BURSOR & FISHER, P.A.
L. Timothy Fisher (State Bar No. 191626)
Neal J. Deckant (State Bar. No. 322946)
1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-Mail: ltfisher@bursor.com
ndeckant@bursor.com

BURSOR & FISHER, P.A.
Scott A. Bursor (State Bar No. 276006)
2665 S. Bayshore Dr., Suite 220
Miami, FL 33133-5402
Telephone: (305) 330-5512
Facsimile: (305) 676-9006
E-Mail: scott@bursor.com

Class Counsel for the Settlement Class

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re Trader Joe's Tuna Litigation

Case No. 2:16-cv-01371-ODW-AJW

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF COSTS AND EXPENSES, AND AN INCENTIVE AWARD FOR THE CLASS REPRESENTATIVE

Date: September 14, 2020
Time: 1:30 p.m.
Courtroom: 5D, 5th Floor
Hon. Otis D. Wright

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I. INTRODUCTION

Plaintiff Atzimba Reyes ("Plaintiff Reyes" or the "Class Representative"), through her counsel Bursor & Fisher, P.A. ("Bursor & Fisher" or "Class Counsel"), respectfully submits this memorandum of points and authorities in support of her motion for approval of an award of attorneys' fees, reimbursement of litigation costs and expenses, and payment of an incentive award in connection with the classwide settlement of this action.

Pursuant to the Stipulation for Class Action Settlement (the "Settlement Agreement"),[1] Defendants Trader Joe's Company and Trader Joe's East Inc. (collectively, "Trader Joe's" or "Defendants"), on behalf of the suppliers of the Trader Joe's Tuna Products, will pay $1.3 million into a Settlement Fund in cash for the settlement of all claims in this action. Deckant Decl., Ex. 1. The Settlement Agreement defines the Settlement Class to include:

> All persons in the United States who purchased Trader Joe's Tuna from January 5, 2012 through the date on which class notice is disseminated.

Id. The Settlement Agreement includes a $29.00 per claim payout for Settlement Class Members, subject to pro rata dilution if the total amount of claims exceeds the available funds. *Id.* ¶ 2.3(a). Currently, there are 92,706 claims, which means that each claimant will receive an estimated $5.16.

This is an excellent recovery for Class Members. Plaintiff alleges that Defendants' cans of tuna were underfilled between 9.9% and 24.8%. SAC (ECF No. 55) ¶¶ 2-7. Defendants sell their cans of tuna for approximately $1.50 each, meaning that if the alleged underfill is rounded up to 25% in each instance, the potential damages are approximately $0.38 per can. The current payout of $5.16 thus gives

[1] All capitalized terms herein that are not otherwise defined have the definitions set forth in the Settlement Agreement, filed as Ex. 1 to the Declaration of Neal Deckant ("Deckant Decl.") filed with this motion.

every claimant a full refund for more than 13 cans of tuna. In other words, the recovery for the class represents is a substantial portion of the maximum recovery that any Settlement Class Member could reasonably expect should Plaintiff prevail at trial. Unsurprisingly, the response to the Settlement has been overwhelmingly positive: more than 92,000 Class Members have submitted claims and no Class Members have objected. There has only been one opt out.

Class Counsel requests that the Court approve a total payment of one-third of the Settlement Fund ($433,333.33) in attorneys' fees and as reimbursement of costs and expenses. As explained below, both the percentage of the benefit method and the lodestar technique confirm that this amount of attorneys' fees and expenses is fair, reasonable, and supported by the law of this Circuit. Class Counsel collectively worked 591.4 hours on this case for a total lodestar, at current billing rates, of $350,762.50. Deckant Decl. ⁋ 51. Plaintiff's requested fee thus represents a multiplier of just 1.235, well within reason. Furthermore, Class Counsel's relatively low expenses of just $10,271.67—costs that were necessary to the prosecution of this case, and which were carefully and reasonably expended—demonstrate how efficiently they litigated this action. *Id.*, Ex. 4 (providing an itemized listing of each out-of-pocket expense incurred by Bursor & Fisher in connection with this case).

Finally, Plaintiff Reyes request that the Court award her a service award in the amount of $5,000 to account for the significant time and effort they she invested in this case on behalf of the Class.

Under the supervision of a mediator, Richard H. Silberberg, Esq. of Dorsey & Whitney LLP, the Parties agreed to these requested fees, expenses, costs and service awards after the other substantive settlement terms were resolved. *Id.* ⁋⁋ 20-22. Accordingly, these requested amounts are the result of an arm's-length market transaction. *Id.*

II. BACKGROUND AND PROCEDURAL HISTORY

A. Class Counsel's Experience In Similar Tuna Underfill Matters

On August 6, 2012, the attorneys at Bursor & Fisher learned of a complaint that was filed four days earlier in the Superior Court of the State of California, County of Riverside, by the district attorneys of Riverside, Marin, and San Diego Counties (collectively, the "District Attorneys") against Bumble Bee Foods, LLC, Tri-Union Seafoods, LLC d/b/a Chicken of the Sea International, and StarKist Co. *See People v. Bumble Bee Foods, LLC, et al.*, No. RIC 1211729 (Cal. Sup. Ct. Aug. 2, 2012); Deckant Decl. ⁋ 2. The District Attorneys' complaint alleged that these parties "made or caused to be made representations to the public which were untrue and/or misleading," in that certain canned tuna products they manufactured contained "misrepresentations of quantity by failing to meet the standard of identity for canned tuna products seasoned or flavored with broth, as defined in Code of Federal Regulations, Title 21, section 161.190(a)(6)." *Id.* Filed concurrently with the District Attorneys' complaint was a Final Judgment Pursuant to Stipulation, which provided for a total payment of $3,000,000 to the offices of the District Attorneys, along with a $300,000 cy pres payment "in the form of canned tuna distributed to food banks throughout the State of California." *Id.* On October 21, 2013, the court entered an Acknowledgment of Full Satisfaction of Judgment. *Id.* However, the District Attorneys' settlement did not provide any monetary relief to the purchasers of these products, nor did it provide a mechanism through which aggrieved purchasers could submit claims. *Id.*

Between October 2 and October 12, 2012, the attorneys at Bursor & Fisher sent requests for public records pursuant to the California Public Records Act to the District Attorneys of Riverside and San Diego Counties, as well as to the California Department of Food and Agriculture, seeking all documents and/or communications concerning their recent settlement regarding the sale of underfilled cans of tuna. *Id.*

1 ⁋ 3. On December 12, 2012, the attorneys at Bursor & Fisher made arrangements
2 with NOAA to test an initial batch of StarKist-brand tuna, among other brands. *Id.*
3 These efforts led to the filing of *Hendricks v. StarKist Co.*, 13-cv-00729 (N.D.
4 Cal. Feb. 19, 2013), concerning allegations that StarKist-brand canned tuna was
5 underfilled. Deckant Decl. ⁋ 4. On May 14, 2015, after surviving a motion to
6 dismiss but before the class certification stage, the parties settled the StarKist matter
7 on a nationwide basis, comprising of a common fund in the amount of $12 million.
8 *Id.* The StarKist court granted final approval to the settlement, and the Ninth Circuit
9 affirmed on appeal. *Id.*
10 These efforts also led to the filing of *Soto v. Wild Planet Foods, Inc.*, No. 15-
11 cv-05082 (N.D. Cal. Nov. 5, 2015), concerning allegations that Sustainable Seas-
12 brand canned tuna was underfilled. Deckant Decl. ⁋ 5. On November 21, 2016,
13 prior to a ruling on the defendant's motion to dismiss, the parties settled the Wild
14 Planet matter on a nationwide basis, comprising of a common fund in the amount of
15 a $1.7 million common fund. *Id.* The Wild Planet court granted final approval to the
16 settlement, and there were no appeals. *Id.*
17 These efforts also led to the filing of *Soto v. Safeway Inc.*, No. 15-cv-05078
18 (N.D. Cal. Nov. 5, 2015), concerning allegations that Safeway-brand canned tuna
19 was underfilled. Deckant Decl. ⁋ 6. On March 1, 2017, prior to a ruling on the
20 defendant's motion to dismiss, the parties resolved the Safeway matter to their
21 mutual satisfaction. *Id.*

22 **B. Class Counsel's Investigation Into Trader Joe's Tuna**

23 The present litigation concerning Trader Joe's canned tuna is based on the
24 exact same type of test results from the U.S. National Oceanic and Atmospheric
25 Administration ("NOAA") that gave rise to the StarKist, Wild Planet, and Safeway
26 matters. *Id.* ⁋ 7. The products at issue are: (i) 5-ounce canned Trader Joe's
27 Albacore Tuna in Water Salt Added, (ii) 5-ounce canned Trader Joe's Albacore Tuna
28 in Water Half Salt, (iii) 5 ounce canned Trader Joe's Albacore Tuna in Water No

Salt Added, (iv) 5-ounce canned Trader Joe's Albacore Tuna in Olive Oil Salt Added, (v) 5-ounce canned Trader Joe's Skipjack Tuna in Water with Sea Salt, and (vi) 5-ounce canned Trader Joe's Yellowfin Tuna in Olive Oil Solid Light (collectively, "Trader Joe's Tuna"). *Id.*

Specifically, independent testing by a laboratory retained by Plaintiff's counsel determined that 5-ounce cans of Trader Joe's Albacore Tuna in Water Salt Added contain an average of only 2.61 ounces of pressed cake tuna when measured precisely according to the methods specified by 21 C.F.R. § 161.190(c). *Id.* ¶ 8. This is 19.2% below the federally mandated minimum standard of fill of 3.23 ounces for these cans. *See* 21 C.F.R. § 161.190(c)(2)(i)-(xii); Deckant Decl. ¶ 8. These tests were performed by the Southwest Inspection Branch of NOAA, which is part of the U.S. Department of Commerce. *Id.* Each test was conducted over a sample of 24 cans, per the specifications of 21 C.F.R. § 161.190(c). *Id.*

The same tests revealed similar results for the other varieties of Trader Joe's Tuna at issue:

- 5-ounce cans of Trader Joe's Albacore Tuna in Water Half Salt contain an average of only 2.43 ounces of pressed cake tuna, which is 24.8% below the federally mandated minimum standard of fill of 3.23 ounces for these cans;

- 5-ounce cans of Trader Joe's Albacore Tuna in Water No Salt Added contain an average of only 2.43 ounces of pressed cake tuna, which is 24.8% below the federally mandated minimum standard of fill of 3.23 ounces for these cans;

- 5-ounce cans of Trader Joe's Albacore Tuna in Olive Oil Salt Added contain an average of only 2.87 ounces of pressed cake tuna, which is 11.1% below the federally mandated minimum standard of fill of 3.23 ounces for these cans;

- 5-ounce cans of Trader Joe's Skipjack Tuna in Water With Sea Salt contain an average of only 2.56 ounces of pressed cake tuna, which is 9.9% below the federally mandated minimum standard of fill of 2.84 ounces for these cans; and

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- 5-ounce cans of Trader Joe's Yellowfin Tuna in Olive Oil Solid Light contain an average of only 2.78 ounces of pressed cake tuna, which is 13.9% below the federally mandated minimum standard of fill of 3.23 ounces for these cans

Id. ¶ 9.

C. Class Counsel's Work In This Matter

On January 5, 2016, Plaintiff Sarah Magier (since dismissed) filed suit against Trader Joe's in the U.S. District Court for the Southern District of New York. *See Magier v. Trader Joe's Co.*, No. 16-cv-00043 (S.D.N.Y. Jan. 5, 2016); Deckant Decl. ¶ 10. On January 29, 2016, an amended complaint was filed in the Southern District of New York that added the claims of Atzimba Reyes. *Id.*

Following Bursor & Fisher's first-filed matter in *Magier*, a number of additional firms (e.g., Audet & Partners, LLP and Sullivan, Krieger, Truong, Spagnola & Klausner) filed various copycat matters: *Joseph v. Trader Joe's Company*, Case No. 2:16-cv-01371-ODW-AJW; *Aliano v. Trader Joe's Company*, Case No. 2:16-cv04733-ODW-AJW; and *Shaw v. Trader Joe's Company*, Case No. 2:16-cv-02686ODW-AJW. On March 11, 2016, the plaintiff in the *Aliano* matter filed a petition with the U.S. Judicial Panel on Multidistrict Litigation ("MDL") to centralize and consolidate the various matters in the Central District of California. On June 21, 2016, following a full round of briefing on plaintiff Aliano's MDL petition, the parties to the Trader Joe's Tuna matters decided to voluntarily transfer and consolidate their cases before this Court, to be consolidated with the later-filed *Joseph* matter. On November 1, 2016, this Court formally consolidated the transferred cases with Joseph and set procedures for submitting applications for the appointment of interim class counsel pursuant to Federal Rule of Civil Procedure 23(g).

On December 21, 2016, counsel for Plaintiffs Magier and Reyes won a contested motion for the appointment of interim class counsel. 12/21/16 Order (ECF

1 No. 34). In doing so, Plaintiffs Magier and Reyes overcame a competing motion for
2 the appointment of interim class counsel filed by the attorneys representing the
3 plaintiffs in the *Joseph* and *Aliano* matters: Audet & Partners, LLP and Sullivan,
4 Krieger, Truong, Spagnola & Klausner. *Id.* The Court's order recognized the work
5 that Class Counsel had already accomplished at that time, including "an extensive
6 preliminary investigation of potential claims …." *Id.* The Court also recognized that
7 Bursor & Fisher, P.A. had "specifically handled a class action lawsuit about under-
8 filling of canned tuna products," that "it possesses the relevant legal knowledge to be
9 successful in this case." *Id.*

10 On January 20, 2017, Plaintiffs Magier and Reyes filed their consolidated
11 complaint. Deckant Decl. ⁋ 14. On June 2, 2017, the Court granted a motion to
12 dismiss filed by Trader Joe's, based on the finding that Plaintiffs' claims were
13 preempted by the federal Food, Drug and Cosmetic Act ("FDCA"). *Id.* The Court
14 gave Plaintiffs leave to amend. *Id.* On June 30, 2017, Plaintiffs Magier and Reyes
15 filed the operative Second Amended Class Action Complaint. *Id.* ⁋ 15. On October
16 3, 2017, the Court granted in part and denied in part Defendants' second motion to
17 dismiss. *Id.* Specifically, the Court found that Plaintiff Magier's claims were
18 preempted by the FDCA, but it held that Plaintiff Reyes' claims—based on
19 California law—were not preempted. *Id.*

20 On November 22, 2017, Plaintiff served 29 Requests for Production and 13
21 Interrogatories. *Id.* ⁋ 16. That same day, Defendants served 15 Requests for
22 Production on Plaintiff. *Id.* As a result of these requests, Plaintiff Reyes produced
23 23 pages of responsive documents, and Trader Joe's produced 244 pages in two
24 rounds of production. *Id.* On March 1, 2018, Plaintiff served a subpoena *duces*
25 *tecum* on third-party Tri-Union Seafoods, LLC, d/b/a Chicken of the Sea
26 International. *Id.* ⁋ 17. As a result, Chicken of the Sea produced 53 pages of
27 responsive documents. *Id.* On May 14, 2018, Plaintiff noticed the deposition of
28 Defendant Trader Joe's Company pursuant to Federal Rule of Civil Procedure

30(b)(6). *Id.* ⁋ 18. On May 16, 2018, Plaintiff noticed the deposition of several Trader Joe's employees: Chris Condit, Dustin Hopper, Jasmine Mkrtchyan, Matt Sloan, and Cara Yokomizo. *Id.*

Prior to the Parties' resolution of this matter, Plaintiff Reyes' motion for class certification was due to be filed on or before August 10, 2018. *Id.* ⁋ 19. Class Counsel was on track to complete discovery within the time allotted and meet this deadline. *Id.*

D. Arm's-Length Settlement Negotiations

The Settlement Agreement was reached as a result of extensive arm's-length negotiations between the Parties and their counsel. *Id.* ⁋ 20. On July 9, 2018, the parties attended a day-long mediation with Richard H. Silberberg, Esq. of Dorsey & Whitney LLP, working with the National Academy of Distinguished Neutrals. *Id.* ⁋ 20. The parties executed a binding Settlement Term Sheet later that day as a result of their mediation efforts, and they agreed to the Settlement Agreement on September 9, 2019. *Id.*

In connection with the mediation, Plaintiffs' counsel did not negotiate the amount of attorneys' fees separately from the relief made available to the class. *Id.* ⁋ 22. Stated otherwise, through their negotiations, the Parties focused their discussions on the monetary relief made available to the Class, with the provision that Plaintiff may apply for up to one-third of the total value of the common fund in attorneys' fees and as reimbursement of expenses. *Id.* As such, the provisions concerning attorneys' fees and expenses were negotiated in such a manner as to avoid any potential conflict with the Settlement Class, or any argument that such amounts were "traded off" for lesser class consideration. *Id.*

E. Preliminary Approval

On September 14, 2018, Plaintiff moved for preliminary approval of the Settlement Agreement and certification of the Settlement Class. ECF No. 23. On

April 1, 2019, the Court denied Plaintiff's motion without prejudice due to choice of law concerns, finding that Plaintiff had "not address[ed] the choice of law issue or provide[d] support for the notion that the types of [choice of law] concerns addressed in *Mazza* [*v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012)] present no roadblock to certification for class settlement purposes." *See* 4/1/19 Order (ECF No. 96).

On April 19, 2019, Class Counsel submitted a stipulation continuing the deadline for a renewed preliminary approval motion until after the Ninth Circuit Court of Appeals issued an order regarding the *en banc* review in *In Re: Hyundai and Kia Fuel Economy Litigation*, Case No. 15-56014, 881 F.3d 679, 707 (9th Cir. 2018). The *Hyundai and Kia* matter presented the issue of whether a "district court abuse[s] its discretion in certifying a nationwide settlement class without conducting a rigorous predominance analysis under Rule 23(b)(3) to determine whether variations in state consumer protection laws, or individual factual questions regarding exposure to the misleading statements, precluded certification." As such, Class Counsel believed that the *Hyundai and Kia* matter would resolve the Court's concerns.

On June 6, 2019, the Ninth Circuit indeed issued a favorable ruling in *Hyundai and Kia*: "[A] court adjudicating a multistate class action is free to apply the substantive law of a single state to the entire class." *In re Hyundai and Kia Fuel Economy Litig.*, 2019 WL 2376831, at *9-10 (9th Cir. June 6, 2019) ("By default, California courts apply California law unless a party litigant timely invokes the law of a foreign state, in which case it is the foreign law proponent who must shoulder the burden of demonstrating that foreign law, rather than California law, should apply to class claims."). Plaintiff filed her renewed motion for preliminary approval on July 23, 2019, which the Court granted on January 14, 2020 and on January 14, 2020, the Court granted preliminary approval. 1/14/20 Order (ECF No. 105).

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F. Dissemination Of Notice

Dissemination of notice commenced on May 1, 2020. Deckant Deck. ⁋ 27. Kurtzman Carson Consultants ("KCC"), a firm with experience administering more than 2,000 settlements, was chosen by the parties as the Settlement Administrator. Deckant Decl., Ex. 1 at ¶ 1.19; 7/23/19 Peak Decl. ¶ 3 ("Since 1984, KCC has administered more than 6,000 matters and distributed settlement payments totaling well over $20 billion in assets."). KCC's notice plan included creation of a dedicated settlement website, an Internet banner ad campaign, and print publication in National Geographic, the New York Times, and the Los Angeles Daily News, which will reach "approximately 70% of likely Class Members." Peak Decl. ¶¶ 8-13.

KCC has advised that this notice plan is "consistent with the 70-95% reach guideline set forth in the Federal Judicial Center's Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide, which considers 70-95% reach among class members reasonable." *Id.* ¶ 14. KCC estimates that its services in providing notice and claims administration will cost $357,953. Deckant Decl., Ex. 1 at ¶ 4.5.

As of this filing, 92,706 class members have already submitted claims. Not a single class member has objected to the Settlement, and only 1 one class member has requested to be excluded from the Class.

G. Settlement Terms

The Settlement affords the Class with significant relief in the form of $1.3 million. Any Settlement Class Member who submits a valid Cash Claim is entitled to a maximum monetary payment of $29, subject to pro rata dilution. Deckant Decl., Ex. 1 at ¶ 2.3(a). There are no coupons or vouchers, only cash. The Settlement Agreement does not have a "clear sailing" provision. The Settlement Agreement permits Class Counsel to request up to one-third of the settlement fund in attorneys' fees, but Defendants are free to oppose this request.

III. THE CLRA PROVIDES FOR A MANDATORY FEE AWARD

The Class Representative has brought claims against Defendants under various theories, including under California's Consumers Legal Remedies Act, Civil Code §§ 1750, *et seq.* (the "CLRA"). For CLRA claims, an award of fees to the prevailing party is mandatory under Civil Code § 1780(e), which provides: "The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section." As the California Court of Appeal has explained in construing this provision:

> The word 'shall' is usually deemed mandatory, unless a mandatory construction would not be consistent with the legislative purpose underlying the statute." (*West Shield Investigations and Sec. Consultants v. Superior Court* (2000) 82 Cal. App. 4th 935, 949, 98 Cal.Rptr.2d 612.) Our Supreme Court has observed that "the availability of costs and attorney's fees to prevailing plaintiffs is integral to making the CLRA an effective piece of consumer legislation, increasing the financial feasibility of bringing suits under the statute." (*Broughton v. Cigna Healthplans* (1999) 21 Cal. 4th 1066, 1085, 90 Cal. Rptr. 2d 334, 998 P.2d 67.) Thus, a mandatory construction of the word "shall" in section 1780(d) is consistent with the legislative purpose underlying the statute.

Kim v. Euromotors West/The Auto Gallery, 149 Cal. App. 4th 170, 178 (2007).

Here, Class Counsel have negotiated a settlement that will provide Class Members with complete relief for the purchase of two of the Class Settlement Products without proof of purchase. Settlement Agreement § 3. Plaintiffs have thus succeeded by realizing their litigation objectives in large part. As the Settlement Class is the "prevailing party," a fee award to Class Counsel is mandatory under the CLRA. *Graciano v, Robinson Ford Sales*, 144 Cal. App. 4th 140, 150-51 (2006).

IV. CLASS COUNSEL'S REQUESTED ATTORNEYS' FEES AWARD IS FAIR AND REASONABLE

Under Ninth Circuit standards, a District Court may award attorneys' fees under either the "percentage-of-the-benefit" method or the "lodestar" method.

Fischel v. Equitable Life Assur. Soc'y, 307 F.3d 997, 1006 (9th Cir. 2002); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). Class Counsel's fee request is fair and reasonable under either of these methods.

A. The Percentage Of The Benefit Method

Under the common fund doctrine, courts typically award attorneys' fees based on a percentage of the total settlement. *See State of Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990); *see also In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378-79 (9th Cir. 1995) (affirming attorneys' fee award of 33% of the recovery); *Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th Cir. 2003) (affirming attorneys' fee award of 33% of the recovery).

1. The Total Value Of The Settlement Fund Is $1.3 Million

To calculate attorneys' fees based on the percentage of the benefit, the Court must first determine the value of the Settlement Fund. In doing so, the Court must include the value of the benefits conferred to the Class, including any attorneys' fee, expenses, and notice and claims administration payments to be made. *See*, *e.g.*, *Staton v. Boeing*, 327 F.3d 938, 972-74 (9th Cir. 2003); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 (S.D. Cal. 2011), *aff'd*, 473 F. App'x. 716 (9th Cir. 2012). Moreover, the Court must not consider the total monetary amount distributed to the Class; rather, the Court should only consider the amount *made available* to the Class. As articulated in *Young v. Polo Retail, LLC*, 2007 U.S. Dist. LEXIS 27269 (N.D. Cal. Mar. 28, 2007), Ninth Circuit precedent requires courts to award class counsel fees based on the total benefits being made available rather than the amount actually paid out. *Id*. at *23 (citing *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026 (9th Cir. 1997) (ruling that a district court abused its discretion in basing attorney fee award on actual distribution to class instead of amount being made available). Here, because the Settlement Agreement creates a common fund of $1.3 million, that is the amount that should be used for a percentage-of-the-benefit analysis.

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2. The Requested Fee is Reasonable

The Ninth Circuit has established 25% of a common fund as a starting benchmark under a percentage-of-the-benefit analysis. *Hanlon*, 150 F.3d at 1029. However, the 25% benchmark would be unreasonably low here. *See id.* at 148 ("The 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases."); *see also Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272-73 (9th Cir. 1989) (explaining that the benchmark should be "adjusted upward or downward" based on the unique circumstances of the case).

The Ninth Circuit has identified five factors that are relevant in determining whether requested attorneys' fees in a common fund case are reasonable: (a) the results achieved; (b) the risk of litigation; (c) the skill required and the quality of work, (d) market rates as reflected by awards made in similar cases; and (e) the contingent nature of the fee and the financial burden carried by the plaintiffs. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002). Each of these factors points to a higher award in this case. Here, a fee of 33.3% is reasonable for the reasons set forth below.

a. Class Counsel Achieved Extraordinary Results For The Class

The benefit obtained for the Class is foremost among the factors in determining a proper fee. In this case, the significant monetary benefits achieved weighs heavily in favor of an upward adjustment from the 25% benchmark. *In re Bluetooth*, 654 F.3d at 942 (citing *Hensley*, 461 U.S. at 434-36). As noted above, each Class Member making a claim is currently slated to receive a check for $5.16. This far exceeds the amounts obtained in other tuna underfilling cases. *See, e.g.*, *Hendricks v. StarKist Co.*, 13-cv-00729 (N.D. Cal. Feb. 19, 2013) (providing $2.39 in cash after pro rata dilution). Because the Settlement provides a substantial monetary benefit to Class Members above and beyond that recovered in other tuna

underfilling cases, where upward departures were also granted, this factor weighs heavily in favor of the reasonableness of the requested fee award.

b. Plaintiff's Claims Carried Substantial Litigation Risk

The second *Vizcaino* factor looks to the risk and novelty of the claims at issue. Both are certainly present here. Deckant Decl. ¶¶ 31-32. (discussing the risks of litigating Plaintiffs' claims). Indeed, Class Counsel undertook significant financial risk in prosecuting this case.

First, it was far from certain that Class Counsel would be appointed interim class counsel in this action. Had the firms representing the copycat plaintiffs been appointed instead, Class Counsel's considerable effort and expenditures made investigating and initiating this action would have been for naught. Similarly, it was far from certain that this case would survive past the pleadings stage. In fact, the Court initially dismissed this action in full and later only permitted the California claims to proceed based on Class Counsel's technical argument against preemption. 6/02/2017 Order (ECF No. 54).

Going forward, the risks would have only been greater. Indeed, further litigation of this Action would have presented substantial risks to any potential Class recovery. Although Plaintiff had confidence in her claims, it was clear that Defendants would present a vigorous defense, and that there could be no assurance that the Class would be certified or prevail at trial. It was also likely that Defendants would file a motion for summary judgment that would present significant risks to the Class. Even if Plaintiff's claims could proceed past class certification and summary judgment, this case would ultimately devolve into an uncertain "battle of the experts." Defendants would surely present testing from experts who would claim that the Trader Joe's Tuna products are adequately filled and properly labeled. A favorable outcome was not assured. By settling, Plaintiff and the Class avoid these risks, as well as the delays and risks of a lengthy trial and appellate process. The

Settlement will provide Settlement Class Members with monetary benefits that are immediate, certain and substantial, and avoid the obstacles that might have prevented them from obtaining relief.

c. Class Counsel Skillfully Prosecuted This Action

The litigation of a complex, multiparty, nationwide class action "requires unique legal skills and abilities." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d. 1036, 1047 (N.D. Cal 2008). However, the "single clearest factor reflecting the quality of class counsels' services to the class are the results obtained." *In re Heritage Bond Litig.*, 2005 WL 1594389, at *12 (C.D. Cal. June 10, 2005). The quality of opposing counsel is also important in evaluating the quality of the work done by Class Counsel. *Cohorst v. BRE Props., Inc.*, 2011 WL 7061923, at *20 (S.D. Cal. Nov. 14, 2011).

Here, Class Counsel faced an uphill battle not only in their pursuit of the facts in this complicated case, but in the formidable opposition by experienced class action defense counsel from both Buchanan Ingersoll & Rooney PC and Parks & Solar LLP. Despite these obstacles, Class Counsel succeeded in defeating the motion to dismiss and reaching this Settlement. The ability of Class Counsel to obtain such a favorable settlement in these circumstances supports the requested fee award.

d. Market Rates As Reflected By Awards In Similar Cases

Although the Ninth Circuit has established a benchmark fee of 25%, it is not uncommon for courts in this Circuit to award fees even higher than 25% in common fund cases. For example, when awarding 32.8% of the settlement fund for fees and costs, Judge Patel explained: "absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%[,]" as this will "encourage plaintiffs' attorneys to move for early settlement, provide predictability for the attorneys and the class members, and reduce the time consumed by counsel and court in dealing with voluminous fee petitions." *In re Activision Sec.*

1 *Litig.*, 723 F. Supp. 1373, 1378-79 (N.D. Cal. 1989); *see also In re Pac. Enters. Sec.*
2 *Litig.*, 47 F.3d at 378-79 (affirming attorneys' fee of 33% of the recovery); *Williams*,
3 129 F.3d at 1027 (33.33% of total fund awarded); *Morris*, 54 Fed. App'x at 663
4 (affirming fee award of 33% of the recovery); *Vasquez v. Coast Valley Roofing, Inc.*,
5 266 F.R.D. 482, 492 (E.D. Cal. 2010) (citing to five class actions where federal
6 district courts approved attorney fee awards ranging from 30% to 33%); *Martin v.*
7 *AmeriPride Servs., Inc.*, 2011 U.S. Dist. LEXIS 61796, at *23 (S.D. Cal. June 9,
8 2011) (noting that "courts may award attorney's fees in the 30%-40% range");
9 *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416, at *22-23 (S.D.
10 Cal. June 1, 2010) (approving attorney fee award of 33.33% of the common fund and
11 holding that award was similar to awards in three other cases where fees ranged from
12 33.33% to 40%); *Ingalls v. Hallmark Mktg. Corp.*, 2009 U.S. Dist. LEXIS 131081
13 (C.D. Cal. Oct. 16, 2009) (awarding 33.33% fee on a $5.6 million common fund
14 settlement); *Rippee v. Boston Mkt. Corp.*, No. 05-CV-1359 TM (JMA) (Dkt. No. 70,
15 at 7) (S.D. Cal. Oct. 10, 2006) (awarding a 40% fee on a $3.75 million in a common
16 fund settlement).

17 In tuna underfilling cases in particular, courts have seen fit to award fees with
18 upward departures. *See, e.g.*, *Hendricks v. StarKist Co.*, 2016 WL 5462423, at *13
19 (N.D. Cal. Sept. 29, 2016) (granting attorneys' fees equaling 30% of the common
20 fund); *Soto v. Wild Planet Foods, Inc.*, 15-cv-05082-BLF, Nov. 27, 2017 Order (ECF
21 No. 61) (awarding class counsel a fee award of 33.33%). In this case, given the
22 excellent result obtained for the Class, an upward departure is warranted. This is
23 particularly true given that an award of 25% would result in a negative multiplier
24 (*i.e.*, a "haircut"), meaning that Class Counsel would not be fully compensated for
25 the time they billed to this matter.
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e. The Contingent Nature Of The Fee And Financial Burden Borne By Class Counsel

The fifth factor cited by *Vizcaino* is the contingent nature of the fee and the financial burden carried by the plaintiffs. *Vizcaino*, 290 F.3d at 1050. To date, Class Counsel has worked for over four years with no payment, and no guarantee of payment absent a successful outcome. Class Counsel also advanced $10,271.67 in out-of-pocket expenses, again with no guarantee of repayment. If the case had advanced through the end of discovery, class certification, summary judgment and trial, these expenses would have increased many-fold, and Class Counsel would have been required to advance these expenses potentially for several years to litigate this action through judgment and appeals.

B. The Requested Attorneys' Fees Are Reasonable Under A Lodestar Cross Check

Courts in the Ninth Circuit often examine the lodestar calculation as a crosscheck on the percentage fee award to ensure that counsel will not receive a "windfall." *Vizcaino*, 290 F.3d at 1050. The cross-check analysis is a two-step process. First, the lodestar is determined by multiplying the number of hours reasonably expended by the reasonable rates requested by the attorneys. *See Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1028 (9th Cir. 2000). Second, the court determines the multiplier required to match the lodestar to the percentage-of-the-fund request made by counsel, and determines whether the multiplier falls within the accepted range for such a case. Here, the lodestar cross-check confirms the reasonableness of the requested fee.

As of this filing, Class Counsel has worked 591.4 hours on this case for a total lodestar, at current billing rates, of $350,762.50. Deckant Decl. ⁋ 51. This represents a blended hourly rate of just $593.11, which is well within the bounds of reasonable hourly rates in this District. *Id.* ¶ 61. A fee award of 33.3%, or $433,333.33 would represent a multiplier of just 1.235 over the base lodestar fee. *Id.* ¶ 52; Section IV.C below (discussing the factors supporting the application of a

1 multiplier to Class Counsel's lodestar). This multiplier falls well within the accepted
2 range in the Ninth Circuit, and is reasonable. *See*, *e.g.*, *Vizcaino*, 290 F.3d at 1051
3 (noting district court cases in the Ninth Circuit approving multipliers as high as
4 19.6); *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal.
5 2008) (approving fee award resulting in a multiplier of 5.2, and collecting similar
6 cases); *Steiner v. Am. Broad. Co., Inc.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007)
7 (approving multiplier of 6.85); 4 Newberg on Class Actions § 14.7 (courts typically
8 approve percentage awards based on lodestar cross-checks of 1.9 to 5.1 or even
9 higher). The modest multiplier provided by the lodestar cross-check here
10 demonstrates that the percentage fee sought by Class Counsel is fair and reasonable.

11 **C. The Court May Alternatively Grant The Requested Attorneys'**
12 **Fees Under The Lodestar Method**

13 Under Ninth Circuit standards, a District Court may also award attorneys' fees
14 under the "lodestar" method. *Hanlon*, 150 F.3d at 1029. The lodestar figure is
15 calculated by multiplying the hours spent on the case by reasonable hourly rates for
16 the region and attorney experience. *See*, *e.g.*, *In re Bluetooth Headset Prods. Liab.*
17 *Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011); *Hanlon*, 150 F.3d at 1029. The
18 resulting lodestar figure may be adjusted upward or downward by use of a multiplier
19 to account for factors including, but not limited to: (i) the quality of the
20 representation; (ii) the benefit obtained for the class; (iii) the complexity and novelty
21 of the issues presented; and (iv) the risk of nonpayment. *Hanlon*, 150 F.3d at 1029;
22 *see also Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).[2] Courts

23 [2] *Kerr* identifies twelve factors for analyzing reasonable attorneys' fees:

24 (1) the time and labor required; (2) the novelty and difficulty of the
25 questions involved; (3) the skill requisite to perform the legal service
properly; (4) the preclusion of other employment by the attorney due to
26 acceptance of the case; (5) the customary fee; (6) whether the fee is
fixed or contingent; (7) time limitations imposed by the client or the
27 circumstances; (8) the amount involved and the results obtained; (9) the
experience, reputation, and the ability of the attorneys; (10) the
28 'undesirability' of the case; (11) the nature and length of the

typically apply a multiplier or enhancement to the lodestar to account for the substantial risk that class counsel undertook by accepting a case where no payment would be received if the lawsuit did not succeed. *Vizcaino*, 290 F.3d at 1051.

1. Class Counsel Spent A Reasonable Number Of Hours On This Litigation At A Reasonable Hourly Rate

Class Counsel's declarations describe the extensive work performed in connection with this litigation over the past four years. Bursor & Fisher, P.A. carefully coordinated its work throughout this litigation to avoid any internal duplication of effort, and was thereby able to work very efficiently. To support this request, Class Counsel is separately submitting its detailed daily billing records showing what work was done and by whom. Deckant Decl., Ex. 3. These records confirm Class Counsel's efficient billing.

The number of hours expended by Class Counsel is also extremely reasonable given the complications involved in litigating this matter. The pre-suit investigation required extensive work, including rigorous testing. Then, before the merits of this case could even be addressed, it took over a year to consolidate the various actions in a single venue and to win appointment as interim class counsel. Plaintiff's claims were then initially dismissed in full. Then, after amending and setting out a complex analysis, Class Counsel was finally able to convince the Court that Plaintiff's California claims were not preempted. And, finally, the preliminary approval process required numerous filings over a period of a year and a half.

The blended hourly rates for Class Counsel of $593.11 is also quite reasonable. This low blended hourly rate in this case resulted from Class Counsel's practice of assigning appropriate work to less senior lawyers who bill at lower hourly rates in order to minimize fees for the Class, wherever possible. Deckant Decl. ⁋ 56.

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professional relationship with the client; and (12) awards in similar cases.

1 The hourly rates for each of the lawyers who staffed the case are set forth in the
2 Deckant Declaration submitted herewith. *Id.*, Ex. 3.
3 These rates are reasonable as compared to rates routinely approved in this
4 District. *Johnson v. Saul*, 2020 WL 1223539, at *3 (C.D. Cal. Feb. 3, 2020) ("the
5 Central District of California has repeatedly found reasonable fees with effective
6 hourly rates exceeding $1,000 per hour"); *Radford v. Berryhill*, 2017 WL 4279217,
7 at *3 (C.D. Cal. Sept. 26, 2017) (approving fees amounting to $1,197.92 per hour of
8 attorney time); *Palos v. Colvin*, 2016 WL 5110243, at *2 (C.D. Cal. Sept. 20, 2016)
9 (approving fees amounting to $1,546.39 per hour of attorney time); *Daniel v. Astrue*,
10 2009 WL 1941632, at *2-3 (C.D. Cal. July 2, 2009) (approving fees amounting to
11 $1,491.25 per hour of attorney time); *McKibben v. McMahon*, 2019 WL 1109683, at
12 *14 (C.D. Cal. Feb. 28, 2019) (finding hourly rates of up to $1,230 per hour
13 reasonable depending on attorney experience); Deckant Decl. ¶¶ 56-57.
14 **2. All Relevant Factors Support Applying A Multiplier To Class Counsel's Lodestar**
15 The lodestar analysis is not limited to the simple mathematical calculation of
16 Class Counsel's base fee. *See Morales, supra,* 96 F.3d at 363-64. Rather, Class
17 Counsel's actual lodestar may be enhanced according to those factors that have not
18 been "subsumed within the initial calculation of hours reasonably expended at a
19 reasonable rate." *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983) (citation
20 omitted); *see also Morales*, 96 F.3d at 364. In a historical review of numerous class
21 action settlements, the Ninth Circuit found that lodestar multipliers normally range
22 from 0.6 to 19.6, with most (83%) falling between 1 and 4. *See Vizcaino*, 290 F.3d
23 at 1051, n.6; *Gonzalez v. S. Wine & Spirits of Am. Inc.*, 2014 WL 1630674, at *5
24 (C.D. Cal. Apr. 24, 2014) (awarding a "1.18 multiplier, taking into account the
25 contingent nature of the case and the delay in class counsel receiving its full fee
26 award"); *see In re Washington Public Power Supply System Securities Litig.*, 19 F.3d
27 at 1300–1301 (noting that "courts have routinely enhanced the lodestar to reflect the
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risk of non-payment in common fund cases" and finding district court's failure to apply multiplier to lodestar calculation was abuse of discretion where case was "fraught with risk and recovery was far from certain"); *see also* Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 14:03 (3d ed. 1992) (recognizing that multipliers of 1 to 4 are frequently awarded). In considering the reasonableness of attorneys' fees and any requested multiplier, the Ninth Circuit has directed district courts to consider the time and labor required, the novelty and complexity of the litigation, the skill and experience of counsel, the results obtained, and awards in similar cases. *Kerr*, 526 F.2d at 70; *Blum v. Stenson*, 465 U.S. 886, 898-900 (1984). All of these factors further support the reasonableness of the requested fee award in this action. *Vizcaino*, 290 F.3d at 1051.

a. Novelty and Complexity of this Litigation

This case was only the fourth class action ever based on the on the alleged underfilling of canned tuna pursuant to 21 C.F.R. § 161.190. Thus, Class Counsel was faced with difficult legal and factual issues, which required creativity and sophisticated analysis.

As the Court is familiar, this action was hotly contested. It required substantial original work, and significant risk that Class Counsel's efforts (and its out-of-pocket costs) would go uncompensated – since few private parties had ever litigated this type of case before. Settlement negotiations included multiple formal and informal discussions, which were complicated both in terms of the subject matter and damages analyses at issue. *See id.* ¶¶ 20-21.

Therefore, a multiplier of 1.235 is well within the parameters used throughout this Circuit. Indeed, in light of the novelty and complexity of this case, the trailblazing work it required, and concomitant risks to counsel, a substantially higher multiplier would be justified.

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b. Class Counsel Provided Exceptional Representation Prosecuting This Complex Case

Class Counsel respectfully submits that they have conducted themselves in this action in a professional, diligent and efficient manner. Class Counsel has extensive experience in the field of class action litigation. Deckant Decl., Ex. 2 (Bursor & Fisher's resume). Additionally, litigation tasks were allocated to prevent "over lawyering" and inefficiency. The bulk of the work was performed by a small number of attorneys fully familiar with the complex factual and legal issues presented by this litigation. This division of labor permitted the work to be done efficiently, resulting in an economy of service and avoiding duplication of effort.

c. Class Counsel Obtained Excellent Class Benefits

As discussed above, based on the current number of claims, and assuming that this motion for fees, costs and incentive awards is granted in full, the Settlement will provide each claimant with a check for $5.16. This amount far exceeds the recovery in other tuna underfilling actions and represents a full refund for more than 13 cans of underfilled tuna. This is essentially full compensation. The response of class members (92,706 claims have been made to date) confirms that Class Counsel obtained a great result for the Class.

d. Class Counsel Faced A Substantial Risk Of Nonpayment

A critical factor bearing on fee petitions in Ninth Circuit courts is the level of risk of non-payment faced by Class Counsel at the inception of the litigation. *See, e.g.*, *Vizcaino*, 290 F.3d at 1048. The contingent nature of Class Counsel's fee recovery, coupled with the uncertainty that any recovery would be obtained, are significant. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994). In *Wash. Pub. Power*, the Ninth Circuit recognized that:

> It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases …. [I]f this "bonus"

> methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.

Id. at 1299-1300 (citations omitted) (internal quotations marks omitted).

Throughout this case, Class Counsel expended substantial time and costs to prosecute a nationwide class action suit with no guarantee of compensation or reimbursement in the hope of prevailing against a sophisticated Defendant represented by high caliber attorneys. Deckant Decl. ¶¶ 2-44. Class Counsel obtained a highly favorable result for the Class, knowing that if its efforts were ultimately unsuccessful, it would receive no compensation or reimbursement for its costs. This fact alone supports a finding that Class Counsel is entitled to a multiplier.

V. CLASS COUNSEL'S EXPENSES WERE REASONABLE AND NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED ON BEHALF OF THE CLASS

The Ninth Circuit allows recovery of litigation expenses in the context of a class action settlement. *See Staton*, 327 F.3d at 974. Class Counsel is entitled to reimbursement for standard out-of-pocket expenses that an attorney would ordinarily bill a fee-paying client. *See, e.g.*, *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). These expenses include court fees, copying fees, courier charges, legal research charges, telephone/facsimile fees, travel expenses, postage fees, court reporter fees, videographer fees, transcript costs, and other related expenses. Deckant Decl., Ex. 4.

Here, Class Counsel incurred out-of-pocket costs and expenses in the aggregate amount of $10,271.67 in prosecuting this litigation on behalf of the Class. *Id.* Each of these expenses was necessary and reasonably incurred to bring this case to a successful conclusion, and they reflect market rates for various categories of expenses incurred. *Id.* ¶¶ 53-54.

VI. THE REQUESTED INCENTIVE AWARD FOR THE CLASS REPRESENTATIVE IS FAIR AND REASONABLE

In recognition of her effort on behalf of the Class, and subject to the approval of the Court, Defendants have agreed to pay Class Representative Atzimba Reyes $5,000 as appropriate compensation for her time and effort serving as the class representative in this litigation.

Incentive awards "are fairly typical in class action cases." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). Such awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Id.* at 958-59. Incentive awards are committed to the sound discretion of the trial court and should be awarded based upon the court's consideration of, *inter alia*, the amount of time and effort spent on the litigation, the duration of the litigation and the degree of personal gain obtained as a result of the litigation. *See Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995). Incentive awards are appropriate when a class representative will not benefit beyond ordinary class members. For example, where a class representative's claim makes up "only a tiny fraction of the common fund," an incentive award is justified. *Id.*, 901 F. Supp. at 299.

The requested amount of $5,000 for Reyes is appropriate to compensate her for bringing this action for the benefit the Settlement Class Members. Throughout the litigation, Reyes conferred regularly with Class Counsel to receive updates on the progress of the case and to discuss strategy. Deckant Decl. ¶¶ 64-67. She assisted in Class Counsel's investigation throughout this litigation by providing information on the tuna that she purchased, among other matters. *Id.* Reyes assisted in drafting the complaints and reviewed them for accuracy before they were filed. *Id.* She coordinated with Class Counsel to form responses to all discovery requests proffered by Defendants, including written interrogatories and documents requests, and she

gathered documents for production. *Id.* Ms. Reyes was also intimately involved in the settlement process, and has continued to keep abreast of settlement progress to date. *Id.* She has taken significant time away from work and personal activities to initiate and litigate this action. *Id.* She was prepared to litigate this case to a verdict if necessary. *Id.* Ms. Reyes' dedication and efforts have conferred a significant benefit on Settlement Class Members across the United States.

VII. CONCLUSION

Class Counsel were able to obtain a settlement that represents an excellent result for the Class. This Settlement is the culmination of the determined and skilled work of Class Counsel for more than four years. As a result, Plaintiff respectfully requests that this Court award the following:

- $433,333.33 in attorneys' fees, representing 33.3% of the Settlement Fund;
- Costs and expenses to Class Counsel of $10,271.67; and
- Service Awards to Class Representative Reyes of $5,000.

For the foregoing reasons, these amounts are fair and reasonable and should be approved.

Dated: June 10, 2020

BURSOR & FISHER, P.A.

By: *L. Timothy Fisher*
L. Timothy Fisher

L. Timothy Fisher (State Bar No. 191626)
Neal J. Deckant (State Bar. No. 322946)
1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-Mail: ltfisher@bursor.com
ndeckant@bursor.com

BURSOR & FISHER, P.A.
Scott A. Bursor (State Bar No. 276006)
2665 S. Bayshore Dr., Suite 220

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Miami, FL 33133-5402
Telephone: (305) 330-5512
Facsimile: (305) 676-9006
Email: scott@bursor.com

Class Counsel for the Settlement Class