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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

LUIS LERMA, an individual, and  
NICK PEARSON, an individual, on  
behalf of themselves and all others  
similarly situated,

Plaintiffs,

v.

SCHIFF NUTRITION  
INTERNATIONAL, INC., a  
Delaware corporation, and SCHIFF  
NUTRITION GROUP, INC., a Utah  
corporation,

Defendants.

Case No.: 11cv1056-MDD

**ORDER OF FINAL APPROVAL OF  
CLASS SETTLEMENT**

Before this Court is Plaintiffs’ motion for final approval of class  
settlement and provisional class certification pursuant to FED. R. CIV. P. 23.

**BACKGROUND**

Plaintiffs Luis Lerma, Nick Pearson, and Muriel Jayson (“Named  
Plaintiffs”) on behalf of themselves and all others similarly situated, brought  
this class action Complaint against Defendants Schiff Nutrition  
International, Inc. and Schiff Nutrition Group, Inc. (ECF No. 33). Plaintiffs

1 alleged that Defendants violated the Consumers Legal Remedies Act, Civil  
2 Code § 1750, et seq.; Unfair Competition Law, Business and Professions Code  
3 § 17200 et seq.; Illinois Consumer Fraud Act, 502/1, et seq.; personal  
4 injuries/medical monitoring; personal injuries/negligence; and breach of  
5 express warranty. (ECF No. 33-1 at 14-20).

6 On November 21, 2014, the Court issued an order that preliminarily  
7 approved the settlement agreement; 2) provisionally certified the class; 3)  
8 conditionally certified Plaintiffs Lerma and Pearson as Class  
9 Representatives; and 4) conditionally appointed Elaine A. Ryan, Stewart M.  
10 Weltman, and Jeffrey Carton as Class Counsel. (ECF No. 113).

11 On August 10, 2015, Plaintiffs filed a Motion for Final Approval of Class  
12 Action Settlement, Attorneys' Fees and Expenses, and Service Awards. (ECF  
13 No. 153).

14 On October 30, 2015, the Court held a fairness hearing. (ECF No. 169).  
15 Counsel for Plaintiff and counsel for Defendant appeared. No Class Members  
16 or objectors appeared.

#### 17 TERMS OF PROPOSED SETTLEMENT

18 The proposed settlement class (the "Class") consists of "[a]ll residents of  
19 the United States who purchased for personal use and not resale or  
20 distribution, a Covered Product between January 1, 2005, and May 27, 2015."  
21 (ECF No. 153-1 at 22). Class Members do not include Schiff, its affiliates, its  
22 employees, officers, directors, agents, representatives and their immediate  
23 family members, and the legal representatives, successors, or assigns of such  
24 excluded persons or entities. (*Id.*). In addition, Class Members do not  
25 include the judges who have presided over the litigation and their immediate  
26 family members. (*Id.*).

1 I. Class Benefits

2 A. Monetary relief

3 “[E]very Settlement Class Member is entitled to seek monetary  
4 compensation.” (*Id.*). Specifically,

5 Settlement Class Members who do not have Adequate Proof of  
6 Purchase are entitled to reimbursement of \$3 per bottle of the  
7 Covered Products purchased up to a maximum of four bottles  
8 per household. Settlement Class Members who have  
9 Adequate Proof of Purchase (e.g. receipts, intact boxes or  
10 bottles that display readable UPC code and readable lot  
11 number, or similar documentation that identifies the Covered  
12 Product and date and location of purchase) are also entitled to  
13 reimbursement of \$10 for each purchased bottle of the  
14 Covered Products up to five bottles per household.

(*Id.* at 22-23).

15 The Settlement Agreement also provides for Class Members to receive  
16 additional monetary relief if the number of claimants is small. Specifically:

17 [N]o Settlement Funds will revert to Schiff. If the Valid  
18 Claims do not equal or exceed the Available Cash Award  
19 Total, the payment to each Settlement Class Member who  
20 submits a Valid Claim with Adequate Proof of Purchase will  
21 be increased *pro rata* up to a maximum of triple what the  
22 Settlement Class Member would be entitled to under the  
23 Settlement Agreement. If, after that increase, funds remain  
24 in the Settlement Fund, then payment to each Settlement  
25 Class Member who submits a valid claim without Adequate  
26 Proof of Purchase will also be increased *pro rata*, this time up  
to a maximum of double what the Settlement Class Member  
would be entitled to under the Settlement Agreement. If after  
that increase, funds still remain in the Settlement Fund, any  
residual amounts are to be divided *pro rata* among the  
Settlement Class Members who have submitted Valid Claims.

(*Id.* at 23).

1 The Settlement Agreement also provides “that the costs associated with  
2 the dissemination of notice to the Settlement Class and the administration of  
3 the claims process will be paid from the Settlement Fund.” (*Id.* at 24).

4 According to the Parties, the total amount of these cost should not exceed  
5 \$1.5 million. (*Id.*). Class Counsel now expect these costs to be less than  
6 expected, and the estimated savings of approximately \$580,000.00 will revert  
7 to the fund available to pay the Class Members. (ECF No. 166 at 5 n.5).

#### 8 B. Injunctive Relief

9 “[F]or a period of twenty four months commencing six months after  
10 the Effective Date, Schiff will not make the following statements in the  
11 packaging or marketing of the Covered Products: ‘repair joint,’ ‘repair  
12 cartilage,’ ‘rebuild joints,’ ‘rebuild cartilage,’ ‘rejuvenate joints,’ ‘rejuvenate  
13 cartilage,’ or any other version of those statements using variations of the  
14 terms (i.e. the ‘reconstruction representations’).” (ECF No. 153-1 at 23). For  
15 the covered products that Defendants no longer manufacture, monetary relief  
16 is the only remedy under this Settlement. (*Id.* at n.7).

17 “Schiff may seek Settlement Class Counsel’s agreement to modify the  
18 agreed upon labeling changes only if, after the date of Final Approval,  
19 Defendants possess and rely upon an independent, well-conducted, published  
20 clinical trial that substantiates the representations.” (*Id.* at 23-24). Absent  
21 an agreement, Defendants shall seek approval from the Court to modify the  
22 agreed upon labeling changes. (*Id.* at 24).

## 23 II. Class Notice

### 24 A. Consumer Publication/Internet Publication

25 In compliance with the Court’s Preliminary Approval Order dated  
26 November 21, 2014, (ECF No. 113), Defendants provided notice to the Class

1 by using “a combination of notice placements in well-read consumer  
2 publications and on a variety of websites to effectively reach Class Members.”  
3 (ECF No. 113 at 13). “[N]otices were placed in the following national  
4 publications: *Parade*, *People*, *Arthritis Today*, *Cooking Light*, *First for*  
5 *Women*, *Prevention*, and *Reader’s Digest*.” (ECF No. 153-1 at 50).  
6 Additionally, notices were placed on the internet networks of “Google  
7 Display, Google Search, Microsoft Display, Yahoo RMX and Facebook.” (*Id.*).  
8 According to Ms. Intrepido-Bowen, between June 29, 2015, and August 2,  
9 2015, consumer publications are estimated to have reached 53.9% of likely  
10 Class Members and internet publications are estimated to have reached  
11 58.9% of likely Class Members. (Decl. Intrepido-Bowen, ECF 153-6 at 4).

#### 12 B. Toll Free Number

13 A toll free number was established June 25, 2015, in accordance with  
14 the Court’s order of preliminary approval. (ECF No. 113 at 14). As of August  
15 3, 2015, 914 calls were received. (Decl. Intrepido-Bowden, ECF No. 153-6 at  
16 5).

#### 17 C. Website Notice

18 A webpage was also established June 25, 2015, at  
19 [www.SchiffGlucosamineSettlement.com](http://www.SchiffGlucosamineSettlement.com). (*Id.*). This informational website  
20 allows Class Members to download Class Notice; Claim Forms; Copy the  
21 Preliminary Approval Order; Copy the Joint Motion for Limited Modification  
22 of Settlement Agreement; Copy the Second Amended Settlement Agreement  
23 and General Release. (*Id.*). Exclusion forms and claim forms could also be  
24 filed online. (*Id.*). As of August 3, 2015, the website had received 26,928  
25 visits. (*Id.*).

26

### 1 III. Right to Elect Not to Participate in Settlement

2 The Notice also informed the Class Members of their right to opt-out or  
3 exclude themselves from the Settlement, appear through their own counsel,  
4 object to the terms of the Settlement along with the form that the objection  
5 should take, the deadlines for opt-out/exclusion or objection, the date of the  
6 final approval hearing, the scope of the claims released if a member of the  
7 Settlement Class does not opt-out and remains in the Settlement Class, and  
8 the amount of potential Plaintiffs' Service Award and Attorneys' Fee Award.  
9 (ECF No. 153 at 34-35). There have been seven exclusion requests as of  
10 September 24, 2015. (Supplemental Decl. Robin, ECF No. 166-1 at 7).

## 11 DISCUSSION

### 12 I. Class Certification

13 Plaintiff seeks certification of a settlement class under Federal Rule of  
14 Civil Procedure 23(b)(3). "To obtain certification of a class action . . . under  
15 Rule 23(b)(3), a plaintiff must satisfy Rule 23(a)'s . . . prerequisites of  
16 numerosity, commonality, typicality, and adequacy of representation, and  
17 must also establish that 'the questions of law or fact common to class  
18 members predominate over any questions affecting only individual members,  
19 and that a class action is superior to other available methods for fairly and  
20 efficiently adjudicating the controversy.'" *Amgen Inc. v. Connecticut Ret.*  
21 *Plans and Trust Funds*, 133 S.Ct. 1184, 1191 (2013) (internal citations  
22 omitted). In this case, the Court preliminarily certified the proposed  
23 settlement class. (ECF. No. 113). At that time, the Court concluded that the  
24 proposed class satisfied the numerosity, commonality, typicality, and  
25 adequacy of representation requirements of Rule 23(a). (*Id.*). The Court also  
26

1 found the purported class satisfied the predominance and superiority  
2 requirements of Rule 23(b)(3). (*Id.*).

3 A list of those putative Class Members who have timely elected to opt  
4 out of the Settlement and Class, and who are therefore not bound by the  
5 Settlement, the provisions of the Settlement Agreement, this Order and the  
6 final Judgment will be entered by the Clerk of Court. All other Class  
7 Members (as permanently certified below) shall be subject to all of the  
8 provisions of the Settlement, the Settlement Agreement, this Order, and final  
9 Judgment to be entered by the Clerk of Court.

## 10 II. Notice

11 Notice to the putative Class Members was comprised of consumer and  
12 internet publications and the creation of an informational website directed to  
13 all Class Members. The Court finds this notice (i) constituted the best notice  
14 practicable under the circumstances, (ii) constituted notice that was  
15 reasonably calculated, under the circumstances, to apprise the putative Class  
16 Members of the pendency of the action, and of their right to object and to  
17 appear at the Final Approval Hearing or to exclude themselves from the  
18 Settlement, (iii) was reasonable and constituted due, adequate, and sufficient  
19 notice to all persons entitled to be provided with notice, and (iv) fully  
20 complied with due process principles and Federal Rule of Civil Procedure 23.

## 21 III. Fairness of the Settlement

### 22 A. Legal Standard

23 Courts require a higher standard of fairness when a settlement takes  
24 place prior to formal class certification to ensure class counsel and defendants  
25 have not colluded in settling the case. *Hanlon v. Chrysler Corp.*, 150 F.3d  
26 1011, 1026 (9th Cir. 1998). Ultimately, “[t]he court’s intrusion upon what is

1 otherwise a private consensual agreement negotiated between the parties to  
2 a lawsuit must be limited to the extent necessary to reach a reasoned  
3 judgment that the agreement is not the product of fraud or overreaching by,  
4 or collusion between, the negotiating parties, and that the settlement, taken  
5 as a whole, is fair, reasonable and adequate to all concerned.” *Officers for*  
6 *Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982). “The  
7 question [the Court] address[es] is not whether the final product could be  
8 prettier, smarter or snazzier, but whether it is fair, adequate and free from  
9 collusion.” *Hanlon*, 150 F.3d at 1027.

10 Courts consider several factors when determining whether a proposed  
11 “settlement, taken as a whole, is fair, reasonable and adequate to all  
12 concerned.” *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir.  
13 2009) (quoting *Hanlon*, 150 F.3d at 1027). These factors may include one or  
14 more of the following: (1) the strength of the plaintiff’s case; (2) the risk,  
15 expense, complexity, and likely duration of further litigation; (3) the risk of  
16 maintaining class action status throughout the trial; (4) the amount offered  
17 in settlement; (5) the extent of discovery completed and the stage of the  
18 proceedings; (6) the experience and views of counsel; (7) the presence of a  
19 governmental participant; and (8) the reaction of class members to the  
20 proposed settlement. *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242  
21 (9th Cir. 1998); *see also Torrasi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376  
22 (9th Cir. 1993) (holding only one factor was necessary to demonstrate that  
23 the district court was acting within its discretion in approving the  
24 settlement).

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1 B. Analysis

2 1. The strength of the case and the risk, expense, complexity,  
3 and likely duration of further litigation

4 To determine whether the proposed settlement is fair, reasonable, and  
5 adequate, the Court must balance against the risks of continued litigation  
6 (including the strengths and weaknesses of Plaintiff's case), the benefits  
7 afforded to members of the Class, and the immediacy and certainty of a  
8 substantial recovery. *In re Meگو Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th  
9 Cir. 2000).

10 The court shall consider the vagaries of the litigation and  
11 compare the significance of immediate recovery by way of  
12 the compromise to the mere possibility of relief in the  
13 future, after protracted and expensive litigation. In this  
14 respect, 'It has been held proper to take the bird in hand  
15 instead of a prospective flock in the bush.'

16 *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D.  
17 Cal. 2004) (internal citations omitted).

18 Plaintiffs assert that "[t]he proposed Settlement is fair, reasonable and  
19 adequate and reflects the careful consideration by the Parties of the benefits,  
20 burdens, and risks associated with continued litigation of this Action." (ECF  
21 No. 153-1 at 24-25). The Court agrees, given these risks, actual recovery  
22 through settlement confers substantial benefits on the Class that outweigh  
23 potential recovery through full adjudication.

24 2. Stage of the proceedings

25 In the context of class action settlements, as long as the parties have  
26 sufficient information to make an informed decision about settlement,  
"formal discovery is not a necessary ticket to the bargaining table." *Linney*,

1 151 F.3d at 1239 (quoting *In re Chicken Antitrust Litig.*, 669 F.2d 228, 241  
2 (5th Cir. 1982)) (internal quotations omitted). “Rather, the court’s focus is on  
3 whether the ‘parties carefully investigated the claims before reaching a  
4 resolution.’” *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 257 (N.D.  
5 Cal. 2015) (quoting *Ontiveros v. Zamora*, 303 F.R.D. 356, 371 (E.D. Cal.  
6 2014)).

7 Here, a Third Amended Complaint had been filed two years before any  
8 settlement was finalized. (ECF Nos. 35, 81). The parties participated in five  
9 private mediation sessions and engaged in significant discovery. (ECF No.  
10 153-1 at 36). Discovery included “formal and informal discovery necessary to  
11 facilitate and evaluate the strengths and weaknesses of the case.” (ECF No.  
12 153-1 at 35). Over 350,000 pages of documents were produced to the Named  
13 Plaintiffs. (*Id.*). Responses to interrogatories and initial and rebuttal expert  
14 reports were also exchanged. (*Id.*). The Named Plaintiffs obtained and  
15 analyzed the science regarding Defendants’ products with the assistance of  
16 Dr. Thomas J. Schnitzer, M.D., Ph.D., an expert in joint relief remedies.  
17 (*Id.*). Based upon the parties’ investigation, discovery and settlement  
18 negotiations that have taken place in this case, granting final approval is  
19 justified.

### 20 3. The settlement amount

21 To assess whether the amount is fair, the Court may compare the  
22 settlement amount to the parties’ estimates of the maximum amount of  
23 damages recoverable in a successful litigation. *In re Mego Fin. Corp. Sec.*  
24 *Litig.*, 213 F.3d at 459. While settlement amounts that are close to the  
25 plaintiffs’ estimate of damages provide strong support for approval of the  
26 settlement, settlement offers that constitute only a fraction of the potential

1 recovery do not preclude a court from finding that the settlement offer is fair.  
2 *Id.* (finding settlement amount constituting one-sixth of the potential  
3 recovery was fair and adequate). Thus, district courts have found that  
4 settlements for substantially less than the plaintiffs' claimed damages may  
5 be fair and reasonable, especially when taking into account the uncertainties  
6 involved with litigation. *Id.*

7 The Third Amended Complaint in this case alleges that each Class  
8 Member is entitled to monetary compensation and injunctive relief for  
9 violations of the Consumers Legal Remedies Act, Civil Code § 1750, et seq.;  
10 Unfair Competition Law, Business and Professions Code § 17200 et seq.;  
11 Illinois Consumer Fraud Act, 502/1, et seq.; personal injuries/medical  
12 monitoring; personal injuries/negligence; and breach of express warranty.  
13 (ECF No. 113 at 2).

14 a. Monetary relief

15 The parties have agreed that Defendants will establish a settlement  
16 fund to be paid to Class Members who make valid claims. "Settlement Class  
17 Members who do not have Adequate Proof of Purchase are entitled to  
18 reimbursement of \$3 per bottle of the Covered Products purchased up to a  
19 maximum of four bottles per household. Settlement Class Members who  
20 have Adequate Proof of Purchase are also entitled to reimbursement of \$10  
21 for each purchased bottle of the Covered Products up to five bottles per  
22 household." (ECF No. 153-1 at 22). As noted herein, the Settlement Class  
23 Members could also receive additional remuneration resulting from cost  
24 savings in notice, attorney fees and costs, and low submission of valid claims.  
25 As of October 6, 2015, 40,167 Claim Forms have been filed by Class Members.  
26 (Supplemental Decl. Robin, ECF No. 166-1 at 7).

1 The Court has considered and rejects Objector Hammack's objection  
2 that the monetary relief is inadequate because it does not disgorge Defendant  
3 of profits reaped from the alleged deceptive marketing, and because the cost  
4 of the label changes to Defendant have not been provided to the Class.

5 First, restitutionary disgorgement, which is the price paid minus the  
6 value actually received—not nonrestitutionary disgorgement of profits—is  
7 the proper measure of damages on the unfair competition and false  
8 advertising claims (CAL. BUS. & PROF. CODE. §§ 17200 and 17500); *see In re*  
9 *POM Wonderful LLC*, Case No. ML-10-02199-DDP, 2014 WL1225184, \*3  
10 (C.D. Cal. Mar. 25, 2014) (measure of damages for deceptive advertising was  
11 the price paid minus value received—not a full refund); CAL. CIV. CODE §  
12 3343; *In re Tobacco Cases II*, 240 Cal. App. 4th 779, 799 (4th Dist., Div. 1,  
13 2015) (rejecting argument that defendant should be ordered to disgorge  
14 profits to class of purchasers as a deterrent for deceptive advertisements  
15 violating §§ 17200 and 17500); *Colgan v. Leatherman Tool Group, Inc.*, 135  
16 Cal. App. 4th 663, 675 (2d Dist., Div. 5, 2006). These laws focus on making  
17 the victim whole, not on punishing or deterring the defendant, no matter how  
18 egregious the misconduct. *In re Tobacco Cases II*, 240 Cal. App. 4th at 795.  
19 Any deterrent effect resulting from an award for false advertising violations  
20 is merely fortuitous. *Id.*

21 And, although punitive and actual damages are available under the  
22 Consumer Legal Remedies Act, CAL. CIV. CODE § 1780, obtaining actual or  
23 punitive damages in a class action generally requires individualized  
24 assessments of damages that are often not susceptible to class treatment.  
25 *See, e.g., Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 541-42 (N.D.  
26 Cal. 2012) (granting certification for purposes of declaratory and injunctive

1 relief but denying certification to the extent class sought money damages).

2 In sum, the possibility of recovering more money from Defendants to  
3 serve as a deterrent are extremely remote. The cost of labeling changes is  
4 irrelevant to calculating the damages available for the alleged claims.

5 Second, the monetary relief provided in the Settlement is the result of a  
6 compromise of claims that carry significant risks. *See, e.g., In re Tobacco*  
7 *Cases II*, 240 Cal. App. 4th 779 (finding plaintiff class proved defendant's  
8 advertisements violated unfair competition and false advertising laws, but  
9 refusing to award plaintiff any damages for lack of evidence, finding  
10 defendant to be the prevailing party, and ordering plaintiff to pay defendant  
11 \$764,552.73 in costs). The adequacy and fairness of the compromise cannot  
12 be held to the standard of the ideal recovery; the real risks of litigation must  
13 be considered. *Hanlon*, 150 F.3d at 1027; *Linney*, 151 F.3d at 1242.

14 Third, the parties have shown that, given the current claims statistics,  
15 each Class Member is likely to receive more than they actually paid for the  
16 Covered Products, such that Class Members may receive more than they  
17 could have obtained if they filed individual lawsuits.

18 Objector Hammack further objects that the parties do not disclose if the  
19 Settlement Fund is paid for by Defendants' insurance and that it would be  
20 unfair to the Class if the Settlement Fund is paid for entirely through  
21 insurance proceeds. Objector Hammack is concerned that the Settlement will  
22 have no deterrent effect on Defendants if it is funded by insurance. The  
23 Court disagrees with Objector Hammack's unsupported assumptions that the  
24 Defendants must disclose the source of the settlement funds and that  
25 insurance funding invites Defendants to reoffend. Even if the Settlement  
26 provides little or no guard against recidivism, it nevertheless provides

1 adequate relief for the alleged harms, particularly given the risks to Plaintiffs  
2 and the putative Class of pursuing the litigation further. *Hanlon*, 150 F.3d  
3 at 1027.

4 The Court has also considered and rejects Objector Smallwood's  
5 objection that the amount of monetary relief provided is inadequate. Class  
6 Counsel responds to Objector Smallwood's demand for reimbursement for  
7 doctor's bills and for mental frustration and anguish by explaining that  
8 Objector Smallwood may opt out of the Settlement and Class and  
9 independently file her personal injury claims against Defendants. (ECF Nos.  
10 166 at 11, 167 at 7 n.3). The Settlement's opt-out provisions sufficiently  
11 address Objector Smallwood's concern.

12 Accordingly, the Court finds the monetary relief reasonable, adequate  
13 and fair, even though the Settlement does not provide for disgorgement or  
14 disclosure of insurance involvement or the cost of label changes.

15 b. Injunctive relief

16 In accordance with the Settlement Agreement, "for a period of twenty  
17 four (24) months commencing six (6) months after the Effective Date,  
18 [Defendants] will not make the following statements in the packaging or  
19 marketing of the Covered Products: 'repair joints,' 'repair cartilage,' 'rebuild  
20 joints,' 'rebuild cartilage,' 'rejuvenate joints,' 'rejuvenate cartilage,' or any  
21 version of those statements using variations of the terms." (ECF No. 153-1 at  
22 23). Additionally, the Settlement Agreement provides that Defendants may  
23 request agreement to modify the labeling changes if, after the Final Approval  
24 is granted, Defendants possess independent, well-conducted, published  
25 clinical trial/s that substantiate the Defendants' representations for the  
26 Covered Products. If no agreement can be reached, the Defendants may seek

1 approval from the Court to modify the labeling changes. (*Id.* at 24).

2 Truth In Advertising, Inc. (“TINA”) and AARP oppose the terms of this  
3 Settlement on the grounds that the injunctive relief “bans just six types of  
4 phrases from the label of defendants’ glucosamine supplement for a mere two  
5 years.” (ECF No. 168 at 2; *see also* ECF No. 144 at 2-3). TINA and AARP  
6 argue that the “amended settlement continues to allow the use of deceptive  
7 marketing phrases, including, for example, ‘build cartilage,’ ‘improve joint  
8 function,’ ‘reduce joint pain,’ and other synonymous phrases.” (ECF No. 168  
9 at 2). The Court agrees with TINA and AARP that the injunctive relief has  
10 limited value to the Class. Nevertheless, the Court has weighed that limited  
11 value against the small or nonexistent potential value of the injunctive relief  
12 Class Counsel could be expected to obtain at trial and the very significant  
13 risks of continuing the litigation. *Linney*, 151 F.3d at 1242. The Court finds  
14 that the injunctive relief provided in the Settlement is more beneficial to the  
15 Class than the possibility of injunctive relief after prolonged and risky  
16 litigation. Accordingly, the limited injunctive relief is fair, adequate and  
17 reasonable in this instance.

18 The Court has considered and rejects Objector Hammack’s concern that  
19 the injunction is inadequate because its scope is limited to 24 months. The  
20 Court acknowledges that a 5 year injunction, as urged by Objector Hammack,  
21 would be more beneficial to the Class, but, as the parties correctly argue, the  
22 Court’s role is to determine whether the relief is adequate and fair, not  
23 whether it is perfect or even optimal. *Hanlon*, 150 F.3d at 1027.

24 The Court further rejects Objector Hammack’s objection that the relief  
25 is illusory because Defendants can resume deceptive practices at any time  
26 before expiration of the 24 month period merely by petitioning the court. As

1 the parties argue, the Settlement Agreement provides a safeguard against  
2 this by only permitting lifting of the injunction if Defendants present  
3 independent, well-conducted, published clinical trial/s supporting Defendants'  
4 representations.

5 Finally, Objector Hammack objects that the relief provided is  
6 inadequate out of fear that claim forms will be "rejected outright for any  
7 deficiency without providing claimants with an opportunity to cure or explain  
8 such deficiencies." (ECF No. 158 at 3). The parties adequately address this  
9 concern in their replies, explaining that if any claim form is rejected, notice of  
10 the reason for rejection will be given to the claimant and the claimant will  
11 have 30 days to correct the deficiency. (ECF Nos. 166 at 8, 167 at 16-17).

12 Based upon the record before it, the Court finds that the amount and  
13 terms of the proposed monetary benefits and injunctive relief to the Class  
14 Members are fair and reasonable.

15 4. Whether the Class has been fairly and adequately  
16 represented during the settlement negotiations

17 Counsel who represented the Class included attorneys at the firms of  
18 Bonnett, Fairbourn, Friedman & Balint, P.C., Denlea & Carton, Boodell &  
19 Domanskis, LLC and Levin Fishbein Sedran & Berman. Settlement Class  
20 Counsel have "have substantial experience in litigating class actions." (ECF  
21 No. 153-1 at 36). The Court has interacted with counsel on this case for over  
22 four years. Based upon the record before it, the Court finds Plaintiffs'  
23 attorneys are qualified to conduct this litigation and to assess its settlement  
24 value. It appears that the Class has been fairly and adequately represented  
25 during settlement negotiations.

26



1                   5. Reaction of the Class to the proposed settlement

2                   “The Ninth Circuit has held that the number of class members who  
3 object to a proposed settlement is a factor the Court may consider in its  
4 settlement approval analysis.” *Shames* 2012 WL 5392159 at \*8 (citing  
5 *Mandujano v. Basic Vegetable Prods. Inc.*, 541 F.2d 832, 837 (9th Cir. 1976)).  
6 “The absence of a large number of objectors supports the fairness,  
7 reasonableness, and adequacy of the settlement.” *Id.*; *In re Austrian &*  
8 *German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) (“If  
9 only a small number of objections are received, that fact can be viewed as  
10 indicative of the adequacy of the settlement.”); *Boyd v. Bechtel Corp.*, 485 F.  
11 Supp. 610, 624 (N.D. Cal. 1979) (finding “persuasive” the fact that eighty-four  
12 percent of the class filed no opposition).

13                   In this case, Class Notice was published in June. As of October 8, 2015,  
14 there have been seven requests for exclusion. (ECF No. 166 at 4). A review  
15 of the electronic docket shows only three objections filed. (ECF Nos. 158, 161,  
16 162). The small number of exclusions and objections, compared to the large  
17 number of Class Members who received Notice, favors the approval of the  
18 settlement.

19                   6. Absence of collusion in the settlement process

20                   In addition to the above considerations, “the district court must reach a  
21 reasoned judgment that the proposed agreement is not the product of fraud or  
22 overreaching by, or collusion among, the negotiating parties. . . .” *Ficalora v.*  
23 *Lockheed Cal. Co.*, 751 F.2d 995, 997 (9th Cir. 1985) (citations omitted). In  
24 this case, the proposed settlement is the product of extensive negotiations  
25 conducted at arm’s-length among counsel and a neutral mediator. (ECF No.  
26 153-1 at 36). Class counsel and counsel for Defendants demonstrated they

1 were fully prepared to litigate this case through final judgment. They  
2 reached settlement with the assistance of a well-respected neutral. The  
3 Court is satisfied that the settlement process did not involve collusion.

4 Taking all of these factors together, the Court finds that the settlement  
5 is fundamentally “fair, adequate and reasonable” pursuant to Rule 23(e), and  
6 that no evidence of collusion exists. The Court grants the Motion for Final  
7 Approval of Class Action Settlement (ECF No. 153).

#### 8 IV. Motion for Attorneys’ Fees and Costs and Incentive Awards

##### 9 A. Class Representatives’ Incentive Awards

10 Objector Hammack argues that the incentive awards in this case are  
11 unreasonably large when compared to the relief flowing to the Class  
12 Members, and thus unfair. Objector Hammack’s argument is based on a  
13 misunderstanding of the incentive awards contemplated in the settlement.  
14 Class Counsel seeks an *aggregate* \$10,000 award to be *apportioned* among  
15 the Class Representatives. Objector Hammack misunderstood the award to  
16 be \$10,000 for *each* Class Representative, or a combined total of \$30,000. As  
17 Class Counsel note in their Reply, Objector Hammack’s suggested incentive  
18 award of \$2,790 per Class Representative is “just shy of” the \$3,333.33  
19 Plaintiffs actually requested for each of the three Class Representatives.

20 Moreover, the Court finds that the amount of incentive award  
21 requested—\$10,000 to be shared by the three Class Representatives—is well  
22 within reason when considered in light of the entire settlement and relevant  
23 precedent. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947-  
24 948 (9th Cir. 2015) (affirming incentive awards of \$5,000 each for nine class  
25 representatives, even though unnamed class members were to receive only  
26 \$12 each). In assessing reasonableness of incentive awards, courts look to

1 “the number of named plaintiffs receiving incentive payments, the proportion  
2 of the payments relative to the settlement amount, and the size of each  
3 payment.” *Id.* at 947 (quoting *Staton v. Boeing, Co.*, 327 F.3d 938, 977 (9th  
4 Cir. 2003)).

5 In this case, three Class Representatives will receive \$3,333.33 each,  
6 totaling \$10,000.00, while unnamed Class Members are expected to receive  
7 either \$22, for claims not supported by valid proof of purchase, or \$46, for  
8 claims supported by valid proof of purchase. Although it is true that the  
9 incentive awards are roughly 152 times larger than the lowest individual  
10 award, that ratio is smaller than the ones affirmed in *In re Online DVD-*  
11 *Rental* and similar cases. The Ninth Circuit focuses more on the number of  
12 class representatives, the incentive amount, and the proportion to the total  
13 settlement. *Id.* Here, there are fewer class representatives than in *In re*  
14 *Online DVD-Rental* and the \$3,333.33 incentive awards are considerably less  
15 than the \$5,000 amount the Ninth Circuit said was reasonable in *Staton* and  
16 *In re Online DVD-Rental. Id.*

17 Finally, the combined \$10,000.00 in incentive awards is a mere .15% of  
18 the total settlement fund of \$6.51 million, which is less than the .17% of the  
19 settlement fund approved by the Ninth Circuit in *In re Online DVD-Rental.*  
20 *Id.* Accordingly, the Court finds the aggregate \$10,000.00 incentive award to  
21 the Class Representatives to be reasonable and fair.

## 22 B. Costs

23 Class Counsel seek \$134,197.86 in costs. (ECF No. 153-13 at 5  
24 (Bonnett, Fairbourn, Friedman & Balint, P.C. incurred \$96,490.66), 153-14 at  
25 5 (Levin Fishbein Sedran & Berman incurred \$34,374.72 and Boodell &  
26 Domanskis, LLC incurred \$1,819.11), 153-15 at 4 (Denlea & Carton incurred

1 \$1,513.37)). These costs were for mediation, litigation services, experts, and  
2 travel. (See ECF Nos.153-13, 153-14, 153-15 and lodgments in support  
3 thereof). These are the types of expenses routinely charged to paying clients.  
4 See *In re Omnivision Tech.*, 559 F.Supp.2d 1036, 1048 (N.D. Cal. 2008)  
5 (explaining that class counsel “may recover their reasonable expenses that  
6 would typically be billed to paying clients in non-contingency matters.”).  
7 Therefore, the Court grants Class Counsel's request for reimbursement of  
8 expenses in the amount of \$134,197.86.

### 9 C. Attorneys' Fees

10 Class Counsel seek an award of 33% of the \$6.51 million “Settlement  
11 Fund,” which includes the funds to be disbursed directly to the Class,  
12 incentive awards to Class Representatives, as well as notice costs,  
13 administrative costs and attorneys' fees that benefit the Class. The  
14 Settlement Fund does not include a value for the two-year labeling  
15 injunction.

16 “[C]ourts have an independent obligation to ensure that the award, like  
17 the settlement itself, is reasonable....” *In re Bluetooth Headset Products*  
18 *Liability Litigation*, 654 F.3d 935, 941 (9th Cir. 2011). The Ninth Circuit has  
19 approved two different methods for calculating a reasonable attorneys' fee,  
20 depending on the circumstances. *Id.* at 941-942. Where, as here, “a  
21 settlement produces a common fund for the benefit of the entire class, courts  
22 have discretion to employ either the lodestar method or the percentage-of-  
23 recovery method.” *Id.* at 942 (citing *In re Mercury Interactive Corp.*, 618 F.3d  
24 988, 992 (9th Cir. 2010)).

25 “Though courts have discretion to choose which calculation method they  
26 use, their discretion must be exercised so as to achieve a reasonable result.”

1 *Id.* (citing *In re Coordinated Pretrial Proceedings*, 109 F.3d 602, 607 (9th Cir.  
2 1997)).

3 Thus, for example, where awarding 25% of a ‘megafund’  
4 would yield windfall profits for class counsel in light of the  
5 hours spent on the case, courts should adjust the benchmark  
percentage or employ the lodestar method.

6 *Id.* (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301,  
7 1311 (9th Cir. 1990), and *In re Prudential Ins. Co. America Sales Practice*  
8 *Litig. Agent Actions*, 148 F.3d 283, 339 (3d Cir. 1998)).

9 The Ninth Circuit permits courts to award attorneys a percentage of the  
10 common fund “in lieu of the often more time-consuming task of calculating  
11 the lodestar.” *Id.* at 942. “[C]ourts typically calculate 25% of the fund as the  
12 ‘benchmark’ for a reasonable fee award, providing adequate explanation in  
13 the record of any ‘special circumstances’ justifying a departure.” *Id.* (citing  
14 *Six (6) Mexican Workers*, 904 F.2d at 1311). Such circumstances include, but  
15 are not limited to: (1) the results achieved; (2) the risk involved in the  
16 litigation; (3) incidental or nonmonetary benefits conferred by the litigation;  
17 and (4) financial burden of the case on counsel. *Vizcaino v. Microsoft Corp.*,  
18 290 F.3d 1043, 1048-1050 (9th Cir. 2002).

19 Class Counsel properly omit the value of injunctive relief from their  
20 percentage-of-the-fund calculations. Courts may only include the value of  
21 injunctive relief as part of the value of the common fund for purposes of  
22 calculating percentage-of-the-common-fund fee awards “in the unusual  
23 instance where the value to the individual class members... can be accurately  
24 ascertained...” *Staton v. Boeing Co.*, 327 F.3d 938, 974 (2003) (citing *Van*  
25 *Gemert*, 444 U.S. at 478-479)). When the value of injunctive relief is not  
26 included as part of the value of the common fund, courts should consider the

1 value of the injunctive relief as one of the “relevant circumstances” in  
2 determining whether to allow an upward departure from the 25%  
3 benchmark. *Id.* (citing *Vizcaino*, 290 F.3d at 1049). Although Class Counsel  
4 offer an expert’s opinion on the value of the injunctive relief, the opinion is  
5 offered as to the detriment to Defendants and the value to society at large  
6 and to future purchasers, rather than the specific value to these individual  
7 Class Members. (ECF No. 156-2 (sealed)). The Court agrees with the  
8 Objectors that the value of the two year injunction against use of a limited  
9 set of terms in labels is difficult to quantify—especially given the reasonable  
10 inference that many Class Members may not purchase this product again  
11 regardless of labeling claims. The value to these Class Members is  
12 speculative. Accordingly, the Court declines to include the value of injunctive  
13 relief as part of the value of the common fund.

14 Here, the common fund is \$6.51 million, without assigning the  
15 injunctive relief any value. Applying the 25% benchmark results in a fee  
16 award of \$1,627,500.

17 Class Counsel contend that an upward departure—a 33% award  
18 totaling \$2,148,300—is justified here because Class Counsel achieved better  
19 financial and injunctive results than cases applying the 25% benchmark, and  
20 because the two year labeling injunction provides nonmonetary benefits to  
21 the Class that should be considered in the fee award.

22 The value of the injunctive relief is a relevant circumstance for this  
23 Court to consider in deciding whether to apply a percentage higher than the  
24 benchmark. *Staton*, 327 F.3d at 974. The Objectors dispute that the  
25 injunctive relief value justifies a 33% award. Objector Hammack contends  
26 that the 33% fee requested by Class Counsel is excessive, and that the

1 injunctive relief provides little, if any, value to the Class.<sup>1</sup> (ECF No. 158 at  
2 3). Objectors TINA and AARP object to the 33% fee requested as excessive  
3 and urge the Court to award a fee of 25% of the Settlement Fund. (ECF No.  
4 144 at 3-5). The Court finds, contrary to the Objectors' assertion, that the  
5 injunctive relief carries some value to the Class Members. The scope of the  
6 injunctive relief is the product of compromise between Class Counsel and  
7 Defendants, and the parties revised the injunction to provide more benefit to  
8 the Class after the Court expressed concerns about the originally-proposed  
9 injunction. The injunctive relief is not as good as the Objectors would like,  
10 but it is a fair compromise given the significant risk that the Class would  
11 have obtained no injunctive relief if litigation continued.

12 Although the Court finds that the injunctive relief has some value to  
13 the Class, the Court does not find that the benefit is significant enough to  
14 justify an upward departure of the percentage applied to the common fund  
15 when considered in context with the other relevant circumstances. The  
16 litigation lasted four years, obtained substantial success despite significant  
17 risks, and involved complex legal and factual issues. Class Counsel proved to  
18 be experienced and successful. But at times Class Counsel were inefficient  
19 and took detours that extended the settlement approval process and raised  
20 the expense of litigation. The Court agrees with Objectors Hammack, TINA  
21 and AARP that a 33% award would be excessive, finds no basis for departing  
22

---

23  
24 <sup>1</sup> Objector Hammack also argues that the fee award should be further reduced because  
25 Class Counsel's motion for fees and costs was available only through the public record and  
26 not on the Class website. Class Counsel replies that it would have provided the motion to  
any putative Class member who requested it, but that Objector Hammack made no effort  
to ask for the motion. The Court finds that the fee motion was sufficiently accessible to  
the Class and denies Ms. Hammack's objection on this basis.

1 from the 25% benchmark in this case, and finds that a fee award of  
2 \$1,627,500 is reasonable.

3 The Ninth Circuit has “encouraged courts to guard against an  
4 unreasonable result by cross-checking their calculations against a second  
5 method.” *In re Bluetooth*, 654 F.3d at 944 (citing *Vizcaino.*, 290 F.3d at 1050-  
6 1051, and *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability*  
7 *Litig.*, 55 F.3d 768, 820 (3d Cir. 1995)). Application of the “lodestar method”  
8 provides a useful “cross-check” as to the reasonableness of a given percentage  
9 award. *Vizcaino*, 290 F.3d at 1050. Courts commonly use a rough calculation  
10 of the lodestar as a cross-check. *Aboudi v. T-Mobile USA, Inc.*, 2015 WL  
11 4923602, at \*7 (S.D. Cal. Aug. 18, 2015); *Hopkins v. Stryker Sales Corp.*, 2013  
12 WL 496358, at \*4 (N.D. Cal. Feb. 6, 2013).

13 Here, Plaintiffs contend that a rough calculation of the lodestar comes  
14 to \$1,199,148.50, and that that figure should be adjusted by a 1.8 multiplier  
15 to a fee award of \$2,148,300. (ECF No. 153-1 at 53). Comparing the non-  
16 enhanced rough lodestar figure they advance (\$1,199,148.50) with the 25%  
17 percent of the common fund figure (\$1,627,500.00), the multiplier is 1.32.

18 The Court reviewed the Plaintiffs’ fee documentation to ensure their  
19 rough calculation is fair and reasonable to the class. Class Counsel includes  
20 all of the hours expended seeking to stay or withdraw this settlement,  
21 prompting this Court to perform its own rough lodestar calculation. Not only  
22 did the motions to stay and withdraw the settlement fail, but they were also  
23 aimed at preventing the settlement through which Counsel now seeks fees. A  
24 thorough review of Counsel’s fee documentation reveals that Counsel seeks  
25 approximately 135.8 hours, or \$83,562.00, for the failed attempt to stay or  
26 withdraw from the settlement. The Court was disturbed at the staggering



1 amount of time Class Counsel spent in preparing for this ill-considered effort,  
2 particularly because the motion to stay the settlement was only 2 pages long,  
3 the motion to reconsider this Court's denial of the motion to stay was only 3  
4 pages long, the motion for withdrawal was 2 pages, the reply in support of  
5 that motion was 10 pages, and the hearing lasted less than an hour. (ECF  
6 Nos. 116, 118, 120, 124, 131; Elaine Ryan 3/18/2015 time entry ("attend and  
7 present at hearing (.9)")).

8 Even if the efforts had proven successful or beneficial to the Class, it  
9 was unreasonable for attorneys of this experience, billing at these rates, to  
10 have expended so many hours on these simple motions. The Court further  
11 notes that this detour caused actual delay of two months in the notice and  
12 settlement approval schedule.

13 The Court finds the 135.8 hours, or \$83,562.00, expended seeking stay  
14 and withdrawal of the settlement must be excluded as unreasonable from the  
15 lodestar cross-check rough calculation. As a result of this deduction, Class  
16 Counsel's cross-check lodestar amount is reduced to \$1,115,586.50. Based on  
17 the rough lodestar figure calculated by the Court, the multiplier is 1.46.

18 Multipliers of 1 to 4 are commonly found to be appropriate in common  
19 fund cases. *Vizcaino*, 290 F.3d at 1051 n.6. Courts have "routinely enhanced  
20 the lodestar to reflect the risk of non-payment in common fund cases."  
21 *Vizcaino*, 142 F.Supp.2d at 1305.

22 To restrict Class Counsel to the hourly rates they customarily  
23 charge for non-contingent work—where payment is assured—  
24 would deprive them of any financial incentive to accept  
25 contingent-fee cases which may produce nothing. Courts have  
26 therefore held that counsel are entitled to a multiplier for  
risk.

*Id.* at 1306.

1 The Court finds that the 1.46 multiplier is justified in this case by the  
2 risk of undertaking the case and by the value of the injunctive relief. The  
3 actual value of the injunctive relief is subsumed in the multiplier and not  
4 included in the value of the common fund, thus avoiding double-counting its  
5 value and negating the need to calculate the actual value of the injunctive  
6 relief.

7 The Court finds the 1.46 multiplier is within the range of  
8 reasonableness. Accordingly, the lodestar cross-check supports the  
9 reasonableness of the \$1,627,500 fee award calculated using the 25% of the  
10 common fund method. Consequently, the Court grants Plaintiffs' fee request  
11 in the amount of \$1,627,500.

## 12 CONCLUSION

13 IT IS HEREBY ORDERED that the motion for final approval of class  
14 action settlement (ECF No. 153), including the motion in support of award of  
15 attorneys' fees, costs and incentive awards is GRANTED as follows:

- 16 1. The Settlement and Settlement Agreement are hereby approved as  
17 fair, reasonable, adequate, and in the best interests of the Class, and  
18 the requirements of due process and Federal Rule of Civil Procedure  
19 23 have been satisfied. The parties are ordered and directed to  
20 comply with the terms and provisions of the Settlement Agreement.  
21
- 22 2. The Court, having found that each of the elements of Federal Rules  
23 of Civil Procedure 23(a) and 23(b)(3) are satisfied, for purposes of  
24 settlement only, the Class is permanently certified pursuant to  
25 Federal Rule of Civil Procedure 23, on behalf of the following  
26 persons:

1 All residents of the United States who purchased for personal use,  
2 and not resale or distribution, a Covered Product between  
3 January 1, 2005, and May 27, 2015.

4 Specifically excluded from the Settlement Class are the following  
5 persons:

- 6 (i) Schiff and its respective affiliates, employees, officers,  
7 directors, agents, and representatives and their immediate  
8 family members;  
9 (ii) Settlement Class Counsel; and  
10 (iii) The judges who have presided over the Litigation and their  
11 immediate family members.

12 The Class Members identified in the Declaration of Gina  
13 Intrepido-Bowen as having timely and properly elected to opt out  
14 from the Settlement and Class are hereby excluded from the Class  
15 and shall not be entitled to any of the benefits afforded to the  
16 Class Members under the Settlement Agreement. The Court  
17 adopts and incorporates by reference its preliminary conclusions  
18 as to the satisfaction of Rules 23(a) and (b)(3) set forth in the  
19 Preliminary Approval Order (ECF No. 113) and notes again that  
20 because this certification of the Class is in connection with the  
21 Settlement rather than litigation, the Court need not address any  
22 issues of manageability that may be presented by certification  
23 class proposed in the Settlement Agreement.  
24

- 25 3. For purposes of Settlement only, the named Plaintiffs are certified  
26 as Representative of the Class and Class Counsel are appointed to

1 the Class. The Court concludes that Class Counsel and the Class  
2 Representatives have fairly and adequately represented the Class  
3 with respect to the Settlement and the Settlement Agreement.

4 4. Notwithstanding the certification of the foregoing Class and  
5 appointment of the Class Representatives, for purposes effecting the  
6 Settlement, if this Order is reversed on appeal for the Settlement  
7 Agreement is terminated or not consummated for any reason, the  
8 foregoing certification of the Class and appointment of the Class  
9 Representative shall be void and of no further effect, and the parties  
10 to the proposed Settlement shall be returned to the status each  
11 occupied before entry of this Order without prejudice to any legal  
12 argument that any of the parties to the Settlement Agreement might  
13 have asserted but for the Settlement Agreement.

14 5. Named Plaintiffs and all Class Members who are not excluded shall  
15 be deemed to fully and irrevocably release, waive, and discharge  
16 Defendants and each of its respective past, present and future  
17 owners, stockholders, parent corporations, related or affiliated  
18 companies, subsidiaries, officers, directors, shareholders, employees,  
19 agents, principals, heirs, representatives, accountants, attorneys,  
20 auditors, consultants, insurers and re-insurers, and their respective  
21 successors and predecessors in interest, from any and all past,  
22 present, and future liabilities, claims, causes of actions (whether in  
23 contract, tort, or otherwise, including statutory, common law,  
24 property, and equitable claims), damages, costs, attorneys' fees,  
25 losses, or demands, whether known or unknown, existing or  
26

1 potential, or suspected or unsuspected, which Named Plaintiffs and  
2 all Class Members have or may have arising out of or relating to any  
3 act, omission, or other conduct alleged or otherwise referred to in the  
4 Action (the “Released Claims”).

5  
6 6. With respect to the Released Claims, Named Plaintiffs and all Class  
7 Members who are not excluded shall be deemed to have, and by  
8 operation of the Final Judgment shall have, expressly waived and  
9 relinquished, to the fullest extent permitted by law, the provisions,  
10 rights and benefits of Section 1542 of the California Civil Code, or  
11 any other similar provision under federal or state law that purports  
12 to limit the scope of the general release. Section 1542 provides:

13 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH**  
14 **THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS**  
15 **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF**  
16 **KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS**  
17 **SETTLEMENT WITH THE DEBTOR.**

18 7. The Court has reviewed the application for an award of fees, costs,  
19 and expenses submitted by Class Counsel and the exhibits,  
20 memoranda of law, and other materials submitted in support of that  
21 application, and GRANTS costs in the amount of \$134,197.86, an  
22 Incentive Award of \$10,000.00 to be shared by the three Class  
23 Representatives, and attorneys’ fees in the amount of \$1,627,500.00.  
24  
25  
26

1 8. Neither the Settlement Agreement nor any provision therein,  
2 any negotiations, statements or proceedings in connection therewith  
3 shall be construed as, or deemed to be evidence of, an admission or  
4 concession on the part of the Plaintiff, any Class Member,  
5 Defendants, or any other person of any liability or wrongdoing by  
6 them, or that the claims and defenses that have been, or could have  
7 been, asserted in the action are or are not meritorious, and this  
8 Order, the Settlement Agreement or any such communications shall  
9 not be offered or received in evidence in any action or proceedings, or  
10 be used in any way as an admission or concession or evidence of  
11 liability or wrongdoing of any nature or that Plaintiff, any Class  
12 member, or any other person has suffered any damage; provided,  
13 however, that the Settlement Agreement, this Order, and the final  
14 Judgment to be entered thereon may be filed in any action by  
15 Defendants or Class Members seeking to enforce the Settlement  
16 Agreement or the final Judgment by injunctive or other relief, or to  
17 assert defenses including, but not limited to, res judicata, collateral  
18 estoppel, release, good faith settlement, or any theory of claim  
19 preclusion or issue preclusion or similar defense or counterclaim.  
20 The Settlement Agreement's terms shall be forever binding on, and  
21 shall have res judicata and preclusive effect in, all pending and  
22 future actions or other proceedings as to Released Claims and other  
23 prohibitions set forth in this Order that are maintained by, or on  
24 behalf of, the Class Members or any other person subject to the  
25 provisions of this Order.  
26

1 9. In the event that the Settlement Agreement does not become  
2 effective or is cancelled or terminated in accordance with the terms  
3 and provisions of the Settlement Agreement, then this Order and the  
4 final Judgment shall be rendered null and void and be vacated and  
5 all orders entered in connection therewith by this Court shall be  
6 rendered null and void.

7  
8 10. The action and the claims alleged therein are hereby ordered  
9 DISMISSED with prejudice.

10 11. Without in any way affecting the finality of this Order and the final  
11 Judgment, the Court hereby retains jurisdiction as to all matters  
12 relating to the interpretation, administration, and consummation of  
13 the Settlement Agreement.

14 IT IS SO ORDERED.

15  
16 Dated: **November 3, 2015**

17   
18 Hon. Mitchell D. Dembin  
United States Magistrate Judge