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16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

17 **FOR THE COUNTY OF SAN DIEGO**

18 DEMARIE FERNANDEZ, ALFONSO  
19 MENDOZA, and FRED DURAN, on behalf of  
20 themselves and those similarly situated,

21 Plaintiffs,

22 v.

23 OBESITY RESEARCH INSTITUTE,  
24 LLC; CONTINUITY PRODUCTS, LLC;  
25 HENNY DEN UIJL; SANDRA DEN  
26 UIJL; WEST COAST LABORATORIES,  
27 INC.; and DOES 13 through 100, inclusive,

28 Defendants.

Case No. 37-2013-00048664-CU-BT-CTL

**PLAINTIFFS' NOTICE OF MOTION  
AND MOTION FOR ATTORNEYS' FEES,  
REIMBURSEMENT OF COSTS AND  
EXPENSES, AND INCENTIVE AWARDS  
FOR THE CLASS REPRESENTATIVES;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Date: February 7, 2020  
Time: 10:30 a.m.  
Dept: SD-64  
Judge: Hon. John S. Meyer

Complaint Filed: May 14, 2013  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Plaintiffs Fred Duran, DeMarie Fernandez, and Alfonso Mendoza (collectively, “Plaintiffs”  
4 or the “Class Representatives”), through their counsel Bursor & Fisher, P.A. and Nicholas &  
5 Tomasevic, LLP (collectively, “Class Counsel”), respectfully submit this memorandum of points and  
6 authorities in support of their motion for approval of an award of attorneys’ fees, reimbursement of  
7 litigation costs and expenses, and payment of incentive awards to the Class Representatives in  
8 connection with the class-wide settlement of this action.<sup>1</sup>

9 In a case fraught with risk, Class Counsel, through 6.5 years of hard-fought litigation,  
10 overcame significant obstacles to recovery and achieved a settlement (the “Settlement”) that  
11 represents an excellent result for Class Members. As is set forth in more detail in Plaintiffs’  
12 accompanying papers in support of their Motion for Final Approval of Class Action Settlement, the  
13 Settlement includes \$4.6 million in monetary relief made available to Class Members, plus injunctive  
14 relief in the form of changes to Lipozene’s marketing and advertising. *See* Fisher Decl. ¶¶ 19-24.  
15 More specifically, the monetary relief includes a full cash refund, up to \$15 per unit, for 4 units of  
16 Lipozene if a Proof of Purchase is provided. *Id.* Claimants without a Proof of Purchase are eligible  
17 to receive \$7 for their purchase of Lipozene. *Id.* Thus, many Settlement Class Members will receive  
18 a full refund for the entirety of their purchases. *Id.* This is an excellent recovery for Class Members.  
19 Any trial recovery would happen at a much later time, would cause Plaintiffs and the Class to incur  
20 additional costs and attorneys’ fees, and could ultimately provide the Class with less substantial  
21 relief, if any.

22 Plaintiffs ask the Court to approve attorneys’ fees of \$1,400,000. The Court should take three  
23 considerations into account when evaluating this request. First, Defendants have agreed to pay Class  
24 Counsel’s fees separately from the monetary relief made available to the Settlement Class. That is,  
25 the award of attorneys’ fees will not derogate in any way from the Settlement Class’ recovery.

26 <sup>1</sup> The Settlement Agreement is Exhibit 1 to the accompanying Declaration of L. Timothy Fisher. All  
27 capitalized terms herein that are not otherwise defined have the definitions set forth in the Settlement  
-- Agreement.



1 *Compare* Fisher Decl., Ex. 1, ¶ 4.2.1 (specifying that the \$4.6 million in monetary relief shall be “for  
2 payment of Valid Claims”) *with id.* ¶ 9.1 (stating that Class Counsel may separately “apply to the  
3 Court for an award of attorneys’ fees and costs in a total amount not to exceed” \$1.4 million).  
4 Second, Class Counsel did not negotiate the amount of attorneys’ fees until *after* they agreed on the  
5 monetary and injunctive relief that will be paid to the Settlement Class, and only through the  
6 assistance of a mediator, Jill R. Sperber of Judicate West. *See* Fisher Decl. ¶¶ 8-11. Because the  
7 substantive terms of the Settlement Agreement had been agreed to between the parties before these  
8 amounts were agreed to, this provision was negotiated in such a manner as to avoid any potential  
9 conflict with the Settlement Class, or any argument that such amounts were “traded off” for lesser  
10 class consideration. *See id.* Third, the lodestar of Class Counsel is \$1,741,739 and the requested fee  
11 award is \$1,400,000. Fisher Decl., ¶ 39. This represents a “negative multiplier,” or a “haircut,” of  
12 0.80. *Id.* Despite the excellent results achieved on behalf of the Class and the support of the factors  
13 discussed above, Class Counsel is only seeking to recover a portion of their attorneys’ fees. *Id.*

14 Class Counsel also incurred \$51,306.45 in unreimbursed, out-of-pocket litigation expenses  
15 and costs that were necessary to the prosecution of this case and were carefully and reasonably  
16 expended. *See* Fisher Decl., Ex. 4 (an itemized listing of each out-of-pocket expense incurred in  
17 connection with this case); Nicholas Decl., Ex. A (same). While Class Counsel reasonably incurred  
18 these expenses litigating this case on behalf of the Settlement Class, Plaintiffs’ request for \$1.4  
19 million is *inclusive* of their requests for *both* payment of attorneys’ fees *and* reimbursement of out-  
20 of-pocket expenses. In other words, Class Counsel is *not* seeking the reimbursement of expenses *in*  
21 *addition to* the \$1.4 million – the \$1.4 million Plaintiffs are seeking is all-inclusive, which covers  
22 both attorneys’ fees and expenses.

23 Both the Settlement and Class Counsel’s request for an award of fees and expenses have the  
24 overwhelming approval of the Class Members. To date, not a single Class Member has submitted  
25 an objection to the Claims Administrator. Finegan Decl. ¶ 23.

26 In sum, the Court should grant Plaintiffs’ motion for attorneys’ fees and reimbursement of  
27 costs and expenses. Class Counsel has worked 6.5 years on this matter, and have gone out-of-pocket,

1 with no compensation to date. Any fee award that will be paid was negotiated at arm's-length, with  
2 the involvement of a mediator, only *after* the parties fully negotiated the relief to be paid to the  
3 Settlement Class. Moreover, the fee award will be paid separately from the relief made available to  
4 the Settlement Class, and it will not derogate from the Class' recovery in any way. Lastly, the fees  
5 requested by Class Counsel are significantly less than their hourly "lodestar" in this matter – Class  
6 Counsel are taking a "haircut." As such, their request is reasonable and conservative. Class Counsel  
7 should be compensated at fair market rates for their tireless work on behalf of the Settlement Class.

## 8 **II. CLASS COUNSEL ARE ENTITLED TO AN AWARD OF REASONABLE FEES**

9 When a class action case results in relief for the class, whether by settlement or by contested  
10 judgment, class counsel are entitled to a reasonable fee for services rendered, as approved by the  
11 Court and expenses reasonably incurred in obtaining the relief. *See In re Consumer Privacy Cases*  
12 (2009) 175 Cal. App. 4th 545, 552; *Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224, 254-  
13 55; *Lealao v. Benefit Cal.* (2000) 82 Cal. App. 4th 19, 26-34; *Serrano v. Priest* (1977) 20 Cal. 3d 25,  
14 34-48. The Settlement Agreement requires Defendants to pay Class Counsel's attorneys' fees  
15 awarded by the Court, up to \$1,400,000. *See Fisher Decl., Ex. 1, ¶ 9.1.* Class Counsel are entitled  
16 to an award of fees as a matter of law, under three alternative theories: (1) as a matter of contract  
17 under the Stipulation of Settlement; (2) pursuant to the statutory fee-shifting provisions of the  
18 California Consumers Legal Remedies Act, §§ 1750 *et seq.* (the "CLRA"); or (3) under the "private  
19 attorney general" doctrine, codified at Code of Civil Procedure § 1021.5. The Court should direct  
20 Defendant to pay Class Counsel the full amount of attorneys' fees.

### 21 **A. Defendants Are Contractually Obligated To Pay Attorneys' Fees** 22 **To Class Counsel**

23 The provision of the Settlement Agreement that provides for Defendants to contractually pay  
24 fees is at ¶ 9.1, which states: "Class Counsel may apply to the Court for an award of attorneys' fees  
25 and costs in a total amount not to exceed one million, four hundred thousand dollars (\$1,400,000),"  
26 and that "Defendants shall pay any fees and costs awarded to Class Counsel, subject to the conditions  
27 herein." *Fisher Decl., Ex. 1, ¶ 9.1.*

1 Here, the promise to pay attorneys' fees was negotiated at arm's length with the assistance of  
2 a distinguished mediator, Jill R. Sperber of Judicate West. Fisher Decl. ¶¶ 8-11. During this process,  
3 it was an essential term of the Settlement Agreement that Defendants pay Class Counsel's fees  
4 separately from the monetary relief made available to the Settlement Class – Class Counsel did not  
5 want their fees to be deducted from the Settlement Class' recovery. Compare Fisher Decl., Ex. 1, ¶  
6 4.2.1 (specifying that the \$4.6 million in monetary relief shall be “for payment of Valid Claims”)  
7 with *id.* ¶ 9.1 (stating that Class Counsel may separately “apply to the Court for an award of attorneys’  
8 fees and costs in a total amount not to exceed” \$1.4 million).

9 California courts traditionally defer to fee agreements between parties if the agreement is  
10 otherwise valid. See *Melendres v. City of Los Angeles* (1975) 45 Cal. App. 3d 267, 282-83 (“[A]bsent  
11 any legal factors voiding such agreement, or overriding equitable reasons that would have the same  
12 effect, when the parties do contract for fees it should govern the court’s decision.”); see also Code  
13 of Civil Procedure § 1021 (fees may be “left to the agreement” of the parties). This Court should do  
14 the same.

15 **B. Class Counsel Are Entitled To Attorneys’ Fees Under The CLRA**

16 Plaintiffs brought claims against Defendants under California’s Consumer Legal Remedies  
17 Act (“CLRA”). An award of fees to a plaintiff who prevails on CLRA claims is *mandatory* under  
18 Civil Code § 1780(d), which provides: “[t]he court shall award court costs and attorneys’ fees to a  
19 prevailing plaintiff in litigation filed pursuant to this section:”

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

27 *Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal. App. 4th 170, 178.

1 In this case, the Settlement Agreement provides up to \$4.6 million in monetary benefits to  
2 the Settlement Class, plus injunctive relief. Indisputably, the Class is the “prevailing party.”  
3 Therefore, a fee award to Class Counsel is mandatory under the CLRA.

4 **C. Class Counsel Are Entitled To Attorneys’ Fees Under CCP**  
5 **§ 1021.5**

6 Yet a third basis for an award of fees is C.C.P. § 1021.5, which provides for recovery of  
7 reasonable attorneys’ fees to a successful party in actions furthering important rights affecting the  
8 public interest where:

9 (a) a significant benefit, whether pecuniary or nonpecuniary, has been  
10 conferred on the general public or a large class of persons, (b) the  
11 necessity and financial burden of private enforcement, [...] are such  
12 as to make the award appropriate, and (c) such fees should not in the  
13 interest of justice be paid out of the recovery, if any.

14 *Id.* Although § 1021.5 is phrased in permissive terms (the court “may” award), the scope of  
15 discretion under the statute is limited. A full award of fees is *mandatory* if the required elements are  
16 found to exist, absent “special circumstances” justifying a different result. *Lyons v. Chinese Hosp.*  
17 *Ass’n*, (2006) 136 Cal. App. 4th 1331, 1344 and n. 8. Here, all of these conditions are met, and Class  
18 Counsel are entitled to recover attorneys’ fees pursuant to that statute.

19 **1. Plaintiffs Are The Successful Party**

20 Plaintiffs are the “successful party” under § 1021.5. A plaintiff need not obtain a judgment  
21 in its favor to be a successful party. Rather, plaintiffs are “successful” where they obtain the relief  
22 sought in the lawsuit, whether through a voluntary change in a defendant’s conduct, a settlement, or  
23 otherwise. *Hogar Dulce Hogar v. Community Development Commission* (2007) 157 Cal. App. 4th  
24 1358; *Wal-Mart Real Estate Business Trust v. City Council for San Marcos* (2005) 132 Cal. App.  
25 4th 614, 621, 622. Here, Plaintiffs obtained monetary and injunctive relief, as they sought in their  
26 complaint.

27 **2. The Settlement Furthers An Important Right Affecting**  
28 **The Public Interest**

29 This action furthered important rights affecting the public interest. This requirement is  
30 viewed broadly to encompass any litigation that furthers a legislative or constitutional goal. Here,

1 the litigation furthered the Legislature’s intention that food and drug products are accurately  
2 packaged and labeled. Indeed, consumer protection actions such as this one have “long been  
3 judicially recognized to be vital to the public interest.” *Beasley v. Wells Fargo Bank* (1991) 235  
4 Cal. App. 3d 1407, 1417; *see also Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal. App. 4th  
5 663, 703 (awarding fees under § 1021.5 in connection with a UCL claim).

6 **3. The Settlement Confers A Significant Benefit On The**  
7 **General Public Or A Large Class Of Persons**

8 Section 1021.5 requires that the action have resulted in a significant benefit to the general  
9 public or a large class of persons. The Settlement will result in a cash benefit of up to \$4.6 million  
10 on behalf of the Settlement Class, as well as a future benefit, in the form of injunctive relief reflecting  
11 changes to the marketing and packaging of Lipozene. *See* Fisher Decl., Ex. 1, ¶ 4.1.1.

12 **4. Necessity And Financial Burden Of Private Enforcement**

13 Section 1021.5 fees are not recoverable if public enforcement had already been commenced  
14 or would have shortly taken place. *In re Conservatorship of Whitley* (2010) 50 Cal. 4th 1206, 1215  
15 (availability of fees “looks to the adequacy of public enforcement”). But that is not the case here.  
16 No public agency sought to alter Defendants’ practices, brought an enforcement action, or sought  
17 recovery for the money that Settlement Class Members had paid for Lipozene. As such, there was  
18 no public enforcement of Plaintiffs’ claims.

19 **5. Any Award Of Attorneys’ Fees Will Be Paid Separately**  
20 **From The Class’ Recovery**

21 The last element under § 1021.5 is that “fees should not in the interest of justice be paid out  
22 of the recovery.” As discussed above, any payment of attorneys’ fees will be made separately from  
23 the \$4.6 million made available to the Settlement Class, and it will in no way derogate from the  
24 Settlement Class’ recovery. *Compare* Fisher Decl., Ex. 1, ¶ 4.2.1 (specifying that the \$4.6 million  
25 in monetary relief shall be “for payment of Valid Claims”) *with id.* ¶ 9.1 (stating that Class Counsel  
26 may separately “apply to the Court for an award of attorneys’ fees and costs in a total amount not to  
27 exceed” \$1.4 million).

1 **III. THE AMOUNT OF FEES PROVIDED FOR IN THE STIPULATION OF**  
2 **SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED**

3 The method used by California courts to determine the amount of fees is the “lodestar”  
4 method. *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal. 4th 553, 579; *Ketchum v. Moses* (2001)  
5 24 Cal. 4th 1122, 1134; *PCLM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1097. Under this  
6 approach, an initial “lodestar” is calculated by multiplying the reasonable hours expended in the  
7 action by a reasonable hourly rate for each attorney expending that time. *Lealao*, 82 Cal. App. 4th  
8 at 26.

9 Once the court has calculated the lodestar, it may increase or decrease it by applying a  
10 positive or negative “multiplier” to take into account a variety of other factors, including the quality  
11 of the representation, the novelty and complexity of the issues, the results obtained and the  
12 contingent risk presented. Richard M. Pearl, *California Attorney Fee Awards* (3d ed. 2017) § 10.3.

13 The hours worked, lodestar fee, and expenses for the two firms representing the Settlement  
14 Class are set forth in the Fisher Declaration and the Nicholas Declaration, submitted herewith. They  
15 can be summarized as follows:

16

Summary of Class Counsel’s Time, Lodestar, and Blended Hourly Rate			
Firm	Hours	Lodestar	Blended Hourly Rate
Nicholas & Tomasevic, LLP	947	\$287,432	\$303.52
Bursor & Fisher, P.A.	2,553	\$1,454,307	\$569.65
	3,500 <sup>2</sup>	\$1,741,739	\$497.64

17  
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19

20 **A. The Number Of Hours Worked By Class Counsel Was**  
21 **Reasonable**

22 The starting point for the determination of the reasonable number of hours meriting  
23 compensation is, of course, the evidence of the actual number of hours spent on the litigation.

24 <sup>2</sup> Class Counsel estimates that an additional 100 hours will be spent in securing final approval,  
25 administering the settlement, and ensuring the distribution of funds to the Class. Instead of including  
26 such estimates in the submitted lodestar, Class Counsel merely submits that these additional hours  
27 will further reduce the “negative” multiplier of 0.80 requested. *See Center for Biological Diversity*  
28 *v County of San Bernardino (Nursery Prods., LLC)* (2010) 185 Cal. App. 4th 866, 897 (“[A]bsent  
29 circumstances rendering the award unjust, an ... award should ordinarily include compensation for  
30 all the hours reasonably spent.”) (quotation omitted”).

1 *Horsford v. Board of Trustees* (2005) 132 Cal. App. 4th 359, 396. “The line between over-and  
2 under-preparation is difficult to police, and so the Ninth Circuit has cautioned against  
3 second-guessing a winning attorney’s judgment about the time necessary to present a winning case.”  
4 *Dragu v. Motion Picture Indus. Health Plan* (N.D. Cal 2016) 159 F. Supp. 3d 1121, 1129 (citation  
5 omitted); *see also Kerkeles v. City of San Jose* (2015) 243 Cal. App. 4th 88. Here, the two firms  
6 have submitted their time reasonably and necessarily incurred for the benefit of the Class. *See* Fisher  
7 Decl., Ex. 3 (billable hour entries of Bursor & Fisher); Nicholas Decl. ¶¶ 5-11. The number of hours  
8 spent was not only reasonable but was extraordinarily efficient given the complexity of this case,  
9 the hard-fought nature of the litigation, and the difficulties involved. *See* Fisher Decl. ¶¶ 2-7, 16-18  
10 (describing the history of the litigation and the complexity of the legal and factual issues involved).

11 In their declarations, Class Counsel describe the extensive work performed in connection  
12 with this litigation over the past 6.5 years. The two firms involved (*i.e.*, Bursor & Fisher, P.A. and  
13 Nicholas & Tomasevic, LLP) carefully coordinated their work throughout this litigation to avoid  
14 any duplication of effort. Nicholas Decl. ¶ 6. In proceedings before this Court, and in an appeal,  
15 Class Counsel successfully addressed issues ranging from the *prima facie* elements of Plaintiffs’  
16 claims and the pleading standards, the sufficiency of alter ego and veil piercing allegations, standards  
17 for intervention, numerous discovery disputes involving written and deposition discovery, class  
18 certification considerations, and the promulgation of class notice. Fisher Decl. ¶¶ 2-7, 16-18. Given  
19 the complexity and intensity of this litigation, the number of hours Class Counsel worked were  
20 reasonable.

21 **B. Class Counsel’s Hourly Rates Are Reasonable**

22 The hourly rates for each of the lawyers who staffed the case, which are set forth in the  
23 accompanying declarations and exhibits thereto, are reasonable and commensurate with rates  
24 approved in other class actions litigated in this County. *See* Fisher Decl. ¶¶ 35-39 (“Based on my  
25 knowledge and experience, the hourly rates charged by my firm are within the range of market rates  
26 charged by attorneys of equivalent experience, skill, and expertise.”).

1 In general, California law requires less documentation of comparable rates than federal law.  
2 *See Davis v. City of San Diego* (2003) 106 Cal. App. 4th 893, 903 (affirming rate awarded even  
3 though no evidence other than counsel’s own statements presented; rejecting federal standard in  
4 favor of more lenient California standard). Regardless, courts within the local marketplace have  
5 repeatedly held rates commensurate with Class Counsel’s rates to be fair and reasonable in the  
6 context of class actions. *See, e.g., Stuart v. Radioshack Corp.* (N.D. Cal. Aug. 9, 2010) 2010 WL  
7 3155645, at \*6 (approving an average rate of \$708 in wage and hour class action); *see also* Fisher  
8 Decl. ¶¶ 35-39. Here, Class Counsel’s combined blended rate is \$497.64 – well within the local  
9 market’s range of reasonableness. *See* Fisher Decl., ¶¶ 35-39.

10 **C. No “Multiplier” To The Lodestar Is Necessary Here, Because**  
11 **Class Counsel’s Lodestar Significantly Exceeds The Amount**  
12 **They Now Seek In Attorneys’ Fees**

13 Once the Court calculates the lodestar amount, it may increase or decrease the amount to  
14 generate an over-all reasonable fee under all the circumstances. The Court’s ultimate task is to settle  
15 on an amount approximating the fair market rate for the legal services provided, considering all case-  
16 specific facts. *Rogel v. Lynwood Redevelopment Agency* (2011) 194 Cal. App. 4th 1319, 1329.  
17 Here, no multiplier to the lodestar is necessary – and Class Counsel is not requesting one – because  
18 their lodestar greatly exceeds the amount they are now seeking in payment of attorneys’ fees. In  
19 plain English, Class Counsel are taking a “haircut” on this Settlement.

20 Factors generally considered in applying a multiplier include: (1) the time and labor required;  
21 (2) the novelty and difficulty of the questions presented; (3) the requisite legal skill necessary; (4)  
22 the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) whether  
23 the fee is fixed or contingent; (7) the time limitations imposed by the circumstances; (8) the amount  
24 at controversy and the results obtained; (9) the experience, reputation, and ability of the attorneys;  
25 (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with  
26 the client; and (12) awards in similar cases. *See generally Serrano*, 20 Cal.3d at 49.

27 Even though Class Counsel are *not* seeking a multiplier here, many of these factors are  
28 nonetheless present in this matter. This case required considerable time, skill, and labor, as described



1 in the declaration of Class Counsel filed herewith. Class Counsel undertook large risks in filing and  
2 pursuing this case. Class Counsel represented Plaintiffs and the Class on a full contingent fee basis.  
3 Class Counsel have not received any compensation for their services to date, have spent \$51,306.45  
4 on unreimbursed out-of-pocket expenses, and have billed a total of \$1,741,739 to the prosecution of  
5 the case, and have litigated it from inception, without any assurance of compensation for their work.

6 Class Counsel devoted substantial time to the prosecution of this case. In the nearly seven  
7 years this action was pending, Class Counsel (1) overcame Defendants' demurrer; (2) handled an  
8 appeal to the California Court of Appeal; (3) completed a full course of fact discovery, including  
9 fulsome discovery requests, and the depositions of each of the three Class Representatives; (4)  
10 reviewed 11,777 pages of documents; (5) brought several discovery dispute motions; (6) opposed  
11 several motions to intervene; and (7) filed a compelling motion for class certification. Fisher Decl.  
12 ¶¶ 2-7. These substantial efforts naturally precluded Class Counsel from the pursuit of additional  
13 employment. And not only did Class Counsel avoid any major pretrial failures, but Class Counsel  
14 also positioned the case for an excellent resolution.

15 A multiplier would also be appropriate here given risks Class Counsel assumed by taking  
16 this case on a contingent basis. The risk of non-payment in a case handled on a contingent basis  
17 justifies augmentation of a lodestar. Indeed, the Supreme Court has noted it as "one of the most  
18 common fee enhancers[.]" *Graham v. DaimlerChrysler Corp.*, (2004) 34 Cal. 4th 553, 579. For  
19 this reason, positive multipliers in these circumstances are frequently granted. *Chavez v. Netflix*,  
20 (2008) 162 Cal. App. 4th 43, 66 (applying a 2.5 multiplier). In assessing the risks Class Counsel  
21 assumed, the Court must also consider the resources, quality, and tenacity of the opposition. Here,  
22 Class Counsel litigated against sophisticated Defendants, with vast resources at their disposal, and  
23 represented by able counsel from the prestigious firm Venable LLP (previously Gordon Rees Scully  
24 Mansukhani, LLP). Despite the risks and obstacles facing them, Class Counsel negotiated a  
25 settlement that confers substantial benefits on the Settlement Class. This is an outstanding result  
26 given the nature of this case.

1           Class Counsel expended thousands of hours of work over nearly seven years with no  
2 assurance of *any* compensation. Fisher Decl., Ex. 3. A lodestar multiplier is plainly warranted here  
3 – though Class Counsel is not requesting any such multiplier. The lodestar of Class Counsel is  
4 \$1,741,739 and the requested fee award is \$1,400,000. Fisher Decl., ¶ 39. This represents a  
5 “negative multiplier,” or a “haircut,” of 0.80. *Id.* As noted in *Wershba*, a multiplier can range “up  
6 to 4 or even higher.” 91 Cal.App.4th at 255; *see also Chavez*, 162 Cal.App.4th at 66 (citing *Wershba*  
7 with approval); *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 (multiplier of 3.65  
8 upheld). Despite the excellent results achieved on behalf of the Class and the support of the factors  
9 discussed above, Class Counsel is only seeking to recover a portion of their attorneys’ fees. Thus,  
10 the fees requested by Class Counsel are quite conservative and should be approved.

11           **D.     The Fact That Defendants Agreed To Pay Plaintiffs’ Request For**  
12           **Attorneys Fees, And That It Was Recommended By The Mediator**  
13           **And Negotiated Separately From The Class’ Relief, Shows The**  
14           **Reasonableness Of This Request**

15           The fact that Defendants, after extensive negotiation, agreed to include this fee and expense  
16 amount in the Settlement Agreement is also an appropriate factor for the Court to consider in  
17 reviewing Plaintiffs’ request for attorneys’ fees. Here, Plaintiffs’ counsel did not negotiate the  
18 amount of attorneys’ fees until *after* they agreed on the monetary and injunctive relief that will be  
19 paid to the Settlement Class. Fisher Decl. ¶ 10. Because the substantive terms of the Settlement  
20 Agreement had been agreed to between the parties before these amounts were agreed to, and were  
21 ultimately agreed to with the assistance and recommendation of the mediator, Jill R. Sperber, this  
22 provision was negotiated in such a manner as to avoid any potential conflict with the Settlement  
23 Class, or any argument that such amounts were “traded off” for lesser class consideration. *See id.*

24           In *Hensley v. Eckerhart* (1983) 461 U.S. 425, 437 the United States Supreme Court held that  
25 negotiated attorneys’ fee provisions are the “ideal” toward which the parties should strive: “a request  
26 for attorneys’ fees should not result in a second major litigation. Ideally, of course, litigants will  
27 settle the amount of a fee.” Fee arrangements between Plaintiffs and defendants in class actions are  
to be encouraged, particularly where, as here, the record shows the attorneys’ fees to be requested

1 were negotiated separately after the settlement terms of the class claims has been agreed to by the  
2 parties, and are to be paid on top of the class consideration. *Johnson v. Georgia Highway Express,*  
3 *Inc.* (5th Cir. 1974) 488 F.2d 714, 720 (“[I]n cases of this kind, we encourage counsel on both sides  
4 to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a  
5 settlement as to attorneys’ fees.”).

6 As Judge Posner observed in *In Re Continental Illinois Securities Litigation* (7th Cir. 1992)  
7 962 F.2d 566, the virtue in the negotiation of fees by the adversarial parties to the settlement  
8 regarding the amount of fees to be requested (*i.e.*, the defendants who want to minimize the payment  
9 to be made versus the lawyers who wish to receive it) is that the “markets know market value better  
10 than judges do.” *Id.* at 570. Here, the provision as to the amount of fees to be requested set forth in  
11 the Settlement Agreement was negotiated under market conditions: Plaintiffs’ counsel wished to  
12 maximize fees to compensate them, as the law encourages, for risk, innovation, and delay; and  
13 Defendants wished to pay the minimum amount they could, as any monies not approved would be  
14 retained by them. The result is an arm’s-length negotiated amount set by market forces, and resolved  
15 only after the other settlement terms had been agreed to in principle, under the supervision of a  
16 mediator. Such a process provides further indicia of the reasonableness of this requested amount.

#### 17 **IV. LITIGATION COSTS AND EXPENSES WERE REASONABLY INCURRED**

18 To date, Class Counsel incurred out-of-pocket costs and expenses in the aggregate amount of  
19 \$51,306.45 in prosecuting this litigation on behalf of the class. Fisher Decl., Ex. 4 (itemized expense  
20 reports); Nicholas Decl., Ex. A (same). The Court should authorize their reimbursement.

21 Class Counsel is entitled to reimbursement for standard out-of-pocket expenses that an  
22 attorney would ordinarily bill a fee-paying client. *See, e.g., Harris v. Marhoefer* (9th Cir. 1994) 24  
23 F.3d 16, 19. The incurred costs include deposition fees, expert fees, court filing fees, copying fees,  
24 courier charges, legal research charges, telephone/facsimile fees, travel costs, postage fees, and other  
25 related costs. *See* Fisher Decl., Ex. 4; Nicholas Decl., Ex. A.

26 Initially, as with Class Counsel’s request for attorneys’ fees, the reimbursement of costs and  
27 expenses will be paid separately from the \$4.6 million in monetary relief made available to the Class.

1 *Compare* Fisher Decl., Ex. 1, ¶ 4.2.1 (specifying that the \$4.6 million in monetary relief shall be “for  
2 payment of Valid Claims”) *with id.* ¶ 9.1 (stating that Class Counsel may separately “apply to the  
3 Court for an award of attorneys’ fees and costs in a total amount not to exceed” \$1.4 million).  
4 Furthermore, Class Counsel’s request for \$1.4 million is *inclusive* of their requests for *both* payment  
5 of attorneys’ fees *and* reimbursement of out-of-pocket expenses. In other words, Class Counsel is  
6 *not* seeking the reimbursement of expenses *in addition to* the \$1.4 million – the \$1.4 million Plaintiffs  
7 are seeking is all-inclusive, which covers both attorneys’ fees and expenses.

8         Nearly half of Plaintiffs’ costs and expenses are for travel and lodging, which accounts for  
9 travel for hearings and depositions. *See* Fisher Decl., Ex. 4; Nicholas Decl., Ex. A. Specifically,  
10 Plaintiffs incurred travel and lodging expenses in the amount of \$17,392.34 during the 6.5 years this  
11 case was litigated. *See id.* Otherwise, Plaintiffs incurred \$7,290 in mediation fees, \$5,640.90 in  
12 court reporter and deposition fees, and \$1,284.01 in postage and delivery fees, among others. *See*  
13 *id.* Those expenses were necessary due to the complex and technical nature of the claims asserted  
14 in this case. *See* Fisher Decl. ¶ 33. Class Counsel incurred these costs and expenses with no  
15 guarantee of repayment.

16         Class Counsel’s costs and expenses were necessarily and reasonably incurred to bring this  
17 case to a successful conclusion, and they reflect market rates for the various categories of expenses  
18 incurred.

19 **V. THE PROPOSED INCENTIVE AWARDS TO THE CLASS REPRESENTATIVES**  
20 **SHOULD BE APPROVED**

21         The Settlement Agreement provides that subject to the Court’s approval, the Class  
22 Representatives may apply for incentive awards in the amount of \$7,500 apiece. *See* Fisher Decl.,  
23 Ex. 1, ¶ 9.2. The class representatives in this case each merit these awards, and Class Counsel  
24 recommends their approval. *See* Fisher Decl. ¶¶ 43-48.

25         Incentive awards for class representatives are common in class actions, where the class  
26 representative’s personal claims alone would never justify the effort required to prosecute complex  
27 litigation. *See, e.g., In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th at 1393-95 (approving

1 \$10,000 incentive payments to class representatives); *In re Domestic Air Transportation Antitrust*  
2 *Litigation* (N.D. Ga. 1993) 148 F.R.D. 297 (\$142,500 awarded out of a cash settlement fund of \$50  
3 million); *In re Dun & Bradstreet Credit Services Customer Litigation* (S.D. Ohio 1990) 130 F.R.D.  
4 366 (\$215,000 awarded out of a settlement fund of \$18 million); *Spicer v. Chicago Board Options*  
5 *Exchange, Inc.* (N.D. Ill. 1993) 844 F. Supp. 1226 (\$20,000 awarded out of settlement fund of \$10  
6 million). Incentive awards compensate the class representatives for actual costs in time, money, and  
7 the disruption of life incurred in the prosecution of the litigation. Such awards also encourage future  
8 plaintiffs to come forward and vindicate the rights of other injured parties despite having little to  
9 gain personally from their claims. *In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th at  
10 1394-95.

11 Initially, any incentive awards paid to the Class Representatives would be separate from \$4.6  
12 million made available to the Settlement Class. Compare Fisher Decl., Ex. 1, ¶ 4.2.1 (specifying  
13 that the \$4.6 million in monetary relief shall be “for payment of Valid Claims”) with *id.* ¶ 9.2  
14 (establishing procedures for the Class Representatives to separately “apply to the Court for a[n] ...  
15 incentive payment of not more than \$7,500 apiece”). As such, the incentive awards to the Class  
16 Representatives will in no way derogate from the monetary and injunctive relief made available to  
17 the Settlement Class. *See id.*

18 In this case, the Class Representatives have been required to devote extraordinary long-term  
19 effort to their duties on behalf of the Class over the past 6.5 years since 2013. *See* Fisher Decl. ¶¶ 43-  
20 48. Each responded to 33 document requests, 50 interrogatories, and sat for a lengthy deposition.  
21 *Id.* Additionally, Plaintiffs Fernandez and Mendoza were deposed concerning their purchase and  
22 use of Lipozene in a related matter, *Obesity Research Institute, LLC v. DOES 1 through 100*, Case  
23 No. 37-2013-00055350-CU-BT-CTL. *Id.* As such, Plaintiffs Fernandez and Mendoza were deposed  
24 twice about their purchase of use of Lipozene. *Id.* Furthermore, each Class Representative was  
25 cooperative and responsive when asked to respond to discovery, provide information, and provide  
26 deposition testimony. *Id.* Each Class Representative has remained engaged and committed as during  
27 the entirety of this protracted litigation. *Id.* Each Class Representative has been highly responsive,

1 and each took significant time out of his or her personal schedules to participate in this action. *Id.*  
2 In the view of Class Counsel, Plaintiffs Fred Duran, DeMarie Fernandez, and Alfonso Mendoza have  
3 each performed those duties in an exemplary and outstanding manner. *Id.* Each has earned an  
4 incentive award for bringing this matter to a successful resolution on behalf of the Settlement Class.  
5 *Id.*

## 6 VI. CONCLUSION

7 For the foregoing reasons, the Court should approve the provisions of the Settlement  
8 Agreement authorizing an award of attorneys' fees to Class Counsel, and reimbursement of costs  
9 and expenses, in the amount of \$1,400,000, payable by Defendants. An award of these amounts is  
10 reasonable in light of the skill and persistence displayed by Class Counsel, the risk and delay  
11 undertaken as a result of counsel's contingent representation of the class, and the benefits conferred  
12 by the Settlement on the Class Members. Additionally, the Court should award \$7,500 to each of  
13 the three Class Representatives. Such an award is appropriate, given the Class Representatives'  
14 involvement and dedication in litigating this matter, over the course of many years, to a successful  
15 resolution on behalf of the Settlement Class.

16 Dated: January 10, 2020

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

17  
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