LAW OFFICES OF RONALD A. MARRON
RONALD A. MARRON (SBN 175650)
ron@consumersadvocates.com
MICHAEL T. HOUCHIN (SBN 305541)
mike@consumersadvocates.com
LILACH HALPERIN (SBN 323202)
lilach@consumersadvocates.com
651 Arroyo Drive
San Diego, California 92103
Telephone: (619) 696-9006
Facsimile: (619) 564-6665
Class Counsel

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RENEE YOUNG and JOYCETTE GOODWIN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

NEUROBRANDS, LLC, a Delaware limited liability company;

Defendant.

Case No. 4:18-cv-05907-JSW

CLASS ACTION

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

Date: October 8, 2021
Time: 9:00 a.m.
Ctrm: 5
Judge: Hon. Jeffrey S. White

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I. SUMMARY OF THE ARGUMENT

On June 17, 2021, this Court entered an Order preliminarily approving a Class Action Settlement between Plaintiffs Renee Young and Joycette Goodwin ("Plaintiffs"), on behalf of the Class, and Defendant Neurobrands, LLC ("Defendant" or "Neurobrands") (Dkt. No. 90). The Parties reached the Settlement after hard-fought litigation and robust settlement negotiations, which included a full-day mediation and several additional telephonic sessions with a neutral mediator, the Honorable Judge Jay C. Gandhi (Ret.) of JAMS. The Settlement, which is memorialized in the Settlement Agreement ("Agreement") filed with this Court on May 18, 2021 (Dkt. No. 88-3), resolves all claims against Neurobrands in the litigation.

The Settlement preliminarily approved by this Court will provide significant injunctive relief to the Class. Although Neurobrands continues to deny Plaintiffs' allegations, it has agreed under the Settlement Agreement to use its best efforts to reformulate all Products that contain DL-malic acid by removing DL-malic acid as an ingredient. If after using its best efforts, Defendant determines that one or more of the reformulated Products are not scientifically or commercially feasible, Defendant has agreed to modify its packaging, labeling and advertising for the Products by (1) removing the phrase "or flavors" from the phrase "no artificial colors or flavors" on the Neurobrands Product packaging and promotional materials, (2) identifying "DL-malic acid" in the ingredient list of the Product packaging and promotional materials, (3) modifying the Neurobrands website to disclose the use of synthetic malic acid, and (4) adding an asterisk or similar reference to the Product labels directing consumers to the statement "*Learn More at [the URL or webpage of the Neurobrands website]" containing the disclosure of synthetic malic acid. All labeling modifications are permanent, unless and until Defendant changes its product formulation to remove dl-malic acid from the Products. Agreement §§ 4.1-4.3.

The Settlement should now receive the Court's final approval because it is demonstrably "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2). The Settlement provides meaningful relief for the Class in the face of significant risks of continued litigation. Plaintiffs and Class Counsel participated in the settlement negotiations from a well-informed position that resulted in substantial injunctive relief to the Class and a significant benefit to the public at large. Indeed, Class Members have responded positively to the relief that Class Counsel negotiated on their behalf: no Class

Member has filed an objection with this Court. The Settlement has the full support of Plaintiffs and Class Counsel.

For the reasons below, and those stated in Plaintiffs' Motion for Preliminary Approval of Settlement (Dkt. No. No. 88-1), Plaintiffs ask that the Court grant final approval of the Settlement.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Allegations in the Complaint

Plaintiffs filed this class action on September 26, 2018 against Neurobrands regarding allegedly deceptive advertising of the Neurobrands Products. (Dkt. No. 1). On December 17, 2018, Plaintiffs filed a First Amended Complaint bringing claims for violations of California's Consumers Legal Remedies Act, California's Unfair Competition Law, California's False Advertising Law, and causes of action for fraud by omission, negligent misrepresentation, and breach of express and implied warranties. (Dkt. No. 18). The gravamen of Plaintiffs' FAC is that the Neurobrands' Products contain the artificial flavoring ingredient dl malic acid despite Defendant's representations that the Products are made with "no artificial [] flavors." (FAC ¶¶ 16-46).

B. The Parties Have Engaged in Substantial Discovery

During the course of the litigation, the Parties engaged in substantial and extensive discovery, including written discovery, depositions, third-party discovery, and expert discovery. *See* Declaration of Ronald A. Marron in Support of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement ("Marron Decl."), at ¶ 2. Specifically, on February 22, 2019, Plaintiffs served requests for production of documents and interrogatories on Defendant. *Ibid*. Plaintiffs also propounded requests for admission on October 8, 2019, and a second set of requests for production of documents on February 11, 2020. *See id*. Defendant produced, and Plaintiffs reviewed, several hundreds of documents in response to Plaintiffs' document requests. *See id*. On August 29, 2019, Plaintiffs' counsel took the deposition of Defendant's Chief Science & Regulatory Officer and 30(b)(6) witness, Christopher Noonan; on November 19, 2019, Plaintiffs' counsel took the deposition of Defendant's Director of Operations, Reza Mazloumi; and on October 22, 2019, Plaintiffs' counsel took the deposition of Adirondack Beverages Co.'s person most knowledgeable, Erina Jess. *See id*., ¶ 3.

On July 26, 2019, Defendant served requests for production of documents and interrogatories on

each Plaintiff. *See* Marron Decl., ¶ 4. Defendant took the deposition of Plaintiff Joycette Goodwin on September 24, 2019 and the deposition of Renee Young on September 27, 2019. *See id*.

Plaintiffs' counsel also subpoenaed, received, and reviewed several hundred documents from Defendant's co-packers Adirondack Beverages Co. and Unix Packaging, Inc. *See id*., ¶ 5. Plaintiffs also served requests for admissions to authenticate documents produced by Defendant during discovery on March 2, 2021 in preparation for summary judgment motions and trial. *See id*.

The Parties each consulted with and retained experts regarding dl-malic acid and the function of this ingredient in the Products. Marron Decl., ¶ 6. Plaintiffs disclosed the expert report of Dr. Laszlo D. Somogyi on January 17, 2020 and Defendant disclosed the rebuttal expert report of Dr. Lawrence Hawley on March 5, 2020. *Id*. Both Parties served deposition subpoenas on the other party's expert, though neither deposition ultimately took place in light of the Settlement. *See id*.

C. The Parties Also Engaged in Motion Practice

On January 14, 2019, Defendant filed a Motion to Dismiss Plaintiffs' First Amended Complaint. Dkt. No. 29. Plaintiffs opposed the motion on January 28, 2019 and Defendant filed a reply brief on February 4, 2019. Dkt. Nos. 33-34. On February 19, 2019, the Court denied Defendant's Motion to Dismiss in its entirety. Dkt. No. 37.

On October 4, 2019, Plaintiffs filed a motion for class certification seeking Rule 23(b)(2) certification of a Nationwide class and California sub-class. Dkt. No. 43. On October 15, 2020, the Court granted in part and denied in part Plaintiffs' Motion for Class Certification and certified, pursuant to Fed. R. Civ. P. 23(b)(2), a class of California consumers defined as:

> All California citizens who made retail purchases of one of the following Products labeled as containing "natural flavors" and "no artificial colors or flavors" in California on or after January 1, 2012 through October 15, 2020, for personal use and not for resale, excluding Defendant and Defendant's officers, directors, employees, agents and affiliates, and the Court and its staff:
>
> - NeuroSONIC Superfruit Infusion
> - NeuroSONIC Orange Passion;
> - NeuroBLISS White Raspberry;
> - NeuroBLISS Citrus Berry;
> - NeuroBLISS Tropical Lychee;

- Neuro[PROTEIN] Watermelon Min[t];
- NeuroPROTEIN Cherry Vanilla;
- NeuroDAILY Tangerine Citrus; and
- NeuroGASM Passion Fruit.

See Dkt. No. 72. Additionally, the Court appointed Plaintiffs Renee Young and Joycette Goodwin as class representatives and appointed the Law Offices of Ronald A. Marron as class counsel. *Id*.

D. The Parties' Settlement Negotiations and Preliminary Approval

Following the Court's Order regarding Class Certification, the Parties scheduled a full day mediation session before the Honorable Judge Jay C. Gandhi (Ret.) of JAMS. *See* Marron Decl., ¶ 9. Before the mediation, the Parties exchanged detailed mediation briefs setting forth their respective positions. *Ibid*. Because of this mutual exchange of arguments and information and due to the extensive discovery already performed in the case, the Parties were fully prepared and informed to participate in the mediation. *Ibid*. On February 2, 2021, the Parties attended their full-day mediation session before Judge Gandhi, where they agreed in principle to certain terms of an injunctive relief class action settlement. *See* Marron Decl., ¶ 10. Following the first mediation session, the Parties participated in further telephonic sessions with Judge Gandhi and engaged in extensive negotiations to finalize the text of the Settlement Agreement themselves, as well as a notice plan and proposed order for the Court. *Ibid*. The Parties invested substantial time and effort to work through initially incompatible settlement postures and overcome vigorous disagreements. Marron Decl., ¶ 10. The proposed resolution embodied in the Settlement was the product of heavily contested arm's length negotiation. *Ibid*.

On March 12, 2021, the Parties filed a Notice of Settlement with the Court. (Dkt. No. 82). On May 18, 2021, Plaintiffs filed their Motion for Preliminary Approval of Class Action Settlement. (Dkt. No. 88). On June 17, 2021, the Court entered an Order granting preliminary approval of the proposed settlement finding that the settlement is "fair, reasonable, adequate, and in the best interests of the Settlement Class." (Dkt. No. 90 at ¶ 5). This Court also approved the Parties' proposed notice plan and set the Final Approval Hearing for October 8, 2021 at 9:00 a.m. (Dkt. No. 88).

III. SUMMARY OF THE SETTLEMENT

The Settlement Agreement provides that Neurobrands will reformulate the Products by removing

DL-malic acid and/or will modify its Products' labels. *See* Agreement §§ 4.1-4.3. Specifically, Defendant will use its best efforts to reformulate all Products that contain DL-malic acid by removing DL-malic acid as an ingredient. Agreement § 4.1.1. After the Court issued its Order granting Preliminary Approval of Class Action Settlement on June 17, 2021, Defendant began to conduct reformulation research and development and testing to determine the feasibility of removing DL-malic acid as an ingredient in the Products. *See* Marron Decl., ¶ 13. The reformulation research and development and testing is to be completed by January 17, 2022. Agreement § 4.1.2 – 4.1.3. If the new formulations pass requisite testing and are commercially feasible, Defendant will begin switching to the new formulations no later than February 17, 2022. *See id*., §§ 4.1.4.[1] Plaintiffs' counsel have been in regular communication with Defendant regarding the status of this work, and Defendant is currently assessing the shelf life and taste of the potentially reformulated Products. *See* Marron Decl., ¶ 13. Defendant must provide a declaration to Class Counsel confirming that best efforts were used. *See id*., § 4.1.5.

If after using best efforts Defendant determines that one or more of the reformulated Products are not scientifically or commercially feasible, Defendant agrees to modify its packaging, labeling and advertising for all such Products containing dl-malic acid. Agreement §§ 4.2 – 4.3. Specifically, by no later than February 17, 2022, Defendant agrees to (1) add "(DL-malic acid)" after "malic acid" in the ingredient list of all such Products that contain dl-malic acid as an ingredient; (2) replace the phrase "no artificial colors or flavors" with "no artificial colors" from the labeling and advertising of all such Products that contain dl-malic acid as an ingredient; (3) modify its website to disclose that the Products may also contain synthetic malic acid or other acidulants; and (4) add an asterisk or similar reference after or adjacent to the "natural flavors" representation on the top front of each such Product label, which directs the consumer to the statement "*Learn More at [the URL or webpage of the Neurobrands website] containing the disclosure described in (3). *See* Agreement §§ 4.2 – 4.2.4.[2] All such labeling modifications are permanent, unless and until Defendant changes its product formulation to remove all

[1] Defendant and third parties will be permitted to distribute and sell residual Products manufactured prior to the implementation of the reformulations. *See* Agreement § 4.1.4.

[2] Defendant and third parties will be permitted to distribute and sell residual Products manufactured prior to the implementation of the labeling changes. *See* Agreement § 4.2.5.

dl-malic acid from the Products. *See id*., § 4.3. By removing the allegedly misleading labeling, any further alleged economic injury to consumers is prevented. Marron Decl., ¶ 14. The injunctive relief provided by this settlement provides significant value to consumers, continuing long into the future. Marron Decl., ¶ 14.

IV. NOTICE HAS BEEN FULLY DISSEMINATED TO THE CLASS

The Class Notice program was fully executed in accordance with its design and under the terms approved by the Court. *See* Declaration of James R. Prutsman in Support of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement ("Prutsman Decl."), at ¶¶ 1-10. In consultation and collaboration with the parties, Kroll Settlement Administration provided the Court-ordered Notice to Class Members through all distribution channels approved by the Court. The notice procedures are consistent with the class-action notice plan that was approved by this Court and constitute the best notice practicable under the circumstances.

The costs of providing notice totaled $21,027.10, which is to be paid directly by the Defendant. Prutsman Decl., ¶ 10; Agreement §§ 5.1-5.2. Below is a summary of the notice that was provided to the class members.

A. Publication Notice

Notice was published in *USA Today* for four consecutive weeks, on July 23, 2021, July 30, 2021, August 6, 2021, and August 13, 2021. Prutsman Decl., ¶ 8. The notice included a summary notice directly in the publication, included information on the lawsuit, the class, class members' options, and listed the settlement website to direct class members to get more detailed information. *Ibid*. & Ex. C.

B. Social Media Notice

On July 16, 2021, Kroll Settlement Administration began an online advertising campaign on Facebook, Instagram, and Twitter. Prutsman Decl., ¶ 7. The advertising was geo-targeted to California and targeted followers of Neurobrands pages and other healthy lifestyle pages such as Pressed Juicery, GT Kombucha, Orangetheory Fitness, Lululemon, Equinox Gym, Lifetime Fitness, and more. *Ibid*. & Ex. B.

C. Settlement Website

The Settlement Website (www.NeurobrandsClassAction.com) was made publicly accessible on

July 2, 2021 providing information on the lawsuit and access to case documents. Prutsman Decl., ¶ 6. The website contains a summary of the Settlement, a list of important dates, answers to frequently asked questions, and contact information. *Ibid*. The Settlement Website also includes key case filings for Class Members to access, including the complaint, amended complaint, Plaintiff's motion for preliminary approval, the Court's Preliminary Approval Order, the long and short form notices of class action settlement, as well as the settlement agreement, and Plaintiffs' motion for attorneys' fees. *Ibid*. The Settlement Website also displayed the deadline to submit an objection, and the date and time of the Fairness Hearing. *Ibid*. As of September 15, 2021, the website has received 6,056 total visits and 5,538 unique visits. *Ibid*.

The Settlement Website also listed the mailing address of a dedicated post office box and email address in order to receive correspondence from Class Members. Prutsman Decl., ¶ 5. As of September 15, 2021, no mail correspondence has been received from Class Members, and 43 emails have been received and responded to. *Ibid*.

D. CAFA Notice

In accordance with the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, Kroll Settlement Administration compiled a CAFA Notice Packet containing a thumb drive with the necessary case documents as well as cover letter. Prutsman Decl., ¶ 4 & Ex. A. On May 27, 2021, CAFA Notice was mailed via First-Class Certified Mail, to the Attorney General of the United States and the California State Attorney General. *Ibid*. No inquiries have been made from any Attorney General regarding this Settlement. *See* Marron Decl., ¶ 17.

V. OBJECTIONS

The objection deadline was September 8, 2021. Dkt. No. 90. As of September 15, 2021, zero (0) objections have been filed with the Court or received by counsel for the Parties or by the notice administrator. *See* Marron Decl., ¶ 17; *see also* Prutsman Decl., ¶ 9.

VI. THE SETTLEMENT SHOULD RECEIVE FINAL APPROVAL

"[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). Approval of a proposed class action settlement is governed by Federal Rule of Civil Procedure 23(e). "Rule 23(e)

was amended in 2018 to create uniformity amongst the circuits and to focus the inquiry on whether a proposed class action is 'fair reasonable, and adequate.'" *Moreno v. Beacon Roofing Supply, Inc.*, No. 19CV185-GPC(LL), 2020 WL 1139672, at *5 (S.D. Cal. Mar. 9, 2020). "[T]he 2018 amendment to Rule 23(e) establishes core factors district courts must consider when evaluating a request to approve a proposed settlement." *Zamora Jordan v. Nationstar Mortg., LLC*, No. 2:14-CV-0175-TOR, 2019 WL 1966112, at *2 (E.D. Wash. May 2, 2019).

Rule 23(e) now provides that the Court may approve a class action settlement "only after a hearing and only on a finding that it is fair, reasonable, and adequate after considering whether: (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2); *see also Briseno v. Henderson*, 998 F. 3d 1014, 1023-24 (9th Cir. 2021).

"Under Rule 23(e), both its prior version and as amended, fairness, reasonableness, and adequacy are the touchstones for approval of a class-action settlement." *Zamora*, 2019 WL 1966112, at *2. "The purpose of the amendment to Rule 23(e)(2) is establish [sic] a consistent set of approval factors to be applied uniformly in every circuit, without displacing the various lists of additional approval factors the circuit courts have created over the past several decades." *Id*. Factors that the Ninth Circuit have typically considered include (1) the strength of plaintiffs' 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 v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

"[T]he factors in amended Rule 23(e)(2) generally encompass the list of relevant factors previously identified by the Ninth Circuit." *Zamora*, 2019 WL 1966112, at *2 (alteration in original). Indeed, "[t]he goal of this amendment is not to displace any factor, but rather to focus the court and the

lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment. "Accordingly, the Court applies the framework set forth in Rule 23 with guidance from the Ninth Circuit's precedent, bearing in mind the Advisory Committee's instruction not to let '[t]he sheer number of factors' distract the Court and parties from the 'central concerns' underlying Rule 23(e)(2)." *In re Extreme Networks, Inc. Securities Litigation*, No. 15-CV-04883-BLF, 2019 WL 3290770, at *6 (N.D. Cal. July 22, 2019); *see also Hefler v. Wells Fargo & Co.*, No. 16-CV-05479-JST, 2018 WL 6619983, at *4 (N.D. Cal. Dec. 18, 2018).

A. Plaintiffs and Class Counsel Have Adequately Represented the Class

Rule 23(e)(2)(A) requires the Court to consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). This analysis is "redundant of the requirements of Rule 23(a)(4) and Rule 23(g), respectively." *Final approval criteria—Rule 23(e)'s multifactor test*, 4 NEWBERG ON CLASS ACTIONS § 13:48 (5th ed.). A determination of adequacy of representation requires that "two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000), *as amended* (June 19, 2000) (citing *Hanlon*, 150 F.3d at 1020); *see also Hefler*, 2018 WL 6619983, at *6.

As the Court previously found when it certified the Class, all requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(2) have been satisfied. *See* Dkt. No. 72 at pp. 5-13. Nothing since then has changed. There are no conflicts of interest with other class members and both Plaintiffs and Court-appointed Class Representatives have prosecuted this action vigorously on behalf of the Class.[3] Each of the named Plaintiffs pursued this action vigorously on behalf of the Class and each has kept informed about the status of the proceedings. This includes responding to discovery, sitting for tough depositions, reviewing material filings and submitting declarations, and consulting with counsel on other discovery issues. Both Class Representatives were fully prepared to testify at trial, have kept themselves informed

[3] *See* Declarations of Plaintiffs Renee Young and Joycette Goodwin. (Dkt. Nos. 88-5 & 88-6).

about the status of the proceedings, and are dedicated to vigorously pursuing this action on behalf of the Certified Class. Accordingly, the named Plaintiffs have adequately represented the Class.

Class Counsel have also vigorously represented the Class and have no conflicts of interest. The Settlement was negotiated by counsel with extensive experience in consumer class action litigation. *See* Marron Decl., ¶¶ 18-51 & Ex. 1 (firm resume of Law Offices of Ronald A. Marron). Through the discovery process, Class Counsel has obtained sufficient information and documents to evaluate the strengths and weaknesses of the case. Marron Decl., ¶ 12. *See Final approval criteria—Rule 23(e)(2)(A): Adequate representation*, 4 NEWBERG ON CLASS ACTIONS § 13:49 (5th ed.) ("if extensive discovery has been done, a court may assume that the parties have a good understanding of the strengths and weaknesses of their respective cases and hence that the settlement's value is based upon such adequate information."). Based on their experience, Class Counsel concluded that the Settlement provides exceptional results for the class while sparing the class from the uncertainties of continued and protracted litigation. Marron Decl., ¶ 15. *See, e.g., In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness."); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 976 (9th Cir. 2009) (Deference to Class 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."). Accordingly, adequacy of representation is satisfied.

B. The Settlement was Negotiated at Arm's Length

Rule 23(e)(2)(B) requires the Court to consider whether "the proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). Here, the settlement was reached after informed, arm's length negotiations after hard-fought litigation and discovery. The Parties did not settle until after the Court had entered an Order on Plaintiffs' Motion for Class Certification, substantial discovery had been completed, the Parties were preparing for summary judgment motions, and after the Parties exchanged mediation briefs. Marron Decl., ¶¶ 2-10. Settlement discussions also did not begin until after the Parties had exchanged written discovery and documents, which speaks to the fundamental fairness of the process. *See Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("A settlement following sufficient discovery and genuine arms-length negotiation is presumed

fair."). After motion practice and significant discovery efforts, the Parties retained JAMS mediator Judge Jay C. Gandhi (Ret.) for a private mediation session, with extensive follow-up telephonic negotiations. The time that it took to work out significant details and vigorous disagreements between the Parties and the Parties' need for additional telephonic sessions with Judge Gandhi demonstrate that this proposed resolution was the product of heavily disputed and arm's length negotiation (Marron Decl., ¶¶ 9-10) and the involvement of this highly experienced mediator supports a finding that the Settlement is not the product of collusion. *See Harris v. Vector Mktg. Corp.*, No. C–08–5198 EMC, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011) (finding that involvement of a mediator suggested the settlement "was not the result of collusion of bad faith by the parties or counsel"). Further, the Settlement itself bears none of the traditional signs of collusion. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-48 (9th Cir. 2011).

In short, Plaintiffs possessed a wealth of information before engaging in settlement negotiations and both Parties and their counsel were thoroughly familiar with the applicable facts, legal theories, and defenses on both sides. Marron Decl., ¶ 12. Based on this knowledge and their experience litigating and settling class actions, Class Counsel believe that the Settlement is fair, reasonable, and adequate. Marron Decl., ¶ 15. *See Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at *4 (N.D. Cal. Feb. 2, 2009) ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness.") (citation omitted). Therefore, this Court may presume that the settlement is fundamentally fair and was negotiated at arm's length by competent counsel who are experienced in class action litigation.

C. The Substantial Injunctive Relief Offered in the Settlement Supports Final Approval

Rule 23(e)(2)(C) requires that the Court consider whether "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C). "Before the Rule arrives at the articulation of sub-factors, its general directive asks whether the class's relief is adequate." *Final approval criteria—Rule 23(e)(2)(C): Adequate relief*, 4 NEWBERG ON CLASS ACTIONS § 13:51 (5th ed.). "In evaluating the value of the class members' claims, the court need not decide the

merits of the case nor substitute its judgment of what the case might be worth for that of class counsel; however, 'the court must at least satisfy itself that the class settlement is within the 'ballpark' of reasonableness.'" *Id.* (citation omitted).

In reaching the Settlement, Plaintiffs achieved their principal goal of effectuating meaningful changes to the Products or the Products' labels. The proposed Settlement provides for valuable injunctive relief in the form of Product reformulations or modifications to labeling and advertising materials (Agreement at § 4), which is the exact relief sought by the Plaintiffs on behalf of the injunctive relief class certified by this Court on October 15, 2020. (Dkt. No. 72). The value of this substantive and widespread change to Defendant's practices cannot be overstated. These reformulations and/or labelling changes achieve the goals of this lawsuit – providing more relevant information to Neurobrands consumers. *See Riker v. Gibbons*, No. 3:08-cv-00115-LRH-VPC, 2010 WL 4366012, at *4 (D. Nev. Oct. 27, 2010) (approving a settlement for injunctive and declaratory relief, finding that it "achieve[d] the goals of the lawsuit"). These changes will address the harm allegedly caused to the Class and provide Plaintiffs and the Class with invaluable relief going forward – a change in Product formulations and/or labeling and informational disclosures. Indeed, the primary form of relief under the UCL and FAL is injunctive in nature. *See* Cal. Bus. & Prof. Code §§ 17200, 17500. The harm that these statutes seek to redress is false or deceptive advertising in the marketplace. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 320 (2009); *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 954 (2017). The Settlement Agreement accomplishes this goal. *See* Agreement §§ 4.1-4.3. The prospect of continued litigation and a trial would have only delayed implementation of injunctive relief to the Class. And in any event, class members do not waive their right to pursue monetary damages or personal injury damages under the Settlement. Agreement § 6.2.

Here, the injunctive relief provided to the Class under the Settlement is more than adequate considering (i) the costs, risks, and delay of trial and appeal; and (ii) the terms of any proposed award of attorney's fees. *See* Fed. R. Civ. P. 23(e)(2)(C).[4]

[4] Because the Settlement provides only injunctive relief pursuant to Rule 23(b)(2), there is no claims process or distribution plan. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii). Moreover, no agreements were made in connection with the settlement aside from the Settlement Agreement itself. *See* Fed. R. Civ. P. 23(e)(2)(C)(iv); *see also* Marron Decl., ¶ 11.

1. The Costs, Risks, and Delay of Trial and Appeal Support Final Approval

The costs, risks, and delay of trial and appeal further support preliminary approval. Proceeding in this litigation in the absence of settlement poses various risks. The Settlement provides relief to the Class without the risks, costs, and delays inherent in continued litigation, all of which are important factors in considering the reasonableness of the Settlement. *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575-76 (9th Cir. 2004); *see also Rodriguez v. Bumblebee Foods, LLC*, 2018 U.S. Dist. LEXIS 69028, at *8 (S.D. Cal. Apr. 24, 2018) ("It has been held proper to take the bird in hand instead of a prospective flock in the bush.") (internal quotation marks omitted); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (same).

Continued litigation would have carried significant costs, risks, and delay with little additional payoff. Absent the Settlement, Plaintiffs anticipate Defendant would have continued to aggressively challenge Plaintiffs' claims—by filing summary judgment and *Daubert* motions, and even a motion to decertify the class. Despite Plaintiffs' confidence in the facts and legal theory that underpin their claims, they recognize that proceeding in this litigation in the absence of settlement poses various risks such as having summary judgment granted against Plaintiffs and the certified class 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.*, No. C 06-3903, 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 though Plaintiffs were able to certify a class, there is also a risk that the Court could later decertify the class action. *See In re Netflix Privacy Litig.,* No. 5:11-CV-00379 EJD, 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). The Settlement eliminates these risks by ensuring 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.*, No. 08-cv-02041 MNC, 2010 U.S. Dist. LEXIS 29042, at *8 (N.D. Cal. Mar. 5, 2010).

Considering the costs, risks, and delay associated with continued litigation, the robust injunctive relief secured through the Settlement represents an excellent result for the Class. Therefore, final

approval should be granted.

2. The Requested Attorneys' Fees Are Fair and Reasonable

Class Counsel has fully addressed the reasonableness of the fee request in Plaintiffs' Motion for Attorneys' Fees, Costs, and Incentive Awards that was filed on August 4, 2021. (Dkt. No. 91). Class Counsel seek fees in the amount of $715,857.80, plus out-of-pocket expenses in the amount of $34,142.20, for a total of $750,000.000, consistent with the Settlement and Class Notice. Agreement § 8.1.

As the Ninth Circuit and Supreme Court have noted, "the lodestar method yields a fee that is presumptively [reasonable]." *In re Hyundai & Kia Fuel Econ. Litig*., 926 F.3d 539, 571 (9th Cir. 2019) (quoting *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Class Counsel's lodestar for this action is $646,223.00 based on 1232.1 hours attributable to successfully prosecuting this action. *See* Dkt. No. 91-1 (Fee Motion). This results in a modest multiplier of 1.11.[5] *See id*. Accordingly, the Court should find that the requested attorneys' fees and expenses are fair and reasonable.

D. The Proposed Settlement Treats Class Members Equitably

Rule 23(e)(2)(D) requires the Court to consider whether the settlement agreement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). Here, the Settlement benefits all Class Members equally by requiring uniform Product reformulations or Product labeling modifications. Because each Class member is treated equally, the Court should approve the settlement as fair, reasonable, and adequate.

E. The Absence of Governmental Participation Supports Final Approval

Although CAFA does not create an affirmative duty for either state or federal officials to take any action in response to a class-action settlement, CAFA presumes that—once put on notice—state or federal officials will "raise any concerns that they may have during the normal course of the class action settlement procedures." *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08-1365, 2010 WL 1687832,

[5] Including 70 extra hours of "post-application" work to Class Counsel's lodestar calculated at a blended rate (to monitor Defendant's best efforts in Product reformulations (set to be completed by January 17, 2022), potentially insuring Product relabeling should Defendant's reformulation efforts fail, drafting this motion, and responding to objectors and appellate work (if any)), would reduce the multiplier to 1.05. *See* Dkt. No. 91-1 at p. 21, fn. 6.

at *14 (N.D. Cal. Apr. 22, 2010); *see also LaGarde v. Support.com, Inc.*, No. C 12-0609, 2013 WL 1283325, at *7 (N.D. Cal. Mar. 26, 2013) (same); *In re Netflix Privacy Litig.*, No. 5:11-cv-00379, 2013 WL 1120801 at *8 (N.D. Cal. Mar. 18, 2013) (same). To date, no state or federal official has raised any objection to the settlement. *See* Marron Decl., ¶ 17.

F. The Reaction of the Class Members to the Proposed Settlement Has Been Favorable

It is well established that "the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 529 (collecting cases); *see also Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D. N.Y. 2010) ("[A] small number of class members seeking exclusion or objecting indicates an overwhelming positive reaction of the class."). Here, the response from Class members has been overwhelmingly positive. As of September 15, 2021[6], there have been zero objections to the settlement. Prutsman Decl., ¶ 9. This positive reaction to the Settlement indicates the Court should grant final approval, as the Court "'may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it.'" *Garner*, 2010 WL 1687832, at *14. That inference applies with full force here.

VII. THE SETTLEMENT CLASS SHOULD BE CERTIFIED FOR FINAL APPROVAL

Nothing has changed since the Court certified the Class on October 15, 2020 (Dkt. No. 72 [Order on Motion for Class Certification]) and since the Court confirmed certification of the class in its Preliminary Approval Order (Dkt. No. 90 at ¶¶ 7-8). Accordingly, and for brevity, Plaintiff relies on the Court's original findings in certifying the Class following contested class certification briefing. *Id.*

VIII. CONCLUSION

For the reasons set forth above, the Court should grant final approval of Plaintiffs' class action settlement with Defendant Neurobrands, LLC.

[6]The Objection Deadline was September 8, 2021.

Dated: September 17, 2021

Respectfully submitted,

/s/ *Ronald A. Marron*
RONALD A. MARRON

LAW OFFICES OF RONALD A. MARRON, APLC
RONALD A. MARRON
MICHAEL HOUCHIN
LILACH HALPERIN
651 Arroyo Drive
San Diego, California 92103
Telephone: (619) 696-9006
Facsimile: (619) 564-6665
Class Counsel