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.	)	

CLAIMANTS' MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF ORDER FINALLY APPROVING CLASS ACTION SETTLEMENT

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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 Claimants' Motion for Entry of Order Finally Approving Class Action Settlement.

I. SUMMARY OF ALLEGATIONS AND SETTLEMENT TERMS

On January 13, 2014, Claimants filed a Demand for Class Arbitration against Respondent 23andMe, Inc. ("23andMe") captioned *Davis-Hudson, et al. v. 23andMe, Inc.* with the American Arbitration Association ("AAA"), which was assigned Case Number 74-20-1400-0032 (the "Arbitration"). Declaration of Patrick J. Sheehan in Support of Plaintiffs' Motion for Entry of Order Finally Approving Class Action Settlement ("Sheehan Decl."), at ¶ 3. Claimants filed a First Amended Demand for Arbitration (the "Demand") in this arbitration on February 18, 2016. As Claimants allege in the operative Demand, and explained in the papers filed in support of their motion for preliminary approval of this settlement, the 23andMe Personal Genome Service (the "PGS") was designed by 23andMe and offered for sale on-line. *Id.* According to Claimants, 23andMe sold the PGS between October 16, 2007 and November 22, 2013 to consumers based on inaccurate or misleading information regarding the PGS's specifications and capabilities, and in violation of state and federal law. *Id.* Based on these allegations, the Demand asserts causes of action for breach of warranty and violation of state consumer protection laws, seeking primarily damages. *Id.* Respondent denies, and continues to deny, all such allegations.

A copy of the executed Settlement Agreement was submitted separately with the Declaration of John Gravante in Support of the Joint Motion for Conditional Certification of Settlement Class, Preliminary Approval of Settlement Agreement and Approval of Form and

Content of Notice to Settlement Class Members. The settlement documented in the Settlement Agreement provides Settlement Class Members have the ability to submit a claim for $12.50 cash for each PGS they purchased or acquired, with no limit on the number of claims they could individually submit based on the number of units they purchased. Settlement Agreement, Section 2. If they do not elect to receive cash, they will automatically receive a $40 Certificate for use off the cost of a 23andMe Genetic Testing Kit. *Id.*, Section 2, Ex. 1.

Class Counsel negotiated a settlement that was designed to make submitting such claims as easy as reasonably practicable. Based on the extensive efforts of Class Counsel and Respondent, the Court-appointed Settlement Administrator Kurtzman Carson Consultants ("KCC"), sent individual notice by either e-mail or U.S. mail to 335,109 potential Settlement Class Members. *See* Declaration of Alex Thomas on Behalf of Settlement Administrator Regarding Notice ("Thomas Decl."), at ¶¶ 2, 5-6.

In filing this lawsuit, the Claimants' underlying goals were to: (1) confirm and quantify the damages caused by 23andMe's misrepresentations, as discussed above, and (2) provide members of the proposed Settlement Class the ability to receive reimbursement of a portion of their alleged losses. As set forth in paragraph 8 of the Sheehan Declaration, while Claimants' claims for damages were hotly contested by 23andMe, Claimants believe the maximum provable class-wide damages would have been approximately $50.00 for each unit of the PGS purchased, based on the fact that the PGS had two components, a Health component and an Ancestry component, only the Health component was at issue in this Arbitration, and the PGS had a base retail price of approximately $99 during the vast majority of the relevant time period. Thus, a $12.50 cash payment or $40 transferable Certificate to each Settlement Class Member for each unit of the PGS they purchased represents a significant percentage recovery on these claims.

While the subject of a separate motion, the attorneys' fees, costs and expenses and incentive awards provided for by the settlement were not negotiated until after the principal terms and conditions of the settlement benefitting the Settlement Class Members had been agreed to by the Parties and were not agreed to until after the Claimants had submitted that settlement for preliminary approval. Sheehan Decl., at ¶ 12. They were negotiated with the active assistance and involvement of the Honorable Carl J. West (Ret.), so as to ensure there was no appearance of any potential conflict between the negotiations over the principal terms of the settlement benefitting the Settlement Class and any fee negotiations. *Id.* By doing so, the Parties avoided any potential claim that some conflict of interest arises when both negotiations occur at the same time. *See* Manual for Complex Litigation 4th § 21.7 ("Separate negotiation of the class settlement before an agreement on fees is generally preferable."); *see also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 334-35 (3rd Cir. 1998) (affirming final approval of class settlement and fee award where parties negotiated settlement agreement prior to negotiating attorneys' fees).

II. THE SETTLEMENT NOTICE PROGRAM HAS BEEN COMPLETED AND THE INITIAL CLASS MEMBER RESPONSE HAS BEEN POSITIVE

On August 8, 2017, the Arbitrator held a telephonic hearing on the motion for preliminary settlement approval. The Arbitrator thereafter granted preliminary approval of the settlement and provisionally certified the Settlement Class under Rule 8 of the American Arbitration Association Supplementary Rules for Class Arbitration ("Supplementary Rules"). Order Granting Motion for Preliminary Approval of Class Action Settlement and Directing Dissemination of Class Notice Program dated August 16, 2017. The Arbitrator at that time also approved the Parties' proposed notice plan to the Settlement Class, and approved KCC as the claims administrator to supervise and administer the notice plan and the claims administration

process.

As detailed in the Thomas Declaration at ¶¶ 2, 5-6, class notice was e-mailed or mailed directly to 335,109 out of the 335,644 Settlement Class Members identified by 23andMe. In addition, KCC also set up the settlement website and a toll-free telephone number to answer Settlement Class Member inquiries. *Id.*, at ¶¶ 3-4.

23andMe knows the exact number of Settlement Class Members, as all units of the PGS are purchased directly from 23andMe. The fact class notice was individually disseminated to 335,109 individuals means that virtually 100% of the Settlement Class Members have received direct e-mailed and regular-mailed notice of this settlement. Courts routinely approve notice programs reaching a lower percentage of class members. *In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934, 945-46 (9th Cir. 2005) (affirming approval of notice plan based on rental records using both regular and email); *Wilson v. Airborne, Inc.*, 2008 WL 3854963, at * 4 (C.D. Cal., Aug. 13, 2008) (approving program reaching 80% of class members); *Federal Judicial Center Judges' Class Action Notice and Claims Process Checklist*, at www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf ("A high reach, e.g. between 70-95% can often reasonably be reached by a notice campaign"). The notice plan approved and implemented here by KCC was outstanding and appropriate. *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (notice need not actually reach every single class member; instead, the notice need only be reasonably calculated, under all the circumstances, to apprise interested Parties of the pendency of the action and afford them an opportunity to present their objections).

So far there have been a significant number of inquiries to both KCC and Class Counsel (17 phone calls to KCC and 21,403 visitors to the settlement website), but only 19 requests for

exclusion have been received by KCC to date. Thomas Decl., at ¶¶ 3-4, 8. The communications Class Counsel have received from Settlement Class Members directly have been overwhelmingly positive. Sheehan Decl., at ¶ 19.

There have been only 24 "objections" filed with the AAA. A number of these submissions are not really objections to the settlement at all but rather statements by Settlement Class Members to the effect that they were satisfied with the PGS. Sheehan Decl., at ¶ 18. Some objections demand full refunds for the PGS but such objections do not take into account that settlement is the product of compromise or the risks of litigation. *Id.* Other objections ask that attorneys' fees not be awarded but, as set forth in the application for an award of attorneys' and expenses submitted concurrently herewith, the requested amount falls well within the range justified by a settlement of the size at issue here. *Id.* None of the objections received to date provides a valid reason to disturb the settlement in any way. Claimants will more fully address these and any other objections in their reply papers, after the deadline for filing objections has passed.

The notice program and simplified claims process so far has worked as intended. With still eight weeks prior to the December 6, 2017 claims deadline, the response of Settlement Class Members has been significant. As of October 6, 2017, Settlement Class Members have already submitted 7,402 election forms seeking cash compensation, and all who do not will receive the Certificate. *See* Thomas Decl., at ¶ 10. While the notice program has not yet been completed, the lack of significant (or any) opposition to the settlement from persons with a vested interest in this matter to date, combined with the extensive reach of the notice program and ease with which objections can be submitted, is an important factor for the Arbitrator to consider in deciding

whether to approve this settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).[1]

III. THE STANDARDS FOR APPROVAL OF CLASS ACTION SETTLEMENTS ARE SATISFIED HERE

Under Supplementary Rule 8, the Arbitrator must approve all settlement agreements that will bind absent class members. *See also Briggs v. United States*, 2010 WL 1759457, at *3 (N.D. Cal., Apr. 30, 2010). Final approval involves an assessment of whether the class action settlement, as a whole, is fundamentally fair, adequate, and reasonable. *Staton v. Boeing Co*., 327 F.3d 938, 952 (9th Cir. 2003); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004).

In granting final approval of a class action settlement and making such a determination, the Arbitrator's inquiry is comparable to that of a court -- to determine that the settlement: (a) was not the product of fraud or collusion, and (b) is fair, adequate, and reasonable. The Arbitrator must evaluate the settlement terms as a whole, rather than in terms of specific components or terms to accept or reject, in determining whether the settlement is fair, reasonable, and adequate, such that the settlement stands or falls in its entirety. *Officers for Justice v. Civil Service Comm.*, 688 F.2d 615, 625, 628 (9th Cir. 1982); *see also*, *Hanlon*, *supra*, 150 F.3d at 1026. The parties' settlement of disputed claims are highly favored, and there is a particularly strong judicial policy favoring settlement of class litigation. *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) ("there is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits").

[1] Claimants will update the Arbitrator on the responses they receive from Settlement Class Members and the claims received in the reply brief that will be filed closer to the final approval hearing.

The Court in *Officers for Justice* endorsed the examination of the following factors in determining whether a class action settlement is fair, reasonable, and adequate: (1) the experience and views of counsel; (2) the strengths and weaknesses of the plaintiff's case and the range of recovery when compared against the value of the settlement; (3) the risk of obtaining liability and maintaining class action status through trial and appeals; (4) the complexity, expense, and duration of litigation; (5) the reaction of class members to the proposed settlement, including the substance and amount of any opposition to the settlement; and (6) the extent of discovery completed and stage of proceedings at which the settlement was achieved. *Officers for Justice, supra*, 688 F.2d at 625; *Torrisi v. Tuscon Electric Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). The relative importance assigned to each factor "varies depending on the nature of the case." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992).

In determining the adequacy and reasonableness of a proposed settlement, a settlement is presumed fair where, as here, the settlement is reached through arm's length bargaining, where the factual investigation is sufficient to allow counsel and the Arbitrator to act intelligently, where counsel is experienced in similar litigation, and where the percentage of objectors is small. *Officers for Justice, supra*, 688 F.2d at 625; *In re Consol. Pinnacle West Secs. Litig*., 51 F.3d 194, 197 n.6 (9th Cir. 1995). Such a presumption is properly invoked here. The economic value of the settlement, considered as a function of the bargaining and litigation context, shows that this settlement is a fair, reasonable, and adequate compromise of the claims in the Demand and should be finally approved**.**

IV. EVALUATION OF THE SETTLEMENT TERMS UNDER THE *OFFICERS FOR JUSTICE* FACTORS DEMONSTRATES IT IS FAIR, REASONABLE AND ADEQUATE

A. This Settlement was the Product of Serious, Informed Litigation and Non-Collusive Negotiations

Part of the analysis of the reasonableness of a class action settlement involves an inquiry into whether the settlement in question was achieved through arm's-length negotiations by experienced counsel. *See, e.g., In re McDonnell Douglas Equipment Leasing Sec. Litig.*, 838 F.Supp. 729, 737 (S.D.N.Y. 1993) (observing courts "have consistently refused to substitute their business judgment for that of counsel, absent evidence of fraud or overreaching") (quoting *Oppenlander v. Standard Oil Co.,* 64 F.R.D. 597, 624 (D. Colo. 1974)). As set forth in paragraph 14 of the Sheehan Declaration, Class Counsel are experienced in class action litigation (*see* their firm resumes previously submitted to the Arbitrator). They believe these terms are reasonable, particularly considering, *inter alia,* the risks and delays of continued litigation. The benefits made available to the members of the Settlement Class as a whole are fair, reasonable, and adequate compensation for such claims based on the particular facts and circumstances of this case. *See Hanlon, supra,* 150 F.3d at 1027 ("[T]he question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.")

Counsel for the Parties began settlement discussions in the Fall of 2015. Sheehan Decl., at ¶ 4. On January 26, 2016, the Parties conducted an in-person mediation session before David Geronemus. *Id.* Despite fruitful negotiations, no settlement agreement was reached at that mediation. *Id.* The Parties continued to engage in negotiations by conducting numerous telephone conferences, involving 23andMe representatives, and their respective counsel, as well

as several written demands provided to 23andme relating to the insurance policies covering such claims. *Id.* Yet again, no settlement agreement was reached. *Id.*

Later, the Parties arranged to have another in-person mediation session before the Honorable Carl J. West (Ret.). Sheehan Decl., at ¶ 5. During this mediation, which was held on June 2, 2017, the Parties finally agreed to the basic terms of the settlement, summarized in a term sheet prepared by Judge West. *Id.* The mediation session was followed by extensive follow-on negotiations during which the terms of an agreement were extensively debated and negotiated. *Id.*

The Parties continued to engage in protracted negotiations between early June and late July 2017 over the precise language of the Settlement Agreement and accompanying exhibits. Sheehan Decl., at ¶ 6. This process in itself raised numerous issues that required additional consultation and effort, even after the settlement terms were originally agreed to in principle. *Id.* Eventually, the Parties agreed to enter the Settlement Agreement, which was signed effective July 19, 2017. *Id.*

As set forth above, the Settlement Agreement's terms were negotiated over a period of eighteen months, in a process that involved conducting numerous telephone conferences, direct meetings with 23andMe representatives and their counsel, multiple in-person mediation sessions before two different mediators, and extensive follow-on negotiations after those mediations during which the terms of an agreement were extensively debated and negotiated. Sheehan Decl., at ¶ 7. Accordingly, the Parties had had an opportunity to evaluate and to analyze thoroughly the contested legal and factual issues posed by the Arbitration so that adequate demands and the accurate evaluation of 23andMe's positions could be made. *Id.*

Where, as here, experienced counsel view this settlement favorably, and the evidence shows that the settlement was negotiated at arm's-length and in an adversarial manner, this factor weighs significantly in favor of granting final approval to the settlement. Decision-makers favor deference to the "private consensual decision of the settling parties," particularly where the parties are represented by experienced counsel and negotiation has been facilitated by a neutral party, such as a private mediator (or in this case, two separate mediators). *Rodriguez v. West Publishing Corp*., 563 F.3d 948, 965 (9th Cir. 2009).

B. The Views of Experienced Counsel Support Approving this Settlement

In evaluating a settlement, another factor the Arbitrator considers is the judgment of experienced counsel for the Parties. When the counsel recommending approval of the settlement are experienced, significant weight may be given to their opinion. *Kirkorian v. Borelli*, 695 F.Supp. 446, 451 (N.D. Cal. 1988); *see also In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 1992 WL 226321, *2 (C.D. Cal. June 10, 1992) (finding counsel's belief that the proposed settlement represented the most beneficial result for class a significant factor in approving settlement).

Counsel for Claimants and Respondent, guided by the material assistance and recommendation of Judge West, support the approval of the settlement. Where, as here, the settlement was negotiated by experienced counsel and facilitated by not one but two accomplished mediators, "great weight" should be accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation. *DIRECTV, supra*, 221 F.R.D. at 528; *In re Wash. Pub. Power Supply Sys. Sec. Litig*., 720 F.Supp. 1379, 1392 (D. Ariz. 1989) (*aff'd sub nom. Class Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir. 1992)) ("Counsels' opinions warrant great weight both because of their considerable familiarity with

this litigation and because of their extensive experience in similar actions.").

As indicated in the Sheehan Declaration, and previously submissions to the Arbitrator, the Settlement Class has been represented throughout the course of this litigation by counsel with years of experience in litigating consumer class actions and who have negotiated numerous class settlements that have been approved by courts throughout the United States. Based on numerous factors, such as necessity of a settlement to provide partial compensation to Settlement Class Members relatively early on and the uncertainty of the outcome at trial against Respondent, as compared to the direct and significant benefits of the settlement made available, it was the informed conclusion of experienced counsel that the proposed settlement is fair, reasonable, and adequate, and warrants final Arbitrator approval.

C. The Settlement Terms are Fair, Reasonable, and Adequate Considering the Relevant Risk Factors

1. The Strength of Claimants' Claims and the Range of Possible Recovery

Both sides faced risks in proceeding to litigate this case, and the settlement is fair to the Settlement Class Members in light of these risks. *See* NEWBERG ON CLASS ACTIONS § 11:50 (4th ed. 2002) ("In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results."); *DIRECTV, supra,* 221 F.R.D. at 526. While Class Counsel believed that they had a strong case, it was certainly not without risk in terms of the range of possible recovery, assuming liability could be established. Sheehan Decl., at ¶ 11. The range of recovery went from zero if the Arbitrator accepted Respondent's arguments that there are no damages, to an amount based on various calculations such as a comparison of the pricing of the PGS to comparable products provided by other companies, based on the market pricing of the products during the entirety of the relevant

time period. *Id.*

The amount the Parties ultimately agreed to is a reasonable compromise of the claims at issue. Sheehan Decl., at ¶ 9. Given that the PGS Kits sold at a retail price of approximately $99, a cash payment of $12.50 for each unit would constitute a significant recovery based on the average purchase price for the PGS Kits. *Id.* As one measure of damages (which would be vigorously disputed by Respondent), Settlement Class Members could expect to receive a maximum of approximately $50.00 if this matter resolved in Claimants' favor in arbitration (based on an alleged reduction in value in terms of what was purchased versus what was provided of up to 50%, the estimated value of the Health component of the PGS). *Id.* If the settlement is approved, it will compensate Settlement Class Members who elect cash compensation approximately 25% of their alleged losses based on this damage estimate. *Id.* And if they elect to not receive cash and automatically receive the Certificate, that Certificate is worth 80% of their alleged losses based on these estimates. *Id.*

As of October 6, 2017, there have been election forms submitted by 7,402 Settlement Class Members representing 12,078 units of the PGS. Thomas, Decl., at ¶ 10. In comparison, there have only been 19 requests for exclusion and 24 objections to date. Sheehan Decl., at ¶ 18. Simply put, the results thus far are outstanding. [2]

The standard of measuring a settlement "is not how much money a company spends on purported benefits, but the value of those benefits to the class." *In re TD Ameritrade Accountholder Litig*., 266 F.R.D. 418, 423 (N.D. Cal. 2009) (*citing O'Keefe v. Mercedes-Benz United States, LLC*, 214 F.R.D. 266, 304 (M.D. Pa. 2003). This is the relevant question for purposes of evaluating the reasonableness of this settlement as a whole, since neither the Parties

[2] The deadline for submitting objections or requests for exclusion is October 20, 2017. The deadline for submission of election forms is on December 6, 2017. A second and third notice will be sent out on approximately October 13, 2017 and November 29, 2017, respectively.

nor the Arbitrator can compel consumers to elect cash compensation, and the Certificates to be distributed to all Settlement Class Members are valid for three years, rendering the redemption rate unknowable. Thus, in evaluating a settlement (and the reasonableness of the fees requested), the Arbitrator looks at the potential recovery made available to both the individuals and the entire class, rather than the amount claimed, which they estimate to be in excess of $22,670,000, based on the total number of the PGS actually sold by 23andMe during the class period (approximately 510,000), multiplied by the $40 value of the Certificate (totaling $20,400,000), plus attorneys' fees and expenses and incentive awards (totaling $2,270,000). Settlement Agreement, ¶ 2(a)-(c); Sheehan Decl., at ¶ 10. *Cf., Williams v. MGM-Pathe Communications*, 129 F.3d 1026, 1027 (9th Cir. 1997). In addition, the proposed class notice fully advises Settlement Class Members of their alternatives so that they can make informed decisions on whether to accept the settlement or to opt out of the settlement and pursue their own claims. Although only 19 requests for exclusion have been submitted to date, Settlement Class Members have the right to exclude themselves by October 20, 2017 and pursue individual claims if they believe they are entitled to a greater recovery.

2. Complexity of the Litigation

While Class Counsel believed they would be successful in this litigation, the Settlement Class nevertheless faced many risks in proving liability and damages. In this regard, while they believe they could ultimately establish that the PGS was not accurately represented in terms of their actual, legally permitted performance as described above, this issue is far from certain and would be vigorously contested by Respondent. *See* Sheehan Decl., at ¶ 11. In attempting to establish liability, Class Counsel faced the risks that there would be significant disputes whether the characteristics of the PGS were compliant with applicable industry standards, federal law and

state law, which would likely entail competing viewpoints expressed by the Parties' experts. In addition, although the Arbitrator has certified a Settlement Class as part of the preliminary approval order, he has not certified a litigation class. *Id.* Numerous decisions both for and against class certification and several matters pending before the Ninth Circuit illustrate the risks to Claimants and the Settlement Class of proceeding to litigate certification issues on behalf of a nationwide class. *See e.g., Brazil v. Dole Food LLC*, 2014 WL 5794873 (N.D. Cal., Nov. 6, 2014, *aff'd in part*, 9th Cir. No. 14-17480 filed Sept. 30, 2016) (not for publication)); *In re ConAgra Foods, Inc.*, 90 F.Supp.3d 919 (C.D. Cal. 2015) (aff'd in part, *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017) (both granting in part and denying in part class certification).)

Thus, while Claimants continue to believe the claims should be certified for class treatment, the risk of non-certification is plain and underscores the benefits to the Settlement Class. Given the "risk that the class would not be certified … actual recovery through settlement confers substantial benefits on the class that outweighs the potential recovery that could have been obtained through full adjudication." *Gardner v. GC Servs., LP*, 2012 WL 1119534, at * 4 (S.D. Cal., Apr. 2, 2012).[3] And even assuming the Arbitrator granted class certification, absent a settlement, Settlement Class Members faced risks of non-recovery and, even in the best case, long delays in obtaining meaningful monetary recovery beyond what is being offered in this settlement. This settlement is superior to another possible result – little or no recovery for Settlement Class Members, or a recovery not realized for years.

[3] Under the principles set forth in *Hanlon, supra*, the Arbitrator should reaffirm his initial determination on preliminary approval based on the evidence presented that certification of the Settlement Class for settlement purposes is proper. If any objections are raised as to this issue (none have been raised so far), we will address the issue on reply.

D. The Response of the Class Members Has Been Overwhelmingly Positive

As set forth in the Thomas Declaration at ¶¶ 3-4, well over 21,000 potential claimants have either called the KCC toll-free telephone line with questions or visited the settlement website. Settlement Class Members have already submitted 7,402 election forms for 12,078 units of the PGS. In addition, Class Counsel have communicated with numerous Settlement Class Members in response to the class notice, and the settlement has received widespread attention on-line. The majority of Settlement Class Members who have contacted Class Counsel have expressed approval of this settlement. Sheehan Decl., at ¶ 19. In comparison, as of the date of this Motion, only 19 potential Settlement Class Members – or far less than 1% percent of the potential Settlement Class Members who received direct mailed notice from KCC – have opted out of the Settlement, and only 24 objections have been filed. *Id.*, at ¶ 18. Significantly, a number of the objections are not really objections to the settlement at all but rather statements by Settlement Class Members to the effect that they were satisfied with the PGS. *Id.* Some objections demand full refunds for the PGS but such objections do not take into account that settlement is the product of compromise. *Id.* Other objections ask that attorneys' fees not be awarded but, as set forth in the application for an award of attorneys' and expenses submitted concurrently herewith, the requested amount falls well within the range justified by a settlement of the size at issue here. *Id.*

While objections are due by October 20, 2017, the lack of significant opposition to the settlement thus far militates in favor of finally approving the settlement. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) (objection by only 1% of class supports approval); *Churchill Village, LLC v. GE*, 361 F.3d 566, 577 (9th Cir. 2003) (500 opt outs and 45 objections out of 90,000 class members indicates support for settlement). A small number of

objections "strongly supports the fairness of the settlement" and should not stand in the way of final approval. *Shames v. Hertz Corp*., 2012 WL 5392159, at * 8 (S.D. Cal., Nov. 5, 2012) ("The small number of objections and class members who opted out of the settlement, when compared to the large number of class members, favors approval.").

Even if a full refund remedy were warranted under the law and the facts, such a remedy would not be provided by Respondent as part of a settlement, since a full refund is the most Claimants could likely obtain in this litigation. Such relief would not be available absent Claimants prevailing on obtaining a nationwide class certification order, engaging in significant discovery, prevailing against summary judgment and winning a full arbitration, with all the attendant risks and delays. Even if this were realistic, such relief would not be available until some point far into the future. Courts have held that for a settlement to be reasonable it need not represent a 100% recovery of all possible losses. Rather, a settlement is to be considered fair and reasonable in light of the risks of the litigation compared to the benefits conferred. *See Hanlon, supra*, 150 F.3d at 1027; *Rodriguez, supra*, 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 plaintiff's or defense verdict, the potential recovery, and the chances of obtaining it, discounted to present value.").

E. The Case was Sufficiently Advanced That Claimants' Counsel Could Make an Informed Judgment Regarding the Merits of the Settlement

The final *Officers for Justice* factor in the context of approving a class action settlement is the stage of the proceedings at which the settlement was reached. If the parties have sufficient information sharing and cooperation in providing access to necessary data, the settlement may be deemed fair, reasonable, and adequate. *In re Mego Fin. Corp. Sec. Litig*., 213 F.3d 454, 459 (9th Cir. 2000). It is well-established that parties can acquire sufficient information in the absence of

formal discovery and based on informal means of acquiring information. *Id*. ("In the context of class action settlements, formal discovery is not a necessary ticket to the bargaining table where the parties have sufficient information to make an informed decision about settlement." (*quoting Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998))).

In addition to the significant publicly available information about the PGS on both sides of the debate, in connection with these settlement discussions 23andMe disclosed significant information regarding the FDA process, the information gathered to respond to civil investigation demands from government authorities, and the nature and characteristics of the PGS. Sheehan Decl., at ¶ 15. 23andMe also supplied Class Counsel with significant evidentiary information through the discovery process. *Id.* Realistic damage assessments from both sides were based on information available about comparable and competitive products available on the market, average market prices for the PGS, and sales data. *Id.* Class Counsel had all of this information prior to and during the course of negotiating the settlement. *Id.* With the benefit of this information, Class Counsel are confident in their assessment of the merits of the case and the events that gave rise to it. *Id.* Class Counsel therefore possessed sufficient background and information necessary to evaluate the fairness, adequacy, and reasonableness of the proposed settlement. *See Mego Fin. Corp. Sec. Litig*., 213 F.3d at 460.

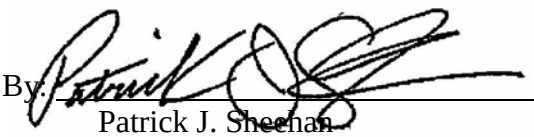
Based on the substantial factual information known to the Parties during the course of the litigation and the settlement negotiations, all counsel were in a position at the time the settlement was reached to understand the strengths and weaknesses of the action such that they could make intelligent and informed decisions regarding the reasonableness of the settlement terms. This final factor weighs in favor of approving this settlement. *Officers for Justice, supra*, 688 F.2d at 625.

V. CONCLUSION

Based on a weighing of all relevant factors, the settlement terms reflected in the Settlement Agreement as a whole are reasonable. Claimants therefore respectfully request the Arbitrator finally approve this class action settlement.

DATED: October 9, 2017

WHATLEY KALLAS, LLP

By: 
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