

THE HONORABLE RONALD B. LEIGHTON

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NICOLE and GUY MAEL, NADINE
VIGLIANO, BRITNEY MOREA, CAROL
CONWAY, ANGELA BERTUCCI and TINA
WIEPERT, on behalf of themselves and all
others similarly situated,

Plaintiffs,

vs.

EVANGER’S DOG AND CAT FOOD
CO., INC., NUTRIPACK, LLC, AGAINST THE
GRAIN PET FOODS, and SHER SERVICES
COMPANY INCORPORATED,

Defendants.

NO. 3:17-cv-05469-RBL

**PLAINTIFFS’ UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Note on Motion Calendar: 11/8/19

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I. INTRODUCTION

1
2 Plaintiffs Nicole and Guy Mael, Nadine Vigliano, Britney Morea, Carol Conway,
3 Angela Bertucci and Tina Wiefert allege that they paid a premium price for meat-based pet
4 foods based on Defendants' advertising of their pet foods as, "human grade," produced in
5 USDA-inspected facilities or with USDA-inspected meats, and "people food for pets."
6 Plaintiffs further allege that three of Defendants' products produced during the class period
7 were eventually recalled because they contained pentobarbital (the "Recalled Products") that
8 injured some of Plaintiffs' pets and caused the death of one. Defendants Evanger's Dog and Cat
9 Food Co., Inc. ("Evanger's"), Nutripack, L.L.C., Against the Grain Pet Foods, and Sher
10 Services, Co. deny all allegations in Plaintiffs' Second Amended Complaint.

11 After more than two years of hard-fought litigation, including significant discovery and
12 motions practice and mediation before Magistrate Judge Creatura, the Parties have reached an
13 agreement to settle the Action on behalf of Plaintiffs and a class of similarly situated
14 consumers. The Settlement¹ provides significant monetary and non-monetary relief to the
15 Class. Pursuant to its terms, Defendants agree to pay \$545,500 into a non-reversionary
16 Settlement Fund and to cease representing that their products are "People Food for Pets," cease
17 using the term "human grade," unless they comply with independent standards and guidelines
18 for use of the term, submit to additional testing on several specific pet food products, and verify
19 their compliance with FDA requirements regarding supplier and ingredient safety for the
20 products bought by Settlement Class Members.

21 The Settlement Fund will be used to pay Settlement Class Members who file claims
22 documenting veterinary expenses associated with symptoms of pentobarbital poisoning or
23 proof of purchase of the Recalled Products. Settlement Class Members with proof of purchase
24 of the Recalled Products can elect either 25% of the value of their purchases in cash, or 50% of

25 _____
26 ¹ Unless otherwise noted, all capitalized terms have the definitions set forth in the Settlement
27 Agreement, which is attached as Exhibit 1 to the Declaration of Jennifer Rust Murray ("Murray
Decl.") and is being filed contemporaneously herewith.

1 the value of those purchases in the form of a product certificate. Settlement Class Members
2 who do not have proof of their purchases may claim a product certificate for three cans of pet
3 food. The parties have identified approximately 3,845 Settlement Class Members who
4 purchased the Recalled Products from the business records of Defendants' and third-party
5 online retailers like Amazon.com and Chewy.com. The parties estimate that a total of
6 approximately 24,000 persons comprise the Settlement Class.

7 The Settlement Fund will also be used to pay attorneys' fees to Plaintiffs' counsel,
8 service awards to Plaintiffs, and settlement administration expenses approved by the Court.
9 Plaintiffs' counsel will request an award of attorneys' fees and expenses of up to \$295,000, and
10 each Plaintiff will request a service award of \$2,500. The proposed Settlement Administrator,
11 CPT Group, has agreed to cap its fees to administer the settlement at \$141,000 and the Parties
12 have agreed total Administration expenses will not exceed \$151,000.

13 The Settlement is an excellent result for Settlement Class Members, and is fair,
14 adequate, and reasonable. Accordingly, Plaintiffs respectfully request that the Court take the
15 following initial steps in the Settlement approval process: (1) provisionally certify the proposed
16 Settlement Class; (2) make a preliminary finding that the Court will be able to approve the
17 Settlement as fair, reasonable, and adequate; (3) approve the proposed Notice Plan and direct
18 that notice be provided to the Settlement Class Members; (4) appoint CPT Group to serve as
19 the Settlement Administrator; and (5) schedule the final Fairness Hearing and related dates.

20 II. BACKGROUND

21 A. Plaintiffs' complaint and background of the litigation.

22 After an investigation by their counsel, Plaintiffs Nicole and Guy Mael filed the initial
23 class action complaint in the Action in June 2017. Plaintiffs filed a First Amended Complaint a
24 few months later, and the operative Second Amended Complaint in April 2018 (Dkt. Nos. 20,
25 31). The Second Amended Complaint alleges that Defendants' meat-based pet food products
26 were advertised as "human grade," USDA inspected," and "People Food for Pets" when in fact
27

1 they were not. Dkt. No. 31 ¶ 9. Plaintiffs allege that pet owners paid a price premium for
2 Defendants' pet food based on these claims. *Id.* ¶¶ 11–33. Plaintiffs further allege that the
3 Recalled Products contained pentobarbital that was responsible for sickening several of
4 Plaintiffs' pets, and causing the death of one dog owned by Nicole and Guy Mael. *Id.* ¶¶ 15, 24,
5 26.

6 Defendants filed motions to dismiss both the First and Second Amended Complaints
7 (Dkt. Nos. 30, 39). The Court denied both motions. (Dkt. Nos. 28, 44.)

8 **B. The Parties engage in substantial discovery.**

9 In the months following the filing of the initial complaint, the parties engaged in
10 substantial discovery. Murray Decl., ¶ 11. The parties exchanged initial disclosures in
11 September 2017. *Id.* Plaintiffs then served interrogatories and requests for production of
12 documents, to which Defendants responded. *Id.* Through these discovery requests, Plaintiffs
13 obtained and analyzed extensive information, including sales data, ingredient lists, FDA
14 reports, product testing reports, communications with consumers, and inspection data for
15 Defendants' products and facilities. *Id.* ¶ 12. Overall, the parties exchanged approximately
16 40,000 pages of documents, which Plaintiffs' counsel used to evaluate the strength of the
17 claims and defenses in the Action. *Id.* ¶ 13. Plaintiffs responded to interrogatories and requests
18 for production propounded by Defendants. *Id.* ¶ 14.

19 **C. The settlement negotiations.**

20 The Parties participated in three mediation sessions with Magistrate Judge Creatura.
21 Murray Decl. ¶ 15. Judge Creatura has experience mediating complex cases, including those
22 involving consumer protection claims. *Id.* The Parties did not reach a settlement during
23 mediation, but continued arm's length negotiations with Judge Creatura's assistance. *Id.* The
24 Parties agreed to the terms of the Settlement on October 18, 2019, and fully executed the
25
26
27

1 Settlement Agreement on October 18, 2019. *Id.* ¶ 9, Ex. 1.² Plaintiffs and their counsel believe
 2 the Settlement is fair, adequate, reasonable, and in the Settlement Class’s best interest. *Id.* ¶ 16.

3 III. SETTLEMENT TERMS

4 The details of the Settlement are contained in the Settlement Agreement (*see* Murray
 5 Decl., Ex. 1), the terms of which are summarized below.

6 A. The proposed Settlement Class.

7 The proposed class definition for settlement purposes (the “Settlement Class”) is:

8 All persons in the United States who purchased (i) Evanger’s Hunk
 9 of Beef, (ii) Evanger’s Braised Beef, or (iii) Against the Grain Pulled
 10 Beef with Gravy between the dates of December 1, 2015 and June
 30, 2017.

11 Settlement Agreement § 1.33. The Settlement Class definition is narrower than the proposed
 12 class in the Second Amended Complaint in that it is limited to consumers who bought the Hand
 13 Packed Products during the time period that the Recalled Products were sold.³

14 B. Monetary relief.

15 Defendants will establish a Settlement Fund in the amount of \$545,500, which will be
 16 used to pay Settlement Class Members’ approved veterinary expenses, make cash payments to
 17 Settlement Class Members who purchased the Recalled Products and opt for a cash payment
 18 instead of a product certificate, and to pay settlement administration costs, and attorneys’ fees
 19 and litigation expenses, and service awards to Plaintiffs approved by the Court. Settlement
 20 Agreement § 2.2.

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 24 ² Before the mediation with Judge Creatura, the Parties participated in an unsuccessful in-
 person mediation with the Honorable Peter D. Lichtman (Ret.) on March 8, 2018.

25 ³ The “Hand Packed Products” are (i) Evanger’s Hunk of Beef, (ii) Evanger’s Braised Beef,
 26 and (iii) Against the Grain Pulled Beef with Gravy. Settlement Agreement at § 1.16. The
 27 “Recalled Products” are defined as the approximately 106,712 cases of these products that were
 recalled in February and March of 2017 but never returned to Evanger’s. *Id.* at 1.28.

1 1. Payments to Settlement Class Members for veterinary expenses.

2 Settlement Class Members whose pets got sick after eating the Recalled Products may
3 submit a claim for out-of-pocket veterinary expenses incurred as a result. To receive an award
4 for veterinary expenses, Settlement Class Members must submit to the Settlement
5 Administrator veterinary records indicating that their pet suffered an illness that was
6 symptomatic of pentobarbital poisoning. The claim for reimbursement will be reviewed and
7 either approved or disapproved by a veterinarian agreed upon by the parties using criteria
8 agreed upon by the parties. Settlement Agreement §§ 2.2(f), 2.4(a). The Settlement
9 Administrator shall allocate funds to pay the approved claims for veterinary expenses before
10 allocating funds to claims based on product purchase. *Id.* §§ 1.21, 2.4.

11 2. Payments to Settlement Class Members who purchased Recalled Products.

12 Using records produced by Defendants and third-party online retailers, the parties have
13 identified 3,845 Settlement Class Members who purchased Recalled Products online. Murray
14 Decl. ¶ 17. After settlement administration expenses, Court-awarded attorneys' fees and service
15 awards, and approved veterinary expenses have been paid, the remaining amount (the "Net
16 Payment Fund") will be used to compensate Settlement Class Members who file claims
17 supported by proof of purchase ("verified purchasers").⁴ Verified purchasers may elect to
18 receive a check in the amount of 25% of their purchases or a product certificate for 50% of
19 their purchase amount. Settlement Agreement §§ 2.2(d), (e), 2.3, 2.4(b). If any funds remain
20 after allocation to cash awards, they shall be distributed to verified purchasers proportionately,
21 based upon their purchases, until up to 100% of those purchases have been repaid. *Id.*
22 § 2.4(b)(ii). If all verified purchasers are fully repaid for their purchases, and there are still

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25 ⁴ Settlement Class Members whose purchases are reflected in the records of Defendants or
26 third-party retailers will be deemed verified purchasers, as will Settlement Class Members not
27 identified in the records who make claims supported by other proof of purchase such as a
receipt.

1 amounts in the Net Payment Fund, the remainder amounts shall be distributed in *cy pres* to the
2 North Shore Animal League America. *Id.* § 2.4(b)(iv).

3 Authorized Claimants who have no proof of purchase of the Recalled Products, and for
4 whom the parties are unable to locate any purchase records, will receive a certificate that may
5 be redeemed for three cans of Evanger's or Against the Grain product from a retailer that
6 currently sells these products. *Id.* § 2.3(b).

7 3. Settlement administration fees and costs.

8 The Settlement Agreement provides that any settlement administration fees and costs
9 will be paid from the Settlement Fund. Settlement Agreement § 2.8. After a competitive bid
10 process, Plaintiffs' counsel propose to retain CPT Group as the Settlement Administrator,
11 subject to Court approval. CPT Group has estimated its costs to carry out the Notice Plan at
12 \$141,000, and has agreed to cap its fee at that amount. Murray Decl. ¶ 19; *see also* Declaration
13 of Julie Green ("Green Decl.") ¶ 30. The remaining money in the administration budget of
14 \$150,000 will be used to administer veterinary expense claims. Settlement Agreement § 1.7.

15 4. Requested service awards.

16 Plaintiffs Nicole Mael, Guy Mael, Nadine Vigliano, Britney Morea, Angela Bertucci,
17 and Tina Wiefert⁵ will request that the Court approve service awards of \$2,500 to each of
18 them. Plaintiffs request a total of \$15,000 be paid from the Settlement Fund in service awards.
19 Plaintiffs assisted in drafting the complaints, responded to written discovery, and produced
20 documents as necessary. Murray Decl. ¶ 14. In addition, plaintiff Nicole Mael assisted
21 Plaintiffs' counsel in the defense of the counterclaim against her. *Id.* Both Nicole and Guy
22 Mael attended the first mediation with Judge Creatura. *Id.*

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26 ⁵ Plaintiff Carol Conway did not purchase any of the Recalled Products. As a result, she is not a
27 member of the proposed Settlement Class and does not seek to represent the proposed
Settlement Class. Ms. Conway has separately resolved her claims against Defendants.

1 5. Attorneys' fees and litigation expenses.

2 Plaintiffs' counsel will request that the Court approve a combined award of attorneys'
3 fees and litigation expenses of up to \$295,000. Plaintiffs' counsel's current lodestar is at least
4 \$850,000, and Plaintiffs' counsel have incurred more than \$35,682 in out-of-pocket costs in
5 prosecuting this action. Murray Decl. ¶ 21. In accordance with *In re Mercury Interactive Corp.*
6 *Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010), Plaintiffs' counsel will file their motion at least
7 thirty days before the deadline for Settlement Class Members to object to or exclude
8 themselves from the Settlement. The motion will be posted to the Settlement Website within
9 twenty-four (24) hours after filing. Settlement Agreement § 5.2(a).

10 **C. Prospective Relief.**

11 Defendants have also agreed to significant non-monetary relief, designed to protect all
12 Settlement Class Members and remediate the alleged false and misleading advertising cited in
13 the Action. Under the Settlement Agreement Defendants (i) will only use the term "human
14 grade" in their advertising if they comply with the voluntary criteria established by the
15 Association of American Feed Control Officials ("AAFCO"); (ii) will no longer use the phrase
16 "people food for pets"; (iii) will no longer produce videos showing people eating their pet
17 foods; (iv) will inform their retailers by letter of this Settlement and these advertising
18 restrictions; (v) will provide Plaintiffs' counsel with a letter confirming compliance with all
19 FDA requirements regarding supplier and ingredient safety for any of their Hand Packed
20 Products; and (vi) will subject their Hand Packed Products to random independent third-party
21 testing, at their own expense of up to \$5,000 per year, every three months for the next two
22 years. Settlement Agreement § 2.1. One month after the Final Settlement Date, Defendants will
23 also file a verification with the Court affirming their compliance with these and other
24 Settlement terms. *Id.* § 2.1(f).

1 **D. Release.**

2 The release is appropriately tailored to the claims made in the Action. In exchange for
3 the benefits provided by the Settlement, Settlement Class Members will release any legal
4 claims that may arise from or relate to the advertising, marketing, promotion, sale, redemption
5 or use of the Recalled Products. Settlement Agreement §§ 1.29, 1.30, 3.1. The Released Claims
6 do not include any claims for money damages by Settlement Class Members (or other
7 consumers) relating to the purchase of products other than the Recalled Products. *Id.*

8 **E. Notice Plan.**

9 CPT Group shall provide the notice required by the Class Action Fairness Act.
10 Settlement Agreement § 5.3; *see also generally* Green Decl. CPT Group will send mail and
11 email notices substantially in the form of Exhibits A and B to Settlement Class Members
12 reflected in the records of Defendants and retailers. Settlement Agreement §§ 5.1, 5.2; Green
13 Decl. ¶¶ 15–17. Amazon.com and Chewy.com shall separately send email notice substantially
14 in the form of Exhibits H and I, to Settlement Class Members who bought the Recalled
15 Products through their websites. Amazon.com and Chewy.com will send these notices at their
16 own cost. Settlement Agreement § 5.2(b). While the email notices Amazon.com and
17 Chewy.com will send contain fewer details about the settlement, they direct Settlement Class
18 Members to the Settlement Website for more information. CPT Group will establish and
19 maintain a Settlement Website and will implement an online media notice effort using ads
20 substantially in the form of Exhibit E in order to provide notice to Settlement Class Members
21 who cannot be identified from available records. Settlement Agreement § 5.2(d); Green Decl.
22 ¶¶ 18–19, 21 & Ex. B. A recording of the long-form notice will also be available by a calling a
23 toll-free number maintained by CPT Group. Settlement Agreement § 5.2(e); Green Decl. ¶ 20.
24 CPT Group will also be responsible for processing, logging, and reviewing claim forms and
25 exclusion requests for deficiencies; addressing deficiencies and providing Settlement Class
26 Members with an opportunity to cure; administering the Settlement Fund, disbursing the
27

1 attorneys' fee award and service awards, and distributing the Settlement Fund to Settlement
2 Class Members. Settlement Agreement §§ 6, 9; Green Decl. ¶¶ 23–29.

3 IV. ARGUMENT AND AUTHORITY

4 Under Rule 23(e)(1), a district court should direct notice of a proposed settlement to the
5 class members who would be bound by it only if the parties show that the court will likely be
6 able to approve the proposed settlement and certify the class for purposes of judgment. Fed. R.
7 Civ. P. 23(e)(1). “This decision has been called ‘preliminary approval’ of the proposed class
8 certification in Rule 23(b)(3) actions.” Fed. R. Civ. P. 23 advisory committee’s note on 2018
9 Amendment. Notice of the proposed settlement to the class members who would be bound is
10 warranted here.

11 A. The Court will be able to certify the Settlement Class.

12 A class should be certified when the Rule 23(a) requirements of numerosity,
13 commonality, typicality and adequacy, and one of the requirements of Rule 23(b) are satisfied.
14 Fed. R. Civ. P. 23; *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019)
15 (“*Hyundai*”). In the settlement context, a court can protect the rights of absent class members
16 by “blocking unwarranted or overbroad class definitions,” *Hyundai* 926 F.3d at 557 (quoting
17 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). Here the proposed Settlement
18 Class and release are appropriately limited to claims arising out of purchase of the Recalled
19 Products, rather than claims arising from purchase of other products sold by Defendants.
20 Consumers who bought Recalled Products, which were found to contain pentobarbital, have
21 stronger claims than consumers who bought other products and limiting the class avoids
22 dilution of their claims.

23 1. The Settlement Class satisfies the requirements of Rule 23(a).

24 Evidence that a proposed class has at least 40 members is sufficient to show joinder is
25 impracticable and the numerosity requirement is met. *Dunakin v. Quigley*, 99 F. Supp. 3d 1297,
26 1327 (W.D. Wash. 2015). The parties have identified 3,845 Settlement Class Members from
27

1 the records of Defendants and online retailers like Amazon.com and Chewy.com. Murray Decl.
 2 ¶ 17. The proposed Settlement Class is comprised of the purchasers of 106,712 cases of
 3 Recalled Products that were not returned to Evanger's. Settlement Agreement § 1.28. There are
 4 an estimated 24,000 Settlement Class Members. Murray Decl. ¶ 18 (Chewy.com sold about
 5 10% of all Recalled Products sold to approximately 2,377 people). Numerosity is satisfied.

6 The commonality requirement under Rule 23(a)(2) requires that class members' claims
 7 "depend upon a common contention," of such a nature that "determination of its truth or falsity
 8 will resolve an issue that is central to the validity of each [claim] in one stroke." *Wal-Mart*
 9 *Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Commonality can be satisfied by "a single
 10 *significant* question of law or fact." *Abdullah v. U.S. Sec. Assoc., Inc.*, 731 F.3d 952, 957 (9th
 11 Cir. 2013) (citation omitted). The determinative common question in this case is whether
 12 Defendants' marketing of the Recalled Products was deceptive or misleading. Under
 13 Washington's Consumer Protection Act, an act or practice "is deceptive if it is likely to mislead
 14 a reasonable consumer. Such an act satisfies the first element if it has the capacity to deceive a
 15 substantial portion of the public." *State v. Mandatory Poster Agency, Inc.*, 199 Wash. App. 506,
 16 512, 398 P.3d 1271, 1274 (2017).⁶ This is an objective inquiry based on a "reasonable
 17 consumer" standard. And whether an act or practice is unfair or deceptive is a question of law.
 18 *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009). Whether
 19 Defendants' advertising and labeling of its pet foods was deceptive is therefore a question that
 20 would be answered the same way for the entire Settlement Class.

21
 22
 23 ⁶ The Court is "free to apply the substantive law of a single state to the entire class" in a
 24 multistate class action, "[s]ubject to constitutional limitations and the forum state's choice-of-
 25 law rules." *Hyundai*, 926 F.3d at 561. Washington courts apply Washington substantive law
 26 "unless a conflict of law is presented to the court." *DP Aviation v. Smiths Indus. Aerospace &*
 27 *Defense Sys. LTD*, 268 F.3d 829, 845 (9th Cir. 2001). Because no party has presented a conflict
 of law to the Court, the Court is free to apply Washington law to the nationwide Settlement
 Class. *See Hyundai*, 926 F.3d at 563 (affirming final approval of settlement where district court
 applied California law to nationwide class).

1 Typicality is satisfied because Plaintiffs’ claims are “reasonably coextensive with those
2 of the absent class members.” *See* Fed. R. Civ. P. 23(a)(3); *Hansen v. Ticket Track, Inc.*, 213
3 F.R.D. 412, 415 (W.D. Wash. 2003). Here, Plaintiffs and Settlement Class members all
4 purchased the same pet food products that were advertised and promoted the same way. Further
5 all the Recalled Products purchased by the Settlement class were recalled after testing positive
6 for pentobarbital. Because the Settlement Class’s claims all arise from the same conduct,
7 typicality is satisfied.

8 Finally, the adequacy requirement is satisfied when the class representatives will “fairly
9 and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). To make this
10 determination, “courts must resolve two questions: ‘(1) do the named plaintiffs and their
11 counsel have any conflicts of interest with other class members and (2) will the named
12 plaintiffs and their counsel prosecute the action vigorously on behalf of the class?’” *Hyundai*,
13 926 F.3d at 566 (citation omitted). Plaintiffs are devoted pet owners who purchased the
14 Recalled Products and whose interests are aligned with those of the Settlement Class. Murray
15 Decl. ¶¶ 20. They have actively participated in the case, including by consulting with counsel,
16 reviewing the complaints, and responding to written discovery requests including
17 interrogatories, requests for production, and requests for admission.

18 In appointing class counsel, the court considers the work counsel has done to prosecute
19 the action, counsel’s experience handling class actions and knowledge of the applicable law,
20 and the resources counsel will devote to the action. Fed. R. Civ. P. 23(g). Plaintiffs’ counsel are
21 well-qualified to serve as class counsel. They are experienced class action litigators with
22 knowledge of the law governing consumer protection and false labeling claims. Murray Decl.
23 ¶ 22; Declaration of Jessica J. Sleater (“Sleater Decl.”) ¶¶ 6-10. Plaintiffs’ counsel have
24 diligently litigated this case for two years and prevailed on key motions. They have already
25 invested over 1,800 hours and tens of thousands of dollars into the case. *Id.* ¶¶ 21; Sleater Decl.
26 ¶ 13.

1 2. The Settlement Class satisfies the requirements of Rule 23(b)(3).

2 Class certification is appropriate under Rule 23(b)(3) when “questions of law or fact
3 common to the members of the class predominate over any question affecting only individual
4 members, and ... a class action is superior to other available methods for the fair and efficient
5 adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3).

6 Predominance is “‘readily met’ in cases alleging consumer fraud.” *Id.* at 559 (quoting
7 *Amchem*, 521 U.S. at 625)). “In many consumer fraud cases, the crux of each consumer’s claim
8 is that a company’s mass marketing efforts, common to all consumers, misrepresented the
9 company’s product—here, [the quality of Defendants’ pet food].” *Id.* “When
10 misrepresentations are made as part of a nationwide, concerted marketing effort, it makes no
11 difference to the predominance analysis whether consumers encounter them in different
12 guises.” *Id.* at 560; *see also Schneider v. Chipotle Mexican Grill, Inc.*, 328 F.R.D. 520, 539
13 (N.D. Cal 2018) (“In cases alleging misrepresentations, common issues predominate when
14 plaintiffs are exposed to a common set of misrepresentations about the product.” (internal
15 quotation marks omitted)). Here, Defendants engaged in a nationwide marketing campaign
16 through the use of both brick and mortar retailers and national online retailers like
17 Amazon.com and Chewy.com and made the alleged misrepresentations in marketing materials
18 displayed with the products. Predominance is satisfied by the common and determinative
19 questions about the truth of Evanger’s claims that its products are “People Food for Pets” or
20 made from “human-grade USDA inspected meats.” A closely related common and predominant
21 question is whether Settlement Class members paid more for Defendants’ pet foods than they
22 would otherwise have paid for pet food as a result of Defendants’ claims.

23 Superiority is also satisfied because resolution of thousands of the relatively small-value
24 claims in this one action is far preferable to a multitude of individual lawsuits and promotes
25 consistency and efficiency of adjudication. *See Fed. R. Civ. P. 23(b)(3); Local Joint Exec. Bd.*
26 *of Culinary/ Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir.
27

1 2001) (cases involving “multiple claims for relatively small individual sums” are particularly
2 well suited to class treatment); *see also Schneider*, 328 F.R.D. at 541 (finding superiority
3 satisfied in case where consumers challenged misrepresentations about quality of food). Any
4 choice of law questions that could create manageability issues for a litigation class do not
5 preclude certification of a settlement class. *See Hyundai*, 926 F.3d at 563 (prospect of having to
6 apply laws of dozens of jurisdictions presents trial manageability problem, which need not be
7 considered in settlement cases).

8 **B. The Court will be able to approve the Settlement as fair, adequate, and reasonable.**

9 The court’s role at the preliminary approval stage is to ensure that “the agreement is not
10 the product of fraud or overreaching by, or collusion between, the negotiating parties, and that
11 the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Hanlon v.*
12 *Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (citation omitted); *see also In re Online*
13 *DVD-Rental Antitrust Litig.*, 779 F.3d 934, 944 (9th Cir. 2015).

14 Under Rule 23(e)(2), a district court considers whether (A) the class representatives and
15 their counsel have adequately represented the class; (B) the proposal was negotiated at arm’s
16 length; (C) the relief provided by the settlement is adequate, taking into account: (i) the costs,
17 risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing
18 relief including the method of processing class-member claims, if required; (iii) the terms of
19 any proposed award of attorneys’ fees, including timing of payment; and (iv) any agreement
20 required to be identified under Rule 23(e)(3) made in connection with the proposed settlement;
21 and (D) the proposal treats class members equitably relative to each other. Fed. R. Civ. P.
22 23(e)(2).

23 These factors are similar to those previously identified by the Ninth Circuit, including:
24 (1) the strength of plaintiffs’ case; (2) the risk, expense, complexity, and likely duration of
25 further litigation; (3) the risk of maintaining class action status through trial; (4) the amount
26 offered in settlement; (5) the extent of discovery completed and the stage of the proceedings;

1 (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8)
2 the reaction of the class members to the proposed settlement. *See In re Bluetooth Headset*
3 *Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (quoting *Churchill Village, LLC v. Gen.*
4 *Elec.*, 362 F.3d 566, 575 (9th Cir. 2004)).

- 5 1. Plaintiffs and their counsel have adequately represented the settlement class.
6 They were well informed of the strengths and weaknesses of the claims and
7 defenses and support the Settlement.

8 As discussed above, Plaintiffs have taken an active role in prosecuting this action and
9 their counsel are experienced class action litigators who have already invested significant time
10 and money into the case. Murray Decl. ¶¶ 10–22; Sleater Decl. ¶¶ 6–16.

11 “A key inquiry is whether the parties had enough information to make an informed
12 decision about the strength of their cases and the wisdom of settlement.” *Rinky Dink, Inc. v.*
13 *World Business Lenders*, Case No. C14-0268-JCC, 2016 WL 3087073, at *3 (W.D. Wash. May
14 31, 2016); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). The
15 Parties have been engaged in this litigation for over two years and have sufficient information
16 to make an informed decision with respect to the Settlement. Murray Decl. ¶¶ 11–15. Among
17 other things, the Parties have litigated Defendants’ motions to dismiss, the merits of
18 Defendants’ counterclaim (which the Court dismissed) and exchanged extensive written
19 discovery. The parties have exchanged thousands of pages of documents, which Plaintiffs’
20 counsel have reviewed and analyzed. *Id.* ¶¶ 13–14. Plaintiffs have engaged in sufficient
21 discovery to assess the strength of their claims, the amount of damages incurred by the
22 Settlement Class, the financial assets available to Defendants, and the risks of continued
23 litigation.

- 24 2. The Settlement is the result of arm’s-length, non-collusive negotiations.

25 The parties negotiated the Settlement at arm’s length over the course of numerous
26 sessions involving two different mediators. “Arm’s length negotiations conducted by
27 competent counsel constitute *prima facie* evidence of fair settlements.” *Ikuseghan v. Multicare*

1 *Health Sys.*, No. 3:14-cv-05539-BHS, 2016 WL 3976569, *3 (W.D. Wash. July 25, 2016); *see*
2 *also Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 852 (1999) (“[O]ne may take a settlement
3 amount as good evidence of the maximum available if one can assume that parties of equal
4 knowledge and negotiating skill agreed upon the figure through arms-length bargaining.”); *In*
5 *re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 227 F.R.D. 553, 567 (W.D. Wash. 2004)
6 (approving settlement entered into in good faith, following arm’s-length and non-collusive
7 negotiations). The arm’s-length negotiations that resulted in the Settlement were conducted
8 with the assistance of a member of this Court. The parties participated in two half-day
9 mediations with Judge Creatura, who also facilitated ongoing negotiations after the in-person
10 mediations.

11 Plaintiffs’ counsel negotiated the Settlement with the benefit of many years of prior
12 experience and a solid understanding of the facts and law of this case. Murray Decl. ¶¶ 10–22.
13 Plaintiffs’ counsel have extensive experience litigating and settling class actions, and consumer
14 class actions in particular (Murray Decl. ¶ 22; Sleater Decl. ¶¶ 6–10) and believe the Settlement
15 is fair, reasonable, adequate, and in the best interest of the Settlement Class as a whole (Murray
16 Decl. ¶ 16; Sleater Decl. ¶ 16). The recommendation of experienced counsel weighs in favor of
17 granting approval and creates a presumption of reasonableness. *See Bellinghausen v. Tractor*
18 *Supply Co.*, 306 F.R.D. 245, 257 (N.D. Cal. 2015) (“The trial court is entitled to, and should,
19 rely upon the judgment of experienced counsel for the parties.” (citation omitted)).

20 The Ninth Circuit has identified “red flags” that may suggest that counsel for plaintiffs
21 in a case allowed pursuit of their own self-interest to infect settlement negotiations, including
22 when counsel receive a disproportionate portion of the settlement, the parties agree to a “clear
23 sailing” arrangement providing for the payment of attorneys’ fees separate and apart from class
24 funds, or the parties agree that any fees not awarded will revert to defendants rather than be
25 added to the class fund. *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d at 569. None is
26 present in this Settlement. Because Plaintiffs’ counsel will be paid from the same Settlement
27

1 Fund as Settlement Class Members, they were incentivized to negotiate the largest fund
2 possible. And Defendants are free to oppose Plaintiffs' counsel's fee request. Settlement
3 Agreement § 2.6. The Court will, of course, have ultimate discretion over the amount of the
4 attorneys' fee award after reviewing Plaintiffs' counsel's motion. Any requested fees or service
5 awards to not approved by the Court will be distributed to Settlement Class Members. *Id.* § 2.7.

6 3. The relief provided by the Settlement is adequate considering the strength of
7 Plaintiffs' case, the risk of maintaining a class action through trial, and the risk,
8 cost, and delay of trial and appeal.

9 Defendants' agreement to pay \$545,500 *and* make significant changes to their business
10 practices, including ceasing to make the representations Plaintiffs allege are misleading,
11 confers a significant benefit on the class. The relief is adequate given the risks and delay of
12 continued litigation. The monetary benefits of the Settlement alone are significant. After
13 approved veterinary expenses are paid, Settlement Class Members may select a cash payment
14 of 25% of their total purchases. Settlement Agreement at § 2.4(b)(i). Given Plaintiffs' theory
15 that the Settlement Class Members paid a premium for pet food based on Defendants'
16 misrepresentations, recovery of a quarter of the purchase price paid, a hefty premium, is an
17 excellent result. And depending on the number of Authorized Claims, Claimants may receive
18 more than 25% of what they paid for the Recalled Products. Any Settlement Class Members
19 who may have a claim for a full refund based on evidence that the Recalled Products sickened
20 their pets can obtain additional compensation for incurred veterinary expenses.

21 Plaintiffs are confident in the strength of their case but also pragmatic about the risks
22 inherent in litigation and various defenses available to Defendants. Plaintiffs still had several
23 hurdles to clear before resolution through further litigation, including additional discovery,
24 class certification, dispositive motions likely to be filed by both parties, and ultimately trial and
25 any appeal that followed. Plaintiffs also recognize that class certification is never certain. For
26 example, Defendants likely would have argued that applying the law of multiple jurisdictions
27 would have created manageability problems and precluded certification of a nationwide

1 litigation class. This is not a concern in the settlement context. *See Hyundai*, 926 F.3d at 563.
2 And even if certification were granted, Defendants could move to decertify or appeal after trial.
3 Plaintiffs therefore faced the ongoing risk that individual Settlement Class Members would
4 have to file their own lawsuits or that payouts on any class-wide recovery would be
5 substantially delayed by appeals.

6 Plaintiffs anticipate that Defendants would have challenged their experts under *Daubert*
7 *v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Defendants would also have
8 argued that Plaintiffs could not prove a causal link between the illnesses of pets and
9 consumption of Defendants' products. And further costly expert work remained to be done,
10 including expert analysis showing the price premium paid as a result of Defendants' alleged
11 misrepresentations. Numerous courts have excluded experts offering opinions on the price
12 impact of alleged product mislabeling statements. *See, e.g., Brazil v. Dole Packaged Foods,*
13 *LLC*, No. 12-CV-01831-LHK, 2014 WL 5794873, at *8–13 (N.D. Cal. Nov. 6, 2014)
14 (decertifying class based on expert's failure to "sufficiently isolate the price impact" of
15 challenged statements on product labels).

16 While continued litigation would be expensive and time-consuming and would present
17 risk to both parties, the Settlement provides prompt and certain relief for Settlement Class
18 Members. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009); *Nat'l Rural*
19 *Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) ("The Court shall
20 consider the vagaries of litigation and compare the significance of immediate recovery by way
21 of the compromise to the mere possibility of relief in the future, after protracted and expensive
22 litigation." (citation omitted)). The possibility that Settlement Class Members could end up
23 recovering nothing at all was significant enough to convince Plaintiffs and Plaintiffs' counsel
24 that the Settlement outweighs the gamble and expense of further litigation.

1 4. The Settlement benefits will be fairly distributed to Settlement Class Members.

2 The Settlement structure mirrors structures approved as fair and reasonable in prior food
3 mislabeling cases. *See, e.g., Retta v. Millennium Prods., Inc.*, No. CV15-1801, 2017 WL
4 5479637 (C.D. Cal. Aug. 22, 2017). The *Retta* plaintiffs alleged that the defendant’s kombucha
5 tea labels used the term “antioxidant” when they contained none, were labeled as “non-
6 alcoholic” when they contained alcohol in excess of the amount permitted for non-alcoholic
7 beverages, and understated the amount of sugar in the drinks. *Id.* at *1. The court granted final
8 approval of a settlement that required defendant to cease making certain representations on its
9 product labels and add warnings to the labels, and provided a settlement fund from which class
10 members could claim differing amounts in either cash or product vouchers based on whether
11 they could provide proof of purchase. *Id.* at *2. The structure of the settlement here is similar
12 and should also be approved.

13 All Settlement Class Members were exposed to Defendants’ misleading marketing
14 statements and suffered harm when they paid a premium price for pet food based as a result. As
15 a result, all Settlement Class Members are eligible to claim either a cash award or a product
16 certificate. With respect to purchases, Settlement Class Members who have proof of purchase
17 (either in their own records or the records of Defendants or online retailers) have stronger
18 claims, as an evidentiary matter, than consumers who do not have proof of purchase. It is
19 therefore fair and reasonable to provide product certificates for three free cans of pet food to
20 class members without proof of purchase. *See In re Volkswagen “Clean Diesel” Mktg., Sales*
21 *Practices, & Prods. Liab. Litig.*, 895 F.3d 597, 607–609 (9th Cir. 2018) (affirming certification
22 of settlement class and final approval of settlement where settlement class members with
23 weaker claims likely benefitted from inclusion in a class with members who had stronger
24 claims); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 225 (N.D. Ill. 2015) (When some
25 class members have stronger claims than others, it is appropriate to provide larger settlement
26 awards to those class members.). Similarly, any Settlement Class Members whose pets may
27

1 have required veterinary care experienced additional damages as a result of Defendants' failure
2 to honor their marketing promises, and it is therefore fair and reasonable to allow them to claim
3 additional compensation from the Settlement Fund.

4 The Parties request that the Court approve distributions in *cy pres* of any unclaimed
5 amounts remaining in the Settlement Fund 120 days after issuance of the checks to the North
6 Shore Animal League America, www.animalleague.org. Settlement Agreement § 2.4(b)(iv),
7 9.4. No funds will revert to Defendants. *Id.* at 2.2(a). A “*cy pres* remedy must account for the
8 nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the
9 silent class members. . . .” *Lane v. Facebook, Inc.*, 696 F3d 811, 820-21 (9th Cir. 2012)
10 (quotations omitted). North Shore Animal League America satisfies these criteria because it
11 operates no-kill animal shelters across the country.

12 5. Plaintiffs' counsel will request approval of a reasonable fee and expenses.

13 Plaintiffs' counsel intend to request an award of up to \$295,000 to compensate them for
14 the work performed on behalf of the Settlement Class and reimburse them for out-of-pocket
15 expenses they have incurred in prosecuting this action. The attorneys' fees and expenses
16 requested are reasonable under the circumstances of this case. *Bluetooth*, 654 F.3d at 941
17 (requiring that any attorneys' fee awarded be reasonable). District courts have discretion to use
18 either the percentage-of-the-fund or the lodestar method to calculate a reasonable attorneys' fee
19 from a common fund established by a class action settlement. *Vizcaino v. Microsoft Corp.*, 290
20 F.3d 1043, 1047 (9th Cir. 2002).

21 Plaintiffs will request that the Court use the lodestar method to calculate a reasonable
22 fee in this case. Plaintiffs' counsel have already invested more than 1,861 hours into
23 prosecution of the case. Their lodestar, calculated at reasonable rates for this district, exceeds
24 \$850,000. Plaintiffs' counsel have incurred \$35,682 in out-of-pocket expenses. Murray Decl.

1 ¶ 21; Sleater Decl. ¶ 13. If Plaintiffs' counsel's anticipated fee request were approved, they
2 would be paid an effective rate of \$139 per hour for their work on the case.⁷

3 The Ninth Circuit uses 25% as the benchmark percentage of the fund award in common
4 fund cases. *Online DVD-Rental*, 779 F.3d at 949. But the Ninth Circuit has recognized that "the
5 benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special
6 circumstances indicate that the percentage recovery would be either too small or too large in
7 light of the hours devoted to the case or other relevant factors." *Six (6) Mexican Workers v.*
8 *Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). The requested award is
9 approximately 54% of the Settlement Fund, but less than 35% of Plaintiffs' counsel's
10 reasonable lodestar. The requested award is reasonable under the circumstances of this case.
11 *See, e.g., Cavnar v. BounceBack, Inc.*, No. 2:45-CV-235-RMP, ECF No. 154 (E.D. Wash. Sept.
12 15, 2015) (granting final approval of settlement and approving award equaling 43% of
13 "limited" total settlement fund of \$530,000, where award was significantly less than reasonable
14 lodestar).

15 Use of the lodestar method here is particularly reasonable given the significant non-
16 monetary aspects of Settlement. Using the percentage-of-the-fund method to calculate a fee in a
17 settlement that provides substantial injunctive relief, in addition to significant monetary relief,
18 is likely to result in a fee that is too low considering counsel's success on the merits. *See*
19 *Bluetooth*, 654 F.3d at 941 (the lodestar method should be used when class counsel obtain
20 significant injunctive relief under a fee shifting statute). Defendants have agreed to cease
21 making numerous representations that Plaintiffs allege are false and pay up to \$5,000 per year
22 for independent testing of their pet food to promote safety.

23 Under the Class Action Fairness Act, a court may not consider the value of
24 unredeemed "coupons" in calculating a reasonable fee using the percentage of the fund method.
25 28 U.S.C. § 1712(a). The statute calls for use of the lodestar method to calculate a reasonable

26 _____
27 ⁷ (\$295,000 award - \$35,682 in costs)/1,861 hours = 139.28 per hour.

1 fee when “a portion of the recovery of the coupons is not used to determine the attorney’s fee.”
2 28 U.S.C. § 1712(b). The product certificates available to the class likely qualify as coupons
3 under CAFA. *See In re EasySaver Rewards Litig.*, 906 F.3d 747, 755 (9th Cir. 2018) (listing
4 factors including whether class members have to pay to obtain a product using the credit,
5 whether it is valid only for select products or services, and the flexibility the credit provides).
6 However, here the value conferred by any product certificate awards is in addition to the
7 \$545,500 Settlement Fund. If the coupon settlement provisions of CAFA apply, they are
8 satisfied by Plaintiffs’ counsel’s request that the Court calculate a reasonable fee award using
9 the lodestar method. 28 U.S.C. § 1712(b)(1).

10 Plaintiffs’ counsel will prepare and file a comprehensive motion for an award of
11 attorneys’ fees supported by detailed time entry records within thirty days after the Court enters
12 a preliminary approval order in this matter. The motion will be posted on the Settlement
13 Website at least 30 days before the deadline for class members to opt-out of or object to the
14 settlement. Settlement Agreement § 5.2(a); *see also In re Mercury Interactive Corp. Sec.*
15 *Litig.*, 618 F.3d 988, 994 (9th Cir. 2010).

16 6. The reaction of Settlement Class Members to the proposed Settlement.

17 Settlement Class Members have not yet been notified of the proposed Settlement or had
18 an opportunity to react to it. Plaintiffs will address this factor in their motion for final approval
19 of the settlement.

20 **C. The Notice Plan complies with Rule 23 and due process.**

21 Rule 23(e)(1) requires the Court to “direct notice in a reasonable manner to all class
22 members who would be bound by” a proposed settlement. Fed. R. Civ. P. 23(e)(1). To comply
23 with due process, notice must be “the best notice practicable under the circumstances, including
24 individual notice to all members who can be identified through reasonable effort.” *Amchem*,
25 521 U.S. at 617. Under Rule 23(c)(2)(B) “notice may be by one or more of the following:
26 United States mail, electronic means, or other appropriate means.” The notice must state in
27

1 plain, easily understood language: (i) the nature of the action; (ii) the definition of the class
2 certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an
3 appearance through an attorney if the member so desires; (v) that the court will exclude from
4 the class any member who requests exclusion; (vi) the time and manner for requesting
5 exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).
6 Fed. R. Civ. P. 23(c)(2)(B); *see also Hyundai*, 926 F.3d at 567 (“settlement notices must
7 ‘present information about a proposed settlement neutrally, simply, and understandably’”)
8 (citation omitted).

9 The Settlement Agreement calls for a robust notice plan that includes direct mail or
10 email notice to Settlement Class Members who can be identified from the records of
11 Defendants or online retailers, and an online media campaign designed to reach unidentified
12 class members. The postcard notice, Email Notice, and Long Form Notice, attached to the
13 Settlement Agreement as Exhibits B, D, and E, are drafted in plain English so they will be easy
14 to understand. They include key information about the Settlement, including the deadline to
15 request exclusion or object to the Settlement, and the date of the Final Approval Hearing (and
16 that the hearing date may change without further notice). The notices state the amount of the
17 maximum amount of fees Plaintiffs’ counsel will request, the amount of service awards
18 Plaintiffs will request, and the maximum fees and costs that Plaintiffs will request for the
19 Settlement Administrator, and provide an estimate of the monetary benefit Settlement Class
20 Members will receive if they do not request exclusion. The notices disclose that, by
21 participating in the Settlement, Settlement Class Members give up the right to sue Defendants
22 for any legal claims that may arise from or relate to the facts and events that are the subject of
23 the Action. The notices direct Settlement Class Members to the Settlement Website for further
24 information, where copies of the notices, the claims form, the Settlement Agreement, the
25 Second Amended Complaint, the opt-out form, and motions and orders relating to the
26 Settlement will be posted. Settlement Agreement § 1.37, 5.2(a). The notices also provide
27

1 contact information for the Settlement Administrator to answer questions. The Online Notice
 2 and the email notices to be sent by third parties Amazon.com and Chewy.com, attached as
 3 Exhibits E, H, and I, contain more summary information but direct Settlement Class Members
 4 to the Settlement Website, which will include the complete Long Form Notice.

5 Settlement Class Members will have sixty (60) days from the Settlement Notice Date to
 6 file claims, opt out of the Settlement Class, or to submit objections. *Id.* § 1.31.

7 **D. The schedule for final approval.**

8 The next steps in the settlement approval process are to schedule a final approval
 9 hearing, notify Settlement Class Members of the Settlement and Fairness Hearing, and provide
 10 Settlement Class Members with the opportunity to exclude themselves from, or object to,
 11 Settlement. The parties propose the following schedule for final approval of the Settlement:

DEADLINE	EVENT
Ten business days after entry of this Order	Defendants make initial payment to Settlement Administrator
Thirty days after entry of this Order	Chewy.com to provide Settlement Administrator with spreadsheet listing Settlement Class Members who purchased products on Chewy.com and the total amount of those purchases.
Thirty days after entry of this Order	Amazon.com to provide Settlement Administrator with spreadsheet listing Settlement Class Members who purchased products on Amazon.com and the total amount of those purchases.
Thirty days after entry of this Order	Settlement Website is active
Sixty days after entry of this Order	Deadline to commence Notice Plan
Thirty days before the Exclusion/Objection deadline	Deadline for Plaintiffs' counsel to file motion for attorneys' fees, reimbursement of litigation costs, and for service awards

1 2	Sixty days after the Settlement Administrator commences Notice Plan	Deadline for Settlement Class Members to submit claims, exclusion requests, and objections
3 4	Thirty days after the deadline to submit claims, exclusion requests, and objections	Settlement Administrator completes review of claims.
5 6	Forty days after the Objection/Exclusion/Claim deadline	Deadline to file responses to objections, motion for final approval, Settlement Administrator declaration, and Amazon declaration
7 8	At the court's convenience but no earlier than 180 days after entry of this order	Final Approval Hearing

V. CONCLUSION

10 Plaintiffs respectfully request that the Court take the following initial steps in the
11 settlement approval process: (1) provisionally certify the Settlement Class; (2) grant
12 preliminary approval of the Settlement; (3) approve the proposed Notice Plan; (4) appoint CPT
13 Group to serve as the Settlement Administrator; and (5) schedule the final Fairness Hearing and
14 related dates.

15 RESPECTFULLY SUBMITTED AND DATED this 31st day of October, 2019.

16
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CERTIFICATE OF SERVICE

I, Jennifer Rust Murray, hereby certify that on October 18, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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