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***Class Counsel***

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

FRANK CAPACI and CYNTHIA FORD  
on behalf of themselves, all others  
similarly situated, and the general public,

Plaintiff,

v.

SPORTS RESEARCH, INC., a  
California Corporation.

Defendant.

Case No. 2:19-cv-03440-FMO-FFM

CLASS ACTION

**PLAINTIFF CYNTHIA FORD'S  
NOTICE OF MOTION FOR  
PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT**

Date: February 15, 2024

Time: 10:00 a.m.

Ctrm: 6D

Judge: Hon. Fernando M. Olguin

Complaint Filed: April 26, 2019

Trial Date: None Set

**NOTICE OF MOTION**

PLEASE TAKE NOTICE THAT on February 15, 2024 at 10:00 a.m., or at such other date and time as may be ordered by the Court, in Courtroom 6D of the United States District Court for the Central District of California, located at 350 West 1st Street, Los Angeles, California, Plaintiff Cynthia Ford (“Plaintiff”) will and hereby does move this Court, pursuant to Federal Rule of Civil Procedure 23(e), for an Order (1) Granting Preliminary Approval of a Class Action Settlement; (2) Certifying a Settlement Class; (3) Appointing Plaintiff as the Class Representative and Plaintiff’s Attorneys as Class Counsel; (4) Approving the Notice Plan; and (5) Setting the Final Approval Hearing and Schedule.

This Unopposed Motion is based on this Notice of Motion, Plaintiff’s concurrently-filed Memorandum of Points and Authorities in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement, the concurrently-filed Declaration of Ronald A. Marron in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement and Exhibits 1-2 attached thereto, the Declaration of Plaintiff Cytnhia Ford in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement, all prior pleadings and proceedings in this matter, and all other evidence and written and oral argument that will be submitted in support of the Motion.

DATED: January 12, 2024

Respectfully submitted,

/s/ Ronald A. Marron  
RONALD A. MARRON

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11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 FRANK CAPACI and CYNTHIA FORD  
14 on behalf of themselves, all others  
15 similarly situated, and the general public,

16 Plaintiff ,

17 v.

18 SPORTS RESEARCH CORPORATION,  
19 a California Corporation.

20 Defendant.

CASE NO. 2:19-cv-03440-FMO-FFM  
CLASS ACTION

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF’S UNOPPOSED  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

Date: February 15, 2024  
Time: 10:00 a.m.  
Ctrm: 6D  
Judge: Hon. Fernando M. Olguin

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1 Plaintiff Cynthia Ford (“Plaintiff”) respectfully submits this Memorandum of  
2 Points and Authorities in support of her Unopposed Motion for Preliminary  
3 Approval of Class Action Settlement with Defendant Sports Research Corporation  
4 (“Sports Research” or “Defendant”) and states as follows:

5 **I. INTRODUCTION**

6 After hard-fought litigation with discovery, contested motion practice, expert  
7 discovery, and extensive settlement negotiations, Plaintiff and Sports Research  
8 reached this proposed Settlement. The Settlement Agreement establishes both  
9 monetary and non-monetary relief and requires Sports Research to pay  
10 \$1,600,000.00 into a **non-reversionary** settlement fund.<sup>1</sup> If approved, the  
11 Settlement will bring an end to what has been, and likely would continue to be,  
12 highly contentious and costly litigation.

13 This motion seeks the entry of an order providing for, among other things: (1)  
14 preliminary approval of the Settlement; (2) preliminary certification of a Settlement  
15 Class; (3) appointment of Plaintiff as Class Representative and Plaintiff’s counsel as  
16 Class Counsel; (4) approval of the Settlement Administrator; (5) approval of the  
17 Notice program and Claims process; and (6) the scheduling of a Final Approval  
18 Hearing to consider final approval of the Settlement.

19 The proposed Settlement is exceedingly fair, and well within the range of  
20 preliminary approval for several reasons. First, it provides relief for Settlement Class  
21 Members where their recovery, if any, would otherwise be uncertain, especially  
22 given Sports Research’s ability and willingness to continue its vigorous defense of  
23 the case. Second, the Settlement was reached only after first engaging in substantial  
24 discovery, motion practice, and extensive arm’s-length negotiations involving a  
25

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26 <sup>1</sup> A copy of the Settlement Agreement (“Agreement”) is attached to the concurrently  
27 filed Declaration of Ronald A. Marron in Support of Plaintiff’s Motion for  
28 Preliminary Approval (“Marron Decl.”) as Exhibit 1. Capitalized terms in this  
Motion have the same meaning as the capitalized terms defined in the Agreement.

1 mediator. Third, the Settlement was not conditioned on any amount of attorneys’  
2 fees for Class Counsel or Incentive Award for Plaintiff, which speaks to the  
3 fundamental fairness of the process. For all of these reasons, and as further described  
4 below, Plaintiff respectfully requests that the Court preliminarily approve the  
5 Settlement.

6 **II. FACTUAL AND PROCEDURAL BACKGROUND**

7 This action was first filed on April 26, 2019. *See* Dkt. No. 1. On June 17,  
8 2019, Plaintiffs Frank Capaci and Cynthia Ford filed a First Amended Complaint  
9 (“FAC”) against Sports Research in the United States District Court for the Central  
10 District of California. Dkt. No. 16. The FAC alleged that the label of Sports  
11 Research’s garcinia cambogia product (“Product”) was false and misleading. The  
12 Complaint sought both monetary damages and injunctive relief for the following  
13 claims: (1) Violations of the Consumers Legal Remedies Act; (2) Violations of the  
14 False Advertising law; (3) Violations of the Unfair Competition Law; (4) Breach of  
15 Express Warranties; (5) Breach of Implied Warranties, (6) Negligent  
16 Misrepresentation, (7) Violations of New Jersey’s Consumer Fraud Act, and (8)  
17 Violations of New Jersey Truth-In-Consumer Contract, Warranty, and Notice Act.

18 Plaintiffs filed a Second Amended Complaint (“SAC”) on April 6, 2020. Dkt.  
19 No. 44. The Parties stipulated to dismiss Plaintiff Frank Capaci from the litigation  
20 on July 14, 2020. Dkt. No. 50. The Court entered the stipulation on July 15, 2020.  
21 Dkt. No. 51. Sports Research filed an Answer to the SAC on July 24, 2020. Dkt. No.  
22 52. In 2019 and 2020, the Parties exchanged substantial written discovery requests  
23 and responses, exchanged voluminous expert reports, and took fact witness and  
24 expert witness depositions. Marron Decl., ¶ 5. On August 14, 2020, Plaintiff filed a  
25 Motion for Class Certification, and both Parties filed Motions to Exclude Experts.  
26 Dkt. Nos. 59-90. On September 14, 2020, both Parties filed Motions for Summary  
27 Judgment or in the alternative, Summary Adjudication. Dkt. No. 95.

28 On April 14, 2022, the Court issued an Order Granting in Part and Denying

1 in Part Plaintiff’s Motion for Class Certification. Dkt. No. 139. The Court granted  
2 class certification of a Nationwide Class and a California Subclass pursuant to Rule  
3 23(b)(3) with respect to Plaintiff’s claims under the Consumers Legal Remedies Act,  
4 (“CLRA”), the Unfair Competition Law (“UCL”), and the False Advertising Law  
5 (“FAL”), breach of express warranty, and negligent misrepresentation. The Court  
6 denied without prejudice class certification under Rule 23(b)(2) and denied with  
7 prejudice class certification of Plaintiff’s implied warranty claim pursuant to Rules  
8 23(b)(3) and 23(b)(2). Dkt. No. 139. Plaintiff Cynthia Ford was appointed as class  
9 representative and the Law Office of Ronald A. Marron was appointed as Class  
10 Counsel. *Id.*

11 On July 3, 2023, the Parties attended a full day mediation conducted by Jill R.  
12 Sperber, Esq. of Judicate West. For several weeks following the mediation, the  
13 Parties continued to negotiate with the help of Ms. Sperber. On August 8, 2023, the  
14 Parties attended a partial day mediation conducted by Ms. Sperber. Thereafter, on  
15 September 1, 2023, based on a mediator’s proposal made by Ms. Sperber, the Parties  
16 agreed to settle the case. The time that it took to work out significant details and  
17 vigorous disagreements between the parties demonstrate that this proposed  
18 resolution was the product of heavily disputed and arm’s length negotiation. *Id.*

19 **III. SUMMARY OF THE PROPOSED SETTLEMENT**

20 **A. The Settlement Class**

21 The proposed settlement establishes a Settlement Class comprised of all  
22 persons who purchased Sports Research Garcinia Cambogia labeled with the  
23 statements “weight management,” “appetite suppression,” and/or “appetite control”  
24 (the “Product”) in the United States on or after April 26, 2015 and until [the date  
25 preliminary approval is granted] for personal or household use and not for resale,  
26 and who did not receive a refund or return the product. Agreement at § 6.1.<sup>2</sup>

27 \_\_\_\_\_  
28 <sup>2</sup> The Settlement Class specifically excludes Defendant’s current and former officers  
and directors, members of the immediate families of Defendant’s officers and

1           **B. Settlement Consideration**

2           **1. Monetary Relief**

3           The Settlement Agreement provides that Sports Research will pay  
4 \$1,600,000.00 into a Settlement Fund. Agreement at § 2.3. This fund will be used,  
5 among other things, to pay authorized claims to the Settlement Class Members, the  
6 costs of settlement administration and notice to the Class Members, any necessary  
7 taxes and tax expenses, Class Counsel’s fees and expenses, and an incentive award  
8 to the named Plaintiff. Agreement at § 10.6. For Authorized Claimants, Sports  
9 Research will provide \$20.00 in cash to each Settlement Class member who  
10 purchased the Product (any size) during the Class Period, limited to one claim per  
11 household. Agreement at § 10.2.1. No additional proof of purchase will be required  
12 beyond a timely submitted and completed claim form and no evidence of multiple  
13 purchases will entitle a claimant to receive compensation in excess of \$20.00 (unless  
14 distribution is increased *pro rata*). *Id.* The settlement provides for a *pro rata*  
15 reduction if the claims exceed the amount in the settlement fund or a *pro rata*  
16 increase if the settlement fund is not exhausted. *Id.* at § 10.2.3.

17           **2. Non-Monetary Relief**

18           Pursuant to the Agreement, Sports Research agrees to discontinue selling the  
19 Product with labels that contain the statements “weight management,” “appetite  
20 suppression,” and/or “appetite control” for a period of five (5) years from the Court’s  
21 entry of the Final Order and Judgment. Agreement at § 10.3. Sports Research  
22 estimates that it has spent approximately \$50,000 to remove such labeling statements  
23 from the Product’s labels. *Id.*

24           **C. The Notice Program and Settlement Administration**

25           Pending this Court’s approval, Classaura Class Action Administration will  
26 \_\_\_\_\_  
27 directors, Defendant’s legal representatives, heirs, successors, and assigns, any  
28 entity in which Defendant has or had a controlling interest during the Class Period,  
and the judicial officers to whom this lawsuit is assigned. *Id.*

1 serve as the Settlement Administrator, and will be responsible for administering the  
2 Notice program and for paying valid claims to Settlement Class members.  
3 Agreement at § 2.30. The Notice program consists of five different components: (1)  
4 direct notice to Settlement Class Members who purchased the Product on Sports  
5 Research’s website, (2) online notice, (3) print publication notice, (4) a press release  
6 via PR Newswire, and (5) a Settlement Website. *See* Agreement at Ex. C [Notice  
7 Plan]. The form of the proposed Notice, agreed upon by Class Counsel and Sports  
8 Research, subject to this Court’s approval and/or modification, is attached to the  
9 Settlement Agreement as Exhibit B. The details of the notice plan are described fully  
10 in the Declaration of Gajan Retnasaba that is attached as Exhibit C to the Settlement  
11 Agreement.

12 **D. Claims Process**

13 The Claims process here is intentionally straightforward, easy to understand  
14 for Settlement Class members, and designed so that Settlement Class members can  
15 make a claim to their portion of the Settlement Fund without complication.  
16 Settlement Class members will make a claim by submitting a valid and timely Claim  
17 Form to the Settlement Administrator. Agreement at § 9.7. A copy of the Claim  
18 Form is attached to the Settlement Agreement as Exhibit A. Claim Forms may be  
19 sent in by hard copy or submitted electronically on the Settlement Website.<sup>3</sup> Once a  
20 Settlement Class member submits a Claim Form and it is reviewed and approved by  
21 the Settlement Administrator, the Settlement Class member will automatically  
22 receive a cash payment as discussed above.

23 **E. Opt-Out and Objection Procedures**

24 Settlement Class members who do not wish to participate in the Settlement  
25

---

26 <sup>3</sup> The Claim Form requires basic information from Settlement Class members,  
27 including: (1) name; (2) telephone number; (3) current address and email address;  
28 (4) dates of purchases; and (5) retailer where Product(s) were purchased. Agreement  
at Ex. A.

1 may opt-out of the Settlement by sending a written request to the Settlement  
2 Administrator at the address designated in the Notice. Agreement at § 8.1.  
3 Settlement Class members also have the option to opt-out electronically through the  
4 settlement website. *Id.*; *see also id.* at Exhibit E. Settlement Class members who  
5 timely opt-out of the Settlement will preserve their rights to individually pursue any  
6 claims they may have against Sports Research, subject to any defenses that Sports  
7 Research may have against those claims. The Settlement Agreement details the  
8 requirements to properly opt-out of the Settlement Class. Agreement at § 8.1. A  
9 Settlement Class member must opt-out by the Objection/Exclusion Deadline. *Id.*

10 Settlement Class members who wish to file an objection to the Settlement  
11 likewise must do so no later than the Objection/Exclusion Deadline. Agreement at §  
12 8.2. All written Objections must (a) identify the case name and number, *Capaci v.*  
13 *Sports Research Corporation*, Case No. 2:19-cv-03440; (b) state the Objector’s full,  
14 legal name, residential address, telephone number, and email address (and the  
15 Objector’s lawyer’s name, business address, telephone number, and email address if  
16 objecting through counsel); (c) a statement describing the Objector’s membership in  
17 the Settlement Class, including a verification under oath as to the date of purchase  
18 and the name of the retailer or store name from where the Objector purchased the  
19 Product, and all other information required by the Claim Form; (d) a written  
20 statement of all grounds for the objection, accompanied by any legal support for such  
21 objection; (e) copies of any papers, briefs, or other documents upon which the  
22 objection is based; (f) a list of all persons who will be called to testify in support of  
23 the objection; (g) a statement of whether the Objector intends to appear at the Final  
24 Approval Hearing (note: if the objector intends to appear at the Final Approval  
25 Hearing through counsel, the objection must also state the identity of all attorneys  
26 representing the Objector who will appear at the Final Approval Hearing); (h) a list  
27 of the exhibits that the Objector may offer during the Final Approval Hearing, along  
28

1 with copies of such exhibits; and (i) the objector’s signature. Agreement at § 8.3.<sup>4</sup>

2 **F. Release of Claims**

3 In exchange for the Settlement consideration, Plaintiff and each Settlement  
4 Class member shall be deemed to have, and by operation of the Final Order and  
5 Judgment shall have fully, finally, and forever released, relinquished, and discharged  
6 all claims arising out of or relating to any claim or allegation made in the Action,  
7 including, without limitation, any and all claims or allegations relating to the  
8 advertising, marketing, labeling or sale of the Products against the Released Parties.  
9 Agreement at § 2.26. The term “Released Parties” is defined in Section 2.27 of the  
10 Settlement Agreement.

11 **G. Class Counsel’s Fees and Expenses and Plaintiff’s Incentive Award**

12 The Settlement Agreement provides that Class Counsel may request an award  
13 of attorneys’ fees not to exceed one third of the Settlement Consideration and an  
14 award of expenses not to exceed \$150,000.00, subject to this Court’s approval.  
15 Agreement at § 11.1. The Settlement Agreement provides that Plaintiff may seek an  
16 Incentive Award of up to \$5,000.00, subject to Court approval. *Id.* at § 11.3. If the  
17 Court grants Plaintiff’s Motion for Preliminary Approval, then Plaintiff will fully  
18 address the reasonableness of the requested fee and incentive award in her  
19 forthcoming Motion for Attorneys’ Fees, Costs, and Incentive Award.

20 **IV. LEGAL STANDARD FOR PRELIMINARY APPROVAL**

21 Rule 23(e) of the Federal Rules of Civil Procedure requires a preliminary  
22 evaluation of a proposed class action settlement, the first step in a three-stage  
23 process. At this stage, the Court must initially determine whether it “will likely be  
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25 <sup>4</sup> In addition, any Objector who has an attorney representing them, must include with  
26 their Objection (a) the identity of all counsel who represent the Objector, including  
27 former or current counsel who may be entitled to compensation for any reason  
28 related to the objection; and (b) a list of any other objections submitted by the  
Objector, and/or their counsel, in any class action in any court, whether state or  
federal, in the United States in the last five (5) years. *Id.*

1 able to” (i) approve the settlement as fair, reasonable, and adequate; and (ii) “certify  
2 the class for purposes of judgment on the proposal.” Fed. R. Civ. P. 23(e)(1)(B).  
3 Then, after potential class members are given notice and an opportunity to object,  
4 the Court must hold a hearing to consider whether to approve the settlement and  
5 certify the settlement classes. *See* Fed. R. Civ. P. 23(e)(2).

6 Federal Rule of Civil Procedure 23(e) provides that the Court may approve a  
7 class action settlement “only after a hearing and only on a finding that it is fair,  
8 reasonable, and adequate after considering whether:

9 (A) the class representatives and class counsel have adequately represented  
10 the class;

11 (B) the proposal was negotiated at arm’s length;

12 (C) the relief provided for the class is adequate, taking into account:

13 (i) the costs, risks, and delay of trial and appeal;

14 (ii) the effectiveness of any proposed method of distributing relief to  
15 the class, including the method of processing class-member claims;

16 (iii) the terms of any proposed award of attorney’s fees, including  
17 timing of payment; and

18 (iv) any agreement required to be identified under Rule 23(e)(3); and

19 (D) the proposal treats class members equitably relative to each other.”

20 Fed. R. Civ. P. 23(e)(2).

## 21 **V. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL**

### 22 **A. Plaintiff and Class Counsel Have Adequately Represented the** 23 **Class**

24 Rule 23(e)(2)(A) requires the Court to consider whether “the class  
25 representatives and class counsel have adequately represented the class.” Fed. R.  
26 Civ. P. 23(e)(2)(A). This analysis is “redundant of the requirements of Rule 23(a)(4)  
27 and Rule 23(g), respectively.” *Final approval criteria—Rule 23(e)’s multifactor test*,  
28 4 NEWBERG ON CLASS ACTIONS § 13:48 (5th ed.). A determination of adequacy of



1 representation requires that “two questions be addressed: (a) do the named plaintiffs  
2 and their counsel have any conflicts of interest with other class members and (b) will  
3 the named plaintiffs and their counsel prosecute the action vigorously on behalf of  
4 the class?” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000), *as*  
5 *amended* (June 19, 2000) (citing *Hanlon*, 150 F.3d at 1020).

6 Plaintiff Cynthia Ford has no conflicts of interest with other class members  
7 and has prosecuted this action vigorously on behalf of the Class. *See* Declaration of  
8 Cynthia Ford submitted concurrently herewith (“Ford Decl.”). Plaintiff suffered the  
9 same injuries as the absent class members because she purchased the Product for  
10 personal and household use, in reliance on the “weight management” and “appetite  
11 control” statements on the Product’s label. *See id.* at ¶ 3. During the litigation,  
12 Plaintiff actively participated in the discovery process including by responding to  
13 written discovery, searching for responsive documents, and sitting for a deposition  
14 on July 10, 2020. *Id.*, ¶¶ 5-6. Plaintiff was appointed a class representative on April  
15 14, 2022. *Id.*, ¶ 8. Plaintiff is dedicated to vigorously pursue this action on behalf of  
16 the Class and has kept informed about the status of the proceedings for the past four  
17 years. *Id.*, ¶¶ 4-12. Accordingly, Plaintiff has adequately represented the Class.

18 Class Counsel have also vigorously represented the Class and have no  
19 conflicts of interest. The Settlement was negotiated by counsel with extensive  
20 experience in consumer class action litigation. *See* Marron Decl., ¶¶ 15-52 & Ex. 2  
21 (Marron firm resume). Through the discovery process, Class Counsel has obtained  
22 sufficient information and documents to evaluate the strengths and weaknesses of  
23 the case. Marron Decl., ¶ 5. Based on their experience, Class Counsel concluded that  
24 the Settlement provides exceptional results for the class while sparing the class from  
25 the uncertainties of continued and protracted litigation. Marron Decl., ¶ 11. *See,*  
26 *e.g., In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008)  
27 (“The recommendations of Plaintiffs’ counsel should be given a presumption of  
28 reasonableness.”); *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 976 (9th Cir. 2009)

1 (deference to Class Counsel’s evaluation of the Settlement is appropriate because  
2 “[p]arties represented by competent counsel are better positioned than courts to  
3 produce a settlement that fairly reflects each party’s expected outcome in  
4 litigation.”). Adequacy of representation is satisfied.

5 **B. The Settlement was Negotiated at Arm’s Length**

6 Rule 23(e)(2)(B) requires the Court to consider whether “the proposal was  
7 negotiated at arm’s length.” Fed. R. Civ. P. 23(e)(2)(B). “This inquiry aims to root  
8 out settlements that may benefit the Plaintiffs’ lawyers at the class’s expenses,  
9 sometimes called ‘collusive settlements.’” *Final approval criteria—Rule*  
10 *23(e)(2)(B): Arm’s length negotiation*, 4 NEWBERG ON CLASS ACTIONS § 13:50 (5th  
11 ed.). Here, the settlement was negotiated at arm’s length after hard-fought litigation  
12 and discovery. *See Nat’l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221  
13 F.R.D. 523, 528 (C.D. Cal. 2004) (“A settlement following sufficient discovery and  
14 genuine arms-length negotiation is presumed fair.”). The time that it took to work  
15 out significant details and vigorous disagreements between the parties and the  
16 parties’ need for two separate mediation sessions in front of Jill Sperber of Judicate  
17 West demonstrate that this proposed resolution was the product of heavily disputed  
18 and arm’s length negotiation. Agreement §§ 1.10 – 1.11. Indeed, the Parties only  
19 agreed to settle the case following a mediator’s proposal made by Ms. Sperber.  
20 Agreement § 1.11. Plaintiff Cynthia Ford made herself available during both  
21 mediation sessions, and during the ensuing months, remained available to discuss,  
22 and did discuss, terms of the proposed settlement with Class Counsel to ensure her  
23 approval of the relief to the Class. Ford Decl., ¶ 9. Plaintiff Ford also reviewed and  
24 signed the Settlement Agreement to ensure its fairness and sent a signed copy of the  
25 Settlement Agreement to Class Counsel. Ford Decl., ¶ 10. The settlement  
26 negotiations were hard-fought, with both Parties and their counsel thoroughly  
27 familiar with the applicable facts, legal theories, and defenses on both sides. Marron  
28 Decl., ¶ 10.

1 Here, class members who submit a timely claim will be entitled to actual  
2 monetary relief that includes \$20.00 in cash to each Settlement Class member who  
3 purchased the Product (any size) during the Class Period, limited to one claim per  
4 household. Agreement at § 10.2.1. Additionally, Sports Research has agreed to  
5 valuable injunctive relief. Agreement at § 10.3. The settlement is also not contingent  
6 upon an award of attorneys’ fees to class counsel and the amount of fees awarded is  
7 within the sole discretion of the Court. Finally, the settlement agreement does not  
8 contain a “kicker” arrangement whereby unpaid attorneys’ fees revert to the  
9 defendant. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir.  
10 2011). Instead, unpaid attorneys’ fees will be added to the class fund and will not  
11 revert back to Sports Research. Agreement § 10.2.3. Therefore, this Court may  
12 presume that the settlement is fundamentally fair and was negotiated at arm’s length  
13 by competent counsel who are experienced in class action litigation.

14 **C. The Relief Provided to the Class is Adequate**

15 Rule 23(e)(2)(C) requires that the Court consider whether “the relief provided  
16 for the class is adequate, taking into account: (i) the costs, risks, and delay of trial  
17 and appeal; (ii) the effectiveness of any proposed method of distributing relief to the  
18 class, including the method of processing class-member claims; (iii) the terms of any  
19 proposed award of attorney’s fees, including timing of payment; and (iv) any  
20 agreement required to be identified under Rule 23(e)(3).” Fed. R. Civ. P.  
21 23(e)(2)(C). “Before the Rule arrives at the articulation of sub-factors, its general  
22 directive asks whether the class’s relief is adequate.” *Final approval criteria—Rule*  
23 *23(e)(2)(C): Adequate relief*, 4 NEWBERG ON CLASS ACTIONS § 13:51 (5th ed.). “In  
24 evaluating the value of the class members’ claims, the court need not decide the  
25 merits of the case nor substitute its judgment of what the case might be worth for  
26 that of class counsel; however, ‘the court must at least satisfy itself that the class  
27 settlement is within the ‘ballpark’ of reasonableness.’” *Id.* (citation omitted).

28 Sports Research has agreed to settle this matter for a non-reversionary total of

1 \$1,600,000. Agreement at § 2.3. In lieu of taking this matter to trial with the  
2 possibility of obtaining no relief, this is an excellent result for the Class. The amount  
3 of recovery per claimant is also adequate because Settlement Class Members who  
4 purchased the Product (any size) during the class period can claim \$20.00 in cash  
5 from the Settlement Fund, limited to one claim per household. Agreement at §  
6 10.2.1. This recovery is significant considering that the average price of the 90-count  
7 Product, which accounts for 93% of the Products sold during the Class Period, was  
8 \$18.99. *See* Dkt. No. 59.<sup>5</sup> The \$20.00 recovery for each claimant is an excellent  
9 result considering it represents a large fraction of damages that Plaintiff believed  
10 could have been recoverable at trial. Balancing all of the factors that go into  
11 protracted litigation and taking this into consideration, the Parties believe \$20.00 per  
12 claimant represents a fair settlement amount.<sup>6</sup> Moreover, the settlement agreement  
13 provides for injunctive relief. Agreement at § 10.3.

14 **1. *The Costs, Risks, and Delay of Trial and Appeal Support Preliminary***  
15 ***Approval***

16 The costs, risks, and delay of trial and appeal further support preliminary  
17 approval. Proceeding in this litigation in the absence of settlement poses various  
18 risks such as having summary judgment granted against Plaintiff, having the class  
19 decertified, or losing at trial. Weighed against those risks, and coupled with the  
20 delays associated with continued litigation, the benefits to the class fall within the  
21 range of reasonableness. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454,  
22

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23 <sup>5</sup> The average retail price of the 180-count Product, which accounts for 7% of the  
24 Products sold during the Class Period, was \$24.94. *See id.*

25 <sup>6</sup> A monetary cap of \$20.00 per claimant is fair and reasonable and has been  
26 approved by other Courts. *See, e.g., Hilsley v. Ocean Spray Cranberries, Inc.*, 2020  
27 WL 520616, at \*1 (S.D. Cal. Jan. 31, 2020) (granting preliminary approval of  
28 settlement that provided for \$1.00 in cash per product purchased, up to 20 bottles,  
capping payment at \$20.00 per claimant (unless distribution increased *pro rata*)).

1 459 (9th Cir. 2000) (ruling that “the Settlement amount of almost \$2 million was  
2 roughly one-sixth of the potential recovery, which, given the difficulties in proving  
3 the case, [wa]s fair and adequate”); *see also* *Linney v. Cellular Alaska P’ship*, 151  
4 F.3d 1234, 1242 (9th Cir. 1998) (“The fact that a proposed settlement may only  
5 amount to a fraction of the potential recovery does not, in and of itself, mean that the  
6 proposed settlement is grossly inadequate and should be disapproved.”) (internal  
7 quotation marks omitted); *see Curtis-Bauer v. Morgan Stanley & Co., Inc.*, No. C  
8 06-3903, 2008 WL 4667090, at \*4 (N.D. Cal. Oct. 22, 2008) (“Settlement avoids the  
9 complexity, delay, risk and expense of continuing with the litigation and will  
10 produce a prompt, certain, and substantial recovery for the Plaintiff class.”). The  
11 Settlement eliminates these risks by ensuring Class Members a recovery that is  
12 certain and immediate, eliminating the risk that class members would be left without  
13 any recovery at all.

14 **2. The Proposed Method of Distributing Relief to the Class Is Effective**

15 “[T]he goal of any distribution method is to get as much of the available  
16 damages remedy to class members as possible and in as simple and expedient a  
17 manner as possible.” *Final approval criteria—Rule 23(e)(2)(C)(ii): Distribution*  
18 *method*, 4 NEWBERG ON CLASS ACTIONS § 13:53 (5th ed.). The claims process is  
19 straightforward and allows Settlement Class members to make a claim by submitting  
20 a valid and timely Claim Form to the Settlement Administrator without  
21 complication. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales*  
22 *Practices, & Prod. Liab. Litig.*, No. 8:10ML 02151 JVS, 2013 WL 3224585, at \*18  
23 (C.D. Cal. June 17, 2013) (“The requirement that class members download a claim  
24 form or request in writing a claim form, complete the form, and mail it back to the  
25 settlement administrator is not onerous.”). If there is any remaining cash amount in  
26 the Settlement Fund after payment of Notice and Settlement Administrator expenses,  
27 any necessary taxes and tax expenses, a Fee and Expense Award, Incentive Award,  
28 and the total amount of all Authorized Claims, the Settlement Administrator shall

1 divide any remaining monetary amounts equally among the Authorized Claimants  
2 and shall pay each such Authorized Claimant his or her *pro rata* share of the  
3 remaining monetary amount. Agreement at § 10.2.3. This *pro rata* distribution  
4 ensures that Settlement Class Members will receive the maximum amount of the  
5 settlement fund and that no money will revert back to Defendant. *See McGrath v.*  
6 *Wyndham Resort Dev. Corp.*, No. 15CV1631 JM (KSC), 2018 WL 637858, at \*6  
7 (S.D. Cal. Jan. 30, 2018) (finding a non-reversionary settlement fund to be “fair,  
8 reasonable, and adequate.”). Accordingly, the Court should find the proposed  
9 method of distribution of class funds to be effective.

10 **3. *The Proposed Attorneys’ Fee Award is Fair and Reasonable***

11 As discussed above, the Settlement Agreement provides that Class Counsel  
12 may request an award of attorneys’ fees not to exceed one third of the Settlement  
13 Consideration and out-of-pocket expenses not to exceed \$150,000.00, subject to this  
14 Court’s approval. Agreement at § 11.1. Class Counsel’s fee request is within the  
15 range of what courts have approved in other class action cases. *See, e.g., Singer v.*  
16 *Becton Dickinson & Co.*, No. 08–CV–821–IEG, 2010 WL 2196104 (S.D. Cal. June  
17 1, 2010) (awarding 33.33% of \$1 million settlement fund); *Martin v. Ameripride*  
18 *Servs. Inc.*, 2011 WL 2313604, at \*8 (S.D. Cal. June 9, 2011) (“Other case law  
19 surveys suggest that 50% is the upper limit, with 30-50% commonly being awarded  
20 in cases in which the common fund is relatively small.”). If the Court grants this  
21 Motion, then Class Counsel will fully address the reasonableness of the requested  
22 fee award in Plaintiff’s forthcoming Motion for Attorneys’ Fees, Costs, and  
23 Incentive Award.

24 **4. *No Side Agreements Were Made in Connection with the Proposed***  
25 ***Settlement***

26 Rule 23(e)(3) requires that the Parties “must file a statement identifying any  
27 agreement made in connection with the [settlement] proposal.” Fed. R. Civ. P.  
28 23(e)(3). No agreements were made in connection with the settlement aside from the

1 Settlement Agreement itself. Marron Decl., ¶ 14.

2 **D. The Proposed Settlement Treats Class Members Equitably**  
3 **Relative to Each Other**

4 Rule 23(e)(2)(D) requires the Court to consider whether the Settlement  
5 Agreement “treats class members equitably relative to each other.” Fed. R. Civ. P.  
6 23(e)(2)(D). “A distribution of relief that favors some class members at the expense  
7 of others may be a red flag that class counsel have sold out some of the class  
8 members at the expense of others, or for their own benefit.” *Final approval*  
9 *criteria—Rule 23(e)(2)(D): Intra-class equity*, 4 NEWBERG ON CLASS ACTIONS §  
10 13:56 (5th ed.). Here, the settlement treats each class member equally. As discussed  
11 above, each class member who purchased the Product during the Class Period can  
12 make a claim for \$20.00 in cash from the Settlement Fund, limited to one claim per  
13 household. Agreement at § 10.2.1. Because each class member is treated equally,  
14 the Court should approve the settlement as fair and reasonable.

15 **VI. The SETTLEMENT SATISFIES THIS COURT’S REQUIREMENTS**

16 **RE. PRELIMINARY APPROVAL (DKT. NO. 178)**

17 **A. All Class Requirements Are Met**

18 The Court previously certified a Nationwide class and California subclass. *See*  
19 *Dkt. No. 139*. In the Settlement Agreement, the Parties propose that the Court certify  
20 a Settlement Class under Rule 23(e) that is substantially similar to the Nationwide  
21 class previously certified by this Court. *See id.*; *see also* Agreement § 6.1. The Court  
22 can amend or alter the class definition at any time before a decision on the merits.  
23 *See* Fed. R. Civ. P. 23(c)(1)(C); *see also Vizcaino v. United States Dist. Crt. for W.*  
24 *Dist. Wash.*, 173 F.3d 713, 721 (9th Cir. 1999).

25 The proposed Settlement Class differs from the previously certified  
26 Nationwide class in three key aspects. First, the term “Product” now includes an  
27 additional contested labeling statement – “appetite control.” Agreement § 6.1. This  
28 inclusion is warranted because this contested labeling statement was present on the

1 Product’s label during the Class Period. *See* SAC ¶ 20. Second, the “Class Period”  
2 is defined to conclude on the date that the Court grants preliminary approval of this  
3 Settlement. Agreement § 6.1. This serves a dual purpose: first, to avoid an open-  
4 ended class period, and second, to mitigate the risk of potential fraud. Finally, in  
5 addition to certification pursuant to Rule 23(b)(3) (*see* Dkt. No. 139), the Parties  
6 propose that the Settlement Class be certified pursuant to Rule 23(b)(2) because  
7 Sports Research has agreed to injunctive relief pursuant to the Settlement.  
8 Agreement § 10.3.

9 For the same reasons the Court previously granted class certification, the  
10 Court should find that class requirements are met with respect to the proposed  
11 Settlement Class as defined in Section 6.1 of the Settlement Agreement.<sup>7</sup>

12 **B. The Settlement is Within a Range of Possible Judicial Approval**

13 This factor is addressed in Section V(C), *supra*.

14 **C. The Proposed Allocation Plan for the Settlement Fund**

15 The Settlement Fund shall be used to pay in full and in the following order:  
16 (a) any necessary taxes and tax expenses; (b) all costs associated with the Settlement  
17 Administrator, including costs of providing Notice to Settlement Class members,  
18 processing Claims, and all costs relating to providing necessary notices in  
19 accordance with CAFA; (c) any Fee and Expense Award made by the Court to Class  
20 Counsel under Section 11 of the Settlement Agreement; (d) any Incentive Award  
21 made by the Court to the Plaintiff under Section 11 of the Settlement Agreement;  
22 and (e) payments to Authorized Claimants and any others as allowed by this  
23 Settlement Agreement and approved by the Court. Agreement § 10.6.

24 The Settlement Fund will be used to pay the cost of class notice and claims  
25

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26 <sup>7</sup> The proposed Settlement Class is substantially similar to the Class certified by the  
27 Court on April 14, 2022. *See* Dkt. No. 139 [Order on MCC]. For brevity, Plaintiff  
28 relies on the Court’s original findings in certifying the Class following contested  
class certification briefing. *Id.*



1 administration in the amount of up to \$150,000.00, or a lesser or greater amount as  
2 ordered by the Court. Agreement § 9.11. If the amount of valid claims timely  
3 submitted by class members exceeds the amount in the Settlement Fund, cash  
4 payments to Settlement Class members who submit timely and valid claims will be  
5 reduced *pro rata* until the funds remaining in the Settlement Fund are exhausted. If  
6 the amount of valid claims timely submitted by class members does not exhaust the  
7 amount in the Settlement Fund after payment of Notice and Settlement  
8 Administrator expenses, a Fee and Expense Award, any necessary taxes, tax  
9 expenses, Incentive Awards, and the total amount of all Authorized Claims, cash  
10 payments to class members will increase *pro rata* until the funds remaining in the  
11 Settlement Fund are exhausted. Agreement 10.2.3.

12 **D. The Settlement was Negotiated at Arm's Length**

13 This factor is addressed in Section V(B), *supra*.

14 **E. The Proposed Incentive Award is Fair and Reasonable**

15 The Settlement Agreement provides that Plaintiff may apply to the court for  
16 an incentive award of \$5,000.00. Agreement at § 11.3. Here, Plaintiff will request  
17 an Incentive Award in an amount of \$5,000.00 to recognize her time and efforts on  
18 behalf of the Class for the past four and a half years, including reviewing the First  
19 and Second Amended Complaints, other material filings, and keeping informed  
20 about the status of proceedings, reviewing and responding to written discovery and  
21 searching for responsive documents, preparing for and having her deposition taken,  
22 reviewing class certification briefing and providing a declaration to be filed in  
23 support of class certification, being available for and attending mediation, reviewing  
24 and signing the Settlement Agreement, and accepting the financial and reputational  
25 risk for pursuing this litigation. *See Ford Decl.*, ¶¶ 4-14. Plaintiff Ford has spent  
26 hours assisting Class Counsel in litigating this case including by, *inter alia*, (1)  
27 providing information and facts regarding her purchases of the Products to include  
28 in the First Amended Complaint and Second Amended Complaint, (2) assisting in

1 the discovery process and searching for responsive documents in order to respond to  
2 written discovery, (3) being available to prepare for and attend a deposition and  
3 familiarizing herself with the procedures for remote depositions during COVID-19,  
4 (4) providing a declaration in support of class certification and being appointed a  
5 class representative following class certification briefing, (5) being available during  
6 mediation and settlement discussions, and (6) reviewing and signing the proposed  
7 Settlement Agreement. *See* Marron Decl., ¶ 12. The Incentive Payment is not  
8 conditioned on Plaintiff’s approval of the Settlement and is instead conditioned on  
9 approval by the Court. *See* Agreement § 11.3; *see also* Ford Decl., ¶ 10 (“My  
10 approval of the Settlement is not dependent or conditioned on the promise of any  
11 Incentive Award.”).

12 Here, Plaintiff has taken on substantial responsibility in litigating this case,  
13 and the class has benefitted from the time and effort she spent doing so. An incentive  
14 award is therefore appropriate. *See In re Online DVD–Rental*, 779 F.3d 934, 947–  
15 48 (9th Cir. 2015) (\$5,000 incentive award appropriate); *Willner v. Manpower Inc.*,  
16 No. 11-cv-02846-JST, 2015 WL 3863625, at \*8 (N.D. Cal. June 20, 2015) (awarding  
17 \$7,500 to class representative who contributed hours to the litigation over four years,  
18 sat for a day-long deposition, and responded to written discovery requests, among  
19 other tasks); *Cellphone Termination Fee Cases* 186 Cal. App. 4th 1380 (June 28,  
20 2010) (\$10,000 incentive award to each class representative).

21 **F. There is No Cy Pres Recipient. Any Leftover Money is Distributed**  
22 **to the Class on a Pro Rata Basis**

23 There is no *cy pres* recipient because any leftover amounts in the Settlement  
24 Fund will be distributed to class members *pro rata*. *See* Agreement § 10.2.3.

25 **G. Adequacy of the Class Notice**

26 Upon settlement of a certified class, “[t]he court must direct notice in a  
27 reasonable manner to all class members who would be bound by the proposal.” Fed.  
28 R. Civ. P. 23(e)(1)(B). Federal Rule of Civil Procedure 23(c)(2) requires the “best

1 notice that is practicable under the circumstances, including individual notice to all  
2 members who can be identified through reasonable effort.” A class action settlement  
3 notice “is satisfactory if it generally describes the terms of the settlement in sufficient  
4 detail to alert those with adverse viewpoints to investigate and to come forward and  
5 be heard.” *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)  
6 (internal quotation marks omitted). These requirements are satisfied.

7 Here, the Notice Plan includes (1) direct notice to class members who  
8 purchased the Product from the Sports Research website; (2) online publication  
9 notice using targeted advertising to users of Facebook who are likely to be class  
10 members; (3) a press release through PR Newswire; (4) print publication notice in  
11 the *Daily Journal* once a week for four consecutive weeks; (5) CAFA Notice to  
12 federal, state, and territory attorney generals; and (6) a Settlement Website to provide  
13 detailed information to class members about the proposed settlement and enable  
14 class members to file claims or opt-out online. *See* Agreement at Ex. C.

15 The proposed class notice fairly apprises the putative class members of the  
16 terms of the proposed settlement, and of the options available to them in connection  
17 with the settlement and court proceedings. *See* Agreement § 9.1; *see also* Agreement  
18 at Exhibits B-C. The Notice describes the nature of the action and the claims alleged;  
19 it provides the definition of the class, and explains the terms of the settlement,  
20 including the settlement amount, the distribution of that amount, and the release; it  
21 includes an explanation that lays out the class members’ options under the  
22 settlement: they may remain in the class, object to the settlement but still remain in  
23 the class, or exclude themselves from the settlement and pursue their claims  
24 separately against defendant; it explains the procedures for objecting to the  
25 settlement; and provides information about the Final Fairness Hearing. *See*  
26 Agreement at Ex. B. Class members are instructed to submit their written objections  
27 directly to the Court, and the settlement provides for submission of an exclusion  
28 form to be provided to class members by the Settlement Administrator. Agreement

1 §§ 8.1, 8.2. In short, the procedure for providing notice and the content of the notice  
2 constitutes the best practicable notice and complies with the requirements of Rule  
3 23 and due process.

4 **H. How the Settlement Will Be Administered**

5 A Claimant may complete a Claim Form and submit it by U.S. mail or online  
6 at the Settlement Website. Agreement § 9.7. A Claim Form may also be requested  
7 by calling the Toll-Free number provided by the Settlement Administrator or by  
8 writing to the Settlement Administrator. *Id.* To be eligible for a Settlement Payment,  
9 a Claimant must timely submit a signed and completed Claim Form containing his  
10 or her name, mailing address and email address, date(s) of purchase, and retailer(s)  
11 where products were purchased. Agreement § 9.8; Agreement at Ex. A. A Claim  
12 Form must be postmarked or submitted online no later than the Claims Deadline. *Id.*  
13 The Settlement Administrator shall be responsible for reviewing and administering  
14 all claims to determine their validity. Agreement § 9.5. The Settlement  
15 Administrator shall reject any claim that does not comply in any material respect  
16 with the instructions on the Claim Form or the terms of the Settlement Agreement,  
17 or is submitted after the Claims Deadline, or is otherwise determined to be invalid,  
18 incomplete or fraudulent. *Id.* All disputes relating to the Settlement Administrator's  
19 ability and need to perform its duties shall be referred to the Court, if necessary,  
20 which will have continuing jurisdiction over the terms and conditions of the  
21 Settlement until all obligations contemplated by the Settlement have been carried  
22 out. Agreement § 9.9. The proposed amount and cap to be paid to the Settlement  
23 Administrator is not to exceed \$150,000.00, or a lesser or greater amount as ordered  
24 by the Court. Agreement § 9.11

25 The Settlement Administrator shall retain copies of all claims submitted, all  
26 documentation of claims approved or denied, and all Settlement Payments made.  
27 Agreement § 9.6. Upon determining a claim submitted pursuant to this Settlement  
28 Agreement is valid and the amount of the Settlement Payment, the Settlement

1 Administrator shall notify counsel for the Settling Parties by email of that  
2 determination. *Id.* Sports Research shall be permitted to submit to the Settlement  
3 Administrator, with a copy to Class Counsel, any information demonstrating that the  
4 submitted claim is not valid. *Id.* The Settlement Administrator may then contact the  
5 Claimant who submitted the claim to request any further information. *Id.* The  
6 Settlement Administrator shall then make a final determination that is not  
7 challengeable by any Party. *Id.* Within five (5) calendar days after the Claims  
8 Deadline, the Settlement Administrator shall provide the Settling Parties with a  
9 declaration attesting to completion of the notice process set forth in this Section.  
10 Agreement § 9.10.

11 **I. Release of Claims**

12 Here, class members who do not exclude themselves from the settlement will  
13 release all claims arising out of or relating to any claim or allegation made in the  
14 Action, including, without limitation, any and all claims or allegations relating to the  
15 advertising, marketing, labeling or sale of the Products. Agreement § 2.26. Released  
16 claims do not include any claims for personal injury. *Id.* There are no differences  
17 between the claims to be released and the claims in the operative complaint. The  
18 release is appropriate because the only claims being released are the claims made in  
19 the Action. The release adequately balances fairness to Plaintiff and the absent class  
20 members with Defendant’s business interest in ending this litigation.

21 **J. CAFA Notice**

22 The parties agree that notice under the Class Action Fairness Act (“CAFA”)  
23 is required. In compliance with the CAFA, within ten (10) days after the Motion for  
24 Preliminary Approval is filed, the Settlement Administrator shall cause notice of this  
25 proposed Settlement to be served on the Attorney General of the United States and  
26 the Attorneys General of each State or territory. Agreement § 9.3. The Settlement  
27 Administrator shall file with the Court a certification stating the date(s) upon which  
28 such CAFA notices were sent. *Id.* The Settlement Administrator will provide counsel

1 for the Settling Parties with any substantive responses received in response to any  
2 CAFA notice served. *Id.* The Settlement complies with the substantive requirements  
3 of CAFA because it does not include coupons, class members are not obligated to  
4 pay any money to Class Counsel, and the Settlement does not discriminate based on  
5 geographic location. *See generally*, Agreement.

6 **VII. PROPOSED SCHEDULE OF EVENTS**

7 In connection with Preliminary Approval of the Settlement, the Court should  
8 also set a date and time for the Final Approval Hearing. Other deadlines in the  
9 Settlement approval process, including the deadlines for requesting exclusion from  
10 the Settlement Class or objecting to the Settlement, will be determined based on the  
11 date of the Final Approval Hearing or the date on which the Preliminary Approval  
12 Order is entered. The Parties respectfully propose the following schedule:

<b><u>EVENT</u></b>	<b><u>DEADLINE</u></b>
Deadline to Publish Notice	30 days after entry of the Preliminary Approval Order.
Deadline to submit Claim Forms	60 days after Notice to the Class.
Deadline to File Application for Attorneys' Fees and Expenses	14 days prior to the Objection/Exclusion Deadline.
Deadline to File an Objection with the Court, or submit a Request for Exclusion to the Settlement Administrator	90 days after Notice to the Class.
Deadline to File Motion for Final Approval of Settlement	28 days prior to the Final Approval Hearing.
Deadline to File Response to Objections	14 days prior to the Final Approval Hearing.
Final Approval Hearing	150 days after Notice to the Class.

24 **VIII. CONCLUSION**

25 For the foregoing reasons, Plaintiff respectfully requests that the Court grant  
26 preliminary approval, appoint Plaintiff as Class Representative and Plaintiff's  
27 counsel as Class Counsel, provisionally certify the Class, approve the proposed  
28

1 notice plan, and enter the Proposed Preliminary Approval Order.

2 DATED: January 12, 2024

Respectfully submitted,

3  
4 /s/ Ronald A. Marron

RONALD A. MARRON

5  
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