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10 ***Class Counsel***

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 vs.

18 SPORTS RESEARCH  
19 CORPORATION, a California  
20 Corporation,

21 Defendant.

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

CLASS ACTION

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF PLAINTIFF'S  
MOTION FOR ATTORNEYS'  
FEES, COSTS, AND INCENTIVE  
AWARD**

Date: November 7, 2024

Time: 10:00 a.m.

Ctrm: 6D

Judge: Hon. Fernando M. Olguin

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1       **I. Introduction**

2           This Motion comes before the Court pursuant to Federal Rule of Civil  
3 Procedure 23(h) and this Court’s Order Preliminarily Approving the Class Action  
4 Settlement entered on June 10, 2024. Dkt. No. 190. The Court should, respectfully,  
5 award attorneys’ fees to Class Counsel in the amount of \$550,000, plus costs in the  
6 amount of \$131,810.76. The Court should also, respectfully, award an incentive  
7 payment to the Class Representative Cynthia Ford, who assisted with the successful  
8 prosecution of this action. Plaintiff respectfully requests an incentive award in the  
9 amount of \$5,000.00 for her time and effort in representing the Settlement Class.

10          Class Counsel’s fee request in the total amount of \$550,000 represents one  
11 third of the Settlement Consideration in this class action settlement with Defendant  
12 Sports Research Corporation (“Sports Research” or “Defendant”). Class Counsel’s  
13 time that is attributable to successfully prosecuting this action results in a total  
14 lodestar amount of \$708,344.00. Accordingly, Class Counsel is requesting a  
15 negative multiplier of 1.28. Class Counsel have broken down their hours spent by  
16 timekeeper and by tasks to assist the Court and the Class in evaluating the  
17 reasonableness of the fee request. *See* Declaration of Ronald A. Marron filed  
18 concurrently herewith (“Marron Decl.”), ¶¶ 18. Class Counsel also seeks  
19 reimbursement of their costs that were reasonably necessary to prosecute this action  
20 in the total amount of \$131,810.76.

21          For the reasons set forth below, Plaintiff respectfully requests that the Court  
22 grant her Motion for Attorneys’ Fees, Costs, and Incentive Award.

23       **II. Legal Standard**

24          “In a certified class action, the court may award reasonable attorney’s fees  
25 and nontaxable costs that are authorized by law or by the parties’ agreement.” Fed.  
26 R. Civ. P. 23(h). The fee awarded must be “reasonable.” *In re Bluetooth Headset*  
27 *Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011) (“*In re Bluetooth*”). The  
28 decision to award attorneys’ fees “is committed to the sound discretion” of the court,

1 and should be based on “the unique contours of the case.” MANUAL FOR COMPLEX  
2 LITIG., FOURTH § 14.121 (2004).

3 In a class action, the court follows Rule 23(h), and the “fundamental focus is  
4 the result actually achieved for class members.” *Id.* at § 21.71 (citing Fed. R. Civ. P.  
5 23(h) committee note). The judgment on attorney’s fees and costs must describe the  
6 bases for the Court’s order, including findings of fact and conclusions of law. *See*  
7 *id.* § 14.232; Fed. R. Civ. P. 52(a), 54(d)(2)(C), 58(a)(3) (a separate judgment for  
8 fees is not required).

9 **III. Plaintiff is Entitled to Attorneys’ Fees Under California Law**

10 “An award of attorneys’ fees incurred in a suit based on state substantive law  
11 is generally governed by state law.” *Champion Produce, Inc. v. Ruby Robinson Co.*,  
12 342 F.3d 1016, 1024 (9th Cir. 2003) (citation omitted). “The task of a federal court  
13 in a diversity action is to approximate state law [regarding attorneys’ fee awards] as  
14 closely as possible in order to make sure that the vindication of the state right is  
15 without discrimination because of the federal forum.” *Farmers Ins. Exch. v. Sayas*,  
16 250 F.3d 1234, 1236 (9th Cir. 2001) (quoting *Gee v. Temeco, Inc.*, 615 F.2d 857,  
17 861 (9th Cir. 1980)). Accordingly, “California substantive law determines the  
18 availability and amount of attorney’s fees in this diversity case.” *Winterrowd v. Am.*  
19 *Gen. Annuity Ins. Co.*, 556 F.3d 815, 829 (9th Cir. 2009) (citation omitted); *see also*  
20 *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1169 (C.D. Cal. 2010).

21 Here, Plaintiff invokes the fee-shifting provisions of California’s CLRA, Cal.  
22 Civ. Code § 1780(e), and Private Attorney General Statute, Cal. Code Civ. Proc. §  
23 1021.5, which “are designed to incentivize counsel to pursue consumer interests  
24 through publicly beneficial litigation.” *Milano v. Interstate Battery Sys. of Am., Inc.*,  
25 2012 U.S. Dist. LEXIS 93192, at \*2 (N.D. Cal. July 5, 2012).

26 **A. The CLRA Requires Fees Be Awarded to a “Prevailing Plaintiff”**

27 The CLRA provides the “court shall award court costs and attorney’s fees to  
28 a prevailing plaintiff in litigation filed pursuant to this section.” Cal. Civ. Code §

1 1780(e) (emphasis added). “The legislative policy to allow prevailing plaintiffs  
2 reasonable attorneys’ fees is clear. Section 1780 provides remedies for consumers  
3 who have been victims of unfair or deceptive business practices. The provision for  
4 recovery of attorney’s fees allows consumers to pursue remedies in cases...where  
5 the compensatory damages are relatively modest.” *Hayward v. Ventura Volvo*, 108  
6 Cal. App. 4th 509, 512 (2003) (internal citation omitted). This provision is “integral  
7 to making the CLRA an effective piece of consumer legislation, increasing the  
8 financial feasibility of bringing suits under the statute,” *Broughton v. Cigna*  
9 *Healthplans*, 21 Cal. 4th 1066, 1086 (1999), and must “be liberally construed and  
10 applied to promote [the statute’s] underlying purposes, which are to protect  
11 consumers against unfair and deceptive business practices and to provide efficient  
12 and economical procedures to secure such protection.” *See* Cal. Civ. Code § 1760;  
13 *accord Hayward*, 108 Cal. App. 4th at 512-13 (“section 1760 expressly directs  
14 [courts] to liberally construe section 1780 to protect consumers”). A fee award to a  
15 prevailing plaintiff in a CLRA action is thus mandatory, even when resolved before  
16 trial. *Kim v. Euromotors West/The Auto Gallery*, 149 Cal. App. 4th 170, 178-79, 181  
17 (2007).

18 **B. The Private Attorney General Statute Separately Entitles a**  
19 **“Successful” Party to Fees in Public Interest Cases**

20 California Code of Civil Procedure “section 1021.5 authorizes an award of  
21 attorney fees to a ‘private attorney general,’ that is, a party who secures a significant  
22 benefit for many people by enforcing an important right affecting the public  
23 interest.” *Serrano v. Stefan Merli Plastering Co.*, 52 Cal. 4th 1018, 1020 (2011)  
24 (“*Stefan*”). Consistent with the policies underlying the statute, the entitlement  
25 belongs to both the litigant and her counsel. *Lindelli v. Town of San Anselmo*, 139  
26 Cal. App. 4th 1499, 1509 (2006); *see also Serrano v. Priest*, 20 Cal. 3d 25, 44 (1977)  
27 (“*Priest*”) (purpose of fee-shifting statutes is to “award...substantial attorney fees to  
28 those public-interest litigants and their attorneys...who are successful in such cases”

1 and thereby incentivize “representation of interests of similar character in future  
2 litigation”); *accord Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir.  
3 2008).

4 “Although the section ‘is phrased in permissive terms...the discretion to deny  
5 fees to a party that meets its terms is quite limited,’ and generally requires a full fee  
6 award unless special circumstances would render such an award unjust.” *Fitzgerald*  
7 *v. City of Los Angeles*, No. CV 03-01876DDP(RZX), 2009 WL 960825, at \*3 (C.D.  
8 Cal. Apr. 7, 2009) (quoting *Lyons v. Chinese Hosp. Ass’n*, 136 Cal. App. 4th 1331,  
9 1344 (2006)). Fees are awarded when: (1) the action “has resulted in the enforcement  
10 of an important right affecting the public interest,” (2) “a significant benefit, whether  
11 pecuniary or nonpecuniary, has been conferred on the general public or a large class  
12 of persons...”, and (3) “the necessity and financial burden of private  
13 enforcement...are such as to make the award appropriate[.]” *Stefan*, 52 Cal. 4th at  
14 1026 (quoting Cal. Code Civ. Proc. § 1021.5 and citing *Woodland Hills Residents*  
15 *Assn., Inc. v. City Council*, 23 Cal. 3d 917, 935 (1979)).

16 “The key question is ‘whether the financial burden placed on the party  
17 [claiming fees] is out of proportion to its personal stake in the lawsuit.’” *Heston v.*  
18 *Taser Int’l., Inc.*, 431 Fed. Appx. 586, 589 (9th Cir. 2011) (quoting *Lyons*, 136 Cal.  
19 App. 4th at 1352 ). Here, the Products typically retail for \$20.00, so buyers could  
20 not possibly have a stake adequate to litigate. Further, the “elimination of allegedly  
21 false representations... confer[] a benefit on both the class members and the public  
22 at large.” *See Brazil v. Dell Inc.*, No. C-07-01700 RMW, 2012 WL 1144303, at \*1  
23 (N.D. Cal. Apr. 4, 2012). Because the Settlement provides for both monetary and  
24 injunctive relief, Plaintiff has acted as a true attorney general and is the successful  
25 party.

26 **C. The Settlement Agreement Provides for Attorneys’ Fees, Costs,**  
27 **and an Incentive Award**

28 “A request for attorney’s fees should not result in a second major litigation.

1 Ideally...litigants will settle the amount of a fee.” *Hensley v. Eckerhart*, 461 U.S.  
2 424, 437 (1983). That is what the parties have done in the Settlement Agreement.  
3 The Settlement Agreement provides that “Class Counsel may make an application  
4 for an award of fees not to exceed one third of the Settlement Consideration”  
5 (Agreement at § 11.1). Here, Class Counsel are seeking fees in the amount of one  
6 third of the Settlement Consideration.

7 Settlements such as these “are highly favored,” in part because they promote  
8 efficient resolution of disputes, and therefore interpretation ought to be made in  
9 favor of enforcement wherever possible. *See Neary v. Regents of Univ. of Cal.*, 3  
10 Cal. 4th 273, 277-78 (1992); *Nicholson v. Barab*, 233 Cal. App. 3d 1671, 1683  
11 (1991); *Victoria v. Super. Ct.*, 40 Cal. 3d 734, 753, n.8 (1985). The parties are in  
12 agreement as to the appropriate amount of compensation for Class Counsel’s efforts  
13 in obtaining the monetary and injunctive relief on behalf of the Class. Where, as  
14 here, the parties have negotiated an arms’ length settlement, “[a] court should refrain  
15 from substituting its own value for a properly bargained-for agreement.” *In re Apple*  
16 *Computer, Inc. Derivative Litig.*, No. C 06-4128 JF (HRL), 2008 WL 4820784, at  
17 \*3 (N.D. Cal. Nov. 5, 2008).

18 **IV. Class Counsel are Entitled to Attorneys’ Fees and Costs Under the**  
19 **Common Fund Doctrine**

20 “[A] plaintiff or his attorney, whose efforts create, discover, increase or  
21 preserve a fund to which others also have a claim is entitled to recover from the fund  
22 the costs of his litigation, including attorneys’ fees.” *Vincent v. Brand*, 557 F.2d 759,  
23 769 (9th Cir. 1977). “This rule...is designed to prevent unjust enrichment by  
24 distributing the costs of litigation among those who benefit from the efforts of the  
25 litigants and their counsel.” *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1046  
26 (N.D. Cal. 2008) (citing *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271  
27 (9th Cir. 1989)). Under the percentage-of-the-fund method, the court calculates the  
28 fee award by designating a percentage of the total common fund. *Six Mexican*

1 *Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). Here,  
2 “because the benefit to the class is easily quantified,” the Court can easily apply the  
3 percentage method to determine whether the requested fee is reasonable. *In re*  
4 *Bluetooth*, 654 F.3d at 941.

5 **V. Class Counsel’s Requested Fees are Fair and Reasonable**

6 “Under California law, the primary method for determining the amount of  
7 reasonable attorneys' fees is the lodestar method.” *McCrary v. Elations Co., LLC*,  
8 No. EDCV130242JGBSPX, 2016 WL 769703, at \*10 (C.D. Cal. Feb. 25, 2016)  
9 (citing *In re Consumer Privacy Cases*, 175 Cal.App. 4th 545, 556–57 (2009)). “The  
10 lodestar is calculated by multiplying the number of hours reasonably expended by  
11 counsel by a reasonable hourly rate.” *Id.* “A court may increase or decrease that  
12 amount by applying a positive or negative multiplier based on, among other factors,  
13 the quality of representation, the novelty and complexity of the issues, the results  
14 obtained, and the contingent risk presented.” *Id.*

15 “In cases in which the class benefit can be monetized with a reasonable degree  
16 of certainty, a percentage of the benefit approach may be used to cross-check the  
17 lodestar calculation.” *Id.* (citing *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th  
18 19, 26–27, 97 Cal.Rptr.2d 797 (2000)). “California courts use this percentage cross-  
19 check not only in conventional common fund cases but also in cases in which the  
20 defendant creates a common fund for the benefit of the class members and agrees to  
21 pay attorneys’ fees separately.” *Id.* (citing *Lealao*, 82 Cal.App. 4th at 35–37). “Under  
22 the percentage method, California has recognized that most fee awards based on  
23 either a lodestar or percentage calculation are 33% and has endorsed the federal  
24 ‘benchmark’ of 25%.” *Id.* (citing *In re Consumer Privacy Cases*, 175 Cal.App. 4th  
25 at 556 n.13).

26 California courts and the Ninth Circuit have considered various factors for  
27 determining the reasonableness of the fee requested under the percentage-of-the-  
28 fund or lodestar method, including:



1 [T]he extent to which class counsel achieved the results for the class,  
2 whether the case was risky for class counsel, whether counsel's  
3 performance generated benefits beyond the cash settlement fund, the  
4 market rate for the particular field of law (in some circumstances), the  
5 burden class counsel experienced while litigating the case (e.g., cost,  
6 duration, foregoing other work), and whether the case was handled on  
7 a contingency basis.

8 *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954-55 (9th Cir. 2015); *see*  
9 *also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002); *Priest*, 20  
10 Cal. 3d at 49. No rigid formula is available, and each factor should be considered  
11 only if appropriate. *See Dep't of Transp. v. Yuki*, 31 Cal. App. 4th 1754, 1771 (1995).

12 Here, the Settlement creates a common fund in the amount of \$1,600,000, in  
13 addition to injunctive relief. Class Counsel's fee request in the amount of one third  
14 of the Settlement Consideration is reasonable under both the percentage of the fund  
15 and the lodestar approach.

16 **A. The Claims Against Sports Research Required Substantial Time  
17 and Labor**

18 Prosecuting and settling the claims against Sports Research demanded  
19 considerable time and labor, making this fee request reasonable. This Settlement was  
20 reached after highly contentious litigation. The organization of Class Counsel  
21 ensured that the work was coordinated to maximize efficiency and minimize  
22 duplication of effort. Marron Decl., ¶ 6. Class Counsel devoted substantial time to  
23 investigating the claims against Sports Research. Marron Decl., ¶ 7. Class Counsel  
24 also expended resources researching and developing the legal claims at issue. *Id.*

25 Substantial time and resources were also dedicated to conducting discovery.  
26 Marron Decl., ¶¶ 8-9. In 2019 and 2020, the Parties exchanged substantial written  
27 discovery requests and responses and exchanged voluminous expert reports. *Id.*  
28 Sports Research took the deposition of Plaintiff Ford as well as the depositions of  
Plaintiff's damages expert Charlene Podlipna and Plaintiff's garcinia cambogia  
expert Dr. David Allison. *Id.* Class Counsel took the depositions of Sports

1 Research's damages expert Daniel P. Werner, Ph.D, survey expert, Dr. Samantha  
2 Iyengar, and garcinia cambogia expert, Dr. Douglas Kalman. *Id.* Class Counsel  
3 devoted substantial time to preparing for these depositions and to reviewing  
4 documents produced by Sports Research during the litigation. *Id.*

5 There was also considerable motion practice. Class Counsel fully briefed a  
6 motion for class certification that was granted by the Court and successfully opposed  
7 Sports Research's Motion for Reconsideration. Marron Decl., ¶¶ 10-12. Class  
8 Counsel filed a successful opposition to Sports Research's Motion to Exclude  
9 Plaintiff's experts. Marron Decl., ¶ 11. Class Counsel also fully briefed a Motion for  
10 Summary Judgment, or in the Alternative, Summary Adjudication, and Motions to  
11 Exclude the Testimony, Opinions, and Reports of Defendant's Experts. *Id.*, ¶ 10.

12 Settlement negotiations consumed further time and resources. Marron Decl.  
13 ¶¶ 13-14. The Parties spent considerable preparing for and attending multiple  
14 mediation sessions before Jill R. Sperber, Esq. of Judicate West before agreeing to  
15 settle the case based on a mediator's proposal. *Id.* Finally, a significant amount of  
16 time was devoted to negotiating and drafting of the Agreement and the preliminary  
17 approval process, and to all actions required thereafter pursuant to the preliminary  
18 approval order. *Id.* Each of the above-described efforts was essential to achieving  
19 the Settlement before the Court. *Id.* Thus, the time and resources devoted to this  
20 Action readily justify the requested fee.

21 **B. The Issues Were Novel and Difficult, and Required the Skills of**  
22 **Highly Talented Attorneys**

23 This was not a simple case. The quality of Class Counsel's legal work  
24 conferred a substantial benefit on the Settlement Class in the face of significant  
25 litigation obstacles. Based on the discovery obtained and the motion practice during  
26 the action, if Plaintiff would have rejected the Settlement and continued to litigate  
27 this action through trial against Sports Research, the Parties would have proceeded  
28 to trial and there would have been a significant risk that no monetary recovery would

1 have been obtained. While acknowledging the strengths and weakness of the parties’  
2 respective positions, the Settlement has reached a difficult but fair accord.

3 In any given case, the skill of legal counsel should be commensurate with the  
4 novelty and complexity of the issues, as well as the skill of the opposing counsel.  
5 Class Counsel has extensive experience handling complex consumer class actions.  
6 Marron Decl., ¶¶ 3-4 & Ex. A. Class Counsel has already devoted 1,290.8 attorney  
7 hours, plus costs, to litigating and settling the claims against Sports Research, and  
8 are committed to overseeing the Settlement and this litigation through to its  
9 successful conclusion. *See* Marron Decl., ¶ 19. Litigation of this action required  
10 counsel trained in class action law and procedure as well as the acquisition and  
11 analysis of a significant amount of factual and legal information. Class Counsel  
12 possess these attributes, and their participation added value to the representation of  
13 this Settlement Class. The record demonstrates that the Action involved complex  
14 and novel challenges, which Class Counsel met at every juncture. *See Adoma v.*  
15 *Univ. of Phoenix*, 913 Supp. 2d 964, 983 (E.D. Cal. Dec. 20, 2012) (the quality of  
16 representation weighed in favor of an increase over 25% benchmark for fees).

17 In evaluating the quality of representation by Class Counsel, the Court should  
18 also consider opposing counsel. *See, e.g., In re Equity Funding Corp. Sec. Litig.*,  
19 438 F. Supp. 1303, 1337 (C.D. Cal. 1977) (noting that plaintiff’s counsel faced  
20 “established and skillful defense lawyers”). Sports Research is represented by Garcia  
21 Rainey Blank & Bowerbank LLP and Foley & Lardner, LLP, both full service law  
22 firms who have both the resources and reputation for vigorous and effective  
23 advocacy of their clients’ interests. Indeed, Sports Research believes that it has  
24 meritorious substantive defenses to Plaintiff’s claims but recognizes that these  
25 endpoints are achievable only after considerable further expense. Litigation of this  
26 magnitude has been and would continue to be very costly for both parties and the  
27 outcome uncertain. “[A]voiding a trial and inevitable appeals in this complex . . .  
28 suit strongly weigh in support of approval of the Settlement, rather than prolonged

1 and uncertain litigation.” *Rodriguez v. W. Pub. Corp.*, No. CV05-3222 R (MCX),  
2 2007 WL 2827379, at \*8 (C.D. Cal. Sept. 10, 2007).

### 3 **C. Class Counsel Achieved an Excellent Result for the Class**

4 Courts have consistently recognized that the result achieved is an important  
5 factor to be considered in making a fee award. *Hensley*, 461 U.S. at 436 (“most  
6 critical factor is the degree of success obtained”); *Vizcaino*, 290 F.3d at 1048  
7 (“[e]xceptional results are a relevant circumstance” in awarding attorneys’ fees);  
8 *Glendora v. Cmty. Redevelopment Agency v. Demeter*, 155 Cal.App. 3d 465, 475  
9 (1984); *Lealao*, 82 Cal. App. at 40; *In re Omnivision Techs.*, 559 F. Supp. 2d at 1046.

10 Given the significant litigation risks Class Counsel faced, the Settlement  
11 represents a successful result. Rather than facing additional years of costly and  
12 uncertain continuing litigation, the Settlement Class Claimants now will receive both  
13 monetary and injunctive relief. Here, Sports Research has agreed to settle this matter  
14 for a **non-reversionary** total of \$1,600,000. Agreement at § 2.3. Sports Research  
15 will provide \$20.00 in cash to each Settlement Class member who purchased the  
16 Product (any size) during the Class Period, limited to one claim per household.  
17 Agreement at § 10.2.1. No additional proof of purchase will be required beyond a  
18 timely submitted and completed claim form. *Id.* The settlement provides for a *pro*  
19 *rata* reduction if the claims exceed the amount in the settlement fund or a *pro rata*  
20 increase if the settlement fund is not exhausted. *Id.* at § 10.2.3.

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

27 Finally, the release in the Settlement Agreement is narrowly tailored to only  
28 include “all claims arising out of or relating to any claim or allegation made in the

1 Action, including, without limitation, any and all claims or allegations relating to the  
2 advertising, marketing, labeling or sale of the Products against the Released Parties.  
3 Agreement at § 2.26.. Therefore, Class Counsel has achieved a successful result  
4 through this class action settlement.

5 **D. The Claims Presented Serious Risk**

6 The Settlement is particularly noteworthy given the combined litigation risks.  
7 Sports Research raised substantial and meritorious defenses and success under these  
8 circumstances represents a genuine milestone.

9 The \$1,600,000 Settlement Fund is substantial, given the complexity of the  
10 litigation and the significant risks and barriers that loomed in the absence of  
11 Settlement. Any of these risks could easily have impeded, if not altogether derailed,  
12 this Action if it were not for Plaintiff's and Class Counsel's successful prosecution  
13 of these claims. The recovery achieved by this Settlement must be measured against  
14 the fact that any recovery by Plaintiff and Settlement Class Members through  
15 continued litigation could only have been achieved if: (i) Plaintiff was able to  
16 establish liability and damages at trial; and (ii) the final judgment was affirmed on  
17 appeal. The Settlement is an extremely fair and reasonable recovery for the  
18 Settlement Class in light of Sports Research's defenses, and the challenging and  
19 unpredictable path of litigation that Plaintiff and the class would have faced absent  
20 the Settlement. Marron Decl., ¶¶ 15.

21 **E. Class Counsel Assumed Considerable Risk to Pursue this Action on**  
22 **a Pure Contingency Basis**

23 In undertaking to prosecute this case on a contingent fee basis, Class Counsel  
24 assumed a significant risk of nonpayment or underpayment. Marron Decl., ¶ 18. That  
25 risk warrants an appropriate fee. Devoting more than five years and costs to this  
26 action necessarily precluded Class Counsel from taking on other employment. And,  
27 there was significant risk that Class Counsel, despite committing these resources,  
28 would not have received any compensation for its services. *Id.* Class Counsel's

1 ability to collect compensation was entirely contingent upon it prevailing. The  
2 substantial risk of non-recovery inherent in class action litigation is well-  
3 documented.

4 When attorneys undertake litigation on a contingent basis, a fee that is limited  
5 to the hourly fee that would have been paid by a fee-paying client, win or lose, is not  
6 a reasonable fee by market standards. *Greene v. Dillingham Constr. NA., Inc.*, 101  
7 Cal. App. 4th 418, 428-29 (2002).

8 A contingent fee must be higher than a fee for the same legal services  
9 paid as they are performed. The contingent fee compensates the lawyer  
10 not only for the legal services he renders but for the loan of those  
11 services. The implicit interest rate on such a loan is higher because the  
12 risk of default (the loss of the case, which cancels the debt of the client  
to the lawyer) is much higher than that of conventional loans.

13 *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132-33 (2001) (quoting Hon. Richard Posner,  
14 *Economic Analysis of Law* (4th ed. 1992)); *see also Rader v. Thrasher*, 57 Cal. 2d  
15 244, 253 (1962).

16 From the outset of litigation to the present, Class Counsel litigated this matter  
17 on a contingent basis and placed their own resources at risk to do so. Marron Decl.  
18 ¶ 18. Additionally, public policy concerns – in particular, ensuring the continued  
19 availability of experienced and capable counsel to represent classes of injured  
20 plaintiffs holding small individual claims – support the requested fee. The progress  
21 of the Action to date shows the inherent risk faced by Class Counsel in accepting  
22 and prosecuting the Action on a contingency fee basis. Despite Class Counsel’s  
23 effort in litigating this Action, Class Counsel remains completely uncompensated  
24 for the time invested in the Action, in addition to the substantial expenses that were  
25 advanced. Marron Decl., ¶¶ 18, 22. There can be no dispute that this case entailed  
26 substantial risk of nonpayment for Class Counsel.

27 **F. Class Counsel Are Requesting a Negative Multiplier of 1.28**

28 Under the lodestar method, the court calculates the fee award by multiplying

1 the number of hours reasonably spent by a reasonable hourly rate and then enhancing  
2 that figure, if necessary, to account for the risks associated with representation. *Paul,*  
3 *Johnson, Alston & Hunt*, 886 F.2d at 272; *In re Bluetooth*, 654 F.3d at 941 (same).  
4 Class Counsel has calculated a lodestar of \$708,344.00. *See Marron Decl.*, ¶¶ 19-21.  
5 This lodestar is based on 1,290.8 attorney hours, and does not include support staff  
6 hours or any post-application work (such as briefing this motion, briefing the final  
7 approval motion, responding to objectors, and appellate work, if necessary). *Id.*  
8 Given that Class Counsel is only requesting \$550,000 in fees, Class Counsel is  
9 requesting a negative multiplier of 1.28. *Marron Decl.*, ¶ 20. In light of the  
10 exceptional results obtained, the tenacity with which the case was litigated, the risk,  
11 difficulty and public service rendered by this action and the future work on the  
12 Settlement and claims administration, the Court should find that Class Counsel’s  
13 request for a negative multiplier to be reasonable.

14 **G. Class Counsel Are Requesting Fees in the Amount of One Third**  
15 **of the Settlement Consideration**

16 Class Counsel is requesting fees in the amount of one third of the Settlement  
17 Consideration (\$1,600,000 common fund and \$50,000 cost of implementing  
18 injunctive relief). While the Ninth Circuit has generally established 25% of a  
19 common fund as a “benchmark” award for attorneys’ fees (*Vizcaino*, 290 F.3d at  
20 1047), the “exact percentage [awarded] varies depending on the facts of the case,  
21 and in most common fund cases, the award exceeds the benchmark.” *Vasquez v.*  
22 *Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010) (“typical range of  
23 acceptable attorneys’ fees in the Ninth Circuit is 20% to 33 1/3 % of total settlement  
24 value”); *Hopkins v. Stryker Sales Corp.*, No. 11-2786, 2013 WL 2013 WL 496358,  
25 at \*1 (N.D. Cal. Feb. 6, 2013) (acknowledging same and awarding 30%); *In re*  
26 *Activision Sec. Litig.*, 723 F. Supp. 1373, 1377 (N.D. Cal. 1989) (“[a] review of  
27 recent reported cases discloses that nearly all common fund awards range around  
28 30%”); *Pokorny v. Quixtar, Inc.*, No. 07-00201 SC, 2013 WL 3790896, \*1 (N.D.

1 Cal. July 18, 2013) (acknowledging same, stating 30% award is “the norm absent  
2 extraordinary circumstances that suggest reasons to lower or increase the  
3 percentage” and granting fee request of 27.3%); *see also In re Pacific Enters. Sec.*  
4 *Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (award of 33% of settlement fund as fees  
5 affirmed).

6 “[I]n cases under \$10 million, the awards more frequently will exceed the  
7 25% benchmark.” *Lopez v. Youngblood*, No. 07-474, 2011 WL 10483569, \*13 (E.D.  
8 Cal. Sept. 1, 2011). And, importantly, the calculation of attorneys’ fees is based on  
9 a percentage of the entire potential benefit created by Class Counsel, rather than just  
10 the amount claimed against the fund. *See In re Online DVD-Rental Antitrust Litig.*,  
11 779 F.3d at 953 (no error “in calculating the attorneys’ fees award by calculating it  
12 as a percentage of the total settlement fund, including notice and administrative  
13 costs, and litigation expenses”); *Williams v. MGM-Pathe Commc’ns Co.*, 129 F.3d  
14 1026, 1027 (9th Cir. 1997) (“district court abused discretion by basing the fee on the  
15 class members’ claims against the fund rather than on a percentage of the entire fund  
16 or on the lodestar”); *Six Mexican Workers*, 904 F.2d at 1311 (“The Supreme Court  
17 has stated that attorneys’ fees sought under a common fund theory should be  
18 assessed against every class members’ share, not just the claiming members”). In  
19 addition to the \$1,600,000 common fund, the settlement also provides for valuable  
20 injunctive relief that is difficult to quantify, but should nonetheless be taken into  
21 account when awarding fees. *In re Quaker Oats Labeling Litig.*, No. C 10-0502 RS,  
22 2014 WL 12616763, at \*1 (N.D. Cal. July 29, 2014); *Guttman v. Ole Mexican*  
23 *Foods, Inc.*, No. 14-CV-04845-HSG, 2016 WL 91074261 (N.D. Cal. Aug. 1, 2016).

24 Class Counsel’s requested fee award of one third of the Settlement  
25 Consideration is consistent with other fee awards in this circuit. *See In re Mego Fin.*  
26 *Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000), *as amended* (June 19, 2000)  
27 (affirming fee award of 33 1/3% of fund); *In re Pacific Enters. Sec. Litig.*, 47 F.3d  
28 373, 379 (9th Cir. 1995) (award of 33% of settlement fund as fees affirmed); *Morris*



1 *v. Lifescan, Inc.*, 54 Fed. App'x 663 (9th Cir. 2003) (affirming fee award of 33% of  
2 fund).

3 **VI. Class Counsel's Rates and Hours Expended are Reasonable**

4 Class Counsel's lodestar of \$708,344.00 is summarized in the concurrently  
5 filed Declaration of Ronald A. Marron. *See* Marron Decl., ¶¶ 19-21. This lodestar  
6 is based on 1,290.8 attorney hours of work, and does not include support staff hours  
7 or any hours of post-application work (such as briefing this motion, briefing the final  
8 approval motion, responding to objectors, and appellate work, if necessary). *See id.*  
9 Class Counsel's lodestar is supported by fair and reasonable rates and hours.

10 **A. Class Counsel's Hourly Rates Are Reasonable and Have Been**  
11 **Approved by Numerous Federal and State Courts**

12 Courts look to prevailing market rates in the community in which the court  
13 sits. *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 906 (9th Cir. 1995);  
14 *see also Camancho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008);  
15 MANUAL FOR COMPLEX LITIGATION, FOURTH, § 14.122 ("The rate should reflect  
16 what the attorney would normally command in the relevant marketplace."). Class  
17 Counsel's rates are reasonable because they are in line with hourly rates charged by  
18 attorneys of comparable experience, reputation and ability for similar complex  
19 consumer protection class action litigation. *See Ketchum*, 24 Cal. 4th at 1133; *see*  
20 *also Blum v. Stenson*, 465 U.S. 886, 895 (1984) (to assist the court in calculating the  
21 lodestar, plaintiff must submit "satisfactory evidence . . . that the requested rates are  
22 in line with those prevailing in the community for similar services by lawyers of  
23 reasonable comparable skill, experience and reputation."). Moreover, calculating the  
24 lodestar using Class Counsel's current billing rates is appropriate given the deferred  
25 nature of counsel's compensation. *See Fischel v. Equitable Life Assur. Soc'y of the*  
26 *United States*, 307 F.3d 997, 1010 (9th Cir. 2002) (attorneys must be compensated  
27 for delay in payment); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d  
28 1291, 1305 (9th Cir. 1994) (explaining the court may compensate for a delayed

1 payment “by applying the attorneys’ current rates to all hours billed during the  
2 course of the litigation.”).

3 Here, Class Counsel attaches as Exhibit A to the Marron Declaration the  
4 Marron Firm’s current resume detailing its experience in prosecuting class actions.  
5 Marron Decl., ¶ 3 & Ex. A. Additionally, Class Counsel’s requested rates and hours  
6 are listed in the lodestar charts showing work by timekeeper. *See* Marron Decl., ¶ 19  
7 & Table 1. These rates are in line with the prevailing market rates for attorneys and  
8 support of similar experience, skill, and reputation. *See* Marron Decl., ¶¶ 26-27 &  
9 Exs. B-C.

10 The Marron Firm’s requested rates are as follows:

11 Timekeeper	Position	Rate Requested
12 Ronald Marron	Partner	\$845.00
13 Michael Houchin	Senior Associate	\$570.00
14 Lilach Halperin	Associate	\$515.00

15 Marron Decl., ¶ 19 & Table 1. Class Counsel’s hourly rates have been approved by  
16 numerous state and federal courts (Marron Decl., ¶ 29) and this Court should find  
17 Class Counsel’s rates to be reasonable.

18 **B. Class Counsel’s Hours Expended Are Reasonable**

19 Class Counsel is entitled to be compensated for reasonable time spent at all  
20 points in the litigation. Courts should avoid engaging in an “*ex post facto*  
21 determination of whether attorney hours were necessary to the relief obtained.”  
22 *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992). The issue “is not whether  
23 hindsight vindicates an attorney’s time expenditures, but whether at the time the  
24 work was performed, a reasonable attorney would have engaged in similar time  
25 expenditures.” *Id.* Here, Class Counsel expended a total of 1,290.8 attorney hours to  
26 date, excluding the extra hours of preparing this Motion, the Motion for Final  
27 Approval, its supporting declarations, responding to objectors, and appellate work,  
28 if necessary. *See* Marron Decl., ¶¶ 19-21. This includes, among other tasks, time

1 billed for investigating the claims and drafting pleadings; briefing Plaintiff’s Motion  
2 for Class Certification, Motions to Exclude Expert Reports, and Motion for  
3 Summary Judgment; defending Sports Research’s Motion to Exclude Expert  
4 Reports, Motion for Summary Judgment, and Motion for Reconsideration of Class  
5 Certification Order; party discovery and expert discovery; preparing for trial;  
6 extensive negotiations and settlement discussions; drafting class notices, the  
7 settlement agreement, and release language; drafting the motion for preliminary  
8 approval and its supporting documents; due diligence document review; and work  
9 relating to case management and communications with Sports Research’s counsel.  
10 Class Counsel have summarized the hours spent on each of the tasks in the chart  
11 shown below, which were crucial to achieving the settlement on behalf of the Class.  
12 Marron Decl., ¶ 21.<sup>1</sup>

Tasks Performed	Hours Billed
Pre-filing Investigation and Drafting Complaint	17.8
Rule 26(f) Conference and Rule 26(f) Report	16.1
Discovery	396.1
Motion Practice	647.1
Stipulations and Joint Motions Regarding Scheduling	18.3
Settlement Negotiations/ Settlement Agreement	129.6

19  
20 <sup>1</sup> Counsel need only submit summaries of their hours incurred; submission of billing  
21 records are not required. *See Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142,  
22 1148-49 (9th Cir. 2000) (the court may rely on summaries of the total number of  
23 hours spent by counsel); *In re Quantum Health Resources, Inc.*, 962 F. Supp. 1254,  
24 1256-57 (C.D. Cal. 1997) (“the lodestar method needlessly increases judicial  
25 workload, creates disincentive for early settlement, and causes unpredictable  
26 results”); *Wershba*, 91 Cal. App. at 255 (counsel’s declarations sufficient to evidence  
27 “the reasonable hourly rate for their services and establishing the number of hours  
28 spent working on the case ... California law permits fee awards in the absence of  
detailed time sheets”); *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1810 (1996)  
 (“lodestar calculation could be based on a counsel’s estimate of time spent”). At the  
Court’s request, Class Counsel can submit itemized time sheets for *in camera*  
inspection.

Class Notice	22
Case Management	43.8
<b>TOTAL</b>	<b>1,290.8</b>

Marron Decl., ¶ 21 & Table 2.

Counsel should be compensated for all hours claimed, which are documented and based on contemporaneous time records. *See* Marron Decl., ¶ 26; *Hensley*, 461 U.S. at 435 (Prevailing plaintiff’s counsel “should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation” and “should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.”); *Ketchum*, 24 Cal. 4th at 1133 (fees “should be fully compensatory” and, absent “circumstances rendering the award unjust, . . . include compensation for all the hours reasonably spent”).

**VII. The Requested Costs are Fair and Reasonable**

Both California and Ninth Circuit courts allow recovery of pre-settlement litigation costs in the context of class action settlements. *See Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003); *Priest*, 20 Cal. 3d at 35; *Rider v. Cnty. of San Diego*, 11 Cal. App. 4th 1410, 1424, n. 6 (1992); *see also Costs and expenses—Generally*, 5 NEWBERG ON CLASS ACTIONS § 16:1 (5th ed.). The analysis to apply in deciding which expenses are compensable in a common fund case of this type is whether the particular costs “would typically be billed to paying clients in non-contingency matters.” *See In re Omnivision Tech.*, 559 F. Supp. 2d at 1048 (“Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters”); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (same); *Carter v. Anderson Merchandisers, LP*, Nos. EDCV 08-0025-VAP (OPx), EDCV 09-0216-VAP (OPx), 2010 WL 1946757, at \*3 (C.D. Cal. May 11, 2010) (awarding litigation costs under a ‘reasonableness’ standard) (citing *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 2009 WL 928133, at \*13 (N.D. Cal. Apr. 3, 2009)).

Costs compensable include “nontaxable costs that are authorized by law or by

1 the parties' agreement." Fed. R. Civ. P. 23(h). "Expenses such as reimbursement for  
 2 travel, meals, lodging, photocopying, long-distance telephone calls, computer legal  
 3 research, postage, courier service, mediation, exhibits, documents scanning, and  
 4 visual equipment are typically recoverable." *In re Toys R Us-Delaware, Inc.--Fair*  
 5 *& Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 469 (C.D. Cal.  
 6 2014) (quoting *Rutti v. Lojack Corp., Inc.*, No. SACV 06-350 DOC (JCx), 2012 WL  
 7 3151077, \*12 (C.D. Cal. July 31, 2012)). "Courts also have discretion to reimburse  
 8 consulting and expert witness fees." *Id.* (citing *In re Media Vision Technology*  
 9 *Securities Litigation*, 913 F.Supp. 1362, 1366-67 (N.D. Cal. 1996); *see also Johnson*  
 10 *v. General Mills, Inc.*, No. SACV-10-00061-CJC(ANx), 2013 WL 3213832, at \*6  
 11 (C.D. Cal. June 17, 2013) (awarding costs in a class action).

12 Here, Class Counsel has incurred \$131,810.76 in costs reasonably necessary  
 13 to conduct this litigation. *See* Marron Decl., ¶ 22. All costs incurred were necessary  
 14 to the prosecution of this litigation. *Id.* The costs incurred by Class Counsel are  
 15 summarized in the chart shown below:

Description	Amount
Class Certification Notice	\$34,395.00
Expert Fees	\$63,809.67
Mediation	\$7,740.00
Research	\$13,786.92
Court Reporters and Deposition Transcripts	\$8,564.68
Process Servers/Courtesy Copies	\$1,786.27
Travel Expenses	\$824.69
Court Fees	\$400.00
Mail/Copies/Calendaring Software	\$503.53
<b>TOTAL</b>	<b>\$131,810.76</b>

25 Marron Decl., ¶ 22 & Table 3. These costs are entirely reasonable given Class  
 26 Counsel's engagement of litigation experts, the number of depositions that have  
 27 occurred, the amount of discovery that has taken place, and other expenses  
 28 associated with litigating this action successfully on behalf of the Class.

1 **VIII. The Requested Incentive Award is Fair and Reasonable**

2 Finally, Plaintiff respectfully requests an incentive award for her efforts in  
3 prosecuting this action for the past five years. Incentive awards “are fairly typical in  
4 class action cases,” *Rodriguez*, 563 F.3d at 958, and “serve an important function in  
5 promoting class action settlements.” *Sheppard v. Consol. Edison Co. of N.Y., Inc.*,  
6 No. 94-CV-0403(JG), 2002 WL 2003206, at \*5 (E.D. N.Y. Aug. 1, 2002). Incentive  
7 awards for class representatives are routinely provided to encourage individuals to  
8 undertake the responsibilities of representing the class and recognize the time and  
9 effort spent in the case. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 205  
10 F.R.D. 369, 369 (D. D.C. Feb. 1, 2002).

11 Such awards “are intended to compensate class representatives for work done  
12 on behalf of the class, to make up for financial or reputational risk undertaken in  
13 bringing the action, and, sometimes, to recognize their willingness to act as a private  
14 attorney general.” *Rodriguez*, 563 F.3d at 958-959. Incentive awards are committed  
15 to the sound discretion of the trial court and should be awarded based upon the  
16 court’s consideration of: (1) the actions the class representatives took to protect the  
17 interests of the class; (2) the degree to which the class benefited from those actions;  
18 and (3) the amount of time and effort the class representatives expended in pursuing  
19 the litigation. *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). These  
20 factors, as applied to this Action, demonstrate the reasonableness of the requested  
21 incentive award to Plaintiff.

22 Plaintiff provided substantial assistance that enabled Class Counsel to  
23 successfully prosecute the Action including reviewing material filings; responding  
24 to written discovery and searching for responsive documents; continuous  
25 communications with Class Counsel throughout the litigation; submitting a  
26 declaration in support of class certification and being appointed as a class  
27 representative; reviewing and approving the Settlement Agreement; and being  
28 committed to secure substantive relief on behalf of the Class. Marron Decl., ¶ 16;

1 Dkt. No. 183-3 [Ford Declaration at ¶¶ 4-14]. Additionally, Plaintiff Ford incurred  
2 additional time and expense when she prepared and sat for a deposition on July 10,  
3 2020. *Id.*, at ¶ 6. Plaintiff was integral to forming the theory of the case, and litigating  
4 it through settlement. Marron Decl., ¶ 16. The incentive award is reasonable when  
5 taking into account the additional time, effort, and risk Plaintiff contributed to  
6 vindicate the rights of the Class. *Id.*

7 An incentive award in the amount of \$5,000.00 is presumptively reasonable.  
8 *See Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 266 (N.D. Cal. 2015) (“a  
9 \$5,000 payment is presumptively reasonable”); *Wren v. RGIS Inventory Specialists*,  
10 No. C-06-05778 JCS, 2011 WL 1230826, at \*36 (N.D. Cal. Apr. 1, 2011) (“there is  
11 ample case law finding \$5,000 to be a reasonable amount for an incentive  
12 payment.”); *see also Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380  
13 (June 28, 2010) (\$10,000 incentive award to each class representative); *Munoz v.*  
14 *BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399 (June 10, 2010)  
15 (\$5,000 award). Accordingly, the Court should award Plaintiff Ford \$5,000 as an  
16 incentive award consistent with the terms of the Settlement Agreement.

17 **IX. Conclusion**

18 For the foregoing reasons, Plaintiff respectfully requests the Court grant her  
19 Motion for Attorneys’ Fees, Costs, and Incentive Award. Plaintiff respectfully  
20 requests that the Court award Class Counsel \$550,000.00 in attorneys’ fees,  
21 \$131,810.76 in costs, and \$5,000 as an incentive award to Plaintiff Cynthia Ford.

22  
23 DATED: July 22, 2024

Respectfully submitted,

24  
25 /s/ Ronald A. Marron  
26 RONALD A. MARRON

27 **LAW OFFICES OF**  
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