BEFORE THE AMERICAN ARBITRATION ASSOCIATION

KAREN DAVIS-HUDSON and SARAH DIAZ, individually and on behalf of all others similarly situated,	)	
Claimants,	)	
vs.	)	CASE NO. 74-20-1400-0032
23ANDME, INC.,	)	
Respondent.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR APPROVAL OF AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

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Claimants Karen Davis-Hudson and Sarah Diaz (collectively, the "Class Representatives" or "Claimants"), by and through Class Counsel Whatley Kallas, LLP and Podhurst Orseck, P.A. (collectively "Class Counsel"), respectfully submit this Memorandum in support of their motion for approval of an award of attorneys' fees, reimbursement of litigation costs and expenses, and payment of incentive awards in connection with the class-wide settlement of this Arbitration, consistent with Section 11 of the Settlement Agreement.

As set forth in more detail in the accompanying Motion for Entry of Order Finally Approving Class Action Settlement (which is incorporated herein by reference), pursuant to the Settlement Agreement, Settlement Class Members may claim $12.50 in cash for each unit of the PGS for which a valid and timely election is submitted, with no cap on individual or overall claims, or if they do not, they will automatically receive a $40.00 transferable Certificate for the purchase of a PGS Kit. Settlement Agreement, Section 2. This payment is not subject to *pro rata* dilution. *Id.* The Settlement Class is defined to include:

> [A]ll persons residing in the United States of America who purchased for personal use a PGS Kit in the United States of America from 23andMe between October 16, 207 and November 22, 2013 other than for purposes of resale or distribution or to provide to third parties for purposes of research or education. Excluded from the Settlement Class are (1) employees of 23andMe, including their current or former directors, officers and counsel; (2) any entity that has a controlling interest in 23andMe; (3) 23andMe's affiliates and subsidiaries; and (4) the arbitrator to whom this case is assigned and any member of the arbitrator's immediate family.

Order Granting Motion for Preliminary Approval of Class Action Settlement and Directing Dissemination of Class Notice Program dated August 16, 2017, at 2.

Consistent with the Settlement Agreement and negotiations with the Honorable Carl J. West (Ret.), the mediator who helped the parties negotiate this settlement, Class Counsel request

that the Arbitrator approve an award of attorneys' fees and reimbursement of expenses totaling $2,250,000, inclusive of expenses. As explained below, the lodestar technique confirms that the amount of attorneys' fees and expenses in Section 11 of the Settlement Agreement is fair, reasonable, and supported by California and federal law. As of October 6, 2017, Class Counsel and co-counsel who worked on matters common to the Settlement Class had collectively worked 2,139.75 hours on this case for a total lodestar, at current billing rates, of $1,172,456.25. Declaration of Patrick J. Sheehan in Support of Claimants' Motion for Entry of Order Finally Approving Class Action Settlement and Motion for Award of Attorneys' Fees and Expenses and Incentive Awards for Class Representatives ("Sheehan Decl." or "Sheehan Decl."), ¶¶ 21, 23; Declaration of John Gravante, III in Support of Claimants' Motion for Entry of Order Finally Approving Class Action Settlement and Motion for Award of Attorneys' Fees and Expenses and Incentive Awards for Class Representatives ("Gravante Declaration" or "Gravante Decl.")¶ 3; Declaration of James H. McFerrin in Support of Claimants' Motion for Entry of Order Finally Approving Class Action Settlement and Motion for Award of Attorneys' Fees and Expenses and Incentive Awards for Class Representatives ("McFerrin Declaration" or "McFerrin Decl."), ¶ 4. The $2,250,000 requested by Class Counsel will also include reimbursement for $87,286.59 in out-of-pocket expenses, as set forth in the above Declarations. These expenses were necessary to the prosecution of this case, were carefully and reasonably expended, and should be reimbursed. A fee award of $2,250,000, after payment of litigation expenses, would represent approximately a 1.8 multiplier over the base lodestar fee as of today, and will be lower by the time this settlement is finally approved, and thus is well within the accepted range of multipliers and fees approved by courts in California and the Ninth Circuit.

I. BACKGROUND AND PROCEDURAL HISTORY

The previous Declaration of John Gravante and the Sheehan Declaration submitted concurrently herewith contain detailed discussion of the background and procedural history of this Arbitration, including (i) the pleadings and initial motions, (ii) written discovery and document discovery, (iii) the parties' arm's-length settlement negotiations, and (iv) preliminary approval and dissemination of comprehensive notice.

Of relevance to this motion, Section 11 of the Settlement Agreement authorizes the Class Representatives and Class Counsel to petition the Arbitrator for an award of attorneys' fees and expenses. The Claimants subsequently agreed after the Settlement Agreement was executed and after submitting this settlement for preliminary approval, to cap this request at $2,250,000, inclusive of expenses.

Section 11 of the Settlement Agreement also provides that the Class Representatives and Class Counsel may petition the Arbitrator for approval of payments of no more than $20,000 total for the Class Representatives. Class Counsel are requesting that the Class Representatives receive $10,000 each.

II. THE CLRA PROVIDES FOR A MANDATORY AWARD OF ATTORNEYS' FEES TO THE PREVAILING PARTY

The Class Representatives brought claims against Respondent under various theories, including under Cal. Bus. & Prof. Code § 17200, *et seq.*, unlawful business acts and practices; Cal. Bus. & Prof. Code § 17200, *et seq.*, unfair business acts and practices; Cal. Bus. & Prof. Code § 17200, *et seq.*, fraudulent business acts and practices; Cal. Bus. & Prof. Code § 17500, *et seq.*, misleading or deceptive advertising; Cal. Comm. Code § 2314, breach of the implied warranty of merchantability; Cal. Comm. Code § 2315, breach of the implied warranty of fitness for a particular purpose; California's Consumers Legal Remedies Act, Civil Code §§ 1750, *et*

seq. (the "CLRA"); negligent misrepresentation and unjust enrichment. For CLRA claims, an award of fees to the prevailing party is mandatory under Civil Code § 1780(d), which provides: "The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section." As the California Court of Appeal has explained:

> The word 'shall' is usually deemed mandatory, unless a mandatory construction would not be consistent with the legislative purpose underlying the statute." (*West Shield Investigations and Sec. Consultants v. Superior Court* (2000) 82 Cal. App. 4th 935, 949, 98 Cal.Rptr.2d 612.) Our Supreme Court has observed that "the availability of costs and attorneys fees to prevailing plaintiffs is integral to making the CLRA an effective piece of consumer legislation, increasing the financial feasibility of bringing 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.

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

Here, Class Counsel have recovered a valuable settlement that will distribute millions of dollars in value to Settlement Class Members located nationwide. Claimants have thus succeeded on a practical level by realizing in part their litigation objectives. As the Settlement Class is the "prevailing party," a fee award to Claimants' counsel is mandatory under the CLRA. *Graciano v. Robinson Ford Sales*, 144 Cal.App.4th 140, 150-51 (2006).

III. THE REQUESTED AWARD OF ATTORNEYS' FEES IS FAIR AND REASONABLE UNDER THE LODESTAR METHOD

Attorneys' fees may be awarded based on the "lodestar" method where there is no formal common fund, taking into account numerous factors as described, *infra*. *Fischel v. Equitable Life Assur. Soc'y*, 307 F.3d 997, 1006 (9th Cir. 2002); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). *See also Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001). Class Counsel's fee request is fair and reasonable under this methodology.

The lodestar figure consists of "***all*** the hours ***reasonably spent***, including those relating solely to the fee," times reasonable hourly rates. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1133 (2001) (emphasis in original). *See also, e.g., In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011); *Hanlon*, 150 F.3d at 1029. The resulting lodestar figure may be adjusted upward or downward by use of a multiplier to account for factors including, but not limited to: (i) the quality of the representation; (ii) the benefit obtained for the class; (iii) the complexity and novelty of the issues presented; and (iv) the risk of nonpayment. *Hanlon*, 150 F.3d at 1029; *see also Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).[1] *See also Lealao*, 82 Cal. Ap. 4th at 40. Typically a multiplier or enhancement is applied to the lodestar to account for the substantial risk that plaintiffs' counsel undertook by accepting a case where no payment would be received if the lawsuit did not succeed. *See San Bernardino Valley Audubon Soc'y v. San Bernardino*, 155 Cal. App. 3d 738, 755 (1984) (award must be large enough "to entice competent counsel to undertake difficult public interest cases"); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002). Thus, a fee that approximates lodestar and a reasonable multiplier is considered presumptively reasonable. *See Morales v. City of San Rafael*, 96 F.3d 359, 363-64 (9th Cir. 1996) (citing cases).

[1] *Kerr* identifies twelve factors for analyzing the reasonableness of an attorneys' fees request:

> (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and the ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

526 F.2d at 70.

1. Class Counsel Spent A Reasonable Number Of Hours On This Litigation At Reasonable Hourly Rates

Class Counsel's Declarations, along with those of co-counsel whose efforts directly contributed to this result, describe the extensive work they performed in connection with this litigation over the past four years. Whatley Kallas and Podhurst Orseck coordinated their efforts and the efforts of their co-counsel throughout this litigation in an effort to ensure that there was minimal duplication of effort by assigning specific tasks to each. This was a novel case that involved a significant amount of original work, requiring significant involvement by more experienced lawyers, primarily on developing the litigation strategy, participating in settlement meetings with Respondent's counsel, attending mediations before David Geronemus and Judge Carl J. West (Ret.), drafting and editing motion papers, conducting written discovery and document discovery, making appearances before the Arbitrator and the Northern District of California and negotiating the settlement.

Respondent was represented by very able counsel from Orrick, Herrington & Sutcliffe LLP, one of the largest and most prestigious law firms in the United States. Sheehan Decl., ¶ 13. This case was hard-fought and concerned complex factual allegations. Given the technical nature of the litigation, and the difficulty of the settlement negotiations, the number of hours Class Counsel spent was reasonable. Furthermore, the hourly rates for each of the lawyers who staffed the case, which are set forth in the accompanying Declarations of counsel and exhibits thereto, are also reasonable.

2. While All Relevant Factors Support Applying A Significant Multiplier To Settlement Class Counsel's Lodestar, Only A Very Modest Multiplier Would Need To Be Applied To Approve This Application

The lodestar analysis is not limited to the initial mathematical calculation of Class

Counsel's base fee. *See Morales, supra,* 96 F.3d at 363-64. Rather, Class Counsel's actual lodestar may be enhanced according to those factors that have not been "subsumed within the initial calculation of hours reasonably expended at a reasonable rate." *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983) (citation omitted); *see also Morales*, 96 F.3d at 364. In a historical review of numerous class action settlements, the Ninth Circuit found that lodestar multipliers normally range from 0.6 to 19.6, with most (83%) falling between 1 and 4. *See Vizcaino*, 290 F.3d at 1051 n.6; *see also Wershba*, 91 Cal. App. 4th at 255 ("Multipliers can range from 2 to 4 or even higher."); *Glendora Cmty. Redev. Agency v. Demeter*, 155 Cal. App. 3d 465, 479 (1984) (approving a multiplier of 12); Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 14:03 (3d ed. 1992) (recognizing that multipliers of 1 to 4 are frequently awarded).

In considering the reasonableness of attorneys' fees and any requested multiplier, the Ninth Circuit has directed fact finders to consider the time and labor required, the novelty and complexity of the litigation, the skill and experience of counsel, the results obtained, and awards in similar cases. *Kerr*, 526 F.2d at 70; *Blum v. Stenson*, 465 U.S. 886, 898-900 (1984). *See also Lealao*, 82 Cal. App. 4th at 40. All of these factors further support the reasonableness of the requested fee award in this action. *Vizcaino,* 290 F.3d at 1051.

a. Novelty And Complexity Of This Litigation

This was not a run-of-the-mill consumer class action. As is evident from the First Amended Demand for Class Arbitration (the "Demand"), the misrepresentations at issue are technical in nature. These factual issues were further complicated by the fact that the PGS was unique in terms of the information it provided. In addition, class arbitration itself is a rarity. Thus, Class Counsel were faced with difficult legal and factual issues, which required substantial original work. This case also posed a significant risk that Class Counsel's efforts (and their over

$87,286.59 in out-of-pocket expenses) would go uncompensated. Settlement negotiations were complicated both in terms of the underlying subject matter and the varying damages analyses at issue. The parties' efforts to resolve this case included in-person meetings with Respondent's attorneys and two separate mediations, including an in-person mediation before David Geronemus, and in-person mediation before Judge West at JAMS, and numerous follow-up discussions. *See* Sheehan Decl., at ¶¶ 4-6. Even after the parties reached an agreement in principle, it still took another almost two months of further negotiations to prepare and execute the Settlement Agreement and accompanying Exhibits. *See id.*, at ¶ 6.

Therefore, a modest positive multiplier of 1.8, which will be lower by the time of final approval, is well within the standard parameters for approved multipliers, in light of the novelty and technical complexity of this case, and concomitant risks to counsel.

b. Class Counsel Provided Exceptional Representation Prosecuting This Complex Case

Class Counsel respectfully submit the attorneys who have worked on this matter have conducted themselves in this action in a professional, diligent, and efficient manner. The lawyers at Whatley Kallas and Podhurst Orseck have extensive experience in the field of class action litigation. Additionally, litigation tasks were allocated between counsel to prevent "over-lawyering" and inefficiency. *See* Sheehan Decl., ¶ 23. The bulk of the work was performed by a few attorneys fully familiar with the complex factual and legal issues presented by this litigation. This division of labor permitted the work to be done efficiently, resulting in an economy of service and minimizing duplication of effort.

c. Class Counsel Obtained Excellent Class Benefits

As pointed out above and in the Declaration of Alex Thomas of Kurtzman Carson Consultants filed in support of the motion for final settlement approval, this settlement provided

direct notice to virtually 100% of the Settlement Class Members, resulting in the opportunity for those class members to submit claims for a significant percentage of their potential out-of-pocket losses. This process has already resulted in a significant number of claims, with that amount increasing every day, and a settlement valued at well over $22,670,000. These results are plainly excellent.

d. Class Counsel Faced A Substantial Risk Of Nonpayment

A critical factor bearing on fee applications is the level of risk of non-payment faced by Class Counsel at the inception of the litigation. *See, e.g.*, *Vizcaino*, 290 F.3d at 1048. The contingent nature of Class Counsel's fee recovery, coupled with the uncertainty that any recovery would be obtained, are significant. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994). In *Wash. Pub. Power*, the Ninth Circuit recognized that:

> It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases …. [I]f this "bonus" methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.

Id. at 1299-1300 (citations omitted) (internal quotations marks omitted). *See also Ketchum*, 24 Cal. App. 4th at 1138.

Throughout this action, Class Counsel expended substantial time and resources to prosecute a nationwide class action suit with no guarantee of compensation or reimbursement in the hope of prevailing against a sophisticated Respondent represented by high caliber attorneys at Orrick Herrington & Sutcliffe LLP. *See* Sheehan Decl., ¶ 13. Class Counsel obtained a highly favorable result for the Settlement Class, knowing that if their efforts were ultimately unsuccessful, they would receive no compensation or reimbursement for their already-incurred

expenses. This fact further supports a modest multiplier of 1.8 in this situation.

IV. CLASS COUNSEL'S REQUESTED AWARD OF ATTORNEYS' FEES IS FAIR AND REASONABLE UNDER A "CONSTRUCTIVE COMMON FUND" CROSS-CHECK

To further satisfy itself that Class Counsel's requested attorneys' fees are reasonable, as an optional cross-check the Arbitrator can examine this request as if this were a common fund settlement, through the analogy of a "constructive common fund." To create a constructive common fund, the Arbitrator add ups the value of the benefits made available to the Settlement Class, any attorneys' fee and expense payments to be made, and notice and administration costs. *See, e.g.*, *Staton v. Boeing*, 327 F.3d 938, 972-74 (9th Cir. 2003); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 (S.D. Cal. 2011), *aff'd*, 473 F. App'x. 716 (9th Cir. 2012). As the Court recognized in its decision that was affirmed in *In Re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934 (9th Cir. 2015), all the benefits provided under the settlement, including the requested attorneys' fees, are combined when calculating the total value of the settlement fund. *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 33 (2000). Thus, "the sum of the [amounts provided to the class and the attorneys' fees] ordinarily should be treated as a settlement fund for the benefit of the class …." *Consumer Privacy Cases*, 175 Cal.App.4th 545, 554 (2009) (quoting *Manual for Complex Litigation* § 21.71 at 525 (4th ed. 2008)).

Here, as of the date of these papers, the total value of the constructive common fund is over $22,670,000, comprised of the following elements (which does not include any notice and administration costs):

- $20,400,000, representing the maximum value of cash and and Certificates made available to the Class; *see* Sheehan Decl., ¶ 10;

- $2,250,000 to Class Counsel for attorneys' fees, which includes reimbursement of $87,286.59 in expenses; *Id.*, at ¶¶ 10, 23.

- $20,000 in possible incentive awards to the Class Representatives; *Id.*, at ¶ 25;

Of this, Class Counsel's requested payment of attorneys' fees (after reimbursement for the litigation costs and expenses set forth herein and in the accompanying Declarations) constitutes approximately 10% of the constructive common fund, with that percentage decreasing every day. This percentage is comfortably within the normal range recognized in California. *See, e.g.*, *Lafitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480 (2016) (percentage of benefit provided to class members can be referred to as bases to enhance lodestar for attorneys' fees, even in absence of formal consumer fraud); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) ("[T]his court concludes that in class action common fund cases the better practice is to set a percentage fee and that, absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%."); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378-79 (9th Cir. 1995) (affirming attorney's fee award of 33% of the recovery); *Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th Cir. 2003) (affirming attorney's fee award of 33% of the recovery).

This is a conservative cross-check analysis as to the reasonableness of the negotiated fee and expense award. The Ninth Circuit has expressly held that in evaluating the reasonableness of fee requests, the fact finder is to evaluate the whole amount made available to Settlement Class Members, even when unclaimed amounts would remain with Respondent. This is the relevant question since the Arbitrator cannot force consumers to submit claims and utilize the compensation they receive – even where, as here, the parties make it straightforward to do so and

all Class members will automatically receive one form of compensation. In *Williams v. MGM-Pathe Communications,* 129 F.3d 1026, 1027 (9th Cir. 1997), the Ninth Circuit reversed the reduction of a fee application for one-third of a fund based on amount claimed as compared to amount of the fund available for claims, even where the unclaimed funds would stay with Defendants, when that term was part of the settlement agreement: "We conclude that the district court abused its discretion by basing the fee on the class members' claims against the fund rather than on a percentage of the entire fund or on the lodestar." *See also Boeing v. Van Gemert*, 444 U.S. 472, 480 (1980) (class plaintiffs' "right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the effort of class representatives and their counsel"). There is no meaningful difference between a fund with a reversion provision and a claims process with no cap on either individual or overall claims, the value of which can be readily calculated. *See also Lafitte, supra*, 1 Cal.5th at 496; *Lealao, supra*, 82 Cal.App.4th at 822. Thus, it would be inconsistent with both state and federal court precedent to determine the reasonableness of this fee request based on consideration of any type of claims or usage rate. It would also be inconsistent with California state law interpreting the CLRA to do so. *Graciano v. Robinson Ford Sales, supra*, 144 Cal.App.4th at 162-64.

V. THE FACT RESPONDENT AGREED TO THIS AMOUNT ALSO SHOWS THE REASONABLENESS OF THIS REQUEST

The fact that Respondent, after extensive negotiation, agreed to this fee and expense amount is also an appropriate factor for the Arbitrator to consider in reviewing the fee and expense provisions of the settlement. Because the substantive terms of the settlement had been agreed to between the parties and executed, and the request for preliminary approval submitted to the Arbitrator, before these amounts were agreed to, and were ultimately agreed to with the assistance of Judge West, shows this provision was negotiated in such a manner as to avoid any

potential conflict with the Settlement Class or any argument that such amounts were "traded off" for lesser class consideration. Sheehan Decl., ¶ 12.

In *Hensley v. Eckerhart, supra,* 461 U.S. at 437, the United States Supreme Court held that negotiated attorneys' fee provisions are the "ideal" toward which the parties should strive: "a request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will 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 were negotiated separately after the settlement terms of the class claims has been agreed to by the parties, and are to be paid on top of the class consideration. *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 720 (5th Cir. 1974) ("in cases of this kind, we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorneys' fees.").

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

VI. CLASS COUNSEL'S EXPENSES WERE REASONABLE AND NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED ON BEHALF OF THE CLASS

To date, Claimants' Counsel have incurred out-of-pocket costs and expenses in the aggregate amount of $87,286.59 in prosecuting this litigation on behalf of the Settlement Class.

Litigation expenses are appropriately reimbursed in the context of a class action settlement in addition to the payment of attorneys' fees. *See Staton*, 327 F.3d at 974; *Rider v. San Diego*, 11 Cal. App. 4th 1410, 1424 n.6 (1992). Class Counsel are entitled to reimbursement for litigation out-of-pocket expenses that an attorney would ordinarily bill a fee-paying client. *See*, *e.g.*, *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). These expenses include arbitrator fees, mediator fees, filing fees, travel expenses, litigation support expenses, legal research expenses and other related expenses. Each of these expenses was necessarily and reasonably incurred to bring this Arbitration to a successful conclusion. *See* Sheehan Decl., ¶ 24.

VII. THE REQUESTED INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVE AND INTERESTED PARTIES ARE FAIR AND REASONABLE

In recognition of their efforts on behalf of the Settlement Class, and subject to the approval of the Court, Respondent has agreed to pay the Class Representatives $10,000 each as appropriate compensation for their time and effort serving as the class representatives in this litigation. That said, the Class Representatives are mindful of the requirement that incentive awards must be justified in light of each party's time and involvement. For the reasons discussed below, Class Representatives seek incentive awards in the amount of $10,000 each.

Incentive awards "are fairly typical in class action cases." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). Such awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a

private attorney general." *Id.* at 958-59. Incentive awards should be awarded based upon the consideration of, *inter alia*, the amount of time and effort spent on the litigation, the duration of the litigation and the degree of personal gain obtained as a result of the litigation. *See Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (incentive award of $50,000); *Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476 at *51-52 (N.D. Cal. Jan. 26, 2007) (awarding $100,000 divided among four plaintiffs in overtime wages class action); *Harris v. Vector Mktg. Corp.*, 2012 U.S. Dist. LEXIS 13797 (N.D. Cal. Feb. 6, 2012) (awarding $12,500 service award); *Bond v. Ferguson Enters.*, 2011 U.S. Dist. LEXIS 77692 (E.D. Cal. July 18, 2011) (approving service awards of $11,250); *Trujillo v. City of Ontario*, 2009 U.S. Dist. LEXIS 79309 (C.D. Cal. Aug. 24, 2009) (approving service awards of $30,000).

The requested amount of $10,000 each for the two Class Representatives is appropriate to compensate them for their additional efforts in bringing this action for the benefit of hundreds of thousands of Settlement Class Members. In connection with this motion, these Class Representatives have submitted declarations describing their involvement in the litigation. They aver in their declarations that they: (i) assisted with Class Counsel's investigation by describing the events surrounding their purchase of the PGS, (ii) provided Class Counsel with relevant documentation for their review, (iii) carefully reviewed the Demand for accuracy and approved it before it was filed, (iv) conferred with Class Counsel by phone and e-mail to discuss the status of the case, which included case strategy, motions that were currently pending, and the prospects of settlement, (v) were willing and prepared to take part in discovery and available to produce documents and take part in a deposition, and/or (vi) were also prepared to testify at arbitration. Both of these Class Representatives have provided an estimate of the number of hours they spent working with Class Counsel. *See* Declaration of Karen Davis-Hudson in Support of Claimants'

Motion for Entry of Order Finally Approving Class Action Settlement and Motion for Award of Attorneys' Fees and Expenses and Incentive Awards for Class Representatives, ¶7; Declaration of Sarah Diaz in Support of Claimants' Motion for Entry of Order Finally Approving Class Action Settlement and Motion for Award of Attorneys' Fees and Expenses and Incentive Awards for Class Representatives, ¶ 7. The dedication and efforts of these Class Representatives have conferred a significant benefit on hundreds of thousands of purchasers of PGS Kits across the United States.

VIII. CONCLUSION

Class Counsel and the Class Representatives produced a substantial benefit to Settlement Class Members. They now seek to be compensated for that work, consistent with the provisions of the Settlement Agreement, the negotiations with Respondent and the assistance of Judge West. In the end, Class Counsel will receive less than a conservative 1.8 multiplier on their standard hourly rates, making this request presumptively reasonable. As a cross-check, there is a constructive common fund worth at least $22,650,000, and the requested fee is well within the range of percentage fees routinely awarded in California. For the foregoing reasons, the amounts requested are fair and reasonable and should be approved. Class Counsel and the Class Representatives therefore respectfully request that the Arbitrator approve the payment of fees, expenses and incentive awards, including:

- Payment of $2,250,000 to Claimants' Counsel for payment of attorneys' fees and reimbursement of out-of-pocket expenses; and

- Payment of awards to Class Representatives in the amount of $10,000 each

DATED: October 9, 2017

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