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11 Attorneys for Plaintiff and the Class

12
 13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN FRANCISCO DIVISION

16 FAITH BAUTISTA, Individually and on)
 17 Behalf of All Others Similarly Situated,)
 18 Plaintiff,)

19 vs.)

20 VALERO MARKETING AND SUPPLY)
 21 COMPANY,)
 22 Defendant.)

Case No. 3:15-cv-05557-RS

CLASS ACTION

DECLARATION OF STUART A.
 DAVIDSON IN SUPPORT OF PLAINTIFF'S
 MOTION FOR FINAL APPROVAL OF
 CLASS ACTION SETTLEMENT AND
 CLASS COUNSEL'S REQUEST FOR A FEE
 AND EXPENSE AWARD AND PLAINTIFF
 SERVICE AWARD

Date: March 11, 2021
 Time: 1:30 p.m.
 Courtroom: 3 – 17th Floor
 Judge: Hon. Richard Seeborg

1 I, Stuart A. Davidson, declare as follows:

2 1. I am an attorney licensed to practice in the state of Florida and I have been admitted
3 *pro hac vice* before this Court. I am a partner in the law firm of Robbins Geller Rudman & Dowd
4 LLP (“Robbins Geller” or “Class Counsel”), counsel for the preliminarily appointed Settlement
5 Class Representative, Faith Bautista (“Plaintiff” or “Settlement Class Representative”), and one of
6 the preliminarily appointed counsel for the Settlement Class in this Action.¹ I have been actively
7 involved in the prosecution and resolution of this Action, am familiar with its proceedings, and have
8 knowledge of the matters set forth herein based upon my involvement in this Action and based upon
9 my supervision of, or communications with, other lawyers and staff assigned to this Action.

10 2. I respectfully submit this Declaration in support of Plaintiff’s Motion for Final
11 Approval of Class Action Settlement and Class Counsel’s Request for a Fee and Expense Award and
12 Plaintiff Service Award. This Declaration demonstrates why the proposed Settlement is fair,
13 reasonable, and adequate, in the best interests of the Settlement Class, and should be approved by the
14 Court. This Declaration also sets forth the background and principle proceedings of the Action, the
15 nature of the claims asserted, the legal services provided by Class Counsel, and the negotiations that
16 led to the proposed Settlement with Defendant Valero Marketing and Supply Company (“Valero” or
17 “Defendant”).

18 **I. PRELIMINARY STATEMENT**

19 3. The Settlement is the culmination of four years of vigorously contested litigation that
20 secures meaningful and important relief for the Settlement Class in the form of changes to Valero’s
21 business practices that directly resolve the claims in the Action. As detailed below, Plaintiff and
22 Class Counsel zealously prosecuted the claims at every stage of the Action. They successfully
23 defended against multiple motions to dismiss; engaged in comprehensive and contentious discovery
24 that included a motion to compel, the production, review, and analysis of thousands of pages of
25 documents from Valero and third-parties, and the taking of nine depositions; defended against

26 _____
27 ¹ All capitalized terms that are not otherwise defined herein have the same meanings ascribed
28 to them in the Class Action Settlement Agreement and Release (“Settlement Agreement”). ECF No.
279-1.

1 multiple *Daubert* expert challenges; successfully moved for class certification; defended against
2 Valero’s summary judgment and decertification motions while moving for cross summary-judgment;
3 and successfully petitioned the Ninth Circuit Court of Appeals to review this Court’s class
4 decertification order, all before entering into the Settlement.

5 4. The legal risks to continued litigation were great and the potential rewards too small
6 to justify passing up the proposed Settlement. Continued litigation would require Plaintiff to first
7 persuade the Ninth Circuit to reverse this Court’s decertification order, and then win at trial. Even
8 assuming Plaintiff were to win at trial, her victory would almost certainly be appealed. Success at
9 each of these steps is far from certain, and the process could take years. And at the end, Settlement
10 Class members would receive the exact same meaningful, non-monetary relief they will get through
11 the Settlement, and also a claim to a *de minimis* amount of individual damages that would be
12 uneconomical to distribute. The Settlement immediately provides the more meaningful non-
13 monetary relief component and eliminates the high risk of continued litigation under circumstances
14 where a favorable outcome was not guaranteed.

15 5. The extensive litigation and discovery efforts in this Action allowed Class Counsel to
16 fully understand and appreciate the evidence, legal arguments, and strengths and weaknesses of the
17 case, against which to evaluate the Settlement. The Settlement was not reached, however, until after
18 three separate mediation attempts with an experienced mediator, Cathy Yanni of JAMS, who
19 ultimately made a “mediator’s proposal” that the Parties accepted.

20 6. The Court preliminarily approved the Settlement in its Order Granting Unopposed
21 Motion for Preliminary Approval of Class Action Settlement (ECF No. 284) (“Preliminary Approval
22 Order”). The Settlement will resolve all claims asserted in the Action against Valero on behalf of a
23 Settlement Class, defined as follows:

24 All persons who, between December 3, 2011 and the date of preliminary approval,
25 purchased gasoline using a debit card at a Valero-branded station in California that
26 advertised a “cash” price and “credit” price on Relevant Valero-Branded Signage but
27 the Relevant Valero-Branded Signage did not affirmatively disclose how gasoline
28 purchased with a debit card was priced, and were charged more money per gallon
than the advertised “cash” price.

28 *Id.*, ¶8.

1 7. On November 20, 2020, the Court-appointed Settlement Administrator, Epiq Class
2 Action & Claims Solutions, Inc. (“Epiq”), commenced dissemination of notice to the Settlement
3 Class pursuant to the terms of the Settlement Agreement and the Preliminary Approval Order. *See*
4 Declaration of Cameron R. Azari, Esq., on Implementation of Settlement Notice Plan (“Azari
5 Decl.”), submitted herewith. The Settlement Notice Plan consisted of: (1) an online banner ad
6 campaign; (2) a social media campaign; (3) a print campaign in six specific California newspapers;
7 (4) a national press release in English and Spanish; and (5) a dedicated informational website. *Id.*,
8 ¶¶8-15. The Settlement Notice informed Settlement Class members of (i) the definition of the
9 Settlement Class; (ii) their right to exclude themselves from the Settlement Class; and (iii) their right
10 to object to any aspect of the Settlement, including Class Counsel’s request for attorneys’ fees and
11 expenses.

12 8. As discussed below, Class Counsel’s requested fee represents a multiplier of 0.142,
13 *i.e.*, a significant discount or “*negative* multiplier” on Class Counsel’s combined “lodestar” (*i.e.*,
14 Class Counsel’s hourly rates multiplied by the hours spent on prosecuting and settling this Action).
15 Class Counsel have aggressively litigated this case on a wholly contingent basis and submit that this
16 fee request is fair, reasonable, and adequate, and warrants this Court’s approval. This request is well
17 within the range of fees typically awarded in similar types of cases and is justified in light of the
18 benefits obtained, the substantial risks undertaken, and the quality, nature, and extent of the services
19 rendered.

20 9. The Court-ordered deadline for filing objections to the Settlement or requesting to be
21 excluded from the Settlement Class is February 18, 2021. To date, no objections to any aspect of the
22 Settlement have been filed by Settlement Class members.

23 10. Accordingly, Plaintiff respectfully submits that the Settlement should be approved as
24 fair, reasonable, and adequate, and that Class Counsel should be awarded \$1,650,000 in attorneys’
25 fees and expenses, and Plaintiff should be awarded a \$2,000 service award for her time and effort in
26 representing the Settlement Class.

1 **II. HISTORY OF THE LITIGATION**

2 11. This is a consumer class action alleging that Valero violated California’s (1)
3 Consumer Legal Remedies Act, Cal. Civ. Code §1750, *et seq.* (“CLRA”); (2) False Advertising
4 Law, Cal. Bus. & Prof. Code §17500, *et seq.* (“FAL”); and (3) Unfair Competition Law (“UCL”),
5 Cal. Bus. & Prof. Code §17200, *et seq.*²

6 12. The operative Second Amended Complaint generally alleges that pricing signage at
7 various Valero-branded stations in California violates these statutes because it does not make clear
8 that the advertised “credit” price will apply to a debit card instead of the lower “cash” price, which a
9 reasonable consumer would expect.

10 **A. Commencement of the Litigation and Rule 12 Motion Practice**

11 13. Plaintiff filed the initial Complaint against Valero on December 4, 2015, alleging
12 violations of the CLRA, FAL, and UCL, on behalf of all persons who paid for Valero-branded
13 gasoline with a debit card in California between July 2011 and the present. ECF No. 1.

14 14. Valero filed a Rule 12(b)(6) motion to dismiss on February 26, 2016. ECF No. 31.
15 Plaintiff filed a First Amended Complaint (“FAC”) on April 8, 2016, ECF No. 42, mooted Valero’s
16 motion.

17 15. On April 29, 2016, Valero filed a Rule 12(b)(6) motion to dismiss the First Amended
18 Complaint. ECF No. 45. The Parties presented oral argument to the Court, and the Court granted
19 Valero’s motion on July 21, 2016, finding that the First Amended Complaint failed to adequately
20 plead facts showing that Valero exercised sufficient control over Valero-branded stations to hold it
21 liable for the stations’ pricing signage, and that Plaintiff failed to plead her claim under the
22 “unlawful” prong of the UCL by not alleging whether she entered a personal identification number
23 (“PIN”) to support the predicate violation of Cal. Fin. Code §13081(b). ECF No. 60.

24 16. On September 23, 2016, Plaintiff filed a Second Amended Complaint alleging that
25 Valero had some control over signage at Valero-branded stations. ECF No. 69.

26
27 ² Earlier pleadings included claims for breach of contract and accounting, but Plaintiff
28 voluntarily dropped those claims.

1 17. On October 21, 2016, Valero filed another Rule 12(b)(6) motion focused on a single
2 claim in the Second Amended Complaint (the UCL “unlawful prong” claim predicated on violation
3 of Cal. Fin. Code §13081(b), ECF No. 72), which the Parties fully briefed. The Court granted
4 Valero’s motion on November 18, 2016. ECF No. 78. On December 6, 2016, Plaintiff moved for
5 reconsideration of the Court’s order, ECF No. 79, and the Parties fully briefed Plaintiff’s motion.
6 The Court denied Plaintiff’s motion on December 12, 2016. *See* ECF No. 81.

7 **B. The Parties Engaged in Extensive Fact and Expert Discovery**

8 18. Discovery was robust and contentious. As alluded to above, Plaintiff and Class
9 Counsel crafted and served targeted document requests and interrogatories on Valero and certain
10 third parties beginning as soon as permitted by the Federal Rules. Plaintiff issued six subpoenas to
11 third parties (a Valero-branded gas distributor, a Valero-branded Dealer, Visa, MasterCard, and a
12 payment processor) and obtained and reviewed thousands of pages of documents and obtained
13 countless lines of sales data for use by Plaintiff’s damages expert. This required numerous meet and
14 confers with defense counsel and a motion to compel discovery from Valero. *See* ECF No. 103.

15 19. Class Counsel were able to quickly review thousands of pages of discovery, identify
16 key “hot” documents, and utilize those documents to plead facts in the Second Amended Complaint
17 to overcome Valero’s defense that Plaintiff did not allege facts suggesting that Valero had sufficient
18 control over Valero-branded stations or those stations’ signage. In addition, Class Counsel worked
19 to obtain useful deposition testimony from a number of key fact witnesses, expert witnesses, and
20 third parties. This included five hybrid Rule 30(b)(6) and Rule 30(b)(1) depositions of Valero and
21 its employees, two third-party depositions (of a Valero distributor representative and a Valero-
22 branded station representative), and two depositions of Plaintiff’s expert witnesses.

23 20. At the same time, Class Counsel assisted Plaintiff to prepare for her deposition by
24 Valero, and to respond to Valero’s discovery requests.

25 **C. Plaintiff Successfully Achieved Class Certification and Defended**
26 **Against *Daubert* Challenges and Class Notice Challenges**

27 21. Plaintiff moved for class certification on May 26, 2017. ECF No. 87. The Parties
28 engaged in significant motion practice related to that motion, which included multiple motions to

1 strike expert evidence. ECF Nos. 105, 113-114, 117-119. On October 4, 2017, the Court granted
2 Plaintiff's class certification motion, concluding that the proposed class satisfied all of the
3 requirements of Rules 23(a) and (b)(3). ECF No. 123.

4 22. On May 24, 2018, Plaintiff moved for approval of a class notice plan. ECF No. 136.
5 On June 7, 2018, the Parties fully briefed their respective motions, which included briefing on a
6 contested motion by Valero to file a sur-reply. ECF Nos. 140-141, 143-144, 147-148, 150. Valero
7 strongly objected to Plaintiff's proposed method of identifying the Valero-branded stations that
8 would be at issue (*i.e.*, that displayed the allegedly deceptive signage and charged a higher price for
9 debit purchases). On July 16, 2018, the Court granted Valero's motion and denied Plaintiff's motion
10 without prejudice. ECF No. 152.

11 23. On August 3, 2018, Plaintiff filed a Renewed Motion for Approval of Class Notice
12 Plan, which included: (1) an online banner campaign; (2) a social media campaign; (3) a print
13 campaign in six California newspapers; (4) a national press release in English and Spanish; (5) an
14 informational website; and (6) a 90-day opt-out period. ECF No. 157. On August 15, 2018, the
15 Court granted Plaintiff's renewed class notice plan. ECF No. 164 at 1. Notice was provided
16 pursuant to the Court's Order. ECF No. 246.

17 **D. Plaintiff Defended Against Summary Judgment and Decertification**
18 **Motions and Another Round of *Daubert* Challenges**

19 24. On September 20, 2018, Valero moved to decertify the class primarily on the grounds
20 that individualized issues predominated over common questions of fact and law. ECF No. 173.
21 Valero argued that because Plaintiff could not accurately identify the stations relevant to her liability
22 claims, trial would require individualized evidence as to each station's signage and pricing during
23 the relevant period, and that consideration of this individualized evidence would be unmanageable.
24 *Id.* at 15.

25 25. Valero and Plaintiff also cross-moved for summary judgment on certain of Plaintiff's
26 theories of liability and Valero's defenses, and each party made *Daubert* challenges to the other
27 side's experts. ECF Nos. 174, 175, 189, 193; *see also* ECF No. 170.

1 26. The Court heard argument on the motions for decertification and summary judgment
2 on October 25, 2018, and ordered further briefing on whether class certification would be
3 appropriate under Rule 23(b)(2) instead of Rule 23(b)(3). ECF No. 237. The Parties filed
4 supplemental briefs on November 9, 2018. ECF Nos. 243-244.

5 27. On December 4, 2018, the Court issued an Order decertifying the class, holding that
6 the class still satisfied the requirements of Rule 23(a) but no longer met the requirements of Rule
7 23(b)(3), including predominance and superiority. ECF No. 248. At the same time, the Court
8 partially granted each Parties' cross-motions for summary judgment. ECF No. 249. The Court
9 denied the Parties' cross-motions to exclude certain expert testimony. *Id.* at 2-6.

10 28. On December 17, 2018, Plaintiff sought permission to seek reconsideration of the
11 Court's decertification and summary judgment Orders, which the Court granted. ECF Nos. 250-251.
12 The Parties fully briefed Plaintiff's motion for reconsideration (ECF Nos. 254-255), which the Court
13 denied on February 6, 2019. ECF No. 257.

14 **E. Plaintiff Successfully Petitioned the Ninth Circuit to Review This**
15 **Court's Decertification Order**

16 29. On February 20, 2019, Plaintiff filed a Rule 23(f) petition in the Ninth Circuit seeking
17 interlocutory review of the Court's Order decertifying the Class. ECF No. 261. On March 4, 2019,
18 Valero filed an answer to Plaintiff's Rule 23(f) petition. ECF No. 279-2, ¶11. On June 26, 2019, the
19 Ninth Circuit granted Plaintiff's Rule 23(f) petition and later set a briefing schedule. ECF No. 269;
20 ECF No. 279-2, ¶12. On September 17, 2019, the Ninth Circuit vacated the briefing schedule on
21 Plaintiff's appeal to allow the Parties to engage in further settlement discussions. ECF No. 279-2,
22 ¶13.

23 **III. THE SETTLEMENT**

24 **A. The Parties' Arm's-Length Negotiations**

25 30. The Settlement is the product of intense and hard-fought negotiations, which were
26 conducted at arm's length between experienced counsel over the course of four years that included
27 three separate mediation attempts with an experienced mediator, Cathy Yanni of JAMS, who
28 ultimately made a "mediator's proposal" that the Parties accepted. Ms. Yanni is a full-time specialist

1 in Alternative Dispute Resolution. Since joining JAMS in 1998, she has settled thousands of cases.
2 Her practice includes mediation and Special Master work. Her substantive knowledge, her focused
3 attention to detail, and her persistent follow up are the keys to her high success. Ms. Yanni has also
4 been included on the “National Mediators” List, *Chambers USA* (2019), where she is acknowledged
5 for her “high-quality reputation.” Sources also praise her ability to “maintain good relations and
6 credibility with both sides.” *Chambers USA* (2020). See <https://www.jamsadr.com/yanni/>.

7 31. The Parties attempted to mediate a settlement in this Action at three significant stages
8 of the litigation. First on March 27, 2018, shortly after the Court certified the litigation class; then
9 on November 29, 2018, while Valero’s decertification motion was under submission; and then a
10 third time on October 29, 2019, after the Ninth Circuit granted Plaintiff’s Rule 23(f) petition.

11 32. The Parties exchanged detailed mediation submissions in advance of each mediation.
12 The Parties were not able to settle this case on any of their mediation attempts, but they made
13 substantial progress towards a resolution. During the two months that followed their final in-person
14 mediation attempt in October 2019, the Parties continued their settlement efforts through Ms. Yanni
15 as a neutral mediator.

16 33. In December 2019, Ms. Yanni issued, and the Parties accepted, a “mediator’s
17 proposal” to settle the Action for business practice changes specified in the Settlement Agreement
18 and \$1,650,000, inclusive of all fees and expenses. On January 2, 2020, Plaintiff informed the Court
19 that the Parties had reached an agreement-in-principle to settle the Action, subject to the preparation
20 and execution of a Settlement Agreement. The only agreements between the parties that exist are
21 contained in the Settlement Agreement.

22 **B. Preliminary Approval of the Settlement and Notice to Settlement**
23 **Class Members**

24 34. On September 30, 2020, after some unanticipated delays caused by the COVID-19
25 pandemic, Plaintiff filed an Unopposed Motion for Preliminary Approval of Class Action
26 Settlement, along with supporting declarations (“Preliminary Approval Motion”). ECF No. 279.
27 That motion asked the Court to preliminarily approve the Settlement, preliminarily certify the
28 Settlement Class, appoint Plaintiff as the Representative and her counsel as Class Counsel, and direct

1 notice to the Settlement Class. Plaintiff requested that the Court approve the proposed forms of
 2 notice, which among other things, described the terms of the Settlement, advised Settlement Class
 3 members of their rights in connection with the Settlement, informed Settlement Class members of
 4 the amount of attorneys' fees and expenses that Class Counsel would request, and explained the
 5 procedure to object to the Settlement or opt out of the Settlement Class.

6 35. The Court's Preliminary Approval Order was entered on November 5, 2020. ECF
 7 No. 284. Among other things, it appointed Epiq as the Settlement Administrator and directed Epiq
 8 to activate the Settlement Website and provide publication notice to the Settlement Class. *Id.*, ¶¶13-
 9 16. Pursuant to the Preliminary Approval Order, and under Class Counsel's supervision, Epiq
 10 activated the Settlement Website – www.gasolinesignagesettlement.com – on November 19, 2020,
 11 which provided Settlement Class members with information concerning the Settlement and their
 12 rights thereunder, and downloadable copies of the Notice, Publication Notice, Second Amended
 13 Complaint, Settlement Agreement, Preliminary Approval Motion, and Preliminary Approval Order.
 14 *See id.*, ¶14. Also pursuant to the Preliminary Approval Order, on November 22, 2020, Epiq
 15 launched the print publication notice campaign, and published the Publication Notice in the *Los*
 16 *Angeles Times*, *Orange County Register*, *Sacramento Bee*, *San Diego Union-Tribune*, *San Francisco*
 17 *Chronicle*, and *San Jose Mercury News/East Bay Times*. *See id.*, ¶8.

18 **IV. FACTORS IN SUPPORT OF THE SETTLEMENT**

19 **A. The Settlement Was Fairly, Honestly, and Aggressively Negotiated by** 20 **Counsel Who Endorse the Settlement**

21 36. The Settlement was reached only after arm's-length, adversarial, good-faith
 22 negotiations that included three separate in-person mediation attempts with an experienced mediator
 23 who ultimately made a "mediator's proposal" that the Parties accepted. For each mediation session,
 24 the Parties prepared comprehensive mediation statements and thoroughly presented arguments
 25 supporting their claims and defenses. Class Counsel are actively engaged in complex federal
 26 litigation, particularly the litigation of consumer class actions like this, and have a reputation for
 27 litigating such cases all the way to trial. Defense counsel are experienced lawyers from Hawxhurst
 28

1 Harris LLP, a formidable defense firm with a reputation for vigorous and successful defense of
2 complex consumer class actions.

3 37. The volume and substance of Class Counsel's knowledge of the merits and potential
4 weaknesses of Plaintiff's claims are adequate to support the Settlement. By the time they entered
5 into the Settlement, Plaintiff and Class Counsel had developed a comprehensive understanding of the
6 facts through extensive discovery and independent investigation, and a battle-tested assessment of
7 the strengths and weaknesses of the claims in the Action, refined through hard litigation of every
8 phase short of briefing Plaintiff's Rule 23(f) appeal and trial.

9 38. Indeed, before entering into the Settlement, Class Counsel thoroughly researched the
10 applicable law with respect to the claims asserted in the Action and the potential defenses thereto,
11 drafted three robust pleadings, and defended against two motions to dismiss. Class Counsel
12 extensively investigated the facts through comprehensive discovery, including five depositions of
13 Valero and its employees, and depositions of a Valero distributor and a Valero dealer. Class
14 Counsel also obtained, reviewed, and analyzed thousands of pages of documents from Valero and
15 third parties. This required Class Counsel to meet and confer with Valero and other third parties
16 many times. Class Counsel also successfully moved to compel Valero to produce additional
17 discovery, including millions of lines of station sales data for analysis by Plaintiff's damages expert.
18 Class Counsel retained and consulted with experts in the area of marketing and accounting/damages
19 and deposed two of Valero's expert witnesses. All of these efforts enabled Plaintiff and Class
20 Counsel to endorse the Settlement as fair, adequate, and reasonable.

21 39. It is also significant that, as of the date of this Declaration, no objections to the
22 Settlement have been submitted by a Settlement Class member. Should any objections be timely
23 filed between the date of this Declaration and the Final Approval Hearing, Class Counsel will
24 address them in a supplemental memorandum to be filed with the Court on or before March 4, 2021.

25 **B. The Settlement Eliminates the Risks and Any Potential Delay of**
26 **Obtaining Meaningful Relief for the Settlement Class**

27 40. This consumer class action turned out to be incredibly complex and contentious, and
28 Plaintiff and Class Counsel faced and overcame many hurdles. But the path to victory on the merits

1 remains challenging. To win, Plaintiff and Class Counsel would have to persuade the Ninth Circuit
2 to reverse this Court’s decertification of the litigation class, and then win at trial. Even if they won
3 at trial, it is likely that Plaintiff and Class Counsel would face a post-trial appeal. Absent the
4 Settlement, there was a real possibility that the Settlement Class would get nothing.

5 41. In deciding to enter into the Settlement, Plaintiff and Class Counsel considered,
6 among other things, the meaningful non-monetary relief for the Settlement Class members and the
7 risks of continued litigation. Plaintiff’s task at the Ninth Circuit is a difficult one. While Plaintiff
8 believes her appeal has merit, there is a risk that the Ninth Circuit would defer to this Court’s
9 discretion on the Rule 23 analysis. And while Class Counsel believe that all of the claims asserted
10 against Defendant have merit, as discussed above, there are high risks as to whether Plaintiff would
11 ultimately prevail on the merits. At trial, there is a risk that the jury could be persuaded by Valero’s
12 arguments that a reasonable consumer would not view their debit card as cash, or that Valero should
13 not be held responsible for individual station’s decisions on how to display and process debit card
14 payments. Even if Plaintiff were successful, moreover, the class would have received the exact same
15 non-monetary relief the Settlement provides, and a claim to a *de minimis* amount of damages (*i.e.*, 4
16 cents per gallon) that would likely be difficult to calculate and uneconomical to distribute.
17 Moreover, that process could take years.

18 42. In light of such risks, both Plaintiff and Class Counsel believe the Settlement to be in
19 the best interests of the Settlement Class.

20 **C. The Settlement Consideration in the Context of Damages**

21 43. This Court held that the difference between a branded station’s advertised “cash”
22 price and “credit” price was a reasonable measure of damages. *Bautista v. Valero Mktg. & Supply*
23 *Co.*, 322 F.R.D. 509, 518 (N.D. Cal. 2017). The price differential between the advertised “cash” and
24 “credit” prices at Valero-branded stations is often only 4-cents per gallon. *See Bautista v. Valero*
25 *Mktg. & Supply Co.*, No. 15-cv-05557-RS, 2016 WL 3924117, at *4 (N.D. Cal. July 21, 2016). This
26 means the amount of individual damages suffered by each Settlement Class member is *de minimis*
27 and would be uneconomical to distribute.

1 44. In Class Counsel’s view, the Settlement is an exceptional result because it eliminates
2 the high risk that the Settlement Class members would receive nothing and provides the Settlement
3 Class with immediate and meaningful non-monetary relief going forward that directly resolves the
4 challenged conduct in this Action while giving up very little in *de minimis* individual damages.
5 Notably, Settlement Class members have the right to exclude themselves from the Settlement Class
6 and pursue any claim for individual damages they may have, subject to any defenses by Valero. If
7 litigation continued, Plaintiff faced a high risk without a correlating increase in reward to make that
8 risk worth taking. The process of winning an appeal before the Ninth Circuit and prevailing at trial
9 would not guarantee a larger recovery for the Settlement Class. It would only guarantee further
10 delay in any recovery and the continued risk of no recovery. For these reasons, the Settlement is a
11 meaningful achievement for the Settlement Class.

12 45. Based on their experience in consumer class action litigation and in this case, and
13 after weighing the substantial benefits of the Settlement against the numerous obstacles to recovery
14 after continued litigation, Class Counsel determined that the Settlement is fair, reasonable, and in the
15 best interest of the Settlement Class.

16 **V. CLASS COUNSEL’S REQUEST FOR AN AWARD OF ATTORNEYS’**
17 **FEES AND EXPENSES IS REASONABLE AND SHOULD BE APPROVED**

18 46. Class Counsel spent 10,452.93 hours of attorney and paraprofessional time
19 prosecuting this Action on the Settlement Class’ behalf. *See* accompanying Declaration of Stuart A.
20 Davidson Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for
21 Award of Attorneys’ Fees and Expenses (“Robbins Geller Decl.”), ¶4 & Ex. A; Declaration of
22 Rafael Bernardino, Jr., Filed on Behalf of Hobson, Bernardino & Davis, LLP, in Support of
23 Application for Award of Attorneys’ Fees and Expenses (“Hobson Bernardino Decl.”), ¶4 & Ex. A.
24 The resulting lodestar is \$7,479,412.20. Class Counsel also incurred \$584,645.08 in expenses
25 litigating this Action. Class Counsel respectfully request that the Court award \$1,650,000 in
26 attorneys’ fees and expenses, inclusive, which represents a 0.142 (*negative*) multiplier on Class
27 Counsels’ lodestar of \$7,479,412.20.
28

1 47. Class Counsel have prosecuted the Action on a wholly contingent basis and believe
2 such a fee is reasonable and appropriate in light of the efficiency with which they litigated this
3 matter, the resources Class Counsel expended in prosecuting the case, and the inherent risk of
4 nonpayment from representing the Settlement Class on a contingent-fee basis. Class Counsel further
5 request a service award of \$2,000 to Plaintiff. The legal authorities supporting the requested fees
6 and expenses are set forth in the accompanying memorandum of law.

7 **A. Time, Labor, and Fee Percentage Requested**

8 48. Class Counsel have devoted a significant amount of time and resources into
9 researching, investigating, and prosecuting this Action. Class Counsel have substantial experience
10 representing consumers in class actions, including in this District. The identification and
11 background of Class Counsel are attached as Exhibit G to the Robbins Geller Declaration and
12 Exhibit E to the Hobson Bernardino Declaration.

13 49. Class Counsel’s representation of the Settlement Class required considerable efforts,
14 as detailed above. *See* §§II, IV.A. As noted, Class Counsel vigorously represented the Settlement
15 Class’s interests through multiple Rule 12(b)(6) motions, extensive discovery, class certification,
16 summary judgment, class decertification, an appeal to the Ninth Circuit, and settlement negotiations.

17 50. Class Counsel zealously prosecuted this case on a contingency basis. As a result,
18 despite working on this matter for over four years before Settlement, Class Counsel have not
19 received any payment for their services in prosecuting the Action, nor have they been paid their
20 litigation expenses reasonably incurred.

21 51. When Class Counsel undertook to represent Plaintiff and the Settlement Class, it was
22 with the expectation that they would have to devote a significant amount of time and effort in their
23 prosecution of the case, and advance large sums on investigation, research, consultants, and
24 mediation. It was also with the knowledge that Class Counsel would spend many hours of hard
25 work against capable defense lawyers with no assurance of ever obtaining any compensation for
26 their efforts. In undertaking this responsibility, Class Counsel made sure that sufficient attorney
27 resources were dedicated to advancing Plaintiff’s claims, and that sufficient funds were available to
28

1 advance the expenses required to zealously pursue such complex litigation. Class Counsel assumed
2 a substantial risk that this case would yield no recovery and leave them uncompensated.

3 52. The fee request is a small fraction of Class Counsel’s lodestar and is requested after
4 discussion with and approval by Plaintiff. *See* Declaration of Faith Bautista (“Bautista Decl.”), ¶5.
5 The fee request is similar to other requests approved by courts in this District, as set forth in Class
6 Counsel’s accompanying memorandum of law. *See* Memorandum of Law in Support of Plaintiff’s
7 Motion for Final Approval of Class Action Settlement and Class Counsel’s Request for a Fee and
8 Expense Award and Plaintiff Service Award.

9 53. The hourly rates for attorneys and professional support staff included in these
10 schedules are consistent with the regular current rates Robbins Geller and Hobson, Bernardino &
11 Davis, LLP (“Hobson Bernardino”) have submitted and have had approved in this District and by
12 other courts. *See* Robbins Geller Decl. and Hobson Bernardino Decl., filed herewith.

13 54. In light of the uncertain nature and extent of the Action, the complexity of the factual
14 and legal issues presented, and the substantial risks Class Counsel overcame, Class Counsel
15 respectfully submit that their request for attorneys’ fees and expenses at a small fraction of lodestar
16 warrants the Court’s approval.

17 **B. The Risk, Magnitude, and Complexity of the Litigation**

18 55. As detailed above, the Action asserts violations of the CLRA, FAL, and UCL and
19 involves challenging issues of law and fact that presented considerable risks. Indeed, the Parties saw
20 their fortunes change repeatedly over the course of this four-year-old case.

21 56. Defendants’ multiple motions to dismiss were complex and raised challenging
22 arguments requiring experience and considerable effort to prepare a thorough opposition. Document
23 discovery involved the review and analysis of thousands of pages of documents and numerous meet
24 and confer conferences with counsel for Valero and third parties, who sought to constrain the scope
25 of discovery sought by Plaintiff. Indeed, Plaintiff was forced to move to compel to obtain discovery
26 from Valero. The seven fact and two expert witness depositions Class Counsel took required
27 extensive preparation and consultation with Plaintiff’s experts.

1 57. Plaintiff's motion for class certification required nuanced research and analysis and
2 attached substantial supporting documentary evidence. It also required the retention of two
3 experienced experts who submitted reports and rebuttal reports on issues of consumer deception and
4 damages. Plaintiff's comprehensive responses to Defendant's motions for decertification and for
5 summary judgment, and the preparation of Plaintiff's cross motion for summary judgment, were
6 similarly complex and challenging. Plaintiff also successfully briefed a Rule 23(f) petition to the
7 Ninth Circuit that presented complex issues. And the negotiation of the Settlement that occurred
8 over the course of three mediation attempts and follow-up negotiations was equally complex and
9 challenging.

10 58. As a result of these challenges, when Class Counsel undertook this representation,
11 there was no assurance that the Action would survive a motion to dismiss or achieve class
12 certification. Therefore, there was no assurance that Class Counsel would recover any payment for
13 their services. In addition, the time spent by Class Counsel on this case was at the expense of the
14 time that they could have devoted to other matters. Moreover, if the case had not settled, Class
15 Counsel were fully prepared to litigate this case through appeal and trial.

16 **C. Quality of the Representation**

17 59. Class Counsel are among the most experienced and skilled class and complex
18 litigation practitioners in the country, as illustrated by their firm biographies attached to their
19 respective declarations. Robbins Geller Decl., Ex. G; Hobson Bernardino Decl., Ex. E. The
20 recovery obtained for the Settlement Class is the direct result of the significant efforts of highly
21 skilled attorneys with substantial experience in prosecuting complex consumer class actions.

22 60. The quality of opposing counsel is also important in evaluating the quality of Class
23 Counsel's work. Defendants were represented by experienced lawyers from a well-respected
24 defense firm, Hawxhurst Harris LLP. Defense counsel has a reputation for vigorous advocacy in
25 defending complex consumer cases such as this one. Law360 identified Hawxhurst Harris as one of
26 ten litigation boutiques in the United States that give "Big Law" a run for its money. *See*
27 <http://www.hawxhurstllp.com/class-action-defense/>. The ability of Class Counsel to obtain a
28

1 favorable settlement for the Settlement Class in the face of such opposition further supports the
2 quality of Class Counsel's representation.

3 **VI. THE REQUESTED EXPENSES ARE APPROPRIATE**

4 61. Class Counsel incurred litigation expenses in the amount of \$585,265.04 in
5 connection with the prosecution of the Action. These expenses are reflected in the books and
6 records maintained by Robbins Geller and Hobson Bernardino. The expenses and charges are
7 summarized by category in Exhibit B to the respective Robbins Geller and Hobson Bernardino
8 Declarations submitted herewith.

9 62. Class Counsel submit that these expenses are reasonable and were necessary for the
10 successful prosecution of the Action. Class Counsel's expenses reflect routine and typical
11 expenditures incurred in the course of litigation, such as the costs of investigation, legal research,
12 document duplication, consultant fees, mediation fees, and expedited mail delivery. Class Counsel
13 were aware that they might not recover any of these expenses unless and until the Action was
14 successfully resolved. Accordingly, Class Counsel took steps to minimize expenses whenever
15 practicable without jeopardizing the vigorous and efficient prosecution of Plaintiff's claims.

16 **VII. AN AWARD TO PLAINTIFF IS FAIR AND REASONABLE**

17 63. Class Counsel also respectfully request that the Court grant Plaintiff a service award
18 of \$2,000 for her time and effort in representing the Settlement Class. As detailed in the
19 accompanying memorandum of law, and as more fully described in the Bautista Declaration,
20 Plaintiff has been fully committed to pursuing the claims detailed in the Second Amended Complaint
21 on behalf of the Settlement Class. *See* Bautista Decl., ¶¶2-5. The efforts expended by Plaintiff
22 during the course of this Action, devoted to her representation of the Settlement Class, are precisely
23 the types of activities courts have found support a service award, and the \$2,000 award sought here
24 is well below the amount that has been found presumptively reasonable in this District.

25 **VIII. CONCLUSION**

26 64. Given the significant and valuable non-monetary recovery for the Settlement Class
27 and the uncertainty as to whether Plaintiff would have ultimately prevailed, Class Counsel
28 respectfully submit that the Settlement should be approved as fair, reasonable, and adequate. In

1 addition, in light of the significant attorney effort required to litigate this Action and achieve the
2 Settlement, and the \$584,645.08 in expenses incurred, Class Counsel respectfully submit that the
3 Court should award \$1,650,000 in attorneys' fees and expenses, inclusive, which amounts to a 0.142
4 (*negative*) multiplier on Class Counsel's lodestar, plus a service award of \$2,000 to Plaintiff in
5 connection with her representation of the Settlement Class.

6 I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th
7 day of February, 2021, at Boca Raton, Florida.

8 */s/Stuart A. Davidson*
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10 STUART A. DAVIDSON
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on February 4, 2021, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

/s/ Stuart A. Davidson

STUART A. DAVIDSON (*pro hac vice*)

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Manual Notice List

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- (No manual recipients)