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SUPERIOR COURT OF CALIFORNIA

SAN FRANCISCO

DAVID MACHLAN, an individual, on behalf of himself, the general public and those similarly situated, Plaintiff, v. THE PROCTER & GAMBLE COMPANY; NEHEMIAH MANUFACTURING COMPANY LLC, Defendants.	Case No. CGC 14-538168 **CLASS ACTION** PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR ATTORNEYS' FEES, COSTS AND INCENTIVE AWARD Date: March 29, 2017 Time: 9:30 a.m. Department: 305 Honorable Judge Mary Wiss

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I. INTRODUCTION

This case has been pending for over three years, and Plaintiff's counsel have not yet received any compensation for their work on this case or for the out of pocket expenses they have incurred. They collectively expended over 1100 hours investigating, litigating, and negotiating to reach a successful resolution. The purpose of this motion is to apply for an award of attorneys' fees, costs, and incentive awards as provided in the settlement agreement. The amount is to be paid by Defendant Nehemiah Manufacturing Company separately from, and in addition to, all payments to class members. The payment will not reduce any class member's recovery.

As was further explained in Plaintiff's briefing in support of preliminary and final approval of settlement, the settlement confers significant benefits on class members. All class members will receive benefits in cash. In addition, all users will benefit from changed practices, including changed marketing and advertising practices and a reformulated product.

As provided in the Settlement Agreement, Plaintiff's counsel now seeks an order from the Court awarding $620,934.40 in attorneys' fees, $29,065.60 in costs for Plaintiff's counsel, and $5,000.00 as an incentive award for the named Plaintiff. The Parties negotiated these provisions of the Settlement Agreement only after negotiating and reaching an agreement as to all the other material terms. Such an approach is endorsed by the *Manual For Complex Litigation*. *See Manual For Complex Litigation* ¶ 21.7 (4th ed. 2004) ("Separate negotiation of the class settlement before an agreement on fees is generally preferable."). The resulting settlement is the product of a non-collusive, adversarial negotiation in light of the work devoted by Plaintiff's counsel under California law. Plaintiff's counsel's corresponding request for fees and costs is fair, just, and reasonable under California law and should be granted.

II. ARGUMENT

This Court has discretion over the amount of attorneys' fees awarded. *See Lealao v. Beneficial Cal., Inc*. (2000) 82 Cal. App. 4th 19, 25-26; *Levy v. Toyota Motor Sales, U.S.A.* (1992) 4 Cal. App. 4th 807, 813; *Horn v. Swoap* (1974) 41 Cal. App. 3d 375, 384 (use of mechanical formula rejected); C.E.B., Attorney Fee Awards 2d, Chap. 11; C.J.E.R., Judges' Benchbook, Civil

Proceedings: Trial § 16.76. Plaintiff's counsel respectfully suggests that the requested fees, costs, and incentive award are justified by the work performed and benefits obtained in this Litigation.

A. Plaintiff's Counsel Should Be Awarded $620,934.40 in Attorneys' Fees and $29,065.60 in Costs.

1. Plaintiff's Counsel's Requested Fee Is Reasonable When Assessed Using The Lodestar-Multiplier Method.

In California, attorneys' fee awards are traditionally determined by taking the "lodestar"—or the hours spent times the reasonable hourly compensation—and applying a "multiplier." *See Serrano v. Priest* ("*Serrano III*") (1977) 20 Cal. 3d 25, 48-49*; see also Meister v. Regents of Univ. of Calif.* (1998) 67 Cal. App. 4th 437, 449; *Melnyk v. Robledo* (1976) 64 Cal. App. 3d 618, 624-25; *Clejan v. Reisman* (1970) 5 Cal. App. 3d 224, 241; *Fed-Mart Corp. v. Pell Enterprises* (1980) 111 Cal. App. 3d 215, 222. Where fees are available under statute, the "lodestar" method should be used to determine a statutory attorneys' fee award unless the statutory authorization for the award provides for another method. In this case, fees are available by statute, and the statute does not provide for a method of computing fees, so the lodestar method is appropriate.[1] *See Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1131 ("In determining the amount of reasonable attorney fees to be awarded under a statutory attorney fees provision, the trial court begins by calculating the 'lodestar' amount" and that the "California Supreme Court has further instructed that attorney fees awards 'should be fully compensatory.'").

Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or "negative"—i.e., less than 1—"multiplier to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained and the contingent risk presented." *Lealao*, 82 Cal. App. 4th at 26; *see also Serrano III*, 20 Cal. 3d at 48-49; *Ramos v. Countrywide Home Loans, Inc*. (2000) 82 Cal. App. 4th 615, 622; *Beasley v. Wells Fargo Bank* (1991) 235 Cal. App. 3d 1407, 1418 (multipliers are used to

[1] On Plaintiff's CLRA claims, Civil Code section 1780(d) provides, "The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section."

compensate counsel for the risk of loss, and to encourage counsel to undertake actions that benefit the public interest).

a. Plaintiff's Counsel's Lodestar Is Reasonable.

Plaintiff's counsel have worked 1174 hours on this case to date, for a lodestar of $927,975. (Declaration of Adam Gutride in Support of Motion for Final Approval of Class Action Settlement and Application for Attorneys' Fees, Costs and Incentive Awards ("Final Gutride Decl."), ¶¶ 63-64 (table showing hours worked by each timekeeper).)[2] Plaintiff's counsel's efforts to date included, without limitation:

- Researching and drafting a comprehensive class action complaint;
- Researching and drafting oppositions to Defendants' motions to dismiss, including preparing for the hearing thereon;
- Obtaining remand by the United States District Court for the Northern District of California;
- Researching and drafting an amended class action complaint;
- Researching and preparing oppositions to Defendants' demurrers and motion to strike, including preparing for hearings thereon;
- Researching and preparing oppositions to Defendants' motion to stay, including preparing for the hearing thereon;
- Conducting significant discovery including by written interrogatories, document requests (including the review of approximately 250,000 pages of documents), and depositions (including traveling to Ohio to depose eight witnesses in a six day period);[3]

[2] As explained in the Gutride Final Declaration filed herewith, and in footnotes 3-6, this lodestar excludes hours that have been allocated to *Pettit v. The Procter & Gamble Company*, Case No. 15-cv-2150 (N.D. Cal.) ("*Pettit*").

[3] P&G produced approximately 60,000 pages of documents and six of the eight witnesses. Because P&G did not accept liability in this case or pay any of the costs of settlement, and because Plaintiff's counsel and P&G agreed that those documents and transcripts could be used in *Pettit* in lieu of re-taking the discovery, work spent conducting and reviewing that discovery has been allocated to *Pettit.* (Id. ¶ 63.)

- Conducting third party discovery;[4]
- Conducting extensive research into the technical aspects of flushability and the market for flushable wipes, and consulting with experts thereon;[5]
- Meeting and conferring with Defendants regarding discovery disputes and stipulations;
- Drafting mediation statements and participating in two all-day mediations before Judge Karnow;
- Negotiating and preparing the Settlement Agreement along with all corresponding documents, including claim forms, summary notice and long form notice, and proposed orders;
- Researching and preparing motion for preliminary approval and supporting documents, including proposed preliminary approval order, proposed, and final judgment;
- Supervising the work of the Claims Administrator;
- Researching and preparing motion for final approval and supporting documents;
- Preparing this Application and supporting documentation; and
- Preparing for and attending numerous hearings and case management conferences.

(Id., ¶¶ 5-55.)

Before the final approval hearing, Plaintiff's counsel's efforts will also include, without limitation:

- Continued correspondence with Settlement Class Members and supervision of the work of the Claims Administrator;
- Filing replies in support of this Application and the motion for final approval,

[4] Some of this work, such as the subpoena to a INDA, the flushable wipes manufacturers' trade association, was similarly allocated to the *Pettit* case. (Id.)

[5] Because Plaintiff's expert did only preliminary testing in this case to assist with settlement, but did more detailed testing and filed a formal report in suport of class certification in the *Pettit* case, the bulk of the time working with the expert has been allocated to the *Pettit* case. (Id.)

including opposing objections, if any.

(Id., ¶ 56.)

Plaintiff's counsel calculated their lodestar using Plaintiff's counsel's billing rates of $925 and $900 per hour for Adam Gutride and Seth Safier, respectively, and billing rates of $725 per hour for Kristen Simplicio, and $700 for Marie McCrary. (Final Gutride Decl., ¶¶ 64-65.) These hourly rates are market rates in San Francisco for attorneys of Plaintiff's counsel's background and experience. (Id.); *Tait v. BSH Home Appliances Corp*. (C.D. Cal. July 27, 2015) No. SACV100711DOCANX, 2015 WL 4537463, at *12 (approving as reasonable $800 per hour for partners, associate time to a maximum of $550 per hour, and paralegal time to a maximum of $225 per hour); *Vinh Nguyen v. Radient Pharm. Corp.*, (C.D. Cal. May 6, 2014) No. 11–00406, 2014 WL 1802293, at *11 (approving 2014 rates up to $750 per hour for partners, $550 per hour for associates, and $225 per hour for paralegals); *Wren v. RGIS Inventory Specialists* (N.D. Cal. Apr. 1, 2011) 2011 U.S. Dist. LEXIS 38667 (finding as reasonable $650 per hour for a 1993 graduate). Plaintiff's counsel Adam Gutride and Seth Safier are, respectively, graduates from Yale Law School 1994 and Harvard Law School 1998, with twenty-one and eighteen years of litigation experience. (Final Gutride Decl., ¶ 67.) Kristen Simplicio and Marie McCrary have, respectively, over ten and nine years of experience. (Id.)[6]

These rates are the current rates charged by Plaintiff's counsel, which are appropriate given the deferred and contingent nature of counsel's compensation.[7] *See LeBlanc-Sternberg v. Fletcher* (2nd Cir. 1998) 143 F.3d 748, 764 ("[C]urrent rates, rather than historical rates, should be applied in order to compensate for the delay in payment….") (citing *Missouri v. Jenkins* (1989) 491 U.S. 274,

[6] Adam Gutride and Seth Safier were previously attorneys at the San Francisco office of the law firm of Orrick Herrington & Sutcliffe, where litigators who graduated in 1994 and 1998 respectively currently bill at hourly rates of in excess of $1000. (Final Gutride Decl., ¶ 68.) Ms. Simplicio is 2007 graduate of the American University, Washington College of Law. (Id. ¶ 67.) Marie McCrary is a 2008 graduate of New York University Law School. (Id.) Plaintiff's counsel's billing rates have repeatedly been approved by other California Superior Court Judges, as well as other judges throughout California. (Id. ¶ 66.)

[7] Plaintiff's counsel employs its 2016 rates.

283-84; *In re Washington Pub. Power Supply Sys. Sec. Litig.* (9th Cir. 1994) 19 F.3d 1291, 1305 ("The district court has discretion to compensate delay in payment in one of two ways: (1) by applying the attorneys' current rates to all hours billed during the course of litigation; or (2) by using the attorneys' historical rates and adding a prime rate enhancement.").

b. An Upward Multiplier Would Be Appropriate In This Case.

(1) This Court Has The Discretion To Apply A Multiplier.

A law firm that focuses on contingent-fee class action cases does not get paid in every case. Sometimes—as in several other cases this firm has handled—it gets nothing or is awarded fees equal to only a small percentage of the amount it had worked. Where a plaintiff's firm does succeed, therefore, it is appropriate to award a multiplier, to compensate for the risks the firm regularly undertakes. Because Plaintiff's counsel's lodestar attributable to this litigation of $927,975 is more than the requested fee award of $620,934.40, no multiplier is necessary. But if this Court for some reason reduces the lodestar below $620,934.40 it should still award Plaintiff's counsel $620,934.40, by applying a very modest multiplier.[8]

This Court has discretion to apply a multiplier to account for various factors, including, *inter alia,* the contingent nature of the fee award (both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award), the novelty and complexity of the questions involved, the value of class benefits obtained, and the importance of other injunctive relief obtained. *See Ramos,* 82 Cal. App. 4th at 622. There is no exclusive list of factors, nor any "mechanical formula that dictates how the trial court should evaluate" them. *Lealao,* 82 Cal. App. 4th at 41 (quoting *Flannery v. California Highway Patrol* (1988) 61 Cal. App. 4th 629, 639). *See also Serrano III,* 20 Cal. 3d at 49; *Ketchum,* 24 Cal. 4th 1122 at 1138; *City of Oakland,* 203 Cal. App. 3d at 78; *Downey Cares,* 196 Cal. App. 3d at 995 n.11; *Maria P. v. Riles* (1987) 43 Cal. 3d

[8] For example, if this Court eliminated 50% of Plaintiff's counsel's hours or cut their hourly rates by 50%, the lodestar would be $463,987.50, and a fee award of $620,934.40 would still require less than a 1.34 multiplier.

1281, 1294 n.8*; Press v. Lucky Stores, Inc.* (1983) 34 Cal. 3d 311, 322; *Serrano v. Unruh* ("*Serrano IV"*) (1982) 32 Cal. 3d 621, 625 n.6.

(2) Plaintiff's Counsel Displayed Skill In Presenting The Settlement Class Members' Claims.

Plaintiff's counsel presented Settlement Class Members' claims with creativity, skill and ingenuity. As Defendants were represented by able counsel (including lawyers from three different law firms, including Covington & Burling LLP, Ulmer & Berne, and Dudnick, Detwiler Riven & Striker LLP) who fought hard on all fronts, the settlement of this case was due to Plaintiff's counsel's litigation skill and experience.

Plaintiff's counsel could have insisted on continuing to litigate through certification and trial to increase its lodestar. Plaintiff's counsel should be rewarded for its efficiency (and the concomitant savings to the judicial system) by application of a multiplier.

In *Lealao*, for example, the Court explained that, unless multipliers are provided to reflect the size of the class recovery when counsel agree to settle before trial, there will be a disincentive to settle promptly inherent in the lodestar methodology. 82 Cal. App. 4th at 52 (citing *Merola v. Atlantic Richfield Company* (3d Cir. 1975) 515 F.2d 165, 168 (lodestar-multiplier approach "permits the court to recognize and reward achievements of a particularly resourceful attorney who secures a substantial benefit for his clients with a minimum of time invested")); *Bowling v. Pfizer, Inc.* (S.D. Ohio 1996) 922 F. Supp. 1261, 1282-1283 (case settled "in swift and efficient fashion"); *Arenson v. Board of Trade of City of Chicago* (N.D. Ill. 1974) 372 F. Supp. 1349, 1358 (awarding a fee of four times the normal hourly rate on ground that, if the case had not settled and gone to verdict, "there is no doubt that the number of hours of lawyer's time expended would be more than quadruple the number of hours expended to date"). Similarly, in *Thayer v. Wells Fargo Bank* (2001) 92 Cal. App. 4th 819, the Court noted that "[t]he California cases appear to incorporate the 'results obtained' factor into the 'quality' factor: i.e., high-quality work may produce greater results in less time than would work of average quality, thus justifying a multiplier." *Id*.

(3) Plaintiff's Counsel Bore Considerable Risk.

Application of a multiplier would also be warranted by the risks Plaintiff's counsel bore in prosecuting this case. *See Serrano III*, 20 Cal. 3d at 49 (listing contingent risk and foregone employment opportunities as factors to be considered in lodestar multipliers). As the California Supreme Court has explained:

> [a] contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans. A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.

Ketchum, 24 Cal. 4th at 1132-33; *see also Cazares v. Saenz* (1989) 208 Cal. App. 3d 279, 288. ("In addition to compensation for the legal services rendered, there is a *raison d'etre* for the contingent fee: the contingency. The lawyer on a contingent fee contract receives nothing unless the plaintiff obtains a recovery. Thus, in theory, a contingent fee in a case with a 50 percent chance of success should be twice the amount of a non-contingent fee for the same case.").

Indeed, in *In re Continental Illinois Securities Litigation* (7th Cir. 1993) 962 F.2d 566, a federal appellate court reversed a fee award in a class action for, among other things, the trial court's refusal to enhance Plaintiff's counsel's lodestar for contingency risk. "The judge refused to award a risk multiplier—that is, to give the lawyers more than their ordinary billing rates in order to reflect the risky character of their undertaking. This was error in a case in which the lawyers had no source of compensation for their services."[9] *Id*. at 569. "[T]he failure to make any provision for risk of loss may result in systematic under-compensation of Plaintiff's counsel in a class action case, where as we have said the only fee that counsel can obtain is, in the nature of the case, a contingent one." *Id*.

[9] California courts look to the jurisprudence interpreting Federal Rule 23 in class action litigation. *See Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 438.

Throughout this litigation, Plaintiff's counsel have expended a substantial amount of time and advanced costs to prosecute a class action suit with no guarantee of compensation or reimbursement in the hope of prevailing against a company represented by first-rate attorneys. (Final Gutride Decl., ¶¶ 60-61.) Plaintiff faced substantial risks at class certification and at trial. (Id., ¶ 59.) Plaintiff's counsel also bore the risk that Defendants would dig in and attempt to bury Plaintiff's counsel in work. (Id., ¶ 60-61.) Plaintiff's counsel turned away work due, in part, to the pendency of this litigation. (Id., ¶ 60.)

(4) Plaintiff's Counsel Conferred Substantial Benefits On Settlement Class Members.

Plaintiff's counsel also achieved an excellent settlement. Each settlement class member can obtain a refund (up to $50 total) from Nehemiah, of $1 for each Product package purchased, regardless of the price the class member paid for the package or the number of wipes contained in each package. Proof of Purchase is not required to obtain the refund for up to 10 Product packages (i.e., refund up to $10); proof of purchase is required to obtain a refund of more than $10.

The Amended Settlement Agreement also contemplates changed practices, some of which have already occurred, as well as injunctive relief. For example, subsequent to the initiation of, and in part as a result of the Litigation, Nehemiah modified the formulation of the substrate (i.e., the paper) used in its Products by adopting the New Formulation Kandoo Wipes. Nehemiah further agreed that, for a period of two years after the Effective Date, it shall be enjoined by the Court not to market the wipes that had the prior (less flushable) substrate, not to use phrases such as "sewer safe" and "septic safe," and to warn people not to flush more than two wipes at a time and to use the product only in well-maintained sewer and septic systems. (Supplemental Declaration of Adam J. Gutride in Support of Motion for Preliminary Approval of Class Action Settlement ("Supp. Prelim. Gutride Decl."), Ex. 3, § 3.3.)

(5) Any Necessary Multiplier Would Fall Well Within The Range Commonly Applied.

A multiplier to offset any reduction in Plaintiff's counsel's lodestar would fall well within (indeed below) the range commonly applied by California courts. For example, in *Sternwest Corp.*

v. Ash (1986) 183 Cal. App. 3d 74, the Court of Appeal remanded a case for a lodestar enhancement of "two, three, four or otherwise." *Id.* at 76. Another California court explicitly stated that "[m]ultipliers can range from two to four or even higher." *Wershba*, 91 Cal. App. 4th at 240 (citing *Coalition for L. A. County Planning etc. Interest v. Board of Supervisors* (1977) 76 Cal. App. 3d 241, 251 (affirming a multiplier of 2) and *Arenson,* 372 F. Supp. at 1358 (awarding a fee four times the normal hourly rate on ground that, if the case had not settled and gone to verdict, "there is no doubt that the number of hours of lawyer's time expended would be more than quadruple the number of hours expended to date")); *see also City of Oakland,* 203 Cal. App. 3d at 83 (affirming a 2.34 multiplier); *Glendora Community Redevelopment Agency v. Demeter* (1984) 155 Cal. App. 3d 465, 479-80 (approving a fee award representing a multiplier of 12).

(6) Additional Work Will Likely Be Required Of Plaintiff's Counsel.

More work remains. This Application is being submitted (and posted to the Settlement Website) before the period has ended for Settlement Class Members to opt out or object. Even after final approval, Plaintiff's counsel likely will have to answer questions from Settlement Class Members and consult with Defendants and the Claims Administrator concerning the fulfillment of the Class Benefits. Though unlikely, Plaintiff's counsel may also have to spend significant time opposing appeals. This time might not be compensated, but it will be required of Plaintiff's counsel to make certain the Settlement Class Members receive their benefits as soon as practicable.[10]

2. A "Cross-Check" of The Requested Fee Under the Percentage-of-Recovery Approach Confirms its Reasonableness.

In evaluating this Application, the Court may explicitly consider the requested fees as a percentage of the total settlement value. In other words, the Court may "cross-check" the

[10] Plaintiff's counsel anticipates that there will be another 10-15 hours before this Litigation is entirely complete and an estimated 175-250 hours, in the event that this Court's judgment is appealed. (Final Gutride Decl., ¶ 72.) Should the Court award less than the maximum amount of fees agreed to be paid by Defendant, Plaintiff's counsel reserves the right to seek additional attorneys' fees for later-performed work.

reasonableness of the lodestar-based fee under the percentage-of-recovery (or percentage-of-benefit) approach. This cross-check is a common practice in both California and federal courts of adjusting the lodestar based on the "amount at stake" and the "results obtained." *See Lealao*, 82 Cal. App. 4th at 39-40 ("in cases in which the value of the class recovery can be monetized with a reasonable degree of certainty and it is not otherwise inappropriate, a trial court has discretion to adjust the basic lodestar through the application of a positive or negative multiplier where necessary to ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation"); *see also Glendora,* 155 Cal. App. 3d at 474; *In re Activision Securities Litigation* (N.D. Cal. 1989) 723 F. Supp.1373, 1378 (percentage of benefit approach is preferred to ensure "proportionality, predictability and protection of the class," while ignoring that approach "encourages abuses such as unjustified work and protracting the litigation").

In *Lealao*, the Court explained in detail the rationale and propriety of this practice: "[I]ntermediate appellate courts in this state have, in effect, adopted the common federal practice of 'cross-checking' the lodestar against the value of recovery (which is not duplicative because the amount or value of the recovery is reflected in the basic lodestar), because the award is still anchored in the time spent by counsel on the case and the practice is therefore consistent with the mandate of *Serrano II*." *Id*. "Courts agree that, because, the percentage-of-the benefit approach 'is result-oriented rather than process-oriented, it better approximates the workings of the 'marketplace' than the lodestar approach." *Id*. at 48. "It is in large part because it provides a credible measure of the market value of the legal services provided that some federal courts use a percentage-of-the-benefit analysis to "cross-check" the propriety of a lodestar [based] fee award." *Id*. at 49.

Here, the value of the recovery can be monetized with a reasonable degree of certainty. A total of approximately $3 million is being made available – i.e., $1 per product for the approximately 3 million products sold during the class period. (Supp. Prelim. Gutride Decl., Ex. 3 at § 4.4.) In addition, Nehemiah is making changes to its representations and product that will decrease future deception, saving class members and the general public from additional losses. (Id.

at § 3.3.)

Courts applying the percentage-of-the-benefit approach have typically awarded fees in a range from 20 to 30 percent and sometimes higher. *See. e.g.*, *Six Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1311; *accord Paul, Johnson, Alston & Hunt v. Graulty* (9th Cir. 1989) 886 F.2d 268, 273 ("25 percent has been a proper benchmark figure . . . and any modification should be accompanied by a reasonable explanation of why the benchmark is unreasonable under the circumstances''). Studies also show that this benchmark is within the range followed by most courts. *See, e.g.*, Lynk, *The Courts and the Plaintiff's Bar: Awarding the Attorney's Fee in Class-Action Litigation* (1994) 23 J. Legal Study 185, 208; Newberg & Conte, Attorney Fee Awards (2d ed. 1993) § 14.6 at 550-51 ("In the normal range…fee awards fall in the 20 to 33 percent range…usually 50 percent…is the upper limit"); *Paul, Johnson,* 886 F.2d at 273 ("ordinarily…fee awards range from 20 percent to 30 percent of the fund created"); *In re Activision Sec. Litig.*, 723 F. Supp. at 1378 (setting 30 percent as fee for all future class action common-fund cases in that court). In the free market, one regularly sees negotiated contingent fee arrangements in which the lawyers retain 25%, 33%, 40% or even more of the plaintiff's recovery.

Based on the $3 million minimum benefit, the 25% benchmark would suggest fees of $750,000, substantially more than the approximately $610,000 being requested here. Thus, a "cross-check" reveals that the fee requested by Class Counsel is reasonable.

Further, when determining the value of the settlement, courts properly consider the non-monetary benefits, such as changed practices, required by the settlement. *See, e.g.*, *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 972-74; *Hartless v. Clorox Co.* (S.D. Cal. 2011) 273 F.R.D. 630, 645, *aff'd*, (9th Cir. 2012) 473 F. App'x. 716; *Pokorny v. Quixtar, Inc.* (N.D. Cal. July 18, 2013) No. C 07-0201 SC, 2013 WL 3790896, at *1, *appeal dismissed* (Sept. 13, 2013); *In re Netflix Privacy Litig.* (N.D. Cal. Mar. 18, 2013) No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *7, *appeal dismissed* (Dec. 19, 2013). This settlement provides significant additional value in non-monetary benefits. Though these benefits are more difficult to monetize, they are likely no less (and potentially of much greater value). This Court need not ascribe a precise value to the injunctive

relief but is entitled to estimate it. *See Wehlage v. Evergreen at Arvin LLC* (N.D. Cal. Oct. 4, 2012) No. 4:10-CV-05839-CW, 2012 WL 4755371, at *4; *see also Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1029 (affirming fee award based on the lodestar approach where the district court performed a cross-check using the percentage approach with respect to the estimated value of the injunctive relief).

3. Plaintiff's Counsel Should Be Awarded $29,065.60 in Costs.

Plaintiff's counsel requests that, in addition to reasonable attorneys' fees, the Court grant its application for reimbursement of approximately $29,000 in expenses incurred by it in connection with the prosecution of this Litigation.[11] The expenses incurred are itemized in the Gutride Declaration. (Final Gutride Decl., ¶ 69.) Nehemiah agreed in the Settlement Agreement to reimburse these expenses as long as the total amount of fees and costs did not exceed $650,000. Plaintiff believes that the expenses are reasonable and should be reimbursed. (Id.)

Plaintiff's counsel is typically entitled to reimbursement of all reasonable out-of-pocket expenses and costs in prosecution of the claims and in obtaining a settlement. *See Vincent v. Hughes Air West* (9th Cir. 1977) 557 F.2d 759, 769. In *Serrano III*, for example, the Supreme Court advised that reimbursement of costs in a common fund is "grounded in 'the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property'." *Serrano III*, 20 Cal. 3d at 35, *citing Alyeska Pipeline Co. v. Wilderness Society* (1995) 421 U.S. 240, 257.

4. Awarding Less Than The Requested Fees and Costs Will Cause A Windfall To Defendants.

Defendants have already agreed that Nehemiah should pay the full amount of the requested fees and costs, separate from and in addition to the amounts paid for notice and claims

[11] As discussed in the Final Gutride Declaration, the expenses are current as of January 31, 2017. They do not include expenses that have yet to be invoiced, including (for example) service and filing fees and expenses associated with this Application and the Final Approval Motion Plaintiff's counsel anticipates that these costs will be approximately $400.

administration and the amounts paid to Class Members. If the request is cut, no additional money will be paid to Class Members. Rather, the money will remain with, and be a windfall to, Nehemiah. As the negotiations of the Settlement were hard-fought, Nehemiah already believes that it is better off paying the full amounts owing under the Settlement than proceeding to trial. That conclusion is not surprising, as Defendants have been charged with substantial wrongdoing. It is not in the interests of justice to allow Nehemiah to retain the funds that Defendants believe should be paid to Plaintiff's counsel for Plaintiff's counsel's work on the case.

B. The Incentive Award To The Representative Plaintiff Is Reasonable.

This Court should also approve a $5,000.00 incentive award to the named Plaintiff, as it is just, fair and reasonable. In deciding whether to approve an incentive award, a court should consider: "(1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulty encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation and; (5) the personal benefit (of lack thereof) enjoyed by the class representative as a result of the litigation." *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F. Supp. 294, 299. Further, as a matter of public policy, incentive awards are necessary to encourage consumers to formally challenge perceived false advertising and unfair business practices.

Plaintiff took on substantial risk, most importantly the risk of bearing Defendants' costs. (Final Gutride Decl., ¶ 59.) Plaintiff also spent in excess of 50 hours, over 3 years, on this Litigation, including reviewing documents and remaining actively involved in the case during and after settlement. (Id.) Had he not come forward, there is no reason to believe that Defendants would ever have agreed to pay. He is also agreeing to a broader release—i.e., for property damage—than are class members. (Id.)

In light of Plaintiff's efforts, Defendants have agreed that Nehemiah should pay him a $5,000 incentive award. Plaintiff's counsel respectfully requests that the Court approve the incentive award, which is reasonable in light of the Plaintiff's efforts and the relief to the Settlement Class resulting from this Litigation and his broader release. *See* Theodore Eisenberg & Geoffrey P.

Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1333 (2006) (an empirical study of incentive awards to class action plaintiffs has determined that the average aggregate incentive award within a consumer class action case is $29,055.20, and that the average individual award is $6,358.80.); *see also In re Mego Fin. Corp Sec. Litig*. (9th Cir. 2000) 213 F.3d 454, 463 (awarding the named plaintiff $5,000 involving a class of 5,400 people and a total recovery of $1.725 million); *In re U.S. Bancorp Litig*. (8th Cir. 2002) 291 F.3d 1035, 1038 (awarding the named plaintiff $2,000 in a case with a total recovery of $3 million).

III. CONCLUSION

For the foregoing reasons, Plaintiff asks this Court to grant this application for an award of $5,000.00 to him, and $650,000.00 in attorneys' fees and expenses incurred in this Litigation to be paid by Nehemiah separately from the benefits provided to the Settlement Class, in accordance with the Settlement Agreement.

DATED: February 15, 2017

GUTRIDE SAFIER LLP

By: _____
Adam Gutride, Attorneys for Plaintiff