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ATTORNEYS FOR PLAINTIFFS AND THE SETTLEMENT CLASS

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

DONNA CONNARY, ZORIANA PAWLUK-FLORIO, ADRIENNE ANDRY, and PAUL TORRECILLAS, on behalf of themselves and all others similarly situated **Plaintiffs,** **v.** **S.C. JOHNSON & SON, INC.** **Defendant.**	**CASE NO.: RG20061675** **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, APPROVAL OF CLASS REPRESENTATIVE SERVICE AWARDS, AND AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Date: November 16, 2021 Time: 3:00pm Dept: 23 Judge: Honorable Brad Seligman Reservation No.: **R-2261352**

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PLEASE TAKE NOTICE that on November 16, 2021, at 3:00pm, in Department 23 of the Superior Court of California for the County of Alameda located at 1221 Oak Street, Administration Building, Oakland, CA 94501, before the Honorable Brad Seligman presiding, Plaintiffs Donna Connary, Zoriana Pawluk-Florio, Adrienne Andry, and Paul Torrecillas (collectively "Plaintiffs") will move, and hereby do move the Court for an order finally approving the settlement in this matter, awarding class representatives Plaintiffs Donna Connary, Zoriana Pawluk-Florio, Adrienne Andry, and Paul Torrecillas a service award of $2,500.00 each, awarding Plaintiffs' Counsel one-third of the settlement amount ($750,000) to reimburse them for their costs, fees and expenses incurred in connection with the prosecution of this action, and approving the payment of the Settlement Administrator's, Angeion's, expenses.

This motion is based upon this Notice; the attached Memorandum of Points and Authorities, the Declaration of Wyatt A. Lison in Support of Final Approval of Class Action Settlement ("Lison Final Decl."); the Declaration of Stan V. Smith, Ph.D. ("Smith Decl."); the Declaration of Steven Weisbrot ("Weisbrot Decl."); the Declaration of Colin B Weir submitted previously in support of Preliminary Approval ("Weir Decl."); the Declarations of Class Representatives Donna Connary, Zoriana Pawluk-Florio, Adrienne Andry, and Paul Torrecillas in support of final approval; the Declaration of Christian Schreiber in Support of Plaintiffs' Motion for Attorneys' Fees and Costs ("Schreiber Decl."), and all matters of which this Court may take judicial notice, including all pleadings in this matter, and such evidence and argument as the Court may permit at the hearing.

MEMORANDUM AND POINTS OF AUTHORITIES

I. INTRODUCTION

Approval of the Class Action Settlement should be granted as it is demonstrably fair, adequate, and reasonable. The Settlement, a product of arm's length negotiations with the help of the Hon. Jay C. Gandhi (Ret.) of JAMS, provides substantial monetary and injunctive relief, and a narrow release.

The Court granted preliminary approval of the Settlement on May 13, 2021, certified a settlement class, and approved a schedule and procedure for providing notice of the settlement to Cass Members. The Notice Plan went in accordance with the Preliminary Approval Order, and more than 130,000 Class Members submitted claims, two Class Members opted out of the settlement, and one person objected. This level of support from the Class confirms the outstanding result that the Settlement represents, and the significant relief that it provides to Class Members. For their work in bringing about this excellent Settlement, Representative Plaintiffs Donna Connary, Zoriana Pawluk-Florio, Adrienne Andry, and Paul Torrecillas ask the Court to award each of them a service award of $2,500. Given the excellent and efficient outcome obtained for the Class, Plaintiffs ask the Court to approve an award of attorneys' fees, costs, and expenses equal to 33 1/3% of the Settlement Fund.

II. SUMMARY OF THE LITIGATION

On November 12, 2019, Plaintiffs Andry and Pawluk-Florio sent Defendant S.C. Johnson & Son ("SCJ") a demand regarding the unlawful and misleading "Non-Toxic" labeling of certain Method Products ("CLRA Letter"). (*See* Declaration of Wyatt A. Lison in Support of Preliminary Approval ("Lison Prelim. Decl."), ¶ 4.) The CLRA Letter was based on Class Counsel's investigation focused on the "non-toxic" labeling of household goods and their ingredients, including the Method Products here, and their potential to cause harm to persons and the environment. (*Id*., ¶3.) On March 13, 2020, SCJ made Plaintiffs a class settlement proposal, but instead of responding Plaintiffs insisted that any discussions on behalf of a class be done in a mediation before a former-judge familiar with California and other states' consumer laws, and contingent on SCJ's agreement to remove the unqualified "Non-Toxic" labeling from Method Products as part of any settlement. (*Id*., ¶8.)

Prior to the mediation, SCJ produced information regarding the Products to inform Plaintiffs' Counsel of the potential recovery in any case, as well as SCJ's anticipated defenses to any action so

that Plaintiffs' counsel could properly evaluate any potential settlement. (*Id*., ¶11.) The Parties also submitted detailed mediation statements summarizing their positions to inform Judge Gandhi of the potential class-wide exposure to SCJ, and risks of litigating the action to Plaintiffs. (*Id*.) The Parties mediated the matter on April 22, 2020 and reached an agreement in principle to settle the "Non-Toxic" claims on a nationwide class basis subject to confirmatory discovery. (*Id*., ¶12.) SCJ produced documents and information regarding the Products that Plaintiffs requested, and while negotiating the details of the settlement, Plaintiffs filed their Complaint in this Action. (*Id*., ¶13-14.) On January 21, 2021, Plaintiffs filed an amended complaint conforming to the Parties' subsequent negotiations (*id*., ¶¶15-16), and the amended Settlement was provided to the Court on May 7, 2021. (*See* Supplemental Declaration of Wyatt A. Lison, Exhibit A ("Settlement").)

The Court granted preliminary approval of the Settlement on May 13, 2020. The notice plan was executed pursuant to the Court's Order, including advertising online, in social media and People Magazine. (Weisbrot Decl., ¶¶5-7.) The notice resulted in a greater reach than anticipated, reaching 79.23% of the potential class, and with more than 130,000 claims being made. (*Id*., ¶ 8.)

III. SUMMARY OF THE SETTLEMENT

As detailed more fully in the Settlement, SCJ established a Settlement Fund of $2.25 million as compensation for a limited release of Class Members' claims under the terms specified in the settlement. (Settlement, §§ 4.2.) The Settlement Fund will also cover any award for attorneys' costs, fees and expenses, service awards to Plaintiffs, and settlement administration costs. (*Id*., § 4.1.)

Class Members were able to make claims for up to 10 Products without proof of purchase, and without any limitation with proof of purchase, and entitled to a cash payment of up to $1.00 per Product purchased. (*Id*., § 4.2(j).) Given the tremendous success of the notice plan, it is anticipated that Settlement payments to Class Members will be decreased on a *pro rata* basis based on the more than 130,000 claims submitted to date, which still results in class members receiving more than the estimated $0.53 in damages on a per-product basis. (Lison Final Decl., ¶ 12.)

The Settlement also provides injunctive relief that is equally, if not more valuable than the cash recovery provided to Class Members. (Smith Decl., ¶22.) As part of this Settlement, SCJ will remove the "Non-Toxic" claims from the Products and references to the Products being "Non-Toxic" on its

websites. (Settlement, § 4.5) This despite the "non-toxic" claim not being removed after a prior settlement including that claim in *Vincent, et al. v. People Against Dirty, et al.,* Case No. 16-cv-6936 (S.D.N.Y.) ("*Vincent*"). (Lison Prelim. Decl., ¶7 and Exhibit B thereto.) By virtue of this injunctive relief, the Settlement will substantially benefit Class Members and consumers nationwide who might consider purchasing Method Products in the future, which if sales over the next four years paces the past four years encompasses some $43 million in potential future damage. (Smith Decl., ¶¶23-25.)

IV. CLASS MEMBERS RECEIVED THE BEST NOTICE PRACTICABLE

As ordered by the Court, Angeion ran a paid online and social advertising campaign from July 2, 2021 to September 30, 2021, targeting Class Members through Facebook and Instagram. (Weisbrot Decl., ¶5-6.) The Short-Form notice was also published in People magazine the week of July 30 as was done in *Vincent*. (*Id*. at ¶7.) The Notice Plan had a greater reach than anticipated at 79.23%, and resulted in more than two times the claims made in *Vincent*. (*Id*. at ¶13.)

Angeion established a Settlement Website (https://www.householdproductssettlement.com/), which went live on July 2, 2021, where Class Members can make claims up until November 1, 2021. (*Id*., ¶13.) The Settlement Website provided a summary chart of the important deadlines; the Long-Form notice of the settlement; an easy-to-understand FAQs about the settlement; and important documents related to the case including the First Amended Complaint, Settlement Agreement, and the Court's Preliminary Approval Order. (*Id*., ¶10.) Class Members directed to the Settlement Website landed on a page that identified the Method Products subject to the Settlement and allowed for the submission of a claim. (*Id*., ¶6.) Angeion also established a phone line for people to get information about the Settlement or request a claim form that could be submitted through the mail. (*Id*., ¶12.)

The notice provided to Class Members exceeded the Court's Preliminary Approval Order, constituted the best notice practicable under the circumstances, and effectuated due and sufficient notice to the Class explaining the Settlement and how class members could opt out, object, and appear at the final approval hearing. (*See* C.R.C. 3.769(f); Weisbrot Decl., ¶17.) The notice was neutral as to the merits of the proposed Settlement and was unquestionably "adequate to fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." (*7-Eleven Owners for Fair Franchising v.*

Southland Corp., (2000) 85 Cal.App.4th 1135, 1164).

The deadline for Class Members to object to or opt out of the Settlement was October 18, 2021, and Class Members' objections are being considered even if made after that date. (Lison Final Decl., ¶ 3.) As of the filing of this Motion, one person objected to the settlement, and two people opted out. (Weisbrot Decl., ¶14-15.)

V. THE SETTLEMENT SHOULD BE APPROVED AS FAIR AND REASONABLE

A. Legal Standard for Final Settlement Approval

A class action settlement requires approval of the court after a hearing. (Cal. Rule of Court 3.769(a).) Court approval is a two-step process. This Court did the first step by conducting a preliminary review of the settlement, approving the proposed notice to class members, and certifying the settlement class. (*Id.* at 3.769(c), (d); *In re Cellphone Term. Fee Cases* (2009) 180 Cal. App. 4th 1110, 1118). This includes a "preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." (Manual for Complex Litigation § 21.632 (4th ed.).)

Following notice, the court must consider any objections by class members and the extent to which class members have elected to opt out of the settlement and make a final determination whether to approve the settlement. (Cal. Rule of Court 3.769(f), (g); *Cellphone Term. Fee Cases*, 180 Cal. App. 4th at 1118.) At the fairness hearing, courts consider "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 128 [quoting *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801].)

B. The Settlement is Fair and Reasonable and Merits Final Approval

1. The Settlement amount and injunctive relief are favorable in light of the strength of Plaintiffs' case and the potential recovery at trial

The strength of the case for Plaintiffs on the merits, balanced against the amount offered in settlement, is the most important factor. (*Kullar*, 168 Cal. App. 4th at 130.) The Settlement provides a non-reversionary fund of $2.25 million, which compensates the Class for the limited release

associated with the "Non-Toxic" labeling claim. (Settlement, § 4.1.) The Settlement's monetary relief compares favorably with Plaintiffs' Counsel's estimated relief. (Lison Prelim. Decl., ¶ 21.) Colin Weir, Vice President at Economics and Technology, Inc., who has modeled damages in similar labeling matters, estimates that the "Non-Toxic" claim here resulted in a price premium of approximately $0.53 per product. (*Id*. and Ex. F thereto at Table 1.) Even with over 130,000 claims, Class Members who made claims will receive more than their estimated damages. (Lison Prelim. Decl., ¶ 22 [explaining at nearly 240,000 claims, Class Members would be receiving their approximated damages].) This is superior to the *Vincent* settlement that involved the labeling of Method products, further supporting final approval. (Weir Decl., ¶ 25, Table 1)(*See Dunk*, 48 Cal. App. 4th at, 1804 n 12 [valuations of similar settlements are relevant to settlement approval].)

In addition to the cash payments, the Settlement requires SCJ to remove the unqualified "Non-Toxic" claim from the Products and from SCJ's websites. Settlement, §4.5. Removing the "Non-Toxic" claim was not achieved in *Vincent*, and something SCJ said it would not do despite the NAD's findings that it was misleading. (Lison Prelim. Decl., ¶7 and Exhibit E thereto.) SCJ's agreement to remove the "Non-Toxic" claim from the Products' labeling provides significant value avoiding an estimated $43 million in future harm over the next four years that was likely to occur absent this Settlement because the Products have been labeled that way for more than a decade, SCJ refused to remove the claim prior to this Settlement and going forward people will not be deceived into thinking the Products are truly harmless to people and the environment. (Smith Decl., ¶¶ 22-23.) This injunctive relief prevents SCJ from reaping additional benefits from the "Non-Toxic" claim going forward, substantially benefiting Class Members and the general public, and supporting final approval here. (*See, e.g., In re TracFone Unlimited Service Plan Litigation* (N.D. Ca. 2015) 112 F.Supp. 3d 993, 1005 [noting the important value of injunctive relief provided in a settlement that benefits both class members and the general public].)

2. The litigation risks heavily favor approval

As Plaintiffs set forth in their Motion for Preliminary Approval, Plaintiffs and the Class would face real risks on the merits and class certification absent the Settlement. Liability for SCJ's "Non-Toxic" claims is far from certain because it is not defined as it relates to consumer products. While

Plaintiffs are confident that consumers view "Non-Toxic" to mean anything that is not "toxic," i.e., having the capacity to harm people or the environment, there is a risk that Plaintiffs' view of "toxic" only applies to hazardous substance labeling. Even if they pass that hurdle, SCJ denies that the Products can cause injury or illness; claims to have scientific proof that many are truly not harmful; and has asserted there is no price premium for the Products. SCJ will likely assert that to the extent Class Members were damaged by the "Non-Toxic" claim, damages would be minimal. (*See, e.g.,* *Ries v. Arizona Beverages* USA LLC (N.D.Cal.2012) 287 F.R.D. 523, 532 [restitution is the difference between value of a product and comparable product without the challenged claim]; *In re Facebook, Inc., PPC Advertising Litigation* (N.D.Cal.2012) 282 F.R.D. 446, 461 [restitution is the difference between what plaintiffs paid and the value of what plaintiffs received].) Given the technical nature of the claim involved, and the pricing compared to other name brand cleaners, it would be risky and expensive to litigate Plaintiffs' claims through class certification and trial.

Additionally, *Vincent* also involved "Non-Toxic" claims for many of the Products at issue here, and released claims related to their "Non-Toxic" labeling. (Lison Prelim. Decl., Exh. B thereto at §2.28.) Even though the *Vincent* settlement did not get the "Non-Toxic" labeling removed from the Products' labels – something this Settlement achieves – SCJ will argue that members of the *Vincent* class cannot bring or participate in any action concerning the labeling of the same products. (*See Villacres v. ABM Indus. Inc.* (App. Dist. 1 2010) 189 Cal. App. 4th 562, 575–76 [explaining the res judicata effect under California's primary rights doctrine]; *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal. 4th 788 ["When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right"].) SCJ will also likely argue the *Vincent* release precludes claims involving the same products in other states as well.

SCJ will also likely argue that the *Vincent* settlement put consumers on notice of the deceptive nature of the "Non-Toxic" labeling – although for a different reason than is alleged in this Action. This could create questions whether those consumers could reasonably continue to rely on the "Non-Toxic" labeling in purchasing the products after the *Vincent* class period ended. (*See, e.g.,* *Blessing v. Sirius XM Radio Inc.* (S.D.N.Y. Mar. 29, 2011) 2011 WL 1194707, at *10 ["Courts have often held that reliance on a misrepresentation requires individualized proof"].) These arguments could make

ascertaining class members difficult, and potentially prevent a class from being certified for litigation altogether or, at best, substantially reduce the size of the class to just those persons who first purchased Method products after the end of the *Vincent* class period. These issues could limit or preclude Plaintiffs' claims, making the Settlement's relief eminently fair and reasonable.

Even if Plaintiffs overcame these hurdles, they would face a lengthy delay before any potential recovery while the "Non-Toxic" claim remained on the Products. (Lison Prelim. Decl., ¶ 10.) By contrast, if approval is granted, Class Members will receive substantial monetary relief now, and the general public will more quickly benefit by the removal of the "Non-Toxic" claims. Thus, this Settlement confer an advantage on the Class by ensuring significant and timely relief for their claims.

3. The Settlement is well-informed based on Class Counsel's investigation

Prior to sending the CLRA Letter, Plaintiffs conducted an in-depth investigation into the Products' labeling, formulation, ingredients, and potential toxicity. (Lison Prelim Decl., ¶ 3.) After sending the CLRA Letter, and as a condition for engaging in mediation, Plaintiffs demanded, and SCJ provided, information to assess the value of Plaintiffs' and the Class's claims, including sales of the Products for the last 4 years, and for the *Vincent* class period which extended 7 years prior to the class period here. (*Id*., ¶11.) Plaintiffs also retained an economist to give an estimated value of the "Non-Toxic" labeling claims to consumers to assess the Settlement's value. (*Id*., ¶ 21 and Exhibit F thereto.)

Thus, Plaintiffs quickly and efficiently obtained substantial, adequate information upon which to base the decision to settle this case. (*Cf. Laffitte v. Robert Half Int'l Inc*. (2016) 1 Cal. 5th 480, 503 [approving "encouragement" of plaintiffs' "counsel to seek an early settlement and avoid unnecessarily prolonging the litigation"]). Given the nature of the claim alleged, with which Plaintiffs' Counsel has extensive experience, the foregoing information was sufficient to arrive at a reliable estimate of the risk facing Plaintiffs' claims and the approximate exposure that SCJ faced.

4. Experienced counsel supports the reasonableness of the Settlement

Class Counsel has extensive experience in complex consumer class action lawsuits, similar in size, scope, and complexity to this Action. (Lison Prelim. Decl., ¶ 23 and Exhibit G thereto**.)** **C**lass Counsel considers the Settlement to be an excellent result for the Class, and to be a fair, reasonable and adequate resolution of the Class's claims. (Lison Final Decl., ¶ 0; *see also* Schreiber Decl., ¶20.)

As explained *supra* (p. 5), Class Members who submitted claims will receive more than their estimated damages. The monetary relief that Class Members will receive from the Settlement also compares favorably to the prior *Vincent* settlement (Lison Prelim. Decl., ¶ 21 and Exhibit F thereto, Table 1), and is comparable to other product labeling settlements negotiated by Class Counsel. (*See, e.g., Larsen v. Trader Joe's Co.* (N.D.Cal. July 11, 2014) 2014 WL 3404531 [approving $3.375M nationwide settlement of allegedly false "All Natural" and "100% Natural" claims]; *Zeisel v. Diamond Foods, Inc.* (N.D.Cal. Oct. 16, 2012) 2012 WL 4902970 [approving $2.6M nationwide settlement for alleged misbranding of shelled walnuts with heart health claims under similar terms].) Both Plaintiffs' Counsel and SCJ's counsel have represented parties in numerous consumer class actions and are experienced and qualified to evaluate the strength of the claims and defenses and to recommend the Settlement to this Court. (Lison Prelim. Dec., Ex. F.) Recommendation from such experienced counsel weighs in favor of final approval here.

5. The reaction of the Class favors final approval

Over 130,000 Class Members submitted claims to receive money from the Settlement. Weisbrot Dec., ¶13. Two people opted out of the Settlement (*id.*, ¶14), and the single objection did not object to the monetary recovery, or the achieved injunctive relief. (Lison Final Decl., ¶7.) This reaction from the Class strongly favors final approval. (*See, e.g.*, *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 411 [finding two opt outs and one objection from a class of just 188 people to be a favorable reaction to a settlement].)

6. This Settlement is presumptively and demonstrably fair

A "presumption of fairness" exists when: (1) a settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the Court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 245.) "Public policy generally favors the compromise of complex class action litigation." (*Cellphone Term. Fee Cases*, 180 Cal. App. 4th at 1118)[quoting *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723, fn. 14].) As the Court preliminarily concluded, and should now finally conclude, the Settlement is fair and reasonable.

The Settlement was reached through arm's length negotiations with the help of a mediator who

is a former federal magistrate judge, and only after significant research, investigation, and confirmatory discovery. (Lison Prelim Dec., ¶¶ 3, 9, 11-12 and 20.) Class Counsel are experienced in representing consumers in complex labeling matters such as this one (*id.*, ¶ 23), and out of millions of Class Members, just one person has objected to the settlement. (Weisbrot Decl., ¶15.) A settlement such as this reached through arm's length negotiations with the help of a neutral mediator is presumptively fair. (*Wershba*, 91 Cal. App. 4th at 245; *Munoz*, 186 Cal. App. 4th at 408 n.5.)

7. The scope of the release is appropriate

The court cannot release claims that are outside the scope of the allegations of the complaint. (*Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal. App. 5th 521.) The release is limited, not general, directly tied to claims involving the "Non-Toxic" labeling claim, and has no wavier of Civil Code § 1542. (Settlement, § 2.21.) This Court preliminary approved the Settlement, including its limited release. (Order Granting Preliminary Approval, ¶ 1.) Thus, the scope of the release, as with the other factors, supports finding the Settlement is fair and reasonable.

VI. THE CLASS REPRESENTATIVE SERVICE AWARDS ARE REASONABLE

Named Plaintiffs, Donna Connary, Zoriana Pawluk-Florio, Adrienne Andry, and Paul Torrecillas, are eligible for service awards to compensate them for work done on behalf of the class. (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804; *Cellphone Term. Fee Cases*, 186 Cal. App. 4th at 1393-94; Manual for Complex Lit. § 21.62, n.971.) Service awards are appropriate to induce individuals to participate in class action lawsuits, and courts consider factors such as the risk to the class representative in commencing suit, the notoriety and personal difficulties encountered by the class representative, the time and effort spent by the class representative, the duration of the litigation, and the personal benefit, or lack thereof, enjoyed by the class representative as a result of the litigation. (*Clark*, 175 Cal.App.4th at 804 [citation omitted].) The *Clark* factors support awarding the Named Representative Plaintiffs a modest service award of $2,500 each.

Plaintiffs dedicated from five to six and a half hours on this action, including consulting with Class Counsel, reviewing important case filings, and providing information and input regarding the case and Settlement. (*See* Lison Final Decl., Exhibits B-E.) Plaintiffs did not expect anything more

than what Class Members will receive, and brought this action despite the potential time commitment and reputational harm in filing a class action against SCJ. (*Id.*)

Without Plaintiffs' willingness to take the foregoing actions and devote their own time to them, the interests of the Class would not have been protected. Here, over 130,000 Class Members will be more than compensated for their purchases of misbranded Method Products. And many millions more will benefit when the "Non-Toxic" claim is removed from the Products' labels, as they will not be misled to believing the Products pose no potential harm to people or the environment. Under the *Clark* factors, and in light of service awards approved in similar circumstances, the requested awards of $2,500 for Representative Plaintiffs are reasonable. (*See, e.g., In re Nucoa Real Margarine Litig.* (C.D.Cal. June 12, 2012, 2012 U.S.Dist.LEXIS 189901, at *108-18 [awarding $8,000 service award in a labeling case, collecting cases granting service awards between $3,000 and $5,000]; *Miller v. Ghirardelli Chocolate Co.* (N.D.Cal. Feb. 20, 2015) 2015 WL 758094 [$5,000 service award approved in food labeling case]; Lison Final Decl. ¶ 8 [recommending approval of the service awards].)

VII. PLAINTIFFS' REQUEST FOR ATTORNEYS' COSTS FEES AND REIMBURSEMENT OF LITIGATION COSTS AND EXPENSES IS REASONABLE

Class Counsel requests $750,000, which is one-third of the Settlement Fund, to cover attorneys' fees, costs and expenses incurred in this case. Trial courts may award attorneys' fees from a common fund in a class action pursuant to either the "percentage" method or the "lodestar-multiplier" method. (*Laffitte*, 1 Cal. 5th at 489; *id.* at 503 ["[W]hen class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created."].) The requested award is appropriate under a percentage-of-the-benefit methodology, as well as under a lodestar methodology.

A. An Award of 33 1/3 percent of the Common Fund Should Be Awarded

The percentage-of-the-recovery method has several advantages for the calculation of attorneys' fees. Among them are the "relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the

litigation." (*Laffitte*, 1 Cal.5th at 503.) This method encourages diligent and efficient litigation by "'allow[ing] courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.'" (*Id.* at p. 493 [citation omitted].) California courts regularly employ this method of calculation (*see, e.g., In Re: Cipro Cases I and II*, JCCP Nos. 4154 & 4220, slip op. (Super. Ct. San Diego County, Apr. 21, 2017) [awarding 30%]; *In re CafePress Inc. S'holder Litig.*, No. CIV522744, slip op. (Super. Ct. San Mateo County, Aug. 11, 2015) [same]; *In re Epicor Software Corp. S'holder Litig.*, No. 30-2011-00465495-CU-BT-CXC, slip op. (Super Ct. Orange County, Oct. 24, 2014) [same]), as do federal courts in the Ninth Circuit and throughout the country. (*See, e.g., In re Bluetooth Headset Products Liability Litigation* (9th Cir. 2011) 654 F.3d 935, 942.)

When a class action settlement includes a common fund, an award of one-third of the fund as attorneys' fees is common. (*See Laffitte*, 1 Cal.5th at 487 [affirming an attorney fee award of 1/3 of a $19M settlement fund]; *Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 61, 66 n.11 ["Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery" (citation omitted)].)[1] Moreover, when a settlement results in both monetary and non-monetary relief for the class, courts recognize the appropriateness of awarding fees of one-third of the fund to account for the benefit conferred by the non-monetary relief. (*See, e.g. id.* at 61 [success achieved for a class action settlement includes changes in the defendant's policies, even if not required by the settlement]; *Laguna v. Coverall N. Am., Inc.* (9th Cir 2014) 753 F.3d 918, 922-23 [later vacated as moot by settlement (approving requested fee award as a reasonable percentage of the constructive common fund that included the monetary value of the settlement's injunctive relief)].) Plaintiffs are requesting one-third here.

California courts evaluate several factors when assessing the propriety of an attorneys' fee award: (1) the novelty and difficulty of the questions involved; (2) the interests at stake and the results

[1] A non-exhaustive list of other cases awarding a percentage of benefit based on the common fund of one-third or more include *Castaneda v. Burger King Corp.* (N.D. Cal. Jul. 12, 2010) 2010 U.S.Dist.LEXIS 78299 [awarding 33%]; *In re California Indirect Purchases* (Cal. Super. Ct. Oct. 22, 1998) 1998 WL 1031494, at *9 [setting forth a survey of awards approved by trial courts in common fund cases, including *In re Milk Antitrust Litigation* (L.A.Sup.Ct.1998) (33⅓% award); *Carlson v. C.H. Robinson Worldwide* (D. Minn. 2006) 2006 U.S.Dist.LEXIS 67108, *21-22 [35%]; *Worthington v. CDW* (S.D. Ohio 2006) 2006 U.S.Dist.LEXIS 32100, *22 [granting 38⅓% of the fund].)

obtained on behalf of the class; (3) the experience, reputation, and ability of the attorneys who performed the services, and the skill they displayed in litigation; (4) the contingent risk presented; and (5) the extent to which the litigation precluded other employment by the attorneys. (*See Laffitte*, 1 Cal.5th at 488; *Serrano v. Priest* (1977) 20 Cal.3d 25 at 49.) However, the court is not bound by a rigid formula and has substantial discretion to select and weigh the relevant factors. (*Lealao v. Beneficial California, Inc. (2000)* 82 Cal.App.4th 19, 41.) Given the contingent nature of this action, the uncertainty surrounding the hotly contested legal issues, the excellent result achieved, and the experience of Class Counsel, an award of 31% of the fund is fair, reasonable, and appropriate.

This case is novel and would be difficult to litigate. When they began investigating SCJ's "Non-Toxic" claims, counsel was unaware of any previously successful challenges the non-toxic labeling of consumer products based on the same theory. (Lison Final Decl., ¶6.) Moreover, Class Counsel pursued this matter on a contingency basis despite the many hurdles to getting a class certified and succeeding on the merits given SCJ's likely defenses. (*Supra*, § V.B.2.; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 [courts place a high emphasis on the risk counsel take in pursuing a case due to the risk involved in pursuing contingency fee cases].) Despite these hurdles, Class Counsel achieved a high level of success both in monetary relief with claimants receiving more than their estimated damages, and injunctive relief in having the "Non-Toxic" claim removed. (*See Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 418 [in the context of attorney's fees under 42 U.S.C. § 1984, a central feature in determining attorneys' fees is "the degree of success obtained"].)

The Settlement was achieved by diligent, resourceful, and creative class action litigators pushing novel theories of litigation with decades of experience. (Lison Prelim. Decl., ¶23 and Exhibit G thereto.) "The prosecution and management of a complex . . . class action requires unique legal skills and abilities." (*In re Omnivision Technologies, Inc.* (N.D. Cal. 2008) 559 F.Supp.2d 1036, 1047, citations omitted.) Class Counsel evidenced those unique skills through their effective negotiations that led to this Settlement, from the CLRA Letter, through mediation and negotiating the final terms of the Settlement. Moreover, Class Counsel was precluded from doing other work while investigating and prosecuting this case. (Lison Final Decl., ¶29.)

Finally, California's public policy goals of precluding the "greenwashing" of consumer goods is furthered by this Settlement. *See* Bus. & Prof. Code § 17580 (adopting the FTC's "Green Guides" as California law.) While motivated by the societal import of getting the "Non-Toxic" claims off the Products' labeling, Class Counsel made their substantial investment because of the possibility of a contingent fee upon resolution. (Lison Final Decl., ¶ 20.) Awards of common fund fees are essential to furthering the salutary goal of attracting competent counsel to handle complicated and risky cases like this one. Attorneys "will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if [the attorneys are] assured that [they] will be promptly and directly compensated should [their] efforts be successful." (*Melendres v. City of Los Angeles* (1975) 45 Cal.App.3d 267, 273 [quoting *Estate of Stauffer* (1959) 53 Cal.2d 124, 132].) Because Class Counsel assumed the risk of prosecuting this case, the general public will not be further misled by false "Non-Toxic" claims in the future, and Class Members are being refunded for SCJ's fraud.

B. A Lodestar Crosscheck Confirms the Reasonableness of the Award

In California, Courts are permitted – but not required – to cross-check the percentage-of-the-recovery method using the lodestar method to ensure that the percentage fee is reasonable. (*Laffitte*, 1 Cal.5th at pp. 504, 506.) The lodestar cross check method is a two-step process. First, the court calculates the lodestar "by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate." (*Id.* at p. 489.) The court may then apply a multiplier after considering other factors, including those listed above. (*Id.*) Under this approach, the court may reexamine the percentage if a comparison between it and the lodestar enhancement "produces an imputed multiplier far outside the normal range." (*Id.* at 504.)

California courts regularly award fees with multipliers ranging from 2 to 4, or even higher. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255 [collecting cases], disapproved on another ground in *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.) These multipliers play an important role in contingent cases because they "bring the financial interests for [attorneys …] into line with incentives they have to undertake claims for which they are paid on a fee-for-service basis." (*Ketchum*, 24 Cal.4th at 1132.) Here, a multiplier of 1.93 is appropriate and justified. (Lison Final Decl., ¶27.)

Class Counsel's lodestar in this case is $380,939.00 to date for approximately 650 hours prior to filing this motion, and $16,677.40 in costs and expenses and $14,387.50 in non-reimbursable expert fees. (Lison Final Decl., ¶¶21-22, 26.) Class Counsel's hourly rates of $725 to $825 for partners, and $300 to $675 for associates, are within the range of prevailing rates in the Bay Area for attorneys of comparable skill, experience, and reputation. (Lison Final Decl., ¶ 23; Schreiber Decl., ¶13-17.) (*See also Dickey v. Advanced Micro Devices, Inc.* (N.D.Cal. Feb. 21, 2020) 2020 WL 870928, at *8, at *22 [approving $275-$575 for associates and $615-$1,000 for partners as reasonable]; *In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at *2 (N.D. Cal. Sept. 20, 2018) [finding rates between $300 and $1,050 for attorneys reasonable]; *LCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095 ["The reasonable hourly rate is that prevailing in the community for similar work."]; (*In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.* (N.D.Cal. Oct. 25, 2016, 2016 U.S.Dist.LEXIS 148374, at *790 [approving partners' hourly rates over $1,000, and approving Class Counsel's hourly rate].) Class Counsel's hourly rates have been previously approved by numerous courts in the Bay Area and throughout the country, most recently in the Southern District of Texas. (*See Regmund v. Talisman Energy USA, Inc.* (S.D.Tex. May 12, 2021) 2021 U.S.Dist.LEXIS 92346, at *6 [approving Wyatt Lison's and Joe Kravec's hourly rates and awarding $9 million in fees in a class action settlement valued over $36 million, including a $27 million fund].) An award of one-third of the common fund would amount to a multiplier already under 2, before accounting for the time to be spent through final approval, settlement administration, and responding to client and Class Members' inquires. (Lison Final Decl., ¶¶ 27-28.)

Class Counsel's hours are also reasonable. Class Counsel dedicated substantial time and effort in the initial investigation, through the mediation and subsequent negotiations over the terms of the Settlement, and in litigation. (*See id.*, ¶¶ 21, 26 [summarizing the work performed by category that were reasonably incurred in connection with the prosecution of this case].) The resources Class Counsel dedicated were necessary to prevail in this action, and they did not waste time or resources even before settlement was certain. (*Kerkeles v. City of San Jose* (2015) 243 Cal.App.4th 88, 104 [recognizing that "lawyers are not likely to spend unnecessary time on contingency fee cases"].) Each hour logged in this case was spent in furtherance of this successful outcome.

The lodestar multiplier of 1.93 in this case is well within the normal range of multipliers. "Multipliers can range from 2 to 4 or even higher." (*Wershba*, 91 Cal.App.4th at 255; *see also Natural Gas Anti-Trust Cases I, II, III & IV* (Super. Ct. San Diego County, Dec. 11, 2006, No. 4221) 2006 WL 5377849, at *4 [recognizing the application of multipliers "between 4 and 12"]; *Chavez*, 162 Cal.App.4th at 66; *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512.) Thus, the lodestar multiplier requested here is, in fact, well-within the normal range. (*Laffitte*, 1 Cal.5th at 504.) And given the quality of the work performed by Class Counsel, the novelty and complexity of the issues, the resulting cash fund and injunctive relief, and the contingent risks Plaintiffs faced, a multiplier less than 2 is eminently reasonable. (*Lealao*, 82 Cal.App.4th at 26 [listing non-exclusive factors to consider in deciding whether to grant a multiplier].)

For the same reason, it would be inappropriate to reduce the multiplier here simply because this case was resolved quickly. First, a 1.93 multiplier is in line with the guidelines for case resolution in California courts. Second, one of the recognized shortfalls of the lodestar method is its propensity to discourage early settlement. (*Laffitte*, 1 Cal.5th at 490.) And a relatively early settlement is particularly beneficial here given the heavy risks in litigation; the cash payout to Class Members; and the critically important injunctive relief. (*See Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1050, fn. 5 ["noting that it may be a relevant circumstance [in calculating the attorney's fee] that counsel achieved a timely result for class members in need of immediate relief."].)

C. The Claims Administrator's Costs Should Be Approved

Angeion's claims administration costs and expenses to date are $300,816.79, and are estimated to incur an additional $189,116.00 (Weisbrot Decl., 16.) As part of Final Approval, the Court should order Angeion's fees be paid for their costs from the Settlement Fund.

VIII. CONCLUSION

For all the foregoing reasons, the Settlement is fair and reasonable, with substantial monetary relief to Settlement Class Members, and injunctive relief that will benefit the general public. Plaintiffs respectfully request that the Court grant final approval of the Settlement; approve the requested Class Representative awards and attorneys' costs, fees and expenses; approve the payment of costs to the claims administrator; and enter the accompanying proposed order and final judgment.

October 26, 2021

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