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the Proposed Class

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JENALE NIELSEN, individually and on behalf of others similarly situated,

Plaintiff,

vs.

WALT DISNEY PARKS AND RESORTS U.S., Inc., a Florida Corporation, and DOES 1 through 10, inclusive,

Defendants.

Case No.: 8:21-cv-02055-DOC-ADS

PLAINTIFF'S NOTICE OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Date: February 20, 2024
Time: 8:30 a.m.
Judge: Hon. David O. Carter
Court: 9D

NOTICE OF MOTION & MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

TO THE CLERK OF THE ABOVE-ENTITLED COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 20, 2024 at 8:30 a.m., or as soon thereafter as counsel may be heard, before the Honorable David O. Carter in Courtroom 9D located at 411 West Fourth Street, Santa Ana, California 92701, Plaintiff Jenale Nielsen will and does hereby move the Court for an order granting final approval of the Parties' class-wide Settlement Agreement pursuant to Rule 23(e) of the Federal Rule of Civil Procedure. In addition to the Memorandum in support of the Motion, this Motion is supported by the Settlement Agreement, the Declaration of Nickolas J. Hagman, the Declaration of Cameron R. Azari, and the proposed Final Judgment and Order. This Motion is also supported by the pleadings and papers on file in this matter, as well as upon such other matters to be filed, and that may be presented to the Court at the time of the hearing.

Dated: January 23, 2024

Respectfully submitted,

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CENTRAL DISTRICT OF CALIFORNIA

JENALE NIELSEN, individually and on behalf of others similarly situated,

Plaintiff,

vs.

WALT DISNEY PARKS AND RESORTS U.S., Inc., a Florida Corporation, and DOES 1 through 10, inclusive,

Defendants.

Case No.: 8:21-cv-02055-DOC-ADS

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Hearing Date: February 20, 2024
Time: 8:30 A.M.
Judge: Hon. David O. Carter
Courtroom: 9D

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I. INTRODUCTION

Plaintiff Jenale Nielsen ("Plaintiff") requests that this Court grant final approval of the class action settlement between her and Defendant Walt Disney Parks and Resorts U.S., Inc. ("WDPR" or "Disney"). Final approval is appropriate because, as the Court found in its preliminary approval Order, the Settlement is fair, reasonable, and adequate and secures substantial benefits to the Class, without the delay and risks associated with trial and potential appeals. (ECF No. 92.)

Under the Settlement, all Settlement Class Members who did not submit valid and timely Requests for Exclusion will automatically receive an equal payment of approximately $67.41 from the $9,500,000.00 Settlement Fund. Further, after the initial distribution of payments, if the amount remaining in the Settlement Fund (due to unredeemed checks) is greater than $10.00 per Settlement Class Member, each Settlement Class Member will receive a second *pro rata* payment.

Notice of the proposed Settlement was issued to the Settlement Class per the Court's Preliminary Approval Order and the notice program ensured that virtually all of the Settlement Class members received notice of the proposed settlement. (Supplemental Declaration of Cameron R. Azari on Implementation and Adequacy of Notice Plan ¶ 9 ("Suppl. Azari Decl.¶ __.")).[1] Specifically, notice was sent to 91,017 Settlement Class members by electronic mail. Notice was also sent to 13,741 Settlement Class members via regular mail. Supplemental Azari Decl.¶ 9-10. The reaction of the Settlement Class members to the proposed Settlement has been overwhelmingly positive. The objection and Request For Exclusion deadlines were January 15, 2024. As of that date, only four Settlement Class members requested to be excluded from the Settlement. **Not a single Settlement Class member objected to the Settlement**.

[1] Mr. Azari's Declaration On Implementation And Adequacy Of Notice Program was filed in support of Plaintiff's Motion For Attorneys' Fees, Costs, and A Service Award and can be found at ECF Doc. No. 93-4.

Given the Court's prior findings, the substantial relief provided to the Settlement Class, and the enthusiastic reception to the Settlement by the Settlement Class, the Settlement is fair, reasonable, and adequate. Plaintiff requests, therefore, that the Court now finally certify the Settlement Class for settlement purposes and finally approve the Settlement as fair, reasonable, and adequate.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff initiated this class-action lawsuit to recover damages on behalf of herself and all other purchasers of Disney's "Dream Key" pass. (Declaration of Nickolas J. Hagman In Support Of Motion For Final Approval ¶¶ 3-4 ("Hagman Decl.¶ __.")) In 2021, Disney introduced a new annual pass program and began selling four tiers of annual passes, collectively called "Magic Keys," that could be used for entry into Disney's California theme parks. *Id.* at ¶¶ 4-5. Unlike Disney's prior annual pass program, which did not require advance reservations to use, each Magic Key pass required pass holders to make an advance reservation to visit the parks. *Id.* Customers who purchased Magic Key passes were entitled to make reservations to enter the Disneyland and California Adventures theme parks without having to purchase tickets for a period of one year from when their Magic Key passes were first used. *Id.* The highest tier Magic Key pass sold in 2021 and was called the "Dream Key." Each Dream Key cost $1,399.00. Hagman Decl. ¶ 5. In her Complaint, Plaintiff alleged that Disney promised that Dream Keys would provide "reservation-based admission to one or both theme parks every day of the year," with "no blockout dates." Hagman Decl. ¶¶ 5-6.

Plaintiff purchased a Dream Key pass, believing that it entitled her to access the parks every day of the year so long as the parks were not at capacity and park reservations were available. Hagman Decl. ¶ 6; SAC ¶¶ 15-20. After purchasing her pass, Plaintiff learned that she was unable to use it to make a reservation on some days, even when the parks were not at capacity and general admission park

reservations were listed as available on Disney's website. *Id.* As she alleged in her Complaint, on numerous occasions, Plaintiff was unable to use her pass to make reservations because her desired dates were "unavailable," despite Disney's website listing plenty of availability for daily ticket reservations. *Id.*

The Complaint likewise alleged that other Dream Key purchasers claimed to have experienced similar issues with their Dream Keys, complaining that they were also unable to use their passes to secure reservations, even though reservations were available for regular tickets on those same days. SAC ¶¶ 31-37.

In November 2021, Plaintiff initiated this action against WDPR in Orange County Superior Court. Hagman Decl. ¶ 3. The case was then removed to this Court and, in April 2022, the Court denied, in part, WDPR's motion to dismiss. ECF No. 35; Hagman Decl. ¶ 7. Thereafter, Plaintiff filed her Second Amended Complaint, alleging violations of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, *et seq.*, and asserting claims for breach of contract and breach of the implied covenant of good faith and fair dealing. ECF No. 41.

The parties thereafter engaged in extensive fact and expert discovery. Hagman Decl. ¶¶ 13-16. Disney made comprehensive document productions, and the parties exchanged various expert reports regarding class certification. Hagman Decl. ¶¶ 14-22. The parties also took five depositions, including depositions of each party's expert witness. Hagman Decl. ¶¶ 16, 18, 21.

On April 24, 2023, Plaintiff moved for class certification. ECF No. 61. On May 31, 2023, WDPR opposed Plaintiff's class certification motion and simultaneously moved to exclude both Plaintiff's damage theory and her expert's testimony. ECF Nos. 67, 70. On July 7, 2023, Plaintiff replied in support of her motion for class certification, submitted a rebuttal expert report, and opposed WDPR's motion to exclude. ECF Nos. 72, 75. On July 14, 2023, WDPR filed its reply in support of its

motion to exclude and filed a motion to exclude the rebuttal report of Plaintiff's expert. ECF Nos. 82, 83.

On July 19, 2023, the parties participated in a full-day mediation session with the Honorable Jay C. Gandhi (Ret.), which resulted in a settlement agreement in principle. Hagman Decl. ¶¶ 16-27. Thereafter, the parties worked diligently and cooperatively to convert their agreement into the comprehensive Settlement Agreement currently before the Court. Hagman Decl. ¶ 28. The Settlement Agreement is attached to the Hagman Declaration as Exhibit 1.

On October 16, 2023, the Court granted preliminary approval of the proposed Settlement. (ECF No. 92.) As described in detail below, the Parties then implemented the Notice Program provided for in the Settlement Agreement and approved by the Court. Suppl. Azari Decl.¶¶ 9-16. In addition, on December 28, 2023, Plaintiff filed a *Motion For Attorneys' Fees, Costs, and a Service Award*. Plaintiff's Motion for fees and costs is set for hearing on February 20, 2024, which is the same day as the hearing on the instant motion.

III. THE SETTLEMENT TERMS

A. Proposed Settlement Class

The Settlement provides relief to the following proposed Settlement Class: "all Persons who purchased a Dream Key."[2] Agr. ¶ 1.33. The Dream Key pass was sold from August 15, 2021, to October 25, 2021. The Settlement Class consists of 103,435 individual passholders. Hagman Decl. ¶ 14.

B. Settlement Benefits – Monetary Relief

The proposed Settlement provides that Disney shall pay $9,500,000.00 into a non-reversionary Settlement Fund that will be used to pay awards to Settlement Class

[2] Excluded from the proposed Class are (1) Disney, or any entity or division in which Disney has a controlling interest, and its legal representatives, offices, directors, assigns, and successors; (2) the judge to whom this case is assigned and the Judge's immediate family and staff; and (3) governmental entities. Agr. ¶ 1.33.

members, as well as Court-approved attorneys' fees and costs, an incentive award to Plaintiff, and all costs and fees for Settlement notice and claims administration. Agr. ¶ 1.35. Each Settlement Class member will receive an equal portion of the Settlement Fund, after deductions for Court-approved attorneys' fees and costs, a service award to Plaintiff, and costs of notice and claims administration. Agr. ¶ 1.35, ¶ 1.4, ¶ 2.2. Settlement Class members are not required to submit a claim form in order to receive payment. Instead, the Settlement Administrator will simply mail checks to individual Settlement Class members. Agr. ¶ 2.3. During the notice period, Settlement Class members had the opportunity to request that payment be made electronically and / or to update their mailing addresses. Agr. ¶ 2.3. Approximately, 2,700 Class Members have opted to receive payments electronically. Payments to Settlement Class members will be made within sixty (60) days following the entry of final judgment and the resolution of all appeals, if any. Agr. ¶ 2.5. If the amount remaining in the Settlement Fund after the initial unredeemed checks expire exceeds $10.00 per Settlement Class Member who redeemed the initial payment, then each Settlement Class Member who redeemed his or her initial payment will receive a second, *pro rata* payment. Agr. ¶ 1.6.[3]

C. Class Notice and Settlement Administration

Notice has been provided to the Settlement Class by emailing the Court-Approved Email Notice (attached to the Azari Decl. as Exhibit 2) to the email address associated with each Settlement Class Members' purchase of their Dream Key. Agr. ¶ 4.1(b). Additionally, the Court-Approved Short Notice (attached to the Azari Decl. as Exhibit 3) was mailed to the postal addresses associated with the Settlement Class

[3] Following the expiration of unredeemed checks for the second round of payments to Settlement Class Members, or if there is an insufficient amount in the Settlement Fund after the initial round of payments to pay at least $10.00 to each Settlement Class Member, then the remaining money in the Settlement Fund will be distributed to a Cy Pres Designee approved by this Court. Agr. ¶ 2.6.

Members for whom Disney was not able to provide a valid email address, or for whom the email Notice bounced back to the Settlement Administrator. Agr. ¶ 4.1(c).

Email notice as described above was provided to 91,017 Settlement Class Members. Suppl. Azari Decl. ¶ 9. Postcard notice by regular mail was provided to 13,741 Settlement Class Members for whom Disney did not have email addresses and/or for Settlement Class Members whose email addresses were no longer valid. *Id.* This means that "[w]ith the address updating protocols that were used, the Notice Program individual notice efforts reach[ed] approximately 99% of the identified Settlement Class Members." Suppl. Azari Decl. ¶ 19.

In addition to providing direct, individual notice to Settlement Class Members, the Settlement Administrator also established a settlement website where copies of relevant filings (including the Settlement Agreement, Court-Approved Notice forms, the operative Second Amended Complaint, the motion for preliminary approval, the motion for attorneys' fees, and the Court's preliminary approval order) have been posted. Suppl. Azari Decl. ¶ 13. The website is located at: https://dreamkeysettlement.com. The website provides Settlement Class Members with answers to frequently asked questions and information regarding how to opt out of the Settlement or object. It also permits Settlement Class Members to update their mailing addresses and submit Requests for Exclusion. Agr. ¶ 4.1(d). The Settlement Administrator also established a toll-free telephone number (1-877-894-4029) which allows callers to hear an introductory message and learn more about the settlement in the form of recorded answers to FAQs. *Id.* at ¶ 14. Callers are also able to request claim packages using the toll-free number. The toll-free number was prominently displayed in all notice documents. The automated phone system is available 24 hours a day, 7 days a week. *Id.*

D. Requests For Exclusion and Objections

The Settlement Administrator received only four (4) Requests for Exclusion. Suppl. Azari Decl. ¶ 17. This means that, if the Court grants final approval, 99.99% of the Settlement Class will be bound by the Settlement. No Settlement Class member objected to the Settlement. Suffice it to say, the Settlement Class members overwhelmingly approved of the Settlement.

IV. LEGAL ARGUMENT

Plaintiff seeks final approval of the proposed Settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. Courts follow a three-step procedure for approval of class action settlements: (1) preliminary approval of the proposed settlement; (2) dissemination of court-approved notice; and (3) a final fairness hearing where class members may be heard regarding the settlement and at which time evidence may be presented regarding the settlement's fairness, adequacy, and reasonableness. *Manual for Complex Litig.* (Fourth) (2004) § 21.63.

The Court granted preliminary approval on October 16, 2023. As explained, notice has been disseminated to the Settlement Class in accordance with the Court's preliminary approval order. Suppl. Azari Decl. ¶¶ 9-12. The Court now can, and should, finally approve the Settlement. Federal courts strongly favor and encourage settlements, particularly in class actions where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit to the class. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting the "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned"); *Newberg on Class Actions* § 11.41 (4th ed. 2002) (citing cases).

Plaintiff seeks certification of a proposed Settlement Class of 103,435 individuals and consisting of: "All persons who purchased a Dream Key." Agr. ¶ 1.33. Dream Keys were on sale from August 15, 2021 to October 25, 2021. As

outlined below, because the class certification standards set forth in Rule 23(a) and (b)(3) are satisfied and the settlement is fair, reasonable, and adequate, the Court should certify the proposed Class for settlement purposes and finally approve the proposed Settlement.[4]

A. The Settlement Satisfies Rule 23(a).

The Court should first confirm its preliminary finding that the underlying Settlement Class meets the requirements of Rule 23(a). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Manual for Complex Litig.* (Fourth), § 21.632. The requirements are well known: numerosity, commonality, typicality, and adequacy. Each requirement has been met in this case. Fed. R. Civ. P. 23(a); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979–80 (9th Cir. 2011).

1. The Settlement Class is Sufficiently Numerous.

Courts find numerosity where there are so many class members as to make joinder impracticable. *See* Fed. R. Civ. P. 23(a)(1). Generally, courts will find numerosity is satisfied where a class includes at least 40 members. *MacRae v. HCR Manor Care Services, LLC*, 14-cv-00715, 2018 WL 8064088, at *4 (C.D. Cal. Dec. 10, 2018) (Carter J.). This Settlement Class of 103,435 individuals easily satisfies Rule 23's numerosity requirement. Joinder of the 103,435 individuals is clearly impracticable—thus the numerosity prong is satisfied.

2. The Settlement Class Satisfies the Commonality Requirement.

The Settlement Class also satisfies the commonality requirement, which is met where class members' claims "depend upon a common contention," of such a

[4] While WDPR agrees that the class ought to be certified for settlement purposes, it maintains that no class could be certified for litigation purposes, for the reasons set out in its class certification opposition and associated motion to exclude Plaintiff's damages theory and expert testimony (*see* Dkt. 67, 70), and expressly reserves its right to contest class certification in the event the settlement is not finally approved (*see* Agr. ¶¶ 10.4(c), 10.5).

nature that "determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *see Saenz v. Lowe's Home Centers, LLC*, No. 217CV08758ODWPLA, 2019 WL 1382968, at *3 (C.D. Cal. Mar. 27, 2019) (noting that the Ninth Circuit has held that "commonality only requires a significant question of law or fact"). "[T]he requirements for finding commonality are minimal." *Rigo Amavizca v. Nutra Mfg., LLC*, No. 820CV01324RGKMAA, 2021 WL 682113, at *6 (C.D. Cal. Jan. 27, 2021), *citing Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)).

Plaintiff's and Settlement Class members' claims arise out of Disney's uniform product, advertisements and representations, and policies and practices. Several core, common issues exist, including: (1) the meaning of the terms "subject to availability," "blockout dates," and/or "park reservations"; (2) whether Disney promised Dream Key purchasers that they would be able to make reservations if park reservations were available; (3) whether Disney prevented Dream Key passholders from making reservations when park reservations were available; (4) whether Disney interfered with Dream Key purchasers' ability to receive the benefit of the contracts; and (5) whether Dream Key passes are "goods or services" under the CLRA. Resolution of one, or all, of these common questions would affect all Class members.

Because resolution of one, or all, of the foregoing common questions would affect all Settlement Class members, Plaintiff has met the commonality requirement of Rule 23(a). *See, e.g.*, *Aikens v. Malcom Cisneros*, No. 5:17-CV-02462-JLS-SP, 2019 WL 3491928, at *4 (C.D. Cal. July 31, 2019); *Feller v. Transamerica Life Ins. Co.*, 2017 WL 6496803, at *7 (C.D. Cal. Dec. 11, 2017) (commonality satisfied for plaintiffs' breach of contract and implied covenant claims); *MacRae*, 2018 WL 8064088, at *5 (commonality satisfied for CLRA claims where "class members were

exposed to the same agreement and therefore allegedly experienced the same misrepresentation and concealment . . .").

3. Plaintiff's Claims and Defenses are Typical.

Plaintiff satisfies the typicality requirement because her claims are "reasonably coextensive with those of the absent class members." *See* Fed. R. Civ. P. 23(a)(3); *Meyer v Portfolio Recovery Assocs.*, 707 F.3d 1036, 1042 (9th Cir. 2012) (upholding typicality finding). Plaintiff alleges she purchased her Dream Key pass after having read and reviewed the same allegedly deceptive and misleading statements contained in Disney's Dream Key advertisements that were made available to all Settlement Class members who purchased Dream Key passes, which advertised that the passes provided access every day of the year without "blockout dates." *See Just Film, Inc. v. Buono*, 847 F.3d 1108, 1118 (9th Cir. 2017) ("[I]t is sufficient for typicality if the plaintiff endured a course of conduct directed against the class."). Plaintiff's claims are typical because she and all Settlement Class members were subject to the same Magic Key reservation system and all Dream Keys were afforded the same level of access to reservations. Accordingly, the typicality requirement is satisfied. *See Mier v. CVS Pharm., Inc.*, No. SACV201979DOCADSX, 2021 WL 3468951, at *5 (C.D. Cal. Apr. 29, 2021) (typicality satisfied because plaintiff and the class were under the same belief that the statement on the label was true and were damaged because it was not true); *MacRae*, 2018 WL 8064088, at *6 (typicality satisfied because Plaintiff and class members all "received the admission statement on which the CLRA claim is based").

4. Plaintiff is an Adequate Settlement Class Representative.

Last, the adequacy requirement is satisfied where (1) there are no antagonistic or conflicting interests between named plaintiffs, their counsel, and the absent class members; and (2) the named plaintiffs and their counsel will vigorously prosecute

the action on behalf of the class. Fed. R. Civ. P. 23(a)(4); *see also Ellis,* 657 F.3d at 985, *citing Hanlon,* 150 F.3d at 1020)).

Here, Plaintiff has no conflicts of interest with other Settlement Class members, is subject to no unique defenses, and she and her counsel vigorously prosecuted this case on behalf of the Class. Plaintiff is a member of the proposed Settlement Class who experienced the same injuries and, like other Settlement Class members, seeks compensation for Disney's allegedly deceptive and misleading statements, policies, and practices. As such, her interests and those of her counsel are consistent with those of the proposed Settlement Class. *See Aikens*, 2019 WL 3491928, at *4 ("Again, Plaintiff's claims arise out of the same set of facts as the claims for the proposed Class. The Court finds no sign of potential conflict of interest between Plaintiff and the Class Members she seeks to represent. Accordingly, the Court concludes that Plaintiff is an adequate class representative.").

Further, counsel for Plaintiff have decades of combined experience vigorously litigating consumer class actions and are well-suited to advocate on behalf of the Class. *See* Hagman Decl. ¶¶ 30-32; *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 566 (9th Cir. 2019) (adequacy satisfied if plaintiffs and their counsel lack conflicts of interest and will prosecute the action vigorously on behalf of the class). Plaintiff and Class Counsel satisfy the adequacy requirement.

B. The Requirements of Rule 23(b)(3) are Met for Purposes of Settlement.

"In addition to meeting the conditions imposed by Rule 23(a), the parties seeking class certification must also show that the action is maintainable under Fed. R. Civ. P. 23(b)(1), (2) or (3)." *Hanlon*, 150 F.3d at 1022. Here, Plaintiff alleges that the Settlement Class is maintainable for purposes of settlement under Rule 23(b)(3), as common questions predominate over any questions affecting only individual members and class resolution is superior to other available methods for a fair and

efficient resolution of the controversy. *Id*. In determining whether the "superiority" requirement is satisfied, a court may consider: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. Fed. R. Civ. P. 23(b)(3).

Common questions predominate Plaintiff's breach of contract claim. The Court previously determined that key common provisions in the form contract, such as the phrases "subject to availability" and "blockout dates," are ambiguous. The determination of meaning of ambiguous terms in a form contract requires the examination of objective criteria, which is a common issue that will greatly inform the resolution of the breach of contract claim. *See Menagerie Prods. v. Citysearch,* No. CV 08-4263 CASFMO, 2009 WL 3770668, *10 (C.D. Cal. Nov. 9, 2009) (if the language in form contract was ambiguous, common issues predominate because the meaning would be established on a classwide basis).

Common issues also predominate Plaintiff's implied covenant of good faith and fair dealing claim. Whether Disney was vested with discretion, whether Disney abused that discretion, and whether Disney interfered with Dream Key purchasers' ability to obtain the benefits of the Dream Keys are common issues that will predominate regarding the breach of implied covenant claim. *See Feller*, 2017 WL 6496803, *11-12 ("the duty of good faith and fair dealing is assessed under an objective standard under California law, making this claim suitable for class treatment"); *Menagerie Prods.*, 2009 WL 3770668, *11 (same).

Plaintiff's CLRA claim turns on whether Disney employed misleading and deceptive statements to advertise its Dream Key passes. That question can be

resolved using the same evidence for all Settlement Class members, and thus is precisely the type of predominant question that makes a class-wide settlement appropriate. *See, e.g., Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) ("When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) . . . .'") (citation omitted).

There is little doubt that resolving all Settlement Class members' claims through a single class action is superior to a series of individual lawsuits brought by each of the more than one hundred thousand Dream Key pass purchasers. "From either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." *Hanlon*, 150 F.3d at 1023. Adjudicating individual actions here is impracticable: the amount in dispute for individual Settlement Class members is too small, the technical issues involved are too complex, and the required expert testimony and document review too costly. *See Just Film*, 847 F.3d at 1123.

Because Plaintiff seeks to certify a class in the context of a proposed settlement, this Court "need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Prods*., 521 U.S. at 620 (citation omitted). The proposed Settlement therefore meets the requirements of Rule 23(b)(3).

C. The Court Should Finally Approve the Settlement.

Rule 23(e) provides that a proposed class action may be "settled, voluntarily dismissed, or compromised only with the court's approval." In order for a proposed class action settlement to be approved, the Court must determine, after holding a hearing, that the settlement is fair, reasonable, and adequate, recognizing that "'[i]t is the settlement taken as a whole, rather than the individual component parts, that

must be examined for overall fairness.'" *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003), *quoting Hanlon*, 150 F.3d at 1026)). The Ninth Circuit has identified nine factors to consider in analyzing the fairness, reasonableness, and adequacy of a class settlement: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the views of counsel; (7) the presence of a governmental participant; (8) the reaction of the class members to the proposed settlement and; (9) whether the settlement is a product of collusion among the parties. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011); *see also Hanlon,* 150 F.3d at 1026. In applying these factors, this Court should be guided foremost by the "overriding public interest in settling and quieting litigation[,]" which "is particularly true in class action suits . . . ." *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989). Here, the relevant factors make clear that proposed Settlement is fair, reasonable, and adequate and should be preliminarily approved.

1. The Strength of Plaintiff's Case[5]

Plaintiff has built a strong case supporting her breach of contract, breach of implied covenant, and CLRA claims. With respect to her breach of contract claim, Plaintiff believes she would ultimately be able to prove that Disney breached its promise to provide Plaintiff and Dream Key purchasers with reservation-based access to the park every day of the year with no blockout dates, provided park reservations were available. Plaintiff believes that the evidence would establish that Disney limited the number of reservations available to Dream Key pass holders and restricted their ability to use their passes as advertised and promised. Such conduct

[5] Disney does not agree with Plaintiff's characterization of the strength of her claims and reserves all rights to contest Plaintiff's claims on the merits if the settlement is not finally approved. *See* Agr. ¶¶ 10.4(c), 10.5.

prevented Plaintiff and other Dream Key purchasers from realizing the benefits of their bargains with Disney and constitutes a breach of contract.

Plaintiff also believes that she would be able to prove her claim that Disney breached the implied covenant of good faith and fair dealing. Plaintiff would show that instead of providing passholders with the benefit of the contract (making a reservation every day of the year so long as park reservations were available) Disney significantly limited the reservations for Dream Key passholders and deprived them of the primary benefits of the pass. *See Ahl-E-Bait Media, Inc. v. Jadoo TV, Inc.*, No. 12-cv-05307, 2013 WL 11324312, *7-9 (C.D. Cal. Apr. 16, 2013) (implied covenant claim sufficiently pled alleging defendant exercised discretion in a manner that deprived plaintiff of the benefit of the contract).

Plaintiff also states a claim under the CLRA, which prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770. The CLRA is governed by the "reasonable consumer" test, which requires a plaintiff to "show that members of the public are likely to be deceived." *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (internal citations omitted). If this case were to be tried, Plaintiff would produce evidence demonstrating that the Dream Key pass provides access to services within the meaning of the CLRA, and that reasonable consumers were likely to be deceived by Disney's misleading and deceptive statements and representations contained in its Dream Key advertisements and terms and conditions. Disney's actions constitute a violation of the CLRA.

Plaintiff, however, also recognizes that success is not guaranteed. Plaintiff acknowledges that Disney made substantive arguments regarding the appropriateness of classwide relief and the viability of Plaintiff's theory of damages. *See e.g.*, ECF No. 70 (WDPR's Reponses in Opposition to Plaintiff's Motion for Class Certification); ECF No. 67 (WDPR's Motion to Strike Plaintiff's Damages

Theory and Expert Report); ECF No. 83 (WDPR's Motion to Strike the Plaintiff's Rebuttal Expert Report).

Plaintiff takes these arguments seriously and believes that the Settlement Agreement strikes the right compromise between risking a loss on class certification and / or at trial, with obtaining valuable and certain relief for the Settlement Class. It is "plainly reasonable for the parties at this stage to agree that the actual recovery realized and risks avoided here outweigh the opportunity to pursue potentially more favorable results through full adjudication." *Dennis v. Kellogg Co*., No. 09-CV-1786-L WMC, 2013 WL 6055326, at *3 (S.D. Cal. Nov. 14, 2013). "Here, as with most class actions, there was risk to both sides in continuing towards trial. The settlement avoids uncertainty for all parties involved." *Chester v. TJX Cos*., No. 515CV01437ODWDTB, 2017 WL 6205788, at *6 (C.D. Cal. Dec. 5, 2017). Given the substantial obstacles and risks inherent in consumer class actions, including class certification, summary judgment, and trial, the significant benefits the Settlement provides favor final approval. Hagman Decl. ¶ 29.

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

Class actions typically entail a high level of risk, expense, and complexity, which is one reason that judicial policy so strongly favors resolving class actions through settlement. *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998). If the parties were unable to resolve this case through settlement, continued litigation would be protracted and costly. Consumer class actions often take many years to resolve. Before ever approaching trial in this case, the Court would need to rule on Plaintiff's class certification motion, and the pending motions to strike. The parties would further likely be required to litigate a Rule 23(f) appeal and brief summary judgment and *Daubert* motions. Absent final approval of the settlement, significant work would remain, with likely post-trial activity to follow.

This case involves a proposed Class of approximately 103,435 individuals (each of whom, Disney has argued, would individually need to establish proof of their expectations and unsuccessful attempts to access reservations). The case involves a complicated and technical factual overlay against a prominent and sympathetic Defendant. The proposed Settlement balances the costs of continued litigation, and the risk of adverse rulings for the Class at any of the remaining stages of the litigation and potential for delay, against the obvious benefits of obtaining immediate relief that is fair and valuable to the Class. *See Newberg on Class Actions* § 11.50 ("In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results."); *Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004). Thus, this factor favors approval.

3. The Risk of Maintaining Class Action Status Through Trial

While the parties briefed Plaintiff's Motion for Class Certification, the Court has not yet certified any class in this case. If this case were to proceed to trial, Plaintiff would encounter risks in obtaining and maintaining class certification. Defendant has opposed certification if the case proceeds. Thus, Plaintiff "necessarily risk[s] losing class action status." *Grimm v. Am. Eagle Airlines, Inc.*, No. LACV1100406JAKMANX, 2014 WL 12746376, *10 (C.D. Cal. Sept. 24, 2014); *Acosta v. TransUnion, LLC*, 243 F.R.D. 377, 392 (C.D. Cal. 2007) ("The value of a class action 'depends largely on the certification of the class,' and [] class certification undeniably represents a serious risk for plaintiffs in any class action lawsuit"), *quoting In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liability Litig.*, 55 F.3d 768, 817 (3d Cir. 1995)). While Plaintiff is confident this case is appropriate for class certification and has marshaled evidence in support of her pending motion, class certification proceedings are discretionary and it is by no means certain that this case will be certified as a class action. *See*, *e.g.*, *Ellis v. Costco*

Wholesale Corp., 657 F.3d 970, 987 (9th Cir. 2011). If this case is not certified, class members would receive no relief.

4. The Amount Offered in Settlement

The value of the settlement favors approval. The proposed Settlement *immediately* provides significant relief to Settlement Class members. Each Settlement Class member is entitled to an equal share of the $9,500,00.00 Settlement Fund, after payment of attorneys' fees, a service award, and notice and administration costs.

This Settlement provides substantial benefits for the Settlement Class and is an excellent result. As Plaintiff argued in support of her Motion to Certify, the total possible damages at trial for the putative Class claims is approximately $39 million. ECF 62-6 at 26. That amount would represent a complete victory for the Class. At a gross level, the proposed Settlement represents almost 25% of the possible trial recovery. Plaintiff's expert determined that full damages for each potential class member was $379.19. *See* ECF 62-2, at 26. Through the Settlement Agreement, each Settlement Class Member will receive approximately $67.41. Although a successful trial for Plaintiff would likely produce a better result, the proposed Settlement should be approved because of the risk that Plaintiff might not succeed at trial, or even at the class certification stage, and even if she does, likely appeals would follow. The Settlement need not represent the best possible outcome in order to meet the fair, reasonable and adequate standard. *See Officers for Justice v. Civil Serv. Comm'n of City & Cty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982), *citing Flinn v. FMC Corp.*, 528 F.2d 1169, 1173-74 (4th Cir. 1975)).

Here, the Settlement Agreement achieves an outstanding result of approximately 17% of full damages, without the risk of continued litigation, and without the need litigate this action through trial and appeals. *See, e.g.*, *Bravo v. Gale Triangle, Inc.*, No. CV1603347BROGJSX, 2017 WL 708766, *10 (C.D. Cal. Feb.

16, 2017) (granting preliminary approval of a settlement that provides class members with fourteen percent of the maximum recovery).

As Disney has argued, a complete victory is far from certain. Dream Key passholders actually visited the theme parks using their Dream Keys. Dream Key passes, therefore, had *some* value and Class members received that value. Plaintiff believes—and is prepared to prove at trial—that each Class member suffered damages in the approximate amount of $379.19 each, which is the difference between the price of a Dream Key pass and the actual value of the pass. Disney has asked the Court to reject Plaintiff's damages model and to preclude her damage claims from being presented to the jury. Even if Plaintiff is allowed to present her damage theory to the jury, Disney will argue that each Dream Key pass was worth the price paid by each Class member. It is possible that the Court could reject Plaintiff's damage model, thereby preventing her case from proceeding on a classwide basis. It is also possible that at trial, the jury may be unpersuaded by Plaintiff's theory. It might award no damages or only partial damages. The range of recovery for Class members is, therefore, anywhere from $379.19 per Class member to zero. The Settlement appropriately balances the risks of further litigation against the certainty of a material recovery for all Class members and should be approved by the Court. *See Bravo*, 2017 WL 708766, *10.

Finally, given the difficulties and expenses Settlement Class members would face to pursue individual claims, and the possibility that they might be unaware of their claims, this settlement amount is appropriate. *Id.*; *Officers for Justice*, 688 F.2d at 628.

5. The Extent of Discovery Completed and the Stage of Proceedings

This factor requires an evaluation of whether "the parties have sufficient information to make an informed decision about settlement." *Linney*, 151 F.3d at

1239. "A settlement following sufficient discovery and genuine arm's-length negotiation is presumed fair." *Nat'l Rural Telecomms.*, 221 F.R.D. 523, 527-28 (C.D. Cal. 2004). "A court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case." 5 *Moore's Federal Practice*, § 23.85[2][e] (Matthew Bender 3d ed.); *see also Newberg on Class Actions*, § 11.45 at 129.

Here, the parties completed extensive formal written and oral discovery. Hagman Decl. ¶¶ 14-16. Disney produced approximately 24,472 pages of documents in response to Plaintiff's multiple requests for production, including non-public information involving the Magic Key program and Dream Key Advertisements and the size and makeup of the Settlement Class. *Id.* Plaintiff conducted depositions of two of Disney's representatives, and Disney deposed the Plaintiff. Hagman Decl. ¶ 16. Plaintiff also produced approximately 677 pages of documents in response to Disney's requests. Hagman Decl. ¶ 15. Additionally, the parties exchanged expert reports and rebuttal reports in support of, and in opposition to, Plaintiff's motion for class certification and deposed the opposing party's respective expert. Hagman Decl. ¶¶ 17-22.

Accordingly, the parties are in the best position to evaluate the strengths and weaknesses of their claims and defenses and were well-equipped to negotiate the settlement agreement. *Id*. Because Plaintiff is well-informed about the strengths and weaknesses of this case, this factor favors final approval of the Settlement. *See Vandervort v. Balboa Capital Corp.*, No. 11-1578-JLS (JPRX), 2013 WL 12123234, at *6 (C.D. Cal. Nov. 20, 2013) (finding factor weighs in favor of preliminary approval where class counsel propounded written discovery, took multiple depositions, and responded to the defendant's written discovery requests).

6. The Experience and Views of Counsel

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation." *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Class Counsel have substantial experience litigating complex class cases of various types, including consumer class actions such as this one. *See* Hagman Decl. ¶¶ 30-32. Class Counsel endorse the Settlement without reservation. Hagman Decl., ¶ 29. A great deal of weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation. *See, e.g., Norton v. Maximus, Inc.*, No. CV 1:14-0030 WBS, 2017 WL 1424636, at *6 (D. Idaho Apr. 17, 2017); *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc*., 221 F.R.D. 523, 528 (C.D. Cal. 2004. Thus, this factor supports approval.

7. The Reaction of the Settlement Class to the Settlement

The deadline to object or opt out of the settlement was January 15, 2024. Notably, only 4 individuals requested to be excluded from the Settlement. Suppl. Azari Decl., ¶ 17. Further, no Settlement Class member objected to the Settlement. "It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 529; 4 *Newberg on Class Actions* § 11:48 (4th ed. 2002) ("Courts have taken the position that one indication of the fairness of a settlement is the lack of or small number of objections [citations omitted]"). This factor, therefore, strongly favors final approval.

8. Lack of Collusion Among the Parties

The proposed Settlement was not the result of collusion among the negotiating parties and it was negotiated at arms-length with the assistance of a respected mediator. Courts look to whether the proposed settlement is a product of arm's

length negotiations, performed by counsel well versed in the type of litigation involved. *See In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 947 (9th Cir. 2011); *see also Newberg on Class Actions* § 11.41 (a proposed settlement is entitled to "an initial presumption of fairness" when the settlement has been "negotiated at arm's length by counsel for the class"); *Hughes v. Microsoft Corp.*, No. C93-0178C, 2001 WL 34089697, at *7 (W.D. Wash. Mar. 26, 2001) ("A presumption of correctness is said to attach to a class settlement reached in arm's-length negotiations between experienced capable counsel after meaningful discovery."), *quoting Manual for Complex Litigation* (Third) § 30.42)).

Here, there are no indicia of collusion in either the procedural elements of the settlement process or in the substance of the Settlement. The parties negotiated a substantial settlement, as outlined above, after significant arm's-length negotiations with the assistance of a skilled class action mediator, Hon. Jay C. Gandhi (Ret.). Hagman Decl. ¶ 26; *see*, *e.g.*, *In re Toys "R" Us-Del., Inc. FACTA Litig.*, 295 F.R.D. 438, 450 (C.D. Cal. 2014); *G.F. v. Contra Costa Cty.*, No. 13-CV-03667-MEJ, 2015 WL 4606078, at *13 (N.D. Cal. July 30, 2015) ("[T]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.") (internal quotations omitted); *see also Cohorst v. BRE Props*., No. 3:10-CV-2666-JM-BGS, 2011 WL 7061923, at *12 (S.D. Cal. Nov. 9, 2011) report and recommendation adopted as modified, No. 10CV2666 JM BGS, 2012 WL 153754 (S.D. Cal. Jan. 18, 2012) ("[V]oluntary mediation before a retired judge in which the parties reached an agreement-in-principle to settle the claims in the litigation are highly indicative of fairness . . . . We put a good deal of stock in the product of arm's-length, non-collusive, negotiated resolution.").

Finally, the parties did not discuss or negotiate an award of attorneys' fees and have not reached any agreement regarding fees. Instead, Class Counsel applied for an award of fees and costs concurrently with this motion for final approval of the

Settlement. ECF No. 93; Agr. ¶ 8.1. Because Class Counsel will only be paid from the same non-reversionary fund as members of the Settlement Class, Class Counsel had every reason to negotiate the largest fund possible. The settlement was carefully and thoughtfully negotiated and results in a fair outcome for Settlement Class members. This factor weighs in favor of preliminary approval of the proposed Settlement.

9. The Settlement Treats Settlement Class Members Equitably

Finally, Rule 23(e)(2)(D) requires that the proposed Settlement treat all class members equitably. In determining whether this factor weighs in favor of approval, courts consider whether the proposed Settlement "improperly grant[s] preferential treatment to class representatives or segments of the class." *Hudson v. Libre Technology Inc.,* No. 3:18-CV-1371-GPC-KSC, 2020 WL 2467060, *9 (S.D. Cal. May 13, 2020), *quoting In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)).

Here, the proposed Settlement does not improperly discriminate between Settlement Class members. Plaintiff seeks certification of a single class of Dream Key pass purchasers, and all members of the proposed Settlement Class are entitled to the same relief and are compensated in kind for the harm they suffered. All Settlement Class members will receive an equal *pro rata* share of the $9,500,000 Settlement Fund, after the deduction of the costs of notice, settlement administration, Plaintiff's Service Award, and Class Counsel's attorneys' fees and costs. Plaintiff will not receive preferential treatment or compensation disproportionate to the harm she suffered under this proposed Settlement. She is entitled to relief under the Settlement terms like any other Settlement Class member, and while the parties have not agreed on a service award for Plaintiff, she seeks only $5,000. *See Campos v. Converse, Inc.*, No. EDCV201576JGBSPX, 2022 WL 4099756, at *7 (C.D. Cal. Aug. 15, 2022) (permitting service award to class representative in amount of $6,000

where he "vigorously participated" in the litigation); *see also Smith v. Am. Greetings Corp.*, No. 14-CV-02577-JST, 2016 WL 362395, at *10 (N.D. Cal. Jan. 29, 2016) (finding $5,000 service awards are "presumptively reasonable").

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Court grant Plaintiff's Motion for Final Approval of Class Action Settlement.

Dated: January 23, 2024

Respectfully submitted,

/s/ *Nickolas J. Hagman*

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