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*Attorneys for Plaintiffs and Settlement Class
Representatives Mike Xavier and Steven
Prescott and the Settlement Class*

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

MIKE XAVIER and STEVEN PRESCOTT,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

BAYER HEALTHCARE LLC, a Delaware
limited liability company; BEIERSDORF,
INC., a Delaware corporation,

Defendants.

Case No. 5:20-CV-00102-NC
Case Filed: 1/3/2020
FAC Filed: 5/15/2020
SAC Filed: 7/14/2021

Assigned to the Hon. Nathanael M. Cousins

**DECLARATION OF KATHERINE A.
BRUCE IN SUPPORT OF PLAINTIFFS'
MOTIONS FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT AND FOR
ATTORNEYS' FEES, EXPENSES, AND
SERVICE AWARDS**

REDACTED AND PUBLICLY FILED

DECLARATION OF KATHERINE A. BRUCE

I, KATHERINE A. BRUCE, hereby declare under penalty of perjury as follows:

1. I am a partner at Clarkson Law Firm, P.C. (“**Clarkson**”), co-counsel of record with Moon Law APC (“**Moon**”) for Plaintiffs and Settlement Class Representatives Steven Prescott and Mike Xavier (collectively, “**Plaintiffs**” and/or “**Settlement Class Representatives**”) and preliminarily appointed as Settlement Class Counsel.¹ I am a member in good standing with the California State Bar and admitted to all United States District Courts in the State of California. I make this declaration in support of Plaintiffs’ motion for final approval of class action settlement (“**FAM**”) and Plaintiffs’ motion for attorneys’ fees, costs, and service awards (“**Mot. Fees, Costs, Svc. Aw.**”) (collectively “**Motions**”). I make the following statements based on my own personal knowledge, except where indicated as based upon information and belief. If called to testify to the following matters, I could and would do so competently.

2. I have submitted concurrently herewith true and correct copies of the following documents as exhibits:

- a. **Exhibit 1**: Court-Appointed Claim Administrator Digital Settlement Group’s (“**DSG’s**”) most recent Weekly Administrator Summary, dated October 31, 2021;
- b. **Exhibit 2**: Clarkson’s firm resume that accurately sets forth its attorneys’ qualifications to serve as class counsel for the Settlement Class² (hereinafter, the “**Clarkson Resume**”);
- c. **Exhibit 3**: The firm resume for Moon Law, APC (“**Moon**”), which accurately sets forth its attorneys’ qualifications to serve as class counsel for the Settlement Class

¹ All capitalized terms have the same meaning as those terms set forth in the preliminarily approved Settlement Agreement, fully executed on July 12, 2021, and filed as Exhibit 1 to the Declaration of Katherine A. Bruce in support of Plaintiffs’ amended motion for preliminary approval [Dkt. 99-11] (“**Settlement Agreement**” and/or “**Ag.**”). Order, 7/29/2021 [Dkt. 107].

² The term “**Settlement Class**” or “**Class**” is effectively defined under the terms of the Settlement Agreement as: all retail consumers who purchased in the United States one or more of the Products, for use and not for resale, prior to the date that the Class is first notified of the settlement pursuant to the Court’s preliminary approval order (on September 17, 2021, the “**Notice Date**”). See Ag. ¶¶ 2.13 (Excluded Persons), 2.23 (Notice Date), 2.26 (Online Notice), 2.32 (Preliminary Approval), 2.33 (Products), 2.39 (Settlement Class). The term “**Products**” means Coppertone sunscreen products that included “Mineral-Based” on the label, in various sizes and forms: Coppertone Water Babies Pure & Simple, Coppertone Kids Tear Free, and Coppertone Sport Face. *Id.* ¶ 2.33.

(hereinafter, the “**Moon Resume**”);

- d. **Exhibit 4**: Template cover letters and corresponding mailing lists for notices served on the Attorney Generals for each State and the United States, including the March 26, 2021 notice regarding the first settlement agreement, and the July 23, 2021 notice regarding the amended Settlement Agreement, pursuant to the Class Action Fairness Act of 2005, codified at 28 U.S.C. § 1715(b) (“**CAFA**”);
- e. **Exhibit 5**: A chart that summarizes Clarkson’s total hours expended, and corresponding hourly rates and total fees, disaggregated by each timekeeper and nature of work performed;
- f. **Exhibit 6**: A chart that summarizes Moon Law’s total hours expended, and corresponding hourly rates and total fees, disaggregated by each timekeeper and nature of work performed;
- g. **Exhibit 7**: Excerpt from ALM Media Properties, LLC’s National Law Journal’s Billing Survey, dated 2014, regarding billing rate averages for partners as high as \$1,055 per hour and for associates as high as \$675 per hour in and around 2014;
- h. **Exhibit 8**: Jennifer Smith, The Wall Street Journal, *On Sale: The \$1,150-per-Hour Lawyer --- Legal Fees Keep Rising, but Don’t Believe Them; Clients Are Demanding, and Getting, Discounts* (Dow Jones & Company, Inc., 4/11/2013), regarding increasing billing rates as high as \$1,000 per hour, including trial lawyers charging \$1,500 per hour;
- i. **Exhibit 9**: Sara Randozzo, The AmLaw Daily, *When it Comes to Billing, Latest Rate Report Shows the Rich Keep Getting Richer* (ALM, 4/16/2012), summarizing findings of TyMetrix, a company that manages and audits legal bills, regarding billing rates over a 5-year period ending in December 2011, to compile the rising rates companies actually pay for legal work, noting Los Angeles amongst the highest rates, associate rates averaging about \$600 per hour amongst the top quartile, and partner rates averaging \$900 per hour amongst the top quartile;
- j. **Exhibit 10**: Printout from The Wall Street Journal Online, *Top Billers* (WSJ,

2/23/2011), regarding billing rates as high as \$1,250 an hour in approximately 2011;

- k. **Exhibit 11**: Printout from the ALM Daily Report, dated February 22, 2011, regarding progressively rising billing rates for San Francisco, California, between 2006 and 2009, as high as \$775 per hour;
- l. **Exhibit 12**: Excerpts from Westlaw CourtExpress, *Legal Billing Report*, of the California Rate Report by Billing Rate in Volume 11, specifically including: Quarterly Issue No. 1 (May 2009) at pp. 59-60, Quarterly Issue No. 2 (dated August 2009) at pp. 72-73, and Quarterly Issue No. 3 (dated December 2009) at pp. 72-73, which reflect a trend of rising hourly rates in the State of California as high as \$960 per hour;
- m. **Exhibit 13**: Excerpt from ALM Media Properties, LLC's National Law Journal's Billing Survey, dated 2010, regarding billing rate averages for partners as high as \$769 per hour and for associates as high as \$442 per hour in and around 2010; and
- n. **Exhibit 14**: Amy Kolz, The AmLaw Daily, *Bankruptcy Rates Top \$1K Mark in 2008-09* (ALM, 12/15/2009), reviewing bankruptcy hourly billing rates reported in court filings in Delaware and the Southern District of New York, over a 12-month period ending in August 2009, have risen as high as \$1,065 per hour, with many AmLaw 200 partners billing in excess of \$1,000 per hour, and associates as high as \$700 per hour.

I. LITIGATION & SETTLEMENT HISTORY

3. **Investigation.** Plaintiffs have engaged in extensive formal and informal discovery, pursued written discovery and Defendants' documents, thoroughly investigated Plaintiffs' claims, and consulted with experts. Indeed, Plaintiffs and their Settlement Class Counsel have dedicated considerable, time, effort, and skill in the investigation and discovery for this litigation, including, but not limited to:

- (1) Researching and analyzing relevant scientific studies and published research regarding the benefits and costs of using mineral versus non-mineral or chemical active ingredients in sunscreens, including the attributes of both from an aesthetic

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- standpoint and the toxicity and adverse impact chemical active ingredients have on humans, animals, and reefs, including corals and inhabiting marine life, to understand the materiality of “Mineral-Based” and similar advertising claims and their importance to consumers;
- (2) Researching and analyzing the regulations, including the Code of Federal Regulations and various state regulations, regarding labeling and advertising personal care consumer goods, cosmetics, over the counter drugs, and sunscreens, including any reports or studies considered by the legislature or executive agency in promulgating those regulations;
 - (3) Researching and analyzing publications from or made available by the United States Federal Trade Commission (“**FTC**”) and Federal Drug Administration (“**FDA**”) regarding labeling and advertising recommendations, requirements, and prohibitions for personal care consumer goods, cosmetics, over the counter drugs, and sunscreens to evaluate mineral and natural claims and materials that informed said guidance;
 - (4) Researching and analyzing information from or made available by the FDA regarding the Generally Recognized as Safe (“**GRAS**”) rating or lack thereof for sunscreen active ingredients and its development over time;
 - (5) Researching and analyzing any FTC enforcement actions or investigations into “Mineral-Based” or similar claims for personal care consumer goods, cosmetics, over the counter drugs, and sunscreens;
 - (6) Researching and analyzing relevant or related investigations and decisions of the Better Business Bureau’s National Advertising Division (“**NAD**”) and National Advertising Review Board (“**NARB**”) to evaluate any industry standards for advertising and substantiating claims regarding personal care consumer goods, cosmetics, over the counter drugs, and sunscreens;
 - (7) Researching and analyzing prior litigation related to the Products and Defendants’ other personal care, consumer goods, cosmetics, over the counter drugs, and sunscreens;
 - (8) Researching and analyzing market research, including consultation with experts, regarding consumers’ perception, materiality, and monetary value of the “Mineral-Based” and similar claims to evaluate the reasonable consumers understanding and importance placed on such claims;
 - (9) Researching and analyzing Defendants’ and major third-party retailer websites and social media profiles, periodically and including archived web pages, to evaluate all publicly available labels for Products, including prominent front label claims, related “Mineral-Based” claims, and back label ingredient disclosures, as well as Defendant’s marketing strategy and the net impression of online consumers;
 - (10) Conducting extensive legal research to analyze the prospective merits and weaknesses of the case through class certification and trial, including each element of class certification, common defenses thereto regarding issues of commonality, predominance, and typicality, and the various states laws regarding the statute of limitations, elements of each cause of action, common affirmative defenses, and available remedies;
 - (11) Researching the industry practices regarding the research and development, sourcing and manufacture of raw materials, production of finished household consumer goods, labeling development, compliance checks, and production, marketing through third parties, data analytics for digital marketing campaigns, and related financial considerations for budgeting, auditing, and protecting profit margins;
 - (12) Researching and analyzing Defendants’ secretary of state filings and Defendant Bayer Healthcare LLC’s financial reporting to investors and the Securities Exchange Commission to evaluate Defendants’ market sects, financial strategy, operations, and corporate structure
 - (13) Analyzing Defendants’ Products’ sales and related documents, and researching retail sales pricing for the Products, in consultation with experts in consumer behavior, statistical analysis, and market research designed to isolate the premium consumers pay for falsely advertised common household goods, to determine the maximum value

- 1 recoverable for economic losses to the Settlement Class;
- 2 (14) Researching and analyzing potential class-wide damages based on a review of price
- 3 premiums attributed to similar false and deceptive advertising claims or similar
- 4 products regarding household consumer goods;
- 5 (15) Researching and analyzing comparable products to identify sunscreens with and
- 6 without a “Mineral-Based” or similar claims, with and without all mineral active
- 7 ingredients, and understand the salient product attributes and its impact on pricing;
- 8 (16) Obtaining and evaluating Defendants’ document production and responses to
- 9 interrogatories and requests for documents, including key information and documents
- 10 regarding Defendants’ market research, market strategy, labels, sales, and formulation
- 11 of the Products;
- 12 (17) Reviewing consumer protection advocacy group publications, analyses, and research,
- 13 including for example the Environmental Working Group, concerning sunscreens and
- 14 their ingredients;
- 15 (18) Interviewing and vetting potential class representatives and plaintiffs to not only
- 16 analyze their adequacy and any potential conflicts of interests to evaluate their
- 17 adequacy and fairness as a class representative, commitment to the putative class and
- 18 ability to satisfy the duties of a class representative, but also to investigate consumer
- 19 experiences with the Products, reasons for purchasing them, and understanding of the
- 20 challenged marketing claims in this litigation; and
- 21 (19) Investigating, drafting, and engaging in pre-litigation activities to comply with pre-
- 22 lawsuit notice requirements, including those imposed under the California Consumers
- 23 Legal Remedies Act, codified at Civil Code, sections 1750, *et seq.* and various state
- 24 laws surrounding breaches of warranty, as well take steps to ensure the preservation
- 25 of evidence, including fleeting digital advertising campaigns, the content of dynamic
- 26 websites, data analytics for such digital marketing, and various other documents and
- 27 information relevant to this litigation.

28 4. **Pre-Suit Demand Activities.** Aside from initiating the investigation of this matter, Settlement Class Counsel engaged in several pre-litigation activities. On September 18, 2018, Plaintiffs’ counsel served Defendant Bayer Healthcare LLC with a Pre-Litigation Demand Letter, advising of its alleged violations of the California Consumer Legal Remedies Act, codified at Cal. Civ. Code §§ 1750, *et seq.* (“**CLRA**”) and other applicable laws, and further requesting it preserve relevant evidence (“**2018 Letter**”). Defendant failed to respond to the 2018 Letter and failed to take any known corrective action requested to remedy its alleged false and deceptive advertising of the Products as “Mineral Based.” On January 3, 2020, Plaintiffs’ counsel filed this putative class action (Dkt. 1) and simultaneously served both Defendants with a second Pre-Litigation Demand Letter, informing them of their alleged violations under the CLRA and other applicable laws, and further requesting they preserve relevant evidence (“**2020 Letter**”). Yet again, the 2020 Letter did not generate any known adequate remedial measures and so Plaintiffs subsequently amended the complaint to assert a claim for damages under the CLRA pursuant to section 1782, as set forth below.

5. **The Pleadings.** Defendants challenged the pleadings, which required Plaintiffs’

1 counsel to conduct extensive legal research and prepare substantial briefing, including preparations
2 for oral arguments, related reports to the Plaintiffs regarding the status of the litigation, and ongoing
3 conferences between Plaintiffs' counsel to evaluate, strategize, and use their collective knowledge
4 and experience to successfully defeat Defendants' challenges and optimize the position of Plaintiffs
5 and the class of consumers they have sought to represent.

- 6 a. On January 3, 2020, Plaintiffs filed a nationwide class action complaint against
7 Defendants, alleging Defendants falsely labeled the Products as "Mineral-Based"
8 in violation of state consumer protections laws, breach of express warranty, and
9 to Defendants' unjust enrichment. Dkt. 1.
- 10 b. On May 1, 2020, Defendants filed a motion to transfer venue under 28 U.S.C. §
11 1404(a); a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2);
12 a motion to dismiss under Rule 12(b)(6); and a motion to strike under Rule 12(f).
13 Dkt. 25, 26.
- 14 c. In response, on May 15, 2020, Plaintiffs filed a First Amended Complaint
15 ("FAC") to add additional remedies available under California Consumers Legal
16 Remedies Act, codified at Cal. Civ. Code 1750, *et seq.* ("CLRA"). Dkt. 28.
- 17 d. On that same date, Plaintiffs also filed an opposition to Defendants' motions to
18 transfer venue and dismiss for lack of personal jurisdiction (Dkt. 29), to which
19 Defendants replied on May 22, 2020. Dkt 34.
- 20 e. On May 29, 2020, Defendants again moved to dismiss or strike Plaintiffs' FAC
21 under Federal Rules of Civil Procedure 12(b)(6) and 12(f). Dkt. 36. Plaintiffs
22 opposed Defendants' motions on June 12, 2020 (Dkt. 43), and Defendants filed a
23 reply on June 19, 2020 (Dkt. 44).
- 24 f. On June 29, 2020, the Court denied Defendants' motions to dismiss for lack of
25 personal jurisdiction and to transfer venue. Dkt. 46.
- 26 g. After a hearing on July 22, 2020, the Court denied Defendants' motion to dismiss
27 or strike on July 31, 2020. Dkt. 50.
- 28 h. On August 14, 2020, Defendants answered Plaintiffs' FAC. Dkt 51, 52.

- 1 i. Pursuant to the Parties’ unopposed motion and stipulation filed on July 14, 2021
2 (Dkt. 98), and this Court’s order entered the same day (Dkt. 102), Plaintiffs filed
3 the Second Amended Complaint (“SAC”) the very same day (Dkt. 103).

4 6. **Case Management Strategy and Related Activities.** Plaintiffs’ counsel invested
5 significant hours engaged in case management, including the preparation, review, and
6 implementation of a discovery and briefing schedule, status reports and case management
7 statements, protective order regarding confidentiality and protocol regarding electronically stored
8 information (“ESI”), and related activities. The design and implementation of such plans for
9 managing this litigation, at times, required considerable analysis and conferences to protect the
10 putative class’s interests, weighing of likely outcomes and associated costs, and evaluation of the
11 practical realities of litigation and coordination of numerous attorneys, staff, consultants and
12 experts, and related vendors. This included, by way of example, the following activities:

- 13 a. The Parties met and conferred to prepare, draft, and file, on June 3, 2020, the initial
14 Joint Case Management Statement and Federal Rule of Civil Procedure 26(f)
15 report. Dkt. 41.
- 16 b. The Parties also met and conferred to prepare, draft, and file a protective order, on
17 September 4, 2020 (Dkt. 55), governing the confidentiality of information and
18 documents.
- 19 c. The Parties also met and conferred to prepare and draft an ESI Protocol governing
20 the preservation, review, and production of materials that would entail a
21 significant amount work if done poorly or without consideration of the facts,
22 circumstances, and issues in this litigation. Although the Parties prepared a draft
23 ESI Protocol, they did not file it as they focused their efforts, instead, on the
24 upcoming settlement conferences, which were productive, such that further
25 attorney hours committed to finalize and file the protocol did not appear
26 reasonably necessary at the time.
- 27 d. Moreover, throughout the pre-trial stage, the Parties have met and conferred to
28 prepare, draft, and file numerous case management statements and, where

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1 required, schedules, and less substantial status reports, apprising the Court of the
 2 status of the case and any relevant or pertinent matters. *See, e.g.*, Amended Joint
 3 Case Management Statement, 8/19/2020 [Dkt. 53]; Amended Joint Case
 4 Management Statement, 12/2/2020 [Dkt. 70]; Amended Joint Case Management
 5 Statement, 3/3/2021 [Dkt. 79]; Joint Status Report, 5/19/2021 [Dkt. 88]; Joint
 6 Status Report, 6/8/2021 [Dkt. 90]; Joint Status Report, 6/23/2021 [Dkt. 94]; Joint
 7 Status Report, 7/7/2021 [Dkt. 97].

8 7. **Discovery.** Settlement Class Counsel engaged in discovery, compiling documents and
 9 information, reviewing and analyzing discovery and disclosures, propounding and responding to
 10 interrogatories and document requests, and engaging in related activities to not only buttress
 11 Plaintiffs and the putative class’s claims and defend against Defendants’ defenses, but also to
 12 identify deficiencies, evaluate the admissibility of evidence, identify witnesses and third-parties to
 13 subpoena for depositions and/or documents in connection with certification or the merits, conduct
 14 further investigations into information available from alternative sources, and ensure that critical
 15 evidence is prioritized according to a reasonable and thoughtful schedule that is both economically
 16 efficient and effective at advancing the putative class’s position to maximize case value. Some of
 17 the discovery-related activities included the following:

- 18 a. On August 19, 2020, Plaintiffs served Bayer Healthcare LLC and Beiersdorf, Inc.
 19 (“**Defendants**”) with substantial requests for documents and interrogatories that
 20 included issues of class certification and merits.
- 21 b. On August 21, 2020, Defendants similarly served Plaintiffs with requests for
 22 documents and interrogatories.
- 23 c. On September 4, 2020, the Parties exchanged initial disclosures.
- 24 d. On October 2, 2020, Defendants each served responses to Plaintiffs’ discovery
 25 requests.
- 26 e. On October 2, 2020, Defendant Beiersdorf produced documents, which included
 27 comprehensive market research, trade strategy, and advertising designs, as well as
 28 formulation information, all of which informed Plaintiffs’ case strategy and

1 settlement position. In addition, Defendants provided Plaintiffs with
2 comprehensive Product sales data.

3 f. On October 5, 2020, Plaintiffs served responses to Defendants' discovery
4 requests.

5 g. Plaintiffs' counsel evaluated Defendants' discovery, defenses, and the merits of
6 Plaintiffs' claims, consulted with damages experts, conducted extensive research
7 into comparison product labels, market pricing, and retail sales, and conducted a
8 comprehensive analysis of Defendants' sales data to determine maximum case
9 value assuming full liability, as well as reasonable settlement value in light of the
10 risks of litigation and likely price premium attributable to the false mineral-based
11 label of the sunscreen products at issue.

12 **8. Discovery and Investigation Advanced the Prosecution of the Litigation and**
13 **Facilitated Settlement Negotiations.** Armed with information from formal discovery and their
14 investigation, Plaintiffs and their counsel vigorously prosecuted this litigation and negotiated the
15 Settlement Agreement based on a well-informed analysis of the strengths and weaknesses of the
16 case, the likelihood of success at certifying this litigation as a class action and prevailing on the
17 merits at trial, and the maximum and reasonable monetary value of this litigation. Plaintiffs'
18 research and investigation not only facilitated their success on several motions challenging the
19 pleadings, jurisdiction, and venue (Order, 6/29/2020 [Dkt. 46]; Order 7/31/2020 [Dkt. 50]), prepared
20 them for class certification and trial, demonstrating their adequacy, but it also served Plaintiffs well
21 in negotiating a fair, adequate, and reasonable settlement. By order of this Court, the Parties
22 participated in settlement conferences with the acting Magistrate Judge for the Northern District of
23 California, the Honorable Virginia C. DeMarchi. *See* Order, 6/1/2020 [Dkt. 38]; Minute Entry,
24 9/25/2020 [Dkt. 65]; Minute Entry, 12/11/2020 [Dkt. 72]; Minute Entry, 12/14/2020 [Dkt. 73].

25 **9. First Three Settlement Conferences.** Prior to the first settlement conference on
26 September 25, 2020, the parties exchanged comprehensive mediation briefs and submitted
27 confidential settlement letters to the Court that extensively detailed their legal and factual support.
28 Thereafter, the Parties participated in settlement conferences with Judge DeMarchi on three separate

1 days over the course of three months before ultimately reaching the initial settlement. The first two
2 conferences entailed a full day of settlement negotiations and the third conference entailed a half-
3 day of settlement negotiations, all of which Judge DeMarchi mediated. At the conclusion of the last
4 settlement conference, Plaintiffs and Defendants reached a tentative settlement in principle on key
5 terms. Thereafter, the Parties earnestly debated the details of the settlement over the course of
6 several months, including the Notice Plan and claims process, among other terms, in consultation
7 with respected administrators. Indeed, Plaintiffs spent approximately three months negotiating the
8 finer details and language of the initial settlement agreement, including the Claim Form, Long Form
9 and Short Form Notices, Online Advertisements, and Proposed Orders Granting Preliminary and
10 Final Approval. These negotiations required extensive calls between counsel for the Parties, at times
11 exceeding more than several hours throughout the week, numerous discussions amongst Plaintiffs’
12 counsel that, again, would exceed more than several hours throughout the week, and several
13 discussions between Plaintiffs and their counsel. In addition the hours of discussion, the drafting of
14 the settlement agreement and related exhibits required a substantial number of hours to implement
15 the ongoing debate about the details of the settlement.

16 **10. Next Two Settlement Conferences.** On March 17, 2021, Plaintiffs filed their motion
17 for preliminary approval of the class action settlement (Dkt. 81), which this Court heard on April
18 21, 2021 (Minute Entry, 4/21/2021 [Dkt. 86]). On April 29, 2021, the Court denied Plaintiffs’
19 motion for preliminary approval without prejudice, identifying specific concerns that the Parties
20 subsequently remedied in the amended Settlement Agreement. Order, 4/29/2021 [Dkt. 87]; Order,
21 7/29/2021 [Dkt. 107]. To resolve those issues, the Parties returned to Judge DeMarchi for two
22 additional settlement conferences to facilitate further arm’s-length negotiations that took place over
23 the course of two months. Thereafter, Plaintiffs’ counsel, again, spent a significant number of hours
24 in negotiations and discussions with Defendants’ counsel, amongst themselves, and with their
25 clients, as well as the drafting and review phase of the amended Settlement Agreement and related
26 exhibits. Finally, on July 13, 2021, the Parties had a fully executed Settlement Agreement. And, on
27 July 14, 2021, Plaintiffs filed an amended motion for preliminary approval of the amended
28 Settlement Agreement and, after a hearing on July 28, 2021, the Court granted the motion on July

1 29, 2021. PAM, 7/14/2021 [Dkt. 99]; Minute Entry, 7/29/2021 [Dkt. 105]; Order, 7/29/2021 [Dkt.
 2 107]. In granting the motion, the Court found the terms of the Settlement Agreement preliminarily
 3 reasonable and the Notice Plan preliminarily consistent with due process of law. Order, 7/29/2021
 4 [Dkt. 107].

5 **11. Plaintiffs' Counsel's Further Settlement-Related Activities.** Plaintiffs' counsel
 6 spent a considerable amount of time to craft the proposed settlement, vet and work with
 7 administrators, develop and oversee the performance of the Notice Plan, and prepare multiple
 8 motions to obtain this Court's approval of the Settlement Agreement. Setting aside the investigation
 9 necessary to ensure a fully informed, reasonable, and fair settlement, Plaintiffs' counsel spent hours
 10 reviewing and revising the first and amended Settlement Agreements, including multiple
 11 conferences internally and with Defendants' counsel, Plaintiffs, the administrator, and with
 12 consultants. Plaintiffs' counsel spent several hours vetting various administrator budgets and
 13 proposed notice plans, including researching indirect digital campaigns to ensure it will satisfy due
 14 process and reach a substantial majority of the Settlement Class. Plaintiffs' counsel also prepared
 15 and filed a detailed preliminary approval motion on March 17, 2021 (Dkt. 81-82) and an amended
 16 motion on July 14, 2021 (Dkt. 99-100), as well as prepared for and appeared at oral arguments for
 17 each. Following preliminary approval, Plaintiffs' counsel has actively monitored and overseen the
 18 administration of the Notice Plan and Settlement Class's responses to ensure that notice reached
 19 Settlement Class Members and they have had a reasonable opportunity to correct deficiencies before
 20 the deadlines to submit claims, objections, and requests for exclusion. Plaintiffs' counsel has also
 21 spent significant time preparing the instant Motions.

22 **12. Extensive Arm's-Length and Informed Settlement Negotiations Mediated by an**
 23 **Acting Magistrate Judge Based on Robust Investigation and Discovery.** Throughout this
 24 process, neither counsel for Plaintiffs nor Plaintiffs colluded with Defendants or their counsel to
 25 undermine the interests of the Class. At all times, the parties negotiated at arm's length and Plaintiffs
 26 and Plaintiffs' counsel strenuously negotiated for the benefit of the Settlement Class. Consequently,
 27 the Settlement Agreement is the result of fully informed negotiations based on a vast amount of
 28 information obtained during discovery and mediation, in the course of Plaintiffs' extensive

1 investigation, as well as numerous rounds of review of the Settlement Agreement and related
2 documents and vigorous negotiation.

3 13. **Plaintiffs' Service.** Plaintiffs participated in the pre-suit investigation phase,
4 including verifying their adequacy as class representatives, evaluating potential conflicts of
5 interests, ensuring their claims are typical of the Class, and contributing to the drafting of the
6 complaint. They also engaged in the discovery process, including conducting a reasonable and
7 diligent investigation and search for documents and information, reviewing discovery responses,
8 and certifying the accuracy and completeness of responses to interrogatories. Indeed, Plaintiffs'
9 counsel spent hours speaking to each Plaintiff to discuss the discovery requests, search for
10 documents and information independently, and then review responses prior to signing them.
11 Additionally, they actively engaged in the settlement process, including preparing for settlement
12 negotiations, attending a full-day settlement conference, conferring with counsel regarding
13 settlement offers and demands, and evaluating the Settlement Agreement to ensure it constitutes a
14 fair, reasonable, and adequate settlement for the Class. Plaintiffs were fully informed of the benefits
15 and risks before entering into the Amended Settlement Agreement. At all times, Plaintiffs were
16 responsive to the demands of this litigation, made all reasonable efforts to fulfill their obligations to
17 the putative class, and acted in the best interests of the Settlement Class.

18 **II. PLAINTIFFS' COUNSEL'S BACKGROUND**

19 14. **Plaintiffs' Counsel's Qualifications, Experience, Demonstrated Success, and**
20 **Views.** Plaintiffs' counsel are experienced consumer advocates and are well qualified to serve as
21 Class Counsel. *See Ex. 2* [Clarkson Law Firm Resume]; Exhibit *Ex. 3* [Moon Law Firm Resume].
22 They have vast experience successfully representing plaintiffs and classes in complex class-action
23 litigation, specifically in consumer product mislabeling cases. *Ex. 2* [Clarkson Law Firm Resume];
24 Exhibit *Ex. 3* [Moon Law Firm Resume]. Plaintiffs' counsel have diligently prepared this matter
25 for class certification and trial in accordance with the Court's schedule and presented this settlement
26 to the Court in conformity with this District's guidelines. The proposed settlement was negotiated
27 by Plaintiffs' counsel who have extensive experience in consumer class action litigation as set forth
28 in their respective firm resumes. *Ex. 2* [Clarkson Law Firm Resume]; Exhibit *Ex. 3* [Moon Law

1 Firm Resume]. The settlement reflects the realities of each side’s case and the information obtained
 2 during the discovery and mediation process. The settlement is the result of extensive, informed,
 3 arm’s-length negotiations between counsel with substantial litigation experience, who are fully
 4 familiar with the legal and factual issues in this case, and who have specific experience litigating
 5 and settling complex and class action cases. Based on their collective experience, Plaintiffs’ counsel
 6 concluded that the proposed settlement provides exceptional results for the Class while sparing the
 7 Class from the uncertainties and costs of continued and protracted litigation. Based on Plaintiffs’
 8 counsel experience in cases, just like this litigation, and their well-rounded and extensive
 9 investigation and valuation of this matter, they strongly recommend this Court grant final approval
 10 of the Settlement Agreement. Indeed, the following provides a sampling of some representative
 11 cases:

- 12 a. ***Fluoroquinolone Antibiotic Cases***. Mr. Clarkson was the first attorney in the
 13 country to take on clients in connection with claims for permanent and disabling
 14 nerve damage caused by Levaquin, Cipro, and Avelox antibiotics manufactured
 15 by Johnson & Johnson and Bayer Pharmaceuticals. Mr. Clarkson represents
 16 dozens of clients across the country.
- 17 b. ***Garcia v. Iovate et al., Santa Barbara Superior Court, Case No. 1402915***. Mr.
 18 Clarkson successfully intervened in this case on behalf of a class of consumers of
 19 the popular “Hydroxycut” weight loss supplement and, along with the efforts of
 20 its co-counsel, increased the size of the settlement by more than ten-fold to a total
 21 settlement value of over \$10 million.
- 22 c. ***Imburgia, et al vs. DirecTV Inc., Los Angeles County Superior Court, Case***
 23 **No. BC398295**. Mrs. Clarkson was actively involved in obtaining class
 24 certification of a matter involving unlawful termination fees against the satellite
 25 television giant, DirecTV, and was among the attorneys appointed as co-lead class
 26 counsel for the certified class. Most notably, she played an integral role in
 27 defeating DirecTV’s motion to compel arbitration following the United States
 28 Supreme Court’s 2011 decision in *AT&T Mobility v. Concepcion* – the only case

1 in the nation to overcome *Concepcion*'s broad impact on consumer contracts with
 2 arbitration provisions. Mrs. Clarkson participated in the further defeat of
 3 DirecTV's appeal in the Ninth Circuit. The decision was ultimately reversed by
 4 the United States Supreme Court, although Justices Thomas, Ginsburg, and
 5 Sotomayor filed dissents, consistent with plaintiffs' position, writing that the
 6 majority's decision "again expanded the scope of the FAA, further degrading the
 7 rights of consumers and further insulating already powerful economic entities
 8 from liability for unlawful acts."

9 d. ***Grair vs. Johnson v. GlaxoSmithKline, Inc.*, 166 Cal. App. 4th 1497 (2009), Los**
 10 **Anges County Superior Court, Case No. BC288536.** While at her former law
 11 firm, Mrs. Clarkson assisted in achieving a class settlement of over \$3.5 million
 12 for a class of California consumers of the drug Paxil. This was a hard-fought
 13 lawsuit that spanned over the course of eight years. The settlement changed the
 14 general perception of sleeping pills which are no longer regarded as "non-habit
 15 forming" as falsely advertised by GlaxoSmithKline.

16 e. ***Penos vs. Zell, et al.*, Los Angeles County Superior Court, Case No. BC398686.**
 17 Mrs. Clarkson assisted in uncovering Labor Code violations on behalf of
 18 employees in this certified class action lawsuit. She was an integral part of the
 19 discovery, briefing, and negotiations that ultimately led to a class action settlement
 20 of this matter, resulting in hundreds of thousands of dollars to the employee class.

21 **III. SETTLEMENT FUND & ALLOCATION**

22 15. **Monetary Relief Per Amended Settlement Agreement.** Under the terms of the
 23 Settlement Agreement, Defendants must pay \$2.25 million into the Settlement Fund that shall be
 24 exhausted by: (1) Class Members' valid claims, (2) notice and claims administration costs, (3)
 25 Plaintiffs' attorneys' fees and costs, and (4) incentive or service awards to Plaintiffs. *See* Ag. at ¶¶
 26 2.38 (Settlement Benefit), 2.40 (Settlement Fund). If the Settlement Fund is under- or over-
 27 subscribed, each valid claim will receive a *pro rata* upwards (for a maximum multiplier of nine (9))
 28 or downwards adjustment per Product, respectively. *Id.* ¶ 3.13. Any remaining funds shall be

1 disbursed *cy pres* to a charitable organization. *Id.*³ No money reverts to Defendants. *Id.* ¶ 2.40. Class
 2 Members who cannot produce proof of purchase may submit a claim to receive \$2.50 per unit of
 3 Product, for up to four (4) units per household, which totals \$10.00. *Id.* ¶ 3.4. Class Members who
 4 submit proof of purchase with their claim may receive \$2.50 per unit of Product, without limitation
 5 to the number of units. *Id.*

6 16. **Effective and Fair Distribution of Settlement Fund and Treatment of the**
 7 **Settlement Class.** Under the Settlement Agreement, Defendants must pay \$2.25 million into the
 8 Settlement Fund and each purchaser who submits a valid claim may receive \$2.50 per Product,
 9 without limitation for consumers who have proof they purchased more than four Products, which
 10 will be adjusted *pro rata* in the event of the Settlement Fund’s over- or under-subscription. Ag. at
 11 ¶¶ 2.4, 3.4. The household cap of four Products without proof of purchase is based on customary
 12 purchasing behaviors for similar household consumer products and aligns with the average repeat
 13 purchaser rate for the Products (of approximately [REDACTED] over the course of two or more years).
 14 The claims have been—and will continue to be—processed through the experienced and Court-
 15 approved Claim Administrator, DSG, to facilitate submission of valid claims, detect and eliminate
 16 fraudulent claims, and maintain a complete accounting of the distribution of moneys from the
 17 Settlement Fund with the oversight of all counsel and this Court. Ag. at § III; Order, 7/29/2021 [Dkt.
 18 107], at ¶ 9 (appointing DSG).

19 **IV. VALUATION OF CONSIDERATION AND RELIEF TO SETTLEMENT CLASS**

20 17. **Monetary Relief Valuation.** An evaluation of the monetary component of the

21
 22 ³ **Cy Pres Award.** As set forth in the Declarations of Katherine A. Bruce, Kevin O. Moon, Steven
 23 Prescott, Mike Xavier, Theodore Scarborough, Alvaro Alonso, and Teresa Gonzalez-Ruiz
 24 submitted in support of Plaintiffs’ amended motion for preliminary approval of class action
 25 settlement, filed July 13, 2021 (Dkt. 99-2 to 99-8), none of the Parties or their counsel colluded to
 26 steer the *cy pres* award to Look Good Feel Better to serve their personal interests to the detriment
 27 of the class. They are not owners, executive officers, or employees and, therefore, they do not have
 28 an ownership or financial interest in the charitable organization, and they cannot control how the
 charity administers or allocates the award. Plaintiffs and their counsel agreed to designate this
 charity solely based on the belief that the charity works to combat cancer, would use the award in a
 manner that serves the interests of the class of consumers who purchase sunscreen (and the Products
 at issue in this case), which are primarily designed to provide sun protection and, therefore, prevent
 cancer. *Id.* As such, this Court preliminarily approved the *cy pres* recipient after careful
 consideration of its nexus to this litigation and confirmation of the lack of any collusion or self-
 serving interests. Order, 7/29/2021 [Dkt. 107].

1 proposed settlement demonstrates its adequacy and reasonableness in two ways:

2 a. **Price Premium.** First, the Settlement Class’s best-case recovery of all economic
 3 losses would be the price “premium” consumers paid for the alleged falsely
 4 advertised product attribute—its mineral-based quality. Based on Settlement
 5 Class Counsel’s independent research, conducted in late-2020, regarding the
 6 advertised retail prices for major brick and mortar and ecommerce retailers (such
 7 as CVS, RiteAid, Target, Walmart, Amazon, Instacart, and Google Shopping), the
 8 average retail price for each Product falls within a range of approximately \$7.44
 9 and \$9.89, which averages across all Products to approximately \$8.88. The \$2.50
 10 refund for Products that cost approximately \$8.88 is equal to a 28.2% price
 11 premium, which is within the range of a reasonable estimated price premium based
 12 on my firm and my co-counsel’s collective experience in litigating false
 13 advertising cases and having conjoint analyses conducted to determine the price
 14 premium for an every-day household good where the challenged advertising claim
 15 is not the primary purpose of the product (which, here, is sun protection and not
 16 mineral active ingredients).

17 b. **Settlement Fund Percentage of Total Sales.** Second, based on the sales data
 18 provided by Defendant, the \$2.25 million Settlement Fund represents nearly [REDACTED] %
 19 of Defendants’ sales of approximately [REDACTED], for approximately [REDACTED]
 20 [REDACTED] products, over the course of approximately 5 years. If one were to assume
 21 that a full refund of the purchase price is the Settlement Class’s best-case scenario
 22 (which far exceeds actual damages or restitution absent proof that the Products do
 23 not provide any sun protection—i.e., Settlement Class Members received
 24 absolutely no benefit in exchange for their money), then one would conclude
 25 Defendants’ total sales represent the maximum monetary value of the case.
 26 Although Plaintiffs’ counsel does not suggest that Defendants’ total sales is
 27 equivalent to Defendants’ maximum exposure for the actual economic losses
 28 suffered by the Settlement Class (i.e., actual damages being the portion of the sales

1 price that consumers paid solely for the falsely advertised “Mineral-Based”
 2 attribute), it represents the absolute outer-limits to the Settlement Class’s
 3 economic losses recoverable in this action assuming the price premium was 100%
 4 of the sales price and the Class were entitled to a complete refund for Products
 5 that failed to provide any benefit at all.

6 18. **Injunctive Relief & Valuation.** In addition to the monetary relief, the changed
 7 practices will benefit the Settlement Class by ensuring transparency with the challenged “Mineral-
 8 Based” labeling claim. Defendants have removed “Mineral-Based” from the Products’ labels and,
 9 under the terms of the Settlement Agreement, Defendants have agreed that if the term “Mineral-
 10 Based” is used on Coppertone sunscreen product labels that contain chemical active ingredients
 11 over the next approximately 2 years and two months (up to and including December 31, 2023), then
 12 the product packaging will state the product contains other sunscreen active ingredients. Ag. at ¶¶
 13 1.4, 4.1. The cessation of the mineral-based claim, and agreement to add labeling statements that
 14 ensure transparency, provide a significant benefit to consumers, regardless of whether they submit
 15 a claim or seek exclusion from the Settlement Class. The proposed injunctive relief not only benefits
 16 the Settlement Class, but it provides a significant benefit to all consumers, a fairly functioning
 17 marketplace, and the public that is extraordinarily valuable. Transparency and honesty in advertising
 18 facilitates a highly visible and competitive marketplace by promoting credibility and fair
 19 competition. It raises the floor of truth telling in advertising by major competitors elevating the
 20 customary standard of practice across the industry. It serves fidelity to consumer protection laws
 21 designed to prevent consumer fraud. It avoids future deception that causes substantial economic
 22 losses to consumers who purchase the Products and pay a premium for their falsely advertised all-
 23 mineral active ingredients.⁴

24 19. **Continued Costs and Risks in Strongly Contested Litigation.** Proceeding in this
 25 litigation in the absence of a settlement poses significant risks, such as failing to certify this action
 26 as a class, having summary judgment granted against Plaintiffs, or losing at trial.

27 a. **Battle of Experts.** Even assuming that Plaintiffs were to achieve certification, and
 28

⁴ See also, *infra*, fn. 5 (monetary value approximation for injunctive relief).

1 overcome the inevitable motion for summary judgment, they would face the risk
2 of failing to establish liability at trial in light of conflicting expert testimony. Not
3 only would the Parties' experts battle over consumer perceptions of the challenged
4 "Mineral-Based" labeling claims, but they would battle over whether consumers
5 paid a premium for the "Mineral-Based" attributes, including what, if any, dollar
6 amount should be assigned to that premium. Because Defendants strongly dispute
7 consumers' perceptions, that any price premium exists, and the amount of the
8 price premium, any testimony from the Parties' experts necessary to establish or
9 refute these issues would diverge wildly. In this "battle of experts," it is virtually
10 impossible to predict with any certainty which testimony would be credited, and,
11 ultimately, which expert's version would be accepted by the jury. The experience
12 of Plaintiffs' counsel has taught them that these considerations can make the
13 ultimate outcome of a trial highly uncertain.

14 b. **Appellate Risks and Delays.** Moreover, even if Plaintiffs were to prevail at trial,
15 they would face additional risks if Defendants appeal or move for a new trial. *See,*
16 *e.g., In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 WL 238298,
17 1991 U.S. Dist. LEXIS 15608, at *2-3 (N.D. Cal. Sept. 6, 1991) (the jury rendered
18 a verdict for plaintiffs exceeding \$100 million, however, the court overturned the
19 verdict and ordered a new trial with respect to the corporate defendant). By
20 settling, Plaintiffs and the Settlement Class avoid these risks and the delays of the
21 appellate process.

22 c. **Risks of Decertification.** Plaintiffs also face risks in certifying a class and
23 maintaining that class status through trial. Defendants have also vigorously argued
24 against class certification, including issues of typicality, jurisdiction, and
25 Plaintiffs' standing to represent consumers across the nation with respect to their
26 purchase of various Products; and issues concerning commonality and
27 predominance related to reliable class-wide proof of a damages model consistent
28 with Plaintiffs' liability theory under *Comcast v. Behrend*, 569 U.S. 27 (2013).

1 Even assuming that the Court were to certify a class, the class could still be
2 decertified at any time. *See, e.g., In re Netflix Privacy Litig.*, No. 5:11-CV-00379
3 EJD, 2013 U.S. Dist. LEXIS 37286, 2013 WL 1120801, at *6 (N.D. Cal. Mar. 18,
4 2013) (“The notion that a district court could decertify a class at any time is one
5 that weighs in favor of settlement.”) (citations omitted). From their prior
6 experience, Plaintiffs’ counsel anticipate that Defendants would likely move for
7 reconsideration, attempt to appeal the Court’s decision pursuant to Rule 23(f),
8 and/or move for decertification at a later date. Here, the Settlement Agreement
9 eliminates these risks by ensuring Settlement Class Members a recovery that is
10 certain, immediate, and eliminates the risk that they would be left without any
11 recovery at all.

12 d. **Expert Costs.** In addition, the expense to prosecute this case is substantial in light
13 of the need for expert testimony from multiple disciplines, including economics,
14 conjoint analysis, and marketing. The costs associated with these experts,
15 including expert investigation, analysis, surveys, reports and rebuttal reports,
16 depositions, oppositions to any *Daubert* challenges, testimony, and any associated
17 costs such as travel expenses, would quickly accumulate. The accumulation of
18 such costs could quickly lead to a scenario in which settlement might not be
19 economically feasible for either party.

20 e. **Trial Delays to Relief & Ongoing/Continued Harm.** Finally, because trial
21 would likely not occur until June 22, 2022 (*see* Case Management Scheduling
22 Order, 8/20/2020, Dkt. 54) or later, any monetary and injunctive relief achieved
23 as a result of trial, would not occur for another one to two years, or more. In the
24 meantime, Defendants could continue to deceptively label the Products with
25 impunity to the financial detriment of Settlement Class Members and consumers.

26 f. **Plaintiffs Faced a Formidable Opponent and Demonstrated Success on Novel
27 and Complex Issues.** This case was novel and without the benefit of well-
28 established precedent informing the litigation and providing a roadmap to success.

1 Plaintiffs' counsel are aware of only one other case concerning misleading
 2 "Mineral-Based" sunscreen products (*Mayhew v. KAS Direct, LLC*, 2018 WL
 3 3122059, at *1 (S.D.N.Y. June 26, 2018)), but that out-of-circuit case involved
 4 numerous additional misrepresentations concerning a variety of different
 5 products. Plaintiffs litigated this action without having the predictability provided
 6 by well-established precedent. Additionally, Defendants are well-resourced, with
 7 many billions of dollars in revenue annually, and represented by an experienced
 8 and reputable defense firm, which strongly and deftly contested liability.
 9 Defendants hotly contested whether Plaintiffs' claims were preempted by the
 10 Federal Food, Drug, and Cosmetic Act. *See* MTD, 5/1/2020 [Dkt. 26], at p. 2.
 11 Further, in what Defendants described as "an issue of first impression,"
 12 Defendants claimed the FDA had primary jurisdiction over Plaintiffs' specific
 13 claims. *Id.* Defendants also attacked Plaintiffs' allegations based on a host of
 14 additional grounds. *Id.* However, Plaintiffs were able to overcome every one of
 15 Defendants' attacks to the significant benefit of the Settlement Class. Order,
 16 6/29/2020 [Dkt. 46]; Order 7/31/2020 [Dkt. 50]. Plaintiffs' counsel took on and
 17 overcame these risks and their ability to prevail on motions to dismiss and obtain
 18 a lucrative settlement against formidable opposition not only confirms the quality
 19 of their representation, but also evidences their expertise.

20 **V. THE SUCCESS OF THE LITIGATION AND SETTLEMENT CLASS'S INITIAL**
 21 **REACTION**

22 20. **Achieved Primary Litigation Objectives.** In sum, Plaintiffs' dual primary objectives
 23 in litigation have been achieved: (1) fair and adequate monetary compensation to consumers misled
 24 into purchasing the Products based on the false "Mineral-Based" labels; and (2) a change in
 25 Defendants' marketing practices that will ensure honesty and transparency to all consumers. Setting
 26 aside the extraordinary value achieved through the injunctive relief component, the dollar value of
 27 the direct monetary relief totals approximately █ % of Defendants' past and prospective sales.

28 21. **Settlement Class's Initial Reaction.** On September 17, 2021, the Court-appointed

1 Claims Administrator, DSG, initiated the Notice Plan. The deadline to respond to the proposed
 2 settlement, be it the submission of a claim, objection, or request for exclusion expires sixty days
 3 later on November 17, 2021. Ag. at ¶ 2.4 [Claims]; Order, 7/29/2021 [Dkt. 107], at ¶¶ 13
 4 [Exclusions], 16 [Objections]. Although the Claim Period is almost three-quarters complete, DSG
 5 has already received more than 63,000 claims as of October 31, 2021, and is on track to achieve the
 6 approximately 75,000 to 100,000 estimated claims. *See Ex. 1* [Admin. Rept.]; Schey Supp. Decl
 7 ISO Am. PAM, 7/14/2021 [Dkt. 99-10], at ¶ 9. Additionally, *neither Plaintiffs nor DSG have*
 8 *received any requests for exclusion and not a single Settlement Class Member has filed an*
 9 *objection as of October 31, 2021.* *See Ex. 1* [Admin. Rept.]. Thus, the Settlement Class has
 10 unanimously shown a positive reaction to the Settlement Agreement. In addition, no later than
 11 December 1, 2021, Plaintiffs will file a list of any and all valid opt-outs DSG receives postmarked
 12 by November 17, 2021, as well as update this Court regarding the Settlement Class's reaction to the
 13 Settlement Agreement. Order, 7/29/2021 [Dkt. 107], at ¶ 14.

14 VI. SETTLEMENT CLASS CERTIFICATION

15 22. **Class Certification Elements.**

- 16 a. **Numerosity.** there were tens or hundreds of thousands, if not millions, of
 17 Settlement Class Members throughout the United States, as more than [REDACTED]
 18 [REDACTED] products have been sold in the past five years and market research shows
 19 a repeat purchaser rate of approximately [REDACTED]. The
 20 estimated units of Products sold is based on Defendants' sales data designated as
 21 confidential.
- 22 b. **Plaintiffs'/Counsel's Fair & Adequate Representation.** Plaintiffs and their
 23 counsel do not have any conflicts with Settlement Class Members and have
 24 vigorously prosecuted this case through their pre-litigation investigation, complex
 25 motion practice, fact discovery, settlement negotiations, and structuring of the
 26 proposed settlement. *See, supra.* Plaintiffs agreed to serve in a representative
 27 capacity, communicated frequently with their attorneys, responded to discovery
 28 requests, contributed to the preparation of the complaint, and actively participated

1 in settlement negotiations. *See also, supra.* Plaintiffs' counsel are qualified to
 2 serve as Settlement Class Counsel. *See also, supra.*

- 3 c. **Superiority.** Settlement Class Members lack the incentive to bring their own
 4 cases against Defendants, given their minimal potential individual recovery in
 5 comparison to the exorbitant costs of establishing liability, when the estimated
 6 average retail price, per Product, ranges between \$7 and \$10, which represents the
 7 absolute maximum conceivable actual damages (actual consumer economic
 8 losses) that may be recovered in this action. Additionally, Plaintiffs' Counsel have
 9 monitored federal filings throughout this proceeding to identify any similar cases
 10 and have found none. Defendants have not reported any related cases to Plaintiffs
 11 pursuant to N.D. Cal. Civ. L.R. 3-12.

12 **VII. ATTORNEYS' FEES AND COSTS**

13 **23. Total Requested Fees and Costs Award for All Settlement Class Counsel.**

14 Pursuant to the terms of the Settlement Agreement, Settlement Class Counsel may apply to the
 15 Court for an award of attorneys' fees up to 30% of the \$2.25 million common fund (\$675,000), plus
 16 costs and expenses. Here, Plaintiffs seek \$675,000 in attorneys' fees and \$6,242.55 in costs.
 17 Settlement Class Counsel have dedicated themselves to the prosecution of Plaintiffs and similarly
 18 situated consumers for approximately 2 years, incurring to date a lodestar of \$755,857.50 in billable
 19 professional time, based on their current billing rates, receiving no compensation at all for their time
 20 and efforts to date, and having no guarantee that they would ever receive such compensation. The
 21 hours expended, hourly rates, and related fees, along with the out-of-pocket expenses incurred are
 22 reasonable in amount and were reasonably necessary to prosecute the Settlement Class's claims in
 23 this litigation, as well as achieve the exemplary result afforded under the Settlement Agreement.

24 **24. Percentage of Recovery & Loadstar Cross-Check.**

- 25 a. The \$675,000 million fee sought represents 30%, in compliance with the
 26 Settlement Agreement, of the \$2.25 million cash component of the settlement,
 27 after an *inverse or negative* 1.119 multiplier is applied to Settlement Class
 28 Counsel's lodestar, without consideration of the injunctive relief component.

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A 30% fee is less than one-third of the Settlement Fund.

- b. When the value of the injunctive relief component is considered, which avoids future economic losses in the range of roughly [REDACTED],⁵ then the total settlement value is approximately [REDACTED]. With this added monetary benefit to the Settlement Class, the \$675,000 requested fee represents approximately [REDACTED] of the total settlement value, which is a negative or inverse multiplier of [REDACTED].
- c. Both calculations, including a negative multiplier to reach 30% of the Settlement Fund and 30% of the percentage of the total settlement value (which takes into consideration the value of injunctive relief), fall well within the range approved by courts in other similar cases.

25. **Lodestar by Members of Clarkson.**

- a. **Materials Reviewed re Billing Records.** Members of Clarkson, as a matter of firm policy, maintain time records that identify the timekeeper, time spent, and activities performed, which are regularly and contemporaneously recorded by the listed timekeepers in the ordinary course of business. I have reviewed Clarkson’s time entries, cross-referenced file materials and communications, and consulted with various timekeepers to: ensure the

⁵ The monetary value of injunctive relief may be *roughly* estimated by: (1) calculating average annual prospective sales based on Defendants’ sales data for the past approximately 5 years and determining the historical average annual revenues (approximately [REDACTED]); and (2) multiplying it by an estimated “price premium” that is based on either: (a) the total settlement amount of \$2.25 million in comparison to the total revenues (nearly [REDACTED]), or (b) individual Settlement Class Member recovery in comparison to the purchase price (28.2% or the average retail purchase price of \$8.88 divided by the \$2.50 per product recovery). Based on this calculation, and assuming that all market conditions remained relatively constant, and that the injunctive relief eliminated all economic losses, then the Settlement Agreement avoids approximately [REDACTED] to \$1,274,640, on average annually, in future economic losses. As the injunctive relief component commenced as of the preliminary approval of the Settlement Agreement on July 29, 2021, and concludes approximately 2.42 years later on December 31, 2023, then the total future losses avoided roughly equals [REDACTED] to \$3,084,628.80. These estimated values are *general* estimates that are only intended to give the Court a method to understand the monetary value of injunctive; they are not intended to be precise or definitive valuations.

1 accuracy and reliability of time records; eliminate any duplicate, unnecessary,
2 excessive, or erroneous time entries; and confirm all billable hours set forth in
3 this declaration regard this action and are reasonable, accurate, and complete
4 as of the signing of this declaration.

- 5 b. **Lodestar by Members of Clarkson.** The following chart sets forth each
6 member of Clarkson according to their name, position, and/or year of
7 graduation from law school (where applicable). It also provides the number of
8 hours, in six-minute increments (0.1), that each member worked on this case
9 and their corresponding hourly billing rate. It calculates the total fees incurred
10 by multiplying the number of hours and billing rate, including a grand total for
11 the firm and for each member. Lastly, it calculates the weighted average
12 billing rate for this case by dividing the total fees by the total hours. I have
13 also attached a chart as **Exhibit 5** that similarly identifies timekeepers and
14 summarizes their hours, rate, and total fees according to the type of activity.

CLARKSON LODESTAR			
Member, Position (Year of Graduation)	Hours	Rate (\$/Hour)	Total Fees (\$)
Ryan J. Clarkson, Managing Partner (2005)	133.6	875	\$116,900.00
Katherine A. Bruce, Partner (2012)	241.6	775	187,240.00
Lauren A. Anderson, Associate (2019)	247.8	450	111,510.00
Kelsey J. Elling, Associate (2019)	82.1	450	36,945.00
Paralegal		225	
TOTAL HOURS/FEES	787	-	\$471,022.50
WEIGHTED AVERAGE BILLING RATE	-	598.50	-

24 26. **Lodestar by Members of Moon.** The following chart sets forth each member of
25 Moon according to their name, position, and/or year of graduation from law school (where
26 applicable). It also provides the number of hours, in six-minute increments (0.1), that each member
27 worked on this case and their corresponding hourly billing rate. It calculates the total fees incurred
28 by multiplying the number of hours and billing rate, including a grand total for the firm and for each

1 member. Lastly, it calculates the weighted average billing rate for this case by dividing the total fees
 2 by the total hours. I have also attached a chart as **Exhibit 6** that similarly identifies timekeepers and
 3 summarizes their hours, rate, and total fees according to the type of activity.

MOON LODESTAR			
Member, Position (Year of Graduation)	Hours	Rate (\$/Hour)	Total Fees (\$)
Christopher D. Moon, Managing Partner (2006)	179	850	\$152,150.00
Kevin O. Moon, Managing Partner (2006)	156.1	850	132,685.00
TOTAL HOURS/FEES	335.1	-	\$284,835.00
WEIGHTED AVERAGE BILLING RATE	-	850	-

11 27. **Future Hours/Work.** In addition to the above, I estimate that Settlement Class
 12 Counsel will incur dozens of additional hours for future work in connection with this case through
 13 final approval and to ensure the Court-appointed settlement administrator satisfies all duties with
 14 respect to the settlement at issue in the instant motions. Settlement Class Counsel will continue to
 15 devote additional time and resources to this litigation. This includes, among other things: preparing
 16 and appearing for the hearing on the instant motions, including responding to any oppositions or
 17 objections; assisting Settlement Class Members in the settlement claims process and responding to
 18 Settlement Class Member inquiries; ensuring all valid claims are paid and no invalid or fraudulent
 19 claims are paid from this settlement; and monitoring the distribution of settlement monies to
 20 Settlement Class Members who submit valid claims

21 28. **Costs Incurred.** Clarkson routinely maintains records of each cost incurred in a
 22 particular case as a matter of firm policy, as well as an itemized listing of the primary out-of-pocket
 23 expenses disaggregated by date, description, and amount. Expenses are only allocated to a particular
 24 case if they are not standard overhead costs incurred in general operations, but instead were only
 25 incurred and intended to serve the particular case. Plaintiffs' total litigation expenses of \$6, 242.55
 26 were reasonably incurred in this case. These expenses are reflected in the records of Settlement
 27 Class Counsel and were necessary to prosecute this litigation. All expenses were carefully and
 28 reasonably expended, and they reflect market rates for various categories of expenses incurred. Most

1 of these expenses were incurred for expert opinions, mediation fees, and court fees. Expense items
 2 were billed separately, and such charges were not duplicated in Settlement Class Counsel's billing
 3 rates. Below is a summary chart of the litigation expenses by category:

SETTLEMENT CLASS COUNSEL'S EXPENSES	
Category of Expenses	Cost Incurred
Filing Fee	\$400
Service/Postage Fees	\$739
Transcript Fees	\$103.55
Expert/Consultants	\$5,000
TOTAL COSTS INCURRED	\$6,242.55

10 29. **Future Costs.** The current costs set forth above do not include any costs and expenses
 11 Settlement Class Counsel expects to incur after the filing of these Motions—be it an additional for
 12 traveling to and appearing for the hearings on these motions, or any costs incurred in connection
 13 with any objections and/or appeals of a ruling on these Motions. The requested award for
 14 reimbursement of costs should be granted because all of the costs and expenses are reasonably
 15 incurred and necessary given the complex nature and nationwide scope of this case.

16 30. **Market Hourly Billing Rates.** Based on my knowledge and experience, the hourly
 17 rates reflected above are within the range of market rates charged by attorneys of equivalent
 18 experience, skill, and expertise. Clarkson charges the same hourly rates to clients who retain
 19 Clarkson on a non-contingent basis—i.e., clients who regularly pay for billed services on a periodic
 20 basis. I have personal knowledge of the range of hourly rates typically charged by counsel in
 21 California and the United States, both on current and past matters, for class actions involving
 22 consumer protection matters, similar to the subject matter of this case. My understanding of said
 23 rates comes from: (1) litigating and reviewing attorneys' fee applications, declarations, supporting
 24 materials, and orders awarding or denying requested fees; (2) discussing fees with other attorneys;
 25 (3) reviewing declarations regarding prevailing market rates filed by other attorneys seeking fees;
 26 (4) reviewing surveys, articles, and empirical research regarding attorneys' fees; (5) spending five
 27 years in my practice as a lawyer solely working on a non-contingent hourly basis, negotiating and
 28 reviewing agreements concerning fees for attorneys of varying expertise, specialties, years in

1 practice, and firms; and (6) auditing time records. In determining Clarkson’s hourly rates from year
 2 to year, Clarkson has consciously taken market rates into account and has aligned its rates with the
 3 market. Clarkson’s rates are consistent with, and in fact less than, the non-contingent market rates
 4 charged by attorneys of reasonably comparable experience, skill, and reputation for reasonably
 5 comparable class action work.

6 **31. Recent Example of Fee Award to Settlement Class Counsel.** In fact, recently, in
 7 granting final approval of a nationwide class-action settlement concerning mislabeled products, the
 8 San Bernardino Superior Court considered the same hourly rates for Clarkson as here as part of a
 9 lodestar cross-check and thereafter approved an attorneys’ fee award of 33% of the common fund.
 10 *See O’Brien v. Sunshine Makers, Inc.*, Superior Court for the County of San Bernardino, Case No.
 11 CIV-SB-2027994 (Order, Sept. 21, 2021).

12 **32. Previously Approved Hourly Rates.** In fact, comparable hourly rates have been
 13 found reasonable by various courts—some *more than a decade ago*—for reasonably comparable
 14 services, including:

15 a. *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07 1827 SI, MDL,
 16 No. 1827 (N.D. Cal. 2013), an antitrust class action, in which the court found blended hourly rates
 17 of \$1000, \$950, \$861, \$825, \$820, and \$750 per hour reasonable.

18 b. *Williams v. H&R Block Enterprises, Inc.*, Alameda County Superior Ct. No.
 19 RG08366506, Order of Final Approval and Judgment filed November 8, 2012, a wage and hour
 20 class action, in which the court found the hourly rates of \$785, \$775, and \$750 reasonable for the
 21 more senior counsel.

22 c. *Luquetta v. The Regents of the Univ. of California*, San Francisco Superior
 23 Ct. No. CGC-05-443007, Order Granting Plaintiff’s Motion for Common Fund Attorneys’ Fees
 24 and Expenses, filed October 31, 2012, a class action to recover tuition overcharges, in which the
 25 court found the hourly rates of \$850, \$785, \$750, and \$700 reasonable for plaintiffs’ more
 26 experienced counsel.

1 d. *Pierce v. County of Orange*, 905 F. Supp. 2d 1017 (C.D. Cal. 2012), a civil
2 rights class action brought by pre-trial detainees, in which the court approved a lodestar- based on,
3 *inter alia*, rates of \$850 and \$825 per hour in 2011.

4 e. *Holloway et. al. v. Best Buy Co., Inc.*, No. 05-5056 PJH (N.D. Cal. 2011)
5 (Order dated November 9, 2011), a class action alleging that Best Buy discriminated against
6 female, African American and Latino employees by denying them promotions and lucrative sales
7 positions, in which the court approved lodestar-based rates of up to \$825 per hour.

8 f. *Californians for Disability Rights, Inc., et al. v. California Department of*
9 *Transportation, et al.*, 2010 U.S. Dist. LEXIS 141030 (N.D. Cal. 2010), adopted by Order
10 Accepting Report and Recommendation filed February 2, 2011, a class action in which the court
11 found reasonable 2010 hourly rates of up to \$835 per hour.

12 g. *Credit/Debit Card Tying Cases*, San Francisco County Superior Court, JCCP
13 No. 4335, Order Granting Plaintiffs' Motion for Attorneys' Fees, Expenses, and Incentive
14 Awards, filed August 23, 2010, an antitrust class action, in which the court, before applying a 2.0
15 lodestar multiplier, found reasonable 2010 hourly rates of \$975 for a 43-year attorney, \$950 for a
16 46-year attorney, \$850 for 32 and 38 year attorneys, \$825 for a 35-year attorney, \$740 for a 26-
17 year attorney, \$610 for a 13-year attorney, and \$600 for a 9-year attorney, and \$485 for a 5-year
18 attorney.

19 33. **Publications re: Market Hourly Rates.** Settlement Class Counsel's hourly rates are
20 reasonable and well in line with the standard and accepted hourly rates in this jurisdiction by
21 attorneys of similar experience, reputation, and skill. The reasonableness of Settlement Class
22 Counsel's hourly rates is also supported by a number of surveys and articles concerning legal billing
23 rates, which are attached as **Exhibits 7-14**. As discussed in paragraph 2, *supra*, these publications
24 evidence reported rates that have progressively increased over the years. Indeed, these publications
25 show rates from several years to more than a decade ago that are either the same as, or greater than,
26 Settlement Class Counsel's current rates. In this way, the publications further evidence the
27 reasonableness of Settlement Class Counsel's current rates, as several years of constant increases
28 have elapsed, but Settlement Class Counsel continues to bill at the lower rates charged by firms

1 practicing in complex litigation about a decade ago.

2 34. **Quality of Representation.** Settlement Class Counsel has consistently displayed a
3 high level of skill regarding the complex legal and factual issues presented in this action. Settlement
4 Class Counsel worked diligently for approximately two years to prosecute this action and spent
5 several months crafting a settlement that would ensure real and substantial benefits for all Settlement
6 Class Members. In doing so, Settlement Class Counsel avoided years of delay associated with
7 litigating this case, as well as the risks and uncertainty inherent in taking the case to trial and
8 ultimately collecting any monetary judgment if Plaintiffs prevailed.

9 35. **Forego Employment.** From the beginning, this action has demanded a great deal of
10 Settlement Class Counsel's attention. This action required considerable work due to its novel theory
11 and application to a significant number of products sold over the course of decades, including, for
12 example, significant: pre- and post-filing investigation; research and analysis of legal and factual
13 issues concerning certification as applied to the factual matter and case theory; research and analysis
14 regarding the laws of different states on liability, remedies, and defenses; research and analysis of
15 complex scientific matters concerning the toxicity of the products at issue; research and analysis of
16 decades of marketing efforts, advertisements and labels on a multitude of products; consultation
17 with experts from a variety of disciplines; and mediation and settlement. Due to the considerable
18 expenditure of time, effort, and resources to prosecute this action, Clarkson was required, on some
19 occasions, to forego employment in other matters, and to reallocate resources away from other
20 competing matters, in order to allow Clarkson to commit the necessary resources to prosecute this
21 case.

22 36. **Contingency Fee Retention & Assumption of Risks.** Adding to the other risks
23 discussed herein is the fact that Plaintiffs' counsel undertook this litigation on a contingency-fee
24 basis, requiring them to shoulder not only the cost of attorney time, but all the costs of nearly two
25 years of litigation, and several months of pre-litigation investigation. Indeed, Plaintiff's counsel
26 performed all of the described work on a pure contingency-fee basis, with no guarantee that they
27 would ever be paid for any of their work or be reimbursed for any of their out-of-pocket costs. They
28 turned down other potentially profitable matters in order to take on this large-scale case, and devoted

1 resources to it that could have been devoted to other potentially income-generating matters. In this
2 way, Plaintiffs’ counsel undertook this complicated litigation, based on a relatively novel theory,
3 despite all of the risks entailed with certification, exorbitant expert costs, trial, and the inevitable
4 appeal to a successful verdict, and saw it through to completion even though they might never be
5 paid at all and instead lose hundreds of thousands in sunken costs and millions in attorney hours.

6 I declare the foregoing is true and correct under the penalty of perjury of the laws of the
7 United States of America.

8 Executed this 3rd day of November, 2021.

9 /s/ Katherine A. Bruce
10 Katherine A. Bruce, Esq.

11 *Attorney for Plaintiffs and Settlement Class*
12 *Representatives Mike Xavier and Steven*
13 *Prescott, and the Settlement Class*

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