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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
Assigned for all purposes to the Hon. Nathanael M. Cousins

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' AMENDED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Hearing Information
Hearing Date: August 18, 2021
Time: 1:00 p.m. (PST)
Courtroom: 5

Video/Telephone Access
Webinar: https://cand-uscourts.zoomgov.com/j/1601632758?pwd=VmthNENlOWFSNGRFdEFJSzlVcVZ1QT09
Webinar ID: 160 163 2758
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Local telephone dial-in: 1-669-254-5252 or 1-646-828-7666

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case involves a putative class action filed by Plaintiffs Mike Xavier and Steven Prescott ("**Plaintiffs**") against Defendants Bayer Healthcare LLC and Beiersdorf, Inc. ("**Defendants**"). Defendants have manufactured, marketed, and/or sold Coppertone sunscreen Products[1] throughout the United States, at different points in time. Plaintiffs filed this putative class action alleging that the Products' "Mineral-Based" labels deceive consumers into believing they contain only mineral active ingredients, when they contain chemical active ingredients. *See* Complaint, 1/3/2020, Dkt. 1.

The parties previously reached a nationwide settlement of the putative class action and entered into a settlement agreement on March 12, 2021. Thereafter, on March 17, 2021, Plaintiffs filed a motion for preliminary approval of class action settlement. Dkt. 81. After conducting a hearing on Plaintiffs' motion, the Court issued an Order on April 29, 2021 (Dkt. 87) (the "**Order**"), denying the motion without prejudice for the following reasons:

> (1) the proposed release in the settlement agreement is overbroad, (2) the parties lack an explanation regarding a non-collusive relationship to the *cy pres* beneficiary, (3) the justification for the exceeding administrative expenses and attorneys' fees request is inadequate, (4) the parties' proposed notice is incomplete, and (5) the settlement fails to comply with Northern District procedural guidance regarding claim forms.

Since the Court issued its Order, the parties have worked diligently—including with the assistance of the Honorable Virginia K. DeMarchi over the course of two additional settlement conferences—to rectify these deficiencies. As reflected in the parties' amended settlement agreement, fully executed as of July 12, 2021 ("**Amended Settlement Agreement**"),[2] and the papers filed concurrently herewith: (1) the amended proposed release is narrowly tailored, strictly complies with the identical factual predicate rule, and clearly notifies class members about which claims and parties are being released; (2) there is no collusion or conflict of interest between the parties, counsel, and the designated *cy pres* beneficiary; (3) the administrative expenses and

[1] The "**Products**" mean Coppertone sunscreen products that contain a "mineral-based" claim on the label in various sizes and forms: Coppertone Water Babies Pure & Simple, Coppertone Kids Tear Free, and Coppertone Sport Face.

[2] A copy of the Amended Settlement Agreement is submitted herewith as **Exhibit 1**. The claim form is attached to thereto as Exhibit A. The notice plan, class notices, and online advertisements are also attached as Exhibit B. And the proposed orders granting preliminary and final approval are attached as Exhibits C and D, respectively.

attorneys' fees (***not to exceed*** 30% of the settlement fund) are fair and reasonable; (4) the Notice Plan utilizes the most cost-efficient and effective means to reach a ***minimum*** of 70% of the class, which is consistent with due process and Ninth Circuit precedent in consumer class actions with no reasonably available means to directly contact class members; and (5) provides an estimated number of claims and claim rate based on the administrator and counsel's experience in similar settlements.

Aside from these changes, the substantive terms of the proposed settlement remain the same. Defendants will pay $2.25 million into a common fund with no right to reversion (the "**Settlement Fund**"). Class Members[3] who submit proof of purchase for the Products may receive $2.50 per unit of Product, without limitation. Class Members who cannot produce proof of purchase may receive $2.50 per unit of Product, up to a maximum of four (4) units per household, for a total of $10.00. Plaintiffs may apply for a reasonable incentive or service award from the fund, not to exceed $5,000 each (or $10,000 total), and, as noted, Counsel may apply for attorneys' fees, not to exceed 30% of the fund, plus reimbursement of their out-of-pocket expenses, all of which is subject to court approval. Notice and claims administration costs are to be paid from the fund in an amount not to exceed $530,000 plus postage. Further, Defendants have removed "Mineral-Based" from the Products' labels and, under the terms of the proposed settlement, Defendants have agreed that, if the term is used on Coppertone sunscreen product labels at any point between the preliminary approval of this settlement and December 31, 2023, and the products contain both mineral sunscreen active ingredients and other sunscreen active ingredients, then Defendants will include a statement on the product packaging that states the product contains other sunscreen active ingredients. The cessation of the mineral-based claim, and the agreement to add clear labeling representations to ensure transparency moving forward, provide a significant benefit to class members, regardless of whether they submit a claim or seek exclusion from the settlement.

As set forth below, the settlement is fair, reasonable, adequate, and should be certified under Rule 23(a), (b)(2), and (b)(3). In addition, the proposed notice and claims process satisfies Rule 23(c)(2) and (e)(2)(C)(ii).

[3] The terms "**Class**" and "**Class Members**" are synonymous with "**Settlement Class**" and "**Settlement Class Members**."

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II. FACTUAL AND PROCEDURAL BACKGROUND

A. Litigation History

This action has been heavily contested. On January 3, 2020, Plaintiffs filed the class action complaint, alleging violations of state consumer protections laws, breach of express warranty, and unjust enrichment. Dkt. 1. On May 1, 2020, Defendants filed a motion to transfer venue under 28 U.S.C. § 1404(a); a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2); a motion to dismiss under Rule 12(b)(6); and a motion to strike under Rule 12(f). Dkt. 25, 26.

In response, on May 15, 2020, Plaintiffs filed a First Amended Complaint ("**FAC**") to add additional remedies available under California Consumers Legal Remedies Act, codified at Cal. Civ. Code 1750, *et seq.* ("**CLRA**"), in lieu of an opposition pursuant to Rule 15(a). Dkt. 28. On that same date, Plaintiffs also filed an opposition to Defendants' motions to transfer venue and dismiss for lack of personal jurisdiction (Dkt. 29), to which Defendants replied on May 22, 2020 (Dkt. 34). On May 29, 2020, Defendants moved to dismiss or strike Plaintiffs' FAC under Rules 12(b)(6) and 12(f). Dkt. 36. Plaintiffs opposed Defendants' motion on June 12, 2020. Dkt. 43. Defendants filed a reply on June 19, 2020. Dkt. 44. On June 29, 2020, the Court denied Defendants' motions to dismiss for lack of personal jurisdiction and to transfer venue. Dkt. 46. After a hearing on July 22, 2020, the Court denied Defendants' motion to dismiss or strike on July 31, 2020. Dkt. 50. On August 14, 2020, Defendants answered Plaintiffs' FAC. Dkts. 51-52. On August 20, 2020, the Court entered a Case Management Scheduling Order and referred this case to a settlement conference with Judge DeMarchi. Dkt. 54.

Immediately after Defendants answered the FAC, on August 19, 2020, Plaintiffs served Defendants with substantial requests for documents and interrogatories. *See* Bruce Decl. at ¶ 3. On August 21, 2020, Defendants similarly served Plaintiffs with requests for documents and interrogatories. *Id.* The Parties exchanged initial disclosures on September 4, 2020. *Id.* Then, on October 2, 2020, Defendants each served responses to Plaintiffs' discovery requests. *Id.* On October 2, 2020, Defendant Beiersdorf produced documents, which included comprehensive market research, trade strategy, and advertising designs, as well as formulation information, all of which

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informed Plaintiffs' case strategy and settlement position. *Id.* In addition, Defendants provided Plaintiffs with comprehensive Product sales data. *Id.* On October 5, 2020, Plaintiffs likewise served responses to Defendants' discovery requests. *Id.* Plaintiffs' counsel proceeded to evaluate Defendants' discovery, defenses, and the merits of Plaintiffs' claims, consulted with damages experts, conducted extensive research into comparison product labels, market pricing, and retail sales, and conducted a comprehensive analysis of Defendants' sales data to determine maximum case value assuming full liability, as well as reasonable settlement value in light of the risks of litigation and likely price premium attributable to the false mineral-based label on the sunscreen products at issue. *Id.*

Thereafter, the parties participated in settlement conferences with Judge DeMarchi on three separate days over the course of three months before ultimately reaching a settlement in principle.[4] After the Court denied preliminary approval on April 29, 2021, the parties engaged in further negotiations over the course of two months and participated in two additional settlement conferences with Judge DeMarchi before finally reaching agreement on the terms reflected in the Amended Settlement Agreement. Bruce Decl. at ¶ 3.

B. The Proposed Settlement

The Settlement Class is defined, under the terms of the Amended Settlement Agreement, as:

> "Settlement Class" or "Settlement Class Members" means all retail consumers who purchased in the United States one or more Coppertone sunscreen products, for use and not for resale, prior to the Notice Date 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. The Settlement Class does not include wholesale, resale, and distribution buyers, and the other Excluded Persons.

See **Exhibit 1** [Am. Settlmnt. Ag.] at ¶¶ 2.13 (Excluded Persons), 2.23 (Notice Date), 2.33 (Products), 2.39 (Settlement Class).

1. Monetary Relief

Defendants will pay a total of $2.25 million into a Settlement Fund, which shall be exhausted

[4] *See* Bruce Decl. at ¶ 4; Minute Entry, 9/28/2020, Dkt. 65 (9/25/2020 Settlement Conference); Minute Entry, 12/14/2020, Dkt. 72 (12/11/2020 Settlement Conference); Minute Entry, 12/15/2020, Dkt. 73 (12/14/2020 Settlement Conference).

to pay: (1) Class Members' valid claims, (2) notice and claims administration costs, (3) attorneys' fees and costs, and (4) incentive or service awards to Plaintiffs. *See* **Exhibit 1** [Am. Settlmnt. Ag,] at ¶¶ 2.38 (Settlement Benefit), 2.40 (Settlement Fund). No money reverts to Defendants. *Id.*

Each Class Member who makes a claim may receive $2.50 per unit of Product for which they have proof of purchase, without limitation. *See* **Exhibit 1** [Am. Settlmnt. Ag.] at ¶ 3.4. Class Members who cannot produce proof of purchase may receive $2.50 per unit of Product, for up to a maximum of four (4) units per household, which totals $10.00. *Id.* These amounts may be *pro rata* increased up to a maximum of nine (9) times each claim if the Settlement Fund is under-subscribed, or decreased if over-subscribed. *Id.* ¶ 3.13. Any remaining funds will be disbursed *cy pres* to the charitable organization, Look Good Feel Better. *Id*. ¶ 3.13. Claims may be submitted either electronically through a settlement website or by mail. *Id*. ¶ 3.2. The claims process includes measures to reduce the risk of fraudulent claims. *Id*. ¶ 3.5. The claim form (available in English and Spanish) is a simple two-page form, which can be quickly submitted with any proof of purchase either online or by mail. *See* **Exhibit 1** [Am. Settlmnt. Ag.] at Exhibit A (Claim Form).[5] Payment of claims may be made by check or electronic payments, which is more convenient for claimants than traditional check payments and reduces related transaction costs.

2. Injunctive Relief

The Amended Settlement Agreement also includes changed practices. Defendants have discontinued using the term "Mineral-Based" on the Products' labels. *See* **Exhibit 1** [Am. Settlmnt. Ag.] at ¶ 1.4. Defendants have also agreed that if the term "Mineral-Based" is used on Coppertone sunscreen product labels between the preliminary approval of this settlement and December 31, 2023, and the products contain both mineral sunscreen active ingredients and other sunscreen active ingredients, then Defendants will include a statement on the product packaging that it contains other sunscreen active ingredients. *Id.* at ¶ 4.1.

[5] Specifically, all that is required from Class Members is name and contact information; chosen method of payment (check, PayPal, Zelle, or Venmo); an attestation that they purchased the claimed Products in the United States, within the requisite period of time, for purposes other than retail, based on the mineral-based claim; and indication of whether proof of purchase will be provided. *Id.*

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3. The Proposed Release Is Narrowly Tailored and Complies with Ninth Circuit Precedent

The parties have amended the proposed release to address the Court's concerns. Specifically, the scope of the released claims and released parties have been narrowed and clarified so that only claims based on the identical factual predicate as that underlying the claims in this action are being released and Settlement Class Members can accordingly identify the released parties. **Exhibit 1** [Am. Settlmnt. Ag.] at ¶¶ 2.35, 2.36; FAC, 5/15/2020, Dkt. 28, at ¶¶ 3-5, 27-36 (alleging Defendant falsely advertised Products as "Mineral-Based," when the active ingredients contain chemicals).

The Released Claims and Released Parties, including a redline of changes made, are defined under sections 2.35 and 2.36 of the Amended Settlement Agreement as follows:

> "**Released Claims**" means any and all rights, duties, obligations, claims, actions, causes of action, or liabilities, whether arising under local, state, or federal law, whether by statute, regulation, contract, common law, or equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated that arise out of or relate to ~~in any way~~: (a) the allegations, claims, or contentions that were or could have been asserted in the Litigation regarding the Products; (b) ~~the Products, including, but not limited to, their performance as well as~~ any advertising, labeling (including but not limited to packaging), marketing, claims, or representations ~~of any type whatsoever regarding such~~ the sunscreen active ingredients in the Products; (c) all labels or packaging for the Coppertone sunscreen products that conform to the terms of the Settlement. Section 2.35(c) is ~~only~~ intended to apply only to Settlement Class Members as of the date of Preliminary Approval~~.~~ and who do not exclude themselves from the Settlement Class. For the avoidance of doubt: (i) the Released Claims in this Section 2.35 are intended to reach the full scope of claims that may be released under the identical factual predicate rule without exceeding or violating it; (ii) the Released Claims do not include claims for personal injury allegedly arising out of use of the Products.
>
> "**Released Parties**" means ~~Defendants~~Bayer HealthCare LLC and Beiersdorf, Inc, and each and all of their predecessors and successors in interest to the Coppertone brand or the Products, former, present and future direct and indirect subsidiaries, ~~divisions,~~ parents, ~~owners, successors,~~ and affiliates involved in the development, manufacturing, distribution, marketing, advertising, labeling and/or sale of the Products, and each and all of the aforementioned entities' and individuals' former, present, and future officers, directors, shareholders, partners, employees, agents, representatives, suppliers, resellers, retailers, wholesalers, distributors, customers, insurers, assigns, servants, and attorneys~~, assignees, heirs, and executors, whether specifically named and whether or not participating in the settlement by payment or otherwise~~.

Consistent with controlling authority in the Ninth Circuit, the Released Claims have been narrowed to reach no further than the identical factual predicate underlying this action. *See Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) ("A settlement agreement may preclude a party

from bringing a related claim in the future even though the claim was not presented and might not have been presentable in the class action, but only where the released claim is based on the identical factual predicate as that underlying the claims in the settled class action.") (quotations and citations omitted); *Chavez v. Converse, Inc.*, 2020 WL 4047863, at *1 (N.D. Cal. July 8, 2020) (Cousins, J.) (approving release of all claims "that were or could have been asserted based on the facts pleaded in the Lawsuit").

Similarly, the Released Parties have been clarified to limit the affiliates to those that have participated in the conduct at issue in this action—namely, the "development, manufacturing, distribution, marketing, advertising, labeling and/or sale of the Products." *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 109 (2d Cir. 2005) (approving release of non-parties where the claims released are based on the same underlying factual predicate as the claims asserted against the parties, reasoning in part that "it is hard to imagine that defendants . . . would have settled without also releasing [the non-parties] from liability; to do so would have invited relitigation of the same factual allegations against the [defendants]."); Rubenstein, 6 Newberg on Class Actions § 18:20 (5th ed.) ("As the Ninth Circuit decision makes clear, the rationale behind approving releases of non-parties turns on the courts' interest in the settlement of disputes. A defendant may be unlikely to settle a class action if class members can later pursue unasserted claims, or claims against non-parties, that may have the effect of re-opening the litigation.").[6]

[6] This Court has previously approved language similar to the definition of Released Parties here. *See, e.g., Chavez v. Converse, Inc.*, No. 15-cv-03746-NC, 2020 WL4047863 (N.D. Cal. July 8, 2020) (Cousins, J.) and Class Action Settlement Agreement, 6/3/2020, Dkt. 210-9, ¶ 2.25 ("[Defendant] and its past, present and future divisions, affiliates, predecessors, successors, assigns, shareholders, owners, officers, directors, employees, agents, trustees, attorneys, representatives, administrators, fiduciaries, beneficiaries, subrogees, executors, partners, parents, subsidiaries, and privies."); *Weeks v. Google LLC*, No. 5:18-cv-00801-NC, Order Grant. Pls.' Mot. Final Approval, 12/13/2019, Dkt. 184, and Settlement Agreement, 5/10/2019, Dkt. 155-2, at ¶ 1.36 ("(i) Defendant Google LLC, all of Google's current or former directors, officers, members, administrators, agents, insurers, beneficiaries, trustees, employee benefit plans, representatives, servants, employees, attorneys, parents, subsidiaries, Affiliates, divisions, branches, units, shareholders, investors, contractors, successors, joint venturers, predecessors, related entities, and assigns, all other individuals and entities acting on Google's behalf, and (ii) Google North America Inc. (a subsidiary of Google), as well as all of Google North America Inc.'s current or former directors, officers, members, administrators, agents, insurers, beneficiaries, trustees, employee benefit plans, representatives, servants, employees, attorneys, parents, subsidiaries, Affiliates, divisions, branches, units, shareholders, investors, contractors, successors, joint venturers, predecessors, related entities, and assigns, all other individuals and entities acting on Google North America Inc.'s behalf.").

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Additionally, the California Code of Civil Procedure section 1542 waiver in the Amended Settlement Agreement under section 8.2 has been revised so that it only applies to Plaintiffs and not all Settlement Class Members.

4. There Is No Collusion or Conflict of Interest Between the Parties, Counsel and the Designated *Cy Pres* Beneficiary, Look Good Feel Better

Look Good Feel Better is a charitable organization that is dedicated to improving the quality of life of people across the nation undergoing cancer treatment.[7] The organization, like the Products, serve consumers looking to avoid or mitigate the effects of skin cancer. *Id.* Plaintiffs, Defendants, and their respective counsel of record do not have any ownership or financial interest in Look Good Feel Better. Bruce Decl. ¶ 5; Moon Decl. ¶ 3; Scarborough Decl. ¶ 2-3; Prescott Decl. ¶ 2; Xavier Decl. ¶ 2; Alonso Decl. ¶ 4; Gonzalez-Ruiz Decl. ¶ 3. They do not have any control over how the charity will administer the *cy pres* award so as to steer funds to serve their personal interests. Bruce Decl. ¶ 5; Moon Decl. ¶ 4; Scarborough Decl. ¶ 3; Prescott Decl. ¶ 3; Xavier Decl. ¶ 3; Alonso Decl. ¶ 4; Gonzalez-Ruiz Decl. ¶ 3. They did not engage in any collusion to direct a *cy pres* award to a "pet" charity or organization designed to serve their personal interests to the detriment of the interests of the Settlement Class. *Id.*; Bruce Decl. ¶ 5; Moon Decl. ¶¶ 5-7; Scarborough Decl. ¶ 2-3; Prescott Decl. ¶ 4-6; Xavier Decl. ¶ 4-6; Alonso Decl. ¶ 3-5; Gonzalez-Ruiz Decl. ¶ 3-4. Accordingly, there is no collusion or conflict of interest between the Settlement Class, parties, counsel, and Look Good Feel Better.

5. Administrative Expenses, Incentive Awards, Attorneys' Fees and Costs

All costs of notice and administration of the settlement (capped at $530,000 plus postage) will be paid from the Settlement Fund. *See* **Exhibit 1** [Am. Settlmnt. Ag.] at ¶ 5.7. The costs are consistent with market rates. Bruce Decl. ¶ 8. Plaintiffs' counsel reviewed bids from various notice and claims administrators that have experience administering consumer class action settlements to evaluate their estimated reach and the reliability of those estimates based on the methods proposed. *Id.* Plaintiffs' counsel also reviewed each budget to evaluate what is and what is not included in the

[7] *See* https://lookgoodfeelbetter.org/about/about-the-program/ (last visited July 13, 2021); https://lookgoodfeelbetter.org/about/history/#main (last visited July 13, 2021).

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estimated total, alongside the total estimated claims that would impact the final cost, plus postage. *Id.* Based on Plaintiffs' counsel's evaluation, Plaintiffs' counsel determined DSG's budget was not only consistent with market rates, but also costs incurred for similar settlements. *Id.*

In addition, each Plaintiff may receive up to $5,000 ($10,000 in total) as an incentive or service award from the Settlement Fund, subject to Court approval, to compensate Plaintiffs for the time, work, and risk they undertook in prosecuting this action (including the risk of liability for Defendants' costs). **Exhibit 1** [Am. Settlmt. Ag.] at ¶ 6.2. Each Plaintiff participated in the pre-suit investigation phase, including verifying their adequacy as a class representative, evaluating potential conflicts of interests, ensuring their claims are typical of the Class, and contributing to the drafting of the complaint. Bruce Decl. ¶ 6. They also engaged in the discovery process, including conducting a reasonable and diligent investigation and search for documents and information, reviewing discovery responses, and certifying the accuracy and completeness of responses to interrogatories. *Id.* Additionally, they actively engaged in the settlement process, including preparing for settlement negotiations, attending a full-day settlement conference, conferring with counsel regarding settlement offers and demands, and evaluating the proposed settlement to ensure it constitutes a fair, reasonable, and adequate settlement for the Class. *Id.*[8]

In addition, the Amended Settlement Agreement permits Class Counsel to apply for payment of their attorneys' fees, ***not to exceed*** 30% of the Settlement Fund, plus their costs, all of which is subject to Court approval. *See* **Exhibit 1** [Am. Settlmnt. Ag.] at ¶ 6.1. The 30% attorneys' fees cap in the Amended Settlement Agreement is a reduction of the one third (1/3) attorneys' fee cap in the parties' previous Settlement Agreement. Of course, while the Court need not decide the issue of attorneys' fees at present, Class Counsel will justify their requested fees by a lodestar-multiplier,

[8] *See also, e.g., Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 454-55 (E.D. Cal. 2013) (awarding $5,000 to each class representative for bringing claim to class counsel's attention, searching for relevant documents, explaining employment practices, and giving interviews regarding their experience); *Garcia v. Gordon Trucking*, 2012 WL 5364575, at *11 (E.D. Cal. Oct. 29, 2012) (finding "[c]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incurred during the course of the class action litigation," and awarding $15,000 to each class representative for assisting in investigation, preparation of complaint, producing documents, providing deposition testimony, responding to discovery, and assisting with settlement).

consistent with awards for common-fund settlements, under which fees are a percentage of the fund. Bruce Decl. at ¶ 7.[9] The request for fees, costs, and incentive awards will be the subject of a separate motion to be filed, and posted on the settlement website, at least 42 days before the final approval hearing, which is 14 days before the deadline for objections. *See* **Exhibit 1** [Am. Settlmnt. Ag.] at ¶¶ 2.25, 6.1, 6.2, 7.2, 7.4. Notwithstanding the foregoing, Plaintiffs explain below that a 30% fee is reasonable and entirely consistent with awards granted in similar cases in the Ninth Circuit. *See*, *infra*, § III. D.

6. Notice

Under the terms of the Settlement Agreement, the notice and claims administrator, DSG, will establish a settlement website containing the Court approved long- and short-form notices, contact information for DSG and counsel of record, pertinent dates and status updates, Amended Settlement Agreement, preliminary approval order, the claim form, answers to frequently asked questions, a Product list, Class Counsel's application for attorneys' fees, costs, and incentive awards, and the motion for final approval and related order. *See* **Exhibit 1** [Am. Settlmnt. Ag.] at ¶¶ 2.41 (website) and Exhibit B [Notice Plan] at ¶ 12; Schey Decl. at ¶ 15.

The notice plan uses cost-efficient and effective methods designed to research consumers of household products, in the absence of a customer list, including: (1) a settlement website, (2) internet impression advertising, (3) targeted search term advertising, and (4) a press release. *See* **Exhibit 1** [Am. Settlmnt. Ag.] at Exhibit B [Notice Plan] at ¶¶ 14, 16, 17, 18; Schey Decl. at ¶¶ 9, 15-16, 17, 19, 20, 21. The online advertisements target those who have purchased or demonstrated an interest in sunscreen products and will link to the settlement website, which shall reach a ***guaranteed minimum*** of at least 70% of the Class and achieve sixty-six (66) million combined impressions. *See* **Exhibit 1** [Am. Settlmnt. Ag.] at Exhibit B [Notice Plan] at ¶¶ 18, 20; Schey Decl. at ¶¶ 21, 23. Finally, the claims administrator will operate a toll-free information line regarding the case and settlement. *See* **Exhibit 1** [Am. Settlmnt. Ag.] at Exhibit B [Notice Plan] at ¶ 2; Schey Decl. ¶ 10.

[9] *See also, e.g., Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002) ("It is an established practice in the legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases."); *Clark v. City of L.A.*, 8803 F.2d 987, 991 (9th Cir. 1986) (finding loadstar multiplier proper).

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III. PRELIMINARY APPROVAL IS WARRANTED

"Approval under [Rule] 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to Class Members, whether final approval is warranted." *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc. ("DIRECTV")*, 221 F.R.D. 523, 525 (C.D. Cal. 2004) (citing Fed. Judicial Center, Manual for Complex Litig. § 30.41 (3rd ed., 1995)). The purpose of preliminary approval is for the Court to determine whether the parties should notify the putative Class Members of the proposed settlement and proceed with a fairness hearing. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). Notice should be disseminated where "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *Id.* (*quoting* Rubenstein, 4 Newberg on Class Actions § 11.25 (1992)). Rule 23(e)(2) states that the court may only approve the settlement if "it is fair, reasonable, and adequate." *See also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Id.* Courts must balance "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Id.* (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)). The Ninth Circuit has a strong judicial policy that favors class action settlements. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

A. Relative Monetary Value of the Class Claims Support the Settlement

Courts "assess the consideration obtained by the class members in a class action settlement" (*DIRECTV*, 221 F.R.D. at 527), including the value of injunctive relief (*Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015); *Lane v. Facebook, Inc.*, 696 F.3d 811, 825 (9th Cir. 2012)). "[I]t is well

settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial." *DIRECTV*, 221 F.R.D. at 527 (citing *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998)). Here, Plaintiffs' best-case recovery would be the price "premium" consumers paid for the alleged falsely advertised product attribute—its mineral-based composition. Bruce Decl. at ¶ 10a. Defendants strongly dispute that any such price premium exists, and, therefore, any testimony of the parties' competing experts would diverge wildly. *Id.* at ¶ 12.

Under the Amended Settlement Agreement, Defendants must pay $2.25 million into the Settlement Fund and each purchaser who submits a claim may receive $2.50 per Product. **Exhibit 1** [Am. Settlmnt. Ag.] at ¶¶ 2.4, 3.4. Whether the monetary component of the proposed settlement is adequate, fair, and reasonable may be evaluated in two ways.

- First, the average retail price for each Product falls within a range of approximately $7.44 and $9.89 and the average retail price for the Products is approximately $8.88. Bruce Decl. at ¶ 10a. The $2.50 refund for Products that cost approximately $8.88 is equal to a 28.2% price premium, which is easily within the range of a reasonable estimated price premium based on Counsel's experience in having conjoint analyses conducted to determine the price premium for an every-day household good where the challenged advertising claim is not the primary purpose of the product (which, here, is sun protection and not mineral active ingredients). *Id.*

- Second, the $2.25 million Settlement Fund represents nearly [redacted]% of Defendants' sales of approximately $[redacted], for approximately [redacted] products, over the course of approximately 5 years. Bruce Decl. at ¶ 10b. If one were to assume that a full refund of the purchase is the Class's best-case scenario (which far exceeds actual damages or restitution absent proof that the Products do not provide any sun protection—i.e., Class Members received absolutely no benefit in exchange for their money), then one would conclude Defendants' total sales represent the maximum monetary value of the case. *Id.* Where a settlement achieves 10% of the maximum recoverable damages, it has been approved as "eminently fair and reasonable." *In re Crazy Eddie Securities Litigation*, 824 F. Supp. 320, 323-324 (E.D.N.Y. 1993); *see also, e.g., Cheng Jiangchen v. Rentech, Inc.*, 2019 WL 5173771, at *7 (C.D. Cal. Oct. 10, 2019).[10] Further, the monetary relief provided by this settlement is especially beneficial in a contested proceeding like this one, where Class Members—who lack proof of purchase, which is likely the vast majority of

[10] *See also, e.g., Fitzhenry-Russell v. The Coca-Cola Company*, 2019 WL 11557486, * 2, 4 (N.D. Cal. Oct. 3, 2019) (granting final approval for **$2.45 million common fund** for falsely advertised "Real Ginger" beverages based on lower **6%** price premium, derived from conjoint and regression analyses, and far greater total gross sales of **$790 million** in comparison to the this case); Mot. for Approval Settlement, May 9, 2019 (Dkt. 84), in *Fitzhenry-Russell v. The Coca-Cola Company*, No. 5:17-cv-00603-EJD (noting $790 million in total gross sales).

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Class Members here—might receive nothing at all.[11]

In addition to the monetary relief, the changed practices will benefit Class Members by ensuring transparency in the challenged "Mineral-Based" labeling claim. Bruce Decl. at ¶ 11. Defendants have removed "Mineral-Based" from the Products' labels and, under the terms of the proposed settlement, Defendants have agreed that if the term "Mineral-Based" is used on Coppertone sunscreen product labels that contain chemical active ingredients over the next approximately 2 ½ years, then the product packaging will state the product contains other sunscreen active ingredients. **Exhibit 1** [Am. Settlmnt. Ag.] at ¶¶ 1.4, 4.1. The cessation of the mineral-based claim, and agreement to add labeling statements that ensure transparency, provide a significant benefit to consumers, regardless of whether they submit a claim or seek exclusion from the Settlement Class. Bruce Decl. at ¶ 11.

In sum, Plaintiffs' dual primary objectives in litigation have been achieved: (1) fair and adequate monetary compensation to consumers misled into purchasing the Products based on the false "Mineral-Based" labels; and (2) a change in Defendants' marketing practices that will ensure honesty and transparency to all consumers. Bruce Decl. at ¶ 13 Setting aside the extraordinary value achieved through the injunctive relief component, the dollar value of the direct monetary relief totals approximately [redacted]% of Defendants' past and prospective sales. *Id.* at ¶ 10.

B. Settlement Avoids Continuing Litigation Risks and Exorbitant Expert and Trial Costs

Proceeding in this litigation in the absence of settlement poses significant risks, such as failing to certify the Class, having summary judgment granted against Plaintiffs, or losing at trial. Bruce Decl. at ¶ 12. Such considerations have been found to weigh heavily in favor of settlement.[12]

[11] *See, e.g.*, *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1132 (9th Cir. 2017) (explaining that the post-trial claims process by which each consumers' affidavits would "force a liability determination" as to that consumer).

[12] *See* Federal Judicial Center, Manual for Complex Litigation § 21.62, at 316 (4th ed. 2004); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009); *Curtis-Bauer v. Morgan Stanley & Co.*, No. C 06-3903 TEH, 2008 WL 4667090 (N.D. Cal. Oct. 22, 2008); *see also In re Netflix Privacy Litig.*, 2013 WL 1120801, at *6 (N.D. Cal. Mar. 18, 2013) ("The notion that a district court could decertify a class at any time is one that weighs in favor of settlement.") (citations omitted); *Fulford v. Logitech, Inc.*, 2010 U.S. Dist. LEXIS 29042, at *8 (N.D. Cal. Mar. 5, 2010) (settlement

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Even assuming that Plaintiffs were to prevail on certification and successfully oppose the inevitable motion for summary judgment, they would face the risk of failing to establish liability at trial, particularly if there is any conflicting expert testimony. Bruce Decl. at ¶ 12. Not only would the parties' experts battle over consumer perceptions of the challenged "Mineral-Based" labeling claims, but they would battle over whether consumers paid a premium for the "Mineral-Based" attributes, including what, if any, dollar amount should be assigned to that premium. *Id.* In this "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which expert's version would be accepted by the jury. *Id.* The experience of Plaintiffs' counsel has taught them that these considerations can make the ultimate outcome of a trial highly uncertain. *Id.* In addition, the expense to prosecute this case is substantial in light of the need for expert testimony from multiple disciplines, including economics, conjoint analysis, and marketing. *Id*. The costs associated with these experts, including expert investigation, analysis, surveys, reports and rebuttal reports, depositions, oppositions to any *Daubert* challenges, testimony, and any associated costs such as travel expenses, would quickly accumulate. *Id.* The accumulation of such costs could quickly lead to a scenario in which settlement might not be economically feasible for either party. *Id.* Finally, because trial would likely not occur until June 22, 2022 (*see* Case Management Scheduling Order, 8/20/2020, Dkt. 54) or later, any monetary and injunctive relief achieved as a result of trial would not occur for another one year or more (Bruce Decl. at ¶ 12). In the meantime, Defendants could continue to deceptively label the Products with impunity to the financial detriment of Class Members and consumers. *Id.*

C. Plaintiffs Reached an Informed Settlement, Following Discovery, in an Arms-Length Negotiation Supported by Experienced Plaintiffs' Counsel's Views

Class settlements are presumed fair when they are reached "following sufficient discovery and genuine arms-length negotiation." *DIRECTV*, 221 F.R.D. at 528; Rubenstein, 4 Newberg on Class Actions at § 11.24 (5th ed.). Under this factor, courts evaluate whether Class Counsel had sufficient information to make an informed decision about the merits of the case. *See In re Mego*

eliminates these risks by ensuring Class Members a recovery that is "certain and immediate, eliminating the risk that class members would be left without any recovery… at all.").

Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir. 2000). Additionally, "[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Omnivision Techns., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008). Deference to Plaintiffs' counsel's evaluation of the Settlement is appropriate because "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez*, 563 F.3d at 967 (citing *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)*; see DIRECTV*, 221 F.R.D. at 528 (finding that experienced counsel's views regarding settlement are entitled to great weight); *Harris v. Vector Mktg. Corp.*, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011) ("An initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's-length bargaining.").

Here, the settlement was negotiated by counsel with extensive experience in consumer class action litigation. Bruce Decl. at ¶ 14; **Exhibit 2** [Clarkson Law Firm Resume]; **Exhibit 3** [Moon Law Resume]. As discussed above, Plaintiffs' counsel has received, examined, and analyzed information, documents, and materials that enabled them to assess the likelihood of success on the merits. Bruce Decl. at ¶ 4. These efforts included detailed interrogatory responses and documents concerning all critical aspects of the case, including issues relevant to both merits and class certification, consultation with experts and an independent investigation and analysis of sales data. *Id.* Further, in anticipation of the mediation sessions with Judge DeMarchi, both parties exchanged comprehensive mediation briefs and submitted confidential settlement letters to the Court that extensively detailed their legal and factual support. Bruce Decl. at ¶ 4. Thereafter, over several months, the parties engaged in five different settlement conference sessions with Judge DeMarchi, during which the parties vigorously negotiated the case. *Id.* The original and Amended Settlement Agreement also underwent multiple rounds of review and vigorous negotiation. *Id.* The settlement reflects the realities of each side's case and the information obtained during the discovery and mediation process. Bruce Decl. at ¶ 14. The proposed settlement is the result of extensive, informed, arms-length negotiations between counsel with substantial litigation experience, who are fully familiar with the legal and factual issues in this case, and who have specific experience litigating

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and settling complex and class action cases. *Id.* Accordingly, based on their collective experience, Plaintiffs' counsel concluded that the settlement agreement provides exceptional results for the Class while avoiding the uncertainties and costs of protracted litigation. *Id.*

D. The Reduced 30% Cap on Attorneys' Fees Is Preliminarily Reasonable

Courts in the Ninth Circuit have regularly awarded attorneys' fees of 30% of the common fund in similar pre-certification consumer class-action cases. *Weeks v. Google LLC*, 2019 WL 8135563, at *4 (N.D. Cal. Dec. 13. 2019), J. Cousins (awarding 30% fee as "consistent with Ninth Circuit's applicable law regarding percentage of the fund fee awards"); *see also, e.g.*, *Miller v. Ghirardelli Chocolate Co.*, 2015 WL 758094, at *1, 5 (N.D. Cal. Feb. 20, 2015) (awarding 30% of common fund in pre-certification mislabeled "Natural" food consumer class action, involving motions to dismiss and strike, motion to intervene, and discovery motions as reflected in docket report **Exhibit 4**); *Fitzhenry-Russell v. Coca-Cola Co.*, 2019 WL 11557486, at *1, 8-9 (N.D. Cal. Oct. 3, 2019) (awarding 30% of the monetary value of the settlement in pre-certification mislabeled "Natural" food consumer class action, involving motion to dismiss as reflected in docket report **Exhibit 5**); *Hendricks v. Starkist Co*, 2016 WL 5462423, at *5, 11-12 (N.D. Cal. Sept. 29, 2016), *aff'd sub nom. Hendricks v. Ference*, 754 F. App'x 510 (9th Cir. 2018) (awarding 30% of common fund in pre-certification consumer class action concerning mislabeled and underfilled tuna cans); *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588, 591-92, 601-02 (N.D. Cal. 2020) (awarding 30% of common fund in consumer class action concerning falsely advertised "non-GMO" food); *Gergetz v. Telenav, Inc.*, 2018 WL 4691169, at *1, 7 (N.D. Cal. Sept. 27, 2018) (awarding 30% of common fund in pre-certification consumer class action asserting violations of Telephone Consumer Protection Act (unsolicited text messages), involving motion to dismiss as reflected in docket report **Exhibit 6**); *Maxin v. RHG & Co.*, 2017 WL 748143, at *1, 7 (S.D. Cal. Feb. 27, 2017) (preliminarily approving a 30% fee in pre-certification class action asserting falsely advertised "Made in USA" products, when preliminary approval filed within two weeks of filing complaint as reflected in docket report **Exhibit 7**); *Hazlin v. Botanical Labs., Inc.*, 2015 WL 11237634, at *1, 6-7 (S.D. Cal. May 20, 2015) (awarding 30% fee in pre-certification class action

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asserting false advertising of supplements' health benefits, involving a motion to dismiss as reflected in docket report **Exhibit 8**); *Howerton v. Cargill, Inc.*, 2014 WL 6976041, at *1, 6 (D. Haw. Dec. 8, 2014) (awarding 30% fee in pre-certification mislabeled "Natural" sweetener class action, involving a motion to stay and transfer as reflected in docket report **Exhibit 9**); *Loomis v. Slenderstone Distribution*, 2021 WL 873340, at *1, 10-11 (S.D. Cal. Mar. 9, 2021) (awarding 33.75% fee in pre-certification class action asserting fitness belts falsely advertised as a replacement for traditional exercise, involving motion to dismiss as reflected in docket report **Exhibit 10**); *Francisco v. Numismatic Guar. Corp.*, 2008 WL 649124, at *1-2, 4, 13 (S.D. Fla. Jan. 1, 2008) (awarding nearly 30% fee on pre-certification mislabeled "First Strikes" coins class action where preliminary approval filed within 8 months following discovery and mediation).[13]

[13] In fact, courts regularly award attorneys' fees of ***more than*** 30% of the fund. *See, e.g.*, *Pacific Enters.*, 47 F.3d 373, at (one-third fee of $12 million fund); *Morris v. Lifescan, Inc.*, 54 F.App'x 663, 664 (9th Cir. 2003) (one-third fee of $14.8 fund); *Marshall v. Northrop Grumman Corporation*, 2020 WL 5668935, *8-9 (C.D. Cal. Sept. 18, 2020) ("An attorney fee of one third of the settlement fund is routinely found to be reasonable in class actions. 'Nationally, the average percentage of the fund award in class actions is approximately one-third.'") (quoting *Multi-Ethnic Immigrant Workers Org. Network v. City of Los Angeles*, N2009 WL 9100391, at *4 (C.D. Cal. Jun. 24, 2009)); *Romero v. Producers Dairy Foods, Inc.*, 2007 WL 3492841, at *4 (E.D. Cal. Nov. 14, 2007) ("fee awards in class actions average around one-third of the recovery") (quoting Rubenstein, 4 Newberg On Class Actions § 14.6 (4th ed. 2007)); *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 450 (E.D. Cal. 2013) (cataloguing percentage awards between 30% and 33.3%); *Figueroa v. Capital One, N.A.*, 2021 WL 211551, at *9 (S.D. Cal. Jan. 21, 2021) ("Although the court recognized the Ninth Circuit's 25 percent benchmark in common fund cases, it did not adopt this touchstone. Generally, 'California courts routinely award attorneys' fees of one-third of the common fund.'") (quoting *Beaver v. Tarsadia Hotels*, 2017 WL 4310707, at *9 (S.D. Cal. Sept. 28, 2017); *In re Heritage Bond Litig.*, 2005 WL 1594403, at *18, n.12 (C.D. Cal. Jun. 10, 2005) ("Indeed federal courts 'have consistently approved of attorney fee awards over the 25% benchmark[,]' specifically at a rate of "30% or higher[.]") (quoting *Knight v. Red Door Salons, Inc.*, 2009 WL 24367, at *17 (N.D. Cal. Feb. 2, 2009) ("nearly all common fund awards range around 30%")); *Boyd Emmons v. Quest Diagnostics Clinical Laboratories, Inc.*, No. 2017 WL 749018, *6-8 (E.D. Cal. Feb. 27, 2017) (awarding one-third of common fund); *Jiangchen v. Rentech, Inc.*, 2019 WL 5173771, * 9-11 (C.D. Cal. Oct. 10, 2019) (awarding one-third of common fund); *Deaver v. Compass Bank*, 2015 WL 8526982, *10-14 (N.D. Cal. Dec. 11, 2015) (awarding 33% of common fund); *Marshall*, 2020 WL 5668935 (cataloguing awards one-third of common fund); *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 297 (N.D. Cal. 1995) ("the cases . . . in which high percentages such as 30-50 percent of the fund were awarded involved relatively smaller funds of less than $10 million"); *Pointer v. Bank of Am., N.A.*, 2016 WL 7404759, at *14 (E.D. Cal. Dec. 20, 2016) ("in most common fund cases, the award exceeds [the 25%] benchmark"); *Armes v. Hot Pizzas, LLC*, 2017 U.S. Dist. LEXIS 89920, at *18 (D. Ariz. Jun. 9, 2017) ("Courts in this Circuit routinely recognize that as the size of the common fund decreases, the percentage to which plaintiff's counsel is entitled increases, and common funds under $10 million often result in awards between 30-50 percent."); *Aichele v. City of L.A.*, 2015 WL 5286028, at *5 (C.D. Cal. Sep. 9, 2015 ("in cases under $10 million, the awards more frequently will exceed the 25% benchmark, and indeed go above 30%.").

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IV. THE COURT SHOULD PROVISIONALLY CERTIFY THE SETTLEMENT CLASS

The Ninth Circuit has recognized that certifying a settlement class to resolve consumer lawsuits is a common occurrence. *Hanlon*, 150 F.3d at 1019. In addition, the Ninth Circuit has declared that a strong judicial policy favors settlement of Rule 23 class actions. *See Class Plaintiffs*, 955 F.2d at 1276. When presented with a proposed settlement prior to the class certification stage, a court must determine whether the putative settlement class satisfies the requirements for class certification under Rule 23. *See* Fed. R. Civ. P. 23(e). In assessing certification requirements, a court may properly consider that there will be no trial.[14]

A. The Rule 23(a) Prerequisites Are Satisfied for Settlement Purposes

1. The Class Members Are Too Numerous to Be Joined

For a class to be certified, its members must be so numerous that their joinder would be "impracticable." Fed. R. Civ. P. 23(a)(1). Here, there are thousands or tens of thousands of Class Members throughout the United States, as more than [redacted] products have been sold in the past approximately five years. Bruce Decl. at ¶ 15a. Numerosity is satisfied.

2. The Action Involves Common Questions of Law and Fact

To satisfy Rule 23(a)(2)'s commonality requirement, the claims "must depend upon a common contention" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The Ninth Circuit "permissively" construes this requirement—it is satisfied with "shared legal issues" or "a common core of salient facts." *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) (quoting *Hanlon*, 150 F.3d at 1019). Here, all of the claims turn on common questions. For example, whether the Products' labeling is misleading and deceptive and therefore unlawful; whether Plaintiffs and the Class are entitled to equitable and/or injunctive relief; and whether Plaintiffs and the Class have sustained damages as a result of Defendants' unlawful conduct. Commonality is therefore satisfied.

[14] *See Amchem Prods. v. Windsor*, 117 S. Ct. 2231, 138 L. Ed. 2d 689, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial.").

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3. Plaintiffs' Claims Are Typical of Those of the Class

Plaintiffs' claims are typical under Rule 23(a)(3) "if they are reasonably coextensive with those of absent class members." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1141 (9th Cir. 2016). "Measures of typicality include 'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured in the same course of conduct.'" *Id*. (citation omitted). In this case, Plaintiffs and Class Members have the same claims arising from the same misleading Product labeling (i.e., all products state "Mineral-Based" on the labels), causing the same injuries (all consumers paid a premium for the false "Mineral-Based" attribute). As a result, typicality is satisfied. *See, e.g., Gold v. Lumber Liquidators, Inc.*, 323 F.R.D. 280, 288-89 (N.D. Cal. 2017).

4. Plaintiffs and Class Counsel Will Fairly and Adequately Protect the Interests of Class Members

The test for evaluating adequacy of representation under Rule 23(a)(4) is: "(1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). The test is easily met here. First, Plaintiffs and their counsel do not have any conflicts with Class Members and have vigorously prosecuted this case through their pre-litigation investigation, complex motion practice, fact discovery, settlement negotiations, and structuring of the proposed settlement. Bruce Decl. at ¶¶ 3-4, 14, 15b. Plaintiffs agreed to serve in a representative capacity, communicated frequently with their attorneys, responded to discovery requests, contributed to the preparation of the complaint, and actively participated in settlement negotiations. *Id.* at ¶ 3, 4, 6, 15b. Second, Plaintiffs' counsel are experienced consumer advocates and are well qualified to serve as Class Counsel. Bruce Decl. at ¶¶ 14, 15b. **Exhibit 2** [Clarkson Law Firm Resume]; **Exhibit 3** [Moon Law Firm Resume]. They have vast experience successfully representing plaintiffs and classes in complex class-action litigation, specifically in consumer product mislabeling cases. Bruce Decl. at ¶¶ 14, 15b; **Exhibit 2** [Clarkson Law Firm Resume]; **Exhibit 3** [Moon Law Firm Resume]. Plaintiffs' counsel have

diligently prepared this matter for class certification and trial in accordance with the Court's schedule and presented this settlement to the Court in conformity with this District's guidelines. Bruce Decl. at ¶¶ 3-4, 15b. Adequacy is thus satisfied.

B. Rule 23(b)(3) Is Satisfied for Settlement Purposes

Rule 23(b)(3) requires that common questions of law or fact "predominate over any questions affecting only individual members," and that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The trial manageability criteria of Rule 23(b)(3)(A) drops out of the analysis when "certifying a settlement class, where, by definition, there will be no trial." *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 557 (9th Cir. 2019); *see also Amchem Prods.*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial."). Here, common questions predominate over individualized questions for settlement purposes, and a class action is a superior method for resolving this controversy.

1. Common Questions of Fact and Law Predominate

The predominance analysis "focuses on the relationship between the common and individual issues in the case, and tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation." *Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 894-95 (N.D. Cal. 2015) (citation omitted). In the settlement context, predominance is satisfied when the claims arise out of the defendant's common conduct. *See, e.g., In re Hyundai & Kia*, 926 F.3d at 559.

a. Common Questions of Fact

Common questions of fact abound with respect to Plaintiffs' claims, including, but not limited to, the following:

> (1) whether Defendants' conduct constitutes an unfair method of competition, or unfair or deceptive act or practice, in violation of the CLRA; (2) whether Defendants used deceptive representations in connection with the sale of the Products, represented the Products have characteristics they do not have, or advertised the Products with the intent not to sell them as advertised, in violation of the CLRA; (3) whether Defendants' labeling and advertising of the Products are untrue or misleading in violation of California's False Advertising Law, codified at Cal. Bus. & Prof. Code §§ 17500, *et*

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seq. ("**FAL**"); (4) whether Defendants knew or by the exercise of reasonable care should have known their labeling and advertising was and is untrue or misleading in violation of the FAL; (5) whether Defendants' conduct is an unfair, fraudulent, or unlawful business practice within the meaning of California's Unfair Competition Law, codified at Cal. Bus. & Prof. Code §§ 17200, *et seq.* ("**UCL**"); (6) whether Plaintiffs and the Class paid more money for the Products than they actually received, how much, and the proper measure of damages or restitution; (7) whether Defendants' conduct constitutes a breach of express warranty; (8) whether Plaintiffs and the Class are entitled to equitable and/or injunctive relief; (9) whether Plaintiffs and the Class have sustained damages as a result of Defendants' misconduct; and (10) whether Defendants were unjustly enriched by their unlawful conduct.

b. Common Questions of Law

Defendants sold the same Products nationwide with the allegedly deceptive labeling. Just as is the case for all Californians, the claims of false advertising will present uniform issues of material fact for Class Members nationwide. In light of the uniform alleged misconduct, the elements that need to be proven under the consumer protection laws of all States are substantively identical. To the extent differences exist, they are immaterial and do not undermine certification for settlement purposes only when the Court need not concern itself over the management of slight variances in the law. *See In re Hyundai & Kia*, 926 F.3d at 557 (ruling the trial manageability criteria of Rule 23(b)(3)(A) drops out of the analysis when "certifying a settlement class, where, by definition, there will be no trial."); *see also Amchem Prods.*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial.").

Courts agree that unjust enrichment across the States does not differ materially, so a nationwide class may be certified. *See, e.g.*, *In re Abbott Labs. Norvir Anti-Tr. Litig.*, 2007 WL 1689899, at *9 (N.D. Cal. Jun. 11, 2007) (certifying nationwide class, holding that the "variations among some States' unjust enrichment laws do not significantly alter the central issue or the manner of proof").[15]

[15] *See also In re Checking Account Overdraft Litig.*, 307 F.R.D. 630, 647 (S.D. Fla. 2015) ("There is general agreement among courts that the "minor variations in the elements of unjust enrichment under the laws of the various states . . . are not material and do not create an actual conflict.") (quoting *Pa. Emple., Benefit Tr. Fund v. Zeneca, Inc.*, 710 F.Supp.2d 458, 477 (D. Del. 2010)); *In re Mercedes–Benz Tele Aid Contract Litig.*, 257 F.R.D. 46 (D.N.J. 2009) ("While there are minor

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In distilling the various states' laws down to two common elements, one court explained:

> At the core of each state's law are two fundamental elements—***the defendant received a benefit from the plaintiff and it would be inequitable for the defendant to retain that benefit without compensating the plaintiff.*** The focus of the inquiry is the same in each state. Application of another variation of the cause of action than that subscribed to by a state will not frustrate or infringe upon that state's interests. In other words, regardless of which state's unjust enrichment elements are applied, the result is the same. Thus, there is no real conflict surrounding the elements of the cause of action.

Powers v. Lycoming Engines, 245 F.R.D. 226, 231 (E.D. Pa. 2007) (emphasis added), *rev'd on other grounds*, 2009 WL 826842, 328 Fed. Appx. 121 (3d Cir. 2009). These two elements are the same for all Class Members, regardless of their state of residence, as all paid a price premium to Defendants to purchase the Products—thus, all conferred a benefit on Defendants—and none received a true mineral-based Product, therefore rendering it inequitable for Defendants to retain the benefit.

C. A Class Action Is the Superior Means of Resolving This Case

A class action is also superior under Rule 23(b)(3) because it represents the only realistic method for Class Members to obtain relief. *See, e.g., Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (where "classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation"). Class Members lack the incentive to bring their own cases against Defendants, given the potential recovery for each Class Member, and the parties are unaware of any other such cases having been filed. Bruce Decl. at ¶ 15c (the average retail sales price, per Product, is between $7 and $10, which represents the absolute maximum conceivable actual damages per Product). "Cases, such as this, 'where litigation costs dwarf potential recovery' are paradigmatic examples of those well-suited for classwide prosecution." *Mullins v. Premier Nutrition Corp.*, 2016 WL 1535057, at *8 (N.D. Cal. Apr. 15, 2016). Accordingly, settlement class certification is appropriate and should be granted.

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variations in the elements of unjust enrichment under the laws of the various states, those differences are not material and do not create an actual conflict."); *Schumacher v. Tyson Fresh Meats, Inc.*, 221 F.R.D. 605, 612 (D.S.D. 2004) ("In looking at claims for unjust enrichment, we must keep in mind that the very nature of such claims requires a focus on the gains of the defendants, not the losses of the plaintiffs. That is a universal thread throughout all common law causes of action for unjust enrichment.").

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V. THE PROPOSED NOTICE SATISFIES DUE PROCESS

The proposed notice plan and claim form comport with the procedural and substantive requirements of Rule 23. Under Rule 23, due process requires that Class Members receive notice of the settlement and an opportunity to be heard and participate in the litigation. *See* Fed. R. Civ. P. 23(c)(2)(B); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 175-76 (1974). The mechanics of the notice process are left to the discretion of the Court, subject only to the broad "reasonableness" standards imposed by due process.[16]

Here, the notice plan uses cost-efficient and effective methods specifically designed to reach unknown consumers of sunscreen products, including: (1) a settlement website, (2) internet impression advertising, (3) targeted search term advertising, and (4) a press release. *See* **Exhibit 1** [Am. Settlmnt. Ag.] at Exhibit B [Notice Plan] at ¶¶ 14, 16, 17, 18; Schey Decl. at ¶¶ 9, 15-16, 17, 19, 20, 21. The online notice, which links to the settlement website, will reach a ***guaranteed minimum*** of at least 70% of the Class and achieve sixty-six (66) million combined impressions on various websites targeted to individuals who have purchased, or shown interest in, sunscreen. *See* **Exhibit 1** [Am. Settlmnt. Ag.] at Exhibit B [Notice Plan] at ¶¶ 18, 20; Schey Decl. at ¶¶ 21,23. Finally, DSG, the claims administrator, will operate a toll-free information telephone line regarding the case and settlement. *See* **Exhibit 1** [Am. Settlmnt. Ag.] at Exhibit B [Notice Plan] at ¶ 2; Schey Decl. at ¶ 10.

As explained in DSG's declarations, this multi-communication method is the best notice practicable and is reasonably designed to reach the Settlement Class Members and drive a claim-rate consistent with similar settlements. Schey Decl. at ¶¶ 23-25; Schey Supp. Decl. at ¶¶ 4-8.

- There is no reasonably ascertainable Class Member identifying information to facilitate direct notice through postcards or emails. Schey Supp. Decl. at ¶ 4; *see also, e.g.*, *In re Google Referrer Header Privacy Litig.*, 2014 WL 1266091, *7 (N.D. Cal. Mar. 26, 2014) (where direct individual notice is not practical, "publication or something similar is sufficient to provide notice to the individuals that will be bound by the judgment").

[16] *See* 7A Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1786 (3d ed. 2008)*; see also Rosenburg v. I.B.M.*, 2007 WL 128232 at *5 (N.D. Cal. Jun. 12, 2007) (notice should inform class members of essential terms of settlement including claims procedure and their rights to accept, object or opt-out of settlement).

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- The Notice Plan emulates Defendants' marketing strategy to promote its efficiency. Schey Supp. Decl. at ¶ 6.

- Importantly, DSG's estimated ***minimum* 70%** reach is consistent with the non-linear relationship between media spend and new consumers who view advertisements—that is, at an approximately 70% reach, the cost to find new consumers exponentially increases while the actual reach plateaus, hitting a point of diminishing returns. Schey Supp. Decl. at ¶ 8. In other words, to reach the next 30% (totaling a 100% reach), a significant amount of money from the Settlement Fund would be allocated to Notice—with little return—and in lieu of paying valid claims submitted by Settlement Class Members, to the detriment of the Class. *Id.*

- A minimum 70% reach is consistent with due process and the Federal Judicial Center's published Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide (2010). Schey Supp. Decl. at ¶ 7; *see also Free Range Content, Inc. v. Google, LLC*, 2019 WL 1299504, at *6 (N.D. Cal. Mar. 21, 2019) ("Notice plans estimated to reach a minimum of 70 percent are constitutional and comply with Rule 23." (brackets and quotations omitted)); *Edwards v. Nat'l Milk Producers Fed'n*, 2017 WL 3623734, at *4 (N.D. Cal. June 26, 2017), *aff'd sub nom. Edwards v. Andrews*, 846 F. App'x 538 (9th Cir. 2021) (same); *Gergetz*, 2018 WL 4691169 at 4 (same); Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide, Fed. Judicial Center, p. 1 (2010), https://www.fjc.gov/sites/default/ files/2012/NotCheck.pdf (endorsing a 70-95% reach as consistent with due process).

- Additionally, based on DSG's experience with similar settlements DSG estimates approximately 75,000 to 100,000 claims will be submitted, which is approximately [redacted]% of the approximately [redacted] class. Schey Supp. Decl. at ¶ 9; *see also* Fed. Trade Comm'n., *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns* (Sept. 2019) at p. 11 (4% average claim rate for direct notice and combined direct and indirect notice plans in consumer class actions).[17]

Further, in compliance with Rule 23(c)(2), the proposed notices inform Class Members, in clear and plain language about the nature of the action, including relevant claims, issues, and defenses; the definition of the Settlement Class; the proposed settlement and summary of settlement

[17] Courts have granted final approval of consumer class action settlements involving a less than 1% to 4% claim rate. *See, e.g.*, *Pollard v. Remington Arms Co., LLC*, 320 F.R.D. 198, 214 (W.D. Mo. 2017), *aff'd*, 896 F.3d 900 (8th Cir. 2018) (0.29% claim rate for direct and indirect notice plan in unfair and deceptive trade practice case involving firearms); *Chipotle*, 336 F.R.D. 588 at 597 (0.83% claim rate for indirect notice plan in falsely advertised "non-GMO" food case); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 329 (N.D. Cal. 2018) (1.8% claim rate for direct and indirect notice plan in privacy/data breach case); *Broomfield v. Craft Brew All., Inc.*, 2020 WL 1972505, at *6 (N.D. Cal. Feb. 5, 2020) (about 2% claim rate for direct and indirect notice plan in falsely labeled beer case); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1255 (C.D. Cal. 2016) (2.75% claim rate for direct and indirect notice in falsely advertised clothing case); *In re Toys "R" Us-Del., Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 468 (C.D. Cal. 2014) (approximately 3% claim rate for indirect notice plan in FACTA case); *Fitzhenry-Russel v. Coca-Cola Co.*, 2019 WL 11557486, at *2 (N.D. Cal. Oct. 3, 2019) (3.2% claim rate for indirect notice in falsely advertised "Real" ginger in beverage case); *Carlotti v. Asus Comput. Int'l*, 2020 WL 3414653, at *4 (N.D. Cal. Jun. 22, 2020) (4.02% claim rate for direct and indirect notice plan in falsely advertised laptop case).

benefits; the need, timing, and how to file a claim; the right to opt out or object and the time frame and manner; the prospective request for attorneys' fees, costs, and incentives; and that they will be bound by the judgment if they do not timely opt out, satisfying all aspects of Rule 23(c)(2). **Exhibit 1** [Am. Settlmnt. Ag.] at Exhibits B1 [Long Form Notice] and B2 [Short Form Notice]. In addition, the notices refer Class Members to the settlement website where they can obtain more information, including the long-form notice, which provides more details about the case and the settlement, the procedures for opting out or objecting, and methods to obtain additional information. **Exhibit 1** [Am. Settlmnt. Ag.] at Exhibits B1 [Long Form Notice] and B2 [Short Form Notice]. The settlement website will also contain a copy of the full Settlement Agreement and will post motions for final approval and incentive and fee awards when filed. **Exhibit 1** [Am. Settlmnt. Ag.] at Exhibits B [Notice Plan] at ¶ 12; Schey Decl. at ¶¶ 10, 15. Class Members who seek benefits need only complete the simple two-page claim form and submit it online or by mail. **Exhibit 1** [Am. Settlmnt. Ag.] at Exhibit A [Claim Form]. The claim form presents no unreasonable hurdles and, instead, merely requires contact information, selection of payment method, certification of facts entitling Class Members to benefits, and proof of purchase for more than four Products. *Id.*

VI. DATES FOR THE FINAL APPROVAL PROCESS

In connection with preliminary approval, Plaintiffs request the Court set the following dates:

1. Deadline to initiate Class Notice (Minimum of 30 days after Preliminary Approval Hearing)	September 17, 2021
2. Deadline to file motion for attorneys' fees, costs, and incentive/service awards (42 days before Fairness Hearing)	November 3, 2021
3. Deadline to file motion for final approval (42 days before Fairness Hearing)	November 3, 2021
4. Deadline for claim submission (postmarked or online) (60 day claim period; 28 days before Fairness Hearing)	November 17, 2021
5. Deadline for opt-out (postmarked) (60 day opt-out period; 28 days before Fairness Hearing)	November 17, 2021
6. Deadline to file objections (60 day objection period; 28 days before Fairness Hearing 14 days after motions filed)	November 17, 2021

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7.	Deadline to file claim administrator's certification of total number and dollar amount of claims to date (14 days before Fairness Hearing)	December 1, 2021
8.	Deadline to respond to objections (7 days before Fairness Hearing; 14 days after objections filed)	December 8, 2021
9.	Fairness Hearing	December 15, 2021

VII. CONCLUSION

Accordingly, Plaintiffs respectfully request the Court preliminarily approve the settlement.

DATED: July 13, 2021

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