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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)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: July 12, 2021
Time: 8:30 a.m.
Courtroom: 10B

Hon. John A. Kronstadt

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I. INTRODUCTION

Plaintiffs Andre Galvan, Lucinda Lopez, Thu Thuy Nguyen, Robert Meyer, and Jamelia Harris ("Plaintiffs"), by and through Plaintiffs' Lead Interim Counsel,[1] respectfully submit this memorandum in support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement. The Stipulation of Class Action Settlement (hereafter, "Settlement") and its exhibits are attached as Exhibit 1 to the Declaration of L. Timothy Fisher ("Fisher Decl."), filed herewith.

Plaintiffs' operative complaint, the Second Amended Class Action Complaint, Dkt. No. 45 ("SAC"), alleges that Defendants Smashburger IP Holder LLC, and Smashburger Franchising LLC (collectively "Smashburger" or "Defendants") misrepresented the size of its Triple Double, Bacon Triple Double, and Pub Triple Double burgers (collectively, the "Triple Double Burgers") as containing "Double the Beef." The lawsuit alleges that contrary to this statement, Triple Double Burgers actually include two patties that are each half the size of the patties of Smashburger's regular-sized Classic Smash™ burgers, and thus do not contain "double the beef." Defendants have vigorously denied these allegations and asserted numerous defenses.

After two full-day mediations before Jill R. Sperber, Esq. of Judicate West, undertaking a thorough investigation, including reviewing the trademark case filed against Smashburger, entitled *In-N-Out Burgers v. Smashburger IP Holder LLC and Smashburger Franchising LLC*, Case No. 8:17-cv-01474, and protracted discovery, including Plaintiffs review of more than 14,500 documents produced by Defendants, the Parties have reached a settlement that provides a real and substantial monetary benefit to the Class. Defendants have agreed to provide $2,500,000 in cash (the "Cash Settlement Fund") and 1.5 million vouchers valued between $2.00 and $2.49 each, or over $3,000,000 in total vouchers, to pay claims for those who purchased

[1] All capitalized terms not otherwise defined herein shall have the same definitions as set out in the settlement agreement. *See* Fisher Decl., Ex. 1.

one or more of the Subject Products. Class Members can receive a $4.00 cash award for each Subject Product the Authorized Claimant purchased during the Class Period, up to a maximum of five (5) claims (or $20.00 in cash) without Proof of Purchase.[2] Alternatively, the Authorized Claimant may choose to receive up to 10 product vouchers. The product vouchers will be fully and freely transferrable and allow the bearer, upon the purchase of a regularly-priced entrée at a company owned Smashburger-branded restaurant, to either upgrade a single beef hamburger to a double beef hamburger for no additional cost or receive a free small fountain drink.[3]

As in any class action, the Settlement is subject initially to preliminary approval and then to final approval by the Court after notice to the class and a hearing. Plaintiffs now request this Court to enter an order in the form of the Proposed Preliminary Approval Order, which is attached to the Settlement as Exhibit D. That Order will: (1) grant preliminary approval of the Settlement; (2) conditionally certify the Class, designate Plaintiffs as Class Representatives, and appoint Bursor & Fisher, P.A. as Plaintiffs' Lead Counsel; (3) appoint Heffler Claims Group as the Settlement Administrator and establish procedures for giving notice to members of the Class; (4) approve forms of notice to Class Members; (5)

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[2] If the aggregate value of the cash rewards claimed by Authorized Claimants pursuant to valid and timely Claim Forms exceeds the Net Cash Amount, then the monetary value of the awards to be provided to each Authorized Claimant shall be reduced on an equal pro rata basis, such that the aggregate value of the awards does not exceed the Net Cash Amount. If the aggregate value of the cash rewards claimed by Authorized Claimants pursuant to valid and timely Claim Forms is less than the Net Cash Amount, then the monetary value of the awards to be provided to each Authorized Claimant shall be increased on an equal pro rata basis, such that the aggregate value of the awards equals the Net Cash Amount.

[3] If more than 1.5 million vouchers are requested, then the number of vouchers per person will be reduced on an equal pro rata basis and if more than 1.5 million people request vouchers, then the vouchers will be distributed based on when they were requested. If fewer than 1.5 million vouchers are requested, the remaining vouchers will be donated to the Boys and Girls Club, subject to the Court's approval.

mandate procedures and deadlines for exclusion requests and objections; and (6) set a date, time and place for a final approval hearing.

Class certification for purposes of settlement is appropriate under Federal Rules of Civil Procedure 23(a) and (b)(3). The proposed Class is so numerous that the joinder of all Class Members is impracticable; there are questions of law or fact common to the proposed Class; the proposed Class Representatives' claims are typical of those of the Class; and the proposed Class Representatives will fairly and adequately protect the interests of the proposed Class. In addition, common issues of law and fact predominate over any questions affecting only individual members and a class action as proposed here is superior to other available methods for the fair and efficient adjudication of the controversy. Issues of manageability of a nationwide class are of little consequence as the Parties now seek certification only of a settlement Class. Further, Defendants have acted on grounds that apply generally to the Class, so that final relief is appropriate respecting the class as a whole.

The Settlement is fair and reasonable and falls within the range of possible approval. It is the product of extended arms-length negotiations between experienced attorneys familiar with the legal and factual issues of this case and all Class Members are treated fairly under the terms of the Settlement. Plaintiffs, by and through their counsel, have conducted an extensive investigation into the facts and law relating to this matter as set forth below and in the accompanying Fisher Declaration. Plaintiffs and their counsel hereby acknowledge that in the course of their investigation they received, examined, and analyzed information, documents, and materials that they deem necessary and appropriate to enable them to enter into the Settlement on a fully informed basis. It is an outstanding result for Class Members. The Court should enter the proposed order granting preliminary approval.

II. PROCEDURAL BACKGROUND

On February 8, 2019, Plaintiff Andre Galvan filed a class action complaint against Defendants in the United States District Court for the Central District of

California, Case No. 2:19-CV-00993-JAK-(JEMx), alleging that Defendants mislabeled their Triple Double Burgers as containing "Double the Beef."[4] On March 18, 2019, Mr. Galvan filed a first amended class action complaint against Defendants.[5]

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

On July 24, 2019, Plaintiffs Galvan, Lopez, Nguyen, Meyer, Trevino, and Harris, filed a Consolidated Amended Class Action Complaint. Dkt. No. 41. On August 22, 2019, Plaintiffs filed their Second Amended Consolidated Class Action Complaint[6], which asserts claims for violations of the California Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750, *et seq.*) ("CLRA"), California's Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200, *et seq.*) (the "UCL"), California's False Advertising Law (Cal. Bus. & Prof. Code §§ 17500, *et seq.*) (the "FAL"), and violations of New York General Business Law §§ 349 and 350 (collectively, "NYGBL"), as well as claims for Breach of Express Warranty, Fraud, and Unjust Enrichment. Dkt. No. 45.

The Parties have engaged in significant discovery. *See* Fisher Decl. ¶ 2. The Parties exchanged and met and conferred concerning a number of discovery requests, including interrogatories and requests for production. *See id*. In response, Smashburger produced critical documents concerning the merits of the case and its

[4] Jollibee Foods Corporation was also named as a defendant in the complaint.

[5] The first amended complaint added Lucinda Lopez as a plaintiff and omitted Jollibee Foods Corporation as a defendant.

[6] Barbara Trevino dismissed her claims on November 26, 2019.

overall financial condition to Plaintiffs. *Id*. Plaintiffs reviewed over 14,500 documents. *Id.* Plaintiffs also reviewed numerous files from the trademark case filed against Smashburger, entitled *In-N-Out Burgers v. Smashburger IP Holder LLC and Smashburger Franchising LLC*, Case No. 8:17-cv-01474. *Id.* Finally, Plaintiffs retained a damages expert, who analyzed Defendants' sales information and worked with Plaintiffs' counsel to develop a potential damages model. *Id*.

The Parties and their counsel have engaged in substantial arm's-length negotiations in an effort to resolve this action. *Id*. ¶ 3. On February 6, 2020, the Parties participated in a full day of mediation with Jill R. Sperber, Esq. of Judicate West. The February 6, 2020 mediation did not result in a settlement, but the Parties continued to work with Ms. Sperber toward a potential settlement. *Id*. On May 7, 2020, the Parties participated in another full day of mediation with Ms. Sperber. Once again, the Parties did not reach an agreement at the May 7 mediation, but made sufficient progress and continued to work with Ms. Sperber in the months that followed. *Id.* Finally, after more than eight months of intense negotiations, the Parties executed a settlement term sheet on October 8, 2020. *Id.*

III. THE LEGAL STANDARD FOR PRELIMINARY APPROVAL

Approval of class action settlements involves a two-step process. First, the Court must make a preliminary determination whether the proposed settlement appears to be fair and is "within the range of possible approval." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 273 (N.D. Cal. 1976), *cert. denied sub nom. Beaver v. Alaniz*, 439 U.S. 837 (1978). If so, notice can be sent to Settlement Class Members and the Court can schedule a final approval hearing where a more in-depth review of the settlement terms will take place. *See Manual for Complex Litigation, 3d Edition*, § 30.41 at 236-38 (hereafter, the "Manual").

The purpose of preliminary approval is for the Court to determine whether the parties should notify the putative class members of the proposed settlement and proceed with a fairness hearing. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079. Notice of a settlement should be disseminated where "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *Id.* (*quoting* NEWBERG ON CLASS ACTIONS § 11.25 (1992)). Preliminary approval does not require an answer to the ultimate question of whether the proposed settlement is fair and adequate, for that determination occurs only after notice of the settlement has been given to the members of the settlement class. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079 (finding that "[t]he question currently before the court is whether this settlement should be preliminarily approved" for the purposes of notifying the putative class members of the proposed settlement and proceeding with a fairness hearing, which requires the court to consider whether the settlement appears to be fair and "falls within the *range of possible approval*") (emphasis added).

Nevertheless, a review of the standards applied in determining whether a settlement should be given *final* approval is helpful to the determination of preliminary approval. One such standard is the strong judicial policy of encouraging compromises, particularly in class actions. *See In re Syncor*, 516 F.3d at 1101 (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983)).

While the district court has discretion regarding the approval of a proposed settlement, it should give "proper deference to the private consensual decision of the parties." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). In fact, when a settlement is negotiated at arm's-length by experienced counsel, there is a presumption that it is fair and reasonable. *See In re Pac. Enters. Sec. Litig.*, 47 F.3d

373, 378 (9th Cir. 1995). Ultimately, however, the Court's role is to ensure that the settlement is fundamentally fair, reasonable, and adequate. *See In re Syncor* 516 F.3d at 1100.

In preliminarily evaluating the adequacy of a proposed settlement, particular attention should be paid to the process of settlement negotiations. Here, the negotiations were conducted at arm's length, were non-collusive and were well informed, with an assessment of the strengths and weaknesses of the claims on both sides, were conducted between counsel on both sides with decades of class action experience, and utilized at the appropriate time the assistance of a well-respected mediator. Under such circumstances, the settlement is entitled to a presumption of reasonableness, and the court is entitled to rely upon the opinions and assessments of counsel. *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622-23 (N.D. Cal. 1979).

Beyond the public policy favoring settlements, the principal consideration in evaluating the fairness and adequacy of a proposed settlement is the likelihood of recovery balanced against the benefits of settlement. "[B]asic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation." *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). That said, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625.

IV. THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE

Rule 23(e)(2) provides that "the court may approve [a proposed class action settlement] only after a hearing and on finding that it is fair, reasonable, and adequate." When making this determination, the Ninth Circuit has instructed district

courts to balance several factors: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; and (6) the experience and views of counsel. *Hanlon*, 150 F.3d at 1026;[7] *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). Here, the balance of these factors readily establishes that the proposed settlement should be preliminarily approved.

A. Strength Of The Plaintiffs' Case

In determining the likelihood of a plaintiff's success on the merits of a class action, "the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice*, 688 F.2d at 625 (internal quotations omitted). The court may "presume that through negotiation, the Parties, counsel, and mediator arrived at a reasonable range of settlement by considering Plaintiff's likelihood of recovery." *Garner v. State Farm. Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *9 (N.D. Cal. Apr. 22, 2010) (citing *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)).

Here, as set forth in the Fisher Declaration, Class Counsel engaged in lengthy arm's-length negotiations with Smashburger's counsel, and were thoroughly familiar with the applicable facts, legal theories, and defenses on both sides. Fisher Decl. ¶¶ 2-4. Although Plaintiffs and Class Counsel had confidence in their claims, they also recognize that they will face risks at class certification, summary judgment, and trial. *Id*. ¶ 6. Defendants vigorously deny Plaintiffs' allegations and assert that neither Plaintiffs nor the Class suffered any harm or damages. Indeed, Defendants argue that their advertising campaign was not false or misleading and that Plaintiffs would

[7] In *Hanlon*, the Ninth Circuit also instructed district courts to consider "the reaction of the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026. This consideration is more germane to final approval and will be addressed after the dissemination of notice to the Class.

be unable to certify any class. *Id.* In addition, even if Plaintiffs prevailed on class certification and summary judgment, Defendants would no doubt present a vigorous defense at trial, and there is no assurance that the Class would prevail – or even if they did, that they would not be able to obtain an award of damages significantly more than achieved here absent such risks. *Id.* Indeed, Plaintiffs' own damages expert estimated that if Plaintiffs were to prove their liability case, certify a nationwide class, and prevail at trial, potential recovery of actual damages would range from, on the low end, $1,380,783, to the high end, approximately $6,706,809. *Id.*

Thus, in the eyes of Class Counsel, the proposed Settlement provides the Class with an outstanding opportunity to obtain significant relief at this stage in the litigation. *Id*. The Settlement also abrogates the risks that might prevent them from obtaining any relief. *Id*.

B. Risk Of Continuing Litigation

As referenced above, proceeding in this litigation in the absence of settlement poses various risks such as failing to certify a class, having summary judgment granted against Plaintiffs, or losing at trial. Such considerations have been found to weigh heavily in favor of settlement. *See Rodriguez*, 563 F.3d at 966; *Curtis-Bauer v. Morgan Stanley & Co., Inc.*, 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class."). Even assuming that Plaintiffs were to survive summary judgment, they would face the risk of establishing liability at trial in light of conflicting expert testimony between their own expert witnesses and Defendants' expert witnesses. In this "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which expert version would be accepted by the jury. The experience of Class Counsel has taught them that these considerations can make the ultimate outcome of a trial highly uncertain.

Moreover, even if Plaintiffs prevailed at trial, in light of the possible conflicting damage theories that could be presented by both sides, there is a substantial likelihood that Class Members may not be awarded significantly more than is offered to them under this Settlement on an individual basis. For example, in *In re Apple Computer Sec. Litig.*, 1991 WL 238298, at *1 (N.D. Cal. Sept. 6, 1991), the jury rendered a verdict for plaintiffs after an extended trial. Based on the jury's findings, recoverable damages would have exceeded $100 million. *Id.* However, weeks later, the District Court overturned the verdict, entering judgment notwithstanding the verdict for the individual defendants, and ordered a new trial with respect to the corporate defendant. *Id.* By settling, Plaintiffs and the Class avoid these risks, as well as the delays and risks of the appellate process. Here, under the Settlement, Class Members stand to recover *a cash refund* for up to five Subject Products purchased within the Class Period. It is hard to imagine obtaining a recovery greater than this settlement this at trial, and is within the range of full recovery. Fisher Decl. ¶ 6 (Plaintiffs' own damages expert estimated that if Plaintiffs were to prove their liability case, certify a nationwide class, and prevail at trial, potential recovery would range from, on the low end, $1,380,783, to the high end, approximately $6,706,809.).

C. Risk Of Maintaining Class Action Status

In addition to the risks of continuing the litigation, Plaintiffs would also face risks in certifying a class and maintaining class status through trial. Even assuming that the Court were to grant a motion for class certification, the class could still be decertified at any time. *See In re Netflix Privacy Litig.*, 2013 WL 1120801, at *6 (N.D. Cal. Mar. 18, 2013) ("The notion that a district court could decertify a class at any time is one that weighs in favor of settlement.") (internal citations omitted). From their prior experience, Class Counsel anticipates that Defendants would likely appeal the Court's decision pursuant to Rule 23(f), and/or move for decertification at a later date. "[C]onsummating this Settlement promptly in order to provide effective

relief to Plaintiff and the Class" eliminates these risks by ensuring Class Members a recovery that is certain and immediate. *Johnson v. Triple Leaf Tea Inc.*, 2015 WL 8943150, at *4 (N.D. Cal. Nov. 16, 2015).

D. The Extent Of Discovery And Status Of Proceedings

Under this factor, courts evaluate whether class counsel had sufficient information to make an informed decision about the merits of the case. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). Here, this matter has progressed through fact discovery more than sufficiently. Plaintiffs, through their counsel, have conducted extensive research, discovery, and investigation during the prosecution of the Action, including, without limitation: (a) investigated potential legal claims arising from Defendants' misrepresentations regarding their Triple Double burgers as described in the complaint; (b) analyzed Defendants' representations on their website and in their marketing materials; (c) researched Defendants' corporate structure; (d) reviewed the trademark case filed against Smashburger, entitled *In-N-Out Burgers v. Smashburger IP Holder LLC and Smashburger Franchising LLC*, Case No. 8:17-cv-01474; (e) worked with a damages expert to develop a potential damages model for the claims in this action; (f) evaluated the adequacy of the named plaintiffs; (g) reviewed over 14,500 documents produced by Defendants. Fisher Decl. ¶ 2. The Parties also held numerous telephonic and written discussions regarding Plaintiffs' allegations, discovery and settlement as well as two full-day mediations and extensive follow-up with Jill Sperber of Judicate West. *Id.* at ¶ 3. The Settlement is the result of fully-informed negotiations.

E. The Value of the Settlement

When evaluating a proposed class settlement, "[[o]f particular importance is the value to class members of the settlement compared to their potential recovery in a successful litigation." *McKnight v. Uber Techs., Inc.*, 2017 WL 3427985, at *4 (N.D. Cal. Aug. 7, 2017). There is no bright line rule that establishes an appropriate

settlement amount or structure. As courts in this District hve recognized, a cash settlement amounting to only 3% of the maximum potential recovery has been accepted as fair and reasonable when the plaintiffs faced the risk of recovering nothing absent a settlement. *Custom LED, LLC v. eBay, Inc.*, 2014 WL 2916871, at *4 (N.D. Cal. June 24, 2014).

The proposed settlement here provides a $2,500,000 Cash Settlement Fund. In addition to the fund, Defendants have agreed to provide 1.5 million vouchers, valued between $2.00 and $2.49 each. The 1.5 million vouchers provide at least an additional $3,000,000 of value. Thus, the total value of the settlement is no less that $5.5 million. Fisher Decl. ¶ 4.

The proposed settlement offers Class Members the choice between receiving a cash refund, where they can receive a $4.00 cash award for each Subject Product purchased during the Class Period, up to a maximum of five claims, totaling $20.00 in cash,[8] or they may choose to receive up to 10 product vouchers, totaling between $20.00 and $24.90 in value.[9] The product vouchers will be fully and freely transferrable. The product vouchers will entitle the bearer of the voucher, upon the

[8] If the aggregate value of the cash rewards claimed by Authorized Claimants pursuant to valid and timely Claim Forms exceeds the Net Cash Amount, then the monetary value of the awards to be provided to each Authorized Claimant shall be reduced on an equal pro rata basis, such that the aggregate value of the awards does not exceed the Net Cash Amount. If the aggregate value of the cash rewards claimed by Authorized Claimants pursuant to valid and timely Claim Forms is less than the Net Cash Amount, then the monetary value of the awards to be provided to each Authorized Claimant shall be increased on an equal pro rata basis, such that the aggregate value of the awards equals the Net Cash Amount. Settlement, at ¶ 42.

[9] If more than 1.5 million vouchers are requested, then the number of vouchers per person will be reduced on an equal pro rata basis and if more than 1.5 million people request vouchers, then the vouchers will be distributed based on when they were requested. If fewer than 1.5 million vouchers are requested, the remaining vouchers will be donated to the Boys and Girls Club, subject to the Court's approval. Settlement, at ¶ 43.

purchase of a regularly-priced entrée at a company owned Smashburger-branded restaurant, to either: a) upgrade a single beef hamburger to a double beef hamburger for no additional cost; or b) get a small fountain drink for no additional cost. If fewer than 1.5 million vouchers are requested, the remaining vouchers will be donated to the Boys and Girls Club, subject to the Court's approval.

Given that the class includes individuals who have already demonstrated the willingness and propensity to purchase products from Smashburger, and the fact that the vouchers have potentially more value than the cash option, and have other valuable features noted above, importantly the fact that they can be freely transferred to anyone else, the likelihood is that the redemption rate will be very high.

Because the proposed settlement presents Class Members with a choice between cash and a voucher, it is not a "coupon" settlement. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 952 (9th Cir. 2015) (finding that a settlement that gives claimants the option to choose between cash or a gift card is not a "coupon" settlement); *Seebrook v. Children's Place Retail Stores, Inc.*, 2013 WL 6326487, at *1 (N.D. Cal. Dec. 4, 2013) ("the option of a coupon does not transform a class action settlement into a coupon settlement under CAFA.") (citation omitted); *Cody v. SoulCycle Inc.*, 2017 WL 6550682, at *7 (C.D. Cal. Oct. 3, 2017) (approving settlement giving class members the choice between reinstatement of up to two expired classes or cash reimbursement for up to two expired classes, and holding that "[b]ecause class members here may elect the 'Cash Option' or keep the 'cash-equivalent' of the reinstated classes, without spending any money of their own or receiving any 'discount,' this Settlement is not a 'coupon settlement' and therefore not subject to CAFA's limitations on contingent fees.").

Moreover, the features of the proposed voucher itself, including that it is freely transferable, make it more akin to a voucher than a coupon. *See, e.g., Seebrook*, 2013 WL 6326487, at *1 (settlement approved where it provided a transferable ten dollar merchandise certificate without a minimum purchase amount.); *In re Toys R*

Us, 295 F.R.D. 438, 460 n.95 (C.D. Cal. 2014) (vouchers were not coupons because they were transferable); *Foos v. Ann, Inc.*, 2013 WL 5352969, at *2 (S.D. Cal. Sept. 24, 2013) (vouchers are "freely transferable"). Class members can use their certificates at hundreds of Smashburger locations, or they can freely transfer or sell their certificates. There are approximately 120 company owned Smashburger restaurants across 20 states, where an upgrade from a single beef hamburger to a double beef hamburger generally costs approximately $2.00, and a small fountain drink generally costs approximately $2.49. Fisher Decl., ¶ 4. Courts have recognized that the variety of choices available to class members to enable them to make use of non-cash awards – which here include choosing between upgrading to a double burger or a free fountain drink at hundreds of restaurants throughout the country – should be considered in weighing the propriety of a coupon or voucher settlement. *In re Online DVD-Rental*, 779 F.3d at 951.

Given the litigation risks outlined above, the value to class members from the settlement proposed here is substantial. Class members have the option of recovering up to $20.00 in cash, or up to $24.90 in vouchers. This is an excellent result, as it effectively provides a full refund to Class Members. The value of the settlement here is substantial compared to the potential recovery at trial, and all Class Members will receive an award without having to take further action.

F. Experience And Views Of Counsel

"The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Omnivision Techns., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008). Deference to Plaintiff's counsel's evaluation of the Settlement is appropriate because "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez*, 563 F.3d at 967 (citing *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)).

Here, the Settlement was negotiated by counsel with extensive experience in consumer class action litigation. *See* Fisher Decl. Ex. 2 (firm resume of Bursor & Fisher, P.A.). Based on their collective experience, Plaintiffs' Lead Counsel and Class Counsel concluded that the Settlement Agreement provides exceptional results for the Settlement Class while sparing Settlement Class Members from the uncertainties of continued and protracted litigation.

V. THE COURT SHOULD PROVISIONALLY CERTIFY THE CLASS, AND ENTER THE PRELIMINARY APPROVAL ORDER

A. The Proposed Settlement Class Should Be Certified

The Class consists of "all persons in the United States and United States Territories who purchased and/or consumed one or more of the Subject Products during the Class Period." Settlement, at ¶ 7. Excluded from the Class are (a) Defendants and their employees, principals, officers, directors, agents, affiliated entities, legal representatives, successors and assigns; (b) the judges to whom the Action has been or is assigned and any members of their immediate families; (c) those who purchased the Subject Products for the purpose of re-sale; and (d) all persons who have filed a timely Request for Exclusion from the Class. *Id*. ¶ 7. The Class Period is July 1, 2017 through May 31, 2019. Settlement, at ¶ 10. This Court has not yet certified this case as a class action. For settlement purposes, the Parties and their counsel request that the Court provisionally certify the Class.

The Ninth Circuit has recognized that certifying a settlement class to resolve consumer lawsuits is a common occurrence. *Hanlon*, 150 F.3d at 1019. When presented with a proposed settlement, a court must first determine whether the proposed settlement class satisfies the requirements for class certification under Rule 23. In assessing those class certification requirements, a court may properly consider that there will be no trial. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable

management problems . . . for the proposal is that there be no trial."). For the reasons below, the Class meets the requirements of Rule 23(a) and (b).

B. The Class Satisfies Rule 23(a)

1. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." *See* Fed. R. Civ. P. 23(a)(1). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members, but not satisfied when membership dips below 21." *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000). Here, the proposed Settlement Class is comprised of hundreds of thousands of consumers who purchased the Triple Double Burgers – a number that obviously satisfies the numerosity requirement. Accordingly, the proposed Settlement Class is so numerous that joinder of their claims is impracticable.

2. Commonality

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." *See* Fed R. Civ. P. 23(a)(2). Commonality is established if plaintiffs and class members' claims "depend on a common contention," "capable of class-wide resolution … meaning that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Because the commonality requirement may be satisfied by a single common issue, it is easily met. H. Newberg & Conte, 1 *Newberg on Class Actions* § 3.10, at 3-50 (1992).

There are ample issues of both law and fact that are common to the members of the Class. Indeed, all of the Class Members' claims arise from a common nucleus of facts and are based on the same legal theories. By way of example, Plaintiffs allege that the Defendants mislabeled their Triple Double Burgers by stating that the burgers contained "double the beef" compared to Smashburger's regular-sized

Classic Smash™ burgers. Commonality is satisfied by the existence of these common factual issues. *See Arnold v. United Artists Theatre Circuit, Inc.* 158 F.R.D. 439, 448 (N.D. Cal. 1994) (commonality requirement met by "the alleged existence of common … practices").

Second, Plaintiffs' claims are brought under legal theories common to the Class as a whole. Alleging a common legal theory alone is enough to establish commonality. *See Hanlon*, 150 F.3d at 1019 ("All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."). Here, all of the legal theories asserted by Plaintiffs are common to all Class Members (with the exception of California and New York statutory claims, which are pled only on behalf of the California and New York Subclasses). *See* SAC at ¶¶ 73-95. Thus, commonality is satisfied.

3. Typicality

Rule 23(a)(3) requires that the claims of the representative plaintiffs be "typical of the claims … of the class." *See* Fed. R. Civ. P. 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *See Hanlon*, 150 F.3d at 1020. In short, to meet the typicality requirement, the representative Plaintiffs simply must demonstrate that the members of the Settlement Class have the same or similar grievances. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

The claims of the named Plaintiffs are typical of those of the Class. Like those of the Class, their claims arise out of the purchase of Smashburger's Triple Double Burgers and the alleged mislabeling of those products. *See* SAC. ¶¶ 1-4. Each named Plaintiff purchased Smashburger's Triple Double Burgers and was exposed to the allegedly false or misleading labels. *Id.* at ¶¶ 18-23. The named Plaintiffs have precisely the same claims as the Class, and must satisfy the same elements for each

of their claims. *Id.* at ¶¶ 28-36. The named Plaintiffs and all Class Members have been injured in the same course of conduct. *Id.* Therefore, Plaintiffs satisfy the typicality requirement.

4. Adequacy

The final requirement of Rule 23(a) is set forth in subsection (a)(4) which requires that the representative parties "fairly and adequately protect the interests of the class." *See* Fed. R. Civ. P. 23(a)(4). A plaintiff will adequately represent the interests of the class where: (1) plaintiffs and their counsel do not have conflicts of interest with other class members, and (2) where plaintiffs and their counsel prosecute the action vigorously on behalf of the class. *See Staton v. Boeing Co.*, 327 F.3d 938, 958 (9th Cir. 2003). Moreover, adequacy is presumed where a fair settlement was negotiated at arm's-length. 2 *Newberg on Class Actions, supra,* § 11.28, at 11-59.

Plaintiffs' Lead Counsel have vigorously and competently pursued the Class Members' claims. The arm's-length settlement negotiations that took place and the investigation they undertook demonstrate that Plaintiffs' Lead Counsel adequately represent the Class. Moreover, the named Plaintiffs and Plaintiffs' Lead Counsel have no conflicts of interests with the Class. Rather, the named Plaintiffs, like each absent Class Member, have a strong interest in proving Defendants' common course of conduct, and obtaining redress. In pursing this litigation, Plaintiffs' Lead Counsel, as well as the named Plaintiffs, have advanced and will continue to advance and fully protect the common interests of all members of the Class. Plaintiffs' Lead Counsel have extensive experience and expertise in prosecuting complex class actions. Plaintiffs' Lead Counsel are active practitioners who are highly experienced in class action, product liability, and consumer fraud litigation. *See* Fisher Decl. Ex. 2 (firm resume of Bursor & Fisher, P.A.). Accordingly, Rule 23(a)(4) is satisfied.

C. The Class Satisfies Rule 23(b)(3)

In addition to meeting the prerequisites of Rule 23(a), Plaintiffs must also

meet one of the three requirements of Rule 23(b) to certify the proposed class. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Under Rule 23(b), a class action may be maintained if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3). Certification under Rule 23(b)(3) is appropriate "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon*, 150 F.3d at 1022.

1. Common Questions Of Law And Fact Predominate

The proposed Settlement Class is well-suited for certification under Rule 23(b)(3) because questions common to the Settlement Class Members predominate over questions affecting only individual Settlement Class Members. Predominance exists "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Hanlon*, 150 F.3d at 1022. As the U.S. Supreme Court has explained, when addressing the propriety of certification of a settlement class, courts take into account the fact that a trial will be unnecessary and that manageability, therefore, is not an issue. *Amchem*, 521 U.S. at 620.

In this case, common questions of law and fact exist and predominate over any individual questions, including (in addition to whether this settlement is reasonable (*see Hanlon*, 150 F.3d at 1026-27)), *inter alia*: (1) whether Defendants' representations regarding the Subject Products were false and misleading or reasonably likely to deceive consumers; (2) whether the Subject Products are misbranded; (3) whether Defendants violated the CLRA, UCL, FAL, and NYGBL 349 and 350; (4) whether Defendants had defrauded Plaintiffs and the Class Members; and (5) whether Plaintiffs and the Class have been injured by the wrongs complained of, and if so, whether Plaintiffs and the Class are entitled to damages,

injunctive and/or other equitable relief, including restitution or disgorgement, and if so, the nature and amount of such relief.

2. A Class Action Is The Superior Mechanism For Adjudicating This Dispute

The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of the Settlement Class. Each individual Settlement Class Member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendants' liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

Moreover, since this action will now settle, the Court need not consider issues of manageability relating to trial. *See Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial."). Accordingly, common questions predominate and a class action is the superior method of adjudicating this controversy.

VI. THE PROPOSED NOTICE PROGRAM PROVIDES ADEQUATE NOTICE AND SHOULD BE APPROVED

Once preliminary approval of a class action settlement is granted, notice must be directed to class members. For class actions certified under Rule 23(b)(3), including settlement classes like this one, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to

all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). In addition, Rule 23(e)(1) applies to any class settlement and requires the Court to "direct notice in a reasonable manner to all class members who would be bound by a proposal." Fed R. Civ. P Rule 23(e)(1)

When a court is presented with class notice pursuant to a settlement, both the class certification notice and notice of settlement may be combined in the same notice. *Manual*, § 21.633 at 321-22 ("For economy, the notice under Rule 23(c)(2) and the Rule 23(e) notice are sometimes combined."). This notice allows Class Members to decide whether to opt out of or participate in the class and/or to object to the Settlement and argue against final approval by the Court. *Id*. The proposed notice program is highly targeted, employs best-in-class tools and technology to reach at least 80% of Settlement Class Members nationwide, which includes, on average, 2.7 times through direct notice and publication media notice through online display, search, social media and a press release with cross-device targeting on desktop and mobile, a settlement website, and a toll-free number. February 5, 2021 Declaration of Jeanne C. Finegan ("Finegan Decl.") ¶ 3. The proposed 80% reach is "consistent with best practicable court-approved notice programs in similar matters and the Federal Judicial Center's guidelines concerning appropriate reach." *Id.* ¶ 32.

The notice accurately informs Class Members of the salient terms of the Settlement, the Class to be certified, the final approval hearing and the rights of all parties, including the rights to file objections and to opt out of the class. Additionally, the notice provides information on how Class Members can object and opt out of the Class and to send those objections to the Court, information on how Class Members may access the case docket through the Court's Public Access to Court Electronic Records ("PACER"), and the contact information of Class Counsel. The Parties in this case have created and agreed to the following forms of notice, which will satisfy both the substantive and manner of distribution requirements of Rule 23 and due process. *See* Exs. E and F to the Settlement, at Fisher Decl. Ex. 1.

Internet and Publication Notice: The internet and social media banner ad part of the notice program will collectively obtain over 32 million individual notice impressions. These forms of digital notice were designed to reach persons most likely to be Class Members. The internet and publication notice program is described in detail in the Finegan Declaration. *See* Finegan Decl. ¶¶ 25-29

Email Notice: A notice substantially in the form attached as Exhibit E to the Settlement shall be e-mailed or mailed to the last known e-mail address or mailing address of any Class Member whose contact information is available to Smashburger as part of its SmashClub Rewards programs. Approximately 1,700,000 email addresses will be provided to the Settlement Administrator. Finegan Decl. ¶ 15.

Settlement Website: The Parties will post a copy of the Long Form Notice (Ex. E) on a website (www.burgersettlement.com) to be maintained by the Administrator, which will additionally contain the settlement documents, an online claim form (Ex. C.), a list of important dates, and any other information to which the Parties may agree. The website shall also contain a Settlement Email Address and Settlement Telephone Number in addition to Class Counsel's contact information, where Class Members can submit questions and receive further information and assistance.

CAFA Notice: The Parties shall also cause to be disseminated the notice to public officials required by the Class Action Fairness Act ("CAFA"). *See* Settlement at ¶ 74.

These proposed methods of giving notice are appropriate because they provide a fair opportunity for Class Members to obtain full disclosure of the conditions of the Settlement and to make an informed decision regarding the proposed Settlement. Thus, the notices and notice procedures amply satisfy the requirements of due process.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court

preliminarily approve the Settlement Agreement, provisionally certify the Class for the purposes of preliminary approval, approve the proposed notice plan, and enter the Proposed Order Granting Motion for Preliminary Approval of Class Action Settlement, submitted herewith.

Dated: March 1, 2021

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