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

14 MEGAN SCHMITT, DEANA REILLY,
15 CAROL ORLOWSKY, and STEPHANIE
16 MILLER BRUN, individually and on
17 behalf of themselves and all others
18 similarly situated,

19 Plaintiffs,

20 v.

21 YOUNIQUE, LLC,

22 Defendant.

Case No. 8:17-cv-01397-JVS-JDE

**PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR AWARD OF ATTORNEYS' FEES
AND REIMBURSEMENT OF
LITIGATION EXPENSES TO CLASS
COUNSEL AND SERVICE AWARDS**

Complaint Filed: 8/17/17

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16 *Transactions (FACTA) Litig.*, 295 F.R.D. 438, 469 (C.D. Cal. 2014)21,22

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18 19 F.3d 1291, 1300 (9th Cir. 1994).10

19 *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008)19

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1 Megan Schmitt, Deana Reilly, and Stephanie Miller-Brun (“Plaintiffs”),
2 through their undersigned counsel, respectfully submit this memorandum of law in
3 support of their Motion for Award of Attorneys’ Fees and Reimbursement of
4 Litigation Expenses to Class Counsel and Service Awards (the “Motion”).

5 **I. INTRODUCTION**

6 After nearly two years of grueling litigation, and with the parties twice
7 approaching the start of trial, Class Counsel¹ was able to secure an outstanding
8 resolution of this and other pending (and potential) litigation through an Agreement
9 providing significant monetary and injunctive relief for Plaintiffs and a broader class
10 of consumers than the Court certified during the litigation (the “Settlement Class”).²
11 The litigation was hard fought at every turn with disputes over standing, procedural
12 and substantive elements of claims, extensive discovery matters, summary judgment
13 issues, class certification (and defendant Yunique LLC’s (“Defendant”) repeated
14 attempts to overturn the certification), motions *in limine*, and class notice.

15 Class Counsel now seek attorneys’ fees of one-third of the Settlement Fund,
16 or \$1,083,333.33, and reimbursement of Class Counsel’s reasonable and necessary
17 expenses totaling \$152,744.79. In addition, Class Counsel request Service Awards
18 of \$15,000 each to Plaintiffs, \$2,500 to the named plaintiff in the parallel *Bowers*
19 action resolved as part of the Agreement, and \$500 each to three members of the
20 Settlement Class who significantly contributed to the litigation.

21 _____
22 ¹ Any terms not otherwise defined herein have the same meaning as in the Class Settlement
23 Agreement (“S.A.”), attached as Exhibit A to the concurrently filed Declaration of Adam Gonnelli
24 in support of Plaintiffs’ Motion for Award of Attorneys’ Fees and Reimbursement of Litigation
25 Expenses to Class Counsel and Service Awards (“Gonnelli Decl.”).

26 ² “Settlement Class” means all persons who (1) during the Class Period, resided in one of
27 the following states: California, Ohio, Florida, Michigan, Minnesota, Missouri, New Jersey,
28 Pennsylvania, Tennessee, Texas, and Washington; and (2) purchased one or more Products for
personal, family or household use and not for resale. *See* S.A., § II.Z.

1 The settlement is an outstanding resolution of this high-risk complex
2 litigation and provides substantial monetary benefit to Settlement Class members.
3 Through Class Counsel’s efforts, a Settlement Fund of \$3,250,000.00 has been
4 created for, among other things, (1) payments to Settlement Class Members with
5 valid claims; (2) any attorneys’ fees and costs awarded by the Court; (3) any Service
6 Awards granted by the Court; and (4) all costs of settlement notice and
7 administration. The Agreement also provides valuable injunctive relief by requiring
8 Defendant to conduct testing of any fiber lash products with ingredients Defendant
9 describes as “natural” for three years to assure the central issue in this case does not
10 reoccur.

11 The attorneys’ fees requested by Class Counsel, one-third of the Settlement
12 Fund, is a reasonable and justified departure from the baseline 25% norm in the
13 Ninth Circuit because, among other reasons, Class Counsel have faced and
14 overcome atypically extensive obstacles in this litigation and were still able
15 negotiate an Agreement that is projected to provide Settlement Class members with
16 significant monetary redress. Moreover, when using a lodestar calculation applying
17 Class Counsel’s customary hourly rates as a cross-check, the requested fee award
18 represents a negative multiplier of 0.77, which further supports the reasonableness
19 of the one-third fee request. The expenses Class Counsel seek reimbursement for are
20 reasonable as well and standard in this type of class litigation.

21 Finally, the Service Awards requested are reasonable and should be approved.
22 Each potential recipient has provided the Court with a declaration detailing their
23 contributions to this action and the amount of time spent. For all the reasons
24 discussed herein, the Court should grant Plaintiffs’ Motion.³

25 ³ Pursuant to the Court’s October 21, 2019 Amended Additional Order on Preliminary
26 Approval, Plaintiffs will file their motion for final approval of the settlement by March 6, 2020.

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 Plaintiffs allege that Defendant sold “Moodstruck 3D Fiber Lashes” (the
3 “Product”) between October 1, 2012, and July 31, 2015, while representing that the
4 lashes component of the Product was composed of “Natural Fibers” and “100%
5 Natural Green Tea fibers,” when the lashes were actually synthetic. Plaintiffs allege
6 that they and their fellow consumers were injured by paying a price premium for the
7 Product based on Defendant’s misrepresentation. Defendant denies these allegations
8 and vigorously contested the litigation at every step.

9 **A. Procedural History**

10 Plaintiff Megan Schmitt filed this action on August 14, 2017, alleging that
11 Defendant’s representation that the Product fibers were composed of “Natural
12 Fibers” and “100% Natural Green Tea fibers,” constituted fraudulent, unfair,
13 unlawful, and deceptive business practices, in violation of the laws of the state of
14 California. *See* ECF No. 1. An amended complaint filed on October 13, 2017, added
15 Plaintiffs Deana Reilly, Carol Orlosky, and Stephanie Miller-Brun, and causes of
16 action alleging violations of the laws of Ohio, Florida, and Tennessee. *See* ECF No.
17 43. Plaintiffs sought both injunctive and monetary relief. *See id.* at 37-38.

18 On November 3, 2017, Defendant moved to dismiss the amended complaint
19 pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). *See* ECF No. 45.
20 The Court granted in part and denied in part Defendant’s motion. *See* ECF No. 53.
21 Thereafter, Plaintiffs filed a Second Amended Complaint (ECF No. 58), which
22 Defendant answered, explicitly denying Plaintiffs’ allegations regarding the
23

24 *See* ECF No. 257 at 2. That motion will address, *inter alia*, the overall fairness of the
25 Agreement, the appropriateness of class certification of the Settlement Classes, and detail the
26 results of the Settlement Administrator’s Notice Plan, including claims, objections and opt-outs. A preliminary description is included *infra* at Section II.B.

1 accuracy of the label and the ingredients of the product at issue. *See* ECF No. 60.

2 On October 4, 2018, Plaintiff Kirsten Bowers filed a class action complaint in
3 the Circuit Court of Jackson County in the State of Missouri styled *Bowers v.*
4 *Younique LLC*, 1816-CV25646. *Bowers* asserted similar factual claims as those in
5 *Schmitt*. Defendant disputed, and continues to dispute, the allegations in both
6 *Schmitt* and *Bowers*. There has been no decision on class certification in *Bowers*.

7 Following hard-fought and contentious discovery, Plaintiffs moved for class
8 certification. *See* ECF No. 77. Defendant opposed the motion and moved for
9 summary judgment, or in the alternative, summary adjudication. *See* ECF Nos. 94
10 and 106. On December 21, 2018, the Court granted Defendant's summary judgment
11 motion with respect to some of Plaintiffs' causes of action, including all of
12 Orłowsky's claims. *See* ECF No. 136. On January 10, 2019, the Court certified
13 classes of California, Florida, and Ohio consumers. *See* ECF No. 149. Defendant
14 vigorously attacked certification and sought interlocutory review by the Ninth
15 Circuit, decertification by this Court, and stays of class notice. The parties also
16 submitted motions *in limine* and competing jury instructions.

17 The Parties made numerous efforts to resolve the dispute throughout the
18 litigation. *See* Gonnelli Decl., ¶¶ 80-85. A first attempt at mediation in 2018 yielded
19 no results, but a second mediation with the Honorable Leo Pappas (Ret.) on April
20 23, 2019, brought the Parties closer to settlement. *See id.* Discussions continued
21 through the mediators and between counsel, ultimately resulting in this Agreement.

22 **B. Terms of the Settlement**

23 The proposed settlement provides for the creation of a Settlement Fund in the
24 amount of \$3,250,000.00 for: (1) taxes and tax expenses of the Fund, if any; (2)
25 payments of valid claims from members of the Settlement Class; (3) attorneys' fees
26 and expenses to be determined by the Court; (4) Service Awards; and (5) all costs of

1 settlement notice and administration. *See* S.A. § IV.A.1. The Settlement provides for
2 cash refunds to each member of the Settlement Class who submits a timely and
3 valid Claim Form. *See id.*, § V.J. The total amount of the payment to each member
4 of the Settlement Class will be based on the number of valid claims submitted.

5 The Agreement further provides that, for a period of three years, if Defendant
6 elects to describe an ingredient in its current or future fiber lash products as
7 “natural,” Defendant will have the product tested by a reputable U.S.-based
8 laboratory every six months to confirm the ingredients identified are in fact
9 “natural” as described and remain so. *See id.*, § IV.B.1.

10 **C. Class Notice**

11 The Settlement Administrator has commenced the Notice Plan authorized by
12 the Court. *See* concurrently filed Declaration of Michael E. Hamer (“Hamer Decl.”).
13 The Notice Plan informed Settlement Class members that, *inter alia*, Class Counsel
14 would seek attorneys’ fees up to one-third of the Settlement Fund, expenses up to
15 \$175,000, and Service Awards of up to \$67,500. *See* ECF No. 251-1 at 8.
16 Objections are due on January 21, 2020. *See* ECF No. 257 at 2. As of November 14,
17 2019, no objections or opt-outs have been received. *See* Hamer Decl., ¶ 10.

18 **III. ARGUMENT**

19 **A. The Requested Fee Award Is Reasonable Under Applicable Ninth**
20 **Circuit Standards**

21 Federal Rule of Civil Procedure 23(h) provides that “[i]n a certified class
22 action, the court may award reasonable attorney’s fees and nontaxable costs that are
23 authorized by law or the parties’ agreement.” The Rule further provides that “[a]
24 claim for an award must be made by motion under Rule 54(d)(2),” notice of which
25 must be “directed to class members in a reasonable manner.” Fed. R. Civ. P.
26 23(h)(1). The Settlement Administrator has commenced the Notice Plan set forth in

1 the Settlement which informs the Settlement Class of the maximum attorneys' fees
2 and expenses sought by Class Counsel. *See* Hamer Decl., ¶ 8.⁴

3 Under the "common fund" or "common benefit" doctrine, "a lawyer who
4 recovers a common fund for the benefit of persons other than himself or his client is
5 entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van*
6 *Gemert*, 444 U.S. 472, 478 (1980). This doctrine is equitable in nature and
7 recognizes that "those who benefit from the creation of the fund should share the
8 wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub.*
9 *Power Supply Sys. Sec. Litig. ("WPPSS")*, 19 F.3d 1291, 1300 (9th Cir. 1994).

10 A district court has "broad authority" over attorney fee awards in class
11 actions, *see Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000), and the guiding
12 principle is that a fee award is to be "reasonable under the circumstances." *WPPSS*,
13 19 F.3d at 1304. To determine the appropriate fee in a common fund case, the Ninth
14 Circuit "requires district courts to assess fee awards using either the 'percentage of
15 the fund' method or the 'lodestar' method." *Carter v. San Pasqual Fiduciary Tr.*
16 *Co.*, No. SACV 15-1507 JVS (JCGx), 2018 U.S. Dist. LEXIS 33834, at *22-23
17 (C.D. Cal. Feb. 28, 2018) (quoting *Fischel v. Equitable Life Ass. Soc'y of the U.S.*,
18 307 F.3d 997, 1006 (9th Cir. 2002)). "The use of the percentage-of-the-fund method
19 in common-fund cases is the prevailing practice in the Ninth Circuit for awarding
20 attorneys' fees and permits the Court to focus on a showing that a fund conferring
21 benefits on a class was created through the efforts of plaintiffs' counsel." *In re*
22 *Korean Air Lines Co., Antitrust Litig.*, No. MDL No. 1891, 2013 U.S. Dist. LEXIS
23 186262, at *3 (C.D. Cal. Dec. 23, 2013) (citations omitted). However, "courts
24 routinely cross-check their 'percentage of the fund' calculation with the lodestar

26 ⁴ This Motion detailing the basis for the fee request will be posted on the Settlement
27 Website.

1 method . . .” *Carter*, 2018 U.S. Dist. LEXIS 33834, at *22-23 (quoting *Vizcaino v.*
2 *Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002)).

3 Because the Agreement contemplates that Class Counsel will seek an award
4 of attorneys’ fees and expenses in terms of a percentage of the Settlement Fund, *see*
5 S.A. § X.A, Class Counsel respectfully requests that the Court review the requested
6 fee award of one-third of the Settlement Fund under the percentage of the fund
7 method with a lodestar cross-check. Class Counsel submits that the requested fees
8 are reasonable under both methods, and, in compliance with the Court’s September
9 16, 2019 Order granting Plaintiffs’ Motion for Preliminary Approval (the
10 “Preliminary Approval Order,” ECF No. 255), Class Counsel herein provides the
11 Court with “relevant information to justify their entitlement to their requested fee
12 award, including a lodestar calculation with evidentiary support.” *Id.* at 14.⁵

13 **1. The Fee Request is Supported by the Percentage-of-Recovery**
14 **Method**

15 Under the percentage-of-recovery method, “the court simply awards the
16 attorneys a percentage of the fund sufficient to provide class counsel with a
17 reasonable fee.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)
18 (citations omitted). In the Ninth Circuit, the starting benchmark for fee awards in
19 common fund cases is 25% of the common fund. *See Carter*, 2018 U.S. Dist.
20 LEXIS 33834, at *22 (citing *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d
21 935, 942 (9th Cir. 2011)). However, the percentage may be adjusted according to
22 several factors, including:

23
24
25 ⁵ *See* concurrently filed Declarations of Adam Gonnelli, Bonner C. Walsh, Alison M.
26 Bernal, Davis Pastor, Thomas J. Hershewe, Phil LeVota and Edwin J. Kilpela, Jr. in support of
Plaintiffs’ Motion (the “Class Counsel Declarations”).

1 (1) the results achieved; (2) the risk involved in undertaking the
2 litigation; (3) the generation of benefits beyond the cash settlement
3 fund; (4) the market rate for services; (5) the contingent nature of the
4 fee; (6) the financial burden to counsel; (7) the skill required; (8) the
5 quality of the work; and (9) the awards in similar cases.

6 *Id.* at *23 (citing, *inter alia*, *Vizcaino*, 290 F.3d at 1048-49). The Ninth Circuit has
7 found attorneys' fees awards of one-third of the common fund to be reasonable. *See*
8 *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (affirming
9 award of one-third of total recovery); *see also Singer v. Becton Dickinson and Co.*,
10 No. NO. 08-CV-821-IEG (BLM), 2010 U.S. Dist. LEXIS 53416, at *22-23 (S.D.
11 Cal. 2010) (awarded 33.3% percent of common fund and noted "typical range of
12 20% to 50% awarded"). When considering the above factors, the Court should find
13 that an award of one-third of the Settlement Fund is reasonable here as well.

14 **a. The results achieved support the reasonableness of the**
15 **requested attorneys' fees**

16 "The result achieved is a significant factor to be considered in making a fee
17 award." *Carter*, 2018 U.S. Dist. LEXIS 33834, at *22 (internal quotations omitted).
18 *See also Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (the "most critical factor is
19 the degree of success obtained"). The exceptional results obtained by Class Counsel
20 on behalf of Plaintiffs and the Class merit a fee award of one-third of the Settlement
21 Fund. Here the Agreement provides a full refund for any Settlement Class member
22 who files a valid claim. *See* S.A. § V.J. In the event that the monies in the
23 Settlement Fund are not sufficient to provide each claimant a full refund, the refunds
24 will be reduced *pro rata*. *See id.* And if there are Residual Funds remaining in the
25 Settlement Fund after each claimant has received a full refund, eligible Settlement
26 Class members will receive a *pro rata* increase to their payments until the Residual
27 Fund is exhausted. *See id.*

28 While it is still early in the claims process, Plaintiffs are able to provide the

1 Court with an “estimate of the likely individual recovery.” ECF No. 255 at 13.⁶ If
2 the Court grants Class Counsel’s requested attorneys’ fees and expenses (totaling
3 \$1,236,078.12), requested Service Awards (totaling \$49,000), and the Settlement
4 Administrator incurs costs up to the anticipated \$250,000, *see* Hamer Decl., ¶ 15,
5 approximately \$1,714,921.88 will remain to pay for valid claims by Settlement
6 Class members. As of November 14, 2019, based on the claims submitted so far, the
7 Settlement Administrator currently estimates that there may ultimately be 35,000
8 valid claims seeking refunds for a total of 141,400 Products, or an average of 4.04
9 Products per claim. *See id.*, ¶ 14. If these were the final calculations, and based on a
10 retail value of \$29 per Product, the total refunds sought would be \$4,100,600. This
11 would mean that each Settlement Class member submitting a valid claim would
12 receive a refund of 41.8% of their \$29 purchase price for each Product purchased, or
13 an average of \$12.13 per claimed Product and \$49.00 per claimant. This is an
14 excellent result for the Settlement Class.

15 The Agreement not only provides substantial payments to Settlement Class
16 members who elect to file claims, but also provides significant injunctive relief that
17 benefits the Settlement Class and the public, further supporting Plaintiffs’ fee
18 request. Specifically, the Agreement provides that, if Defendant elects to describe an
19 ingredient in its current or future fiber lash products as “natural,” Defendant will
20 have the product tested by a reputable U.S.-based laboratory every six months to
21 confirm the ingredients identified are in fact “natural” as described and remain so.
22 S.A., § IV.B.1. Such testing shall be undertaken to confirm that the ingredients are
23 natural and not “synthetic” as that term is defined in the Organic Foods Production
24 Act of 1990, at 7 U.S.C. § 6502(21). *See id.* This testing will assure that the

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26 ⁶ Plaintiffs will provide an updated estimate to the Court as part of their motion for final
27 approval due March 6, 2020. -13-

28

1 Settlement Class and the public will not be exposed to fiber lashes from Defendant
2 that are mislabeled as “natural,” and supports the reasonableness of the requested
3 fees. For these reasons, the results achieved by Class Counsel after extensive
4 litigation support the reasonableness of the requested fees. The high percentage of
5 damages estimated to be received by Settlement Class members militates in favor of
6 an increase to one-third from twenty-five percent of the Settlement Fund.

7 **b. The risk involved in the litigation supports the**
8 **reasonableness of the requested attorneys’ fees**

9 The risk taken by Class Counsel of “not recovering at all, particularly [in] a
10 case involving complicated legal issues[]” is a “significant factor to be considered
11 in determining attorney fees.” *Carter*, 2018 U.S. Dist. LEXIS 33834, at *24
12 (quoting *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1046-47 (N.D. Cal. 2007)).
13 Here Class Counsel pursued this litigation for over two years, expending 2,095.49
14 hours in time, \$1,403,218.00 in lodestar, and \$152,744.79 in expenses despite “a
15 likelihood that Plaintiffs would recover nothing.” *Id.* at *25. Accordingly, this factor
16 strongly supports the requested fee award.

17 **c. The Settlement’s generation of benefits beyond the cash**
18 **Settlement Fund supports the reasonableness of the**
19 **requested attorneys’ fees**

20 As detailed *supra*, Section III.A.1.b, the Agreement provides significant
21 injunctive relief beyond the monetary benefits of the Settlement Fund. Accordingly,
22 this factor supports the request. *See, e.g., Vizcaino*, 290 F.3d at 1049 (“Incidental or
23 nonmonetary benefits conferred by the litigation are a relevant circumstance.”).

24 **d. The market rate for similar services supports the**
25 **reasonableness of the requested attorneys’ fees**

26 As discussed in further detail *infra*, the attorneys’ fees sought by Class

1 Counsel are based on hourly rates commensurate with the market rate for similar
2 services. *See* Gonnelli Decl., ¶¶ 97-98; Class Counsel Declarations. Moreover, if
3 this were a non-representative litigation, the customary fee arrangement would be
4 contingent, on a percentage basis, and in the range of 30% to 40% of the recovery.
5 *See, e.g., Blum v. Stenson*, 465 U.S. 866, 902 n.19 (1984) (“In tort suits, an attorney
6 might receive one-third of whatever amount the plaintiff recovers.”). Class Counsel
7 is requesting one-third of the Settlement Fund, which as detailed *infra* is consistent
8 with what courts in this Circuit and throughout the country routinely award.
9 Therefore, this factor supports the reasonableness of the requested fee.

10 **e. The contingent nature of Plaintiffs’ arrangement with**
11 **Class Counsel and the financial burden to Class Counsel**
12 **support the reasonableness of the requested attorneys’**
13 **fees**

14 The Ninth Circuit has long recognized that the public interest is served by
15 rewarding attorneys who assume representation on a contingent basis to compensate
16 them for the risk that they might be paid nothing at all for their work. *See WPPSS*,
17 19 F.3d at 1299 (“Contingent fees that may far exceed the market value of the
18 services if rendered on a non-contingent basis are accepted in the legal profession as
19 a legitimate way of assuring competent representation for plaintiffs who could not
20 afford to pay on an hourly basis regardless whether they win or lose.”); *Vizcaino*,
21 290 F.3d at 1051 (courts reward successful class counsel in contingency cases “for
22 taking the risk of nonpayment by paying them a premium over their normal hourly
23 rates”). This Court has further held that attorneys “are entitled to a larger fee award
24 when their compensation is contingent in nature.” *Carter*, 2018 U.S. Dist. LEXIS
25 33834, at *25 (citing, *inter alia*, *Vizcaino*, 290 F.3d at 1048-50).

26 Unlike Defendant’s counsel, who were presumably entitled to payment on an

1 hourly basis and reimbursement for their expenses regardless of their success, Class
2 Counsel have not been compensated for any time or expenses in their prosecution of
3 this litigation and would have received no compensation or reimbursement of
4 expenses had this litigation not been successful. In addition, since the case was hard
5 fought and required thorough responses to Defendant’s motions, many on short
6 notice, Class Counsel attorneys working on this litigation have foregone the
7 opportunity to devote time to other cases and faced a substantial risk that the
8 litigation would yield no or very little recovery and leave them uncompensated for
9 their time and substantial out-of-pocket expenses. *See, e.g.,* Gonnelli Decl., ¶ 108,
10 110, 112; Walsh Decl., ¶ 5. Accordingly, this factor strongly supports the fee
11 requested.

12 **f. The skill required and quality of Class Counsel’s work**
13 **supports the reasonableness of the requested attorneys’**
14 **fees**

15 As this Court has recognized, the “single clearest factor reflecting the quality
16 of class counsels’ services to the class are the results obtained.” *Carter*, 2018 U.S.
17 Dist. LEXIS 33834, at *25 (internal quotations omitted). The successful prosecution
18 of these complex claims required the participation of attorneys with significant
19 experience and skill in class action litigation. Here Class Counsel have extensive
20 experience in class action litigation and have successfully served as lead counsel in
21 numerous such cases. *See* Gonnelli Decl., ¶ 92, Ex. B; Class Counsel Declarations.

22 Moreover, as detailed in the Gonnelli Declaration, ¶¶ 8-85, Class Counsel
23 shepherded Plaintiffs and the Settlement Class through a gauntlet of impediments,
24 facing and overcoming nearly every obstacle a plaintiff can face prior to trial in a
25 class action. This case was not the typically streamlined consumer class action
26 where a complaint is filed, a motion to dismiss is defeated, class certification is

1 potentially litigated and then the matter is settled. Instead, Plaintiffs and Class
2 Counsel pursued this litigation to the point of approaching trial twice, which is
3 uncommon in consumer class actions. *See In re Nissan Radiator*, No. 10 CV 7493
4 (VB), 2013 U.S. Dist. LEXIS 116720, at *23-24 (S.D.N.Y. May 30, 2013)
5 (“consumer class trials are relatively rare.”). At the same time, Defendant sought to
6 utilize nearly every procedural tool available to derail Plaintiffs’ claims, including,
7 *inter alia*, seeking appellate review of the Court’s Class Certification Order,
8 subsequently seeking decertification of the class, attempting to forestall notice, and
9 seeking to have Plaintiff’s experts’ testimony excluded from trial through *Daubert*
10 motions. Class Counsel’s fee request is commensurate with their experience and
11 skill they brought to the litigation, with which resulted in a strong recovery for
12 Plaintiffs and the Settlement Class. *See Gonnelli Decl.*, ¶¶ 104-07.

13 **g. The awards in similar cases supports the reasonableness**
14 **of the requested attorneys’ fees**

15 Courts often look at fees awarded in comparable cases to determine if the fee
16 requested is reasonable. *See Vizcaino*, 290 F.3d at 1050 n.4. Cases settling for less
17 than \$10 million often result in fees above 30%. *See Van Vranken v. Atlantic*
18 *Richfield Co.*, 901 F. Supp. 294, 297-98 (N.D. Cal. 1995)

19 (citing cases); *Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1210
20 (C.D. Cal. 2014) (fee award of 33% in \$3.3 million settlement was reasonable);
21 *Stuart v. RadioShack Corp.*, No. C-07-4499 EMC, 2010 U.S. Dist. LEXIS 92067, at
22 *15 (N.D. Cal. Aug. 9, 2010) (approving a fee award of one-third of the \$4.5 million
23 settlement fund).

24 This Court has previously granted fees of one-third of a common fund in class
25 action settlements. *See Brulee v. Dal Glob. Servs., LLC*, No. CV 17-6433
26 JVS(JCGx), 2018 U.S. Dist. LEXIS 211269, at *32 (C.D. Cal. Dec. 13, 2018);

1 *Carter*, 2018 U.S. Dist. LEXIS 33834, at *34. Additionally, courts in comparable
2 consumer “natural” class actions have granted one-third in fees. *See e.g., Luib v.*
3 *Henkel Consumer Goods Inc.*, No. 17-cv-03021 (BMC) (E.D.N.Y.), ECF No. 60
4 (granting 33% of settlement fund); *Rapoport-Hecht v. Seventh Generation, Inc.*, No.
5 14-CV-9087 (KMK) (S.D.N.Y.), ECF No. 76 (same). Accordingly, this factor
6 supports the reasonableness of the requested fees.

7 **2. The Fee Request Is Also Reasonable When Evaluated Under the**
8 **Lodestar/Multiplier Method**

9 The Ninth Circuit encourages courts to “cross-check” the reasonableness of a
10 percentage award by using the “lodestar method,” which “measures the lawyers’
11 investment of time in the litigation.” *Vizcaino*, 290 F.3d at 1050. “[T]he lodestar
12 calculation can be helpful in suggesting a higher percentage when litigation has been
13 protracted,” as it has been here. *Id.*

14 The lodestar analysis involves two questions: (1) “whether the number of
15 hours Class Counsel expended on the litigation was reasonable;” and (2) “whether
16 Class Counsel’s hourly rates are reasonable.” *Brulee*, 2018 U.S. Dist. LEXIS
17 211269, at *27-28. As detailed in the Gonnelli Declaration, the Agreement was
18 entirely the product of Class Counsel’s diligent efforts in investigating and
19 prosecuting this litigation. In total, Class Counsel expended 2,095.49 hours in
20 prosecuting this action with a total lodestar of \$1,403,218.00 when applying Class
21 Counsel’s usual and customary rates. *See Gonnelli Decl.*, ¶ 101. Both factors
22 support the reasonableness of Class Counsel’s fee request.

23 **a. The hours expended by Class counsel are reasonable**

24 The number of hours expended by Class Counsel, 2,095.49, was reasonable in
25 the context of this contentious litigation. Hours are deemed reasonable if they were
26 “expended in pursuit of the ultimate result achieved in the same manner that an

1 attorney traditionally is compensated by a fee-paying client.” *Hensley*, 461 U.S. at
2 431. The Court “should defer to the winning lawyer’s professional judgment as to
3 how much time he was required to spend on the case.” *Moreno v. City of*
4 *Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008).

5 Nor were the 2,095.49 hours Class Counsel spent on this case a result of
6 Plaintiffs’ excessively aggressive strategy. Much of the time spent was compelled
7 by the need to fend off motion after motion filed by Defendant and by the litigation
8 nearing trial twice.

9 Class Counsel reviewed “timekeeping records to ensure none were erroneous,
10 duplicative, excessive or administrative.” *Carter*, 2018 U.S. Dist. LEXIS 33834, at
11 *29. In addition to this routine review, Class Counsel further omitted all attorney
12 travel time. *See* Gonnelli Decl., ¶ 100; Walsh Decl., ¶ 6; Bernal Decl., ¶ 7. This led
13 to a reduction of Class Counsel’s overall lodestar by approximately 14 percent. The
14 resulting number of hours is reasonable in light of the extensive litigation Class
15 Counsel participated in over the last two years.

16 **b. Class Counsel’s hourly rates are reasonable**

17 The determination of whether rates are reasonable requires “examining the
18 prevailing market rates in the relevant community charged for similar services by
19 lawyers of reasonably comparable skill, experience, and reputation.” *Carter*, 2018
20 U.S. Dist. LEXIS 33834, at *27 (internal quotations omitted). Here Class Counsel
21 firms have provided declarations detailing why their proposed rates for this case are
22 reasonable, including, *inter alia*, lists of fee awards in other similar cases,
23 descriptions of their experience in class litigation, and other bases for their rates.
24 *See* Gonnelli Decl., ¶¶ 92-98; Class Counsel Declarations. *See also* *Parkinson v.*
25 *Hyundai Motor Am.*, 796 F. Supp.2d 1160, 1172 (C.D. Cal. 2010) (“Courts may find
26 hourly rates reasonable based on evidence of other courts approving similar rates or

1 other attorneys engaged in similar litigation charging similar rates.”). Class Counsel
2 attorneys’ hourly rates range from \$400.00 to \$795.00, with an average per hour rate
3 of approximately \$670 which has been found reasonable for this jurisdiction. *See,*
4 *e.g., Good Morning to You Prods. Corp. v. Warner/Chappell Music, Inc., No. CV*
5 *13-4460-GHK (MRWx)*, 2016 U.S. Dist. LEXIS 191665, at *18-21 (C.D. Cal. Aug.
6 16, 2016) (finding partner rates up to \$820 hour, and average partner rate of \$693.83
7 per hour, reasonable and “within the range of rates charged in this district by
8 attorneys with comparable skill and experience.”). *See also* Gonnelli Decl., ¶ 98
9 (identifying reports showing average partner rate in community).

10 **c. The Fee Request is Supported by Class Counsel’s**
11 **Negative Lodestar**

12 As the Ninth Circuit has recognized, attorneys in common fund cases are
13 frequently awarded a multiple of their lodestar, which rewards them “for taking the
14 risk of nonpayment by paying them a premium over their normal hourly rates for
15 winning contingency cases.” *Vizcaino*, 290 F.3d at 1051. “Multipliers of 1 to 4 are
16 commonly found to be appropriate in complex class action cases.” *Hopkins v.*
17 *Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 U.S. Dist. LEXIS 16939, at *12
18 (N.D. Cal. Feb. 6, 2013) (citing *Vizcaino*, 290 F.3d at 1051 n.6) (finding multiplier
19 was between 1.0 and 4.0 in approximately 83 percent of the cases surveyed).

20 Class Counsel’s fee request of \$1,083,333.33, when divided by Class
21 Counsel’s \$1,403,218.00 lodestar, results in a “negative multiplier” of 0.77. *See In*
22 *re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F.3d
23 602, 607 (9th Cir. 1997) (comparing the lodestar fee to the percentage fee is an
24 appropriate measure of a percentage fee’s reasonableness). Accordingly, a multiplier
25 below 1.0, like here, strongly supports the reasonableness of the request and justifies
26 a departure from the 25% benchmark. *See, e.g., Carter*, 2018 U.S. Dist. LEXIS

1 33834, at *29 (C.D. Cal. Feb. 28, 2018) (“an award is probably reasonable if it is
2 below the lodestar”) (citations omitted); *In re Flag Telecom Holdings, Ltd. Sec.*
3 *Litig.*, No. 02-CV-3400 (CM) (PED), 2010 U.S. Dist. LEXIS 119702, at *77
4 (S.D.N.Y. Nov. 8, 2010) (“Lead Counsel’s request for a percentage fee representing
5 a significant discount from their lodestar provides additional support for the
6 reasonableness of the fee request.”).

7 **IV. CLASS COUNSEL’S EXPENSES ARE REASONABLE AND SHOULD**
8 **BE REIMBURSED**

9 Attorneys who create a common fund or benefit for a class are entitled to be
10 reimbursed for their out-of-pocket expenses incurred in creating the fund or benefit,
11 so long as the submitted expenses are reasonable, necessary, and directly related to
12 the prosecution of the action. *See, e.g., In re OmniVision*, 559 F Supp. 2d at 1048
13 (“Attorneys may recover their reasonable expenses that would typically be billed to
14 paying clients in non-contingency matters.”).

15 Class Counsel have collectively incurred significant expenses in the
16 prosecution of this litigation in the total amount of \$152,744.79. *See Gonnelli Decl.*,
17 Ex. G. Much of these expenses were incurred by Plaintiffs’ experts. *See id.*, Ex. F.
18 These and other costs for, *inter alia*, experts, mediation, discovery and travel, are all
19 the type of expenses routinely charged to hourly paying clients, and should be
20 approved here. *See e.g., In re Toys R Us-Delaware, Inc. Fair and Accurate Credit*
21 *Transactions (FACTA) Litig.*, 295 F.R.D. 438, 469 (C.D. Cal. 2014) (“Expenses
22 such as reimbursement for travel, meals, lodging, photocopying, long-distance
23 telephone calls, computer legal research, postage, courier service, mediation,
24 exhibits, documents scanning, and visual equipment are typically recoverable.”)
25 (citation omitted).

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1 **V. THE REQUESTED SERVICE AWARDS ARE APPROPRIATE**

2 Service awards “are fairly typical in class action cases.” *Rodriguez v. W.*
3 *Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009); *see Toys R Us*, 295 F.R.D. at 470.
4 “Such awards are intended to ‘compensate class representatives for work done on
5 behalf of the class, to make up for financial or reputational risk undertaken in
6 bringing the action, and . . . , sometimes, to recognize their willingness to act as a
7 private attorney general.’” *Anderson v. Nextel Retail Stores, LLC*, No. CV 07-4480-
8 SVW (FFMx), 2010 U.S. Dist. LEXIS 71598, at *26-27 (C.D. Cal. June 30, 2010)
9 (quoting *In re Mego*, 213 F.3d at 463).

10 Class Counsel here seek Service Awards of \$15,000 each to the three Class
11 Representatives in this action, \$2,500 to Kirsten Bowers, the named Plaintiff in the
12 parallel *Bowers* action that was resolved as part of the Agreement, and \$500 each to
13 three members of the Settlement Class who made significant contributions to the
14 litigation, Breanna Kelly, Ashley Willey and Maegan Nelson. As required by the
15 Preliminary Approval Order, each of these individuals have submitted a detailed
16 sworn declaration providing “adequate proof for each representative, including
17 approximate time spent on the case.” ECF No. 255 at 15. *See Gonnelli Dec., Exs.*
18 *H-N.*

19 The Class Representatives here, Schmitt, Williams⁷ and Miller-Brun, were each
20 heavily involved in the litigation and spent considerable time, effort and
21 inconvenience fulfilling their responsibilities as class representatives. *See Gonnelli*
22 *Decl., Exs. H-J* (Schmitt - 80 hours; Williams - 65 hours; Miller-Brun – 56 hours).
23 Their work included, *inter alia*, responding to document requests and
24 interrogatories, traveling to Los Angeles for comprehensive depositions, as well as

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26 ⁷ Class Representative Deana Williams recently changed her name from Deana Reilly. *See*
27 *Gonnelli Decl., Ex. J, ¶ 2.* -22-

1 being intricately involved with almost every phase in the litigation, including
2 settlement. *See id.* In light of the Class Representatives’ significant efforts, as well
3 as the risks they took in bringing the action and the difficulties they endured, awards
4 of \$15,000 are reasonable and well-earned. *See, e.g., Edwards v. First Am. Corp.*,
5 No. CV 07-03796 SJO (FFMX), 2016 U.S. Dist. LEXIS 188791, at *1-2 (C.D. Cal.
6 Oct. 14, 2016) (\$15,000 service award in consumer class action); *Boyd v. Bank of*
7 *Am. Corp.*, No. SACV 13-0561-DOC (JPRx), 2014 U.S. Dist. LEXIS 162880, at
8 *20 (C.D. Cal. Nov. 18, 2014) (\$15,000 service award in FLSA action).

9 Plaintiff Bowers should receive a Service Award of \$2,500 in light of her
10 spending approximately 10 hours in pursuing the parallel *Bowers* action, including
11 by consulting with Class Counsel numerous times regarding the initial complaint,
12 litigation strategy and the Agreement. *See Gonnelli Decl.*, Ex. K, ¶ 4.

13 Settlement Class members Kelly, Willey and Nelson each seek a nominal
14 Service Award of \$500 each. As detailed in their declarations, each spent time
15 consulting with Class Counsel about bringing a potential class action on behalf of
16 others injured in their states, and each were prepared to do so when they were
17 included in the Agreement after consultation with Class Counsel. *See Gonnelli*
18 *Decl.*, Exs. L-N. They spent an average of three hours participating in this litigation,
19 and by entering into the Agreement with Defendant and providing a release of their
20 claims, they contributed to purchasers of the Products from their states being
21 included in the Settlement. *See Gonnelli Decl.*, ¶ 116; *id.*, Exs. L-N. Accordingly,
22 despite not being Class Representatives, they have provided sufficient assistance to
23 the Settlement Class to obtain a minimal Service Award of \$500. *See, e.g.,*
24 *Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 125 (S.D.N.Y. 2001) (class
25 members received \$1,500 incentive awards for, *inter alia*, “agreeing to represent the
26 various subclasses” and “by regular communications for more than two years

1 concerning the prosecution and settlement of the action.”) (internal quotations
2 omitted).

3 **VI. CONCLUSION**

4 For the foregoing reasons, Plaintiffs respectfully request that the Court enter
5 the concurrently filed proposed order granting Class Counsel (i) attorney’s fees of
6 one-third of the Settlement Fund; and (ii) reimbursement of \$152,744.79 in
7 expenses, as well as granting the requested Service Awards.

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