CLARKSON LAW FIRM, P.C.
Ryan J. Clarkson (SBN 257074)
rclarkson@clarksonlawfirm.com
Shireen M. Clarkson (SBN 237882)
sclarkson@clarksonlawfirm.com
Katherine A. Bruce (SBN 288694)
kbruce@clarksonlawfirm.com
Lauren E. Anderson (SBN 329173)
landerson@clarksonlawfirm.com
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069
Tel: (213) 788-4050
Fax: (213) 788-4070

Attorneys for Plaintiffs

MOON LAW APC
Christopher D. Moon (SBN 246622)
chris@moonlawapc.com
Kevin O. Moon (SBN 246792)
kevin@moonlawapc.com
600 West Broadway, Suite 700
San Diego, California 92101
Tel: (619) 915-9432
Fax: (650) 618-0478

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MIKE XAVIER and STEVEN PRESCOTT, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BAYER HEALTHCARE LLC, a Delaware limited liability company; BEIERSDORF, INC., a Delaware corporation,

Defendants.

Case No. 5:20-CV-00102-NC
Case Filed: 1/3/2020
FAC Filed: 5/15/2020
Assigned for all purposes to the Hon. Nathanael M. Cousins

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Hearing Information
Hearing Date: April 21, 2021
Time: 1:00 p.m. (PST)
Courtroom: 5

Video/Telephone Access
Webinar: https://cand-uscourts.zoomgov.com/j/1601632758?pwd=VmthNENlOWFSNGRFdEFJSzlVcVZ1QT09
Webinar ID: 160 163 2758
Password: 277082
Local telephone dial-in: 1-669-254-5252 or 1-646-828-7666

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TABLE OF CONTENTS

Clarkson Law Firm, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

Clarkson Law Firm, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

TABLE OF AUTHORITIES

Cases

Clarkson Law Firm, P.C.
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Los Angeles, CA 90069

Clarkson Law Firm, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

Federal Statutes

State Statutes

Secondary Sources

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The parties have reached a nationwide settlement of the putative class action filed by Plaintiffs Mike Xavier and Steven Prescott ("**Plaintiffs**") against Defendants Bayer Healthcare LLC and Beiersdorf, Inc. ("**Defendants**"). Defendants have manufactured, marketed, and/or sold Coppertone sunscreen products[1] throughout the United States, at different points in time. Plaintiffs filed this putative class action alleging that the Products' "Mineral-Based" labels deceive consumers into believing they contain only mineral active ingredients, when they contain chemical active ingredients. *See* Complaint, 1/3/2020, Dkt. 1. A copy of the settlement agreement, dated March 12, 2021 ("**Settlement Agreement**"), is submitted herewith as Exhibit 1. The claim form is attached to the Settlement Agreement as Exhibit A. The notice plan, class notices, and online advertisements are attached to the Settlement Agreement as Exhibit B.

Under the terms of the proposed settlement, Defendants will pay $2.25 million into a common fund with no right to reversion (the "**Settlement Fund**"). Class Members[2] who submit proof of purchase for the Products may receive $2.50 per unit of Product, without limitation. Class Members who cannot produce proof of purchase may receive $2.50 per unit of Product, up to a maximum of four (4) units per household, for a total of $10.00. Plaintiffs may apply for a reasonable incentive or service award from the fund, not to exceed $5,000 each (or $10,000 total), which is subject to court approval. Class

Counsel may apply for an award from the fund to pay their reasonable attorneys' fees, not to exceed one-third (1/3) of the fund, plus reimbursement of their out-of-pocket expenses, all of which is subject to court approval. Notice and claims administration costs are to be paid from the fund in an amount not to exceed $530,000 plus postage.

Defendants have removed "Mineral-Based" from the Products' labels and, under the terms

[1] The "**Products**" mean Coppertone sunscreen products that contain a "mineral-based" claim on the label: Coppertone Water Babies Pure & Simple, Coppertone Kids Tear Free, and Coppertone Sport Face.

[2] The terms "**Class**," "**Class Member**," or "**Class Members**" refer to persons or entities who purchased one or more Products in the United States for purposes other than retail.

of the proposed settlement, Defendants have agreed that, if the term is used on Coppertone sunscreen product labels at any point between the preliminary approval of this settlement and December 31, 2023 (approximately 2 years and 8 months), and the products contain both mineral sunscreen active ingredients and other active ingredients, then Defendants will include a statement on the product packaging that states the product contains other sunscreen active ingredients. The cessation of the mineral-based claim, and the agreement to add clear labeling representations to ensure transparency moving forward, provide a significant benefit to consumers, regardless of whether they submit a claim or seek exclusion from the settlement. It facilitates a highly visible and competitive marketplace by promoting credibility and fair competition, raises the floor of truth telling in advertising by elevating the customary standard of practice across the industry, and ensures fidelity to consumer protection laws that benefits consumers, the public, and the market.

The Court should preliminarily approve the proposed settlement because it is fair, reasonable, and adequate, and will satisfy this Court's rigorous scrutiny under Rule 23(e)(2) at the final approval hearing. *See, e.g.*, *Weeks v. Google LLC*, No. 5:18-CV-00801-NC, 2019 U.S. Dist. LEXIS 124332, 2019 WL 8135562, at *1 (N.D. Cal. Jul. 22, 2019); *Fitzhenry-Russell v. Coca-Cola Co.*, No. 5:17-CV-00603-EJD, 2019 U.S. Dist. LEXIS 200701, 2019 WL 6111378, at *1 (N.D. Cal. Jun. 13, 2019). Experienced counsel have strenuously negotiated the proposed settlement terms at arms' length, including three separate settlement conferences before the Honorable Virginia K. DeMarchi, Magistrate Judge for the United States District Court for the Northern District of California, and fully informed counsel have approved the settlement based on the strengths and weaknesses of the case and the risks and costs of litigation. *See Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.* ("*DIRECTV*"), 221 F.R.D. 523, 528 (C.D. Cal. 2004) (finding that experienced counsel's views regarding settlement are entitled to great weight); *Harris v. Vector Mktg. Corp.*, No. 08-cv-5198, 2011 U.S. Dist. LEXIS 48878, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011) ("An initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's-length bargaining.").

Additionally, it is appropriate to certify a nationwide class for settlement under Rule 23(a),

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9255 Sunset Blvd., Suite 804
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(b)(2), and (b)(3), because Defendants' challenged labeling is uniform for all purchasers, the damages or restitution calculation is the equivalent of the percentage of the price that consumers pay for the falsely advertised "Mineral-Based" attribute, and any variance amongst the elements of the legal claims in different states and the District of Columbia are immaterial.

Lastly, the notice plan and claims process satisfy Rule 23(c)(2) and (e)(2)(C)(ii). Notice is to be provided to the Class using cost-efficient and effective methods specifically designed to reach consumers of common household products, where no contact information is reasonably available, including: (1) a settlement website, (2) targeted online advertising, (3) targeted search term advertising, and (4) a press release. A respected third-party notice and claims administrator (Digital Settlement Group or "**DSG**") has designed the notice plan to reach a minimum of 70% of the Class. The notice plan is based on the administrator's decades of experience in administering class action settlements, as well as its extensive experience in marketing and media-planning and industry standard digital media analytics that help advertisers understand the composition, reach, and frequency of consumer media audiences. Class Members may submit claims through a process that is both easy to understand and use, and the administrator will validate claims to prevent fraud.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Litigation History

This action has been heavily contested. On January 3, 2020, Plaintiffs filed the class action complaint, alleging violations of state consumer protections laws, breach of express warranty, and unjust enrichment. *See* Complaint, 1/3/2020, Dkt. 1. On May 1, 2020, Defendants filed a motion to transfer venue under 28 U.S.C. § 1404(a); a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2); a motion to dismiss under Rule 12(b)(6); and a motion to strike under Rule 12(f). *See* Motion to Transfer, 5/1/2020, Dkt. 25; Motion to Dismiss, 5/1/2020, Dkt. 26.

On May 15, 2020, Plaintiffs filed a First Amended Complaint ("**FAC**") to add additional remedies available under California Consumers Legal Remedies Act, codified at Cal. Civ. Code 1750, *et seq.* ("**CLRA**"), in lieu of an opposition pursuant to Rule 15(a). FAC, 5/15/2020, Dkt. 28. On that same date, Plaintiffs also filed an opposition to Defendants' motions to transfer venue and

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dismiss for lack of personal jurisdiction (Opp., 5/15/2020, Dkt. 29), to which Defendants replied on May 22, 2020 (Reply, 5/22/2020, Dkt. 34).

On May 29, 2020, Defendants moved to dismiss or strike Plaintiffs' FAC under Rules 12(b)(6) and 12(f). *See* Motion to Dismiss, 5/29/2020, Dkt. 36. Plaintiffs opposed Defendants' motion on June 12, 2020. *See* Opp., 6/12/2020, Dkt. 43. Defendants filed a reply on June 19, 2020. *See* Reply, 6/19/2020, Dkt. 44.

On June 29, 2020, the Court denied Defendants' motion to dismiss for lack of personal jurisdiction and to transfer venue. *See*, Order, 6/29/2020, Dkt. 46. After a hearing on July 22, 2020, the Court denied Defendants' motion to dismiss or strike on July 31, 2020. *See*, Order, 7/31/2020, Dkt. 50. Accordingly, on August 14, 2020, Defendants answered Plaintiffs' FAC. *See* Answer, 8/14/2020, Dkts. 51-52. On August 20, 2020, the Court entered a Case Management Scheduling Order and referred this case to a settlement conference with Judge DeMarchi. *See*, CMO, 8/20/2020, Dkt. 54.

Thereafter, the parties participated in settlement conferences with Judge DeMarchi on three separate days over the course of three months before ultimately reaching a settlement in principle. *See* Declaration of Katherine A. Bruce ("**Bruce Decl.**") at ¶ 4; Exhibit 1 [Settlement Agreement] at ¶ 1.5; Minute Entry, 9/28/2020, Dkt. 65 (9/25/2020 Settlement Conference); Minute Entry, 12/14/2020, Dkt. 72 (12/11/2020 Settlement Conference); Minute Entry, 12/15/2020, Dkt. 73 (12/14/2020 Settlement Conference).

B. Discovery

Immediately after Defendants answered the FAC, on August 19, 2020, Plaintiffs served Defendants with substantial requests for documents and interrogatories. *See* Bruce Decl. at ¶ 3. On August 21, 2020, Defendants similarly served Plaintiffs with requests for documents and interrogatories. *Id.* The Parties exchanged initial disclosures on September 4, 2020. *Id.* Then, on October 2, 2020, Defendants each served responses to Plaintiffs' discovery requests. *Id.* On October 2, 2020, Defendant Beiersdorf produced documents, which included comprehensive market research, trade strategy, and advertising designs, as well as formulation information, all of which

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9255 Sunset Blvd., Suite 804
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9255 Sunset Blvd., Suite 804
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informed Plaintiffs' case strategy and settlement position. *Id.* In addition, Defendants' provided Plaintiffs with comprehensive Product sales data. *Id.* On October 5, 2020, Plaintiffs likewise served responses to Defendants' discovery requests. *Id.* Plaintiffs' counsel proceeded to evaluate Defendants' discovery, defenses, and the merits of Plaintiffs' claims, consulted with damages experts, conducted extensive independent research into comparison product labels, market pricing, and retail sales, and conducted a comprehensive analysis of Defendants' sales data to determine maximum case value assuming full liability, as well as reasonable settlement value in light of the risks of litigation and likely price premium attributable to the false mineral-based attribute of the sunscreen products at issue. *Id.*

C. The Proposed Settlement

The Settlement Class is effectively defined, under the terms of the Settlement Agreement, as:

> All persons, other than Excluded Persons,[3] who, at any time prior to the date that the Class is first notified of the settlement pursuant to the Court's preliminary approval order (the "**Notice Date**"), purchased the Products in the United States, for purposes other than resale (hereinafter, referred to as the "**Settlement Class**" or "**Settlement Class Member(s)**").

See Exhibit 1 [Settlement Agreement] at ¶¶ 2.13 (Excluded Persons), 2.23 (Notice Date), 2.26 (Online Notice), 2.32 (Preliminary Approval), 2.33 (Products), 2.39 (Settlement Class).

1. Monetary Relief

Defendants will pay a total of $2.25 million into a Settlement Fund, which shall be exhausted to pay: (1) Class Members' valid claims, (2) notice and claims administration costs, (3) Plaintiff's attorneys' fees and costs, and (4) incentive or service awards to Plaintiffs. *See* Exhibit 1 [Settlement Agreement] at ¶¶ 2.38 (Settlement Benefit), 2.40 (Settlement Fund). No money reverts to Defendants. *Id.*

Each Class Member who makes a claim may receive $2.50 per unit of Product for which they have proof of purchase, without limitation. *See* Exhibit 1 [Settlement Agreement] at ¶ 3.4. Class Members who cannot produce proof of purchase may receive $2.50 per unit of Product, for up to a maximum of four (4) units per household, which totals $10.00. *Id.* These amounts may be

[3] *See* Exhibit 1 [Settlement Agreement] at ¶ 2.13 for definition of "Excluded Persons."

pro rata increased up to a maximum of nine (9) times each claim, or decreased, if the Settlement Fund is under or over-subscribed, respectively. *Id.* ¶ 3.13. Any remaining funds will be disbursed *cy pres* to the charitable organization Look Good Feel Better (*id*. ¶ 3.13), which is dedicated to improving the quality of life of people undergoing cancer treatment (*see* https://lookgoodfeelbetter.org/about/about-the-program/ (last visited 3/2/2021)). Claims may be submitted either electronically through a settlement website or by mail. *Id*. ¶ 3.2. The claims process includes measures to reduce the risk of fraudulent claims. *Id*. ¶ 3.5.

The claim form (available in English and Spanish) is a simple two-page form, which can be quickly completed, either online or submitted by mail, allowing the same for submission of proof of purchase. *See* Exhibit 1 [Settlement Agreement] at Exhibit A (Claim Form).[4] Payment of claims may be made by check or electronic payments (PayPal), which is more convenient for claimants than traditional check payments and reduces related transaction costs.

2. Injunctive Relief

The Settlement Agreement also includes changed practices. Defendants have discontinued using the term "Mineral-Based" on the Products' labels. *See* Exhibit 1 [Settlement Agreement] at ¶ 1.4. Under the terms of the Settlement Agreement, Defendants have agreed that if the term "Mineral-Based" is used on Coppertone sunscreen product labels between the preliminary approval of this settlement and December 31, 2023, and the products contain both mineral sunscreen active ingredients and other active ingredients, then Defendants will include a statement on the product packaging that it contains other sunscreen active ingredients. *Id.* at ¶ 4.1. The cessation of the Mineral-Based claim, and agreement to add clear labeling claims to ensure transparency provide a significant benefit to consumers, regardless of whether they submit a claim or opt out of the Settlement Class. Bruce Decl. ¶ 10.

The proposed injunctive relief not only benefits the Settlement Class, but it provides a significant benefit to all consumers, a fairly functioning marketplace, and the public. Bruce Decl. ¶

[4] Specifically, all that is required from Class Members is name and contact information; chosen method of payment (by check or PayPal); an attestation that they purchased the claimed Products in the United States, within the requisite period of time, for purposes other than retail, based on the mineral-based claim; and indication of whether proof of purchase shall be provided. *Id.*

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9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

10. Transparency and honesty in advertising facilitates a highly visible and competitive marketplace by promoting credibility and fair competition. *Id.* It raises the floor of truth telling in advertising by major competitors elevating the customary standard of practice across the industry. *Id.* It serves fidelity to consumer protection laws designed to prevent consumer fraud. *Id.*

3. Administrative Expenses, Incentive Awards, Attorneys' Fees and Costs

All costs of notice and administration of the settlement (capped at $530,000 plus postage) will be paid from the Settlement Fund. *See* Exhibit 1 [Settlement Agreement] at ¶ 5.7. The costs are consistent with market rates. Bruce Decl. ¶ 7.

In addition, each Plaintiff may receive up to $5,000 ($10,000 in total) as an incentive or service award from the Settlement Fund, subject to Court approval, to compensate Plaintiffs for the time, work, and risk they undertook in prosecuting this action (including the risk of liability for Defendants' costs). *Id*. ¶ 6.2. "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incurred during the course of the class action litigation." *Garcia v. Gordon Trucking*, No. 1:10-CV0324-AWI-SKO, 2012 U.S. Dist. LEXIS 160052, 2012 WL 5364575, at *11 (E.D. Cal. Oct. 29, 2012) (quoting *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001). Each Plaintiff participated in the pre-suit investigation phase, including verifying their adequacy as a class representative, evaluating potential conflicts of interests, ensuring their claims are typical of the Class, and contributing to the drafting of the complaint. Bruce Decl. ¶ 5. They also engaged in the discovery process, including conducting a reasonable and diligent investigation and search for documents and information, reviewing discovery responses, and certifying the accuracy and completeness of responses to interrogatories. *Id.* Additionally, they actively engaged in the settlement process, including preparing for settlement negotiations, attending a full-day settlement conference, conferring with counsel regarding settlement offers and demands, and evaluating the proposed settlement to ensure it constitutes a fair, reasonable, and adequate settlement for the Class. *Id.*[5]

[5] *See also Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 454-55 (E.D. Cal. 2013) (awarding $5,000 to each class representative for bringing claim to class counsel's attention,

In addition, the Settlement Agreement permits Plaintiffs' counsel to apply for payment of their attorneys' fees, in an amount up to one-third (1/3) of the Settlement Fund, plus their costs, all of which is subject to Court approval.[6] *See* Exhibit 1 [Settlement Agreement] at ¶ 6.1. Counsel will justify fees by a lodestar-multiplier, consistent with awards for common-fund settlements, under which fees are a percentage of the fund. Bruce Decl. at ¶ 6; *see also, e.g.*, *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002) ("It is an established practice in the legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases."); *Clark v. City of L.A.*, 8803 F.2d 987, 991 (9th Cir. 1986) (finding loadstar multiplier proper).

The Court need not decide these issues at present; rather it is appropriate to defer them until the final approval hearing, after Settlement Class Members have had an opportunity to comment. Also, in further consideration of the Settlement Class's interests, Plaintiffs and Class Counsel may apply for awards below the maximum amount allowable, depending on the number of Settlement Class claims. Bruce Decl. at ¶ 6. The request for fees, costs, and incentive awards will be the subject

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9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

searching for relevant documents, explaining employment practices, and giving interviews regarding their experience); *Garcia*, 2012 WL 5364575, at *11 (awarding $15,000 to each class representative for assisting in investigation, preparation of complaint, producing documents, providing deposition testimony, responding to discovery, and assisting with settlement).

[6] The Ninth Circuit has affirmed attorney fee awards of one third of a common fund. *See, e.g., In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (one-third fee from $12 million fund); *Morris v. Lifescan, Inc.*, 54 F.App'x 663, 664 (9th Cir. 2003) (one-third fee of $14.8 fund). "An attorney fee of one third of the settlement fund is routinely found to be reasonable in class actions. 'Nationally, the average percentage of the fund award in class actions is approximately one-third.'" *Marshall v. Northrop Grumman Corporation*, No. 16-CV-6794 AB (JCx), 2020 U.S. Dist. LEXIS 177056, 2020 WL 5668935, *8-9 (C.D. Cal. Sept. 18, 2020) (quoting *Multi-Ethnic Immigrant Workers Org. Network v. City of Los Angeles*, No. CV 07-3072 AHM (FMMx), 2009 U.S. Dist. LEXIS 132269, 2009 WL 9100391, at *4 (C.D. Cal. Jun. 24, 2009)); *Romero v. Producers Dairy Foods, Inc.*, No. 05-484, 2007 U.S. Dist. LEXIS 86270, 2007 WL 3492841, at *4 (E.D. Cal. Nov. 14, 2007) ("fee awards in class actions average around one-third of the recovery") (quoting Newberg On Class Actions § 14.6 (4th ed. 2007)). In addition, numerous courts have approved a one-third fee award in class action settlements. *See, e.g., Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 450 (E.D. Cal. 2013) (cataloguing percentage awards between 30% and 33.3%); *Boyd Emmons v. Quest Diagnostics Clinical Laboratories, Inc.*, No. 1:13-cv-00474-DAD-BAM, 2017 U.S. Dist. LEXIS 27249, 2017 WL 749018, *6-8 (E.D. Cal. Feb. 27, 2017) (awarding one-third of common fund); *Jiangchen v. Rentech, Inc.*, No. CV 17-1490-GW(FFMx), 2019 U.S. Dist. LEXIS 180474, 2019 WL 5173771, * 9-11 (C.D. Cal. Oct. 10, 2019) (awarding one-third of common fund); *Deaver v. Compass Bank*, No. 13-cv-00222-JSC, 2015 U.S. Dist. LEXIS 166484, 2015 WL 8526982, *10-14 (N.D. Cal. Dec. 11, 2015) (awarding 33% of common fund); *Marshall*, 2020 WL 5668935 (cataloguing awards one-third of common fund).

of a separate motion to be filed, and posted on the settlement website, at least 42 days before the final approval hearing, which is 14 days before the deadline for objections. *See* Exhibit 1 [Settlement Agreement] at ¶¶ 2.25, 6.1, 6.2, 7.2, 7.4.

4. Notice

Under the terms of the Settlement Agreement, the notice and claims administrator, DSG, will establish a settlement website containing the Court approved long- and short-form notices, contact information for DSG and counsel of record, pertinent dates and status updates, Settlement Agreement, preliminary approval order, the claim form, answers to frequently asked questions, a Product list, and Class Counsel's application for attorneys' fees, costs, and incentive awards, and the motion for final approval and related order. *See* Exhibit 1 [Settlement Agreement] at ¶¶ 2.41 (website) and Exhibit B [Notice Plan] at ¶ 12; Declaration of Mark Schey ("**Schey Decl.**") at ¶ 15.

The notice plan uses cost-efficient and effective methods designed to research consumers of household products, in the absence of a customer list, including: (1) a settlement website, (2) internet impression advertising, (3) targeted search term advertising, and (4) a press release. *See* Exhibit 1 [Settlement Agreement] at Exhibit B [Notice Plan] at ¶¶ 14, 16, 17, 18; Schey Decl. at ¶¶ 9, 15-16, 17, 19, 20, 21. The online advertisements link to the settlement website, which shall reach at least 70% of the Class and achieve sixty-six (66) million combined impressions, and target those who have purchased sunscreen or demonstrated interest in these Products. *See* Exhibit 1 [Settlement Agreement] at Exhibit B [Notice Plan] at ¶¶ 18, 20; Schey Decl. at ¶¶ 21, 23. Finally, the claims administrator will operate a toll-free information line regarding the case and settlement. *See* Exhibit 1 [Settlement Agreement] at Exhibit B [Notice Plan] at ¶ 2; Schey Decl. at ¶ 10.

III. PRELIMINARY APPROVAL IS WARRANTED

"Approval under [Rule] 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to Class Members, whether final approval is warranted." *DIRECTV, Inc.*, 221 F.R.D. at 525 (citing *Manual for Complex Litig., Third*, § 30.41 (1995)). The purpose of preliminary approval is for the Court to determine whether the parties should notify the putative Class Members of the

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9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

Clarkson Law Firm, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

proposed settlement and proceed with a fairness hearing. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). Notice should be disseminated where "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *Id.* (*quoting* NEWBERG ON CLASS ACTIONS § 11.25 (1992)). Rule 23(e)(2) states that the court may only approve the settlement if "it is fair, reasonable, and adequate." *See also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Id.* Courts must balance "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Id.* (citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)). The Ninth Circuit has a strong judicial policy that favors class action settlements. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

A. Relative Monetary Value of the Class Claims Support the Settlement

Courts "assess the consideration obtained by the class members in a class action settlement" (*DIRECTV*, 221 F.R.D. at 527), including the value of injunctive relief (*Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015); *Lane v. Facebook, Inc.*, 696 F.3d 811, 825 (9th Cir. 2012)). "[I]t is well settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial." *DIRECTV*, 221 F.R.D. at 527 (citing *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998)). Plaintiffs' best-case recovery would be the price "premium" consumers paid for the alleged falsely advertised product attribute—its mineral-based quality. Bruce Decl. at ¶ 9a. Defendants strongly dispute that any such price premium exists, and, therefore, any testimony of the parties' experts necessary to establish or refute a price premium would diverge wildly. Bruce Decl. at ¶ 11a.

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Under the terms of the settlement agreement, the monetary relief requires Defendant to pay $2.25 million into the Settlement Fund and each purchaser who submits a claim may receive $2.50 per Product. Exhibit 1 [Settlement Agreement] at ¶¶ 2.4, 3.4. Whether the monetary component of the proposed settlement is adequate, fair, and reasonable may be evaluated in two ways.

First, the average retail price for each Product falls within a range of approximately $7.44 and $9.89 and the average retail price for the Products is approximately $8.88. Bruce Decl. at ¶ 9a. The $2.50 refund for Products that cost approximately $8.88 is equal to a 28.2% price premium, which is within the range of a reasonable estimated price premium based on Counsel's experience in having conjoint analyses conducted to determine the price premium for an every-day household good where the challenged advertising claim is not the primary purpose of the product (which, here, is sun protection and not mineral active ingredients). *Id.*; *see also, e.g.*, *Fitzhenry-Russell v. The Coca-Cola Company*, No. 5:17-cv-00603-EJD, 2019 WL 11557486, * 2, 4 (N.D. Cal. Oct. 3, 2019) (granting final approval for $2.45 million common fund in false advertising claim regarding "Made from Real Ginger" claim on Canada Dry ginger ale based on a 6% price premium for "real" ginger)[7].

Second, the $2.25 million Settlement Fund represents nearly [redacted]% of Defendants' sales of approximately $[redacted] million, for approximately [redacted], over the course of approximately 5 years. Bruce Decl. at ¶ 9b. If one were to assume that a full refund of the purchase is the Class's best-case scenario (which far exceeds actual damages or restitution absent proof that the Products do not provide any sun protection—i.e., Class Members received absolutely no benefit in exchange for their money), then one would conclude Defendants' total sales represent the maximum monetary value of the case. *Id.* Where a settlement achieves 10% of the maximum recoverable damages, it has been approved as "eminently fair and reasonable." *In re Crazy Eddie*

[7] *See also* Plaintiffs' Motion for Approval of Class Action Settlement filed on May 9, 2019 [ECF 84] in *Fitzhenry-Russell v. The Coca-Cola Company*, No. 5:17-cv-00603-EJD, also available at: https://1.next.westlaw.com/Link/Docket/I54B7CFFCECE011E69822EED485BC7CA1/Blob/ecf/CANDCTDW/godls,035117962986/5-17CV00603_DocketEntry_05-09-2019_84.pdf?courtNorm=CANDCT&courtnumber=1014&casenumber=5%3a17-CV-00603&originationContext=document&transitionType=DocumentImage&contextData=(sc.Default)&uniqueId=edb977b5-85c3-469d-b406-ee9515b47165&attachments=false&localImageGuid=I6633c4f078c511e9b9a4c01c1c69a433&AcceptCharges=true (last visited 3/17/2021) (noting at page 12 $790 million in total gross sales).

Securities Litigation, 824 F. Supp. 320, 323-324 (E.D.N.Y. 1993); *see also, e.g., Cheng Jiangchen v. Rentech, Inc.*, No. CV 17-1490-GW(FFMx), 2019 U.S. Dist. LEXIS 180474, 2019 WL 5173771, at *7 (C.D. Cal. Oct. 10, 2019).

The monetary relief provided by this settlement is especially beneficial in a contested proceeding like this one, where Class Members who lack proof of purchase—which is likely the vast majority of Class Members here—might receive nothing at all. *See, e.g., Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1132 (9th Cir. 2017), *cert. denied sub nom. ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313, 199 L. Ed. 2d 206, 86 U.S.L.W. 1376 (2017) (explaining that the post-trial claims process by which each consumers' affidavits would "force a liability determination" as to that consumer).

In addition to the monetary relief, the changed practices will benefit Class Members and other consumers by ensuring transparency in the challenged "Mineral-Based" labeling claim. Bruce Decl. at ¶ 10. Defendants have removed "Mineral-Based" from the Products' labels and, under the terms of the proposed settlement, Defendants have agreed that if the term "Mineral-Based" is used on Coppertone sunscreen product labels at any point after the preliminary approval of this settlement and through December 31, 2023, and the products contain both mineral sunscreen active ingredients and other active ingredients, then Defendants will include a statement on the product packaging that states the product contains other sunscreen active ingredients. Exhibit 1 [Settlement Agreement] at ¶¶ 1.4, 4.1. The cessation of the mineral-based claim, and agreement to add labeling statements that ensure transparency, provide a significant benefit to consumers, regardless of whether they submit a claim or seek exclusion from the Settlement Class. Bruce Decl. at ¶ 10.

The proposed injunctive relief not only benefits the Settlement Class, but it provides a significant benefit to all consumers, a fairly functioning marketplace, and the public that is extraordinarily valuable. Bruce Decl. at ¶ 10. Transparency and honesty in advertising facilitates a highly visible and competitive marketplace by promoting credibility and fair competition. *Id.* It raises the floor of truth telling in advertising by major competitors elevating the customary standard of practice across the industry. *Id.* It serves fidelity to consumer protection laws designed to prevent

Clarkson Law Firm, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

consumer fraud. *Id.*

In sum, Plaintiffs dual primary objectives in litigation have been achieved: (1) fair and adequate monetary compensation to consumers misled into purchasing the Products based on the false "Mineral-Based" labels; and (2) a change in Defendants' marketing practices that will ensure honesty and transparency with all consumers. Bruce Decl. at ¶ 12. Setting aside the extraordinary value achieved through the injunctive relief component, the dollar value of the direct monetary relief totals approximately [redacted]% of Defendants' past and prospective sales. *Id.* at ¶ 10b. This last calculus of approximately [redacted]% of sales assumes, *arguendo*, that the total sales constitute the maximum exposure for actual economic losses, even though only a portion of those sales, reasonably attributed to the price premium consumers have paid for the falsely advertised "Mineral-Based" attribute, would be the maximum exposure for actual economic losses. *Id.*

B. Continuing Litigation Risks and Costs Support the Settlement

Proceeding in this litigation in the absence of settlement poses significant risks, such as failing to certify a Class, having summary judgment granted against Plaintiffs, or losing at trial. Bruce Decl. at ¶ 11. Such considerations have been found to weigh heavily in favor of settlement.[8] Even assuming that Plaintiffs were to satisfy certification, and the inevitable motion for summary judgment, they would face the risk of establishing liability at trial if there is any conflicting expert testimony. Bruce Decl. at ¶ 11a. Not only would the parties' experts battle over consumer perceptions of the challenged "Mineral-Based" labeling claims, but they would battle over whether consumers paid a premium for the "Mineral-Based" attributes, including what, if any, dollar amount should be assigned to that premium. *Id.* In this "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which expert's version would be accepted by the jury. *Id.* The experience of Plaintiffs' counsel has taught them that these considerations can make the ultimate outcome of a trial highly uncertain. *Id.*

Moreover, even if Plaintiffs were to prevail at trial, the Class would face additional risks if

[8] *See* Federal Judicial Center, Manual for Complex Litigation § 21.62, at 316 (4th ed. 2004); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009); *Curtis-Bauer v. Morgan Stanley & Co.*, No. C 06-3903 TEH, 2008 U.S. Dist. LEXIS 85028, 2008 U.S. Dist. LEXIS 85028, at *13 (N.D. Cal. Oct. 22, 2008).

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Los Angeles, CA 90069

Defendants appeal or move for a new trial. Bruce Decl. at ¶ 11b; *see also In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 WL 238298, 1991 U.S. Dist. LEXIS 15608, at *2-3 (N.D. Cal. Sept. 6, 1991) (the jury rendered a verdict for plaintiffs exceeding $100 million, however, the court overturned the verdict and ordered a new trial with respect to the corporate defendant). By settling, Plaintiffs and Class Members avoid these risks and the delays of the appellate process. Bruce Decl. at ¶ 11b.

Plaintiffs also face risks in certifying a class and maintaining that class status through trial. Bruce Decl. at ¶ 11c. Even assuming that the Court were to certify a class, the class could still be decertified at any time. *See In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 U.S. Dist. LEXIS 37286, 2013 WL 1120801, at *6 (N.D. Cal. Mar. 18, 2013) ("The notion that a district court could decertify a class at any time is one that weighs in favor of settlement.") (internal citations omitted). From their prior experience, Plaintiffs' counsel anticipate that Defendants would likely move for reconsideration, attempt to appeal the Court's decision pursuant to Rule 23(f), and/or move for decertification at a later date. *Id.* Here, the Settlement Agreement eliminates these risks by ensuring Class Members a recovery that is "certain and immediate, eliminating the risk that class members would be left without any recovery… at all." *Fulford v. Logitech, Inc.*, No. 08-cv-02041 MMC, 2010 U.S. Dist. LEXIS 29042, at *8 (N.D. Cal. Mar. 5, 2010).

In addition, the expense to prosecute this case is substantial in light of the need for expert testimony from multiple disciplines, including economics, conjoint analysis, and marketing. Bruce Decl. at ¶ 11d. The costs associated with these experts, including expert investigation, analysis, surveys, reports and rebuttal reports, depositions, oppositions to any *Daubert* challenges, testimony, and any associated costs such as travel expenses, would quickly accumulate. *Id.* The accumulation of such costs could quickly lead to a scenario in which settlement might not be economically feasible for either party. *Id.*

Finally, because trial would likely not occur until June 22, 2022 (*see* Case Management Scheduling Order, 8/20/2020, Dkt. 54) or later, any monetary and injunctive relief achieved as a result of trial, would not occur for another one and one-half years (1.5 years) or more (Bruce Decl.

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9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

at ¶ 11e). In the meantime, Defendants could continue to deceptively label the Products with impunity to the financial detriment of Class Members and consumers. *Id.*.

C. Plaintiffs Reached an Informed Settlement, Following Discovery, in an Arms-Length Negotiation

Class settlements are presumed fair when they are reached "following sufficient discovery and genuine arms-length negotiation." *DIRECTV*, 221 F.R.D. at 528; 4 Newberg at § 11.24. Under this factor, courts evaluate whether Class Counsel had sufficient information to make an informed decision about the merits of the case. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). As discussed above, Plaintiffs' counsel has received, examined, and analyzed information, documents, and materials that enabled them to assess the likelihood of success on the merits. Bruce Decl. at ¶ 4. These efforts included detailed interrogatory responses and documents concerning all critical aspects of the case, including issues relevant to both merits and class certification, consultation with experts and an independent investigation and analysis of sales data. *Id.* The parties also attended three days of settlement conferences over the course of several months with the Honorable Virginia K. DeMarchi. *Id.* Consequently, the settlement agreement is the result of fully-informed negotiations based on a vast amount of information obtained during discovery and mediation. *Id.*

D. Plaintiffs' Counsel's Experience and Views Support the Settlement

"The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Omnivision Techns., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008). Deference to Plaintiffs' counsel's evaluation of the Settlement is appropriate because "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez*, 563 F.3d at 967 (citing *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)).

Here, the settlement was negotiated by counsel with extensive experience in consumer class action litigation. Bruce Decl. at ¶ 13; Exhibit 2 [Clarkson Law Firm Resume]; Exhibit 3 [Moon Law Resume]. Specifically, in anticipation of the mediation sessions with the Honorable Virginia K. DeMarchi, both parties exchanged comprehensive mediation briefs and submitted confidential

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9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

settlement letters to the Court that extensively detailed their legal and factual support. Bruce Decl. at ¶ 4. Thereafter, over nearly three months, the parties engaged in three different settlement conference sessions with Judge DeMarchi, during which the parties vigorously negotiated the case. *Id.* The Settlement Agreement also underwent multiple rounds of review and vigorous negotiation. *Id.*

The settlement reflects the realities of each side's case and the information obtained during the discovery and mediation process. Bruce Decl. at ¶ 13. The proposed settlement is the result of extensive, informed, arms-length negotiations between counsel with substantial litigation experience, who are fully familiar with the legal and factual issues in this case, and who have specific experience litigating and settling complex and class action cases. *Id.*

Accordingly, based on their collective experience, Plaintiffs' counsel concluded that the settlement agreement provides exceptional results for the Class while sparing the Class from the uncertainties and costs of continued and protracted litigation. *Id.*

IV. THE COURT SHOULD PROVISIONALLY CERTIFY THE SETTLEMENT CLASS

The Ninth Circuit has recognized that certifying a settlement class to resolve consumer lawsuits is a common occurrence. *Hanlon*, 150 F.3d at 1019. In addition, the Ninth Circuit has declared that a strong judicial policy favors settlement of Rule 23 class actions. *See Class Plaintiffs*, 955 F.2d at 1276. When presented with a proposed settlement prior to the class certification stage, a court must determine whether the putative settlement class satisfies the requirements for class certification under Rule 23. *See* Fed. R. Civ. P. 23(e). In assessing certification requirements, a court may properly consider that there will be no trial. *See Amchem Prods. v. Windsor*, 117 S. Ct. 2231, 138 L. Ed. 2d 689, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial.").

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Clarkson Law Firm, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

Clarkson Law Firm, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

A. The Rule 23(a) Prerequisites Are Satisfied for Settlement Purposes

1. The Class Members Are Too Numerous to Be Joined

For a class to be certified, its members must be so numerous that their joinder would be "impracticable." Fed. R. Civ. P. 23(a)(1). It is undisputable that there are thousands or tens of thousands of Class Members throughout the United States, as more than [redacted] products have been sold in the past approximately five years. Bruce Decl. at ¶ 14a. Numerosity is satisfied.

2. The Action Involves Common Questions of Law and Fact

To satisfy Rule 23(a)(2)'s commonality requirement, the claims "must depend upon a common contention" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 180 L.Ed.2d 374, 564 U.S. 338, 350 (2011). The Ninth Circuit "permissively" construes this requirement—it is satisfied with "shared legal issues" or "a common core of salient facts." *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) (quoting *Hanlon*, 150 F.3d at 1019). Here, all of the claims turn on common questions. For example, whether the Products' labeling is misleading and deceptive and therefore unlawful; whether Plaintiffs and the Class are entitled to equitable and/or injunctive relief; and whether Plaintiffs and the Class have sustained damages as a result of Defendants' unlawful conduct. Commonality is therefore satisfied.

3. Plaintiffs' Claims Are Typical of Those of the Class

Plaintiffs' claims are typical under Rule 23(a)(3) "if they are reasonably coextensive with those of absent class members." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1141 (9th Cir. 2016). "Measures of typicality include 'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured in the same course of conduct.'" *Id*. (citation omitted). In this case, Plaintiffs and Class Members have the same claims arising from the same misleading Product labeling (i.e., all products state "Mineral-Based" on the labels), causing the same injuries (all consumers paid a premium for the false "Mineral-Based" attribute). As a result, typicality is satisfied. *See, e.g., Gold v. Lumber Liquidators, Inc.*, 323 F.R.D. 280, 288-89 (N.D. Cal. 2017).

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9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

4. Plaintiffs and Class Counsel Will Fairly and Adequately Protect the Interests of Class Members

The test for evaluating adequacy of representation under Rule 23(a)(4) is: "(1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). The test is easily met here.

Plaintiffs and their counsel do not have any conflicts with Class Members and have vigorously prosecuted this case through their pre-litigation investigation, complex motion practice, fact discovery, settlement negotiations, and structuring of the proposed settlement. Bruce Decl. at ¶¶ 3, 4, 14b. Plaintiffs agreed to serve in a representative capacity, communicated frequently with their attorneys, responded to discovery requests, contributed to the preparation of the complaint, and actively participated in settlement negotiations. *Id.* at ¶ 3, 4, 5, 14b

Plaintiffs' counsel are experienced consumer advocates and are well qualified to serve as Class Counsel. Bruce Decl. at ¶¶ 13, 14b; Exhibit 2 [Clarkson Law Firm Resume]; Exhibit 3 [Moon Law Firm Resume]. They have vast experience successfully representing plaintiffs and classes in complex class-action litigation, specifically in consumer product mislabeling cases. Bruce Decl. at ¶¶ 13, 14b; Exhibit 2 [Clarkson Law Firm Resume]; Exhibit 3 [Moon Law Firm Resume]. Plaintiffs' counsel have diligently prepared this matter for class certification and trial in accordance with the Court's schedule and presented this settlement to the Court in conformity with this District's guidelines. Bruce Decl. at ¶¶ 13, 14b. Adequacy is thus satisfied.

B. <u>Rule 23(b)(3) Is Satisfied for Settlement Purposes</u>

Rule 23(b)(3) requires that common questions of law or fact "predominate over any questions affecting only individual members," and that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The trial manageability criteria of Rule 23(b)(3)(A) drop out of the analysis when "certifying a settlement class, where, by definition, there will be no trial." *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 557 (9th Cir. 2019); *see also Amchem Prods.*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would

present intractable management problems … for the proposal is that there be no trial."). Here, common questions predominate over individualized questions for settlement purposes, and a class action is a superior method for resolving this controversy.

1. Common Questions of Fact and Law Predominate

The predominance analysis "focuses on the relationship between the common and individual issues in the case, and tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation." *Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 894-95 (N.D. Cal. 2015) (citation omitted). In the settlement context, predominance is ordinarily satisfied when the claims arise out of the defendant's common conduct. *See, e.g., In re Hyundai & Kia*, 926 F.3d at 559. As the Ninth Circuit explained in *Hyundai*:

> The district court found that the following undisputed common questions predominated over individualized issues: (1) "[w]hether the fuel economy statements were in fact inaccurate"; and (2) "whether [the automakers] knew that their fuel economy statements were false or misleading." The court also found that the alleged misrepresentations were "uniformly" made via "Monroney stickers and nationwide advertising." We have held that these types of common issues, which turn on a common course of conduct by the defendant, can establish predominance in nationwide class actions.

Id. at 559-60.[9]

a. Common Questions of Fact

Common questions of fact abound with respect to Plaintiffs' claims, including, but not limited to, the following:

> (1) whether Defendants' conduct constitutes an unfair method of competition, or unfair or deceptive act or practice, in violation of the CLRA; (2) whether Defendants used deceptive representations in connection with the sale of the Products, represented the Products have characteristics they do not have, or advertised the Products with the intent not to sell them as advertised, in violation of the CLRA; (3) whether Defendants' labeling and advertising of the Products are untrue or misleading in violation of California's False Advertising Law, codified at Cal. Bus. & Prof. Code §§ 17500, *et seq.* ("**FAL**"); (4) whether Defendants knew or by the exercise of reasonable care should have known their labeling and advertising was and is untrue or misleading in violation of the FAL; (5) whether Defendants' conduct is an unfair, fraudulent, or unlawful business practice within the meaning of California's Unfair Competition Law, codified at Cal. Bus. & Prof. Code §§ 17200, *et seq.* ("**UCL**"); (6) whether Plaintiffs

[9] *See also, Gold*, 323 F.R.D. at 288, 290-93 (holding predominance satisfied where claims based on "the same defective conduct"); *Kacsuta v. Lenovo (United States) Inc.*, No. 13-cv-00316 CJC (RNBx), 2014 WL 12585783, at *3 (C.D. Cal. Sept. 15, 2014).

Clarkson Law Firm, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

and the Class paid more money for the Products than they actually received, how much, and the proper measure of damages or resitution; (7) whether Defendants' conduct constitutes a breach of express warranty; (8) whether Plaintiffs and the Class are entitled to equitable and/or injunctive relief; (9) whether Plaintiffs and the Class have sustained damages as a result of Defendants' misconduct; and (10) whether Defendants were unjustly enriched by their unlawful conduct.

b. Common Questions of Law

Defendants sold the same Products nationwide with the allegedly deceptive labeling. Just as is the case for all Californians, the claims of false advertising will present uniform issues of material fact for Class Members nationwide. In light of the uniform alleged misconduct, the elements that need to be proven under the consumer protection laws of all States are substantively identical. To the extent differences exist, they are immaterial and do not undermine certification for settlement purposes only when the Court need not concern itself over the management of slight variances in the law. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d at 557 (ruling the trial manageability criteria of Rule 23(b)(3)(A) drops out of the analysis when "certifying a settlement class, where, by definition, there will be no trial."); *see also Amchem Prods.*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial.").

Courts agree that unjust enrichment across the States does not differ materially, so a nationwide class may be certified. *See, e.g., In re Abbott Labs. Norvir Anti-Tr. Litig.*, Nos. C 04-1511 CW, C 04-4203 CW, 2007 U.S. Dist. LEXIS 44459, 2007 WL 1689899, at *9 (N.D. Cal. Jun. 11, 2007) (certifying nationwide class, holding that the "variations among some States' unjust enrichment laws do not significantly alter the central issue or the manner of proof"); *In re Checking Account Overdraft Litig.*, 307 F.R.D. 630,_647 (S.D. Fla. 2015) ("There is general agreement among courts that the "minor variations in the elements of unjust enrichment under the laws of the various states . . . are not material and do not create an actual conflict.") (quoting *Pa. Emple., Benefit Tr. Fund v. Zeneca, Inc.*, 710 F.Supp.2d 458, 477 (D. Del. 2010)); *In re Mercedes–Benz Tele Aid Contract Litig.*, 257 F.R.D. 46 (D.N.J. 2009) ("While there are minor variations in the elements of unjust enrichment under the laws of the various states, those differences are not material and do not

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9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

create an actual conflict."); *Schumacher v. Tyson Fresh Meats, Inc.*, 221 F.R.D. 605, 612 (D.S.D. 2004) ("In looking at claims for unjust enrichment, we must keep in mind that the very nature of such claims requires a focus on the gains of the defendants, not the losses of the plaintiffs. That is a universal thread throughout all common law causes of action for unjust enrichment.").

In distilling the various states' laws down to two common elements, one court explained:

> At the core of each state's law are two fundamental elements—***the defendant received a benefit from the plaintiff and it would be inequitable for the defendant to retain that benefit without compensating the plaintiff.*** The focus of the inquiry is the same in each state. Application of another variation of the cause of action than that subscribed to by a state will not frustrate or infringe upon that state's interests. In other words, regardless of which state's unjust enrichment elements are applied, the result is the same. Thus, there is no real conflict surrounding the elements of the cause of action.

Powers v. Lycoming Engines, 245 F.R.D. 226, 231 (E.D. Pa. 2007) (emphasis added), *rev'd on other grounds*, 2009 WL 826842, 328 Fed. Appx. 121 (3d Cir. 2009). These two elements are the same for all Class Members, regardless of their state of residence, as all paid a price premium to Defendants to purchase the Products—thus, all conferred a benefit on Defendants—and none received a true mineral-based Product, therefore rendering it inequitable for Defendants to retain the benefit.

C. A Class Action Is the Superior Means of Resolving This Case

A class action is also superior under Rule 23(b)(3) because it represents the only realistic method for Class Members to obtain relief. *See, e.g.*, *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (where "classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation"). Class Members lack the incentive to bring their own cases against Defendants, given the potential recovery for each Class Member, and the parties are unaware of any other such cases having been filed. Bruce Decl. at ¶ 14c (the average retail sales price, per Product, is between $7 and $10, which represents the absolute maximum conceivable actual damages per Product). "Cases, such as this, 'where litigation costs dwarf potential recovery' are paradigmatic examples of those well-suited for classwide prosecution." *Mullins v. Premier Nutrition Corp.*, No. 13-cv-01271-RS, 2016 U.S. Dist. LEXIS 51140, 2016 WL 1535057, at *8 (N.D. Cal. Apr. 15, 2016). Accordingly, settlement class

Clarkson Law Firm, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

certification is appropriate and should be granted.

V. THE PROPOSED NOTICE SATISFIES DUE PROCESS

The proposed notice plan and claim form comport with the procedural and substantive requirements of Rule 23. Under Rule 23, due process requires that Class Members receive notice of the settlement and an opportunity to be heard and participate in the litigation. *See* Fed. R. Civ. Proc., Rule 23(c)(2)(B); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 175-76 (1974). The mechanics of the notice process are left to the discretion of the Court, subject only to the broad "reasonableness" standards imposed by due process.[10]

Here, the notice plan uses cost-efficient and effective methods specifically designed to research consumers of household products that are predominantly sold at retail, including: (1) a settlement website, (2) internet impression advertising, (3) targeted search term advertising, and (4) a press release. *See* Exhibit 1 [Settlement Agreement] at Exhibit B [Notice Plan] at ¶¶ 14, 16, 17, 18; Schey Decl. at ¶¶ 9, 15-16, 17, 19, 20, 21. The online notice, which links to the settlement website, will reach at least 70% of the Class and achieve sixty-six (66) million combined impressions on various websites targeted to individuals who have purchased, or shown interest in, sunscreen. *See* Exhibit 1 [Settlement Agreement] at Exhibit B [Notice Plan] at ¶¶ 18, 20; Schey Decl. at ¶¶ 21,23. Finally, DSG, the claims administrator, will operate a toll-free information telephone line regarding the case and settlement. *See* Exhibit 1 [Settlement Agreement] at Exhibit B [Notice Plan] at ¶ 2; Schey Decl. at ¶ 10.

As explained in DSG's declaration, this multi-communication method is the best notice practicable and is reasonably designed to reach the Settlement Class Members. Schey Decl. at ¶¶ 23-25; *see also, e.g., In re Google Referrer Header Privacy Litig.*, No. 5:10-cv-04809 EJD, 2014 U.S. Dist. LEXIS 41695, 2014 WL 1266091, *7 (N.D. Cal. Mar. 26, 2014) (where direct individual notice not practical, "publication or something similar is sufficient to provide notice to the

[10] *See* 7A Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1786 (3d ed. 2008)*; see also Rosenburg v. I.B.M.*, No. C 06-0430 PJH, 2006 U.S. Dist. LEXIS 41775, 2007 WL 128232 at *5 (N.D. Cal. Jun. 12, 2007) (notice should inform class members of essential terms of settlement including claims procedure and their rights to accept, object or opt-out of settlement).

Clarkson Law Firm, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

Clarkson Law Firm, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

individuals that will be bound by the judgment"). In compliance with Rule 23(c)(2), the proposed notices inform Class Members, in clear, concise, plain, and easily understood language about the nature of the action, including relevant claims, issues, and defenses; the definition of the Settlement Class; the proposed settlement and summary of settlement benefits; the need, timing, and how to file a claim; the right to opt out or object and the time frame and manner; the prospective request for attorneys' fees, costs, and incentives; and that they will be bound by the judgment if they do not timely opt out, satisfying all aspects of Rule 23(c)(2). Exhibit 1 [Settlement Agreement] at Exhibits B1 [Long Form Notice] and B2 [Short Form Notice]. In addition, the notices refer Class Members to the settlement website where they can obtain more information, including the long-form notice, which provides more details about the case and the settlement, the procedures for opting out or objecting, and methods to obtain additional information. Exhibit 1 [Settlement Agreement] at Exhibits B1 [Long Form Notice] and B2 [Short Form Notice]. The settlement website will also contain a copy of the full Settlement Agreement and will post motions for final approval and incentive and fee awards when filed. Exhibit 1 [Settlement Agreement] at Exhibits B [Notice Plan] at ¶ 12; Schey Decl. at ¶¶ 10, 15. Class Members who seek benefits need only complete the simple two-page claim form and submit it online or by mail. Exhibit 1 [Settlement Agreement] at Exhibit A [Claim Form]. The claim form presents no unreasonable hurdles and, instead, merely requires contact information, selection of payment method, certification of facts entitling Class Members to benefits, and proof of purchase for more than four Products. *Id.*

VI. DATES FOR THE FINAL APPROVAL PROCESS

In connection with preliminary approval, Plaintiffs request the Court set the following dates:

1. Deadline to initiation Class Notice (Minimum of 30 days after Preliminary Approval Hearing)	May 21, 2021
2. Deadline to file motion for attorneys' fees, costs, and incentive/service awards (42 days before Fairness Hearing)	July 7, 2021
3. Deadline to file motion for final approval (42 days before Fairness Hearing)	July 7, 2021
4. Deadline for claim submission (postmarked or online) (60 day claim period; 28 days before Fairness Hearing)	July 21, 2021

5.	Deadline for opt-out (postmarked) (60 day opt-out period; 28 days before Fairness Hearing)	July 21, 2021
6.	Deadline to file objections (60 day objection period; 28 days before Fairness Hearing 14 days after motions filed)	July 21, 2021
7.	Deadline to file claim administrator's certification of total number and dollar amount of claims to date (14 days before Fairness Hearing)	August 4, 2021
8.	Deadline to respond to objections (7 days before Fairness Hearing; 14 days after objections filed)	August 11, 2021
9.	Fairness Hearing	August 18, 2021

VII. CONCLUSION

Accordingly, Plaintiffs respectfully request the Court preliminarily approve the settlement.

DATED: March 13, 2021

CLARKSON LAW FIRM, P.C.

/s/ Katherine A. Bruce
Ryan J. Clarkson, Esq.
Shireen M. Clarkson, Esq.
Katherine A. Bruce, Esq.
Lauren E. Anderson, Esq.

MOON LAW APC
Christopher D. Moon, Esq.
Kevin O. Moon, Esq.

Attorneys for Plaintiffs

Clarkson Law Firm, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069