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 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) **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT** Date: January 30, 2023 Time: 8:30 a.m. Courtroom: 10B Hon. John A. Kronstadt

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I. INTRODUCTION

On September 19, 2022, this Court preliminarily approved the Settlement and directed notice to be sent to the Settlement Class. *See* Order Re Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Preliminary Approval Order" or "PA Order"), ECF No. 74. The settlement administrator has implemented the Court-approved notice plan, which was designed to reach 80% of the certified Settlement Class. Finegan Decl. ¶¶ 2-17; Fenwick Decl. ¶¶ 3-9. The reaction from the Class has been overwhelmingly positive. To date, **more than 875,000 class members have filed claims**.[1] There have been **no requests for exclusion, and no objections**.[2] As this Court has noted, "[a] low proportion of opts outs and objections indicates that the class generally approves of the settlement." *Arreola v. Shamrock Foods Co.*, 2021 WL 4220630, at *5 (C.D. Cal. Sept. 16, 2021) (internal quotation omitted) (Kronstadt, J). "[T]he absence of objections and small number of requests for exclusion weighs in favor of final approval." *Brulee v. DAL Global Servs., LLC*, 2018 WL 6616659 at *6 (C.D. Cal. Dec. 13, 2018) (Selna, J.).

Accordingly, Plaintiffs Andre Galvan, Lucinda Lopez, Thu Thuy Nguyen, Robert Meyer, and Jamelia Harris ("Plaintiffs"),[3] by and through Plaintiffs' Lead Counsel, respectfully submit this memorandum in support of Plaintiffs' Motion for Final 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."), ECF No. 65-2.

Plaintiffs' operative complaint, the Second Amended Class Action Complaint, Dkt. No. 45 ("SAC"), alleges that Defendants Smashburger IP Holder LLC and

[1] The deadline to file claims is January 17, 2023. *See* Order Regarding Settlement Deadlines, ECF No. 76.

[2] The deadline to object or opt-out of the Settlement was December 19, 2022. *See* Order Regarding Settlement Deadlines, ECF No. 76.

[3] All capitalized terms not otherwise defined herein shall have the same definitions as set out in the settlement agreement. *See* Fisher Decl., Ex. 1, ECF No. 65-2.

Smashburger Franchising LLC (collectively "Smashburger" or "Defendants") misrepresented the size of their 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.

The Settlement was only reached after two full-day mediations before Jill R. Sperber, Esq. of Judicate West, and after a thorough investigation by Plaintiffs, 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 pages of documents produced by Defendants. Fisher Decl. ¶¶ 2 and 3, ECF No. 65-2. The Settlement 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 one or more of the Subject Products. *Id.* ¶ 4. 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. *Id.* [4] Alternatively, the Authorized Claimant may choose to receive up to 10 product

[4] 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.

vouchers. *Id*. 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. *Id*.[5]

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 arm's-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 Fisher Declaration, ECF No. 65-2. Plaintiffs and their counsel hereby acknowledge that in the course of their

[5] 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 first responders, or some other charitable organization chosen by the Defendants, subject to the Court's approval.

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 as confirmed by the enormous class participation and the absence of opt-outs and objections. The Court should have no hesitation in granting final 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."[6] On March 18, 2019, Mr. Galvan filed a first amended class action complaint against Defendants.[7]

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 September 19, 2022, in its Preliminary Approval Order, this Court appointed Bursor & Fisher, P.A. as Lead Class Counsel. Dkt. No. 74.

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,[8] which asserts claims for violations of the California Consumers Legal

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

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

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

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, ECF No. 65-2. 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 overall financial condition to Plaintiffs. *Id*. Plaintiffs reviewed over 14,500 pages of 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 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. *Id*. 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*.

This Court preliminarily approved the Settlement on September 19, 2022. ECF No. 74. Plaintiffs filed their motion for attorneys' fees, expenses, and service

awards on December 5, 2022. ECF No. 77.

III. THE LEGAL STANDARD FOR FINAL APPROVAL

Federal Rule of Civil Procedure Rule 23(e) requires court approval for class-action settlements. Fed. R. Civ. P. 23(e). "When the parties reach a settlement agreement before class certification, a court uses a two-step process to approve a class-action settlement." *Alvarez v. Sirius XM Radio Inc.*, 2021 WL 1234878 at *5 (C.D. Cal. Feb. 8, 2021) (Selna, J.) (citing *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003)). "First, the court must certify the proposed settlement class. Second, the court must determine whether the proposed settlement is fundamentally fair, adequate, and reasonable." *Id*. (internal citations omitted).

IV. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

A. The Settlement Class

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, ECF No 65-2 at 13. 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*. The Class Period is July 1, 2017 through May 31, 2019. *Id*. at ¶ 10.

The Ninth Circuit has recognized that certifying a settlement class to resolve consumer lawsuits is a common occurrence. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998), overruled on other grounds by *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). 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.").

B. The Court Has Already Preliminary Certified The Proposed Class

The Court's Preliminary Approval Order provisionally certified a Settlement Class after concluding that each of the requirements under Rule 23(a) and (b)(3) were satisfied. PA Order, at 14, ECF No. 74. No substantive changes have occurred since that ruling, and, more importantly, no objections have challenged that conclusion. The Court may therefore rely on the same rationale as explained in the preliminary approval order to find that class certification is appropriate under Rule 23(a) and (b) in connection with final approval. *See Alvarez*, 2021 WL 1234878, at *5 ("[F]or the reasons specified in its preliminary approval order, the Court certifies the Settlement Class for final approval of the Settlement."); *Ochinero v. Ladera Lending, Inc.*, 2021 WL 4460334, at *4 (C.D. Cal. July 19, 2021) (Selna, J.) (noting on final approval that "[t]he Court has already certified the Settlement Class for purposes of this Settlement Agreement.").[9]

V. THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE

Under Rule 23(e)(2), if the proposed settlement would bind class members, the Court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate. To make this determination, the Court must consider the following factors:

[9] Plaintiffs incorporate by reference their prior arguments regarding certification of the Settlement Class, as set forth in the Motion for Preliminary Approval, rather than repeating them here. *See* ECF No. 65-1 at 16:4-20:22.

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorneys' fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2); *see also* Preliminary Approval Order at 15-16, ECF No. 74.

Before the revisions to the Federal Rule of Civil Procedure 23(e), the Ninth Circuit had developed its own list of factors to be considered. *See, e.g.*, *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 964 (9th Cir. 2011) (citing *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 575 (9th Cir. 2004)). "The revised Rule 23 'directs the parties to present [their] settlement to the court in terms of [this new] shorter list of core concerns[.]'" *Alvarez*, 2021 WL 1234878, at *5 (quoting Fed. R. Civ. P. 23(e)(2), 2018 Advisory Committee Notes). "The goal of amended Rule 23(e) is ... to focus the district court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *Id*. (brackets and internal quotations omitted).

A. Adequacy Of Representation

"Under Rule 23(e)(2)(A), the first factor to be considered is whether the class representatives and class counsel have adequately represented the class. This analysis includes 'the nature and amount of discovery' undertaken in the litigation." *Alvarez*, 2021 WL 1234878, at *5 (quoting Fed. R. Civ. P. 23(e)(2)(A), 2018 Advisory Committee Notes).

Here, the Settlement was negotiated by counsel with extensive experience in consumer class action litigation. *See* Fisher Decl. Ex. 2, ECF No. 65-2 (firm resume of Bursor & Fisher, P.A.). Based on their collective experience, and after conducting extensive research, discovery, and investigation, 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.

"The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008). Deference to Plaintiffs' 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 v. W. Publ'g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (citing *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)).

As this Court found in its Preliminary Approval Order:

> Counsel have actively and extensively litigated this matter. They have "conducted extensive research, discovery, and investigation during the prosecution of this action including," (i) exchanging requests for production and interrogatories; (ii) reviewing over 14,500 documents produced by Defendants, including documents concerning its financial condition, (iii) reviewing 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; (iv) retaining a damages expert, who analyzed Defendants' sales information and worked with Plaintiffs' Counsel to develop a potential damages model; and (v) engaging in substantial arm's-length settlement negotiations. Fisher Decl. ¶¶ 2–3. Therefore, there is sufficient information for them to have made informed decisions about this action and its settlement.

PA Order, at 16-17, ECF No. 74. This same analysis supports final approval of the Settlement.

B. Negotiated At Arm's Length

The second Rule 23(e)(2) factor asks the Court to confirm that the proposed settlement was negotiated at arm's length. Fed. R. Civ. P. 23(e)(2)(B). "As with the preceding factor, this can be 'described as [a] 'procedural' concern[ ], looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement.'" *Alvarez*, 2021 WL 1234878, at *6 (quoting Fed. R. Civ. P. 23(e)(2), 2018 Advisory Committee Notes). Courts will evaluate the settlement process as well as the terms and conditions of the agreement to assure "that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (quoting Hanlon, 150 F.3d at 1027). "The involvement of a neutral or court-affiliated mediator or facilitator in settlement negotiations may bear on whether those negotiations were conducted in a manner that would protect and further the class interests." *Alvarez*, 2021 WL 1234878, at *6 (internal brackets and quotations omitted).

Here, this Court previously determined in its Preliminary Approval Order that the Settlement Agreement has been negotiated at arm's length. PA Order, at 17-18, ECF No. 74. As noted in the Court's order:

> There is no evidence of any fraud, overreaching or collusion among the parties. They engaged in settlement negotiations with the assistance of Jill Sperber, an experienced, private neutral. Dkt. 65-1 at 10; Fisher Decl. ¶ 3. The settlement negotiations were extensive. The parties participated in two full days of mediation with Ms. Sperber—February 6, 2020 and May 7, 2020. Fisher Decl. ¶ 3. Only "after more than eight months of intense negotiations" did the parties reach a settlement on October 8, 2020. Id.

PA Order, at 17, ECF No. 74.

The Court further noted that the settlement consideration is non-reversionary

and, while the anticipated attorney fees are substantial, the Class will receive the majority of the consideration.

This same analysis supports final approval of the Settlement.

C. Adequacy of Relief Provided For The Class

"The third factor the Court considers is whether 'the relief provided for the class is adequate, taking in to account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).'" *Alvarez*, 2021 WL 1234878, at *6 (quoting Fed. R. Civ. P. 23(e)(2)(C)). Under this factor, the relief "to class members is a central concern." Id. (internal quotation omitted).

As this Court has recognized, "[a] low proportion of opts outs and objections 'indicates that the class generally approves of the settlement.'" *Arreola v. Shamrock Foods Co*, 2021 WL 4220630, at *5 (C.D. Cal. Sept. 16, 2021) (Kronstadt, J) (quoting *In re Toys R Us-Delaware, Inc. -- Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 456 (C.D. Cal. 2014) (collecting cases); *see also In re Omnivision Techs., Inc.,* 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." (quoting *Nat'l Rural Telecomms. Corp. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528-29 (C.D. Cal. 2004)).

Here, there have been no objections to the settlement, no exclusions, and, to date, more than 875,000 claims. Fenwick Decl. ¶ 8. Given that there are probably millions of class members, the absence of any objections and exclusions and the extraordinarily high number of claims furnishes strong proof that the Settlement is adequate.

As set forth below, the Settlement is also adequate under the more particular

factors outlined in Rule 23(e)(2)(C).

1. Strength of Plaintiffs' Claims, and the Costs, Risks, And Delay Of Trial And Appeal

The first adequacy factor is "the costs, risks and delay of trial and appeal." Fed. R. Civ. P. 23(e)(2)(C)(i).

As noted by this Court:

> It is "well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair." *Officers for Just.*, 688 F.2d at 628. "The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Id.* at 625. "Estimates of a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years)." *In re Toys "R" Us-Delaware, Inc.—Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453 (C.D. Cal. 2014); *see also Rodriguez*, 563 F.3d at 965 ("In reality, parties, counsel, mediators, and district judges naturally arrive at a reasonable range for settlements by considering the likelihood of a plaintiffs' or defense verdict, the potential recovery, and the chances of obtaining it, discounted to the present value.").

PA Order, at 18, ECF No. 74.

Here, Defendants' maximum potential liability is approximately $6.7 million. *Id.* The Settlement provides the Class with $2.5 million in cash and 1.5 million vouchers valued between $2.00 and $2.49 each, or over $3 million in total vouchers. The cash value of the Settlement alone equates to about 37 percent of the Class's maximum potential recovery. *Id.* The total value of the Settlement of no less than $5.5 million equates to approximately 82 percent of the Class's maximum potential recovery.

Absent settlement, Plaintiffs risk failing to certify a class, losing at summary judgment, losing at trial and/or losing on appeal. PA Order, at 18, ECF No. 74. In settling, Plaintiffs also avoid the delays associated with further litigation and appeals.

Id. "Indeed, Defendants continue 'vigorously [to] deny Plaintiffs' allegations and assert that neither Plaintiffs nor the Class suffered any harm or damages' and that 'their advertising campaign was not false or misleading and that Plaintiff would be unable to certify any class.'" Fisher Decl. ¶ 6, ECF No. 65-2. *Id.* In settling, Plaintiffs also avoid the risks of being unable to collect on a judgment.

It its Preliminary Approval Order, this Court noted that "[t[hese considerations support the conclusion that the amount offered for the Gross Settlement Amount is reasonable." *Id.* The extremely positive reaction of the Class to the Notice of Settlement only strengthens the Court's conclusion.

2. Effectiveness of The Proposed Method Of Distributing Relief to the Class

The second adequacy factor is "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii).

In its Preliminary Approval Order, this Court noted as follows regarding this factor:

> The proposed method of distributing relief to the Class is fair. The notification process, including a settlement website, emailed notices, and targeted internet and social media banner ads estimated to reach at least 80% of the Settlement Class should be effective. See Settlement Agreement ¶¶ 44, Finegan Decl. ¶¶ 3, 15-16; Dkt. 65-1 at 26–27. In addition, the expected timeline for payment under the Settlement Agreement is reasonable. Dkt. 65-1 at 26. Therefore, this factor weighs in favor of preliminary approval.

PA Order, at 18, ECF No. 74.

The extraordinarily high participation of the Class in the Settlement supports this Court's conclusion as to this factor as well.

3. Proposed Attorneys' Fees Award

Third, the Court must consider "the terms of any proposed award of attorneys' fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(c)(iii). The Settlement

Agreement provides that attorney's fees and expenses ordered by the Court will be the only compensation for Class Counsel and will be paid from the Cash Settlement Fund. Settlement Agreement ¶ 51, ECF No. 65-2 at 27. "The Parties have no agreement between themselves as to the amounts of Attorneys' Fees." *Id.* "Defendants will have the right to challenge the amount of Attorneys' Fees . . . requested by Class Counsel." *Id.*

Class Counsel seeks $825,000 in attorneys' fees, representing 15% of the total Settlement Fund or 33% of the Cash Settlement Fund. This amount is reasonable relative to the benefits of the Settlement for Settlement Class Members, for all the reasons stated in Plaintiffs' December 5, 2022 Fee Brief. See ECF No. 77-1. Plaintiffs' December 5, 2022 Fee Motion was posted on the Settlement Web Site, www.burgersettlement.com. No class member has objected to the request for attorneys' fees. *Id.* This factor also favors approval of the Settlement.

4. Agreement Identification Requirement

The Court must also evaluate any agreement made in connection with the proposed Settlement. See Fed. R. Civ. P. 23(e)(2)(C)(iv), (e)(3). Here, the Settlement Agreement before this Court is the only agreement. Fisher Decl., ¶¶ 3-8, ECF No. 65-2. Thus, the Court need not evaluate any additional agreements outside of the evaluation it makes of the Settlement Agreement.

D. Equitable Treatment of Class Members

The final Rule 23(e)(2) factor turns on whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D).

The Preliminary Approval Order noted the following with regard to this factor: "The Settlement Agreement provides that the Net Settlement Amount will be allocated among all Class Members on a pro-rata basis. Dkt. 65-1 at 17. The method of calculating the award to each Class Member is fair and reasonable. Accordingly, this factor weighs in favor of preliminary approval." PA Order at 19, ECF No. 74.

The Class's post-notice reaction to the Settlement, and, in particular the absence of objections and opt-outs, confirms this Court's preliminary assessment of this factor.

VI. THE PROPOSED SETTLEMENT CLASS MEETS THE NOTICE REQUIREMENTS UNDER RULES 23(e)(1)(B) AND 23(c)(2)(B)

Rule 23(e)(1)(B) requires the court to "direct notice in a reasonable manner to all class members who would be bound by" a proposed class settlement. Fed. R. Civ. P. 23(e)(1)(B). Rule 23(c)(2)(B) further directs that the notice be "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). Rule 23(c)(2)(B) further states that the "notice may be made by one of the following: United States mail, electronic means, or other appropriate means." *Id.* "The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." *Id.* Notice is satisfactory if it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Churchill Vill., LLC v. Gen. Elec.,* 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980).

In its Preliminary Approval Order, this Court concluded that the Proposed Notice adequately summarized the terms of the Settlement, advised the Class of the choice between the cash award and the voucher options, informed the Class of the Settlement Website URL and toll-free number and instructed the Class how to object or opt-out. The Claims Administrator has implemented the Notice. Finegan Decl.

¶¶ 2-17; Fenwick Decl. ¶¶ 3-9. To date, there have been more than 875,000 claims, but no objections and no opt-outs. Fenwick Decl. at ¶ 8 The deadline to object and opt-out has lapsed.

The overwhelming participation in the settlement by the Class demonstrates that the notice previously approved by the Court and implemented by the Claims Administrator satisfies the notice standard. Accordingly, the Court should find that the Notice to the Settlement Class was fair, adequate, and reasonable.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Final Approval of the Settlement. A Proposed Order granting final approval and certifying the Settlement Class is submitted herewith.

Dated: January 9, 2023

BURSOR & FISHER, P.A.

By: /s/ *L. Timothy Fisher*

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 Class Counsel

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