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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

KATHLEEN SONNER on Behalf of Herself and All Others Similarly Situated,

Plaintiff,

v.

SCHWABE NORTH AMERICA, INC. and NATURE'S WAY PRODUCTS, LLC,

Defendants.

Case No. 5:15-cv-01358-VAP (SPx)

**CLASS ACTION**

**MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT AND REQUEST FOR ATTORNEYS' FEES AND EXPENSES**

Date: January 25, 2021
Time: 2:00 p.m.

USDJ: Virginia A. Phillips
Courtroom: 8A, 8th Fl., 1st Street-LA
USMJ: Sheri Pym
Courtroom: 3 or 4, 3rd Fl., R'side

Date Filed: July 7, 2015

**DEMAND FOR JURY TRIAL**

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Plaintiff Kathleen Sonner submits this memorandum in support of her motion for final approval of the proposed class action settlement and request for an award of attorneys' fees and reimbursement of expenses.[1]

## I. INTRODUCTION

After more than five years of substantial litigation, including an appeal, and on the eve of trial, the Parties reached a proposed settlement of this class action.[2] Plaintiff now seeks final approval of the proposed Settlement.

Under the Settlement, Defendants will pay Settlement Class Members cash reimbursements for their purchases of Ginkgold up to the full retail price paid. No proof of purchase is required to receive reimbursement for up to three purchases. For those Settlement Class Members with proof of purchase, they will receive reimbursements for all purchases up to the full retail price. If valid claims exceed the fund, refunds will be proportionately reduced. The $3.375 million Settlement Fund created by Defendants will also pay for Notice of the Settlement, attorneys' fees and expenses, and a Class Representative service award.

The Settlement represents an excellent recovery for the Settlement Class—a point confirmed by the large number of claims submitted by Settlement Class Members to date. Indeed, since the thorough, Court-approved Notice Plan commenced on October 15, 2020, there have been over 80,000 claims submitted by Settlement Class Members, with no requests to opt-out.[3] *See* Declaration of Jennifer M. Keough Regarding Notice Plan and Settlement Administration ("Notice Plan

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[1] Capitalized terms have the same meaning of in the Settlement Agreement (the "Settlement" or "SA"). *See* ECF No. 186.

[2] All capitalized terms herein have the same meaning as set forth in the Stipulation of Settlement (hereinafter "Settlement," "Settlement Agreement," or "SA") that was filed with the Court on September 29, 2017. *See* Doc. No. 166-2 (the Settlement).

[3] The deadline to opt-out or object to the Settlement is December 28, 2020. Plaintiff will respond to any objections on or before January 11, 2021.

Decl."), ¶¶ 1-18, 25. While the number of claims deemed valid ultimately will be less, the number of claims submitted is robust.

Moreover, the award of attorneys' fees and expenses requested by Class Counsel, and which Defendants do not oppose, is well within the range established by the case law. The Settlement provides that Defendants will not oppose an award of attorneys' fees and reimbursement of expenses of up to 33% of the Settlement Fund. After deducting costs of $166,833.79, the requested award of attorneys' fees of $946,916.10 represents approximately 28% of the Settlement Fund. Plaintiff's counsel have prosecuted this litigation on a wholly contingent basis, accruing over $1.4 million in attorneys' fees. Thus, as detailed below, the requested fee award represents a significant discount on Plaintiff's counsel's lodestar. Accordingly, awarding Class Counsel's requested attorneys' fees and costs on behalf of themselves and the other Plaintiff's counsel is well below the accepted range of attorney fee awards in class settlements. Similarly, given the extensive contributions made by Plaintiff, a service award of $5,000 is well within the range awarded in class settlements.

The proposed Settlement is "fair, reasonable, and adequate" in accordance with Fed. R. Civ. P. 23(e)(2) and warrants final approval by this Court, including final certification of the Settlement Class and approval of the negotiated attorneys' fees, expenses, and Class Representative service award. Plaintiff respectfully requests an order: (1) granting final approval of the Settlement; (2) certifying the Settlement Class; (3) approving the request for attorneys' fees and expenses; and (4) awarding a service award to Plaintiff Kathleen Sonner in the amount of $5,000 for her efforts in representing the Class.

## II. HISTORY OF LITIGATION

The Settlement was reached after five years of hard-fought litigation that included an appeal to the Ninth Circuit, extensive investigation and party and non-party discovery, work with several expert witnesses, including preparation of expert

reports for class certification and trial, and months of settlement negotiations, including mediations with two separate mediators. Discovery included over 172,000 pages of documents, six depositions, eight reports from six experts, and subpoenaed documents from six third-party retailers who produced extensive sales data. These efforts are detailed in the Declaration of Paula R. Brown in Support of Motion for Preliminary Approval of Class Action Settlement ("Brown Preliminary Approval Decl."). *See* ECF No. 189-2, ¶¶ 7-33; *see also* ECF No. 189-1 (Preliminary Approval Motion) at 3-7.

## III. THE SETTLEMENT MERITS APPROVAL

The proposed Settlement is fair, reasonable, and adequate and reflects careful consideration by both Parties of the benefits, burdens, and risks associated with continued litigation of the Action. Plaintiff respectfully submits that this Court should grant final approval of the Settlement and order relief be given to the Settlement Class.

### A. The Standards for Final Approval of Class Action Settlements

Pursuant to Rule 23(e), after directing notice to settlement class members in a reasonable manner and prior to granting final approval of a proposed settlement, the Court must conduct a fairness hearing and determine whether the settlement's terms, as a whole, are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) (the court's role is to determine whether the settlement is not collusive and, "taken as a whole, is fair, reasonable and adequate to all concerned"); *Rodriguez v. West Publ'g Co.*, 563 F.3d 948, 965 (9th Cir. 2009) ("In this case, the negotiated amount is fair and reasonable no matter how you slice it. There is no evidence of fraud, overreaching, or collusion."); *see generally Manual for Complex Litigation (Fourth)* § 21.62 (2004) ("Rule 23(e)(1)(C) establishes that the settlement must be fair, reasonable, and adequate."); H. Newberg & A. Conte, *Newberg on Class Actions* § 11:41 (4th ed.

2002).[4] In making its determination, "[i]t is neither for the court to reach any ultimate conclusion regarding the merits of the dispute, nor to second guess the settlement terms." *In re TD Ameritrade Account Holder Litig.*, No. C 07-2852, 2011 U.S. Dist. LEXIS 103222, at *11-12 (N.D. Cal. Sept. 12, 2011) (citing *Officers for Justice*, 688 F.2d at 625).

Judicial policy strongly favors the settlement of class actions. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). "[V]oluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice*, 688 F.2d at 625. Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length and size of the litigation. *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) ("[T]here is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits ….").

Several non-exhaustive factors are recognized as guideposts to the "fair, adequate and reasonable" determination: (1) the strength of plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount achieved or recovered in resolution of the action; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; and (7) the reaction of the class members to the proposed settlement. *See Class Plaintiffs*, 955 F.2d at 1291; *Officers for Justice*, 688 F.2d at 625. A settlement is entitled to a presumption of fairness when reached by experienced counsel. *See Rodriguez*, 563 F.3d at 965 ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution"). Each of these factors supports approval of the Settlement.

[4] Internal citations omitted and emphasis is in original, unless stated otherwise.

### B. The Settlement Is Fair, Reasonable, and Adequate

#### 1. Cash Reimbursements Provided to Settlement Class Members

The Settlement consists of all purchasers of Ginkgold in California from July 7, 2011 to October 1, 2020 and in the United States from January 1, 2016 to October 1, 2020. Each Settlement Class Member who submits a valid claim will receive cash reimbursement for up to three purchases of Ginkgold without proof of purchase. For Settlement Class Members with proof of purchase, they may receive up to their full purchase price for all purchases.

As of December 16, 2020, over 80,000 claims had been submitted to the Claims Administrator as a result of the successful Notice Plan, which resulted in more impressions than originally anticipated. Notice Plan Decl., ¶¶ 8, 25. Although the claims deadline is still open and the claims are still being processed, it appears the Settlement Fund will be exhausted. SA, §§ 2.2, 2.2.1.

Nonetheless, should any funds remain, the American Brain Foundation is an appropriate *cy pres* recipient because it funds research related to all types of brain diseases and disorders, including those at issue in this Action. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011) (*cy pres* recipient should be related to the nature of the lawsuit and the class members, including their location); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990); ECF No. 189-5 (Declaration of Jane Ransom in Support of *Cy Pres* Designation of American Brain Foundation), ¶¶ 2-4.

#### 2. Notice and Administration Costs, Attorneys' Fees and Expenses, and Class Representative Service Award

Notice and administration expenses, attorneys' fees and expenses, and a Class Representative service award will be paid from the Settlement Fund. SA, § 2.2. Defendants agree to not oppose Class Counsel's application for reasonable attorneys' fees and expenses not to exceed 33% of the Settlement Fund. SA, § 2.4. Defendants

also agree not to oppose any request for a Court-awarded service award of $5,000 to Plaintiff. *Id.*

### C. The Settlement Was Reached After Serious, Informed, and Non-Collusive Arm's-Length Negotiations

The Settlement was reached on the eve of trial, after five years of litigation and several extensive arm's-length settlement negotiations, including participation in three full-day mediation sessions with two different mediators. Settlements that are products of such negotiations are considered presumptively fair and reasonable. *See In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1171 (S.D. Cal. 2007) ("[T]he fact that the settlement agreement was reached in arm's length negotiations after relevant discovery [has] taken place create[s] a presumption that the agreement is fair.") (quoting *Linney v. Cellular Alaska P'ship*, No. C-96-3008, 1997 U.S. Dist. LEXIS 24300, at *16 (N.D. Cal. July 18, 1997) *aff'd*, 151 F.3d 1234 (9th Cir. 1998)); *Kline v. Dymatize Enters., LLC*, No. 15-CV-2348, 2016 U.S. Dist. LEXIS 142774, at *14 (S.D. Cal. Oct. 13, 2016) ("That the settlement was reached with the assistance of an experienced mediator further suggests that the settlement is fair and reasonable."); *Anderson v. Nextel Retail Stores, LLC*, No. CV 07-4480, 2010 U.S. Dist. LEXIS 43377, at *44 (C.D. Cal. Apr. 12, 2010) ("Because the present agreement was reached through arms-length negotiation between experienced parties whose negotiations were overseen by an experienced mediator, it is entitled to a presumption of fairness.").

Here, counsel for the Parties each zealously negotiated on behalf of their clients' best interests. Class Counsel, who are experienced in prosecuting complex class actions, had a "clear view of the strengths and weaknesses" of their case, and thus, were in a strong position to make an informed decision regarding the reasonableness of a potential settlement. *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010). Despite their good-faith efforts during the initial meditation with Hon. Edward A. Infante (Ret.) of JAMS, the Parties were unable to

find common ground. The Parties proceeded with intense litigation and discovery, which included analyzing over 172,000 pages of electronic discovery, several depositions, third party discovery, summary judgment, an appeal, class certification, and full Rule 26 expert reports, in addition to two subsequent mediation session with experienced mediator Scott Markus. With a clear view of the strengths and weaknesses of the claims, and after numerous discussions and proposals, the Parties ultimately agreed to the proposed Settlement. The experience of counsel and the fair result reached are illustrative of the arms-length negotiations that led to the Settlement.

### D. The Strengths of Plaintiff's Case and Risks Inherent in Continued Litigation Favor Approval

Settlements resolve the inherent uncertainty on the merits, and are therefore strongly favored by the courts, particularly in class actions. *See Van Bronkhorst*, 529 F.2d at 950; *U.S. v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977). This action is not unique in this regard—the Parties disagree about the merits, and there is substantial uncertainty about the Action's litigated outcome.

Although Plaintiff is resolute in the strength of her claims against Defendants, Plaintiff must balance this against the considerable risks and duration of continuing litigation. Should this case proceed to trial, which is the next step, the hurdles Plaintiff faces are substantial, and the potential upside is limited. Trial would amount to a fierce and expensive "battle of the experts" on the science behind Defendants' advertising claims. This always presents the potential for confusing jurors. Additionally, Defendants have argued that monetary relief is not the full retail value of Ginkgold, but rather, some smaller portion of the retail price. Moreover, given the substantial motion practice in the Action to date, the losing party would likely appeal any verdict. Settlement ensures a substantial recovery for the Settlement Class now while obviating the need for a lengthy, complex, and uncertain trial and appeal. *See Asghari v. Volkswagen Grp. of Am., Inc.*, No. CV 13-02529, 2015 U.S. Dist. LEXIS 188824,

at *51-54 (C.D. Cal. May 29, 2015); *In re Nucoa Real Margarine Litig.*, No. CV 10-00927, 2012 U.S. Dist. LEXIS 189901, at *42-44 (C.D. Cal. June 12, 2012).

Given the uncertainties and limited upside of continued litigation, this factor weighs in support of final approval of the Settlement.

**E. The Risk, Complexity, Expense, and Duration of the Litigation Favor Approval**

The risk, expense, complexity, and duration of the case if taken to trial rather than settled weighs heavily in favor of final approval of the Settlement.

Here, the Settlement provides substantial benefits to Settlement Class Members in the form of cash reimbursements. The guaranteed recovery also obviates the risk and delay of continued litigation, trial, and appeal—significant factors considered in evaluating a settlement. *See Create-A-Card, Inc. v. INTUIT, Inc.*, No. CV-07-6452, 2009 U.S. Dist. LEXIS 93989, at *13 (N.D. Cal. Sept. 22, 2009). Continued litigation to trial would be time-consuming and expensive, only to possibly obtain less than what is immediately available through the Settlement. Indeed, there is a very real risk the Settlement Class may receive nothing after going through the expense of trial. Thus, elimination of delay and expense weighs in favor of approval. *Nobles v. MBNA Corp.*, No. C 06-3723, 2009 U.S. Dist. LEXIS 59435, at *5 (N.D. Cal. June 29, 2009) ("The risks and certainty of recovery in continued litigation are factors for the Court to balance in determining whether the Settlement is fair."); *Kim v. Space Pencil, Inc.*, No. C 11-03796, 2012 U.S. Dist. LEXIS 169922, at *15 (N.D. Cal. Nov. 28, 2012) ("The substantial and immediate relief provided to the Class under the Settlement weighs heavily in favor of its approval compared to the inherent risk of continued litigation, trial, and appeal, as well as the financial wherewithal of the defendant.").

This Settlement establishes a means for prompt resolution of Settlement Class Members' claims and cash payments, which ensure the Settlement Class Members will benefit from the Settlement. Given the alternative of continued, complex litigation before this Court, and the risks involved in a trial where Settlement Class

Members might get nothing, the availability of prompt relief under the Settlement is highly beneficial to the Settlement Class.

**F. The Amount Achieved Under the Settlement Favors Approval**

The Settlement provides real relief for Settlement Class Members by providing them reimbursement for at least a significant portion of and up to the full retail purchase price of their Ginkgold purchases. "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). Rather, "[e]stimates of what constitutes a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years)." *In re Nucoa*, 2012 U.S. Dist. LEXIS 189901, at *46.

The average retail price of Ginkgold ranges from $23.00 to $28.00 over the Settlement Class period. Although the Settlement claims period is still open and the Settlement Administrator is processing claims, which may result in a reduction of valid claims, the current number of claims results in an average cash reimbursement of near the full retail price of Ginkgold to each Settlement Class Member.[5] Given the risk of losing at trial and getting nothing, or having relief delayed by appeal, the relief provided by this Settlement is considerable.

Additionally, the Court should give significant weight to the negotiated resolution of the parties. "'[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the

[5] If the requested cost of notice, attorneys' fees and expenses, and plaintiff service award (totaling $1,518,750) are awarded and deducted from the Settlement Fund, $1,856,250 remains to pay Settlement Class Members. Assuming, 80,0000 valid claims are made, Settlement Class Members will receive an average cash reimbursement of $23.20 each.

product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.'" *Hanlon v. Chrysler*, 150 F.3d 1011, 1027 (9th Cir. 1998) (quoting *Officers for Justice*, 688 F.2d at 625); *accord Rodriguez*, 563 F.3d at 965. The issue is not whether the settlement could have been better in some fashion, but whether it is fair: "Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon*, 150 F.3d at 1027.

**G. Experience and Views of Counsel Favor Approval**

Courts recognize that the opinions of experienced counsel supporting a settlement, especially after vigorous arm's-length negotiations, are entitled to considerable weight. *See True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1079 (C.D. Cal. 2010) (holding that class counsel's views that settlement was reasonable weighed in favor of settlement); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) *aff'd*, 661 F.2d 939 (9th Cir. 1981) ("[T]he fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight.").

Class Counsel have substantial experience serving as class counsel in complex litigation including false advertising cases. Class Counsel's views and recommendations concerning the Settlement are the product of thorough analysis and consideration of the issues and risks of continued litigation. Class Counsel believes that the results achieved by the Settlement are eminently fair, adequate and reasonable. *See* Brown Preliminary Approval Decl., ¶ 6.

**H. The Reaction of Settlement Class Members Favors Approval**

Courts have likewise recognized that a favorable reaction by class members to the proposed settlement strongly supports final approval. *See Chun-Hoon*, 716 F. Supp. 2d at 852 ("The reaction of class members to the proposed settlement, or perhaps more accurately the absence of a negative reaction, strongly supports

settlement."). Class members must be allowed the opportunity to review and object to both the preliminary notice of settlement and the plaintiff's application for attorneys' fees prior to final approval. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-94 (9th Cir. 2010); *Ozga v. U.S. Remodelers, Inc.*, No. C 09-05112, 2010 U.S. Dist. LEXIS 91196, at *5 (N.D. Cal. Aug. 9, 2010) (in granting final approval of a settlement class, court considered that the "overall reaction to the Settlement has been positive"); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (where only one of 5,400 class members opted-out and just a "handful" objected, "[t]he reaction of the class members to the proposed settlement further supports the conclusion that … the Settlement was fair, adequate and reasonable").

Here, the reaction of persons in the Settlement Class is very positive. As of December 16, 2020, no requests for exclusions have been made and only one potential objection was made. *See* Brown Final Approval Decl., ¶ 10;[6] Notice Plan Decl., ¶¶ 20, 23. This response supports final approval. *See, e.g.*, *Galluci v. Boiron, Inc.*, No. 11cv2039, 2012 U.S. Dist. LEXIS 157039, at *19 (S.D. Cal. Oct. 31, 2012) ("The response of the Class to this action, the certification of a class, and the Settlement ... strongly favors final approval of the Settlement. Out of the estimated millions who received Notice [] only two class members submitted valid requests for exclusion. Moreover, only three Objections were filed[.]"); *Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-0324, 2012 U.S. Dist. LEXIS 160052, at *14, *17, *19 (E.D. Cal. Oct. 31, 2012) (no objections and less than 1% of the class electing to opt out weighed in favor of final approval and the adequacy of the amount offered in settlement); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) ("the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable

[6] "Brown Final Approval Decl." references the concurrently submitted Declaration of Paula R. Brown in Support of Motion for Final Approval of Class Action Settlement.

to the class members"); *Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming approval of a class action settlement where forty-five objections were received out of 90,000 notices).

In sum, the Settlement is the product of arms-length negotiations among the Parties, well informed of the relative strengths and weaknesses of their claims and defenses. The Settlement is fair, adequate and reasonable, and warrants final approval under Rule 23(e).

## IV. THE CLASS SHOULD BE CERTIFIED

The Court's Preliminary Approval Order analyzed the requirements of Fed. R. Civ. P. 23, finding the requirements satisfied and certifying the Settlement Class for settlement purposes only. ECF No. 198. Nothing has changed that would affect the Court's ruling on class certification. For the reasons stated in the preliminary approval motion and the Preliminary Approval Order, the Court's certification of the Settlement Class for settlement purposes only should be affirmed. *See Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877, 887 (C.D. Cal. 2016).

## V. CLASS NOTICE SATISFIED DUE PROCESS

The notice provided to the Settlement Class was adequate and satisfies Rule 23 and all other due process requirements. Rule 23 requires that "the court … direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). While actual notice is not required, the notice must be reasonably calculated to apprise the Settlement Class of the pendency of the settlement and afford them an opportunity to present their objections or opt-out. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950); *In re Nucoa*, 2012 U.S. Dist. LEXIS 189901, at *35.

The notice provided under the Settlement was reasonably calculated to apprise the Settlement Class of the pendency of the Action and their right to object or exclude

themselves from the Settlement. This Court previously approved the form and manner of notice, which was modeled after and consistent with "The Federal Judicial Center's 'Illustrative' Forms of Class Action Notices." *See* http://www.fjc.gov/ (last visited November 9, 2017); *see also* Fed. R. Civ. P. 23 Advisory Committee Notes (2003) ("The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms."); *Johns v. Bayer Corp.*, No. 09cv1935, 2013 U.S. Dist. LEXIS 14933, at *6 (S.D. Cal. Feb. 1, 2013) ("the form and information contained within the notice is based on and consistent with the Federal Judicial Center's notices and satisfy the requirements of Rule 23 and due process").

"With a national class such as this that consists of persons with unknown addresses, notice by publication is reasonable." *In re Nucoa*, 2012 U.S. Dist. LEXIS 189901, at *36-37. Sufficiently reaching class members nationwide through publication notice can be costly, but is necessary where direct notice cannot be given and is routinely reimbursed. *See, e.g.*, *McCrary v. Elations Co., LLC*, No. 13-0242, 2016 U.S. Dist. LEXIS 24050, at *8, 15 and n.4 (C.D. Cal. Feb. 25, 2016) (reimbursing $475,000 in notice and settlement administration costs in nationwide settlement totaling $1,350,000 in class relief); *Dennis v. Kellogg Co.*, No. 09-CV-1786, 2013 U.S. Dist. LEXIS 163118, at *23-24 (S.D. Cal. Nov. 13, 2013) (reimbursing $908,665 in notice and settlement administration costs from $4 million nationwide settlement fund).

As detailed in the concurrently filed declaration from the Settlement Administrator, the Notice Plan was executed as previously detailed, resulting in over 298 million impressions, 4.3 million more than originally planned. *See* Notice Plan Decl., ¶ 8. In addition, the Settlement Website and toll-free hotline have been established and visited by Settlement Class Members. *Id.*, ¶¶ 13-17. Given the successful notice program resulting in more claims than anticipated, the actual costs

of notice and administration will be more than the $400,000 requested by JND. *Id.*, ¶¶ 26, 27. However, JND is only seeking reimbursement capped at $400,000.

## VI. PLAINTIFF'S FEE AND EXPENSE REQUEST SHOULD BE APPROVED

Plaintiff seeks a combined award of attorneys' fees and expenses of $1,113,750. Less counsel's $166,833.79 in costs expended to date to litigate this Action, the requested fee award of $946,916.21 represents a negative multiplier of 0.66 on Plaintiff's counsel's lodestar of more than $1.4 million and 28% of the $3.375 million Settlement Fund.

The Ninth Circuit approves "two separate methods for determining attorneys' fees," *i.e.*, the percentage and lodestar/multiplier methods. *Hanlon*, 150 F.3d at 1029; *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 570 (9th Cir. 2019); *see also Laffitte v. Robert Half Int'l, Inc.*, 1 Cal. 5th 480, 503 (2016). "In class action cases where the defendants provide monetary compensation to the plaintiffs, 'courts have discretion to employ either the lodestar method or the percentage-of-recovery method.'" *Hyundai*, 926 F.3d at 570. The requested fees and expenses should be approved as fair and reasonable under the lodestar or common fund methods.

### A. The Lodestar Method

"The lodestar calculation begins with the multiplication of the number of hours reasonable expended by a reasonable hourly rate." *Hyundai*, 926 F.3d at 570. The court "may then adjust the resulting figure upward or downward to account for various factors, including the quality of the representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment." *Id.*

"'[T]he lodestar method yields a fee that is presumptively reasonable.'" *Id.* (quoting *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010)); *see also Harris v. Marhoefer*, 24 F.3d 16, 18 (9th Cir. 1994); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975); *Ketchum v. Moses*, 24 Cal. 4th 1122, 1138 (2001) ("the unadorned lodestar reflects the general

local hourly rate for a ***fee-bearing*** case; it does ***not*** include any compensation for contingent risk, extraordinary skill, or any other factors a trial court may consider").

The purpose of using the lodestar method is to mirror the legal marketplace: counsel will not handle cases on straight hourly fees that are payable only if they win, so an enhancement helps determine a fee that is commensurate with what attorneys could expect to be compensated for similar service in these circumstances. *San Bernardino Valley Audubon Soc'y v. San Bernardino*, 155 Cal. App. 3d 738, 755 (1984) (award must be large enough "to entice competent counsel to undertake difficult public interest cases"); *Lealao v. Beneficial Cal.*, 82 Cal. App. 4th 19, 50 (2000) (adjusted lodestar should not be significantly different from the percentage fee freely negotiated in comparable litigation). Lodestar "[m]ultipliers can range from 2 to 4, or even higher." *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see also Steiner v. Am. Broad. Co., Inc.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) ("this multiplier [of 6.85] falls well within the range of multipliers that courts have allowed"); *Vizcaino*, 290 F.3d at 1051 (multiplier of 3.65); *Keith v. Volpe*, 501 F. Supp. 403, 414 (C.D. Cal. 1980) (multiplier of 3.5).

In this case, Plaintiff's counsel's lodestar is $1,416,113.25 based on 2,676.25 hours of work as of December 14, 2020. *See* Brown Final Approval Decl., ¶ 12; Carpenter Final Approval Decl., ¶ 6. Accordingly, the $1,113,750 million award, less $166,833.79 in costs, represents a negative multiplier of 0.66. In light of the results obtained, the risk and difficulty of trial, and the future work on the final approval reply papers and hearing, settlement administration, and potential appeals still to be performed, the requested fee is fair and reasonable. *See Milburn v. PetSmart, Inc.*, No. 1:18-cv-00535, 2019 U.S. Dist. LEXIS 187530, at *29 (E.D. Cal. Oct. 28, 2019) (awarding 33.3% of common fund where lodestar amounted to a negative multiplier).

**1. The Hourly Rates Are Reasonable**

Reasonable hourly rates are determined by "prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). Typically, the

forum where the district court sits is recognized as the "relevant community." *Shirrod v. Dir., OWCP*, 809 F.3d 1082, 1087 (9th Cir. 2015) (citing *Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1053 (9th Cir. 2009)). Thus, Plaintiff's counsel are entitled to the hourly rates charged by attorneys of comparable experience, reputation, and ability for similar litigation. *Blum*, 465 U.S. at 895 n.11; *Ketchum*, 24 Cal. 4th at 1133; *see also Serrano v. Unruh*, 32 Cal. 3d 621, 640 n.31 (1982) ("The formula by which reasonable market value is reached is variously phrased" as "comparable salaries earned by private attorneys with similar experience and expertise in equivalent litigation," and the "hourly amount to which attorneys of like skill in the area would typically be entitled.").[7]

Plaintiff's counsel's lodestar is calculated using rates that have been accepted in numerous other class action cases. *See, e.g.*, Brown Final Approval Decl., ¶ 11; Carpenter Final Approval Decl., ¶ 9; *Warner v. Toyota Motor Sales, U.S.A., Inc.*, No. CV 15-2171, 2017 U.S. Dist. LEXIS 77576, at *42-43 (C.D. Cal. May 21, 2017) (approving BHO hourly rates as reasonable given "the prevailing rates in the community for lawyers of comparable skill, experience, and reputation"); *In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09md2087, 2014 U.S. Dist. LEXIS 162106, at *192 (S.D. Cal. Nov. 18, 2014) (approving hourly rates of attorneys and paralegals at BHO as "typical rates for attorneys of comparable experience"); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 644 (S.D. Cal. 2011) (approving BHO's hourly rates: "based on the Court's familiarity with the rates charged by other firms in the San Diego area, the Court finds the rates charged by the attorneys and paralegals in this

[7] An attorney's actual billing rate for similar work is presumptively appropriate. *See Wershba*, 91 Cal. App. 4th at 254-55; *People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir. 1996). "Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990).

action reasonable"); *Dennis v. Kellogg Co.*, No. 09-CV-1786, 2013 U.S. Dist. LEXIS 163118, at *22-23 (S.D. Cal. Nov. 14, 2013) (approving hourly rates of BHO as "fall[ing] within typical rates for attorneys of comparable experience"); *Johnson v. Gen. Mills, Inc.*, No. SACV 10-00061, 2013 U.S. Dist. LEXIS 90338, at *19-21 and n.3 (C.D. Cal. June 17, 2013) (approving hourly rates and time spent by BHO, stating "[t]he Court has considered class counsel's rates and finds they are reasonable because of the experience of the attorneys and prevailing market rates").

Plaintiff's counsel's rates also compare with rates approved by other trial courts in class action litigation, by what attorneys of comparable skill charge in San Diego. *See Makaeff v. Trump Univ., LLC*, No. 10cv0940, 2015 U.S. Dist. LEXIS 46749, at *12-14 (S.D. Cal. Apr. 9, 2015) (approving hourly rates of $600-$825 for partners, and $250-$450 for associates, and $150-$430 for paralegals); *Zest IP Holdings, LLC v. Implant Direct MFG., LLC*, No. 10-CV-0541, 2014 U.S. Dist. LEXIS 167563, at *13-15 (S.D. Cal. Dec. 3, 2014) (approving average hourly billing rates of $775 for partners and $543 for associates); *Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-5923, 2015 U.S. Dist. LEXIS 67298, at *15 (N.D. Cal. May 21, 2015) (approving rates of $475-$975 for partners, $300-$490 for associates, and $150-$430 for paralegals); Brown Final Approval Decl., Ex. A (the 2015 National Law Journal Billing Survey provides the following California rates: $200-$1,080 for partners; $300-$950 for associates; $175-$595 for Of Counsel attorneys; and $25-$325 for paralegals). Finally, Plaintiff's counsel have submitted sworn declarations attesting to their hourly rates and total hours devoted to the case, their experience, and describing their efforts to prosecute this Action.

**2. The Hours Expended Are Reasonable**

The number of hours spent by Plaintiff's counsel is reasonable given the efforts to ultimately obtain this resolution. This Action has lasted over five years and involved hard-fought litigation including an appeal to the Ninth Circuit, substantial motion practice, discovery, expert reports, preparation for trial, and protracted

settlement negotiations. *See* Brown Preliminary Approval Decl., ¶¶ 7-33; Preliminary Approval Mem. at 3-7. Thus, the 2,676.25 total hours spent by Plaintiff's counsel is reasonable. *See* Brown Final Approval Decl., ¶ 12; Carpenter Final Approval Decl., ¶ 6.[8] Moreover, counsel's work is not yet done. Class Counsel still need to: (1) prepare for and attend the Final Fairness Hearing, including the research and drafting of the reply papers and response to objectors; (2) oversee the claims administration process, including addressing any claim review issues and monitoring payments to the Settlement Class Members; (3) handle any appeals; (4) disburse any service award and Plaintiff's counsel's fees and expenses; and (5) oversee the *cy pres* administration, if any Settlement Funds remain. Often, responding to objectors involves obtaining written discovery, deposition testimony, or both from the objectors. And if there are appeals, hundreds of thousands of dollars of additional attorney time may be incurred in post-judgment motions (such as appeal bond requests) and in defending the Settlement on appeal to the Ninth Circuit. None of this additional time will be compensated. Accordingly, the requested fee is justified in light of the contingent nature of this action, the excellent results achieved, the work

[8] Counsel need only submit summaries of their hours incurred; submission of billing records is not required. *Wershba*, 91 Cal. App. 4th at 254-55; *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 64 (2008) ("timesheets are not required of class counsel to support fee awards in class action cases."); *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1148-49 (9th Cir. 2000) (the court may rely on summaries of the total number of hours spent by counsel); *Johnson*, 2013 U.S. Dist. LEXIS 90338, at *20-21 n.3 (citing *Lobatz* and approving class counsel's hours without detailed billing records, stating "the hours spent by counsel do not appear to be unreasonable in light of the extensive litigation … and other time-intensive tasks"); *Hemphill v. S.D. Ass'n of Realtors, Inc.*, 225 F.R.D. 616, 623-24 (S.D. Cal. 2004) (declining review of detailed time records where no evidence of collusion); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 284 (3d Cir. 2009) (finding district court's reliance on time summaries of counsel proper). This is particularly true when the lodestar method is consistent with the percentage method. *See Laffitte*, 1 Cal. 5th at 505; *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1265 (C.D. Cal. 2016).

performed to date, and the significant amount of additional work Class Counsel will have to undertake in the future.

### B. The Fee Award of 28% of the Settlement Fund Is Fair and Reasonable

The requested fees amounting to 28% of the Settlement Fund also are reasonable under a percentage of the fund calculation. Under the percentage method, "the court simply awards the attorneys a percentage of the fund sufficient to provide class counsel with a reasonable fee," using 25% as a benchmark. *Hanlon*, 150 F.3d at 1029. However, "the 25% benchmark can be adjusted upward or downward, depending on the circumstances." *Hyundai*, 926 F.3d at 570.

In determining the amount of the benefit conferred, the appropriate measure is the gross settlement amount – including attorneys' fees, expenses and administration. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 935 (9th Cir. 2015) (affirming award of 25% of the gross fund: "The district court did not err in calculating the attorneys' fees award by calculating it as a percentage of the total settlement fund, including notice and administrative costs, and litigation expenses."); *Bravo v. Gale Triangle, Inc.*, No. CV 16-03347, 2017 U.S. Dist. LEXIS 77714, at *41-43 (C.D. Cal. Feb. 16, 2017) (same); *Boeing Co. v. Van Gamert*, 444 U.S. 472, 480-81 (1980) (under the common fund doctrine, class counsel are entitled to a reasonable fee on the funds "awarded to the prevailing class").

The Ninth Circuit has affirmed fee awards "far greater" than 25%. *Hyundai*, 926 F.3d at 571 (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48 (9th Cir. 2002) (affirming fees totaling 28% of class recovery) and *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming 33% of class recovery)); *see also In re Mego*, 213 F.3d at 457, 463 (affirming fee award of 33 1/3% of fund); *McPhail v. First Command Fin. Planning, Inc.*, No. 05cv179, 2009 U.S. Dist. LEXIS 26544, at *10 (S.D. Cal. Mar. 30, 2009) (30% for first $10 million and 25% for additional $2 million settlement); *Morris v. Lifescan, Inc.*, 54 Fed. Appx. 663, 664 (9th Cir. 2003)

(affirming fee award of 33% of fund); *Johnson*, 2013 U.S. Dist. LEXIS 90338, at *18-20 (approving fee award of 30% of fund); *Milburn*, 2019 U.S. Dist. LEXIS 187530 at *29 (awarding 33.3% of fund).

"Indeed, in most common fund cases, the award exceeds th[e] benchmark." *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786, 2013 U.S. Dist. LEXIS 16939, at *2 (N.D. Cal. Feb. 6, 2013) (awarding 30 percent of the fund); *see also Chavez*, 162 Cal. App. 4th at 66 n.11 (30.3 percent and 27.9 percent are "not out of line with class action fee awards calculated using the percentage-of-the-benefit method"). More particularly, "in cases under $10 million, the awards more frequently will exceed the 25% benchmark." *Lopez v. Youngblood*, No. CV-F-07-0474, 2011 U.S. Dist. LEXIS 99289, at *36 (E.D. Cal. Sept. 1, 2011); *see also In re Nuvelo Sec. Litig.*, No. C 07-04056, 2011 U.S. Dist. LEXIS 72260, at *7 (N.D. Cal. July 6, 2011).

A departure upward from the benchmark percentage to 28% is appropriate here given the exceptional results achieved for the Settlement Class, the complexity of the science questions at issue, the duration and contingency nature of the litigation, and the vigorous opposition from Defendants throughout. *See Morris*, 54 Fed. Appx. at 664 (affirming 33% award where district court found "class counsel achieved exceptional results in [a] risky and complicated class action and despite [defendant]'s vigorous opposition throughout the litigation"); *In re Pac. Enters.*, 47 F.3d at 379 (affirming 33.3% award based on complexity of case and risks); *Johnson*, 2013 U.S. Dist. LEXIS 90338, at *18-20 (awarding 30% for extensive work, significant financial risk, and complex scientific issues). This is particularly true because the award amounts to a negative multiplier on Plaintiff's counsel's lodestar. *Milburn*, 2019 U.S. Dist. LEXIS 187530, at *29; *Johnson*, 2013 U.S. Dist. LEXIS 90338, at *19.

Plaintiff's counsel request 28% of the $3.375 million settlement value created through Plaintiff's counsel's efforts over five years of hard-fought litigation. Counsel

should be justly rewarded for obtaining the substantial relief for the Settlement Class Members.

### C. Plaintiff's Expenses Are Reasonable and Compensable

The Ninth Circuit and California state courts allow recovery of pre-settlement litigation costs in the context of class action settlements. *See Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003); *Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977); *Rider v. San Diego*, 11 Cal. App. 4th 1410, 1423 n.6 (1992); *see also* H. Newberg & A. Conte, *Newberg on Class Actions* § 12.08, at 50-51 (2d ed. 1993). "Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters." *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1048 (N.D. Cal. 2007); *see also Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

Plaintiff's counsel submitted declarations attesting to the expenses incurred in this Action—in the aggregate, $166,833.79 was invested over the five years spent on this litigation.[9] Counsel incurred these costs for, *inter alia*, expert fees, mediation fees, electronic litigation database support, filing and service expenses, travel, computer research, photocopies, postage, and telephone charges. These expenses were reasonably and necessarily incurred and are the sort that would typically be billed to paying clients in the marketplace. *See In re Hydroxycut*, 2014 U.S. Dist. LEXIS 162106, at *193 (awarding reimbursement for "filing fees, photocopies, postage, telephone charges, computer research, mediation fees, and travel" because they are "the types of expenses routinely charged to paying clients"); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d at 1177-78 (awarding as reasonable and necessary, reimbursement for "1) meals, hotels, and transportation; 2) photocopies; 3) postage, telephone, and fax; 4) filing fees; 5) messenger and overnight delivery; 6) online legal research; 7) class action notices; 8) experts, consultants, and investigators; and

[9] *See* Brown Final Approval Decl., ¶¶ 15-18; Carpenter Final Approval Decl., ¶ 5.

9) mediation fees"); *Beane v. Bank of N.Y. Mellon*, No. 07 Civ. 09444, 2009 U.S. Dist. LEXIS 27504, at *25-26 (S.D.N.Y. Mar. 31, 2009) (awarding as "properly chargeable to the Settlement Fund" because they "are the type for which the paying, arms' length market reimburses attorneys" reimbursement for court fees, photocopying and reproduction, deposition transcripts, postage and messenger services, transportation and lodging, telephone bills, and expert and electronic litigation database support). Accordingly, Class Counsel's application for reimbursement of $166,833.79 in expenses should be approved.

**D. The Class Representative Service Award Should Be Approved**

"Incentive awards are fairly typical in class action cases." *Rodriguez*, 563 F.3d at 958 (citing 4 William B. Rubenstein, et al., *Newberg on Class Actions* §11:38 (4th ed. 2008)); *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 n.7 (2018). The Ninth Circuit recognizes that service awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez*, 563 F.3d at 958-59; *see also Edwards v. Nat'l Milk Producers Fed'n*, No. 11-cv-04766, 2017 U.S. Dist. LEXIS 145214, at *42 (N.D. Cal. June 26, 2017) ("Service awards for class representatives are provided to encourage individuals to undertake the responsibilities of representing the class and to recognize the time and effort spent on the case."). Service awards are committed to the sound discretion of the trial court and should be awarded based upon the court's consideration of, *inter alia*, the amount of time and effort spent on the litigation, the duration of the litigation and the degree of personal gain obtained as a result of the litigation. *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).

Here, Class Counsel respectfully request that the Court approve a service award of $5,000 to the Class Representative in recognition of her contributions toward the successful prosecution of this litigation. Plaintiff has devoted substantial time and

effort to this Action, including being deposed over several hours, providing written responses to discovery requests, checking for and providing requested documents, participating in periodic telephone conferences and exchanging correspondence with Plaintiff's counsel, and reviewing and approving pleadings, including the complaint and the Settlement Agreement. Additionally, Plaintiff was prepared for and committed to testifying at trial. *See* Declaration of Kathleen Sonner in Support of Application for Service Award; *see also* Brown Preliminary Approval Decl., ¶ 34.

The requested service award falls squarely in line with amounts awarded in comparable cases. *See, e.g.*, *China Agritech*, 138 S. Ct. at 1811 n.7 (recognizing class representative may obtain incentive award of up to $25,000); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (affirming $5,000 award); *Faigman v. AT&T Mobility, LLC*, No. C06-04622, 2011 U.S. Dist. LEXIS 15825, at *15 (N.D. Cal. Feb. 16, 2011) ("incentive payments of $5,000 are presumptively reasonable"); *In re Simon v. Toshiba America*, No. C 07-06202, 2010 U.S. Dist. LEXIS 42501, at *12-13 (N.D. Cal. Apr. 30, 2010) (same); *In re Mego*, 213 F.3d at 457, 463 (approving $5,000 incentive awards); *Brown v. 22nd Dist. Agric. Ass'n*, No. 15-cv-2578, 2017 U.S. Dist. LEXIS 75439, at *48 (S.D. Cal. May 15, 2017) ($5,000 incentive award "is consistent with the amount courts typically award as incentive payments"); *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365, 2010 U.S. Dist. LEXIS 49477, at *47 (N.D. Cal. Apr. 22, 2010) (service award of $20,000 was "well justified" given plaintiffs' efforts on behalf of the class) (compiling cases); *Edwards*, 2017 U.S. Dist. LEXIS 145214, at *42-43 ("the requested awards of $5,000 each are well within the usual norms of modest compensation paid to class representatives").

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## VII. CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that the Court confirm certification of the Settlement Class, grant final approval of the Settlement, and approve Class Counsel's request for attorneys' fees and expenses and a service award for Plaintiff.

Dated: December 16, 2020

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 16, 2020.

*s/ Paula R. Brown*

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