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**SUPERIOR COURT OF CALIFORNIA**
**COUNTY OF SAN DIEGO**
**NORTH COUNTY DIVISION**

**MARK HINKLE and DANIEL ROSSI, Individually and On Behalf of All Others Similarly Situated,**

**Plaintiffs,**

**v.**

**SPORTS RESEARCH CORPORATION,**

**Defendant.**

**Case No.: 37-2020-00001422-CU-NP-NC**

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS**

**Judge:** Hon. Timothy M. Casserly
**Date:** March 26, 2021
**Time:** 1:30 pm
**Dept.:** N-31

**Action Filed:** January 9, 2020

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## I. INTRODUCTION

Plaintiffs Mark Hinkle ("Plaintiff Hinkle") and Daniel Rossi ("Plaintiff Rossi") (together the "Named Plaintiffs") submit this motion for final approval of the proposed class action settlement and certification of settlement class in this action against defendant Sports Research Corporation ("Sports Research" or "Defendant"). The terms of the Settlement are set forth in the Settlement Agreement and General Release ("Agreement" or "Agr.") [1] previously filed with the Court on June 19, 2020 as Exhibit 1[2] to the Declaration of Abbas Kazerounian ("Kazerounian Decl.") in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class (ROA #25).[3]

The settlement terms are substantively fair, adequate, and reasonable, meeting the criteria for final approval. The Settlement provides for a $10 award per valid class member claim, a $2,500 service award to each of the two Named Plaintiffs, $325,000 in attorneys' fees and costs, and reasonable compensation of $104,192.50 to ILYM Group Inc. (the "Settlement Administrator") for the comprehensive Notice plan and settlement administration. Additionally, Defendant has agreed to implement the meaningful changes to the labeling of the Covered Products.

The Settlement Administrator reports that it has received 14,862 timely and valid claims submitted by the Class Members, only two requests for exclusion, and zero objections. Thus, the response from settlement class members has been overwhelmingly positive. Final approval is also endorsed by the two Named Plaintiffs. In sum, all pertinent factors for final approval of this nationwide class action settlement are satisfied and establish that the Settlement is fair, adequate, and reasonable. Plaintiffs thus respectfully request final approval of the Settlement and entry of the proposed final judgment order submitted herewith.

[1] Unless otherwise specified, defined terms used in this memorandum are intended to have the meaning ascribed to those terms in the Agreement.

[2] References to declarations herein are to declarations concurrently filed with the present motion for final approval of class action settlement, unless otherwise stated.

[3] Plaintiffs are afforded up to 22 pages for this brief pursuant to Court order (ROA #51).

## II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In the action filed on January 9, 2020 (ROA #1), Plaintiffs alleged that during the Settlement Class Period of January 9, 2016 to January 9, 2020, Defendant made false or misleading health claims concerning several of Defendant's Covered Products, in violation of the following state regulations: (a) California's False Advertising Law ("FAL"), Bus. & Prof. Code §§ 17500, *et seq*.; (b) California's Unfair Competition Law ("UCL"), Bus. & Prof. Code §§ 17200, *et seq*.; (c) California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq*., and engaged in (d) negligent misrepresentation and (e) Intentional Misrepresentation (Agr. § I.C). Defendant filed an Answer on February 18, 2020 (ROA # 13.) Sports Research generally denied all liability from Plaintiffs' allegations and asserted 34 affirmative defenses (ROA #13).

Prior to the commencement of this action, the Parties attended private mediation before Judge Gail Andler (Ret.), and continued negotiations amongst themselves for several months before reaching an agreement to resolve claims on a class action basis. Agr. § I.F.; Kazerounian Decl., ¶¶ 7-8 (ROA #25). Following settlement, Plaintiffs' Counsel conducted confirmatory written discovery and took the PMK deposition of Defendant's Representative Paul Pedersen about the allegations of the Complaint and information relating to being able to provide relief called for under the Settlement, as well as information to sales of the Covered Products, on June 10, 2020. *See id.* at ¶ 10. Plaintiffs also sought information concerning contacting information for the class members from Defendant and third parties Amazon, Inc., General Nutrition Corporation, and Vitamin Shoppe. Barthel Decl., ¶¶ 5-9 (ROA #27). Contact information for settlement class members was obtained from Amazon and Vitamin Shoppe. *Id.*

The Settlement includes individuals nationwide who purchased Premium MCT Oil or Tumeric Curcumin C3 ("Covered Products") during the period January 9, 2016 to January 9, 2020 ("Class Period"). Specifically, the Settlement Class is defined as:

> All residents of the United States and its territories who purchased for personal use, and not resale or distribution, a Covered Product between January 9, 2016 and January 9, 2020.
>
> Excluded from the Settlement Class are SRC and its respective affiliates, employees, officers, directors, agents, and representatives,

> and their immediate family members; Settlement Class Counsel and partners, attorneys, and employees of their law firms; and the judges who have presided over the Action, the case identified in Paragraph I.A, or the mediations referenced in Paragraph I.F, and their immediate family members.

Agr. § III.A.

Under the Settlement, Defendant has agreed to pay the following to each member of the Settlement Class who submitted a valid and timely claim form: (1) a voucher of $7.00 towards any product manufactured or sold by Defendant, valid for one year and freely transferrable; and (2) a payment of $3.00 cash. Agr. § IV.D. Defendant also agreed to pay class counsel combined attorneys' fees and litigation costs of up to $325,000, pay to the two Named Plaintiffs a service award of up to $2,500 each (Agr. § VI) and pay the Settlement Administrator the reasonable notice and claims administration costs (*see Id.* at § IV.A). Moreover, Defendant has agreed to important non-monetary benefits in the form of labeling changes to the Covered Products, Agr. § IV. In return for injunctive relief and monetary benefit to the Settlement Class, Plaintiffs, on behalf of the proposed Settlement Class, will unconditionally release and discharge Defendant and other related Released Persons from the Released Claims. *Id.* at § IX.B and C.

On June 19, 2020, Plaintiffs filed an unopposed motion for preliminary approval of the Settlement before this Court, (ROA #23 and 24.) The Settlement was preliminarily approved on October 23, 2020, (ROA #40). The Preliminary Approval Order set a deadline for notices to be provided to class members by January 25, 2021; a deadline for Plaintiffs to file the motion for attorneys' fees, costs and service award by February 8, 2021; a deadline for class members to submit a claims form by February 23, 2021; a deadline for the parties to inform the Court of exclusions, proof of class notice by March 10, 2021; a deadline for a motion for final approval of Settlement by March 10, 2021; and set a fairness hearing for March 26, 2021, (ROA #40.)

In accordance with the Preliminary Approval Order, the Notice was given to the Settlement Class Members in multiple ways to best ensure notice to the greatest extent possible, starting with (1) by email where available; (2) by direct mail notice (postcard-type notice) to those consumers whose email was unknown or invalid, where an address is available; a national internet banner ad campaign; and (3) detailed notice on the Settlement website (https://srsettlement.com). *See* Agr. §

II.E; Declaration of Stephanie Molina ("Molina Decl."), ¶¶ 2-8, filed herewith; Exhibit A (E-mail Notice); Exhibit B (Mail Notice); Exhibit C (Banner Ads). The email notice, mail notice, and website notice[4] provided a summary of the important details of the Settlement, including deadlines and instructions on how to opt out or object. Taking into consideration the entire Notice campaign, the Settlement Administrator estimates an excellent class notice reach of approximately 99.95%. Molina Decl., at ¶ 8.

Plaintiffs timely filed their Motion for Attorneys' Fees, Costs and Service Awards on February 8, 2021 (the "Fee Motion," ROA #44), which was promptly posted on the settlement website on February 9, 2021 (Molina Decl., ¶ 4). The Plaintiffs now seek final approval of the class action settlement as well as approval of the Fee Motion.

## III. LEGAL STANDARD

When a proposed class-wide settlement is reached, the settlement must be submitted to the court for approval. 2H. Newberg& A. Conte, Newberg on Class Actions (3d ed. 1992) at §11.41, p.l 1- 87. At the final approval stage, however, the Court must determine whether the settlement is "fair, adequate, and reasonable." *See Wershba v. Apple 10 Computer*, 91 Cal. App. 4th 224, 244 (2001) (quoting *Dunk v. Ford Motor Co.*, (1996) 48 Cal.App.4th 1794, 1801 (1996); Cal. Rules of Court, Rule 1859(g)).

A "presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *See Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 245 (2001); *see also M. Berenson Co. v. Faneuil Hall Marketplace, Inc.* 671 F. Supp. 819, 822 (D. Mass. 1987) ("Where, as here, a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair.") (footnote omitted). The court should approve the settlement because it is fair reasonable and adequate and meets the

[4] Declaration of Jason A. Ibey ("Ibey Decl."), ¶ 11, filed herewith; Exhibit 1 thereto (detailed notice on settlement website).

criteria for granting final approval. This Agreement is fair, adequate, and reasonable by every standard set forth above.

Beyond the presumption of fairness that should exist here, the courts look to the following fairness factors: 1) the strength of plaintiffs' case, 2) the risk, expense, complexity and likely duration of further litigation, 3) the risk of maintaining class action status through trial, 4) the amount offered in settlement, 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. The burden is on the proponent of the settlement to show that it is fair, adequate, and reasonable. *See Wershba*, 91 Cal. App. 4th at 244-245.

## IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Dunk*, 48 Cal. App. 4th at 1802. This Settlement satisfies these four requirements.

### A. THE SETTLEMENT WAS REACHED THROUGH ARM'S-LENGTH BARGAINING

California courts recognize "a presumption of fairness exists where ... [a] settlement is reached through arms' length bargaining." *Id.* The Settlement in this case is the result of non-collusive, arm's length and informed negotiations over a period of many months since before the action was filed, conducted between the Parties' counsel. In the lengthy negotiation process, each party was represented by counsel, including at a full day mediation before the Honorable Andler of JAMS that put the Parties on track to reach a resolution of the matter on a class action basis. Agr. § I.F.; Kazerounian Decl., ¶¶ 7-8 (ROA #25). No class member has objected to the final approval of the Settlement on this ground. Moline Decl., ¶ 11; Ibey Decl., ¶ 5. There is no doubt that the Settlement in this case is the result of serious, non-collusive and informed mediation and many months of negotiations. The litigation has been challenged capable advocacy on both sides.[5]

[5] Counsel for Defendant at Garcia Rainey Blank & Bowerbank LLP, Jeffrey M. Blank are experiences civil litigators, including in commercial litigation and general business litigation. *See e.g.*, http://garciarainey.com/Attorneys/Jeffrey-M-Blank.html; http://garciarainey.com/Attorneys/Norma-Garcia-Guillen.html.

Accordingly, the Court should conclude that settlement negotiations were vigorously conducted at arms' length without any suggestion of undue influence.

### B. Investigation and Confirmatory Discovery are Sufficient to Allow Counsel and the Court to Make an Informed Decision on Settlement

The Parties actively engaged in negotiating settlement for over a year. *See* Kazerounian Decl., ¶¶ 5-10 (ROA #25). First, the Plaintiffs engaged in pre-filing investigation, including online research, and informal discovery through the conduit of private mediation with Judge Andler (Ret.). For mediation, the Parties, through counsel informally exchanged information, weighing the strengths and weaknesses of each sides respective legal arguments concerning the potential liability of Defendant. The Action was then commenced on January 9, 2020. Plaintiffs also conducted confirmatory discovery (special interrogatories and a PMK deposition of Defendant), allowing for Plaintiffs to ascertain important information about the Covered Products sold nationwide. Kazerounian Decl., ¶¶ 8-10 (ROA #25); Barthel Decl., ¶¶ 6 & 8 (ROA #27). Further, Plaintiffs served a document subpoena on three non-parties retailors of the Covered Products (i.e., Amazon.com, GNC and Vitamin Shoppe[6]). Barthel Decl., ¶¶ 6 & 8 (ROA #27);

### C. Experience of Counsel In Similar Litigation

Plaintiffs' counsel are highly experienced in this type of consumer litigation, including class action litigation. *See* Kazerounian Decl., ¶¶ 2, 17-68 (ROA #46); Ibey Decl., ¶¶ 2, 18-34 (ROA #47). Some of the product false advertising cases handled by Plaintiffs' counsel include *Scheuerman v. Vitamin Shoppe Indus*., BC592773, 2017 Cal. Super. LEXIS 8083, *3 (Los Angeles Sup. Ct. Jan. 26, 2017) (finally approved class settlement); *Kline v. Dymatize Enters., LLC*, No. 15-CV-2348-AJB-RBB, 2016 U.S. Dist. LEXIS 142774 (S.D. Cal. Oct. 13, 2016) (granting approval of class settlement[7]); *Ayala v. Triplepulse, Inc.,* No. BC655048, 2018 Cal. Super. LEXIS 3242 (Los Angeles Sup. Ct., Nov. 13, 2018) (finally approved class settlement); and *Holt v.*

[6] At deposition, Defendant's representative indicated those three entities were the biggest retailers of the Covered Products in California. *See* Ibey Decl., ¶ 10 (ROA #26).

[7] Finally approved on April 6, 2017. *See id*. at ¶ 26.

*Foodstate, Inc. ,* 2020 U.S. Dist. LEXIS 7265, *4 (D. NH Jan. 16, 2020) (finally approved class settlement), among others.

**D. NO OBJECTIONS TO THE SETTLEMENT**

As of March 5, 2021, the Settlement Administrator has received 14,682[8] valid and timely claims to the Settlement. Molina Decl., ¶ 13.[9] Only 2 individuals requested exclusion and there are zero objections. *Id.* at ¶¶ 9 and 10. Thus, the overall reaction of the Settlement Class Members has been very positive, which further supports the presumption of fairness of the Settlement. *See 7-Eleven Owners for Fair Franchising v. Southland Corp*., 85 Cal. App. 4th 1135, 1140, 102 Cal. Rptr. 2d 777, 780 (2000) (finding that small percentage of class objections to settlement create a presumption that the settlement was fair).

In sum, the facts that the Settlement was the result of arm's length bargaining, there was adequate investigation and discovery, the class was represented by experienced counsel, and no members of the Class objected to the Settlement. The initial presumption of fairness is thus met as the four factors identified in *Dunk* are established here.

## V. THE COURT SHOULD APPROVE THE SETTLEMENT BECAUSE, BEYOND THE PRESUMPTION OF FAIRNESS, THE SETTLEMENT AGREEMENT IS FAIR, REASONABLE, AND ADEQUATE

In making a fairness determination beyond the presumption of fairness, courts also consider the following factors: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the benefits conferred by settlement; (5) the experience and views of counsel; (6) the extent of discovery completed and the state of the proceedings; and (7) the reaction of class members to the proposed settlement. *See Dunk*, 48 Cal. App. 4th at 1801 (citation omitted); *see also 7-Eleven Owners for Fair Franchising v. Southland Corp*., 85 Cal. App. 4th 1135 (Cal. App. 1st Dist. 2000).

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[8] 14,481 claims submitted online; and 381 claims submitted by Mail. Molina Decl., ¶ 13.

[9] The Settlement permits only one claim form per settlement class members, regardless of the number of products purchased. Agr. IV.D. The Settlement Administrator reports receiving 1,215 duplicative claims. Molina Decl., ¶ 12. As of March 5, 2021, no late or invalid claims have been received by the Settlement Administrator. Molina Decl., ¶ 11. However, given the deadline of February 23, 2021, it is possible some late claims (if mailed) could be received prior to the Fairness Hearing scheduled for March 26, 2021.

However, "[t]he inquiry 'must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the 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.'" *See Dunk,* 48 Cal. App. 4th at 1801.

**A. THE STRENGTHS OF PLAINTIFFS' CASE**

Plaintiffs believe they have a strong case that Defendant unlawfully misrepresenting the health benefits of the Covered Products as containing "healthy fats," "beneficial fats," "natural" ingredients, "anti-bacterial," "anti-microbial" and "anti-viral properties," and the place of manufacture of the Covered Products as "Made in the USA," when those claims were factually untrue and illegally claimed and lacking required disclosures, under various federal regulations, including 21 C.F.R. 101.65(d)(2)(i)(F), 1 C.F.R. § 101.14(a)(4), 21 C.F.R. §§ 101.65 and 101.14, 21 C.F.R. § 101.13(h), and FD&C Act, 21 U.S.C. § 321(g)(1)). *See* Compl., ¶¶ 1-5, 14-22. The Covered Products contained 14 grams of saturated fats and contained ingredients not made in the USA. *Id*. at ¶ 14. Plaintiffs assert claims under California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* ("UCL"); California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq.* ("FAL"); and for negligent and/or intentional misrepresentations. Thus, after investigations and discussions with Defendant, Plaintiffs and Class Counsel believe that they have a strong case for false advertising and would prevail at trial, but Defendant strongly disputes such allegations and believed it would prevail at trial.

Defendant filed an Answer generally denying the allegations of the complaint and raised no less than 34 affirmative defenses, with reservation to assert further affirmative defenses, (ROA #13). The factual theory underlying Defendant's defenses was that none of the claimed misrepresentations appeared on the Covered Products at the time of the filing of the action. As such, according to Defendant, there was no corrective action for Sports Research to take, and this nullified any good-faith basis for ongoing harm under the CLRA and Plaintiffs' other claims.

However, without a settlement, Defendant would continue to contest liability and damages, requiring expert analysis and motion practice concerning reliance of the Named Plaintiffs on Defendant's advertising and the appropriate measure of damages. Defendant would also challenge

class certification on a contested motion. Thus, the outcome of the case is by no means certain absent a settlement.

**B. THE RISKS, EXPENSE, COMPLEXITY AND LIKELY DURATION OF LITIGATION**

Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Class actions such as these pose serious risk, expense, complexity, and likely last for years of protracted litigation, and this case is no different. There is a significant risk on liability, damages, and issues of class certification. Class Counsel undertook the representation of Plaintiffs at their own expense and risk with no assurances that Class Counsel would receive any compensation. *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 579-580 (2004).

Sports Research denies that it committed any wrongful act or violated any law or duty and maintains that it has meritorious defenses to all claims alleged in the action. *Id*. While both sides strongly believe in the merits of their respective positions in this case, there are risks to both sides in continuing the action. *Id*. at § I. Class Counsel understand that there are uncertainties associated with complex class action litigation and that no one can predict the outcome of the case. *See* Kazerounian Decl. to Mot. for Prelim. Appr., ¶ 11; *see also*, Agr. § I.I. Nevertheless, Class Counsel are confident that at least some class would be certified here, should the case proceed, even though Defendant would vigorously defend the action. If the action were to continue, challenges would likely be made to any class certification motion made by Plaintiffs, thereby placing in doubt whether a class could be certified in the action, and additional substantive challenges to the claims might be raised. Also, continued litigation would require expensive expert testimony,[10] which, in turn, increases the complexity and number of triable issues.

In considering the Settlement, the Plaintiffs and Class Counsel thus carefully balanced the risks of engaging in protracted and contentious litigation against the benefits to the Class from the injunctive relief. Similarly, in reaching a Settlement, Defendant recognized that if a class were

[10] *See generally*, *Miller v. Los Angeles County Flood Control Dist.*, 8 Cal.3d 689, 70 (1973) (finding that "lacking the requisite expert testimony, plaintiffs failed to prove an essential element of their case -- the standard of care applicable to Noble Manors -- and the nonsuit was proper as to the theory of negligence.').

certified on a contested motion, there would be the risk of large statutory damages (Prayer for Relief), and possibly punitive damages (*see* Compl., ¶ 113), in additional to restitution and/or other injunctive relief, and substantially increased attorneys' fees and costs for Defendant in continuing to defend the action. This early settlement avoids those risks to both sides.

Given the delicate nature of class actions, the risks of maintaining this action through trial are high. At trial, many of the risks and expenses that were outlined above with respect to litigation are also applicable to trial. Some of the defenses asserted by Defendant presented serious threats to the claims of the Plaintiffs and the other Settlement Class Members, many of which were set forth in Defendant's Answer. [11]

Plaintiffs and Defendant would also have to call multiple witnesses with little assurance of succeeding at trial. The case would only proceed to trial if there were genuine factual issues that must be determined by a fact-finder, and thus no party would be able to accurately predict the outcome. In the meantime, there would be a long, difficult struggle that would likely last for days with substantial risk hanging over both parties. This Settlement provides all Settlement Class Members nationwide, regardless of means, the relief to which they are entitled in a prompt and efficient manner. Thus, it is desirable that the Settlement be finally approved.

**C. THE BENEFITS CONFERRED BY SETTLEMENT**

The Settlement provides for significant payment in light of the cost of the Covered Products, attorney's fees, administrator's costs, and injunctive benefits. The monetary and non-monetary benefits conferred by the settlement for the class are substantial and clearly outweigh the potential benefits and risks of proceeding with the class action.

**1. Monetary Relief**

Sports Research has agreed to provide cash payments to Class Members who make a valid claim. Validly claiming Settlement Class Members will receive from Defendant (1) voucher of $7.00 towards any product manufactured or sold by SRC, valid for one year and freely

[11] Some of the Defendant's asserted defenses in its Answer include: Failure to State a Claim; Failure to Mitigate; Statute of Limitations; Adequate Remedy at Law; Good Faith; Economic Loss Rule; and Preemption (*see* ROA #13).

transferrable; plus (2) payment of $3.00 cash. Agr. at § IV.D. Thus, each validly claiming Settlement Class Member will receive an award of $10.00,[12] for submitting a simple claim signed under penalty of perjury. *See* Agr. § II.E; Ibey Decl., ¶ 12 (Exhibit 2 thereto).

A plaintiff who establishes liability for false advertising "will be entitled only to such damages as were *caused by* the violation." *Burndy Corp. v. Teledyne Indus., Inc.*, 748 F.2d 767, 771 (2d Cir. 1984) (emphasis added). Under California consumer protection laws, plaintiffs can measure class-wide damages using methods that evaluate what a consumer would have been willing to pay for the product had it been labeled accurately. *See Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015); *see also*, *In re Facebook, Inc., PPC Advertizing Litigation,* 282 F.R.D. 446, 461 (N.D. Cal. 2012) (restitution under UCL is difference between what plaintiffs paid and the value of what plaintiffs received).

This suit is "predicated on the theory that the plaintiffs paid too much for the product and deserve compensation from the manufacturer." *See Emerging Issues in Noninjury Class Litigation Targeting Product Lines*, 39 Tort & Ins. L.J. 137 (Fall 2003). The settlement award (valued at $10 per claim, Agr. § IV.[13]) compares very favorably to what the Plaintiffs could recover at trial on their best day. As explained in *Colgan* v. *Leatherman Tool Group, Inc.*, "restitution under the [consumer protection laws] must be of a measurable amount to restore to the plaintiff what has been acquired by violations of the statutes." 135 Cal. App. 4th 663, 698 (2006).

[12] A proposed settlement may be acceptable even though it amounts to only a small percentage of the potential recovery that might be available to class members at trial. *See National Rural Tele. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("well settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery"); *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 460 (E.D. Pa. 2000) ("the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement; rather, the percentage should be considered in light of strength of the claims*"); In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036 (N.D. Cal. Jan. 9, 2008) (court-approved settlement amount that was just over 9% of the maximum potential recovery); *see also In re Mego Fin'l Corp. Sec. Litig.*, 213 F. 3d 454, 459 (9th Cir. 2000).

[13] In *Bezdek*, the Court granted final approval of a class settlement, finding the relief afforded by the settlement of approximately $8.44 per pair of footwear and injunctive relief, for up to two pairs of shoes, was reasonable in relation to the uncertainty of success at trial and the non-reversionary common fund. *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 351 (D.Mass. 2015).

Here, Plaintiffs would likely only be able to recover a small percentage of the cost of the products due to the alleged misrepresentations, i.e., the diminished value. According to Sports Research, the average retail price of the MCT Oil during the Class Period is $21.00, and the average retail price of the Turmeric Curcumin during the Class Period is $24.20. *See* Ibey Decl. to Mot. for Prelim. Appr. ¶ 9; *see also*, Compl., ¶ 30 (Plaintiff Hinkle paid $27.95 pre-tax for MCT Oil), and ¶ 32 (Plaintiff Rossi paid $29.95 pre-tax for Turmeric Curcumin). *See* Hinkle Decl., ¶ 13 (ROA # 28); *see* Rossi Dec., ¶ 13 (ROA # 29).

In *Munoz v. BCI Coca-Cola Bottling Co.,* 186 Cal.App.4th 399, 408–409 (201), the court held that evaluating the magnitude (or the "potential value") of the claims being released does not require an explicit statement of the maximum amount the class could recover if it prevailed. Nevertheless, the Settlement award here valued at $10 per Settlement Class Member represents approximately 35% to 41% of the average cost of the Covered Products, which Plaintiffs believes is likely more than 100% of the amount the Settlement Class Members could actually recover at trial. *See* ROA #24, pp. 19-20. Thus, this Settlement is an excellent result for the Settlement Cass Members. *See e.g.*, *In re Omnivision Techs., Inc*., 559 F. Supp. 2d 1036, 1042 (N.D. Cal. Jan. 9, 2008) (approving settlement that constituted 6% of maximum potential damages); *Jones v. Abercrombie & Fitch Trading Co.*, No. CV 15-0105 JGB (Ex), 2018 U.S. Dist. LEXIS 198001, at *17 (C.D. Cal. Nov. 19, 2018) (finally approving class action settlement where the total settlement amounted to "approximately 35% of the expected recovery").

The monetary settlement benefits were also negotiated in light of the Defendant's disclosure to Plaintiffs through informal discovery, about how many of the Covered Products were sold. Consequently, Class Counsel are informed and believe that monetary relief in this case gives an adequate amount to the Settlement Class Members for their purchases of the past product without any prosecution of the case themselves and provides adequate injunctive relief so that such a situation with Defendant does not occur again.

**2. <u>Injunctive Relief</u>**

Sports Research agreed to make significant labeling changes as part of the Settlement. Agr. at § IV.F. Sports Research agrees to adhere to the following to provisions as it pertains to

advertising of the Covered Products from its literature, promotional labeling material and website: (i) cease representing that the MCT Product contains "healthy fats" and "beneficial fats"; describing the product as "healthy"[;] describing the products as "a natural sustained energy"; representing the product contains "anti-bacterial," "anti-microbial" and "anti-viral properties": and (ii) cease representing that the Turmeric Product has "anti-inflammatory" and "anti-oxidant benefits". *Id*. at § IV.F. The changes to the literature and promotional material shall be commenced within ninety (90) days from the Effective Date of the Settlement Agreement. *Id*. Class Members may also benefit from the deterrent effect of this nationwide Settlement because it provides a deterrent effect for future violations, both to Sports Research and consumer product manufacturers generally.

**3. Release**

In exchange for the monetary compensation and injunctive relief, all Settlement Class Members will relinquish claims arising from or relating to claims concerning the Covered Products. *See* Agr. § II.CC. However, any claims for bodily injury are excluded from the Release (*id*. at § II.CC). The Release also includes a waiver under Section 1542 of the California Civil Code as to claims that are the same as, substantially similar to, or overlap the Released Claims (*id*. at § IX.B.3). Thus, the Release by the Named Plaintiffs and Settlement Class members closely tracks the claims asserted for the Covered products and is reasonable.

Additionally, Sports Research agrees to release the Named Plaintiffs and Settlement Class Members who are not opt-outs from any claims Sports Research may have against them, solely with respect to the Released Claims, except as to the rights and obligations established by the Agreement. *Id*. at § IX.C.

**D. THE EXPERIENCE AND VIEW OF COUNSEL**

Although recommendations of counsel proposing the Settlement are not conclusive, the Court can properly take them under consideration, particularly if they have been involved in litigation for some period of time, appear to be competent, have experience with this type of litigation, and discovery has commenced, as here. *See* 2 H. Newberg, Newberg on Class Actions § 11.47 (2d ed. 1985). Indeed, courts do not substitute their judgment for that of the proponents,

especially when experienced counsel familiar with the litigation have reached a settlement. *See e.g., Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990) ("It is well established that a court deciding whether to approve a class action settlement should not substitute its judgment for that of the proponents of the settlement …"). Courts presume the absence of fraud or collusion in the negotiation of a settlement unless evidence to the contrary is offered. *See* Newberg on Class Actions § 11.51; *see also In re Chicken Antitrust Litig*., 560 F. Supp. 957, 960 (N.D. Cal. 1980) (… it is well settled that a proposed settlement, taken on the whole, need only be fair, adequate, and reasonable in light of the interests of all the parties and not the product of fraud or collusion, to meet the court's approval."). In short, the negotiations were conducted in good faith.

As explained above and in the Fee Brief, Class Counsel are qualified and highly experienced in consumer class action litigation, including with regard to product false advertising claims. They have detailed knowledge of this case initiated in January of 2020, following pre-suit mediation held on May 30, 2019; and Plaintiffs' counsel conducted pre-filing investigation, negotiated with opposing counsel extensively, and received informal and confirmatory written discovery. *See* Kazerounian Decl., ¶¶ 6-10 (ROA #25). Thus, Class Counsel are sufficiently aware of the benefits and risks of settlement compared to proceeding with litigation and have determined settlement to be in the best interest of the Settlement Class Members. *See Dunk*, 48 Cal. App. 4th at 1802 ("the litigation has reached the stage where 'the parties certainly have a clear view of the strengths and weaknesses of their cases.'"). The endorsement of settlements as fair, reasonable and adequate for the classes by qualified and well-informed counsel operating at arm's length, is "entitled to significant weight." *Dunk*, 48 Cal. App. 4th at 1802.

As such, the Court should defer to the views of counsel and preliminarily approve the Settlement. Class Counsel believe that under the circumstances, the proposed Agreement is fair, reasonable, and adequate, and in the best interest of the Settlement Class Members. Kazerounian Decl., ¶ 8; Ibey Decl., ¶ 10.

**E. PUBLIC POLICY IN FAVOR OF QUIETING LITIGATION SUPPORTS FINAL APPROVAL**

"[T]here is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp*., 529 F.2d 943, 950 (9th

Cir. 1976) (footnote omitted). *See also Potter v. Pacific Coast Lumber Company*, 37 Cal. 2d. 592, 602 (1951); 2 Newberg on Class Actions (3d ed. 1992) ("Newberg") § 11.41 (citing cases). In addition to quieting this class action litigation, the Settlement will resolve nationwide claims concerning alleged misrepresentations in the advertising and improper labeling of the Covered Products (i.e., various bottles of Sports Research's Premium MCT Oil and Turmeric Curcumin products, Agr. § I.A.), while not releasing any claims for bodily injury. Thus, public policy favors granting final approval to this Settlement.

**F. THE RESPONSE FROM SETTLEMENT CLASS MEMBERS IS POSITIVE**

As noted above, the reaction from Settlement Class Members to the Settlement was very positive. There are 14,862 valid claims to the Settlement, only 2 requests for exclusion out of more than 100,000 Settlement Class Members,[14] and zero objections (Molina Decl., ¶¶ 10, 11 & 13). *See e.g.*, *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal.App.4th 1135, 1152–1153 (2000) (class members' response "overwhelmingly positive" when "a mere 80 of the 5,454 noticed class members elected to opt out" and nine objected).

**G. NOTICE TO THE CLASS WAS FAIR, ADEQUATE, AND REASONABLE**

California has abundant authority providing guidance to trial courts when fashioning notices of class action settlements. *See* Cal. Rules of Court, Rule 3.766; *see also*, *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1164 (2000); *accord*, *Cellphone Termination Fee Cases* (2010) 186 Cal. App. 4th 1380, 1390–1393.

Here, notice of the proposed class action Settlement was given to the Settlement Class Members in multiple ways to best ensure notice to the greatest extent possible, starting with (1) by email where available (Exhibit B to Agr.); (2) by direct mail notice (postcard-type notice) to those consumers who email was unknown or invalid, where an address is available (Exhibit C to Agr.); a national internet banner ad campaign (Exhibit D to Agr.); and (3) detailed notice on the Settlement website (Exhibit E to Agr.[15]). *See also,* Agr. § II.F; Molina Decl., ¶¶ 2-8.

[14] There are more than 100,000 Settlement Class Members, based on information obtained from Defendant and third-parties, and in light of more than 1.2 million units of the Covered Products sold nationwide during the Class Period. *See* ROA #24, p. 9; ROA # 45, p. 11.

[15] Exhibit 1 to Ibey Decl. ¶ 11, filed herewith.

Plaintiffs sought class certification for settlement purposes under Cal. Civ. Proc. § 382. They did not separately request class certification under the special rules for a certified class under the Cal. Civ. Code § 1781 of the CLRA. Regardless, the requirements of Cal. Civ. Civ. Code § 1781(d) do not appear to govern nationwide consumer class actions.[16] Thus, the Court did not need to additionally order class notice be provided by means of newspaper of general circulation in any county. In any event, subdivision (f) of Cal. Civ. Civ. Code § 1781 of the CLRA mandates that notice of a settlement class be given "as the court directs," thus granting the trial court discretion to fashion notice of a settlement class, provided the court orders that notice be sent "to each member who was given notice pursuant to subdivision (d)."

**1. Notice was Provided to Over 99% of the Settlement Class**

The comprehensive notice explained above is more than sufficient notice for due process purposes, especially where the notice reach here is an estimated 99.95% (Molina Decl., ¶ 8), which means that virtually all Settlement Class Members were informed of the proposed Settlement. *See e.g., Scheuerman, supra*, 2017 Cal. Super. LEXIS 8083, *3 (Los Angeles Sup. Ct. Jan. 26, 2017) (granting final approval in a product false advertising matter where notice was emailed to over 30,230 class members and mailed to 4,682 class members); *Lloyd v. Navy Fed. Credit Union*, No. 17-cv-1280-BAS-RBB, 2019 U.S. Dist. LEXIS 89246, at *9 (S.D. Cal. May 28, 2019) (finally approving settlement where notice was provided by email or mail (as available), and long form notice on the settlement website); *McCrary v. Elations Co., LLC*, No. EDCV 13-0242 JGB (SPx), 2016 U.S. Dist. LEXIS 24050, at *19-20 (C.D. Cal. Feb. 25, 2016) (finally approving settlement where notice was provided by email and mail, print publication, and internet banner ads).[17]

[16] By its terms, Cal. Civ. Code § 1781(d) concerns notice when a class action is "permitted"—i.e., when a court certifies a class for adjudication. To "permit" means "[t]o suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act." Black's Law Dict. (6th ed. 1990) p. 1140, col. 1; *accord*, Webster's 3d New Internat. Dict. (1971) p. 1683, col. 3.

[17] "Courts have come to accept both email and internet notice campaigns as acceptable means of giving notice in class actions" and they "are beginning to embrace the belief that internet notice may be preferable to traditional methods of publication notice." Making Class Actions Work: The Untapped Potential of the Internet, 69 U. Pitt. L. Rev. 727, 733-734 (Summer 2008).

**2. Reasonable Opportunity to Submit a Claim Form**

Settlement Class Members were afforded the opportunity to submit a claim form via the Settlement website or by mail, with 90 days[18] to do so. *See* Agr. §§ II.D, II.E. & V.A; Molina Decl., ¶¶ 4-6. The claim form was simple and easy to understand (Exhibit A to the Agreement; Exhibit 2 to Ibey Decl., ¶ 12). Among other things, the Claim Form required the Settlement Class Member to declare under penalty of perjury that they purchased at least one of the Covered Products during the Class Period, and if the Covered Product is an MCT Oil product purchased on or after January 1, 2019, declare under penalty of perjury that the MCT Oil product's label contained the representation that it had "beneficial fats"; "healthy fats"; and "anti-bacterial, "anti-microbial" and "anti-viral properties," Agr. § II.E; *see also* Exhibit A to Agr.; and Exhibit 2 to Ibey Decl., ¶ 12. The Class Members were allowed submit one claim to the Settlement, regardless of the number of bottles of the Covered Products purchased during the Class Period. *Id*. at § IV.D.

**3. Reasonable Opportunity to Object or Request Exclusion**

Settlement Class Members had up to 90 days to request exclusion (opt out) from of the Settlement or to object to its terms. *See* Agr. § II.V; ROA #40, p. 10; *see also* Molina Decl., ¶¶ 9-10. The deadline for doing both was one hundred and twenty days (120) from the date the court grants the motion for preliminary approval. *Id*. at § II.V. The Settlement Class Members who desired to opt out of the Settlement were allowed to do so by completing and mailing an exclusion request to the Settlement Administrator that was post marked no later than the deadline of February 23, 2021 (*see* Molina Decl., ¶ 9). The exclusion request was required to be signed by the Person in the Settlement Class requesting exclusion, was required to contain a statement that indicates his or her desire to be excluded from the Settlement Class in the matter of *Hinkle et al. v. Sports*

[18] Amazon.com commenced its own email notice to Settlement Class Members on December 4, 2020, which still provided a fair and reasonable "81" days to submit a claim form, request exclusion or object. *See* Ibey Decl., ¶¶ 7 and 13; Exhibit 3 thereto (language of Amazon.com notice). *See e.g., Orellana v. Silva Trucking, Inc*., No. CV F 04-5979 AWI LJO, 2005 U.S. Dist. LEXIS 55831, at *4 (E.D. Cal. Dec. 22, 2005) (granting preliminary approval of settlement providing 60 days to submit a claim form); *see also Lusby v. Gamestop Inc*., 297 F.R.D. 400, 414(N.D. Cal. 2013) (noting that a renewed motion "should ensure that class members are afforded at least sixty days to submit their claim form, opt-out, or object to the settlement.").

*Research Corporation* (or sufficient words to indicate the present lawsuit against Sports Research Corporation), and was required to contain a statement that he or she is otherwise a Person in the Settlement Class and purchased one or more of the Covered Products. *See* Agr. § VII.D.1.

Any Settlement Class Members who desired to object were required to do so on or before the deadline of February 23, 2021 and were afforded 90 days to do so. Agr. § II.V; ROA #40, p. 10; *see* Molina Decl., ¶ 10. In order to object, the Settlement Class Member was required to include in the objection submitted to the Court and served on Settlement Class Counsel and Sports Research's Counsel (1) the name, address, telephone number of the Person objecting and, his/her counsel, if any; (2) a signed declaration stating that he or she is a Person in the Settlement Class and purchased one or more of the Covered Products; (3) a statement of all objections to the Settlement Agreement and any supporting documentation; and (4) a statement of whether he or she intends to appear at the Final Approval Hearing, either with or without counsel, and if with counsel, the name of his or her counsel who will attend. Agr. § VII.C. No objections were received by Class Counsel, the Settlement Administrator, or noted on the Court's Registrar of Actions as of March 09, 2021. Molina Decl., ¶ 10; Ibey Decl., ¶ 5.

Therefore, the Court should find that the Notice to the class was fair, adequate, and reasonable, affording Settlement Class Members a reasonable amount of time to submit a claim, request exclusion, or object to the proposed Settlement as well as the Fee Brief.

## VI. REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS COMBINED OF $325,000 SHOULD BE APPROVED AS FAIR, ADEQUATE, AND REASONABLE

As explained in detail in the Fee Motion, Plaintiffs' request for attorneys' fees, costs and services awards is fair and reasonable and should be approved (ROA #45). Since filing the Fee Motion on February 8, 20201, Class Counsel have continued to respond to inquiries from settlement class members, kept in contact with the Settlement Administrator, and prepared and timely filed the present motion for final approval of class action settlement. Kazerounian Decl., ¶ 6; Ibey Decl., ¶ 6.[19] Additional works remains to be completed, as Class Counsel will need to

[19] Mr. Kazerounian was approved for an hourly rate of $710 in the matter of *Hofstader v. Providence Health And Services, et al.*, Case No. 2:18-cv-00062-SMJ (E.D. Cal. Feb. 19, 2021). Kazerouinian Decl., ¶ 9.

prepare for and attend the Fairness Hearing, and if finally approved, would need to oversee distribution of settlement awards to validly claiming Settlement Class Members and implementation of the labeling changes called for by the Settlement. Therefore, the requested awards in the Fee Brief remains fair and reasonable and should be approved, including in light of zero objections by Settlement Class Members to the Settlement or the Fee Brief.

## VII. THE NOTICE AND CLAIMS ADMINISTRATION COSTS ARE REASONABLE

Settlement administration and notices expenses are to be paid separately by Defendant (*see* Agr. §§ IV.A & VI) as there is no common fund. The Court preliminarily approved the notice and claims process that was performed by Administrator, and notices expenses are to be paid separately by Defendant. *See* Preliminary Approval Order, 3:18-3:20. The Settlement Agreement provides, and the Notice to the Settlement Class Members indicated, a cap of $110,000 for the Notice Program (Agr. § IV.A.), which is reasonable in light of direct notice to over 11,000 Vitamin Shoppe customers, direct notice to over 95,000 Amazon.com customers (*see* Ibey Decl., ¶ 7), providing for supplemental notice via an internet banner ad campaign with 10,002,794 impressions,[20] working to process over 14,000 claims, and maintaining a settlement website and toll-free phone number. As of approximately February 5, 2021, the Settlement Administrator reportedly incurring settlement administration expenses of $45,954.15, which includes the cost of class notice. *See* ROA #, 45, p. 13. A final estimate for settlement administration expenses is estimated to be $104,192.50 (Molina Decl. ¶ 15). As the final estimate is under the $110,000 cap and is justified by the administration of the claims processing, comprehensive nationwide class notice, and estimated costs for award distribution, should be approved.

## VIII. THE CLASS IS PROPERLY CERTIFIED FOR SETTLEMENT PURPOSES

On October 23, 2020, the Court previously and preliminarily certified this action as a class action for settlement purposes, finding the settlement terms could be fair, adequate, and reasonable (ROA #40, p. 2). The number of Class Members exceeding 100,000 nationwide is sufficiently numerous to warrant resolution under California Code of Civil Procedure § 382; the claims of the

[20] *Id.* at ¶ 8. Internet banner ad impressions refers to the number of digital views of the online ad content. *See generally*, https://www.investopedia.com/terms/i/impression.asp

two Named Plaintiffs concerning purchase of the MCT Oil and Turmeric products (MCT Oil was purchased by Mr. Hinkle, Compl., ¶ 30; and Turmeric was purchased by Mr. Rossi, Compl., ¶ 32) are typical of the claims of the Class Members relating to the Covered Products (*see* Agr. § I.A.; Exhibit F to Agr.); the claims at issue share a commonality in terms of the alleged misrepresentations and mislabeled products (*see* Sections V.A. and B. above); and both the Class Representatives and Class Counsel have been adequate representatives for the Class Members.

The Settlement Administrator timely provided the comprehensive Notice to the Settlement Class Members (Molina Decl., ¶¶ 2-8). Class Counsel have also discharged their duties by, among other things, overseeing the settlement and responding to inquiries from Settlement Class Members (Kazerounian Decl., ¶ 6; Ibey Decl., ¶ 6); timely filing the Fee Motion (ROA #45 and 45), with the Fee Brief promptly posted on the settlement website on February 9, 2021 (Molina Decl., ¶ 4); and now timely file the present motion for final settlement approval (*see* ROA #40, p. 10).

While Plaintiffs are confident of a favorable determination on the merits, they believe it is desirable that the action be fully and finally compromised, settled, and forever barred pursuant to the terms and conditions set forth in this Agreement, without risks and further expense of litigation. Plaintiffs agree that this settlement provides substantial settlement benefits. Agr. at § I.I to I.K. Similarly, as evidenced by the Agreement, Defendant denies liability and any wrongdoing, but has also determined that it is desirable to settle the action as set forth in the Agreement. *Id*. at § I.I.

Thus, Plaintiffs contend that this proposed Settlement continues to meet all of the requirements for class certification under CCP § 382, and therefore, the Court may finally appropriately approve the Settlement based on the Agreement. As such, the class is appropriately finally certified for settlement purposes.

## IX. CONTINGENT CY PRES RECIPIENTS

Under the Settlement, unclaimed settlement funds are to be distributed to two charitable entities to be selected (one each) by the Parties, subject to Court approval (*see* Agr. § II.J; I.V.E.3.; and IV.G). Sports Research "shall have no reversionary interest in any portion of the cash payments to Settlement Class Members" (Agr. § IV.G). Thus, should there be any unclaimed settlement funds after distribution, such as uncashed checks (void if not cashed within 90 days),

the Parties propose to the Court for approval of an equal *cy pres* distribution to the charitable, with Plaintiffs proposing the National Consumer Law Center ("NCLC"), and Defendant proposing the Constitutional Rights Foundation Orange County ("CRFOC"). Ibey Decl., ¶ 9.

The California Supreme Court has held that the various methods of distributing the unpaid residual of a class recovery that go under the name of "fluid recovery" may be "essential to ensure that the policies of disgorgement or deterrence are realized" and should be utilized where appropriate to "fulfill[] the purposes of the underlying cause of action." *Granberry v. Islay Investments*, 9 Cal.4th 738, 760 (1995), quoting *State of California v. Levi Strauss & Co.*, 41 Cal.3d 460, 472 (1986). As noted in *In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 722 (2006), the legislative intent of Cal. Code Civ. Proc. § 384 is "to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action, or to promote justice for all Californians." Section 384, however, does not apply when (as in this Settlement with Sports Research) the Agreement specifically provides for distribution of unclaimed funds (*see* Agr. § II.J; I.V.E.3 & IV.G). In such instance, the court is to scrutinize the Agreement and approve it only after determining that it is fair, adequate, and reasonable. *In re Microsoft I-V Cases*, 135 Cal.App.4th at 722.[21]

This action concerns claims under statutes such as the FAL, UCL, CLRA, and claims for common law misrepresentation (Compl., ¶¶ 5, 62, 72, 82), which largely serve to protect consumer rights, including with regard to advertising of products. A *cy pres* distribution to Plaintiffs' proposed nonprofit, NCLC, of unclaimed funds (if any) would thus be appropriate because it is a nonprofit organization that "has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S."[22] Courts have found the NCLC to have the requisite nexus with consumer

[21] "[A] trial court is not required to initiate an investigation to determine other possible *cy près* distributions when it conducts a reasonable assessment of a *cy près* distribution proposed in a settlement agreement." *Id.* at 725.

[22] https://www.nclc.org/about-us/about-us.html. Moreover, "NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices…" *Id.*

classes for qualification as a *cy pres* recipient. *See, e.g., Smith v. One Nev. Credit Union*, No. 2:16-cv-02156-GMN-NJK, 2020 U.S. Dist. LEXIS 244534, at *5 (D. Nev. Dec. 30, 2020) (noting "the NCLC contributes to the field of consumer protection in multiple ways, all of which are likely to benefit potential class members," such as "organiz[ing] conferences and trainings to educate attorneys and advocates operating in the consumer protection field."); *Estakhrian v. Obenstine*, No. CV 11-3480 FMO (CWx), 2016 U.S. Dist. LEXIS 147105, at *23 (C.D. Cal. Oct. 24, 2016) (recognizing NCLC's work in consumer protection and unfair and deceptive acts and practices); *Johnson v. Gen. Mills, Inc*., 2013 WL 3213832, *3 (C.D. Cal. 2013) (approving NCLC as *cy pres* designee in food labeling case).

Defendant's proposed *cy pres* recipient is CFROC, a nonprofit, which, according to their website is "is a local non-profit, non-partisan education organization dedicated to promoting civic literacy, youth leadership, and career awareness among Orange County teens."[23] The CFR offers programs such as Mock Trial, Peer Court, Law Day, Career Forum and Constitution Day.[24] Thus, a *cy pres* award to CFR would benefit the local Southern California community.[25]

Therefore, the Court should approve *cy pres* distribution of any unclaimed settlement funds to the charitable entities pursuant to Sections II.J; I.V.E.3; and IV.G of the Agreement.

## X. CONCLUSION

In conclusion, Plaintiff respectfully requests that the Court finally approve the proposed Settlement and sign the proposed Final Approval Order and Judgment submitted herewith, which proposed order includes a provision for approving attorneys' fees, costs, and services awards.

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[23] https://www.crfoc.org/about-us/

[24] https://www.crfoc.org/programs/

[25] Although CFROC has evolved into a separate entity (https://www.crf-usa.org/50th/celebrating-50-years), the main Constitutional Rights Foundation has been approved in the past as a *cy pres* recipient of unclaimed settlement funds representing 5% of the net settlement funds "for use in preparing and distributing educational materials about health care reform and *other legal matters pertaining to the rights of consumers*, health insurance, and healthcare; and (2) the Insure the Uninsured Project for use in its efforts to increase coverage of California's uninsured population." *Scher v. Cal. Physician' Serv*., No. CGC 08-481431, 2012 Cal. Super. LEXIS 13562 (Sup. Ct. San Francisco, April 3, 2012) (emphasis added).

Dated: March 10, 2021

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