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Settlement Class Counsel

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THOMAS IGLESIAS, individually and on  
behalf of all others similarly situated,

Plaintiff,

vs.

FERRARA CANDY CO., and DOES 1  
through 10, inclusive,

Defendants.

) Case No. 3:17-cv-00849-VC

) **[CLASS ACTION]**

) **PLAINTIFF’S NOTICE OF MOTION  
AND MOTION FOR ATTORNEYS’  
FEES, EXPENSES, AND SERVICE  
AWARD; MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT**

) **[Concurrently served with:  
Declaration of Ryan J. Clarkson;  
Declaration of Thomas Iglesias;  
Supporting Exhibits thereto; and  
Proposed Order]**

) Hon. Judge Vince Chabbria

) Complaint filed: February 21, 2017

) Hearing Date: October 25, 2018

) Hearing Time: 10:00 AM

) Hearing Location: Courtroom 4

Clarkson Law Firm, P.C.  
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**NOTICE OF MOTION AND MOTION**

**PLEASE TAKE NOTICE** that on October 25, 2018, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 4, 17th Floor, of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California 94102, before the Honorable Judge Vince Chhabria, Plaintiff Thomas Iglesias (“Plaintiff” or “Mr. Iglesias”), on behalf of himself, the general public, and all others similarly situated, by and through his counsel Ryan J. Clarkson, Shireen M. Clarkson, and Bahar Sodaify of Clarkson Law Firm, P.C. (“Class Counsel”), in this matter against Ferrara Candy Company (“Defendant” or “Ferrara”) shall and hereby does move the Court for an order granting Plaintiff’s motion for attorneys’ fees, expenses, and service award, as follows: (a) a 25% benchmark attorneys’ fees award in the amount of \$625,000; (b) reasonably and necessarily incurred litigation expenses in the amount \$102,172.12; and (b) a reasonable service award of \$5,000.00 to the sole class representative and named Plaintiff Thomas Iglesias.

This motion is brought pursuant to the Court’s preliminary approval order (Dkt. 80) and the settlement of the parties (Dkt. 72-4), and is based on the attached memorandum of points and authorities; declaration of Ryan J. Clarkson; declaration of Thomas Iglesias; proposed order; all other records, pleadings, and papers on file in this action; and such other evidence or argument as may be presented to the Court at the hearing on the motion.

Dated: September 6, 2018

**CLARKSON LAW FIRM, P.C.**



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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiff Thomas Iglesias moves the Court for an award of attorneys' fees, expenses, and a service award as part of this preliminarily approved class action settlement (Dkt. 80) of Plaintiff's claims alleging violations of California and federal consumer protection and packaging laws in connection with the packaging of opaque, theater box candy products manufactured by Defendant.

Pursuant to the terms of settlement, Class Counsel may apply for attorneys' fees in an amount not to exceed \$750,000, or 30% of the \$2.5 million claim fund, plus reimbursement of out-of-pocket expenses, subject to court approval (Dkt. 72-4 ¶ 9.1).<sup>1</sup> Class Counsel now seeks an award of attorneys' fees in the amount of 25%, or \$625,000, and reimbursement of \$102,172.12 in litigation expenses. The requested fees are reasonable, and Class Counsel asks the Court to follow Ninth Circuit precedent in awarding the benchmark fee award. All expenses were reasonably expended to achieve the settlement, a \$2.5 million claim fund and significant injunctive relief for the class. Plaintiff also seeks a \$5,000 service award as payment for his commitment of time, effort, and resources on behalf of the settlement class. *Id.* ¶ 9.2.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

**A. Procedural History**

Plaintiff filed this lawsuit on February 21, 2017, alleging violations of state and federal packaging laws and consumer protections laws (Dkt. 1). On April 19, 2017, Defendant filed a Rule 12(b)(6) motion to dismiss Plaintiff's complaint (Dkt. 14). On May 10, 2017, Plaintiff filed

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<sup>1</sup> Specifically, Defendant will pay up to \$500,000 in Court-approved attorney fees, costs and expenses within 45 days after entry of final approval. *Id.* ¶ 9.1.1. If the Court approves attorneys' fees, costs, and expenses in excess of \$500,000, Defendant will cause the remaining balance to be paid within forty-five (45) days after the Effective Date. Dkt. 72-4 ¶ 1.17 ("Effective Date" means the first date by which all of the following events shall have occurred: the Court has entered the Final Approval Order and Judgment on the docket in the Action, and (a) the time to appeal from such order has expired and no appeal has been timely filed, (b) if such an appeal has been filed, it has finally been resolved and has resulted in an affirmation of the Final Approval Order and Judgment, or (c) the Court, following the resolution of the appeal, enters a further order or orders approving settlement on the terms set forth herein, and either no further appeal is taken from such order(s) or any such appeal results in affirmation of such order(s) on appeal. Without limiting the generality of the foregoing, the Effective Date shall not occur prior to final resolution of the Fee and Cost Application and any appeals regarding the Fee and Cost Application.)

1 his first amended complaint (“FAC”) pursuant to Rule 15(a) to add additional remedies available  
2 under the statutes in lieu of an opposition (Dkt. 18). On May 24, 2017, Defendant filed a Rule  
3 12(b)(6) motion to dismiss the FAC, claiming the products are not misleading and do not contain  
4 nonfunctional slack-fill (Dkt. 28), which Plaintiff opposed on June 7, 2017 (Dkt. 34), to which  
5 Defendant replied on June 14, 2017 (Dkt. 37), and the Court denied on July 25, 2017 (Dkt. 40).  
6 Defendant answered Plaintiff’s FAC on August 8, 2017 (Dkt. 41).

7 In the ensuing weeks, the parties negotiated and filed a stipulated protective order to share  
8 documents (Dkt. 43). During the following months, the parties met and conferred over Plaintiff’s  
9 discovery requests and Defendant’s (supplemental) responses, which led to Plaintiff’s motion to  
10 compel (Dkt. 47), which the Court granted on November 29, 2017 (Dkt. 48). Defendant then  
11 produced over 6,000 documents, which Class Counsel reviewed before Rule 30(b)(6) depositions  
12 on December 20-21, 2017 in Chicago. *See* Declaration of Ryan J. Clarkson (“RJC Decl.”) ¶ 16.

13 Meanwhile, Plaintiff’s counsel pressed to a settlement-ready posture. On October 10,  
14 2017, the parties mediated in San Francisco with Martin Quinn but the case did not settle. RJC  
15 Decl. ¶ 18. On the heels of Plaintiff’s credible deposition testimony on November 13, 2017 and  
16 successful motion to compel on November 29, 2017, the parties slated a second mediation, which  
17 was held on February 2, 2018, with Honorable William Cahill (Ret.) in San Francisco. *Id.* ¶ 19.  
18 Judge Cahill telephonically mediated in the ensuing months. *Id.* ¶ 26. Within weeks of Plaintiff’s  
19 class certification motion on March 5, 2018 (Dkt. 53-54), the parties settled (Dkt. 58). *Id.*

20 On May 10, 2018, Plaintiff filed his motion for preliminary approval of the proposed  
21 settlement (Dkt. 72), which the Court granted (Dkt. 80). *Id.* ¶ 28.

22 **B. Class Counsel Expended Considerable Time and Resources to Investigate,**  
23 **Litigate, and Settle These Class Claims.**

24 Class Counsel has spent 1,081.8 hours on this case, including investigation of the facts and  
25 law (RJC Decl. ¶¶ 3-10); overcoming multiple pleadings challenges (*Id.* ¶¶ 12-14); relentlessly  
26 pursuing discovery (*Id.* ¶¶ 15-17); pressing settlement (*Id.* ¶¶ 18-19, 26); retaining and working  
27 with experts in multiple disciplines (*Id.* ¶¶ 20-25); filing a strong class certification motion (*Id.* ¶  
28 25); and negotiating the strongest slack fill settlement on record (*Id.* ¶ 27).



1           The benefits of the settlement are substantial, particularly given the numerous obstacles  
 2 Class Counsel overcame to achieve it and the risks of continued litigation for the class. *Id.* ¶ 27,  
 3 29-31. While vigorously litigating this case, Class Counsel had to navigate the ever-changing legal  
 4 terrain and overcome pitfalls common to other slack-fill lawsuits. *Id.* ¶ 31. As reflected in hotly  
 5 contested pleadings challenges, this case raised novel issue, which Plaintiff and Class Counsel  
 6 astutely addressed and overcame. *Id.* Additionally, Class Counsel faced substantial risks of  
 7 nonpayment in prosecuting this case on a contingency fee basis. *Id.* ¶ 9. At class certification,  
 8 Class Counsel continued to vigorously represent the class by preparing a robust, expert-driven  
 9 motion that included expert opinions from four highly credible experts, accompanied by a large-  
 10 scale consumer survey, detailed slack-fill analysis, marketing analysis, and conjoint analysis. *Id.*  
 11 ¶¶ 20-25. Settlement also was not a simple endeavor, consisting of two mediations in San  
 12 Francisco followed by months of mediation privileged settlement negotiations. *Id.* ¶¶ 18-19, 26.

13           **C. Class Counsel Achieved Substantial Benefits for the Settlement Class.**

14           The results obtained for the class are generally considered to be the most important factor  
 15 in determining the appropriate fee award in a common fund case. *See Hensley v. Eckerhart*, 461  
 16 U.S. 424, 435 (1983); *see also* Federal Judicial Center, *Manual for Complex Litigation*, § 27.71, p.  
 17 336 (4th Ed. 2004) (the “fundamental focus is on the result actually achieved for class members”) (citing Fed. R. Civ. P. 23(h) committee note). Standing alone, this factor supports Class Counsel’s  
 18 fee request. As a result of Class Counsel’s vigorous prosecution of this case and negotiation of the  
 19 settlement, Class Counsel secured important and substantial benefits for the settlement class.  
 20

21           First, the settlement is the largest-ever slack-fill settlement on record<sup>2</sup> and provides a  
 22 superior recovery for the class. RJC Decl. ¶ 27. Defendant will pay a total of \$2.5 million in cash  
 23 to a common claim fund. *Id.* Subject to court approval, the settlement fund will be used to pay the  
 24 settlement payments to class members, discussed *infra*, notice and administration costs  
 25 (\$522,000), a service award to Mr. Iglesias (\$5,000), reimbursement of litigation expenses  
 26 (\$102,172.12), and an award of reasonable attorneys’ fees (\$625,000). *Id.* ¶ 28.

27  
 28 <sup>2</sup> *Cf. Kline v. Dymatize Enters., LLC*, No. 15-CV-2348, 2016 U.S. Dist. LEXIS 142774 (S.D. Cal. Oct. 13, 2016) (protein powder slack-fill case securing injunctive relief only).

1           Second, each class member who makes a claim may obtain a cash refund of 50 cents per  
 2 box purchased for an unlimited number of purchases. Dkt. 72-4 ¶ 4.2.2. Up to 15 claims, for a  
 3 total of \$7.50, will be paid without proof of purchase. *Id.* There is no cap on the number or amount  
 4 of claims submitted by class members with proof of purchase. *Id.* These amounts are subject to  
 5 increase or decrease, pro rata, to ensure the claim fund is exhausted. *Id.* ¶ 4.2.6. Claims may be  
 6 submitted electronically or by mail. *Id.* ¶ 5.1.3.1. No money will revert to Defendant. *Id.* ¶ 4.2.7.  
 7 Significantly, there have been 71,116 claim submissions to date. *Id.* ¶ 30.

8           Third, this settlement also provides the class with significant injunctive relief from  
 9 Defendant by way of modifying its fill level quality control procedures and target fill levels going  
 10 forward to at least 75% for theater box products, and 50% for all other products, including bag-in-  
 11 a-box. *Id.* ¶ 4.1. This is excellent relief given that Plaintiff’s packaging design engineering expert  
 12 estimated the actual fill levels for theater box products to range from 42.6% to 52.5% and for bag-  
 13 in-a-box products to be 27.2% (Dkt. 54-18 p. 30 tbl. 11).

14           Fourth, the settlement also provides that all costs of notice and administration of the  
 15 settlement (\$522,000) will be paid from the claim fund. RJC Decl. ¶ 28.

16           Lastly, subject to Court approval, the settlement provides for a service award of \$5,000 to  
 17 Mr. Iglesias, who served as the class representative. Mr. Iglesias was an active participant in this  
 18 lawsuit from the onset. *Id.* ¶¶ 56-60. He reviewed documents before they were filed, responded to  
 19 written discovery, and sat for a full day deposition during which he provided stellar testimony. *Id.*  
 20 Defendant even communicated to Class Counsel that the strength of Mr. Iglesias’ testimony was  
 21 one of the primary reasons Defendant was persuaded to settle this case. *Id.* ¶ 17.

### 22 **III. THE AGREED-UPON FEE REQUEST IS FAIR, REASONABLE, AND JUSTIFIED**

23           Federal Rule of Civil Procedure 23 provides, “In a certified class action, the court may  
 24 award reasonable attorneys’ fees and nontaxable costs that are authorized by law or by the parties’  
 25 agreement.” Fed. R. Civ. P. 23(h). Pursuant to the terms of the settlement, Class Counsel may  
 26 move the Court for an award of attorneys’ fees not to exceed 30% of the amount actually  
 27 contributed to the common fund, plus litigation expenses. Dkt. 72-4 ¶ 9.1. Here, Plaintiff seeks a  
 28 benchmark award of 25%, or \$625,000.

1 Plaintiff is entitled to attorneys' fees pursuant to the Consumers Legal Remedies Act  
 2 ("CLRA"), California Civil Code Section 1750, *et seq.*, which requires mandatory payment of  
 3 attorneys' fees and costs to successful plaintiffs. The attorneys' fees provision of the CLRA,  
 4 Section 1780(e), states: "The court *shall* award court costs and attorney fees to a prevailing  
 5 plaintiff in litigation filed pursuant to this section." Thus, some award of attorneys' fees is  
 6 mandatory. *Kim v. Euromotors West/The Auto Gallery*, 149 Cal.App.4th 170, 177 (2007).

7 In common fund cases such as this one, courts within the Ninth Circuit have discretion to  
 8 use one of two methods to determine whether the fee request is reasonable: (1) percentage-of-the-  
 9 fund; or, (2) lodestar plus a risk multiplier. *Staton v. Boeing*, 327 F.3d 938, 967-68 (9th Cir.  
 10 2003); *see also In re Mercury Interactive Corp.*, 618 F.3d 988, 992 (9th Cir. 2010). "Though  
 11 courts have discretion to choose which calculation method they use, their discretion must be  
 12 exercised so as to achieve a reasonable result." *In re Bluetooth Headset Prods. Liab. Litig.*, 654  
 13 F.3d 935, 942 (9th Cir. 2011).

14 The benchmark request for attorneys' fees is reasonable based upon the extensive arm's  
 15 length negotiations that serve as independent confirmation of the fairness of the settlement,  
 16 including attorneys' fees. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). The  
 17 requested fees are also fully supported under the percentage-of-the-fund and lodestar approach,  
 18 which Class Counsel offer as an additional means of cross-checking the requested fees.

19  
 20 **A. The Ninth Circuit Benchmark of Twenty-Five Percent of the Common Fund is Warranted.**

21 The "benchmark" percentage for attorneys' fees in the Ninth Circuit is 25% of the  
 22 common fund with costs and expenses awarded in addition to this amount. *Vizcaino v. Microsoft*  
 23 *Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). "However, in most common fund cases, the award  
 24 exceeds that [25%] benchmark." *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal.  
 25 2007) (citing *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1998)). *See also*  
 26 *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 448 (E.D. Cal. 2013) ("[t]he typical  
 27 range of acceptable attorneys' fees in the Ninth Circuit is 20 percent to 33.3 percent of the total  
 28 settlement value"). "[A]bsent extraordinary circumstances that suggest reasons to lower or

1 increase the percentage, the rate should be set at 30%.” *Omnivision*, 559 F. Supp. 2d at 1048,  
 2 (citing *In re Activision Sec. Litig.*, 723 F.Supp. at 1378).

3 Settlement class members were provided notice that Class Counsel would seek an award of  
 4 attorneys’ fees of up to 30% of the common fund. Class Counsel’s request for attorneys’ fees of  
 5 25% of the claim fund is well under that amount. In addition, the fee request is fully supported by  
 6 factors considered by the Ninth Circuit including: (a) the results achieved; (b) the risk of litigation;  
 7 (c) the skill required and the quality of work; and (d) the contingent nature of the fee. *See*  
 8 *Vizcaino*, 290 F.3d at 1047.

9 *1. The Results Achieved Justify a Benchmark Award.*

10 The most important factor in granting a fee award is the degree of success counsel  
 11 achieved for the class. *See Vizcaino*, 290 F.3d at 1048; *see also Six Mexican Workers v. Arizona*  
 12 *Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.1990). To measure that success, “the factor given  
 13 the greatest emphasis is the size of the fund created, because a common fund is itself the measure  
 14 of success . . . [and] represents the benchmark from which a reasonable fee will be awarded.”  
 15 *Manual for Complex Litigation*, § 14.121 (internal quotations omitted).

16 In the present case, Class Counsel achieved the largest result on record for a slack fill case,  
 17 a non-reversionary \$2.5 million settlement fund. Compared with other slack-fill litigation, this  
 18 result is excellent. *See Kline v. Dymatize Enters., LLC*, No. 15-CV-2348, 2016 U.S. Dist. LEXIS  
 19 142774 (S.D. Cal. Oct. 13, 2016) (protein powder slack-fill case providing only injunctive relief).  
 20 Class Counsel has *also* achieved injunctive relief for the settlement class, wherein Defendant will  
 21 modify its fill level quality control procedures and target fill levels to at least 75% for theater box  
 22 products, and 50% for all other products, including bag-in-a-box. Dkt. 72-4 ¶ 4.1. Additionally,  
 23 the class member response has been overwhelmingly positive with 71,116 claim submissions to  
 24 date. RJC Decl. ¶ 30. In summary, Class Counsel has achieved excellent results for the settlement  
 25 class, and a 25% benchmark award is warranted.

26 *2. The Risks Involved Support Justify a Benchmark Award.*

27 The next factor justifying an award of the benchmark is the substantial degree of risk faced  
 28 by Class Counsel. *See Vizcaino*, 290 F.3d at 1048. This was not an easy case. To achieve the

1 results they accomplished for the class, Class Counsel took on and overcame a series of very  
 2 significant risks. RJC Decl. ¶¶ 9, 32, 51-52. As an initial matter, Defendant is a well-resourced  
 3 competitor in the confectionery industry, now part of the second largest candy company in the  
 4 world with net revenues of over \$12 billion annually<sup>3</sup>, and represented by an experienced defense  
 5 firm, which strongly contested liability. *Id.* ¶ 32; *See In re Equity Funding Corporation Securities*  
 6 *Litigation*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977) (the quality of opposing counsel is important  
 7 in evaluating the quality of class counsel’s work). Class Counsel’s ability to obtain this result  
 8 against formidable opposition confirms the quality of Class Counsel’s representation.

9 Additionally, the expense to prosecute this case has been substantial in light of the need for  
 10 expert testimony from multiple disciplines, including packaging design engineering, economics,  
 11 conjoint analysis, and marketing. RJC Decl. ¶¶ 20-25. In order to present a robust case for class  
 12 certification, Plaintiff retained an expert in each of these fields. *Id.* Undoubtedly, the quality of  
 13 Plaintiff’s expert declarations, expert reports, and studies proffered in support of class certification  
 14 was a substantial factor in persuading Defendant to settle. Class Counsel’s willingness to take on  
 15 the risk of nonpayment substantially benefited Plaintiff and the settlement class. Accordingly, this  
 16 factor favors an award of the benchmark fee percentage.

17 3. *The Complexity and Novelty of the Issues Support a Benchmark Award.*

18 This action involved specialized and hotly contested legal issues that are at the cutting  
 19 edge of recent developments in the area of slack-fill law. This action contained complex legal  
 20 issues, i.e., whether Defendant’s product packaging contains nonfunctional slack-fill and is  
 21 considered deceptive to reasonable consumers. There was (and is) no appellate decision in any  
 22 circuit that dealt with these specific issues. RJC Decl. ¶ 32. Resolution of the issues therefore  
 23 involved researching and analyzing conflicting district court opinions and statutory interpretation.  
 24 *Id.* Indeed, at the time of settlement (and since), there have been numerous theater box slack-fill  
 25 cases which had been defeated on pleadings challenges, at class certification, and on the merits.  
 26 *See, e.g., Daniel v. Tootsie Roll Indus., LLC*, 2018 U.S. Dist. LEXIS 129143, (S.D.N.Y. Aug. 1,  
 27

28 <sup>3</sup> *See* <https://www.candyindustry.com/2018-Global-Top-100-candy-companies-Part-4> (last visited September 5, 2018).

1 2018) (Rule 12(b)(6) dismissal of Junior Mints theater box purchaser’s deceptive packaging /  
 2 slack fill claims); *White v. Just Born, Inc.*, Case No. 2:17-cv-04025 (W.D. Mo. Aug. 7, 2018)  
 3 (certification of Mike and Ike theater box purchaser class denied); *Bratton v. The Hershey Co.*,  
 4 Case No. 2:16-cv-04322 (W.D. Mo. Feb. 16, 2018) (summary judgment of Hershey theater box  
 5 class action granted); Here, given the complexity and novelty of the issues, an award of the  
 6 benchmark is appropriate.

7  
 8 4. *The Skill Required, Quality of Work, and Arms’ Length Negotiations By  
 Experienced Counsel Support a Benchmark Award.*

9 Class Counsel has demonstrated substantial skill, diligence, efficiency, and a high quality  
 10 of work in achieving a common fund of \$2.5 million and notable injunctive relief as part of the  
 11 settlement. *See Knight v. Red Door Salons, Inc.*, No. 08-01520 SC, 2009 U.S. Dist. LEXIS 11149,  
 12 at \*16 (N.D. Cal. Feb. 2, 2009) (“The sizeable recovery of \$500,000 is some testament to  
 13 Plaintiffs’ counsel’s skill. This factor supports the [30%] requested fee.”). Class Counsel obtained  
 14 this excellent result in face of vigorous opposition involving issues that were hotly contested.  
 15 Class Counsel were able to achieve the settlement due to considerable expertise and experience in  
 16 prosecuting complex class actions (Dkt. 72-5, Firm Resume); RJC Decl. Ex. 1 ¶ 40. Class Counsel  
 17 adeptly opposed Defendant’s pleading challenges (*Id.* ¶¶ 12-14), relentlessly pursued documents  
 18 via law and motion practice (*Id.* ¶¶ 15-17), obtained critical admissions during Defendant’s Rule  
 19 30(b)(6) depositions (*Id.* ¶ 16), and carefully prepared Plaintiff for deposition (*Id.* ¶ 17). In  
 20 anticipation of the Parties’ mediations with respected mediators Martin Quinn and Judge Cahill,  
 21 Class Counsel submitted comprehensive mediation briefs extensively detailing Plaintiff’s legal  
 22 and factual support. *Id.* ¶ 18. When the case did not settle, Plaintiff filed a forceful motion for  
 23 class certification, including declarations from Plaintiff, Class Counsel, and Plaintiff’s four  
 24 retained experts. *Id.* ¶¶ 20-25. Only then did the case settle with the continued assistance of  
 25 mediator Judge Cahill. *Id.* ¶ 26.

26 Moreover, Class Counsel is at the forefront of slack-fill litigation, currently litigating four  
 27 other theater box candy product cases in California state and federal court. *Id.* ¶ 40. This  
 28 experience allowed Class Counsel to focus on the key factual and legal issues and navigate this

1 case to a settlement-ready posture. *See Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431,  
 2 449 (E.D. Cal. 2013) (approving fee in amount of 33 percent of class recovery in part because case  
 3 “required specialist skills to litigate the legal theories [] in the case”); *Franco v. Ruiz Food Prods.*,  
 4 No. 1:10-cv-02354, 2012 U.S. Dist. LEXIS 169057, at \*48 (E.D. Cal. Nov. 27, 2012) (awarding  
 5 fees of 33 percent of settlement amount due to counsel’s specialized skills); *In re Heritage Bond*  
 6 *Litig.*, CV 02-6512 , 2005 U.S. Dist. LEXIS 13555, at \*61 (C.D. Cal. June 10, 2005) (awarding  
 7 attorneys’ fees in the amount of 33 percent of the common fund based in part on the effort, skill  
 8 and experience of class counsel).

9 In sum, the settlement was the result of extensive, informed, arms-length negotiations  
 10 between counsel with substantial litigation experience, who are exceedingly familiar with the legal  
 11 and factual issues in this case, and who have precise experience litigating and settling complex  
 12 and class action cases like this. This case required a substantial commitment of time, resources,  
 13 and energy from Class Counsel, and the relief achieved simply would not have been possible but  
 14 for the commitment and skill of Class Counsel.

15 5. *The Contingent Nature of the Case Supports a Benchmark Award.*

16 The burdens borne by Class Counsel in taking on the litigation is another relevant factor  
 17 that justifies an award of the benchmark. *See Vizcaino*, 290 F.3d at 1050; *see also Six Mexican*  
 18 *Workers*, 904 F.2d at 1311. Adding to the other risks discussed herein is the fact that Class  
 19 Counsel undertook this litigation on a contingency-fee basis, requiring them to shoulder not only  
 20 the cost of attorney time, but all the substantial costs of more than two years of litigation. RJC  
 21 Decl. ¶ 9. Indeed, courts have long recognized the public policy of rewarding attorneys for  
 22 accepting representation on a contingency-fee basis. *See In re Washington Pub. Power Supply Sys.*  
 23 *Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994). This is especially true where, as here, Class  
 24 Counsel have significant experience in the particular type of litigation at issue, i.e., deceptive  
 25 packaging and slack fill. Moreover, when counsel takes cases on a contingency-fee basis, the risk  
 26 of non-payment after years of litigation justifies a significant fee award. *See Hopkins v. Stryker*  
 27 *Sales Corp.*, No. 11-CV-02786, 2013 U.S. Dist. LEXIS 16939, at \*8 (N.D. Cal. Feb. 6, 2013) (in  
 28 awarding fees of 30 percent of the settlement, the court explained that “[c]lass [c]ounsel took a

1 significant risk investing in this case” because it “was conducted on an entirely contingent fee  
2 basis against a well-represented [d]efendant” and because [a]ll of the financial risk of litigation  
3 was therefore assumed by [c]lass counsel, whose fee arrangement with [p]laintiffs required [c]lass  
4 [c]ounsel to bear all the costs of litigation”).

5 Class Counsel performed all of the described work on a pure contingency-fee basis, with  
6 no guarantee that they would ever be paid for any of their work or be reimbursed for any of their  
7 out-of-pocket costs. RJC Decl. ¶ 9. They turned down other potentially profitable matters,  
8 including hourly work, in order to take on this large-scale case, and devoted resources to it that  
9 could have been devoted to other potentially income-generating matters. *Id.* ¶51. Class Counsel’s  
10 willingness to undertake this complicated litigation and see it through to completion,  
11 notwithstanding the risk that they might never be paid at all, should be recognized and rewarded,  
12 in accordance with Ninth Circuit precedent. *See Vizcaino*, 290 F.3d at 1049.

13  
14 6. *Lack of Objections by Class Members to Requested Fees Supports a  
Benchmark Award.*

15 Finally, absence of objections from the class to the fees requested further demonstrates the  
16 reasonableness and fairness of the attorney’s fee request. *See Garner v. State Farm Mut. Auto. Ins.*  
17 *Co.*, No. CV 08 1365, 2010 U.S. Dist. LEXIS 49482, at \*5 (N.D. Cal. Apr. 22, 2010) (noting  
18 “single objection out of a sizeable class, after notice, further demonstrates the reasonableness and  
19 fairness of [c]lass [c]ounsel’s request”). Notably, this fee brief is being submitted two weeks prior  
20 to the objection deadline so it is impossible to know whether any class members will object to this  
21 class action settlement during the next two weeks at this time (Dkt. 80). To date, however, *zero*  
22 formal objections to the settlement have been received based on the agreed upon 30% claim fund  
23 fee (or otherwise), while over 71,000 class members have made claims. RJC Decl. ¶ 30.

24  
25 **B. The Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee  
Award.**

26 It is well settled in the Ninth Circuit that, “[i]n a common fund case, the district court has  
27 discretion to apply either the lodestar method or the percentage-of-the-fund method in calculating  
28 a fee award.” *Fischel v. Equitable Life Assurance Soc’y of the U.S.*, 307 F.3d 997, 1006 (9th Cir.



2002); *see also, e.g., Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th Cir. 1989); *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1295 (9th Cir. 1994). While the court has discretion to use either method, “the primary basis of the fee award remains the percentage method.” *Vizcaino*, 290 F.3d at 1050; *see also Six Mexican Workers*, 904 F.2d at 1311 (“benchmark percentage [of 25% of the fund] should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors”).

Here, Class Counsel’s unadjusted lodestar is \$523,702.50. Less than a 1.2 multiplier would be required to bring Class Counsel’s lodestar to the 25-percent fee request.

*I. Class Counsel’s Hourly Rates are Reasonable*

Under the lodestar method, a reasonable hourly rate “is the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation.” *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). Ordinarily, reasonable hourly rates are based on each attorney’s *current* hourly rates. *Vizcaino*, 290 F.3d at 1051. The relevant community is the location where the district court sits, in this case the Northern District of California. *Camacho*, 523 F.3d at 979. Declarations regarding the prevailing market rate in the relevant community are sufficient to establish a reasonable hourly rate. *See Widrig v. Apfel*, 140 F.3d 1207, 1209 (9th Cir. 1998). Class Counsel’s hourly rates are summarized below:

<b>Name (Year of Bar Admission) (Title)</b>	<b>Hourly Rate</b>
Ryan J. Clarkson (2005) (Managing Attorney)	\$650
Shireen M. Clarkson (2004) (Senior Partner)	\$650
Bahar Sodaify (2013) (Associate)	\$375

The billing rate for the partners (Mr. and Mrs. Clarkson) is well within the normal range of fees charged by firms in Southern California for partner work and are comparable to those in the Northern District. *See Camacho*, 523 F.3d at 979 (9th Cir. 2008) (Court remanded for the “district court to make a determination of the reasonable hourly rate on the basis of the prevailing rates in the Northern District, or a *community shown to be comparable* to the Northern District.”); *see Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 455 (9th Cir. 2010) (district court did not

1 abuse its discretion in awarding 2008 hourly rates for Bay Area attorneys of up to \$875 for a  
2 partner, \$700 for an attorney with 23 years of experience); *Gutierrez v. Wells Fargo Bank, N.A.*,  
3 2015 U.S. Dist. LEXIS 67298 (N.D. Cal. May 21, 2015) (finding reasonable rates for Bay Area  
4 attorneys of between \$475-\$975 for partners, and \$300-\$490 for associates); *Pom Wonderful, LLC*  
5 *v. Purely Juice, Inc.*, No. CV 07-2633, 2008 U.S. Dist. LEXIS 110460, at \*11-12 (C.D. Cal. Sep.  
6 22, 2008) (finding partner rates of \$750 to \$475 and associate rates of \$425 to \$275 reasonable in  
7 Los Angeles). In fact, Class Counsel's billing rates have not increased since 2016, when billing on  
8 this case commenced. RJC Decl. ¶42. Class Counsel's hourly rates are reasonable. *See* RJC Decl.  
9 Exs. 2-9 (surveys of legal rates, including Laffey Matrix).

10 2. *Class Counsel's Hours Expended are Reasonable*

11 From this case's inception to the present, a period of nearly two years, Class Counsel  
12 recorded 1,081.8 hours litigating this matter. RJC Decl. ¶ 42. Class Counsel also delegated many  
13 tasks to lower-billing paralegals and associate attorneys. *Id.* ¶ 43. Because this was a contingency-  
14 fee case, Class Counsel had little incentive to spend unnecessary time on tasks. The hours Class  
15 Counsel spent litigating the case were limited to that necessary to pursue Plaintiff's claims  
16 Accordingly, the hours expended were reasonable and necessarily incurred. Class Counsel shall  
17 make available for *in camera review* their detailed billing records upon request of the Court. *Id.*

18 3. *Class Counsel's Lodestar is Reasonable*

19 Using the reasonable hourly rates and reasonable hours expended in the course of this  
20 litigation, Class Counsel's unadorned lodestar is \$523,702.50. RJC Decl. ¶ 43 (summary chart of  
21 Class Counsel's timekeepers disaggregated by number of hours, rate, and total fees).

22 4. *Enhancement of the Lodestar is Justified*

23 Based on Class Counsel's unadorned lodestar figure of \$523,702.50, the 25% fee  
24 requested by Class Counsel reflects a multiplier of less than 1.2. It is well-settled that a positive  
25 multiplier is appropriate in common fund cases to reward attorneys for the risk assumed in taking  
26 and litigating the case. *See In re Wash. Public Power Supply System Securities Litigation*, 19 F.3d  
27 1291, 1300 (9th Cir. 1994); *Vizcaino*, 290 F.3d at 1051 ("This mirrors the established practice in  
28 the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them

1 a premium over their normal hourly rates for winning contingency cases”); *Steiner v. American*  
 2 *Broadcasting Co., Inc.*, 247 Fed. Appx. 780, 783 (9th Cir. 2007) (affirming an attorney fee award  
 3 representing a lodestar multiplier of 6.85 because it fell within the range of multipliers that courts  
 4 have allowed); *see also Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal.  
 5 2008) (approving 25% fee award yielding a multiplier of 5.2 and stating that “there is ample  
 6 authority for such awards resulting in multipliers in this range or higher”); *Garner*, 2010 U.S.  
 7 Dist. LEXIS 49482, at \*5 (“Class Counsel effectively seek a multiplier of less than 2. This is well  
 8 within the range of multipliers applied in common fund cases....”).

9 Here, the stellar monetary relief obtained for the settlement class, the risks involved in the  
 10 litigation, the contingent nature of the fee, the novelty and complexity of the issues presented, the  
 11 absence (thus far) of any objections to the requested fee amounts, and the experience of Class  
 12 Counsel in litigating class actions as described herein justify a multiplier, at least for cross-check  
 13 purposes. *See In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir.  
 14 1994) (“[C]ourts have routinely enhanced the lodestar to reflect the risk of nonpayment by paying  
 15 them a premium over their normal hourly rates for winning contingency cases.”). A lodestar-plus-  
 16 multiplier cross-check therefore further supports the reasonableness of the requested 25% fee.

#### 17 **IV. REIMBURSEMENT OF LITIGATION EXPENSES IS WARRANTED**

18 “Reasonable costs and expenses incurred by an attorney who creates or preserves a common  
 19 fund are reimbursed proportionately by those class members who benefit from the settlement.” *In*  
 20 *re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996). In the present case,  
 21 the litigation expenses Class Counsel incurred were necessary to secure the resolution of this  
 22 litigation. RJC Decl. ¶ 45. Class Counsel advanced all expenses without assurance that they would  
 23 ever be repaid. *Id.* ¶ 9. The settlement permits Class Counsel to seek reimbursement of their  
 24 litigation expenses and the class notice informed class members that Class Counsel would seek an  
 25 award of costs not to exceed that amount (Dkt. 81-1). Class Counsel is making a request for  
 26 reimbursement of \$102,172.12 in litigation costs. *Id.* These expenses are reflected in the records of  
 27 Clarkson Law Firm, P.C., and were necessary to prosecute this litigation. *Id.* ¶ 45. Class Counsel  
 28 shall make available for in *camera review* their detailed litigation expense records upon request of

1 the Court. *Id.* All expenses were carefully and reasonably expended, and they reflect market rates  
 2 for various categories of expenses incurred. *Id.* Most of these expenses were incurred for expert  
 3 opinions and testimony, court fees, consumer survey fees, mediation fees, discovery costs, courier  
 4 costs, travel costs, and copying costs. *Id.* Expense items are billed separately and such charges are  
 5 not duplicated in Class Counsel’s billing rates. *Id.* Accordingly, full reimbursement of Class  
 6 Counsel’s litigation expenses is warranted. *See Tait v. BSH Home Appliances Corp.*, No. SACV  
 7 10-0711, 2015 U.S. Dist. LEXIS 98546, at \*3 (C.D. Cal. July 27, 2015) (awarding full  
 8 reimbursement of costs where vast majority incurred through expert opinions and testimony, court  
 9 fees, discovery costs, travel costs, copying costs, mailing costs, and so forth in light of length of  
 10 litigation and the importance of expert testimony).

11 **V. THE SERVICE AWARD FOR THE NAMED PLAINTIFF IS FAIR**

12 The settlement provides for a service award of \$5,000 to Mr. Iglesias subject to court  
 13 approval (Dkt. 72-4). The award is appropriate in light of the time and effort expended by  
 14 Plaintiff. *Staton*, 327 F.3d at 977. Courts routinely grant such awards, which are intended to  
 15 advance public policy by encouraging individuals to come forward and take action to protect the  
 16 rights of the class, as well as to compensate class representatives for their time, effort, and  
 17 inconvenience. *Id.*; *see also Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal.  
 18 1995). Relevant considerations include: (1) the risk to the class representative in commencing  
 19 suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the  
 20 class representative; (3) the amount of time and effort spent by the class representative; (4) the  
 21 duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class  
 22 representative as a result of the litigation. *See Van Vranken*, 901 F. Supp. 294 at 299.

23 Here, the involvement of named Plaintiff Thomas Iglesias was critical to the prosecution of  
 24 the case. RJC Decl. ¶ 56. Mr. Iglesias contributed 45-50 hours to this case and bore the financial  
 25 risk of no recovery. Declaration of Thomas Iglesias (“Iglesias Decl.”) ¶ 35. He also took  
 26 significant time away from work, family, and personal activities to initiate and litigate this action.  
 27 He held regular meetings with Class Counsel to receive updates on the progress of the case and to  
 28 discuss strategy, as well as assisted in Class Counsel’s pre-suit investigation by discussing his

1 consumer experience and providing information on his purchases and use of the products. RJC  
 2 Decl. ¶¶ 56-57. He assisted in the drafting of pleadings and papers, and reviewed each for  
 3 accuracy before they were filed. *Id.* ¶ 58. He coordinated with Class Counsel to form responses to  
 4 discovery requests, including written document requests, and searched for responsive documents.  
 5 *Id.* ¶ 57. Mr. Iglesias also sat for a full-day deposition. *Id.* In fact, Defendant communicated to  
 6 Class Counsel that it was Mr. Iglesias' persuasive and credible testimony that played a significant  
 7 part in persuading Defendant to settle this case. *Id.* Finally, he was intimately involved in the  
 8 settlement process, and has continued to keep abreast of settlement progress to date and he was  
 9 prepared to litigate this case to a verdict if necessary. *Id.* His dedication and efforts have conferred  
 10 a significant benefit on tens of thousands of claimants and millions of consumers and prospective  
 11 consumers across the United States, as well as the general public.


12 In light of the relevant factors, a service award of \$5,000 to Mr. Iglesias is appropriate and  
 13 should be awarded. *See In re Toys R Us-Delaware, Inc. Fair & Accurate Credit Transactions Act*  
 14 *(FACTA) Litig.*, 295 F.R.D. 438, 472 (C.D. Cal. 2014) (approving \$5,000 incentive  
 15 award); *Faigman v. AT&T Mobility LLC*, No. C06-04622, 2011 WL 672648, \*5 (N.D. Cal. Feb.  
 16 16, 2011) (noting that “[i]n [the Northern] [D]istrict, incentive payments of \$5,000 are  
 17 presumptively reasonable”). There is no evidence in the record which rebuts the presumptive  
 18 reasonableness of the requested service award here.

## 19 VI. CONCLUSION

20 For the foregoing reasons, Class Counsel respectfully requests that the Court grant  
 21 Plaintiff's motion for an award of attorneys' fees in the total amount of \$625,000 (25% of the  
 22 claim fund), litigation expenses of \$102,172.12, and a service award in the amount of \$5,000 to  
 23 Plaintiff Thomas Iglesias as class representative.

24  
 25 Dated: September 6, 2018

**CLARKSON LAW FIRM, P.C.**

  
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