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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHARAE CASEY, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. DOCTOR'S BEST, INC., Defendant.	Case No.: 8:20-cv-01325-JLS-JDE **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION FOR CLASS CERTIFICATION; FINAL APPROVAL OF SETTLEMENT; AWARD OF INCENTIVE PAYMENT; AND AWARD OF ATTORNEYS' FEES, COSTS, AND EXPENSES** Date: July 8, 2022 Time: 10:30 a.m. Courtroom: 10A

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INTRODUCTION

Plaintiff, Sharae Casey, respectfully moves for final approval of a proposed class action settlement (the "Settlement") with Defendant Doctor's Best, Inc. ("Doctor's Best" or "Defendant"), the terms and conditions of which are set forth in the Settlement Agreement (ECF No. 37-1, with amendments at ECF No. 42-1, together collectively the "Settlement Agreement").[1] In brief, this case concerns Plaintiff's claims that Defendant sold dietary supplement Products with the representation that they contained "Glucosamine Sulfate," but that the Products did not in fact contain this compound. Doctor's Best denies the allegations and Plaintiff's entitlement to the relief sought, but does not oppose this motion and has approved the form of the proposed Order of Final Approval submitted herewith.

This memorandum reincorporates and supplements the arguments made in Plaintiff's previous application for preliminary approval of the Settlement, which the Court approved by order dated February 28, 2022 (ECF No. 45) (the "Preliminary Approval Order"). To promote judicial efficiency, this memorandum also incorporates and assumes familiarity with the Court's recitals and findings in the Preliminary Approval Order. *See generally id.*

Since the Court granted preliminary approval of the Settlement, the Claims Administrator has overseen the issuance of the Notice according to the Notice Plan, the website has been established, and Class Members have begun filing claims. *See generally* Declaration of Paul Ferruzzi of Kroll Settlement Administration LLC ("Kroll Decl."). The deadline for objecting to the Settlement or requesting exclusion

[1] Unless otherwise noted, capitalized terms have the same meaning as in the Settlement Agreement and all emphasis is added and quotations omitted.

is June 10, while the deadline for submission of claims is on June 14. At this time, no objections have been received.

As discussed below, this Settlement easily meets the criteria set forth in Fed. R. Civ. P. 23(e)(2). Plaintiff respectfully requests that the Court (1) certify the Settlement Class; (2) approve the proposed Settlement; (3) approve an incentive award of $5,000.00 to Plaintiff; and (4) approve her application for attorneys' fees, costs, and expenses in the modest, aggregate amount of $475,000.00.

BACKGROUND

Litigation History

On July 22, 2020, Plaintiff Sharae Casey filed this putative class action against Defendant Doctor's Best, alleging that, based on laboratory testing, Doctor's Best was selling nutritional supplements that were mislabeled as containing Glucosamine Sulfate because they did not in fact contain that substance. Settlement Agreement ¶ 1.1. Plaintiff alleges that this conduct violated California's Unfair Competition law, California's False Advertising Law, California's Consumers Legal Remedies Act; and constituted a breach of warranty and unjust enrichment. *Id.* On December 10, 2020, Defendant filed a motion to dismiss the Complaint. *Id.* ¶ 1.2. The Court has held this motion to dismiss in abeyance pending the settlement. *Id.*

On April 13, 2021, Plaintiff (through her Counsel), Defendant, and Defendant's Counsel participated in an all-day remote mediation conducted by the Honorable Edward A. Infante (Ret.) of JAMS. Settlement Agreement ¶ 1.2. That mediation subsequent discussions resulted in the Settlement Agreement. *Id.*

The Court held a preliminary approval hearing on January 14, 2022. ECF No. 43. Following supplemental submissions by the parties, the Court granted preliminary approval of the Settlement on February 28, 2022. ECF No. 45.

The Settlement of This Action

The Settlement of this Action is on behalf of all Persons who purchased the Products in the United States between July 22, 2016 and the date of Preliminary Approval (i.e. February 22, 2022), excluding purchases made for purposes of resale. Settlement Agreement ¶ 1.3. In exchange for the Class Members' release of claims related to the alleged mislabeling (Settlement Agreement ¶¶ 91, 9.2), the proposed Settlement provides for the following benefits:

Monetary Relief

This Settlement provides that Settlement Class Members can receive $5.00 per Product package if they do not have Proof of Purchase (regardless of the price the Settlement Class Member actually paid), subject to a five (5) Product package per Household maximum. Settlement Agreement ¶ 4.4. If Settlement Class Members do have Proof of Purchase, then they can receive 60% of the purchase price per Product package (before any taxes and after any discounts), subject to a twelve (12) Product package per Household maximum. *Id.* ¶ 4.5. The Settlement Agreement precludes: (i) the maximum payment to any Household submitting claims without Proof of Purchase from exceeding $25.00, and (ii) a Settlement Class Member from receiving payment for a purchase of a Product that the Settlement Class Member does not affirmatively claim on the Claim Form. *Id.* ¶ 4.6.

Changed Practices

Doctor's Best has agreed for a period of three years to not represent on any labels, marketing, or advertising materials that any Product offered for sale by it prior to the Settlement Agreement's Effective Date contains Glucosamine Sulfate, and not to represent on any labels, marketing, or advertising materials that any new

Product contains Glucosamine Sulfate unless it actually contains Glucosamine Sulfate. Settlement Agreement ¶ 3.1.

Administrative Expenses, Fee Application, and Incentive Payment

All fees and expenses incurred by the Claim Administrator (Kroll), the cost of paying Valid Claims, and all costs of notice will be paid by Doctor's Best, separately from and in addition to the monetary relief provided to the Class. Settlement Agreement ¶ 4.14. Plaintiff may also apply to the Court for an Incentive Award of $5,000 or less, which Doctor's Best will not challenge, and which Doctor's Best will pay if awarded by the Court. *Id.* ¶¶ 7.2, 7.3.

Furthermore, after presenting the Settlement Agreement for preliminary approval, the parties agreed that Plaintiff's Counsel may apply to the Court for an award of attorneys' fees, costs, and expenses in a total amount not to exceed four hundred seventy-five thousand dollars ($475,000), to be paid by Doctor's Best, and Doctor's Best has agreed not to oppose such an application (the "Fee Application"). *Id.* ¶ 7.1 (as reflected in the First Amendment to the Class Action Settlement Agreement, filed at ECF No. 42-1). Importantly, the Settlement is not conditioned on Court approval of Plaintiff's Counsel's Fee Application. *Id.*

Notice to the Class

After the Court approved the notice program, Kroll established a settlement website (https://www.doctorsbestglucosaminesettlement.com/), offering easy access to information about the Settlement and important deadlines, and making available relevant documents including the Settlement Agreement, the Notice, the Claim Form, and the Opt-Out Form, as well as various court filings. The Settlement Website will remain accessible until 180 days after distribution of all of the Settlement Benefits. Settlement Agreement ¶ 5.2.

Kroll also oversaw the distribution of more than 75,000 direct notice messages sent to consumers' email addresses. Kroll Decl. ¶ 11. These email addresses were provided pursuant to subpoenas directed to the largest online retailers of the Products. *See id.*[2] To reach Class Members who may not have received direct notice, Kroll also engaged in an online notice campaign. *See generally* Declaration of Jeanne C. Finegan, APR ("Finegan Kroll Decl.").

The claims administrator also provided CAFA notice to the appropriate government officials. *See* Kroll Decl. ¶ 4.

[2] As described previously, Amazon.com—the largest retailer of the Products—agreed to comply with the subpoena on the condition that it send the notice to its customers through its own contact system. ECF No. 47. As a result, Amazon issued more than one million notices to its customers, to more than 389,000 unique email addresses. *See* Declaration on Behalf of Amazon.com, Regarding Email Notice, by Clarice Cohn. In addition, Vitacost refused to provide email addresses of its online purchasers in response to the subpoena on the basis that such activity would be beyond the scope of the user agreement covering the collection of these emails. MIP Decl. ¶ 7. Upon further discussion with counsel for Defendant, it appears that this retailer only accounted for roughly 3-4% of total sales of the Products during the Class Period, and the best estimates were that Vitacost would only provide roughly 11,000 emails based on an analysis of other retailer data. *Id.* Counsel also discussed with the Claims Administrator the likelihood that Vitacost's email list would include customers who purchased the Product from other retailers that did provide email information (and thus received direct notice), as well as whether it would be feasible to conduct a targeted indirect notice campaign online to reach these consumers. *Id.*; Kroll Decl. ¶ 7; *see also* Finegan Kroll Decl. ¶ 3 (the online advertising reached 90% of the Class). Given the low percentage of emails, the otherwise robust online publication notice, and the inability to specifically reach these consumers, Plaintiff's Counsel determined that it would cause unnecessary delay to take judicial action to enforce the subpoena. MIP Decl. ¶ 7.

Class Response

The claim period ends on June 14, 2022, and the deadlines for objections and exclusions has not passed. Plaintiffs' reply in further support of final approval and the Fee Application is due no later than June 24, 2022 (ECF 45), wherein Plaintiff's Counsel expect to provide additional, non-final information regarding the claims received as of that time. However, as of the filing of this motion, no objections have been received and 14 requests for exclusion have been received. Kroll Decl. ¶ 14.

The parties also conferred and agreed to designate the Arthritis National Research Foundation as the *cy pres* recipient for any unclaimed funds. Declaration of Matthew Insley-Pruitt ("MIP Decl.") ¶ 22; Settlement Agreement ¶ 4.12.

ARGUMENT

The Court should grant final certification to the Settlement Class because it meets all the requirements of Fed. R. Civ. P. 23. The Court should further grant final approval of the Settlement because it is fair, reasonable, and adequate, and class members have been given appropriate notice. Finally, the Court should grant the Fee Application and an incentive award to Plaintiff.

I. THE NOTICE REQUIREMENTS ARE SATISFIED

Pursuant to Rule 23(c)(2), upon ordering notice under Rule 23(e)(1) to a Rule 23(b)(3) settlement class, the court must direct to the Settlement Class the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

This Court reviewed the proposed Notice in the Preliminary Approval Order, and directed certain changes to the form of the notices. ECF No. 45. This Court then later approved the amended notices. ECF No. 48. The Claim Administrator oversaw notice pursuant to the Notice Plan. *See* Kroll Decl.; Finegan Kroll Decl.

II. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

To grant final approval of the Settlement, the Court must first conclude that the Settlement Class satisfies Rule 23. The Court did so, conditionally, in its Preliminary Approval Order. ECF No. 45 at 7-13. No new information, or controlling precedent, has developed to suggest any reason to alter this conclusion: there are still the same number of Settlement Class Members; the case involves the same common issues of fact and law; Plaintiff remains a typical class member; Plaintiff and her counsel remain adequate class representatives; common issues continue to predominate over any individual issues; and a class action remains the superior means of adjudicating this action. The Court should grant final certification of the Settlement Class for the same reasons and pursuant to the same authority set forth in the Preliminary Approval Order. ECF No. 45 at 7-13.

III. FINAL APPROVAL IS WARRANTED BECAUSE THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

Pursuant to Rule 23(e), a class action "may be settled, voluntarily dismissed, or compromised only with the court's approval." A court should approve a settlement upon a finding that it is fair, reasonable, and adequate, considering the following factors:

> 1. the class representatives and Plaintiff's Counsel have adequately represented the class;
>
> 2. the proposed settlement was negotiated at arm's length;
>
> 3. 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
>
> 4. the proposed settlement treats class members equitably relative to each other.

See Fed. R. Civ. P. 23(e)(2). When deciding whether to approve a settlement before a class has been formally certified, the court must "consider[] the recovery in comparison to the strength of the case, the stage of litigation, the risk of further litigation, and any indications of potential collusion." *In re Lithium Ion Batteries Antitrust Litig. v. Andrews*, 853 F. App'x 56, 58 (9th Cir. 2021). Here, consideration of these factors indicates that final approval is warranted.

A. The Settlement Was Negotiated by Experienced and Informed Counsel

The Settlement is fair and adequate considering the stage of litigation and risk of further litigation. As the Court already noted, "Plaintiff's Counsel are experienced in the prosecution and resolution of consumer class actions." ECF No. 45 at 15; *see also id.* at 18 (noting that "the individual attorneys from Wolf Popper have a wealth of experience in class actions in general, as well as, in litigating dietary supplement labelling class actions in particular"). The Court found that "the Parties have sufficient information to make an informed decision about settlement," because, "[c]ritically, before even filing a complaint, Plaintiff sent some of the contents of one of the nutritional supplements she purchased from Doctor's Best to a laboratory for analysis, which allegedly revealed that the primary composition of the capsules consisted of Glucosamine Hydrochloride and Potassium Sulfate, rather than Glucosamine Sulfate." *Id.* at 17. The Court found that "in light of the straightforward nature of Plaintiff's claims, the extent of this fact development is

sufficient for parties to accurately assess the value of the claims at issue." *Id.* The Court credited Counsel's evaluation of the "significant challenges inherent in consumer class litigation challenging the labeling of nutritional supplements" and the "real possibility of multiple lengthy appeals before the Ninth Circuit" if the case proceeded through litigation, "which would prolong the time before the Class receives any relief." *Id.* at 15-16. Accordingly, the Court "agree[d] that the risks of continuing further litigation in this case are substantial." *Id.* at 16. And, "perhaps most significantly, counsel has obtained substantial monetary and injunctive relief in this case." *Id.* at 18.

No new facts have emerged that would change any of the Court's foregoing conclusions. In particular, the lack of any objections to date from Class Members, and the few exclusions, show that they consider the Settlement to be fair considering the stage of litigation and information available.

B. The Settlement Agreement Was Negotiated at Arm's Length and Is Not the Product of Collusion

Under the new Rule 23(e)(2) standard, "[c]ourts must scrutinize settlement agreements … for potentially unfair collusion in the distribution of funds between the class and their counsel." *Briseño v. Henderson*, 998 F.3d 1014, 1019 (9th Cir. 2021). *Briseño* identified as potential red flags the fact that "[c]lass counsel w[ould] receive seven times more money than the class members; an injunction touted by an expert as worth tens of millions of dollars appear[ed] worthless; the defendant agree[d] not to challenge the plaintiffs' attorneys' fees amount; [and] any reduction in those fees by the court revert[ed] to the defendant." *Id.* at 1018.

None of these potentially problematic features are present here. The settlement is the result of arm's length negotiations. More specifically, Plaintiff's

Counsel, Doctor's Best, and Doctor's Best's counsel participated in an all-day remote mediation conducted by the esteemed Honorable Edward A. Infante (Ret.) of JAMS, and the case settled shortly thereafter. Settlement Agreement ¶ 1.2. The parties then separately came to a negotiated resolution on the maximum amount of attorneys' fees for which Plaintiff's Counsel could apply without objection from Doctor's Best. *Id.* ¶ 7.1 (as amended at ECF No. 42-1). Importantly, the Settlement is not conditioned on Court approval of Plaintiff's Counsel's application for attorneys' fees, costs, and expenses. *Id.* ("The settlement shall not be conditioned on Court approval of Plaintiff's Counsel's application for attorneys' fees, costs, and expenses.").

Here, the parties agreed upon—and fully executed—a Settlement that provided only that Plaintiff's Counsel could apply for an award of attorneys' fees to be determined by the Court. Only thereafter did the parties revisit the issue of attorneys' fees and come to a supplemental agreement. These circumstances do not raise the "red flags" present in *Briseño*. *See JS Halberstam Irrevocable Grantor Tr. v. Davis*, No. 3:21-cv-413-SI, 2022 U.S. Dist. LEXIS 83257, at *9-10 (D. Or. May 9, 2022) (no collusion concerns where "[t]he arm's length nature of the parties' negotiation . . . shows that despite the clear sailing provision, the parties engaged in no collusion," and where the fee agreement was achieved "only after [the parties] had agreed to the substantive terms of the Settlement"); *accord Seb Inv. Mgmt. AB v. Symantec Corp.*, No. C 18-02902 WHA, 2022 U.S. Dist. LEXIS 24241, at *27 (N.D. Cal. Feb. 10, 2022) (no collusion concerns where the settlement agreement itself, as here, "expressly provides that it is not conditioned upon any award of attorney's fees").

Indeed, consistent with this authority, and as the Court already noted on preliminary approval, "at the time it was negotiated, the Proposed Settlement did not include an attorney fee agreement. Only several months later did Plaintiff and Doctor's Best file documentation indicating that they had reached an agreement as to attorney fees and costs. . . . This timing supports that the present settlement is not the product of collusion to benefit Plaintiff's Counsel." ECF No. 45 at 18.

Consumers were given notice of the amendment to the Settlement Agreement regarding the amount of Plaintiff's Counsel's anticipated request for attorneys' fees. Again, the lack of objections shows that the members of the Class do not find the request objectionable. There is therefore no reason to alter the Court's conclusion in its Preliminary Approval Order that there are no indicia of collusion.

C. The Settlement Provides Fair, Reasonable, and Adequate Substance for Settlement

In its Preliminary Approval Order, the Court found that the Settlement provided substantive benefits to the Settlement Class. The Court found that the Settlement "provides for substantial monetary recovery," considering that "a relatively high number of consumers may have proof of purchase, as much of Doctor's Best's business is online" and would receive 60% of the price they paid, and that the rest would receive $5 per package, which is "is slightly more than one fifth of the price paid for the most popular product." ECF No. 45 at 16. The Court found "this monetary recovery eminently reasonable," and also found that "the injunctive relief provided by the Settlement Agreement addresses any future harm consumers of Doctor's Best products would be likely to suffer as a result of the company's labelling practices." *Id.*

Additionally, "[i]t is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004). Here, the overwhelmingly positive Class reaction, in terms of the sheer number of claims, the few exclusions, and the lack of any objections received to date, weighs in the strongest terms in favor of a finding that the Settlement is fair, reasonable, and adequate.

IV. THE COURT SHOULD GRANT PLAINTIFF AN INCENTIVE AWARD

"A[n] [incentive] award recognizes the time and effort of the named plaintiff[] and the fact that [she] secured a recovery for absent class members. Without the named plaintiff[], this Settlement, and its benefits to the Settlement Class Members, would not have been possible." *Perks v. ActiveHours, Inc.*, No. 5:19-cv-05543-BLF, 2021 U.S. Dist. LEXIS 57272, at *25 (N.D. Cal. Mar. 25, 2021). While "fairly typical in class action cases (citation omitted) …. [a] class representative must justify an incentive award through evidence demonstrating the quality of plaintiff's representative service, such as substantial efforts taken as class representative to justify the discrepancy between [her] award and those of the unnamed plaintiffs." *Amaro v. Gerawan Farming Inc*., No. 1:14-cv-00147-DAD-SAB, 2020 U.S. Dist. LEXIS 189529, at *26-27 (E.D. Cal. Oct. 12, 2020) (citation omitted). When evaluating the evidence put forth, courts will examine: "(1) conflicts of interest between the class representative and the class in assessing the terms or disparity of an award, (2) actions taken by the class representative to protect the class's interest, (3) the benefit received by the class based on the class representative's actions, (4)

the time and effort expended by the class representative, and (5) the class representative's reasonable fears of workplace retaliation." *Loomis v. Slendertone Distrib.*, No. 19-cv-854-MMA (KSC), 2021 U.S. Dist. LEXIS 44047, at *33-34 (S.D. Cal. Mar. 9, 2021).

Plaintiff requests a well-deserved incentive award of $5,000. Plaintiff has invested time, effort, and energy into representing the absent members of the Settlement Class for the past two years. Plaintiff provided critical information that contributed to the commencement of this Action, including a sample of the product that she purchased so that it could be tested in a laboratory. "Courts have generally found that $5,000 incentive payments are reasonable." *Mortley v. Express Pipe & Supply Co.*, No. 8:17-cv-01938-JLS-JDE, 2019 U.S. Dist. LEXIS 240790, at *23 (C.D. Cal. May 29, 2019); *see also In re Vizio, Inc.*, No. 8:16-ml-02693-JLS-KES, 2019 U.S. Dist. LEXIS 239976, at *47 (C.D. Cal. July 31, 2019).

V. THE COURT SHOULD GRANT PLAINTIFF'S REQUEST FOR ATTORNEYS' FEES, COSTS, AND EXPENSES

Plaintiff's Counsel's Fee Application in the total amount of $475,000 is very reasonable in light of the injunctive relief and cash benefits provided by the Settlement, as well as the effort put forth by counsel.

A. Plaintiff's Counsel Are Entitled to a Reasonable Fee Award

In accordance with Fed. R. Civ. P. 23(h), "the court may award reasonable attorney's fees and non-taxable costs that are authorized by law or by the parties' agreement." In so doing, "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *Wong v. Arlo Techs.*, No. 5:19-cv-00372-BLF, 2021 U.S. Dist. LEXIS 58514, at *31 (N.D. Cal. Mar. 25, 2021) (quoting *In re Bluetooth Headset*

Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011)). This obligation exists irrespective of "whether the attorneys' fees come from a common fund or are otherwise paid." *Briseño*, 998 F.3d at 1023 (citation omitted).

"Attorneys' fees provisions included in proposed class action settlement agreements are, like every other aspect of such agreements, subject to the determination whether the settlement is 'fundamentally fair, adequate, and reasonable.'" *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (citation omitted). "Thus, to avoid abdicating its responsibility to review the agreement for the protection of the class, a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement." *Santos v. Camacho*, No. 04-00006, No. 04-00038, No. 04-00049, 2008 U.S. Dist. LEXIS 35991, at *102-103 (D. Guam Apr. 23, 2008) (citation omitted); *see also Briseño*, 998 F.3d at 1022 (remarking on what the court considers to be "an independent obligation to ensure that [any attorneys' fee] award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount.").

"In *Bluetooth*, [the Ninth Circuit] explained that courts should scrutinize agreements for 'subtle signs that class counsel have allowed pursuit of their own self-interests . . . to infect the negotiations…and smoke out potential collusion.'" *Briseño*, 998 F.3d at 1023 (quoting *In re Bluetooth*, 654 F.3d at 947). The Court identified three non-exhaustive, but definitive indicators: "(1) when counsel receive[s] a disproportionate distribution of the settlement; (2) when the parties negotiate a 'clear sailing' arrangement, under which the defendant agrees not to challenge a request for an agreed-upon attorney's fee; and (3) when the agreement contains a 'kicker' or 'reverter' clause that returns unawarded fees to the defendant, rather than the class." *Id.* (quotations omitted).

B. The Amount Requested in the Fee Application Is Reasonable

Courts generally evaluate the reasonableness of a fee request based on a percentage of the amounts recovered or benefits obtained in the settlement, the lodestar of counsel, or some combination of the two. *See Lafitte v. Robert Half Int'l Inc.*, 376 P.3d 672 (2016) (reviewing the use of both methods of calculating attorneys' fees under California law, and allowing the use of percentage of recovery in a common fund). Here, the Fee Application is very reasonable under either metric, especially considering that the Settlement requires Defendant to both ensure that it sells properly labelled products and provides monetary relief to Class members.

1. The Fee Application Is a Modest Percentage of the Total Potential Monetary Recovery

In the Ninth Circuit, there is a 25% "benchmark" for calculating attorneys' fees with a monetary recovery. *See, e.g.*, *Fischel v. Equitable Life Assurance Soc'y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002); *see also Figueroa v. Capital One, N.A.*, No. 18cv692 JM(BGS), 2021 U.S. Dist. LEXIS 11962, at *25 (S.D. Cal. Jan. 21, 2021) (recognizing that California courts often award up to one third of the amount recovered). Courts also usually apply the 25% calculation to the total possible recovery—and not just the amount that was actually distributed—when the settlement provides for a "claims made" process. *See Wallace v. Countrywide Home Loans. Inc.*, No. SACV 08-1463-JLS (MLGx), 2015 U.S. Dist. LEXIS 190929, at *25 (C.D. Cal. Apr. 17, 2015) (recognizing that "the Ninth Circuit has held that the 25% percentage benchmark must be measured against the full fund set aside by the settlement rather than the actual payout to the class" (citing *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997)).

In this case, the Defendant will pay Class members either $5 per package or 60% of the retail price paid, depending on whether or not the Class member provides proof of purchase and subject to limitations for each household. Settlement Agreement ¶¶ 4.4, 4.5. This results in a range of possible total values of the monetary portion of the settlement. If all Class members submitted claims without proof for all of the units sold (without consideration of the household restriction), this would result in a monetary benefit of approximately $7.5 million.[3] Similarly, given that the weighted average price of all of the products was $23.57 (ECF 44), if every Class member provided proof of purchase (again, without considering the household restrictions) then the total possible recovery would be approximately $21 million (i.e., 60% of 1.5 million units times $23.57 per unit). If the Court were to apply the 25% benchmark to these figures, Plaintiffs' Counsel would be within their rights to apply for a fee between approximately $1.8 million and $5.3 million. The Fee Application of $475,000 (inclusive of expenses) is between roughly 6 and 2 percent of the total potential recovery, a request that is well below the benchmark.

When evaluating whether the requested fee is a reasonable percentage, Courts consider a variety of factors, including: "(1) the results achieved, (2) the risk of litigation, (3) the skill required and the quality of the work, and (4) the contingent nature of the fee and the financial burden carried by the plaintiffs." *Song v. Thc - Orange Cty.*, No. 8:17-cv-00965-JLS-DFM, 2019 U.S. Dist. LEXIS 240579, at *15 (C.D. Cal. Aug. 2, 2019) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002)). As discussed above, the Settlement achieved notable results for

[3] During the Class Period, Defendant sold approximately 1.5 million units of the products on a wholesale basis. MIP Decl. ¶ 4.

the Class. With respect to practice changes, there is little else that could have been achieved at trial since Defendant will not sell Glucosamine Sulfate unless it actually contains Glucosamine Sulfate. With respect to monetary recovery, those consumers with proof of purchase (and therefore with the strongest defenses against potential challenges by Defendant) are eligible to recover up to 60% of the amount that they paid. Consumers without receipts will still receive approximately 21% of their purchase price. This is a good percentage recovery of the potential damages available.[4]

The litigation was also risky and likely to involve significant expert discovery, as outlined in the Preliminary Approval Order, and as indicated by the recent granting of summary judgment and current appeal to the Ninth Circuit in *Hollins et al. v. Walmart Inc.*, 2:19-cv-05526-SVW, 2021 U.S. Dist. LEXIS 162030 (C.D. Cal., Aug. 17, 2021)). *See Vizcaino*, 290 F.3d at 1048 (noting that the case was "extremely risky" to counsel due to prior adverse rulings).

This matter was resolved at a relatively early stage, since the motion to dismiss briefing was ongoing. This reflects well on the skill and quality of Plaintiff's Counsel's efforts to resolve the matter expeditiously, but also tempers the impact of

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[4] *See, e.g.*, *Defrees v. Kirkland*, 2:11-cv-04272-JLS-SPx, 2018 U.S. Dist. LEXIS 125462, at *12-13 (C.D. Cal. July 26, 2018) (surveying recovery in derivative shareholder litigation and finding recoveries commonly ranged from 11 to 31 percent); *Mortley*, 2019 U.S. Dist. LEXIS 240790, at *14-15 (surveying wage and hour settlements which ranged from 14 to 73.5 percent recovery); *Tawfilis v. Allergan, Inc.*, No. 8:15-cv-00307-JLS-JCG, 2018 U.S. Dist. LEXIS 173687, at *12 (C.D. Cal. Aug. 27, 2018) (recovery represented 8.3% of maximum potential antitrust damages); *see also In re Vizio, Inc.*, 2019 U.S. Dist. LEXIS 239976, at *37 (recognizing that the combination of injunctive relief with monetary relief justified an upward departure for fees).

the fact that counsel undertook this matter on a purely contingent basis. *See* MIP Decl. ¶ 14; Declaration of Jonathan Rotter ("Rotter Decl.") ¶ 6; *see also Song*, 2019 U.S. Dist. LEXIS 240579, at *19.

2. Plaintiffs' Counsel's Lodestar Supports the Fee Application

In addition to the monetary relief, the Settlement also provides important injunctive relief. In a nutshell, Defendants have agreed to stop selling any Products currently labeled as containing Glucosamine Sulfate, and only to sell in the future Products that actually contain Glucosamine Sulfate. This is the core issue of the case, and few other practice changes could be achieved through continued litigation. Additionally, Plaintiff brought a count under the CLRA, which contains a fee-shifting provision. The "lodestar" method is therefore appropriate for evaluating fee requests in the context of both injunctive relief and fee-shifting provisions. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 941. Even when using a percentage of recovery method, courts often perform a lodestar "cross check." *Wallace*, 2015 U.S. Dist. LEXIS 190929, at *29-30. In accordance with this approach, "[r]easonableness is the goal, and mechanical or formulaic application of method, where it yields an unreasonable result, can be an abuse of discretion." *Amaro*, 2020 U.S. Dist. LEXIS 189529, at *20.

"Under the lodestar method, attorneys' fees are calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Wong*, 2021 U.S. Dist. LEXIS 58514, at *32 (citation omitted); *Loomis*, 2021 U.S. Dist. LEXIS 44047, at *25; *In re Bluetooth*, 654 F.3d at 945-46. This necessitates a two-step process: "First, a court calculates the lodestar figure by multiplying the number of hours reasonably expended on a

case by a reasonable hourly rate." *Kelly v. Wengler*, 822 F.3d 1085, 1099 (9th Cir. 2016). "Second, the court determines whether to modify the lodestar figure, upward or downward, based on factors not subsumed in the lodestar figure." *Id.* "There is a strong presumption that the lodestar is a reasonable fee." *Fronda v. Staffmark Holdings, Inc.*, No. 15-cv-02315-MEJ, 2018 U.S. Dist. LEXIS 92330, at *26-27 (N.D. Cal. June 1, 2018).

To date, Plaintiffs' Counsel have expended over 457 hours for a collective lodestar of $305,874. MIP Decl. ¶ 17.

a. Class Counsel's Hourly Rates Are Reasonable

In the first step under the lodestar method, "[t]he Court first considers whether Class Counsel's hourly rates are reasonable." *Loomis*, 2021 U.S. Dist. LEXIS 44047, at *26-27 (quotations omitted); *see also Santos*, 2008 U.S. Dist. LEXIS 35991, at *118; *Chalmers v. Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986).

Wolf Popper LLP's hourly rates—ranging from $320 per hour for paralegals to $895 per hour for senior partners—are comparable to the rates of other attorneys engaging in complex consumer protection class action litigation. MIP Decl. ¶¶ 11-14. The reasonableness of these rates is supported by the fact that Plaintiffs' Counsel have extensive experience in prosecuting complex class action litigation, and that courts have approved similar past fee requests by Plaintiffs' Counsel, including consumer class actions, proceeding in the Ninth Circuit. *See, e.g., Bozarth v. Envision Healthcare Corp., et al.*, No. ED CV 17-1935 FMO (SHKx), 2020 U.S. Dist. LEXIS 117294, at *22 (C.D. Cal. June 30, 2020) (awarding the requested $1.85 million in attorneys' fees and costs, finding the requested fee award fair, reasonable, and appropriate given the "work performed in this action and the prevailing rates in the community for lawyers of comparable skill, experience, and reputation"); *see*

also Belfiore v. Procter & Gamble Co., Case 2:14-cv-04090-PKC-RML, Order Granting Final Approval of Class Action Settlement (E.D.N.Y. July 27, 2020) (ECF No. 361) and Plaintiff's Memorandum of Law in Support of Unopposed Motion for Final Approval of Class Action Settlement, Award of Attorneys' Fees, Reimbursement of Out-of-Pocket Expenses, and Class Representative Payment, dated June 11, 2020 (ECF No. 358) (awarding in full the requested $3.2 million in attorneys' fees, costs, and expenses, including work performed by Mr. Insley-Pruitt); *Copher et al. v. Bank of America, N.A. et al.*, Case 5:13-cv-00353-M (W.D. Ok.), Final Order and Judgment, dated June 2, 2016 (ECF No. 111) and Plaintiffs' Joint Declaration in Support of Motion for Final Approval, dated April 12, 2016 (ECF No. 103) (awarding $1.875 million for legal fees in consumer class action regarding residential mortgage servicing that settled before any dispositive motion was filed, accepting without comment the reasonableness of Wolf Popper's standard hourly rates used in the lodestar calculation, including the work performed by Mr. Insley-Pruitt). Similarly, the rates charged by attorneys at Glancy Prongay are reasonable and "are comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude." *Lea v. TAL Educ. Grp.*, 18-CV-5480 (KHP), 2021 U.S. Dist. LEXIS 229314, at *37 (S.D.N.Y. Nov. 30, 2021) (approving Glancy Prongay's 2021 rates of $600 to $995 for partners, and $500 to $750 for associates); *Yaron v. Intersect ENT, Inc.*, Case No.: 4:19-cv-02647-JSW, 2021 U.S. Dist. LEXIS 217929, at *5-7 (N.D. Cal. Nov. 5, 2021) (accepting Glancy Prongay's rates as part of lodestar cross-check); *In re CytRx Corp. Sec. Litig.*, Case No.: 2:16-CV-05519-SJO-SK, 2018 U.S. Dist. LEXIS 231651, at *1-5 (C.D. Cal. Sept. 17, 2019) (same), *In re K12 Inc. Sec. Litig.*, Master File No. 4:16-cv-04069-PJH, 2019 WL 3766420, at *2 (N.D. Cal. July 10, 2019) (same).

These hourly rates are also consistent with rates that have been accepted from attorneys in other actions in the Ninth Circuit. *See, e.g.*, *Hurtado v. Rainbow Disposal Co.*, Case No.: 8:17-cv-01605-JLS-DFM, 2021 U.S. Dist. LEXIS 105692, at *19 (C.D. Cal. May 21, 2021) (the Court approved one of Class Counsel's hourly rates of $900 per hour and the second Class Counsel's hourly rates of $800 per hour, and rates between $260 and $600 per hour billed for work performed by paralegals and non-partner level attorneys.); *Defrees*, 2018 U.S. Dist. LEXIS 125462, at *15 (approving fees up to $965 for partners); *G. F. v. Contra Costa Cnty.*, Case No. 13-cv-03667-MEJ, 2015 U.S. Dist. LEXIS 159597, at *38-41 (N.D. Cal. Nov. 25, 2015) (the Court approved an hourly rate of $845-$975 for two of the "most senior and experienced litigators," hourly rates between $210 and $700 for attorneys, and hourly rates ranging from $175 and $340 for non-attorneys."); *Sherman v. Clp Res.*, CV 12-8080-GW-PLAx, 2020 U.S. Dist. LEXIS 152477, at *7 (C.D. Cal Aug. 6, 2020) (the Court found Class Counsel's hourly rates of $210 per hour, for law clerks and paralegals, to $895 per hour for the Attorney to be reasonable). The rates at Wolf Popper and Glancy Prongay law firms are also the same standard current hourly rates charged on non-contingent matters. MIP Decl. ¶ 14; Rotter Decl. ¶ 6.

Accordingly, Class Counsel's hourly rate further weighs in favor of their Fee Application.

b. Settlement Class Counsel Expended a Reasonable Amount of Hours on This Matter

"Beyond establishing a reasonable hourly rate, a party seeking attorneys' fees bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Fronda*, 2018 U.S. Dist. LEXIS

92330, at *28-29 (quotation omitted); *see also Santos*, 2008 U.S. Dist. LEXIS 35991, at *128.

The more than 457 hours spent on this matter by Class Counsel to date were reasonably spent on necessary tasks for this litigation. Among other things, Class Counsel devoted their time to:

- undertaking a factual and legal investigation into Plaintiff's allegations, prior to filing the Complaint;
- drafting and filing the Complaint;
- researching and drafting response to Defendant's Motion to Dismiss;
- telephone conferences, videoconference, and e-mail correspondence with other members of Plaintiffs' Counsel and Plaintiff;
- telephone conferences and e-mail correspondence with Defendants;
- comprehensive settlement negotiations, including mediation;
- drafting and negotiation over the terms of the Settlement and the Settlement Agreement;
- preparing the papers in support of preliminary approval of the settlement and presenting it to the Court at the preliminary approval hearing;
- oversight of the notice and claims process, including regular contact with the claims administrator;
- issuance of subpoenas to retailers;
- communication with class members regarding the claims process; and
- preparing the motion for final approval of the Settlement.

MIP Decl. ¶ 5; *see also* Rotter Decl. ¶ 3. Plaintiffs' Counsel will certainly spend more time to ensure that the Settlement is approved by the Court, including anticipated additional work to assist and address any concerns of Class Members.

c. Adjustment of the Lodestar

"After determining the lodestar, the Court divides the total fees sought by the lodestar to arrive at the multiplier." *Fronda*, 2018 U.S. Dist. LEXIS 92330, at *30. That being said, "[t]he lodestar amount is presumptively the reasonable fee amount, and thus a multiplier may be used to adjust the lodestar amount upward or downward only in "rare" and "exceptional" cases, supported by both "specific evidence" on the record and detailed findings by the lower courts' that the lodestar amount is unreasonably low or unreasonably high." *Santos,* 2008 U.S. Dist. LEXIS 35991, at *122-23 (citation and quotation omitted); *see also In re Bluetooth,* 654 F.3d at 942 n.7. In such instances, the following factors have been found to support the rebuttal of the presumption: "(1) the time and 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 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." *Pagh v. Wyndham Vacation Ownership, Inc*., No. 8:19-cv-00812-JWH-ADSx, 2021 U.S. Dist. LEXIS 56040, at *5 n.10 (C.D. Cal. Mar. 23, 2021); *Hose v. Wash. Inventory Serv.*, No.: 14-cv-2869-WQH-AGS, 2020 U.S. Dist. LEXIS 117242, at *42-43 (S.D. Cal. Jul. 2, 2020); *Fronda*, 2018 U.S. Dist. LEXIS 92330, at *25; *Santos,* 2008 U.S. Dist.

LEXIS 35991, at *122-123 n.111 (quoting *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 71 (9th Cir. 1975)). Many of these factors have already been addressed in the context of evaluating the Fee Application as a percentage of the recovery, *supra*. Perhaps most importantly, Plaintiff's Counsel was able to achieve a significant portion of what it would seek at trial—i.e., getting Defendant to stop selling supplements currently labeled as containing Glucosamine Sulfate and only to sell Products in the future that actually contain Glucosamine Sulfate, and providing consumers with cash recovery—early in the litigation process and without unnecessary expenditures. A modest multiple is justified in this situation, and the fee award should not be reduced based on the lodestar amount.

Here, Plaintiff's Counsel would receive a 1.5 lodestar multiplier if the Fee Application is granted in full.[5] This lodestar multiplier—which will certainly decrease as Plaintiff's Counsel continue to represent the class's interests—is well within the range of reasonableness.[6] Thus, the allocation of the multiplier to Plaintiff's Counsel is fair and reasonable.

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[5] The Fee Application includes the expenses of $16,630.21 sought in this matter. If the expenses are granted in full, the amount remaining for attorneys' fees will be $458,369.79. As such, $458,369.79 divided by the lodestar of $305,874 is 1.498.

[6] *See, e.g.*, *Vizcaino*, 290 F.3d at 1051 (observing that in a majority of collected cases the lodestar multiplier fell between 1.0 and 3.0); *Etter v. Thetford Corp.*, No. SACV 13-00081-JLS (RNB), 2017 U.S. Dist. LEXIS 59814, at *27 (C.D. Cal. Apr. 14, 2017) (approving 1.69 lodestar multiplier after reviewing decisions); *Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877, 901-02 (C.D. Cal. 2016) (approving a 1.68 multiplier based solely on the lodestar method); *Noll v. eBay, Inc.*, 309 F.R.D. 593, 610 (N.D. Cal. 2015) (1.6 multiplier); *Willner v. Manpower Inc.*, No. 11-CV-02846-JST, 2015 U.S. Dist. LEXIS 80697, at *22 (N.D. Cal. June 22, 2015) (2.1 multiplier); *Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1210 (C.D. Cal. 2014) (finding a lodestar multiplier of 2.52 to be "well within the range of acceptable

C. Plaintiff's Counsel's Expense Application Is Reasonable

"Counsel are entitled to reimbursement of the out-of-pocket costs they reasonably incurred investigating and prosecuting the case." *Loomis*, 2021 U.S. Dist. LEXIS 44047, at *31. The expenses should be "necessary," (*Amaro*, 2020 U.S. Dist. LEXIS 189529, at *26), and comparable to those that would "normally be charged to a fee paying client." *Perks*, 2021 U.S. Dist. LEXIS 57272, at *24. "These can include reimbursements for: (1) meals, hotels, and transportation; (2) photocopies; (3) postage, telephone, and fax; (4) filing fees; (5) messenger and overnight delivery; (6) online legal research; (7) class action notices; (8) experts, consultants, and investigators; and (9) mediation fees." *Amaro*, 2020 U.S. Dist. LEXIS 189529, at *26.

As a result of the early stage of the Settlement, Plaintiff's Counsel's expenses are modest in this action, totaling only $16,630.21. MIP Decl. ¶ 21. The largest expenses (totaling more than $10,000) include the mediation expenses and online legal research. *Id.* Other compensable expenses include expert fees, court expenses, travel, and appropriate office expenses. *Id.* The Fee Application is inclusive of expenses and there is no separate, additional award of expenses sought.

CONCLUSION

The Court should finally certify the Class, approval the Settlement, and grant the Fee Application.

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DATED: May 20, 2022 Respectfully submitted,

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multipliers"); *In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 U.S. Dist. LEXIS 37286, at *31 (N.D. Cal. Mar. 18, 2013) (1.66 multiplier).

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