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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FAITH BAUTISTA, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. VALERO MARKETING AND SUPPLY COMPANY, Defendant.	Case No. 3:15-cv-05557-RS CLASS ACTION NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CLASS COUNSEL'S REQUEST FOR A FEE AND EXPENSE AWARD AND PLAINTIFF SERVICE AWARD; MEMORANDUM OF LAW IN SUPPORT THEREOF Date: March 11, 2021 Time: 1:30 p.m. Courtroom: 3 – 17th Floor Judge: Hon. Richard Seeborg

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT on March 11, 2021, at 1:30 p.m., or on a date selected by the Court, Plaintiff Faith Bautista ("Plaintiff") will and hereby does respectfully move the Court, in the courtroom of the Honorable Richard Seeborg, Courtroom 3, 17th Floor of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California 94102, for an Order granting final approval of the Settlement and awarding fees and expenses to Class Counsel and a service award to Plaintiff.

This motion is based on the notice of motion and motion for Final Approval of Class Action Settlement and Class Counsel's Request for a Fee and Expense Award and Plaintiff Service Award, the following memorandum of points and authorities in support, the accompanying declarations and exhibits, the arguments of counsel, and any other matters in the record or that properly come before the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff[1] has achieved a Settlement of this consumer class action which squarely addresses the challenged conduct and satisfies each of the Rule 23(e)(2) factors, as well as the factors considered by the Ninth Circuit in deciding whether a class settlement is fair, reasonable, and adequate. The Settlement is particularly beneficial to the Settlement Class in light of the many risks Plaintiff faced, including that: (i) the Ninth Circuit could rule against Plaintiff on her Rule 23(f) appeal of this Court's decertification of the litigation class; and (ii) protracted and expensive continued litigation, including trial and likely appeals, could ultimately lead to no change at all in Defendant Valero Marketing and Supply Company's ("Valero") challenged conduct.

The Settlement was negotiated at arm's length by counsel with extensive experience in complex consumer class actions. Before agreeing to the Settlement, Class Counsel had a thorough

[1] All capitalized terms that are not otherwise defined herein have the same meanings ascribed to them in the Class Action Settlement Agreement and Release, dated as of September 30, 2020 ("Settlement Agreement"). ECF No. 279-1. Citations are omitted and emphasis is added throughout unless otherwise noted.

understanding of the merits of Plaintiff's claims, the strengths and weaknesses of the evidence and legal arguments, and the likelihood of ultimate success. Indeed, the Settlement is the result of hard-fought litigation among sophisticated parties and experienced counsel in which virtually every issue was contested. Before agreeing to the Settlement, Class Counsel successfully defended against multiple motions to dismiss; engaged in comprehensive and contentious discovery that included a motion to compel, the production, review, and analysis of thousands of pages of documents and the taking of nine depositions; defended against multiple *Daubert* expert challenges; successfully moved for class certification; defended against Valero's summary judgment and decertification motions while moving for cross summary-judgment; successfully petitioned the Ninth Circuit Court of Appeals to review this Court's class decertification; and made detailed submissions in connection with three separate, in-person mediations with an experienced mediator, Cathy Yanni of JAMS.

On November 5, 2020, the Court granted preliminary approval of the Settlement, preliminarily certified the Settlement Class, and authorized notice to the Settlement Class ("Preliminary Approval Order"), finding that the Settlement was fair, reasonable, and adequate, subject to further consideration at the Final Approval Hearing. ECF No. 284, ¶6. In accordance with the Preliminary Approval Order, Class Counsel ensured that the Class Notice and Publication Notice ("Notice") were disseminated to the Settlement Class as provided in the Preliminary Approval Order. *See* Declaration of Cameron R. Azari, Esq., on Implementation of Settlement Notice Plan ("Azari Decl."), submitted herewith. The Settlement Administrator, Epiq Class Action & Claims Solutions, Inc. ("Epiq"), commenced dissemination of the Notice on November 20, 2020 by (i) posting the Class Notice on the Settlement website along with comprehensive information about the Settlement; (ii) publishing the Publication Notice in the *Sacramento Bee*, *San Jose Mercury News/East Bay Times*, *Los Angeles Times*, *Orange County Register*, *San Diego Union-Tribune*, and the *San Francisco Chronicle*; (iii) posting Internet Banner Notices with links to the Settlement website on online networks and social media platforms, including *Facebook*, *Twitter*, and *Instagram*; and (iv) publishing the Publication Notice in a

nationwide Informational Release. *Id.*, ¶¶8-15. To date, not a single objection to the proposed Settlement has been made, and no requests for exclusion have been received. *Id.*, ¶18.

For all the reasons set forth herein and in the accompanying declarations, Class Counsel respectfully submit that the Settlement is fair, adequate, and reasonable under the applicable legal standards and should be finally approved by the Court.

Likewise, based on the time and lodestar committed to this litigation as well as the exceptional result achieved and significant risks faced by Class Counsel, the fee and expense request of $1,650,000, inclusive, is reasonable and should be granted. Indeed, Class Counsel litigated this case for over four years, entirely on a contingent-fee basis, with no payment to date whatsoever. Notably, the requested fee and expense award would result in a significant ***negative*** multiplier and therefore is certainly reasonable.

II. FACTUAL AND PROCEDURAL BACKGROUND

The 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 ("Davidson Declaration" or "Davidson Decl.") filed simultaneously herewith, and adopted by reference herein, fully describes the factual background and procedural history of the Action, the extensive efforts undertaken by Plaintiff and Class Counsel during the course of the Action, the risks of continued litigation, and the negotiations leading to the Settlement. *See* Davidson Decl., ¶¶11-33, 36-42.

In short, Plaintiff filed a detailed second amended complaint ("Complaint") and opposed two attempts by Valero to dismiss the Action pursuant to Rule 12. *See id.*, ¶¶13-17. Discovery was extensive and contentious, involving a motion to compel, the production and review of thousands of documents, and the taking of nine depositions. *Id.*, ¶¶18-19. Following that discovery, Plaintiff filed a detailed class certification motion, attaching substantial documentary evidence in support, which the Court granted over Valero's opposition on October 4, 2017. *Id.*, ¶¶21-23. In connection with class certification, Plaintiff defended against Valero's motion to strike her experts' testimony. *Id.*, ¶21. Plaintiff then defended against Valero's motions to decertify the litigation class and for summary judgment, while also offensively moving for summary judgment

on certain of Valero's affirmative defenses. *Id*., ¶¶24-28. After this Court granted Valero's motion to decertify, Plaintiff successfully petitioned the Ninth Circuit for review under Fed. R. Civ. P. 23(f), and was preparing to brief her appeal when the Parties entered into the Settlement. *Id*., ¶29. At no point did Valero concede the merits of Plaintiff's allegations.

The Settlement is the product of extensive, arm's-length negotiations under the guidance of Cathy Yanni, a neutral, third-party mediator with JAMS. *Id*., ¶¶30-33, 36-39. The Parties attended three separate in-person mediation sessions that included detailed submissions regarding the strengths and weaknesses of the Action, the evidence, and the Parties' respective claims and defenses. *Id*., ¶¶32, 36. The Parties were unable to reach a compromise at these mediation sessions. *Id*., ¶31. Settlement was subsequently reached only after Ms. Yanni issued a "mediator's proposal," which the Parties accepted. *Id*., ¶¶33, 36.

Plaintiff's and Class Counsel's diligent prosecution of the Action has directly resulted in immediate and meaningful non-monetary relief to the Settlement Class. Valero will take steps to affirmatively address the central complaint in this Action, *i.e.*, Valero agrees to: (1) no longer approve the use of signage in California that advertises "cash" and "credit," but omits debit prices; (2) amend its "Wholesale Branding Manual" to include a statement that any station advertising discounted pricing must indicate how debit cards will be charged; (3) provide fuel pump decals and signage that prominently display debit card pricing to any Valero-branded stations in California that notify Valero that they advertise discounted pricing for cash; and (4) promptly notify and demand compliance from any Valero-branded stations in California it discovers are violating these terms. Settlement Agreement, ¶4.2. These changes will come at significant costs of time and money to Valero. *See* Declaration of Charles Pettibon, ECF No. 279-4, ¶¶7-10.

III. PLAINTIFF HAS PROVIDED SUFFICIENT NOTICE TO THE SETTLEMENT CLASS IN COMPLIANCE WITH RULE 23 AND DUE PROCESS

Under Rule 23(e)(1), a district court approving a class action settlement "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(c)(2)(B) also provides that notice of a class settlement must be "the best notice that is practicable under the circumstances, including individual notice to all members who

can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (class notice designed to fulfill due process requirements). Notice "'must 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.'" *Tennille v. W. Union Co.*, 785 F.3d 422, 436 (10th Cir. 2015).

Valero does not maintain contact information for each Settlement Class member. Accordingly, the Settlement Notice Plan targeted Settlement Class members through a combination of online banner ads, social media ads, press releases, and print media channels designed to reach a minimum of 70% of the Settlement Class an average of three times each. Azari Decl., ¶¶6-15; *see also* Declaration of Cameron Azari, Esq., on Proposed Settlement Notice Plan, ECF No. 279-6, ¶7. The plan included a nationwide supplemental digital campaign and national press release targeting Settlement Class members who have migrated from California or who were temporarily in California at the time of their transaction, which further enhanced the reach and frequency of the Settlement Notice Plan. *Id.*

As explained in Plaintiff's memorandum of law in support of preliminary approval (ECF No. 279, at §VI), the Settlement Notice satisfied the applicable standards and amply informed Settlement Class members of all relevant information regarding the Settlement, Class Counsels' fee and expense request, and Settlement Class members' rights to object or opt out. Moreover, the Settlement Notice Plan is substantially the same plan that the Court approved in connection with notifying the formerly certified litigation class of the pendency of the class action. ECF No. 164. For these reasons, the Court's Preliminary Approval Order found that the form and content of the Notice, as well as the methods for notifying the Settlement Class, "satisfy the requirements of due process and Fed. R. Civ. P. 23, and will provide the best notice practicable under the circumstances." Preliminary Approval Order, ¶14.

IV. THE SETTLEMENT MERITS FINAL APPROVAL

It is well established within this Circuit that the settlement of a complex proposed class action, such as this, is both favored and encouraged. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019) (*en banc*) (recognized the "'strong judicial policy that favors

settlements, particularly where complex class action litigation is concerned'"). Because of this, when exercising their sound discretion to approve a settlement, courts are mindful "'not to decide the merits of the case or resolve unsettled legal questions.'" *Shaw v. Interthinx, Inc.*, No. 13-CV-01229-REB-NYW, 2015 WL 1867861, at *2 (D. Colo. Apr. 22, 2015); *see Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) ("Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute.").

To finally approve a class action settlement as fair, reasonable, and adequate, Rule 23(e)(2) requires the Court to consider "whether: (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2).

These factors largely encompass those identified by the Ninth Circuit for evaluating a class settlement. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (quoting *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). The *Churchill* factors are: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement. *Id.* These Ninth Circuit factors are often reviewed alongside those identified by Rule 23. *See, e.g., Walters v. Target Corp.*, No. 3:16-cv-1678-L-MDD, 2020 WL 6277436, at *5 (S.D. Cal. Oct. 26, 2020).

A. Class Counsel and Plaintiff Have Adequately Represented the Settlement Class

The Rule 23(e)(2)(A) factor examines whether the class representative and Class Counsel adequately represented the Settlement Class. This factor overlaps with the fifth *Churchill* factor which looks at the extent of discovery completed and the stage of proceedings.

Class Counsel and Plaintiff have adequately represented the Settlement Class throughout the almost five years in which they have fiercely litigated this case all the way up through summary judgment before the litigation class was decertified, and then Class Counsel successfully petitioned the Ninth Circuit for Rule 23(f) review. Throughout that process, which required the preparation of numerous complex legal briefs, Class Counsel conducted extensive discovery of Valero and third parties that included the review and analysis of thousands of pages of documents and the taking of nine depositions. Before entering into the Settlement, Class Counsel engaged in three separate mediation attempts, which required additional complex submissions. *See* November 5, 2020 Transcript of Zoom Video Conference Proceedings at 5 (the Court: "the long and short of it is I think there was a great deal of good attorney effort in this case").

Class Counsel's support of the Settlement can be considered and also favors approval. *In re Bluetooth*, 654 F.3d at 946. Here, Class Counsel have extensive experience litigating consumer class actions, and it is their considered judgment that the Settlement represents a very good result for the Settlement Class given that it achieves the primary goal of the litigation. Davidson Decl., ¶¶44-45. "Given Class Counsel's extensive experience in this field, and their assertion that the settlement is fair, adequate, and reasonable, this factor supports final approval of the Settlement Agreement." *Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D. 673, 685 (N.D. Cal. 2016).

B. The Settlement Was Negotiated at Arm's Length

The Settlement was extensively negotiated between the Parties and carefully guided by Ms. Yanni as a neutral mediator. On March 27, 2018, shortly after the Court certified the litigation class, counsel and authorized representatives for both Parties participated in the first face-to-face mediation which took place in San Francisco. Davidson Decl., ¶31. Before the mediation, the Parties provided Ms. Yanni with comprehensive settlement statements and supporting exhibits

identifying key evidence. *Id*., ¶32. The Parties attended a second face-to-face mediation with Ms. Yanni on November 29, 2018, while Valero's decertification motion was under submission, and a third face-to-face mediation on October 29, 2019, after the Ninth Circuit granted Plaintiff's Rule 23(f) petition. *Id*., ¶31. The Parties reached an agreement in principle to settle the litigation only after Ms. Yanni issued a mediator's proposal. *Id*., ¶33. Ms. Yanni attests that she never witnessed or sensed any collusiveness between the Parties (because there was none). *See* Declaration of Cathy Yanni, ECF No. 279-5, ¶14.

Courts have recognized that "[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." *Satchell v. Fed. Express Corp.*, No. C03-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007); *see also Harris v. Vector Mktg. Corp*., No. C-08-5198 EMC, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011). Here, Ms. Yanni played a very active – indeed, critical – role in bringing about the Settlement.

The agreement in principle was followed by extensive negotiations between the Parties regarding the detailed terms of the Settlement, including the scope of the releases and the form and content of the notice to be disseminated. Davidson Decl., ¶34. These facts establish that the Settlement is the result of hard-fought, arm's-length negotiations and "not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Officers for Justice*, 688 F.2d at 625; *see also* November 5, 2020 Transcript of Zoom Video Conference Proceedings at 4 (the Court noting that this case was "intensely litigated" prior to settlement). Accordingly, this factor strongly favors final approval of the Settlement.

C. The Relief Is Adequate Considering the Costs, Risks and Delay of Trial and Appeal

Rule 23(e)(2)(C)(i) examines the sufficiency of the relief in light of the costs, risks, and delay of trial and appeal. It largely overlaps with *Churchill* factors one (strength of Plaintiff's case), two (risk, expense, complexity, and likely duration of litigation), three (the risk of maintaining class action status), and four (amount offered in settlement).

1. The Injunctive Relief Is Meaningful

The relief here is meaningful. The Settlement requires Valero to modify its approved signage and fuel pump decals to directly address the challenged conduct, *i.e.*, notifying consumers when debit card purchases of gasoline will be charged like credit cards rather than cash. Under the Settlement, the signage at Valero-branded stations in California must prominently disclose how debit cards will be charged. This is precisely the issue raised in all the pleadings and the operative Second Amended Complaint, and the primary form of relief sought. *See* Hr'g Tr. at 4:14-18, Preliminary Approval Zoom Video Conference Proceedings (Nov. 5, 2020) (the Court: "I do think in this case it is relief that is congruent with what was requested in the case, what the case was all about, and I think that the . . . proposed relief is meaningful and provides some real recovery for the class . . . .") (attached hereto as Exhibit 1).

2. Serious Legal and Factual Questions Placed the Litigation's Outcome in Doubt

If litigation continued, Plaintiff would be faced with significant risk of obtaining no relief for the proposed class. Although Plaintiff successfully sought appellate review of the Court's decertification Order, permission to pursue an appeal does not suggest success on the merits. *See* November 5, 2020 Transcript of Zoom Video Conference Proceedings at 14 (the Court noting that the parties never learned what the Ninth Circuit's thoughts on decertification would have been). And even if Plaintiff were to win on appeal, she would still need to prove liability and damages at trial.

3. The Delay in Further Litigation

While this Action has been pending for over five years, absent the Settlement, there would likely be several more years of further litigation and the uncertainty that goes along with that. The Parties and the Court would expend significant time, resources, and costs to complete Plaintiff's appeal and trial. Moreover, assuming Plaintiff was successful at the Ninth Circuit and at trial, the inevitable appeals would surely follow, further delaying any relief to the Settlement Class and creating further uncertainty. There is real value in an immediate resolution in the face of such delays and uncertainty.

D. The Requested Attorneys' Fees

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(iii). As discussed below (§V), Class Counsel seek an award of attorneys' fees and expenses of $1,650,000, inclusive. This represents a substantial ***negative*** multiplier on Class Counsel's lodestar. The Settlement Agreement provides that any attorneys' fee and expense award shall be paid to Class Counsel within 30 calendar days from the expiration of time to appeal the Court's Order approving the Settlement or, if an appeal is taken, within 30 calendar days of the final resolution of such appeal. Settlement Agreement, ¶4.8.

E. The Parties Have No Other Agreement

Rule 23(e)(2)(C)(iv) requires consideration of any agreement required to be disclosed under Rule 23(e)(3). The Parties have entered into no other agreement. Davidson Decl., ¶33.

F. The Proposal Treats Settlement Class Members Equitably

Because the Settlement provides for injunctive relief – namely, a change in Valero's approved signage and other related relief – it necessarily treats all Settlement Class members equitably.

G. The Settlement Satisfies the Remaining *Churchill* Factors

1. The Experience and Views of Counsel

Experienced counsel, negotiating at arm's length, have weighed the factors discussed above and endorse the Settlement. Davidson Decl., ¶46. As the Ninth Circuit has observed, "[t]his circuit has long deferred to the private consensual decision of the parties" and their counsel in settling an action. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). The views of the attorneys actively conducting the litigation and who are most closely acquainted with the facts of the underlying litigation, are entitled to "'[g]reat weight.'" *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *see also Destefano v. Zynga, Inc.*, No. 12-cv-04007-JSC, 2016 WL 537946, at *13 (N.D. Cal. Feb. 11, 2016) ("'A district court is entitled to give consideration to the opinion of competent counsel that the settlement is fair, reasonable, and adequate.'").

Class Counsel are experienced and able lawyers in this area of practice and firmly believe that the Settlement is fair, adequate, and reasonable, and particularly so in view of the risks, burdens, and expense of continued litigation. Davidson Decl., ¶¶45-46.

2. Reaction of the Settlement Class to Date

"In evaluating the fairness, adequacy, and reasonableness of settlement, courts also consider the reaction of the class to the settlement." *In re Amgen Inc. Sec. Litig.*, No. CV 7-2536 PSG-PLAx, 2016 WL 10571773, at *4 (C.D. Cal. Oct. 25, 2016). Pursuant to this Court's Preliminary Approval Order, the Court-approved Notices were disseminated through internet banner ads and social media and published in a nationwide press release and the *Sacramento Bee*, *San Jose Mercury News/East Bay Times*, *Los Angeles Times*, *Orange County Register*, *San Diego Union-Tribune*, and the *San Francisco Chronicle*; publishing the Publication Notice in a nationwide Informational Release. Azari Decl., ¶¶8-13. And the Settlement Agreement, Notice, and Preliminary Approval Order were posted to a publicly-available website dedicated to the Action (www.gasolinesignagesettlement.com), which became operational on November 19, 2020, *see id*., ¶14.

The Notice advised the public, including the Settlement Class, of the terms of the Settlement and Class Counsel's anticipated request for an award of attorneys' fees and expenses, as well as the procedure and deadline for filing objections and opting out of the Settlement Class. *See generally* ECF No. 284-1. The Notice also provided Settlement Class members with information on where they could obtain additional information and get answers to their questions. *Id.*

The Parties also provided CAFA Notice of the Settlement, ECF No. 280, and to date, no government agency has sought to intervene or comment on the Settlement.

While the objection/exclusion deadline – February 18, 2021 – has not yet passed, to date, no objections and no exclusion requests have been received. *See* Azari Decl., ¶18. "[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998); *see also Retta v. Millennium Prods., Inc.*, No. CV15-1801

PSG AJWx, 2017 WL 5479637, at *6 (C.D. Cal. Aug. 22, 2017) ("'It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members.'" (quoting *Nat'l Rural Telecomms.*, 221 F.R.D. at 528-29)). Of course, "[t]he fact that some class members object to the Settlement does not by itself prevent the court from approving the agreement." *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001). The reaction to the Settlement further confirms the reasonableness of the Settlement.[2]

Each of the above factors fully supports a finding that the Settlement is fair, reasonable, and adequate, and therefore deserves the Court's approval.

V. CLASS COUNSEL'S FEE AND EXPENSE REQUEST IS REASONABLE

Class Counsel respectfully request an award of attorneys' fees and expenses of $1,650,000, inclusive. The guiding principle in this Circuit is that a fee award be "'reasonable under the circumstances.'" *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994) ("*WPPSS*") (emphasis omitted). The requested fee here is reasonable under the lodestar analysis and satisfies the relevant Ninth Circuit factors.

A. Plaintiff Is Entitled to Fees Under Governing California Law

"The 'lodestar method' is appropriate in class actions brought under fee-shifting statutes (such as federal civil rights, securities, antitrust, copyright, and patent acts), where the relief sought – and obtained – is often primarily injunctive in nature and thus not easily monetized, but where the legislature has authorized the award of fees to ensure compensation for counsel undertaking socially beneficial litigation." *In re Bluetooth*, 654 F.3d at 941. "California substantive law determines the availability and amount of attorney's fees in this diversity case." *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815, 829 (9th Cir. 2009). Here, Class Counsel's fee request is justified by the fee-shifting provisions of California's CLRA, Cal. Civ. Code §1780(e), and Private Attorney General Statute, Cal. Code Civ. Proc. §1021.5, which "are designed to incentivize

[2] In accordance with the Preliminary Approval Order, should any objections be received prior to the February 18, 2021 deadline, Plaintiff will address them in her reply brief, which will be filed on or before March 4, 2021.

counsel to pursue consumer interests through publicly beneficial litigation." *Milano v. Interstate Battery Sys. of Am., Inc.*, No. 10-CV-2125-CW, 2012 U.S. Dist. LEXIS 93192, at *2 (N.D. Cal. July 5, 2012).

The CLRA provides that the "court ***shall*** award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section." Cal. Civ. Code §1780(e). "The legislative policy to allow prevailing plaintiffs reasonable attorney's fees is clear. Section 1780 provides remedies for consumers who have been victims of unfair or deceptive business practices. The provision for recovery of attorney's fees allows consumers to pursue remedies in cases . . . where the compensatory damages are relatively modest." *Hayward v. Ventura Volvo*, 108 Cal. App. 4th 509, 512 (2003). This provision 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 of Cal.*, 21 Cal. 4th 1066, 1086 (1999), and must "be liberally construed and applied to promote [the statute's] underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." *Id.*; *see* Cal. Civ. Code §1760; *accord Hayward*, 108 Cal. App. 4th at 512-13 ("section 1760 expressly directs [courts] to liberally construe section 1780 to protect consumers"). A fee award to a prevailing plaintiff in a CLRA action is thus mandatory, even when resolved before trial. *Kim v. Euromotors West/The Auto Gallery*, 149 Cal. App. 4th 170, 178-79, 181 (2007).

California Code of Civil Procedure "section 1021.5 authorizes an award of attorney fees to a 'private attorney general,' that is, a party who secures a significant benefit for many people by enforcing an important right affecting the public interest." *Serrano v. Stefan Merli Plastering Co.*, 52 Cal. 4th 1018, 1020 (2011). Consistent with the policies underlying the statute, the entitlement belongs to both the litigant and her counsel. *Lindelli v. Town of San Anselmo*, 139 Cal. App. 4th 1499, 1509 (2006); *see also Serrano v. Priest*, 20 Cal. 3d 25, 44 (1977) (purpose of fee-shifting statutes is to "award . . . substantial attorney's fees to those public-interest litigants and their attorneys . . . who are successful in such cases" and thereby incentivize "representation of interests

of similar character in future litigation"); *accord Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008).

"Although the section 'is phrased in permissive terms . . . the discretion to deny fees to a party that meets its terms is quite limited,' and generally requires a full fee award unless special circumstances would render such an award unjust." *Fitzgerald v. City of Los Angeles*, No. CV 03-01876 DDP (RZx), 2009 U.S. Dist. LEXIS 34803, at *9-*10 (C.D. Cal. Apr. 7, 2009) (quoting *Lyons v. Chinese Hosp. Ass'n*, 136 Cal. App. 4th 1331, 1344 (2006)). Fees are awarded when: (1) the action "'has resulted in the enforcement of an important right affecting the public interest,'" (2) "'a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons . . .'", and (3) "'the necessity and financial burden of private enforcement . . . are such as to make the award appropriate . . . .'" *Stefan*, 52 Cal. 4th at 1026 (quoting Cal. Code Civ. Proc. § 1021.5 and citing *Woodland Hills Residents Ass'n., Inc. v. City Council*, 23 Cal. 3d 917, 935 (1979)). "The key question is 'whether the financial burden placed on the party [claiming fees] is out of proportion to its personal stake in the lawsuit.'" *Heston v. Taser Int'l., Inc.*, 431 F. App'x 586, 589 (9th Cir. 2011) (quoting *Lyons v. Chinese Hosp. Ass'n*, 136 Cal. App. 4th 1331, 1352 (2006)). Here, the price differential between the "cash" price and the "credit" price at most Valero-branded stations is only 4 cents per gallon, so buyers could not possibly have a stake adequate to litigate. Further, the "elimination of allegedly false representations . . . confer[] a benefit on both the class members and the public at large." *See Brazil v. Dell Inc.*, No. C-07-01700 RMW, 2012 U.S. Dist. LEXIS 47986, at *4 (N.D. Cal. Apr. 4, 2012). Thus, Plaintiff has acted as a true attorney general and is a successful party.

"[A] party need not prevail on every claim to be considered a successful party within the meaning of the statute." *Grodensky v. Artichoke Joe's Casino*, 171 Cal. App. 4th 1399, 1437 (2009); *see also Graciano v. Robinson Ford Sales, Inc.*, 144 Cal. App. 4th 140, 153 (2006) (As with section 1021.5, "[i]t is settled that 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes [under the CLRA] if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." (internal quotation and emphasis omitted)). Plaintiff is a prevailing and successful party because the lawsuit "achieved

its main litigation objective": ensuring that Valero-branded stations in California clearly inform consumers how their debit cards will be treated. *See* Settlement Agreement, ¶4.2. Injunctive relief, such as this, that is "'socially beneficial' . . . justif[ies] a fee award under" the CLRA. *In re Bluetooth*, 654 F.3d at 944.

B. The Requested Fee Is Reasonable Under the Lodestar Method

As discussed above, the requested fee is based on statute, and thus the lodestar method applies. "'The guiding principles in determining awards of attorneys' fees should be to provide compensation sufficient to stimulate the motive for representation of classes.'" *In re Equity Funding Corp. of Am. Sec. Litig.*, 438 F. Supp. 1303, 1325 (C.D. Cal. 1977). When determining a reasonable fee in a class action, the lodestar figure is "'presumptively reasonable,'" *In re Bluetooth*, 654 F.3d at 941 (quoting *Cunningham v. Cty. of Los Angeles*, 879 F.2d 481, 488 (9th Cir. 1988)); *see also Harris v. Marhoefer*, 24 F.3d 16, 18 (9th Cir. 1994) (the lodestar "presumptively provides the accurate measure of reasonable fees"). Here, the negotiated fee is a small percentage of Class Counsel's lodestar, and, thus, is reasonable.

"The lodestar method requires 'multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer.'" *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015). Class Counsel spent 10,452.93 hours of attorney and paraprofessional time prosecuting this Action on the Settlement Class' behalf. *See* accompanying Declaration of Stuart A. Davidson Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Decl."), ¶4 & Ex. A; Declaration of Rafael Bernardino, Jr., Filed on Behalf of Hobson, Bernardino & Davis, LLP, in Support of Application for Award of Attorneys' Fees and Expenses ("Hobson, Bernardino Decl."), ¶4 & Ex. A. The resulting lodestar is $7,479,412.20. Thus, the requested $1,065,354.92 fee (after subtracting expenses) represents a ***negative*** multiplier of ***0.142***. *Id.*

As this Court recognized at the preliminary approval hearing, there was a great deal of good attorney effort in this case. *See* Preliminary Approval Transcript at 5:5-6. That effort

included an extensive pre-filing investigation, the drafting of three complex pleadings, the preparation and presentation of numerous complex legal briefs and arguments related to multiple motions to dismiss, cross motions for summary judgment, class certification and decertification, class notice, and a Rule 23(f) petition. Class Counsel also briefed numerous offensive and defensive *Daubert* motions and a motion to compel discovery. Class Counsel obtained and reviewed thousands of pages of documents from Valero and third parties and took nine depositions. Class Counsel also attended three separate mediation sessions, submitting detailed submissions to the mediator, and engaged in significant follow-up negotiations to achieve the Settlement relief for the Settlement Class. Class Counsel's hours are reasonable based on the work performed and were necessary to the relief obtained. The hours spent by Class Counsel are all the more reasonable in light of Class Counsel's adversary. Valero was represented by a formidable law firm, Hawxhurst Harris LLP (ranked as a top-ten litigation boutique by Law360), which increased the risk of failure, as well as the quantity and quality of work this case demanded. Class Counsel nevertheless achieved this exceptional result despite a worthy adversary who was ***not*** working on a contingent basis.

Class Counsel's hourly rates, too, are reasonable and have recent judicial approval. *See* June 11, 2020 Hr'g Tr. at 25:12-16, *Kaess v. Deutsche Bank AG*, No. 1:09-cv-01714 (GHW) (RWL) (S.D.N.Y.) ("I find that these billable rates [for Robbins Geller] based on the timekeeper's title, specific years of experience, and market rates for similar professionals in their fields . . . to be reasonable in this context.") (attached as Exhibit 2 hereto); Nov. 15, 2017 Hr'g Tr. at 16:13-19, *In re Genworth Fin. Sec. Litig.*, No. 1:14-cv-02392 (AKH) (S.D.N.Y.), ECF No. 181 ("I don't find the rates [for Robbins Geller and Labaton] – they're high, but I don't find them unreasonable, given what's going on in the market," and "agree" the firm's rates were "actually below market."). For attorneys with 12 years of experience or less (who did the bulk of the work on this case), Class Counsel's average rate is lower than the average approved in settlements in this District. For the senior attorneys who took supervisory roles, the rate is slightly higher than average. *Id*. That is unsurprising here considering that Class Counsel have been recognized as among the top in their field. *Id.*

The last piece of the lodestar analysis is the risk multiplier. "Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052-54 (9th Cir. 2002)); *Craft v. Cty. of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008) (noting "ample authority" for a multiplier of 5.2 and collecting cases with substantially higher multipliers); *see also In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 4:14-md-2541-CW, 2017 WL 6030065, at *9 & n.57 (N.D. Cal. Dec. 6, 2017) (collecting cases), *aff'd*, 768 F. App'x 651 (9th Cir. 2019). The Ninth Circuit, for its part, has determined in the context of a crosscheck that a multiplier of 6.85 was "well within the range of multipliers that courts have allowed." *Steiner v. Am. Broad. Co., Inc.*, 248 F. App'x 780, 783 (9th Cir. 2007).

As explained in detail above, this is not the average case in terms of either the risk taken on by Class Counsel or the results achieved for the Settlement Class. Accordingly, if the lodestar analysis were to return a multiplier within the range deemed allowable by the Ninth Circuit, it would serve to confirm the appropriateness of the fee award here. However, there is ***no*** multiplier here. To the contrary, Class Counsel are seeking a ***negative*** multiplier of 0.142, without accounting for the additional work that remains to be done to complete this Settlement.

C. The Result Achieved for the Settlement Class

Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *Zynga*, 2016 WL 537946, at *17 ("The overall result and benefit to the class from the litigation is the most important factor in granting a fee award."); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained."), *aff'd*, 899 F.2d 21 (11th Cir. 1990).

As discussed above, the non-monetary benefit that Class Counsel achieved for the Settlement Class is meaningful and achieves what Class Counsel set out to accomplish, and it justifies the appropriateness of the fee and expense award here.

D. The Risks of the Litigation and the Novelty and Difficulty of the Questions Presented

Numerous cases have recognized that risk as well as the novelty and difficulty of the issues presented are important factors in determining a fee award. *See, e.g.*, *Vizcaino*, 290 F.3d at 1048; *WPPSS*, 19 F.3d at 1299-1301. Uncertainty that Plaintiff and Class Counsel would be successful is highly relevant in determining risk. *Id.* at 1300. As the court aptly observed in *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610 (D. Colo. 1976), "[i]n evaluating the services rendered in this case, appropriate consideration must be given to the risks assumed by plaintiffs' counsel in undertaking the litigation. The prospects of success were by no means certain at the outset, and indeed, the chances of success were highly speculative and problematical." *Id.* at 632, 636-37; *see also Zynga*, 2016 WL 537946, at *18 ("[W]hen counsel takes on a contingency fee case and the litigation is protracted, the risk of non-payment after years of litigation justifies a significant fee award.").

As detailed above, continued litigation presented high risks and uncertainties on Plaintiff's Rule 23(f) appeal and at trial.

E. The Skill Required and the Quality and Efficiency of the Work

The "'prosecution and management of a complex national class action requires unique legal skills and abilities.'" *Zynga*, 2016 WL 537946, at *17. Robbins Geller is a nationally recognized leader in the fields of consumer class actions and complex litigation. *See* Exhibit G to Robbins Geller Decl. Hobson, Bernardino & Davis, LLP is similarly skilled and experienced. *See* Exhibit E to Hobson, Bernardino Decl. The result obtained for the Settlement Class is the direct result of Class Counsel's expertise and the significant efforts of its highly skilled and specialized attorneys. *See* www.rgrdlaw.com; www.hbdlegal.com.

F. The Contingent Nature of the Fee and the Financial Burden Carried by Class Counsel

A determination of a fair fee must include consideration of the contingent nature of the fee and the difficulties that were overcome in obtaining the settlement:

> 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. *See* Richard Posner, *Economic Analysis of Law*

> §21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.

WPPSS, 19 F.3d at 1299. Indeed, "[c]ourts 'routinely' enhance multipliers to reflect the risk of non-payment in common fund cases." *van Wingerden v. Cadiz, Inc.*, No. LA CV15-03080 JAK (JEMx), 2017 WL 5565263, at *13 (C.D. Cal. Feb. 8, 2017) (citing *Vizcaino*, 290 F.3d at 1051).

The risk of no recovery for a class and its counsel in complex cases of this type is very real. There are numerous class actions in which plaintiffs' counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. For example, in *In re Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010), a case that Robbins Geller prosecuted, the court granted summary judgment to defendants after eight years of litigation, after plaintiff's counsel incurred over $7 million in expenses, and worked over 100,000 hours, representing a lodestar of approximately $40 million. In another case, after a lengthy trial involving securities claims against JDS Uniphase Corporation, the jury reached a verdict in defendants' favor. *See In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007).

Because the fee in this matter was entirely contingent, the only certainties were that there would be no fee without a successful result and that such a result would be realized only after considerable effort. Nevertheless, Class Counsel committed significant resources of both time and money to vigorously and successfully prosecute this Action for the Settlement Class' benefit. *See* Exhibits A-B to Robbins Geller Decl.; Exhibits A-B to Hobson, Bernardino Decl. While the contingent nature of Class Counsel's representation strongly favors a premium on Class Counsel's lodestar, again Class Counsel's fee and expense request here represents a significant ***discount*** to their lodestar.

G. Reaction of the Settlement Class Supports Approval of the Attorneys' Fees Requested

District courts in the Ninth Circuit also consider the reaction of the class when deciding whether to award the requested fee. *In re Heritage Bond Litig.*, No. 02-ML-1475-DT (RCx), 2005

WL 1594403, at *21 (C.D. Cal. June 10, 2005) ("The existence or absence of objectors to the requested attorneys' fee is a factor in determining the appropriate fee award.").

The Notices have been disseminated as provided for in the Court's Preliminary Approval Order, and the Settlement Agreement (ECF No. 279-1), Notices, and Order Granting Unopposed Motion for Preliminarily Approval of Class Action Settlement (ECF No. 284) were posted to a website dedicated to the Settlement (www.gasolinesignagesettlement.com) (Azari Decl., ¶14). Settlement Class members were informed in the Notices that Class Counsel would move the Court for an award of no more than $1,650,000 in attorneys' fees and expenses. Azari Decl., Attachment 5 (Notice) at 8. Settlement Class members were also advised of their right to object to the fee and expense request, and that such objections are required to be filed with the Court no later than February 18, 2021. As of the date of this memorandum, no Settlement Class member has objected to the fee and expense request, or any aspect of the Settlement. The lack of objection is compelling evidence that the request for fees and expenses is reasonable. *See, e.g.*, *Zynga*, 2016 WL 537946, at *13 ("By any standard, the lack of objection of the Class Members favors approval of the Settlement."). This is not to say that a small number of objections would stand in the way of approval of a reasonable fee, however. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000).

VI. CLASS COUNSEL'S EXPENSES ARE REASONABLE AND INCLUDED IN THEIR REQUEST

Class Counsel do ***not*** request an additional award for their litigation expenses and charges ($584,645.08) reasonably incurred. Robbins Geller Decl., ¶5; Hobson, Bernardino Decl., ¶5. Rather, this amount is included in their $1,650,000 fee and expense request.

The main expenses here relate to expert witnesses fees and providing notice to the formerly certified litigation class. Robbins Geller Decl., ¶6 & Ex. B. Class Counsel were also required to travel in connection with court appearances, discovery, and settlement efforts, and to work long hours. Work-related transportation, lodging, and meal costs totaled $90,339.80 or approximately 15.4% of aggregate expenses. Robbins Geller Decl., Ex. D; Hobson, Bernardino Decl., Ex. C. *See*

also In re Immune Response Sec. Litig., 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007) ("'reimbursement for travel expenses . . . is within the broad discretion of the Court'").

The expenses also include the costs of mediation efforts ($14,895.00 or approximately 2.5% of total expenses) and e-discovery ($34,089.06 or approximately 5.8% of total expenses). Robbins Geller Decl., ¶6(h)-(i). Additional expenses include the costs of factual and legal research ($21,006.79 or approximately 3.6% of total expenses). *Id*., Ex. C. These are the costs of computerized factual and legal research services such as Lexis/Nexis, Westlaw, and PACER. It is standard practice for attorneys to use such databases to assist them in researching legal and factual issues and reimbursement is proper. *See Immune Response*, 497 F. Supp. 2d at 1177.

These expenses are reasonable.

VII. THE REQUESTED SERVICE AWARD IS REASONABLE GIVEN THE LENGTH OF THE CASE AND THE SIGNIFICANT EFFORTS OF PLAINTIFF FAITH BAUTISTA

Finally, pursuant to the Settlement, Class Counsel respectfully request, and Valero does not oppose, a Service Award for the Class Representative in the amount of $2,000. Settlement Agreement, ¶4.9. "[I]ncentive awards that are intended to compensate class representatives for work undertaken on behalf of a class are fairly typical in class action cases." *Online DVD-Rental*, 779 F.3d at 943 (internal quotation omitted). 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." *Rodriguez*, 563 F.3d at 958-59. Courts' main concern in approving incentive awards is to make sure that "they do not undermine the adequacy of the class representatives." *Radcliffe v. Experian Info. Sols. Inc*., 715 F.3d 1157, 1163 (9th Cir. 2013). "Incentive awards of $5,000 have been deemed 'presumptively reasonable' in this District," *Chen v. Chase Bank USA, N.A.*, No. 19-cv-01082-JSC, 2020 WL 2644332, at *7 (N.D. Cal. Jan. 16, 2020), and are within the range of service awards this Court has awarded in other cases. *See, e.g.*, *Lucero v. Solarcity Corp.*, No. 15-cv-05107-RS, 2018 WL 573593, at *2 (N.D. Cal. Jan. 26, 2018) ($2,500); *EK Vathana v. Everbank*, No. 09-cv-02338-RS, 2016 WL 3951334, at *3-*4 (N.D. Cal. July 20, 2016)

($12,500); *Milligan v. Toyota Motor Sales, U.S.A., Inc.*, No. C 09-05418 RS, 2012 WL 10277179, at *9 (N.D. Cal. Jan. 6, 2012) ($5,000).

Here, an incentive award of $2,000 is warranted and does not pose a danger to Plaintiff Bautista's adequacy as a Class Representative. Class Counsel and Plaintiff Bautista did not enter into any kind of agreement by which the incentive payment is contingent on her support for the Settlement. In addition, Plaintiff Bautista did substantial work on behalf of the Settlement Class, including gathering documents, preparing and sitting for her deposition, reviewing and understanding correspondence from Class Counsel, and participating in the mediation process. Over four years of litigation, Ms. Bautista spent over 160 hours participating in this case, including attending or being available for three mediation sessions. Declaration of Faith Bautista, ¶4.

Plaintiff's $2,000 Service Award request is appropriate and should be granted.

VIII. CONCLUSION

For each of the foregoing reasons, (i) the Settlement is fair, adequate and reasonable and should be approved, and (ii) Class Counsel's request for a fee and expense request, as well as Plaintiff's Service Award request are reasonable and should be granted.

DATED: February 4, 2021

Respectfully submitted,

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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

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Manual Notice List

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- (No manual recipients)

EXHIBIT 1

Pages 1 - 15

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE RICHARD SEEBORG

FAITH BAUTISTA, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
vs.	)	No. C 15-05557 RS
VALERO MARKETING AND SUPPLY COMPANY,	)	
Defendant.	)	San Francisco, California Thursday November 5, 2020 1:30 p.m.

TRANSCRIPT OF ZOOM VIDEO CONFERENCE PROCEEDINGS

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(APPEARANCES CONTINUED ON FOLLOWING PAGE)

Reported By: ***Debra L. Pas, CSR 11916, CRR, RMR, RPR***
Official Reporter - US District Court
Computerized Transcription By Eclipse

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- - -

THURSDAY - NOVEMBER 5, 2020 **1:29 P.M.**

P R O C E E D I N G S

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THE CLERK: Calling Case 15-CV-5557, Bautista versus Valero Energy Corporation.

Counsel, please state your appearances.

MR. GOLD: Good afternoon. This is Chris Gold from Robbins Geller Rudman and Dowd for the plaintiffs.

THE COURT: Good afternoon.

MR. DAVIDSON: Good afternoon, Your Honor. This is Stuart Davidson from Robbins Geller, all the way on the other coast in Florida, on behalf of the plaintiff.

THE COURT: Good afternoon.

MR. HAWXHURST: Good afternoon, Your Honor. In the middle of the country is Gerry Hawxhurst, with Hawxhurst Harris, on behalf of Valero Marketing and Supply Company.

THE COURT: Good afternoon.

MR. HARRIS: Good afternoon. David Harris also on behalf of defendant Valero.

THE COURT: Good afternoon.

MR. PINTAR: Good afternoon, Your Honor. Ted Pintar of Robbins Geller Rudman and Dowd for plaintiff.

THE COURT: Good afternoon.

MR. BERNARDINO: Good afternoon, Your Honor. Rafael Bernardino on behalf of the plaintiffs.

THE COURT: Good afternoon. So this is on for preliminary approval of the proposed class action settlement. The question is whether or not the proposed settlement falls within the ambit of what is fair, reasonable and adequate.

As you all know, I'm very familiar with the long history of this case. It was intensely litigated.

As noted, I think, in your motion papers, at one point there was a reference to the fact that during the course of it each side had at some point gained and then lost the upper hand. So I am familiar with the intensity of the battle.

We can go over the particular parts of the proposed settlement, but let me just sort of is give you my general sense of it. While I'm sometimes skeptical of injunctive only relief in proposed class action settlements, I do think in this case it is relief that is congruent with what was requested in the case, what the case was all about, and I think that the proposal is -- proposed relief is meaningful and provides some real recovery for the class, proposed class. So I'm inclined to look favorably upon this.

To go over some of the particulars, the notice plan is fine. We can talk about it in a little more detail. The release, as I read it, is cabined to the claims. That's what I'm always looking for. The incentive fee award is modest and fine.

In the attorney's fee request, I know it's a substantial

reduction from the overall lodestar. It's against the background of the fact that I had found some real problems with the -- with the case, which was then going to be reviewed by the circuit.

But the long and short of it is I think there was a great deal of good attorney effort in this case and so I think the amount that's being requested is a legitimate amount.

So I had a couple of questions for you, but I'm generally content with what I see with respect to the proposed disposition.

So I'll turn it back to you. The one question I do want to ask is just procedurally the -- or maybe more than procedurally. Substantively we're in the -- we're in a circumstance in which there is an effort to recertify a class that I had decertified, but recertify it for purposes of settlement, and parties are all in agreement with doing that. And in the course of this there is a question that does arise about the standing of the individual plaintiff to -- to seek to represent the class when I effectively had found that couldn't proceed to litigate the injunctive class an individual basis.

But you've cited me to some Fourth Circuit law that says that can be done, and my -- one of my questions would be: Is there Ninth Circuit law that gives us any intel on that subject? But that's a fairly technical, if you will, concern.

As I say, overall I'm satisfied with what I see. So with

that, who would like to say anything, if there is anything to be said?

MR. GOLD: Sure, Your Honor. Chris Gold for the plaintiffs.

We appreciate your opening thoughts. You know, I think I'll just address Your Honor's questions, to the extent Your Honor wants some responses. I'll take them in reverse order.

So the standing issue is obviously an issue that everyone was paying attention to and we did look at this. We found that Fourth Circuit case law, which also cited a Supreme Court case that we believe is helpful. But beyond that, it wasn't an issue we were able to find much law in any circuit, including the Ninth obviously or we would have been happy to cite it. But we don't believe it presents a problem.

We believe the way the Fourth Circuit explained the issue and the Supreme Court, it makes sense. You know, the -- the -- the Court held -- although the Court held the plaintiff did not have standing to litigate injunctive relief, the Court held that the plaintiff did have standing to litigate monetary relief by virtue of her out-of-pocket losses in overpaying for gasoline. So that satisfies the Article III case or controversy requirement; right?

So now that we're asking the Court to enter a judgment, and as the case law we cited says, the judgment, you know, by agreement, the Supreme Court said in that *City of Cleveland*

case that it's the parties' agreement at this point that's granting the Court the authority to enter the judgment.

That means that as the *Barry* case in the Fourth Circuit held, relief in the settlement can include contractual obligations that couldn't be imposed without consent, and it can even include relief under statutes that don't have a private right of action.

So we satisfied the, you know, Article III standing inquiry for the -- with a case or controversy for the litigation before the Court.

Now Valero is agreeing to do whatever it thinks, you know, may resolve that case or controversy, and its efforts to resolve that case or controversy should not -- cannot or should not deprive the plaintiff of standing to litigate before this Court.

One can imagine, you know, extreme circumstances where, you know, a plaintiff has standing in a litigation and, you know, what sort of result would arise if the defendant, you know, can remove that standing from the plaintiff just by virtue of what type of relief it's agreeing to in order to resolve that case or controversy.

So for that reason, you know, even though we wish obviously there was some more helpful case law, we do think it is a technical issue, but I do believe it's sound on the law.

THE COURT: Okay. All right. Yes. Mr. Hawxhurst.

MR. HAWXHURST: Yes, Your Honor.

I just wanted to say in addition to the legal arguments that Mr. Gold made, we also would say that there are good policy reasons for this to happen. It involves cases. It gets -- as you pointed out, it gives us relief that's congruent with what the whole lawsuit was about.

THE COURT: Right, right.

MR. GOLD: Great point. And if Your Honor would like me to answer the class certification question?

THE COURT: Yeah. Go ahead.

MR. GOLD: So when Your Honor decertified the class, the main issue is one really of manageability. You know, how are we going to identify all these stations with the evidence that we had mustered up until that point.

So those concerns, manageability --

THE COURT: It was a manageability slash B3 predominance. They are related. They are two related concepts in this case. But you're right. You're right.

MR. GOLD: Exactly. It all boiled down to how are we going to do this in a class action, you know? Whether you're looking at it through the predominance lens or the superiority lens, it really came down to, you know, how are we going to do this at trial?

And those concerns -- you know, if you look at the ***Hyundai*** case out of the Ninth Circuit or the ***Amchem*** case out of the

Supreme Court, those manageability concerns don't exist in the settlement context. So we believe without those concerns, the class does satisfy the 23(b) predominance and superiority.

And obviously Your Honor previously held that the 23(a) requirements were satisfied. We believe they still are.

So for that reason we think, you know, class certification would be appropriate here.

THE COURT: Yeah. I think that's a fair point and makes sense to me.

Shifting slightly to the notice issue, we had had some -- ironed that out at a certain point in time, what notice was going to look like in this case when it was a certified class.

Run by me now what you're proposing, how you're proposing to notify the class of this injunctive relief disposition. How is that going to be done?

MR. HAWXHURST: So, Your Honor, as Valero is responsible for the notice part actually monetarily, I thought I would address it, if that's --

THE COURT: Go ahead.

MR. HAWXHURST: -- okay.

So, Your Honor, as the Court noted, there was some dispute over notice the first go-around and over our objections, the Court authorized a pretty strict notice provision by the plaintiffs that included just nationwide, not just California.

THE COURT: Right.

MR. HAWXHURST: So that went forward, and the Court found that it satisfied due process and all of the other requirements for notice.

What Valero did was -- said okay, what was good the first go-around should be good the next go-around. Let's not try and pinch pennies. Let's not try and save money.

The first go-around was done by, I believe, Garden City, who ultimately was acquired by Epic. So when we say "Epic," it's really the same company that did it the first time around. And what we did, Your Honor, is we said give us the same -- meet the same criteria that the Court found was acceptable, very reasonable, adequate the first go-around. And we did that, Your Honor, without regard to cost. We didn't put it out for bid. We didn't do any of that.

And in addition, that wouldn't matter anyway because none of this comes out of any recovery. This is something Valero agreed to take on. So, Your Honor, the notice is substantially identical to what Your Honor approved in the first go-around.

And then, of course, they are going to take care of the administration. They took care of the CAFA notice, which we filed notice. The CAFA notice went out.

I don't believe any of the AGs, General Becerra, no one has responded to any of the CAFA notices. So we have clear sailing on that part as well.

THE COURT: Okay. The proposal that you -- I have

your proposed order that you submitted, and it had -- you know, as it always does, it has some blank dates, and then you gave me some proposal on final approval schedule.

I take it it's just all -- all we need to do is once there is a date for final approval, the final approval hearing, then all the other dates will flow fairly easily from what you've given me.

Have you discussed when you would like a final approval hearing?

MR. GOLD: We have not, Your Honor. We're happy to do that, or we thought we would leave it to the Court's discretion.

THE COURT: Well, either way is fine with me.

What's your -- I mean, perhaps you can just tell -- I don't need necessarily a specific date, but, you know, what kind of time frame are you looking at between now and final -- the final approval hearing, and then I can just supply it.

MR. GOLD: We need at least 100 days from your order on preliminary approval.

THE COURT: Okay. And then beyond that, you don't have any -- the parties don't have any particular preference that, well, we want it to be later or we want it to be as close to 100 as you can be. It doesn't matter?

MR. GOLD: My guess -- I haven't spoken to the other side, but my guess is the sooner the better.

THE COURT: Okay.

MR. HAWXHURST: We would agree with that, Your Honor. In talking with Epic, they think that 100 days, or whatever the period gives us for notice, is going to be plenty, especially given that people are sitting around just reading stuff all day these days.

THE COURT: The only countervailing notion, and it's not a major one, is that because of the circumstances in which we find ourselves, it would be -- in a perfect world it would be nice to have a physical final approval hearing in a courtroom, but none of us know when -- pardon?

MR. HAWXHURST: I apologize. I said, I'm keeping my fingers crossed that we can do that with 100 days.

THE COURT: Well, I like the optimism. We'll see. But, you know, if you -- the further out you move it, probably the better the chances are that you can do it in person.

But I hope you're right. It wouldn't be the end of the world if we have to do it virtually. It's a little -- as you probably know, I don't know if -- I have had a few approval hearings where I have had objectors, frankly, and when you're using Zoom it's a little bit more complicated if there are objectors who want to appear and sometimes they don't.

MR. DAVIDSON: This is Stuart Davidson of Robbins Geller.

I've had a couple so far done via Zoom with dozens of

objectors showing up. And it just -- it seemed -- including one in front of Judge Koh. And it just seemed to require a little bit of management at the outset and organization. Almost like the Supreme Court is doing in their oral arguments now, where just one at a time.

But it -- I found them helpful, and I have enjoyed the fact that you seem to get more people from the public, just interested class members, who might just want to listen in. Sometimes they -- I seem to enjoy that more public participation.

THE COURT: Right. And I think every week that goes by people are getting more and more used to doing things this way, so...

Okay. Well, I will -- so I will -- we don't have to -- I don't want to impose on your time to figure out all the dates right now. I'll just -- with your input in terms of the parameters, I'll just pick some dates and build them in there.

Okay. Anything else we need to -- anything else anyone wants to have on the record in the event of -- I don't know if you have any sense, you probably don't yet, if we're likely to have any objectors. I suspect there won't be very many, if we have any, but you never know.

MR. HAWXHURST: Nothing from Valero, Your Honor. Thank you for the Court's time and effort in this case. We appreciate it.

MR. GOLD: Nothing from plaintiffs as well. We appreciate your time, Your Honor.

THE COURT: Okay. Very good. It was an interesting case. You litigated it with gusto. So we never did get the benefit of the thoughts from our friends on high in the Ninth Circuit, but that's okay. I could live with that. So we'll barrel ahead.

So I do find that preliminarily the proposed disposition is fair, reasonable and adequate. And I'll go ahead and use your proposed order as the jumping off point. I may tweak it a little bit, but having gone through it before this hearing, I don't anticipate, if I do at all, it will be of any consequence.

So we'll go from there. Be looking for that, and it will have dates set on there and we'll move ahead.

MR. HAWXHURST: Your Honor, I'm sorry. Gerald Hawxhurst.

One last thing I just wanted to raise with the Court. There was errata that was filed due to some miscommunication with the notice company, and there was a new proposed order submitted.

THE COURT: Okay.

MR. HAWXHURST: I just want to make sure the Court -- I believe Ms. Lew knows which one that is. But it's important to know because that is a different Exhibit B-2.

THE COURT: Okay. I will look for the -- for the filing subsequent to the initial Exhibit B-2. And as you say, Ms. Lew is adept at finding things. So we'll find it and use that.

MR. GOLD: Just for the Court's convenience, it's docket No. 281.

THE COURT: Okay. Good.

MR. HAWXHURST: That's the errata. And then the -- the Chambers copy was submitted earlier that morning.

THE COURT: Okay. On our mailbox?

MR. HAWXHURST: Yes, Your Honor.

THE COURT: Okay. Okay, good. I think that's all I need.

But congratulations on resolving this, at least on a -- preliminarily, and we will go forward.

MR. HAWXHURST: Thank you, Your Honor.

MR. GOLD: Thank you, Your Honor.

THE COURT: Thank you. Thanks very much.

MR. BERNARDINO: Thank you, Your Honor. Have a good afternoon.

THE COURT: Thank you. You too.

(Proceedings adjourned.)

CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Thursday, December 10, 2020

EXHIBIT 2

K6BKDEUC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

NORBERT G. KAESS, et al,

Plaintiffs,

v. 09 CV 1714 (GHW)(RWL)
Telephone Conference

DEUTSCHE BANK AG, et al.,

Defendants.

----------x

New York, N.Y.
June 11, 2020
4:30 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

GLANCY PRONGAY & MURRAY LLP
Attorneys for Plaintiffs
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-and-
ROBBINS GELLER RUDMAN & DOWD LLP
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ERIC NIEHAUS
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BY: DAVID JANUSZEWSKI
SAMUEL MANN

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Attorneys for Underwriter Defendants
BY: WILLIAM J. O'BRIEN
ANDREW BEATTY

(The Court and all parties appearing telephonically)

THE COURT: This is Judge Woods.

Is there a court reporter on the line?

(Pause)

THE COURT: Let me just say a few words at the outset of today's conference.

First, you should conceive of this conference as if it was happening in the courtroom. As you know, the dial-in information for this call is publicly available; members of the public and the press are welcome to dial in.

Second, let me ask you to all keep your phones on mute at all times when you're not speaking on the phone. I can hear some background noise right now, shuffling some paper. We should not hear any background noise during the course of the conference. Please keep your phones on mute at all times when you are not speaking during the conference. That will help us to keep a clear record of what we say today.

Third, I'd like to ask each of the people who will speak during this conference to please identify themselves each time that they speak during this conference. So, if you speak during this conference, you should say your name each time that you speak. You should do that regardless of whether or not you've spoken previously during the conference. That will help us to keep a clear record of today's conference.

Last, as you've heard, there is a court reporter on

the line. You should not be surprised if he chimes in at any point. If he does, and if he asks you to do something to help him to hear or understand what you're saying, please do what he asks. That will help us to, again, keep a clear record of the conference today.

Because there is a court reporter on the line transcribing the conference, I'm ordering that there be no recordings or rebroadcasts of any portion of the conference.

So, with those introductory remarks in hand, let me turn to the parties.

I'd like to ask for counsel for each side to identify counsel who are on the line for each of the parties and any representatives for each of the parties. What I'm going to ask is that, if you can, that one person from each side identify herself and the members of her team; that way, we won't have to hear many people chiming in at a time.

So let me begin with counsel for plaintiffs.

Who's on the line for plaintiffs?

MR. PINTAR: Good afternoon, your Honor. It's Ted Pintar, and I'm here with Eric Niehaus and Kevin Lavelle, from Robbins Geller Rudman & Dowd, for plaintiffs.

THE COURT: Good. Thank you very much.

Who is on the line for defendants?

MR. MURRAY: Excuse me. I hate to interrupt, but this is also for plaintiffs, Brian Murray, from Glancy Prongay &

Murray. Sorry to interrupt you.

Now the defendants.

THE COURT: Fine.

Counsel for defendants?

MR. JANUSZEWSKI: Good afternoon, your Honor. This is David Januszewski, and I have my colleague, Samuel Mann. We are both from Cahill Gordon & Reindel, representing Deutsche Bank and the Deutsche Bank defendants. And on the line, we also have, from Deutsche Bank, Stella Tipi, in-house counsel at Deutsche Bank.

THE COURT: Good. Thank you very much.

So, counsel --

MR. O'BRIEN: I'm sorry. Good afternoon, your Honor. I just wanted to introduce myself and my colleagues. William J. O'Brien and Andrew Beatty, from the firm of Skadden Arps Slate Meagher & Flom, on behalf of the underwriter defendants.

THE COURT: Good. Thank you very much.

So, counsel, first, let me thank you all for being on the call. I scheduled this conference as a settlement hearing or approval hearing with respect to the proposed resolution of this case. I have reviewed all of the materials that have been submitted on the docket to date in connection with this matter. I'd like to hear, however, from each of the parties, to hear, in particular, if there's anything that any of you would like to add to any of your written submissions in connection with

the proposed resolution of the case.

Let me begin with counsel for plaintiffs.

Counsel?

MR. PINTAR: Again, good afternoon, your Honor. Ted Pintar, for plaintiffs.

I had a number of things I wanted to mention just at the outset. Obviously, we're here on the final approval of an $18.5 million settlement. We are very proud of that result. As we have indicated, and I won't repeat all of what's in the papers, but it represents a very significant percentage of reasonably recoverable damages.

On February 27, 2020, this Court entered its preliminary approval order. Pursuant to that order, notice was disseminated. The claims administrator mailed over 112,000 notice packages, published the summary notice in the Wall Street Journal and Business Wire, and set up a settlement website where the notice and other settlement-related documents were posted.

And, as a result, there was one objection. It's not clear to me whether that has been withdrawn. I won't attempt to characterize Mr. Agay's email. We submitted it to the Court. He indicates, however, that he would not be participating today. There were only four opt-outs. And I do have some information on claims to date. Over 11,000 claims have been submitted, and they are still processing claims --

the mailed claims, so that number is likely to rise even from there.

So, we believe that not only is it a good settlement, that the class has reacted very positively to it, and, as you know, today we're asking the Court to enter three orders: The final judgment, the order approving plan of allocation, and the order awarding attorneys' fees and expenses and award to class plaintiffs. Other than that, your Honor, I certainly don't have anything to add to our papers. I'm happy to address any questions the Court may have, though.

THE COURT: Good. Thank you very much, counsel.

Let me hear from each of the groups of defendants.

First, counsel for the Deutsche defendants.

MR. JANUSZEWSKI: Yes, your Honor. Again, this is David Januszewski, from Cahill Gordon.

We have nothing to add to what was submitted, which was designed to address the objection that my friend just addressed. We have nothing to add to that.

THE COURT: Good. Thank you very much.

Counsel for the remaining defendants, anything that you'd like to add to your written submissions?

MR. O'BRIEN: Yes. William O'Brien, from the firm of Skadden Arps Slate Meagher & Flom, on behalf of the underwriter defendants.

And like Mr. Januszewski, we have nothing further to

add.

THE COURT: Good. Thank you very much.

Is there anyone else on the line who wishes to be heard?

So, hearing none, counsel, I'm going to approve the proposed resolution of this action, or series of actions. What I'd like to do is to ask you to place your phones, again, on mute, if you would, please. I'd like to review the reasoning for my decision. I'm going to do so now orally. At the end, I'll take up the two orders and judgment that the parties have proposed. Let me begin with, first, an overview.

So, I. Overview:

Plaintiffs brought this securities class action in February 2009 on behalf of all persons who purchased the 7.35 percent Noncumulative Trust Preferred Securities of Deutsche Bank Capital Funding Trust X and/or the 7.60 percent Trust Preferred Securities of Deutsche Bank Contingent Capital Trust III securities from Deutsche Bank AG pursuant to public offerings from November 6, 2007, to February 14, 2008. Plaintiffs allege that defendants violated Sections 11, 12(a)(2), and 15 of the Securities Act (the "Securities Act") and (15, U.S.C., Section 77k, 771(a)(2), and 77o) by omitting material facts from the offering documents. See declaration of Eric I. Niehaus ("Niehaus dec."), Docket No. 308, paragraph 3.

Since then, plaintiffs have extensively litigated this

case. The parties have engaged in significant motion practice, and have completed fact discovery. Niehaus declaration paragraphs 3-4. Now, plaintiffs seek final approval of the class action settlement and approval of their plan for allocating the net proceeds of the settlement. Plaintiffs' counsel also seek an award of attorneys' fees and litigation costs, and the lead plaintiffs seek an award for expenses incurred while representing the class.

Judge Batts presided over this case for almost the entire time that it has been pending in this court. The case was reassigned to me on February 20, 2020, after Judge Batts' untimely death.

II. Class Certification:

On October 2, 2018, pursuant to Rule 23 of the Federal Rules of Civil Procedure, Judge Batts granted plaintiffs' motion to certify a class defined as: All persons or entities who purchased or otherwise acquired the 7.35 percent Noncumulative Trust Preferred Securities of Deutsche Bank Capital Funding Trust X ("7.35 percent Preferred Securities"), and/or the 7.60 percent Trust Preferred Securities of Deutsche Bank Contingent Capital Trust III ("7.60 percent Preferred Securities"), pursuant or traceable to the public offerings that commenced on or about November 6, 2007, and February 14, 2008. Excluded from the class are defendants, the officers and directors of Deutsche Bank, and the underwriter defendants at

all relevant times, members of their immediate families and their legal representatives, heirs, successors, or assigns and any entity in which defendants have or had a controlling interest. Docket No. 224 at 10.

III. Approval of the Settlement Agreement:

Rule 23(e) requires court approval for a class action settlement to ensure that it is procedurally and substantively fair, reasonable, and adequate. Federal Rule of Civil Procedure 23(e). To determine procedural fairness, courts examine the negotiating process leading to the settlement. Wal-Mart Stores, Inc. v. Visa USA, Inc., 396 F.3d 96, 116 (2d Cir. 2005). To determine substantive fairness, courts analyze whether the settlement's terms are fair, adequate, and reasonable according to the factors set forth in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).

The court examines procedural and substantive fairness in light of the "strong judicial policy favoring settlements" of class action suits. Wal-Mart Stores, 396 F.3d at 116. A "presumption of fairness, adequacy, and reasonableness may attach to a class action settlement reached in arm's-length negotiations between experienced capable counsel after meaningful discovery." Id. "Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." In re EVCI Career Colls. Holding Corp. Sec. Litig., 2007 WL 2230177, at *4

(S.D.N.Y. July 27, 2007).

A. Procedural Fairness:

The settlement is procedurally fair, reasonable, adequate and not a product of collusion. The settlement was reached after the parties had conducted a thorough investigation and evaluated the claims and defenses; the agreement in principle was reached after sessions with the Honorable Judge Layn R. Phillips, a former United States District Judge and an experienced mediator of securities class actions and other complex litigation. Niehaus declaration paragraph 6, 129. In advance of the mediation, the parties exchanged detailed mediation statements addressing both liability and damages. Id. The parties reached a final resolution on September 12, 2019, with the assistance of Judge Phillips, after formal mediation. Id.

B. Substantive Fairness:

The settlement is also substantively fair. The factors set forth in Grinnell provide the analytical framework for evaluating the substantive fairness of a class action settlement. The Grinnell factors are: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the

ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a recovery in light of all of the attendant risks of litigation. Grinnell 295 F.2d at 463. Litigation here through trial will be complex, expensive, and long. It has been complex, expensive, and long. Thus, the first Grinnell factor weighs in favor of final approval. See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 330 F.R.D. 11, 36 (E.D.N.Y 2019) ("Settlement is favored if settlement results in substantial and tangible present recovery, without the attendant risk and delay of trial.").

With respect to the second factor, the class members' reaction to the settlement has been overwhelmingly positive. Of the 112,397 notice packets mailed to potential members of the settlement class, four exclusion requests were received. Supplemental declaration of Ross D. Murray (Supplemental Murray Dec.") Docket No. 324, Paragraphs 4, 6. Only one class member, Mr. Richard Agay, objected. See Richard Agay letter ("Agay letter") Docket No. 320-21.

That objection did not challenge the settlement, the resolution of this case, the reasons for the settlement, the manner in which class plaintiffs and lead counsel prosecuted the litigation, the work lead counsel performed, or lead

counsel's fee and expense application. Instead, the objection asserted only that Mr. Agay received his copy of the notice late, and that he was confused by certain aspects of the submission, and that the claims administrator did not sufficiently respond to Mr. Agay's telephonic inquiry. On June 5, 2020, Mr. Agay emailed lead counsel in an email that I construe as him withdrawing his objections, perhaps because he recognized that he was apparently persuaded by the response of the parties showing that he was not entitled to recovery in the suit. See Docket No. 329. While Mr. Agay received his notice later than expected, he received it with enough time to submit objections, and the delay was caused by a failure at his broker. His objection does not suggest that the overall distribution or notice program was ineffective in design or execution.

The absence of objections, with the exception of one retail investor, who literally withdrew his objection, coupled with the minimal number of requests for exclusion, strongly supports the finding that the settlement plan of allocation and fee and expense requests are fair, reasonable, and adequate. See In re Citigroup, Inc. Sec. Litig., 965 F. Supp. 2d 369, 382 (S.D.N.Y. 2013); In re Bisys Sec. Litig., 2007 WL 2049726, at *1 (S.D.N.Y. July 16, 2007); In re Veeco instruments Inc. Sec. Litig., 2007 U.S. Dist. LEXIS 85629, at *40.

In sum, the overall favorable response demonstrates

that the class approves of the settlement and supports final approval.

The plaintiffs completed fact discovery, so counsel "had an adequate appreciation of the merits of the case before negotiating." Beckman v. KeyBank, N.A., 293 F.R.D. 467, 475 (S.D.N.Y. 2013)(quoting In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 537 (3rd Cir. 2004); see also Niehaus declaration paragraph 5. Lead plaintiffs spent significant time and resources analyzing and litigating the legal and factual issues of this case, including an extensive factual and legal investigation into the settlement class's claims and engaging in the detailed formal mediation process. Niehaus declaration paragraph 5.

Turning to the fourth and fifth factors, the risk of establishing liability and damages further weighs in favorable of final approval. "Litigation inherently involves risks." In re PaineWebber Ltd. Partnerships Litig., 171 F.R.D. 104, 126 (S.D.N.Y. 1997). Indeed, the primary purpose of settlement is to avoid the uncertainty of a trial on the merits. See Velez v. Majik Cleaning Serv., Inc., 2007 WL 7232783, at *6 (S.D.N.Y. June 25, 2007). Here, plaintiffs face significant risks as to both liability and damages; defendants challenged the premise that the allegedly omitted information was material and the notion that plaintiffs could prove that the drop in price was related to the allegedly omitted information. See Niehaus

declaration paragraphs 106, 115 to 17. The proposed settlement eliminates these uncertainties. These factors, therefore, weigh in favor of final approval.

The risk of obtaining class certification is nonexistent here. Therefore, the sixth Grinnell factor weighs in favor of final approval. Settlement generally eliminates the risk, expense, and delay inherent in the litigation process as a whole.

Turning to the seventh factor, there is nothing to suggest that Deutsche Bank or the underwriter defendants would be unable to withstand a greater judgment than the settlement amount. "But a defendant is not required to empty its coffers before a settlement can be found adequate." Shapiro v. JP Morgan & Co., 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24, 2014)(quotation omitted).

Deutsche Bank's financial circumstances -- or I should say the defendants' financial circumstances do not ameliorate the force of the other Grinnell factors, which lead to the conclusion that the settlement is fair, reasonable, and adequate.

Finally, the amount of the settlement, in light of the best possible recovery and the attendant risks of litigation, weighs in favor of final approval. The determination of whether a settlement amount is reasonable "is not susceptible of a mathematical equation yielding a particularized sum." In

re Austrian & German Bank Holocaust Litig., 80 F.Supp. 2d 164, 178 (S.D.N.Y. 2000). Instead, "There is a range of reasonableness with respect to a settlement - a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972).

Here, lead plaintiffs assert that the settlement would constitute 47 percent of the estimated recoverable damages. Niehaus declaration paragraph 19. This is a reasonable result when compared to the median ratio of settlement to investor losses of 2.1 percent for securities class action settlements in 2019. Id. Therefore, the amount of this immediate recovery is reasonable, and this factor weighs in favor of final approval.

Weighing the Grinnell factors, I find that the settlement is substantively fair and weigh in favor of final approval.

IV. Plan of Allocation:

"To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized - namely, it must be fair and adequate...an allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." In Re WorldCom, Inc. Sec. Litig., 388 F. Supp. 2d

319, 344 (S.D.N.Y. 2005)(citation and quotation omitted). "A plan of allocation need not be perfect," in re EVCI Career Colleges Holding Corp. Sec. Litig., 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007)(collecting cases), or "tailored to the rights of each plaintiff with mathematical precision," PaineWebber, 171 F.R.D. at 133; see also RMed International, Inc. v. Sloan's Supermarkets, Inc., 2000 WL 420548, at *2 (S.D.N.Y. April 18, 2000) (recognizing that "aggregate damages in securities fraud cases are generally incapable of mathematical precision"). Thus, "In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel." In re EVCI Career Colleges Holding Corp. Sec. Litig., 2007 WL 2230177, at *11.

Lead counsel, who are experienced and competent in complex class actions, prepared the plan of allocation in connection with plaintiffs' damages expert. Niehaus declaration paragraphs 100, 134. The settlement fund, minus attorneys' fees and expenses, will be allocated on a pro rata basis according to the relative size of class members' "Recognized claims." Id. at paragraphs 9, 10. The expert has calculated an estimated individual class members' claim based on (i) allegations when the alleged concealed facts and trends became known (i.e., realization events); (ii) an event study that estimates price changes in the securities as a result of realization events; and (iii) the statutory formula used to

calculate recoverable damages during the settlement class period. Declaration of Steven P. Feinstein ("Feinstein dec"), Docket No. 177-1, paragraphs 29-42.

Because the plan of allocation has a clear rational basis, equitably treats the class members, and was devised by experienced and estimable class counsel, the Court finds it fair and adequate. See In re Telik, Inc. Sec. Litig., 576 F.Supp. 2d, 570, 581 (S.D.N.Y. 2008).

V. Dissemination of Notice:

On February 27, 2020, the Court entered an order granting preliminary approval of the settlement as "fair, reasonable and adequate" to class members. In accordance with that order, lead counsel retained Gilardi & Co. LLC ("Gilardi") as claims administrator to supervise and administer the notice procedure in connection with the settlement and to process all claims. Declaration of Ross D. Murray ("Murray dec"), Docket No. 310, paragraph 2.

Gilardi sent a copy of the notice to potential members of the settlement class. First, Gilardi mailed, by first class mail, the notice packet to 283 nominees - banks, brokerage companies, and other institutions - that Gilardi had in its proprietary database. Id. at paragraph 5.

Next, Gilardi mailed the notice packet to 4,643 additional institutions or entities on the U.S. Securities and Exchange Commission's ("SEC") list of active brokers and

dealers. Id. paragraph 5.

Gilardi also delivered electronic copies of the notice packet to 381 registered electronic filers, primarily institutions and third-party filers, and to the depository trust company ("DTC") on the DTC legal notice system ("LENS"), which enables bank and broker nominees to contact Gilardi for copies of the notice for their beneficial holders. Id. paragraph 7. Gilardi received multiple responses and additional names of potential settlement class members from individuals or other nominees, with requests for over 64,000 notice packets to be forwarded directly to nominees' customers. Id. paragraph 9. Gilardi also published the summary notice in the Wall Street Journal and transmitted it over Business Wire. Id. paragraph 11. Gilardi also posted the date and time of the hearing on the settlement website. Id. paragraph 12.

Gilardi ultimately mailed a total of 112,397 notice packets, including mailing notice packets to persons a second time when the first set were returned as undeliverable. Supplemental Murray declaration paragraph 4.

These notices apprised settlement class members, among other things, of: (i) the amount of the settlement; (ii) the reasons why the parties are proposing the settlement; (iii) the maximum amount of attorneys' fees and expenses that will be sought; (iv) the identity and contact information for representatives of lead counsel available to answer questions

concerning the settlement; (v) the right of settlement class members to object to the settlement; (vi) the right to request exclusion from the settlement class; (vii) the binding effect of a judgment on settlement class members; (viii) the dates and deadlines for certain settlement-related events; and (ix) the way to obtain additional information about the action and the settlement by contacting lead counsel and the settlement administrator. See Federal Rule of Civil Procedure 23(c)(2)(B).

I find that these efforts fairly and adequately advised class members of the terms of the settlement, as well as the right of Rule 23 class members to opt out of, or to object to the settlement, and to appear at the final fairness hearing today. I find that the notice and its distribution comported with all constitutional requirements, including those of due process.

VI. Attorneys' Fees, Costs and Expenses:

Lead counsel requests attorneys' fees in the amount of what the Court calculates to be $6,166,666.67 plus interest earned at the same rate as the settlement fund. This amounts to one-third of the settlement fund, or 33.3 percent of the settlement fund. Lead counsel also seeks reimbursement of: (i) $1,203,502.39 in litigation expenses in total, with Robbins Geller Rudman & Dowd LLP ("Robbins Geller") seeking $1,170,981.31, Glancy Prongay & Murray seeking $28,740.22, and

Murray Frank LLP seeking $3,780.86; and (ii) to approve the award to the lead plaintiffs, or class plaintiffs, of "20,000 in the aggregate pursuant to 15, U.S.C., Section 77Z-1(a)(4) in connection with their representation of the class." Niehaus declaration paragraph 17.

Now, the trend in the Second Circuit is to use the percentage of the fund method to compensate attorneys in common fund cases, although the Court has discretion to award attorneys' fees based on the lodestar method or the percentage of recovery method. See Fresno County Employees' Ret. Association v. Isaacson/Weaver Family Trust, 925 F.3d 63, 68 (2d Cir. 2019).

The notice provided to class members advised that class counsel would apply for attorneys' fees for up to 33.3 percent of the settlement fund, in addition to litigation costs not to exceed 1.3 million. See Gilardi declaration Exhibit A Notice at 2. No class member objected to the request.

A. Goldberger Factors:

Reasonableness is the touchstone when determining whether to award attorneys' fees. In Goldberger v. Integrated Resources, Inc., 209 F.3d 43 (2d Cir. 2000), the Second Circuit set forth the following six factors to determine the reasonableness of a fee application: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the

litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. Id at 50.

1. Class Counsel's Time and Labor:

Plaintiffs' counsel have expended more than 26,000 hours of attorney time in total over the course of this action, the vast majority of which was time expended by of counsel at Robbins Geller. Declaration of Eric Niehaus in support of lead counsel's motion for an award of attorneys' fees ("Niehaus fee declaration"), Docket No. 311 paragraph 5. Niehaus declaration paragraph 135.

2. Magnitude and Complexity of the Litigation:

The size and difficulty of the issues in a case are significant factors to be considered in making a fee award. In re Prudential Sec, Inc. Ltd. Partnership Litig., 912 F. Supp. 97, 100 (S.D.N.Y. 1996). "In evaluating the settlement of a securities class action, federal courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain." In re Flag Telecom Holdings Ltd. Sec. Litig., 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (quotation omitted). This case is one of substantial magnitude. In addition to all of the complications that are attendant to any large securities class action, this matter involved events that happened over ten years ago, extensive discovery, and litigation. The amount sought by plaintiffs'

counsel is commensurate with the magnitude and complexity of this litigation.

3. The Risk of Litigation:

As discussed, lead counsel faced significant risk in prosecuting this action and proving the merits of the claims. All of the fact-finding has concluded. Given the complexity of the case, the risk at summary judgment and trial is significant. Defendants adamantly denied any wrongdoing, and, in the event that litigation had continued, would have continued to aggressively litigate their defenses through summary judgment, Daubert motions, trial, and any appeals.

4. Quality of Representation:

Lead counsel has considerable expertise in securities litigation. See Robbins Geller resume, Niehaus fee declaration, Exhibit G; see also declaration of Brian P. Murray filed on behalf of Glancy Prongay & Murray LLP in support of application for award of attorneys' fees and expenses ("Murphy fee declaration"). Robbins Geller attorneys are currently "lead or [are] named counsel in hundreds of securities class action or large institutional-investor cases" and are "responsible for the largest securities class action in history." Niehaus fee declaration, Exhibit G. RiskMetrics Group has recognized Glancy Prongay & Murray as one of the top plaintiffs' law firms in the United States in its securities class action services report for every year since the inception

of the report in 2003. See Murphy fee declaration, Exhibit I.

The high quality of defense counsel opposing plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the settlement. Cahill Gordon & Reindel and Skadden Arps Slate Meagher & Flom are two prominent defense firms, and "the ability of plaintiffs' counsel to obtain a favorable settlement for the class in the face of such formidable opposition confirms the quality of their representation of the class." In re Marsh ERISA Litig., 265 F.R.D. 128, 148 (S.D.N.Y. 2010).

Accordingly, the Court finds that this Goldberger factor weighs in favor of the requested fee award.

5. The Requested Fee in Relation to the Settlement:

Generally, courts consider the size of a settlement to ensure that the percentage awarded does not constitute a windfall. In this case, the requested fee is 33.3 of the settlement, within the range of reasonableness, in light of other class action settlements in this circuit. See Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar, 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009)("Class counsel's request for 33 percent of the settlement fund is typical in class action settlements in the Second Circuit.").

6. Public Policy Considerations:

When determining whether a fee award is reasonable, courts consider the social and economic value of the class

action "and the need to encourage experienced and able counsel to undertake such litigation." In re Sumitomo Copper Litig., 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999). "Courts have, as a generic matter, frequently observed that the public policy of vigorously enforcing the federal securities laws must be considered in calculating an award." In re BioScrip, Inc. Sec. Litig., 273 F.Supp. 3d 474, 502 (S.D.N.Y. 2017)(quotation omitted) affirmed sub nom. Fresno County Employees Retirement Association v. Isaacson/Weaver Family Trust, 925 F.3d 63 (2d Cir. 2019).

Vigorous, private enforcement of the federal securities laws can only occur if private investors can obtain some parity in representation with that available to large corporate defendants. Accordingly, public policy favors granting lead plaintiffs' fee request.

After considering all of the Goldberger factors, the requested fee award appears to be reasonable.

B. Lodestar "Cross Check":

In Goldberger, the Second Circuit "encouraged the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage." Goldberger, 209 F.3d at 50. "Of course, where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." Id.

As of April 17, 2020, plaintiffs' counsel have

expended over 26,000 hours in total in this case, resulting in a total lodestar of $16,069,646. Niehaus fee declaration paragraph 4, Exhibit A; Murphy fee declaration, Exhibit A. Robbins Geller expended 17,356.85 hours with a lodestar of $12,021,477, Glancy Prongay & Murray LLP expended 8,097.8 hours with a lodestar of $3,639,826.50, the Frank Murray LLP expended 562.2 hours with a lodestar of $355,902.50. Id. Plaintiffs' counsel submitted declarations and time reports in support of their motion for attorneys' fees. Id. Counsel submitted a summary time records detailing the billable rate and hours worked by each attorney and professional support staff in this case. I find that these billable rates based on the timekeeper's title, specific years of experience, and market rates for similar professionals in their fields nationwide and in New York, where Robbins Geller LLP is based, to be reasonable in this context.

Based on plaintiffs' counsel's requested fee - one-third of the settlement, or by the Court's calculation, $6,166,666.67 - the lodestar yields a negative "cross-check" multiplier of about 0.38; therefore, the fee is well below the typically awarded multipliers in this circuit. "Courts regularly award lodestar multipliers from 2 to 6 times lodestar in this circuit." Fleisher v. Phoenix Life Insurance Company, 2015 WL 10847814, at *18 (S.D.N.Y. Sept. 9, 2020)(quotation omitted)(collecting cases). Thus, the lodestar

"cross-check" confirmation that plaintiffs' counsel requested fee is reasonable.

The Court therefore finds that, based on the Goldberger factors and the lodestar "cross-check," that plaintiffs' counsel's requested fees are reasonable.

C. Litigation Expenses:

Plaintiffs' counsel requests $1,203,502.39 total in litigation expenses, including filing fees, process service, mailing expenses, document management and hosting services, investigative and expert witnesses, legal research, travel and mediation. See Niehaus fee declaration paragraph 5, Exhibit B. Robbins Geller seeks $1,170,981.31, Glancy Prongay & Murray seeks $28,740.22, and Murray Frank LLP seeks $3,780.86. The largest component of plaintiffs' counsel's expenses was the cost of experts and consultants, amounting to $750,458, or approximately 62 percent of total expenses. Niehaus fee declaration paragraph 6. The next largest components of plaintiffs' counsel's expenses were for transportation, hotels, and meals ($227,852.66), court transcripts and deposition materials ($68,030.54), and mediation ($27,210). See Niehaus fee declaration, Exhibit B. The notice disclosed that lead counsel would seek up to $1,300,000 in litigation expenses. No objection to these expenses was received.

"It is well-established that counsel who create a common fund are entitled to the reimbursement of expenses that

they advance to a class." In re Giant Interactive Group, Inc., 279 F.R.D. 151, 165 (S.D.N.Y. 2011); see also In re Indep. Energy Holdings, 302 F.Supp. 2d 180, 183 Note 3 (S.D.N.Y. 2003). "Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients as long as they were 'incidental and necessary to the representation of those clients.'" (quotation omitted). The expenses for which lead counsel seeks payment are the type of expenses that courts typically approve. See In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 468 (S.D.N.Y. 2004). Therefore, the Court finds that the requested litigation expenses are reasonable and necessary to the representation of the class and are appropriately reimbursed to class counsel.

D. Lead Plaintiffs' Expenses:

Lead plaintiffs seek an award of $20,000 for both of them in recognition of the time and expense that they incurred on behalf of the class. Motion in support, Docket No. 307, at 31; see also Niehaus declaration paragraph 17. 15, U.S.C., Section 77Z-1(a)(4) allows "the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class."

As set forth in their declaration, lead plaintiffs dedicated a significant amount of time to the successful

prosecution of this action, including by reviewing pleadings and motions, discussing strengths and risks of the case, and consulting with lead counsel regarding settlement. Kaess and Farrugio declaration paragraphs 2 through 12. These are the kinds of activities which regularly are found to support awards to class representatives.

As set forth in their declaration, lead plaintiffs assert that the value of their time and resources invested in this case is substantially in excess of the $20,000 award that they seek here. Id. And the application here is consistent with the notice, which disclosed that "Class plaintiffs may seek an award pursuant to 15, U.S.C., Section 77z-1(a)(4) in connection with their representation of the class in an amount not to exceed $20,000 in the aggregate." Murphy fee declaration, Exhibit A notice.

Thus, I find that the requested award of $20,000 to lead plaintiffs is reasonable.

VII. Conclusion:

In conclusion, I approve the class action settlement for $18,500,000 and approve the plan for allocating the net proceeds of the settlement. I also award plaintiffs' counsel attorneys' fees in the amount of what the Court calculates to be $6,166,666.67, plus interest earned at the same rate as the settlement fund. This amounts to one-third of the settlement fund, or 33.3 percent of the settlement fund. I am also

awarding $1,203,502.39 in litigation expenses to be divided as outlined by lead counsel. Finally, I award lead plaintiffs $20,000 in the aggregate for time and expenses incurred while representing the class.

So, counsel, thank you very much for your patience as I got through the reasoning for my decision to approve the settlement here.

I received the proposed orders and judgment, and I expect to act on those promptly after today's conference.

Is there anything else that we should take up now, before we adjourn?

First, counsel for plaintiffs?

MR. PINTAR: Not for plaintiffs, your Honor. Again, Ted Pintar. Thank you very much.

THE COURT: Thank you.

Counsel for the Deutsche Bank defendants?

MR. JANUSZEWSKI: Your Honor, David Januszewski.

Nothing else from us.

THE COURT: Good. Thank you.

Counsel for the underwriter defendants?

MR. O'BRIEN: Yes. William O'Brien, from Skadden Arps Slate Meagher & Flom LLP.

Nothing further from us as well.

THE COURT: Good. Thank you, all.

COUNSEL: Thank you. * * *