representative. (Settlement ¶ 6.2-6.3.) Plaintiffs provided assistance that enabled Class Counsel to successfully prosecute this Litigation and reach a settlement, including locating and forwarding responsive documents and information, responding to written discovery, sitting for a full-day deposition (and in the case of Mr. Margaryan, an additional half-day deposition), and preparing testimony for trial. (Gutirde Decl., ¶¶ 59-60.) The Service Award is designed to compensate the Class Representatives for (1) the time and effort undertaken in and risks of pursuing this action (including the risk of liability for the costs of suit) and (2) because they are agreeing to a release broader than the one that will bind settlement class members. (Settlement ¶ 9.1.)

Class Counsel also requests an award of Attorneys' Fees and Costs of $2,250,000. (Id., ¶ 6.1.) Even when combined with the additional payment they will receive in connection with the Massachusetts and New York case, the amount will reimburse them for less than 60% of their total lodestar and expenses. (Gutride Decl., ¶¶ 72, 74.) These amounts are disclosed in the proposed

notices. (Id., Exs. B1, B3, B5.) The reasonableness of this request is discussed in Section E, *infra*.

**D. Approval of the Settlement**

**1. Legal Framework**

Strong judicial policy favors settlement of class actions. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1269, 1276 (9th Cir. 1992); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998). Settlements of complex cases greatly contribute to the efficient utilization of scarce judicial resources and achieve the speedy resolution of justice. "The claims, issues, or defenses of a certified class may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e). A decision "to approve or reject a settlement is committed to the sound discretion of the trial judge because [s]he is exposed to the litigants, and their strategies, positions, and proof." *In re Mego Fin. Corp,* 213 F. 3d 454, 458 (9th Cir. 2000). The Court must consider whether the settlement as a whole is reasonable; it stands or falls in its entirety. *See Hanlon v. Chrysler Corp*., 150 F.3d 1101, 1026 (9th Cir. 1998) ("*Hanlon*"). In addition, Rule 23(e) "requires the district court to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable." *Id.* at 1026. Under Ninth Circuit precedent, the district court must balance a number of factors including:

> the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; 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 the class members to the proposed settlement.

*Id.* Recent amendments to Rule 23 similarly require the district court to consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). The Court should apply "the framework set forth in Rule 23, while continuing to draw guidance from the Ninth Circuit's factors and relevant precedent." *Hefler v. Wells Fargo & Co.*, No. 16-cv-05479-JST, 2018 U.S. Dist. LEXIS 213045, at *13 (N.D. Cal. Dec. 17, 2018).

**2. Adequacy of Notice**

The proposed notice plan and claim form, which are attached to the Settlement as Exhibits B1, B3, B4, and B5, comport with the procedural and substantive requirements of Rule 23 and the N.D. Cal. Guide. Under Rule 23, due process requires that class members receive notice of the settlement using the best notice that is "practicable under the circumstances." *See* Fed. R. Civ. P. 23(c)(2)(B). The mechanics of the notice process are left to the discretion of the Court, subject only to the broad "reasonableness" standards imposed by due process. *See* 7A Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1786 (3d ed. 2008)*; see also Rosenburg v. I.B.M.*, No. CV-06-00430-PJH 2007, 2007 WL 128232 at *5 (N.D. Cal. 2007) (notice should inform class members of essential terms of settlement including claims procedure and their rights to accept, object or opt-out of settlement); N.D. Cal. Guide ¶¶ 3-5 (identifying information to be included in notice). In this Circuit, it has long been the case that a notice of settlement will be adjudged satisfactory if it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Churchill*, 361 F.3d 566, 575 (9th Cir. 2004) (citing *Mendoza v. Tucson Sch. Dist. No.1*, 623 F.3d 1338, 1352 (9th Cir. 1980)). The proposed Notice Plan satisfies these content requirements and is designed to reach a high percentage of the Settlement Class.

Notice of the settlement is to be provided to the Settlement Class as follows: (1) via publication of a one-half page ad in People magazine (circulation of 3,031,829 with approximately 33,926,000 readers of the print edition) and a one-half page ad in Good Housekeeping magazine (circulation of 4,101,000 with approximately 18,536,000 readers of the print edition); (2) a press release issued through PR News Wire's USA 1 network; (3) a total of 37,800,000 impressions of the Online Notice targeted at likely class members that are served across a whitelist of 3,000 internet sites and via social media; (4) a sponsored blog/newsletter post on

www.topclassactions.com; (5) Email Notice via electronic mail to each Class Member for which KDP has provided an email address; and (6) mailed notice to each Class Member for which KDP has provided a mailing address but not an email address. (Settlement Ex. B2.)

The proposed notices inform class members about the proposed settlement; a summary of settlement benefits; their right to opt out and the information required by N.D. Cal. Guide ¶ 4 regarding opt outs; their right to object and the information required by N.D. Cal. Guide ¶ 5 regarding objections; the need to file a claim; and the prospective request for attorneys' fees, costs and representative service awards. The published notices refer class members to the settlement website where they can obtain the long-form notice, which provides more details about the case and the settlement, online and printable versions of the claim form and the opt out forms, a fuller discussion of the release, and methods to obtain additional information. In addition, the settlement website, will also shall contain a contact information page that will include address and telephone numbers for the claim administrator and Class Counsel, the Settlement Agreement, the date of the final approval hearing, the motions for approval and for attorneys' fees and any other important documents in the case. Further, the administrator will provide a toll-free telephone number at which class members can obtain information.

As explained in the declaration from the claim administrator filed herewith, this multi-communication method is expected to reach at least 74% of the settlement class members an estimated average of 2.3 times each, and it is the best notice practicable. (Finnegan Decl., ¶¶ 3-4.) *See, e.g.*, *Simpao v. Gov't of Guam*, 369 F. App'x 837, 838 (9th Cir. 2010) (notice plan was "best notice practicable" where direct notice was mailed to class members and supplemented by published notice); *In re Google Referrer Header Privacy Litig.*, No. 5:10-cv-04809, 2014 WL 1266091, *7 (N.D. Cal. Mar. 26, 2014) (where direct individual notice not practical, "publication or something similar is sufficient to provide notice to the individuals that will be bound by the judgment"); *see also In re Tableware*, 484 F. Supp. 2d 1078, 1080 (N.D.Cal. 2007) (approving settlement; holding that where defendants do not maintain complete lists of all class members, notice via publication is "reasonable"); *In re Netflix Privacy Litig.*, No. 5:11-cv-00379, 2012 WL 2598819, *5 (N.D. Cal. July 5, 2012) (approving notice procedure that included emailing

customers at last known email address, publication in *People* magazine, and advertising on Facebook.com). In addition to publication, notice will be sent directly (via email or U.S. mail) to potential class members as identified through KDP's customer service database records.

The Class Action Fairness Act requires that KDP give notice of the proposed class action settlement to appropriate state and federal officials and supply all of the information and documents set forth in 28 U.S.C. § 1715 (b)(1)-(8). KDP will do so within ten days after the Settlement Agreement is filed with the Court. (Settlement Ex. B-2.)

**3. Fairness, Adequacy, and Reasonableness of Settlement**

**(a) Procedural Concerns**

The Court must consider whether "the class representatives and class counsel have adequately represented the class" and whether "the proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(A)-(B). As the Advisory Committee notes suggest, these are "matters that might be described as 'procedural' concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement." Fed. R. Civ. P. 23(e)(2)(A)-(B) advisory committee's note to 2018 amendment. These concerns implicate factors such as the non-collusive nature of the negotiations, as well as the extent of discovery completed and stage of the proceedings. *See Hanlon*, 150 F.3d at 1026.

***i. Adequate Representation of the Class***

In granting class certification, the Court concluded that the Class Representatives and Class Counsel were adequate. Doc. 199 at 25. This remains true. The Class Representatives have "no conflicts of interest" (id.) and have invested significant time and resources in this litigation for more than two years. Class Counsel have "successfully represented numerous plaintiff classes, involving a variety of claims, in state and federal courts throughout the country" (Doc. 180 at 19) and have "effectively" represented the class interests in this case (Doc. 199 at 25).

***ii. Arm's Length Negotiations***

The Ninth Circuit "put[s] a good deal of stock in the product of an arm's-length, non-collusive, negotiated resolution" in approving a class action settlement. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Class settlements are presumed fair when they are

reached "following sufficient discovery and genuine arms-length negotiation," both of which occurred here. *See Nat'l Rural Telecomms. Coop. v. DIRECTV*, *Inc.,* 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("*DIRECTV*"); 4 Newberg at § 11.24. "The extent of discovery [also] may be relevant in determining the adequacy of the parties' knowledge of the case." *DIRECTV*, 221 F.R.D. at 527 (quoting *Manual for Complex Litigation, Third* § 30.42 (1995)). "A court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case." *DIRECTV*, 221 F.R.D. at 527 (quoting 5 *Moore's Federal Practice*, §23.85[2][e] (Matthew Bender 3d ed.)).

Here, before agreeing upon the terms of the settlement, the parties engaged in extensive factual and expert investigation, which included twenty-two fact and expert depositions, document production of over 200,000 pages of documents, interrogatories, and third-party discovery. Gutride Decl. ¶¶ 11-16. The parties also had undertaken extensive briefing and argument on various significant legal issues, including in connection with two motions to dismiss, class certification, a motion for summary judgment, and preparations for the jury trial. *See* Section B, *supra*. In addition, Plaintiff Ms. Fitzhenry-Russell and her counsel have experience in other ginger ale litigation, which has further informed their views about the claims in this case. The record was thus sufficiently developed that the parties were fully informed as to the viability of the claims and able to adequate evaluate the strengths and weaknesses of their respective positions and risks to both sides if the case did not settle. Gutride Decl., ¶ 44.

The parties negotiated the proposed settlement in good faith with the assistance of two independent, experienced mediators, the Honorable Wayne R. Andersen (Ret.) of JAMS and Robert A. Meyer of JAMS. Gutride Decl., ¶ 46; Meyer Decl. ¶¶ 4-8. "The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." *Adams v. Inter-Con Sec. Sys. Inc.*, No. C-06-5428 MHP, 2007 WL 3225466, at *3 (N.D. Cal. Oct. 30, 2007).

**(b) Substantive Concerns**

Rule 23(e)(2)(C) and (D) set forth factors for conducting "a 'substantive' review of the

terms of the proposed settlement." Fed. R. Civ. P. 23(e)(2)(C)-(D) advisory committee's note to 2018 amendment. In determining whether "the relief provided for the class is adequate," the Court must consider "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C). In addition, the Court must consider whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D).

***i. Strength of Plaintiffs' Case and Risk of Continuing Litigation***

Consistent with Rule 23's instruction to consider "the costs, risks, and delay of trial and appeal," Fed. R. Civ. P. 23(e)(2)(C)(i), courts in this circuit evaluate "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; [and] the risk of maintaining class action status throughout the trial," *Hanlon*, 150 F.3d at 1026. Generally, the principal risks to be assessed are the difficulties and complexities of proving liability and damages. *See, e.g., Mego*, 213 F.3d at 458-59 (assessing risk of inability to prove fraudulent scheme in affirming settlement); *Linney v. Cellular Alaska Partnership*, 151 F.3d at 1240-1241 (9th Cir. 1998) (assessing risks involving fraudulent concealment and ability to obtain damages in affirming settlement); *Torrisi v. Tucson Electric Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993), *cert denied,* 512 U.S. 1220 (1994) (approving settlement based in part on "inherent risks of litigation"); *Class Plaintiffs*, 955 F.2d at 1292 (approving settlement based on uncertainty of claims and avoidance of summary judgment); *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982, *cert denied*, 495 U.S. 1217 (1983) (approving settlement based in part on the possibility that a judgment after a trial, when discounted, might not reward class members for their patience and the likely delay reflected in the "track record" for large class actions).

In considering whether to enter into the Settlement, Plaintiffs, represented by counsel experienced in food labeling litigation, weighed the risks inherent in establishing all the elements of their claims in a jury trial, as well as the expense of trial and likely duration of post-trial motions and appeals. Plaintiffs agreed to settle this litigation on these terms based on their careful

investigation and evaluation of the facts and law relating to Plaintiffs' allegations and consideration of the facts and views expressed by the mediator and KDP during the settlement negotiations. *See Louie v. Kaiser Found. Health Plan, Inc.*, No. 08-cv-0795, 2008 WL 4473183, at *6 (S.D. Cal. Oct. 6, 2008) ("Class counsels' extensive investigation, discovery, and research weighs in favor of preliminary settlement approval.").

Plaintiffs and Class Counsel were aware that, in order to prevail at trial, they would have to prove not only that KDP's "Made From Real Ginger" representation was misleading, but that those statements were material; that consumers relied on the misrepresentation; the representation caused injuries; that there were recoverable damages for the Class; and in order to obtain punitive damages, that KDP's conduct constituted fraud, oppression, or malice. Although Plaintiffs believe the evidence obtained in discovery established KDP's liability and damages, KDP vigorously denies those allegations, creating substantial uncertainty of obtaining a successful verdict after trial and appeal. Among other things, KDP disputed that the "Made from Real Ginger" claim was misleading or material to a reasonable consumer in that the phrase was literally true and regardless was not important to the consumer decision-making. Further, KDP criticized Plaintiffs' consumer understanding and materiality surveys as flawed and unreliable. Plaintiffs also faced substantial challenges in establishing the amount of class-wide damages. KDP argues that the conjoint model Plaintiffs used to calculate damages makes unsupportable assumptions that are contradicted by the facts and are not reliable. In particular, KDP asserted that its products are line priced and that the pricing of Canada Dry is unaffected by the "Made From Real Ginger" claim.

While Class Counsel are confident in their positions and believe Plaintiffs' claims are strong, Class Counsel are also experienced and realistic enough to know that the recovery and certainty achieved through settlement, as opposed to the uncertainty inherent in the trial and appellate process, weighs heavily in favor of settlement, particularly given the above risks, which could easily have impeded Plaintiffs' successful prosecution at trial and in an eventual appeal. Gutride Decl., ¶¶ 54-57. Under the circumstances, Plaintiffs and Class Counsel appropriately determined that the instant settlement outweighs the gamble of continued litigation. *Id.* Moreover, even if Plaintiffs prevailed at trial, any recovery could be delayed for years by an appeal. *Id.* Thus,

even in the best case, it could take years to secure any meaningful relief for class members. *See Lipuma v. American Express Company*, 406 F. Supp. 2d 1298, 1322 (S.D. Fla. 2005) (likelihood that appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement).

Further, a comparison of the settlement award to the potential damages that might be recovered for the Class at trial, given the risks of the litigation, supports the reasonableness of the Settlement. *See* N.D. Cal. Guide ¶1(d) (preliminary approval motion should set forth "potential recovery if plaintiffs were to prevail" and "likely recovery per plaintiff" under the settlement). Plaintiffs' expert opined that price premium damages total approximately $10.8 million, or an average of $0.09 per product. Gutride Decl., ¶¶ 50, 51. Even after trial, class members would have to make claims because they cannot otherwise be identified. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1131-32 (9th Cir. 2017) ("Rule 23 specifically contemplates the need for such individualized claim determinations after a finding of liability."). The settlement amount per product is much higher and there is no reason to believe the post-trial claim rate would exceed a settlement claim rate.[3] Additionally, there is substantial value to KDP's changed practices (i.e. removing the "Made From Real Ginger" phrase from its Canada Dry Labeling). This is a very favorable outcome given the substantial risks of continuing with this complex litigation, and the uncertainty inherent in a jury trial, as well as the advantages of obtaining an immediate cash benefit for Class Members and avoiding the substantial expenses of further litigation.

The Settlement release is no broader than a res judicata release that would be obtained after trial. It releases only claims that were or could have been asserted regarding labeling, advertising

[3] "[I]t is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial." *DIRECTV*, 221 F.R.D. at 527, *citing Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). *See also e.g., Destefano v. Zynga, Inc.*, No. 12-cv-04007-JSC, 2016 WL 537946, at *11 (N.D. Cal. Feb. 11, 2016) ("Settlement Amount represent[ing] approximately 14 percent of likely recoverable aggregate damages at trial" was "well within the range of percentages approved in other securities-fraud related actions"); *In re Biolase, Inc. Sec. Litig.*, No. SACV 13-1300-JLS, 2015 WL 12720318, at *4 (C.D. Cal. Oct. 13, 2015) (settlement representing "approximately 8% of the maximum recoverable damages … equals or surpasses the recovery in many other securities class actions"); *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (settlement representing 9% of maximum damages fair and reasonable and "higher than the median percentage of investor losses recovered in recent shareholder class action settlements").

and product formulation—the very issues in suit. *See Allied Fire Prot. v. Diede Constr., Inc.*, 127 Cal. App. 4th 150, 155 (2005) ("Res judicata serves as a bar to all causes of action that were litigated or that could have been litigated in the first action."); *see also In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 327 (N.D. Cal. 2018) ("the Ninth Circuit allows federal courts to release not only those claims alleged in the complaint, but also claims 'based on the identical factual predicate as that underlying the claims in the settled class action.'") (quoting *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010)). Claims relating to "personal injury or property damage arising out of the use of the Product" are specifically excluded from the release.

***ii. Effectiveness of Distribution Method***

The Court must consider "the effectiveness of [the] proposed method of distributing relief to the class." Fed. R. Civ. P. 23(e)(2)(C)(ii). Class Members who seek benefits under the Settlement must only to submit a relatively simple claim form with basic questions about class membership. As KDP is a wholesaler and has no records of Class Member purchases, a claim form is required to identify class members and their eligible purchases. The form can be completed online, or class members have the option to print and mail the claim form to the claim administrator. Settlement ¶¶ 4.1-4.3 and Ex. A. Payments will be made by check and mailed. *Id.* This procedure is claimant-friendly, efficient, cost-effective, proportional and reasonable. Pursuant to N.D. Guide ¶1(g), Class Counsel estimate, based on their experiences with recent settlements in other food labeling cases and the input of the claims administrator, 100,000 class members will submit a claim. Gutride Decl., ¶ 62; Finnegan Decl., ¶ 36.

***iii. Terms of Attorneys' Fees***

Class Counsel seeks an award of attorneys' fees and costs for all Class Counsel in an amount of $2,250,000. That request is addressed in Section E, *infra*.

***iv. Supplemental Agreements***

Rule 23(e)(3) requires identification of any "supplemental" agreements. As noted above, Defendants have separately reached agreement with the plaintiffs in the New York and Massachusetts actions that are being handled by the same Plaintiffs' counsel, and agreed to pay a separate attorneys' fee in connection with that litigation. A copy of that agreement is attached as

Exhibit G to the Settlement and propriety is addressed in Section E, *infra*.

***v. Equitable Treatment of Class Members***

All class members are entitled to the same relief under the Settlement. This proposal is fair and equitable because the $0.40 per product refund is far greater than the $0.09 average alleged price premium per Product. Even though products may have been sold at different prices based on size or retail location, the alleged premium is always 4% or 4.67%, and uniform relief makes it unnecessary for claimants to testify how much they paid for each purchase and makes the settlement administratively efficient. The Settlement also provides for a Service Award for the Representative Plaintiffs, which is explained in Section F, *infra*.

***vi. Counsel's Experience***

Although not articulated as a separate factor in Rule 23(e), courts have given considerable weight to the opinion of experienced and informed counsel who support settlement. *See DIRECTV*, 221 F.R.D. at 528; *see also In re NVIDIA Corp. Derivative Litig.*, No. C-06-06110-SBA, 2008 WL 5382544 at *4 (N.D. Cal. Dec. 22, 2008); *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988). In deciding whether to approve a proposed settlement of a class action, "[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Stewart v. Applied Materials, Inc.*, No. 15-cv-02632-JST, 2017 WL 3670711, at *6 (N.D. Cal. Aug. 25, 2017); *accord Omnivision*, 559 F. Supp. 2d at 1043 (same). Here, Class Counsel came to recommend this Settlement after over two years of hard-fought litigation, during which it expended over 5741.8 hours, which includes extensive briefing on a variety of significant contested legal issues and preparation for a jury trial. Gutride Decl. ¶¶ 2-41. KDP is also represented by seasoned, class-action litigators who support the settlement. Id. ¶ 43.

***vii. Past Distributions***

The information requested by N.D. Cal. Guide ¶ 11 regarding past distributions in other comparable class settlements is provided in the Gutride Declaration. Gutide Decl., ¶ 43 and Ex. 2.

**E. Approval of the Attorneys' Fees and Expenses.**

**1. Plaintiffs' Fee Request is Reasonable Under the Lodestar Approach.**

**(a) Legal Standard**

Plaintiffs request the payment of attorneys' fees and expenses in the amount of $2,250,000, which is provided for in the Settlement Agreement separate and apart from the money made available to the class for purposes of claims payment and notice and administration expenses. Under Ninth Circuit standards, in cases such as this where the relief is primarily injunctive and there is a fee-shifting statute (California Civil Code § 1750 and California Code of Civil Procedure § 1021.5), it is appropriate for a District Court to analyze an attorneys' fee request and issue an award based on the "lodestar" method. *Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). Plaintiffs' fee request is reasonable under this approach as Class Counsel obtained both injunctive and monetary relief. Further, an attorney is entitled to "recover as part of the award of attorney's fees those out-of-pocket that would normally be charged to a fee paying client." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (internal quotation marks and citation omitted). To support an expense award, Plaintiffs should file an itemized list of their expenses by category, listing the total amount advanced for each category, allowing the Court to assess whether the expenses are reasonable. *See Wren v. RGIS Inventory Specialists, No. 06-cv-05778-JCS*, 2011 WL 1230826, at *30 (N.D. Cal. Apr. 1, 2011); N.D. Cal. Guide ¶ 6.

**(b) Analysis**

Under the lodestar approach, "[t]he lodestar (or touchstone) is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate." *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 26 (2000); *accord Kelly v. Wengler*, 822 F.3d 1085, 1099 (9th Cir. 2016). Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative (i.e. fractional) "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." *Id.*; *see also Serrano v. Priest ("Serrano III")*, 20 Cal. 3d 25, 48-49 (1977); *Ramos v. Countrywide Home Loans, Inc*. 82 Cal. App. 4th 615, 622 (2000); *Beasley v. Wells Fargo Bank,* 235 Cal. App. 3d 1407, 1418 (1991)

(multipliers are used to compensate counsel for the risk of loss, and to encourage counsel to undertake actions that benefit the public interest).

Class Counsel's lodestar through the date of this application is approximately $407,611.95. Gutride Decl., ¶ 72. Class Counsel's efforts to date included, without limitation:

- Pre-filing investigation;
- Drafting a class action complaint and three amended complaints;
- Opposing KDP's two motions to dismiss;
- Drafting numerous case management conference statements and stipulations;
- Meeting-and-conferring with KDP's counsel regarding the scope of discovery, the sufficiency of discovery responses and production, the retention of electronic documents, KDP's searches for electronically stored information, the terms and scope of a stipulated protective order, and the timing of production and briefing numerous discovery disputes;
- Reviewing in excess of 200,000 pages of documents produced by KDP;
- Subpoenaing and reviewing documents from third parties and litigating a motion to quash;
- Taking eleven depositions and defending four depositions of Plaintiffs and five expert depositions;
- Briefing the motion for class certification and attending a hearing;
- Preparing a plan for class notice and ensuring the dissemination of notice in accordance with the terms of the notice plan;
- Opposing KDP's motion for summary judgment and attending a hearing;
- Preparing for and attending the pretrial conference, including meeting and conferring with KDP to prepare the joint pretrial filings, i.e., exhibit lists, witness lists, stipulations and disputed issues for conduct at trial, designations of discovery materials, judge-directed voir dire questions and jury questionnaire, statement of the case, and jury instructions;
- Drafting a comprehensive mediation statement and participating in an all-day mediation before Robert A. Meyer of JAMS and continued mediated settlement discussions with Robert A. Meyer and Honorable Wayne R. Andersen (Ret.) of JAMS;
- Preparing for trial, including performing mock jury research, preparing trial strategy, and

preparing witness examination outlines;

- Negotiating and drafting the Settlement Agreement along with corresponding documents, including claim forms, summary notice, and long form notice; and
- Preparing this Motion and supporting documentation.

*See* Gutride Decl., ¶¶ 2-41; Margarian Decl., ¶¶ 2-9; Durie Decl. ¶¶ 2-3 and 7-12; and DeBenedictis Decl., ¶¶ 3-5.

Before the final approval hearing, Class Counsel's efforts will also include, without limitation:

- Reviewing and responding to correspondence from class members;
- Supervising the work of the Settlement Administrator; and
- Researching and drafting a reply in support of this motion and opposing objections, if any.

Gutride Decl., ¶ 75.

Class Counsel calculated their lodestar using Class Counsel's regular billing rates, which for the attorneys involved range from $425 to $975 per hour. Gutride Decl., ¶ 66; Margaryan Decl., ¶ 12; Durie Decl., ¶ 6; and DeBenedictis Decl. ¶ 7. These hourly rates are equal to market rates in San Francisco for attorneys of Class Counsel's background and experience. Id.; *see also In re Optical Disk Drive Prod. Antitrust Litig.,* No. 3:10-MD-2143 RS, 2016 WL 7364803, at *8 (N.D. Cal. Dec. 19, 2016) (approving hourly rates of $205 to $950); *Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 WHA, 2015 WL 2438274, at *5 (N.D. Cal. May 21, 2015), *appeal dismissed* (Oct. 30, 2015) (approving hourly rates of $475 to $975).[4] Each of the lawyers who did substantive work on the case graduated from a top law school (Yale, Harvard, Boalt, NYU, University of Texas, Northwestern); and the key players have at least 10 and in some cases 20 years of litigation experience. Gutride Decl., ¶ 69; Margaryan Decl., ¶ 14; Durie Decl., ¶ 15; and

[4] Plaintiffs' Counsel has also calculated their lodestar using the rates provided in the Laffey Matrix, which this Court has recognized is a "well-established objective source for rates that vary by experience." *In re HPL Techs., Inc., Sec. Litig.*, 366 F. Supp. 2d 912, 921 (N.D. Cal. 2005). After adjusting the rates, which are tailored for the District of Columbia, by approximately 8.6% for the Bay Area attorneys and 1.8% for the Los Angeles attorneys, as done by Judge Walker in *In re HPL Techs., Inc., Sec. Litig.*, Plaintiffs' Counsel's total lodestar using the adjusted Laffey rates is $4,257,154.15. Gutride Decl., ¶ 72.

DeBenedictis Decl., Ex. 1.[5]

These rates are the current rates charged by Class Counsel, which is appropriate given the deferred and contingent nature of counsel's compensation. *See LeBlanc-Sternberg v. Fletcher,* 143 F.3d 748, 764 (2nd Cir. 1998) ("[C]urrent rates, rather than historical rates, should be applied in order to compensate for the delay in payment….") (citing *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989)); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994) ("The district court has discretion to compensate delay in payment in one of two ways: (1) by applying the attorneys' current rates to all hours billed during the course of litigation; or (2) by using the attorneys' historical rates and adding a prime rate enhancement.").

In any event, Class Counsel's attorneys' fee request of $1,842,388.05 ($2,250,000 minus costs and expenses of $407,611.95, discussed *infra*), comes in well *below* the fee amount of $4,364,398.50 calculated using the lodestar method. Even counting the additional $750,000 that Class Counsel will receive in connection with the Massachusetts and New York action, the total fee recovery will be $2,592,388.05.[6] Thus, far from any "upward" multiplier, Class Counsel's requested fee actually results in a fractional multiplier of .61, which further justifies the full requested fee award. *See, e.g.*, *Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D. 673, 690-91 (N.D. Cal. 2016) (holding negative lodestar multiplier to be indication of reasonableness of fee

[5] Furthermore, it is almost certain the rates paid by KDP to its attorneys in this case far exceed the rates requested for Class Counsel. *See Managing Class Action Litigation: A Pocket Guide For Judges* § IV(F) (suggesting an examination of the defendant's attorney fee records as a measure of what might be reasonable). The billing rates are standard rates and/or have been recently approved by other judges in this District. Gutride Decl., ¶¶ 67-68; Margarian Decl. ¶13; Durie Decl. ¶¶ 13-14; DeBenedictis Decl., ¶¶ 8, 13.

[6] The Court is not required under Rule 23(e)(5)(B) to approve of the New York and Massachusetts Settlements or those Plaintiffs' agreements to forego objecting to the 49-State Settlement. By its terms, Rule 23(e)(5)(B) requires the Court only to approve of agreements to forego objections to the settlement before the Court. The 49-State Settlement is not before this Court, nor is the individual settlement with the Massachusetts and New York Plaintiffs. Nevertheless, even if the Rule did apply, the Court should find the agreement reasonable. Defendants have agreed that Plaintiffs' counsel's work in bringing not only the California case, but also the New York and Massachusetts cases, as the catalyst for the 49-State Settlement. Under the agreements, the New York and Massachusetts named Plaintiffs are being treated the same as the named plaintiffs in the Missouri action, and their counsel is being compensated for their work as the catalyst for the benefits provided to the 49-State Settlement Class.

request); *Johnson v. Triple Leaf Tea Inc.*, No. 3:14-cv-01570-MMC, 2015 U.S. Dist. LEXIS 170800 at *6 (N.D. Cal. Nov. 16, 2015) (finding where "Class Counsel's lodestar exceeded the negotiated award" to be "well within the range courts have allowed in the Ninth Circuit"); *Lusby v. GameStop Inc.*, No. C12-03783 HRL, 2015 WL 1501095, at *4 (N.D. Cal. Mar. 31, 2015) ("Class Counsel's lodestar . . . result[s] in a negative multiplier of approximately .54. This is below the range found reasonable by other courts in California."); *Covillo v. Specialtys Café*, No. C-11-00594 DMR, 2014 WL 954516, at *7 (N.D. Cal. Mar. 6, 2014) ("Plaintiffs' requested fee award is approximately 65% of the lodestar, which means that the requested fee award results in a so-called negative multiplier, suggesting that the percentage of the fund is reasonable and fair.").

Class Counsel requests that, in addition to reasonable attorneys' fees, the Court grant its application for reimbursement of $407,611.95 in out-of-pocket expenses incurred by it in connection with the prosecution of this litigation. Gutride Decl., ¶ 74. As required by the N.D. Cal. Guide ¶ 6, the expenses incurred are itemized in counsel's declarations. Gutride Decl., ¶ 73 and Ex. 3; Margarian Decl., ¶ 17; Durie Decl., ¶ 18; and DeBenedictis Decl., ¶ 17 and Ex. 2. Here, since the requested sum of $2,250,000 is inclusive of both attorneys' fees *and* costs, should the Court choose to calculate the two totals separately, it should subtract the $407,611.95 in costs from that number and award $1,842,388.05 in attorneys' fees.[7]

**2. Plaintiffs' Fee Request is Less Than Class Counsel Would Recovery Under a Catalyst Theory.**

Had the parties not reached this settlement, Class Counsel would have requested fees as the catalyst for the injunctive and monetary relief obtained in the 49-State Settlement, which would have supported an even larger fee award than the total being sought now. Section 1021.5 of the California Code of Civil Procedure authorizes a court (including a federal court) to award attorneys' fees to a party who has achieved "the enforcement of an important right affecting the public interest." C.C.P. § 1021.5. To be eligible for a fee award pursuant to C.C.P. § 1021.5, a

[7] Should the Court deem any of the requested costs to not be reimbursable, Plaintiff requests that the Court increase the attorneys' fee award such that the net amount of $2,250,000 provided via the Settlement Agreement is awarded, as any increase to the attorneys' fee award would still result in a significant negative lodestar multiplier and, therefore, be reasonable.

party need not win at summary judgment or trial. Rather, as the California Supreme Court has explained, "The appropriate benchmarks in determining which party prevailed are (a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two." *Maria P. v. Riles*, 43 Cal. 3d 1281, 1291 (1987) (internal citations omitted); *accord MacDonald v. Ford Motor Co.*, No. 13-CV-02988-JST, 2015 WL 6745408, at *3 (N.D. Cal. Nov. 2, 2015). A plaintiff can be deemed a prevailing party even without obtaining an injunction or similar judicially enforceable result, if she was the "catalyst" for the desired result. *See Tipton–Whittingham v. City of L.A.*, 316 F.3d 1058, 1062 (9th Cir.2003) (same), certified question answered, 34 Cal. 4th 604 (2004) ("California law continues to recognize the catalyst theory and does not require 'a judicially recognized change in the legal relationship between the parties' as a prerequisite for obtaining attorney fees under Code of Civil Procedure section 1021.5."); *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 560-61 (2004), as modified (Jan. 12, 2005) (same); *accord Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 844 (9th Cir. 2007).

In order to recovery attorneys' fees under the catalyst theory, Plaintiffs must demonstrate: "(1) that the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense ... and (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit." *MacDonald v. Ford Motor Co.*, No. 13-CV-02988-JST, 2015 WL 6745408, at *3 (N.D. Cal. Nov. 2, 2015) (quoting *Tipton–Whittingham v. City of Los Angeles*, 34 Cal. 4th 604 *at 608 (2004)). Moreover, where settlement attempts would have been futile, or "exigent circumstances [] required immediate resort to judicial process," the duty to engage in pre-litigation settlement efforts is waived. *See, e.g., Envtl. Prot. Info. Ctr. v. California Dep't of Forestry & Fire Prot.*, 190 Cal. App. 4th 217, 237 (2010), as modified on denial of reh'g (Dec. 15, 2010); *Cates v. Chiang*, 213 Cal. App. 4th 791, 816 (2013) ("But because it is a judicially-created rule to promote the purposes of section 1021.5 and deter attorneys from filing meritless suits merely to obtain attorney fees, it should not be applied to bar an attorney fees recovery where to do so would defeat the core purpose of the statute.")

Plaintiffs must show that their suit was "a substantial causal factor" in the changed conduct, but not necessarily the only factor. *See Henderson v. J.M. Smucker Co.*, No. CV 10–4524–GHK (VBKx), 2013 WL 3146774, at *4 (C.D. Cal. June 19, 2013) (quoting *Graham*, 34 Cal. 4th at 573). "[T]he chronology of events may raise an inference that the litigation was the catalyst for the relief." *Hogar v. Cmty. Dev. Com. of City of Escondido*, 157 Cal. App. 4th 1358, 1366 (2007). While Defendants may rebut that inference, courts should be "mindful that 'defendants, on the whole, are usually rather reluctant to concede that the litigation prompted them to mend their ways." *MacDonald*, 2015 WL 6745408, at *4 (quoting *Klamath Siskiyou Wildlands Ctr. v. Babbitt*, 105 F. Supp. 2d 1132, 1139 (D. Or. 2000)).

The facts here easily would have supported a fee award on the catalyst theory even if Plaintiffs did not prevail at trial. Defendants concede that the work of Plaintiffs and Class Counsel was the catalyst for the nationwide injunctive relief and the monetary benefits provided in the 49-state settlement. Settlement ¶ 6.5. Plaintiffs demanded the label changes at the outset of the suit in a demand letter (Gutride Decl., Ex. 1), and again, in a mediation last summer (id. ¶ 24). Defendants refused for over two years, before agreeing to the label changes in the 49-State Settlement. That settlement requires Defendants to change their labeling and marketing *everywhere*; it does not make any exception for labeling and marketing in California. *See* Dkt. # 321-2, at Section III. Thus, even without a trial, California purchasers would have been provided the new, improved labels and advertising.

Further, the Settlements' use of a claims process for monetary relief is no different than what would have happened after trial (*see* Section D.3.(b).i) and is exactly what was requested in the CLRA demand served before the litigation (Gutride Decl Ex. 1), as the CLRA expressly requires. *See* Cal. Civ. Code § 1782(d) (stating that no damages action may be maintained if after notice to the Defendant, "(1) All consumers similarly situated have been identified, or a reasonable effort to identify such other consumers has been made [and] (2) All consumers so identified have been notified that *upon their request* the person shall make the appropriate correction, repair, replacement, or other remedy of the goods and services.") (emphasis supplied).

Defendants had ample earlier opportunity to settle these claims, as Plaintiffs waited five months after sending the CLRA demand to add their monetary claims for Ms. Fitzhenry-Russell, even though the CLRA only requires a wait of 30 days. *See* Cal. Civ. Code § 1782(d) and Dkt.# 42. And the lawsuits by Mr. Margaryan, as well as the Massachusetts and New York plaintiffs, were not filed until six months and 1.5 years, respectively, after Ms. Fitzhenry-Russell's first CLRA settlement demand was made.[8]

Finally, although it is not necessary for Plaintiffs to show that they were the sole cause of the changes, that is the case here. The settling plaintiffs and counsel who negotiated the 49-State Settlement did *nothing* to prosecute the underlying litigation; they merely copied the complaints that had been filed by the Plaintiffs, relied on the discovery obtained by Class Counsel in this case, and settled using the injunctive relief that Plaintiffs had proposed at mediation last summer. Gutride Decl. ¶¶ 35, 37. Even the 49-State Settlement documents themselves are copies of forms prepared by Plaintiffs' counsel in other cases—e.g., with identical section numbering and content, font selection, and even footnotes—namely the Procter & Gamble "flushable wipes" settlement now pending before Judge Seeborg, and the Salov olive oil settlement that was approved by Judge Gonzales-Rogers. Id. ¶ 37.

In sum, Class Counsel would have been entitled to a fee award for *all* their work on this case to date under the lodestar analysis set forth above, even in the absence of settlement. Class Counsel could even have brought that motion for fees before trial, because they had already prevailed on the primary relief being sought for the California class, i.e., a changed label. But instead of doing so and proceeding to a risky trial in which the California class members might get no monetary relief at all, they reasonably decided to agree to the claims-made settlement for

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[8] A subsequent plaintiff may rely on an earlier plaintiff's CLRA demand without making his own. *See, e.g., In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1178 (S.D. Cal. 2010) (despite dismissal of plaintiff who sent original CLRA notice and filed CLRA affidavit, other plaintiffs could pursue CLRA claims because CLRA letter had stated that original plaintiff "was complaining on her own behalf and all others similarly situated" and gave sufficient notice of nature of alleged violations); *accord In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.,* 754 F. Supp. 2d 1145, 1174 (C.D. Cal. 2010); *Sanchez v. Wal-Mart Stores, Inc.*, No. Civ. S-06-cv-2573 DFL KJM, 2007 U.S. Dist. LEXIS 33746, at *10-11 (E.D. Cal. May 8, 2007).

monetary relief. In connection with the settlement, they are seeking *less in fees* than they would be entitled to receive under the catalyst theory—only 60% of their lodestar. These facts make it abundantly clear that the settlement is not an effort by Class Counsel to enrich itself at the expense of the class, but the exact opposite: to enrich class members at the expense of Class Counsel's own recovery.

**F. Approval of the Representative Service Awards.**

This Court should also approve a $5,000 representative service award to each of the Plaintiffs as it is just, fair and reasonable. In deciding whether to approve such an award, a court should consider: "(1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulty encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation and; (5) the personal benefit (of lack thereof) enjoyed by the class representative as a result of the litigation." *Van Vranken v. Atlantic Richfield Co.,* 901 F. Supp. 294, 299 (N.D. Cal. 1995); *see also* N.D. Cal. Guide ¶ 7. Further, as a matter of public policy, representative service awards are necessary to encourage consumers to formally challenge perceived false advertising and unfair business practices.

Plaintiffs took on substantial risk, most importantly the risk of publicity and notoriety. Gutride Decl., ¶¶ 59-60. Indeed, there were numerous online postings criticizing Plaintiffs for their role in this suit. *Id.* Plaintiffs also worked with counsel throughout the two-year litigation. *Id.* Plaintiffs responded to discovery requests, including interrogatories and requests for production, searched their personal records for responsive documents, and attended their depositions. *Id.* Plaintiffs also remained actively involved in the litigation prior to and after settlement. *Id.*

The proposed representative service awards are reasonable in light of the Plaintiffs' efforts and the relief to the Class resulting from this litigation. *See* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1333 (2006) (an empirical study of incentive awards to class action plaintiffs has determined that the average aggregate incentive award within a consumer class action case is $29,055.20, and that the average individual award is $6,358.80.); *see also Mego*, 213 F.3d at 463 (awarding the named

plaintiff $5,000 involving a class of 5,400 people and a total recovery of $1.725 million); *Smith v. CRST Van Expedited, Inc.,* 2013 WL 163293, *6 (S.D. Cal. Jan. 14, 2013) (finding the amount of the incentive payments requested, $15,000, is well within the range awarded in similar cases); *Embry v. Acer America Corp.*, Dkt.# 218 (N.D. Cal. Feb. 14, 2012) (awarding $15,000 incentive award); *Gibson & Co. Ins. Brokers, Inc. v. Jackson Nat. Life Ins. Co*., 2008 WL 618893 (C.D. Cal. Feb. 27, 2008) (awarding $5,000 incentive fee).

**G. Dates for the Final Approval Process**

Plaintiff requests that in connection with preliminary approval, this Court set a date for a final approval hearing. Subject to preliminary approval being entered by January 11, 2019, Plaintiffs propose the following schedule:

| Item | Proposed Due Date |
|---|---|
| Notice Date | January 19, 2019 |
| Deadline for objections, claims, opt-outs | March 19, 2019 |
| Replies in support of final approval and motion for attorneys' fees, costs and representative awards; response to objections | March 27, 2019 |
| Final approval hearing | April 10, 2019 at 2:00 p.m. |

**H. Conclusion**

For the reasons stated above, Plaintiffs respectfully request that this Court grant preliminary approval to the proposed class action settlement.

Dated: January 4, 2019

**GUTRIDE SAFIER LLP**
/s/ Adam J. Gutride
ADAM J. GUTRIDE (State Bar No. 181446)
SETH A. SAFIER (State Bar No. 197427)
MARIE A. MCCRARY (State Bar No. 262670)
100 Pine Street, Suite 1250
San Francisco, CA 94111
Telephone: (415) 271-6469
Facsimile: (415) 449-6469

MATTHEW T. MCCRARY (admitted *pro hac vice*)
265 Franklin St, Suite 1702
Boston, MA 02110
Telephone: (214) 502-2171

**THE MARGARIAN LAW FIRM**
HOVANES MARGARIAN (State Bar No. 246359)
801 North Brand Boulevard, Suite 210
Glendale, California 91203
Telephone: (818) 553-1000
Facsimile: (818) 553-1005

**DURIE TANGRI LLP**
DARALYN J. DURIE (State Bar No. 169825)
ADAM BRAUSA (State Bar No. 298754)
DAVID MCGOWAN (State Bar No. 154289)
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: (415) 362-6666
Facsimile: (415) 236-6300

*Counsel for Plaintiffs and the Class*