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15 **UNITED STATES DISTRICT COURT**
16 **CENTRAL DISTRICT OF CALIFORNIA**

17 LOREAN BARRERA, On Behalf of
18 Herself and All Others Similarly Situated,

19 Plaintiff,

20 v.

21 PHARMAVITE LLC, a California
limited liability company,

22 Defendant.
23
24
25

Case No.: 2:11-cv-04153-CAS
(AGrx)

**PLAINTIFF’S MEMORANDUM
IN SUPPORT OF MOTION FOR
AWARD OF ATTORNEYS’ FEES
AND EXPENSES AND
PLAINTIFF INCENTIVE AWARD**

Date: December 4, 2017

Time: 10:00 a.m.

Courtroom: 8D- 8th Fl.

The Hon. Christina A. Snyder

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1 **I. INTRODUCTION**

2 Settlement Class Counsel¹ aggressively litigated this action for over five years,
3 successfully defeating Pharmavite’s motion to dismiss, obtaining certification of a
4 California Class and thereafter defeating Pharmavite’s motion for summary judgment,
5 motion to decertify, motion for judicial estoppel and *Daubert* motions. While
6 readying the case for trial, Settlement Class Counsel succeeded in securing a
7 nationwide settlement resulting in a Settlement that provides benefits to the Class
8 worth \$11,310,000. In addition, the Settlement provides for important labeling relief.
9 This Settlement was struck with the assistance of Magistrate Judge Gandhi in an all-
10 day mediation session, followed by dozens of email, texts, and phone calls with Judge
11 Gandhi in the ensuing months. Then, following an inquiry by the Court, the
12 Settlement was amended to allow Pharmavite the option of distributing any unclaimed
13 Settlement benefits to existing claimants. The significant monetary and non-monetary
14 recovery obtained was achieved through the effective advocacy of Settlement Class
15 Counsel, who litigated the Action against highly skilled defense counsel. The
16 Settlement has been well received by the Class as, to date, there are no objectors to the
17 Settlement,² 1 opt out, and 59,884 claims submitted. The claims number is expected
18 to increase as the Claims Period does not end until November 13, 2017.

19 As Class Counsel undertook this matter on a fully contingent basis, Plaintiff
20 Lorean Barrera, by her Class Counsel, respectfully submits this Memorandum in
21 Support of her Motion for an Award of Attorneys’ Fees in the amount of \$3,475,000
22 (which is less than Settlement Class Counsel’s lodestar), plus \$600,000 in expenses,
23 and a \$10,000 Incentive Award for Plaintiff Barrera. Plaintiff will file a separate

24 _____
25 ¹ Capitalized terms not otherwise defined herein shall have the meaning ascribed to
26 them in the Amended Settlement Agreement and General Release (Dkt. No. 420-4),
27 hereinafter referred to as “Settlement Agreement.” To the extent there is any conflict
28 between the definitions of those terms, the definitions in the Settlement Agreement
will control.

² By design, the deadline for objections is not until November 13, 2017.

1 Memorandum of Law in Support of her Motion for Final Approval of the Settlement
2 as a whole on or before November 27, 2017, pursuant to the Court’s Preliminary
3 Approval Order (Dkt. No. 423). *See also In re Mercury Interactive Corp. Sec. Litig.*,
4 618 F.3d 988, 993-95 (9th Cir. 2010).

5 In light of the recovery obtained, the time and effort devoted by Settlement
6 Class Counsel, the work performed, the skill and expertise required, the risks that
7 counsel undertook, the results obtained (including prevailing on Defendant’s summary
8 judgment and decertification motions), and that the requested fees are less than
9 Settlement Class Counsel’s lodestar, Settlement Class Counsel submits that the
10 requested fee award and the reimbursement of incurred expenses are fair and
11 reasonable. Further, based on Plaintiff Barrera’s active participation in this litigation
12 since 2011, including attending the day-long mediation with Judge Gandhi, the
13 requested Incentive Award is fair and reasonable.

14 **II. PROCEDURAL HISTORY AND SETTLEMENT NEGOTIATIONS**

15 Pharmavite manufactures, markets, sells, and distributes glucosamine and/or
16 chondroitin formulated products sold under the “Nature Made®” brand name, as well
17 as under various brand names of unaffiliated retailers.³ On May 13, 2011, Plaintiff
18 filed this putative class action alleging that certain claims made on the Nature Made
19 TripleFlex products are false, deceptive, and/or misleading. These claims were
20 brought under California consumer protection laws. On October 11, 2011, Plaintiff
21 filed a Second Amended Class Action Complaint on behalf of a nationwide – or
22 California only class. On November 19, 2014, this Court granted, in part, Plaintiff’s
23 Motion for Class Certification, certifying California-only consumer classes seeking
24 monetary damages. Over the course of the next two years, the Parties completed
25 document and expert discovery, filed and respectively defeated competing summary
26

27 ³ A complete list of the products covered by the Settlement Agreement (the “Covered
28 Products”) is attached as Dkt. No. 420-6.

1 judgment motions and motions to strike each other's experts, Plaintiff defeated
2 motions for judicial estoppel and to decertify the Classes, and both Parties had begun
3 preparing the case for trial. All of this provided a fulsome record upon which to base
4 their settlement negotiations.

5 The Settlement Agreement was reached after ten months of vigorous arm's-
6 length negotiations, including an in-person meeting of Plaintiff's and Pharmavite's
7 counsel on June 25, 2016, followed by an all-day mediation on July 26, 2016 before a
8 neutral mediator, the Honorable Jay C. Gandhi, Magistrate Judge, and numerous
9 subsequent telephone calls, texts, and email exchanges involving Judge Gandhi and
10 the Parties' counsel. The Court granted preliminary approval of the Settlement on
11 June 5, 2017.

12 The Settlement Terms

13 The significant aspects of this Settlement include the following (described in
14 more detail in the Settlement Agreement (Dkt. No. 420-4)):

15 **A. Class Relief**

16 The Settlement provides significant class relief, including \$6.9 million in cash
17 and free product benefits made available to the Settlement Class and significant
18 injunctive relief.

19 **1. Monetary Relief - Cash Paid to Settlement Class Members**

20 Pharmavite will pay \$1 million to be distributed to Settlement Class Members
21 with valid claims who elect cash compensation. Settlement Class Members who have
22 Adequate Proof of Purchase (*e.g.*, receipts, boxes or bottles, credit card statements, or
23 similar documentation that identifies the Covered Product) for purchases made during
24 the Class Period may request \$25 for each Covered Product purchased during the
25 Class Period, up to four (4) Covered Products or \$100, per household. Settlement
26 Class Members who elect cash compensation but do not have Adequate Proof of
27 Purchase may request \$12.50 for each Covered Product purchased during the Class
28 Period, up to a maximum of four (4) Products or \$50, per household. Each Class

1 Member seeking monetary compensation must submit a simple Claim Form which
2 requires a sworn declaration but no notarization. Any excess cash which is not used to
3 pay validated cash claims will be distributed with *pro rata* increases to all claimants
4 with validated cash claims until all cash is distributed. Any shortfall will result in *pro*
5 *rata* reductions of all validated cash claims. If there is insufficient cash to fulfill all
6 valid claims, such claimants can receive Offered Product Benefits, as described below.

7 **2. Free Offered Product Benefits to Settlement Class**
8 **Members**

9 Pharmavite will provide Settlement Class Members with \$5.9 million in product
10 and fulfillment costs (“Offered Product Benefits”) (based on Pharmavite’s MSRP and
11 actual fulfillment costs) to be distributed to Settlement Class Members with valid
12 claims who elect a product award and/or whose cash claim is not wholly fulfilled from
13 available funds. Settlement Class Members, regardless of whether they possess
14 Adequate Proof of Purchase, may request up to \$25 worth of Offered Product Benefits
15 for each Covered Product they purchased during the Class Period, up to a maximum
16 of six (6) Covered Products or \$150 worth of Offered Product Benefits⁴, per
17 household. Any excess Offered Product Benefits not needed to fulfill validated claims
18 will be distributed with *pro rata* increases to claimants (whether requesting solely
19 Offered Product Benefits or a Cash Award reduced *pro rata*) with validated claims up
20 to \$300 of Offered Product Benefits. If excess product remains after all validated
21 claims and *pro rata* increases up to \$300 per household of Offered Product Benefits

22 _____
23 ⁴ The Offered Product Benefits include a diverse selection of the following popular
24 Pharmavite products: (1) Balanced B-100 Timed Release; (2) Super B Complex,
25 Mega Size; (3) Multi Complete Value Size; (4) Multi Prenatal Value Size; (5) Prenatal
26 + DHA; (6) Prenatal + DHA Value Size; (7) Postnatal Multi + DHA; (8) Fish Oil
27 1200 mg. Burp-less Value Size; (9) Krill Oil 300 mg; (10) Triple Omega 3-6-9 Value
28 Size; (11) Digestive Probiotics Daily Balance; (12) TripleFlex® Triple Strength Value
Size; (13) TripleFlex® Triple Strength 50+ Value Size; (14) CholestOff® Plus; (15)
Multi Adult Gummies; (16) Triple Omega 3-6-9; and (17) Super Omega-3 Fish Oil
Full Strength Mini. (See Dkt. No. 420-8.)

1 have been fulfilled, the Parties have identified several excess product distribution
2 options, including further distributions to claimants or *cy pres* distribution. (Dkt. No.
3 420-4, Section IV(G).) Any shortfall in Offered Product Benefits will result in *pro*
4 *rata* reductions of validated claims.

5 **3. Injunctive Relief - Labeling Changes**

6 Beginning 180 days after the Effective Date, Pharmavite will no longer use the
7 following terms, or any substantially identical variation of the proscribed terms, on
8 product labels to describe the effect of glucosamine and/or chondroitin on cartilage:
9 “rebuild”, “rebuilds”, “rebuilding”, “renew”, “renewing”, “renewal”, “rejuvenate”,
10 “rejuvenates”, “rejuvenation”, or “rejuvenating”.

11 **B. Notice and Administration Costs**

12 Notice and Administration costs up to \$325,000 are to be paid from the
13 Settlement monies. The Settlement Agreement provides that once the number of valid
14 claims received exceeds 40,000, the administration costs “may be increased pro rata
15 on a per-claim basis.” The first \$25,000 of any such increases will be paid at
16 Pharmavite’s sole expense and any amounts in excess of this \$25,000 amount will also
17 be paid by Pharmavite but any such amounts will be deducted from the amount of the
18 Offered Product Benefits provided by the Settlement Agreement. Currently, almost
19 60,000 claims have been recorded but have not yet gone through the verification
20 process, during which there is likely to be a reduction of the claims numbers due to
21 winnowing by the Settlement Administrator of any fraudulent claims. Thus, at this
22 time it is not known whether there will be any amounts deducted from the Offered
23 Product Benefits.

24 **C. Incentive Award to Class Representative**

25 The Settlement Agreement provides Plaintiff may apply for an Incentive Award
26 of up to \$10,000 as compensation for bringing this case, serving as the Court-
27 appointed class representative, providing documents and deposition testimony,
28 actively monitoring and assisting her counsel to ready this case for trial, and

1 participating in an all-day, in person mediation that led to the resolution of this case.
2 The Incentive Award will be paid separate and apart from, and will not diminish or
3 erode, the payment of claims to Settlement Class Members as set forth above.

4 **D. Attorneys' Fees and Expenses**

5 The Settlement Agreement provides Settlement Class Counsel (Bonnett,
6 Fairbourn, Friedman & Balint, P.C.; Siprut, PC; Boodell & Domanskis, LLC; Levin
7 Sedran & Berman; and Westerman Law Corp.), may apply to the Court for an
8 aggregate award of up to \$600,000 in cost reimbursements and up to \$3.475 million in
9 attorneys' fees. Pharmavite will pay Court awarded attorneys' fees and expenses
10 separate and apart from, so as to not diminish or erode, the payment of claims to
11 Settlement Class Members as set forth above.

12 **III. SETTLEMENT CLASS COUNSEL'S REQUESTED ATTORNEYS'
13 FEE AWARD IS WARRANTED, FAIR, AND REASONABLE**

14 **A. Settlement Class Counsel Are Entitled to Compensation**

15 It is well-recognized that class counsel are entitled to an attorneys' fee award
16 out of a settlement because such an award, in economic terms, "is the compensation
17 for the *effort* expended to benefit the class. Counsel will not undertake actions of this
18 nature unless they can receive adequate compensation for (i) their time, (ii) the risk of
19 not prevailing, (iii) the delay in receipt of fees, [and] (iv) the investment (money as
20 well as time) that must be made in a case." Stuart T. Rossman & Charles Delbaum,
21 *Consumer Class Actions* § 15.2.1 (6th ed. 2006). Equally well-recognized is that
22 when attorneys undertake litigation on a contingent basis, a fee that is limited to the
23 hourly fee that would have been paid by the fee-paying client, win or lose, is not a
24 reasonable fee by market standards. *Greene v. Dillingham Constr. NA., Inc.*, 101 Cal.
25 App. 4th 418, 428-29 (2002). Indeed, the contingency fee awarded to Settlement
26 Class Counsel must be greater than the fees the same attorneys would charge their
27 clients in non-contingency cases. As noted by the California Appellate court in
28 *Ketchum*:

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

7 *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001) (quoting Posner, *Economic Analysis*
8 *of Law* at 534, 567 (4th ed. 1992)). *See also Banyai v. Mazur*, No. 00 Civ. 9806, 2008
9 WL 5110912, at *4 (S.D.N.Y. Dec. 2, 2008) (“A lawyer whose compensation is
10 contingent on services can be expected to receive more than she would receive if she
11 were charging an hourly rate.”) (citations omitted); *Rader v. Thrasher*, 57 Cal. 2d 244,
12 253 (1962). Nevertheless, as set forth below, the fee award Settlement Class Counsel
13 seeks here is less than their collective lodestar.

14 From the outset of this litigation to the present, Settlement Class Counsel
15 litigated this matter on a contingent basis and placed at risk their own resources to do
16 so. Because the fee in this matter was entirely contingent, the only certainty was that
17 Settlement Class Counsel would not get paid unless they obtained a successful result.
18 Absent this Settlement, there was a sizeable risk that Plaintiff, the Settlement Class,
19 and their counsel would obtain no recovery at all. Indeed, there was no guarantee that
20 Plaintiff would succeed at trial or on appeal. At no time has Pharmavite conceded
21 liability, the appropriateness of class certification, or the availability of relief. To the
22 contrary, Pharmavite fought this action every step of the way including both moving
23 to decertify the Class and for summary judgment.

24 In short, Plaintiff’s counsel achieved something rare in a consumer fraud class
25 action – they created a clear path to trial, which in turn required Pharmavite to take
26 notice and settle on the terms provided for in the Settlement Agreement. As a result,
27 Settlement Class Counsel obtained an excellent result on behalf of the Class, as Class
28 Members are eligible to receive Cash Awards and Offered Product Benefits valued

1 slightly above the average purchase price of the most popular Covered Product.⁵ And,
2 any fee award will be paid separately so as not to reduce the relief to Settlement Class
3 Members.

4 Moreover, Settlement Class Counsel’s work is not yet done. Settlement Class
5 Counsel still need to: (1) prepare for and attend the final approval hearing, including
6 drafting the response to any objections that may be subsequently filed; (2) oversee the
7 claims administration process, including addressing any claims review issues and
8 monitoring payments to the Settlement Class; (3) monitor the *cy pres* distribution
9 process, if any; and (4) handle any appeals. Often, responding to objectors involves
10 obtaining written discovery, deposition testimony, or both from the objectors. And if
11 there are appeals, hundreds of thousands of dollars of additional attorney time may be
12 incurred in post-judgment motions (such as appeal bond requests) and in defending
13 the Settlement on appeal to the Ninth Circuit. None of this additional time will be
14 compensated.

15 Accordingly, in light of the fact Settlement Class Counsel is entitled to an
16 award of attorneys’ fees that should be in excess of their lodestar, in addition to the
17 contingent nature of this action, the work performed to date, the excellent results
18 achieved, and the significant amount of additional work Settlement Class Counsel will
19 have to undertake in the future on behalf of Plaintiff and the Settlement Class,
20 Settlement Class Counsel’s request for compensation is appropriate and warranted.

21 **B. The Requested Award Is Fair and Reasonable.**

22 The requested fee award is also fair and reasonable. The Federal Rules of Civil
23 Procedure expressly authorize that “the court may award reasonable attorney’s fees
24 and nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R.
25 Civ. P. 23(h). Federal courts at all levels encourage litigants to resolve fee issues by

26
27
28 ⁵ TripleFlex Triple Strength retails on average for \$23.

1 agreement whenever possible. As the Supreme Court has explained, “[a] request for
2 attorney’s fees should not result in a second major litigation. Ideally, of course,
3 litigants will settle the amount of a fee.” *Hensley v. Eckerhart*, 461 U.S. 424, 437
4 (1983); *see also Johnson v. Ga. Hwy. Exp., Inc.*, 488 F.2d 714, 720 (5th Cir. 1974)
5 (“In cases of this kind, we encourage counsel on both sides to utilize their best efforts
6 to understandingly, sympathetically, and professionally arrive at a settlement as to
7 attorney’s fees.”).

8 Pharmavite has agreed not to oppose an application by Settlement Class
9 Counsel of a combined fee award up to \$3.475 million in connection this Settlement.
10 It was only after the Parties negotiated all other material terms and provisions of the
11 Settlement that the Parties addressed the issue of attorneys’ fees. *See* Ex. A, Ryan
12 Final Approval Decl., at ¶ 14; Ex. B, Weltman Final Approval Decl., at ¶ 14. The
13 resulting amount reflects a compromise reached through arm’s-length bargaining by
14 sophisticated counsel familiar with the case as well as the participation of the
15 Magistrate.

16 Further, by arriving at the fee arrangement through arm’s-length negotiation,
17 the Parties negotiated under the best of market conditions and through a process which
18 the courts have encouraged. *See Eckerhart*, 461 U.S. at 437. Pharmavite has an
19 interest in minimizing the fee; Settlement Class Counsel have an interest in
20 maximizing the fee to compensate themselves (as the case law encourages) for their
21 risk, innovation, and creativity; and the negotiations are informed by the Parties’
22 knowledge of the work done and result achieved as well as their views on what the
23 Court may award if the attorneys’ fees award were litigated.

24 Under factually analogous circumstances to those here, the court in *Shames v.*
25 *Hertz Corp.*, No. 07-CV-2174, 2012 WL 5392159 (S.D. Cal. Nov. 5, 2012), approved
26 a negotiated fee. The *Shames* settlement provided both cash and non-monetary
27 benefits similar to the cash and free product awards available to the Class here. The
28 parties in *Shames*, like Plaintiff and Pharmavite, separately negotiated a maximum fee

1 award to be paid to class counsel independent from the recovery to the class. 2012
2 WL 5392159, at *3. And, as here, the negotiated fee was below counsels’ lodestar.
3 *Id.* at *19. As the court noted in *Lopez v. Youngblood*, in approving the agreed-upon
4 fee award to be paid separately from class members’ recovery, defendants “would
5 receive an unjustified windfall if the requested fees were not granted in full,” because
6 “one important purpose of the class action device is that defendants should not benefit
7 from their wrongdoing, and should be deterred from doing so by being vulnerable to
8 class actions to remedy their wrongful conduct.” No. CV-F-07-0474 DLB, 2011 WL
9 10483569, at *15 (E.D. Cal. Sept. 2, 2011.) The *Lopez* court also reasoned “it is
10 critically important to provide appropriate incentives for attorneys to undertake the
11 risk of class litigation. To the extent they are not properly awarded when they are
12 successful, that undermines the deterrent purpose of the class action mechanism.” *Id.*

13 **C. The Requested Fee Award Is Less Than Settlement Class Counsel’s**
14 **Lodestar, Further Establishing That it is Fair and Reasonable**

15 Using the lodestar/multiplier approach as a crosscheck further supports that
16 Settlement Class Counsel’s fee request is fair and reasonable. Under the two-step
17 lodestar/multiplier crosscheck, trial courts first calculate the lodestar, consisting of
18 “*all* the hours *reasonably spent*, including those relating solely to the fee,” times
19 reasonable hourly rates. *Ketchum*, 24 Cal. 4th at 1133 (emphasis in original); *see also*
20 *Hensley*, 461 U.S. at 433. That figure is then augmented or multiplied to reflect
21 additional factors that must be considered in determining a reasonable attorneys’ fee
22 award. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975); *Ketchum*,
23 24 Cal. 4th at 1138 (“the unadorned lodestar reflects the general local hourly rate for a
24 *fee-bearing* case; it does *not* include any compensation for contingent risk,
25 extraordinary skill, or any other factors a trial court may consider”) (emphasis in
26 original).

27 Here, Settlement Class Counsel devoted a total of over 8,499 hours successfully
28 litigating this case and negotiating its Settlement, resulting in a total lodestar of

1 \$4,455,991.25 as of September 20, 2017. *See* Ex. A, Ryan Final Approval Decl., at ¶
2 15; Ex. B, Weltman Final Approval Decl., at ¶ 15; Ex. C, Westerman Final Approval
3 Decl., at ¶¶ 3-4. Settlement Class Counsel’s Declarations provide summaries of the
4 hours they devoted to this case and their respective hourly billing rates.⁶ The
5 requested fee award is less than Settlement Class Counsel’s combined lodestar of
6 \$4,455,991.25, representing 78% of the lodestar and reflects a negative 0.78
7 multiplier, which will further be reduced by the work that remains to oversee the
8 Settlement to its conclusion. *See* Ex. A, Ryan Final Approval Decl., at ¶¶ 13, 15; Ex.
9 B, Weltman Final Approval Decl., at ¶¶ 13, 15.

10 Courts in the Ninth Circuit generally approve multipliers between 1 and 4. *See*,
11 *e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (3.65
12 multiplier); *In re Google Referrer Header Privacy Litig.*, No. 5:10-CV-04809-EJD,
13 2015 WL 1520475, at *10 (N.D. Cal. Mar. 31, 2015) (2.2 multiplier); *Bellinghausen*
14 *v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at *15 (N.D. Cal.
15 Mar. 20, 2015) (1.49 multiplier); *Howerton v. Cargill*, No. 13-00336, 2014 WL
16 6976041, at *6 (D. Haw. Dec. 8, 2014) (1.3882 multiplier); *Boyd v. Bank of Am.*

17
18 ⁶ Summaries are provided as the Court has “intimate familiarity” with the work that
19 was done over five years of extensive and hard-fought litigation. *See Shames*, 2012
20 WL 5392159, at *19 (citing *Fox v. Vice*, 131 S.Ct. 2205, 2216, 180 L.Ed.2d 45 (2011)
21 (holding counsel need not submit detailed time sheets as “[T]rial courts need not, and
22 indeed should not, become green-eyeshade accountants. The essential goal in shifting
23 fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial
24 courts may take into account their overall sense of a suit, and may use estimates in
25 calculating and allocating an attorney’s time. And appellate courts must give
26 substantial deference to these determinations, in light of the district court’s superior
27 understanding of the litigation.”) (internal quotations and citations omitted)); *see also*
28 *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1148-49 (9th Cir. 2000) (the
court may rely on summaries of the total number of hours spent by counsel); *Hemphill*
v. S.D. Ass’n of Realtors, Inc., 225 F.R.D. 616, 623-24 (S.D. Cal. 2004) (declining
review of detailed time records where no evidence of collusion).

29 If requested by the Court, Settlement Class Counsel can and will provide the Court
30 with their detailed time records for inspection and review.

1 *Corp.*, No. SACV 13-0561-DOC, 2014 WL 6473804, at *12 (C.D. Cal. Nov. 18,
2 2014) (2.58 multiplier); *Rose v. Bank of Am. Corp.*, No. 5:11-CV-02390-EJD, 2014
3 WL 4273358, at *12 (N.D. Cal. Aug. 29, 2014) (2.59 multiplier); *Custom LED, LLC*
4 *v. eBay, Inc.*, No. 12-CV-00350-JST, 2014 WL 2916871, at *9 (N.D. Cal. June 24,
5 2014) (1.94 multiplier); *de Mira v. Heartland Emp't Serv., LLC*, No. 12-CV-04092
6 LHK, 2014 WL 1026282, at *4 (N.D. Cal. Mar. 13, 2014) (1.36 multiplier); *Moore v.*
7 *Verizon Commc'ns Inc.*, No. C 09-1823 SBA, 2014 WL 588035, at *7 (N.D. Cal. Feb.
8 14, 2014) (1.58 multiplier); *Reed v. 1-800 Contacts, Inc.*, No. 12-CV-02359 JM BGS,
9 2014 WL 29011, at *9 (S.D. Cal. Jan. 2, 2014) (2.9 multiplier); *Nigh v. Humphreys*
10 *Pharmacal, Inc.*, No. 12CV2714-MMA-DHB, 2013 WL 5995382, at *12 n. 11 (S.D.
11 Cal. Oct. 23, 2013) (1.2 multiplier); *Keith v. Volpe*, 501 F. Supp. 403, 414 (C.D. Cal.
12 1980) (3.5 multiplier).⁷

13 Settlement Class Counsel's fee request seeking 78% of their lodestar to date (or
14 a 0.78 multiplier), which is well below the range of multipliers courts have approved,
15 is reasonable, especially considering the efforts of Settlement Class Counsel in
16 litigating this case for over five years and successfully readying it for trial, the risk of
17 non-recovery at trial or on appeal, and the excellent settlement achieved. *See Miller v.*
18 *Ghirardelli Chocolate Co.*, No. 12-cv-04936, 2015 WL 758094, at *6 (N.D. Cal. Feb.
19 20, 2015) (where factors would have justified application of a positive multiplier, the
20 agreed upon fee award that resulted in a negative multiplier was reasonable); *In re*
21 *Marsh ERISA Litig.*, 265 F.R.D. 128, 146 (S.D.N.Y. 2010) (fact that counsel sought
22 only 87.6% of their lodestar "strongly suggests that the requested fee is reasonable");
23 *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515 (S.D.N.Y. 2009) (there
24 is "no real danger of overcompensation" where negative multiplier is sought).

25 _____
26 ⁷ See also "Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008", at
27 p. 24 (indicating a mean multiplier of 1.54 is awarded by courts in the 9th Circuit and
28 of 1.82 in consumer class actions specifically) (available at http://scholarship.law.cornell.edu/clsops_papers/64).

1 Further, Settlement Class Counsel’s hourly rates and hours expended are
2 reasonable and the requested fee is fair and reasonable given the results obtained, the
3 efficiency with which the case was litigated, the risk, difficulty, and the public service
4 rendered by this action and Settlement Class Counsel’s continued work on the
5 approval process and settlement administration.

6 **1. The Hourly Rates Are Reasonable**

7 Settlement Class Counsel’s hourly rates should be comparable to the hourly
8 rates charged by attorneys of like experience, reputation, and ability for similar
9 litigation. *Ketchum*, 24 Cal. 4th at 1133. They should also be consistent with the
10 prevailing market rates in the community in which the court sits. *Schwartz v. Sec’y of*
11 *Health & Human Servs.*, 73 F.3d 895, 906 (9th Cir. 1995).⁸ Payment at full market
12 rates is essential to fulfill the goal of enticing well-qualified counsel to undertake
13 difficult consumer interest litigation, such as this. *San Bernardino Valley Audubon*
14 *Society, Inc. v. County of San Bernardino*, 155 Cal. App. 3d 738, 755 (1984).
15 Settlement Class Counsel have decades of specialized experience in class actions,
16 particularly false advertising and consumer law, collectively recovering billions of
17 dollars on behalf of their clients. *See* Ex. A, Ryan Final Approval Decl., at ¶¶ 2-3; Ex.
18 B, Weltman Final Approval Decl., at ¶ 2; Ex. C, Westerman Final Approval Decl., at
19 ¶ 2. Their hourly rates are well within the range of rates billed by comparable
20 attorneys in this market and are the standard rates they charge to all of their clients.⁹

21
22
23 ⁸ *See also Howerton*, 2014 WL 6976041, at *6 (citing *Gates v. Deukmejian*, 987 F.2d
1392, 1405 (9th Cir.1992), *as amended on denial of reh’g*, (1993) (noting that the rate
awarded should reflect “the rates of attorneys practicing in the forum district”).

24 ⁹ An attorney’s actual billing rate for similar work is presumptively appropriate. *See*
25 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254-55 (2001); *People Who*
26 *Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir. 1996). “Affidavits of the
27 plaintiffs’ attorney and other attorneys regarding prevailing fees in the community,
and rate determinations in other cases, particularly those setting a rate for the
28 plaintiffs’ attorney, are satisfactory evidence of the prevailing market rate.” *United*
Steelworkers of Am. v. Phelps Dodge Corp., 896 F.2d 403, 407 (9th Cir. 1990).

1 Settlement Class Counsel’s rates have been accepted in numerous other class
2 action cases. *See* Ex. A, Ryan Final Approval Decl., at ¶¶ 16-17; Ex. B, Weltman
3 Final Approval Decl., at ¶ 16; Ex. C, Westerman Final Approval Decl., at ¶ 2.
4 Settlement Class Counsel’s rates also compare very favorably with rates approved by
5 other trial courts in class action litigation.¹⁰ Finally, Settlement Class Counsel have
6 submitted sworn declarations attesting to their hourly rates and total hours devoted to
7 the case, their experience, and describing their efforts to prosecute this case. *See*
8 *generally* Exhibits A-C.

9 2. The Hours Expended Are Reasonable

10 The 8,499 hours spent by Settlement Class Counsel is reasonable given the
11 extensive investigation, expert consultation (science, marketing, and damages),
12 voluminous discovery, and motion practice involved in litigating this case for over 5
13 years. *See* Ex. A, Ryan Final Approval Decl., at ¶¶ 4-13; Ex. B, Weltman Final
14 Approval Decl., at ¶¶ 4-13.¹¹ Settlement Class Counsel also spent a significant
15 amount of time (almost one year) negotiating the Settlement in principle and then
16 finalizing the actual terms of the Settlement with Pharmavite, who scrutinized and
17 bargained virtually every provision of the Agreement. And, even after the Settlement
18

19 ¹⁰ *See Lingenfelter v. Astrue*, No. SA CV-03-00264-VBK, 2009 WL 2900286, at *4
20 (C.D. Cal. Sep. 3, 2009) (\$600 is “reasonable”); *POM Wonderful, LLC v. Purely*
21 *Juice, Inc.*, No. CV-07-2633-CAS, 2008 WL 4351842, at *4 (C.D. Cal. Sept. 22,
22 2008) (approving partner rates of \$750-\$450 and associate rates of \$425-\$275); *Love*
23 *v. Mail on Sunday*, No. CV-05-7798-ABC(PJWX), 2007 WL 2709975, at *8 (C.D.
24 Cal. Sept. 7, 2007) (approving partner rates of \$540-\$690 and associate rates of \$305-
25 \$485); *Housing Rights Ctr. v. Sterling*, No. CV 03-859 DSF, 2005 WL 3320738, at
26 *2-3 (C.D. Cal. Nov. 1, 2005) (noting hourly rates may run up to \$1,000 per hour in
27 Los Angeles, with \$125 to \$650 routine in California).

28 ¹¹ *See Brazil v. Dell Inc.*, No. C-07-01700, 2012 WL 1144303, at *1 (N.D. Cal. Apr. 4,
2012) (any concerns the district court initially had regarding the “substantial amount
of the award” (over \$6 million) were alleviated because of “the number of hours billed
and documented by Class Counsel and their attorneys and staff is reasonable under the
circumstances of this complex and demanding case, which was litigated over more
than four years and involved substantial discovery and motion practice.”).

1 Agreement was executed, negotiations continued resulting in an Amended Settlement
2 Agreement. Moreover, Settlement Class Counsel’s work is not yet done. Settlement
3 Class Counsel still need to: (1) prepare for and attend the final approval hearing,
4 including the research and drafting of the response to objectors, if any; and (2) oversee
5 the claims administration process, including addressing any claim review issues and
6 monitoring payments to the Settlement Class. None of this additional time will be
7 compensated. Yet, as Settlement Class Counsel’s lodestar inevitably increases, the
8 negative multiplier will grow, all of which further supports the reasonableness of the
9 requested fee award.

10 **3. The Requested Fees Are Reasonable in Light of the**
11 ***Kerr* Factors**

12 In considering the reasonableness of attorneys’ fees under a lodestar
13 calculation, courts consider “a host of ‘reasonableness’ factors, including the quality
14 of representation, the benefit obtained for the class, the complexity and novelty of the
15 issues presented, and the risk of nonpayment,” known as the *Kerr* factors.¹² *In re*
16 *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941–42 (9th Cir.2011) (quotation
17 marks omitted) (citing *Kerr*, 526 F.2d at 70); *Blum v. Stenson*, 465 U.S. 886, 898-900
18 (1984); *Foos v. Ann, Inc.*, No. 11-2794, 2013 WL 5352969, at *4 (S.D. Cal. Sept. 24,
19 2013) (“After computing the ‘lodestar,’ the district court may then adjust the figure
20 upward or downward taking into consideration [*Kerr*’s] twelve ‘reasonableness’
21 factors”).

22 ¹² The *Kerr* court outlined the following 12 reasonableness “guidelines”: “(1) the time
23 and labor required, (2) the novelty and difficulty of the questions involved, (3) the
24 skill requisite to perform the legal service properly, (4) the preclusion of other
25 employment by the attorney due to acceptance of the case, (5) the customary fee, (6)
26 whether the fee is fixed or contingent, (7) time limitations imposed by the client or the
27 circumstances, (8) the amount involved and the results obtained, (9) the experience,
28 reputation, and ability of the attorneys, (10) the ‘undesirability’ of the case, (11) the
nature and length of the professional relationship with the client, and (12) awards in
similar cases.” These 12 guidelines are commonly grouped together as set forth by
the Ninth Circuit in *In re Bluetooth*.

1 As demonstrated in the firm resumes attached to Settlement Class Counsel’s
2 Declarations, Settlement Class Counsel are experienced and skilled class action
3 attorneys specifically in consumer litigation. *See* Ex. A, Ryan Final Approval Decl.,
4 at ¶¶ 2-3; Ex. B, Weltman Final Approval Decl., at ¶ 2; Ex. C, Westerman Final
5 Approval Decl., at ¶ 2. The skill and competence of opposing counsel cannot be
6 doubted. *See, e.g., In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337
7 (C.D. Cal. 1977) (noting that plaintiff’s counsel faced “established and skillful defense
8 lawyers”). Pharmavite is represented by a team of experienced attorneys from Tatro
9 Tekosky Sadwick LLP in Los Angeles and Faegre Baker Daniels LLP in Minneapolis,
10 both firms skilled in class action defense. In light of the experience, diligence, and
11 hard-fought litigation of this case by counsel on both sides, the high-quality of
12 representation Plaintiff and the Settlement Class received is evident. And, as
13 demonstrated above and in Plaintiff’s preliminary approval motion, this litigation
14 concerned hotly disputed legal and factual issues. *See* Sections I and II above; Dkt.
15 No. 413-1. The successful efforts expended by Settlement Class Counsel are further
16 supported by the significant benefit provided to the Settlement Class, as described
17 above. Finally, that Settlement Class Counsel took on the risk associated with a
18 litigation such as this on a fully contingent basis, further supports the reasonableness
19 of the fee award Settlement Class Counsel are requesting.

20 In light of the exceptional results obtained (including \$6.9 million in cash and
21 free product benefits made available to the Settlement Class and the significant
22 injunctive relief), the efficiency with which the case was litigated, the risk, difficulty,
23 and the public service rendered by this action, and Settlement Class Counsel’s
24 continued work on the approval process and settlement administration, the requested
25 fee is fair and reasonable.

26 **D. The Requested Fee Award is Fair and Reasonable When Measured**
27 **Against the “Constructive Common Fund” the Settlement Provides.**

28 The requested fee award also is fair and reasonable when cross-checked against

1 the percentage of the constructive common fund created by the settlement it
2 represents. *See In re Bluetooth*, 654 F.3d at 943 (further confirmation of the
3 reasonableness of class counsel’s fee award, courts may evaluate the fee award in light
4 of the “constructive common fund” made available by the settlement). According to
5 the common fund rule, “a litigant or a lawyer who recovers a common fund for the
6 benefit of persons other than himself or his client is entitled to a reasonable attorney’s
7 fee from the fund as a whole.” *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537,
8 1545 (2013) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980)); *see also Mills v.*
9 *Elec. Auto Lite Co.*, 396 U.S. 375, 392 (1970) (recognizing counsel’s right to
10 compensation for obtaining a common benefit on behalf of the class). This rule has
11 existed in federal courts for more than a century. *See Goldberger v. Integrated*
12 *Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) (citing to *Trustees v. Greenough*, 105
13 U.S. 527 (1881)).

14 Under the percentage of the fund method, the value of the common fund – *i.e.*,
15 the amount of the benefit conferred – is measured by the total recovery available for
16 the Settlement Class, not the amount actually claimed by class members. *Boeing*
17 *Co.*, 444 U.S. at 480-81; *Williams v. MGM-Pathe Commc’ns Co.*, 129 F.3d 1026,
18 1027 (9th Cir. 1997). This method recognizes that the efforts of class counsel
19 established the entire settlement, including non-monetary benefits, for the benefit
20 of the entire settlement class. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d
21 423, 437 (2d Cir. 2007) (citing *Williams*, 129 F.3d at 1027); *Vizcaino*, 290 F.3d at
22 1049 (“Incidental or nonmonetary benefits conferred by the litigation are a
23 relevant circumstance.”). Further, notice and administration amounts, as well as
24 attorneys’ fees and expenses, are also considered part of the fund for purposes of
25 calculating fees on the basis of the percentage of the fund. *See, e.g., Weeks v. Kellogg*
26 *Co.*, No. CV 09-08102(MMM)(RZx), 2013 WL 6531177, at *7 (C.D. Cal. Nov. 23,
27 2013) (“post-settlement cost of providing notice to the class can reasonably be
28 considered a benefit to the class”); *Lopez*, 2011 WL 10483569, at *12 (amount of fund

1 takes into account attorneys’ fees and class administration costs).¹³

2 Here, the minimum value of the Settlement – if the requested fees, expenses,
3 and Plaintiff incentive compensation are awarded and no value is attributed to the
4 agreed upon injunctive relief obtained – is \$11,310,000, consisting of \$6.9 million
5 available to the Settlement Class in the form of cash or free product, \$325,000 in
6 notice and administrative costs, \$600,000 in attorneys’ expenses, \$10,000 incentive
7 award, plus \$3,475,000 in attorneys’ fees. Settlement Class Counsel’s \$3.475 million
8 fee request is slightly less than 31% of the Settlement value, and that is without
9 considering the substantial injunctive relief obtained by the Settlement.

10 While 25% is generally the benchmark, the court may and should depart from
11 this benchmark percentage when the percentage recovery would be “either too small
12 or too large in light of the hours devoted to the case or other relevant factors.”
13 *Mendoza v. Hyundai Motor Co., Ltd.*, No. 15-cv-01685-BLF, 2017 WL 342059, at
14 *13 (N.D. Cal. Jan. 23, 2017) (citing *Six (6) Mexican Workers v. Ariz. Citrus*
15 *Growers*, 904 F.2d 1301, 1311 (1990)); *see also* *Torrissi v. Tuscon Elec. Power Co.*, 8
16 F.3d 1370, 1476 (9th Cir. 1993). Chief among the “other relevant factors” are high
17 risk cases – such as this one – as “courts systematically reward risk.” *See* Eisenberg,
18 Theodore and Miller, Geoffrey P., “Attorneys’ Fees and Expenses in Cass Action
19 Settlements: 1993-2008”, (2009), *Cornell Law Faculty Working Papers*, Paper 64, at
20 p. 18 (*available at* http://scholarship.law.cornell.edu/clsops_papers/64.) An analysis
21 of 15 years’ worth of class action settlements, revealed that in consumer class actions
22 considered “high risk” cases, the mean fee award was 31.3% (slightly more than what
23 Settlement Class Counsel are requesting here). *Id.* Similarly, the National Association
24

25 ¹³ *See also In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 554 (2009) (“the
26 sum of the two amounts [settlement fund and attorneys’ fees] ordinarily should be
27 treated as a settlement fund for the benefit of the class ...” (citing *Manual for*
28 *Complex Litigation* (4th ed. 2008) §21.71, p. 525) (*see* additional authorities cited
therein); *Apple Computer, Inc. v. Super. Ct.*, 126 Cal. App. 4th 1253, 1269 (2005).

1 of Consumer Advocates (NACA), a nationwide non-profit corporation whose primary
2 practices or interests involve consumer rights and protection, has found “there is
3 authority for presuming an award in the 20%-30% range to be reasonable and
4 appropriate” in consumer class actions as it “keeps class counsel’s financial interest
5 closely aligned with that the of class itself” and “approximates the ‘free market’
6 negotiated fees obtained in traditional contingency litigation (in which contingent fees
7 of 30% to 40% are common).” NACA’s *Standards and Guidelines for Litigating and*
8 *Settling Consumer Class Actions*, Revised 3rd Edition, published at 299 F.R.D. 160, p.
9 27 (N.D. Tex. 2014).¹⁴

10 Additional “relevant factors” present here are that Settlement Class Counsel
11 achieved this successful Settlement only after extensive litigation, significant amounts
12 of discovery, substantial motion practice, and hard-fought protracted negotiations, but
13 without trial and further extended litigation and appeals, which would only have
14 increased the costs ultimately borne by the Settlement Class. District courts have
15 routinely granted, and the Ninth Circuit has affirmed, awards of attorneys’ fees
16 substantially exceeding 25% where some, or all, of these factors are present. *See, e.g.,*
17 *In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 457, 463 (9th Cir. 2000) (affirming
18 fee award of 33 1/3% of fund noting the complexity of the litigation); *In re Pac.*
19 *Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming a fee award of 33% of
20 settlement fund noting the complexity of the litigation); *Lusby v. GameStop, Inc.*, No.
21 C12-03783, 2015 WL 1501095, at *9 (N.D. Cal. Mar. 31, 2015) (awarding 33.3% of
22 settlement fund was justified considering the complexity of litigating and negotiating
23 the Settlement and the litigation risks); *Miller*, 2015 WL 758094, at *5 (“Even if the
24 court considers only the monetary relief of \$5.25 million, the requested fee reflects

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27 ¹⁴ *See also Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008) (“Empirical
28 studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of recovery.”).

1 30% of that benefit” which is consistent with similar cases “[w]here a common fund is
2 under \$10 million, a fee award of this amount is often held appropriate”); *Howerton*,
3 2014 WL 6976041, at *6 (awarding 30% of the settlement fund in attorneys’ fees and
4 expenses in a case involving a cash component, product vouchers and labeling
5 changes to product); *Boyd*, 2014 WL 6473804, at *12 (awarding 1/3 of the settlement
6 fund in attorneys’ fees because of the “exceptional terms of the settlement, in both the
7 monetary and non-monetary relief; the overwhelming support of the class for the
8 settlement; and the considerable risks in litigation”); *Kellogg Co.*, 2013 WL 6531177,
9 at *30 (awarding 30% as “reasonable in light of awards in other common fund
10 cases”); *McPhail v. First Command Fin. Planning, Inc.*, No. 05cv179-IEG-JMA, 2009
11 U.S. Dist. LEXIS 26544, at *10 (S.D. Cal. Mar. 30, 2009) (30% for first \$10 million
12 and 25% for additional \$2 million settlement); *In re Heritage Bond Litig.*, No. 02-ML-
13 1475, 2005 WL 1594389, at *9 (C.D. Cal. June 10, 2005) (“the Court concludes that
14 the exceptional result achieved in this action justifies an award of one-third of the
15 Settlement Fund in attorneys’ fees”) (collecting cases).¹⁵

16 While all these factors support the requested fee award, so too do the labeling
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18 ¹⁵*See also Parker v. L.A.*, 44 Cal. App. 3d 556, 567-68 (1974) (affirming award of
19 33%); *In re Cal. Indirect Purchases*, No. 960886, 1998 WL 1031494, at *9 (Alameda
20 Super. Ct. Oct. 22, 1998) (recognizing that numerous California trial courts have
21 awarded fees in excess of 30%, citing *In re Milk Antitrust Litig.*, No. BC070061 (L.A.
22 Super. Ct. 1998) (33 1/3% fee award)); *In re Facsimile Paper Antitrust Litig.*, Nos.
23 963598, 964899 and 967137 (S.F. Super. Ct. 1997) (33 1/3% fee award); *In re Liquid*
24 *Carbon Dioxide Cases*, J.C.C.P. 3012 (S.D. Super. Ct. 1996) (33 1/3% fee award); *In*
25 *re Cal. Indirect-Purchaser Plasticware Antitrust Litig.*, Nos. 961814, 963201 and
26 963590 (S.F. Super. Ct. 1995) (33 1/3% fee award); *Abzug v. Kerkorian*, No. CA-
27 000981 (L.A. Super. Ct. 1990) (45% fee award); *Haitz v. Meyer, et al.*, No. 572968-3
28 (Alameda Sup. Ct. 1990) (45% fee award); *Steiner v. Whittacker Corp.*, No. CA
000817 (L.A. Super. Ct. 1989) (35% fee award fee); *Andrews v First Interstate Bank*
of California, No. 953575 (S.F. Super. Ct. 1997) (30% fee award); *In re Cal. Indirect-*
Purchaser Infant Formula Antitrust Class Action Litig., J.C.C.P. No. 2557 (L.A.
Super. Ct. 1993) (30% fee award); *Fang, et al. v. United Bank, et al.*, No. 873365
(S.F. Super. Ct. 1992) (30% fee award); *Sconce/Lamb Cremation Cases*, J.C.C.P. No.
2085 (L.A. Super. Ct. 1989) (30% fee award)).

1 changes negotiated as part of the injunctive relief. In *In re Ferrero Litig.*, the Ninth
2 Circuit affirmed a fee award of \$985,920 where the fund was only \$550,000, and the
3 label changes consisted of including additional nutritional information on packaging
4 and new advertising protocols. No. 12-56469, 2014 WL 3465685, at *1 (9th Cir. July
5 16, 2014). *See also Vizcaino*, 290 F.3d at 1049 (“Incidental or nonmonetary benefits
6 conferred by the litigation are a relevant circumstance.”) (distinguishing case from *In*
7 *Re Bluetooth*, 654 F.3d at 946-47 on the ground that counsel had engaged in
8 substantial work on the matter and had engaged the settlement with the assistance of
9 judicial officers); *Pappas v. Naked Juice Co. of Glendora, Inc.*, No. CV11-08276 JAK
10 (PLAx) Order at 5 (court took into account injunctive relief as part of the settlement
11 fund for purposes of determining whether the settlement was reasonable) (*see Ex. D*);
12 *In re Jiffy Lube Int’l.*, 2012 WL 4849617, at *2 (S.D. Cal. Oct. 10, 2012)
13 (preliminarily approved settlement as fair and reasonable when considering all aspects
14 of the recovery to the class, including the injunctive relief).

15 As result, Settlement Class Counsel respectively submit that an attorneys’ fee
16 award of \$3.475 million is reasonable and should be approved.

17 **IV. SETTLEMENT CLASS COUNSEL’S REQUESTED EXPENSES**
18 **ARE REASONABLE AND COMPENSABLE**

19 Settlement Class Counsel also seek to be reimbursed for the reasonable and
20 necessary expenses they advanced to prosecute this litigation since its inception in
21 2011. Both the Ninth Circuit and California state courts allow recovery of pre-
22 settlement litigation costs in the context of class action settlements. *See Staton v.*
23 *Boeing*, 327 F.3d 938, 974 (9th Cir. 2003); *Serrano v. Priest*, 20 Cal. 3d 25, 35
24 (1977). “Attorneys may recover their reasonable expenses that would typically be
25 billed to paying clients in non-contingency matters.” *In re Omnivision Techs.*, 559 F.
26 Supp. 2d 1036, 1048 (N.D. Cal. 2007); *see also Harris v. Marhoefer*, 24 F.3d 16, 19
27 (9th Cir. 1994).

28 Settlement Class Counsel have submitted declarations attesting to the expenses

1 incurred in this litigation. *See* Ex. A, Ryan Final Approval Decl., at ¶¶ 19-20; Ex. B,
2 Weltman Final Approval Decl., at ¶ 18; Ex. C, Westerman Final Approval Decl., at
3 ¶ 5. In the aggregate, Settlement Class Counsel have currently advanced \$588,795.78
4 in expenses. The amount of expenses will increase in connection with Final
5 Approval, including additional expenses Settlement Class Counsel incur traveling to
6 and attending the Final Approval Hearing, as well as expenses associated with
7 responding to any objections that may be raised in this case. In connection with
8 Plaintiff’s Final Approval Motion, Settlement Class Counsel will supplement the
9 record with any additional expenses advanced. Ex. A, Ryan Final Approval Decl., at
10 ¶ 23; Ex. B, Weltman Final Approval Decl., at ¶ 19.

11 Settlement Class Counsel, as detailed in their Declarations, incurred these
12 expenses mostly for expert fees, but also for mediation fees, filing fees, travel,
13 computer research, photocopies, postage, and telephone charges. All of these
14 expenses were reasonably and necessarily incurred, and are of the sort that would
15 typically be billed to paying clients in the marketplace. *See, e.g., Mendoza*, 2017 WL
16 342059, at *14 (awarding as reasonable, expenses resulting from “expert consultants,
17 litigation support and professional services, and travel”); *In re Immune Response Sec.*
18 *Litig.*, 497 F. Supp. 2d 1166, 1177-78 (S.D. Cal. 2007) (awarding as reasonable and
19 necessary, reimbursement for “1) meals, hotels, and transportation; 2) photocopies; 3)
20 postage, telephone, and fax; 4) filing fees; 5) messenger and overnight delivery; 6)
21 online legal research; 7) class action notices; 8) experts, consultants, and investigators;
22 and 9) mediation fees”).

23 As part of the Settlement, Settlement Class Counsel agreed to accept, and
24 Pharmavite agreed not to object to, \$600,000 to reimburse them for expenses. Thus,
25 Settlement Class Counsel’s request is presumptively reasonable and should be
26 approved.

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1 **V. PLAINTIFF’S REQUEST FOR AN INCENTIVE AWARD SHOULD**
2 **BE APPROVED**

3 Incentive awards “are fairly typical in class action cases.” *Rodriguez v. West*
4 *Publishing Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). The Ninth Circuit has
5 recognized that incentive, or service, awards serve an important function as they “are
6 intended to compensate class representatives for work done on behalf of the class, to
7 make up for financial or reputational risk undertaken in bringing the action, and,
8 sometimes, to recognize their willingness to act as a private attorney general.”
9 *Rodriguez*, 563 F.3d at 958-59. Incentive awards are committed to the sound
10 discretion of the trial court and should be awarded based upon the court’s
11 consideration of, *inter alia*, the amount of time and effort spent on the litigation, the
12 duration of the litigation and the degree of personal gain obtained as a result of the
13 litigation. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D.
14 Cal. 1995).

15 Here, Plaintiff and Settlement Class Counsel respectfully request that the Court
16 approve a modest incentive award of \$10,000 to Plaintiff Barrera in recognition of her
17 contribution toward the successful prosecution of this case. Ms. Barrera was an active
18 participant in this litigation from its inception, reviewing relevant pleadings,
19 producing relevant documents, otherwise participating in the discovery process, and
20 keeping in constant communication with her counsel throughout the litigation.
21 Plaintiff Barrera also sat for a 4.5-hour deposition and attended the all-day mediation
22 before Judge Gandhi. *See* Ex. A, Ryan Final Approval Decl., at ¶ 24; Ex. B, Weltman
23 Final Approval Decl., at ¶ 22.

24 The requested incentive award is in line with, or falls below, amounts awarded
25 in comparable cases. *See, e.g., In re: Easysaver Rewards Litig.*, No. 09-cv-02094,
26 2016 WL 419048, at *5 (S.D. Cal. Aug. 9, 2016) (approving \$10,000 and \$15,000
27 incentive awards where plaintiffs were actively involved, including being deposed,
28 subject to written discovery, and traveling to attend mandatory settlement conference);

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic mail notice list. I hereby certify that I have mailed the foregoing document via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 22, 2017.

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