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8 **UNITED STATES DISTRICT COURT**

9 **NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION**

10 GORDON NOBORU YAMAGATA and  
11 STAMATIS F. PELARDIS, individually and  
12 on behalf of all others similarly situated,

12 Plaintiffs,

13 v.

14 RECKITT BENCKISER LLC,

15 Defendant.

Case No. 3:17-cv-03529-VC

**PLAINTIFFS' NOTICE OF JOINT  
MOTION AND MOTION FOR  
PRELIMINARY APPROVAL**

**CLASS ACTION**

Hrg Date: June 24, 2021

Time: 2:00 p.m.

District Judge Vince Chhabria  
Courtroom 4, 17th Floor

Complaint Filed: June 19, 2017

**JURY TRIAL DEMANDED**

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**NOTICE OF MOTION AND MOTION**

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PLEASE TAKE NOTICE that on June 24, 2021, at 2:00 p.m., in Courtroom 4, 17th Floor, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Vince Chhabria, and pursuant to Federal Rule of Civil Procedure 23(e), Plaintiffs, individually and on behalf of the proposed Settlement Class, and Defendant Reckitt Benckiser LLC will and hereby do jointly move for preliminary approval of class action Settlement Agreement, conditional certification of Settlement Class, and approval of Class Notice.

Plaintiffs respectfully move this Honorable Court for entry of an Order: (1) granting preliminary approval of the Settlement; (2) approving and directing notice as set forth in the Class Notice Program attached as Exhibit 4 to the Settlement Agreement; (3) conditionally certifying the Settlement Class for Settlement purposes; (4) approving the form and content of the forms of Class Notice attached as Exhibits 5-9 to the Settlement Agreement; (5) appointing Plaintiffs Gordon Noboru Yamagata, Stamatis F. Pelardis, Maureen Carrigan, Lori Coletti, Ann-Marie Maher, Carol Marshall, Deborah A. Rawls, Oneita Steele, and Maxine Tishman as Class Representatives; (6) appointing Timothy G. Blood and Thomas J. O'Reardon II of Blood Hurst & O'Reardon, LLP as Class Counsel; (7) appointing Epiq Class Action and Claims Solutions as Settlement Administrator; and (8) scheduling a Final Approval Hearing to consider entry of a final order approving the Settlement, final certification of the Settlement Class for settlement purposes only, and the request for attorneys' fees, costs, and expenses, and Plaintiffs' service awards.

This joint motion is based upon this notice of motion, Plaintiffs' memorandum in support of the motion for preliminary approval and certification of the Settlement Class, the declarations of Timothy G. Blood, Brenda A. Frederick, and Cameron R. Azari, the previously filed motion for preliminary approval and accompanying documents (ECF Nos. 203, 203-1, 203-2, 203-3, 203-4, and 208), and all supporting exhibits, the complete file and record in this action, and such oral argument as the Court may consider in deciding this motion.

Dated: May 12, 2021

BLOOD HURST & O'REARDON, LLP  
TIMOTHY G. BLOOD (149343)

By: s/ Timothy G. Blood  
TIMOTHY G. BLOOD

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**MEMORANDUM OF POINTS AND AUTHORITIES**

1  
2 Plaintiffs submit this memorandum in support of the Joint Motion for Preliminary Approval  
3 of Class Action Settlement. The Stipulation of Settlement (“Settlement” or “SA”) is attached as  
4 Exhibit A to the concurrently filed Declaration of Timothy G. Blood (“Blood Decl.”).

**I. INTRODUCTION**

5  
6 At the March 23, 2021 hearing on the Parties’ joint motion for preliminary approval, the  
7 Court requested additional information regarding the number of class members, information  
8 regarding the projected take rate, the potential recovery from a class trial, how the settlement  
9 compares to other settlements of similar cases, and the risks and benefits of proceeding to trial versus  
10 settlement. Additionally, the Court’s order on preliminary approval requested additional information  
11 about accounting for the deduction from the fund for class members that select products rather than  
12 cash. *See* ECF No. 211.

13 Following the March 23, 2021 hearing, the parties renegotiated part of the proposed  
14 settlement to eliminate the option for Class Members to choose products rather than cash, leaving  
15 cash refunds for claimants. While the settlement continues to consist of a \$50 million common fund,  
16 all claimants will receive a cash payment. As before, the cash payment will be for the full amount  
17 of the average retail price of the product at issue, Schiff Move Free Advanced. Claimants still may  
18 receive reimbursement of \$22 per purchase for up to three purchases without proof of purchase, and  
19 reimbursement for more than three purchases with proof of purchase.

20 Additional data obtained from retailers in preparation for the notice plan confirms the  
21 settlement fund—which is the largest amount obtained in this type of case—should be sufficient to  
22 pay claimants. The average number of Move Free Advance purchases is about 2.6 units per Class  
23 Member. The total number of units sold during the Class Period is about 16,050,065. Under the  
24 proposed notice program, about 76% of Class Members will receive direct notice mostly through  
25 email, with some receiving notice by mail. The remainder of the Class will receive notice through  
26 publication. The Claims Administrator estimates the aggregate amount claimed will range from  
27 \$18,601,610 to \$23,796,592. Meanwhile, the amount of the fund available for Class Member  
28

1 reimbursements, assuming the Court awards the requested award of attorney’s fees, reimbursement  
2 of expenses and claims administration costs is about \$35,608,628.

## 3 **II. PROCEDURAL HISTORY AND THE AMENDED SETTLEMENT AGREEMENT**

4 The previous motion for preliminary approval described in detail the lengthy procedural  
5 history of this matter, and the minutiae of the Settlement Agreement. *See* ECF No. 203. Rather than  
6 repeat those details here, they are incorporated by this reference, stated in the concurrently filed  
7 Declaration of Timothy G. Blood (“Blood Decl.”), and summarized below.

### 8 **A. Summary of the Procedural History**

9 In this action Plaintiffs allege Defendant falsely advertised its glucosamine joint health  
10 dietary supplement “Move Free Advanced” (“MFA”)<sup>1</sup> by claiming it provides joint health benefits  
11 that it does not provide. The litigation has lasted nearly four years, involved discovery motions,  
12 class certification in two courts, summary judgment, 30 depositions, over 20 third party subpoenas,  
13 more than 303,000 pages of documents (exceeding 116 GB), reports and declarations from 14  
14 designated experts, and many days of mediations with three different neutrals at various stages  
15 throughout the action. *See* ECF No. 203 at 1-2; Blood Decl., ¶¶ 4-37. The settlement was reached  
16 only after this significant history, while the Parties were preparing for trial, and just weeks away  
17 from the final pretrial conference.

### 18 **B. The Updated Settlement Agreement**

19 Under the Settlement, Defendant will create a \$50 million non-reversionary Common Fund  
20 to compensate Class Members and pay for Class Notice, any award of attorneys’ fees and expenses,  
21 and Class Representative service awards.

#### 22 **1. Class Members Receive Full Cash Refunds**

23 Class Members will receive \$22 cash for each unit of MFA they purchased. SA, § IV.3. This  
24 amount is about the average retail price paid by Class Members. Class Members may claim  
25 reimbursement for up to 3 purchases without proof of purchase, for a total of \$66. Three purchases  
26

27 <sup>1</sup> “Move Free Advanced” or “MFA” refers to the glucosamine supplement products marketed  
28 and distributed by Reckitt Benckiser called Move Free Advanced, Move Free Advanced Plus MSM,  
and Move Free Advanced Plus MSM & Vitamin D.



1 are slightly more than the average number of purchases made by Class Members, which is 2.6.  
2 Blood Decl., ¶ 44,. Those with proof of purchase may claim as many refunds as they have proof of  
3 purchase.

4 To be eligible for reimbursement, Class Members need only complete and timely submit  
5 online or by mail a simple Claim Form. SA, § V, Ex. 10 (Claim Form). The Claim Form has just  
6 two questions: (1) how many bottles of MFA were purchased? and (2) do you want to receive a  
7 check or digital payment? *Id.*

8 No portion of the Common Fund will revert to Defendant. Any funds remaining after  
9 calculating valid claims will be distributed to Claimants by increasing the amount of their valid cash  
10 or product claims up to three times the original claim amount. SA, § IV.4.b. In the event such  
11 increased amount would exceed three times the original claim amount, a second round of class  
12 notice and an additional claim-in opportunity will occur. *Id.*, § IV.4.c. If money remains after this  
13 Supplemental Claim Deadline, the valid claims will again be calculated and increased pro rata until  
14 the Net Fund is exhausted. *Id.* If there is not enough money to cover all claims, cash claims will be  
15 reduced *pro rata*. *Id.*, § IV.4.a.

16 Given the large size of the cash awards, the combined Direct Notice and Publication Notice  
17 process, the second Direct Notice and Supplemental Claim process, and three-time upward  
18 adjustment provision, the Parties anticipate there will be only a de minimis amount of funds  
19 remaining because of occurrences like uncashed checks. The Parties propose that any remaining  
20 money be distributed to the Orthopaedic Research Society in accordance with the *cy pres* doctrine.  
21 *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011) (*cy pres* recipient should be related to the  
22 nature of the lawsuit and the class members, including their location); *Six (6) Mexican Workers v.*  
23 *Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990). The Orthopaedic Research Society is an  
24 appropriate *cy pres* recipient in this action. It the most prestigious musculoskeletal research society  
25 with top researchers and clinicians from around the U.S. and abroad. The Orthopaedic Research  
26 Society will ear-mark any *cy pres* award to its OA education and research-related efforts. *See* ECF  
27 No. 203-3 (Declaration of Brenda Frederick Re: Orthopaedic Research Society).

28

1                   **2. Notice and Administration Costs, Attorneys' Fees and Expenses, and**  
 2                   **Class Representative Service Awards**

3                   The cost of class notice and settlement administration, attorneys' fees and expenses, and the  
 4 Class Representative service awards will be paid from the Common Fund. SA, § II.16. Defendant  
 5 agrees to not oppose Plaintiffs' Counsel's application for attorneys' fees of up to 25% of the  
 6 Common Fund (\$12,500,000) plus reimbursement of litigation expenses. SA, §§ IX.A-B. Defendant  
 7 also agrees not to oppose a request for Court-awarded service awards of \$7,500 to Plaintiffs  
 8 Yamagata, Pelardis, and Carrigan, and \$500 to Plaintiffs Coletti, Maher, Marshall, Rawls, Steele,  
 9 and Tishman. SA, § IX.D.

10                   **3. The Class Notice Plan**

11                   The structure of the proposed Class Notice Plan is unchanged. The Settlement Class will be  
 12 notified through a combination of email notice, directly mailed postcards, targeted internet  
 13 publication strategies, a settlement website, and live operator telephone hotline. SA, §§ IV.B-C.  
 14 Epiq Class Action and Claims Solutions ("Epiq" or the "Settlement Administrator"), a firm  
 15 specializing in class action notice plans, has assisted in designing the Class Notice Plan and will see  
 16 to its implementation. *See* Declaration of Cameron R. Azari, Esq. re Class Notice Program ("Azari  
 17 Decl.").

18                   Most Class Members will directly receive class notice by email or postcard, with most by  
 19 email. *See* SA, Exs. 6 (Email Notice), 7 (Amazon Email Notice), and 8 (Postcard Notice). In  
 20 response to the Court's questions about the direct notice provided by Amazon, the Parties and  
 21 Amazon's counsel met and conferred and ultimately reached agreement on the updated language in  
 22 the revised proposed Amazon Email Notice. Blood Decl., ¶ 61. The Amazon Email Notice now  
 23 contains the same elements as the Email Notice being sent to the other Class Members. *See* Exs. 6-  
 24 7. Like the Email Notice, the Amazon Email Notice uses language and incorporates the substantive  
 25 elements from the Federal Judicial Center's model summary notice.<sup>2</sup> As a result of subpoenas to the  
 26

27                   <sup>2</sup> *See* <https://www.fjc.gov/sites/default/files/2016/ClaAct06.pdf>; *see also* Standing Order for  
 28 Civil Cases Before Judge Vince Chhabria at 14 ("The parties should consider using the Federal  
 Judicial Center's model notices").

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1 largest retailers of MFA, Class Counsel obtained contact information to send direct class notice to  
2 approximately 4.7 million Class Members. All the Subpoenaed Retailers, including two previous  
3 holdouts CVS and BJ's Wholesale, have provided all their Class Member contact information.

4 In addition to the direct notice efforts, class notice will be disseminated through a multi-  
5 faceted online publication campaign. Through this targeted digital media campaign, the Internet  
6 Banner Advertisements (Ex. 9) will be widely disseminated and include hyperlinks that take readers  
7 directly to the Settlement Website. The online campaign will utilize multiple targeting layers, which  
8 include both geographic targeting and category contextual targeting based on how MFA was  
9 actually marketed to help ensure delivery to the most appropriate digital users. Azari Decl., ¶¶ 37-  
10 47. The Internet Banner Advertisements will strategically appear on relevant websites, social media  
11 platforms, and as a result of organic searches that include relevant Internet AdWords. The  
12 Settlement will also be publicized by an English and Spanish informational release to approximately  
13 16,500 media outlets across the United States. *Id.*, ¶ 46.

14 The Settlement Administrator will also create a Settlement Website  
15 ([www.MoveFreeAdvancedSettlement.com](http://www.MoveFreeAdvancedSettlement.com)) to provide potential Class Members with information  
16 about the Settlement, a general description of the lawsuit, the Settlement relief, important dates and  
17 deadlines, and Class Members' legal rights. The Settlement Website will be in English and Spanish,  
18 contain updates on the status of the Settlement, and post relevant pleadings and Settlement-related  
19 documents, including the Settlement Agreement and its exhibits, the Long-form Notice (which will  
20 be available in English and Spanish), this memorandum, and, when filed, the Preliminary Approval  
21 Order, final approval motion, motion for an award of attorneys' fees and reimbursement of costs  
22 and expenses, the operative complaint, and the Final Judgment and Order Approving Settlement.  
23 SA, § VI.B.5; Azari Decl., ¶ 48.

24 A toll-free telephone hotline with a live operator will be available. Notice to public officials  
25 required by the Class Action Fairness Act ("CAFA") will be sent in accordance with the provisions  
26 of that Act. *See* SA, § VI.B.6.

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1 **III. THE SETTLEMENT ADDRESSES THE COURT’S PREVIOUS ISSUES AND**  
2 **OBSERVATIONS**

3 The Court raised several issues and observations during the previous preliminary approval  
4 hearing. Following the hearing, the Parties held numerous negotiations which led to the revised  
5 Settlement Agreement submitted with this motion. The revised Settlement Agreement and Class  
6 Notice Plan, as explained below, address each of the Court’s questions. The Settlement should be  
7 preliminarily approved as fair, reasonable and adequate. *See Cotter v. Lyft, Inc.*, 193 F. Supp. 3d  
8 1030, 1037 (N.D. Cal. 2016).

9 **A. The Settlement Has a \$50 Million Fund, But No Longer Includes the Product**  
10 **Option**

11 In response to the Court’s questions regarding the optional free product option, the Parties  
12 eliminated it from the updated Settlement.

13 The Settlement now provides an all-cash \$50 million non-reversionary Common Fund from  
14 which Class Members are entitled to receive \$22 cash per purchase of the Move Free Advanced  
15 products at issue. The option for a claimant to choose various products instead of cash has been  
16 removed. A comparison of the previous and revised settlement is attached to the concurrently filed  
17 Blood Declaration as Exhibit B. Class Members may receive cash awards for up to three units  
18 purchased without submitting any proof of purchase. There is no limit on the number of purchases  
19 claimed for those Class Members that have proof of purchase. If the payout does not exhaust the  
20 fund, the cash awards will be increased pro rata up to three times the claimed amounts. If this first  
21 pro rata increase does not exhaust the fund, then the claim period will be extended for all Class  
22 Members by sixty days and Class Notice will be provided again to those Class Members who did  
23 not originally submit a Claim. If, following the supplemental claims period and supplemental notice,  
24 the amount of the fund still exceeds the aggregate amount of valid claims, the amounts paid on all  
25 valid claims will be further increased pro rata up until the fund is exhausted. Any money remaining  
26 in the fund after distribution (*e.g.*, uncashed checks) will be distributed to the Orthopaedic Research  
27 Society, the proposed *cy pres* recipient. *See* Declaration of Brenda A. Frederick (ECF No. 203-3).

28

1           **B.       The Estimated Number of Class Members**

2           Class Counsel obtained Nielsen retail sales data from Defendant, wholesale shipment data  
3 from Defendant, and retail sales data subpoenaed from the eight largest retailers of Move Free  
4 Advanced (Amazon, Walgreens, Walmart, Sam's, Costco, Rite Aid, CVS, and BJ's Wholesale) to  
5 determine nationwide retail sales, the number of units sold, the estimated number of Class Members,  
6 the average retail price, and the average number of units purchased per Class Member. Based on  
7 this data, the estimated total nationwide units sold is 16,050,065 with retail sales of \$358,879,453.  
8 Blood Decl., ¶ 75. The average retail price per unit (retail sales divided by units sold) is \$22.36. *Id.*,  
9 ¶ 43. The average number of units purchased by each Class Member is calculated to be 2.6. *Id.*,  
10 ¶¶ 44, 72. Thus, the estimated number of Class Members is 6,173,102. A summary is provided  
11 below:

Nationwide Retail Sales	\$358,879,453
Average Retail Price	\$22.36
Total Number of Units Sold	16,050,065
Average Number of Units Purchased Per Class Member	2.6
Number of Class Members	6,173,102

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17           **C.       Direct Notice to the Settlement Class**

18           Approximately 4.67 million Class Members, representing an estimated 76% of the  
19 Settlement Class, will receive notice directly either through email or mail.

20           The proposed Class Notice Plan has not changed, but additional information recently  
21 obtained from the top retail sellers provides additional detail about the number of Class Members  
22 who can be sent notice directly. Class Counsel has now successfully obtained Class Member contact  
23 information from the eight largest retailers of Move Free Advanced.<sup>3</sup> Collectively, these retailers  
24 sold over 90% of Move Free Advanced to the Settlement Class. Blood Decl., ¶ 59. Some of the  
25

26 \_\_\_\_\_  
27 <sup>3</sup> As previously discussed, in lieu of producing the customer contact information, Amazon  
28 proposes sending email notice to its customers who purchased Move Free Advanced at its own  
expense. Amazon has substantial experience providing class notice in this type of situation. It has  
agreed to provide a declaration attesting to its efforts. *See* Blood Decl., ¶ 61.

1 Subpoenaed Retailers only possessed mailing addresses and not email addresses for certain  
 2 customers. Directly mailed class notice is substantially more expensive than directly emailed class  
 3 notice. Azari Decl., ¶ 20. Therefore, to maximize the Settlement dollars available for Class Members  
 4 while still achieving the best practicable notice, the names and mailing addresses that were produced  
 5 have been “reverse appended” to yield reliable email addresses in those instances where they were  
 6 not provided by the Subpoenaed Retailers. *Id.*, ¶ 20. As a result of these various efforts, 3.77 million  
 7 Class Members will be directly emailed the class notice and 903,400 Class Members will be directly  
 8 mailed the class notice. *Id.*, ¶¶ 20-21, 30, 32. This represents an estimated 76% of the Settlement  
 9 Class. This amount of direct notice is rare in a consumer product case not involving direct-to-  
 10 consumer sales by the defendant.<sup>4</sup> This Class Notice Plan is more fully described in the  
 11 accompanying Declaration of Cameron R. Azari.

12 **D. The Estimated Claims Rate**

13 Lastly, the Court inquired about estimated claims rates and the size of the likely awards to  
 14 the Class Members making claims. Claims rates for consumer class action settlements rates “rarely  
 15 exceed seven percent, even with the most extensive notice campaigns.” *Sullivan v. DB Invs., Inc.*,  
 16 667 F.3d 273, 329 n.60 (3d Cir. 2011); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472,  
 17 480 (1980) (“Their right to share the harvest of the lawsuit upon proof of their identity, whether or  
 18 not they exercise it, is a benefit in the fund created by the efforts of the class representatives and  
 19 their counsel.”). “The prevailing rule of thumb with respect to consumer class actions is a claims  
 20 rate of 3-5 percent.” *Forcellati v. Hyland’s, Inc.*, No. CV 12-1983, 2014 U.S. Dist. LEXIS 50600,  
 21 at \*17 (C.D. Cal. Apr. 9, 2014) (quoting *Ferrington v. McAfee, Inc.*, No. 10-CV-01455, 2012 U.S.  
 22 Dist. LEXIS 49160, at \*13 (N.D. Cal. Apr. 6, 2012)); *see also Keil v. Lopez*, 862 F.3d 685, 697 (8th  
 23 Cir. 2017) (noting “a claim rate as low as 3 percent is hardly unusual in consumer class actions and  
 24 does not suggest unfairness”); *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588, 599 (N.D.

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 26 \_\_\_\_\_  
 27 <sup>4</sup> Here, Defendant maintains a retail website to sell Move Free Advanced. However, the sales  
 28 through that website were less than 0.5% of the total Move Free Advanced sales. Defendant  
 provided the contact information for these Class Members and they will be directly sent the class  
 notice.

1 Cal. 2020) (approving settlement with a 0.83% claims rate); *Moore v. Verizon Commc'ns, Inc.*, No.  
 2 C 09-1823, 2013 U.S. Dist. LEXIS 122901, at \*30 (N.D. Cal. Aug. 28, 2013) (approving settlement  
 3 with a 3% claim rate); *Munday v. Navy Fed. Credit Union*, No. SACV 15-1629, 2016 U.S. Dist.  
 4 LEXIS 193973, at \*23 (C.D. Cal. Sept. 15, 2016) (assuming a 5% claim rate); *Tait v. BSH Home*  
 5 *Appliances Corp.*, No. SACV 10-0711, 2015 U.S. Dist. LEXIS 98546, at \*25 (C.D. Cal. July 27,  
 6 2015) (noting “a claims rate somewhat above 3% was likely a realistic possibility”).

7 Given the combination of notice methods, the number of Class Members being directly  
 8 noticed, and the Settlement award amounts available to these Class Members, the Settlement  
 9 Administrator estimates that the aggregate amount claimed will range from \$18,601,610 to  
 10 \$23,796,592. This calculation is based on an estimated take rate ranging from 5.4% to 7%. For Class  
 11 Members receiving direct notice, which is approximately 76% of the Settlement Class, the take rate  
 12 will range from 7% to 9%. Based on the Settlement Administrator’s experience in similar class  
 13 actions it is estimated that 10% of claimants will submit a claim for one unit, 30% of claimants will  
 14 claim two units, and 60% of claimants will claim three units. Azari Decl., ¶ 50.

#### 15 **IV. THE SETTLEMENT MERITS APPROVAL**

##### 16 **A. The Settlement Represents a Reasonable Settlement Compared to a Possible** 17 **Recovery at Trial**

18 This is a record-breaking settlement that eclipses settlements in other similar cases, reflecting  
 19 both the excellent settlement achieved and the difficulty in obtaining and keeping a large class action  
 20 judgment in federal court. While the Ninth Circuit has “never required courts ‘to estimate the range  
 21 of possible outcomes and ascribe a probability to each point on the range,’” a comparison to possible  
 22 trial outcomes is appropriate. *Gallucci v. Gonzales*, 603 Fed. Appx. 533, 535 (9th Cir. 2015)  
 23 (quoting *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)).

24 If a theoretical trial were held for all members of the proposed nationwide class, the amount  
 25 of full refunds would be about \$359 million, plus attorney’s fees and costs since many state false  
 26 advertising statutes contain fee shifting provisions.

27 New York’s consumer protection laws contain several potentially applicable additional  
 28 damage provisions. *See* New York General Business Law (“GBL”) §§ 349(h), 350-e. For treble

1 damages, GBL sections 349(h) and 350-e provide discretionary treble damages “if the court finds  
 2 that the defendant willfully or knowingly violated” the statute. The treble damages are capped at  
 3 \$1,000 for section 349 actions and \$10,000 in section 350-e actions. However, the statutes are  
 4 unclear whether the treble damages as well as the caps apply per case or per member of the class  
 5 member basis, and Plaintiffs are unaware of case law discussing the issue. At any rate, “courts do  
 6 not traditionally factor treble damages into the calculus for determining a reasonable settlement  
 7 value.” *Rodriguez*, 563 F.3d at 964; *see also Carnegie v. Household Int’l, Inc.*, 445 F. Supp. 2d  
 8 1032, 1035 (N.D. Ill. 2006) (“[N]umerous courts have held that in determining a settlement value,  
 9 the potential for treble damages should not be taken into account.”) (collecting cases).

10 For statutory damages, GBL section 349(h) provides “any person who has been injured by  
 11 reason of any violation of this section may bring an action . . . to recover his actual damages or fifty  
 12 dollars, whichever is greater[.]” Here, the average purchase price is \$22.36 and the average number  
 13 of purchases per Class Member is 2.6, for an average recovery of \$58.14 per Class Member, making  
 14 the average statutory damage amount greater than \$50. *See Belfiore v. P&G*, 311 F.R.D. 29, 70  
 15 (E.D.N.Y. 2015) (class members are entitled to the \$50 statutory damages, but plaintiff’s damages  
 16 expert may be able to calculate an average price paid for the misrepresentation).

17 Similarly, GBL § 350-e provides “[a]ny person who has been injured by reason of any  
 18 violation of section three hundred fifty or three hundred fifty-a of this article may bring an action in  
 19 his or her own name to enjoin such unlawful act or practice, an action to recover his or her actual  
 20 damages or five hundred dollars, whichever is greater, or both such actions.” There are  
 21 approximately 633,760 New York class members, resulting in potential statutory damages of  
 22 \$316,880,000 for the New York class members. An argument advanced by defendants in these  
 23 cases, but which is unresolved, is whether this provision violates the Due Process Clause.<sup>5</sup>

24 \_\_\_\_\_  
 25 <sup>5</sup> In making the argument, defendants typically cite cases like *Larson v. Harman-Mgmt. Corp.*,  
 26 No. 1:16-cv-00219, 2019 U.S. Dist. LEXIS 219294, at \*19 (E.D. Cal. Dec. 18, 2019) (“courts have  
 27 found that such statutory damages, when aggregated for each purported [] violation, violate the Due  
 28 Process Clause.”); *see also Parker v. Time Warner Entm’t Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003)  
 (“[T]he aggregation in a class action of large numbers of statutory damages claims potentially  
 distorts the purpose of both statutory damages and class actions.”); *Golan v. FreeEats.com, Inc.*,  
 930 F.3d 950, 962-63 (8th Cir. 2019) (finding statutory damage award violated Due Process Clause);



1 The \$50 million all-cash Settlement here is the largest ever in a consumer product false  
 2 advertising case. Further, the percentage of potential recovery at trial that the Settlement provides  
 3 to the class is inline or greater than settlements approved in this Circuit and elsewhere. *In re Mego*  
 4 *Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (“It is well-settled law that a cash settlement  
 5 amounting to only a fraction of the potential recovery does not per se render the settlement  
 6 inadequate or unfair.”); *See also e.g., Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)  
 7 (5.6% recovery was fair, adequate, and reasonable); *In re Omnivision Techs.*, 559 F. Supp. 2d 1036,  
 8 1042 (N.D. Cal. 2007) (net settlement amount of 6% of potential recovery reasonable); *In re Wells*  
 9 *Fargo & Co. S’holder Derivative Litig.*, 445 F. Supp. 3d 508, 522 (N.D. Cal. 2020) (noting percent  
 10 of potential recovery for securities class action settlements were “2.5 percent between 2008 and  
 11 2016, and 3 percent in 2017”); *In re Checking Account*, 830 F. Supp. 2d 1330, 1346 (S.D. Fla. 2011)  
 12 (9% of total potential damages fair “even absent the risks associated with prosecuting these claims”);  
 13 *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988) (3-5% of potential recovery  
 14 reasonable: “A settlement can be satisfying even if it amounts to a hundredth or even a thousandth  
 15 of a single percent of the potential recovery.”); *Deaver v. Compass Bank*, No. 13-cv-00222, 2015  
 16 U.S. Dist. LEXIS 166484, at \*22 (N.D. Cal. Dec. 11, 2015) (10.7% “of the total potential liability  
 17 exposure, before any deductions for fees, costs, or incentive awards” was reasonable); *Balderas v.*  
 18 *Massage Envy Franchising, LLC*, No. 12-cv-06327, 2014 U.S. Dist. LEXIS 99966, at \*16 (N.D.  
 19 Cal. July 21, 2014) (net settlement amount of 5% of potential recovery reasonable); *Stovall-Gusman*  
 20 *v. W.W. Granger, Inc.*, No. 13-cv-02540, 2015 U.S. Dist. LEXIS 78671, at \*12 (N.D. Cal. June 17,  
 21 2015) (net settlement amount of 7.3% of estimated trial award reasonable); *Arnett v. Bank of Am.,*  
 22 *N.A.*, No. 3:11-cv-1372, 2014 U.S. Dist. LEXIS 130903, at \*19 (D. Or. Sep. 18, 2014) (“7.3%  
 23 recovery was fair, adequate, and reasonable”).

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 27 *Belfiore*, 311 F.R.D. at 73 (“Here, the statutory damages could be excessive and in violation of state  
 28 policy.”); *Mirkin v. Viridian Energy, Inc.*, No. 3:15-cv-1057, 2016 U.S. Dist. LEXIS 86616, at \*31  
 (D. Conn. July 5, 2016) (noting GBL §§ 349 and 350 “could transform statutory damages into  
 punitive ones in a manner that raises serious due process concerns”).

**B. The Settlement Compared to Similar Approved Settlements**

This Settlement far exceeds other class action settlements in this type of case. Even with class sales larger than sales presented here, settlements are typically below \$10 million. This includes a previous similar Move Free Advanced false advertising case that included far more sales but settled for \$6.51 million.

The earlier settled case, *Lerma v. Schiff Nutrition Int'l, Inc.*, No. 3:11-cv-1056 (S.D. Cal., final approval granted Nov. 3, 2015), included the same false advertising allegations as this one. However, the sales covered by *Lerma* were substantially larger. That nationwide settlement included all Move Free Advanced products sold from 2005 to 2015, plus 42 additional joint health products sold over the span of 10 years. *Lerma*, ECF No. 141-4. An estimated 50 million units were sold during the *Lerma* class period with an average retail price of \$20, representing about \$1 billion in retail sales. *Lerma*, ECF Nos. 108 at 4 and 153-1. The settlement consisted of a fund of \$6.51 million. *Lerma*, ECF No. 141-1 at 13. Class members could recover \$3 per unit purchased for up to 4 units purchased without proof of purchase and \$10 per unit for up to 5 purchases with proof of purchase. *Lerma*, ECF No. 141-1 at 14. The settlement fund provided 0.65% of the nationwide retail sales. Attorneys' fees amounted to 25% of the fund, and the estimated net settlement fund provided 0.49% of the nationwide retail sales. *See* 2016 U.S. Dist. LEXIS 25498, at \*6 (S.D. Cal. Mar. 1, 2016).

*Pearson v. NBTY, Inc.*, No. 1:11-cv-07972 (N.D. Ill, final approval granted July 14, 2016) also involved a number glucosamine supplements, including the category sales leader Osteo Bi-Flex. The *Pearson* settlement encompassed six putative class actions and covered the purchases of almost 100 different glucosamine products. *Pearson*, ECF No. 213-1 (Settlement Agreement) at 1; No. 213-2 (Exhibit A to Settlement Agreement). It released all retailers and entities in the chain of distribution of the challenged products. *Pearson*, ECF No. 213-1 at 9. The *Pearson* settlement created a \$7.5 million fund with 33% of the fund going toward attorneys' fees. *Id.* at 6; ECF No. 250 (Mtn. for Attorneys' Fees) at 9. After attorneys' fees, expenses and incentive awards, the net fund was \$3,495,000. *Pearson*, ECF No. 344 (Claims Administrator Decl.) at 6. The class consisted of approximately 12 million class members, with estimated total sales of \$240 million. *Pearson*, ECF

1 No. 113 at 6. Accordingly, the gross settlement fund provided 3.1% of the potential full refund  
2 recovery and 1.46% of the net fund.

3 Plaintiff in *Hazlin v. Botanical Laboratories, Inc.*, No. 3:13-cv-00618 (S.D. Cal., final  
4 approval granted May 20, 2015) also alleged false advertising of glucosamine supplements. The  
5 nationwide settlement fund was \$3.1 million with 30% going towards attorneys' fees and expenses.  
6 *Hazlin*, ECF No. 42-1 at 3, 8. Claimants could receive \$15-\$18 per purchase. *Id.* at 17. The retail  
7 sales during the class were approximately \$132 million. *Hazlin v. Botanical Labs., Inc.*, No.  
8 13cv0618, 2015 U.S. Dist. LEXIS 189687, at \*15 (S.D. Cal. May 20, 2015) (8 million units); *Hazlin*,  
9 ECF No. 42-1 at 17 (average price of \$16.50). The gross settlement amount represented 2.3% of the  
10 total retail sales. Net of attorneys' fees and expenses, the settlement amount represented 1.6% of  
11 sales.

12 In *Gallucci v. Boiron, Inc.* the court approved a nationwide class settlement covering 200  
13 homeopathic products sold over a 12-year period. No. 11cv2039, 2012 U.S. Dist. LEXIS 157039,  
14 at \*2, 7 (S.D. Cal. Oct. 31, 2012). Like here, the plaintiffs claimed the products were falsely  
15 advertised because the scientific research demonstrated that the claims were misleading. The  
16 settlement provided \$5 million and payments of \$10 per units purchased, capped at 10 units with  
17 proof of purchase and capped at 5 units without proof of purchase if sworn under penalty of perjury.  
18 *Id.* at \*16. Retail sales of the products at issue totaled \$65,575,194 for January 1, 2007 to September  
19 30, 2011 (approximately 40% of the class period), or roughly \$115 million for the entire class period.  
20 *Gallucci*, ECF No. 106-6 at 2-3. Thus, the gross settlement fund amounted to a 4.3% recovery of  
21 the potential full refund award at a trial. Attorneys' fees of \$1.25 million were provided from the  
22 fund, and so resulted in a 3.3% recovery of potential damages for the net settlement fund. *See* 2012  
23 U.S. Dist. LEXIS 157039, at \*25.

24 In *re Cobra Sexual Energy Sales Practices Litigation*, No. 2:13-cv-05942 (C.D. Cal.)  
25 (preliminarily approved on Nov. 9, 2020) was a seven-year litigation involving a men's virility  
26 supplement. It settled for a common fund totaling \$100,000. ECF No. 295 at 7. Class members  
27 received \$9.61 on average. ECF No. 298 at 1. The fund paid out 10,401 claims of \$9.61 for a total  
28 of \$99,954. *Id.* Attorneys were awarded \$490,000 in fees. ECF No. 296 at 1.

1 A \$23.25 million settlement fund was created in *Wilson v. Airborne, Inc.*, No. EDCV 07-  
 2 770 (C.D. Cal). *See* 2008 U.S. Dist. LEXIS 110411, at \*10 (C.D. Cal. Aug. 13, 2008) (final approval  
 3 order). The case involved the false and misleading advertising of the dietary supplement Airborne.  
 4 Class members could submit claims for up to six packages, with reimbursements ranging from \$2.75  
 5 to \$10.50 per purchase. *Wilson*, ECF No. 146 (Final Approval Motion). 282,717 valid claims were  
 6 made totaling \$14.9 million. *Wilson*, 2008 U.S. Dist. LEXIS 110411, at \*21-22. Because the  
 7 settlement did not contain the mechanisms to pay remaining amounts to class members that the  
 8 current proposed settlement provides, over \$9.5 million went to *cy pres* recipients. *Wilson*, ECF No.  
 9 271 at 2.

10 The following table summarizes the Settlement and the settlements discussed above where  
 11 potential damages at trial were able to be estimated.

Case	Product	Settlement Amount <sup>6</sup>	Potential Recovery at Trial (Retail Sales)	Settlement Percent of Potential Recovery	Net Settlement Percent of Potential Recovery
<i>Yamagata v. Reckitt Benckiser LLC</i>	MFA	\$50 million	\$359 million	14%	10.2% <sup>7</sup>
<i>Lerma v. Schiff Nutrition Int'l, Inc.</i> (S.D. Cal.)	42 Joint Health Supplements including MFA	\$6.51 million	\$1 billion	0.65%	0.49%
<i>Pearson v. NBTY, Inc.</i> (N.D. Ill.)	100 Glucosamine Products	\$7.5 million	\$240 million	3.1%	1.46%
<i>Hazlin v. Botanical Laboratories, Inc.</i> (S.D. Cal)	Glucosamine Products	\$3.1 million	\$132 million	2.3%	1.6%
<i>Gallucci v. Boiron, Inc.</i> (S.D. Cal.)	200 Homeopathic Products	\$5 million	\$65.5 million	4.3%	3.3%

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<sup>6</sup> The settlement amount for each case includes attorneys' fees, reimbursements of expenses, and class notice and administration costs. *See* discussion above.

<sup>7</sup> Because the similar settlements did not disclose all settlement administrative costs and to compare apples to apples, only the attorneys' fees (25% of the fund) and expenses (\$750,000) and incentive awards were deducted from the fund to calculate the net settlement amount.

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1 2 3	<i>In re Cobra Sexual Energy Sales Practices Litigation</i> (C.D. Cal.)	Virility Supplements	\$100,000 <sup>8</sup>	Unknown	Unknown	Unknown
4 5	<i>Wilson v. Airborne, Inc.</i> (C.D. Cal.)	Airborne Supplements	\$23.5 million	Unknown	Unknown	Unknown

**C. The Risks of Litigating a Class Trial Versus the Benefits of Settlement**

Plaintiffs’ risks of litigating a class trial and keeping a favorable judgment are real and substantial, and the Settlement is “preferable to lengthy and expensive litigation with uncertain results.” 4 A Conte & H. Newberg, *Newberg on Class Actions*, § 11:50 at 155 (4th ed. 2002).

**1. Risks of Establishing Liability at a Class Trial**

Results from three class action false advertising trials illustrate the risks for Plaintiffs at trial here. Each involved false advertising allegations of products advertised as providing health benefits and ended in either a verdict for the defendant or a hung jury. Each appeared to present very compelling facts.

In *Allen v. Hyland’s*, No. 2:12-cv-01150 (C.D. Cal.) the plaintiff lost a 13-day class trial involving homeopathic products where the defendant advertised the products as providing specific benefits that no homeopathic product could provide. *Allen* was a nationwide class with damages for refunds of \$255 million. The claims involved similar allegations as here—that the products were false and misleading because they are incapable of providing the advertised health benefits. *See* 2021 U.S. Dist. LEXIS 34695, at \*3 (C.D. Cal. Feb. 23, 2021). The trial court also followed the jury’s finding in ruling against plaintiff on the equitable claims for restitution and injunctive relief. *See Allen*, 2021 U.S. Dist. LEXIS 34695, at \*3.

In *Farar v. Bayer AG*, plaintiffs alleged Bayer’s One-A-Day products contained false and misleading heart health, immunity, and energy claims in violation of consumer protection statutes from California, Florida, and New York. *See* No. 3:14-cv-04601, 2017 U.S. Dist. LEXIS 193729, at \*3 (N.D. Cal. Nov. 15, 2017). Plaintiffs defeated a motion to dismiss and summary judgement,

<sup>8</sup> Attorneys were awarded \$490,000 in fees.

1 however, the four-year litigation ended in a jury verdict for Bayer. *Farar*, ECF No. 327 (Judgment).  
 2 Preceding the loss at trial, the plaintiffs had successfully argued a full refund damages model, which  
 3 exposed Bayer to a \$4 billion verdict. Judge Orrick held:

4 Plaintiffs’ theory of full restitution is supported not only by their individual  
 5 allegations, but also ample evidence in the record. Defendants’ own research and  
 6 marketing strategy documents confirm the effectiveness of their marketed health  
 7 claims, and lend credence to plaintiffs’ assertions that they purchased the One A Day  
 8 products for their touted health claims. Moreover, plaintiffs present expert testimony  
 9 from Dr. Edward R. Blonz supporting their assertion that there is no measurable  
 benefit for the typical American from taking defendants’ Products, as well as that the  
 evidence does not support the Products’ claims regarding heart health, immunity, or  
 physical energy.

10 *Farar*, 2017 U.S. Dist. LEXIS 193729, at \*30. Despite Judge Orrick’s assessment of the strength of  
 11 plaintiffs’ case, the jury found for defendant.

12 *Racies v. Quincy Bioscience, LLC* (N.D. Cal.) was a false advertising case involving  
 13 Prevacen, a dietary supplement purported to improve brain function. The trial took place in January  
 14 of last year in the Northern District and resulted in a hung jury. This trial highlights the  
 15 unpredictability of a jury asked to weigh complex scientific evidence and the hurdles presented by  
 16 the unanimous jury verdict requirement in federal court. Prevacen is a fraud. Plaintiff in *Racies*  
 17 offered an expert which provided testimony detailing the biological implausibility of Prevacen’s  
 18 active ingredient. The expert presented what seemed to be convincing evidence—Prevacen is  
 19 incapable of passing the blood-brain barrier, and therefore could do nothing. The jury, however, was  
 20 not convinced.

21 *Racies* also demonstrates the risk of decertification. The California class was decertified  
 22 after trial because the named plaintiff testified that he relied on an “Improves Memory” claim, when  
 23 in fact he purchased a “Brain Cell Protection” label. *Racies*, No. 15-cv-00292, 2020 U.S. Dist.  
 24 LEXIS 78156, at \*11 (N.D. Cal. May 4, 2020). The Court held the named plaintiff was not typical,  
 25 and the class failed to satisfy the predominance requirement. *Id.* at \*15.

## 26 2. Other Potential Risks of Continued Litigation

27 The Supreme Court and the Ninth Circuit, which are increasingly favoring dismissal of cases  
 28 on procedural grounds over determinations on the merits of the case, also present significant

1 uncertainty and risk. As noted by the Court during the preliminary approval hearing, there is a risk  
2 that Plaintiffs' claims could be found preempted before or after trial on appeal. Litigation over the  
3 preemptive effect of the Dietary Supplement Health and Education Act of 1994 ("DSHEA") is  
4 particularly active in the Ninth Circuit. *Compare Greenberg v. Target Corp.*, 985 F.3d 650 (9th Cir.  
5 2021) (finding preemption) *with Kroessler v. CVS Health Corp.*, 977 F.3d 803 (9th Cir. 2020) (no  
6 preemption). Currently, *Seegert v. Rexall Sundown Inc.*, No. 20-55486 (9th Cir.), which presents  
7 whether DSHEA preempts a false advertising claim involving a glucosamine joint health  
8 supplement, will be argued by the end of this year or early next year.

9       There is also a risk of decertification. On April 6, 2021, the Ninth Circuit vacated a class  
10 certification order and held "the number of uninjured class members must be de minimis" in order  
11 to maintain class status. *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 993  
12 F.3d 774, 2021 U.S. App. LEXIS 9880, at \*32 n.12 (9th Cir. Apr. 6, 2021). A Ninth Circuit judge  
13 has requested a vote on rehearing the appeal to reconsider the divided ruling, and on April 28, 2021  
14 the parties were ordered to submit briefs on whether the case should be reheard en banc. Throughout  
15 this litigation Defendant has maintained that customer satisfaction with Move Free Advanced is  
16 high.

17       Currently pending before the Supreme Court is the Ninth Circuit's decision in *Ramirez v.*  
18 *TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020). There, the Ninth Circuit held "that every member  
19 of a class certified under Rule 23 must satisfy the basic requirements of Article III standing at the  
20 final stage of a money damages suit when class members are to be awarded individual monetary  
21 damages." *Id.* at 1017. The Supreme Court granted *certiorari*, and oral argument was held on March  
22 30, 2021. The analysis of the oral argument is largely troubling for plaintiff classes with the  
23 consequences of the Supreme Court's anticipated decision unknown.

24       Finally, there is uncertainty as to which of the claims for relief Plaintiffs here assert are  
25 viable in federal court. The recent Ninth Circuit decision in *Sonner v. Premier Nutrition Corp.*, 971  
26 F.3d 834 (9th Cir. 2020), a case involving a glucosamine supplement, exemplifies the new-found  
27 federal jurisdictional risks of continued litigation. *Sonner* held that plaintiffs must show an  
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1 inadequate remedy at law in order to seek restitution. *Id.* at 839 (holding that plaintiff must satisfy  
 2 this “threshold jurisdictional question”).

3 **V. SETTLEMENT CLASS MEETS THE REQUIREMENTS FOR CLASS**  
 4 **CERTIFICATION AND MERITS PRELIMINARY APPROVAL**

5 Plaintiffs incorporate by reference the previously filed motion for preliminary approval which  
 6 details why the Settlement Class satisfies Rule 23 requirements and otherwise merits preliminary  
 7 approval. *See* ECF No. 203 at §§ IV-VII.

8 **VI. THE PROPOSED SCHEDULE OF EVENTS**

9 The key Settlement-related dates are based on when preliminary approval of the settlement  
 10 is granted and the date for the Final Approval Hearing. The relevant settlement-related dates  
 11 calculated in accordance with the provisions of the Settlement are:

EVENT	DEADLINE
Dissemination of Class Notice	Within 45 calendar days from entry of the Preliminary Approval Order
Briefs in support of award of attorneys’ fees and reimbursement of expenses	No later than 44 days prior to the Final Approval Hearing
Briefs in support of final approval	No later than 35 days prior to the Final Approval Hearing
Deadlines for objections and opt-outs	14 days before date first set by Court for Final Approval Hearing
Briefs in response to objections and in further support of final approval and attorneys’ fees	No later than 7 days prior to the Final Approval Hearing

19 Accordingly, the Parties request the Court schedule the Final Approval Hearing for 120 days  
 20 after entry of the Preliminary Approval Order, or as soon thereafter as the Court’s schedule permits.

21 **VII. CONCLUSION**

22 For the reasons set forth above, the Parties respectfully request that the Court: (1) grant  
 23 preliminary approval of the Settlement; (2) approve and direct notice as set forth in the Class Notice  
 24 Program; (3) conditionally certify the Settlement Class; (4) approve the form and content of the  
 25 proposed forms of Class Notice; (5) appoint Plaintiffs Gordon Noboru Yamagata, Stamatis F.  
 26 Pelardis, Maureen Carrigan, Lori Coletti, Ann-Marie Maher, Carol Marshall, Deborah A. Rawls,  
 27 Oneita Steele, and Maxine Tishman as Class Representatives; (6) appoint Timothy G. Blood and  
 28 Thomas J. O’Reardon II of Blood Hurst & O’Reardon, LLC as Class Counsel; (7) appoint Epiq



1 Class Action and Claims Solutions as Settlement Administrator; and (8) adopt the proposed  
2 schedule including setting a date for the Final Approval Hearing.

3 Respectfully submitted,

4 Dated: May 12, 2021

BLOOD HURST & O'REARDON, LLP  
TIMOTHY G. BLOOD (149343)  
THOMAS J. O'REARDON II (247952)

By: *s/ Timothy G. Blood*

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 12, 2021, I electronically filed 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 denoted on the Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 12, 2021.

*s/ Timothy G. Blood*

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