

1 Laurence D. King (SBN 206423)
2 Matthew B. George (SBN 239322)
3 Mario M. Choi (SBN 243409)
4 **KAPLAN FOX & KILSHEIMER LLP**
5 1999 Harrison Street, Suite 1560
6 Oakland, CA 94612
7 Telephone: 415-772-4700
8 Facsimile: 415-772-4707
9 *lking@kaplanfox.com*
10 *mgeorge@kaplanfox.com*
11 *mchoi@kaplanfox.com*

12 Frederic S. Fox (*pro hac vice*)
13 Donald R. Hall (*pro hac vice*)
14 **KAPLAN FOX & KILSHEIMER LLP**
15 850 Third Avenue, 14th Floor
16 New York, NY 10022
17 Telephone: 212-687-1980
18 Facsimile: 212-687-7714
19 *ffox@kaplanfox.com*
20 *dhall@kaplanfox.com*

21 *Attorneys for Plaintiffs and the Settlement Class*

22
23
24
25
26
27
28
**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

15 MARTIN SCHNEIDER, SARAH
16 DEIGERT, THERESA GAMAGE, and
17 NADIA PARIKKA, Individually and on
18 Behalf of All Others Similarly Situated,

19 Plaintiffs,

20 v.

21 CHIPOTLE MEXICAN GRILL, INC., a
22 Delaware Corporation,

23 Defendant.

Hartley M. K. West (SBN 191609)
KOBRE & KIM LLP
150 California Street, 19th Floor
San Francisco, CA 94111
Telephone: 415-582-4781
hartley.west@kobrekim.com

Matthew I. Menchel (*pro hac vice*)
KOBRE & KIM LLP
201 South Biscayne Boulevard, Suite 1900
Miami, FL 33131
Telephone: 305-967-6108
matthew.menchel@kobrekim.com

Case No. 4:16-cv-02200-HSG (KAW)

**NOTICE OF MOTION AND MOTION
FOR FINAL APPROVAL OF
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Judge: Hon. Haywood S. Gilliam, Jr.
Courtroom: 2, 4th Floor
Date: July 30, 2020
Time: 2:00 p.m.

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 30, 2020, at 2 p.m., in Courtroom 2 of the United States District Court for the Northern District of California, Ronald V. Dellums Federal Building and U.S. Courthouse, 1301 Clay Street, Oakland, California 94612, the Honorable Haywood S. Gilliam, Jr., presiding, Plaintiffs and Settlement Class Representatives Martin Schneider, Sarah Deigert, Theresa Gamage, and Nadia Parikka (“Plaintiffs”) will and hereby do move for an Order pursuant to Rule 23 of the Federal Rules of Civil Procedure (“Rule”): (i) granting final approval of the proposed Settlement¹ with Defendant Chipotle Mexican Grill, Inc. (“Defendant” or “Chipotle”); (ii) finally approving Plaintiffs’ Plan of Allocation; and (iii) dismissing with prejudice Plaintiffs’ claims against Defendant.

This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities set forth below, the accompanying Declaration of Laurence D. King in Support of Plaintiffs’ Motion for Final Approval of Settlement, dated June 1, 2020 (“King Declaration”), and the exhibits thereto, the Motion for Attorneys’ Fees, Expenses, and Service Awards, filed April 24, 2020 (“Fees Motion”) (Dkt. 224), and accompanying Declaration of Laurence D. King in Support of Plaintiffs’ Motion for Attorneys’ Fees, Expenses, and Service Awards (“King Fees Declaration”) (Dkt. 224-1), and the exhibits thereto, the pleadings and records on file in this Action, and other such matters and argument as the Court may consider at the hearing of this motion.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court should grant final approval of the Settlement.
2. Whether the Court should finally approve the Plan of Allocation.
3. Whether the Court should dismiss with prejudice Plaintiffs’ claims against Defendant.

¹ All capitalized terms are defined in the Settlement Agreement and Release (“Settlement” or “Stipulation”), filed September 11, 2019 (Dkt. 205-2), unless otherwise noted.

TABLE OF CONTENTS

	Page
1 MEMORANDUM OF POINTS AND AUTHORITIES	1
2 I. INTRODUCTION	1
3 II. BACKGROUND	3
4 III. CLASS NOTICE AND CLAIMS ADMINISTRATION	3
5 A. Notice And Settlement Administration	3
6 B. Claims, Objections, And Requests For Exclusion	5
7 IV. ARGUMENT	5
8 A. Legal Standard For Final Approval Of Class Settlements	5
9 B. The Settlement Is Fair, Reasonable, And Adequate, And Should Be	
10 Approved	6
11 1. The Settlement Resulted From Informed, Arms'-Length	
12 Negotiations	8
13 2. The Relief Under The Settlement Is Adequate And Balances The	
14 Risks And Expense Of Trial	11
15 a. The Strength Of Plaintiffs' Case And The Risk Of	
16 Continuing Litigation Weighs In Favor Of Approval	11
17 b. The Settlement Amount Constitutes A Substantial,	
18 Immediate Recovery For The Class And Weighs In Favor	
19 Of Approval	13
20 c. The Experienced View Of Counsel And Response Of Class	
21 Members Weigh In Favor Of Approval	15
22 d. The Claims Process Is Convenient And Effective, And The	
23 Requested Attorneys' Fees Are Reasonable	17
24 3. The Settlement Treats All Class Members Equally	18
25 C. The Court Approved Notice Program Satisfies Due Process And	
26 Adequately Provided Notice To Class Members	18
27 D. The Plan Of Allocation Is Fair, Reasonable, And Adequate, And Should Be	
28 Finally Approved	20
V. CONCLUSION	21

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Bautista v. Harvest Mgmt. Sub LLC</i> , No. CV12-10004 FMO (CWx), 2014 WL 12579822 (C.D. Cal. July 14, 2014)	17
<i>Bostick v. Herbalife Int’l of Am., Inc.</i> , No. CV 13-2488 BRO (SHx), 2015 WL 12731932 (C.D. Cal. May 14, 2015).....	15
<i>Bower v. Cycle Gear, Inc.</i> , No. 14-cv-02712-HSG, 2016 WL 4439875 (N.D. Cal. Aug. 23, 2016).....	11
<i>Briseno v. ConAgra Foods, Inc.</i> , 844 F.3d 1121 (9th Cir. 2017).....	19, 20
<i>Broomfield v. Craft Brew Alliance, Inc.</i> , No. 17-cv-01027-BLF, 2020 WL 1972505 (N.D. Cal. Feb. 5, 2020)	passim
<i>Brown v. Hain Celestial Grp., Inc.</i> , No. 3:11-CV-03082-LB, 2016 WL 631880 (N.D. Cal. Feb. 17, 2016).....	12
<i>Campbell v. Facebook, Inc.</i> , 951 F.3d 1106 (9th Cir. 2020).....	10
<i>Churchill Vill., LLC v. Gen. Elec.</i> , 361 F.3d 566 (9th Cir. 2004).....	7, 8
<i>Class Plaintiffs v. Seattle</i> , 955 F.2d 1268 (9th Cir. 1992).....	6, 8
<i>Curtis–Bauer v. Morgan Stanley & Co., Inc.</i> , No. 06–C–3903 TEH, 2008 WL 4667090 (N.D. Cal. Oct. 22, 2008)	13
<i>Dickey v. Advanced Micro Devices, Inc.</i> , No. 15-cv-04922-HSG, 2020 WL 870928 (N.D. Cal. Feb. 21, 2020).....	7, 9, 14, 17
<i>Downey Surgical Clinic, Inc. v. Optuminsight, Inc.</i> , No. CV09-5457PSG (JCx), 2016 WL 5938722 (C.D. Cal. May 16, 2016)	14
<i>Free Range Content, Inc. v. Google, LLC</i> , No. 14-cv-02329-BLF, 2019 WL 299504 (N.D. Cal. Mar. 21, 2019).....	9, 15
<i>Graves v. United Indus. Corp.</i> , No. 2:17-cv-06983-CAS-SKx, 2020 WL 953210 (C.D. Cal. Feb. 24, 2020).....	13
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998).....	7
<i>Hefler v. Wells Fargo & Co.</i> , No. 16-CV-05479-JST, 2018 WL 6619983 (N.D. Cal. Dec. 18, 2018)	17, 20
<i>Hendricks v. Starkist Co.</i> , No. 13-CV-00729-HSG, 2016 WL 5462423 (N.D. Cal. Sept. 29, 2016), <i>aff’d sub nom.</i> <i>Hendricks v. Ference</i> , 754 F. App’x 510 (9th Cir. 2018)	11, 12

TABLE OF AUTHORITIES (cont.)

Page(s)

1	<i>Holloway v. Bristol-Myers Corp.</i> ,	
2	485 F.2d 986 (D.C. Cir. 1973)	16
3	<i>Hunter v. Nature's Way Prods., LCC</i> ,	
4	No. 3:16-cv-532-WQH-AGS, 2020 WL 71160 (S.D. Cal. Jan. 6, 2020)	19
5	<i>In re Aftermarket Auto. Lighting Prod. Antitrust Litig.</i> ,	
6	No. 09 MDL 2007-GW(PJWX), 2014 WL 12591624 (C.D. Cal. Jan. 10, 2014)	20
7	<i>In re Bluetooth Headset Prods. Liab. Litig.</i> ,	
8	654 F.3d 935 (9th Cir. 2011).....	10
9	<i>In re Citric Acid Antitrust Litig.</i> ,	
10	145 F. Supp. 2d 1152 (N.D. Cal. 2001)	18, 20
11	<i>In re Extreme Networks, Inc. Sec. Litig.</i> ,	
12	No. 15-CV-04883-BLF, 2019 WL 3290770 (N.D. Cal. July 22, 2019).....	13, 18
13	<i>In re Hyundai & Kia Fuel Econ. Litig.</i> ,	
14	926 F.3d 539 (9th Cir. 2019).....	11
15	<i>In re Lenovo Adware Litig.</i> ,	
16	No. 15-md-02624-HSG, 2019 WL 1791420 (N.D. Cal. Apr. 24, 2019)	passim
17	<i>In re LinkedIn User Privacy Litig.</i> ,	
18	309 F.R.D. 573 (N.D. Cal. 2015)	17
19	<i>In re Mego Fin. Corp. Sec. Litig.</i> ,	
20	213 F.3d 454 (9th Cir. 2000).....	8, 9
21	<i>In re Netflix Privacy Litig.</i> ,	
22	No. 5:11-CV-00379 EJD, 2013 WL 1120801 (N.D. Cal. Mar. 18, 2013).....	8
23	<i>In re Nexus 6P Prods. Liab. Litig.</i> ,	
24	No. 17-cv-02185-BLF, 2019 WL 6622842 (N.D. Cal. Nov. 12, 2019).....	7, 18
25	<i>In re Omnivision Techs., Inc.</i> ,	
26	559 F. Supp. 2d 1036 (N.D. Cal. 2008)	13, 15
27	<i>In re Online DVD-Rental Antitrust Litig.</i> ,	
28	779 F.3d 934 (9th Cir. 2015).....	1
	<i>In re Tableware Antitrust Litig.</i> ,	
	484 F. Supp. 2d 1078 (N.D. Cal. 2007)	18
	<i>In re Toys R Us-Delaware, Inc.—Fair and Accurate Credit Transactions Act (FACTA) Litig.</i> ,	
	295 F.R.D. 438 (C.D. Cal. 2014)	10, 13
	<i>In re Volkswagen “Clean Diesel” Mktg., Sales Practice & Prods. Liab. Litig.</i> ,	
	229 F. Supp. 3d 1052 (N.D. Cal. 2017)	6
	<i>Johnson v. Gen. Mills, Inc.</i> ,	
	No. SACV 10-00061-CJC, 2013 WL 3213832 (C.D. Cal. June 17, 2013)	14

TABLE OF AUTHORITIES (cont.)

Page(s)

1	<i>Larsen v. Trader Joe's Co.,</i>	
2	No. 11-CV-05188-WHO, 2014 WL 3404531 (N.D. Cal. July 11, 2014).....	14
3	<i>Linney v. Cellular Alaska P'ship,</i>	
4	151 F.3d 1234 (9th Cir. 1998).....	8, 15
5	<i>Littlejohn v. Ferrara Candy Co.,</i>	
6	No. 3:18-cv-00658-AJB-WVG, 2019 WL 2514720 (S.D. Cal. June 17, 2019).....	19
7	<i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.,</i>	
8	221 F.R.D. 523 (C.D. Cal. 2004).....	12
9	<i>Noll v. eBay, Inc.,</i>	
10	309 F.R.D. 593 (N.D. Cal. 2015).....	15
11	<i>Norris v. Mazzola,</i>	
12	No. 15-CV-04962-JSC, 2017 WL 6493091 (N.D. Cal. Dec. 19, 2017).....	6
13	<i>Officers for Justice v. Civil Serv. Com'n of the City and Cty. of San Francisco,</i>	
14	688 F.2d 615 (9th Cir. 1982).....	7, 13
15	<i>Phillips Petro. Co. v. Shutts,</i>	
16	472 U.S. 797 (1985).....	18
17	<i>Retta v. Millennium Prods., Inc.,</i>	
18	No. CV15-1801 PSG AJWx, 2017 WL 5479637 (C.D. Cal. Aug. 22, 2017).....	12
19	<i>Roes, 1-2 v. SFBSC Mgmt., LLC,</i>	
20	944 F.3d 1035 (9th Cir. 2019).....	10
21	<i>Sadowska v. Volkswagen Grp. of Am., Inc.,</i>	
22	No. CV 11-00665-BRO AGRX, 2013 WL 9600948 (C.D. Cal. Sept. 25, 2013).....	13
23	<i>Schneider v. Chipotle Mexican Grill, Inc.,</i>	
24	No. 16-cv-02200-HSG, 2019 WL 570751 (N.D. Cal. Feb. 12, 2019).....	10
25	<i>Schneider v. Chipotle Mexican Grill, Inc.,</i>	
26	No.16-cv-02200-HSG, 2019 WL 1512265 (N.D. Cal. Apr. 8, 2019).....	4
27	<i>Schneider v. Chipotle Mexican Grill, Inc.,</i>	
28	No. 16-cv-02200-HSG, 2020 WL 511953 (N.D. Cal. Jan. 31, 2020).....	passim
	<i>Schneider v. Chipotle Mexican Grill, Inc.,</i>	
	328 F.R.D. 520 (N.D. Cal. 2018).....	10, 12
	<i>Shvager v. ViaSat, Inc.,</i>	
	No. CV 12-10180 MMM (PJWx), 2014 WL 12585790 (C.D. Cal. Mar. 10, 2014).....	14
	<i>Spann v. J.C. Penney Corp.,</i>	
	314 F.R.D. 312 (C.D. Cal. 2016).....	11
	<i>Stovall-Gusman v. W.W. Granger, Inc.,</i>	
	No. 13-cv-02540-HSG, 2015 WL 3776765 (N.D. Cal. June 17, 2015).....	14

TABLE OF AUTHORITIES (cont.)

Page(s)

<i>Vasquez v. Coast Valley Roofing</i> , 670 F. Supp. 2d 1114 (E.D. Cal. 2009).....	6
--	---

Statutes

28 U.S.C. § 1715(a) (Class Action Fairness Act of 2005, "CAFA").....	4, 17
15 U.S.C. § 45 (Fed. Trade Comm'n Act, Section 5)	1, 5, 16
California Civil Code § 1781(d) (California Consumers Legal Remedies Act)	4

Rules

Federal Rules of Civil Procedure	
Rule 23	6
Rule 23(a).....	1
Rule 23(b)(3).....	1
Rule 23(c)(2)	19
Rule 23(e).....	5, 7, 8, 19
Rule 23(e)(2)	7, 9
Rule 23(e)(2)(A)-(B).....	8
Rule 23(e)(2)(C)(i)	11
Rule 23(e)(2)(C)(ii).....	17
Rule 23(e)(2)(C)(ii)-(iv).....	20
Rule 23(e)(2)(C)(iv)	18
Rule 23(e)(2)(D)	18
Rule 23(e)(3)	18
Rule 23(h)	19

Treatises

MANUAL FOR COMPLEX LITIGATION, FOURTH § 23.63 (Fed. Jud. Ctr. 2004)	6
William B. Rubenstein, Albert Conte & Herbert Newberg, 4 NEWBERG ON CLASS ACTIONS §§ 13:39–40 (5th ed. 2014).....	6

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On January 31, 2020, the Court granted preliminary approval of the proposed Settlement, provisionally certifying the proposed Settlement Class pursuant to Rule 23(a) and 23(b)(3) for settlement purposes and directed Class Notice to the Settlement Class (Dkt. 219). *See Schneider v. Chipotle Mexican Grill, Inc.*, No. 16-cv-02200-HSG, 2020 WL 511953 (N.D. Cal. Jan. 31, 2020). Pursuant to the Joint Stipulation and Order Setting Dates (“Scheduling Order”) (Dkt. 222), the Court scheduled the Final Approval Hearing for July 30, 2020.

Plaintiffs filed their Fees Motion on April 24, 2020, detailing the history of the litigation and the Settlement Class’s reception to the Settlement as of that time. Since then, the reaction of the Settlement Class Members to the notice of the Settlement has continued to be positive, with nearly 251,000 Claim Forms filed, one request for exclusion sought, and no objections received.² Pursuant to the Scheduling Order, Plaintiffs now submit this memorandum in support of, among other things, final approval of the Settlement.

The Settlement is “fair, reasonable, and adequate,” and represents a very good recovery for the Settlement Class. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 945 (9th Cir. 2015). The Settlement provides for a cash Settlement Fund of \$6.5 million. The Settlement delivers considerable relief to the Settlement Class: indeed, eligible claimants will receive an amount greater than the price premium calculated by Plaintiffs’ expert. Had the Settlement not been achieved, Settlement Class Members would face substantial uncertainty and delay waiting for a successful result in this litigation. Indeed, the Settlement Class would have continued to face significant litigation risk in the form of the potential decertification of the certified classes, *Daubert* motions, trial, and appeals.

² Class Counsel have received letters disagreeing with the Settlement amount per claim and have either requested mediation or allege that they are owed damages under the “Federal Trade Commission Act Section 5: Unfair or Deceptive Act or Practices.” *See King Decl.*, Ex. B. For the reasons set forth below, because these letters do not meet the requirements for a valid “objection” or a valid “opt out” under the terms of the Settlement, or are otherwise invalid, the Court should reject them. *See Settlement* § V (“Procedures for Objecting to or Requesting Exclusion from Settlement”).

1 The Settlement terms, Class Notice, and the Claims Process have been negotiated in
 2 satisfaction of the Northern District's Procedural Guidance for Class Action Settlements
 3 ("Procedural Guidance").³ The Settlement with Chipotle was negotiated at arms-length, delivers a
 4 favorable result to the Settlement Class, and will avoid further protracted litigation. Based on
 5 Plaintiffs' expert, Class Counsel estimated a maximum, best case \$24.5 million recovery at trial for
 6 the three states originally at issue in this Action, had Plaintiffs prevailed. *See* King Fees Decl. ¶ 32.
 7 Using assumptions provided by Chipotle, and based on a nationwide Settlement Class, Plaintiffs
 8 extrapolated that the maximum recoverable damages would be approximately \$87.5 million. *Id.*;
 9 *see also* Suppl. Decl. of Laurence D. King in Further Supp. of Pltfs' Unopp. Mot. for Prelim. Appr.
 10 of Proposed Settlement, to Amend Compl. for Settlement Purposes, and to Modify Cl. Definitions,
 11 dated Dec. 12, 2019 (Dkt. 213), ¶¶ 3-4. The Settlement thus represents approximately 7.4% of
 12 Plaintiffs' estimated recoverable damages. *Id.* Settlement Class Members nonetheless would
 13 obtain a significant recovery, considering that Plaintiffs' expert calculated the price premium of an
 14 average \$10 meal at Chipotle to be only \$0.23 (2.47%). *See* Decl. of Laurence D. King in Support
 15 of Pls' Mot. for Cl. Cert., dated Nov. 17, 2017, Ex. 41 (Report of Dr. Jon A. Krosnick, dated
 16 Aug. 11, 2017 ("Krosnick Rpt.")(Dkt. 95-42)).

17 Under the supervision of Class Counsel, Court-approved Class Action Settlement
 18 Administrator Angeion Group, LLC ("Angeion") has carried out the Class Notice plan approved
 19 by the Court. Class Notice has included: (1) digital internet advertising, (2) newspaper publication,
 20 once in *People* magazine and four times in the *East Bay Times*, (3) the maintenance of the
 21 Settlement Website, and (4) a toll-free hotline accessible 24 hours a day, 7 days a week. Response
 22 to Class Notice and to the Settlement has been strong, particularly for a notice program without any
 23 direct notice. Should the Court grant final approval, over 250,000 Settlement Class Members will
 24 be eligible to receive monetary payments.

25 Plaintiffs respectfully request that the Court grant final approval of the Settlement.

26
 27
 28 ³ <https://cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/>

1 **II. BACKGROUND**

2 Plaintiffs have detailed the background of this Action in their Motion for Preliminary
3 Approval of Proposed Settlement, to Amend Complaint for Settlement Purposes, and to Modify
4 Class Definitions (“Preliminary Approval Motion”) (Dkt. 205), and in their Fees Motion. Plaintiffs
5 accordingly provide the following background only to the extent relevant to the instant motion. *See*
6 Procedural Guidance (“If the plaintiffs choose to file two separate motions, they should not repeat
7 the case history and background facts in both motions.”).

8 The Parties agreed to resolve the Action after four years of active litigation and three in-
9 person mediations. *See* Fees Mot. at 2-5; King Fees Decl. ¶¶ 9-31. Plaintiffs’ efforts in the Action
10 included completing substantial factual and expert discovery, extensive motion practice, and trial
11 preparation, as well as the three in-person mediations. *Id.*

12 Plaintiffs filed their Preliminary Approval Motion on September 11, 2019. The Parties
13 appeared at the preliminary approval hearing on December 5, 2019 (Dkt. 212). On January 31,
14 2020, the Court granted preliminary approval of the Settlement, provisionally certifying the
15 Settlement Class and directing Class Notice to be issued to Settlement Class Members pursuant to
16 the Settlement and Preliminary Approval Motion. *Schneider*, 2020 WL 511953, at *12. Pursuant
17 to the Scheduling Order, the Court directed Class Notice be issued to Settlement Class Members
18 no later than March 31, 2020.

19 Plaintiffs filed the Fees Motion on April 24, 2020. In the Fees Motion, Plaintiffs provided
20 the Court with a detailed background of the Action and the results of the Class Notice and Claims
21 Process to date. The current results of the Class Notice and Claims Process are detailed below.
22 After the Court grants final approval of the Settlement, Class Counsel will provide a post-
23 distribution accounting within 21 days after the distribution of the Settlement Awards. King Decl.
24 ¶ 7; *see also* Settlement § XXV (Settlement Timeline).

25 **III. CLASS NOTICE AND CLAIMS ADMINISTRATION**

26 **A. Notice And Settlement Administration**

27 The Court’s Preliminary Approval Order appointed Angeion to serve as Class Action
28 Settlement Administrator and to provide Class Notice to the Settlement Class. As detailed in the

1 Declaration of Steven Weisbrot of Angeion Group, LLC Regarding Settlement Administration,
 2 dated June 1, 2020 (“Weisbrot Declaration”), submitted as Exhibit A to the King Declaration, Class
 3 Notice has been successfully implemented. Settlement Class Members have been notified of their
 4 rights by Website Notice, Newspaper Publication Notice, and via an extensive digital media plan
 5 to publish Notice of the Settlement. *See id.* ¶¶ 5-11.

6 Angeion operates the dedicated Settlement Website,
 7 www.chipotlenongmoclaction.com,⁴ as well as a dedicated toll-free number. *Id.* ¶¶ 7, 9. These
 8 resources provide information about the Settlement and Claims Process to Settlement Class
 9 Members in real time and allow them access to the Claim Form and other documents. *Id.* Among
 10 other things, the Long Form Notice, Claim Form, Preliminary Approval Motion, Preliminary
 11 Approval Order, Stipulation, Amended Class Action Complaint, and the Fees Motion have been
 12 posted on the Settlement Website for public viewing and download. *Id.* The Settlement Website
 13 is included on all forms of Class Notice provided to Settlement Class Members. As of May 31,
 14 2020, there have been 226,387 unique visitors to the Website and approximately 509,603-page
 15 views. *Id.* ¶ 8.

16 In addition, Angeion’s media plan included digital internet advertising serving 59,598,000
 17 impressions on various websites, which targeted a potential audience size of 30,100,000. *Id.* ¶ 6;
 18 *see also* Decl. of Steven Weisbrot of Angeion Group, LLC in Supp. of Mot. for Prelim. Appr. of
 19 Cl. Action Settlement, filed Sept. 11, 2019 (Dkt. 205-12), ¶¶ 14, 19. Additionally, on or about
 20 March 27, 2020, Angeion placed an advertisement in *People* magazine, and also placed
 21 advertisements in the *East Bay Times* for four weeks, as required by the California Consumers
 22 Legal Remedies Act, Cal. Civ. Code § 1781(d). *Id.* ¶ 5. Finally, Angeion caused notice to be
 23 served pursuant to the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1715(a), on
 24 relevant government authorities. *Id.* ¶ 4.

25
 26 ⁴ The Website was established and operated by KCC Class Action Services (“KCC”) until the Court
 27 granted preliminary approval of the Settlement, whereby Angeion took over operation of and
 28 reestablished the Website (Dkt. 180). *See Schneider v. Chipotle Mexican Grill, Inc.*, No.16-cv-
 02200-HSG, 2019 WL 1512265, at *5 (N.D. Cal. Apr. 8, 2019) (appointing KCC as Notice
 Administrator).

1 Roughly 72.64% of the Settlement Class was contacted through the dissemination of
 2 internet advertisements and notice in *People* magazine, separate and apart from the publications in
 3 the *East Bay Times*, Settlement Website, and via the toll-free hotline. *Id.* ¶ 11.

4 **B. Claims, Objections, And Requests For Exclusion**

5 The deadline to submit claims, request exclusion, or file an objection was May 30, 2020.
 6 *Id.* ¶ 13.⁵ As of May 31, 2020, the Settlement Administrator received one timely request for
 7 exclusion from the Settlement and no objections.⁶ *Id.*

8 The Claim Form was designed to allow for ease of use by Settlement Class Members to
 9 submit claims online or by mail (Dkt. 205-5). As of May 31, 2020, Angeion has received 250,975
 10 Claims, 4,386 Claims of which are supported with proofs of purchase. Weisbrot Decl. ¶ 12. These
 11 Claims are subject to review and audit by Angeion. *Id.*

12 Subject to Angeion's review and audit of received Claims, Class Counsel estimate that most
 13 of the Net Settlement Fund (Settlement Fund minus Settlement Costs) will likely be distributed to
 14 claimants, with a remainder for *cy pres*. King Decl. ¶ 5. Once Angeion completes its review and
 15 audit of the received Claims, Plaintiffs will update the Court with more exact numbers in their reply
 16 in further support of final approval. *Id.*

17 **IV. ARGUMENT**

18 **A. Legal Standard For Final Approval Of Class Settlements**

19 A class action may not be dismissed, compromised, or settled without approval of the Court.
 20 Fed. R. Civ. P. 23(e). The settlement approval procedure includes three steps: (1) certification of
 21 a settlement class and preliminary approval of the proposed settlement; (2) dissemination of notice
 22 to class members; and (3) a formal fairness hearing, also known as a final approval hearing, at
 23 which class members may be heard regarding the settlement, and at which counsel may present

24 ⁵ Because mailed claims, exclusions, and objections must be postmarked by May 30, there may still
 25 be claims, exclusions, or objections in transit. Angeion will make a supplemental declaration for
 26 any additional claims, exclusions, or objections received with Plaintiffs' reply in further support of
 this motion. Should there be any further requests for exclusion and/or objections, Plaintiffs will
 respond to them in their reply.

27 ⁶ As noted above, Class Counsel received several letters disagreeing with the Settlement amount
 28 per claim and either seeking mediation or greater damages under Section 5 of the Federal Trade
 Commission Act. *See* King Decl., Ex. B.

argument concerning the fairness, adequacy, and reasonableness of the settlement. *Vasquez v. Coast Valley Roofing*, 670 F. Supp. 2d 1114, 1124-25 (E.D. Cal. 2009); *see also* MANUAL FOR COMPLEX LITIGATION, FOURTH § 23.63 (Fed. Jud. Ctr. 2004). This procedure safeguards Settlement Class Members' due process rights and enables the Court to fulfill its role as the guardian of class interests. *See* William B. Rubenstein, Albert Conte & Herbert Newberg, 4 NEWBERG ON CLASS ACTIONS §§ 13:39–40 (5th ed. 2014).

The Court completed the first two steps when it granted preliminary approval of the Settlement, preliminarily certified the Settlement Class, and approved Plaintiffs' Class Notice program (Dkt. 219). *Schneider*, 2020 WL 511953, at *12. There are no new facts that would alter the conclusion that certification of the Settlement Class is warranted. And, the Class Notice program was extensive and thorough under the circumstances, which entailed posting notice online at the Settlement Website, creating and publishing banner ads on websites advertising notice of the Settlement, and placing advertisements in the *East Bay Times* and in *People* magazine. *See* Weisbrot Decl. ¶¶ 5-7.

The Settlement Administrator has confirmed that Class Notice program was successful. *Id.* ¶ 11. Therefore, the Class Notice program fully complied with Rule 23 and due process. *Id.* ¶ 15.

B. The Settlement Is Fair, Reasonable, And Adequate, And Should Be Approved

The Ninth Circuit favors compromise and settlement of complex class actions. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (citations omitted); *see also In re Volkswagen "Clean Diesel" Mktg., Sales Practice & Prods. Liab. Litig.*, 229 F. Supp. 3d 1052, 1061 (N.D. Cal. 2017) (citing *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015)); *Norris v. Mazzola*, No. 15-CV-04962-JSC, 2017 WL 6493091, at *4 (N.D. Cal. Dec. 19, 2017) ("Judicial policy strongly favors settlement of class actions."). Accordingly, courts are to give:

proper deference to the private consensual decision of the parties.... [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

1 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (citation and internal quotations
2 omitted).

3 A court may approve the parties' settlement only after it determines that it is "fair,
4 reasonable, and adequate." Fed. R. Civ. P. 23(e); *Officers for Justice v. Civil Serv. Com'n of the*
5 *City and Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). In making this determination,
6 courts in this Circuit balance the following factors:

- 7 (1) the strength of the plaintiffs' case;
- 8 (2) the risk, expense, complexity, and likely duration of further litigation;
- 9 (3) the risk of maintaining class action status throughout the trial;
- 10 (4) the amount offered in settlement;
- 11 (5) the extent of discovery completed and the stage of the proceedings;
- 12 (6) the experience and views of counsel;
- 13 (7) the presence of a governmental participant; and
- 14 (8) the reaction of the class members to the proposed settlement.

15 *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (citing *Hanlon*, 150 F.3d at
16 1026); *Dickey v. Advanced Micro Devices, Inc.*, No. 15-cv-04922-HSG, 2020 WL 870928, at *4
17 (N.D. Cal. Feb. 21, 2020); *In re Lenovo Adware Litig.*, No. 15-md-02624-HSG, 2019 WL 1791420,
18 at *4 (N.D. Cal. Apr. 24, 2019).

19 The recent amendments to Rule 23(e) direct courts to consider a similar list of factors:

- 20 (A) the class representatives and class counsel have adequately represented the class;
- 21 (B) the proposal was negotiated at arm's length;
- 22 (C) the relief provided for the class is adequate, taking into account:
 - 23 (i) the costs, risks, and delay of trial and appeal;
 - 24 (ii) the effectiveness of any proposed method of distributing relief to the class,
25 including the method of processing class-member claims;
 - 26 (iii) the terms of any proposed award of attorney's fees, including timing of
27 payment; and
 - 28 (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

29 Fed. R. Civ. P. 23(e)(2); *In re Nexus 6P Prods. Liab. Litig.*, No. 17-cv-02185-BLF, 2019 WL
30 6622842, at *6 (N.D. Cal. Nov. 12, 2019). The Advisory Committee's notes clarify that this list of
31 factors does not "displace" the *Churchill* factors, "but instead aim to focus the court and attorneys
32 on 'the core concerns of procedure and substance that should guide the decision whether to approve
33 the proposal.'" *Broomfield v. Craft Brew Alliance, Inc.*, No. 17-cv-01027-BLF, 2020 WL 1972505,
34 at *6 (N.D. Cal. Feb. 5, 2020) (quoting Rule 23(e)(2) Adv. Cmte Notes to 2018 Am.). An

1 evaluation of both the *Churchill* factors and the factors set forth in Rule 23(e) confirms that the
 2 Settlement is fair, reasonable, and adequate.

3 **1. The Settlement Resulted From Informed, Arms'-Length Negotiations**

4 The Court must ensure that the Settlement is not “the product of collusion among the
 5 negotiating parties.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000); *see Class*
 6 *Plaintiffs*, 955 F.2d at 1290. And under Rule 23(e)(2)(A)-(B), the Court considers whether
 7 Plaintiffs and Class Counsel adequately represented the Settlement Class and whether the
 8 Settlement was negotiated at arm’s length. “These considerations overlap with certain *Churchill*
 9 factors, such as the noncollusive nature of negotiations, the extent of discovery completed, and the
 10 stage of proceedings.” *Broomfield*, 2020 WL 1972505 at *7 (citing *Churchill*, 361 F.3d at 575).

11 “Courts have afforded a presumption of fairness and reasonableness of a settlement
 12 agreement where that agreement was the product of non-collusive, arms’ length negotiations
 13 conducted by capable and experienced counsel.” *In re Netflix Privacy Litig.*, No. 5:11-CV-00379
 14 EJD, 2013 WL 1120801, at *4 (N.D. Cal. Mar. 18, 2013) (citing, *e.g.*, *Garner v. State Farm Mut.*
 15 *Auto. Ins. Co.*, No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *13 (N.D. Cal. Apr. 22, 2010)).
 16 The presumption is warranted here because the Settlement was reached only after extensive motion
 17 practice and discovery had permitted the Parties a full opportunity to make an informed decision
 18 about settlement. *See* Fees Motion at 2-5; King Fees Decl. ¶¶ 9-31; *see also Linney v. Cellular*
 19 *Alaska P’ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) (finding final approval appropriate where the
 20 parties have “sufficient information to make an informed decision about settlement”) (citation
 21 omitted). As “settlement negotiations were conducted free of collusion,” the Court should evaluate
 22 the final approval factors “under the presumption of fairness and reasonableness.” *Netflix Privacy*,
 23 2013 WL 1120801, at *4.

24 Here, the Parties mediated three times in person before two mediators to arrive at the
 25 Settlement. Although the Parties provided their respective positions to the mediator at their first
 26 mediation, the Parties did not reach a settlement as the Parties were in the midst of discovery and
 27 motion practice. *See* King Fees Decl. ¶¶ 11-15. The Parties had more clarity concerning the
 28 strengths and weaknesses of their positions at their second in-person mediation, with the completion

1 of discovery and the Court’s decision granting Plaintiffs’ motion for class certification and denying
 2 Defendant’s motion for summary judgment. *Id.* ¶¶ 11-23. Nonetheless, while some progress was
 3 made during that mediation, the Parties did not settle. *Id.* ¶ 24. It was only after continuous
 4 negotiations through the mediator, briefing on Chipotle’s motion for decertification, and during
 5 trial preparations that the third in-person mediation culminated in the Settlement via a mediator’s
 6 proposal. *Id.* ¶¶ 27-28. These multiple mediation sessions and the hard-fought compromise entered
 7 into by the Parties demonstrate that the Settlement “was not tainted by collusion or conflicts of
 8 interest.” *Dickey*, 2020 WL 870928, at *7; *see* Fed. R. Civ. P. 23(e)(2) Adv. Cmte. Notes to 2018
 9 Am. (advising that “the involvement of a neutral ... mediator or facilitator in those negotiations
 10 may bear on whether they were conducted in a manner that would protect and further the class
 11 interests”); *Free Range Content, Inc. v. Google, LLC*, No. 14-cv-02329-BLF, 2019 WL 1299504,
 12 at *6 (N.D. Cal. Mar. 21, 2019) (holding the presence of mediator weighs in favor of applying a
 13 presumption of correctness).

14 At the time the Parties reached settlement, the Parties had investigated and tested the
 15 strength of Plaintiffs’ claims through fact and expert discovery, a motion for class certification,
 16 Defendant’s request for appellate review of the Court’s class certification decision, a summary
 17 judgment motion, and Defendant’s pending motion to decertify. *See* Fees Motion at 3-4; *Mego*
 18 *Fin. Corp.*, 213 F.3d at 459 (affirming settlement approval where “Class Counsel conducted
 19 significant investigation, discovery and research” and “had worked with damages and accounting
 20 experts throughout the litigation”); *Broomfield*, 2020 WL 1972505, at *7 (holding that there was
 21 “vigorous” prosecution “through extensive motion practice – including a motion to dismiss, a
 22 motion for class certification, a petition for permission to appeal the Class Certification Order, and
 23 an *en banc* petition for rehearing”). Indeed, the Parties completed broad fact and expert discovery,
 24 which included propounding or responding to hundreds of discovery requests, producing and
 25 reviewing hundreds of thousands of pages of documents, producing or reviewing five expert
 26 reports, taking or defending 17 depositions, engaging in numerous discovery meet-and-confers with
 27 Defendant, and seeking judicial intervention multiple times. King Fees Decl. ¶¶ 11-14. The Parties
 28 also engaged in substantial and extensive motion practice, including the above-mentioned motions

1 for class certification, summary judgment, and for decertification. Here, settlement negotiations
2 were informed and at arm's length.

3 Finally, although there is a so-called "clear sailing" provision in the Settlement, there are
4 no indicia of collusion. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-47 (9th
5 Cir. 2011); *Roes, I-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1050-56 (9th Cir. 2019). First, the
6 Court already determined in its Preliminary Approval Order that there were no indicia of collusion,
7 and nothing has changed that would alter this determination. *Schneider*, 2020 WL 511953, at *8-
8 9. And, unlike in *Bluetooth* or *Roes*, the Court here had already granted class certification prior to
9 Plaintiffs' Preliminary Approval Motion (Dkts. 136, 164). *See Schneider v. Chipotle Mexican*
10 *Grill, Inc.*, 328 F.R.D. 520, 543 (N.D. Cal. 2018), as amended by *Schneider v. Chipotle Mexican*
11 *Grill, Inc.*, No. 16-cv-02200-HSG, 2019 WL 570751 (N.D. Cal. Feb. 12, 2019). "As the Ninth
12 Circuit has made clear, the 'procedural burden' under Rule 23(e) 'is more strict when a settlement
13 is negotiated *absent* class certification.'" *Broomfield*, 2020 WL 1972505, at *22 (quoting *Bedolla*,
14 787 F.3d at 1224) (emphasis in original); *see Bluetooth*, 654 F.3d at 946 (describing higher level
15 of scrutiny for "settlement agreement ... negotiated prior to formal class certification"); *Campbell v.*
16 *Facebook, Inc.*, 951 F.3d 1106, 1121-22 (9th Cir. 2020) (noting that the "case does not implicate
17 the 'higher standard of fairness' that applies when parties settle a case before the district court has
18 formally certified a litigation class") (citing *Hanlon*, 150 F.3d at 1026; NEWBERG ON CLASS
19 ACTIONS § 13:13). "This is true even if the class certified prior to settlement is narrower than the
20 class certified for settlement purposes." *Broomfield*, 2020 WL 1972505, at *22 (citing *Kumar v.*
21 *Salov N. Am. Corp.*, No. 14-CV-2411-YGR, 2017 WL 2902898, at *4 (N.D. Cal. July 7, 2017),
22 *aff'd*, 737 F. App'x 341 (9th Cir. 2018)).

23 Class Counsel have also requested a fee proportionate to the non-reversionary fund and
24 within the range ordinarily granted in this Circuit. *See Lenovo*, 2019 WL 1791420, at *8 (noting
25 20-30% of settlement amount is "usual range") (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043,
26 1047 (9th Cir. 2002)). Finally, the requested award comes from the non-reversionary Settlement
27 Fund, and Defendant will not receive any fees that are not awarded, but instead will be distributed
28 in accordance with the provisionally approved Plan of Allocation. *In re Toys R Us-Delaware*,

1 *Inc.—Fair and Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 558 (C.D. Cal.
 2 2014) (finding that the “absence of a ‘kicker provision’ in the parties’ settlement ... reduces the
 3 likelihood that plaintiffs and [defendant] colluded to confer benefits on each other at the expense
 4 of class members”).

5 Accordingly, the Settlement “is not the product of collusion or fraud, but rather is the result
 6 of a successful arm’s-length negotiation.” *Bower v. Cycle Gear, Inc.*, No. 14-cv-02712-HSG, 2016
 7 WL 4439875, at *5 (N.D. Cal. Aug. 23, 2016); *see In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d
 8 539, 569 (9th Cir. 2019).

9 **2. The Relief Under The Settlement Is Adequate And Balances The Risks**
 10 **And Expense Of Trial**

11 The relief Plaintiffs and Class Counsel obtained for Settlement Class Members further
 12 weighs in favor of final approval as it provides substantial, immediate relief for Settlement Class
 13 Members. The Settlement is a very good result, especially when balanced against the risks and
 14 delays associated with continued litigation.

15 **a. The Strength Of Plaintiffs’ Case And The Risk Of Continuing**
 16 **Litigation Weighs In Favor Of Approval**

17 Under Rule 23(e)(2)(C)(i), courts in the “Ninth Circuit evaluate ‘the strength of the
 18 plaintiff’s case; the risk, expense, complexity, and likely duration of further litigation; [and] the
 19 risk of maintaining class action status throughout the trial.’” *Broomfield*, 2020 WL 1972505, at *8
 20 (quoting *Hanlon*, 150 F.3d at 1026); *Lenovo*, 2019 WL 1791420, at *5. “Approval of a class
 21 settlement is appropriate when plaintiffs must overcome significant barriers to make their case.”
 22 *Hendricks v. Starkist Co.*, No. 13-CV-00729-HSG, 2016 WL 5462423, at *4 (N.D. Cal. Sept. 29,
 23 2016), *aff’d sub nom. Hendricks v. Ference*, 754 F. App’x 510 (9th Cir. 2018).

24 As detailed in their Preliminary Approval Motion and the Fee Motion, Plaintiffs overcame
 25 significant challenges to achieve the Settlement. Represented by three national, respected firms,
 26 Defendant vigorously defended itself from the outset of the case and continued litigation would
 27 have undoubtedly presented significant risks and resulted in years of delays. *See, e.g., Spann v.*
 28 *J.C. Penney Corp.*, 314 F.R.D. 312, 326 (C.D. Cal. 2016) (“The settlement the parties have reached

1 is even more compelling given the substantial litigation risks in this case.”); *Brown v. Hain*
 2 *Celestial Grp., Inc.*, No. 3:11-CV-03082-LB, 2016 WL 631880, at *6 (N.D. Cal. Feb. 17, 2016)
 3 (noting that the defendant “vigorously” disputed liability). In addition, Plaintiffs obtained class
 4 certification and withstood a motion for summary judgment, and the Parties were preparing for a
 5 trial set for September 16, 2019. King Fees Decl. ¶¶ 19, 26.

6 However, it is unclear whether Plaintiffs would have been able to maintain class
 7 certification through the entirety of the Action. *See Retta v. Millennium Prods., Inc.*, No. CV15-
 8 1801 PSG AJWx, 2017 WL 5479637, at *5 (C.D. Cal. Aug. 22, 2017) (noting that because “an
 9 ‘order that grants or denies class certification may be altered or amended before the final
 10 judgment[,]’ Fed. R. Civ. P. 23(c)(1)(C)” and “[b]ecause Defendants may vigorously contest class
 11 certification should this case proceed to trial, this factor favors final approval of the Settlement
 12 Agreement”). Indeed, prior to reaching the Settlement, Defendant had sought to decertify the
 13 classes (Dkt. 184), and there was no guarantee that the Court would have upheld its prior decision
 14 certifying this Action as a class action.

15 Moreover, as the Court made clear when it granted class certification, there were issues
 16 concerning Plaintiffs’ damages calculations. Indeed, the Court questioned the “import of”
 17 Plaintiffs’ damages model, noting that the results by Plaintiffs’ expert was “ambiguous at best,”
 18 and, furthermore, would be “subject to myriad challenges on cross-examination.” *Schneider*,
 19 328 F.R.D. at 534; *id.* at 541. In turn, whether Plaintiffs’ experts would have survived another
 20 round of Defendant’s pretrial *Daubert* motions or whether Plaintiffs would have successfully
 21 obtained any damages at trial is questionable.

22 Finally, Plaintiffs would have had to prevail at trial and on appeal, and there is no assurance
 23 that Plaintiffs would have succeeded at either stage. Here, the Settlement avoids prolonging the
 24 delay in recovery and instead provides certain and immediate relief to consumers. *See, e.g., Nat’l*
 25 *Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (“Avoiding such
 26 a trial and the subsequent appeals in this complex case strongly militates in favor of settlement
 27 rather than further protracted and uncertain litigation.”); *Hendricks*, 2016 WL 5462423, at *4-5
 28 (“To prevail, Plaintiff would be required to successfully move for class certification, survive

summary judgment, and receive a favorable verdict capable of withstanding a potential appeal. The risks and costs associated with class action litigation weigh strongly in favor of settlement.”); *Sadowska v. Volkswagen Grp. of Am., Inc.*, No. CV 11-00665-BRO AGRX, 2013 WL 9600948, at *4 (C.D. Cal. Sept. 25, 2013) (“If the Court were deny approval for the settlement, there is a strong possibility that the class members would lose their chance at recovery entirely.”).

“Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.” *Lenovo*, 2019 WL 1791420, at *4 (quoting *Ching v. Siemens Indus., Inc.*, No. 11-cv-04838-MEJ, 2014 WL 2926210, at *4 (N.D. Cal. June 27, 2014) (quotations omitted)); *Curtis-Bauer v. Morgan Stanley & Co., Inc.*, No. 06–C–3903 TEH, 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008) (“Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class.”). The above litigation risks weigh in favor of approving the Settlement.

b. The Settlement Amount Constitutes A Substantial, Immediate Recovery For The Class And Weighs In Favor Of Approval

“Crucial to the determination of adequacy is the ratio of plaintiffs’ expected recovery *balanced* against the value of the settlement offer.” *In re Extreme Networks, Inc. Sec. Litig.*, No. 15-CV-04883-BLF, 2019 WL 3290770, at *9 (N.D. Cal. July 22, 2019) (internal quotation marks and citation omitted). However, “[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.” *Officers for Justice*, 688 F.2d at 628.

Here, the \$6.5 million Settlement (7.4% of estimated damages based on a nationwide class, 26.5% of estimated damages at trial) is a sizeable recovery when considering the challenges detailed above. *See, e.g., In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (approving settlement that constituted 6% of maximum potential damages); *Toys R Us*, 295 F.R.D. at 454 (noting that award representing between 5% and 30% of recovery “is not a *de minimis* amount” and “weighs in favor of approval”); *Graves v. United Indus. Corp.*, No. 2:17-cv-06983-CAS-SKx, 2020 WL 953210, at *6 (C.D. Cal. Feb. 24, 2020) (granting final approval of

\$2.5 million settlement); *Downey Surgical Clinic, Inc. v. Optuminsight, Inc.*, No. CV09-5457PSG (JCx), 2016 WL 5938722 at *5 (C.D. Cal. May 16, 2016) (granting final approval where recovery was as low as 3.21% of potential recovery at trial); *Stovall-Gusman v. W.W. Granger, Inc.*, No. 13-cv-02540-HSG, 2015 WL 3776765, at *4 (N.D. Cal. June 17, 2015) (granting final approval of a net settlement amount representing 7.3% of the plaintiffs' potential recovery at trial); *Shvager v. ViaSat, Inc.*, No. CV 12-10180 MMM (PJWx), 2014 WL 12585790, at *10 (C.D. Cal. Mar. 10, 2014) (approving settlement representing "2.8% of the recovery that might have been obtained had the case continued"). Additionally, Settlement Class Members can participate in the Settlement without being required to provide documentation showing that they made a purchase at Chipotle. *See Johnson v. Gen. Mills, Inc.*, No. SACV 10-00061-CJC, 2013 WL 3213832, at *3 (C.D. Cal. June 17, 2013) (that class members could recover "without proof of purchase" supported the conclusion that the settlement was "a good result for the class"); *Larsen v. Trader Joe's Co.*, No. 11-CV-05188-WHO, 2014 WL 3404531, at *4 (N.D. Cal. July 11, 2014) (similar); *Broomfield*, 2020 WL 1972505, at *9 (similar).

The Settlement represents a good result for Settlement Class Members in that Settlement Class Members will receive up to \$10 without receipts, \$20 with proofs of purchase, and a maximum of \$30 per household. *See* Settlement §§ I.Z., III.E.1. This amount is substantial given that Plaintiffs' expert determined that the price premium for an average \$10 Food Product purchase at Chipotle was \$0.23 (2.47%). *See* Krosnick Rpt.

Where there is a *cy pres* award provision in a class action settlement, "the '*cy pres* award must be guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members, and must not benefit a group too remote from the plaintiff class.'" *Dickey*, 2020 WL 8707927, at *6 (quoting *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012)). In its Preliminary Approval Order, the Court found that the Parties' selection of Public Justice and Public Counsel satisfied the Ninth Circuit's requirements, as the entities "share the interests of the Class Members in preventing consumer fraud, in the context of mislabeling of food products." *Schneider*, 2020 WL 511953, at *9. Nothing has changed that would warrant a different determination.

When considering Defendant's defenses and continued class certification challenges, the Settlement delivers a substantial recovery for the Settlement Class. *See Linney*, 151 F.3d at 1242 (settlement amounting to a fraction of the potential total recovery was reasonable given the significant risks of going to trial); *Noll v. eBay, Inc.*, 309 F.R.D. 593, 606 (N.D. Cal. 2015) ("Immediate receipt of money through settlement, even if lower than what could potentially be achieved through ultimate success on the merits, has value to a class, especially when compared to risky and costly continued litigation.").

c. **The Experienced View Of Counsel And Response Of Class Members Weigh In Favor Of Approval**

"Courts within the Ninth Circuit also give weight to the experienced view of counsel and the response of class members." *Free Range Content*, 2019 WL 1299504, at *7 ("Class counsel's views that the settlement is a good one is entitled to significant weight."); *Omnivision Techs.*, 559 F. Supp. 2d at 1043. Class Counsel have extensive experience representing plaintiffs and classes in complex litigation and consumer class actions (*see* Dkts. 205-9, 205-10) and support this Settlement. *See* King Decl. ¶ 7.

The positive reaction from Settlement Class Members further weighs in favor of approval. At the time of preliminary approval, using the proposed Class Notice procedures, Plaintiffs anticipated between a 1-2% claims rate based on their counsel's experience and similar cases, although Plaintiffs pointed out that the claims rate may be higher or lower due to Chipotle's reputation and lack of direct notice, respectively (Dkt. 205 at 21-22). Here, the 0.83% claims rate is on par with other consumer cases and does not otherwise weigh against approval. *See, e.g., Broomfield*, 2020 WL 1972505, at *7 (approving settlement with response rate of "about two percent"); *Bostick v. Herbalife Int'l of Am., Inc.*, No. CV 13-2488 BRO (SHx), 2015 WL 12731932, at *27 (C.D. Cal. May 14, 2015) (approving settlement with "response rate of less than 1%").

The deadline to object to the Settlement was May 30, 2020 (Dkt. 222). The Settlement Administrator has received no objections and one timely request for exclusion. Weisbrot Decl. ¶ 13; *see also id.*, Ex. D. And, as of this filing, the Court has also not received any objections to the Settlement. Class Counsel have received eleven letters concerning the Settlement, with nine

1 noting that the \$2 per claim Settlement Award is inadequate given the allegations of the Complaint
 2 and seeking “mediation,” and two alleging that, under Section 5 of the Federal Trade Commission
 3 Act, they are owed greater damages. King Decl. ¶¶ 3, 4; *see id.*, Ex. B.

4 Should the Court construe the letters as objections, the objections should be rejected. First,
 5 because these letters were not formally lodged with the Court as required under the Court-ordered
 6 objection procedure provided for in the Settlement (§ V.A) and described in the Long Form Notice
 7 (Dkt. 205-4) and on the Settlement Website, the letters should be rejected out of hand. As for the
 8 nine Settlement Class Members seeking to mediate their individual claims, Plaintiffs are unsure
 9 whether they are objecting to the Settlement or are actually seeking to opt out; if they want to pursue
 10 their own claims, these Settlement Class Members should have followed the Court-ordered opt out
 11 procedure.⁷ *See* Settlement § V.B. And, as for the two Settlement Class Members seeking greater
 12 damages under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, their “objections”
 13 must be rejected because “private actions to vindicate rights asserted under the Federal Trade
 14 Commission Act may not be maintained.”⁸ *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 987
 15 (D.C. Cir. 1973). Finally, contrary to the comments of these Settlement Class Members, the
 16 Settlement Award is substantial given the expert-determined price premium, Defendant’s vigorous
 17 defenses, and the uncertainty of the outcome at trial. Without more, these letters should be rejected.
 18 *See Lenovo*, 2019 WL 1791420, at *7 (finding that objecting to the settlement amount without
 19 articulating any other basis for rejecting the settlement did “not affect [the Court’s] conclusion that
 20 the settlement is fair and reasonable”).

21 Importantly, given the number of Settlement Class Members, these eleven letters, even if
 22 they were construed as “objections,” calculate to 0.000037% of the over 30 million Settlement
 23 Class Members that received Class Notice. “[T]he absence of a large number of objections to a
 24 proposed class action settlement raises a strong presumption that the terms of a proposed class

25 _____
 26 ⁷ In addition, Plaintiffs note that five of the handwritten letters are written in the same handwriting,
 in the same verbatim language, and originating from New York. *See* King Decl., Ex. B (Mary
 Conquest, Maria Conquest, Edwin Fernandez, Crystal John, Joanne Leach letters).

27 ⁸ These Settlement Class Members could have also sought exclusion to bring their own claims
 28 against Chipotle.

1 settlement action are favorable to the class members.” *Dickey*, 2020 WL 870928, at *6 (quoting
 2 *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 528–29); *see also In re LinkedIn User Privacy Litig.*,
 3 309 F.R.D. 573, 589 (N.D. Cal. 2015) (“A low number of opt-outs and objections in comparison to
 4 class size is typically a factor that supports settlement approval.”).

5 Further weighing in favor of approval, none of the federal officials and attorneys general to
 6 whom Angeion caused CAFA notice to be provided have objected to the Settlement. *See*
 7 *Bautista v. Harvest Mgmt. Sub LLC*, No. CV12-10004 FMO (CWx), 2014 WL 12579822, at *9
 8 (C.D. Cal. July 14, 2014) (absence of objections to the CAFA notice supported approval).

9 **d. The Claims Process Is Convenient And Effective, And The**
 10 **Requested Attorneys’ Fees Are Reasonable**

11 Rule 23(e)(2)(C)(ii) asks whether the methods of distribution and claims processing are
 12 effective. Settlement Class Members have received information regarding the Settlement benefits
 13 through the Court-approved Class Notice program. *See* Settlement § IV. To obtain those benefits,
 14 Settlement Class Members need only submit a Claim Form, which was designed to be as convenient
 15 as possible, and, depending on whether a Settlement Class Member has receipts, certify or provide
 16 minimal documentation of their purchases. *Id.* §§ I.F., III.E.1. As evidenced by the claims rate in
 17 this Action and the distribution of claims, the methods of distribution are convenient and effective.
 18 *See supra* Section III.B. Thus, the Settlement’s method for processing claims and distributing relief
 19 is fair and reasonable. *See, e.g., Hefler v. Wells Fargo & Co.*, No. 16-CV-05479-JST, 2018 WL
 20 6619983, at *7 (N.D. Cal. Dec. 18, 2018).

21 Under Rule 23(e)(2)(C)(ii), the Court must also consider whether the terms of the attorneys’
 22 fees requested are reasonable. As discussed more fully in the Fees Motion and the King Fees
 23 Declaration, Plaintiffs respectfully submit that the requested fees of 30% of the Settlement
 24 (\$1.95 million), reimbursement of \$636,556.28 for expenses, and \$20,000 incentive awards
 25 (\$5,000 per Plaintiff) are reasonable given the result achieved in this complex case and the
 26 favorable reaction of Settlement Class Members. Similarly, the Settlement Administrator’s
 27 estimated \$676,408.43 in fees (of which \$400,000 is already provided for in the Stipulation) for
 28 administration of the Settlement is fair and reasonable. *See* Weisbrot Decl. ¶ 14. And, with respect

to Rule 23(e)(2)(C)(iv), there are no agreements, other than the Settlement, required to be identified under Rule 23(e)(3).

3. The Settlement Treats All Class Members Equally

Rule 23(e)(2)(D) requires that the Court consider whether “the proposal treats class members equitably relative to each other.” *Nexus 6P*, 2019 WL 6622842, at *9. The crux of the inquiry is whether the agreement “improperly grant[s] preferential treatment to class representatives or segments of the class.” *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (citation omitted). The modest requested incentive awards for Plaintiffs, which are in the range generally awarded in this District (Fees Motion at 17-18), “does not constitute inequitable treatment of class members.” *Extreme Networks*, 2019 WL 3290770, at *8.

Nor does the Settlement grant preferential treatment to any other portion of the Settlement Class. *See In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001) (“A plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable.”). Each Settlement Class Member is eligible to obtain \$2 back on each qualifying purchase and may submit a claim for up to five qualifying purchases (\$10) without any documentation. Each Settlement Class Member can obtain up to \$20 for ten qualifying purchases with proof of payment, and there is a 15-claim (\$30) cap per household. The Plan of Allocation complies with the requirements of case law governing the approval of such allocation, as it has a reasonable and rational basis for distribution and provides any consumer who had purchased a Food Product from Chipotle during the Class Period with reimbursement even without a receipt. All Settlement Class Members who have submitted timely and valid claims are entitled to receive monetary compensation and are placed on an equal footing. The Settlement does not favor any segment of Settlement Class Members over any other, which supports final approval.

C. The Court Approved Notice Program Satisfies Due Process And Adequately Provided Notice To Class Members

Due process requires the best notice that is practicable under the circumstances. *See Phillips Petro. Co. v. Shutts*, 472 U.S. 797, 812 (1985). It does not require actual notice to each and every

1 class member. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1128 (9th Cir. 2017) (“neither
2 Rule 23 nor the Due Process Clause requires actual notice to each individual class member”).

3 Here, Class Notice includes all the information required under Rules 23(c)(2), 23(e), and
4 23(h), and the Due Process Clause of the U.S. Constitution. Specifically, Class Notice apprises
5 Settlement Class Members of the pendency of the Action, the Settlement terms, the Fees Motion,
6 their rights under the proposed Settlement, including the right to opt out of the Settlement and to
7 object to the Settlement or Fees Motion, and the binding effect of final approval (Dkts. 205-3, 205-
8 4). Class Notice further conveys all information necessary for Settlement Class Members to make
9 informed decisions relating to the Settlement, and all information called for under the Procedural
10 Guidance. *Id.*

11 As set forth above and in the Weisbrot Declaration, since the entry of the Preliminary
12 Approval Order, Angeion has implemented the extensive media plan publishing Notice of the
13 Settlement, managed the Settlement Website, and caused Notice to be published in *People*
14 magazine and in the *East Bay Times*. *Id.* ¶¶ 5-7. To date, there have been almost approximately
15 509,603-page views of the Settlement Website, and approximately 61,640,940 digital impresses.
16 *Id.* ¶¶ 8, 11.

17 The Court found in its Preliminary Approval Order that Plaintiffs’ Class Notice plan was
18 the best practicable notice under the circumstances. *Schneider*, 2020 WL 511953, at *10-11; *see*
19 *also* Weisbrot Decl. ¶ 15; *Briseno*, 844 F.3d at 1129. The procedures implemented above satisfy
20 due process. *See, e.g., Hunter v. Nature’s Way Prods., LCC*, No. 3:16-cv-532-WQH-AGS, 2020
21 WL 71160, at *3-4 (S.D. Cal. Jan. 6, 2020) (finding adequate notice published on website, 29-day
22 media campaign, and publication in the *San Diego Union-Tribune*); *Littlejohn v. Ferrara Candy*
23 *Co.*, No. 3:18-cv-00658-AJB-WVG, 2019 WL 2514720, at *5 (S.D. Cal. June 17, 2019) (finding
24 online notice and publication notice adequate where the defendant did “not collect or maintain
25 information sufficient to identify Class Members”).

26 Additionally, the publication element of the Class Notice program was tailored to the
27 circumstances of this Action. Weisbrot Decl. ¶ 15. Notice was not only posted on the dedicated
28

Settlement Website but also targeted to the most appropriate audiences. *Id.* ¶¶ 6-7; *see also Briseno*, 844 F.3d at 1129 (“[N]otice by publication ... on a website ... is sufficient to satisfy due process.”).

D. The Plan Of Allocation Is Fair, Reasonable, And Adequate, And Should Be Finally Approved

A plan for allocating class settlement funds is subject to the fair, reasonable, and adequate standard that applies to approval of the class settlement as a whole. *See Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv); Citric Acid*, 145 F. Supp. 2d at 1154. A plan of allocation “need only have a reasonable, rational basis, particularly if recommended by experienced and competent counsel.” *In re Aftermarket Auto. Lighting Prod. Antitrust Litig.*, No. 09 MDL 2007-GW(PJWX), 2014 WL 12591624, at *4 (C.D. Cal. Jan. 10, 2014) (citation omitted). Settlement distributions that apportion funds based on the relative amount of damages class members have suffered are fair and reasonable. *Hefler*, 2018 WL 6619983, at *12.

Here, under the Plan of Allocation, Settlement Class Members could receive monetary compensation by only submitting a Claim Form with answers to basic questions about class membership and their purchase of Chipotle’s Food Products. Settlement § III.E.1. Proof of purchase is not required for Settlement Class Members to recover. *Id.* Additionally, when submitting the Claim Form (Dkt. 205-5), Settlement Class Members can decide whether to receive payment in the form of a check or by electronic payment. Settlement § I.Z. “[I]t is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits.” *Broomfield*, 2020 WL 1972505, at *8 (quoting *In re Illumina, Inc. Sec. Litig.*, No. 3:16-CV-3044-L-MSB, 2019 WL 6894075, at *8 (S.D. Cal. Dec. 18, 2019)).

The Claims Period has closed and nearly 251,000 Claims have been submitted. Weisbrot Decl. ¶ 12. Angeion will review and audit the Claims. *Id.* Of the total claims made to date, approximately 246,589, or 98.3%, submitted claims without proof of purchase, and 4,386, or 1.7%, submitted claims with proof of purchase. *Id.*

The Plan of Allocation proposed in connection with the Settlement is the same as submitted at preliminary approval (Dkt. 205). The Court provisionally found this Plan of Allocation “fair, reasonable, and adequate and in the best interest of Plaintiffs and the other Settlement Class

Members.” *Schneider*, 2020 WL 511953, at *10. The Settlement creates a non-reversionary cash fund of \$6.5 million. After payment of notice and administration costs and any approved award of attorneys’ fees, costs, and/or service awards, all funds remaining will be distributed to the Settlement Class and to *cy pres*. The Settlement Administrator will complete all necessary calculations under the Plan of Allocation and pay eligible claimants in a single installment. No Settlement Class Members will receive preferential treatment; the only distinguishing feature of Settlement Class Members’ recovery is which type of claim they opted to submit.

There have been no objections to this plan, and Plaintiffs respectfully request the Court finally approve the Plan of Allocation. In accordance with the Procedural Guidance, Plaintiffs will submit a post-distribution accounting to the Court within 21 days after the Settlement Fund is distributed to class members.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court enter the proposed Final Order and Judgement, thereby finally approving the Settlement, directing payment of the claims, and entering final judgment.

Respectfully submitted,

KAPLAN FOX & KILSHEIMER LLP

DATED: June 1, 2020

By: /s/ Laurence D. King
Laurence D. King

Laurence D. King
Matthew B. George
Mario M. Choi
1999 Harrison Street, Suite 1560
Oakland, CA 94612
Telephone: 415-772-4700
Facsimile: 415-772-4707
lking@kaplanfox.com
mgeorge@kaplanfox.com
mchoi@kaplanfox.com

KAPLAN FOX & KILSHEIMER LLP

Frederic S. Fox (*pro hac vice*)

Donald R. Hall (*pro hac vice*)

850 Third Avenue, 14th Floor

New York, NY 10022

Telephone: 212-687-1980

Facsimile: 212-687-7714

ffox@kaplanfox.com

dhall@kaplanfox.com

KOBRE & KIM LLP

Hartley M. K. West

150 California Street, 19th Floor

San Francisco, CA 94111

Telephone: 415-582-4781

hartley.west@kobrekim.com

KOBRE & KIM LLP

Matthew I. Menchel (*pro hac vice*)

201 South Biscayne Boulevard, Suite 1900

Miami, FL 33131

Telephone: 305-967-6108

matthew.menchel@kobrekim.com

Counsel for Plaintiffs and the Settlement Class