

1 Rafey S. Balabanian (SBN - 315962)  
rbalabanian@edelson.com  
2 Eve-Lynn Rapp (admitted *pro hac vice*)  
erapp@edelson.com  
3 EDELSON PC  
123 Townsend Street, Suite 100  
4 San Francisco, CA 94107  
Telephone: (415) 212-9300  
5 Facsimile: (415) 373-9435

6 Gordon M. Fauth, Jr. (SBN 190280)  
gfauth@finkelsteinthompson.com  
7 Of Counsel to  
FINKELSTEIN THOMPSON LLP  
8 100 Pine Street, Suite 1250  
San Francisco, CA 94111  
9 Telephone: (415) 398-8700  
Direct: (510) 238-9610  
10 Facsimile: (415) 398-8704

11 Timothy N. Mathews (*pro hac vice* pending)  
TNM@chimicles.com  
12 Catherine Pratsinakis (*pro hac vice* pending)  
CP@chimicles.com  
13 CHIMICLES & TIKELLIS LLP  
One Haverford Centre  
14 361 West Lancaster Avenue  
Haverford, Pennsylvania 19041  
15 Tel: (610) 642-8500  
16 Fax: (610) 649-3633

[Additional counsel listed on signature page]  
17 *Counsel for Plaintiffs and the Settlement Class*

18 **UNITED STATES DISTRICT COURT**  
19 **NORTHERN DISTRICT OF CALIFORNIA**

20  
21 **IN RE 24 HOUR FITNESS PREPAID**  
22 **MEMBERSHIPS LITIGATION**

CASE NO. 4:16-cv-01668

CONSOLIDATED CASES:  
No. 3:16-cv-01668-JSW  
No. 3:16-cv-02359-JSW

23  
24 **PLAINTIFFS' NOTICE OF MOTION**  
25 **AND MOTION FOR PRELIMINARY**  
26 **APPROVAL OF CLASS ACTION**  
27 **SETTLEMENT AGREEMENT**

28 Judge: Jeffrey S. White  
Date: December 8, 2017  
Time: 9:00 A.M.  
Courtroom: 5, 2nd Floor

**NOTICE OF MOTION**

**PLEASE TAKE NOTICE** that on December 8, 2017 at 9:00 a.m., or at such other time as may be set by the Court, Plaintiffs Kevin O’Shea, Mark Vitcov, Rod Morris, Michael Losquadro, Dipti Shah, and Russell Marchewka will appear, through counsel, before the Honorable Jeffrey S. White, or any Judge sitting in his stead, in Courtroom 5, 2nd Floor, 1301 Clay Street, Oakland, California 94612, and then and there, respectfully move the Court, pursuant to Federal Rule of Civil Procedure 23(e), to grant preliminary approval of the proposed class action settlement reached between themselves and Defendant 24 Hour Fitness USA, Inc.

Plaintiffs’ motion is based upon this Notice, the Memorandum of Points and Authorities filed herewith, the exhibits attached thereto, including the Parties’ proposed class action settlement agreement, the Declaration of Rafey S. Balabanian filed simultaneously herewith, and the record in this matter, along with any oral argument that may be presented to the Court and evidence submitted in connection therewith.

Respectfully Submitted,

**KEVIN O’SHEA, MARK VITCOV, ROD MORRIS, MICHAEL LOSQUADRO, DIPTI SHAH, AND RUSSELL MARCHEWKA,**  
individually and on behalf of all others similarly situated,

Dated: November 1, 2017

By: /s/ Rafey S. Balabanian

Rafey S. Balabanian (SBN - 315962)  
rbalabanian@edelson.com  
Eve-Lynn Rapp (admitted *pro hac vice*)  
erapp@edelson.com  
EDELSON PC  
123 Townsend Street, Suite 100  
San Francisco, CA 94107  
Tel: 415.212.9300  
Fax: 415.373.9435

Douglas Thompson, Jr. (admitted *pro hac vice*)  
dthompson@finkelsteinthompson.com  
FINKELSTEIN THOMPSON LLP  
James Place  
1077 30th Street, N.W., Suite 150  
Washington, DC 20007  
Tel: 202.337.8000  
Fax: 202.337.8090

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Gordon M. Fauth, Jr. (SBN 190280)  
gfauth@finkelsteinthompson.com  
Of Counsel to  
FINKELSTEIN THOMPSON LLP  
100 Pine Street, Suite 1250  
San Francisco, CA 94111  
Tel: 415.398.8700  
Fax: 415.398.8704

Timothy N. Mathews (*pro hac vice* pending)  
TNM@chimicles.com  
Catherine Pratsinakis (*pro hac vice* pending)  
CP@chimicles.com  
CHIMICLES & TIKELLIS LLP  
One Haverford Centre  
361 West Lancaster Avenue  
Haverford, Pennsylvania 19041  
Tel: 610.642.8500  
Fax: 610.649.3633

Kristen L. Sagafi (SBN- 222249)  
ksagafi@tzlegal.com  
TYCKO & ZAVAREEI LLP  
483 Ninth Street – Suite 200  
Oakland, CA 94607  
Tel: (510) 254-6810

1 **SUMMARY OF ARGUMENT**

2 The Court should grant Plaintiffs' motion for preliminary approval of the class action  
3 settlement reached between Plaintiffs and Defendant 24 Hour Fitness.

4 The Court must engage in a two-part inquiry to determine whether preliminary approval is  
5 appropriate. The first part of the analysis concerns certification of the proposed settlement class.  
6 The proposed class must meet the requirements of Rule 23(a) and at least one subsection of Rule  
7 24(b). *See also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614, 621 (1997). The second  
8 part requires the Court to determine whether the proposed settlement warrants preliminary  
9 approval and notice to the proposed class. The preliminary approval hearing is a pre-notification  
10 hearing meant to ensure that the settlement is not "unacceptable at the outset." Herbert Newberg &  
11 Alba Conte, *Newberg on Class Actions* § 11.25 at 3839 (4th ed. 2002).

12 The proposed class is appropriate for certification for settlement purposes because it meets  
13 the requirements of both Rule 23(a) (numerosity, commonality, typicality, and adequacy of  
14 representation) and Rule 23(b)(3) (predominance and superiority). *See also Amchem*, 521 U.S. at  
15 614, 621. Indeed, the class numbers approximately 255,000 individuals, they share several  
16 common questions of fact and law, and each Plaintiff's experience and the injury they suffered  
17 were materially the same as the absent class members. And, Plaintiffs are suitable class  
18 representatives, and their counsel satisfy the criteria of Rule 23(g), since they have shown  
19 themselves to "fairly and adequately represent the interest of the class." Fed. R. Civ. P.  
20 23(g)(1)(B). In short, certification of the Settlement Class is appropriate.

21 The proposed Settlement undoubtedly merits preliminary approval. Indeed, the Settlement  
22 satisfies the criteria outlined in *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D.  
23 Cal. 2007), in that it: 1) was reached after serious, informed non-collusive negotiations, 2) has no  
24 obvious deficiencies and provides class members with real, immediate relief, 3) does not provide  
25 preferential treatment to any individual class member, and 4) easily falls within the courts' range  
26 of possible approval.

27

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Finally, the proposed notice plan meets the requirements of due process and Rule 23(c) because it provides “individual notice to all members who can be identified through reasonable effort,” Fed. R. Civ. P. 23(c)(2)(B), and is the best practicable under the circumstances.

Accordingly, the Court should grant Plaintiffs’ motion, certifying the Settlement Class for settlement purposes, appointing Plaintiffs Kevin O’Shea, Mark Vitcov, Rod Morris, Michael Losquadro, Dipti Shah, and Russell Marchewka as class representatives, appointing Rafey Balabanian and Eve Lynn-Rapp of Edelson PC, Gordon Fauth of Finkelstein Thompson LLP, Timothy Mathews and Catherine Pratsinakis of Chimicles & Tikellis LLP, and Kristen Sagafi of Tycko & Zavareei LLP as class counsel, and ordering that notice be disseminated to the Settlement Class.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

**I. INTRODUCTION..... 1**

**II. BACKGROUND..... 2**

**A. Plaintiff’s Allegations ..... 2**

**B. The Actions ..... 2**

**C. The Parties’ Settlement Discussions ..... 3**

**III. THE TERMS OF THE SETTLEMENT AGREEMENT ..... 4**

**IV. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED ..... 5**

**V. PLAINTIFFS’ COUNSEL SHOULD BE APPOINTED CLASS COUNSEL..... 9**

**VI. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL ..... 11**

**VII. THE COURT SHOULD APPROVE THE PROPOSED NOTICE PLAN ..... 14**

**VIII. CONCLUSION..... 15**

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**United States Supreme Court Cases**

*Amchem Products, Inc. v. Windsor*,  
521 U.S. 591 (1997) ..... 5, 7, 8, 9

*Eisen v. Carlisle & Jacquelin*,  
417 U.S. 156 (1974) ..... 14

*Erica P. John Fund, Inc. v. Halliburton Co.*,  
131 S. Ct. 2179 (2011) ..... 7

*Wal-Mart Stores, Inc. v. Dukes*,  
131 S. Ct. 2541 (2011) ..... 5, 6, 7

**United States Court of Appeals Cases**

*Ellis v. Costco Wholesale Corp.*,  
658 F.3d 970 (9th Cir. 2011) ..... 6

*In re First All. Mortgage Co.*,  
471 F.3d 977 (9th Cir. 2006) ..... 8

*In re Mego Fin. Corp. Secs. Litig.*,  
213 F.3d 454 (9th Cir. 2000) ..... 12

*Linney v. Cellular Alaska P’ship*,  
151 F.3d 1234 (9th Cir. 1998) ..... 14

*Radcliffe v. Experian Info. Solutions Inc.*,  
715 F.3d 1157 (9th Cir. 2013) ..... 13

*Valentino v. Carter-Wallace, Inc.*,  
97 F.3d 1227 (9th Cir. 1996) ..... 7

*Wolin v. Jaguar Land Rover N. Am. LLC*,  
617 F.3d 1168 (9th Cir. 2010) ..... 6, 9

**United States District Court Cases**

*Ambrosia v. Cogent Commun., Inc.*,  
312 F.R.D. 544 (N.D. Cal. 2016) ..... 6

*Bickley v. Schneider Nat’l, Inc.*,  
08-CV-05806-JSW, 2016 WL 4157355 (N.D. Cal. April 25, 2016) ..... 13, 14

*Bloom, et al. v. American Home Products Corp., et al.*,  
98-cv-20047 (E.D. Pa.) ..... 10

1 *Boring v. Bed Bath & Beyond of California Ltd. Liab. Co.*,  
 12-cv-05259-JST, 2013 WL 6145706 (N.D. Cal. Nov. 21, 2013) ..... 11

2 *Chambers v. Whirlpool Corp.*,  
 3 214 F. Supp. 3d 877 (C.D. Cal. 2016)..... 10

4 *Cordy v. USS-Posco Indus.*,  
 5 12-cv-00553-JST, 2014 WL 212587 (N.D. Cal. Jan 17, 2014) ..... 11, 13, 14

6 *Cotter v. Lyft, Inc.*,  
 176 F.Supp 3d 930 (N.D. Cal. 2016)..... 13, 14

7 *Cox v. Clarus Marketing Grp.*,  
 8 291 F.R.D. 473 (S.D. Cal. 2013)..... 13

9 *Dilts v. Penske Logistics, L.L.C.*,  
 10 08-cv-0318-CAB, 2014 WL 12515159 (S.D. Cal. July 11, 2014)..... 14

11 *Friedman v. 24 Hour USA, Inc.*,  
 06-cv-06282 AHM (C.D. Cal. July 12, 2010)..... 12

12 *Fulford v. Logitech, Inc.*,  
 13 08-cv-02041-MMC, 2010 WL 807448 (N.D. Cal. 2010) ..... 13

14 *Greenwood v. Compucredit Corp.*,  
 15 08-cv-4878, 2010 WL 4807095 (N.D. Cal. Nov. 19, 2010) ..... 8

16 *Hahn v. Massage Envy Franchising LLC*,  
 12-cv-00153-DMS, 2015 WL 2164981 (S.D. Cal. Mar. 6, 2015) ..... 12

17 *Hanlon v. Chrysler Corp.*,  
 18 150 F.3d 1011 (9th Cir. 1998)..... 5, 6, 7

19 *Harris v. Vector Mktg. Corp.*,  
 20 08-cv-5198, 2011 WL 1627973 (N.D. Cal. Apr. 29, 2011) ..... 11

21 *Hopwood v. Nuance*,  
 13-cv-02132 (N.D. Cal. 2015)..... 10

22 *In re Am. Cont’l Corp./Lincoln Sav. & Loan Sec. Litig.*,  
 23 140 F.R.D. 425 (D. Ariz. 1992)..... 7, 8

24 *In re Apple iPhone/iPod Warranty Litig.*,  
 25 10-cv-1610-RS (N.D. Cal.) ..... 10

26 *In re High-Tech Employee Antitrust Litig.*,  
 11-cv-2509, 2013 WL 6328811 (N.D. Cal. Oct. 30, 2013)..... 11

27 *In re LinkedIn User Privacy Litig.*,  
 28 12-cv-03088 (N.D. Cal. 2012)..... 10



1 *In re Netflix Privacy Litig.*,  
 2 11-cv-00379 (N.D. Cal. 2011)..... 10

3 *In re Oreck Corp. Halo Vacuum & Air Purifiers Mktg. & Sales Practices Litig.*,  
 4 282 F.R.D. 486 (C.D. Cal. 2012) ..... 9

5 *In re Relafen Antitrust Litig.*,  
 6 01-cv-12239-WGY (D. Mass.)..... 10

7 *In re Tableware Antitrust Litig.*,  
 8 484 F. Supp. 2d 1078 (N.D. Cal. 2007)..... 11, 12

9 *In re Volkswagen “Clean Diesel” Mktg, Sales Practices, and Prod. Liab. Litig.*,  
 10 2672-CRB, 2016 WL 4010049 (N.D. Cal. July 26, 2016)..... 10, 13

11 *Kagan v. Wachovia Sec.*,  
 12 09-cv-5337 SC, 2012 WL 1109987 (N.D. Cal. Apr. 2, 2012) ..... 5

13 *Kanawi v. Bechtel Corp.*,  
 14 254 F.R.D. 102 (N.D. Cal. 2008) ..... 7

15 *Ma v. Covidien Holding, Inc.*,  
 16 12-cv-02161, 2014 WL 360196 (C.D. Cal. Jan. 31, 2014) ..... 14

17 *Makaeff v. Trump Univ., LLC*,  
 18 10-cv-0940-GPC-WVG, 2014 WL 688164 (S.D. Cal. Feb. 21, 2014)..... 8

19 *Marsh v. First Bank of Delaware*,  
 20 11-cv-05226-WHO, 2014 WL 554553 (N.D. Cal. Feb. 7, 2014) ..... 6

21 *Martina v. LA Fitness Int’l, LLC*,  
 22 12-cv-02063 WHW, 2013 WL 5567157 (D.N.J. Oct. 8, 2013) ..... 12

23 *McKnight v. Uber Techs., Inc.*,  
 24 14-cv-05615-JST, 2017 WL 3427985 (N.D. Cal. Aug. 7, 2017)..... 12, 13

25 *Moshogiannis v. Sec. Consultants Grp., Inc.*,  
 26 10-cv-05971-EJD, 2012 WL 423860 (N.D. Cal. Feb. 8, 2012) ..... 5, 11

27 *Rodman v. Safeway*,  
 28 11-cv-3003-JST (N.D. Cal)..... 10

*Ruch v. AM Retail Grp., Inc.*,  
 14-cv-05352-MEJ, 2016 WL 1161453 (N.D. Cal. Mar. 24, 2016)..... 8, 9

*Silver et al. v. L.A. Fitness Int’l LLC.*,  
 10-cv-002326-MMB (E.D. Pa. March 13, 2013) ..... 12

*Vandervort v. Balboa Capital Corp.*,

1 8 F. Supp. 3d 1200 (C.D. Cal. 2014)..... 12

2 *Villegas v. J.P. Morgan Chase & Co.*,

3 09-cv-00261, 2012 WL 5878390 (N.D. Cal. Nov. 21, 2012) ..... 13, 14

4 **State Cases**

5 *In re Tobacco II Cases*,

6 207 P.3d 20 (Cal. 2009)..... 8

7 *Marchewka v. 24 Hour Fitness USA, Inc.*,

8 16-cv-02359-MEJ (N.D. Cal.)..... 3

9 *McAdams v. Monier, Inc.*,

10 182 Cal. App. 4th 174 (2010)..... 8

11 *O’Shea, et al. v. 24 Hour Fitness USA, Inc.*,

12 16-cv-1668-EDL (N.D. Cal.) ..... 2

13 **Statutory Provisions**

14 28 U.S.C. § 1715 ..... 15

15 Fed. R. Civ. P. 23 .....*passim*

16 **Other Authorities**

17 Herbert Newberg & Alba Conte, *Newberg on Class Actions*,

18 § 11 (4th ed. 2002) ..... 11, 14

19 Manual for Complex Litigation (Second),

20 § 30.44 (1985) ..... 11

21 Manual for Complex Litigation (Fourth),

22 § 21.633 (2004) ..... 5

23

24

25

26

27

28

1 **I. INTRODUCTION**

2 Plaintiffs Kevin O’Shea, Mark Vitcov, Rod Morris, Michael Losquadro, Dipti Shah, and  
3 Russell Marchewka, in their individual and representative capacities, (collectively, “Plaintiffs”)  
4 seek preliminary approval of a class action settlement that, if approved, will resolve the instant  
5 lawsuit and a related state court action against Defendant 24 Hour Fitness USA, Inc. (“Defendant”  
6 or “24 Hour Fitness”).<sup>1</sup> Broadly speaking, Plaintiffs allege that 24 Hour Fitness carried out a  
7 fraudulent and misleading sales campaign related to prepaid memberships, by orally promising  
8 consumers a fixed annual renewal amount, and then years later raising amounts. Defendant denies  
9 that it engaged in any wrongdoing and contends that it was forthright about its membership terms,  
10 which were written in each membership agreement. After motion practice, formal and informal  
11 discovery, two private mediation sessions with the well-respected neutral, John B. Bates, Esq. of  
12 JAMS in San Francisco, and lengthy direct negotiations, the parties have reached a full-relief  
13 settlement.

14 The Settlement is the product of a great deal of hard and creative work put forth by the  
15 parties and it is an incredibly strong result for the class. First, class members who submit a claim  
16 form and declaration will receive a *full refund* of the increases in the annual renewal amount they  
17 have already paid, and their future annual renewal amounts will revert back to their initial annual  
18 renewal amount, which will be locked for so long as they timely pay and remain members in good  
19 standing. The claim form is simple and straightforward, merely requiring class members to attest  
20 to the fact that, at the time they signed-up for the membership, they were told that the initial  
21 annual renewal amount was guaranteed for life. In other words, class members who attest that they  
22 were told the renewal amount was fixed for life will receive *full relief* under the Settlement.

23  
24 

---

<sup>1</sup> A copy of the proposed class action settlement agreement (“Settlement”) is attached as Exhibit  
25 A to the Declaration of Rafey S. Balabanian, dated November 1, 2017, filed simultaneously  
26 herewith (“RB Decl.”). Defendant also reached a settlement with the District Attorneys for the  
27 California Counties of Orange and Contra Costa (the “Counties”). However, the framework and  
28 relief included in this Settlement were negotiated by Class Counsel, independent of the Counties.  
In fact, Defendant did not disclose the potential settlement with the Counties until August 30,  
2017, *after* nearly every term had been negotiated and the Agreement was near final.

1 Second, even those class members who do not file a claim will be automatically entitled to a  
2 reduction in their current annual renewal amount, which will stay in place for three years. The  
3 combined relief ensures that each and every class member stands to benefit from this Settlement,  
4 making it truly an exceptional result, particularly in light of the difficulties that lied ahead.  
5 Accordingly, Plaintiffs respectfully request that the Court grant this motion, certify the Settlement  
6 Class (defined below) for settlement purposes, appoint them as class representatives and their  
7 counsel as class counsel, and approve their proposed notice plan.

## 8 **II. BACKGROUND**

### 9 **A. Plaintiffs' Allegations**

10 Defendant operates the largest chain of fitness centers in the United States. (ECF No. 104,  
11 Third Amended Complaint (“TAC”) ¶ 19.) Prior to 2006, Defendant’s prepaid membership  
12 contracts stated that it would not increase the “Guaranteed Annual Renewal Amounts” for lifetime  
13 members so long as they remained members in good standing. After April 2006, however,  
14 Defendant changed the membership contracts to provide that the annual renewal amount was only  
15 guaranteed for an additional one year beyond the initial term. Plaintiffs allege that Defendants’  
16 sales representatives continued to represent that the contract promised guaranteed lifetime renewal  
17 amounts, however, and explicitly told consumers – as they were trained to do – that there was “no  
18 need to spend the time to read all the fine print.” (*Id.* ¶ 28, n. 7.) Despite complying with its  
19 promise for many years, on June 1, 2015, Defendant began informing many Prepaid Members that  
20 their Annual Renewal Amount would increase. Scores of members lodged complaints describing  
21 virtually identical sales pitches. (*Id.* ¶¶ 28–30.) Plaintiffs joined together in this now consolidated  
22 class action case asserting numerous causes of action under the laws of various states, including  
23 those of California, Oregon, Texas and Washington. (*Id.* ¶¶ 122-270.)

### 24 **B. The Actions**

25 On April 1, 2016, Plaintiffs O’Shea, Vitcov, and Morris filed a putative class action  
26 complaint against Defendant in this Court,<sup>2</sup> and on April 29, 2016, Plaintiff Marchewka filed a

27 \_\_\_\_\_  
28 <sup>2</sup> *Kevin O’Shea, et al. v. 24 Hour Fitness USA, Inc.*, 16-cv-1668-EDL (N.D. Cal.).

1 materially identical lawsuit.<sup>3</sup> Those cases were consolidated for all purposes (the “Federal  
2 Action”), and those Plaintiffs filed an amended consolidated class action complaint (the “FAC”)  
3 on December 9, 2016. Defendant moved to dismiss the FAC, and after full briefing, on September  
4 1, 2017, the Court granted the motion dismissing all claims without prejudice, as barred by the  
5 applicable limitations periods. (ECF No. 98.) A Second Amended Complaint was filed on  
6 September 22, 2017 (the “SAC”). (ECF No. 100.)

7 On June 2, 2016, Plaintiff Shah filed a class action lawsuit against Defendant in California  
8 Superior Court in Alameda County, RG16818048 (the “State Action”), asserting claims similar to  
9 those asserted in the Federal Action. In the year leading up to this Settlement, counsel for Plaintiffs  
10 in the State Action and Federal Action coordinated their efforts and worked cooperatively with  
11 respect to informal discovery and settlement negotiation. (RB Decl. ¶¶6, 11.) Pursuant to the  
12 Settlement now before the Court, Plaintiff Shah has joined the other Plaintiffs as a named  
13 representative in a Conditional Third Amended Consolidated Complaint (“TAC”), which was filed  
14 by stipulation prior to this Motion. Assuming the Court finally approves the Settlement, the State  
15 Action will be dismissed with prejudice.

16 Starting in October 2016, the parties engaged in formal and informal discovery with  
17 Defendant. (*Id.* ¶¶10-13.) Defendant produced to Plaintiffs in both actions over 7,000 documents  
18 consisting of nearly 50,000 pages. (*Id.* ¶13.) Plaintiffs also produced to Defendants documents and  
19 affidavits amassed in the course of Plaintiffs’ counsel’s investigation. (*Id.* ¶12.)

### 20 C. The Parties’ Settlement Discussions

21 Counsel for the parties met and conferred on dozens of occasions regarding ways to  
22 potentially narrow or resolve the claims in the Actions. (*Id.* ¶¶ 14-18.) The parties’ counsel met in  
23 person on October 5, 2016. (*Id.* ¶14.) Thereafter, the parties attended two all-day mediation  
24 sessions on January 23 and 31, 2017, as well as several follow up mediation calls with Mr. Bates.  
25 (*Id.* ¶17.) Following substantial progress with Mr. Bates, the parties continued their discussions

26  
27  
28 <sup>3</sup> *Russell Marchewka v. 24 Hour Fitness USA, Inc.*, 16-cv-02359-MEJ (N.D. Cal.).

1 directly in several more arm's-length negotiations and reached the Settlement now before the  
2 Court. (*Id.* ¶18.)

### 3 **III. THE TERMS OF THE SETTLEMENT AGREEMENT**

- 4 • **Settlement Class:** All individuals who enrolled in a "Prepaid Membership"<sup>4</sup> as  
5 indicated in 24 Hour Fitness's membership records system and who maintained  
6 their Prepaid Membership on or after April 1, 2015.<sup>5</sup> (Agreement ¶¶ 1.29, 1.30 &  
7 1.45.)
- 8 • **Relief with Valid Claim Form and Declaration:** Each class member who submits  
9 a valid claim form and declaration is entitled to: (a) continued membership at the  
10 initial annual renewal amount for so long as the member timely pays and remains a  
11 member in good standing, and (b) if he or she has already paid an increased  
12 renewal amount, a full refund of the increased amounts paid (*i.e.*, the difference  
13 between the initial annual renewal amount and increased annual renewal amount  
14 paid). If a class member terminated his or her Prepaid Membership after receiving  
15 notice of an increase, he or she will be entitled to reinstatement at the initial annual  
16 renewal amount. (*Id.* ¶ 2.2.)
- 17 • **Automatic Relief:** Class members who *do nothing* (*i.e.*, do not submit a valid  
18 claim form and declaration) will be entitled to reduced annual renewal amounts  
19 according to three distinctions. First, current members whose annual renewal  
20 amount has not yet been increased will have the assurance that if Defendant  
21 increases their rates in the future, the increased amount will be capped for three  
22 years at \$45 annually for Sport members and \$90 annually for Super Sport  
23 members. Second, current members whose annual renewal amount already  
24 increased will receive a reduction in their current annual renewal amount equal to  
25 ten percent (10%) of the increase, and the amount will be fixed for three years.  
26 Third, members whose Prepaid Memberships terminated after notice of the annual  
27 renewal amount increase may reinstate their memberships with a reduction equal to  
28 ten percent (10%) of the increase, which will be fixed for three years. (*Id.* ¶ 2.1.)
- **Class Representative Incentive Award:** Defendant has agreed, subject to court  
approval, to pay an incentive award not to exceed \$3,000 for each representative (in  
addition to the relief to which they are entitled as class members). (*Id.* ¶ 9.6.)
- **Attorneys' Fees and Costs:** 24 Hour Fitness has agreed, subject to Court approval,  
to pay attorneys' fees, costs and expenses together totaling one million, five-  
hundred thousand dollars (\$1,500,000), which was negotiated at arm's length with  
the assistance of Mr. Bates. (*Id.* ¶ 9.5.)

---

23 <sup>4</sup> The Agreement defines "Prepaid Membership," generally, as a 24 Hour Fitness  
24 membership agreement marketed or sold on or after April 1, 2006, which allows a Prepaid  
25 Member to prepay between one and three years of dues and renew annually for an Annual  
26 Renewal Amount. (Agreement ¶ 1.30.) The Settlement Class excludes: current 24 Hour Fitness  
27 employees; court officers, employees, the mediator, the parties' counsel and their respective  
28 immediate family members; persons who terminated a Prepaid Memberships who did not receive  
an increase notice; and persons who opt out of the Settlement.

<sup>5</sup> April 1, 2015 marks the first date on which 24 Hour Fitness began notifying certain of its  
members of an imminent increase to their annual renewal amount. (TAC ¶ 3.)

- **Release:** Class members agree to release all claims arising out of or based upon allegations that Defendant deceived members into enrolling in a Prepaid Membership by representing that Annual Renewal Amounts were fixed, guaranteed, lifetime, for life, or could not ever be increased; improperly increased Annual Renewal Amounts; or breached any the Prepaid Membership by increasing the Annual Renewal Amount. (*See Id.* ¶¶ 1.39, 3.1, & 3.2 for full release language.)

#### IV. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

In order to grant preliminary approval, the Court must first determine that the proposed settlement class is appropriate for certification. To do so, the class must meet the requirements of Rule 23(a) and at least one subsection of Rule 23(b). *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614, 621 (1997); Manual for Complex Litigation (Fourth) § 21.633 (2004).

Here, Plaintiffs seek certification under Rule 23(b)(3) and thus must demonstrate that the proposed class and proposed class representative meet six requirements: (1) numerosity; (2) commonality; (3) typicality; (4) adequacy of representation; (5) predominance of common legal or fact questions; and (6) superiority. Fed. R. Civ. P. 23(a)(1)-(4) and 23(b)(3); *see also Kagan v. Wachovia Sec., L.L.C.*, 09-cv-5337-SC, 2012 WL 1109987, at \*4-5 (N.D. Cal. Apr. 2, 2012). The proposed class meets each of these elements.

First, the proposed class is sufficiently numerous. Here, there are approximately 255,000 proposed class members, which includes 127,000 members whose annual renewal amounts increased. That is more than enough. *See Moshogiannis v. Sec. Consultants Grp., Inc.*, 10-cv-05971-EJD, 2012 WL 423860, at \*3 (N.D. Cal. Feb. 8, 2012) (holding that numerosity is satisfied by class of 254 members).

Second, the proposed class shares common questions of law and fact. Commonality is construed permissively and is demonstrated when the claims of all class members “depend upon a common contention.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545, 2557 (2011) (citation omitted); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Here, the claims of class members stem from the same factual questions, including: (i) whether Defendant had a policy and/or practice of making misrepresentations regarding the terms of Prepaid Memberships; (ii) whether Defendant used marketing materials that contradicted the terms of its written contracts; and (iii) whether the contracts clearly disclosed the terms of the memberships. Those factual questions also lead to common questions of law, including: (i) whether Defendant

1 intended to defraud consumers by offering “lifetime guarantees” as part of Prepaid Memberships;  
2 (ii) whether it was reasonable for Plaintiffs and the class to rely on Defendant’s  
3 misrepresentations; (iii) whether the oral misrepresentations of Defendant’s sales representatives  
4 are relevant in determining the terms of the Prepaid Memberships; and (iv) whether the integration  
5 clauses in the contracts bar any evidence of oral misrepresentations. These common questions—  
6 and there are many more—are sufficient to establish commonality. *Dukes*, 131 S. Ct. at 2556  
7 (“[E]ven a single common question will do”).

8 Third, Plaintiffs’ claims are typical of class member claims. A plaintiff’s claim is typical  
9 where it arises from the same course of conduct that gives rise to the claims of other class  
10 members and is based on the same legal theory. *See Ambrosia v. Cogent Commun., Inc.*, 312  
11 F.R.D. 544, 554 (N.D. Cal. 2016) (noting that typicality emphasizes “whether [named plaintiffs]  
12 other members have the same or similar injury...and whether other class members have been  
13 injured but the same course of conduct.”) (citations omitted). Ultimately, this requirement ensures  
14 that “the interest of the named representative aligns with the interests of the class.” *Wolin v.*  
15 *Jaguar Land Rover N. Am. LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). Here, Plaintiffs’ nearly  
16 identical allegations are closely aligned with the thousands of alleged online complaints reflecting  
17 the same claims. Moreover, each Plaintiff reasonably relied on these misrepresentations and was  
18 subsequently harmed (when the amounts increased) in ways that were materially identical to the  
19 experiences of other members. Plaintiffs also are not subject to unique defenses that would  
20 distinguish their interests from those of the other class members. *See Marsh v. First Bank of*  
21 *Delaware*, 11-cv-05226-WHO, 2014 WL 554553, at \*8 (N.D. Cal. Feb. 7, 2014) (quoting *Ellis v.*  
22 *Costco Wholesale Corp.*, 658 F.3d 970, 984 (9th Cir. 2011) (finding the typicality requirement  
23 satisfied when class members were allegedly injured by similar conduct and suffered similar harm,  
24 as “[t]ypicality refers to the nature of the claim or defense of the class representative, and not to  
25 the specific facts from which it arose or the relief sought”).

26 Fourth, Plaintiffs and proposed class counsel have and will continue to adequately  
27 represent the class. For adequacy, the Court must ask: “(1) do the named plaintiffs and their  
28 counsel have any conflicts of interest with other class members and (2) will the named plaintiffs



1 and their counsel prosecute the action vigorously on behalf of the class?” *Hanlon*, 150 F.3d at  
2 1020. Appointing a plaintiff with typical claims who has retained adequate counsel is usually  
3 sufficient. *Dukes*, 131 S. Ct. at 2551 n.5 (discussing how the fulfillment of the typicality  
4 requirement usually also supports a finding of adequacy because an adequate representative will  
5 have claims that are typical of those of the class). Here, Plaintiffs share the same interest in  
6 securing relief for the claims in this case as every other class member – since they are harmed in  
7 the same way – and there is no evidence of any conflict of interest. Plaintiffs have demonstrated  
8 their continued willingness to vigorously prosecute this case. (RB Decl. ¶21.) Further, as discussed  
9 below, Plaintiffs have retained adequate counsel. *See, e.g., Kanawi v. Bechtel Corp.*, 254 F.R.D.  
10 102, 111 (N.D. Cal. 2008) (finding adequacy met where plaintiffs “demonstrated their  
11 commitment to the action” and their attorneys were “qualified to represent the class”).

12 Fifth, the proposed class satisfies the predominance requirement. Courts favor certification  
13 where, as here, “the actual interests of the parties can be served best by settling their differences in  
14 a single action.” *Hanlon*, 150 F.3d at 1022. The predominance requirement tests “whether [the]  
15 proposed class[] [is] sufficiently cohesive to warrant adjudication by representation.” *Id.* (citing  
16 *Amchem*, 521 U.S. at 623-24). Whether common issues predominate depends on “the elements of  
17 the underlying cause of action.” *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179,  
18 2184 (2011). Plaintiffs’ causes of action all hinge on the same central issues: (1) whether  
19 Defendant had a policy or practice of making misleading statements and discouraging consumers  
20 from reading the contract; (2) whether class members relied on those representations and  
21 omissions; (3) whether their reliance was reasonable in light of the written contracts that were  
22 presented to them; and (4) the amount of damages they suffered as a result.

23 These common questions can be resolved for all class members in a single adjudication.  
24 First, in claims alleging oral fraud or misrepresentation, the exact wording used by salespeople  
25 need not be identical.<sup>6</sup> *Cf. In re Am. Cont’l Corp./Lincoln Sav. & Loan Sec. Litig.*, 140 F.R.D. 425,

26 \_\_\_\_\_  
27 <sup>6</sup> In addition, because the Settlement provides full relief for class members who attest that  
28 they were told the annual renewal amount was guaranteed for life, any potential individual issues  
concerning oral representations are resolved by the settlement process itself. “Implicit in the

1 430-431 (D. Ariz. 1992) (finding that common issues predominated because although the  
2 individual statements made to class members “were not identical, they were sufficiently uniform  
3 to warrant class treatment,” and noting that “the gravamen of the alleged fraud [was] not limited to  
4 the specific misrepresentations made” but rather addressed the “whole roster of deception  
5 designed to contrive a false image”) (cited with approval in *In re First All. Mortgage Co.*, 471  
6 F.3d 977, 991 (9th Cir. 2006)); *Makaeff v. Trump Univ., LLC*, 10-cv-0940-GPC, 2014 WL  
7 688164, at \*12-13 (S.D. Cal. Feb. 21, 2014) (certifying consumer fraud class over defendant’s  
8 arguments that there were “no scripts or uniform promotional materials containing any material  
9 misrepresentation” because evidence of orchestrated uniform scheme made it “highly likely that  
10 each member of the putative class was exposed to the same misrepresentations”).

11 Further, as California courts have made clear, only the named class representative—not all  
12 class members—must demonstrate reliance on a defendant’s misrepresentations. *See, e.g., In re*  
13 *Tobacco II Cases*, 207 P.3d 20, 35 (Cal. 2009) (explaining that “courts repeatedly and consistently  
14 []hold that relief under the UCL is available without individualized proof of deception, reliance  
15 and injury”) And where the misrepresentations are material (a common legal issue), plaintiffs—  
16 including absent class members—are entitled to a presumption of reliance. *Id.* at 39 (for purposes  
17 of fraud, UCL, FAL, and CLRA claims, presumption of reliance “arises where there is a showing  
18 that a misrepresentation was material”); *McAdams v. Monier, Inc.*, 182 Cal. App. 4th 174, 178  
19 (2010) (an “inference of common reliance” may be applied to a CLRA class that alleges a material  
20 misrepresentation consisting of a failure to disclose a particular fact). Thus, where, as here,  
21 consumers are misled by uniform, material misrepresentations and/or omissions, courts presume  
22 reliance on a class-wide basis. *See Greenwood v. Compucredit Corp.*, 08-cv-4878, 2010 WL  
23 4807095, at \*5 (N.D. Cal. Nov. 19, 2010) (holding that where all class members received same  
24 alleged misrepresentations, reliance is presumed, and thus “individualized issues of reliance do not  
25 overcome the predominance of common issues in [such a] case”).

26 \_\_\_\_\_  
27 satisfaction of the predominance test is the notion that the adjudication of common issues will help  
28 achieve judicial economy.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

1 In addition, when “[c]onfronted with a request for settlement-only class certification, a  
2 district court need not inquire whether the case, if tried, would present intractable management  
3 problems....” *Amchem*, 521 U.S. at 620 (internal citations omitted). “[A]ny manageability  
4 problems that may have existed are eliminated by the settlement.” *Ruch v. AM Retail Grp., Inc.*,  
5 14-cv-05352-MEJ, 2016 WL 1161453, at \*10 (N.D. Cal. Mar. 24, 2016).

6 Sixth, a class action is a superior method of resolving this controversy. Plaintiffs must  
7 show that a class action is the “most efficient and effective means of resolving the controversy.”  
8 *Wolin*, 617 F.3d at 1175-76; *see also Valentino*, 97 F.3d at 1234-35 (finding a class action is  
9 superior when it will reduce the costs inherent in litigation and “no realistic alternative exists” for  
10 class members). “Where recovery on an individual basis would be dwarfed by the cost of litigating  
11 on an individual basis, this factor weighs in favor of class certification.” *Wolin*, 617 F.3d at 1175.  
12 Here, the proposed class is comprised of approximately 255,000 members. By providing swift  
13 resolution of common claims in a way that would not be possible on an individual basis, a class  
14 action is the superior method of adjudication.

15 **V. PLAINTIFFS’ COUNSEL SHOULD BE APPOINTED CLASS COUNSEL**

16 Under Rule 23, “a court that certifies a class must appoint class counsel...[who] must  
17 fairly and adequately represent the interest of the class.” Fed. R. Civ. P. 23(g)(1)(B). The Court  
18 considers: (1) work in identifying or investigating potential claims; (2) experience in handling  
19 class actions or other complex litigation and the type of claims asserted in the case; (3) knowledge  
20 of the applicable law; and (4) resources committed to representing the class. Fed. R. Civ. P.  
21 23(g)(1)(A)(i)-(iv); *see, e.g., In re Oreck Corp. Halo Vacuum & Air Purifiers Mktg. & Sales*  
22 *Practices Litig.*, 282 F.R.D. 486, 492 (C.D. Cal. 2012). The parties seek the appointment of Rafey  
23 Balabanian and Eve Lynn-Rapp of Edelson PC, Gordon Fauth of Finkelstein Thompson LLP,  
24 Timothy Mathews and Catherine Pratsinakis of Chimicles & Tikellis LLP, and Kristen Sagafi of  
25 Tycko & Zavareei LLP, as class counsel. Proposed class counsel readily satisfy the criteria of Rule  
26 23(g).

27 Edelson PC has devoted—and will continue to devote—a significant amount of time and  
28 effort to this litigation, beginning with its initial investigation of Plaintiffs’ allegations. (RB Decl.

1 ¶23.) Through both formal and informal discovery, the lawyers at Edelson PC have tirelessly  
 2 sought the information needed to develop Plaintiffs’ claims and represent the class. (*Id.*) Further,  
 3 they have extensive experience in similar complex litigation and have been appointed class  
 4 counsel in numerous consumer class actions, many of them in this District. (*See id.*)<sup>7</sup>

5 Chimicles & Tikellis LLP (“C&T”) and Tycko & Zavareei LLP (“TZ”) have likewise  
 6 devoted—and will continue to devote—a significant amount of time and effort to this litigation,  
 7 including by playing an integral role in the negotiation and drafting of the Settlement, Claim  
 8 Form, and Notice. C&T and TZ, along with Edelson, were instrumental in settlement negotiations,  
 9 and C&T and Edelson bore the lion’s share of responsibility among proposed class counsel in  
 10 drafting the Settlement, Claim Form, and Notice. C&T and TZ are likewise pillars of the class  
 11 action plaintiffs’ bar, as reflected in their firms’ resumes. (RB Decl. ¶2.)<sup>8</sup>

12 Similarly, Finkelstein Thompson, LLP (“FT”) has been instrumental in this litigation from  
 13 its inception and in the Settlement before the Court. The firm’s attorneys are experienced in class  
 14 actions and have served in leadership positions in significant nationwide class litigation that has  
 15 recovered billions of dollars of damages for class members, including in this District. (*Id.* ¶25.)<sup>9</sup>

16 \_\_\_\_\_  
 17 <sup>7</sup> See *Hopwood v. Nuance*, 13-cv-02132 (N.D. Cal.); *In re LinkedIn User Privacy Litig.*, 12-  
 18 cv-03088-YGR (N.D. Cal.); *In re Netflix Privacy Litig.*, 11-cv-00379-EJD (N.D. Cal.) (appointing  
 19 Edelson interim lead counsel, noting that while two other firms had impressive resumes and  
 litigation experience, Edelson’s “significant and particularly specialized expertise in...class action  
 renders them superior to represent the putative class.”).

20 <sup>8</sup> Tim Mathews of C&T and Kristen Sagafi of TZ have been described as “among the most  
 21 capable and experienced lawyers in the country in [consumer class action] cases.” *Chambers v.*  
*Whirlpool Corp.*, 214 F. Supp. 3d 877, 902 (C.D. Cal. 2016). In addition, while it is rare, Mr.  
 22 Mathews of C&T has held a lead role in several class action cases in which, like the Settlement  
 here, plaintiffs achieved a full recovery, including two in this District: *Rodman v. Safeway*, 11-cv-  
 23 3003-JST (N.D. Cal.) (judgment for 100% of damages plus interest recently affirmed by Ninth  
 Circuit); *In re Apple iPhone/iPod Warranty Litig.*, 10-cv-1610-RS (N.D. Cal.) (settlement class  
 members received, on average, a net recovery of 118% of the cost of replacement phones).

24 <sup>9</sup> The firm was named one of the top 50 securities litigation firms for 2015 by Institutional  
 25 Shareholder Services. Cases in which FT has worked to achieve successful results for class  
 members include: *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig.*,  
 26 2672-CRB (N.D. Cal.) (leadership committee member; \$14.7 billion settlement); *Bloom v.*  
*American Home Products Corp.*, 98-cv-20047 (E.D. Pa.) (secured settlement valued at \$239  
 27 million); *In re Relafen Antitrust Litig.*, 01-cv-12239-WGY, (D. Mass.) (executive committee  
 28 member; settled for \$175 million).

1 FT will continue to devote whatever resources are necessary to bring the litigation to a successful  
2 conclusion. (*See id.*)

3 **VI. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL**

4 After determining that the proposed class should be certified, the Court must determine  
5 whether the Settlement warrants approval. The procedure for review of a proposed settlement is a  
6 well-established two-step process: preliminary and final approval. Fed. R. Civ. P. 23(e); *see also*  
7 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 11.25 at 3839 (4th ed. 2002). The  
8 first step is a preliminary, pre-notification hearing to ensure that the settlement is not  
9 “unacceptable at the outset.” *Id.* Courts in this District grant preliminary approval where: “(1) the  
10 proposed settlement appears to be the product of serious, informed non-collusive negotiations, (2)  
11 has no obvious deficiencies, (3) does not improperly grant preferential treatment to class  
12 representatives or segments of the class, and (4) falls within the range of possible approval.” *In re*  
13 *Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (quoting Manual for  
14 Complex Litigation (Second) § 30.44 (1985)). *See also Cordy v. USS-Posco Indus.*, 12-cv-00553-  
15 JST, 2014 WL 212587, at \*2 (N.D. Cal. Jan 17, 2014) (quoting *Tableware*).

16 First, settlements that are the result of hard-fought litigation and arm’s-length negotiations  
17 among experienced counsel, such as this one, are “entitled to an initial presumption of fairness.” *In*  
18 *re High-Tech Employee Antitrust Litig.*, 11-cv-2509, 2013 WL 6328811, at \*1 (N.D. Cal. Oct. 30,  
19 2013) (internal citations and quotations omitted); *see also Harris v. Vector Mktg. Corp.*, 08-cv-  
20 5198, 2011 WL 1627973, at \*8 (N.D. Cal. Apr. 29, 2011). Settlement negotiations are generally  
21 found to be non-collusive when reached with the assistance of a third-party neutral, *see e.g.*,  
22 *Boring v. Bed Bath & Beyond of California Ltd. Liab. Co.*, 12-cv-05259-JST, 2013 WL 6145706,  
23 at \*7 (N.D. Cal. Nov. 21, 2013), and are found to have been informed where the parties exchanged  
24 evidence and information prior to negotiations. *See Moshogiannis*, 2012 WL 423860, at \*5  
25 (holding that settlement was fair, reasonable, and adequate where, *inter alia*, “the parties  
26 conducted a significant amount of informal discovery...”). Here, the Settlement was reached after  
27 significant discovery, with the assistance of a third-party neutral over two all-day mediation  
28 sessions, following a substantial amount of additional negotiation. (RB Decl. ¶¶ 8-18).

1           Second, the Settlement is free of defects. A court is likely to find a settlement free from  
2 obvious deficiencies when it provides a real, immediate monetary benefit to the class despite  
3 numerous risks. *See Tableware*, 484 F. Supp. 2d. at 1080 (finding settlement providing a \$500,000  
4 fund free of obvious defects in light of “the anticipated expense and complexity of further  
5 litigation”). *See also In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (finding  
6 that a settlement for about one-sixth of the potential recovery was fair and adequate after  
7 accounting for “the difficulties in proving the case”). Here, the Settlement provides full relief to  
8 class members who attest that they were misled by Defendant’s employees. Comparable  
9 settlements (*i.e.*, those involving unlawful fees and breach of contract) most often provide partial  
10 refunds or coupons.<sup>10</sup> Moreover, although class members who submit claims will receive full  
11 relief, a class member need not submit a claim form or take *any* steps to obtain some relief from  
12 the Settlement. This relief, which likely exceeds the relief class members could expect to obtain  
13 with a judgment, *see infra* Part VI.D, is exceptional in light of the litigation risks.<sup>11</sup>

14           Third, the Settlement does not provide preferential treatment to any individual class  
15 member. Of course, pure proportionality is not necessary to ensure that relief is fairly allocated.  
16 *McKnight v. Uber Techs., Inc.*, 14-cv-05615-JST, 2017 WL 3427985, at \*3 (N.D. Cal. Aug. 7,

---

17 <sup>10</sup> *Friedman v. 24 Hour Fitness USA, Inc.*, 06-cv-06282-AHM (C.D. Cal. July 12, 2010)  
18 (granting final approval where plaintiffs could elect between partial reimbursement of charges, or  
19 a certificate for three free months of membership); *Silver v. L.A. Fitness Int’l, LLC*, 10-cv-002326  
20 (E.D. Pa. Mar. 13, 2013) (granting preliminary approval where plaintiffs could elect between  
21 partial reimbursement (33.3%) of unlawful fees or a certificate for a 45-day membership, and  
22 could only receive a full refund *and* the certificate if they provided a certified mail receipt of their  
23 request to cancel); *Martina v. LA Fitness Int’l, LLC*, 12-cv-02063, 2013 WL 5567157 (D.N.J. Oct.  
24 8, 2013) (granting final approval where one subclass of plaintiffs could elect either two free 25-  
25 minute personal training sessions or \$100 credit towards a new membership, and a second  
26 subclass could elect a 33.3% refund of fees or certificate for a 45-day membership); *Hahn v.*  
27 *Massage Envy Franchising LLC*, 12-cv-00153-DMS, 2015 WL 2164981 at \*2 (S.D. Cal. Mar. 6,  
28 2015) (granting preliminary approval where class members expressly receive no “possibility of a  
refund,” and instead either approximately 75% of forfeited prepaid massage services, to be used  
within six months, or a 30-day extension to redeem massage services, depending on their status).

<sup>11</sup> The risks in this case were significant, with the Court having already dismissed Plaintiffs’  
FAC. (ECF No. 63.) When viewed in light of those risks, there should be no doubt that the  
Settlement it is not “obviously deficient.” *See, e.g., Tableware*, 484 F. Supp. 2d at 1080 (“Based  
on [the] risk and the anticipated expense and complexity of further litigation, the court cannot say  
the proposed settlement is obviously deficient....”).

1 2017) (citing *Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1204 (C.D. Cal.  
2 2014) (granting preliminary approval for a settlement that distributed funds by giving \$175 to all  
3 class members who received at least one unsolicited fax, and up to \$275 to class members who  
4 received additional faxes). The Settlement here contains no preferential treatment. The Settlement  
5 **automatically** entitles all class members to a reduced annual renewal amount without requiring  
6 them to complete or submit a claim form, and those who can truthfully attest that they were misled  
7 will receive full relief. Also, the Settlement calculates all refunds, reduced renewal amounts, and  
8 original renewal amounts on individual bases. In other words, rather than establishing a fixed  
9 refund or fixed annual renewal amount (which has the potential of either overcompensating or  
10 undercompensating most class members), the Settlement gives each class member relief  
11 proportional to his or her injury. *See, e.g., In re Volkswagen “Clean Diesel” Litig.*, 2672-CRB,  
12 2016 WL 4010049, at \*16 (N.D. Cal. July 26, 2016) (finding no preferential treatment where  
13 “buyback values” and “restitution payments” for class members were based on a standard,  
14 industry-accepted valuation of the individual class member’s vehicle); *see also McKnight*, 2017  
15 WL 3427985, at \*3.<sup>12</sup>

16 Fourth, the Settlement falls well within the range of possible approval. “In determining  
17 whether the proposed settlement falls within the range of reasonableness, the Court evaluates the

18 \_\_\_\_\_  
19 <sup>12</sup> Moreover, while each Plaintiff will seek a modest incentive award of \$3,000 in recognition  
20 the time and effort spent pursuing the claims as a class representative, no Plaintiff expected an  
21 incentive award and the request for such an award in no way provides class representatives  
22 preferential treatment. *See Villegas v. J.P. Morgan Chase & Co.*, 09-cv-00261, 2012 WL  
23 5878390, at \*7 (N.D. Cal. Nov. 21, 2012); *Cordy*, 2014 WL 212587, at \*1, \*3. In evaluating  
24 incentive awards, courts are concerned with whether there is a “significant disparity between the  
25 incentive awards and the payments to the rest of the class members” such that it creates a conflict  
26 of interest. *Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013). Here,  
27 class members who submit claim forms will be entitled to their original renewal rate for life.  
28 Given that Defendant already increased many class members’ fees by as much as \$100 per year  
and might have continued to apply future increases, the monetary value of this component may  
easily amount to thousands of dollars per class member. Thus, no significant disparity exists  
between the incentive payments and the recovery of the average class member. *See, e.g., Cox v.*  
*Clarus Marketing Grp, LLC*, 291 F.R.D. 473, 483 (S.D. Cal. 2013) (approving a \$5,000 incentive  
award where class members would receive a maximum payment of \$36); *Fulford v. Logitech, Inc.*,  
08-cv-02041-MMC, 2010 WL 807448, \*3 n. 1 (N.D. Cal. 2010) (collecting cases awarding  
incentive payments ranging from \$5,000 to \$40,000).

1 relative strengths and weaknesses of the Plaintiffs’ case, and balances Plaintiffs’ expected  
2 recovery against the value of the settlement offer.” *Bickley v. Schneider Nat’l, Inc.*, 08-cv-05806-  
3 JSW, 2016 WL 4157355, at \*1 (N.D. Cal. April 25, 2016) (citing *Cotter v. Lyft, Inc.*, 176 F. Supp.  
4 3d 930, 935, (N.D. Cal. 2016)). Generally, satisfaction of the previous three factors is sufficient to  
5 satisfy this prong. *See Dilts v. Penske Logistics, L.L.C.*, 08-cv-0318-CAB, 2014 WL 12515159, at  
6 \*3 (S.D. Cal. July 11, 2014) (finding that the settlement fell within the range of possible approval  
7 “given the fact that the settlement [was] the product of serious, informed and non-collusive  
8 negotiations, ha[d] no obvious defects, and [did] not improperly grant preferential treatment”).  
9 Here, the Settlement provides full relief for all class members who attest that they were misled,  
10 and at the same time provides some relief for any class member who do not so attest. This 100%  
11 recovery is well beyond the 13–34% recovery that courts have concluded falls “within the range of  
12 possible approval.” *See, e.g., Ma v. Covidien Holding, Inc.*, 12-cv-02161, 2014 WL 360196, at \*5  
13 (C.D. Cal. Jan. 31, 2014) (citing *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir.  
14 1998)) (approving 9.1% potential recovery as within the range of possible approval); *Villegas*,  
15 2012 WL 5878390, at \*6–7 (15% potential recovery); *Cordy*, 2014 WL 212587, at \*3 (16–26%  
16 potential recovery).

17 **VII. THE COURT SHOULD APPROVE THE PROPOSED NOTICE PLAN**

18       Once a class has been certified, due process and Rule 23 require that the court “direct to  
19 class members the best notice that is practicable under the circumstances, including individual  
20 notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P.  
21 23(c)(2)(B). That means, whenever possible “[i]ndividual notice must be sent to all class members  
22 whose names and addresses may be ascertained through reasonable effort.” *Eisen v. Carlisle &*  
23 *Jacquelin*, 417 U.S. 156, 173 (1974). Notice is adequate when it provides the information  
24 necessary to make a decision in language that can be readily understood by the average class  
25 member. *See Alba Conte & Herbert Newberg, Newberg on Class Actions* § 11:53 (4th ed. 2002).  
26 Here, the format and language of each form of notice is straightforward and all of the information  
27 required under Rule 23 is present.

28



1 To ensure compliance with due process and Rule 23, the parties agreed to a four-part  
 2 notice plan, developed by Rust Consulting, Inc. (the “Settlement Administrator”), a well-respected  
 3 class action settlement administrator. First, the Settlement Administrator will send direct notice to  
 4 the last known mailing address of class members as reflected in Defendant’s records.<sup>13</sup> This first-  
 5 class mailing will include class notice, the claim form, *and a postage prepaid return envelope*.<sup>14</sup>  
 6 Second, beginning no later than ten (10) days after an order granting preliminary approval, the  
 7 Settlement Administrator will establish, maintain, and update a settlement website, which will  
 8 contain electronic versions of claim forms that can be submitted online and will provide additional  
 9 information. Third, the Settlement Administrator will also maintain a toll-free number, utilizing  
 10 both live operators and Interactive Voice Response. Finally, the Settlement Administrator will  
 11 serve the notices required by CAFA, 28 U.S.C. § 1715(b)(1)-(8).

12 **VIII. CONCLUSION**

13 For the above reasons, Plaintiffs respectfully request that the Court: (1) certify the  
 14 Settlement Class; (2) appoint Kevin O’Shea, Mark Vitcov, Rod Morris, Michael Losquadro, Dipti  
 15 Shah, and Russell Marchewka as class representatives; (3) appoint Edelson PC, Finkelstein  
 16 Thompson LLP, Chimicles & Tikellis LLP, and Tycko Zavareei LLP as class counsel; (4) grant  
 17 preliminary approval of the proposed Settlement Agreement; (5) approve the proposed notice plan;  
 18 and (6) grant such further relief the Court deems reasonable and just.

19 Dated: November 1, 2017

Respectfully Submitted,

Kevin O’Shea, Mark Vitcov, Rod Morris, Michael  
 Losquadro, Dipti Shah, and Russell Marchewka on  
 behalf of themselves and the Settlement Class

23 <sup>13</sup> Before initially mailing the class notice and claim form, the Settlement Administrator will  
 24 run an update of the last known addresses in the Settlement Class List through the National  
 Change of Address database. *See* Notice at Ex. 2 the of Settlement Agreement.

25 <sup>14</sup> If this direct notice is returned to the Settlement Administrator as undeliverable, the  
 26 Settlement Administrator will (a) re-mail any class notice so returned with a forwarding address,  
 27 and (b) make reasonable efforts to attempt to find an address for any returned class notice that  
 28 does not include a forwarding address. If the Settlement Administrator is unable to find an updated  
 address for re-mailing, the Settlement Administrator will email notice to the last known email  
 address provided in the notice list for such class member, where an email address is available.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

/s/ Rafey S. Balabanian  
Rafey S. Balabanian (SBN - 315962)  
rbalabanian@edelson.com  
Eve-Lynn Rapp (admitted *pro hac vice*)  
erapp@edelson.com  
EDELSON PC  
123 Townsend Street, Suite 100  
San Francisco, California 94107  
Tel: 415.212.9300  
Fax: 415.373.9435

Douglas Thompson, Jr. (admitted *pro hac vice*)  
dthompson@finkelsteinthompson.com  
FINKELSTEIN THOMPSON LLP  
James Place  
1077 30th Street, N.W., Suite 150  
Washington, DC 20007  
Tel: 202.337.8000  
Fax: 202.337.8090

Gordon M. Fauth, Jr. (SBN 190280)  
gfauth@finkelsteinthompson.com  
Of Counsel to  
FINKELSTEIN THOMPSON LLP  
100 Pine Street, Suite 1250  
San Francisco, CA 94111  
Tel: 415.398.8700  
Fax: 415.398.8704

Timothy N. Mathews (*pro hac vice* pending)  
tnm@chimicles.com  
Catherine Pratsinakis (*pro hac vice* pending)  
cp@chimicles.com  
CHIMICLES & TIKELLIS LLP  
One Haverford Centre  
361 West Lancaster Avenue  
Haverford, Pennsylvania 19041  
Tel: 610.642.8500  
Fax: 610.649.3633

Kristen L. Sagafi (SBN- 222249)  
ksagafi@tzlegal.com  
TYCKO & ZAVAREEI LLP  
483 Ninth Street – Suite 200  
Oakland, CA 94607  
Tel: (510) 254-6810

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I, Rafey S. Balabanian, an attorney, certify that on November 1, 2017, I served the above and foregoing ***Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement Agreement*** by causing true and accurate copies of such paper to be filed and transmitted to all counsel of record via the Court’s CM/ECF electronic filing system.

/s/ Rafey S. Balabanian

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

*In re 24 Hour Fitness Prepaid Memberships  
Litigation*

CASE NO. 4:16-cv-01668

CONSOLIDATED CASES:

No. 3:16-cv-01668-JSW

No. 3:16-cv-02359-JSW

**[PROPOSED] ORDER  
PRELIMINARILY APPROVING  
JOINT STIPULATION AND  
SETTLEMENT AGREEMENT**

1 The Parties to the Litigation have entered into a Joint Stipulation and Settlement Agreement  
2 (the “Settlement Agreement”) dated November 1, 2017, attached as Exhibit A to the Declaration of  
3 Rafey S. Balabanian in Support of Plaintiffs’ Motion for Preliminary Approval of the Settlement (the  
4 “Motion”). The Court has reviewed and considered all papers filed in support of the Motion,  
5 including the Joint Stipulation and Settlement Agreement and exhibits thereto and the Declaration of  
6 Rafey S. Balabanian in Support of the Motion. The Court finds that there is a sufficient basis for  
7 granting preliminary approval of the Settlement, preliminarily certifying the Settlement Class as  
8 defined herein, directing that notice be disseminated to Settlement Class Members in accordance  
9 with the terms of the Settlement Agreement, and setting a Fairness Hearing at which the Court will  
10 consider whether to grant final approval of the Settlement Agreement.

11 ACCORDINGLY, the Court GRANTS the Motion for Preliminary Approval of the  
12 Settlement as provided for herein:

13 1. Capitalized terms used herein but not otherwise defined shall have the same meaning  
14 as set forth in the Settlement Agreement.

15 2. The Court preliminarily approves the Settlement Agreement.

16 3. The Court conditionally certifies, for settlement purposes only, the following  
17 Settlement Class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure:

18 all Persons in the United States who were enrolled in a 24 Hour Fitness  
19 Prepaid Membership as of April 2015, as indicated in 24 Hour Fitness’s  
20 membership records system, excluding: (a) any current employees or  
21 agents of 24 Hour Fitness, (b) any officers or employees of the Court, the  
22 mediator, and their respective immediate family members, (c) counsel for  
23 all Parties and members of their immediate family members, (d) any Person  
24 whose Prepaid Membership was terminated but who did not receive notice  
25 of Increased Annual Renewal Amount, as indicated in 24 Hour Fitness’s  
26 membership records system, and (e) any Persons who properly submit an  
27 Opt Out.

28 This conditional certification shall be without force or effect if there is no Order and  
Judgment, if the Order and Judgment are reversed or modified on appeal, or if the  
Settlement Agreement is terminated, fails to be approved, fails to become effective, or  
otherwise fails to be consummated.

1           4.       The Court appoints, for settlement purposes only, Kevin O’Shea, Mark Vitcov, Rod  
2 Morris, Michael Losquadro, Russell Marchewka, and Dipti Shah, as Representative Plaintiffs.

3           5.       The Court appoints, for settlement purposes only, the following attorneys as  
4 Settlement Class Counsel: (a) Rafey Balabanian and Eve-Lynn Rapp of Edelson PC, 123 Townsend  
5 Street, Suite 100, San Francisco, CA 94107; (b) Gordon Fauth, of counsel to Finkelstein Thompson  
6 LLP, 100 Pine Street, Suite 1250, San Francisco, CA 94111; (c) Timothy Mathews and Catherine  
7 Pratsinakis of Chimicles & Tikellis LLP, 361 West Lancaster Avenue, Haverford, PA 19401; and (d)  
8 Kristen Sagafi of Tycko & Zavareei LLP, 483 Ninth Street, Suite 200, Oakland, CA 94607.

9           6.       The Court appoints Rust Consulting, Inc., as the Settlement Administrator.

10          7.       The Court approves the Notice, substantially in the form attached as Exhibit 1 to the  
11 Motion and the notice plan described in Section V.4 of the Settlement Agreement:

12          8.       Persons on the Notice List who wish to opt out of the Settlement Class must fully  
13 execute and submit to the Settlement Administrator a written statement that is postmarked no later  
14 than forty-five (45) days following the Notice Date, as described in Section 6 of the Settlement  
15 Agreement and in the Class Notice. Each written Opt Out must include:

16           a.       The name of the lawsuit, *In re 24 Hour Fitness Prepaid Memberships*  
17 *Litigation*, Case No. 4:16-cv-01668-JSW;

18           b.       Such Person’s (i) full name, (ii) address, (iii) Prepaid Membership agreement  
19 number, (iv) Prepaid Member number, (v) telephone number, and (vi) email address, if any;

20           c.       A statement that Such Person wishes to be excluded from the Settlement Class  
21 and from participating in the proposed Settlement Agreement; and

22           d.       Such Person’s signature.

23 If a fully completed and properly executed Opt Out is not received by the Settlement Administrator  
24 from such Person postmarked on or before the date forty-five (45) days following the Notice Date,  
25 then that Person will be deemed to have forever waived his or her right to opt out of the Settlement  
26 Class and the Releases described in Section 3 of the Settlement Agreement shall apply to that  
27 Person. Persons in the Notice List who do not properly submit Opt Outs shall be deemed Settlement  
28

1 Class Members and will be bound by the Settlement Agreement and all subsequent proceedings,  
2 orders and judgments in this Litigation. Persons in the Notice List who properly submit Opt Outs are  
3 not Settlement Class Members, and shall have no further role in the Litigation.

4 9. Settlement Class Members who wish to object to the Settlement must file a written  
5 objection with the Court and serve any such written objection on counsel for the respective parties  
6 within forty-five (45) days following the Notice Date. The objection must contain:

7 a. The full name, address, telephone number and email address, if any, of the  
8 Settlement Class Member;

9 b. The Settlement Class Member's Prepaid Membership agreement number and  
10 Prepaid Member number, as printed in the Class Notice;

11 c. The name and contact information of any and all attorneys representing,  
12 advising, or in any way assisting the objector in connection with the preparation or submission of the  
13 objection or who may profit from the pursuit of the objection;

14 d. A written statement of all grounds for the objection accompanied by any legal  
15 support for the objection, if any;

16 e. Copies of any papers, briefs, or other documents upon which the objection is  
17 based.

18 f. A statement of whether the Settlement Class Member intends to appear at the  
19 Fairness Hearing either personally or through counsel, who must file an appearance or seek *pro hac*  
20 *vice* admission;

21 g. The signature of the Settlement Class Member; and

22 h. A list of all other objections submitted by the objector, or the objector's  
23 counsel, if any, to any class action settlements in any court in the United States in the previous five  
24 (5) years. If the objecting Settlement Class Member or his, her, or its counsel, has not objected to  
25 any other class action settlement in the United States in the previous five (5) years, he, she or it shall  
26 so state in their objection. Settlement Class Members who do not timely make their objections in this  
27 manner will be deemed to have waived all objections and shall not be heard or have the right to  
28

1 appeal from the Order and Judgment.

2 10. The Response Deadline for submitting a Claim Form and Declaration shall be sixty  
3 (60) days following the Notice Date. Settlement Class Members who wish to submit a Claim Form  
4 and Declaration must mail it to the Settlement Administrator postmarked on or before the Response  
5 Deadline or upload it to the Class Website on or before the Response Deadline. Settlement Class  
6 Members shall have twenty-one (21) days from the date of receipt of notice of defective Claim Form  
7 and Declaration to cure such defect.

8 11. Representative Plaintiffs shall file a motion for final approval of the Settlement  
9 Agreement at least fourteen (14) days prior to the Fairness Hearing. Such motion shall include any  
10 responses to objections filed by Settlement Class Members.

11 12. Settlement Class Counsel shall file a motion for reasonable attorneys' fees and  
12 expenses to be awarded to Settlement Class Counsel, and incentive awards to the Representative  
13 Plaintiffs, at least fourteen (14) days prior to the deadline for opt outs and objections to the  
14 Settlement.

15 13. The Court sets \_\_\_\_\_ at \_\_\_\_\_ as the date and time of  
16 the Fairness Hearing, at which point the Court will determine whether to grant final approval of the  
17 Settlement Agreement, including the award of attorneys' fees and incentive awards contemplated by  
18 the Settlement Agreement, and enter the Order and Judgment.

19 14. The Court reserves the right to continue the date of the Fairness Hearing and related  
20 deadlines. In that event, the revised hearing date and/or deadlines shall be posted on the Class  
21 Website, and the Parties shall not be required to re-send Notices.

22 15. In the event the Settlement Agreement is not finally approved or is otherwise  
23 terminated in accordance with provisions of the Settlement Agreement, the Settlement Agreement  
24 and all proceedings had in connection therewith shall be null and void, except insofar as expressly  
25 provided to the contrary in the Settlement Agreement, and without prejudice to the *status quo ante*  
26 rights of Representative Plaintiffs, 24 Hour Fitness, and Persons in the Settlement Class.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**IT IS SO ORDERED**

DATED: \_\_\_\_\_

\_\_\_\_\_  
Hon. Jeffrey S. White  
United States District Court Judge