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
22525 Pacific Coast Highway
Malibu, CA 90265
Tel: (213) 788-4050
Fax: (213) 788-4070

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, CA 92101
Tel: (619) 915-9432
Fax: (650) 618-0478

Attorneys for Plaintiffs, Settlement Class Representatives, and Settlement Class Members

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

CHRISTOPHER O'BRIEN and TIFFANY KIPIKASHA, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SUNSHINE MAKERS, INC., a California corporation,

Defendant.

Case No.: CIV-SB-2027994
Case Filed: December 18, 2020
Assigned for all purposes to Hon. David Cohn

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

Hearing Information
Date: September 21, 2021
Time: 10:00 a.m.
Dept.: S-26

PUBLICALLY FILED – Redacts Material from Conditionally Sealed Record

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

STATUTE STATUTES

SECONDARY SOURCES

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs and Settlement Class Representatives Christopher O'Brien, Tiffany Kipikasha, and Michelle Moran ("**Plaintiffs**" and/or "**Settlement Class Representatives**") hereby move the Court for entry of an order granting final approval of the Settlement Agreement (the "**Settlement Agreement**"). Defendant Sunshine Makers, Inc. ("**Defendant**") does not oppose this motion. Plaintiffs and Defendant are referred to herein as the "**Parties**."

I. INTRODUCTION

This nationwide class action settlement resolves claims against Defendant for falsely and misleadingly advertising Simple Green cleaning products as "Non-Toxic" in exchange for a $4.35 million common fund, with no right to reversion, and Defendant's complete cessation of the offending "Non-Toxic" product labels. This Court previously approved both the method of notice, and the opportunity for class members to submit claims, opt-out, or object to the settlement. Overall, the notice was a great success and the response from class members was extremely positive. Plaintiffs' and Settlement Class Counsel Clarkson Law Firm, P.C. ("**Clarkson**") and Moon Law APC ("**Moon**"), and the appointed notice and claims administrator Digital Settlement Group ("**DSG**"), successfully executed the Court-approved notice plan. In so doing, they exceeded the estimated 55 million impressions they anticipated from the print publication and digital online advertising program by nearly ***forty percent***, achieving more than 76 million impressions and the estimated 70% reach to members of the settlement class. As a result, they received a nearly unanimous positive reaction. More than 132,000 class members submitted a claim, on par with or exceeding previously approved claim rates, and only one individual submitted an invalid request to opt-out of the settlement,[1] and ***no settlement class member objected to the settlement***.

As set forth below, the settlement offers a fantastic result that achieves the dual aims of consumer protection law: It simultaneously provides class members with substantial monetary relief and prevents any future consumer fraud by requiring complete cessation of the challenged

[1] The administrator received one request to be excluded from the settlement, however it failed to provide a date of purchase to confirm that the individual is in the Settlement Class. DSG Decl. ¶¶ 22-23.

advertising claims. In all respects, the settlement is fair, adequate, and reasonable and satisfies the standard for final approval.

II. THE SETTLEMENT TERMS

A. The Settlement Class

This Court preliminarily certified this action as a class under Civil Code section 382, appointing Plaintiffs as Settlement Class Representatives and Clarkson and Moon as Settlement Class Counsel, and defining the "**Settlement Class**" as "All persons in the United States who purchased one or more of Defendant's Covered Products at any time [between May 12, 2016 and entry of an Order preliminarily approving this settlement on May 17, 2021]." Order Grant Prelim. App'l, 5/17/2020; Moon Decl. at **Exhibit 1** [Settlement Agreement] at ¶ 7.1.1.[2]

B. The Settlement Consideration

1. Monetary Relief

The Settlement Agreement provides for fair and adequate restitution to be paid to the class members. As part of the settlement, Defendant agreed to pay $4.35 million into a common fund, with no right to reversion, that will be exhausted to pay: (1) valid class member claims; (2) notice and claims administration costs up to $530,000, plus postage; (3) incentive or service awards up to $5,000 for each Plaintiff (totaling $15,000), subject to Court approval upon the submission of a duly noticed motion posted on the Settlement website; (4) attorneys' fees and costs up to one-third of the

[2] The following people are excluded from the Settlement Class: (1) Defendant's officers, directors, or employees and their immediate family members; (2) any judge who has presided of this case; and (3) any persons who timely opt-out of the settlement. Moon Decl. at **Exhibit 1** [Settlement Agreement] at ¶¶ 1.11 [Class Period], 1.14 [Covered Products], 1.15 [Defendant], 1.25 [Notice Response Deadline], 1.26 [Opt-Out Date], 1.30 [Person], 1.39 [Request for Exclusion], 1.41 [Settlement Class], 1.43 [Settlement Class Member], 8.4 [Opt Out Procedure]. "**Covered Products**" include: "all products sold by Defendant and labeled "Non-Toxic," including the following: (1) Simple Green All-Purpose Cleaner; (2) Simple Green All-Purpose Cleaner (Fresh); (3) Simple Green All-Purpose Cleaner (Lemon); (4) Simple Green All-Purpose Cleaner (Lavender); (5) Simple Green Oxy Solve Total Outdoor Cleaner; (6) Simple Green Oxy Solve House and Siding Cleaner; (7) Simple Green Oxy Solve Concrete and Driveway Cleaner; (8) Simple Green Oxy Solve Deck and Fence Cleaner; (9) Simple Green Wash & Wax; (10) Simple Green All-Purpose Wipes; (11) Simple Green All-Purpose Wipes (Lemon); (12) Simple Green Multi-Purpose Foaming Cleaner; (13) Simple Green Carpet Cleaner; (14) Simple Green Marine All-Purpose Boat Cleaner; (15) Simple Green Heavy Duty BBQ & Grill Cleaner; (16) Simple Green Heavy Duty BBQ & Grill Cleaner (Aerosol); (17) Simple Green Oxy Dog Stain & Odor Oxidizer; (18) Simple Green Bio Dog; (19) Simple Green Advanced Dog Bio Boost Stain & Odor Remover; (20) Simple Green Cat Pet Stain & Odor Remover; and (21) Simple Green Outdoor Odor Eliminator, and all sizes and packaging types of those products." *Id.* at ¶ 1.14.

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

common fund ($1,450,000), plus costs and expenses, subject to Court approval upon the submission of a duly noticed motion posted on the settlement website; and (5) a *cy pres* award for any uncashed checks to charitable organizations.[3]

Each Settlement class member was permitted to submit a claim online or by mail and elect to either submit proof of purchase to receive a cash refund of $3.00 per Covered Product, without limitation; or submit their claim without proof of purchase to receive $3.00 per Covered Product, up to a maximum of 10 Covered Products ($30.00). *Id.* at ¶¶ 1.35 [Receipt], 4.2.2 [Amount of Valid Claim], 5.1.3.1. Each class member was permitted to submit a claim either electronically through the settlement website or by mail. *Id*. ¶ 5.1.3.1. To date, nearly 1,000 class members with proof of purchase have submitted claims, and more than 132,000 class members without proof of purchase have submitted claims. DSG Decl. ¶ 25. Any unclaimed funds will be awarded *cy pres* to charitable organizations.

2. Injunctive Relief

As part of the settlement, Defendant has also agreed to entirely remove the "Non-Toxic" references from the Covered Products' packaging and labeling. Moon Decl. at **Exhibit 1** [Settlement Agreement] at ¶ 4.1.1. The cessation of the "Non-Toxic" claim provides a significant benefit to consumers, regardless of whether they submit a claim or opt out of the settlement. *Id.*; Moon Decl. at ¶¶ 9, 38.

C. Release by the Class

Under the Settlement Agreement, "Released Claims" are defined, in sum, as all claims "arising out of Plaintiffs' price premium theory and/or other allegations that they expected to receive a product that did not pose any risk of harm to humans, animals, and the environment . . . and any and all claims or causes of action based on substantially the same factual predicate." Moon Decl. at **Exhibit 1** [Settlement Agreement] at ¶¶ 1.36 [Released Claims], 6.1 [Releases]. "Excluded from the Released Claims are any and all claims for personal injury, wrongful death, and/or emotional

[3] *See* Moon Decl. at **Exhibit 1** [Settlement Agreement] at ¶¶ 1.2 [Administrative Costs], 1.5 [Claim Fund], 1.18 [Fees and Cost Application], 1.14 [Total Monetary Settlement Amount], 1.34 [Qualifying Settlement Claim Form], 1.45 [Valid Claim], 4.2.6 [*Cy Pres* Award], 4.2.7 [No Reversion], 5.1.1 [Administrative Costs Cap], 5.1.3.1 [Settlement Website], 9.1 [Attorneys' Fees & Costs Cap], 9.2 [Incentive Award Cap].

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

distress arising from wrongful death." *Id.* Only after the entry of final judgment on a motion for final approval of the class settlement, duly noticed and posted on the settlement website, and after the exhaustion of all appeals in a manner affirming the judgment, will the release be binding. *Id.* at ¶¶ 1.17 [Effective Date], 6.1 [Releases].

III. NOTICE TO THE CLASS AND CLAIMS ADMINISTRATION

A. Notice

The Court-approved notice plan reached more than 70% of the class, using the best practicable means to reach unknown class members, through efficient and economical advertising. Moon Decl. at **Exhibit 1** [Settlement Agreement] at Ex. A [Notice Plan] at ¶¶ 22-23 [Effectiveness, Efficiency, Economical, Best-Practicable Means]; DSG Decl. at ¶ 12. The notice plan commenced over the course of sixty (60) days and included: (1) targeted online advertising and search term advertising that drove people to the dedicated settlement website; (2) print advertisement in a publication that circulates to more than 1,975,000 readers; (3) a press release that reached 4,000 United States websites, nearly 3,000 media outlets, and more than 550 news content systems to reach journalists through a network with over 20,000 daily unique visitors. Moon Decl. at **Exhibit 1** [Settlement Agreement] at Ex. A [Notice Plan] at ¶¶ 11 [Settlement Website], 14-16 [Print Publication and Press Release], 17-21 [Online Advertising]; DSG Decl. at ¶ 12. All relevant court filings related to the settlement, the Settlement Agreement, Claim Form, and the long form and short form notices, as set forth in Exhibit A (Notice Plan), Exhibit D (Long Form Notice), and Exhibit E (Short Form Notice) to the Settlement Agreement, were posted on the settlement website, explaining to class members their rights, how to exercise them, and the outcome of their choices in plain and concise language. DSG Decl. at ¶ 33. Additionally, DSG operated a toll-free information phone line, promptly corresponded with settlement class members, and routinely checked the settlement website to ensure it stayed operational throughout the notice period. DSG Decl. at ¶¶ 3, 12.

B. Claims

Following robust notice and a sixty-day claim period, more than 132,000 settlement class members submitted a claim. DSG Decl. at ¶ 25. [redacted]

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

[redacted]. *Id.*; Moon Decl. at ¶ 36.

C. Opt-Outs and Objections

Under the Settlement Agreement, settlement class members had the right to object or opt-out of the settlement as outlined in paragraphs 8.2 and 8.3 of the Settlement Agreement, requiring a signed writing postmarked by no later than 90 days following entry of an order granting preliminary approval and 60 days following the publication of notice as outlined in the notice plan. Moon Decl. at **Exhibit 1** [Settlement Agreement] at ¶¶ 1.23 [Notice Date], 1.25 [Notice Response Deadline], 8.2 [Objections], 8.3 [Opt-Outs]. The opt-out and objection procedure did not present any unreasonable hurdles or difficulties. *Id.* Notwithstanding a lengthy claim period and clear notice to the settlement class members, ***not a single member has objected***. DSG Decl. at ¶ 22. Indeed, only one individual submitted a request for exclusion from the settlement, albeit failing to confirm that he is a member of the settlement class. *Id.* at ¶¶ 22-23.

IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. Legal Standard for Final Approval

Rule 3.769 of the California Rules of Court sets forth the procedures for settlement of class actions in California. *Cellphone Termination Fee Cases*, 180 Cal.App.4th 1110, 1118 (2009). At final approval, the trial court confirms its preliminary determination "whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper." *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 234-35 (2001). In exercising its discretion, "[d]ue regard . . . should be given to what is otherwise a private consensual agreement between the parties." *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal.App.4th 1135, 1145 (2000). California courts favor settlement, particularly in class actions and other complex cases in which substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. *See In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 723 n. 14 (2006) ("Public policy generally favors the compromise of complex class action litigation."); *7-Eleven Owners*, 85 Cal.App.4th at 1151; *Stambaugh v. Sup.*

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

Ct., 62 Cal.App.3d 231, 236 (1976); Rubenstein, 4 *Newberg on Class Actions* § 13.44 (5th Ed. 2021) (citing cases).

In reviewing a class action settlement, the trial court need not "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *7-Eleven Owners*, 85 Cal.App.4th at 1145. As such, "the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits" of Plaintiffs' claims. *Id*.; *see also Wershba*, 91 Cal.App.4th at 246. The focus is on whether the proposed settlement is fair, reasonable, and adequate under the circumstances of the case. *See In re Microsoft*, 135 Cal.App.4th at 723; *see also Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).

B. <u>The Proposed Settlement Is Fair, Reasonable, and Adequate</u>

1. The Settlement Is Entitled to a Presumption of Fairness

"[A] class action settlement is presumed to be fair [where]: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Chavez v. Netflix, Inc.* 162 Cal.App.4th 43, 52-53 (2008); *Kullar v. Foot Locker Retail, Inc.* 168 Cal.App.4th 116, 128 (2008).

i. The Settlement Is the Product of Arm's-Length Negotiations by Settlement Class Counsel Following a Robust Investigation

To reach this fair and reasonable settlement, counsel for the Parties were well informed on class action subject matter and accordingly operated at arm's-length. Moon Decl. at ¶¶ 3, 5, 14 and **Exhibit 2** [Clarkson Firm Resume]; **Exhibit 3** [Moon Firm Resume]. The Parties considered all available information, including critical documents, as well as the risks and expenses of further litigation and the prospect of losing on the merits when negotiating this settlement. Moon Decl. at ¶¶ 26-27, 29. The Parties exchanged discovery which, in pertinent part, included Defendant's testing and consultant reports substantiating Defendant's challenged advertising claims and comprehensive sales data for the Covered Products that Plaintiffs used to further consult with Plaintiffs' experts, as well as evaluate liability, maximum case value, and the likelihood of success at certification and

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

trial. *Id*. at ¶ 28. The Parties also engaged with a neutral, third-party mediator for a full-day mediation on December 7, 2020, and further consulted with Digital Settlement Group to design and execute a robust notice program and prepare and disseminate concise and easy-to-understand claim forms, class notices, and online advertisements. *Id*. at ¶¶ 5, 12. In assessing the strengths and weaknesses of the case through the discovery process and significant independent investigation, counsel for Plaintiffs and settlement class members have examined the issues at hand and determined that this settlement provides the best possible resolution. *Id*. at ¶ 3, 5-10. At no time did Plaintiffs or Settlement Class Counsel collude with Defendant or its counsel, subvert the interests of the class to benefit counsel, Plaintiffs, or any other person or party, or take any action that undermined the interests of the class. *Id.* at ¶ 5. This settlement is the product of extensive arm's length bargaining between the Parties, and resulted in a fair, informed, and well-negotiated outcome for the class. *Id*. Absent a finding of fraud or collusion, settlement agreements negotiated and endorsed by experienced counsel are presumptively fair and reasonable. *See Dunk*, 48 Cal.App.4th at 1802.

ii. Counsel Is Experienced in Similar Litigation

Settlement Class Counsel is competent and experienced in the representation of consumers in class action litigation. Moon Decl. at ¶ 14; **Exhibit 2** [Clarkson Firm Resume]; **Exhibit 3** [Moon Firm Resume]. Settlement Class Counsel is particularly experienced in litigation involving false and deceptive advertising claims, like the one at issue in this case, prosecuting and settling multiple such cases on behalf of consumers deceived by misleading labels on household goods, including purported "Non-Toxic" cleaning products. *Id.* Therefore, Settlement Class Counsel's assessment of this case is entitled to great weight and strongly supports final approval of this settlement. *See Dunk*, 48 Cal.App.4th at 1802; *Kullar*, 168 Cal.App.4th at 128.

iii. There Is No Opposition to The Settlement

In the case of few opt-outs and/or objectors, courts have uniformly held that such settlements are fair and adequate. *See Chavez,* 162 Cal.App.4th at 49, 53 (affirming final approval where 0.2 percent of the class, or 1,234 class members, opted out, and the two out of a 5.5 million class who objected were "small by any measure"; *7-Eleven Owners*, 85 Cal.App.4th at 1152-53 (finding

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

response of absent class members "overwhelmingly positive" where only 1.5 percent elected to opt out and less than 1%, or 8 out of 5,454 class members, objected). In this case there have been no objections and only one invalid opt-out request. DSG Decl. at ¶¶ 22-23. With virtually unanimous approval of the settlement, this factor weighs heavily in favor of final approval and the Court should find that the "presumption of fairness" applies in this case. *See Dunk*, 48 Cal.App.4th at 1802.

2. The Settlement Is Fair, Adequate, and Reasonable

In assessing the fairness of a settlement, the court may consider several factors, including "the strength of plaintiffs' case, the risk, expense, complexity, and likely duration of further litigation, the risk of maintaining class action status through 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." *In re Microsoft I-V Cases*, 135 Cal.App.4th at 723. The list of factors is not exclusive, and the court is free to engage in balancing and weighing of factors depending on the circumstances of the case. *Dunk*, 48 Cal.App.4th at 1801.

i. The Strength of Plaintiffs' Case and the Risk, Expense, Complexity and Likely Duration of Further Litigation

To assess the adequacy of a class action settlement, the Court should weigh the risk inherent in continued litigation against the immediacy and certainty of substantial settlement proceeds. *See Dunk*, 48 Cal.App.4th at 1801-02; *Wershba*, 91 Cal.App.4th at 250-51.

Although Plaintiffs believe their case is strong, such confidence must be tempered by the fact that the settlement provides a substantial and immediate benefit to the class and avoids significant risks of less or no recovery at all following the expenditure of exorbitant litigation expenses necessary to succeed in protracted and complex litigation. Moon Decl. at ¶¶ 17, 26-27, 29. In negotiating the settlement, Settlement Class Counsel carefully considered the compensation to the class through monetary relief for past economic losses and the avoidance of future harm through changed practices, in comparison to the best possible outcome for the class and the associated risks and costs of litigation. *Id.* at ¶¶ 6-10.

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

Here, litigation through trial would have been expensive, required extensive resources, including thousands of attorney-hours and several hundred thousand dollars in expert expenses, and involved a substantial risk of a defense verdict or monetary recovery of less than the settlement amount, that could only be achieved after years of litigation. *Id.* at ¶¶ 5-10, 26-27. Not only has Defendant heavily contested liability, but it has also contested the existence and extent of any economic losses, arguing that consumers do not interpret the "Non-Toxic" label to mean that the Covered Products do not present a risk of harm to people, animals, and the environment; the "Non-Toxic" claim was not material to consumers in deciding to buy the Covered Products; reliable scientific evidence substantiates the "Non-Toxic" claim; consumers did not pay a premium for the "Non-Toxic" product attribute; and any such premium, assuming it exists, is *de minimus*. *Id.* at ¶ 5. To prevail, Plaintiffs would have to prevail in seeking class certification on a contested motion, maintain the action as a class action throughout the litigation and trial, and defeat the inevitable appeals of class certification and any judgment entered at trial. *Id.*

Not only is litigation and recovery uncertain, but also complex class actions, such as this action, are expensive and time-consuming to prosecute. Moon Decl. at ¶¶ 5-10, 26-27. False advertising class actions such as this require experts to evaluate matters such as toxicity, consumer perception, materiality, and the price premium consumers paid for "Non-Toxic" products. *Id.* at ¶ 27. Indeed, the additional expert costs stemming from the inevitable "battle of the experts" would quickly accumulate through investigation, surveys, reports, depositions, trial testimony, document productions, and associated attorney and judicial time spent presenting, defending, and evaluating the reliability and admissibility of expert opinions and related costs such as travel expenses, court reporting costs, filing fees, and the like, which could quickly lead to a scenario in which settlement might not be economically feasible for any party. *Id.* The alternative to a class/collective settlement—i.e., individual litigations—fares no better as it would tax private and judicial resources, multiplied across numerous actions, winding their way through courts over a period of years. *Id.* As such, the Settlement in this case is consistent with the "overriding public interest in settling and quieting litigation" that is "particularly true in class action suits" and thus, provides another reason to approve the Settlement. *Van Bronkhorst v. Safeco Corp.* 529 F.2d 943, 950 (9th Cir. 1976).

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

In the meantime, Defendant would continue to deceptively advertise the Covered Products with impunity to the financial detriment of class members and consumers. *Id.* at ¶ 27. The monetary and injunctive relief that the Plaintiffs seek would be delayed were the case to proceed without settlement, and further, the monetary relief could be lessened by the continuing expenses of litigation. *Id.* The relief this settlement provides is certain and available now—as opposed to what would be merely a hypothetical and potential award that Plaintiffs could recover from litigation. Because the settlement provides immediate and significant relief, without the attendant risks of continued litigation, this Court should find the settlement is fair, reasonable, and adequate, and accordingly grant final approval.

ii. The Amount Offered in Settlement and Changed Practices Provide an Exceptional Result for the Class

The amount of the settlement favors approval and is more than a fair, reasonable, and adequate compensation for the settlement class. It is well-established that "[t]he proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial." *Wershba*, 91 Cal.App.4th at 246. Indeed, "even if 'the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated,' this is no bar to a class action settlement because 'the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.'" *Id*. at 250.

[redacted] *Id. see also Fitzhenry-Russell v. The Coca-Cola Co.*, 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

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

"Made from Real Ginger" claim on Canada Dry ginger ale based on a 6% price premium for "real" ginger). [redacted]. *Id*.

However, here, the settlement not only [redacted], but it also achieves ***complete cessation*** of the misleading "Non-Toxic" labeling claims, which is the best possible result for obtaining injunctive relief. Moon Decl. at **Exhibit 1** [Settlement Agreement] at ¶4.1.1 [Cessation]. [redacted] *Id.*[4] In light of the monetary value of the total consideration, the proposed settlement far exceeds 10% of the maximum recovery, which amount has been approved by multiple courts as "eminently fair and reasonable." *In re Crazy Eddie Securities Litigation*, 824 F. Supp. 320, 323-324 (E.D.N.Y. 1993); *see also Jiangchen v. Rentech, Inc.*, No. CV 17-1490-GW(FFMx), 2019 WL 5173771, at *7 (C.D. Cal. Oct. 10, 2019).

In addition, the "best case" recovery for Plaintiffs and the settlement class may not be any better than this settlement when considering the risks and costs they would face to continue litigation. Moon Decl. at ¶¶ 26-27, 29. As discussed *supra*, the risks and costs of protracted and complex litigation would eat away at any potential recovery, making the consideration afforded to class members under the settlement more than fair, adequate, and reasonable and heavily weighing in favor of final approval. *Id*.

[4] Additionally, the injunctive relief not only benefits the settlement class, but it provides a significant benefit to all consumers, a fairly functioning marketplace, and the public. *Id.* 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.* It will prevent or reduce the risk of inadvertent harm to humans, animals, and environment by consumers mislead into believing that the Covered Products present no such risk. *Id.* In so doing, it protects the environment and people from harmful ingredients in the Covered Products. *Id.*

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

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

This Settlement came after nearly 1.5 years of pre-suit investigation, litigation and negotiations, which ensured Settlement Class Counsel had a thorough understanding of the strengths and weaknesses of this case prior to entering into the Settlement Agreement. Moon Decl. at ¶¶ 3-5, 28-29. "'[F]ormal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement." *Linney v. Cellular Alaska Partnership* 151 F.3d 1234, 1239 (9th Cir. 1998) (quoting *In re Chicken Antitrust Litig. Am. Poultry* 669 F.2d 228, 241 (5th Cir. 1982)). Settlement Class Counsel conducted a significant factual investigation into the advertising, labeling, and packaging of the Covered Products, and have reviewed the information necessary to reach an informed settlement. Moon Decl. at ¶ 3. Not only have Settlement Class Counsel evaluated all relevant actions brought against Defendant related to the Covered Products, but they have analyzed substantial sales data, product toxicity testing data, all labels for the Covered Products throughout the class period, Defendant's marketing campaigns and strategies, scientific literature and expert analyses of ingredients used in the Covered Products, materials and safety data sheets, complex regulations governing advertising and cleaning product labels, and the legal landscape for consumer fraud and class actions to apprise themselves of the facts and legal merit of the claims and defenses in this case. *Id.* In addition, Settlement Class Counsel have consulted with well-respected toxicology and false-advertising damages experts based on facts revealed through their investigation and discovery to evaluate the merits and likelihood of success at certification and trial. *Id.* In so doing, Settlement Class Counsel have efficiently obtained substantial information to inform settlement negotiations and their assessment that the settlement is fair, adequate, and reasonable, which weighs heavily in favor of final approval. *See Dunk*, 48 Cal.App.4th at 1802.

iv. The Experience and Views of Counsel

Settlement Class Counsel are experienced and respected class action attorneys and believe the settlement is fair, adequate, and reasonable. Settlement Class Counsel's endorsement is entitled to great weight following arms-length settlement negotiations. *See Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("'Great weight' is accorded to the

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."). Indeed, as the *DIRECTV* court explained, counsel "are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation." *Id*. (quoting *In re PacificEnters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)). As such, absent a finding of fraud or collusion, settlement agreements negotiated and endorsed by experienced counsel are presumptively fair and reasonable. *See Dunk*, 48 Cal.App.4th at 1802.

Following many months of arms-length negotiations and a mediation conducted by an unbiased and independent third-party neutral well-versed in false advertising class actions, the Parties entered in the Settlement Agreement. Moon Decl. at ¶¶ 3-5. At no time did Plaintiffs or Settlement Class Counsel collude with Defendant or its counsel, subvert the interests of the class to benefit counsel, Plaintiffs, or any other person or party, or take any action that undermined the interests of the class. *Id.* at ¶ 5. Rather, Settlement Class Counsel applied their extensive experience to their investigation and research into the facts and law surrounding this case to vigorously prosecute this action and negotiate the settlement. *Id*. at ¶¶ 3-5. Through this work, Settlement Class Counsel thoroughly evaluated the respective strengths and weaknesses of their positions, as well as the maximum available recovery for the class. *Id*. at ¶¶ 3, 6-10, 28-29. Accordingly, Settlement Class Counsel believes that the results achieved by the settlement are eminently fair, adequate, and reasonable, providing an immediate and substantial benefit to the settlement class, which heavily favors final approval.

v. The Reaction of Class Members to the Proposed Settlement

Settlement class members gave an extremely positive response to the proposed settlement, which supports final approval of the Settlement as fair, reasonable and adequate. Following an extended notice and claims period, more than 132,000 class members have submitted claims, while ***not a single member objected*** and only one individual submitted an invalid request to opt out that fails to confirm the individual is a member of the settlement class. DSG Decl. at ¶¶ 22-23, 25. *See Chavez,* 162 Cal.App.4th at 49, 53 (affirming final approval where 0.2 percent of the class, or 1,234 class members, opted out, and the two out of a 5.5 million class who objected were "small by any measure"; *7-Eleven Owners*, 85 Cal.App.4th at 1152-53 (finding response of absent class members

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

"overwhelmingly positive" where only 1.5 percent elected to opt out and less than 1%, or 8 out of 5,454 class members, objected). [redacted]. *Id.*; Moon Decl. at ¶ 36. In comparison, courts have granted final approval of consumer class action settlements involving a less than 1% to 4% claim rate.[5] Given the settlement class members virtually unanimous approval of the settlement, evidenced by no valid objections or exclusion requests, and the high percentage of class members that have submitted claims, the Court should similarly endorse the settlement and accordingly grant final approval.

C. Notice to The Class Was Adequate and Fulfilled Due Process

The determination of adequate notice to absentee class members lies within the trial court's discretion and depends upon the information available to reasonably identify class members by the best practicable means. *See*, *e.g.*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318, 70 S. Ct. 652, 664, 94 L.Ed 865, 877 (1950); *Cooper v. Amer. Sav. & Loan Assn.*, 55 Cal.App.3d 274, 285 (1976) (finding notice through publication in the absence of class contact information adequate, where "the membership of the class is huge" and potential damages per class member are of limited size). It is not necessary for class counsel to demonstrate notice reached every single member of the settlement class; rather "[t]he standard is whether notice has a reasonable chance of reaching a substantial percentage of the class members." *Wershba*, 91 Cal.App.4th at 251.

[5] *See*, *e.g.*, *Pollard v. Remington Arms Co., LLC*, 320 F.R.D. 198, 214 (W.D. Mo. 2017), *aff'd*, 896 F.3d 900 (8th Cir. 2018) (0.29% claim rate for direct and indirect notice plan in unfair and deceptive trade practice case involving firearms); *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588, 597, 601-02 (N.D. Cal. 2020) (0.83% claim rate for indirect notice plan in falsely advertised "non-GMO" food case); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 329 (N.D. Cal. 2018) (1.8% claim rate for direct and indirect notice plan in privacy/data breach case); *Broomfield v. Craft Brew All., Inc.*, No. 17-cv-01027-BLF, 2020 WL 1972505, at *6 (N.D. Cal. Feb. 5, 2020) (about 2% claim rate for direct and indirect notice plan in falsely labeled beer case); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1255 (C.D. Cal. 2016) (2.75% claim rate for direct and indirect notice in falsely advertised clothing case).; *In re Toys "R" Us-Del., Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 468 (C.D. Cal. 2014) (approximately 3% claim rate for indirect notice plan in FACTA case); *Fitzhenry-Russel*, 2019 WL 11557486, at *2 (3.2% claim rate for indirect notice in falsely advertised "Real" ginger in beverage case); *Carlotti v. Asus Comput. Int'l*, No. 18-cv-01027-BLF, 2020 WL 3414653, at *4 (N.D. Cal. Jun. 22, 2020) (4.02% claim rate for direct and indirect notice plan in falsely advertised laptop case).

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

Here, notice was effectuated through efficient and economical means that reached the threshold 70% of class, consistent with due process. DSG Decl. at ¶ 24, 34. A combination of print and online publications were disseminated to the public because individualized and direct notice was not reasonably practicable in the absence of customer lists. *Id.* at ¶ 12-15. Notice commenced over the course of sixty days and achieved more than 76 million views or "impressions," which exceeds the estimated 55 million impressions anticipated at the preliminary approval stage, a nearly ***40% increase*** beyond that preliminarily approved notice plan. *Id.* at ¶ 31. Notice of the settlement, accordingly, exceeds the 70% reach anticipated at the preliminary approval stage. *Id.* at ¶ 24, 34. Courts have granted final approval for notice programs that reach or exceed the 70% due process benchmark.[6] Thus, the notice plan provided settlement class members with the best practicable and cost efficient notice that satisfied due process, and, therefore, this Court should grant final approval of the settlement.

D. The Court Should Confirm Certification of the Class

In connection with preliminary approval of the settlement, the Court found that the proposed settlement class met all the requirements of California Code of Civil Procedure, section 382 and, accordingly, certified this action as a class for settlement purposes. *See* Preliminary Approval Order at ¶ ii. In the absence of any new evidence that requires revisiting the issue, Plaintiffs respectfully request that the Court confirm certification of the settlement class.

V. CONCLUSION

For the foregoing reasons, Plaintiffs and Settlement Class Representatives respectfully submit that the proposed settlement is fair, adequate, and reasonable on its merits. Accordingly, this Court should grant final approval of the settlement.

[6] *See*, *e.g.*, *Free Range Content, Inc. v. Google, LLC*, 2019 WL 1299504, at *6 (N.D. Cal. Mar. 21, 2019) ("Notice plans estimated to reach a minimum of 70 percent are constitutional." (brackets and quotations omitted)); *Edwards v. Nat'l Milk Producers Fed'n*, No. 11-CV-04766-JSW, 2017 WL 3623734, at *4 (N.D. Cal. June 26, 2017), *aff'd sub nom. Edwards v. Andrews*, 846 F. App'x 538 (9th Cir. 2021) (same); *Gergetz v. Telenav, Inc.*, No. 16-cv-04261-BLF, 2018 WL 4691169, at *4 (N.D. Cal. Sept. 27, 2018) (same); Fed. Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, p. 1 (2010), available at https://www.fjc.gov/sites/default/ files/2012/NotCheck.pdf (endorsing a 70-95% reach as consistent with due process).

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265

Dated: August 26, 2021

Respectfully submitted,

CLARKSON LAW FIRM
By:

RYAN J. CLARKSON
SHIREEN M. CLARKSON
KATHERINE A. BRUCE
LAUREN E. ANDERSON

MOON LAW APC
By:

CHRISTOPHER D. MOON
KEVIN O. MOON

Attorneys for Plaintiffs, Settlement Class Representatives, and Settlement Class Members

CLARKSON LAW FIRM, P.C.
22525 Pacific Coast Highway
Malibu, CA 90265