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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENZO FORCELLATI and LISA ROEMMICH, on Behalf of Themselves and all Others Similarly Situated,

Plaintiffs,

v.

HYLAND'S, INC., STANDARD HOMEOPATHIC LABORATORIES, INC., and STANDARD HOMEOPATHIC COMPANY,

Defendants.

Case No. 2:12-CV-01983 ODW (MRW)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES, AND SERVICE AWARDS

Date: August 14, 2017
Time: 1:30 p.m.
Courtroom: 5D, 5th Floor

Hon. Otis D. Wright

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I. INTRODUCTION

Plaintiffs Enzo Forcellati and Lisa Roemmich (collectively, the "Class Representatives" or the "Plaintiffs"), through their Court-appointed counsel Bursor & Fisher, P.A., Faruqi & Faruqi, LLP, and Vozzolo, LLC (collectively, "Class Counsel"), respectfully submit this memorandum of points and authorities in support of their motion for approval of an award of attorneys' fees, reimbursement of litigation costs and expenses, and payment of service awards in connection with the class-wide settlement of this action.[1]

As set forth in more detail in the Motion for Final Approval of Class Action Settlement (which is incorporated herein by reference), pursuant to the Settlement Agreement, each Class Member may submit a claim for up to two full refunds for the children's homeopathic products at issue in this case. *See* 10/14/2016 Fisher Decl., Ex. 1 ("Settlement Agreement"), § 3. There is no limit on the number of full refunds that Defendants will pay to Class Members who provide proof of purchase. *Id*. Additionally, there is no cap on the amount of money that Defendants will pay to Class Members. *Id*. As a result, there is no risk that Class Members' refunds will be prorated or reduced for any reason. This payment is not subject to *pro rata* dilution or reduction by any payment to Class Counsel. *Id*. The Settlement Class is defined to include:

> All persons in the United States who purchased the following Hyland's products on or after March 8, 2008: (i) Cold 'n Cough 4 Kids, (ii) Cough Syrup with 100% Natural Honey, (iii) Sniffles 'n Sneezes 4 Kids, (iv) Cold Relief Strips 4 Kids with Zinc, (v) Nighttime Cold 'n Cough 4 Kids, (vi) Complete Flu Care 4 Kids, (vii) Baby Teething Gel, (viii) Baby Cough Syrup, (ix) Baby Gas Drops, (x) Baby Infant Earache Drops, and (xi) Baby Nighttime Tiny Cold Syrup. Excluded from the

[1] The Stipulation of Settlement ("Settlement" or "Settlement Agreement") and its exhibits are attached as Exhibit 1 to the 10/14/2016 Declaration of L. Timothy Fisher ("10/2017/2016 Fisher Decl.") (Dkt. No. 275-2), filed with the Motion for Preliminary Approval (Dkt. No. 275). All capitalized terms herein that are not otherwise defined have the definitions set forth in the Settlement Agreement.

> Class are: (a) Hyland's employees, officers and directors, (b) persons or entities who purchased the Products for the purpose of re-sale, (c) retailers or resellers of the Products, (d) governmental entities, (e) persons who timely and properly exclude themselves from the Class as provided herein, and (f) the Court, the Court's immediate family, and Court staff.

Id. at § 1.36.

This is an excellent recovery for Class Members. The heart of Plaintiffs' claim is that Defendants' products are no more effective than a placebo. *See* Dkt. No. 44, Consolidated Amended Class Action Complaint (the "CAC"), ¶¶ 2 and 63. In *Allen v. Hyland's, Inc.*, the plaintiffs advanced nearly identical claims against Defendants and a jury found for Defendants on every claim. *See Allen v. Hyland's Inc.*, C.D. Cal. Case No. 12-cv-01150-DMG-MAN, Dkt. No. 426 (Verdict Form); *see also Lewert v. Boiron, Inc.*, C.D. Cal. Case No. 11-cv-10803, Dkt. No. 447 (Verdict Form). The result of the *Allen* trial is sobering – class members recovered nothing. Here, the Settlement provides Class Members with a 100% recovery of the cost of the Settlement Class Products without the substantial risk of trial. *See* Settlement Agreement, § 3. This total relief is available for two Settlement Class Products without proof of purchase, and an unlimited number of Settlement Class Products with proof. *Id*. To date, the response to the Settlement has been overwhelmingly positive – more than 129,000 Class Members have submitted claims and no Class Members have objected. *See* Declaration of Lana Lucchessi, ¶¶ 17-18. Additionally, Class Counsel also successfully negotiated injunctive relief to require Defendants to include a money back guarantee on their website. *See* Settlement Agreement, § 3.2. Despite Defendants' recent success in the *Allen* case, Class Counsel successfully negotiated a Settlement that will provide total relief to many Class Members.

Class Counsel request that the Court approve a total payment of $2,900,000 as an award of attorneys' fees, costs and expenses. Declaration of L. Timothy Fisher in

Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Motion for an Award of Attorneys' Fees, Costs and Expenses, and Service Awards (the "6/19/2017 Fisher Decl."), ¶ 33. As explained below, the lodestar technique confirms that the amount of attorneys' fees and expenses is fair, reasonable, and supported by the law of this Circuit. *See infra*. Class Counsel collectively worked 10,608.15 hours on this case for a total lodestar, at current billing rates, of $5,515,329.75. 6/19/2017 Fisher Decl., ¶ 44, Ex. B; Declaration of Antonio Vozzolo in Support of Motion for an Award of Attorneys' Fees, Costs and Expenses (the "6/19/2017 Vozzolo Decl."), ¶¶ 14-16, Exs. C, D, and E. Furthermore, Class Counsel incurred $754,804.19 in expenses and costs that were necessary to the prosecution of this case, and were carefully and reasonably expended. *See* 6/19/2017 Fisher Decl., ¶ 47, Ex. C (an itemized listing of each out-of-pocket expense incurred by Bursor & Fisher in connection with this case); 6/19/2017 Vozzolo Decl., ¶ 23, Exs. F and G (same). Rather than seeking their full lodestar plus expenses, Class Counsel have, after extensive negotiations with Defendants, agreed to request an award of $2,900,000 that represents a significant reduction to their estimated fees and expenses. 6/19/2017 Fisher Decl., ¶ 44. Indeed, this award, after expenses and costs, provides Class Counsel with only $2,145,195.80 of its $5,515,329.75 lodestar – an inverse multiplier of .39. *Id*. This reduced request is presumptively reasonable and should be approved by this Court. *See Gudimetla v. Ambow Educ. Holding*, 2015 WL 12752443, at *9 (C.D. Cal. Mar. 16, 2015) ("The resulting so-called negative multiplier suggests that the percentage-based amount is reasonable and fair based on the time and effort expended by class counsel.") (quoting *In re Portal Software, Inc. Sec. Litig.*, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007)); *see also Zakskorn v. Am. Honda Motor Co.*, 2015 WL 3622990, at *15 (E.D. Cal. June 9, 2015) (Bursor & Fisher agreed to a .75 inverse multiplier and Judge Kimberly Mueller granted their fee request in full).

Finally, Plaintiffs Forcellati and Roemmich request that the Court award them service awards in the amount of $5,000 each to account for the significant time and effort they invested in this case on behalf of the Class.

Under the supervision of Magistrate Judge Jay C. Gandhi, the Parties agreed to these requested fees, expenses, costs and service awards after the other substantive settlement terms were resolved. 6/19/2017 Fisher Decl., ¶ 31. Accordingly, these requested amounts are the result of an arm's-length market transaction. *Id*.

II. BACKGROUND AND PROCEDURAL HISTORY

The Motion for Final Approval of Class Action Settlement (which is incorporated herein by reference), as well as the Declaration of L. Timothy Fisher, submitted herewith, contain a detailed discussion of the long history of this vigorously contested action. Of particular relevance to this motion, the Settlement Agreement acknowledges that Class Counsel is entitled to a payment of attorneys' fees and permits Class Counsel to petition the Court for a reasonable award of attorneys' fees, costs, and expenses. *See* Settlement Agreement § 4.2. Class Counsel's application to the Court for Attorneys' Fee and Expense Award will not exceed $2.9 million. *Id*. Any fee paid by Defendant is separate and apart from the Class' recovery. *Id*.

Section 4.1 of the Settlement Agreement also provides Defendants shall not oppose a Service Award of $5,000 dollars to each of the Class Representatives. Class Counsel are requesting that the Class Representatives receive these Service Awards of $5,000 each to compensate them for their efforts in pursuing this litigation on behalf of the Settlement Class for more than five years.

III. THE CLRA PROVIDES FOR A MANDATORY FEE AWARD

The Class Representatives brought claims against Defendants under various theories, including under California's Consumers Legal Remedies Act, Civil Code §§ 1750, *et seq*. (the "CLRA"). For CLRA claims, an award of fees to the prevailing party is mandatory under Civil Code § 1780(e), which provides: "The court shall

award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section." As the California Court of Appeal has explained, for a Court in construing this provision:

> The word 'shall' is usually deemed mandatory, unless a mandatory construction would not be consistent with the legislative purpose underlying the statute." (*West Shield Investigations and Sec. Consultants v. Superior Court* (2000) 82 Cal. App. 4th 935, 949, 98 Cal.Rptr.2d 612.) Our Supreme Court has observed that "the availability of costs and attorney's 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." (*Broughton v. Cigna Healthplans* (1999) 21 Cal. 4th 1066, 1085, 90 Cal. Rptr. 2d 334, 998 P.2d 67.) Thus, a mandatory construction of the word "shall" in section 1780(d) is consistent with the legislative purpose underlying the statute.

Kim v. Euromotors West/The Auto Gallery, 149 Cal. App. 4th 170, 178 (2007).

Here, Class Counsel have negotiated a settlement that will provide Class Members with complete relief for the purchase of two of the Class Settlement Products without proof of purchase. Settlement Agreement § 3. Plaintiffs have thus succeeded by realizing their litigation objectives in large part. As the Settlement Class is the "prevailing party," a fee award to Class Counsel is mandatory under the CLRA. *Graciano v, Robinson Ford Sales*, 144 Cal. App. 4th 140, 150-51 (2006).

IV. THE REQUESTED FEE IS FAIR AND REASONABLE UNDER LODESTAR PRINCIPLES

The lodestar approach is the preferred method when settling a class action in which CLRA claims were alleged. *Tadepalli v. Uber Techs., Inc.*, 2016 WL 1622881, at *10 (N.D. Cal. Apr. 25, 2016) (applying California's lodestar test where a class action settlement agreement and CLRA both provided the basis for the plaintiff's attorneys fees' motion); *see also Milligan v. Toyota Motor Sales, U.S.A., Inc.*, 2012 WL 10277179, at *8 (N.D. Cal. Jan. 6, 2012) ("Where a defendant pays the fees separately pursuant to a fee-shifting statute like the CLRA, the 'lodestar' method is preferred.")

Similarly, the "lodestar" method is preferred where there is no formal common fund. *See Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994) (holding that district court did not abuse discretion in choosing lodestar method). While the percentage method is easier to apply in cases involving a capped common fund, here, the lodestar approach is the most straightforward because the Settlement Agreement places no cap on Defendants' total liability and does not include a common fund. *See Hanlon*, 150 F.3d at 1029 (affirming choice of lodestar method where calculation of value of common fund was uncertain); *Grays Harbor Adventist Christian School v. Carrier Corp.*, 2008 WL 1901988 (W.D. Wash. April 24, 2008) (holding that where "[s]ettlement relief will be paid on a claims-made basis with no cap to the relief available, consideration of attorneys' fees lends itself more readily to the lodestar method"). The lodestar method is particularly appropriate where, as here, Class Counsel has also negotiated substantial injunctive relief. *In re HP Laser Printer Litig.*, 2011 WL 3861703, at *6 (C.D. Cal. Aug. 31, 2011) ("The attorney fee award is reasonable compared to the degree of success, particularly regarding the injunctive relief obtained.").

The lodestar figure is calculated by multiplying the hours reasonably spent on the case by appropriate hourly rates based on the locale and attorney experience. *See, e.g.*, *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941–942 (9th Cir. 2011); *Hanlon*, 150 F.3d at 1029. The resulting lodestar figure may be adjusted upward or downward by use of a multiplier to account for factors including, but not limited to: (i) the quality of the representation; (ii) the benefit obtained for the class; (iii) the complexity and novelty of the issues presented; and (iv) the risk of nonpayment. *Hanlon*, 150 F.3d at 1029; *see also Kerr v. Screen Extras Guild, Inc.*,

526 F.2d 67, 70 (9th Cir. 1975).[2] Courts typically apply a multiplier or enhancement to the lodestar to account for the substantial risk that plaintiffs' counsel undertook by accepting a case where no payment would be received if the lawsuit did not succeed. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002). Thus, a fee that approximates lodestar is considered presumptively reasonable. *See Morales v. City of San Rafael*, 96 F.3d 359, 363-64, fn. 8 (9th Cir. 1996) ("There is a strong presumption that the lodestar figure represents a reasonable fee."). Fee requests which produce an inverse lodestar multiplier further support an inference of reasonableness. *See Gudimetla*, 2015 WL 12752443, at *9 ("The resulting so-called negative multiplier suggests that the percentage-based amount is reasonable and fair based on the time and effort expended by class counsel.") (quoting *In re Portal Software, Inc. Securities Litigation*, 2007 WL 4171201, at *16); *Schiller v. David's Bridal, Inc.*, 2012 WL 2117001, at *23 (E.D. Cal. June 11, 2012) ("An implied negative multiplier supports the reasonableness of the percentage fee request"); *Zakskorn*, 2015 WL 3622990, at *15 (finding fee request reasonable where class counsel voluntarily agreed to an inverse multiplier of .75); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146 (S.D.N.Y. 2010) (fact that counsel sought only 87.6% of their lodestar "strongly suggests that the requested fee is reasonable.").

Here, Class Counsel request an award of $2,900,000.00 consisting of reimbursement of $754,804.19 in costs and expenses and $2,145,195.80 in attorneys'

[2] *Kerr* identifies twelve factors for analyzing the reasonableness of an attorneys' fees request:

> (1) The time labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and the ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

526 F.2d at 70.

fees. This award represents a significant discount on Class Counsel's lodestar and ensures the reasonableness of their request. Because this amount is well within Ninth Circuit standards, this Court should award the requested attorneys' fees to Class Counsel.

A. Class Counsel Spent a Reasonable Number of Hours on this Litigation

Class Counsel's declarations describe the extensive work performed in connection with this litigation over the past five years. Bursor & Fisher, P.A., and Faruqi & Faruqi, LLP, carefully coordinated their work throughout this litigation to avoid any duplication of effort. To support this request, Class Counsel are separately submitting their detailed daily billing records showing what work was done and by whom. *See* 6/19/2017 Fisher Decl., ¶¶ 40-44, Exs. B and C; Vozzolo Decl., ¶¶ 13-21, Exs. D, C, and E.

This was a novel case that involved a significant amount of original work. 6/19/2017 Fisher Decl. ¶¶ 2-31; Vozzolo Decl., ¶ 5. To Class Counsel's knowledge, this is the first case challenging the efficacy of a homeopathic product certified by a court as a class action. 6/19/2017 Fisher Decl., ¶ 6. As such, this case required original legal research and innovative representation to develop the claims and theories of liability and damages. This case was hard-fought for more than five years and concerned complex factual and legal allegations. Indeed, as the Court previously recognized, "before entering into the Agreement, this Action was on the eve of trial." Dkt. No. 288. Given the technical nature of the litigation, the tenacious battles over class certification and summary judgment, the effort put into trial preparation, and the difficulty of the settlement negotiations, the number of hours Class Counsel spent was reasonable.

B. Class Counsel Worked at a Reasonable Hourly Rate

The hourly rates for each of the lawyers who staffed the case, which are set forth in the accompanying declarations and exhibits thereto, are reasonable and

commensurate with rates approved in other class actions litigated in this District. *See* 6/19/2017 Fisher Decl., ¶¶ 48-51; 6/19/2017 Vozzolo Decl., ¶¶ 24-29, Exs. H-N. In comparison, Defense Counsel the average billing of Norton Rose Fulbright US, LLP, is $775 for partners and $400 for associates, with highs of $900 and $515 respectively. *See* 6/19/2017 Fisher Decl., ¶ 50.[3] In this district the reasonableness of hourly billing rates is determined "based on evidence of other courts approving similar rates or other attorneys engaged in similar litigation charging similar rates." *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172 (C.D. Cal. 2010).

Courts within this District have repeatedly held rates commensurate with Class Counsel's rates to be fair and reasonable. *In re Amgen Sec. Litig.*, 2016 U.S. Dist. LEXIS 148577, *27 (C.D. Cal. Oct. 25, 2016) (approving "a billing rate ranging from $750 to $985 per hour for partners, $500 to $800 per hour for 'of counsels'/senior counsel, and $300 to $725 per hour for other attorneys."); *Kearney v. Hyundai Motor Am.*, 2013 WL 3287996, at *8 (C.D. Cal. June 28, 2013) (approving hourly rates between $650 and $800 for class counsel in a consumer class action); *Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877 (C.D. Cal. 2016) ("quoting a National Law Journal survey of regional billing rates published in 2014, showing standard partner rates among top Los Angeles firms ranging from $490 to $975") (citation omitted); *In re Toyota Motor Corp.*, 2013 U.S. Dist. LEXIS 94485, at *220 n.13 (C.D. Cal. June 17, 2013) (approving hourly rates ranging from $150 to $950); *Vinh Nguyen v. Radient Pharm. Corp.*, 2014 WL 1802293, at *11 (C.D. Cal. May 6, 2014) (approving rates up to $750 per hour for partners, $550 per hour for associates, and $225 per hour for paralegals); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 2015 WL 12592726, *13 (C.D. Cal. Mar. 17, 2015)

[3] *National Law Journal's annual survey of law firm billing rates in 2014* http://www.nationallawjournal.com/id=1202636785489/Billing-Rates-Across-the-Country (last visited June 6, 2017).

(finding Class Counsel's hourly rates ranging from $335 to $905 (See Docket No. 1259-4 at 2) "reasonable for complex class action litigation in Los Angeles."); *see also* 6/19/2017 Fisher Decl., ¶¶ 48-51. Indeed, courts within this locale have previously found the rates of Class Counsel fair and reasonable. *See*, *e.g.*, *Basaraba v. Greenberg*, 2014 WL 12591627, at *5 (C.D. Cal. Nov. 12, 2014) (concluding that the Faruqi firm's "partner, associate, and paralegal rates are in line with those charged by competent experienced counsel in … Los Angeles."); *Astiana v. Kashi Co.*, 2014 U.S. Dist. LEXIS 127624 (S.D. Cal. Sep. 2, 2014) (approving the Faruqi firm's requested fee); *see also* 6/19/2017 Fisher Decl., ¶ 51, *Correa v. Sensa, Products, LLC*, Los Angeles County Superior Ct. No. BC 476808, Judgment, Final Order and Decree Granting Final Approval to Class Action Settlement (Nov. 9, 2012) (approving requested fee rate). Here, Class Counsel's rates are particularly reasonable because the requested fee is a fraction of Class Counsel's lodestar. *See Gudimetla*, 2015 WL 12752443, at *9 (finding the rates reasonable and fair in light of "negative multiplier"); *see also California v. Infineon Techs. AG (In re Dynamic Random Access Memory (DRAM) Antitrust Litig.)*, 2013 U.S. Dist. LEXIS 190974, at *129-30 (N.D. Cal. Oct. 30, 2013) (concluding that "'negative' multipliers of approximately .82 and .71 respectively … alone [where] virtually sufficient" to establish reasonableness).

C. The Requested Fee is Particularly Reasonable in Light of the Relevant Factors

The lodestar analysis is not limited to the simple mathematical calculation of Class Counsel's base fee. *See Morales, supra*, 96 F.3d at 363-64. Rather, Class Counsel's actual lodestar may be enhanced according to those factors that have not been "subsumed within the initial calculation of hours reasonably expended at a reasonable rate." *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983) (citation omitted); *see also Morales*, 96 F.3d at 364. In a historical review of numerous class action settlements, the Ninth Circuit found that lodestar multipliers normally range

from 0.6 to 19.6, with most (83%) falling between 1 and 4. *See Vizcaino*, 290 F.3d at 1051, n.6; *Gonzalez v. S. Wine & Spirits of Am. Inc.*, 2014 WL 1630674, at *5 (C.D. Cal. Apr. 24, 2014) (Awarding a "1.18 multiplier, taking into account the contingent nature of the case and the delay in class counsel receiving its full fee award."); *see In re Washington Public Power Supply System Securities Litigation*, 19 F.3d at 1300–1301 (noting that "courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases" and finding district court's failure to apply multiplier to lodestar calculation was abuse of discretion where case was "fraught with risk and recovery was far from certain"); *see also* Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 14:03 (3d ed. 1992) (recognizing that multipliers of 1 to 4 are frequently awarded). In considering the reasonableness of attorneys' fees and any requested multiplier, the Ninth Circuit has directed district courts to consider the time and labor required, the novelty and complexity of the litigation, the skill and experience of counsel, the results obtained, and awards in similar cases. *Kerr*, 526 F.2d at 70; *Blum v. Stenson*, 465 U.S. 886, 898-900 (1984). All of these factors further support the reasonableness of the requested fee award in this action. *Vizcaino*, 290 F.3d at 1051.

1. Novelty and Complexity of this Litigation

The novelty and complexity of this case strongly supports the requested fee. Class Counsel faced difficult and novel legal and factual issues, which required creativity and presented significant challenges. 6/19/2017 Fisher Decl., ¶¶ 2-31. To Class Counsel's knowledge, this is the first case challenging the efficacy of a homeopathic product certified by a court as a class action. 6/19/2017 Fisher Decl., ¶ 6. As such, this case required original legal research and innovative representation to develop the claims and theories of liability and damages. *Id*.

Class Counsel needed to thoroughly investigate Defendants' products and the regulations relevant to homeopathic products prior to filing complaints on behalf of

the Plaintiffs. *Id*. ¶ 6. This extensive pre-suit investigation allowed Class Counsel to successfully oppose Defendants' two motions to dismiss. *Id*., ¶¶ 9-12.

At class certification, Class Counsel faced significant uncertainty in the Ninth Circuit about the standard for ascertainability at class certification. *Id*. ¶¶ 16-18 . The Third Circuit had recently issued a decision in *Carrera v. Bayer Corp*., 727 F.3d 300 (3d Cir. 2013) holding that a plaintiff seeking to certify a class must propose a feasible and reliable means of identifying class members. 6/19/2017 Fisher Decl., ¶¶ 16-18. The parties submitted supplemental briefing on the issue of whether the proposed class was ascertainable. Dkt. No. 133. In a landmark ruling, the Court granted Plaintiffs' motion for class certification. Dkt. No. 144. The Court declined to follow *Carrera* and held that the ascertainability standard from *Carrera* was inapplicable in the Ninth Circuit. *Id*. at 5-6. The Court certified a nationwide Rule 23(b)(3) class for monetary relief with respect to Plaintiffs' claims for violation of Magnuson-Moss Act, 15 U.S.C. § 2301, et seq., breach of express warranty, breach of implied warranty, violation of the CLRA, violation of the FAL, and violation of the UCL. 6/19/2017 Fisher Decl., ¶ 18.

Furthermore, to support Plaintiffs' claims that Defendants' products were ineffective, Class Counsel conducted extensive discovery that required delving into complicated and technical scientific issues. 6/19/2017 Fisher Decl., ¶¶ 13-15, 21. For example, while this litigation was pending, a study concerning the efficacy of one of the products at issue was in progress at the University of Washington. *Id*. ¶ 21. To address this ongoing study, Plaintiffs (1) subpoenaed the University of Washington for study documents, (2) deposed the chief investigator of the study before and after the final results of the study, (3) deposed Defendants' other experts regarding the results of the study; (4) directed Plaintiffs' experts to prepare supplemental expert reports regarding the study; and (5) addressed the technical arguments related to this study in their successful opposition to Defendants' motion for summary judgment. *Id*.

In light of the novelty and complexity of this case, the trailblazing work it required, and concomitant risks to counsel, a substantially higher fee request would be justified.

2. Class Counsel Provided Exceptional Representation Prosecuting this Complex Case

Class Counsel respectfully submit that they conducted themselves in this action in a professional, diligent and efficient manner. Class Counsel are highly-respected and experienced leaders in the field of consumer class action litigation. *See* 6/19/2017 Fisher Decl., ¶ 35-39, Ex. A; 6/19/2017 Vozzolo Decl., ¶¶ 7-11, Exs. A and B. Tasks were allocated to prevent "over-lawyering" and inefficiency. The bulk of the work was performed by a small number of attorneys fully familiar with the complex factual and legal issues presented by this litigation. This division of labor permitted the work to be done efficiently, resulting in an economy of service and avoiding duplication of effort.

Class Counsel invested a substantial amount of time and resources into investigating and prosecuting the matters alleged in this action. *See supra* IV(A); *see also* 6/19/2017 Fisher Decl., ¶¶ 2-31; *see also* 6/19/2017 Vozzolo Decl., ¶ 6. The successful conclusion of this litigation required Class Counsel to commit a significant amount of time, personnel, and expenses, on a contingency basis, with absolutely no guarantee of being compensated in the end.

Additionally, the ability of Class Counsel to obtain a favorable settlement in the face of a high-caliber adversary also reflects the superior quality of Class Counsel's work. *See, e.g., In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 635–36 (D. Colo. 1976). Defendant is represented by Norton Rose Fulbright US, LLP, one of the largest, most prominent, and respected law firms in the world. Norton Rose has extensive experience in class action litigation. Class Counsel's ability to obtain a

favorable settlement in the face of this sophisticated and skilled adversary reflects the superior quality of their work.

3. Class Counsel Obtained Excellent Class Benefits

The Settlement provides significant relief for the Class. As the *Allen* case demonstrated, there were substantial uncertainties about the outcome of this case. 6/19/2017 Fisher Decl., ¶ 52. Although Class Counsel believed this case to be meritorious, a realistic assessment indicates substantial risks, particularly because much of the outcome at trial would have turned on a "battle of experts" between Plaintiffs' and Defendants' highly-qualified experts. *Id*. Despite the novelty of the claims, the lack of controlling authority, and the failure of the *Allen* claims at trial, Class Counsel negotiated a Settlement that provides Class Members with a 100% recovery of the cost of the Settlement Class Products without the substantial risk of trial. *See* Settlement Agreement, § 3. Furthermore, this total relief is available for two Settlement Class Products without proof of purchase, and an unlimited number of Settlement Class Products with proof. *Id*. This monetary relief directly addresses Plaintiffs' primary allegations. *See* CAC ¶¶ 2 and 63. Class Counsel also successfully negotiated injunctive relief that requires Defendants to include a money back guarantee on their website. *See* Settlement Agreement § 3.2. This provision is not time limited, and will thus provide continued relief to Class Members and future purchasers. *Id*.

Under the Settlement Agreement, Class Members will receive significant financial recovery now, without the delay and the risk of continued litigation. As such, the results achieved by Class Counsel strongly support the fee request. *See Shames v. Hertz Corp.*, 2012 WL 5392159 at *7 (S.D. Cal. Nov. 5, 2012) (approving Plaintiff's fee request of $5,123,336.00, a 20% lodestar reduction, where a claims-made settlement provided a cash recovery of 67% of actual damages).

Class Counsel avoided considerable risks, burdens, and expenses to the Parties and the judicial system by conducting a thorough investigation and achieving a

favorable Settlement. The results achieved by Class Counsel here fully justify the requested fee.

4. Class Counsel Faced a Substantial Risk of Nonpayment

A critical factor bearing on fee petitions in the Ninth Circuit is the level of risk of non-payment faced by Class Counsel at the inception of the litigation. *See*, *e.g.*, *Vizcaino*, 290 F.3d at 1048. The contingent nature of Class Counsel's fee recovery, coupled with the uncertainty that any recovery would be obtained, are significant. *In re Wash. Pub. Power*, 19 F.3d at 1300. In *Wash. Pub. Power*, the Ninth Circuit recognized that:

> It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases ... [I]f this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.

Id. at 1299-1300 (citations omitted) (internal quotations marks omitted); *see also Fischel*, 307 F.3d at 1008 ("It is an abuse of discretion to fail to apply a risk multiplier, however, when (1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky.").

Throughout this case, Class Counsel expended substantial time and costs to prosecute a class action suit with no guarantee of compensation or reimbursement in the hope of prevailing against a sophisticated Defendant represented by high-caliber attorneys. *See* 6/19/2017 Fisher Decl., ¶ 52; *see* 6/19/2017 Vozzolo Decl., ¶¶ 30-31. Moreover, there are significant concerns regarding the financial instability of Defendants. Specifically, Daniel Krombrach, the President and Chief Financial officer of Standard Homeopathic Company, stated "the Company's cash flow and its ability to fund its ongoing operations have been seriously compromised." 6/19/2017

Fisher Decl., ¶ 52, Ex. O, *Affiliated Health Care Associates, P.C. v. Handit2 Network, LLC*, Case No. 1:13-cv-05782, Dkt. No. 101, the Declaration of Danial M. Krombach (N.D. Ill Jan. 6, 2016). "[R]isk that the class will lose should the suit go to judgment on the merits justifies a compromise that affords a lower award with certainty." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006). This fact alone supports a finding that Class Counsel's requested fee is fair and reasonable.

Regardless, Class Counsel obtained a highly favorable result for the Class, knowing that if their efforts were ultimately unsuccessful, they would receive no compensation or reimbursement for their costs. Class Counsel prosecuted the case with the type of vigor and skill required to ensure justice for the Class.

V. DEFENDANTS' AGREEMENT AND JUDGE GANDHI'S RECOMMENDATION, ALSO SHOWS THE REASONABLE OF THIS REQUEST

The fact that Defendants, after extensive negotiation, agreed to include this Fee and Expense Award in the Settlement Agreement is also an appropriate factor for the Court to consider in reviewing the fee and expense provisions of the settlement. The parties have participated in contentious and hard fought settlement negotiations throughout the pendency of this action. *See* 6/19/2017 Fisher Decl., ¶¶ 26-31. These negotiations began in October 2012 when the parties participated in a full-day, in-person mediation with Robert A. Meyer of Loeb & Loeb, LLP. *See* 6/19/2017 Fisher Decl., ¶ 26. After a second unsuccessful all day mediation with Mr. Meyer in May 2013, the parties again failed to reach a settlement. *Id*.

In February 2015, Judge King ordered the parties to participate in a settlement conference with Magistrate Judge Jay C. Gandhi. *Id*. ¶ 27. Over the next year and a half the parties met for full-day in-person settlement conferences with Judge Gandhi on three separate occasions. *Id*. ¶¶ 28-30. After the final settlement conference, the parties, communicating through Judge Gandhi, finally reached this Settlement on July 18, 2016. *Id*. ¶ 30. The Parties agreed to the substantive terms of the Settlement

before agreeing to the Fee and Expense Award. *Id.* ¶ 31. The Fee and Expense Award was ultimately agreed to with the assistance and recommendation of Judge Gandhi. *Id.* ¶¶ 30-31 ; *see*, *e.g.*, *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) ("The arm's-length negotiations, including a day-long mediation before Judge Lynch, indicate that the settlement was reached in a procedurally sound manner."); *In re M.L. Stern Overtime Litig.*, 2009 WL 995864, at *5 (S.D. Cal. Apr. 13, 2009) (granting preliminary approval and stating that "the settlement was reached with the supervision and assistance of an experienced and well-respected independent mediator"); *Cohorst v. BRE Properties, Inc.*, 2011 WL 7061923, at *12 (S.D. Cal. Nov. 14, 2011) ("For example, voluntary mediation before a retired judge [] are highly indicative of fairness.") (internal quotation marks omitted); *Satchell v. Fed. Express Corp.*, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.").

Accordingly, the Settlement was negotiated in such a manner as to avoid any potential conflict with the Settlement Class, or any argument that such amounts were "traded off" for lesser class consideration. *See* 6/19/2017 Fisher Decl., ¶¶ 27-31; *see also* Dkt. No. 288, at *1 ("The parties' Agreement was reached as a result of extensive arm's length negotiations between the parties and their counsel.").

In *Hensley*, 461 U.S. at 437, the United States Supreme Court held that negotiated attorneys' fee provisions are the "ideal" toward which the parties should strive: "a request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." Fee arrangements between plaintiffs and defendants in class actions are to be encouraged, particularly where, as here, the record shows the attorneys' fees to be requested were negotiated separately after the settlement terms of the class claims has been agreed to by the parties, and are to be paid on top of the class consideration. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974) ("[I]n cases of this kind,

we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorneys' fees.").

As Judge Posner observed in *In Re Continental Illinois Securities Litigation*, 962 F.2d 566 (7th Cir. 1992), the virtue in the negotiation of fees is that the "markets know market value better than judges do." *Id.* at 570. Here, the Parties negotiated the amount of fees and expenses set forth in the Settlement Agreement under market conditions: Class Counsel wished to maximize fees to compensate them, as the law encourages, for risk, innovation, and delay; Defendant wished to pay the minimum amount it could, as any monies not approved would be retained by them. The result is an arm's-length negotiated amount set by market forces, and resolved only after the other settlement terms had been agreed to in principle. Such a process provides further indicia of the reasonableness of this requested amount.

VI. CLASS COUNSEL'S EXPENSES ARE REASONABLE AND NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED ON BEHALF OF THE CLASS

To date, Class Counsel incurred out-of-pocket costs and expenses in the aggregate amount of $754,804.19 in prosecuting this litigation on behalf of the class. 6/19/2017 Fisher Decl., ¶¶ 46-47, Ex. C; 6/19/2017 Vozzolo Decl., ¶ 23, Exs. F and G. These expenses are itemized in the declarations submitted to the Court herewith.

The Ninth Circuit allows recovery of pre-settlement litigation costs in the context of a class action settlement. *See Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003). Class Counsel is entitled to reimbursement for standard out-of-pocket expenses that an attorney would ordinarily bill a fee paying client. *See*, *e.g.*, *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). The incurred costs include class notice, expert fees, court fees, copying fees, courier charges, legal research charges, telephone/facsimile fees, travel costs, postage fees, and other related costs. *See* 6/19/2017 Fisher Decl., ¶¶ 46-47, Ex. C (an itemized listing of each out-of-pocket expense incurred by Bursor & Fisher in connection with this case); 6/19/2017 Vozzolo Decl., ¶ 23], Exs. F and G (same).

The costs and expenses that arose from this action were particularly substantial for three reasons. First, this Action was settled on the eve of trial. Thus, unlike many class action settlements, Class Counsel bore the costs of fully litigating and preparing to try this case. Second, because of the technical nature of this action, expert expenses and costs associated with depositions were necessary to effectively prosecute this action. Indeed, there were twenty-four depositions taken in this case. 6/19/2017 Fisher Decl., ¶ 22. Third, Class Counsel bore the substantial cost of providing Class Members with direct notice of the Court's class certification order. Dkt. No. 144.

Class Counsel's cost and expenses were necessarily and reasonably incurred to bring this case to a successful conclusion, and they reflect market rates for the various categories of expenses incurred.

VII. THE REQUESTED SERVICE AWARDS FOR CLASS REPRESENTATIVES RE REASONABLE AND STANDARD

In recognition of their efforts on behalf of the Class, and subject to the approval of the Court, Defendants have agreed to pay Class Representatives $5,000 each (for a total of $10,000), as appropriate compensation for their time and effort serving as the Class Representatives in this litigation.

Service awards "are fairly typical in class action cases." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). Such 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." *Rodriguez*, 563 F.3d at 958–59. Service awards are committed to the sound discretion of the trial court and should be awarded based upon the court's consideration of, *inter alia*, the amount of time and effort spent on the litigation, the duration of the litigation and the degree of personal gain obtained as a result of the litigation. *See Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995). "Many courts in the Ninth

Circuit have also held that a $5,000 incentive award is "presumptively reasonable." *Hawthorne v. Umpqua Bank*, 2015 WL 1927342, at *8 (N.D. Cal. Apr. 28, 2015) (citing In *re Toys R Us–Delaware, Inc. FACTA Litig.*, 295 F.R.D. 438, 470–72 (C.D. Cal. 2014)); *see also In re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 592 (N.D. Cal. 2015)("a $5,000 payment is presumptively reasonable"); *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 463 (9th Cir. 2000) (approving a $5,000 incentive award for each class representative).

The requested amounts of $5,000 for each Class Representative reflect the involvement and time each Class Representative dedicated to the case. The involvement of the Class Representatives in this action was critical to the ultimate success of the case. Class Counsel consulted with the Class Representatives throughout the investigation, filing, prosecution and settlement of this litigation. 6/19/2017 Fisher Decl., ¶¶ 62-66; Vozzolo Decl., ¶¶ 32-36. As such, Plaintiffs Forcellati and Roemmich were actively involved in the litigation and devoted substantial time and effort to the case. They consulted with Class Counsel frequently and reviewed a wide variety of documents related to this case including the complaint and Settlement Agreement. *Id.* Most importantly, Plaintiffs provided detailed information about their purchases and sat for depositions. *Id.* Moreover, Plaintiffs Forcellati and Roemmich were prepared to "go the distance" in this litigation to continue to represent the Class and fight to obtain significant relief on their behalf. *Id.* Their actions and dedication have conferred a significant benefit on Class members across the United States.

Accordingly, incentive awards of $5,000 for each of the Class Representatives are fair and reasonable.[4]

[4] *See*, *e.g.*, *Van Vranken*, 901 F. Supp. at 299–300 (incentive award of $50,000); *Glass v. UBS Fin. Servs., Inc.*, 2007 WL 221862, at *16–17 (N.D. Cal. Jan. 26, 2007), *aff'd*, 331 F. App'x 452 (9th Cir. 2009) (N.D. Cal. Jan. 26, 2007) (awarding $100,000 divided among four plaintiffs in overtime wages class action); *Harris v. Vector Mktg. Corp.*, 2012 WL 381202, at *8 (N.D. Cal. Feb. 6, 2012) (awarding

VIII. CONCLUSION

Class Counsel were able to obtain a settlement that represents an excellent result for the Class. This Settlement is the culmination of the determined and skilled work of Class Counsel for more than five years. As a result, Plaintiffs respectfully request that this Court award the following:

- $2,900,000 in attorneys' fees, and costs and expenses to Class Counsel; and
- Service Awards to Class Representatives Forcellati and Roemmich of $5,000 each (for a total of $10,000).

The requests are reasonable and appropriate, and will not reduce the benefits to the class in any way.

Dated: June 19, 2017

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$12,500 service award); *Bond v. Ferguson Enterprises, Inc.*, 2011 WL 2648879, at *15 (E.D. Cal. June 30, 2011) (approving service awards of $11,250); *Trujillo v. City of Ontario*, 2009 WL 2632723, at *5 (C.D. Cal. Aug. 24, 2009) (approving service awards of $30,000).

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