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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ALEX ANG and LYNN STREIT, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BIMBO BAKERIES USA, INC.,

Defendant.

Case No. 3:13-CV-1196-HSG

OMNIBUS: (A) JOINT MOTION FOR FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT; and (B) PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS' FEES AND EXPENSE AWARD, AND SERVICE AWARDS FOR CLASS REPRESENTATIVES

Judge: Hon. Haywood S. Gilliam, Jr.
Action Filed: March 18, 2013

Hearing: August 27, 2020, at 2:00 p.m.

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INTRODUCTION

Plaintiffs Alex Ang and Lynne Streit (collectively, "Plaintiffs") and Defendant Bimbo Bakeries USA, Inc. ("BBUSA") respectfully submit this Omnibus (A) joint motion for final approval of proposed class action settlement (the "Settlement") of this lawsuit (the "Action"), and (B) Plaintiffs' motion requesting that the Court approve an award of fees and expenses to Plaintiffs' counsel in the amount of $325,000 and service awards to Plaintiffs in the amount of $5,000 each.[1] The terms of the Settlement are set forth in the Settlement Agreement and Release (hereinafter the "Agreement" or "Agr.") that the Court preliminarily approved on April 28, 2020.

As the Court is aware, the Settlement was reached following extensive litigation, culminating in the Court certifying a Fed. R. Civ. P. 23(b)(2) class and denying certification of a Rule 23(b)(3) class. *See* August 31, 2018 Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification (Dkt. No. 186, the "Class Certification Order"). Thereafter, the parties mediated the Action in a session supervised by the Hon. Philip M. Pro (Ret.), former Chief Judge for the United States District Court for the District of Nevada, resulting in the Settlement. The Settlement was thereafter modified, and the Agreement was forged following several in-person and telephonic conferences with the Court to ensure that the Agreement clearly explained what claims were not being waived and that Class members received adequate notice of the Settlement.

As the Court is aware, the Settlement's principal benefit is that it provides injunctive relief in the form of BBUSA's agreement to certify changes to the labels or formulations of the products at issue in the Action.[2] In addition, BBUSA agreed that, for a period of two (2) years, it would advise Class Counsel of any changes to the label statements or formulations of the products at issue to the extent the labeling claims relate to the following: (1) for the "Whole Grain" Class products, any labeling statement that the product is a "good source of whole grain" or "excellent source of whole grain"; (2) for the "100% Whole Wheat" Class products, any change to the product formulation to

[1] Although the Agreement permits Plaintiffs to apply for service awards up to $10,000 each, based on review of comparable awards, Plaintiffs only seek one-half that amount.

[2] A specific list of those products and the labeling changes is set forth at § 4.4 of the Agreement.

include "soy flour"; and (3) for the "Added Coloring" Class products, any change to the product formulation to include "color". *See* Agr. §4.7. Upon being notified of any such changes, Class Counsel will have fifteen (15) days from the date of notice to inform BBUSA if they object to the proposed labeling change. The parties will attempt to resolve any disputes amicably and in good faith. As the Court is aware, BBUSA agreed to pay a total sum of $325,000 in full settlement of the lawsuit to be used for attorneys' fees, litigation costs, and incentive awards. As part of the Settlement, the parties will release each other from all claims and potential claims arising out of the Action or the same nucleus of operative fact as the Action.

As noted above, on April 28, 2020, the Court preliminarily approved the Settlement. (*See* Dkt. No. 236). The Court found that the proposed Settlement (1) appeared to be the product of serious, informed, non-collusive negotiations; (2) did not grant improper preferential treatment to class representatives or other segments of the class; (3) fell within the range of possible approval; and (4) had no obvious deficiencies. The circumstances remain unchanged since that finding. To the parties' knowledge, no Class Member or other person has expressed any negative reaction to the Settlement. Accordingly, for the reasons set forth in this motion and in their Joint Motion for Preliminary Approval, the parties respectfully request that the Court grant final approval of the Settlement.

Furthermore, Plaintiffs respectfully request that the Court grant their unopposed request for an award of $325,000 in attorneys' fees, and modest service awards in the amount of $5,000 each for Plaintiffs Ang and Streit. This action asserts California claims and, thus, the Court applies California law to determine both the right to, and method for, calculating fees. *See Mangold v. Cal. Pub. Utils. Comn'n,* 67 F.3d 1470, 1478 (9th Cir. 1995); *Rodriguez v. Bumble Bee Food LLC,* 2018 U.S. Dist. LEXIS 69028, at *14 (S.D. Cal. Apr. 24, 2018). Counsel's hourly rates are reasonable, counsel expended a reasonable number of hours on this lawsuit and a multiplier here is appropriate in light of the case's status at the time of the Settlement. The Action was a hard-fought lawsuit, which included motion practice and discovery (on a time-pressured basis) and multiple rounds of briefing and supplemental briefing regarding class certification issues. As set forth in the Joint Preliminary Approval Motion, the $325,000 fee-and-expense award is, respectfully, a fraction of the nearly $990,000 in fees and

$90,000 in costs Class Counsel incurred in this Action. As for the service awards, Plaintiffs Ang and Streit actively monitored this case, provided documents, sat for depositions, and, most notably, faced the pressure of Defendants' motion for sanctions for alleged spoliation, which was denied. In light of that work and burden, combined with the benefits achieved for the Class (including future monitoring), Plaintiffs respectfully submit that $5,000 service awards – only one-half of what the Agreement contemplates – are eminently reasonable. Accordingly, as described in detail below, the Settlement satisfies all of the criteria for (1) final approval and (2) awarding Class Counsel's attorneys' fees and expenses and the Class Representatives' modest service awards.[3]

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

BBUSA is the largest bakery company in the United States. *See* Second Amended Complaint (Dkt. No. 40, the "SAC") at ¶1. BBUSA owns and has distributed products under the following brands: Arnold, Ball Park, Bimbo, Boboli, Brownberry, Earthgrains, Entenmann's, Francisco, Freihofer's, Marinela, Mrs. Baird's, Oroweat, Sara Lee, Stroehmann, Thomas', and Tia Rosa. *Id.*

On March 18, 2013, Plaintiffs filed the Action. *See* Dkt. No. 1. On November 4, 2013, Plaintiffs filed the SAC, alleging that BBUSA sold its products with false, misleading, and deceptive labeling in order to increase sales and profits. SAC at ¶172. Plaintiffs' SAC sought injunctive relief and statutory damages, alleging violations of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*, the California False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq.* and the Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* SAC at ¶¶32-40. BBUSA has denied and continues to deny the SAC's allegations, including all claims of wrongdoing or liability against it in the Action, and contends that it would have prevailed on the merits of the Action. The parties engaged in extensive motion practice—which significantly narrowed the scope of Plaintiffs' claims—and discovery, which included the exchanging documents, producing expert reports and conducting depositions.

[3] As of the date of this Omnibus Motion's submission, the time for class members to file objections has not yet concluded. Accordingly, the parties believe it appropriate to file a Proposed Final Omnibus Order closer in time to the Final Approval Hearing on August 27, 2020, so the Court may account for any issues that potentially arise between now and that hearing. Should the Court wish to receive a proposed order earlier in time, the parties will, of course, provide one.

On August 31, 2018, the Court issued the Class Certification Order (reported at *Ang v. Bimbo Bakeries USA, Inc.*, 2018 U.S. Dist. LEXIS 149395 (N.D. Cal. Aug. 31, 2018)), which concluded that Plaintiffs satisfied Fed. R. Civ. P. 23(a)'s requirements for numerosity, commonality, typicality, and adequacy and the requirements of Rule 23(b)(2), but not the requirements of Rule 23(b)(3). *See* Class Certification Order at 17-18, 28. The order certified four California classes for injunctive relief under Rule 23(b)(2) but denied class certification for damages under Rule 23(b)(3). *Id.* at 18, 28. The Court also appointed named Plaintiffs as the Class Representatives and appointed Fleischman Law Firm, PLLC (now Fleischman Bonner & Rocco LLP) and Barrett Law Group, P.A. as co-lead counsel, and Pratt & Associates as local counsel (together, "Class Counsel"). *Id.* at 28-29.

On July 31, 2019, the parties engaged in a full-day mediation overseen by the Hon. Philip M. Pro (Ret.), former Chief Judge for the United States District Court for the District of Nevada and professional mediator at JAMS with substantial experience in mediating class actions. After arm's-length negotiations supervised by Judge Pro, the parties reached an agreement and drafted and executed a term sheet. The terms of resolution were thereafter formally and comprehensively documented in a draft agreement.

On December 13, 2019, the parties moved for preliminary approval of the Settlement. (Dkt. No. 217). On February 13, 2019, the Court held a hearing to consider the Preliminary Approval Motion. The Court issued a Text Order (Dkt. No. 221) advising that, because the Settlement appeared to contain a broad release of claims not certified in the Action, it was directing the parties to meet and confer and file a joint statement advising whether they would agree to amend the Settlement. The parties submitted a Joint Statement on February 22, 2020 (Dkt. No. 222), attaching a revised settlement agreement that modified §8 of the draft agreement and any related terms so that the Settlement only released: (1) all claims for injunctive relief against BBUSA that were certified for class treatment in the Class Certification Order; and (2) the named Plaintiffs' individual claims brought on their own behalf in their individual capacity against BBUSA.

On February 25, 2020, the Court issued an order directing further supplemental briefing in support of the Preliminary Approval Motion to address whether the parties should be required to

provide notice to the Class, and to clarify the nature of the injunctive relief concerning certain products labeled "100% Whole Wheat" that the SAC alleged contained soy flour. (Dkt No. 223). The parties filed a supplemental joint statement addressing these issues on March 3, 2020 (Dkt No. 226), and the Court held a case management conference on March 10, 2020, at the conclusion of which the Court directed the parties to again meet-and-confer and file a proposed Notice Plan for the settlement class. The parties filed a proposed Notice Plan on March 20, 2020. (Dkt. No. 231). On April 31, 2020 the Court issued an order denying the Preliminary Approval Motion (Dkt. No. 232, reported at *Ang v. Bimbo Bakeries USA, Inc.*, 2020 U.S. Dist. LEXIS 56273, at *2 (N.D. Cal. Mar. 31, 2020)), based on the Court's concerns regarding the Notice Plan's adequacy. The parties thereafter filed a Joint Case Management Statement on April 7, 2020 setting forth a revised Notice Plan (Dkt. No. 233), and, following a subsequent April 8, 2020 Order (Dkt. No. 234), filed a Renewed Joint Motion for Preliminary Approval on April 17, 2020. (Dkt. No. 235). The Court issued its order granting preliminary approval on April 28, 2020. (Dkt. No. 236 (reported at *Ang v. Bimbo Bakeries USA, Inc.,* 2020 U.S. Dist. LEXIS 74775, at *2 (N.D. Cal. Apr. 28, 2020))).

THE SETTLEMENT'S TERMS

A. The Settlement Class

The "Class" or the "Settlement Class Members" means: All persons or entities who or that made purchases in California of any BBUSA products identified in the Class Certification Order. *See* Agr. at ¶1.7; Class Certification Order at 1-3.

The "Class Period" means the period during which BBUSA is alleged to have mislabeled the products identified in the Agreement, ranging from March 18, 2009 to the present. *Id.* at 2. Pursuant to the Court's Procedural Guidelines for Class Action Settlements, the Settlement Class under the Agreement does not differ from the class certified in the Class Certification Order. *See* Agr. at ¶1.7.

B. Injunctive Relief

The Agreement provides injunctive relief designed to ensure that the product labeling statements and formulations challenged in the SAC have been changed and are no longer in use. BBUSA has altered, changed or otherwise modified either the labeling or the formulations of the

products at issue. Specifically, BBUSA certifies in the Agreement that it has made the following changes to the labels and/or formulations of the following products:

Product Name	Changes Made
Oroweat Dark Rye Bread	• Color removed
Oroweat Sweet Hawaiian Bread	• Color removed
Sara Lee 100% Whole Wheat Bread (Classic 100% Whole Wheat Bread)	• Soy flour removed from ingredients list • "Good source of whole grain" claim removed • Brand was divested and is no longer controlled by BBUSA in California
Sara Lee Soft & Smooth Whole Grain White Bread	• "Good source of whole grain" claim removed • Brand was divested and is no longer controlled by BBUSA in California
Sara Lee Soft & Smooth 100% Whole Wheat Bread	• "Good source of whole grain" claim removed • Brand was divested and is no longer controlled by BBUSA in California
Thomas' Plain Bagel Thins	• American Heart Association ("AHA") Heart Check Mark removed
Thomas' 100% Whole Wheat Bagel Thins	• AHA Heart Check Mark removed • Soy flour removed from ingredients list • Product discontinued
Thomas' Everything Bagel Thins	• AHA Heart Check Mark removed
Bimbo Original Toasted Bread	• Color removed
Bimbo Double Fiber Toasted Bread	• Color removed
Bimbo 100% Whole Wheat Tortillas	• Discontinued
Thomas' Cinnamon Raisin Swirl Toasting Bread	• Color removed
Thomas' 100% Whole Wheat Bagels	• Soy flour removed from ingredients list
Thomas' 100% Whole Wheat Mini Bagels	• Soy flour removed from ingredients list • Product discontinued
Sahara 100% Whole Wheat Pita Pockets	• Soy flour removed from ingredients list • Product discontinued

Thomas' 100% Whole Wheat English Muffins	• Soy flour removed from ingredients list[4]

In addition to the specific changes listed above and at §4.4 of the Agreement, for a period of two (2) years from the Settlement Effective Date, and subject to a confidentiality order, BBUSA will advise a designated representative of Class Counsel[5] of any changes to the products' labels as soon as reasonably practicable (the "Notice") to the extent they relate to the products' labeling in California as follows:

(a) For the "Whole Grain" Products: Any labeling statement that a product is a "good source of whole grain" or an "excellent source of whole grain";

(b) For the "100% Whole Wheat" Products: Any change to the product formulation to include "soy flour" as an ingredient; and

(c) For the "Added Coloring" Products: Any change to the product formulation to include "coloring" as an ingredient.

See Agr. at §4.7. Class Counsel will have fifteen (15) days from the date of Notice to inform BBUSA if they object to a labeling change. *Id.* The parties will amicably and in good faith attempt to resolve all disputes over labeling changes on an informal basis; that is, without litigation or Court intervention. *Id.*

C. Notice To The Settlement Class Members

Following the Court's March 31, 2020 Order initially denying the Preliminary Approval Motion, the parties revised their joint notice plan. The parties issued a joint notice, the text of which was set forth in their Joint Proposed Notice Plan. (Dkt. No. 231). The Notice was published on the websites of both Class Counsel and BBUSA. In addition, BBUSA issued a press release announcing the Settlement, and directing Class Members and the public's attention to websites where further

[4] This chart is set forth in §4.4 of the Agreement.

[5] The Agreement provides that such designated representatives will be Ben F. Pierce Gore of Pratt & Associates, and Keith M. Fleischman and Joshua D. Glatter of Fleischman Bonner & Rocco LLP. *See* Agr. at §11.11.

information regarding the Settlement could be accessed, downloaded and reviewed. To that end, BBUSA and Class Counsel posted on their websites links to the Agreement, Notice and other Settlement-related documents for public review. Additionally, when the Court granted the parties' application for a brief extension of the date to file the Final Approval Motion (Dkt. No. 240), BBUSA and Class Counsel updated the Notice on their websites to advise Class Members that the time to file any objections to the Final Approval Motion was extended to July 31, 2020 (Dkt. No. 240), and Class Counsel posted that order on their websites. Furthermore, BBUSA has provided the federal and California Attorneys General with notice of the Settlement in accordance with the Class Action Fairness Act ("CAFA") under 28 U.S.C. §1715. (*See* Exhibits A and B to the accompanying Declaration of Anne Kelts Assayag.) Thus, the Notice, which this Court approved, was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (citations omitted). The Notice also described "the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980). Accordingly, notice to Class Members was adequate. To date, no objections or communications of any kind have been received by the parties or filed with the Court with respect to the Settlement, including by any Attorneys General.

D. Scope of Release

Under the terms of the Agreement as revised, the parties release each other from all claims (1) on behalf of the Class, for injunctive, declaratory or other equitable relief that arise out of or in any way relate, directly or indirectly, to the Injunctive Relief Claims prior to the Settlement Effective Date and/or (2) on behalf of the named Plaintiffs, that arise out of or in any way relate, directly or indirectly, to the Individual Claims prior to the Settlement Effective Date (collectively, the "Released Claims"). Nothing in the Agreement constitutes a waiver of any claims by Plaintiffs or Class Members arising entirely after the Effective Date. Agr. at §8.1. To the extent a Class Member believes he or she has a basis to commence a timely claim for money damages or personal injury, the Agreement's release

provisions do not bar any such action. Only the named Plaintiffs have released all of their claims by virtue of their agreement to voluntarily dismiss their claims with prejudice.

ARGUMENT

The parties respectfully adopt and incorporate by reference the arguments set forth in their Preliminary Approval Motion and Renewed Preliminary Approval Motion. Settlement is a strongly favored dispute-resolution method, *see Utility Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989), and that is especially true for class actions, where, as here, "substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation." *Fontes v. Heritage Operating, L.P.*, 2016 U.S. Dist. LEXIS 50502, *7 (S.D. Cal. Apr. 14, 2016) (citation omitted); *see also In re Synoc ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (Public policy "strong[ly] . . . favors settlements, particularly where complex class action litigation is concerned"); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) ("[O]verriding public interest in settling and quieting litigation" is "particularly true in class action suits." (internal quotations omitted)).

"Courts may certify a class action only if it satisfies all four requirements identified in Federal Rule of Civil Procedure 23(a), and satisfies one of the three subdivisions of Rule 23(b)." *Ma v. Covidien Holding, Inc.*, 2014 WL 360196, at *1 (C.D. Cal. Jan. 31, 2014). For settlement purposes only, the parties agree that the class elements are met. Rule 23(e) requires Court approval before the claims, issues, or defenses of a certified class can be settled, voluntarily dismissed, or compromised. Fed. R. Civ. P. 23(e). The purpose of this rule "is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights." *In re Synoc.*, 516 F.3d at 1100. Accordingly, if a settlement is "fundamentally fair, adequate, and reasonable," it must be approved. *In re Heritage Bond Litig.*, 546 F.3d 667, 674-675 (9th Cir. 2008); *see also In re Wireless Facilities, Inc. Secs. Litig. II*, 253 F.R.D. 607, 610 (S.D. Cal. 2008) ("Settlements that follow sufficient discovery and genuine arms-length negotiation are presumed fair").

I. RULE 23'S REQUIREMENTS ARE SATISFIED

In the interest of efficiency, the parties adopt and incorporate herein by reference the Class Certification Order's findings. In sum, this Court concluded:

- Plaintiffs possessed standing generally because there was sufficient evidence they purchased the products at issue, and read and relied upon the challenged label statements. Class Certification Order, 2018 U.S. Dist. LEXIS 149395, at *12-16. Plaintiffs also possessed standing sufficient to seek injunctive relief under Rule 23(b)(2). *Id.* at *25-28.
- The Class was sufficiently numerous in satisfaction of Rule 23(a)(1). *Id.* at *20-21.
- There were sufficient questions of law or fact common to the class in satisfaction of Rule 23(a)(2). *Id.* at *21-22.
- The named Plaintiffs' claims were typical of the Class's claims and/or defenses, in satisfaction of Rule 23(a)(3). *Id.* at *22-24.
- The named Plaintiffs would fairly and adequately represent the Class's interests, in satisfaction of Rule 23(a)(4). *Id.* at *24-25.[6]
- Plaintiffs adequately demonstrated that a single injunction would provide relief to each class member, in satisfaction of Rule 23(b)(2). *Id.* at *25-28.

Accordingly, all applicable Rule 23 rules are satisfied with respect to injunctive relief claims only.

II. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

Rule 23(e) requires judicial approval of a proposed class action settlement based on a finding that the agreement is "fair, reasonable, and adequate." *Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012); *see also Pilkington v. Cardinal Health, Inc.,* 516 F.3d 1095, 1101 (9th Cir. 2008) (Public policy "strong[ly] . . . favors settlements, particularly where complex class action litigation is concerned"); *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 576 (9th Cir. 2004); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) ("[O]verriding public interest in settling and quieting litigation" is "particularly true in class action suits" (internal quotations omitted)). A proposed settlement "need not be ideal, but it must be fair and free of collusion, consistent with a plaintiff's fiduciary obligations to the class." *Lilly v. Jamba Juice Co.*, 2015 U.S. Dist. LEXIS 34498, *18-19 (N.D. Cal. Mar. 18, 2015).

[6] The Court appointed Plaintiff Ang as a representative for all four certified classes, and appointed Plaintiff Streit as a class representative for the "Whole Grain Class" and the "Whole Wheat Class." *Id.* at *48.

Under Rule 23(e), "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). The purpose of this rule "is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008). Therefore, before a court approves a settlement, it must conclude that the settlement is "fundamentally fair, adequate, and reasonable." *In re Heritage Bond Litig.*, 546 F.3d 667, 674-75 (9th Cir. 2008). The Court may issue final approval of the Settlement only after a hearing and upon finding that it is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2); *see also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)). In making this determination, the Court considers a number of non-exhaustive factors, including: (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; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *Churchill*, 361 F.3d at 575 (9th Cir. 2004). The Court may also consider the procedure by which the parties arrived at the Settlement to assess if the Settlement is truly the product of arm's-length bargaining, rather than collusion or fraud. *Chun–Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010).

A. The Agreement Resulted From Serious, Informed, Non-Collusive, Arm's-Length Negotiation

Settlement agreements reached after hard-fought litigation and arm's-length negotiations are "entitled to an initial presumption of fairness." *In re High-Tech Employee Antitrust Litig.*, 2013 U.S. Dist. LEXIS 180530, *6-7 (N.D. Cal. Oct. 30, 2013) (internal quotations and citations omitted). As previously discussed, and as acknowledged in the Preliminary Approval Order, this Action was litigated over nearly seven (7) years, including deposing both Plaintiffs, producing and reviewing thousands of documents, exchanging expert reports and deposing expert witnesses, deposing BBUSA's Rule 30(b)(6) designee, and extensive briefing on motions seeking dismissal, spoliation sanctions and class certification. The parties have had a genuine opportunity to consider the Court's

various rulings, take meaningful discovery and gauge the feasibility and benefits of settlement versus continued litigation. *See In re Wireless Facilities*, 253 F.R.D. at 610 (settlements that follow sufficient discovery and genuine arm's-length negotiation are presumed fair). As the Court is aware, the Settlement was reached only after an intense, full day mediation session that Judge Pro supervised and guided. *Kline v. Dymatize Enters., LLC*, 2016 U.S. Dist. LEXIS 142774, *5 (S.D. Cal. Oct. 13, 2016) ("That the settlement was reached with the assistance of an experienced mediator further suggest that the settlement is fair and reasonable") (citation omitted).

Thanks to the parties', the Court's and Judge Pro's efforts, Plaintiffs' claims were substantially investigated and/or are substantially understood so that the parties and their counsel could candidly assess the merits and weaknesses of the SAC's claims and the defenses thereto.[7] Especially when considered in light of Judge Pro's outstanding and unbiased mediation work, and the fact that the Court preliminary approved the Settlement only after several hearings resulting in adjustments to ensure that the Settlement was clear, proper and provided adequate notice, the parties respectfully submit that Settlement reflects serious, informed, non-collusive, and arm's-length negotiation, and thus requires granting preliminary approval.

B. The Strength Of Plaintiffs' Case, The Risks, Expenses, Complexities And Duration Of Further Litigation And The Risk Of Maintaining Class Certification Through Trial

The likely expense, complexity, duration and risk involved in further litigation strongly favor the Settlement, resulting in prompt injunctive relief and an all-inclusive payment. *See Kline,* 2016 U.S. Dist. LEXIS 142774, *13-14 ("[W]hile confident in the merits of their case, Plaintiffs are cognizant of the inherent risks of lengthy litigation . . . The proposed settlement adequately accounts for these risks"); *Vasquez v. Coast Valley Roofing, Inc.,* 266 F.R.D. 482, 489 (E.D. Cal. 2010) (in weighing the risk of future litigation, "a court may consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after

[7] Section 3.1 of the Agreement sets forth a detailed list of considerations the parties evaluated in reaching the Settlement.

protracted and expensive litigation") (internal quotation marks omitted).

As explained in the Preliminary Approval Motion, the SAC alleges BBUSA violated the Food, Drug and Cosmetic Act, Food and Drug Administration regulations and California's Sherman Law by intentionally labeling certain of its products with misrepresentations to increase sales by implying that its products are healthier or of better quality than competing products. BBUSA denied those allegations, arguing that Plaintiffs cannot show the product labels in question were misleading or violated any laws or regulations or that increased prices were charged because of any of the labeling statements. BBUSA further argued that Plaintiffs lack standing to pursue injunctive relief claims because they failed to produce evidence that they purchased products containing the allegedly misleading labeling statements and, therefore, have not suffered any injury causally connected to the alleged mislabeling of products. The parties' experts prepared reports on the purchasing decisions of consumers and what affect—if any—the labeling at issue would have. The parties plan to offer similar testimony should the litigation continue and BBUSA anticipated bringing a motion for summary judgment to dismiss Plaintiff's remaining claims.

The costs associated with paying experts, further motion practice and discovery, and proceeding through litigation are not superior to the injunctive relief the Settlement provides. Not settling – beyond the financial burdens of continued litigation – raises considerable risks, including: risking the Rule 23(b)(2) class's decertification; losing a summary judgment motion on the merits; the uncertainties of a jury verdict or motion for judgment as a matter of law and appellate challenges to any verdict or rulings issued in the District Court. Moreover, if any Class Members other than the Plaintiffs disagree that the complexity and expense of the case compared to its potential upside favor the Settlement, they are not prohibited from pursuing their own damages claims, which are not waived. These factors and the parties' joint desire to resolve this matter as set forth in the Agreement favor approving the Settlement.

C. The Settlement Provides Meaningful Relief

The Settlement provides meaningful injunctive relief and does not bar Class Members from seeking monetary relief. "[A] proposed settlement may be acceptable even though it amounts to only

a fraction of the potential recovery that might be available to the class members at trial." *Nat'l Rural Telecomm'ns Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (citing *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982)). The injunctive relief afforded here "comports with the purpose of [California's consumer protection statutes] because it protects consumers from" misleading advertising and "is consistent with the injunctive relief approved in . . . cases involving similar facts." *Bee, Denning, Inc. v. Capital Alliance Grp.*, 2016 U.S. Dist. LEXIS 96123, 2016 WL 3952153, at *8 (S.D. Cal. July 21, 2016); *see also Johnson v. Triple Leaf Tea, Inc.*, 2015 U.S. Dist. LEXIS 170800, *12-13 (N.D. Cal. Nov. 16, 2015) (granting final approval, noting "[t]he Settlement affords meaningful injunctive relief" where "the labeling of the Products shall be substantially revised").

D. The Agreement Does Not Provide Preferential Treatment

Because the Court only certified Plaintiffs' injunctive relief claims and did not certify Plaintiffs' damages claims, the Agreement provides for injunctive relief only, with no monetary distribution to Class Members. Thus, neither the Class Representatives nor any Class Member is receiving preferential treatment. All Class Members benefit equally from the labeling and/or formulation changes provided by the Agreement. *See Hart v. Colvin*, 2016 U.S. Dist. LEXIS 155799, *27 (N.D. Cal. Nov. 9, 2016) ("When . . . the settlement provides for only injunctive relief . . . there is no potential for the named plaintiffs to benefit at the expense of the rest of the class") (quotation and citation omitted). *Accord Stathakos v. Columbia Sportswear Co.*, 2018 U.S. Dist. LEXIS 17138, at *9 (N.D. Cal. Jan. 25, 2018).

Although Plaintiffs request the Court's approval of $5,000 service awards to Plaintiffs Ang and Streit for their role as Class Representatives in the Action, the "Ninth Circuit has recognized that service awards to named plaintiffs in a class action are permissible and do not render a settlement unfair or unreasonable." *Harris v. Vector Mktg. Corp.*, 2011 U.S. Dist. LEXIS 48878, *28 (N.D. Cal. Apr. 29, 2011) (citing *Stnton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003)). Service awards to class representatives do not per se constitute an impermissible conflict between class members and their representatives. *Campbell v. Facebook, Inc.*, 2017 U.S. Dist. LEXIS 132624, *12 (N.D. Cal. Aug. 18,

2017), *aff'd* 951 F.3d 1106 (9th Cir. 2020). Here, Plaintiffs Ang and Streit were each deposed, cooperated with Class Counsel in responding to a motion for alleged spoliation sanctions, routinely communicated with Class Counsel, and secured injunctive relief for the Class. If the Court approves a service award for each of them, that simply indicates the efforts Plaintiffs bore to achieve Class relief. Thus, the absence of any preferential treatment supports approving the Agreement.

E. The Settlement Falls Within The Range Of Possible Approval

"To determine whether a settlement 'falls within the range of possible approval,' a court must focus on 'substantive fairness and adequacy,' and 'consider plaintiffs' expected recovery balanced against the value of the settlement offer.'" *Villegas v. J.P. Morgan Chase & Co.*, 2012 U.S. Dist. LEXIS 166704, *20 (N.D. Cal. Nov. 20, 2012) (citing *In re Tableware*, 484 F. Supp. 2d at 1080). Here, BBUSA has altered, eliminated, or otherwise modified either the labeling of the products at issue or the formulations of those products. Further, BBUSA has agreed—for a period of two (2) years—to notify Class Counsel of any changes to the label statements or formulations of the products at issue, to the extent they relate to the claims referenced in the SAC and listed at § 4.7 of the Agreement, and provide them with an opportunity to object to those changes. In similar circumstances, courts have found such settlements worthy of preliminary approval. *See In re Ferrero Litig.*, 2012 U.S. Dist. LEXIS 94900, *12 (S. D. Cal. July 9, 2012) ("Defendant agreed to modify the product label to address the fundamental claim raised in Plaintiffs' complaint . . . The Court concludes that the proposed settlement provides an appropriate remedy to class members. It both considers the strength of Defendant's defenses and obstacles to class-wide recovery, while also addressing the concerns in Plaintiff's complaint"), *aff'd* 583 Fed. Appx. 665 (9th Cir. 2014).

The agreed-upon relief negotiated with Judge Pro's substantial assistance in this case was the product of arm's-length negotiations, conducted after considerable litigation and discovery, resulting in significant injunctive relief that reflects tangible value to the Class Members. When comparing this relief to Plaintiffs' expected recovery—taking into account that no Rule 23(b)(3) class was certified and that BBUSA intended to bring a motion for summary judgment on the merits of Plaintiffs' claims—the Agreement clearly provides substantial value to the Class.

F. The Agreement Has No Deficiencies

A court will likely find a settlement agreement free from obvious deficiencies when it provides immediate injunctive relief while at the same time mitigates the potential uncertainties in continuing litigation. Here, although the Court did not certify a proposed Rule 23(b)(3) class, it certified a Rule 23(b)(2) class and the injunctive relief provided for in the Agreement is significant. Under the terms of the Settlement, the products alleged in the SAC to be mislabeled have either been reformulated or their labels have been changed, immediately benefiting the entire Class. The Agreement also provides mechanisms and procedures to address any future label changes, including providing notice to Class Counsel and an objection process. Moreover, the Agreement has no "obvious substantive defects such as . . . overly broad releases of liability." *Newberg on Class Actions* §13:15 (5th ed. 2014). Consequently, the absence of any deficiencies supports approving the Settlement.

G. Counsel's Experienced Judgment And Views

"The recommendations of plaintiff['s] counsel should be given a presumption of reasonableness" when contemplating approval of a settlement. *Knight v. Red Door Salons, Inc.*, 2009 U.S. Dist. LEXIS 11149, *11 (N.D. Cal. Feb. 2, 2009) (citation omitted). Class Counsel here has substantial experience in class action litigation and, in particular, with class action litigation specific to California's consumer protection statutes and false labeling laws. The opinion of experienced counsel supporting the Settlement is entitled to considerable weight. Furthermore, Class Counsel's experienced judgment and views -- which guided their decision in drafting and negotiating the relief contained in the Agreement and that were informed by the guidance and perspective of Judge Pro -- should be given significant weight in the Court's consideration of this joint motion.

H. There Has Been No Negative Reaction To The Settlement.

The parties issued a press release, announced the Settlement on BBUSA's and Class Counsel's websites, and made Settlement documents available for review and downloading. Additionally, BBUSA provided the federal and California Attorneys General with the CAFA notice required under 28 U.S.C. §1715. To the parties' and their counsel's knowledge, no Class Member, Attorney General, or other person has expressed any negative reaction to the Settlement as of the date of this filing. (*See*

accompanying Declaration of Joshua D. Glatter, Esq. In Support of Omnibus Motion ("Glatter Decl.") at ¶4.)

III. THE COURT SHOULD AWARD CLASS COUNSEL $325,000 IN FEES AND EXPENSES

"An award of attorneys' fees incurred in a suit based on state substantive law is generally governed by state law." *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1024 (9th Cir. 2003). If the proposed Settlement receives final approval, Class Counsel is entitled under California law to an award of attorneys' fees and costs on statutory, equitable, and contractual bases.

Plaintiffs brought claims pursuant to, *inter alia*, the California Consumers Legal Remedies Act. (*See* SAC at ¶¶302-321.) The CLRA mandates an award of fees to a prevailing plaintiff. Cal. Civ. Code §§1780(e) (court "shall award court costs and attorney's fees to a prevailing plaintiff"), 1788.30(c)). This is because the Act "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protections," Cal. Civ. Code §1760, and "the availability of costs and attorneys' fees to prevailing plaintiffs is integral to making the CLRA an effective piece of consumer legislation, increasing the financial feasibility of bringing suits under the statute." *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 644 (2009) (quoting *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 1086 (1999)); *see also Haywood v. Ventura Volvo*, 108 Cal. App. 4th 509, 512 (2003). "Accordingly, an award of attorney fees to 'a prevailing plaintiff' in an action brought pursuant to the CLRA is mandatory, even where the litigation is resolved by a pretrial settlement agreement." *Kim v. Euromotors W./The Auto Gallery*, 149 Cal. App. 4th 170, 178- 79 (2007).

Furthermore, California's Private Attorney General Statute, Cal. Code Civ. P. §1021.5, provides for an award of fees to a "successful" plaintiff if (1) the action "has resulted in the enforcement of an important right affecting the public interest," (2) "a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons," and (3) "the necessity and financial burden of private enforcement . . . are such as to make the award appropriate . . . ." *Serrano v. Stefan Merli Plastering Co., Inc.*, 52 Cal. 4th 1018, 1020 (2011) (quoting Cal.

Code Civ. P. §1021.5, and citing *Woodland Hills Residents Assn., Inc. v. City Council*, 23 Cal. 3d 917, 935 (1979)). Though §1021.5 "is phrased in permissive terms . . . the discretion to deny fees to a party that meets its terms is quite limited." *Lyons v. Chinese Hosp. Ass'n*, 136 Cal. App. 4th 1331, 1344 (2006).

Here, Plaintiffs maintain that they are "prevailing" or "successful" parties under these statutes because, through the Settlement, the litigation achieved its objective of addressing what Plaintiffs maintained were misleading labeling practices by BBUSA with respect to the products at issue and in implementing mechanisms that enable the parties to address future potential labeling changes. *See Henderson v. J.M. Smucker Co.*, 2013 LEXIS 166061, at *4 (C.D. Cal. Nov. 20, 2013) ("Plaintiff obtained the 'primary relief' she sought because 'from a practical perspective, Plaintiff has enforced California consumer protection laws to the extent [she] induced Defendant to remove [partially hydrogenated vegetable oil] from Uncrustables,'" rendering its packaging no longer inaccurate (record citation omitted)); *Graciano v. Robinson Ford Sales, Inc.*, 144 Cal. App. 4th 140, 153 (2006) ("It is settled that 'plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit'" (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983))).

Section 1021.5's requirements are also satisfied. Under that statute, the key inquiry is "whether the financial burden placed on the party [claiming fees] is out of proportion to its personal stake in the lawsuit." *Lyons*, 136 Cal. App. 4th 1352. Here, the amount any Class Member spent to purchase any individual package of the challenged products was certainly no more than $10, an amount not large enough to economically justify individual litigation. Further, the "elimination of allegedly false representations . . . confers a benefit on both the class members and the public at large." *See Brazil v. Dell Inc.*, 2012 LEXIS 47986, at *1 (N.D. Cal. Apr. 4, 2012) (citation omitted).

Statutory bases aside, trial courts can exercise their equitable power to award attorneys' fees and costs when representative litigation secures a substantial benefit. *Serrano v. Priest*, 20 Cal. 3d 25, 38 (1977); *Glendora Cmty. Redevelopment Agency v. Demeter*, 155 Cal. App. 3d 465, 474 (1984). Moreover, settlement agreements are contracts and are, therefore, enforceable. Cal. Code Civ. P. §664.6; *see also Engalla v. Permanente Med. Group, Inc.*, 15 Cal. 4th 951, 971 (1971); *Nicholson v. Barab*, 233 Cal. App. 3d

1671, 1681 (1991).

"Shifting fees in a statutory-fee case serves the public policy of encouraging private enforcement of statutory or constitutional rights." Federal Judicial Center, *Manual for Complex Litigation (Fourth)* § 14.13 (2004). This is because "a financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid." *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 687 (M.D. Ala. 1988). Thus, "[t]he guiding principles in determining awards of attorneys' fees should be to provide compensation sufficient to stimulate the motive for representation of classes[.]" *In re Equity Funding Corp. Sec. Litig.* 438 F. Supp. 1303, 1325 (C.D. Cal. 1977). Here, Class Counsel negotiated and now request a combined fee-and-cost award of $325,000.

The primary means of determining reasonable attorneys' fees in statutory fee-shifting cases is the lodestar/multiplier method. *Lealao v. Beneficial Cal., Inc.,* 82 Cal. App. 4th 19, 26 (2000). This "begins by multiplying the number of hours spent by the attorneys by an hourly rate that is reasonable under the circumstances. The court may then adjust the lodestar upward or downward, depending on the circumstances of the litigation and counsel's representation." *Northwest Energetic Servs., LLC v. Cal. Franchise Tax Bd.*, 159 Cal. App. 4th 841, 879-80 (2008); *see also Ketchum v. Moses*, 24 Cal. 4th 1122, 1131-32 (2001). The fee award here is dramatically lower than Class Counsel's actual lodestar on this case. As of December 12, 2019, when the Preliminary Approval Motion was filed, Class Counsel's actual lodestar was approximately $987,531.73—covering 2,178 hours of work—and an additional $89,456.65 in expenses.[8]

The hours expended by Class Counsel over the course of this multi-year, hard-fought litigation, are, respectfully, eminently reasonable. Though "California case law permits fee awards in the absence of detailed time sheets," *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001), to demonstrate that the time expended here was reasonable, Class Counsel has provided detailed billing records for all firms involved. (Glatter Decl., Exs. 5-7.) Uncounted is additional time that was

[8] Although Class Counsel's lodestar in the time since the Preliminary Approval Motion was filed in December 2019 has increased by $13,300.00, Class Counsel is limiting its lodestar metrics to December 2019.

required to finalize and file this motion, and time that will be required to prepare for and attend the final approval hearing.

Reasonable rates are the prevailing market rates in the community in which the Court sits, for similar litigation by attorneys of comparable experience, skill, and reputation. *See Blum v. Stenson*, 465 U.S. 886, 895-96 & n.11 (1984); *Ketchum*, 24 Cal. 4th at 1133. Courts look to prevailing market rates in the community in which the court sits. *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 906 (9th Cir. 1995); *see also Camancho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). To assist courts in calculating the lodestar, a plaintiff must submit "satisfactory evidence . . . that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonable comparable skill, experience and reputation." *Blum*, 465 U.S. at 896 n.11. "The Ninth Circuit has advised that courts are allowed to rely on their own familiarity with the legal market and subject matter of the lawsuit when awarding attorneys' fees." *Collado v. Toyota Motor Sales, U.S.A., Inc.*, 2011 WL 5506080, at *5 (C.D. Cal. Oct. 17, 2011) (citing *Ingram v. Oroudjian*, 647 F.3d 925 (9th Cir. 2011)), *aff'd in part & rev'd in part*, 550 Fed. Appx. 368 (9th Cir. 2013).

The rates for the Class Counsel attorneys who have worked on this matter are as follows:

FIRM	ATTORNEY	GRADUATION DATE	HOURLY RATE
FLEISCHMAN BONNER & ROCCO (f/k/a Fleischman Law Firm PLLC)	Keith M. Fleischman	1984	$775
	Joshua D. Glatter	1994	$550
	June Park	2004	$525
	Ananda N. Chaudhuri (no longer with firm)	2004	$550
	Bradley F. Silverman	1999	$550

	(no longer with firm)		
	Julia Sandler	2008	$400
	Tyler Van Put	2013	$350
	Michael H. Park	2010	$350
PRATT & ASSOCIATES	Pierce Gore	1986	
BARRETT LAW GROUP			
	Charles Barrett	1998	$425
	Don Barrett	1969	$800/$825
	Richard Barrett	1994	$425/$475/$575
	Dawn Garrison	Paralegal	$100
	Brian Herrington	1995	$475
	Nanci Taylor Maddux	Paralegal	$150
	Zach Schutz	Paralegal	$150
	Sterling Starns	2012	$250/$350

The rates set forth above are in line with awards and rates charged for similar complex class action litigation by attorneys with comparable experience, skill, and reputation. *See Superior Consulting Servs. v. Steeves-Kiss*, 2018 U.S. Dist. LEXIS 80261, 2018 WL 2183295, at *5 (N.D. Cal. May 11, 2018) (noting that "district courts in Northern California have found that rates of $475-$975 per hour for partners and $300-$490 per hour for associates are reasonable."); *Roberts v. Marshalls of CA, LLC*, 2018 U.S. Dist. LEXIS 10884, at *14-15 (N.D. Cal. Jan. 23, 2018) (approving rates between $300 and $750 per hour); *In re Magsafe Apple Power Adapter Litig.*, 2015 U.S. Dist. LEXIS 11353, at *12 (N.D. Cal. Jan. 30, 2015) ("In the Bay Area, reasonable hourly rates for partners range from $560 to $800, for associates from $285 to $510, and for paralegals and litigation support staff from $150 to $240")

(collecting cases).[9]

Moreover, comparing the actual time expended on this matter (even without accounting for expenses) results in a *negative* multiplier of 0.33, demonstrating that the value of the fee is far lower than the time expended. Even were the Court to modestly adjust any of Class Counsel's rates downward to account for minor market differences, the result would still be a material negative multiplier, given that the fee award represents less than 50% of Class Counsel's lodestar. *See In re Google LLC St. View Elec. Commc'ns Litig.*, 2020 U.S. Dist. LEXIS 47928, at *30 (N.D. Cal. Mar. 18, 2020) ("A negative lodestar multiplier" strongly suggests the reasonableness of the requested fee); *Rosado v. Ebay Inc.,* 2016 U.S. Dist. LEXIS 80760, at *8 (N.D. Cal. June 21, 2016); *In re Resistors Antitrust Litig.*, 2020 U.S. Dist. LEXIS 86769, at *8 (N.D. Cal. Mar. 24, 2020) ("Counsel for IPPs' requested fee award represents less than 73% of their reasonable lodestar, a negative multiplier. This further supports the reasonableness of Class Counsel for IPPs' attorney fee request"); *Rivas v. BG Retail, LLC*, 2020 U.S. Dist. LEXIS 8712, at *22 (N.D. Cal. Jan. 16, 2020) ("Third, while Class Counsel's lodestar is $160,270, the requested fee amount is $78,750 - representing an application of a negative multiplier of 0.49. A negative multiplier "suggests that the negotiated fee award is a reasonable and fair valuation of the services rendered to the class by class counsel"), *quoting Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 854 (N.D. Cal. 2010).

Plaintiffs have provided, in accordance with this Court's guidelines, copies of their billing records, broken down by firm and timekeeper. As those records reveal, the Action required significant

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[9] *Accord In re Animation Workers Antitrust Litig.*, 2016 U.S. Dist. LEXIS 156720, at *6 (N.D. Cal. Nov. 11, 2016) (finding rates of senior attorneys of between $845 to $1,200 per hour to be reasonable); *Nitsch v. DreamWorks Animation SKG Inc.,* 2017 U.S. Dist. LEXIS 86124, at *9 (N.D. Cal. June 5, 2017) (finding rates for senior attorneys of between $870 to $1,200 per hour to be reasonable); *Loretz v. Regal Stone, Ltd.*, 756 F. Supp. 2d 1203, 1211 (N.D. Cal. 2010) (approving billing rates ranging from $900 per hour (partners) to $150 per hour (law clerks) for Bay Area plaintiff's counsel in complex civil litigation); *In re High-Tech Emp. Antitrust Litig.*, 2015 U.S. Dist. LEXIS 118052, at *9 (N.D. Cal. Sept. 2, 2015) (approving billing rates of $490 to $975 for partners, $310 to $800 for non-partner attorneys, and $190 to $430 for paralegals, law clerks, and litigation support staff); *Rainbow Bus. Solutions v. MBF Leasing LLC*, 2017 U.S. Dist. LEXIS 200188, at *1-2 (N.D. Cal. Dec. 5, 2017) (finding rates between $275 to $950 per hour to be reasonable); *In re Anthem, Inc. Data Breach Litig.*, 2018 U.S. Dist. LEXIS 140137, at *16-17 (N.D. Cal. Aug. 17, 2018) (finding rates between $400 to $900 per hour to be reasonable; *see also Perez v. Rash Curtis & Assocs.*,, 2020 U.S. Dist. LEXIS 68161, at *58 (N.D. Cal. Apr. 17, 2020) ("Courts in this district would generally find that the blended rate of $634.48 is within the reasonable range of rates").

labor and often involved cross-country travel. The Action included two motions to dismiss pursuant to Rule 12(b)(6), multiple depositions, voluminous document productions, expert discovery, multiple rounds of briefing and supplemental briefing concerning class certification, numerous discovery disputes, and a discovery sanctions motion directed at Plaintiff Ang.

Considering the negative multiplier in the context of a seven-year legal battle that included hotly contested motion practice and multiple rounds of briefing on class certification issues, Class Counsel's fee request is extraordinarily modest, particularly when evaluated against the results achieved. The benefit for the Class and the public is substantial, as BBUSA has altered the allegedly offending labels and, going forward, is bound to confer with Class Counsel regarding anticipated future labeling changes to the relevant products, all without releasing Class Members' damages claims. Furthermore, as noted above, there were many risks endemic to this litigation, especially considering the Court's decision to not certify Rule 23(b)(3) damages classes.

In addition, Class Counsel prosecuted this action on a contingency basis and advanced all out-of-pocket expenses. (Glatter Decl. at ¶19). When attorneys undertake litigation on a contingent basis, a fee that is limited to the hourly fee that would have been paid by a paying client, win or lose, is not reasonable by market standards. *Greene v. Dillingham Constr. NA, Inc.*, 101 Cal. App. 4th 418, 428-29 (2002). As the California Supreme Court has explained:

> A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.

Ketchum, 24 Cal. 4th at 1132-33 (quoting Hon. Richard Posner, *Economic Analysis of Law* (4th ed. 1992)).

As for expenses, Cal. Code Civ. Proc. §§1033.5 (a)(1), (3), (4), and (7) require a Court to award costs for, among other things, court and service of process fees. The Court also has discretion under § 1033.5(c) to award reimbursement of other costs that are "reasonably necessary to the conduct of the litigation, rather than merely convenient or beneficial to its preparation." *Sci. App. Int'l Corp. v.*

Super. Ct. 39 Cal. App. 4th 1095, 1103 (1995). Here, Class Counsel has incurred $86,456.65 in recoverable costs and costs that were reasonably necessary to conduct the litigation, particularly given the extensive document production undertaken for the Action over the years and associated storage and vendor fees. (*See* Glatter Decl., Ex. 8). These expenses are subsumed within the $325,000 fee BBUSA has agreed to pay Class Counsel, and reflect slightly over 26% of the fee.

Accordingly, Plaintiffs respectfully submit that they have satisfied and exceeded the standards governing review of their fee application, a fee that, viewed in the context of the Action's history, is quite modest.

IV. THE PLAINTIFFS SHOULD BE AWARDED SERVICE AWARDS OF $5,000 EACH

Service awards "are fairly typical in class action cases." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). "The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1394 (2010); *see also Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785, 804 (2009) (collecting cases holding that named plaintiffs are generally entitled to a service award for initiating litigation on behalf of absent class members, taking time to prosecute the case, and incurring financial and personal risk); *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 726 (2004) (upholding "service payments" to named plaintiffs for efforts in bringing case). To determine a reasonable service award, courts consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Staton,* 327 F.3d at 977.

Here, Plaintiffs, as class representatives, did far more than merely place their names on a caption. They were actively involved in the Action, produced documents, sat for deposition, communicated regularly with Class Counsel, and, in Plaintiff Ang's case, had to litigate and defeat a motion for sanctions concerning alleged spoliation on Ang's part. Under these circumstances, although Plaintiffs only request an award of $5,000 for each class representative, awards of $10,000

each, as set forth in the Agreement, would be appropriate, particularly in light of the Settlement's mechanisms to address future harm. *See Chu v. Wells Fargo Invs., LLC*, 2011 U.S. Dist. LEXIS 15821, at *14 (N.D. Cal. Feb. 15, 2011) (awarding $10,000 each to two named plaintiffs and $4,000 to three other plaintiffs who joined suit at later date); *Rivera v. Agreserves, Inc.*, 2016 U.S. Dist. LEXIS 131705, *21 (E.D. Cal. Sept. 26, 2016) (affirming $7,500 award where plaintiff "spent a substantial amount of time assisting counsel and participating in the litigation" including sitting for deposition and being present at mediation); *Bruno v. Quten Research Inst., LLC*, 2013 U.S. Dist. LEXIS 35066, *8 (C.D. Cal. Mar. 13, 2013) (affirming $8,000 award where plaintiff "submitted to depositions, investigations, and an involved litigation schedule").

In this case, both Plaintiffs provided significant assistance to Class Counsel. In Plaintiff Ang's case, his own personal reputation and integrity came under fire in connection with BBUSA's motion for sanctions for alleged spoliation, which Plaintiffs defeated. Both Plaintiffs also produced discovery and sat for probing depositions. Both also closely communicated with Class Counsel in connection with settlement discussions, reviewed and evaluated the Agreement. Accordingly, under these circumstances, Plaintiffs respectfully request that the Court award the class representatives service awards of $5,000 apiece.

CONCLUSION

The parties believe that the Agreement remains in their mutual best interests and will conserve resources and promote judicial efficiency and economy, while at the same time providing meaningful benefits to the Class. In reaching this conclusion, each party has taken into account the investigation of the claims, the orders of the Court and the uncertainties, delays, expenses and exigencies of the litigation process. For the reasons set forth in this Omnibus Motion, the parties respectfully request the Court: (1) grant final approval of the Settlement; (2) enter an order awarding Class Counsel $325,000 in attorneys' fees and expenses; (3) enter an order awarding class representatives Ang and Streit service awards in the amount of $5,000 apiece; and (4) grant such other relief as the Court deems just and proper.

Dated: June 17, 2020

Respectfully submitted,

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U.S. District Court

California Northern District

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The following transaction was entered by Fleischman, Keith on 6/17/2020 at 4:21 PM and filed on 6/17/2020

Case Name: Ang et al v. Bimbo Bakeries USA, Inc.
Case Number: 4:13-cv-01196-HSG
Filer: Alex Ang
Lynn Streit
Document Number: 241

Docket Text:
Joint MOTION for Settlement *Final Approval of Proposed Class Action Settlement* filed by Alex Ang, Lynn Streit. Responses due by 7/1/2020. Replies due by 7/8/2020. (Attachments: # (1) Declaration of Joshua D. Glatter, # (2) Exhibit 1 to Glatter Declaration, # (3) Exhibit 2 to Glatter Declaration, # (4) Exhibit 3 to Glatter Declaration, # (5) Exhibit 4 to Glatter Declaration, # (6) Exhibit 5 to Glatter Declaration, # (7) Exhibit 6 to Glatter Declaration, # (8) Exhibit 7 to Glatter Declaration, # (9) Exhibit 8 to Glatter Declaration)(Fleischman, Keith) (Filed on 6/17/2020)

4:13-cv-01196-HSG Notice has been electronically mailed to:

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The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:C:\fakepath\2020-06-17 Omnibus Final Approval Motion.pdf
Electronic document Stamp:
[STAMP CANDStamp_ID=977336130 [Date=6/17/2020] [FileNumber=17050827-0]
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Document description: Declaration of Joshua D. Glatter
Original filename:C:\fakepath\2020-06-17 Joshua Glatter Declaration.pdf
Electronic document Stamp:
[STAMP CANDStamp_ID=977336130 [Date=6/17/2020] [FileNumber=17050827-1]
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Document description: Exhibit 1 to Glatter Declaration
Original filename:C:\fakepath\Exhibit 1.pdf
Electronic document Stamp:
[STAMP CANDStamp_ID=977336130 [Date=6/17/2020] [FileNumber=17050827-2]
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Document description: Exhibit 3 to Glatter Declaration
Original filename:C:\fakepath\Exhibit 3.pdf
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Document description: Exhibit 4 to Glatter Declaration
Original filename:C:\fakepath\Exhibit 4.pdf
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Document description: Exhibit 5 to Glatter Declaration
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Document description: Exhibit 6 to Glatter Declaration
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Document description: Exhibit 7 to Glatter Declaration
Original filename:C:\fakepath\Exhibit 7.pdf
Electronic document Stamp:
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Document description: Exhibit 8 to Glatter Declaration
Original filename:C:\fakepath\Exhibit 8.pdf
Electronic document Stamp:
[STAMP CANDStamp_ID=977336130 [Date=6/17/2020] [FileNumber=17050827-9]
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