GUTRIDE SAFIER LLP
ADAM J. GUTRIDE (State Bar No. 181446)
adam@gutridesafier.com
SETH A. SAFIER (State Bar No. 197427)
seth@gutridesafier.com
KRISTEN SIMPLICIO (State Bar No. 263291)
kristen@gutridesafier.com
100 Pine Street, Suite 1250
San Francisco, California 94111
Telephone: (415) 336-6545
Facsimile: (415) 449-6469

Attorneys for Plaintiff,
DAVID MACHLAN

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 MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT Date: March 29, 2017 Time: 9:30 a.m. Department: 305 Honorable Judge Mary Wiss

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I. INTRODUCTION

On December 9, 2016, this Court preliminarily approved this class action settlement between Plaintiff and Defendants Nehemiah Manufacturing Company ("Nehemiah") and The Procter & Gamble Company ("P&G"). It scheduled a final approval hearing for March 29, 2017 to determine whether (1) the proposed settlement is just, fair, reasonable, and adequate for the Class such that it should be granted final approval; (2) certification of the Class should be made final; (3) the Court should enter the proposed judgment; (4) the Court should award Plaintiff's Counsel attorneys' fees and expenses in the amount set forth in the Amended Settlement Agreement; and (5) the Court should award Plaintiff an incentive for his time and risks undertaken in the Litigation.

Under the terms of the Amended Settlement Agreement, Nehemiah has agreed to abide by an injunction until two years after the Effective Date requiring each of the following:

- ✓ Not to use in the marketing and labeling of its Products[1] the phrases "sewer safe," "septic safe," or substantially similar language; and
- ✓ To include on the labeling of all Product packages, the following disclaimer: "Flush only 1-2 wipes at a time. Use only in well-maintained toilets, drain lines, sewer lines and septic systems."

Class members will also receive a cash payment from Nehemiah for the Products they purchased during the class period. Subject to this Court's approval, Nehemiah will also pay Plaintiff $5,000 to compensate him for a general release and for the time he spent and risk he incurred serving as a class representative. Nehemiah has also agreed to pay Class Counsel attorneys' fees and costs as awarded by this Court, up to a maximum of $650,000. Notice has been provided directly to the class via electronic mail to class members for whom Plaintiff or Nehemiah have an electronic mail address, and there was additional notice through online advertising.

As the Settlement is the product of a non-collusive, adversarial negotiation, Plaintiff respectfully requests that this motion be granted and final judgment entered.

[1] "Products" is defined in the Settlement Agreement as "any pre-moistened wipes sold under the Kandoo® brand name bearing the word 'flushable' on the package label, including without limitation wipes co-branded as Kandoo® with any other name."

II. BACKGROUND FACTS AND DETAILS OF SETTLEMENT

A. Litigation History

1. Filing, Removal and Motions to Dismiss

This case was filed on March 21, 2014. On April 29, 2014, Defendants jointly removed the action to the United States District Court for the Northern District of California ("District Court"), where it was given the case number 3:14-cv-01982-JD and assigned to the Honorable James Donato.

On June 18, 2014, each Defendant filed a motion to dismiss the complaint in the District Court. Nehemiah and/or P&G argued, *inter alia*, that Plaintiff lacked standing to seek injunctive relief; that Plaintiff lacked standing to sue about any wipes other than the Kandoo wipes; and that Plaintiff could not pursue claims against P&G because P&G had first licensed the Kandoo wipes product to Nehemiah in 2009 and then sold the Kandoo brand to Nehemiah in 2013, and accordingly lacked control or authority over Kandoo wipes during the class period—including but not limited to how the product is designed, manufactured, packaged, labeled, and marketed. Plaintiff opposed the motions.

On January 6, 2015, the District Court issued an order granting in part and denying in part the motions to dismiss. In particular, the District Court dismissed all claims regarding wipes other than the Kandoo® wipes, declined to dismiss the remaining claims against P&G, and severed and remanded to the State Court Plaintiff's claim for injunctive relief. On January 20, 2015, each Defendant filed in the District Court an answer to the complaint, including affirmative defenses.

2. Procedural History Following Remand to State Court

On March 20, 2015, P&G applied for designation of the remanded action as complex. On April 21, 2015, that application was approved and the case was assigned for all purposes to this Court. On March 30, 2015, Nehemiah filed an answer to the complaint. The same day, P&G filed a demurrer to the complaint. On May 21, 2015, before Plaintiff's opposition to the demurrer was due, the demurrer was taken off calendar.

On June 5, 2015, P&G filed an amended demurrer, which Plaintiff opposed. On June 30,

2015, upon joint request by the parties, the District Court stayed further proceedings in that court pending resolution of Plaintiff's claim for injunctive relief in this Court.

In an order on August 5, 2015, this Court overruled P&G's amended demurrer to the complaint. On August 28, 2015, P&G filed an answer to the complaint. On September 23, 2015, Plaintiff filed a motion for leave to file a first amended complaint. P&G opposed the motion and filed a conditional motion to strike portions of the first amended complaint. Nehemiah joined in the motion to strike.

On November 9, 2015, this Court issued an order granting in part Plaintiff's motion for leave to file the first amended complaint and granting in part P&G's motion to strike portions of the first amended complaint. On November 20, 2015, Plaintiff filed his first amended complaint.

On January 6, 2016, Nehemiah filed a motion to stay proceedings, pending further action by the Federal Trade Commission regarding the use of the word "flushable" on pre-moistened wipes. P&G joined in the motion, and Plaintiff opposed. In an order dated February 9, 2016, this Court denied Nehemiah's motion to stay.

B. Settlement History

The proposed settlement was reached following significant, hard-fought litigation and many rounds of arms-length talks. (Declaration of Adam Gutride in Support of Motion for Preliminary Approval ("Prelim. Gutride Decl.") ¶ 7.) While the parties had informally discussed settlement for many months, formal discussions began in March 2016, when this case was referred to Judge Karnow for mediation. Several months later, after significant effort by Judge Karnow, including follow up sessions, emails and phone calls, this settlement was reached. (Id. ¶ 8.) On December 7, 2016, the parties entered an amended settlement. (Supplemental Declaration of Adam J. Gutride in Support of Motion for Preliminary Approval of Class Action Settlement ("Supp. Prelim. Gutride Decl."), Ex. 3.)

C. Settlement Summary

The Amended Settlement includes the following material terms and conditions.

1. Consolidation of Actions; Second Amended Complaint

The Settlement contemplates a release of all claims, including the claims for damages that Defendants removed to federal court and the claims for injunctive relief that were remanded to this Court. To avoid the confusion of two settlement approval processes in two courts, on December 15, 2016, Plaintiff dismissed the federal action without prejudice and, on December 14, 2016, filed a Second Amended Complaint in this Court that includes the damages claims. This Court now has sole authority over the settlement. Defendants' deadlines and any other obligations to respond to the Second Amended Complaint have been held in abeyance until after this motion is decided.

2. Class Certification

The parties have agreed to the certification of a Settlement Class defined as: All Persons who on or after March 21, 2010 and prior to the date of Preliminary Approval, purchased, in California, other than for purpose of resale, any Products.[2]

3. Class Benefit and Changed Practices.

To begin with, each settlement class member who submits a Valid Claim[3] shall receive a refund from Nehemiah of One Dollar ($1.00) for each Product package purchased in California during the Class Period, regardless of the price the class member paid for the package or the number of wipes contained in each package, subject to the following limitations:

(a) Proof of Purchase[4] is not required to obtain the refund for up to 10 Product packages purchased (i.e., refund up to $10.00).

[2] The Settlement Class excludes are (1) the Honorable Judges James Donato, Mary E. Wiss, and Curtis E. A. Karnow; (2) any member of their immediate families; (3) any government entity; (4) Nehemiah; (5) P&G; (6) any entity in which Nehemiah or P&G has a controlling interest; (7) any of Defendants' subsidiaries, parents, affiliates, and officers, directors, employees, legal representatives, heirs, successors, or assigns; and (8) any Persons who timely opt-out of the Settlement Class.

[3] A "Valid Claim" requires that a class member certify the truth and accuracy of the following under the penalty of perjury: (a) the Settlement Class Member's name and physical address; (b) the Settlement Class Member's email address, if the Settlement Class Member elects to provide the information; (c) the number of Products purchased during the Class Period; and (d) that the claimed purchases were not made for purposes of resale.

[4] "Proof of Purchase" means an itemized retail sales receipt or retail store club or loyalty card record showing, at a minimum, the purchase of a Product, the purchase price, and the date and place of the purchase.

(b) Proof of Purchase is required to obtain the refund of more than $10.00 (i.e., for more than 10 Product packages purchased).

(c) A maximum of $50.00 will be paid to any Household or Business.

(Supp. Prelim. Gutride Decl., Ex. 3, § 4.4.) 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 as follows:

(a) Not to market as "flushable" or distribute the formulation of the Products that was being sold prior to the introduction of the New Formulation Kandoo Wipes;

(b) To remove from the marketing and labeling of its Products, and not to use in any future marketing or labeling, the phrases "sewer safe," "septic safe" or substantially similar language; and

(c) To add to the labeling of all Product packages, the following disclaimer: "Flush only 1-2 wipes at a time. Use only in well-maintained toilets, drain lines, sewer lines and septic systems."

(Supp. Prelim. Gutride Decl., Ex. 3, § 3.3.)

Class Counsel believes that the provision of the above benefits adequately compensates Class Members for the harm they suffered, in light of the risks of litigation. (Prelim. Gutride Decl., ¶¶ 9-12.) In particular, there may be substantial difficulties establishing that: (1) Defendants' marketing and advertising of the Products was false or likely to deceive or confuse reasonable persons about the performance of the wipes; (2) the alleged effects on sewer treatment facilities of flushing the wipes were material to reasonable persons; (3) P&G exercised any type of control or authority over the Products sufficient to form the basis of any liability; (4) common questions predominate over individual issues such that a class may be certified on some or all claims; (5) the class should include persons who did not personally experience plumbing issues (and if it should not include such persons, how the members of the class would be ascertained); and/or (6) damages or restitution should be awarded or, if so, that any such award should be more than nominal. (Id.)

Even if Plaintiff's claims were successful, the "best case" recovery will likely not be better than the settlement remedy. Settlement Class Members are getting a cash refund from Nehemiah that is estimated to be at least 131% of the likely average recovery at trial per purchase, for up to 50 purchases. Further, it is possible that at trial, damages or restitution would only be awarded to repeat purchasers on the first purchase, because Defendants will argue that repeat purchases meant the consumer was satisfied with the flushability of the Product. Given the risks associated with this litigation, this recovery is excellent.

Nehemiah retained an experienced claim administrator to administer the settlement under the supervision of Plaintiff and the Court.

4. Settlement Release

The Settlement includes a simple "res judicata" release to bind Class Members. A broader release applies to Plaintiff, as he releases all claims of any kind against Defendants. Defendants likewise release any claims they might have against Plaintiff. (Supp. Prelim. Gutride Decl., Ex. 3, §§ 8.2-8.3.)

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

All costs of notice and administration of the Settlement will be paid by Nehemiah. Plaintiff's counsel requests payment of $5,000 for Plaintiff. The incentive fee is designed to compensate the named Plaintiff for (1) the time and risk he took in prosecuting this action (including the risk of liability for Defendants' costs) and (2) agreeing to a release broader than the one that will bind settlement class members. (Supp. Prelim. Gutride Decl., Ex. 3, § 8.2.) Plaintiff also requests payment of his attorneys' out of pocket expenses of $29,066, plus attorneys' fees of $620,934, for a total of $650,000. The reasonableness of Plaintiff's request is discussed in more detail in Plaintiff's separately submitted memorandum of points of authority in support of his application for attorneys' fees, costs and an incentive award.

D. Class Notice

The claim administrator (Heffler Claims Group) established a settlement website at http://www.calwipesettlement.com/, which contains the settlement notices, a contact information

page that includes address and telephone numbers for the claim administrator and the parties, the settlement agreement, the signed order of preliminary approval, online and printable versions of the claim form and the opt out forms, and answers to frequently asked questions. (Declaration of Mark Rapazzini Regarding Notice and Settlement Administration ("Rapazzini Decl.") ¶ 5.) In addition, this motion for final approval and application for attorneys' fees, costs, and incentive awards will be placed on the website upon filing. (Id.)

Additionally, the claims administrator served over eleven million banner ad impressions in the state of California across desktop, mobile and social media (Facebook) which were targeted at settlement class members (e.g. shopping sites for diapers and wipes, sites trafficked by parents with children under age seven, and Facebook pages of those who have "liked" relevant brands). (Id. ¶¶ 5-6.) The ads appeared during the period from December 23,2016 through January 27, 20l7 and linked to the Settlement Website. (Id. ¶ 6.) Details about the notice program can be found in the Declaration of Mark Rapazzini, submitted herewith.

E. Class Response

As of the filing of this motion, no objections have been filed. (Id. ¶ 13,) Moreover, only two persons have opted out. (Id.)

As of February 3, 2017, 29,173 claims have been submitted. (Id. ¶ 14.) The deadline for objections, exclusion requests and claims is March 1, 2017.

III. ARGUMENT

A. Standard for Final Approval

In order "[t]o prevent collusion or unfairness to the Class, the settlement or disapproval of a class action requires court approval." *Malibu Outrigger Board of Governors v. Superior Cour*t (1980) 103 Cal.App.3d 572, 578-79. The standard for granting approval is whether the proposed class action settlement as a whole is fair, adequate and reasonable. *See Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801; *see also Wershba v. Apple Computer, Inc*. (2001) 91 Cal. App. 4th 224, 234; *7-Eleven Owners for Fair Franchising v. Southland Corp*. (2000) 85 Cal. App. 4th 1135, 1145. There is, however, a "strong judicial policy that favors settlement," particularly (like

here) "where complex class action litigation is concerned." *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 2176 ; 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (4th ed. 2002) ("*Newberg*") § 11:41 (citations omitted).

This Court has broad discretion in determining whether a proposed class action settlement is fair. *See Rebney v. Wells Fargo Bank* (1990) 220 Cal. App. 3d 1117, 1138. As the Ninth Circuit has explained, "[t]he district court's decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants, and their strategies, positions, and proof." *In re Mego Financial Corp. v. Securities Litigation* (9th Cir. 2000) 213 F. 3d 454, 458; *Hanlon v. Chrysler Corp*. (9th Cir. 1998) 150 F.3d 1011, 1026.[5]

In exercising this discretion, the Court must generally give "[d]ue regard…to what is otherwise a private consensual agreement between the parties." *Dunk*, 48 Cal. App. 4th at 1801. Indeed, the Court's inquiry "must be limited to the extent necessary to reach a reasonable 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." *Id.* (citations omitted.)

The Court must "explore[] all the relevant factors" bearing on approval of a class action settlement. *See Hanlon,* 150 F.3d at 1026. In California, the "relevant factors" include the strength of plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status through trial; the amount offered in settlement; the extent of discovery completed and the state of the proceedings; the experience and view of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. *See Wershba*, 91 Cal. App. 4th at 244-45. This list of factors is not, however, exclusive. Rather, the trial court is free to engage in a balancing and weighing of factors, depending on the circumstances of each case. *Id*. at 245. The Court, however, is not to engage in a mini-trial on the

[5] To the extent that they are not inconsistent with California jurisprudence, California courts are advised to look for guidance to Rule 23 of the Federal Rules of Civil Procedure and federal cases applying Rule 23. *See Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *see also Green v. Obledo* (1980) 29 Cal. 3d 126, 145-46; *Dunk*, 48 Cal. App. 4th at 1801 fn. 7.

merits. As Judge Friendly instructed:

> [T]he role of the court in passing upon the propriety of the settlement of a…class action is a delicate one….[W]e recognize that since '[t]he very purpose of compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation, the court must not turn the settlement hearing into a trial or a rehearsal of the trial.' Rather, in the words of the Supreme Court,…it must reach an 'intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated' and 'form an educated estimate of the complexity, expense, and likely duration of such litigation…[I]n any case there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of the law and fact in a particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion—and the judge will not be reversed if the appellate court concludes that the settlement lies within that range.

Newman v. Stein (2d Cir. 1972) 464 F.2d 689, 691-93, *cert denied sub nom, Benson v. Newman* (1972) 409 U.S. 2039; *see also Dunk*, 48 Cal. App. 4th at 1801 (citing *Officers for Justice v. Civil Service Comm'n* (9th Cir. 1982) 688 F.2d 615, 625 ("ultimately, the court's determination in nothing more than 'an amalgam of delicate balancing, gross approximation and rough justice")).

B. All of the Relevant Factors Favor Approval of the Settlement

1. A Presumption of Fairness is Applicable to this Settlement.

There is a presumption that a proposed settlement is fair and reasonable when it is the result of arms' length negotiations, there has been investigation and discovery that are sufficient to permit counsel and the court to act intelligently, and counsel are experienced in similar litigation. *See Dunk* 48 Cal. App. 4th at 1800-01; *Newberg* §11.41 at 11-88. All these factors are easily satisfied.

a. Settlement Was Reached Through Arms' Length Negotiation.

The proposed settlement herein is the product of over a thousand hours of active, hard-fought litigation, and protracted and equally hard-fought settlement discussions and negotiations over the course of many months between counsel for Plaintiff and counsel for Defendants, including several in-person mediation sessions conducted by Judge Karnow. (Prelim. Gutride Decl. ¶ 8.)

Prior to mediation, Plaintiff had engaged in significant discovery, including reviewing documents and written declarations and deposing Defendants' corporate representatives and employees on Defendants' business practices. (Id., ¶ 7.) All parties are represented by counsel with significant experience in class action litigation, including litigation related to consumer class

actions. (Final Gutride Decl. ¶ 48.) The parties did not negotiate about attorneys' fees or expenses until they had reached agreement on all other material terms of the Settlement, including the class benefit and notice. (Id.) After an agreement in principle was reached, the parties spent a great deal of time hammering out the Settlement Agreement, claim forms, notices, and orders. (Id. ¶¶ 44-50.) This Settlement was accordingly the "product of hard-fought adversarial negotiations by the parties." *Wershba*, 91 Cal. App. 4th at 245.

b. The Settlement Is the Result of Significant Investigation and Discovery.

In determining whether a settlement is fair, adequate and reasonable, courts often consider "[t]he extent of discovery completed and the stage of the proceedings." *Dunk*, 48 Cal. App. 4th at 1801. This Settlement was achieved after over two years of active litigation, including significant investigation and discovery. (Prelim. Gutride Decl. ¶¶ 7-8.) Apart from formal discovery, Plaintiff's counsel engaged in significant independent investigation, including testing Defendants' products, tracking Defendants' public statements and operations, and obtaining and reviewing documents from sources other than Defendant. (Final Gutride Decl. ¶¶ 7, 39-40.)

c. Counsel For the Parties are Experienced Class Action Attorneys.

This litigation and settlement negotiations were conducted by counsel with experience in consumer class actions and other complex litigation. (Prelim. Gutride Decl. ¶ 4, Ex. 2.) Plaintiff's counsel was familiar with the legal and factual issues of the case, including damage analyses and litigation risk analyses. (Id. ¶¶ 5-8.) Such experience underscores the presumption of fairness that the Court should apply to this Settlement. *See Wershba*, 91 Cal. App. 4th at 245.

d. To Date, No Objections Have Been Filed.

There was a comprehensive internet advertisement campaign, creating over 11 million impressions. (Rapazzini Decl. ¶ 6.) Nevertheless, as of February 10, only 2 class members have opted out and none have objected. (Id. ¶ 13.)[6] Where, like here, only an extremely small percentage

[6] In connection with their reply papers, the parties will file an updated declaration from the claim administrator regarding opt-outs and objections.

of the class has reacted negatively, the law strongly favors final approval. *See, e.g.*, *Newberg* at § 11.41; *Wershba*, 91 Cal. App. 4th at 244-45.

For all of the above reasons, it appropriate for the Court to presume that the proposed Settlement is fair, adequate and reasonable under California law.

2. Additional Relevant Criteria Confirm That The Settlement Is Fair, Adequate and Reasonable.

In addition to the factors establishing a presumption of fairness, in deciding whether to grant final approval to a class action settlement, California courts consider several additional factors, including without limitation: (a) the amount offered in the settlement; (b) the risks inherent in continued litigation; (c) the complexity and stage of the proceedings when settlement was reached; (d) the experience and views of counsel; and (e) the reaction of the class. *See Dunk*, 48 Cal. App. 4th at 1801. Again, this "list of factors is not exhaustive and should be tailored to each case." *Id.*

In considering these factors "it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation…" *Officers for Justice*, 688 F.2d at 625; *7-Eleven*, 85 Cal. App. 4th at 1151. Applied to the instant matter, all of these factors also favor final approval.

a. The Settlement Consideration Is Significant, Appropriate And Fair.

Here, the benefits to Class Members are clear, demonstrable and immediate. Plaintiff achieved his desired goal in this litigation—i.e., obtaining cash refunds for class members and changed practices, including clearer marketing and a reformulated substrate. Plaintiff's counsel according believes that the refund and changed practices provided by the Settlement is a good result, as good or better than the likely recovery at trial.

Additionally, the Settlement provides no preferential treatment for Plaintiff or other Class Members. Plaintiff will receive no more than a $5,000 incentive award to compensate him for the time he spent on this litigation and risks of undertaking this litigation, including the potential liability for costs of suit and his broad release against Defendants. (Supp. Prelim. Gutride Decl., Ex.

3.) Nor does the Settlement provide excessive compensation for Plaintiff's attorneys.[7]

b. The Settlement Extinguishes All Of The Risks Involved In Litigating This Matter.

The Court must next weigh the settlement benefits against the risk inherent in continued litigation. *See Dunk*, 48 Cal. App. 4th at 1801-02. This balancing further supports approval of the Settlement.

Plaintiff's counsel believes that the provision of the above monetary benefits and the changed practices adequately compensate Class Members for the harm they suffered, in light of the risks of litigation. Indeed, with this Settlement, Plaintiff has achieved his desired goal in this litigation—i.e., obtaining refunds, reformulation of the product, and changes to Defendant's marketing and advertising practices. Further, the above benefits are likely better than what Plaintiff might obtain at trial. While at trial, Plaintiff might obtain a 100% refund of the total purchase price of each Product, but the more likely outcome would be that a court would award a "premium" calculated as the difference between the price of a wipe product advertised as flushable versus one that is not so advertised. Even if that premium was found to be as high as 20%, the per-package recovery would range from 18 cents to $2.30, with an average recovery of just 77 cents per package. Based on Plaintiff's counsel's review of the discovery obtained in this case, it appears that approximately retail price of each Product sold in California during the class period was $3.83. Thus, the $1 per product recovery accordingly is 131% of the likely average recovery at trial, assuming a 20% price premium. Moreover, because more than half the purchases were in the range of $1.90-$2.57, the settlement recovery of $1 per package is 263% of the expected recovery at trial. (Supp. Prelim. Gutride Decl., ¶ 10.)[8] Thus, given this evidence of the maximum damages that each class member has sustained and the comparative value of the settlement, this case does not present

[7] *See* Plaintiff's Application For Attorneys' Fees, Costs and Incentive Award.

[8] Even in the unlikely event of a full recovery at trial, purchasers of more than half the products sold at trial would today be receiving 39-53% of their purchase price, a reasonable settlement given the unlikelihood of success on the full recovery claim, the possibility of appeals after trial, and the corresponding delay.

the problems identified in *Kullar v. Foot Locker Retail, Inc.,* 168 Cal. App. 4th 116 (2008).

There are also numerous risks in continuing with this Litigation, including the possibility of losing on summary judgment or being denied class certification. *See supra* page 5.

This Court, which has maintained oversight of these proceedings, is uniquely situated to evaluate the risks of continued litigation. Because the Settlement provides immediate and substantial relief, without the attendant risks of future litigation, it warrants this Court's final approval. *See, e.g., 7-Eleven*, 85 Cal. App. 4th at 1145 (a full and fair assessment of a settlement "is nearly assured when all discovery has been completed and the case is ready for trial").

c. The Complexity, Expense, and Likely Duration of Continued Litigation Against Defendants Favors Final Approval.

Another related factor for the Court to consider in assessing fairness is the complexity, expense and likely duration of the litigation had the Settlement not been reached. *See Dunk*, 48 Cal. App. 4th at 1801; *Officers for Justice*, 688 F.2d at 625; *Marshall v. Holiday Magic, Inc.* (9th Cir. 1977) 550 F.2d 1173, 1178; *Girsh v. Jepson* (3rd Cir. 1975) 521 F.2d 153, 157. In weighing this factor, the Court must compare the benefits of the Settlement to the expenses and delay involved in achieving an equivalent or more favorable result at trial. *See Young v. Katz* (5th Cir. 1971) 447 F.2d 431, 434.

The only thing that is assured from additional litigation is additional expenditures of time and money. Even if this Court or a jury might ultimately award each Class Member more damages and equitable relief, the amount of time and expense to get to that point could be astronomical. It could be years before Class Members received anything. During that time, the practice could have continued unabated and the value of the Class Benefit decreased.

d. The Experience and Views of Counsel Favor Final Approval.

Plaintiff's counsel supports the settlement as fair, reasonable, adequate and in the best interests of the Class as a whole. (Prelim. Gutride Decl. ¶¶ 9-12.) The opinion of experienced counsel supporting the settlement is entitled to considerable weight. *See, e.g., In re First Capital*

Holdings Corp. Fin. Prods. Sec. Litig. (C.D. Cal. June 10, 1992) 1992 U.S. Dist. LEXIS 14337, at *8 (finding belief of counsel that the proposed settlement represented the most beneficial result for the class to be a compelling factor in approving settlement); *Kirkorian v. Borelli* (N.D. Cal. 1988) 695 F. Supp. 446, 451 (opinion of experienced counsel is entitled to considerable weight); *Boyd v. Bechtel Corp*. (N.D. Cal. 1979) 485 F. Supp. 610, 616-17, 622 (recommendations of plaintiffs' counsel should be given a presumption of reasonableness)*; Dunk*, 48 Cal. App. 4th at 1802.

e. The Settlement Enjoys Overwhelming Class Support.

It is also appropriate for the Court to conclude that the settlement is fair, adequate, and reasonable when relatively few Class Members opt-out or object. *See Wershba*, 91 Cal. App. 4th at 244-45; *Hanlon*, 150 F.3d at 1027 ("the fact that the overwhelming majority of the Class willingly approved the offer and stayed in the Class presents at some objective positive as to the fairness"). A certain number of objections are to be expected in a class action with a notice campaign and a potentially large number of class members. *See Newberg* at § 11.41. If, however, only a small number of objections are made, that fact can (and should) be viewed as indicative of the adequacy of the settlement. For example, in *Bell Atlantic Corp. v. Bolger* (3d Cir. 1993) 2 F.3d 1304, 1313, the Court characterized as an "infinitesimal number" the less than 30 of approximately 1.1 million class members who objected.

Here, the exact number of class members in not knowable; however, because Defendants sold approximately 3 million packages of Kandoo "flushable" wipe products in California between April 6, 2010 and April 2016, the number of purchasers is significant. Yet, as of February 10, no objections have been filed, and only two people have opted out. (Rapazzini Decl. ¶ 13.) *See White v. National Football League* (D. Minn. 1993) 822 F. Supp.3d 1389, 1425 ("If the vast preponderance of the class members do not object to the settlement, the claims of inadequacy by some class members are entitled to little weight."); *7-Eleven*, 85 Cal. App. 4th at 1152–1153 (response of absent class members was "overwhelmingly positive" where only 1.5 percent elected to opt out).

This Court is also not ultimately tasked with determining whether a revised class benefit would be "better," "fairer," "more reasonable," or even whether this settlement agreement is the

most perfect agreement that could have been reached. *See, e.g., 7-Eleven*, 85 Cal.App.4th at 1145 ("the [trial] court's determination [of the fairness of a class action settlement agreement] is nothing more than an amalgam of delicate balancing, gross approximation, and rough justice") (citation omitted). Rather, the question before the Court is, giving due regard to what "is otherwise a private consensual agreement between the parties," whether this proposed settlement is fair, reasonable, and adequate to all concerned. *See Dunk*, 48 Cal. App. 4th at 1801; *see also Hanlon*, 150 F.3d at 1027 ("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."). The answer to that question in this case is "yes." The most meaningful benchmark for evaluating a class action settlement is whether it "secures an adequate advantage for the class." *Newberg* at § 11:46. This Settlement Agreement clearly satisfies that test.

IV. CONCLUSION

For the foregoing reasons, and the reasons provided in the concurrently filed application for approval of attorneys' fees, costs and incentive award, Plaintiff requests that the Court enter final judgment certifying the settlement class and approving the settlement, granting his application for an incentive award of $5,000.00, and awarding his counsel $650,000.00 in attorneys' fees and costs.

DATED: February 15, 2017

GUTRIDE SAFIER LLP

By:_____

Adam Gutride, Attorneys for Plaintiff