

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

*Lead Interim Class Counsel*

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

In Re: Smashburger IP Holder, LLC, et al.  
ALL CASES

Lead Case No. LA CV19-00993-JAK  
(JEMx)

**MEMORANDUM IN SUPPORT OF  
MOTION FOR AWARD OF  
ATTORNEYS' FEES,  
REIMBURSEMENT OF EXPENSES,  
AND PLAINTIFFS' REQUEST FOR  
SERVICE AWARDS**

Date: January 30, 2023  
Time: 8:30 a.m.  
Courtroom: 10B

Hon. John A. Kronstadt

TABLE OF CONTENTS

PAGE(S)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I. INTRODUCTION..... 1

II. BACKGROUND AND PROCEDURAL HISTORY ..... 2

III. THE CLRA PROVIDES FOR A MANDATORY AWARD OF ATTORNEYS’ FEES TO THE PREVAILING PARTY ..... 5

IV. CLASS COUNSEL’S REQUESTED ATTORNEYS’ FEE AWARD IS FAIR AND REASONABLE ..... 6

    A. Plaintiff’s Request Is Reasonable Under The Percentage Of The Benefit Method ..... 6

        1. The Total Value Of The Settlement Fund Is \$5.5 Million ..... 6

        2. The *Vizcaino* Factors Favor Plaintiffs’ Requested Award of Fees..... 8

            a. Class Counsel Achieved Excellent Results For The Class ..... 8

            b. Plaintiffs’ Claims Carried Substantial Litigation Risk ..... 9

            c. Class Counsel Generated Benefits Beyond The Settlement Fund ..... 10

            d. Market Rates As Reflected By Awards In Similar Cases ..... 10

            e. The Contingent Nature Of The Fee And Financial Burden Borne By Class Counsel..... 12

    B. A Lodestar Cross-Check Establishes That The Requested Attorneys’ Fees Are Reasonable..... 12

        1. Class Counsel Spent A Reasonable Number Of Hours On This Litigation..... 13

        2. The Rates For Class Counsel’s Work Are Reasonable And In Line With The Market ..... 17

            a. Rates Prevailing In The Community Support Class Counsel’s Hourly Rates ..... 18

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

- b. The Senior Attorneys Working On This Case Are Highly Skilled And Experienced In Class Action Litigation ..... 20
- c. Counsel’s Rates Have Been Approved by Many Other Courts ..... 21
- 3. All Relevant Factors Support Applying A Multiplier To Class Counsel’s Lodestar ..... 22
- V. CLASS COUNSEL’S EXPENSES WERE REASONABLE AND NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED ON BEHALF OF THE CLASS..... 23
- VI. THE REQUESTED INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES ARE FAIR AND REASONABLE..... 24
- VII. CONCLUSION ..... 25

**TABLE OF AUTHORITIES**

**PAGE(S)**

**CASES**

1

2

3

4 *Algarin v. Maybelline, LLC,*  
300 F.R.D. 444 (S.D. Cal. 2014).....9, 10

5

6 *Blum v. Stenson,*  
465 U.S. 886 (1984) ..... 17, 23

7

8 *Broughton v. Cigna Healthplans,*  
21 Cal. 4th 1066 (1999).....5

9

10 *Camancho v. Bridgeport Fin., Inc.,*  
523 F.3d 973 (9th Cir. 2008)..... 18

11 *Chalmers v. City of L.A.,*  
796 F.2d 1205 (9th Cir.1986)..... 17

12

13 *Elder v. Hilton Worldwide Holdings, Inc.,*  
2021 WL 4785936 (N.D. Cal. Feb 4, 2021)..... 21

14

15 *Fischel v. Equitable Life Assur. Soc’y of U.S.,*  
307 F.3d 997 (9th Cir. 2002)..... 6

16

17 *Hanlon v. Chrysler Corp.,*  
150 F.3d 1011 (9th Cir. 1998).....6, 12, 13

18

19 *Harris v. Marhoefer,*  
24 F.3d 16 (9th Cir. 1994)..... 23

20

21 *Hendricks v. Starkist Co.,*  
2016 WL 5462423 (N.D. Cal. Sept. 29, 2016) ..... 7

22

23 *Hensley v. Eckerhart,*  
461 U.S. 424 (1983) ..... 23

24

25 *Hirsch v. Compton Unified Sch. Dist.,*  
2013 WL 1898553 (C.D. Cal. May 3, 2013) ..... 17

26 *In re Activision Sec. Litig.,*  
723 F. Supp. 1373 (N.D. Cal. 1989) ..... 11

27

28

1 *In re Amgen Inc. Sec. Litig.*,  
2 2016 WL 10571773 (C.D. Cal. Oct. 25, 2016)..... 19

3 *In re Bluetooth Headset Prods. Liab. Litig.*,  
4 654 F.3d 935 (9th Cir. 2011)..... 12

5 *In re Heritage Bond Litig.*,  
6 2005 WL 1594403 (C.D. Cal. June 10, 2005) ..... 21

7 *In re Pac. Enters. Sec. Litig.*,  
8 47 F.3d 373 (9th Cir. 1995).....6, 11

9 *In-N-Out Burgers v. Smashburger IP Holder LLC*,  
10 2019 WL 1431904 (C.D. Cal. Feb. 6, 2019)..... 12

11 *Jordan v. Multnomah Cnty.*,  
12 815 F.2d 1258 (9th Cir. 1987)..... 17

13 *Kaupelis v. Harbor Freight Tools USA, Inc.*,  
14 2022 WL 2288895 (C.D. Ca. Jan. 12, 2022)..... 21

15 *Kerr v. Screen Extras Guild, Inc.*,  
16 526 F.2d 67 (9th Cir. 1975)..... 13, 23

17 *Kim v. Euromotors West/The Auto Gallery*,  
18 149 Cal. App. 4th 170 (2007)..... 5

19 *Martin v. AmeriPride Servs., Inc.*,  
20 2011 WL 2313604 (S.D. Cal. June 9, 2011)..... 11

21 *Missouri v. Jenkins*,  
22 491 U.S. 274 (1989) ..... 19

23 *Morales v. City of San Rafael*,  
24 96 F.3d 359 (9th Cir. 1996)..... 22, 23

25 *Morris v. Lifescan, Inc.*,  
26 54 F. App'x 663 (9th Cir. 2003)..... 6, 11

27 *Negrete v. Allianz Life Ins. Co. of N. Am.*,  
28 2015 WL 12592726 (C.D. Cal. Mar. 17, 2015)..... 19

*Nozzi v. Hous. Auth. for the City of Los Angeles*,  
2018 WL 1659984 (C.D. Cal. Feb. 15, 2018)..... 19

1 *Perez v. Rash Curtis & Assocs.*,  
2 2020 WL 1904533 (N.D. Cal. Apr. 17, 2020) .....21

3 *Rodriguez v. W. Publ'g Corp.*,  
4 563 F.3d 948 (9th Cir. 2009).....24

5 *Schwarz v. Sec’y of Health & Human Servs.*,  
6 73 F.3d 895 (9th Cir. 1995)..... 18

7 *Singer v. Becton Dickinson & Co.*,  
8 2010 WL 2196104 (S.D. Cal. June 1, 2010)..... 11

9 *Smith v. Cnty. of Riverside*,  
10 2019 WL 4187381 (C.D. Cal. June 17, 2019) ..... 18

11 *State of Florida v. Dunne*,  
12 915 F.2d 542 (9th Cir. 1990)..... 6

13 *Staton v. Boeing Co.*,  
14 327 F.3d 938 (9th Cir. 2003).....23

15 *United Steelworkers of Am. v. Phelps Dodge Corp.*,  
16 896 F.2d 403 (9th Cir. 1990)..... 17

17 *Van Vranken v. Atl. Richfield Co.*,  
18 901 F. Supp. 294 (N.D. Cal. 1995) .....24

19 *Vasquez v. Coast Valley Roofing, Inc.*,  
20 266 F.R.D. 482 (E.D. Cal. 2010)..... 11

21 *Vizcaino v. Microsoft Corp.*,  
22 290 F.3d 1043 (9th Cir. 2002).....passim

23 *West Shield Investigations and Sec. Consultants v. Superior Court*,  
24 82 Cal. App. 4th 935 (2000).....5

25 *Williams v. MGM-Pathe Commc'ns Co.*,  
26 129 F.3d 1026 (9th Cir. 1997).....6, 11

27 *Young v. Polo Retail, LLC*,  
28 2007 WL 951821 (N.D. Cal. Mar. 28, 2007).....6, 7

*Zaskorn v. Am. Honda Motor Co.*,  
2015 WL 3622990 (E.D. Cal. Jun. 9, 2015) .....21

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**STATUTES**

Cal. Bus. & Prof. Code § 17200 ..... 3

Cal. Bus. & Prof. Code § 17500 ..... 3

Cal. Civ. Code § 1750..... 3, 5

New York General Business Law § 349 ..... 3

New York General Business Law § 350 ..... 3

**OTHER AUTHORITIES**

Alba Conte & Herbert B. Newberg,  
Newberg on Class Actions § 14:03 (3d ed. 1992) ..... 23

1 Plaintiffs Andre Galvan, Lucinda Lopez, Thu Thuy Nguyen, Robert Meyer,  
2 and Jamelia Harris (“Plaintiffs”), by and through Plaintiffs’ Lead Interim Counsel,  
3 respectfully submit this memorandum in support of Plaintiffs’ Motion for an Award  
4 of Attorneys’ Fees.

5 **I. INTRODUCTION**

6 Plaintiffs’ complaint against Defendants Smashburger IP Holding and  
7 Smashburger Franchising LLP (jointly, “Defendants” or “Smashburger”), filed  
8 February 8, 2019, alleged, “Smashburger promotes its Triple Double Burgers as  
9 containing ‘Double the Beef.’” Contrary to this statement, however, Triple Double  
10 Burgers actually included two patties that are each half the size of the patties of  
11 Smashburger’s regular sized Classic Smash™ burgers. Therefore, Triple Double  
12 Burgers contained the same amount of beef as Smashburger’s regular-sized Classic  
13 Smash™ burgers, not ‘double’ the beef.” Second Amended Complaint (Dkt. No.  
14 45), ¶ 2. Smashburger’s false advertising gave rise to claims under California and  
15 New York consumer protection statutes as well as common law claims.

16 On September 19, 2022, this Court preliminarily approved a Settlement that  
17 provides significant relief to all Class members nationwide upon completion of a  
18 simple and straightforward claim form, with no proof of purchase required. Under the  
19 \$2.5 million cash portion of the settlement (the “Cash Settlement Fund”), class  
20 members can receive a \$4.00 cash award for each subject product the claimant  
21 purchased during the class period, up to a maximum of \$20.00 in cash. Alternatively,  
22 the class member may choose to receive up to 10 product vouchers of the 1.5 million  
23 vouchers Smashburger has agreed to provide, either to upgrade a single beef  
24 hamburger to a double beef hamburger for no additional cost or to receive a free small  
25 fountain drink. This portion of the settlement (the “Voucher Settlement Fund”) is  
26 conservatively valued at \$3 million. Thus, the total amount available in settlement is  
27 \$5.5 million. This is an excellent result for the Class.



1 The relief made available to the Class here came after Bursor & Fisher, P.A.  
2 (“Plaintiffs’ Lead Counsel”), along with Ahdoot & Wolfson, PC and Reich Radcliffe  
3 & Hoover LLP (collectively, “Class Counsel”) conducted extensive research,  
4 discovery, and investigation on behalf of the Class. As of December 2, 2022, Class  
5 Counsel and its staff have spent 1103.6 hours on the case and costs of \$21,541.02.

6 Class Counsel requests attorneys’ fees and expenses of \$825,000, representing  
7 15% of the total Settlement Fund and 33% of the Settlement Cash Fund alone, as well  
8 as service award payments of \$2,500 each for the five named Plaintiffs. The amounts  
9 requested are reasonable under Ninth Circuit law. Plaintiffs have provided extensive  
10 and detailed support for the work performed by each of the attorneys and legal  
11 assistants on the case, and have shown that the hourly rates requested are well within  
12 an approvable range.

## 13 **II. BACKGROUND AND PROCEDURAL HISTORY**

14 On February 8, 2019, Plaintiff Andre Galvan filed a class action complaint  
15 against Defendants in the United States District Court for the Central District of  
16 California, Case No. 2:19-CV-00993-JAK-(JEMx), alleging that Defendants  
17 mislabeled their Triple Double Burgers as containing “Double the Beef,” when in  
18 fact the Triple Double Burgers consisted of two patties totaling the same weight as  
19 the basic “Smashburger Classic.”

20 On March 11, 2019, Barbara Trevino, represented by Class Counsel Ahdoot &  
21 Wolfson, filed a similar lawsuit against Defendants in the United States District  
22 Court for the Central District of California, Case No. 2:19-CV-02794. Plaintiffs in  
23 both actions moved for appointment of their respective counsel as Lead Interim  
24 Class Counsel. On May 16, 2019, the Court ordered Galvan’s lawsuit consolidated  
25 with the Trevino lawsuit and appointed Bursor & Fisher, P.A. as Lead Interim Class  
26 Counsel. Dkt. No. 35.

27 On August 22, 2019, Plaintiffs filed their Second Amended Consolidated  
28 Class Action Complaint, which asserts claims for violations of the California

1 Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750, *et seq.*) (“CLRA”),  
2 California’s Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200, *et seq.*) (the  
3 “UCL”), California’s False Advertising Law (Cal. Bus. & Prof. Code §§ 17500, *et*  
4 *seq.*) (the “FAL”), and violations of New York General Business Law §§ 349 and  
5 350 (collectively, “NYGBL”), as well as claims for Breach of Express Warranty,  
6 Fraud, and Unjust Enrichment. Dkt. No. 45.

7 The Parties have engaged in significant discovery. *See* Declaration of L.  
8 Timothy Fisher in Support of Motion for Final Approval of Settlement and in  
9 Support of Motion for Attorneys’ Fees, Costs, and Service Awards (“Fisher Decl.”),  
10 ¶ 6. The Parties exchanged and met and conferred concerning a number of discovery  
11 requests, including interrogatories and requests for production. *See id.* In response,  
12 Smashburger produced critical documents concerning the merits of the case and its  
13 overall financial condition. *Id.* Plaintiffs reviewed over 14,500 documents. *Id.*  
14 Plaintiffs also reviewed numerous files from the trademark case filed against  
15 Smashburger, entitled *In-N-Out Burgers v. Smashburger IP Holder LLC and*  
16 *Smashburger Franchising LLC*, Case No. 8:17-cv-01474 (C.D. Cal. August 28,  
17 2018). *Id.* Finally, Plaintiffs retained a damages expert, who analyzed Defendants’  
18 sales information and worked with Plaintiffs’ counsel to develop a potential damages  
19 model. *Id.*

20 The Parties and their counsel engaged in substantial arm’s-length negotiations  
21 in an effort to resolve this action, including two full days of mediation with Jill R.  
22 Sperber, Esq. of Judicate West and many months of intense settlement negotiations.  
23 *Id.* ¶ 8. On October 8, 2020, the Parties executed a settlement term sheet. *Id.* A  
24 final Stipulation of Class Action Settlement was executed on February 1, 2021. *Id.*

25 Under the settlement, Defendants have agreed to provide \$2,500,000 in cash  
26 (the “Cash Settlement Fund”) and 1.5 million vouchers valued between \$2.00 and  
27 \$2.49 each, conservatively worth \$3,000,000 in total vouchers, to pay claims for  
28 those who purchased one or more of the Subject Products. Class Members can

1 receive a \$4.00 cash award for each Subject Product the Authorized Claimant  
2 purchased during the Class Period, up to a maximum of five (5) claims (or \$20.00 in  
3 cash) without Proof of Purchase. Alternatively, as discussed above, the Authorized  
4 Claimant may choose to receive up to 10 freely transferable product vouchers.

5 On September 19, 2022, after full briefing and supplemental filings as  
6 requested by the Court, this Court granted preliminary approval to the settlement,  
7 approved the notice plan, and observed that counsel has made “substantial efforts  
8 and ... corresponding progress in pursuing the claims in this action.” Order Granting  
9 Preliminary Approval (“Preliminary Approval Order”) (Dkt. No. 74) at 16.

10 The Court also stated:

11 The evidence submitted in connection with Plaintiffs’ Motion for  
12 Preliminary Approval shows that, to date, the attorney’s fees  
13 submitted by Plaintiffs’ counsel are within a reasonable range.  
14 However, in connection with any motion for final approval of the  
15 settlement, Plaintiffs’ Counsel shall submit more detailed  
16 evidence in support of the claimed hourly rate for each attorney  
as well as a detailed description of the tasks performed in  
connection with this action that is in conformance with the  
Standing Order.

17 Preliminary Approval Order, Dkt. 74 at 32. Plaintiffs’ Counsel have complied with  
18 the Court’s instructions by submitting detailed evidence in support of the hourly rate  
19 claimed for each attorney. In addition to submitting counsel’s explanation of the  
20 work performed and evidence that their rates have been approved in many other  
21 cases (*see* Fisher Declaration and Declarations of Tina Wolfson and Marc Reich, all  
22 submitted herewith), Plaintiffs have also submitted evidence of the reasonableness of  
23 their rates, particularly rates over \$700, regarding which the Court in the Preliminary  
24 Approval Order expressed concern. This additional evidence consists of reliable rate  
25 surveys and orders from this and neighboring district courts approving such rates, a  
26 recap of court rulings approving Class Counsel’s rates, and a discussion of the skill  
27 and experience of the senior lawyers involved in this case that justify the rates they  
28

1 charge. These rates are consistent with rates charged and approved in the Southern  
2 California legal market and around the country. *See* Section IV. B. 2, *infra*.

3 Class members have responded enthusiastically to the notice of settlement that  
4 the Court approved. Approximately 977,000 notices were emailed. Declaration of  
5 Frank Ballard, ¶ 9. As of November 30, 2022, just over 539,000 claims have been  
6 filed. *Id.*, ¶ 12.

7 **III. THE CLRA PROVIDES FOR A MANDATORY AWARD OF**  
8 **ATTORNEYS’ FEES TO THE PREVAILING PARTY**

9 Plaintiffs brought claims against Smashburger under California’s Consumers  
10 Legal Remedies Act, Civil Code §§ 1750, *et seq.* (the “CLRA”). SAC, ¶¶ 43-48.  
11 For CLRA claims, an award of fees to the prevailing party is mandatory under Civil  
12 Code § 1780(d), which provides: “The court shall award court costs and attorney’s  
13 fees to a prevailing plaintiff in litigation filed pursuant to this section.” As the  
14 California Court of Appeal has explained, in construing this provision:

15 “The word ‘shall’ is usually deemed mandatory, unless a  
16 mandatory construction would not be consistent with the  
17 legislative purpose underlying the statute.” (*West Shield*  
18 *Investigations and Sec. Consultants v. Superior Court*  
19 (2000) 82 Cal. App. 4th 935, 949, 98 Cal.Rptr.2d 612.)  
20 Our Supreme Court has observed that “the availability of  
21 costs and attorneys fees to prevailing plaintiffs is integral  
22 to making the CLRA an effective piece of consumer  
23 legislation, increasing the financial feasibility of bringing  
24 suits under the statute.” (*Broughton v. Cigna*  
25 *Healthplans* (1999) 21 Cal. 4th 1066, 1085, 90 Cal. Rptr.  
26 2d 334, 988 P.2d 67.) Thus, a mandatory construction of  
27 the word “shall” in section 1780(d) is consistent with the  
28 legislative purpose underlying the statute.

29 *Kim v. Euromotors West/The Auto Gallery*, 149 Cal. App. 4th 170, 178 (2007). Here,  
30 the Class has recovered a Settlement with a total minimum value of \$5,500,000. The  
31 Class is thus the “prevailing party,” and a fee award to Class Counsel is mandatory  
32 under the CLRA.

1 **IV. CLASS COUNSEL’S REQUESTED ATTORNEYS’ FEE AWARD IS**  
2 **FAIR AND REASONABLE**

3 Under Ninth Circuit standards, a District Court may award attorneys’ fees  
4 under either the “percentage-of-the-benefit” method or the “lodestar” method.  
5 *Fischel v. Equitable Life Assur. Soc’y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002);  
6 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). In the Preliminary  
7 Approval Order, the Court previewed its analysis of Class Counsel’s fee request first  
8 under the percentage approach, using lodestar as a cross-check. Plaintiffs  
9 accordingly address the percentage of the benefit approach first.

10 **A. Plaintiff’s Request Is Reasonable Under The**  
11 **Percentage Of The Benefit Method**

12 Under the common fund doctrine, courts typically award attorneys’ fees based  
13 on a percentage of the *total settlement*. See *State of Florida v. Dunne*, 915 F.2d 542,  
14 545 (9th Cir. 1990); see also *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378-79 (9th  
15 Cir. 1995) (affirming attorney’s fee award of 33% of the recovery); *Morris v.*  
16 *Lifescan, Inc.*, 54 F. App’x 663, 664 (9th Cir. 2003) (affirming attorney’s fee award  
17 of 33% of the recovery).

18 **1. The Total Value Of The Settlement Fund Is \$5.5**  
19 **Million**

20 To calculate attorneys’ fees based on the percentage of the benefit, the Court  
21 must first determine the value of the Settlement Fund. In so doing, the Court should  
22 consider the amount made available to the Class. As articulated in *Young v. Polo*  
23 *Retail, LLC*, 2007 WL 951821 (N.D. Cal. Mar. 28, 2007), Ninth Circuit precedent  
24 requires courts to award class counsel fees based on the total benefits being made  
25 available. *Id.* at \*8 (citing *Williams v. MGM-Pathe Commc’ns Co.*, 129 F.3d 1026  
26 (9th Cir. 1997) (ruling that a district court abused its discretion in basing attorney fee  
27 award on actual distribution to class instead of amount being made available). Here,  
28 the value of the settlement consists of two parts: (1) the \$2.5 million Settlement Cash  
Fund from which class members may elect to be paid up to \$20 in cash, and (2) the

1 Voucher Fund, alternatively providing up to ten vouchers that are worth either \$20  
2 (for a burger upgrade) or \$29.40 (for free fountain drinks). *See, e.g. Hendricks v.*  
3 *Starkist Co.*, 2016 WL 5462423, at \*7, \*10 n. 3 (N.D. Cal. Sept. 29, 2016) (finding  
4 that “vouchers are valued at 100 cents on the dollar” where the vouchers have no  
5 expiration date, are freely transferrable, and are redeemable at any retailer that sells  
6 the products).

7 In the Preliminary Approval Order, the Court determined that although the  
8 settlement offers class members the option of claiming a voucher, the settlement is  
9 not a coupon settlement subject to CAFA’s limitations on contingent fees. Dkt. 74 at  
10 22. The Court made this finding because class members may choose either the  
11 vouchers or a cash award. *Id.* Plaintiffs agree with this characterization.

12 In valuing the settlement for a preliminary evaluation of fees, however, the  
13 Court appears to have assigned no value to the vouchers. *See* Preliminary Approval  
14 Order, Dkt. 74 at 21 (“When the Motion was filed ... Plaintiffs had incurred  
15 approximately \$644,00 in attorney’s fees (26% of the 2.5 million Cash Settlement  
16 Fund)”), 22 (“As noted, the attorney’s fees incurred by Plaintiffs to date represent  
17 approximately 27.9% of the \$2.5 million Cash Settlement Fund.”), 23 (“[T]he final  
18 total for attorneys’ fees would be approximately \$763, 817.20, or 30.6% of the Cash  
19 Settlement Fund. ... This allocation would slightly exceed the 25% “benchmark  
20 award” in the Ninth Circuit.”).

21 The attorneys’ fee award will be paid, obviously, out of the Cash Settlement  
22 Fund. Nevertheless, Plaintiffs respectfully submit that the percentage of the benefit  
23 must be calculated against the value of both the cash and voucher portion of the  
24 Settlement Fund. *See Young, supra*, at \*5 (“Plaintiff seeks an award of attorney fees  
25 in the amount of \$438,188.70 to be paid from the settlement fund, which represents  
26 31% of the settlement amount (*accounting for the actual cash value of the gift*  
27 *cards*)”) (emphasis added); *Hendricks, supra*, at \*7, \*10 n. 3 (finding that “vouchers  
28 are valued at 100 cents on the dollar” where the vouchers have no expiration date,

1 are freely transferrable, and are redeemable at any retailer that sells the products). In  
2 this case, the vouchers are worth, at minimum, \$3,000,000.<sup>1</sup> Accordingly, the  
3 attorneys’ fees award that Plaintiffs seek is 15% of the total settlement fund, and as  
4 such is far below the 25% benchmark established by the Ninth Circuit.

5 Even if it were valued as 33% of the Cash Settlement Fund, however, the  
6 requested attorneys’ fee award is well-supported under the factors set forth in in  
7 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002). In *Vizcaino*, the  
8 Ninth Circuit instructed district courts that “Selection of the benchmark or any other  
9 rate must be supported by findings that take into account all of the circumstances of  
10 the case.” *Id.* The Ninth Circuit in *Vizcaino* identified five factors as relevant to  
11 determining whether requested attorneys’ fees in a common fund case are  
12 reasonable: (a) the results achieved; (b) the risk of litigation; (c) whether Class  
13 Counsel’s work generated benefits beyond the Class settlement fund, (d) market  
14 rates as reflected by awards made in similar cases; and (e) the contingent nature of  
15 the fee and the financial burden carried by the plaintiffs. *Id.* at 1048–50. Here, a fee  
16 of 15% (33% if only the Cash Settlement is considered, which Plaintiffs submit  
17 would be incorrect) is reasonable for the reasons set forth below.

18 Under the circumstances of this case, a fee award of \$825,000 is appropriate.

19 **2. The *Vizcaino* Factors Favor Plaintiffs’ Requested**  
20 **Award of Fees**

21 *a. Class Counsel Achieved Excellent Results*  
22 *For The Class*

23 The amount of relief offered by the Settlement provides extraordinary relief  
24 for the class. Class members can opt to receive up to \$20 in cash or vouchers of up  
25 to \$24.90 in value. That is, class members can receive a \$4.00 cash award for each  
26 subject product the claimant purchased during the class period, up to \$20.00 in cash,

27 <sup>1</sup> If the Voucher Settlement Fund is calculated at \$2.49 per voucher (that is,  
28 assuming all vouchers would be redeemed for free fountain drinks), it is worth  
\$3,735,000.

1 or up to 10 product vouchers. The product vouchers will be fully and freely  
2 transferrable and allow the bearer, upon the purchase of a regularly-priced entrée at a  
3 company owned Smashburger-branded restaurant, to either upgrade a single beef  
4 hamburger to a double beef hamburger for no additional cost or receive a free small  
5 fountain drink. As there are approximately 120 company owned Smashburger  
6 restaurants across 20 states, where an upgrade from a single beef hamburger to a  
7 double beef hamburger generally costs approximately \$2.00, and a small fountain  
8 drink generally costs approximately \$2.49, the vouchers are worth between \$20.00  
9 and \$24.90. Fisher Decl., ¶ 10.

10 Thus far the class members have demonstrated their approval of the settlement  
11 by making over 539,000 claims. Declaration of Frank Ballard, ¶ 12.

12 *b. Plaintiffs' Claims Carried Substantial*  
13 *Litigation Risk*

14 The second *Vizcaino* factor looks to the risk and novelty of the claims at issue.  
15 Class Counsel undertook significant litigation risk in prosecuting this case. *See*  
16 *generally* Fisher Decl. ¶¶ 12-15 (discussing the risks of litigating Plaintiffs' claims).  
17 A favorable outcome was not assured. Class Counsel also recognized that they would  
18 face risks at class certification, summary judgment, and trial. Smashburger, well-  
19 represented by able and experienced attorneys, argued that its advertising campaign  
20 was not false or misleading and that Plaintiffs would be unable to certify any class.  
21 Defendants would no doubt have presented a vigorous defense at trial, and there is  
22 no assurance that the Class would prevail.

23 Plaintiffs also faced the possibility that a class might not be certified, or only  
24 partially certified. Whether and to what extent a consumer class can be certified  
25 whose members, as here, must self-identify, remains a question in dispute. *See., e.g.,*  
26 *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 455 (S.D. Cal. 2014) (discussing  
27 ascertainability issues with class member self-identification); *Morales v. Kraft Foods*  
28 *Group*, Case 2:14-cv-04387-JAK-PJW (Order Re Plaintiff's Motion for Class



1 Certification filed 06/23/15) (reviewing conflicting circuit law re self-identification);  
2 Furthermore, Plaintiffs would have likely faced an argument that the class should  
3 include only those consumers who purchased the Triple Double Burger based on  
4 Smashburger’s false advertising claims, and not for some other reason. *Id.* (limiting  
5 class to those who purchased cheese based on “natural” advertising claims).

6 Even if the Class did prevail at trial, there was a danger that they would not be  
7 able to obtain an award of damages significantly more than achieved here absent  
8 such risks. Indeed, Plaintiffs’ own damages expert estimated that if Plaintiffs were to  
9 prove their liability case, certify a nationwide class, and prevail at trial, potential  
10 recovery of actual damages would range from, on the low end, \$1,380,783, to the  
11 high end, approximately \$6,706,809. Fisher Decl., ¶ 14. Thus, in the eyes of  
12 Plaintiffs’ Lead Counsel, the proposed Settlement provides the Class with an  
13 outstanding opportunity to obtain significant relief at this stage in the litigation, and  
14 abrogates the risks that might prevent them from obtaining relief.

15 This was not a “novel” case in the sense that no one had ever brought similar  
16 claims before. Class Counsel did, however, take significant risks in taking on this  
17 case. In light of these risks, the \$5.5 million Settlement is an outstanding result.

18 *c. Class Counsel Generated Benefits Beyond*  
19 *The Settlement Fund*

20 The third factor cited in *Vizcaino* looks to whether “counsel’s performance  
21 generated benefits beyond the cash settlement fund.” *Vizcaino*, 290 F.3d at 1049.  
22 The settlement achieves this goal. Any vouchers not claimed will be donated to the  
23 Boys and Girls Club, subject to the Court’s approval.

24 *d. Market Rates As Reflected By Awards In*  
25 *Similar Cases*

26 The fourth factor cited by *Vizcaino* looks to market rates as reflected by  
27 awards in similar cases. *Vizcaino*, 290 F.3d at 1049 (“Fourth, the court found the  
28 28% rate to be at or below the market rate.”). The reasonableness of Class Counsel’s

1 fee request as a percentage of the total settlement fund, 15%, as well as the 33% fee  
2 as a percentage of the Settlement Cash Fund only, is illustrated by numerous awards  
3 ranging from 30% to 40% in similar cases. For example, when awarding 32.8% of  
4 the settlement fund for fees and costs, Judge Marilyn Hall Patel of the Northern  
5 District of California explained: “absent extraordinary circumstances that suggest  
6 reasons to lower or increase the percentage, the rate should be set at 30%[,]” as this  
7 will “encourage plaintiffs’ attorneys to move for early settlement, provide  
8 predictability for the attorneys and the class members, and reduce the time consumed  
9 by counsel and court in dealing with voluminous fee petitions.” *In re Activision Sec.*  
10 *Litig.*, 723 F. Supp. 1373, 1378–79 (N.D. Cal. 1989); *see also In re Pac. Enters. Sec.*  
11 *Litig.*, 47 F.3d at 378-79 (affirming attorney’s fee of 33% of the recovery); *Williams*,  
12 129 F.3d at 1027 (33.33% of total fund awarded); *Morris*, 54 Fed. App’x at 663  
13 (affirming fee award of 33% of the recovery); *Vasquez v. Coast Valley Roofing, Inc.*,  
14 266 F.R.D. 482, 492 (E.D. Cal. 2010) (citing to five recent class actions where  
15 federal district courts approved attorney fee awards ranging from 30% to 33%);  
16 *Martin v. AmeriPride Servs., Inc.*, 2011 WL 2313604, at \*8 (S.D. Cal. June 9, 2011)  
17 (noting that “courts may award attorneys fees in the 30%-40% range in ... class  
18 actions that result in recovery of a common fun[d] under \$10 million”); *Singer v.*  
19 *Becton Dickinson & Co.*, 2010 WL 2196104, at \*9 (S.D. Cal. June 1, 2010)  
20 (approving attorney fee award of 33.33% of the common fund and holding that  
21 award was similar to awards in three other cases where fees ranged from 33.33% to  
22 40%); *Ingalls v. Hallmark Mktg. Corp.*, 08cv4342 (C.D. Cal. Oct. 16, 2009)  
23 (awarding 33.33% fee on a \$5.6 million common fund settlement); *Rippee v. Boston*  
24 *Mkt. Corp.*, No. 05-CV-1359 TM (JMA) (Dkt. No. 70 at 7) (S.D. Cal. Oct. 10, 2006)  
25 (awarding a 40% fee on a \$3.75 million in a common fund settlement).

1 e. *The Contingent Nature Of The Fee And*  
2 *Financial Burden Borne By Class Counsel*

3 The fifth *Vizcaino* factor is the contingent nature of the fee and the financial  
4 burden carried by the plaintiffs. *Vizcaino*, 290 F.3d at 1050. By the time of the  
5 Final Fairness Hearing, Class Counsel will have worked for three years with no  
6 payment, and no guarantee of payment absent a successful outcome. Class Counsel  
7 also advanced \$20,371.98 in out-of-pocket expenses, again with no guarantee of  
8 repayment. If the case had advanced through class certification, these expenses  
9 would have increased many-fold, and Class Counsel would have been required to  
10 advance these expenses potentially for several years to litigate this action through  
11 judgment and appeals. Indeed, on a summary judgment motion in *In-N-Out v.*  
12 *Smashburger*, a trademark infringement case involving the “Triple Double Burger,”  
13 Judge Selna observed that In-N-Out had forgone a particular line of attack because it  
14 would have required a consumer survey, and In-N-Out had hoped to avoid incurring  
15 that expense by winning summary judgment. *In-N-Out Burgers v. Smashburger IP*  
16 *Holder LLC*, 2019 WL 1431904, at \*7 (C.D. Cal. Feb. 6, 2019). Plaintiffs would  
17 have incurred that same expense and more had the case not settled.

18 **B. A Lodestar Cross-Check Establishes That The**  
19 **Requested Attorneys’ Fees Are Reasonable**

20 Under Ninth Circuit standards, a District Court may also award attorneys’ fees  
21 under the “lodestar” method. *Hanlon*, 150 F.3d at 1029. Lodestar plus any  
22 multiplier may be used as a cross-check against the percentage-of-the-fund fee.  
23 “Calculation of the lodestar, which measures the lawyers' investment of time in the  
24 litigation, provides a check on the reasonableness of the percentage award.”  
25 *Vizcaino*, 290 F.3d at 1050.

26 The lodestar figure is calculated by multiplying the hours spent on the case by  
27 reasonable hourly rates for the region and attorney experience. *See, e.g., In re*  
28 *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011); *Hanlon*,

1 150 F.3d at 1029. The resulting lodestar figure may be adjusted upward or  
2 downward by use of a multiplier to account for factors including, but not limited to:  
3 (i) the quality of the representation; (ii) the benefit obtained for the class; (iii) the  
4 complexity and novelty of the issues presented; and (iv) the risk of nonpayment.  
5 *Hanlon*, 150 F.3d at 1029; *see also Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67,  
6 70 (9th Cir. 1975). Courts typically apply a multiplier or enhancement to the  
7 lodestar to account for the substantial risk that class counsel undertook by accepting  
8 a case where no payment would be received if the lawsuit did not succeed. *Vizcaino*,  
9 290 F.3d at 1051.

10 **1. Class Counsel Spent A Reasonable Number Of**  
11 **Hours On This Litigation**

12 Class Counsel worked efficiently. A single law firm, Bursor & Fisher, served  
13 as Interim Lead Class Counsel. Class Counsel worked with Reich Radcliffe &  
14 Hoover LLP, a frequent co-counsel. The two firms are accustomed to working  
15 together and routinely divide tasks for maximum efficiency. *See* Fisher Decl. ¶ 22;  
16 Reich Decl., ¶¶ 3. Like Bursor & Fisher, Reich Radcliffe & Hoover has not been  
17 paid a single dollar for their valuable work on this case. *See* Reich Decl. ¶ 2. The  
18 third law firm, Ahdoot & Wolfson, PC, filed a second case against Smashburger,  
19 which this Court consolidated with the *Galvan* case. Ahdoot & Wolfson also  
20 worked in concert with Interim Lead Counsel and performed unique tasks that  
21 contributed to the successful outcome in this case. Wolfson Decl., ¶¶ 5-12.

22 Class Counsel have submitted their detailed daily billing records or time  
23 summaries showing what work was done and by whom. Fisher Decl. ¶ 21, Exh. 2;  
24 *see also* Reich Decl. ¶ 4, Exh. B; Wolfson Decl., Exh. 2. These confirm counsel's  
25 efficient billing. For example, Bursor & Fisher strives to assign as much work as  
26 possible to less senior lawyers who bill at lower hourly rates to minimize fees for the  
27 Class. More than 47% of attorneys' hours (331.5 hours) were billed by associates.  
28 Fisher Decl. ¶ 25. At the same time, leadership and settlement of this case required

1 significant involvement by more experienced lawyers. *Id.* Bursor & Fisher partners  
 2 billed approximately 36% of the total hours (249 hours) primarily on developing the  
 3 litigation strategy, discovery, attending mediation, and negotiating the settlement.  
 4 *See id.* In total, as of December 2, 2022, Bursor & Fisher billed 693.6 hours, Reich  
 5 Radcliffe & Hoover billed 190.2 hours, and Ahdoot & Wolfson billed 219.8 hours.  
 6 *See* Fisher Decl., ¶ 25, Reich Decl., ¶ 4 and Exhs. B-C, and Wolfson Decl., ¶ 26.

7 The Court in its Preliminary Approval Order expressed the view that certain  
 8 work performed by the law firms was duplicative or inefficient, and proposed to  
 9 exclude those hours from lodestar. Preliminary Approval Order at 28-32. Plaintiffs  
 10 are convinced that with the detailed daily time records before the Court, the Court  
 11 will revise its view of this work. Far from being duplicative or wasted time, this  
 12 work was unique and important, contributing to the ultimate resolution of the case, as  
 13 discussed for each entry below. Accordingly, Plaintiffs ask that this time be included  
 14 in the final fee award.

15

| <b>Bursor &amp; Fisher, P.A. - In re Smashburger IP Holder Hours Summary Through 7/19/2022</b> |                  |              |
|--|------------------|--------------|
| <b>Pre-Suit &amp; Pleadings</b>  |                  |              |
| <b>ATTORNEY</b>  | <b>TITLE</b>     | <b>HOURS</b> |
| Angeli Patel (AP)  | Summer Associate | 1.5          |

16  
17  
18

19 Ms. Patel, at that time a summer associate, was assigned the appropriate  
 20 lawyer-in-training task of conducting research on the summary judgment motion in  
 21 *In-N-Out v. Smashburger*. Fisher Decl., ¶ 23, Exh. 2. This research provided a  
 22 preview of Smashburger’s defenses and possible outcomes, important considerations  
 23 in the pre-suit phase. *Id.*

24

| <b>Bursor &amp; Fisher, P.A. - In re Smashburger IP Holder Hours Summary Through 7/19/2022</b> |                                      |              |
|--|--------------------------------------|--------------|
| <b>Case Management</b>   |                                      |              |
| <b>ATTORNEY</b>  | <b>TITLE</b>                         | <b>HOURS</b> |
| Brittany Scott (BSS)   | Associate (2019)                     | 2.7          |
| Molly Sasseen (MCS)  | Senior Litigation Support Specialist | 7.0          |

25  
26  
27  
28

1           Brittany Scott conducted research regarding issue preclusion, which again was  
 2 an important issue that the *In-N-Out* case presented. Fisher Decl., ¶ 23, Exh. 2. She  
 3 also performed research on this Court and its previous rulings, *id.*, which every  
 4 conscientious litigation attorney, whether representing plaintiffs or defendants, must  
 5 do when first assigned to a judge.

6           Molly Sasseen, an experienced litigation paralegal, did the critical work of  
 7 filing and arranging service of the complaint, providing this Court with the initiating  
 8 documents, and arranging the filing of the Rule 26(f) report. Fisher Decl., ¶ 23, Exh.  
 9 2. In addition, she communicated with the lead plaintiffs and prospective plaintiffs  
 10 and class members as necessary, as well as monitoring Ahdoot & Wolfson’s  
 11 complaint, which was ultimately consolidated with the *Galvan* action. *Id.* These  
 12 were important tasks assigned to a paralegal who could work on them independently.

| <b>Bursor &amp; Fisher, P.A. - In re Smashburger IP Holder Hours Summary Through 7/19/2022</b> |                                      |              |
|--|--------------------------------------|--------------|
| <b>Leadership</b>  |                                      |              |
| <b>ATTORNEY</b>  | <b>TITLE</b>                         | <b>HOURS</b> |
| Debbie Schroeder (DLS)   | Senior Litigation Support Specialist | 3.1          |

16           Ms. Schroeder, Bursor & Fisher’s most senior legal assistant, either carried out  
 17 or supervised the support tasks involved in counsel’s motion for Bursor & Fisher’s  
 18 appointment for lead counsel. Fisher Decl., ¶ 23, Exh. 2.

| <b>Bursor &amp; Fisher, P.A. - In re Smashburger IP Holder Hours Summary Through 7/19/2022</b> |                                      |              |
|--|--------------------------------------|--------------|
| <b>Settlement</b>  |                                      |              |
| <b>ATTORNEY</b>  | <b>TITLE</b>                         | <b>HOURS</b> |
| Brittany Scott (BSS)   | Associate (2019)                     | 1.5          |
| Jenna L. Gavenman (JLG)  | Summer Associate                     | 1.0          |
| Emma Blake (EFB)   | Summer Associate                     | 3.1          |
| Debbie Schroeder (DLS)   | Senior Litigation Support Specialist | 7.7          |

25           Each of these individuals performed necessary, nonduplicative, and useful  
 26 work on the settlement of the case. Ms. Scott drafted a portion of the settlement term  
 27 sheet. Fisher Decl., ¶ 23, Exh. 2. Ms. Gavenman, then a summer associate,  
 28 procured supplemental authority to submit to the Court after the preliminary

1 approval motion was on file. *Id.* Ms. Blake conducted additional research to learn  
2 this Court's preferences and rules for class action settlements. *Id.* Finally, Ms.  
3 Schroeder handled virtually all of the support tasks for the mediation, a status report  
4 to the Court, and the preliminary approval motion. *Id.*

5 With respect to Reich Radcliffe and Hoover LLP, the Court proposed to  
6 exclude 7.5 hours of Adam Hoover's time from its lodestar. However, the firm's  
7 detailed time records show that this time was appropriate and not duplicative or  
8 wasteful. Mr. Hoover has less experience than Mr. Reich and, accordingly, is  
9 charged at a lower hourly rate; thus, it made sense for Mr. Hoover to do the work  
10 where possible.

11 2.5 of the 7.5 hours were in Task 1, Prelawsuit Investigation and Pleadings.  
12 The bulk of this time was spent on editing the complaint in this action, including  
13 reviewing Defendant's website regarding the statements and images used by  
14 Defendant for the products at issue in this lawsuit. Reich Decl., Exh. B. 1.3 of the  
15 7.5 hours were in Task 2, Case Management. The bulk of this time was spent on  
16 keeping abreast of case developments so that Mr. Hoover could provide input when  
17 needed. Reich Decl., Exh. B. .7 of the 7.5 hours were in Task 3, Leadership. This  
18 was work performed in connection with the motion to appoint lead counsel. Reich  
19 Decl., Exh. B. 3 of the 7.5 hours were in Task 4, Discovery. The bulk of this time  
20 was spent interviewing clients and contact about their purchases of Defendant's  
21 products and their expectations and understandings of what they were purchasing.  
22 Reich Decl., Exh. B. Mr. Hoover conducted *all* of these communications. *Id.*  
23 Plaintiffs respectfully submit that all of Mr. Hoover's time was necessary and not  
24 unduly duplicative of other work.

25 All of these tasks were necessary for the effective prosecution and settlement  
26 of the case. Fisher Decl., ¶ 24. Before making this application, Class Counsel  
27 reviewed all of the time spent in the case and removed duplicative or unnecessary  
28 work, or any time spent getting a newly assigned attorney or staff member up to

1 speed. *Id.* Plaintiffs are confident that the lodestar presented to the Court as a cross-  
2 check is reasonable.

3 **2. The Rates For Class Counsel’s Work Are**  
4 **Reasonable And In Line With The Market**

5 “In determining a reasonable hourly rate, the district court must ‘be guided by  
6 the rate prevailing in the community for similar work performed by attorneys of  
7 comparable skill, experience, and reputation.’ *Chalmers v. City of L.A.*, 796 F.2d  
8 1205, 1210–11 (9th Cir.1986), *reh'g denied, amended on other grounds*, 808 F.2d  
9 1373 (9th Cir.1987).” *Hirsch v. Compton Unified Sch. Dist.*, 2013 WL 1898553, at  
10 \*2 (C.D. Cal. May 3, 2013).

11 “The fee applicant has the burden of producing satisfactory evidence, in  
12 addition to the affidavits of its counsel, that the requested rates are in line with those  
13 prevailing in the community for similar services of lawyers of reasonably  
14 comparable skill and reputation.” *Jordan v. Multnomah Cnty.*, 815 F.2d 1258, 1263  
15 (9th Cir. 1987) (citing *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 79  
16 L.Ed.2d 891 (1984)). “Affidavits of the plaintiffs’ attorney and other attorneys  
17 regarding prevailing fees in the community, and rate determinations in other cases,  
18 particularly those setting a rate for the plaintiffs’ attorney, are satisfactory evidence  
19 of the prevailing market rate.” *United Steelworkers of Am. v. Phelps Dodge Corp.*,  
20 896 F.2d 403, 407 (9th Cir. 1990)

21 Class Counsel’s lodestar of \$750,625 is based on 1103.6 attorney and staff  
22 hours, delivered over the course of three years as of the date of the hearing on this  
23 motion, and is supported by fair and reasonable rates and hours. Class Counsel’s  
24 rates for work in this case were \$250-\$300/hour for paralegals, \$315-450/hour for  
25 associates, and \$700-1,000/hour for partners. Fisher Decl., Exhibit 2; Reich Decl.,  
26 Exhibit B, Wolfson Decl., Exhibit 2. Mindful of the Court’s observation in the  
27 Preliminary Approval Order that more evidence would be required to support rates  
28 over \$700 per hour, Plaintiffs’ declarations include several types of evidence



1 supporting all of the requested rates. *See* Fisher, Reich, and Wolfson Declarations,  
2 and exhibits thereto.

3 a. *Rates Prevailing In The Community Support*  
4 *Class Counsel's Hourly Rates*

5 The relevant community for fees in this case is the greater Los Angeles area.  
6 Courts look to prevailing market rates in the community in which the court sits.  
7 *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 906 (9th Cir. 1995); *see*  
8 also *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). Not only  
9 is the case venued in the Central District, but all three law firms are regular  
10 participants in Southern California litigation. Fisher Decl., ¶ 19; Reich Decl., ¶ 5;  
11 Wolfson Decl., ¶ 32. Bursor & Fisher LLP is a national law firm with offices in  
12 New York, Florida, and California. Fisher Decl., ¶ 17. Reich, Radcliffe & Hoover is  
13 based in Orange County. Reich Decl., ¶ 5. Ahdoot & Wolfson, PC, also has offices  
14 in Los Angeles. Wolfson Decl., ¶ 29.

15 Los Angeles-area attorney rates are among the highest in the country. *See*  
16 Fisher Decl., ¶ 30, Exhibit 3. The 2022 *Real Rate Report*<sup>2</sup>, which compiles and  
17 analyzes rates from around the country, reports that Los Angeles hourly rates are the  
18 third highest, behind only New York City and Silicon Valley. *Id.*

19 This market is reflected in rates that have been awarded in cases in this and  
20 neighboring districts. The hourly rates for each of the lawyers who staffed the case,  
21 which are set forth in the declarations of Class Counsel, are comparable to rates  
22 charged by attorneys with similar experience, skill, and reputation, for similar  
23

24 \_\_\_\_\_  
25 <sup>2</sup> The *Real Rate Report* is “a CEB and Wolters Kluwer ELM Solutions publication  
26 that identifies attorney rates by location, experience, firm size, areas of expertise, and  
27 industry.” *Smith v. Cnty. of Riverside*, 2019 WL 4187381, at \*2 (C.D. Cal. June 17,  
28 2019), *vacated sub nom. Davis v. Cnty. of Riverside*, 2022 WL 1787668 (C.D. Cal.  
Jan. 7, 2022). The order was vacated as part of a subsequent settlement. 2022 WL  
1787668 at \*2.

1 services in the Southern California legal market.<sup>3</sup> *See, e.g., Nozzi v. Hous. Auth. for*  
2 *the City of Los Angeles*, 2018 WL 1659984, at \*7 (C.D. Cal. Feb. 15, 2018) (at 2017  
3 rates, rates of \$1,150, \$750 and \$765 for senior attorneys in private law firm  
4 approved); *State Compensation Insurance Fund v. Khan et al*, Case No. SACV 12-  
5 01072-CJC(JCGx) (C.D. Cal.), Order Granting in Part and Denying in Part the Zaks  
6 Defendants' Motion for Attorneys' Fees, filed July 6, 2016 (Dkt. No. 408) (in 2016,  
7 fees approved include \$890 for a 22-year lawyer, \$840 for a 2-year lawyer), *In re*  
8 *Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at \*9 (C.D. Cal. Oct. 25, 2016)  
9 (approving “a billing rate ranging from \$750 to \$985 per hour for partners, \$500 to  
10 \$800 per hour for ‘of counsels’/senior counsel, and \$300 to \$725 per hour for other  
11 attorneys”); *id.* (“The Court has reviewed the attorneys’ hourly rates and hours  
12 worked, and found them reasonable, given the duration of this litigation and the  
13 favorable settlement for the class”); *In re Toyota Motor Corp. Unintended*  
14 *Acceleration Mktg., Sales Practices, and Products Liability Litig.*, No. 10-ml- 02151  
15 NS (FMOx), Dkt. No. 3933 (C.D. Cal. June 24, 2013) (finding that “[c]lass counsel’s  
16 experience, reputation, and skill, as well as the complexity of the case” justified rates  
17 that ranged from \$150 to \$950); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 2015 WL  
18 12592726, at \*13 (C.D. Cal. Mar. 17, 2015) (hourly rates ranging from \$335 to \$905  
19 “reasonable for complex class action litigation in Los Angeles”).

20 Relevant survey information also supports Class Counsel’s requested rates. In  
21 addition to those surveys and reports cited in the Declaration of L. Timothy Fisher  
22 dated July 26, 2022 (and attached to his current declaration as Exhibits 4-12, Mr.  
23 Fisher’s current declaration also attaches the 2022 Real Rate Report survey compiled  
24

---

25 <sup>3</sup> The Supreme Court and other courts have held that the use of current rates is proper  
26 since such rates compensate for inflation and the loss of use of funds. *See, e.g.,*  
27 *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) (recognizing “an appropriate  
28 adjustment for delay in payment—whether by the application of current rather than  
historic hourly rates or otherwise”).

1 by Wolters Kluwer, which surveys the hourly rates charged in the Third Quarter of  
2 2018 by hundreds of Los Angeles area attorneys. Relevant excerpts of the Real Rate  
3 Report are attached to the Fisher Declaration as Exhibit 3.

4 The real market rates of Los Angeles area attorneys who practice litigation are  
5 surveyed at page 16 of the Real Rate Report, which describes the third quarter 2022  
6 rates charged by 322 Los Angeles partners and 408 associates. For that category, the  
7 third quartile 2022 rate was \$1,045 per hour for partners and \$855 for associates.  
8 Likewise, page 32 of the Report describes the rates charged by 183 Los Angeles  
9 partners with “21 or more years of experience” and “Fewer than 21 years.” For those  
10 categories, the third quartile Los Angeles partner rate in 2022 were \$1,133 per hour  
11 for 21 or more years and \$1,075 for attorneys with fewer than 21 years. Fisher  
12 Decl., Exh. 3. Given counsel’s expertise and experience, the high caliber of work  
13 performed, and excellent results obtained here, the third quartile rates provide the  
14 most appropriate measure. The rates sought by Plaintiff’s attorneys in this motion are  
15 well within these published rates.

16 *b. The Senior Attorneys Working On This Case*  
17 *Are Highly Skilled And Experienced In Class*  
18 *Action Litigation*

19 The attorneys applying for rates over \$700 are highly skilled, experienced  
20 class action counsel. L. Timothy Fisher, who has led this litigation, has been in  
21 practice for 24 years. Fisher Decl., ¶16. His stellar qualifications and record of  
22 success in class action litigation are set forth in his Declaration. *Id.*, ¶¶ 16-20, Exh.  
23 1. Similarly, Marc Reich, in practice for 31 years, and Adam Hoover, an 18-year  
24 lawyer, have extensive experience and success in litigating class actions. Reich  
25 Decl., ¶¶ 4. The same is true of Ahdoot & Wolfson attorneys Tina Wolfson (1994)  
26 and Robert Ahdoot (1994). Wolfson Decl., ¶¶ 13-24 and Exhibit 1. These  
27 outstanding qualifications and record of success in complex class action litigation  
28 justify awarding counsel their full rates. *In re Heritage Bond Litig.*, 2005 WL

1 1594403, at \*19 (C.D. Cal. June 10, 2005) (“The prosecution and management of a  
2 complex national class action requires unique legal skills and abilities. ... The  
3 experience of Class Counsel also justifies the fee award requested.”) (quotations and  
4 citations omitted).

5 c. Counsel’s Rates Have Been Approved by  
6 Many Other Courts

7 Numerous courts have found Bursor & Fisher’s rates reasonable. Fisher Decl.  
8 ¶ 31; see also, e.g., *Kaupelis v. Harbor Freight Tools USA, Inc.*, 2022 WL 2288895 at  
9 \*9 (C.D. Ca. Jan. 12, 2022) (finding Bursor & Fisher rates ranging from \$250/hr to  
10 \$1000/hr as “reasonable compared to other awards in California courts”); *Elder v.*  
11 *Hilton Worldwide Holdings, Inc.*, 2021 WL 4785936 at \*9 (N.D. Cal. Feb 4, 2021) )  
12 (finding Bursor & Fisher rates ranging from \$250/hr to \$1000/hr “are reasonable”);  
13 *Perez v. Rash Curtis & Assocs.*, 2020 WL 1904533, at \*20 (N.D. Cal. Apr. 17, 2020)  
14 (approving Bursor & Fisher’s fee motion and determined that their rates were “within  
15 a reasonable range for rates charged in this district for comparable work”); *West v.*  
16 *Cal. Service Bureau*, Case No. 4:16-cv-03124-YGR, Dkt. No. 128 (N.D. Cal. Jan. 23,  
17 2019); *Dei Rossi v. Whirlpool*, 2:12-cv-00125-TLN-CKD, Dkt. Nos. 181-1 and 188  
18 (2017) (approving fee request where Bursor & Fisher submitted hourly rates of up to  
19 \$875 per hour for partners and \$450 per hour for associates); *Zakskorn v. Am. Honda*  
20 *Motor Co.*, 2015 WL 3622990, \*13-15 (E.D. Cal. Jun. 9, 2015) (approving fee request  
21 where Bursor & Fisher submitted hourly rates of up to \$850 per hour for partners and  
22 \$450 per hour for associates).

23 Courts have similarly awarded Ahdoot & Wolfson attorneys’ fees at rates that  
24 are comparable to the rates applicable to this matter. See, e.g., *Alvarez, et al. v. Sirius*  
25 *XM Radio, Inc.*, Case No. 2:18-08605-JVS-SS (C.D. Cal Feb. 9, 2021) (Dkts. 95, 96;  
26 \$421 million settlement finally approved settlement where the Court awarded Class  
27 Counsel’s full request of approximately \$3.5 million in fees); *Eck, et al. v. City of Los*  
28 *Angeles*, No. BC577028 (Los Angeles Superior Court (“LASC”) (February 2018)

1 (\$295 million finally approved settlement where the Court awarded Class Counsel’s  
2 full request of approximately \$15 million based on percentage of the fund method and  
3 the virtually the same hourly rates); *Lavinsky v. City of Los Angeles*, No. BC542245  
4 (LASC) (October 2019) (\$51 million minimum value finally approved settlement  
5 where the Court awarded Class Counsel’s full request of approximately \$8 million  
6 based on percentage of the fund method and the virtually the same hourly rates);  
7 *Pantelyat v. Bank of America*, No. 1:16-cv-08964 (S.D.N.Y. Jan. 31, 2019) (Dkt. 116;  
8 \$22 million finally approved settlement where the Court awarded Class Counsel’s full  
9 request of \$5.5 million based on percentage of the fund method and the same hourly  
10 rates); *Williamson, et al. vs. McAfee, Inc.*, Case No. 5:14-cv-00158-EJD (N.D. Cal.  
11 Feb. 15, 2017) (Dkt. 118; \$85 Million settlement in deceptive auto renewal case);  
12 *Smith v. Floor & Decor Outlets of Am., Inc.*, Case No. 1:15-cv-04316-ELR, (N.D. Ga.  
13 Jan. 10, 2017) (Dkt. No. 69; \$14.5 Million product liability settlement re: laminate  
14 flooring); *Chimeno-Buzzi v. Hollister Co.*, Case No. 1:14-cv-23120-MGC (S.D. Fla.  
15 April 11, 2016) (Dkt. No. 155; \$10 Million TCPA Settlement).

16 Reich, Radcliffe & Hoover’s rates have also been approved by other courts. On  
17 July 22, 2020, in *Moore v Kimberly Clark*, Circuit Court for the 20th Judicial Circuit,  
18 County of St. Clair State of Illinois, Case No. 19L0846, the Court granted in full an  
19 attorney fee request that included a \$775 hourly loadstar for Mr. Reich. Reich Decl.,  
20 ¶ 6. More recently, in August 2022, in *United States ex. rel. Maithel and Galvan v.*  
21 *Ventura etc. et al.*, United States District Court for the Central District of California,  
22 Case No. CV 15-7760 TJH (JEMx), the firm resolved an attorney fee entitlement based  
23 upon an \$875 hourly loadstar for Mr. Reich and a \$775 hourly loadstar for Mr. Hoover.  
24 *Id.*

25 **3. All Relevant Factors Support Applying A**  
26 **Multiplier To Class Counsel’s Lodestar**

27 The lodestar analysis is not limited to the initial mathematical calculation of  
28 class counsel’s base fee. *See Morales v. City of San Rafael*, 96 F.3d 359, 363-64 (9th

1 Cir. 1996). Rather, Class Counsel’s actual lodestar may be enhanced according to  
2 those factors that have not been “subsumed within the initial calculation of hours  
3 reasonably expended at a reasonable rate.” *Hensley v. Eckerhart*, 461 U.S. 424, 434  
4 n.9 (1983) (citation omitted); *see also Morales*, 96 F.3d at 364. In a historical review  
5 of numerous class action settlements, the Ninth Circuit found that lodestar  
6 multipliers normally range from 0.6 to 19.6, with most (83%) falling between 1 and  
7 4, and a bare majority (54%) between 1.5 and 3. *See Vizcaino*, 290 F.3d at 1051 n.6;  
8 *see also Alba Conte & Herbert B. Newberg, Newberg on Class Actions* § 14:03 (3d  
9 ed. 1992) (recognizing that multipliers of 1 to 4 are frequently awarded). Yet state  
10 and federal courts often approve multipliers of 4 or more.

11 The \$825,000 fee requested in this case, 15% of the total Settlement Fund or  
12 33% of the Settlement Cash Fund, results in a multiplier of 1.09. This modest  
13 multiplier bears out the reasonableness of the percentage-of-the fund award that  
14 Plaintiffs seek.

15 In considering the reasonableness of attorneys’ fees and any requested  
16 multiplier, the Ninth Circuit has directed district courts to consider the time and labor  
17 required, novelty and complexity of the litigation, skill and experience of counsel,  
18 the results obtained, and awards in similar cases. *Blum*, 465 U.S. at 898–900;  
19 *Vizcaino*, 290 F.3d at 1051, *Kerr*, 526 F.2d at 70. These factors are discussed above  
20 at Section IV.A.2. All of the factors weigh heavily in favor of the requested fee  
21 award in this action. *Vizcaino*, 290 F.3d at 1051.

22 **V. CLASS COUNSEL’S EXPENSES WERE REASONABLE AND**  
23 **NECESSARILY INCURRED TO ACHIEVE THE BENEFIT**  
24 **OBTAINED ON BEHALF OF THE CLASS**

25 The Ninth Circuit allows recovery of litigation expenses in the context of a  
26 class action settlement. *See Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003).  
27 Class Counsel is entitled to reimbursement for standard out-of-pocket expenses that  
28 an attorney would ordinarily bill a fee-paying client. *See, e.g., Harris v. Marhoefer*,

1 24 F.3d 16, 19 (9th Cir. 1994). These expenses include court fees, copying fees,  
2 courier charges, legal research charges, telephone/facsimile fees, travel expenses,  
3 postage fees, court reporter fees, videographer fees, transcript costs, and other related  
4 expenses. Fisher Decl., ¶ 35, Exh. 13. To date, Class Counsel incurred out-of-pocket  
5 costs and expenses in the aggregate amount of \$21,541.02 in prosecuting this  
6 litigation on behalf of the Class. *Id.*

7 Each of these expenses was necessarily and reasonably incurred to bring this  
8 case to a successful conclusion, and they reflect market rates for various categories  
9 of expenses incurred. *See id.* ¶ 35.

10 **VI. THE REQUESTED INCENTIVE AWARDS FOR THE CLASS**  
11 **REPRESENTATIVES ARE FAIR AND REASONABLE**

12 While Plaintiffs had negotiated higher incentive awards as part of the  
13 settlement, the Court has indicated that it will approve a \$2,500 award for each of the  
14 Class Representatives. Incentive awards “are fairly typical in class action cases.”  
15 *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). Such awards “are  
16 intended to compensate class representatives for work done on behalf of the class, to  
17 make up for financial or reputational risk undertaken in bringing the action, and,  
18 sometimes, to recognize their willingness to act as a private attorney general.” *Id.* at  
19 958-59. Incentive awards are committed to the sound discretion of the trial court and  
20 should be awarded based upon the court’s consideration of, inter alia, the amount of  
21 time and effort spent on the litigation, the duration of the litigation and the degree of  
22 personal gain obtained as a result of the litigation. *See Van Vranken v. Atl. Richfield*  
23 *Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995). Incentive awards are appropriate when  
24 a class representative will not benefit beyond ordinary class members. For example,  
25 where a class representative’s claim makes up “only a tiny fraction of the common  
26 fund,” an incentive award is justified. *Id.*

27 The Class Representatives contributed valuable work throughout the litigation,  
28 contributing 10-20 hours of work each. *See Reich Decl.*, ¶ 8. They assisted in Class

1 Counsel's pre-suit investigation by discussing their experiences and providing  
2 information on their purchase and use of the Triple Double Burgers, among other  
3 matters. *Id.* They assisted in drafting the four versions of the complaints that have  
4 been filed in this litigation, and they reviewed the complaints for accuracy before  
5 they were filed. *Id.* They have kept abreast of Counsel's settlement efforts and have  
6 provided comments on the parameters of the settlement. *Id.* They were prepared to  
7 litigate this case to a verdict if necessary. *Id.* Their dedication and efforts have  
8 conferred a significant benefit on millions of Smashburger customers across the  
9 United States. *Id.*

## 10 VII. CONCLUSION

11 For the foregoing reasons, Class Counsel and the Class Representatives  
12 therefore respectfully request that the Court approve:

- 13 • \$825,000 in attorneys' fees for Class Counsel, representing 15% of the  
14 total Settlement Fund or 33% of the Cash Settlement Fund;
- 15 • \$21,541.02 in reimbursement of Class Counsel's out-of-pocket  
16 expenses; and
- 17 • Incentive awards of \$2,500 for each of the Class Representatives.

18 For the foregoing reasons, these amounts are fair and reasonable and should be  
19 approved.

20  
21 Dated: December 5, 2022

**BURSOR & FISHER, P.A.**

22 By: /s/ L. Timothy Fisher

23 L. Timothy Fisher (State Bar No. 191626)  
24 1990 North California Blvd., Suite 940  
25 Walnut Creek, CA 94596  
26 Telephone: (925) 300-4455  
27 E-mail: ltfisher@bursor.com

*Lead Interim Class Counsel*



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**REICH RADCLIFFE & HOOVER LLP**

Marc G. Reich (State Bar No. 159936)  
Adam T. Hoover (State Bar No. 243226)  
4675 MacArthur Court, Suite 550  
Newport Beach, CA 92660  
Telephone: (949) 975-0512  
Facsimile: (949) 975-0514  
E-mail: mgr@reichradcliffe.com  
adhoover@reichradcliffe.com

*Attorneys for Plaintiffs Galvan, Lopez, Nguyen and Meyer*

**AHDOOT & WOLFSON, PC**

Tina Wolfson, (State Bar No. 174806)  
Bradley K. King, (State Bar No. 274399)  
2600 W. Olive Ave., Suite 500  
Burbank, CA 91505  
Telephone: (310) 474-9111  
Facsimile: (310) 474-8585  
E-mail: twolfson@ahdootwolfson.com  
bking@ahdootwolfson.com

*Attorneys for Plaintiff Harris*