BURSOR & FISHER, P.A.
L. Timothy Fisher (State Bar No. 191626)
1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-Mail: ltfisher@bursor.com

BURSOR & FISHER, P.A.
Scott A. Bursor (State Bar No. 276006)
2665 S. Bayshore Dr., Suite 220
Miami, FL 33133
Telephone: (305) 330-5512
E-Mail: scott@bursor.com

Interim Class Counsel

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re Trader Joe's Tuna Litigation

Case No. 2:16-cv-01371-ODW-AJW

NOTICE OF RENEWED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: September 16, 2019
Time: 1:30 p.m.
Courtroom: 5D, 5th Floor
Judge: Hon. Otis D. Wright II

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on September 16, 2019 at 1:30 p.m., or as soon thereafter as the matter may be heard by the above-captioned Court, located at the First Street Courthouse, Courtroom 5D - 5th Floor, 350 W 1st Street, Los Angeles, CA 90012, in the courtroom of the Honorable Otis D. Wright II, Plaintiff Atzimba Reyes will and hereby does move, pursuant to Fed. R. Civ. P. 23(e), for the Court to: (i) grant preliminary approval of the proposed Stipulation for Class Action Settlement ("Settlement Agreement"); (ii) provisionally certify the Settlement Class[1] for the purposes of preliminary approval, designate Plaintiff Reyes as the Class Representative, and appoint Bursor & Fisher, P.A. as Class Counsel for the Settlement Class; (iii) establish procedures for giving notice to members of the Settlement Class; (iv) approve forms of notice to Settlement Class Members; (v) mandate procedures and deadlines for exclusion requests and objections; and (vi) set a date, time, and place for a final approval hearing.

This motion is made on the grounds that preliminary approval of the proposed class action settlement is proper, given that each requirement of Rule 23(e) has been met.

This motion is based on the attached Memorandum of Points and Authorities, the accompanying Declaration of L. Timothy Fisher, the Declaration of Carla Peak, the pleadings and papers on file herein, and any other written and oral arguments that may be presented to the Court.

This motion is made following the conferences of counsel pursuant to Local Rule 7-3 which took place on August 24, 2018 and July 19, 2019.

[1] All capitalized terms herein that are not otherwise defined have the definitions set forth in the Settlement Agreement, filed concurrently herewith. *See* Fisher Decl. Ex. 1.

Dated: July 23, 2019

Respectfully submitted,

BURSOR & FISHER, P.A.

By: */s/ L. Timothy Fisher*
L. Timothy Fisher

L. Timothy Fisher (State Bar No. 191626)
1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-Mail: ltfisher@bursor.com

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I. INTRODUCTION

On April 1, 2019, the Court previously denied without prejudice Plaintiff's initial Motion for Preliminary Approval of Class Action Settlement. *See* Dkt. 96. While the Court concluded that "[t]he proposed class meets all four Rule 23(a) factors," it nonetheless found that predominance was lacking under Rule 23(b)(3) because "Plaintiff fails to mention *Mazza* [*v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012)], let alone conduct the required [choice of law] analysis, despite seeking to apply California consumer protection laws to a nationwide class of purchasers across at least 40 states." 4/1/19 Order at 9. As such, the Court found that "Plaintiff does not address the choice of law issue or provide support for the notion that the types of concerns addressed in *Mazza* present no roadblock to certification for class settlement purposes." *Id.* at 10.

Subsequent to the Court's April 1, 2019 Order, the Ninth Circuit, *en banc*, decided *In re Hyundai and Kia Fuel Economy Litig.*, 2019 WL 2376831 (9th Cir. June 6, 2019), which unambiguously makes clear that no such analysis is necessary in this matter. Citing the Ninth Circuit's "strong judicial policy that favors settlements, particularly where complex class action[s] [are] concerned," the *en banc* panel announced its "default" rule that the laws of a single state may ordinarily be applied nationwide in a settlement context without any choice of law analysis. *See Hyundai*, 2019 WL 2376831, at *9-10 ("[A] court adjudicating a multistate class action is free to apply the substantive law of a single state to the entire class."); *see also id.* ("By default, California courts apply California law unless a party litigant timely invokes the law of a foreign state, in which case it is the foreign law proponent who must shoulder the burden of demonstrating that foreign law, rather than California law, should apply to class claims."); *id.* ("If the objectors fail to meet their burden at any step in the analysis, the district court may properly find California law applicable without proceeding to the rest of the analysis."); *id.* ("Neither the district court nor

class counsel were obligated to address choice-of-law issues beyond those raised by the objectors, and we will not decertify a class action for lack of such analysis."). The Ninth Circuit further found that "*Mazza* is readily distinguishable," as "the *Mazza* class was certified for litigation purposes." *Id.* Thus, in *Mazza*, "[t]he prospect of having to apply the separate laws of dozens of jurisdictions presented a significant issue for trial manageability, weighing against a predominance finding." *Id.* Here, such concerns are not present in the settlement context. *Id.*

As such, the Court should grant preliminary approval to the parties' proposed settlement. The Stipulation for Class Action Settlement ("Settlement Agreement")[1] states that Defendants Trader Joe's Company and Trader Joe's East Inc. (collectively, "Trader Joe's" or "Defendants"), on behalf of the suppliers of the Trader Joe's Tuna Products,[2] will pay $1.3 million into a Settlement Fund in cash for the settlement of all claims in this action. *See* Settlement Agreement ¶ 2.1, Fisher Decl. Ex. 1. The Settlement Agreement defines the Settlement Class to include:

> All persons in the United States who purchased Trader Joe's Tuna from January 5, 2012 through the date on which class notice is disseminated.

The Settlement Agreement includes a $29.00 per claim payout for Settlement Class Members, subject to pro rata dilution if the total amount of claims exceeds the available funds. Settlement Agreement ¶ 2.3(a), Fisher Decl. Ex. 1. This is an excellent result for Settlement Class Members compared to their likely recovery should they prevail at trial. That is, a recovery of $29 cash is a substantial portion of

[1] All capitalized terms herein that are not otherwise defined have the definitions set forth in the Settlement Agreement, filed concurrently herewith. *See* Fisher Decl. Ex. 1.

[2] As used in both the Settlement Agreement and in Plaintiff's operative Class Action Complaint, the terms "Trader Joe's Tuna" and "Trader Joe's Tuna Products" mean: (i) 5-ounce canned Trader Joe's Albacore Tuna in Water Salt Added, (ii) 5-ounce canned Trader Joe's Albacore Tuna in Water Half Salt, (iii) 5-ounce canned Trader Joe's Albacore Tuna in Water No Salt Added, (iv) 5-ounce canned Trader Joe's Albacore Tuna in Olive Oil Salt Added, (v) 5-ounce canned Trader Joe's Skipjack Tuna in Water With Sea Salt, and (vi) 5-ounce canned Trader Joe's Yellowfin Tuna in Olive Oil Solid Light.

the maximum recovery any Settlement Class Member could reasonably expect, considering the relatively low cost of a can of tuna, only a fraction of which is alleged to be underfilled. Fisher Decl. ¶¶ 13-14.

As in any class action, the proposed Settlement is initially subject to preliminary approval and then to final approval by the Court after notice to the class and a hearing. Plaintiff now requests that this Court enter an order in the form of the accompanying [Proposed] Order Granting Motion For Preliminarily Approval Of Class Action Settlement, which will:

(1) Grant preliminary approval of the proposed Settlement;

(2) Provisionally certify the Settlement Class on a nationwide basis for the purposes of preliminary approval, designate Plaintiff Reyes as the Class Representative, and Bursor & Fisher, P.A. as Class Counsel for the Settlement Class;

(3) Establish procedures for giving notice to members of the Settlement Class;

(4) Approve forms of notice to Settlement Class Members;

(5) Mandate procedures and deadlines for exclusion requests and objections; and

(6) Set a date, time and place for a final approval hearing.

The proposed Settlement is fair and reasonable and falls within the range of possible approval. It is the product of extended arm's-length negotiations between experienced attorneys familiar with the legal and factual issues of this case. Class Counsel has conducted an extensive investigation into the facts and law relating to this matter and has engaged in lengthy and detailed informal discovery to confirm critical facts regarding the scope of the class, the volume of product sales, the role of suppliers, relevant labeling and advertising, and the relative values of Trader Joe's Tuna Products sold during the Settlement Class Period. The investigation has

included commissioning pressed weight testing of Trader Joe's Tuna and reviewing numerous pressed weight test reports in cooperation with qualified experts from the U.S. National Oceanic and Atmospheric Administration ("NOAA").

Additionally, Bursor & Fisher is singularly experienced with the issues particular to this action. In *Hendricks v. StarKist Co*., No. 13-cv-00729-HSG (N.D. Cal.) (the "*StarKist* Action"), Bursor & Fisher successfully resolved virtually identical claims involving the alleged underfilling of StarKist-brand 5-ounce cans of tuna. *See* July 23, 2015 Order Granting Preliminary Approval, Ex. 2 to Fisher Decl.; *see also* Bursor & Fisher Firm Resume, Ex. 4 to Fisher Decl. In fact, Bursor & Fisher is the only law firm that has ever successfully litigated claims involving the underfilling of canned tuna to resolution. Fisher Decl. at ¶ 3. In the *StarKist* Action, the parties agreed to a settlement valued at $12 million and received over 2.4 million claims, the largest number of submitted claims at the time from class members in the history of class actions. *Id.*

Since entering into the settlement in the *StarKist* Action, Bursor & Fisher brought this action and two other additional cases concerning the alleged underfilling of canned tuna: *Soto v. Wild Planet Foods, Inc.*, 15-cv-05082-BLF (N.D. Cal.) (the "*Wild Planet* Action"); and *Soto v. Safeway, Inc.,* 15-cv-05078-EMC (N.D. Cal.) (the "*Safeway* Action"). *Id.* at ¶ 4. The *Wild Planet* Action concerned allegations that Wild Planet and Sustainable Seas-brand canned tuna were underfilled. *Id.*. On November 21, 2016, prior to a ruling on the defendant's motion to dismiss, the parties settled the *Wild Planet* Action on a nationwide basis, comprising of a common fund in the amount of $1.7 million. *Id.*., Ex. 3. Similarly, the *Safeway* Action concerned allegations that Safeway-brand canned tuna was underfilled. On March 1, 2017, prior to a ruling on the defendant's motion to dismiss, the parties resolved the *Safeway* matter to their mutual satisfaction. *See id.* at ¶ 4.

As a result of these efforts and the experience gained in litigating the *StarKist* Action, the *Wild Planet* Action, and the *Safeway* Action, Class Counsel is fully informed of the merits of the instant action and the proposed settlement, has substantial experience in consumer litigation regarding underfilling of tuna cans and has, as a result, been efficient in substantially streamlining the fact gathering process so as to reach the proposed settlement promptly and without protracted litigation. *Id.* at ¶¶ 3-5.

II. PROCEDURAL BACKGROUND

A. Pleadings And Motions

On January 5, 2016, Plaintiff Sarah Magier commenced an action entitled *Magier v. Trader Joe's Co.*, No. 1:16-cv-00043 (S.D.N.Y.), as a proposed class action, asserting claims for breach of express warranty, breach of the implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, unjust enrichment, violation of New York's General Business Law § 349, violation of New York's General Business Law § 350, negligent misrepresentation, and fraud. At issue in the *Magier* matter were allegations that Trader Joe's underfilled certain 5-ounce canned tuna products.

On January 29, 2016, Plaintiff Sarah Magier amended her operative complaint to add the allegations of Plaintiff Atzimba Reyes. In doing so, the amended *Magier* complaint added claims for violation of California's Consumers Legal Remedies Act, violation of California's Unfair Competition Law, and violation of California's False Advertising Law.

On February 26, 2016, Plaintiff Amy Joseph commenced an action entitled *Joseph v. Trader Joe's Co.*, 2:16-cv-01371-ODW-AJW (C.D. Cal.), as a proposed class action. At issue in the *Joseph* matter were allegations that Trader Joe's Company underfilled certain 5-ounce canned tuna products.

On February 26, 2016, Plaintiff Kathy Aliano commenced an action entitled

Aliano v. Trader Joe's Co., No. 1:16-cv-02623 (N.D. Ill.), as a proposed class action. At issue in the *Aliano* matter were allegations that Trader Joe's Company underfilled certain 5-ounce canned tuna products.

On March 11, 2016, Plaintiff Aliano filed a Motion for Coordination or Consolidation and Transfer Pursuant to 28 U.S.C. § 1407 (the "Motion for Coordination") with the United States Judicial Panel on Multidistrict Litigation (the "JPML"), seeking coordination of the *Aliano*, *Joseph*, and *Magier* matters.

On April 19, 2016, Plaintiff Christine Shaw commenced an action entitled *Shaw v. Trader Joe's Co.*, No. 2:16-cv-02686-ODW-AJW (C.D. Cal.), as a proposed class action. At issue in the *Shaw* matter were allegations that Trader Joe's Company underfilled certain 5-ounce canned tuna products.

On May 26, 2016, counsel for the Parties appeared before the JPML and agreed to stipulate to a change of venue pursuant to 28 U.S.C. § 1404, such that the *Aliano*, *Joseph*, *Magier*, and *Shaw* matters "will be venued in the Central District of California." Based on these representations, the JPML considered the Motion for Coordination to be withdrawn, in favor of voluntary transfer and coordination pursuant to 28 U.S.C. § 1404.

On November 1, 2016, following the Parties' voluntary transfer to the U.S. District Court for the Central District of California before Judge Otis D. Wright II, the Court ordered the *Aliano*, *Joseph*, *Magier*, and *Shaw* matters to be consolidated and thereafter captioned *In re Trader Joe's Tuna Litigation*, No. 2:16-cv-01371-ODW-AJW (C.D. Cal.) (the "Action").

On November 7, 2016, counsel for Plaintiffs Aliano, Joseph, and Shaw filed a Motion for Appointment of Interim Class Counsel, pursuant to Fed. R. Civ. P. 23(g). On November 7, 2016, counsel for Plaintiffs Magier and Reyes filed a competing Motion for Appointment of Interim Class Counsel. On December 21, 2016, the Court appointed Plaintiffs Magier and Reyes' counsel, Bursor & Fisher, P.A., as sole

Interim Class Counsel.

On January 20, 2017, Plaintiffs Magier and Reyes filed the First Amended Class Action Complaint in the consolidated *In re Trader Joe's Tuna Litigation* matter, asserting claims for breach of express warranty, breach of the implied warranty of merchantability, unjust enrichment, violation of New York's General Business Law § 349, violation of New York's General Business Law § 350, negligent misrepresentation, fraud, violation of California's Consumers Legal Remedies Act, violation of California's Unfair Competition Law, and violation of California's False Advertising Law.

On March 21, 2017, Trader Joe's moved to dismiss the First Amended Class Action Complaint in the Action. On June 2, 2017, the Court granted Trader Joe's motion to dismiss, with leave to amend, based predominantly on preemption grounds.

On June 30, 2017, Plaintiffs Magier and Reyes filed the Second Amended Class Action Complaint in the Action. On July 28, 2017, Trader Joe's moved to dismiss the Second Amended Class Action Complaint in the Action. On October 3, 2017, the Court granted in part and denied in part Trader Joe's motion to dismiss the Second Amended Class Action Complaint. Specifically, the Court dismissed Plaintiff Magier's claims in their entirety as preempted. As to Plaintiff Reyes, the Court dismissed her claims for breach of express warranty and negligent misrepresentation. Accordingly, the remaining claims consist of Plaintiff Reyes' claims for breach of the implied warranty of merchantability, unjust enrichment, fraud, violation of California's Consumers Legal Remedies Act, violation of California's Unfair Competition Law, and violation of California's False Advertising Law. On November 9, 2017, Trader Joe's filed its Answer to the Second Amended Class Action Complaint. On March 30, 2018, Trader Joe's filed an Amended Answer to the Second Amended Class Action Complaint.

B. Discovery

Plaintiff engaged in formal and informal factual discovery over a period of several months with Trader Joe's, exchanging detailed data and analytics regarding Trader Joe's pressed weight testing, as well as nationwide wholesale and retail sales data regarding the Trader Joe's Tuna Products. Fisher Decl. at ¶ 7. Plaintiff also commissioned the services of NOAA for a series of pressed weight tests over a period of several months, which included consultations with experts from NOAA regarding the test data and its reliability. *Id.* Because Plaintiff had the benefit of Class Counsel's experience in the *StarKist* Action, the *Wild Planet* Action, and the *Safeway* Action, Plaintiff was able to substantially streamline the fact-gathering process, which, in light of Trader Joe's cooperation and production of necessary documentation and the test data obtained from NOAA, resulted in an efficient resolution without protracted litigation. *Id.*

Specifically, on November 22, 2017, the Parties exchanged discovery requests. *Id.* at ¶ 8. Specifically, Plaintiff Reyes served interrogatories and requests for production on Trader Joe's. *Id.* That same day, Trader Joe's served requests for production on Plaintiff Reyes. *Id.*

On December 22, 2017, the Parties served their written discovery responses. *Id.* at ¶ 9. Plaintiff Reyes made her first document production on January 2, 2018. *Id.* Trader Joe's made their first document production on January 19, 2018. *Id.* Trader Joe's made subsequent document productions on May 11, 2018 and May 21, 2018. *Id.*

On March 1, 2018, Plaintiff Reyes served a subpoena on a third-party, Tri-Union Seafoods, LLC ("Tri-Union"). *Id.* at ¶ 10. On April 13, 2018, Tri-Union made its first document production. *Id.* Tri-Union made a subsequent document production on April 20, 2018. *Id.*

On May 14, 2018, Plaintiff Reyes served a notice of deposition pursuant to

Rule 30(b)(6) on Trader Joe's. *Id.* at ¶ 11. On May 16, 2018, Plaintiff Reyes served an additional five deposition notices for various employees of Trader Joe's. *Id.*

On July 9, 2018, following months of informal negotiations, the Parties attended an in-person mediation, where they executed a binding Class Action Settlement Term Sheet, subject to approval of the Court. *Id.* at ¶ 12.

III. THE LEGAL STANDARD FOR PRELIMINARY APPROVAL

Approval of class action settlements involves a two-step process. First, the Court must make a preliminary determination whether the proposed settlement appears to be fair and is "within the range of possible approval." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 273 (N.D. Cal. 1976), *cert. denied sub nom. Beaver v. Alaniz*, 439 U.S. 837 (1978). If so, notice can be sent to Settlement Class Members and the Court can schedule a final approval hearing where a more in-depth review of the settlement terms will take place. *See Manual for Complex Litigation, 3d Edition*, § 30.41 at 236-38 (hereafter, the "Manual").

The purpose of preliminary approval is for the Court to determine whether the parties should notify the putative class members of the proposed settlement and proceed with a fairness hearing. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079. Notice of a settlement should be disseminated where "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *Id.* (*quoting* NEWBERG ON CLASS ACTIONS § 11.25 (1992)). Preliminary approval does not require an answer to the ultimate question of whether the proposed settlement is fair and adequate, for that determination occurs only after notice of the

settlement has been given to the members of the settlement class. *See Dunk v. Ford Motor Company*, 48 Cal. App. 4th 1794, 1801 (1996).

Nevertheless, a review of the standards applied in determining whether a settlement should be given *final* approval is helpful to the determination of preliminary approval. One such standard is the strong judicial policy of encouraging compromises, particularly in class actions. *See In re Syncor*, 516 F.3d at 1101 (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983)).

While the district court has discretion regarding the approval of a proposed settlement, it should give "proper deference to the private consensual decision of the parties." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). In fact, when a settlement is negotiated at arm's-length by experienced counsel, there is a presumption that it is fair and reasonable. *See In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Ultimately, however, the Court's role is to ensure that the settlement is fundamentally fair, reasonable, and adequate. *See In re Syncor* 516 F.3d at 1100.

Beyond the public policy favoring settlements, the principal consideration in evaluating the fairness and adequacy of a proposed settlement is the likelihood of recovery balanced against the benefits of settlement. "[B]asic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation." *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). That said, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625.

In evaluating preliminarily the adequacy of a proposed settlement, particular attention should be paid to the process of settlement negotiations. Here, the negotiations were conducted by experienced class action counsel. Thus, counsel's assessment and judgment are entitled to a presumption of reasonableness, and the Court is entitled to rely heavily upon their opinion. *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622-23 (N.D. Cal. 1979).

IV. THE COURT SHOULD PROVISIONALLY CERTIFY THE SETTLEMENT CLASS FOR THE PURPOSES OF PRELIMINARY APPROVAL

The Ninth Circuit has recognized that certifying a settlement class to resolve consumer lawsuits is a common occurrence. *Hanlon*, 150 F.3d at 1019. When presented with a proposed settlement, a court must first determine whether the proposed settlement class satisfies the requirements for class certification under Rule 23. In assessing those class certification requirements, a court may properly consider that there will be no trial. *Amchem,* 521 US at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial.").

The Settlement Class consists of "All persons in the United States who purchased Trader Joe's Tuna (*i.e.*, 5 oz. Trader Joe's Albacore Tuna in Water Salt Added, 5 oz. Trader Joe's Albacore Tuna in Water Half Salt, 5 oz. Trader Joe's Albacore Tuna in Water No Salt Added, 5 oz. Trader Joe's Albacore Tuna in Olive Oil Salt Added, 5 oz. Trader Joe's Skipjack Tuna in Water With Sea Salt, and 5 oz. Trader Joe's Yellowfin Tuna in Olive Oil Solid Light) from January 5, 2012 through the date on which class notice is disseminated."[3]

[3] Excluded from this definition are (a) the Defendants and all of Defendants' past and present respective parents, subsidiaries, divisions, affiliates, persons and entities directly or indirectly under its or their control in the past or in the present; (b) Defendants' respective assignors, predecessors, successors, and assigns; (c) all past or present partners, shareholders, managers, members, directors, officers, employees, agents, attorneys, insurers, accountants, and representatives of any and all of the

This Court has not yet certified this case as a class action. For the reasons below, the Class meets the requirements of Rule 23(a) and (b). For settlement purposes only, the parties and their counsel request that this Court provisionally certify the Settlement Class.[4]

A. The Class Satisfies Rule 23(a)

In its April 1, 2019 Order, the Court already concluded, for settlement purposes, that "[t]he proposed class meets all four Rule 23(a) factors." 4/1/19 Order at 6 (Dkt. 96). Specifically, the Court found that: (i) the Class "is sufficiently numerous" because "the class size in this case is approximately 17,300 consumers," (ii) "the claims of the potential class members demonstrate common questions of fact" in that "the claims of Settlement Class Members are based on the same factual predicate as Plaintiff's, namely that Defendants [allegedly] underfilled Trader joe's Tuna Products, and Settlement Class Members purchased them," (iii) "Plaintiff … meets the typicality requirement" because "Plaintiff's claims arise out of the same circumstances as those of the other class members, namely that Plaintiff purchased Defendants' [allegedly] underfilled Trader Joe's Tuna Products during the Settlement Class Period," and (iv) "Plaintiff and her counsel satisfy the adequacy requirement for representing absent class members" because "the named plaintiff and her counsel do not have conflicts of interest with other class members and will vigorously prosecute the interests of the class." *Id.* at 6-7. Here, the same reasoning applies today. The Rule 23(a) factors are plainly satisfied.

B. The Class Satisfies Rule 23(b)(3)

In addition to meeting the prerequisites of Rule 23(a), Plaintiff must also meet one of the three requirements of Rule 23(b) to certify the proposed class. *See Zinser v.*

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foregoing; (d) Defendants' manufacturers, distributors, and suppliers of the Trader Joe's Tuna Products; and (e) all persons who file a timely Request for Exclusion from the Settlement Class.

[4] Defendants do not waive their rights to contest class certification at a later date in the event the Court denies the motion.

Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001). Under Rule 23(b), a class action may be maintained if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3). Certification under Rule 23(b)(3) is appropriate "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon*, 150 F.3d at 1022.

1. Common Questions Of Law And Fact Predominate

In its April 1, 2019 Order, the Court held that it "cannot find the predominance requirement met" because "Plaintiff does not address the choice of law issue [by conducting a choice of law analysis] or provide support for the notion that the types of concerns addressed in *Mazza* [*v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012)] present no roadblock to certification for class settlement purposes." 4/1/19 Order at 10 (underlining added). Subsequent to the Court's opinion, the Ninth Circuit decided *In re Hyundai and Kia Fuel Economy Litig.*, 2019 WL 2376831 (9th Cir. June 6, 2019), which makes clear that no such analysis is necessary in this matter.[5]

Previously, the *Mazza* decision held that courts must conduct a "three-step government interest test" before certifying a nationwide class under California law. 4/1/19 Order at 9 (quoting *Mazza*, 666 F.3d at 590). First, courts must determine "whether the relevant law of each of the potentially affected jurisdictions" differs materially. *Id.* Second, if there is a material difference, "the court examines each jurisdictions' interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists." *Id.* Third, if there is a true conflict, the court must compare each jurisdiction's interest in application of its own

[5] On April 22, 2019, the Court granted the Parties' stipulation to continue the deadline to file the Renewed Motion for Preliminary Approval pending the *In re Hyundai* decision, which would likely "further clarify the applicability of *Mazza*." *See* Dkts. 97, 98.

law "to determine which state's interest would be more impaired if its policy were subordinated." *Id.* Here, the Court noted that "Plaintiff fails to mention *Mazza*, let alone conduct the required analysis, despite seeking to apply California consumer protection laws to a nationwide class of purchasers." 4/1/19 Order at 9.

However, *Mazza* was abrogated – at least in the settlement context – by *In re Hyundai*. In *In re Hyundai*, which was decided *en banc*, the Ninth Circuit definitely held that "[b]y default, California courts apply California law unless a party litigant timely invokes the law of a foreign state, in which case it is the foreign law proponent who must shoulder the burden of demonstrating that foreign law, rather than California law, should apply to class claims." *In re Hyundai*, 2019 WL 2376831, at *9 (internal quotations omitted). If this burden is not met by the proponent of foreign law, then "the district court may properly find California law applicable without proceeding" through a choice of law analysis, meaning that "a court adjudicating a multistate class action is free to apply the substantive law of a single state to the entire class." *Id.* (internal quotations omitted).

The *In re Hyundai* court began its analysis by noting the Ninth Circuit's "strong judicial policy that favors settlements, particularly where complex class action[s] [are] concerned." *Id.* at *4 (quoting *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 21101 (9th Cir. 2008)). The Ninth Circuit further noted that "[t]he criteria for class certification are applied differently in litigation classes and settlement classes." *Id.* at *5.

Given the "judicial policy" of "favor[ing] settlements," the Ninth Circuit announced its "default" rule that the laws of a single state – here, California – may ordinarily be applied nationwide in a settlement context without any choice of law analysis:

> [Objectors] Fetsch and Roland also argue that the district court failed to address variations in state law affecting claims by used car purchasers and that it was required to do

so under *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012). They are incorrect.

Subject to constitutional limitations and the forum state's choice-of-law rules, a court adjudicating a multistate class action is free to apply the substantive law of a single state to the entire class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985); *see also Harmsen v. Smith*, 693 F.2d 932, 946–47 (9th Cir. 1982) (explaining that a district court sitting in diversity must "apply the substantive law of the state in which it sits, including choice-of-law rules"). Here, no party argued that California's choice-of-law rules should not apply to this class settlement arising from an MDL in a California court. By default, California courts apply California law "unless a party litigant timely invokes the law of a foreign state," in which case it is "the foreign law proponent" who must "shoulder the burden of demonstrating that foreign law, rather than California law, should apply to class claims." *Wash. Mut. Bank, FA v. Superior Court*, 24 Cal.4th 906, 103 Cal.Rptr.2d 320, 15 P.3d 1071, 1080-81 (2001) (quoting *Bernhard v. Harrah's Club*, 16 Cal.3d 313, 128 Cal.Rptr. 215, 546 P.2d 719, 721 (1976)); *accord Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 995 (9th Cir. 2010).

To meet their burden, the objectors must satisfy the three-step governmental interest test [as discussed above]. *Wash. Mut.*, 103 Cal.Rptr.2d 320, 15 P.3d at 1080-81. If the objectors fail to meet their burden at any step in the analysis, the district court "may properly find California law applicable without proceeding" to the rest of the analysis. *Pokorny*, 601 F.3d at 995 (quoting *Wash. Mut.*, 103 Cal.Rptr.2d 320, 15 P.3d at 1081). …

[Objectors] Fetsch and Roland do not suggest that application of California law gives rise to constitutional problems. And before the district court, no objector presented an adequate choice-of-law analysis or explained how, under the facts of this case, the governmental interest test's three elements were met. Further, no objector argued that differences between the consumer protection laws of all fifty states precluded certification of a settlement class.

> Consequently, neither the district court nor class counsel were obligated to address choice-of-law issues beyond those raised by the objectors, and we will not decertify a class action for lack of such analysis. *See Harmsen*, 693 F.2d at 947 (affirming district court's application of California law to multistate class where the proponent of foreign law "failed to show, as required by California law, that the law of other states relating to the [state law] claims is significantly different from California's and, more importantly, that the interests of other states would be impaired by application of California law to these nonresident plaintiffs"); *Pokorny*, 601 F.3d at 994–96 (affirming application of California law because the foreign law proponent failed to meet its burden under California's governmental interest test).

Id. at *9-10 (underlining added; some internal citations omitted; footnotes omitted).

Additionally, the Ninth Circuit specifically noted that *Mazza* was "readily distinguishable" and did not apply:

> *Mazza* is readily distinguishable. There, the foreign law proponent (the defendant) "exhaustively detailed the ways in which California law differs from the laws of the 43 other jurisdictions" and showed how applying the facts to those disparate state laws made "a difference in this litigation." *Mazza*, 666 F.3d at 590–91. … Weighing these arguments and concessions, a divided panel concluded that the defendant had "met its burden" to show that foreign law applied "[u]nder the facts and circumstances of this case." *Id.* at 591, 594.
>
> Importantly, the *Mazza* class was certified for litigation purposes. The prospect of having to apply the separate laws of dozens of jurisdictions presented a significant issue for trial manageability, weighing against a predominance finding. *See also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190-92 (9th Cir. 2001) (treating state law variations as a subspecies of trial manageability concerns). In settlement cases, such as the one at hand, the district court need not consider trial manageability issues. *Amchem*, 521 U.S. at 620, 117 S.Ct. 2231.

Id. at *10 (underlining added; footnotes omitted). Here, similarly, no choice of law analysis is required, and *Mazza* is "readily distinguishable" in the settlement context.

The proposed Settlement Class is well-suited for certification under Rule 23(b)(3) because questions common to the Settlement Class Members predominate over questions affecting only individual Settlement Class Members. Predominance exists "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Hanlon*, 150 F.3d at 1022. As the U.S. Supreme Court has explained, when addressing the propriety of certification of a settlement class, courts take into account the fact that a trial will be unnecessary and that manageability, therefore, is not an issue. *Amchem*, 521 U.S. at 620.

In this case, common questions of law and fact exist and predominate over any individual questions, including in addition to whether this Settlement is reasonable (*see Hanlon*, 150 F.3d at 1026–27), *inter alia*: (1) whether Defendants' representations regarding the Trader Joe's Tuna Products were false and misleading or reasonably likely to deceive consumers; (2) whether the Trader Joe's Tuna Products were underfilled; (3) whether Defendants violated the CLRA, UCL, or FAL; (4) whether Defendants breached an implied warranty; (5) whether Defendants had defrauded Plaintiff and Settlement Class Members; (6) whether the Defendants were unjustly enriched in regards to the products at issue; and (7) whether Plaintiff and the Settlement Class have been injured by the wrongs complained of, and if so, whether Plaintiff and the Settlement Class are entitled to damages, injunctive and/or other equitable relief, including restitution or disgorgement, and if so, the nature and amount of such relief.

2. A Class Action Is The Superior Mechanism For Adjudicating This Dispute

The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of the Settlement Class. Each individual

Settlement Class Member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendants' liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

Moreover, since this action will now settle, the Court need not consider issues of manageability relating to trial. *See Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial."). Accordingly, common questions predominate and a class action is the superior method of adjudicating this controversy.

V. THE SETTLEMENT AGREEMENT IS FAIR, ADEQUATE, AND REASONABLE

Rule 23(e)(2) provides that "the court may approve [a proposed class action settlement] only after a hearing and on finding that it is fair, reasonable, and adequate." When making this determination, the Ninth Circuit has instructed district courts to balance several factors: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; and (6) the experience and views of counsel. *Hanlon*, 150 F.3d at 1026;[6] *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). Here, the balance of

[6] In *Hanlon*, the Ninth Circuit also instructed district courts to consider "the reaction of the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026. This consideration is more germane to final approval, and will be addressed at the appropriate time.

these factors readily establishes that the proposed settlement should be preliminarily approved.

A. Strength Of The Plaintiff's Case

In determining the likelihood of a plaintiff's success on the merits of a class action, "the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice*, 688 F.2d at 625 (internal quotations omitted). The court may "presume that through negotiation, the Parties, counsel, and mediator arrived at a reasonable range of settlement by considering Plaintiff's likelihood of recovery." *Garner v. State Farm. Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *9 (N.D. Cal. Apr. 22, 2010) (citing *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)).

Here, Plaintiff's counsel engaged in lengthy arm's-length negotiations with Trader Joe's counsel, and were thoroughly familiar with the applicable facts, legal theories, and defenses. Although Plaintiff and her counsel believe that Plaintiff's claims have merit, they also recognize that they will face risks at class certification, summary judgment, and trial. Trader Joe's would no doubt present a vigorous defense at trial, and there is no assurance that the class would prevail. Thus, in the eyes of Plaintiff's counsel, the proposed Settlement provides the Settlement Class with an outstanding opportunity to obtain significant relief at this early stage in the litigation. The Settlement Agreement also abrogates the risks that might prevent them from obtaining relief.

B. Risk Of Continuing Litigation

As referenced above, proceeding in this litigation in the absence of settlement poses various risks such as failing to certify a class, having summary judgment granted against Plaintiff, or losing at trial. Such considerations have been found to weigh heavily in favor of settlement. *See Rodriguez*, 563 F.3d at 966; *Curtis-Bauer v. Morgan Stanley & Co., Inc.*, 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008)

("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class."). Even assuming that Plaintiff were to survive summary judgment, she would face the risk of establishing liability at trial in light of conflicting expert testimony between their own expert witnesses and Trader Joe's expert witnesses. In this "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which expert version would be accepted by the jury. The experience of Plaintiff's counsel has taught them that these considerations can make the ultimate outcome of a trial highly uncertain.

Moreover, even if Plaintiff were to prevail at trial, the class would face additional risks if Trader Joe's appeals or moves for a new trial. For example, in *In re Apple Computer Sec. Litig.*, 1991 U.S. Dist. LEXIS 15608 (N.D. Cal. Sept. 6, 1991), the jury rendered a verdict for plaintiffs after an extended trial. Based on the jury's findings, recoverable damages would have exceeded $100 million. However, weeks later, the trial judge overturned the verdict, entering judgment notwithstanding the verdict for the individual defendants, and ordered a new trial with respect to the corporate defendant. By settling, Plaintiff and the Settlement Class avoid these risks, as well as the delays and risks of the appellate process.

C. Risk Of Maintaining Class Action Status

In addition to the risks of continuing the litigation, Plaintiff would also face risks in certifying a class and maintaining that class status through trial. Even assuming that the Court were to grant a motion for class certification, the class could still be decertified at any time. *See In re Netflix Privacy Litig.*, 2013 WL 1120801, at *6 (N.D. Cal. Mar. 18, 2013) ("The notion that a district court could decertify a class at any time is one that weighs in favor of settlement.") (internal citations omitted). From their prior experience, Plaintiff's counsel anticipates that Trader Joe's would likely move for reconsideration, attempt to appeal the Court's decision pursuant to

Rule 23(f), and/or move for decertification at a later date. Here, the Settlement Agreement eliminates these risks by ensuring Settlement Class Members a recovery that is "certain and immediate, eliminating the risk that class members would be left without any recovery … at all." *Fulford v. Logitech, Inc.*, 2010 U.S. Dist. LEXIS 29042, at *8 (N.D. Cal. Mar. 5, 2010).

D. The Extent Of Discovery And Status Of Proceedings

Under this factor, courts evaluate whether class counsel had sufficient information to make an informed decision about the merits of the case. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). Here, this matter has progressed through fact discovery more than sufficiently. Accordingly, as discussed above, Plaintiff's counsel has received, examined, and analyzed information, documents, and materials that enabled them to assess the likelihood of success on the merits. These efforts include extensive consultations with experts from NOAA, reviewing and analyzing test results regarding hundreds of tuna cans, numerous interviews with members of the putative class, and significant legal research, analysis of documents and evidence provided by Trader Joe's, and lengthy negotiations.

E. Experience And Views Of Counsel

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

Here, the Settlement was negotiated by counsel with extensive experience in consumer class action litigation, including extensive experience litigating consumer claims regarding allegedly underfilled canned tuna. *See* Fisher Decl. Ex. 4 (firm

resume of Bursor & Fisher, P.A.). Based on their collective experience, Class Counsel concluded that the Settlement Agreement provides exceptional results for the Settlement Class while sparing Settlement Class Members from the uncertainties of continued and protracted litigation.

VI. THE PROPOSED NOTICE PROGRAM PROVIDES ADEQUATE NOTICE AND SHOULD BE APPROVED

Once preliminary approval of a class action settlement is granted, notice must be directed to class members. For class actions certified under Rule 23(b)(3), including settlement classes like this one, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). In addition, Rule 23(e)(1) applies to any class settlement and requires the Court to "direct notice in a reasonable manner to all class members who would be bound by a proposal." Fed. R. Civ. P. 23(e)(1).

When a court is presented with a class-wide settlement prior to the certification stage, the class certification notice and notice of settlement may be combined in the same notice. *Manual*, § 21.633 at 321-22 ("For economy, the notice under Rule 23(c)(2) and the Rule 23(e) notice are sometimes combined."). This notice allows the settlement class members to decide whether to opt out, participate in the class, or object to the settlement. *Id.*

The requirements for the content of class notices for (b)(3) classes are specified in Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii). Each of the proposed forms of notice, including the Long Form and Short Form notices, meet all of these requirements, as detailed in the following table:

Requirement	Long Form, Fisher Decl. Ex. 6	Short Form, Fisher Decl. Ex. 5
"The nature of the action." Fed. R. Civ. P. 23(c)(2)(B)(i).	First introductory bullet; Q&A nos. 2 and 5.	Col. 1, ¶ 1.
"The definition of the class certified." Fed. R. Civ. P. 23(c)(2)(B)(ii).	Second introductory bullet; Q&A no. 4.	Col. 1, ¶ 2.
"The class claims, issues, or defenses." Fed. R. Civ. P. 23(c)(2)(B)(iii).	First introductory bullet; Q&A nos. 2, 5 and 6.	Col. 1, ¶ 1.
"That a class member may enter an appearance through an attorney if the member so desires." Fed. R. Civ. P. 23(c)(2)(B)(iv).	Q&A nos. 16, 17, 18, and 19.	Col. 2, ¶ 3.
"That the court will exclude from the class any member who requests exclusion." Fed. R. Civ. P. 23(c)(2)(B)(v).	Table of "Your Legal Rights and Options;" Q&A nos. 11, 12 and 13.	Col. 2, ¶ 2.
"The time and manner for requesting exclusion." Fed. R. Civ. P. 23(c)(2)(B)(vi).	Q&A no. 13.	Col. 2, ¶ 2.
"The binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B)(vii).	Table of "Your Legal Rights and Options"; Q&A nos. 11, 12, and 24.	Col. 1, ¶ 5.

In addition to meeting the specific legal requirements of Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii), the proposed notices are based on the Federal Judicial Center's ("FJC") model forms for notice of pendency of a class action. FJC prepared these models at the request of the Subcommittee on Class Actions of the U.S. judicial branch's Advisory Committee on the Federal Rules of Civil Procedure. *See* www.fjc.gov. The FJC models are designed to illustrate how attorneys and judges might comply with Fed. R. Civ. P. 23(c)(2)(B)'s requirement that class action notices

"must concisely and clearly state in plain, easily understood language" specific information about the nature and terms of a class action and how it might affect potential class members' rights. *See* www.fjc.gov. FJC explained its methodology for preparing these models as follows:

> We began this project by studying empirical research and commentary on the plain language drafting of legal documents. We then tested several notices from recently closed class actions by presenting them to nonlawyers, asking them to point out any unclear terms, and testing their comprehension of various subjects. Through this process, we identified areas where reader comprehension was low. We found, for example, that nonlawyers were often confused at the outset by use of the terms "class" and "class action." Combining information from the pilot test with principles gleaned from psycholinguistic research, we drafted preliminary illustrative class action notices and forms. We then asked a lawyer-linguist to evaluate them for readability and redrafted the notices in light of his suggestions.

Id. FJC then tested the redrafted model notices "before focus groups composed of ordinary citizens from diverse backgrounds" and also through surveys "[u]sing objective comprehension measures." *Id.*

Based on FJC's testing, the Plaintiff and Class Counsel believe that each of the proposed class notices, which are very closely based on FJC models, with the format and content adopted almost verbatim in most instances, are accurate, balanced, and comprehensible.

These notices will be disseminated through a media plan developed by Kurtzman Carson Consultants ("KCC"), a firm with experience administering more than 2,000 settlements, which has been chosen by the parties as the Settlement Administrator. *See* Settlement Agreement ¶ 1.19, Fisher Decl. Ex. 1; Peak Decl. ¶ 3 ("Since 1984, KCC has administered more than 6,000 matters and distributed settlement payments totaling well over $20 billion in assets."). KCC's proposed

notice plan includes creation of a dedicated settlement website, an Internet banner ad campaign, and print publication in *National Geographic*, the *New York Times*, and the *Los Angeles Daily News*, which will reach "approximately 70% of likely Class Members." Peak Decl. ¶¶ 8-13. KCC advises that this notice plan is "consistent with the 70-95% reach guideline set forth in the Federal Judicial Center's *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, which considers 70-95% reach among class members reasonable." *Id.* ¶ 14. KCC estimates that its services in providing notice and claims administration will cost $357,953. *See* Settlement Agreement ¶ 4.5, Fisher Decl., Ex. 1.

This proposed method of giving notice was developed by KCC, in collaboration with Class Counsel, with the objective of ensuring that as much of the Settlement Fund as possible will be distributed to Settlement Class Members in the most simple and expedient manner. *See, e.g.*, William B. Rubenstein, Newberg on Class Actions § 12:35 (5th ed. 2014) ("[A] court's goal in distributing class action damages is to get as much of the money to the class members in as simple a manner as possible."); *see also id.* § 12:15 ("The goal of any distribution method is to get as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible."). With claim amounts at $29, it will take approximately 17,300 Cash Claims to exhaust the Cash Settlement Fund, and Class Counsel has asked KCC to design the notice and claims process to accomplish this objective. Fisher Decl. ¶ 13.

VII. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court approve the Settlement Agreement, provisionally certify the Settlement Class for the purposes of preliminary approval, approve the proposed notice plan, and enter the [Proposed] Order Granting Renewed Motion for Preliminary Approval of Class Action Settlement, submitted herewith.

Dated: July 23, 2019

Respectfully submitted,

BURSOR & FISHER, P.A.

By: */s/ L. Timothy Fisher*
L. Timothy Fisher

L. Timothy Fisher (State Bar No. 191626)
1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-Mail: ltfisher@bursor.com

BURSOR & FISHER, P.A.
Scott A. Bursor (State Bar No. 276006)
2665 S. Bayshore Dr., Suite 220
Miami, FL 33133
Telephone: (305) 330-5512
Email: scott@bursor.com

Interim Class Counsel