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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GABRIELA BAYOL and BRUCE VERBECK,  
individually and on behalf of all others similarly  
situated,

Plaintiffs,

v.

HEALTH-ADE LLC, and WHOLE FOODS  
MARKET CALIFORNIA, INC.,

Defendants.

Case No. 3:18-cv-01462 MMC

**PLAINTIFFS' NOTICE OF MOTION  
AND MOTION FOR AN AWARD OF  
ATTORNEY'S FEES, COSTS AND  
EXPENSES, AND INCENTIVE  
AWARDS FOR THE CLASS  
REPRESENTATIVES**

Date: October 11, 2019  
Time: 9:00 a.m.  
Courtroom: 7, 19th Floor

Judge: Hon. Maxine M. Chesney

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on October 11, 2019 at 9:00 a.m. or as soon thereafter  
3 as counsel may be heard by the above-captioned Court, located at 450 Golden Gate Avenue,  
4 Courtroom 7, 19th Floor, San Francisco, California 94102 in the courtroom of Judge Maxine M.  
5 Chesney, Plaintiffs Gabriela Bayol and Bruce Verbeck (“Plaintiffs”), by and through their  
6 undersigned counsel of record, will move, pursuant to Fed. R. Civ. P. 23(h) and 54(d)(2), and the  
7 Court’s April 26, 2019 Order Preliminarily Approving Class Action Settlement, for an order  
8 awarding attorney’s fees, reimbursement of litigation costs and expenses, and payment of incentive  
9 fees to Class Representatives.

10 This motion is made on the grounds that an award of attorneys’ fees, reimbursement of  
11 litigation costs and expenses, and payment of incentive fees is proper, given that the parties have  
12 agreed that Class Counsel may make such applications in their Class Action Settlement Agreement,  
13 the work of Class Counsel has conferred substantial benefits to the Class, and that such awards are  
14 permitted under the laws of this Circuit.

15 This motion is based on: (1) this Notice of Motion and Motion, (2) the Memorandum of  
16 Points and Authorities in support thereof, (3) the Declaration of L. Timothy Fisher, (4) the  
17 declarations of Gabriela Bayol and Bruce Verbeck,<sup>1</sup> (5) the papers and pleadings on file, (6) and  
18 other written and oral arguments that may be presented to the Court.

19 **CIVIL RULE 7-4(a)(3) STATEMENT OF ISSUE TO BE DECIDED**

20 Whether the Court should award attorney’s fees, reimbursement of litigation costs and  
21 expenses, and payment of incentive fees to the Class Representatives.

22 Dated: May 24, 2019

Respectfully submitted,

23 **BURSOR & FISHER, P.A.**

24 By: /s/ Yeremey Krivoshey  
25 Yeremey Krivoshey

26 <sup>1</sup> The declarations of Plaintiffs Bayol and Verbeck were submitted in support of Plaintiff’s Motion  
27 for Preliminary Approval and are not being resubmitted again herewith for efficiency. *See*  
28 Declaration of Gabriela Bayol in Support of Plaintiffs’ Motion for Preliminary Approval of  
Settlement, ECF No. 47-2; Declaration of Bruce Verbeck in Support of Plaintiffs’ Motion for  
Preliminary Approval, ECF No. 47-3.

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1 Plaintiffs Gabriela Bayol and Bruce Verbeck (“Plaintiffs” or “Class Representatives”)  
2 respectfully submit this memorandum in support of Plaintiffs’ Motion for an Award of Attorney’s  
3 Fees, Costs and Expenses, and Incentive Awards for the Class Representatives.

#### 4 I. INTRODUCTION

5 The Settlement Agreement provides for an \$3,997,500 “claims-made” fund to pay all valid  
6 and timely claims, attorneys’ fees, costs and expenses, incentive awards to the Class  
7 Representatives, and costs of notice and administration. *See gen.* Fisher Decl., Ex. 1 (“Settlement  
8 Agreement”), ¶ 43. As discussed in detail in Plaintiff’s Motion for Preliminary Approval of Class  
9 Action Settlement, ECF No. 47, at 8-9, 23-25 and at the April 19, 2019 hearing, Class Counsel was  
10 able to retain a reputable class action administration company that will provide a sweeping notice  
11 campaign with at least an 80 percent reach and over 44 million impressions. *See* Declaration of  
12 William W. Wickersham Regarding Class Notice Plan, ECF No. 47-5, at ¶ 17. Utilizing the notice  
13 campaign, Class Counsel anticipates that the Settlement Agreement will be fully subscribed, such  
14 that, while technically a “claims-made” deal, will be more analogous to a true “common fund.”  
15 *See* Plaintiff’s Motion for Preliminary Approval of Class Action Settlement, ECF No. 47, at 9  
16 (about 65,000 claims needed to exhaust Net Cash Amount of the Settlement Agreement).

17 Pursuant to the Settlement Agreement, Class Members can receive cash payments of \$4.00  
18 for each Subject Product purchased during the Class Period up to \$40 without proof of purchase.  
19 This is an outstanding result, as the weighted average retail price of the Subject Products  
20 throughout the Class Period was \$3.83 – less than the \$4.00 offered by the Settlement Agreement.  
21 Declaration of L. Timothy Fisher (“Fisher Decl.”) ¶ 16. Accordingly, Class Members may be  
22 entitled to more than a full refund for up to ten product purchases without having to provide proof  
23 of purchase.

24 The Settlement Agreement also provides significant injunctive relief. Health-Ade has  
25 agreed to (1) maintain on the labels of the Subject Products the following warning statement:  
26 “Kombucha should not be consumed if left unrefrigerated for an extended period of time.  
27 Pregnant/breast feeding? Consult your doctor. Due to natural fermentation, there may be trace  
28

1 amounts of alcohol and small pieces of culture”; (2) effectuate a formulation change that will  
2 control the variability of the alcohol and sugar content in its products to ensure that the declared  
3 sugar and alcohol content on such products’ labels do not vary to a greater extent than allowed by  
4 federal or state labeling standards; and (3) regularly test samples of its products using a third-party  
5 laboratory to ensure compliance with federal and state labeling standards and to ensure the  
6 accuracy of the representations regarding the sugar content of its products.

7 In light of these considerations, Class Counsel requests that the Court approve an award of  
8 attorney’s fees of 25% of the \$3,997,500 Settlement Fund, or \$999,375. This method of  
9 calculating the fee award, based on a percentage of the Settlement Fund, is straightforward, is fair  
10 under the circumstances, and is supported by the laws of this Circuit. The 25% fee is also fair in  
11 light of the significant time Class Counsel has devoted to this case on a contingency fee basis with  
12 the threat of no recovery at all absent a successful resolution.

13 Class Counsel also seeks reimbursement of \$14,252.78 in out-of-pocket expenses. *See*  
14 *Fisher Decl.* ¶¶ 28-29; *see also id.*, Ex. 3 (an itemized listing of each out-of-pocket expense  
15 incurred by Bursor & Fisher in connection with this case). The expenses were necessary to the  
16 prosecution of this case, were carefully and reasonably expended, and should be reimbursed. *Id.*

17 Finally, Plaintiffs Bayol and Verbeck request that the Court award them service awards in  
18 the amount of \$2,000 each to account for the significant time and effort they invested in this case  
19 on behalf of the Class.

## 20 II. BACKGROUND AND PROCEDURAL HISTORY

21 The Declaration of L. Timothy Fisher, submitted herewith, contains a detailed discussion of  
22 the background and procedural history of this case, including (i) Plaintiffs’ pre-suit investigation  
23 and laboratory testing of the Subject Products, (ii) the pleadings and motions, (iii) discovery, (iv)  
24 the parties’ arms-length settlement negotiations, and (v) preliminary approval and dissemination of  
25 notice.

### III. SUMMARY OF THE PROPOSED SETTLEMENT

#### A. Payment To Settlement Class Members

Health-Ade has agreed to pay up to \$3,997,500 to cover all claims filed by Class Members as well as the costs of settlement administration, incentive awards, and attorney's fees, costs, and expenses. Class Members can receive a \$4.00 cash award for each Subject Product the Authorized Claimant purchased during the Class Period, up to a maximum of ten (10) claims (or \$40.00 in cash) if the Authorized Claimant does not provide Proof of Purchase. Authorized Claimants who claim more than \$40.00 in cash awards must submit Proof of Purchase establishing their purchase during the Class Period of each Subject Product claimed and may receive up to \$80.00 in cash awards based on the retail value of the Subject Products shown in the Proof of Purchase. As discussed above and at the April 19, 2019 hearing, Class Counsel anticipates that a total of about 65,000 claims made by Authorized Claimants will exhaust the Net Cash Amount of the Settlement Agreement, such that the Settlement Fund will be fully-subscribed. Should the aggregate value of the cash awards claims by Authorized Claimants exceed the Net Cash Amount, then the monetary value of the awards to be provided to each Authorized Claimant will be reduced on a *pro rata* basis, such that the aggregate value of the awards does not exceed the Net Cash Amount.

As discussed above, the \$4.00 cash award per each Subject Product offered (up to ten purchases or \$40.00) may be more than a full-refund. The weighted average retail price of the Subject Products throughout the Class Period was \$3.83. Fisher Decl. ¶ 16. Accordingly, even if the cash awards ultimately need to be diminished to account for a high number of claims, Class Members may still ultimately recover a full-refund, or an amount close to it.

#### B. Payment Of Attorney's Fees, Costs, Expenses, And Incentive Awards

The Settlement Agreement authorizes Class Counsel to make an application to the Court for an award of attorney's fees and expenses, and incentive awards for the Class Representatives of up to \$2,000. Settlement Agreement ¶¶ 55, 56.

Class Counsel and Defendants have no agreement as to the amount of requested fees that Defendants would oppose. Fisher Decl. ¶ 41. At no point has Class Counsel negotiated its

1 attorney's fees with Defendants. *See id.* There is no "clear sailing" provision. *Id.* Defendants are  
 2 free to challenge the present fee application. *Id.*

3 **IV. THE CLRA PROVIDES FOR A MANDATORY AWARD OF ATTORNEY'S FEES**  
 4 **TO THE PREVAILING PARTY**

5 The Class Representative brought claims against Defendants under California's Consumers  
 6 Legal Remedies Act, Civil Code §§ 1750, *et seq.* (the "CLRA"). For CLRA claims, an award of  
 7 fees to the prevailing party is mandatory under Civil Code § 1780(d), which provides: "The court  
 8 shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this  
 9 section." As the California Court of Appeal has explained, in construing this provision:

10 "The word 'shall' is usually deemed mandatory, unless a mandatory  
 11 construction would not be consistent with the legislative purpose  
 12 underlying the statute." (*West Shield Investigations and Sec.*  
 13 *Consultants v. Superior Court* (2000) 82 Cal. App. 4th 935, 949, 98  
 14 Cal.Rptr.2d 612.) Our Supreme Court has observed that "the  
 15 availability of costs and attorneys fees to prevailing plaintiffs is  
 16 integral to making the CLRA an effective piece of consumer  
 17 legislation, increasing the financial feasibility of bringing suits  
 18 under the statute." (*Broughton v. Cigna Healthplans* (1999) 21 Cal.  
 19 4th 1066, 1085, 90 Cal. Rptr. 2d 334, 988 P.2d 67.) Thus, a  
 20 mandatory construction of the word "shall" in section 1780(d) is  
 21 consistent with the legislative purpose underlying the statute.

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

23 Here, the Class has recovered a Settlement with a total value of \$3,997,500, without even  
 24 accounting for the value of the significant injunctive relief. The Class is thus the "prevailing  
 25 party," and a fee award to Class Counsel is mandatory under the CLRA.

26 **V. CLASS COUNSEL'S REQUESTED ATTORNEY'S FEES AWARD IS FAIR AND**  
 27 **REASONABLE**

28 Under Ninth Circuit standards, a District Court may award attorney's fees under either the  
 "percentage-of-the-benefit" method or the "lodestar" method. *Fischel v. Equitable Life Assur.*  
*Soc'y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029  
 (9th Cir. 1998). Class Counsel's fee request is fair and reasonable under either of these methods.

1           **A.       The Percentage Of The Benefit Method**

2           Under the common fund doctrine, courts typically award attorneys' fees based on a  
3 percentage of the total settlement. *See State of Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir.  
4 1990); *see also In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378-79 (9th Cir. 1995) (affirming  
5 attorney's fee award of 33% of the recovery); *Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th  
6 Cir. 2003) (affirming attorney's fee award of 33% of the recovery).

7                       **1.       The Total Value Of The Settlement Fund Is \$3,997,500**

8           To calculate attorneys' fees based on the percentage of the benefit, the Court must first  
9 determine the value of the Settlement Fund. In doing so, the Court must include the value of the  
10 benefits conferred to the Class, including any attorneys' fee, expenses, and notice and claims  
11 administration payments to be made. *See, e.g., Staton v. Boeing*, 327 F.3d 938, 972-74 (9th Cir.  
12 2003); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 (S.D. Cal. 2011), *aff'd*, 473 F. App'x. 716 (9th  
13 Cir. 2012). Stated otherwise, California courts include the requested attorneys' fees when  
14 calculating the total value of the settlement fund. *Lealao v. Beneficial California, Inc*, 82 Cal. App.  
15 4th 19, 33 (2000). Thus, "the sum of the two amounts ordinarily should be treated as a settlement  
16 fund for the benefit of the class ...." *In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 554  
17 (2009) (quoting the Manual for Complex Litigation § 21.71 at 525 (4th ed. 2008)).

18           Moreover, the Court must not consider the total monetary amount distributed to the Class;  
19 rather, the Court should only consider the amount *made available* to the Class. As articulated in  
20 *Young v. Polo Retail, LLC*, 2007 WL 951821, at \*8 (N.D. Cal. Mar. 28, 2007), Ninth Circuit  
21 precedent requires courts to award class counsel fees based on the total benefits being made  
22 available rather than the amount actually paid out. *Id.* at \*23 (citing *Williams v. MGM-Pathe*  
23 *Comm'ns Co.*, 129 F.3d 1026 (9th Cir. 1997) (ruling that a district court abused its discretion in  
24 basing attorney fee award on actual distribution to class instead of amount being made available).

25           Here, the total value of the Settlement Fund is \$3,997,500, which includes any attorney's  
26 fees that the Court may award to Class Counsel. Further, because Class Counsel anticipates that  
27 the Settlement Fund will be fully subscribed, there may ultimately be no difference between the  
28 amount made available and the actual payout.



1 all purchasers of Millennium's GT's Kombucha products spanning a four-year period between  
2 September 2006 and September 2010. *See id.*, Ex. 12, at 4-5. All class members that did not have  
3 proof of purchase, which was virtually all class members, *received a maximum of six \$1 coupons*,  
4 which expired one year from issuance, *and nothing else*. *See id.* at 5-6. The settlement did not pay  
5 a single dollar to any class member and did not offer much of anything of value at all. Here, Class  
6 Members are entitled to cash payments of \$4.00 for each Subject Product purchased during the  
7 Class Period up to \$40 without proof of purchase.

8 In *Retta v. Millennium Prods., Inc.*, 2017 WL 5479637, at \*1 (C.D. Cal. Aug. 22, 2017), a  
9 case litigated by undersigned Class Counsel,<sup>2</sup> plaintiffs alleged that the defendant's GT's  
10 Kombucha beverages contained high, undisclosed amounts of alcohol and sugar, and  
11 misrepresented the nature and amount of antioxidants in the products. In *Retta*, the defendants sold  
12 about 275 million bottles within the class period. *Retta v. Millennium Prods., Inc.*, Case No. 15-  
13 cv-1801-PSG-AJW, Declaration of GT Dave in Support of Motion for Preliminary Approval of  
14 Class Action Settlement, Dkt. 103-2, at ¶ 7 (C.D. Cal. Nov. 18, 2016). The settlement provided for  
15 an all-inclusive claims made settlement fund of \$8,250,000. *Retta*, 2017 WL 5479637, at \*2.  
16 Here, Defendant sold about 40 million bottles within the class period, and the Settlement  
17 Agreement provides for an all-inclusive claims made settlement fund of \$3,997,500. *See*  
18 Declaration of Gary Cooperman in Support of Motion for Preliminary Approval of Class Action  
19 Settlement, ECF No. 47-4, at ¶ 6. Accordingly, here, the present Settlement Agreement provides  
20 roughly 333 percent greater relief on a per-bottle-sold basis than the settlement in *Retta*.<sup>3</sup>

21 The present Settlement Agreement is also superior to the settlement in *Retta* in another  
22 critical aspect. In both *Retta* and here, the defendants agreed to maintain a warning on the

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23 <sup>2</sup> Class Counsel did not represent the plaintiffs in the *Gauss v. Millennium Products, Inc.* case,  
24 discussed above.

25 <sup>3</sup> In *Retta*, the per bottle price of the kombucha beverages varied between \$2.99 and \$3.99  
26 throughout the class period. *Retta v. Millennium Prods., Inc.*, Case No. 15-cv-1801-PSG-AJW,  
27 Declaration of GT Dave in Support of Motion for Preliminary Approval of Class Action  
28 Settlement, Dkt. 103-2, at ¶ 6 (C.D. Cal. Nov. 18, 2016). Here, the price of Defendant's kombucha  
beverages varied between \$3.52 and \$4.95, with a weighted average retail price of the Subject  
Products throughout the Class Period was \$3.83. *See* Declaration of Gary Cooperman in Support  
of Motion for Preliminary Approval of Class Action Settlement, ECF No. 47-4, at ¶ 5; Fisher Decl.  
¶ 16.

1 products' labels and to conduct regular testing using a third-party laboratory. *See Retta*, 2017 WL  
2 5479637, at \*2. Unlike the defendant in *Retta*, however, Health-Ade has agreed to change the  
3 formulation of its beverages to control for the products' alcohol content. Should Health-Ade be  
4 successful, it will alleviate the central allegation concerning the products' alcohol content in this  
5 case.

6 *b. Plaintiffs' Novel Claims Carried Substantial*  
7 *Litigation Risk*

8 The second *Vizcaino* factor looks to the risk and novelty of the claims at issue. Both are  
9 certainly present here. *See gen.* Fisher Decl. ¶¶ 16-19 (discussing the risks of litigating Plaintiffs'  
10 claims). Class Counsel undertook significant financial risk in prosecuting this case.

11 As an initial matter, as far as Class Counsel knows, no plaintiff's firm has ever obtained  
12 class certification in a case against a kombucha manufacturer or concerning undisclosed alcohol  
13 claims. At class certification, Defendant would likely argue that predominance and commonality  
14 cannot be satisfied because their kombucha beverages contain differing amounts of alcohol and  
15 sugar, and some beverages may be below the 0.5 percent alcohol by volume standard, such that  
16 some class members may not have been harmed at all.

17 Plaintiffs would have faced serious risks even before getting to class certification.  
18 Defendant could have brought a Fed. R. Civ. P. 12(b)(c) motion or sought summary judgment and  
19 argued that this case should be dismissed or stayed under the primary jurisdiction doctrine. For  
20 instance, in *Tortilla Factory, LLC v. Rowdy Mermaid Kombucha LLC*, Case No. 18-cv-2984, ECF  
21 No. 26, at 4 (C.D. Cal. Sep. 11, 2018) Judge Real of the Central District of California recently  
22 granted a motion to dismiss on primary jurisdiction grounds in a case concerning the allegedly  
23 undisclosed alcohol content of a competitor brewer's kombucha beverages. Judge Real held that  
24 the appropriate testing methodology for alcohol in kombucha beverages "is better left to the  
25 expertise of the [Alcohol and Tobacco Tax and Trade Bureau] rather than the courts." *Id.* Thus, as  
26 in *Tortilla Factory*, Defendants could have argued that the testing methodology utilized by  
27 Plaintiffs' experts was not the appropriate one set out by the Alcohol and Tobacco Tax and Trade  
28 Bureau, or that a different and equally valid testing methodology showed different results. While



1 Class Counsel (and some other District Courts) disagree with Judge Real, the risk that Plaintiffs'  
2 testing methodology (and their entire case) could be excluded or dismissed weighed heavily in  
3 favor of settlement.

4 Even if Plaintiffs' claims could proceed past class certification and summary judgment, this  
5 case would ultimately devolve into an uncertain "battle of the experts." Defendants would surely  
6 present testing from experts who would claim that the Subject Products contain below the 0.5  
7 percent alcohol by volume threshold and contain the appropriate amount of sugar.

8 Plaintiffs would also face the very high risk that they could not present a full-refund model  
9 of damages at trial. In false or misleading advertising cases concerning beverages or foods,  
10 plaintiffs are typically foreclosed from full-refund theories of damages at class certification. *See,*  
11 *e.g., In re POM Wonderful LLC*, 2014 WL 1225184, at \*2-\*3 (C.D. Cal. Mar. 25, 2014)  
12 (explaining that a full refund damages model is unavailable where the beverage at issue provided  
13 class members with benefits in the form of calories, hydration, vitamins, and minerals); *Red v.*  
14 *Kraft Foods, Inc.*, 2012 WL 8019257, at \*11 (C.D. Cal. Apr.12, 2012). Here, the Subject Products  
15 contain multiple vitamins, enzymes and probiotics, and provide hydration and calories. Defendants  
16 would have strong arguments against a full damages model for relief.

17 Despite these risks, the Settlement Agreement allows Class Members to submit claims for  
18 \$4.00 per Subject Products purchased, up to \$40.00 (ten total claims), without proof of purchase.  
19 For most Class Members, the relief provided by the Settlement Agreement amounts to more than a  
20 full refund.

21 c. *Class Counsel Generated Benefits Beyond The*  
22 *Settlement Fund*

23 The third factor cited in *Vizcaino* looks to whether "counsel's performance generated  
24 benefits beyond the cash settlement fund." *Vizcaino*, 290 F.3d at 1049. That is true here as well.  
25 The Settlement provides expansive injunctive relief. Health-Ade has agreed to (1) maintain on the  
26 labels of the Subject Products the following warning statement: "Kombucha should not be  
27 consumed if left unrefrigerated for an extended period of time. Pregnant/breast feeding? Consult  
28 your doctor. Due to natural fermentation, there may be trace amounts of alcohol and small pieces

1 of culture”; (2) effectuate a formulation change that will control the variability of the alcohol and  
2 sugar content in its products to ensure that the declared sugar and alcohol content on such products’  
3 labels do not vary to a greater extent than allowed by federal or state labeling standards; and (3)  
4 regularly test samples of its products using a third-party laboratory to ensure compliance with  
5 federal and state labeling standards and to ensure the accuracy of the representations regarding the  
6 sugar content of its products.

7 *d. Market Rates As Reflected By Awards In Similar*  
8 *Cases*

9 The fourth factor cited by *Vizcaino* looks to market rates as reflected by awards in similar  
10 cases. *Vizcaino*, 290 F.3d at 1049 (“Fourth, the court found the 28% rate to be at or below the  
11 market rate.”). The reasonableness of Class Counsel’s 25% fee request is illustrated by numerous  
12 awards ranging from 30% to 40% in similar cases. For example, when awarding 32.8% of the  
13 settlement fund for fees and costs, Judge Patel explained: “absent extraordinary circumstances that  
14 suggest reasons to lower or increase the percentage, the rate should be set at 30%[,]” as this will  
15 “encourage plaintiffs’ attorneys to move for early settlement, provide predictability for the  
16 attorneys and the class members, and reduce the time consumed by counsel and court in dealing  
17 with voluminous fee petitions.” *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378–79 (N.D. Cal.  
18 1989); *see also In re Pac. Enters. Sec. Litig.*, 47 F.3d at 378-79 (affirming attorney’s fee of 33% of  
19 the recovery); *Williams*, 129 F.3d at 1027 (33.33% of total fund awarded); *Morris*, 54 Fed. App’x  
20 at 663 (affirming fee award of 33% of the recovery); *Vasquez v. Coast Valley Roofing, Inc.*, 266  
21 F.R.D. 482, 492 (E.D. Cal. 2010) (citing to five recent class actions where federal district courts  
22 approved attorney fee awards ranging from 30% to 33%); *Martin v. AmeriPride Servs., Inc.*, 2011  
23 WL 2313604, at \*8 (S.D. Cal. June 9, 2011) (noting that “courts may award attorneys fees in the  
24 30%-40% range in ... class actions that result in recovery of a common fun[d] under \$10 million”);  
25 *Singer v. Becton Dickinson & Co.*, 2010 WL 2196140, at \*8-9 (S.D. Cal. June 1, 2010) (approving  
26 attorney fee award of 33.33% of the common fund and holding that award was similar to awards in  
27 three other cases where fees ranged from 33.33% to 40%); *Rippee v. Boston Mkt. Corp.*, Case No.

1 05-CV-1359 TM (JMA), ECF No. 70, at 7 (S.D. Cal. Oct. 10, 2006) (awarding a 40% fee on a  
2 \$3.75 million in a common fund settlement).

3 There is ample authority to make an upwards adjustment from the 25% benchmark here.  
4 Certainly, awarding only the 25% in this case is reasonable.

5 e. *The Contingent Nature Of The Fee And Financial*  
6 *Burden Borne By Class Counsel*

7 The fifth factor cited by *Vizcaino* was the contingent nature of the fee and the financial  
8 burden carried by the plaintiffs. *Vizcaino*, 290 F.3d at 1050. To date, Class Counsel has worked  
9 for roughly a year and a half with no payment, and no guarantee of payment absent a successful  
10 outcome. Class Counsel also advanced \$14,252.78 in out-of-pocket expenses, again with no  
11 guarantee of repayment. If the case had advanced through class certification, these expenses would  
12 have increased many-fold, and Class Counsel would have been required to advance these expenses  
13 potentially for several years to litigate this action through judgment and appeals.

14 **B. The Court May Alternatively Grant The Requested Attorney's  
15 Fees Award Under The Lodestar Method**

16 Under Ninth Circuit standards, a District Court may award attorneys' fees under the  
17 "lodestar" method. *Hanlon*, 150 F.3d at 1029. The lodestar figure is calculated by multiplying the  
18 hours spent on the case by reasonable hourly rates for the region and attorney experience. *See, e.g.,*  
19 *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011); *Hanlon*, 150  
20 F.3d at 1029. The resulting lodestar figure may be adjusted upward or downward by use of a  
21 multiplier to account for factors including, but not limited to: (i) the quality of the representation;  
22 (ii) the benefit obtained for the class; (iii) the complexity and novelty of the issues presented; and  
23 (iv) the risk of nonpayment. *Hanlon*, 150 F.3d at 1029; *see also Kerr v. Screen Extras Guild, Inc.*,  
24 526 F.2d 67, 70 (9th Cir. 1975).<sup>4</sup> Courts typically apply a multiplier or enhancement to the

25 <sup>4</sup> *Kerr* identifies twelve factors for analyzing reasonable attorneys' fees:  
26 (1) the time and labor required; (2) the novelty and difficulty of the questions  
27 involved; (3) the skill requisite to perform the legal service properly; (4) the  
28 preclusion of other employment by the attorney due to acceptance of the case; (5)  
the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations  
imposed by the client or the circumstances; (8) the amount involved and the results  
obtained; (9) the experience, reputation, and the ability of the attorneys; (10) the

1 lodestar to account for the substantial risk that class counsel undertook by accepting a case where  
2 no payment would be received if the lawsuit did not succeed. *Vizcaino*, 290 F.3d at 1051.

3 Here, as of May 20, 2019, a fee award of 25% of the Settlement Fund would amount to a  
4 3.9 multiplier. Fisher Decl. ¶¶ 26-27. However, Class Counsel anticipates spending an extra 60-  
5 100 hours prior to the issuance of a Final Judgment, including handling issues that may arise with  
6 the notice campaign, answering class member questions, responding to any objections, if any,  
7 filing final approval papers, appearing at the final approval hearing, and handling any appeals, if  
8 applicable. *Id.* ¶ 27. Taking into account the additional 60-100 extra hours at a blended rate of  
9 \$558.47, Class Counsel anticipates that a fee award of 25% of the Settlement Fund would amount  
10 to a 3.2 to 3.5 multiplier. As discussed below, such a multiplier is reasonable in light of the  
11 complexity and novelty of the litigation, the hours and resources devoted to this litigation, the  
12 outstanding results achieved, and the significant risk of non-payment.

13 **1. Class Counsel Spent A Reasonable Number Of Hours On**  
14 **This Litigation At A Reasonable Hourly Rate**

15 Class Counsel worked very efficiently. A single law firm, Bursor & Fisher, P.A., served as  
16 Class Counsel. Class Counsel have submitted their detailed daily billing records showing what  
17 work was done and by whom. Fisher Decl., Ex. 2. These records confirm Bursor & Fisher's  
18 efficient billing. For example, Bursor & Fisher strives to assign as much work as possible to less  
19 senior lawyers who bill at lower hourly rates in order to minimize fees for the class. More than  
20 83% of attorney's hours were billed by attorneys billing at \$525 per hour and under. Fisher Decl. ¶  
21 40. However, this was a novel case that involved a lot of original work, which required significant  
22 involvement by a more experienced lawyer. *Id.* Only one senior partner, Mr. Fisher, billed any  
23 time on this case. *Id.* Mr. Fisher billed 15% of the total hours (70.4 out of 459), primarily on  
24 developing the litigation strategy, making court appearances, attending mediations, and negotiating  
25 the settlement. *Id.* In total, as of May 20, 2019, Bursor & Fisher billed 459 hours. *Id.*

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 'undesirability' of the case; (11) the nature and length of the professional  
 relationship with the client; and (12) awards in similar cases.

1 Defendants were represented by very able counsel from one of the largest firms in the  
2 United States. Plaintiffs were able to obtain critical information through discovery, including  
3 through a Rule 30(b)(6) deposition, and worked with experts to put the case in the best position to  
4 succeed. Settlement was reached only after two separate mediations, and extensive negotiations  
5 amongst counsel. Given the complexity of the case, the nature of the litigation, the volume of  
6 discovery, and the difficulty of the settlement negotiations, the number of hours Class Counsel  
7 spent was reasonable.

8 “To determine whether rates are reasonable, courts must identify the relevant community,  
9 and assess the prevailing hourly rate in that community for similar services by lawyers of  
10 reasonably comparable skill, experience, and reputation.” *G. F. v. Contra Costa Cnty.*, 2015 WL  
11 7571789, at \*14 (N.D. Cal. Nov. 25, 2015). “Generally, when determining a reasonable hourly  
12 rate, the relevant community is the forum in which the district court sits.” *Camacho v. Bridgeport*  
13 *Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). Here, the relevant legal community is the San  
14 Francisco or Bay Area legal community in 2019 specializing in complex, high-stakes litigation.

15 The blended hourly rate for Bursor & Fisher’s work of \$558.47 is quite reasonable. Fisher  
16 Decl. ¶ 40. And the hourly rates for each of the lawyers (and staff) who worked on the case, which  
17 are set forth in the Fisher declaration, are also reasonable and amply supported by the evidentiary  
18 materials submitted therewith and the caselaw. *Id.* ¶¶ 25-31 & Exs. 2, 4-11. *See, e.g., In re*  
19 *Animation Workers Antitrust Litig.*, 2016 WL 6663005, at \*6 (N.D. Cal. Nov. 11, 2016) (finding  
20 rates of senior attorneys of between \$845 to \$1,200 per hour to be reasonable); *Nitsch v.*  
21 *DreamWorks Animation SKG Inc.*, 2017 WL 2423161, at \*9 (N.D. Cal. June 5, 2017) (finding rates  
22 for senior attorneys of between \$870 to \$1200 per hour to be reasonable); *Loretz v. Regal Stone,*  
23 *Ltd.*, 756 F. Supp. 2d 1203, 1211 (N.D. Cal. 2010) (approving billing rates ranging from \$900 per  
24 hour (partners) to \$150 per hour (law clerks) for Bay Area plaintiff’s counsel in complex civil  
25 litigation); *In re High-Tech Employee Antitrust Litig.*, 2015 WL 5158730, at \*9 (N.D. Cal. Sept. 2,  
26 2015) (approving billing rates of \$490 to \$975 for partners, \$310 to \$800 for non-partner attorneys,  
27 and \$190 to \$430 for paralegals, law clerks, and litigation support staff); *Rainbow Bus. Solutions v.*  
28

1 *MBF Leasing LLC*, 2017 WL 6017844, at \*1-2 (N.D. Cal. Dec. 5, 2017) (finding rates between  
 2 \$275 to \$950 per hour to be reasonable); *In re Anthem, Inc. v. Data Breach Litig.*, 2018 WL  
 3 3960068, at \*16-17 (N.D. Cal. Aug. 17, 2018) (finding rates between \$400 to \$975 per hour to be  
 4 reasonable). *See also, e.g., Johnson v. Triple Leaf Tea, Inc.*, 2015 WL 8943150, at \*8 (N.D. Cal.  
 5 Nov. 16, 2015) (this Court approving billing rates between \$290 and \$745 per hour in class action  
 6 settlement).

7 **2. All Relevant Factors Support Applying A Multiplier To**  
 8 **Class Counsel’s Lodestar**

9 The lodestar analysis is not limited to the initial mathematical calculation of class counsel’s  
 10 base fee. *See Morales v. City of San Rafael*, 96 F.3d 359, 363-64 (9th Cir. 1996). Rather, Class  
 11 Counsel’s actual lodestar may be enhanced according to those factors that have not been  
 12 “subsumed within the initial calculation of hours reasonably expended at a reasonable rate.”  
 13 *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983) (citation omitted); *see also Morales*, 96 F.3d at  
 14 364. In a historical review of numerous class action settlements, the Ninth Circuit found that  
 15 lodestar multipliers normally range from 0.6 to 19.6, with most (83%) falling between 1 and 4, and  
 16 a bare majority (54%) between 1.5 and 3. *See Vizcaino*, 290 F.3d at 1051 n.6; *see also Alba Conte*  
 17 *& Herbert B. Newberg, Newberg on Class Actions* § 14:03 (3d ed. 1992) (recognizing that  
 18 multipliers of 1 to 4 are frequently awarded). Yet state and federal courts often approve multipliers  
 19 of 4 or more.<sup>5</sup>

20 In considering the reasonableness of attorneys’ fees and any requested multiplier, the Ninth  
 21 Circuit has directed district courts to consider the time and labor required, novelty and complexity

22 <sup>5</sup> *See, e.g., In re Cenco Inc. Sec. Litig.*, 519 F. Supp. 322 (N.D. Ill. 1981) (approving multiplier of 4  
 23 in securities class action); *Municipal Auth. of Bloomsburg v. Pennsylvania*, 527 F. Supp. 982 (M.D.  
 24 Pa. 1981) (approving multiplier of 4.5); *In re Beverly Hills Fire Litig.*, 639 F. Supp. 915 (E.D. Ky.  
 25 1986) (approving multiplier of up to 5); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185 (S.D.N.Y. 1997)  
 26 (approving multiplier of 5.5); *Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A.*,  
 27 778 F.2d 890 (1st Cir. 1985) (approving multiplier of 6); *Muchnick v. First Fed. Savs. & Loan*  
 28 *Assoc. of Phil.*, 1986 WL 10791, at \*3-4 (E.D. Pa. Sept. 30, 1986) (approving multiplier of 8.3 in a  
 consumer class action); *Cosgrove v. Sullivan*, 759 F. Supp. 166 (S.D.N.Y. 1991) (approving  
 multiplier of 8.74); *Perera v. Chiron Corp.*, Civ. No. 95-20725-SW (N.D. Cal. 1999, 2000)  
 (approving multiplier of 9.14; cited in California Class Actions and Coordinated Proceedings  
 §15.05).

1 of the litigation, skill and experience of counsel, the results obtained, and awards in similar cases.  
2 *Blum v. Stenson*, 465 U.S. 886, 898-900 (1984); *Kerr*, 526 F.2d at 70. All of the factors weigh  
3 heavily in favor of the requested fee award in this action. *Vizcaino*, 290 F.3d at 1051.

4 *a. Novelty And Complexity Of This Litigation*

5 As discussed above, after *Retta*, this is only the second case Plaintiffs are aware of  
6 concerning alcohol mislabeling claims where class members actually received a single dollar of  
7 cash relief. No one has even succeeded in certifying a Rule 23(b)(3) class where similar  
8 allegations were involved. Class Counsel hired experts to conduct multiple, complicated tests  
9 concerning the alcohol and sugar content of the Subject Products, and even personally inspected  
10 the laboratory and equipment used to conduct these tests. *See* Fisher Decl. ¶ 10. Class Counsel’s  
11 significant investment of time into investigating the scientific and technological issues concerning  
12 alcohol and sugar testing is the sole reason this case settled for \$3,997,500, instead of the \$1  
13 coupons made available in *Gauss*, which involved substantially the same kombucha products and  
14 equally strong defense counsel. *See id.*, Exs. 12, 13. For instance, plaintiffs in the related action,  
15 *Gonzalez v. Health-Ade LLC*, Case No. 3:18-cv-01836-MMC, ECF No. 41, at 4 (N.D. Cal. July 12,  
16 2018), claimed to have spent “five months of intense investigation, preparation, and research”  
17 before filing their case, but never figured out or alleged that the Subject Products contained an  
18 elevated amount of undisclosed alcohol – by far the driving force of this litigation and settlement.  
19 *See also* Order Granting Bayol Plaintiffs’ Motion for Appointment of Interim Class Counsel, ECF  
20 No. 43, at 3 (stating the Class Counsel “have done a considerable amount of pre-filing work in an  
21 effort to identify and plead potential claims”). Thus, Class Counsel was faced with difficult legal  
22 and factual issues, which required creativity and sophisticated analysis.

23 This action was hotly contested. It required substantial original work, and significant risk  
24 that Class Counsel’s efforts (and its out-of-pocket costs) would go uncompensated. Settlement  
25 negotiations included two formal mediations and many hours of informal settlement discussions,  
26 which were complicated both in terms of the subject matter and damages analyses at issue. *See*  
27 Fisher Decl., ¶ 14.  
28





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

8 *Id.* at 1299-1300 (citations omitted) (internal quotations marks omitted).

9 Throughout this case, Class Counsel expended substantial time and costs to prosecute a  
10 nationwide class action suit with no guarantee of compensation or reimbursement in the hope of  
11 prevailing against sophisticated Defendants represented by high caliber attorneys. *See* Fisher Decl.  
12 ¶¶ 18-22, 25-30, 38-39. Class Counsel obtained a highly favorable result for the Class, knowing  
13 that if its efforts were ultimately unsuccessful, it would receive no compensation or reimbursement  
14 for its costs. This fact alone supports a finding that Class Counsel is entitled to a multiplier.

15 **VI. CLASS COUNSEL’S EXPENSES WERE REASONABLE AND NECESSARILY  
16 INCURRED TO ACHIEVE THE BENEFIT OBTAINED ON BEHALF OF THE CLASS**

17 To date, Class Counsel incurred out-of-pocket costs and expenses in the aggregate amount  
18 of \$14,252.78 in prosecuting this litigation on behalf of the Class. Fisher Decl., Ex. 3. These  
19 expenses are attached as Exhibit 3 to the Declaration of L. Timothy Fisher submitted herewith.

20 The Ninth Circuit allows recovery of litigation expenses in the context of a class action  
21 settlement. *See Staton*, 327 F.3d at 974. Class Counsel is entitled to reimbursement for standard  
22 out-of-pocket expenses that an attorney would ordinarily bill a fee paying client. *See, e.g., Harris*  
23 *v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). These expenses include court fees, copying fees,  
24 courier charges, legal research charges, telephone/facsimile fees, travel expenses, postage fees,  
25 court reporter fees, transcript costs, expert fees, and other related expenses. Fisher Decl., Ex. 3.

26 Each of these expenses was necessarily and reasonably incurred to bring this case to a  
27 successful conclusion, and they reflect market rates for various categories of expenses incurred.

28 *See id.* ¶ 28.

**VII. THE REQUESTED INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES ARE FAIR AND REASONABLE**

In recognition of their efforts on behalf of the Class, and subject to the approval of the Court, Defendants have agreed to pay the Class Representatives up to \$2,000 each (for a total of \$4,000), as appropriate compensation for their time and effort serving as the class representatives in this litigation.

Incentive awards “are fairly typical in class action cases.” *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). Such awards “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.” *Id.* at 958-59. Incentive awards are committed to the sound discretion of the trial court and should be awarded based upon the court’s consideration of, *inter alia*, the amount of time and effort spent on the litigation, the duration of the litigation and the degree of personal gain obtained as a result of the litigation. *See Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995). Incentive awards are appropriate when a class representative will not benefit beyond ordinary class members. For example, where a class representative’s claim makes up “only a tiny fraction of the common fund,” an incentive award is justified. *Id.*, 901 F. Supp. at 299.

The requested amount of \$2,000 each for the Class Representatives is appropriate to compensate them for their efforts in bringing this action for the benefit of millions of Class Members. Throughout the litigation, the Class Representatives held regular meetings with Class Counsel to receive updates on the progress of the case and to discuss strategy. Declaration of Gabriela Bayol in Support of Plaintiffs’ Motion for Preliminary Approval of Settlement, ECF No. 47-2, at ¶¶ 2-9; Declaration of Bruce Verbeck in Support of Plaintiffs’ Motion for Preliminary Approval, ECF No. 47-3, at ¶¶ 2-9. They assisted in Class Counsel’s pre-suit investigation by discussing their experiences and providing information on their purchase and use of the Subject Products, among other matters. *Id.* The Class Representatives assisted in drafting the complaints that have been filed in this litigation, and they reviewed the complaints for accuracy before they were filed. *Id.* They were intimately involved in the settlement process, and have continued to

1 keep abreast of settlement progress to date. *Id.* They were prepared to litigate this case to a verdict  
2 if necessary. *Id.* Their dedication and efforts have conferred a significant benefit on millions of  
3 purchasers of the Subject Products across the United States. *Id.*

4 **VIII. CONCLUSION**

5 Class Counsel and the Class Representatives have worked on this case for a year and a half.  
6 That work produced a benefit to Class Members in the form of a \$3,997,500 million Settlement  
7 Fund, without even taking into account the injunctive relief. We now seek to be paid fairly for that  
8 work. Class Counsel and the Class Representatives therefore respectfully request that the Court  
9 approve:

- 10 • \$999,375 in attorney’s fees for Class Counsel, representing 25% of the Settlement  
11 Fund;  
12 • \$14,252.78 in reimbursement of Class Counsel’s out-of-pocket expenses; and  
13 • Incentive awards of \$2,000 for each of the Class Representatives (for \$4,000 total).

14 For the foregoing reasons, these amounts are fair and reasonable and should be approved.

15  
16 Dated: May 24, 2019

Respectfully submitted,

17  
18 **BURSOR & FISHER, P.A.**

19 By: /s/ Yeremey Krivoshey  
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